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NOTES

HOW STATE LEGISLATIVE PREEMPTION IN INDIANA BARS LOCAL GOVERNMENTS FROM BUILDING A POSITIVE ECONOMIC FUTURE

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INTRODUCTION

The extent to which local governments can exercise authority in a given situation is not likely to be debated on cable news or at the Thanksgiving table. However, it is an important topic that has weighty implications for local and state economies.¹ State-level legislation has chipped away at local government authority within Indiana in recent years,² and research suggests that continuing to limit local government power will suppress the state's future economic growth.³ Economists and government leaders have long advanced the theory that an aggregate of strong local economies makes a strong state economy.⁴ Indiana

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1. See *infra* Part III (discussing the economic implications of state preemption of local home rule authority).

2. Brian Eason, *State to locals: You can't do that. Or that.*, INDYSTAR (Mar. 6, 2016, 7:02 AM), <http://www.indystar.com/story/news/politics/2016/03/06/state-locals-you-cant-do/80607546/> [<https://perma.cc/28AT-NUGT>].

3. See Michael Bell et al., *State and Local Fiscal Policy and Economic Growth and Development* (Geo. Wash. Inst. of Pub. Pol'y, Working Paper No. 26, 2015), available at https://gwipp.gwu.edu/files/downloads/Working_Paper_026_EconGrowth.pdf [<https://perma.cc/R6MS-YSDA>]; see generally Mathew J. Parlow, *Progressive Policy-Making on the Local Level: Rethinking Traditional Notions of Federalism*, 17 TEMP. POL. & CIV. RTS. L. REV. 371 (2008) (arguing that local communities can serve as policy innovation hubs, similar to how states can be “laboratories” for the federal government).

4. See Kenneth F. Payne, *The Entrepreneurial Powers of Local Government: Dillon's Rule Revisited* 61-62, U. OF MASS. AMHERST (Sept. 2003) (citing former HUD Secretary Henry Cisneros's observation that “America's economy is made up of a diverse mix of local economies” and “some researchers have suggested that America's economy should now be seen as a common

is no exception, with fifty-five percent of the state's GDP produced by just three cities.⁵

Yet, opponents of strong local government in the Indiana General Assembly continue to chip away at local authority in favor of instituting uniform, statewide laws, as well as to push their preferred policy choices that may conflict with local ordinances.⁶ Publicly, these opponents will often argue uniform state laws create a better business climate within the state.⁷ Political acumen also suggests opponents of local government authority are sometimes motivated by political realities as much as economics,⁸ showcased by swift preemption of local ordinances contrasting with the majority preference of the General Assembly.⁹ Regardless of the reasoning, it is clear that state legislation limiting local authority has consistently ran counter to the preferences of the communities actually driving the state's economy.¹⁰

This Note argues in favor of local autonomy and against preempting local government authority by demonstrating that state preemption has severe economic consequences. Those who favor strong local government authority in Indiana are unlikely to find a persuasive rationale for their position grounded in the proper role of government or the minutiae of legislative supermajority powers. This Note maintains, however, that an economic argument should and might well prevail.

This Note begins to formulate that economic counter-argument by exploring two reasons why state preemption of local government authority harms state economies. First, a state economy is largely dependent upon the relative strength

market of metropolitan-based local economic regions"); *see also* Reid Wilson, *Cities drive the U.S. economy. Here's proof, in one map*, WASH. POST (Mar. 6, 2014), https://www.washingtonpost.com/blogs/govbeat/wp/2014/03/06/cities-drive-the-u-s-economy-heres-proof-in-one-map/?utm_term=.5ba2846488b7 [<https://perma.cc/BJR3-WNHB>].

5. IHS GLOBAL INSIGHT, U.S. METRO ECONOMIES: GMP AND EMPLOYMENT REPORT: 2015-2017 51, *available at* <http://usmayors.org/metroeconomies/0616/report.pdf> [<https://perma.cc/L5CC-T4V7>] (last visited Sept. 17, 2016).

6. Larry Riley, *When 'home rule' becomes 'patchwork'*, STAR PRESS (Mar. 26, 2016, 6:48 PM), <http://www.thestarpress.com/story/opinion/columnists/2016/03/26/when-home-rule-becomes-patchwork/82214802/> [<https://perma.cc/CX9A-MTVJ>].

7. *Id.*

8. *See generally* John Hamilton, *Pistols at the Pool, Machine Guns on Parade and Nothing We Can Do*, N. Y. TIMES (July 21, 2016), http://www.nytimes.com/2016/07/21/opinion/pistols-at-the-pool-machine-guns-on-parade-and-nothing-we-can-do.html?_r=0 [<https://perma.cc/4PLY-LWK2>] (Mayor of Bloomington, Indiana, arguing that state preemption of local firearm regulations is against the wishes of his city).

9. *See* Barbara Brosher, *Bill Halts Proposed Bloomington Plastic Bag Ban*, IND. PUB. MEDIA (Mar. 17, 2016), <http://indianapublicmedia.org/news/bill-halts-proposed-bloomington-plastic-bag-ban-95486/> [<https://perma.cc/W54N-N8X8>].

10. IHS GLOBAL INSIGHT, *supra* note 5, at 51; *see also* Eason, *supra* note 2; Hamilton, *supra* note 8.

of its local economies within, or just outside, its borders.¹¹ This means states need to allow different local laws and regulations to take precedence over a one-size-fits-all approach that hampers local innovation,¹² which this Note will argue cannot be accomplished under continued state preemption actions against local government authority. Second, there are certain factors that contribute to a prosperous modern-day local economy.¹³ Specifically, such factors include attracting and retaining talented labor, providing amenities that create a high quality of life, and finding the right combination of taxation and government spending.¹⁴ Yet, Indiana preemption legislation restricting local government authority fundamentally hampers local government leaders from addressing these specific factors. The factors are best addressed through varying local approaches based on local characteristics, rather than a uniform, state-level approach.¹⁵

Part I of this Note explains the history of local government authority—how it came to fruition nationally and within Indiana—and then highlights the current state of Indiana’s statutes. Part II examines how preemption legislation is used in Indiana to restrict local government authority, highlighting recent examples. Part III showcases how preemption of local authority has already caused a negative economic impact, explains how further preemption will continue to jeopardize future state economic growth, and argues that curtailing further preemption efforts in favor of increased local government authority will better allow Indiana to compete in the modern economy.

I. THE EVOLUTION OF LOCAL GOVERNMENT AUTHORITY IN INDIANA

In order to fully understand the parameters of local government authority, it is important to not only define its legal parameters but also grasp the history that led to Indiana’s current law. The extent to which local governments have any lawmaking or regulatory authority at all is wrapped up in a concept known as home rule.¹⁶ Former Chief Justice Randall Shepard of the Indiana Supreme Court gave a concise and modern definition of home rule, specific to Indiana, in *Kole v. Faultless*: “[A] [local government] unit is presumed to possess broad powers of local government, unless the Indiana Constitution or a statute expressly denies the unit that power, or expressly grants it to another entity.”¹⁷

Yet, long before this definition was formed, municipalities were first

11. See IHS GLOBAL INSIGHT, *supra* note 5.

12. See generally Parlow, *supra* note 3 (arguing that local communities can serve as policy innovation hubs, similar to how states can be “laboratories” for the federal government).

13. Bell et al., *supra* note 3, at 13-19.

14. *Id.* at 15-17.

15. See generally Parlow, *supra* note 3 (arguing that local communities can serve as policy innovation hubs, similar to how states can be “laboratories” for the federal government).

16. See *Local Government Authority*, NAT’L LEAGUE OF CITIES, <http://www.nlc.org/build-skills-and-networks/resources/cities-101/city-powers/local-government-authority> [https://perma.cc/QWK5-SLVP] (last visited Dec. 1, 2016).

17. 963 N.E.2d 493, 496 (Ind. 2012) (citing IND. CODE § 36-1-3-5 (2007)).

established by acts of state legislators.¹⁸ Although technically under the purview of the states, in practicality “actual control [by states over municipalities] was lax” due to the low level of services provided by local governments and the predominantly rural nature of the communities.¹⁹ By the mid-1800s, as the country began shifting from an agrarian society to a more industrial one, local governments were found to be largely ill-equipped to handle a growing demand for urban services, yet state legislatures were reluctant to provide authority for local governments to operate autonomously.²⁰

Although courts had started hinting at various avenues for addressing this issue, in 1868, John Forrest Dillon, Chief Judge of the Iowa Supreme Court and noteworthy local government scholar, stalled that movement by making the first fully-formed move towards what would become Dillon’s Rule.²¹ In *Clinton v. Cedar Rapids & M.R.R. Co.*, Judge Dillon’s opinion held:

Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. If it may destroy, it may abridge and control. Unless there is some constitutional limitation on the right, the legislature might, by a single act, if we can suppose it capable of so great a folly and so great a wrong, sweep from existence all of the municipal corporations in the State, and the corporation could not prevent it. We know of no limitation on this right so far as the corporations themselves are concerned. They are, so to phrase it, the mere *tenants at will* of the legislature.²²

By 1872, Judge Dillon had incorporated his rule into his new *Treatise on the Law of Municipal Corporations*.²³ Showcasing an expansion in the language from his earlier opinion, the treatise provided this final and full version of Dillon’s Rule:

Under Dillon’s Rule, the state legislature is recognized as having plenary (complete) control over municipal government except as limited by the

18. Diane Lang, *Dillon’s Rule...and the Birth of Home Rule*, MUN. REP. 2 (Dec. 1991), available at <http://academic.regis.edu/jriley/421%20Dillon's%20Rule.pdf> [<https://perma.cc/K3Z5-6J36>].

19. *Id.*

20. *Id.* at 3.

21. See Jesse J. Richardson, Jr., *Dillon’s Rule is from Mars, Home Rule is from Venus: Local Government Autonomy and the Rules of Statutory Construction* 4, DEVOE MOORE-COLLINS INST. OF FLA. ST. U., available at <http://collinsinstitute.fsu.edu/sites/collinsinstitute.fsu.edu/files/FINAL%20PAPER-RICHARDSON.pdf> [<https://perma.cc/MKW3-JUE2>] (last visited Oct. 20, 2016).

22. 24 Iowa 455, 475 (Iowa 1868) (emphasis in original).

23. JOHN F. DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS (James Cockcroft & Co. 1872), available at <https://ia600208.us.archive.org/28/items/cu31924019959414/cu31924019959414.pdf> [<https://perma.cc/7M7S-BZDE>].

state or federal constitution. As a result of this complete legislative control, local government powers are quite limited and only extend to those powers which are: (1) granted in express words; (2) necessarily implied or necessarily incident to the powers expressly granted; and (3) absolutely essential to the declared objects and purposes of the corporation – not simply convenient, but indispensable. Dillon's Rule also establishes that any fair doubt by the courts as to the existence of a power is to be resolved against the municipality. In other words, if the power in-question isn't expressly authorized by the statute or the Constitution, or cannot be necessarily implied from a power that has already been authorized, it is presumed that a municipality does not have the power.²⁴

Notably, this final version added the accompanying rule of statutory construction requiring courts to find against local governments whenever any reasonable doubt persisted as to whether an existence of power was present.²⁵

Although Judge Dillon's opinion became widely used and accepted, there was also an opposition opinion known as the Cooley Doctrine, which called for an "inherent right of local self-government."²⁶ The movement associated with the Cooley Doctrine was led by Judge Thomas Cooley of the Michigan Supreme Court. His vision for the proper role for local government was most visibly laid out in *People v. Hurlbut*.²⁷ In *Hurlbut*, Judge Cooley argued that local self-government was an inherent and absolute right, which prohibited states from taking it away or withholding it.²⁸

Despite Judge Cooley's opposition argument, Judge Dillon's rule quickly took hold in several states, and was ultimately upheld by the U.S. Supreme Court.²⁹ In *City of Trenton v. New Jersey*, the City of Trenton had contracted with a private water company for the purposes of supplying the community with water from the Delaware River.³⁰ The New Jersey State Legislature later imposed a fee on municipalities for acquiring water over a certain allowable threshold.³¹ When the State imposed such a fee under the new law, the City of Trenton refused to pay and the State brought an action for the fee amount and recovered in state court.³² The City appealed to the U.S. Supreme Court, claiming the state law violated its substantive due process under the Fourteenth Amendment.³³ The

24. Lang, *supra* note 18, at 1.

25. *Kole v. Faultless*, 963 N.E.2d 493, 496 (Ind. 2012).

26. Lang, *supra* note 18, at 2.

27. 24 Mich. 44 (Mich. 1871); *see also* Hugh Spitzer, "Home Rule" vs. "Dillon's Rule" for *Washington Cities*, 38 SEATTLE U. L. REV. 809, 816-17 (2015).

28. Spitzer, *supra* note 27, at 816-17.

29. *See Richardson*, *supra* note 21, at 5.

30. 262 U.S. 182, 184 (1923).

31. *Id.* at 183-184.

32. *Id.*

33. *Id.* at 183.

Court held that under New Jersey state law, the city was “merely a department of the state” and its “powers and privileges [were] subject to the [State’s] sovereign will.”³⁴ As such, “the application of [Fourteenth Amendment] restraints . . . [did] not apply as against the [S]tate in favor of its own municipalities[.]” barring the City from invoking Constitutional protections against the State.³⁵

In *Atkin v. Kansas*, a contractor hired by the Kansas City local government to pave a roadway hired an employee to work ten hour days but paid him at an eight hour rate.³⁶ This was against a state law that dictated work days to be eight hours for laborers working directly for the State, directly for a municipality, or via a contract with the State or a municipality.³⁷ The Court, explaining why the state law applied to a local government contract, upheld Dillon’s Rule as described in Judge Dillon’s *Clinton v. Cedar Rapids & M.R.R. Co.* opinion.³⁸ Notably, the Court held local governments to be “mere political subdivisions” of state government.³⁹

A. Indiana’s Path from the Dillon Rule to Home Rule

Despite the stronghold Dillon’s Rule took in the courts, as reformers in multiple states quickly found, Dillon’s Rule allowed some practical local governance problems to persist.⁴⁰ Under Dillon’s Rule, people who found themselves on the adverse side of a local ordinance could (and did) challenge the ordinance, not on the merits of the law but by challenging the local government’s power to even establish the ordinance.⁴¹ Likewise, local governments were “handcuffed” from “taking a wide range of governmental actions we might find commonplace today.”⁴²

In response, the Indiana General Assembly eventually passed the Powers of Cities Act in 1971.⁴³ Born out of the larger national debate surrounding home rule authority⁴⁴ as much as from specific issues within Indiana,⁴⁵ this new law abrogated the use of Dillon’s Rule in Indiana.⁴⁶ In a significant reversal of policy,

34. *Id.* at 187.

35. *Id.* at 192.

36. 191 U.S. 207, 207-09 (1903).

37. *Id.*

38. *Id.* at 221.

39. *Id.* at 220.

40. See Lang, *supra* note 18, at 3.

41. *Kole v. Faultless*, 963 N.E.2d 493, 496 (Ind. 2012).

42. *Id.*

43. Powers of Cities Act of 1971, Pub. L. No. 250, Ind. Act 955 (codified as amended at IND. CODE §§ 18-1-1.5-1 to -30 (1976) (repealed 1980)).

44. See Kenneth E. Vanlandingham, *Municipal Home Rule in the United States*, 10 WM. & MARY L. REV. 269 (1968).

45. See Susan Barnhizer Rivas, *The Indiana Home Rule Act: A Second Chance for Local Self-Government*, 16 IND. L. REV. 677, 678-82 (1983).

46. *Kole*, 963 N.E.2d at 496.

it stated that local government inherently possessed all powers not constitutionally or statutorily restricted.⁴⁷

Nine years later, the Indiana General Assembly passed the Home Rule Act of 1980.⁴⁸ This law was not necessarily a greater extension of home rule authority beyond the 1971 Powers of Cities Act. In fact, this law added language “expressly grant[ing] [a power] to another entity”⁴⁹ as another limiting factor of home rule authority, enumerated specific powers retained by the state, and outlined very specific prescribed powers given to local governments by the state.⁵⁰ Despite those limiting provisions, the Home Rule Act of 1980 also established a new statutory construction rule, in direct contrast to Dillon’s statutory construction rule, requiring courts to find in favor of a local government if there were any discrepancies as to whether a local government had a power or not.⁵¹

B. Indiana’s Current Home Rule Statute

Indiana Code section 36-1-3 houses Indiana’s current Home Rule statute. In essence, this statute maintains the original structure of the Home Rule Act of 1980, but, since the law’s original passage, a longer list of enumerated restraints on local government’s home rule authority has emerged.⁵² These new enumerations against local government authority were accomplished through state preemption legislation,⁵³ which is addressed in further detail in Part II of this Note. These preemption examples are enumerated statutory provisions explaining that local governments cannot:

- impose a tax not otherwise granted by statute;⁵⁴

47. *City of Bloomington v. Chuckney*, 331 N.E.2d 780, 782-83 (Ind. Ct. App. 1975).

48. *Kole*, 963 N.E.2d at 496.

49. IND. CODE § 36-1-3-5 (2017).

50. Rivas, *supra* note 45, at 684. One could argue that by enumerating specific powers that there is an implicit message that local governments lack power over unenumerated items. See Randy E. Barnett, *The Ninth Amendment: It Means What it Says*, 85 TEX. L. REV. 1, 9 (Nov. 2006) (citing James Madison, Speech in Congress Proposing Constitutional Amendments (June 8, 1789), in JAMES MADISON, WRITINGS 437, 448-49 (Jack N. Rakove ed., 1999)) (detailing James Madison’s argument for passage of the Ninth Amendment, that because the first eight Amendments of the Bill of Rights are enumerated there might be an unfounded presumption that unenumerated rights do not actually exist). However, this argument should be put to rest by Part II of this Note. The larger concern, as will be explained, is that by making enumerated restraints on home rule authority part of the original passage of the law, the legislature laid a foundation for future legislation to add to those already enumerated restrictions. See *infra* Part II.

51. Rivas, *supra* note 45, at 703.

52. See IND. CODE § 36-1-3 (2017).

53. See *infra* Part II (discussing history leading to state preemption against local government authority in Indiana).

54. IND. CODE § 36-1-3-8.

- impose license fees greater than an amount reasonably related to the administrative cost of exercising the accompanying regulation;⁵⁵
- impose service fees greater than an amount reasonably related to the administrative cost of providing the service;⁵⁶
- impose a fine of greater than \$10,000 for violation of ordinances related to air emissions;⁵⁷
- impose a first offense fine greater than \$2,500 or a second offense fine greater than \$7,500 for all non-air emissions ordinances;⁵⁸
- invest money except as otherwise provided in statute;⁵⁹ or
- regulate “disposable auxiliary containers” such as plastic bags or styrofoam cups.⁶⁰

There are also other parts of the Indiana Code that further restrict local government authority outside of the specific home rule code section.⁶¹ Many of these restrictions will be explored in depth throughout Parts II and III of this Note, but another example not listed above that has been heavily covered in the media is section 35-47-11.1, which bars local governments from regulating firearms within local boundaries.⁶²

II. ATTACKING LOCAL GOVERNMENT AUTHORITY THROUGH PREEMPTION LEGISLATION

As Indiana’s current statutory code shows, there have been recently successful efforts by the Indiana General Assembly to restrict the degree of autonomy the home rule statute would otherwise provide to local governments.⁶³ Indiana Code section 36-1-3-5 provides the mechanisms by which the state can issue such a restriction.⁶⁴ It states, “[A] unit may exercise any power it has to the extent that the power: (1) is not expressly denied by the Indiana Constitution or

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. IND. CODE § 36-1-3-8.5.

60. *Id.* § 36-1-3-8.6.

61. *See, e.g.*, IND. CODE § 35-47-11.1 (2017) (preempting local governments from regulating firearms).

62. *Id.*; *see generally* Hamilton, *supra* note 8 (Mayor of Bloomington, Indiana, arguing cookie-cutter firearm laws have a negative effect on his community).

63. Eason, *supra* note 2.

64. IND. CODE § 36-1-3-5.

by statute; and (2) is not expressly granted to another entity.”⁶⁵ This means that whenever the Indiana General Assembly wishes to restrict local government authority it must either amend the Indiana Constitution, pass legislation to restrict the authority, or give the authority to another entity.

While recent constitutional amendments have been passed that limit local government authority,⁶⁶ Indiana’s particular mechanism for amending the state’s constitution puts the amendment up for a ballot vote to the state’s citizens after it has worked through the necessary legislative process.⁶⁷ Therefore, while those examples do represent situations where the state has restricted local government authority, the citizens of Indiana’s communities approved the restrictions.⁶⁸ Meaning, self-governance may still have been somewhat upheld in those situations.⁶⁹ Because that dynamic represents a diversion from the point of this Note, the statutory avenue for restricting local government authority will be the focus here.

This statutory restriction is accomplished through what is known as preemption legislation.⁷⁰ Concise definitions of preemption legislation can be found, such as “a law passed by a [state that] takes precedent over a law passed by a [local government].”⁷¹ For the purposes of this Note, however, the layman’s

65. *Id.* § 36-1-3-5(a).

66. *See Indiana voters OK property tax cap amendment*, IND. BUS. JOURNAL (Nov. 2, 2010), <http://www.ibj.com/articles/23227-indiana-voters-ok-property-tax-cap-amendment> [<https://perma.cc/R42B-T9VZ>] (constitutional amendment capping property taxes that can be collected); *see also* Nick Janzen, *Right to Hunt and Fish Approved by Voters*, IND. PUB. MEDIA (Nov. 8, 2016), <http://indianapublicmedia.org/news/hunt-fish-approved-voters-108645/> [<https://perma.cc/CKH7-K6BM>] (constitutional amendment that guarantees a right to hunt and fish in Indiana, making the General Assembly the only lawmaking body that can make any new laws on the issue).

67. IND. CONST. art. XVI.

68. *See* Janzen, *supra* note 66.

69. Beyond the scope here, an examination of the specific language of constitutional amendment ballot initiatives and whether voters truly grasp the nuance of the amendments they vote on is needed. For example, there is polling that shows Americans trust local government more than state government (Justine McCarthy, *Americans Still Trust Local Government More Than State*, GALLUP (Sept. 22, 2014), <http://www.gallup.com/poll/176846/americans-trust-local-government-state.aspx> [<https://perma.cc/WU6X-ULA3>]), but Indiana voters have recently approved two constitutional amendments that transferred power away from local government authority. Suggesting, voter approval of constitutional amendments may not actually be a vote for necessarily restricting local government authority.

70. *See generally, e.g.*, Henry Grabar, *The Shackling of the American City*, SLATE (Sept. 9, 2015, 5:53 AM), http://www.slate.com/articles/business/metropolis/2016/09/how_alec_acce_and_pre_emptions_laws_are_gutting_the_powers_of_american_cities.html [<https://perma.cc/2GBR-YY55>] (showcasing multiple national examples of state preemption of local authority).

71. *What does “preemption” mean in law*, ROTTENSTEIN LAW GRP, <http://www.rotlaw.com/legal-library/what-does-preemption-mean-in-law/> [<https://perma.cc/RS5U-PETA>] (last visited Sept. 18, 2016).

term version will simply be a law passed by a state legislature that either (a) stops a local government from doing something or (b) keeps a local government from being able to start doing something.⁷²

Preemption legislation represents one of, if not the most, substantial threats to home rule in Indiana.⁷³ This is largely because Indiana grants local government authority through statutory home rule versus constitutionally-provided home rule.⁷⁴ Statutory home rule authority, by nature, is subject to alteration by future legislation versus constitutionally-provided home rule authority that would require a constitutional amendment to be altered or reduced.⁷⁵ This difference, along with the specific language of Indiana Code section 36-1-3-5, is probably what has allowed the recent rash of preemption legislation against local government authority to flourish within Indiana.⁷⁶

A. Preemption Legislation Against Local Government Authority in Indiana

In recent years, there has been a noticeable amount of preemption legislation against home rule authority passed by the Indiana General Assembly.⁷⁷ These pieces of legislation have prevented local governments from acting on certain issues and undermined local governments' ability to self-govern in accordance with local needs and circumstances.⁷⁸ Significant examples include:

- 2011: legislation barring local governments from regulating firearms and ammunition;⁷⁹
- 2011: legislation barring local governments from establishing a local minimum wage;⁸⁰
- 2013: legislation barring local governments from mandating employee benefits;⁸¹

72. See generally, e.g., Grabar, *supra* note 70 (showcasing multiple national examples of state preemption of local authority).

73. See Rivas, *supra* note 45, at 685.

74. *Id.* at 682-84.

75. For an example of constitutional home rule, see ILL. CONST. art. VII.

76. See generally Eason, *supra* note 2 (detailing examples of recent state preemption of local government authority).

77. *Id.*

78. *Id.*

79. IND. CODE § 35-47-11.1 (2017); see *City of Evansville v. Magenheimer*, 37 N.E.3d 965, 967 (Ind. Ct. App. 2015).

80. IND. CODE § 22-2-2-10.5 (2017); see also *2011 Minimum Wage Legislation*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/labor-and-employment/2011-minimum-wage-legislation.aspx> [<https://perma.cc/TL8X-64TA>] (last visited Oct. 19, 2016).

81. IND. CODE § 22-2-16-3 (2017).

- 2015: legislation that negated current and barred future local human rights ordinance (later amended through corrective legislation that deleted this provision),⁸² and
- 2016: legislation that barred local governments from regulating “disposable auxiliary containers.”⁸³

Indiana courts have also addressed these recent efforts to preempt local government authority, giving a more complete picture of the practice’s parameters. In *Dykstra v. City of Hammond*, the Indiana Court of Appeals looked at the extent of the 2011 preemption legislation that barred local governments from regulating firearms.⁸⁴ After the Indiana General Assembly passed that law, which prompted Indiana Code section 35-47-11.5, the City of Hammond chose to leave its already established ordinance regulating firearms within the city in the city code, despite the state law preemption.⁸⁵ Dykstra and another plaintiff filed suit under the new state statute through a provision that provided a private right of action to anyone subjected to local firearm ordinances.⁸⁶ The city argued, and the court agreed, that the state’s preemption of the ordinances made repealing the ordinances a moot point.⁸⁷ The court held that the plaintiffs could not be harmed by a city ordinance that had been voided and, without a showing of clear intent by the legislature to make the preemption law retrospective, the new law was only applicable prospectively from its date of enactment.⁸⁸

The effects of preemption legislation on already established local ordinances was further distinguished in *City of Evansville v. Magenheimer*.⁸⁹ Magenheimer was at an Evansville city park with his family when he was forced to leave because he was openly carrying a firearm.⁹⁰ He was licensed to carry the firearm and had the license with him, but Evansville still maintained an ordinance that

82. See Ian Millhiser, *What The ‘Fix’ to Indiana’s ‘Religious Freedom’ Bill Does and Does Not Do*, THINKPROGRESS (Apr. 2, 2015, 2:32 PM), <https://thinkprogress.org/what-the-fix-to-indiana-s-religious-freedom-bill-does-and-does-not-do-162626a9bf4#.zen7ex8f6> [<https://perma.cc/RR4Z-EXUV>] (“Without the fix, Indiana’s RFRA could enable anti-LGBT businesses to deny service or employment on the basis of sexual orientation or gender identity, even in cities or counties that have enacted anti-discrimination ordinances, so long as the business owner’s discriminatory views are rooted in religious belief.”).

83. IND. CODE § 36-1-3-8.6 (2017); see also *Bill banning local plastic bag restrictions signed into law*, INDYSTAR (Mar. 23, 2016, 5:43 PM), <http://www.indystar.com/story/news/politics/2016/03/23/bill-banning-local-plastic-bag-restrictions-signed-law/82183114/> [<https://perma.cc/GC68-647U>].

84. 985 N.E.2d 1105, 1106 (Ind. Ct. App. 2013).

85. *Id.*

86. *Id.*

87. *Id.* at 1107-08.

88. *Id.*

89. 37 N.E.3d 965 (Ind. Ct. App. 2015).

90. *Id.* at 966.

prohibited firearms in city parks even after the 2011 preemption legislation against local firearm regulations went into effect.⁹¹ Same as *Dykstra* before him, Magenheimer brought suit under the private right of action provision in Indiana Code section 35-47-11.1.⁹² The Indiana Court of Appeals quickly distinguished *Magenheimer* from *Dykstra* because Evansville actually enforced its local firearms regulation.⁹³ The court held that Magenheimer was indeed injured through this enforcement of the local ordinance in violation of the preemption law.⁹⁴ Likewise, this injury meant that he was fully within his rights to pursue a claim based on the provided cause of action found in section 35-47-11.1.⁹⁵

The holdings of *Dykstra* and *Magenheimer* demonstrate the large degree of deference provided by the Indiana courts to preemption laws passed by the Indiana General Assembly.⁹⁶ This is, in some part, due to Indiana having statutory home rule versus constitutionally provided home rule,⁹⁷ highlighting the importance of that distinction. In neither case was there discussion of the legislature's authority to issue preemption legislation and there was no debate by the courts on the merits of the preemption legislation.⁹⁸

Meanwhile, the Indiana Constitution provides another factor that can determine how these preemption laws are practically drafted and applied. Article IV, sections 22-23 of the Indiana Constitution bar the General Assembly from creating "local and special laws,"⁹⁹ and require that "all laws shall be general, and of uniform operation throughout the State."¹⁰⁰ In *South Bend v. Kimsey*, the Indiana Supreme Court struck down a state statute that allowed municipal annexation of property to be challenged and defeated if "a majority of the landowners in an affected area opposed it."¹⁰¹ The contention was that the law only applied to counties with a population between 200,000 and 300,000, which was a distinction that only included St. Joseph County.¹⁰² The court held that although the statute was general on its face, the law "does, and was intended to, specifically target St. Joseph County" and was therefore "special legislation."¹⁰³ Although the Court did indicate special legislation might be acceptable in certain circumstances,¹⁰⁴ Indiana courts have generally upheld the constitutional

91. *Id.*

92. *Id.* at 967-68.

93. *Id.* at 968.

94. *Id.* at 970.

95. *Id.*

96. *See id.* at 965; *see also* *Dykstra v. City of Hammond*, 985 N.E.2d 1105 (Ind. Ct. App. 2013).

97. *See supra* Part II.

98. *See id.*; *see also* *Dykstra*, 985 N.E.2d at 1105-08.

99. IND. CONST. art. IV, § 22.

100. IND. CONST. art. IV, § 23.

101. 781 N.E.2d 683, 684-85 (Ind. 2013).

102. *Id.* at 685.

103. *Id.* at 697.

104. *See id.* at 691 (legislation "accompanied by legislative findings" and "identified

requirement against such legislation.¹⁰⁵ Presumably, these holdings send a signal to members of the General Assembly that laws affecting local governments should be drafted in accordance with the text of article IV, sections 22-23.

As explored in Part III of this Note, one of the more economically damning attributes of preempting local government authority is the stripping of local leadership's ability to create policies based on local characteristics.¹⁰⁶ Yet, as just indicated, the Indiana Constitution requires laws to be applied broadly. For example, the 2016 legislation that barred local governments from regulating "disposable auxiliary containers"¹⁰⁷ was actually intended to address an ongoing debate within the City of Bloomington about whether to ban single-use plastic bags from being used at retail businesses.¹⁰⁸ Yet, per article IV, sections 22-23, the legislation intended to thwart this effort had to come in the form of a bill that applied uniformly across the state.¹⁰⁹ The practical effect of this dynamic is an amplification of any repercussions coming from preemption legislation to all of Indiana's local governments, not just those localities at which a particular bill may be aimed.

B. An Explanation of Preemption Proponent Arguments

Those leading and those supportive of preemption legislation against local government authority in Indiana have provided a wide array of arguments to justify their support.¹¹⁰ Because this Note is to serve as the economic counter-argument against those supporters, it is important to explore their often-used economic arguments in favor of preempting local government authority.

The economic narrative being used to further preemption laws is two-fold. First, there is an argument that limiting local government authority will help avoid a "patchwork" of local laws.¹¹¹ Supporters of preemption laws believe if local governments had full autonomy to pass ordinances and regulations that

characteristics" "justifying the legislation[]" would be "permissible under Article IV").

105. See *Alpha Psi Chapter of Psi Kappa Phi Fraternity, Inc. v. Auditor of Monroe Cty.*, 849 N.E.2d 1131, 1139 (Ind. 2006) (striking down a state law that provided a special, situational property tax exemption for Greek organizations at a specific university); *but see Kimsey*, 781 N.E.2d at 697-98 (J. Sullivan dissenting) (highlighting examples where the Court had given deference to legislative decisions that created special local circumstances).

106. See *infra* Part III ("The idea is to allow each individual city to maximize its own local economy so that in the aggregate the state of Indiana is economically stronger.").

107. *Bill banning local plastic bag restrictions signed into law*, *supra* note 83.

108. Eason, *supra* note 2; see also Kendall Downing, *Bloomington group outraged at Indiana's prohibition on "plastic bag bans"*, Fox59 (Mar. 25, 2016, 12:06 PM), <http://fox59.com/2016/03/25/bloomington-group-outraged-at-indianas-prohibition-on-plastic-bag-bans/> [<https://perma.cc/DY8N-GSTV>].

109. See IND. CONST. art. IV, §§ 22-23.

110. See *generally* Riley, *supra* note 6 (providing background on legislator reasoning for preemption efforts).

111. *Id.*

differ from other municipalities it would create an opportunity for individuals and businesses to unintentionally break unknown laws while within a municipality in which they do not reside or conduct regular business.¹¹² Second, and building upon the first point, there is a presumption that avoiding the “patchwork” of local laws in favor of statewide uniformity makes Indiana a “business-friendly state,” because a lack of uniformity in regulations across the state may create an unfriendly business climate.¹¹³ One state legislator even went so far as to say preemption of local authority has been “a response to some communities who have decided they want to go beyond what the state thinks is the right thing to do to regulate businesses.”¹¹⁴

To draw an analogy, this is, in some respects, similar to the federal doctrine of the dormant commerce clause, which is the principle that because interstate commerce is constitutionally vested in the federal government the states are prohibited from passing laws that impair interstate commerce.¹¹⁵ A state-level version of this is playing out in Indiana as state legislators seem to believe the state’s economy is their sole responsibility and its success can only come from statehouse-produced policy.¹¹⁶ As a result, these state legislators are actively barring local governments from enacting policies in certain areas they believe could impair the state’s economy¹¹⁷—specifically as it relates to “patchwork” laws and creating the state’s “business climate.”¹¹⁸ To pursue their belief in this responsibility, state legislators have used preemption legislation against local government authority to keep local government leaders from enacting policies counter to what the state legislators believe is best for Indiana’s economy.¹¹⁹

In addition to Indiana, this dynamic is playing out in states across the country too.¹²⁰ Again turning to bans on “disposable auxiliary containers,” cities throughout the United States have seen their efforts to limit or tax the use of plastic bags preempted by state legislation barring such ordinances.¹²¹ Although the cities view these local regulations “as a simple solution to a nagging environmental hazard,” state legislators have argued these regulations “are anti-

112. Grabar, *supra* note 70.

113. Riley, *supra* note 6; *see also* Eason, *supra* note 2.

114. Eason, *supra* note 2.

115. Dept. of Revenue of Ky. v. Davis, 533 U.S. 328, 337-38 (2008).

116. *See* Eason, *supra* note 2.

117. *See id.*

118. Riley, *supra* note 6.

119. Eason, *supra* note 2; *see generally also* Grabar, *supra* note 70 (explaining that preemption efforts are largely driven by the preferred policies of the state legislators pushing the preemption legislation).

120. *See* Henry Grabar, *When Did the Freedom to Use Plastic Bags Become a GOP Priority?*, SLATE (Jun. 9, 2016, 8:00 AM), http://www.slate.com/blogs/moneybox/2016/06/09/plastic_bag_bans_are_being_replaced_by_plastic_bag_ban_bans.html [<https://perma.cc/D6AT-XVYS>].

121. *See* Jason Daley, *Why Michigan Banned Banning Plastic Bags*, SMITHSONIAN.COM (Jan. 2, 2017), <http://www.smithsonianmag.com/smart-news/why-michigan-banned-banning-plastic-bags-180961630/> [<https://perma.cc/K553-BT5Z>].

business [and] depress economic activity.”¹²² Likewise, the Ohio General Assembly recently passed a law barring local governments from regulating a local minimum wage, employee sick leave, and employee work schedules.¹²³ The bill appears to be aimed at the City of Cleveland, which was scheduled to vote in 2017 on an ordinance to increase the local minimum wage.¹²⁴ An Ohio State Representative who supported the bill argued that allowing local governments to establish their own local minimum wage ordinances would “help destroy the economy,”¹²⁵ despite available evidence to the contrary.¹²⁶

Apart from the economic arguments by state legislators, in reality, there seem to be additional reasons that cause them to support preemption of local authority.¹²⁷ These are important to mention because even those preemption efforts that may not be economically motivated can still have economic consequences.¹²⁸ Political motivation can be one factor, and is a well-documented driving force behind preemption legislation.¹²⁹ Since 2012, Republicans in Indiana have held supermajorities in both chambers of the General Assembly, as well as the Governor’s office.¹³⁰ This has provided some ability to strike down Democratic initiatives across the state, evidenced by the fact that preemption legislation against local government authority has most negatively impacted liberal policies of Democrat-controlled city governments.¹³¹ It is probably also true that different preemption topics generate support from different motivating

122. Grabar, *supra* note 120.

123. Kevin Lui, *Ohio’s State Legislature Just Banned Cities from Raising Local Minimum Wages*, FORTUNE (Dec. 8, 2016), <http://fortune.com/2016/12/09/ohio-state-legislature-cities-local-minimum-wages/> [<https://perma.cc/7X7T-KEPS>].

124. *Id.*

125. Henry Grabar, *Ohio GOP Moves to Stop Cleveland From Making Its Own Laws*, SLATE (Dec. 9, 2016, 3:19 PM), http://www.slate.com/blogs/moneybox/2016/12/09/ohio_state_legislature_passes_law_against_minimum_wage_bestiality.html [<https://perma.cc/FX4T-AHPT>].

126. *See, e.g.*, SEATTLE MINIMUM WAGE STUDY TEAM, UNIVERSITY OF WASHINGTON, REPORT ON THE IMPACT OF SEATTLE’S MINIMUM WAGE ORDINANCE ON WAGES, WORKERS, JOBS, AND ESTABLISHMENTS THROUGH 2015 2-4 (2016), available at <https://www.documentcloud.org/documents/2997999-Seattle-Minimum-Wage-Final-Report.html> [<https://perma.cc/N56S-WJWL>].

127. *See generally* Grabar, *supra* note 70 (explaining some of the political motivations behind legislation preempting of local authority).

128. *See generally* Lauren Box, *It’s Not Personal, It’s Just Business: The Economic Impact of LGBT Legislation*, 48 IND. L. REV. 995 (2015) (exploring the economic impact of Religious Freedom Restoration Acts).

129. *See* Jay-Anne B. Casuga & Michael Rose, *Are State Workplace Preemption Laws on the Rise?*, BLOOMBERG BNA (July 19, 2016), <https://www.bna.com/state-workplace-preemption-n73014444995/> [<https://perma.cc/9RW3-6RES>].

130. *See* Chris Sikich, *Republicans keep Statehouse supermajorities*, INDYSTAR (Nov. 9, 2016, 5:18 PM), <http://www.indystar.com/story/news/politics/2016/11/08/election-results-2016-indiana-state-legislature-supermajority/93284624/> [<https://perma.cc/9AX3-UB6G>].

131. *See* Eason, *supra* note 2 (“[M]uch of the pre-emption movement can be explained by ideology—conservative lawmakers cracking down on liberal city policies . . .”).

factors. For example, voting for the preemption of firearm regulations and voting to preempt local minimum wage ordinances are probably born out of different sets of reasoning.¹³²

III. THE ECONOMIC IMPLICATIONS OF PREEMPTION LEGISLATION AGAINST LOCAL GOVERNMENT AUTHORITY IN INDIANA

It is not disputed by members of the Indiana General Assembly or within this Note that preemption of local government authority can have at least some economic impact. It is just a question of whether that impact is positive or negative. Information is surfacing that shows allowing local-level policy-making is an important factor in propelling modern state economies into the future.¹³³ Meanwhile, recent efforts to preempt local government authority in Indiana and nationally have shown signs of negative economic impacts.¹³⁴ This Part of the Note details how the efforts to preempt local government authority can cause negative economic impacts and lays out the economic counter-argument against the preemption of local government authority in Indiana.

It should be noted that many of the examples of state preemption explored in this Note indeed represent situations where conservative state legislatures are preempting progressive local leadership, possibly implying a partisan bend on this Note's analysis. However, that is not the intent. The evidence explored throughout Part III suggests that local government authority should be upheld regardless of the political ideology that produced a particular policy. This non-partisan and content-neutral approach is what will best allow policy solutions to be applied in a way that best satisfy those factors that create strong, modern-day economies.¹³⁵

A. Issue-Based Examples of Preemption's Negative Economic Effects

Although there is certainly plenty of theoretical debate surrounding home rule and state preemption efforts,¹³⁶ there are also real-world examples of how recent

132. Compare Hamilton, *supra* note 8 (Mayor of Bloomington, Indiana, explaining the partisan ideological divide in regards to state preemption of local firearm regulations), with Grabar, *supra* note 125 (mentioning the economic argument made by an Ohio legislator in favor of preempting local minimum wage laws).

133. Jennifer R. Young, *Harper's Ferry mayor: Home rule helping to build economy*, THE JOURNAL (Feb. 5, 2017), <http://www.journal-news.net/news/local-news/2017/02/harpers-ferry-mayor-home-rule-helping-to-build-economy/> [https://perma.cc/6EBD-AHGU].

134. See Sarah McBride & Laura E. Durso, *Indiana's Religious Freedom Restoration Act Is Bad for Business*, CTR. FOR AM. PROGRESS (Mar. 31, 2015, 5:13 PM), <https://www.americanprogress.org/issues/lgbt/news/2015/03/31/110232/indianas-religious-freedom-restoration-act-is-bad-for-business/> [https://perma.cc/FW9S-AGEK].

135. See generally Parlow, *supra* note 3 (arguing that local communities can serve as policy innovation hubs, similar to how states can be "laboratories" for the federal government).

136. See, e.g., Richard Briffault, *Home Rule and Local Political Innovation*, 22 J.L. & POL. 1 (2006).

preemption legislation has created negative economic consequences, despite efforts to institute different policies at the local level. For example, in 2015, the Indiana General Assembly passed an initial version of the state's Religious Freedom Restoration Act (RFRA).¹³⁷ Part of this law preempted local governments from passing or enforcing local human rights ordinances to protect members of the LGBT community.¹³⁸ This, along with the general sense that the law served as a mechanism to allow LGBT discrimination on religious grounds, caused an immediate economic backlash, losing or putting at risk \$250 million dollars of the state's economy.¹³⁹ At the time of the initial RFRA passage, twelve cities in Indiana already had LGBT protection ordinances.¹⁴⁰ On the surface, non-discrimination ordinances may not seem economic in nature, but there existed a large body of evidence before Indiana's RFRA passage that pro-LGBT policies provided a significant amount of economic benefit.¹⁴¹ Due to the initial backlash of the law, the Indiana General Assembly passed a RFRA "fix" bill aimed at addressing certain discrimination concerns, including its effect on local LGBT protection ordinances.¹⁴² Yet even after the "fix" was enacted, Indiana cities that already had pro-LGBT ordinances continued to suffer economically because of the negative attention generated by the original bill.¹⁴³ It was reported that Indianapolis, which was one of the cities with pro-LGBT ordinances, lost an estimated \$60 million alone in 2015 as a result of the law.¹⁴⁴

Very similarly, in 2016, North Carolina passed House Bill 2, which has been dubbed the "bathroom bill."¹⁴⁵ The basic thrust of this bill is that it "requires citizens to use the public [restroom] that corresponds with their 'biological'

137. Eason, *supra* note 2.

138. *FAQ: Indiana's Religious Freedom Restoration ACT (RFRA)*, ACLU OF IND. (Apr. 8, 2015), <http://www.aclu-in.org/special-notice/308-faq-indiana-s-religious-freedom-restoration-act-rfra> [perma.cc/UD99-K3F3].

139. McBride & Durso, *supra* note 134.

140. Stephanie Wang, *What the 'religious freedom' law really means or Indiana*, INDYSTAR (Apr. 3, 2015, 11:13 AM), <http://www.indystar.com/story/news/politics/2015/03/29/religious-freedom-law-really-means-indiana/70601584/> [perma.cc/63JC-QBR9].

141. See Box, *supra* note 128 (exploring the economic impact of Religious Freedom Restoration Acts).

142. *FAQ: Indiana's Religious Freedom Restoration ACT (RFRA)*, *supra* note 138.

143. See Sarah McBride, *The Economic Cost of Overly Broad RFRA's*, CTR. FOR AM. PROGRESS (Feb. 4, 2016, 9:03 AM), <https://www.americanprogress.org/issues/lgbt/news/2016/02/04/130566/the-economic-cost-of-overly-broad-rfras/> [perma.cc/LE3V-DULY].

144. Brian Eason, *Official: RFRA cost Indy up to 12 conventions and \$60M*, INDYSTAR (Jan. 26, 2016, 10:07 PM), <http://www.indystar.com/story/news/politics/2016/01/25/official-rfra-cost-indy-up-12-conventions-and-60m/79328422/> [perma.cc/UM3Y-23PT].

145. Corinne Journey, *North Carolina's 'Bathroom Bill' Has Flushed Away \$600 Million In Business And Could Dash Governor's Re-election Hopes*, FORBES (Nov. 3, 2016, 11:37 AM), <http://www.forbes.com/sites/corinnejourney/2016/11/03/north-carolinas-bathroom-bill-flushes-away-nearly-1-billion-in-business-and-governor-mccrorys-re-election-hopes/#4d4371046eb5> [perma.cc/7M7F-992D].

gender” listed on their birth certificate,¹⁴⁶ “thus barring transgender [people] from using the bathroom consistent with their gender identities.”¹⁴⁷ The bill thwarted ongoing efforts by the City of Charlotte to allow citizens to use the public restroom that corresponds to their gender identity,¹⁴⁸ because, in the very definition of preemption, this bill “doesn’t just repeal the existing civil-rights ordinances protecting the LGBT community; it bars any locality or agency from enacting new ones.”¹⁴⁹ The economic impact of this bill has been even worse for North Carolina than RFRA has been for Indiana, costing North Carolina approximately \$630 million within just seven months of passage.¹⁵⁰ Unlike Indiana’s RFRA “fix,” North Carolina has yet to pass legislation to try to tamper the impact of the original bill, significantly prolonging its negative effects.¹⁵¹

Although the negative economic consequences of Indiana’s RFRA law and North Carolina’s bathroom bill have largely been the result of political backlash, other politically-charted preemption laws can create negative economic effects simply through their functionality. For example, Indiana’s 2011 law that barred local firearms regulations, which, as explained in the discussion of the *Dykstra* and *Magenheimer* cases in Part II,¹⁵² bars local governments from regulating firearms within local boundaries.¹⁵³ There is plenty of evidence that details how gun control laws and regulations can help reduce gun violence,¹⁵⁴ with one

146. *Id.*

147. Garrett Epps, *North Carolina’s Bathroom Bill Is a Constitutional Monstrosity*, ATLANTIC (May 10, 2016), <https://www.theatlantic.com/politics/archive/2016/05/hb2-is-a-constitutional-monstrosity/482106/> [perma.cc/U4GY-QAQQ].

148. *See Charlotte City Council approves transgender bathroom ordinance over governor’s protest*, FOXNEWS (Feb. 23, 2016), <http://www.foxnews.com/politics/2016/02/23/charlotte-city-council-approves-transgender-bathroom-ordinance-over-governors-protest.html> [perma.cc/3HHG-3JZM].

149. Epps, *supra* note 147.

150. Jurney, *supra* note 145.

151. Amber Phillips, ‘The state is hurting.’ One North Carolina Republican’s appeal to get rid of the bathroom bill before it’s too late, WASH. POST (Feb. 8, 2017), https://www.washingtonpost.com/news/the-fix/wp/2017/02/08/the-state-is-hurting-one-north-carolina-republicans-appeal-to-get-rid-of-the-bathroom-bill-before-its-too-late/?utm_term=.258f90ed798a [perma.cc/96MM-KX37].

152. *See supra* Part II (explaining how Indiana courts have handled preemption legislation by analyzing the holdings of *Dykstra v. City of Hammond*, 985 N.E.2d 1105 (Ind. Ct. App. 2013) and *City of Evansville v. Magenheimer*, 37 N.E.2d 965 (Ind. Ct. App. 2015)).

153. IND. CODE § 35-47-11.1 (2017).

154. *See, e.g.*, Frederic Lemieux, *Effect of Gun Culture and Firearm Laws on Gun Violence and Mass Shootings in the United States: A Multi-Level Quantitative Analysis*, 9 INT’L J. CRIM. JUST. SCI. 74 (June 2014); *see also, e.g.*, David Hamilton & Augustine J. Kposowa, *Firearms and Violent Death in the United States: Gun Ownership, Gun Control and Mortality Rates in 16 States, 2005-2009*, 7 BRIT. J. EDUC., SOC’Y & BEHAV. SCI. 85 (2015); *see also, e.g.*, Bindu Kalesan et al., *Firearm Legislation and Firearm Mortality in the USA: A Cross-Sectional, State-Level Study*, 387 THE LANCET 1847 (2016).

research team noting, “[T]he more stringent [a state’s] gun laws, the lower its rate of violent death. This relationship is strong and in most instances statistically significant at a very high probability level”¹⁵⁵ Nationally, it is estimated a lack of gun control laws leading to gun violence costs the U.S. economy \$229 billion per year.¹⁵⁶ Yet those costs are not shared evenly as locations with higher rates of gun violence bear a larger share of the total related costs.¹⁵⁷ Within Indiana, which ranks extremely poorly in gun violence prevention,¹⁵⁸ it is estimated that gun violence costs the state’s economy approximately \$4.8 billion per year, equating to \$733 per person.¹⁵⁹ Due to Indiana’s 2011 preemption law, local governments are barred from instituting any sort of gun control ordinances that might help alleviate this economic burden, despite some localities having public support to do so.¹⁶⁰

B. Strong Economies are Created Locally

Besides those organically created negative economic effects, preemption of local government authority can also serve as a barrier to the creation of new positive economic outcomes.¹⁶¹ To detail that point, this Section will first describe the factors that are generally believed to create strong, modern-day state economies. Then, Section C will analyze the effects of recent preemption of local government authority in Indiana through the lens of these factors.

Assuming that policy decisions are generally most effective when made in a forward-looking manner, Indiana legislators should be asking themselves “what is best for Indiana’s future, state-level economy?” when evaluating proposed preemption legislation. There is data that shows modern state economies are actually just an aggregate of the economic strength of individual municipalities.¹⁶² This is certainly true nationally.¹⁶³ A recent report by the U.S. Conference of Mayors produced data that indicated “metro economies continued in 2015 to

155. Hamilton & Kposowa, *supra* note 154, at 93.

156. *Statistics on the Cost of Gun Violence*, GIFFORDS LAW CTR., <http://smartgunlaws.org/costs-of-gun-violence-statistics/> [perma.cc/WR2R-8UAY] (last visited Feb. 6, 2017) (this includes some direct costs to the taxpayers through emergency and medical care, as well as a multitude of indirect costs).

157. *Id.*

158. Russ McQuaid, *Statistics rank Indiana low in gun violence prevention*, FOX59 (June 23, 2016), <http://fox59.com/2016/06/23/statistics-rank-indiana-low-in-gun-violence-prevention/> [perma.cc/4G9T-LWDV].

159. Jaeah Lee et al., *How Much Money Does Gun Violence Cost in Your State?*, MOTHERJONES (Apr. 22, 2015, 10:15 AM), <http://www.motherjones.com/politics/2015/04/how-much-money-does-gun-violence-cost-in-your-state> [perma.cc/6W45-2YJY].

160. *See* Hamilton, *supra* note 8.

161. *See infra* Part III.C.

162. Wilson, *supra* note 4.

163. *See* IHS GLOBAL INSIGHT, *supra* note 5.

drive U.S. economic growth.”¹⁶⁴ In Indiana, the municipalities driving most of the state’s economic growth are Indianapolis, Gary, and Fort Wayne.¹⁶⁵ These three cities alone produced approximately fifty-five percent of the state’s GDP in 2015.¹⁶⁶

This is not to suggest that to create a stronger Indiana economy the economic interests of these cities should be held above the interest of other municipalities. What is best economically for one municipality may not be what is best for another municipality, because each geographic area has its own demographics, general strengths and weaknesses, and economic history.¹⁶⁷ Nor do the state legislators from Indianapolis, Gary, and Fort Wayne (even when combined) constitute a majority in the General Assembly,¹⁶⁸ making it unlikely the interests of these cities could even be placed above all others anyway. The idea is to allow each individual city to maximize its own local economy so that, in the aggregate, the state of Indiana can become economically stronger.

From a legislator’s perspective, once it is understood and accepted that strong local economies are what makes a strong state economy, the next question should be “what factors lead to strong local economies?” Research has shown a certain set of factors that are needed.¹⁶⁹ First, because access to skilled labor is a hugely prominent factor that determines where businesses will locate, local markets must be able to attract and retain talented labor.¹⁷⁰ A constant is that “human capital . . . is significantly and positively related” to positive economic growth.¹⁷¹ The key is *talented* labor, typically measured in terms of educational attainment.¹⁷² Multiple studies have shown that as educational attainment increases within a labor force, positive impacts are seen in the areas of employment growth, wage growth, overall GDP growth, and worker productivity.¹⁷³

Second, to build a talented workforce that can attract businesses and help

164. *Id.* at 11.

165. *Id.* at 51.

166. *Id.*

167. See generally *StatsIndiana*, IND. BUS. RESEARCH CTR., http://www.stats.indiana.edu/profiles/profiles.asp?scope_choice=a&county_changer=18000 [perma.cc/R83Q-3MG9] (last visited Dec. 2, 2016) (interactive database for researching economic information about Indiana municipalities).

168. See generally *Find Your Legislator*, IND. GEN. ASSEMBLY, <http://iga.in.gov/legislative/find-legislators/> [perma.cc/LF9V-9EF3] (last visited Dec. 2, 2016) (online tool to find state legislators by district and location) Although statehouse districts do not always perfectly correspond to individual community boundaries, legislators from these areas would comprise approximately thirty percent of both the House and Senate. *Id.*

169. See Bell et al., *supra* note 3.

170. See Neil O’Farrell, *How to attract people to your city (and it’s not just about jobs)*, ECON. DEV. (Apr. 21, 2015), <http://economicdevelopment.org/2015/04/how-to-attract-people-to-your-city-and-its-not-just-about-jobs/> [perma.cc/9PFC-BUAE].

171. Bell et al., *supra* note 3, at 15.

172. *Id.*

173. *Id.* at 15-16 (detailing numerous studies to this effect).

begin positive economic momentum, cities must first ensure they are providing a high quality of life through certain amenities and community norms that are known to attract talented labor.¹⁷⁴ This idea has been growing since the late-1990s, and was famously captured in Richard Florida's *Rise of the Creative Class*.¹⁷⁵ The specific attractions most likely shift along with the specific talent being sought, but there is research that suggests this factor is mostly about maximizing natural benefits to create an authentic sense of place within a community.¹⁷⁶ Ultimately, though, addressing this factor is a must-do for cities that want to positively participate in the modern economy.¹⁷⁷

Third, cities need an ability to properly balance the right combination of taxation and government spending.¹⁷⁸ The basic principle is that if taxes are held constant and government services are increased there will be a positive economic benefit, but if the inverse is true there will be a negative economic benefit.¹⁷⁹ This principle is stronger as it relates to economic competition between municipalities in the same metropolitan area than it is between cities more geographically separated.¹⁸⁰ From the perspective of those individuals in the labor market, government services can be seen as an amenity, which, as just explained, is a vital factor in attracting talented labor.¹⁸¹ Businesses, meanwhile, may also weigh any taxes levied by a city against provided government services considered to be an operational cost reduction, helping businesses justify pursuing the labor talent also lured into the community by those same government-provided amenities.¹⁸²

C. Indiana Case Studies: How Indiana Preemption Laws Are a Restraint on Economic Success

As legislation preempting local government authority continues to proliferate in Indiana,¹⁸³ it is important to analyze the functional effects, specifically

174. See O'Farrell, *supra* note 170.

175. RICHARD FLORIDA, *RISE OF THE CREATIVE CLASS* (Basic Books, 2002).

176. MICHAEL LUIS, INT'L REGIONS BENCHMARKING CONSORTIUM, *A TALE OF TEN CITIES: ATTRACTING AND RETAINING TALENT* 14 (Nov. 2009), available at <http://www.psrc.org/assets/5585/IRBC2-Talent1109.pdf> [perma.cc/N99C-5XEP].

177. See generally *Editorial: Let's focus on community*, CHRONICAL-TRIB. (Nov. 30, 2016, 3:21 PM), <http://indianaeconomicdigest.com/main.asp?SectionID=31&SubSectionID=135&ArticleID=86118&TM=57218.68> [perma.cc/XJ2E-8D2Q] (“The economy of the 21st Century centers around community and place, not around factories. Employers are going to where people are and want to be. People are not moving, as they once did, for their jobs. Now, 70 percent of the time, people are moving for good schools and public services.”).

178. Bell et al., *supra* note 3, at 17-20.

179. *Id.*

180. *Id.* at 18-19.

181. *Id.*

182. *Id.*

183. See H.B. 1133, Ind. General Assembly (2017); see also H.B. 1307, Ind. General Assembly (2017); S.B. 213, Ind. General Assembly (2017).

examining how the laws modify local governments' ability to positively impact the state's economic future. This section will analyze two recent Indiana preemption laws by examining their practical effects and specific impacts on local government authority through the lens of the factors laid out in the previous section.

Indiana's 2011 legislation that barred local governments from instituting local minimum wage ordinances¹⁸⁴ created a textbook case for analyzing the effects of preemption laws. Examining the law through the lens of the three factors laid out in the previous section highlights the level to which local government is barred from pursuing any potential economic benefit a local minimum wage increase might provide. First, this preemption definitely negates an ability to attract new labor through increased job applications.¹⁸⁵ However, while attracting labor is certainly the most vital factor in growing an economy,¹⁸⁶ the actual effect an increase to the minimum wage has on the number of people ultimately in the labor force is probably minimal. In fact, "changes in the minimum wage have little to no impact on employment [numbers]."¹⁸⁷

The true potential for economic benefit arising from an increase in a locality's minimum wage is actually the impact it has on quality of life metrics, which can attract a more talented labor force in the aggregate.¹⁸⁸ This has been shown via research that has consistently found that an increase in the minimum wage can reduce the number of people living in poverty.¹⁸⁹ In turn, a reduction in the number of people living in poverty has been found to increase local quality of life statistics.¹⁹⁰ As described in the previous section, this increase in local quality of life can attract a more talented labor force and set the foundation for future business attraction and economic growth.¹⁹¹

184. IND. CODE § 22-2-2-10.5 (2017); see 2011 *Minimum Wage Legislation*, *supra* note 80.

185. See Alejandra Cancino, *Chicago's minimum wage increase attracting workers to city*, CHI. TRIB. (June 30, 2015, 12:35 PM), <http://www.chicagotribune.com/business/ct-minimum-wage-increase-chicago-0629-biz-20150626-story.html> [perma.cc/24PQ-SMHB].

186. Bell et al., *supra* note 3, at 14.

187. John T. Harvey, *The Real Argument For Raising The Minimum Wage*, FORBES (July 31, 2015, 10:17 AM), <http://www.forbes.com/sites/johntharvey/2015/07/31/real-argument-for-raising-minimum-wage/#2b159f3d9723> [perma.cc/V9GU-MEVW].

188. See O'Farrell, *supra* note 170.

189. Arindrajit Dube, *Minimum Wages and The Distribution of Family Incomes* (Univ. of Mass. Amherst, and IZA, Discussion Paper No. 10572, 2017), available at <http://ftp.iza.org/dp10572.pdf> [https://perma.cc/EV38-2EBV]; see also Mike Konczal, *Economists agree: Raising the minimum wage reduces poverty*, WASH. POST (Jan. 4, 2014), https://www.washingtonpost.com/news/wonk/wp/2014/01/04/economists-agree-raising-the-minimum-wage-reduces-poverty/?utm_term=.a441aba43814 [perma.cc/QE7D-PJCF].

190. David J. Peters, Presentation at the 63rd Ann. N. Am. Meetings of the Regional Sci. Ass'n Int'l: Impact of Poverty on Community Quality of Life and Social Capital: Longitudinal Analysis of 99 Small Towns in Iowa between 1994-2014 (Nov. 11, 2016), available at <http://www.soc.iastate.edu/smalltowns/narsc2016-peters.pdf> [perma.cc/9C5G-K2VQ].

191. See O'Farrell, *supra* note 170.

Likewise, allowing increases to local minimum wages would result in increased tax revenue for local governments.¹⁹² This additional revenue could possibly allow local governments the ability to provide more services without having to institute an across-the-board tax increase. As previously described, this ability to effectively balance levied taxes with government-provided services can be another tool for attracting talented labor and businesses to a locality.¹⁹³

It would be a fair rebuttal to argue that increases in the minimum wage would not affect localities equally, and that an improper match between local ordinances and local characteristics could possibly create negative effects for some communities.¹⁹⁴ In fact, when asked for his evaluation on the impact of Seattle's local minimum wage ordinance, a professor from the University of Washington put it this way:

What I can tell you is that to think one minimum wage is going to have the same impact everywhere at all points in time, that's not really consistent with what we're observing so far . . . it's a lot easier in a town like Seattle . . . [a]nd it might not work so well in a place that [has] uniformly higher poverty, doesn't have as many of these tech sector jobs or other types of high-income employment to make it all work.¹⁹⁵

Despite the fairness of this rebuttal, a general abrogation of local government authority is not the answer. For the sake of the entire state's economy, local leaders need to be empowered to experiment and drive policy innovation.¹⁹⁶ Consistent with themes of both federalism and market competition,

Local innovation will not always lead to desirable policy outputs or results. Nor does local decentralization guarantee success. However, consistent with . . . vision[s] of federalism . . . local governments'

192. See generally Departmental Notice #1, State of Indiana Department of Revenue, How to Compute Withholding for State and County Income Tax (Jan. 1, 2018) (detailing local tax rates on page 3, providing the percent of increased wages that would be taxed locally).

193. Bell et al., *supra* note 3.

194. Compare *One Year On, Seattle Explores Impact Of \$15 Minimum Wage Law*, NPR (Apr. 1, 2016, 4:22 PM), <http://www.npr.org/2016/04/01/472716129/one-year-on-seattle-explores-impact-of-15-minimum-wage-law> [perma.cc/27ZU-4LMB] (how a local increase in the minimum wage effected Seattle), and Jared Bernstein, *So far, the Seattle minimum-wage increase is doing what it's supposed to do*, WASH. POST (Aug. 10, 2016), https://www.washingtonpost.com/posteverything/wp/2016/08/10/so-far-the-seattle-minimum-wage-increase-is-doing-what-its-supposed-to-do/?utm_term=.9ba5d69910a1 [perma.cc/RQV2-FS78] (another examination of the effects in Seattle), with Don Lee, *Four consequences of a \$15 minimum wage*, L.A. TIMES (Apr. 25, 2016, 7:00 AM), <http://www.latimes.com/business/la-fi-minimum-wage-impacts-20160421-snap-htmlstory.html> [perma.cc/E4SY-KRFN] (detailing how unpredictable the effects of minimum wages laws can be, but providing some general assumptions).

195. *One Year On, Seattle Explores Impact Of \$15 Minimum Wage Law*, *supra* note 194.

196. See generally Parlow, *supra* note 3 (arguing that local communities can serve as policy innovation hubs, similar to how states can be "laboratories" for the federal government).

experimentation – both its successes and failures – has the potential to inform state and federal officials as to what laws and policies might be translatable to the broader levels of government.¹⁹⁷

Government should encourage experimentation and innovation because that is what drives the economy forward.¹⁹⁸ General abrogation of local government authority on a particular issue will only stymie local governments from creating the locally tailored solutions needed to positively impact those factors that drive modern economic growth.¹⁹⁹

Other state preemptions of local government authority in Indiana are less economic in nature than local minimum wage ordinances, yet they can still create potential economic consequences. For example, the 2016 preemption of local governments' ability to regulate "disposable auxiliary containers" expanded the debate to incorporate an environmental component as well.²⁰⁰ While members of the General Assembly justified the law's preemption on economic grounds,²⁰¹ citizens of Bloomington, the community known to be discussing a local plastic bag ban that likely prompted the preemption law, saw their local debate arise from environmental concerns.²⁰² From the local citizens' perspective, this was seemingly a debate about their quality of life preferences being discussed in the Statehouse on economic grounds. In fact, a member of the local organization driving the discussion said, about the state's preemption law, "There is a reason these things should be delegated to local government. We should be able to talk about what's good for us, what's good for our waterways, what's good for our environment[.]"²⁰³

Bloomington has a unique starting point in reference to the three factors analysis laid out in Section B. As the home to Indiana University, Bloomington has the natural benefit of an educated labor force and a built-in, factory-like pipeline of future generations of highly-educated labor participants.²⁰⁴ This means, while some communities must focus on attracting new labor, Bloomington already has a talented labor force that it must work to retain. If

197. *Id.* at 385.

198. See GES GROUP ON GROWTH, GOVERNMENT ECONOMIC SERVICE GROUP ON GROWTH: INNOVATION 1 (U.K. Dept. for Bus., Energy & Indus. Strategy 2014), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/370187/bis-14-1169-government-economic-service-group-on-growth-innovation.pdf [perma.cc/5QJA-JEW8].

199. See *supra* Part III.C.

200. See Downing, *supra* note 108.

201. See Eason, *supra* note 2.

202. See Downing, *supra* note 108.

203. Brosher, *supra* note 9 (quoting Rebecca Swanson, a member of Bring Your Bag Bloomington).

204. See generally *IU Fact Book*, IND. UNIV., https://www.iu.edu/~uirr/reports/standard/factbook/2016-17/Bloomington/Fast_Facts/Fast_Facts [perma.cc/J27H-2HPF] (last visited Feb. 7, 2017) (providing information on campus degree production and figures relating to faculty and staff).

Bloomington was only competing in an economy that included other Indiana communities, this might be less of a concern; but, in reality, Bloomington (due to Indiana University and other local employers) is engaged in a more national and international market.²⁰⁵

This distinction matters. Nationally, Indiana is considered to be very poor in environmental quality.²⁰⁶ Yet, “[Bloomington], at least compared to the rest of the state, is [considered] a model of sustainability.”²⁰⁷ If Bloomington were facing only in-state environmental quality of life comparisons it would be very competitive, but, in reality, it is subject to national and international levels of comparison and scrutiny. Citizens of Bloomington were showcasing to local leadership how an environmental quality of life issue could be improved through a possible plastic bag ban.²⁰⁸ Yet, the General Assembly took away local leadership’s ability to engage on this issue at all.²⁰⁹ Admittedly, what works for one Indiana city may not work for another, but the state’s preemption effectively took away Bloomington’s opportunity to compete with national peer cities. If Bloomington is going to be able to retain its talented labor, it at least needs to be able to be responsive to its citizens’ policy preferences.

This national and international marketplace for talented labor is also an example of how the constitutional restriction on special legislation mentioned in Part II has a practical economic effect.²¹⁰ As mentioned, there is ample journalistic evidence to support the claim that the state’s preemption of local “disposable auxiliary container” regulations was in direct response to Bloomington’s local plastic bag ban discussion.²¹¹ Yet, Article 4, Sections 22-23 of the Indiana Constitution barred the General Assembly from passing legislation specifically aimed at only thwarting the Bloomington effort.²¹² The Constitution requires that any legislation “be general, and of uniform operation throughout the State,”²¹³ thereby requiring it to be applicable to all communities.

205. See generally IND. BUS. RESEARCH CTR., A LOOK INSIDE THE 2011 BLOOMINGTON ECONOMY (Sept. 2011), available at [http://www.ibrc.indiana.edu/studies/Bloomington Benchmarking2011.pdf](http://www.ibrc.indiana.edu/studies/Bloomington%20Benchmarking2011.pdf) [perma.cc/SBY9-SW5L] (comparing Bloomington’s economic indicators to national and in-state peers; note that Bloomington has little in-state competition by leading in almost every category against its in-state peers, but when compared to its national peers its performance is consistently middle-of-the-pack).

206. Ryan Sabalow, *Indiana ranked fourth worst in environmental quality*, INDYSTAR (Apr. 20, 2015, 12:04 PM), <http://www.indystar.com/story/news/2015/04/20/indiana-ranked-fourth-worst-environmental-quality/26073003/> [perma.cc/8MPA-TYQV].

207. Jeremy Shore, *To Make Bloomington More Sustainable: The Men and Women at the Forefront*, BLOOMINGTON MAG., Feb. 2012, at 66, available at <http://www.magbloom.com/wp-content/uploads/2012/02/Sustain.pdf> [perma.cc/K474-RLBV].

208. Downing, *supra* note 108.

209. Brosher, *supra* note 9.

210. See *supra* Part II.

211. See Eason, *supra* note 2; Brosher, *supra* note 9; Downing, *supra* note 108.

212. IND. CONST. art. 4, §§ 22-23.

213. IND. CONST. art. 4, § 23.

This Note will not offer an evaluation on the merits of the special and local laws provision of the Indiana Constitution, but the provision's influence on preemption legislation has important practical effects that state legislators should take into consideration before passing preemption laws. Due to the constitutional provision requiring the "disposable auxiliary container" law be applied statewide,²¹⁴ if a labor market participant in Bloomington decided to relocate, due in some part to the preemption law impeding his desired quality of life, he would not have an alternative in-state community to relocate to. He would be forced to leave Indiana if he wished to pursue his quality of life preference because his preference was barred from being enacted in every Indiana community.

The preemption statute's required adherence to the state constitution's general applicability requirement not only restrained Bloomington's ability to determine how the issue fit into its quality of life and labor retention strategy, it restrained every community in Indiana from doing so.²¹⁵ This effect can potentially force labor participants fully outside the state, rather than just a single community. The requirements of article IV, sections 22-23 can exacerbate potential negative economic consequences of any preemption law to a truly state-wide level, rather than the consequences otherwise staying contained to a single community.

CONCLUSION

Over the last several years, the Indiana General Assembly has been engaged in consistent legislative efforts to preempt local government authority on a wide range of policy issues.²¹⁶ One of the arguments made by state legislators in support of these preemption efforts is that thwarting local government authority can avoid a patchwork of local laws and provide the state with a more friendly business climate.²¹⁷ The presumption is that these endpoints equate to a stronger state economy.²¹⁸ Yet, an increasing amount of evidence shows that to be an inaccurate assumption.²¹⁹

While Indiana's future economy continues to be shaped by policy decisions made in the Statehouse, it will be the aggregate strength of the State's individual cities that determines the fortitude of the larger state economy.²²⁰ Just as Dillon's Rule created negative consequences in the early-20th century because of its incompatibility with the practical operating dynamic of local governments,²²¹ modern-day state preemption of local government authority is incompatible with the practical aspects of securing the State's economic future. Recent laws

214. See IND. CONST. art. 4, §§ 22-23.

215. See Downing, *supra* note 108.

216. See *supra* Part II.A.

217. See Riley, *supra* note 6.

218. See Eason, *supra* note 2.

219. See, e.g., Bell et al., *supra* note 3.

220. See IHS GLOBAL INSIGHT, *supra* note 5.

221. See Lang, *supra* note 18, at 3.

preempting local authority have proven to organically cause negative economic consequences,²²² as well as greatly restrict local governments' ability to actively respond to the factors that drive economic growth.²²³

Hopefully, this Note provides those interested in supporting strong home rule authority for Indiana's communities with an economic counter-argument against state-level efforts to limit local government's policy making ability. Preemption legislation against local government authority is derailing the ability of local governments to institute ordinances and regulations, based upon local characteristics, that can improve local economies and thereby improve the aggregate state economy. The irony is that while state legislators have purported to be protecting the state's economy,²²⁴ their preemption of local government authority is actually hampering unique, localized approaches to satisfying the factors of economic growth – the very medium by which modern-day economies thrive.²²⁵

222. See McBride & Durso, *supra* note 134; see also Jurney, *supra* note 145.

223. See *supra* Part III.C.

224. See Eason, *supra* note 2; see also Riley, *supra* note 6.

225. See *supra* Part II.B.