WE ARE NOT STRUCK WITH BLINDNESS: THE ESTABLISHMENT CLAUSE AND RELIGIOUSLY MOTIVATED STATE PREEMPTION OF MUNICIPAL NON-DISCRIMINATION LAW

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INTRODUCTION

On August 19, 2019, the City Council of Fayetteville, Arkansas, had a ten-hour meeting.[1] More than a hundred citizens lined up to share their thoughts on Ordinance 119, a proposed regulation that had become a source of great public debate in the town. Only after they had all spoken did the meeting adjourn at 3:30 AM. The City Council then passed Ordinance 119 by a six-to-two margin, approving its establishment of protections on the basis of sexual orientation and gender identity in the city's non-discrimination law, and making Fayetteville the first town in the state to extend such protections to LGBT individuals.[2] Six months later, the law was invalidated. The Arkansas General Assembly preempted Fayetteville's legislation, making it outside of the city's authority as a municipality to create protected classes beyond those that exist at the state level.[3] Arkansas state law does not protect sexual orientation and gender identity.

Preemption is a powerful tool that states can wield against municipalities, and in recent years they have been doing so with great frequency and occasionally great antagonism. The difficulty for municipalities is that preemption regimes often leave few channels through which cities can challenge preemptive laws and litigation has often relied on federal Constitutional claims when statutory and state constitutional claims are unavailable. Typically, these claims have been based on Equal Protection theories, especially where non-discrimination ordinances (NDOs) have been implicated. However,

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[1] *See Fayetteville Becomes First Ark. City to Pass LGBT Non-Discrimination Law*, LGBTQ NATION (Aug. 20, 2014), https://www.lgbtqnation.com/2014/08/fayetteville-becomes-first-ark-city-to-pass-lgbt-non-discrimination-law/ [https://perma.cc/7P4Z-F6CB].

[2] *See Arkansas: LGBTQ Non-Discrimination in States*, FREEDOM FOR ALL AMERICANS, https://www.freedomforallamericans.org/category/states/ar/ [https://perma.cc/7DJQ-T6WM].

[3] *See* Rebecca Hersher, Arkansas Supreme Court Strikes Down Local Anti-Discrimination Law, NPR (Feb. 23, 2017), https://www.npr.org/sections/thetwo-way/2017/02/23/516702975/arkansas-supreme-court-strikes-down-local-anti-discrimination-law [https://perma.cc/H3KZ-PJZT].

as Professor Richard Briffault et al. note in their issue brief on preemption for the American Constitution Society, "the contemporary landscape of increasing state hostility" creates "an urgency to think[] creatively about new legal arguments."[4] One of these arguments, this Article proposes, is based on the Constitution's Establishment Clause. The path to prevailing on Establishment Clause challenges to preemption law is steep but navigable, especially if courts are willing to adjust their jurisprudence with regard to both the Establishment Clause and preemption doctrine in general.

As national politics become increasingly polarized and the federal government increasingly paralyzed,[5] much of the work to protect the civil and political rights of citizens is happening at the municipal level. Municipalities, especially blue cities in red states, have in recent years been at the forefront of passing progressive legislation across many spheres, from minimum wage provisions and anti-discrimination ordinances to sharing economy regulations and gun laws. Though Justice Brandeis famously characterized states as "laboratories" of democracy, municipalities also serve as arenas for policy experimentation.[6] Municipal governments are often more able to address local problems, respond directly to the concerns and preferences of citizens, and avoid the influence of spending by special interest groups than statewide governments.[7] Furthermore, policies adopted locally can catalyze policy changes at the state and

[4] RICHARD BRIFFAULT ET AL., AM. CONSTITUTION SOCIETY, THE TROUBLING TURN IN STATE PREEMPTION: THE ASSAULT ON PROGRESSIVE CITIES AND HOW CITIES CAN RESPOND (2017).

[5] The federal government was recently shut down for the longest period in its history, largely due to a partisan stalemate regarding immigration policy. *See* Saahil Desai, *It's Not Just the Longest Shutdown Ever*, THE ATLANTIC (Jan. 13, 2019), https://www.theatlantic.com/politics/archive/2019/01/under-donald-trump-longest-shutdown-ever/580114/ [https://perma.cc/RW79-GRSB].

[6] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932).

[7] *See* Paul Diller, *Intrastate Preemption*, 87 B.U.L. REV. 1113, 1119–20 (2007). Diller notes that progressive groups more so than conservative ones tend to utilize "the smaller scale of city politics" in accomplishing their objectives rather than targeting their efforts at the statewide or national level. *Id.* at 1120. He identifies two explanations for this phenomenon: first, that the relative size of city politics as compared to national politics reduces the influence of campaign contributions by special interest groups, leaving municipalities less beholden to these interests and able to provide a "more responsive, democratic form of government" than state and national governments. *Id.* A second explanation for the proliferation of progressive policy experimentation at the local level may be that the largest cities in the United States, those most likely to have ambitious policy agendas, "have a strong leftist political tilt." *Id.* (internal citations omitted).

national level.[8] Policies that prove workable and popular on small, local scales may be adopted by other cities and eventually adopted at the state level.[9]

This percolation of policy from cities "outwards" (to other cities) and "upwards" (to the state) is particularly observable in the civil rights sphere.[10] Historically, localities have often led the charge in creating civil rights reform. For example, cities were at the forefront of the push for marriage equality. In 2004, San Francisco began issuing marriage licenses to same-sex couples, four years before marriage equality would become state law in California.[11] San Francisco's lead was promptly followed by Sandoval County, New Mexico; Multnomah County, Oregon; Asbury Park, New Jersey; and the mayors of both New Palz and Ithaca, New York.[12] All of these decisions placed cities in direct conflict with state law, but highlighted the role that cities can play in moving forward state and national policy debates.[13] Cities are also currently spearheading policy change in the areas of LGBTQ rights,[14] climate change,[15] public health,[16] and immigration,[17] among others.

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[8] *See id.* at 1119.

[9] *See* Diller, *supra* note 7, at 1122.

[10] *See id.* at 1119.

[11] *See* Richard Schragger, *Cities as Constitutional Actors: The Case of Same-Sex Marriage*, 21 VA. J.L. & POL'Y 147, 148 (2005).

[12] *See id.*

[13] See *id.* for an in-depth analysis of the legal and constitutional role of municipal governments in the ongoing debate (at the time of its pre-*Obergefell* publication) concerning marriage equality.

[14] *See, e.g.*, Lydia E. Lavelle, *Grassroots Gay Rights: Legal Advocacy at the Local Level*, 21 AM. U.J. GENDER SOC. POL'Y & L. 507 (2013); HUMAN RIGHTS CAMPAIGN & EQUALITY FED'N INST., MUNICIPAL EQUALITY INDEX: A NATIONWIDE EVALUATION OF MUNICIPAL LAW (2018) (assessing how inclusive municipal laws are of LGBTQ citizens).

[15] *See, e.g.*, Oliver Milman et al., *Four Cities Leading the Way Against Climate Change*, CITYLAB (June 14, 2019), https://www.citylab.com/equity/2017/06/the-fight-against-climate-change-four-cities-leading-the-way-in-the-trump-era/530385/ [https://perma.cc/4QHD-46R9].

[16] *See, e.g.*, Abby Goodnough, *In San Francisco, Opioid Addiction Treatment Offered in Streets*, N.Y. TIMES (Aug. 18, 2018), https://www.nytimes.com/2018/08/18/health/san-francisco-opioid-addiction.html [https://perma.cc/6AKR-JQQJ].

[17] *See, e.g.*, Xi Huang & Cathy Yang Liu, *Welcoming Cities: Immigration Policy at the Local Level*, 54 URB. AFF. REV. 3 (2016); Janell Ross, *6 Big Things to Know About Sanctuary Cities*, WASH. POST (July 8, 2015),

When municipalities seek to fill gaps they see in statewide legislation, however, they run the risk of the state claiming that the local laws are preempted by state or federal law. Recently, states have begun using preemption doctrine rather aggressively, striking down local innovations by overriding municipal legislation or withdrawing authority from municipal governments.[18] This phenomenon is particularly prevalent when cities seek to expand the boundaries of civil rights protections, though it is certainly not limited to conservative state government preemption of progressive municipal legislation.[19]

Inevitably, tensions exist where, as in Arkansas, state legislatures and municipal governments have conflicting operative values; for example, when cities like Fayetteville seek to implement progressive legislation that conflicts with more conservative state governments, like that of Arkansas. In seeking to mount challenges to state action, cities and their defenders should be alert to the justifications provided by state legislatures for preemptive action. In most cases, state preemption of municipal action is valid and almost impossible to challenge, as will be discussed in Part II.B. On occasion, however, state preemption laws may run afoul of the federal Constitution. Preemptive legislation that is discriminatory, that unduly burdens vulnerable populations, or that is based on impermissible motivations—such as the establishment of religion—can and should be challenged. As Justice Hoffman of the Supreme Court of California observed in 1971 in *Parr v. Municipal Court*:

> When we take our seats on the bench, we are not struck with blindness, and forbidden to know as judges what we see as men; and where an ordinance, though general in its terms, only operates upon a special race, sect or class, it being universally understood that it is to be enforced only against that race, sect or class, we may just conclude that it was the intention of the body adopting it that it should only have such operation and treat it accordingly.[20]

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https://www.washingtonpost.com/news/the-fix/wp/2015/07/08/4-big-things-to-know-about-sanctuary-cities-and-illegal-immigration/?utm_term=.85de25e25f3 [https://perma.cc/VA6S-VVBD].

[18] *See* BRIFFAULT ET AL., *supra* note 4, at 1.

[19] *See id.*

[20] Parr v. Mun. Ct., 479 P.2d 353, 356 (1971). This case concerned a municipal ordinance prohibiting sitting on grass in public parks that was intended to discriminate against "hippies" and drive them out of the city. *Id.* at 355.

Justice Hoffman's observation is as important now as it was in 1971. Throughout their history, courts in this country have been asked to distinguish between pretext and prejudice in the service of upholding the Constitution. In confronting legislation with an apparently religious motivation, even when that legislation claims to have a secular purpose, as most preemption laws do, courts should be able to exercise judgment in deciding not to defer to the purposes proffered by lawmakers. Arkansas' preemption of Fayetteville's NDO presents just such an opportunity to probe legislative motivation in the context of state-municipal preemption.

This Article proceeds in three parts. Part I considers the doctrine of state preemption and the current landscape of state preemption of local power, focusing on the increase in state use of preemption in the last few years. Part II provides an overview of Establishment Clause jurisprudence, the state of the Supreme Court's current practice regarding the Establishment Clause, and the elements of an Establishment Clause claim under the Court's various tests. Part II also presents Arkansas' Intrastate Commerce Improvement Act ("Act 137") as a case study and suggests that, where evidence of impermissible religious legislative motivation exists, the Establishment Clause could provide an alternative to Equal Protection and other federal constitutional claims for challenging preemptive laws. Part III considers how well an Establishment Clause claim against Act 137 would fare, concluding that the probability of the bill being struck down on Establishment Clause grounds under current case law is low. As such, Part III proposes a revised Establishment Clause standard which borrows from Equal Protection case law. It suggests that, under this revised standard, an Establishment Clause claim against Act 137, and other bills with analogously suspect motivations, would have a much greater chance of being struck down. Part III also suggests that the current spate of aggressive preemption activity could potentially be mitigated if courts rethink their approach to state-local relations and preemption generally.

I. Blue Cities, Red States: Preemption and Progressive Policies

A. Recent Use of Preemption by States

While preemption has long been a useful mechanism for states to advance legitimate state interests in uniformity and to push back against local parochialism, it has, of late, become a tool of conservative state government opposition to progressive local interests.[21] According to a 2018 study published by the National League of Cities (NLC),

[21] *See id.* at 356; Diller, *supra* note 7, at 1114.

state legislatures have "consistently . . . stricken down laws passed by city leaders in four crucial areas of local governance: economics, social policy, health and safety."[22]

The use of preemption by states to curtail local innovation has become rampant, with one scholar describing the amount of preempted legislation as having reached "epidemic proportions."[23] Both demographic and political trends indicate that many cities will continue to become more Democratic while their state governments remain in Republican control, suggesting that the use of offensive preemption to control progressive policy innovation at the municipal level will not abate any time soon.[24] But this new preemption is not solely the product of demographic trends and the preponderance of Republican-controlled state governments. Especially when red states seek to restrain blue cities, many preemptive bills can be traced to conservative think tanks and nonprofits, such as the American Legislative Exchange Council (ALEC) and the National Rifle Association (NRA), which not only lobby legislators to preempt progressive local action but also, in the case of ALEC, provide model legislation to do so.[25] This increase in preemptive activity is concerning from the perspective of federalism and a concern for local autonomy, but it also has serious implications in areas such as civil rights, public health, and public safety.[26]

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[22] NAT'L LEAGUE OF CITIES, CITY RIGHTS IN AN ERA OF PREEMPTION: A STATE-BY-STATE ANALYSIS 1 (2018). As of the most recent update, twenty-eight states have preempted minimum wage laws, twenty-three have preempted paid leave laws, forty-one have preempted laws regulating ride sharing, five have preempted laws regulating home sharing, twenty have preempted municipal broadband laws, forty-two have preempted tax and expenditure legislation, forty-three have preempted regulations on firearms and ammunition, and three have preempted anti-discrimination laws. *Id.* at 3, 23.

[23] Kenneth A. Stahl, *Preemption, Federalism, and Local Democracy*, 44 FORDHAM URB. L.J. 133, 134 (2017). For an extensive survey of state preemption of municipal laws, *see* NAT'L LEAGUE OF CITIES, *supra* note 22; BRIFFAULT ET AL., *supra* note 4.

[24] *See* Stahl, *supra* note 23, at 136–43.

[25] *See* Lori Riverstone-Newell, *The Rise of State Preemption Laws in Response to Local Policy Innovation*, 47 PUBLIUS: J. FEDERALISM 403, 405 (2017).

[26] *See, e.g.*, Jennifer L. Pomeranz & Mark Pertschuk, *State Preemption: A Significant and Quiet Threat to Public Health in the United States*, 107 AM. J. PUB. HEALTH 900 (2017); Jennifer Karas Montez, *Deregulation, Devolution, and State Preemption Laws' Impact on U.S. Mortality Trends*, 107 AM. J. PUB. HEALTH 1749 (2017); Andrew Gillum, Bill Peduto, & Ted Wheeler, *Mayors Want to Pass Gun Safety Laws, but the NRA and Our State Legislatures Won't Let Us*, USA TODAY (Mar. 23, 2018), https://usatoday.com/story/opinion/2018/03/23/mayors-want-gun-control-but-blocked-nra-preemption-laws-column/450893002/ [https://perma.cc/B372-LYEZ].

Of most significance for the purposes of this Article are the three states—North Carolina, Tennessee, and Arkansas—that have explicitly preempted municipal legislation intended to extend local non-discrimination protections to LGBTQ individuals.[27] Tennessee was the first to do so in 2011.[28] Arkansas followed suit in 2015 with the Intrastate Commerce Improvement Act (Act 137), which will be discussed in detail in Parts II and III. North Carolina is the most recent state to preempt a local NDO, and the most high-profile.[29] North Carolina's is also the only law of the three that has been repealed, although only in part.

North Carolina's bill, the Public Facilities Privacy and Security Act, better known as HB2, was passed in response to the city of Charlotte's Ordinance 7056, which prohibited discrimination on the basis of sexual orientation and gender identity. HB2 limited "sex" to mean the designation of male or female on one's birth certificate and provided that any municipal NDO would be preempted by state regulation.[30]

The Tennessee bill, called the Equal Access to Intrastate Commerce Act, was a 2011 law that amended Tennessee's Human Rights Act to define "sex" as the designation of a person as male or female on their birth certificate and prohibited any local government from enacting ordinances that create any anti-discrimination practices not covered by

[27] *See* NAT'L LEAGUE OF CITIES, *supra* note 22, at 10.

[28] Equal Access to Intrastate Commerce Act, TENN. CODE ANN. § 7-51-1802 (2017) (passed as House Bill 600 during the 2011 Session of the 107th General Assembly and effective as codified April 7, 2017).

[29] *See* Paul J. Weber & Will Weissert, *'Bathroom Bill' Dies Again in Texas as Session Abruptly Ends*, USA TODAY (Aug. 16, 2017), https://www.usatoday.com/story/news/politics/2017/08/16/texas-bathroom-bill/571671001/ [https://perma.cc/W6AL-BYY8]; Amber Phillips, *The Tumultuous History of North Carolina's Bathroom Bill, Which Is On Its Way To Repeal*, WASH. POST (Mar. 30, 2017), https://washingtonpost.com/news/the-fix/wp/2016/12/19/the-tumultuous-recent-history-of-north-carolinas-bathroom-bill-which-could-be-repealed/?noredirect=on&utm_term=.8e291a062d17/ [https://perma.cc/K6R8-582B].

[30] Public Facilities Privacy & Security Act, N.C. GEN. STAT. § 143-760 (2016), repealed by 2017 N.C. Sess. Laws 1, ch.4. HB2 was later repealed in response to widespread public outrage, but the replacement bill retains the preemptive element of HB2 and North Carolina cities remain unable to extend non-discrimination protections beyond what is protected at the state level. *See This HB2 "Repeal" is Fake*, LAMBDA LEGAL (Mar. 30, 2017), https://lambdalegal.org/blog/20170330_fake-hb2-repeal [https://perma.cc/89JK-WE3D].

state law.[31] The law was proposed in response to Nashville's passage of a city-wide NDO that prohibited discrimination on the basis of sexual orientation and gender identity.[32]

Act 137, Arkansas' bill, is similar to Tennessee's. Like the Equal Access to Intrastate Commerce Act, Act 137 prohibits cities and counties in Arkansas from adopting ordinances or policies that "create[] a protected classification or prohibit[] discrimination on a basis not contained in state law."[33] But unlike Tennessee's bill, Act 137 does not offer a definition of "sex."

It is significant that, though their function was to remove protections for LGBTQ individuals, both the Arkansas and Tennessee laws were titled as regulations of intrastate commerce. This has allowed both laws to present as facially neutral, and so avoid successful federal constitutional challenges[34] under the Equal Protection Clause.[35] This is not to say that there are no constitutional challenges to be mounted, especially for these cases which implicate the rights of LGBTQ individuals. As discussed in the next section, despite their facial neutrality and purported secular aims, some of these laws are arguably impermissibly religiously motivated and so could be found invalid under the Establishment Clause of the Constitution.

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[31] Equal Access to Intrastate Commerce Act, TENN. CODE ANN. § 7-51-1802 (2017).

[32] *See* Leslie Fenton, *The Anti-Gay Tennessee Bill No One's Talking About*, SALON (May 26, 2011), https://www.salon.com/2011/05/26/tennessee_antigay_bill_open2011/ [https://perma.cc/CV55-6GPV].

[33] ARK. CODE ANN. §§ 14-1-403 (2015).

[34] There are also state constitutional challenges that could potentially be raised against these preemption bills; however, they are outside the scope of this Article. For a discussion of state constitutional challenges regarding home rule immunity, "generality" requirements, and procedural deficiencies, see BRIFFAULT ET AL., *supra* note 4, at 11–13.

[35] U.S. CONST. amend. XIV. The Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." *Id.*; *see also* Romer v. Evans, 517 U.S. 620 (1996). *Romer* concerned a challenge to a Colorado state referendum which "preclude[d] all legislative, executive, or judicial action at any level of state or local government designed to protect the status of persons based on their homosexual, lesbian or bisexual orientation, conduct, practices or relationships." *Romer*, 517 U.S. at 620. The law was passed in response to the passage of local ordinances in three Colorado cities that extended anti-discrimination protections to individuals on the basis of sexual orientation. *Id.* The Supreme Court held that the state law was unconstitutional under the Equal Protection Clause, on the grounds that the referendum "raise[d] the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.* at 634.

B. What Can Cities Do When Faced with Preemption?

In most states, cities are left with few options when it comes to challenging state laws that preempt local legislation. The doctrine of preemption refers to the idea that the law of a lower authority will be displaced by the law of a higher authority should the two come into conflict. Preemption can occur both at the federal[36] and state[37] level, and it generally takes one of two forms: express or implied. Express preemption is created when a statute explicitly indicates legislative (state or federal) intent to displace other laws by lower authorities.[38] Implied preemption exists where the federal or state regulatory regime is so comprehensive that it has "fully occupied" the field, such that regulation by a lesser authority is intended to be preempted, even if the legislature has not said so

[36] Federal preemption is the invalidation of state or municipal law that conflicts with federal law. The source of federal preemption is the Supremacy Clause in Article IV of the U.S. Constitution. U.S. CONST. art. IV, cl. 2. *See also* Altria Group, Inc. v. Good, 555 U.S. 70, 76 (2008) ("[W]e have long recognized that state laws that conflict with federal laws are without effect.").

[37] The sources of intrastate preemption are varied, and there is a lot of diversity in state-local relationships. Often, the authority for state preemption takes the form of a grant of home rule authority to cities, either through the state constitution or via statute. *See, e.g.*, N.Y. CONST. art. IX ("[E]very local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to its property, affairs or government."); ARK. CODE ANN § 14-55-102 (1875) ("Municipal corporations shall have power to make and publish bylaws and ordinances, not inconsistent with the laws of this state.").

[38] *See, e.g.*, Equal Access to Intrastate Commerce Act, TENN. CODE ANN. §7-51-1802 (2017) (expressly displacing a Nashville, Tennessee, ordinance which added sexual orientation and gender identity to the classes of persons protected by equal opportunity provisions). The Equal Access to Intrastate Commerce Act prohibits municipalities from creating any non-discrimination protections that are not covered by statewide anti-discrimination acts. *Id.* It reads, in part:

> No local government shall by ordinance, resolution, or any other means impose on or make applicable to any person an anti-discrimination practice, standard, definition, or provision that shall deviate from, modify, supplement, add to, change, or vary in any manner from . . . the definition of "discriminatory practices" in § 4-21-102. *Id.*

explicitly.[39] Notably, implied preemption doctrine can displace state or local law even absent any actual conflict with federal or state legislation.[40]

State preemption of municipal law is also impacted by the extent to which the state delegates legislative authority to its municipalities. The federal Constitution makes no mention of local governments and the Tenth Amendment leaves to the states the authority to delegate powers to its cities.[41] As a result, there is no real uniformity among states regarding state-municipal relations. However, states can generally be split into two categories: Dillon's Rule states and home rule states. Dillon's Rule[42] advances a very narrow scope of municipal authority.[43] In Dillon's Rule states, municipalities have only powers expressly granted to them by the state, those that are necessarily incidental to granted powers, and those that are indispensable to municipal governance.[44] Historically,

[39] See, for instance, *O'Connell v. Stockton*, 162 P.3d 583, 587 (Cal. 2007), which states:

> When the Legislature has not expressly stated its intent to occupy an area of law, we look to whether it has *impliedly* done so. This occurs in three situations: when (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the locality (internal quotations and citations omitted).

[40] *See* Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085, 2103 (2000).

[41] U.S. CONST. art. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

[42] Dillon's Rule is named for John F. Dillon, a Justice on the Iowa Supreme Court (1864–69), who expressed what would come to be known eponymously as Dillon's Rule in *City of Clinton v. Cedar Rapids & M.R.R. Co.*, 24 Iowa 455, 475 (1868) ("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."). Dillon's conception was endorsed by the Supreme Court in *Hunter v. City of Pittsburgh*, 207 U.S. 161 (1907), which held that there is no right under the federal Constitution to form local governments and that municipalities are merely "political subdivisions" of the state. *Id.* at 178.

[43] *See* Diller, *supra* note 7, at 1122.

[44] *See* JOHN F. DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS § 9(b) (1873).

Dillon's Rule was widely accepted, but today only eight states maintain Dillon's Rule in some form.[45]

Most states moved away from Dillon's Rule and adopted "home rule" provisions in the late nineteenth and early twentieth centuries.[46] Home rule allows municipalities to exercise any delegable power that the state has not expressly reserved for itself and it can be granted via a variety of mechanisms.[47] States vary as to the extent of these powers they allow their cities to exercise, but almost every state has some version of home rule that is operative.[48] Forty states provide for home rule either in their state constitutions or through statute, though there are differences in its features. For example, some states, like Arizona and Illinois, limit home rule authority to cities with certain population sizes.[49] Others, like Delaware, limit home rule based on subject matter—for instance, restricting the authority of municipalities to pass laws that create felonies.[50] On the whole, no state reserves all authority for itself, nor does any state delegate all legislative power to its cities, the result being that most states engage some aspects of both Dillon's and home rule.[51]

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[45] These states are Alabama, California, Colorado, Illinois, Indiana, Kansas, Louisiana, and Tennessee. In almost all these states, however, Dillon's rule is maintained only for a certain category of local governments, such as townships only in Indiana and non-charter cities in California. *See* AM. CITY CTY. EXCHANGE, FEDERALISM, DILLON RULE, AND HOME RULE 5 (2016).

[46] *See* NAT'L LEAGUE OF CITIES, *supra* note 22, at 5.

[47] *See* Diller, *supra* note 7, at 1114. Home rule has two general features: initiative and immunity. *See* BRIFFAULT ET AL., *supra* note 4, at 2. Initiative power, which is widely accepted throughout the United States with "at least 40 states delegating some significant, presumptive authority to local governments," *id.* at 2, "enable[s] local governments to undertake actions over a range of important issues without having to run to the state for specific authorization." RICHARD BRIFFAULT & LAURIE REYNOLDS, CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 346 (2016). Immunity, by contrast, "protect[s] local government decisions concerning local action from displacement by state law." *Id.*

[48] Forty-four states have some version of home rule that is operative. As with the states that still use Dillon's Rule, many home rule states subject their home rule charters to limitations. In Arizona, for example, home rule only applies to cities with populations of at least 35,000; all smaller cities are governed by Dillon's Rule. *See* AM. CITY CTY. EXCHANGE, *supra* note 45, at 6.

[49] *See id.*

[50] *See* BRIFFAULT ET AL., *supra* note 4, at 2.

[51] *See generally* JESSE J. RICHARDSON, JR., MEGHAN ZIMMERMAN GOUGH, & ROBERT PUENTES, BROOKINGS INST., IS HOME RULE THE ANSWER?: CLARIFYING THE INFLUENCE OF DILLON'S RULE ON GROWTH MANAGEMENT (2003).

The distinctions between primarily Dillon's Rule and primarily home rule jurisdictions and, more often, distinctions between different home rule systems have implications for how empowered cities are to challenge preemption. In states chiefly governed by Dillon's Rule, cities are broadly preempted from legislating in most policy areas.[52] In pure "legislative" home rule states (the majority rule),[53] municipal legislative power can be preempted by clear legislative intent.[54] For other forms of home rule, however, the path to preemption is less clear.

Not all home rule regimes fit the legislative home rule model, and some states have home rule regimes that grant immunity to cities against state preemption of certain categories of legislation or certain types of municipal action.[55] Other systems place requirements on preemptory laws themselves, such as the need to have general and uniform applicability.[56] These provisions create some protections for cities against state interference, but they are not universal and most cities remain subject to legislative home rule. Further, courts typically default against city power when cities attempt to push the boundaries of their authority vis-à-vis states.[57] In cases where state and local governments conflict, courts often rule in favor of state arguments for consistency, perhaps due to a "general judicial uneasiness with creative local action and corresponding preference for uniformity."[58]

The upshot of preemption regimes for municipalities is that cities have few avenues for judicial recourse against state preemptive action, whether or not home rule applies.[59] Local governments do not possess any federalism rights against states under the U.S. Constitution and the bar that must be cleared for preemption laws to raise other federal

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[52] *See* NAT'L LEAGUE OF CITIES, *supra* note 22, at 5.

[53] *See* Diller, *supra* note 7, at 1126.

[54] *See* BRIFFAULT ET AL., *supra* note 4, at 4.

[55] *See id.*

[56] *See id.* at 5.

[57] *See* Stahl, *supra* note 23, at 171.

[58] David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2257, 2347–48 (2003).

[59] *See* Stahl, *supra* note 23, at 172.

constitutional concerns, as will become clear in Sections II and III, is lofty.[60] In the absence of proving that state laws run afoul of the U.S. Constitution, municipalities are left essentially without federal protections against state arrogation of their lawmaking authority. These limitations on municipal options mean that federal constitutional claims can be a significant part of the arsenal for challenging preemption. One such claim will be considered in detail in Parts II and III.

II. The Legal Framework for Federal Constitutional Challenges

Most of the litigation challenging the laws out of Arkansas, North Carolina, and Tennessee have been based on Equal Protection theories. For reasons explained briefly below, Equal Protection claims have not had much success in striking down these preemptive bills. Especially in the case of Act 137, which on its face makes no mention of LGBT populations, an Equal Protection claim is not a probable source of relief. However, the particular facts of Act 137's passage and its legislative history implicate religious concerns such that the Establishment Clause could provide grounds for invalidating the law where Equal Protection cannot. The likelihood of success depends, in part, on which Establishment Clause test the Supreme Court would choose to employ, which is discussed in detail below.

A. Equal Protection Challenge

To prevail on an equal protection claim against state preemption laws, cities must show that the state law in question either intentionally discriminated against a protected

[60] *See* Hunter v. City of Pittsburgh, 207 U.S. 161, 178–79 (1907).

class,[61] which would trigger the courts to apply heightened scrutiny,[62] or that the statute was motivated by a bare desire to harm a group and cannot be supported by any rational basis.[63] Looking at the three state preemption bills that have targeted LGBT non-discrimination, both North Carolina's and Tennessee's expressly limit the definition of "sex." North Carolina limits "sex" to "biological sex"[64] and Tennessee limits it to "the designation of an individual person as male or female as indicated on the individual's birth certificate."[65] Consequently, it could be argued that these provisions, particularly North Carolina's limitation to "biological sex," create facial classifications that may trigger heightened scrutiny for equal protection purposes.[66]

Arkansas' Act 137, in contrast, is facially neutral, and offers no definition of sex or any other protected classifications, and so presents a weaker case for an equal protection claim.[67] The bill provides that municipalities cannot adopt NDOs that create protections

[61] Sexual orientation and gender identity are not currently protected classes in federal law. But some lower courts have read the protection of sexual orientation and gender identity into protections for gender that exist in federal statutes, specifically in the context of Title VII employment claims. *See, e.g.*, Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. 2018) (holding that sexual orientation is a subset of sex discrimination for the purposes of Title VII); Equal Emp't Opportunity Comm'n v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018) (finding that the decision to fire an employee who had decided to transition from male to female constituted discrimination based on failure to conform to gender norms and was thus a form of impermissible sex stereotyping under Title VII); Hively v. Ivy Tech Cmty. Coll. of Ind., 853 F.3d 339 (7th Cir. 2017) (holding that discrimination based on sexual orientation is a form of sex discrimination and is thus prohibited by Title VII of the Civil Rights Act of 1964). The question of whether sex discrimination includes discrimination on the basis of sexual orientation and discrimination against transgender or gender non-conforming persons has arisen primarily in disputes regarding Titles VII and IX of the Civil Rights Act, and until the Supreme Court grants certiorari to resolve the disagreements among the lower courts, the law will remain unsettled.

[62] To invoke heightened scrutiny, it must be shown that the action in question has a facial classification or is motivated by an intent to discriminate; it is not enough to show that a particular group is disparately impacted. *See* Washington v. Davis, 426 U.S. 229, 242 (1976).

[63] *See* Romer v. Evans, 517 U.S. 620, 634–35 (1996).

[64] Public Facilities Privacy and Security Act, 2016 N.C. Sess. Laws 3 §§ 1–3, *repealed by* 2017 N.C. Sess. Laws 4 § 1.

[65] Equal Access to Interstate Commerce Act, TENN. CODE ANN. § 7-51-1802 (2017).

[66] *See* BRIFFAULT ET AL., *supra* note 4, at 14.

[67] Intrastate Commerce Improvement Act, ARK. CODE ANN. §§ 14-1-402, 14-1-403 (2015).

not available in state law, including those for sexual orientation and gender identity.[68] Unlike the Tennessee and North Carolina laws, however, it provides no instruction as to how sexual orientation and/or gender identity should be determined for purposes of state law. The fact that Act 137 does not identify LBGT individuals as targets or explicitly reference LGBT individuals in any way presents a barrier to mounting an equal protection claim against the bill.

B. Why the Establishment Clause?

Even though it is facially neutral, if Act 137 was motivated by a desire to allow business owners to discriminate against LGBT persons on the basis of religious beliefs, it could violate the Establishment Clause. The context and circumstances surrounding the bill's passage, especially statements made on the floor of the Arkansas General Assembly during debate, suggest that religion played a central role in the decision-making of many of the lawmakers in support of the bill.[69] Further, only weeks after the passage of Act 137, Senator Bart Hester and Representative Bob Ballinger—the primary sponsors of Act 137—also sponsored HB 1228, the Religious Freedom Restoration Act.[70] Senator Hester has a documented history of being anti-LGBT and has on numerous occasions linked his views on homosexuality to his religion.[71] In a speech on the steps of the Arkansas state capital in 2014, Senator Hester said:

> Because God loves each and every one of us equally, he provided us an instruction book on how to live our lives . . . and in that instruction book for life He says, "because I love you and I want what is best for you I think marriage is between one man and one woman." Friends, that is truth.[72]

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[68] *Id.*

[69] *See infra* Part III.A.1. for a more thorough discussion of the statements made during floor debates of Act 137.

[70] *See* Jessica Glenza, *Arkansas Passes Indiana-Style 'Religious Freedom' Bill Criticized as Anti-Gay*, THE GUARDIAN (Mar. 31, 2015), https://www.theguardian.com/us-news/2015/mar/31/arkansas-passes-indiana-style-religious-freedom-bill [https://perma.cc/WYB2-NNG9].

[71] *See* Max Brantley, *Senate Committee Defeats Ballinger's Anti-Gay Bill, Also a Sharia Law Attack*, ARK. TIMES (Feb. 25, 2015), https://www.arktimes.com/ArkansasBlog/archives/2015/02/25/senate-committee-defeats-ballingers-anti-gay-bill-also-a-shari [https://perma.cc/BZ2Z-CEMS].

[72] ArkansasTeaParty, *Rally for True Marriage Senator Bart Hester*, YOUTUBE (Nov. 22, 2014), https://www.youtube.com/watch?v=PJGh5H3QxlI [https://perma.cc/39MF-A34S].

Representative Ballinger has a similar history. For example, after Ordinance 119—Fayetteville's original bill that extended non-discrimination protection to LGBT citizens—was repealed, Ballinger tweeted "Glory to God!"[73] On the whole of the facts surrounding Act 137, and in the context of a larger national movement of conservative and fundamentalist Christian opposition to LGBT rights,[74] there is ample reason to suggest that the Establishment Clause is an appropriate framework through which to challenge Act 137 and legislation like it.

C. Understanding the Supreme Court's Establishment Clause Precedents

Both the difficulty and the advantage of bringing an Establishment Clause challenge is the confusion surrounding the Supreme Court's decisions on the subject. Both scholars and Justices alike have lamented the lack of uniformity and predictability in the Court's Establishment Clause precedents. In a foreword written for a 1990 edition of the Journal of Law and Religion, Justice Sandra Day O'Connor discussed the Establishment Clause's "torturous history" in the Court.[75] In his dissent in *Edwards v. Aguillard*, Justice Scalia wrote that "[the Court's] cases interpreting and applying the [Establishment Clause] have made such a maze . . . that even the most conscientious governmental officials can only guess what motives will be held unconstitutional."[76] The only apparent consensus on the Supreme Court's Establishment Clause jurisprudence is that the Supreme Court has reached no consensus on its Establishment Clause jurisprudence.

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[73] The original tweet has since been deleted. *See* David Koon, *What Will Eureka Do?*, ARK. TIMES (Apr. 23, 2015), https://www.arktimes.com/arkansas/what-will-eureka-do/Content?oid=3823746 [https://perma.cc/CFF8-5GFK]; Mark Gao, *What Everybody Missed During the Fight Over Religious Freedom Laws This Year*, WASH. POST (Apr. 6, 2015), https://www.washingtonpost.com/blogs/govbeat/wp/2015/04/06/what-everybody-missed-during-the-fight-over-religious-freedom-laws-this-year/?utm_term=.b196d2523c70 [https://perma.cc/2Y69-4TK8].

[74] *See, e.g.*, Amy L. Stone, *The Impact of Anti-Gay Politics on the LGBTQ Movement*, 10 SOC. COMPASS 459 (2016); Masha Gessen, *How Trump Uses 'Religious Liberty' to Attack L.G.B.T. Rights*, NEW YORKER (Oct. 11, 2017), https://www.newyorker.com/news/news-desk/how-trump-uses-religious-liberty-to-attack-lgbt-rights [https://perma.cc/5P29-4XDX].

[75] Hon. Sandra Day O'Connor, *Foreword: The Establishment Clause and Endorsement of Religion*, 8 J.L. & RELIG. 1, 1 (1990).

[76] Edwards v. Aguillard, 107 S. Ct. 2573, 2605 (1987) (Scalia, J., dissenting).

1. Which Establishment Clause Test Applies?

The Supreme Court has employed at least four different methods of evaluating Establishment Clause claims: the *Lemon* test,[77] the endorsement test (which essentially functions as a supplement to the *Lemon* test), the coercion test, and a historically focused approach. The *Lemon* test is three-pronged and inquires as to a law's purpose, effect, and likelihood of creating a government entanglement with religion. Both the *Lemon* and endorsement tests will be discussed in greater detail in the next section.

The coercion test has been proposed by some conservative Justices, such as Scalia and Thomas, as a replacement for the *Lemon* test. It is most clearly articulated in Justice Kennedy's opinion in *Lee v. Weisman*.[78] The Court in *Weisman* held that the practice of public schools inviting clergy members to deliver benedictions violated the Establishment Clause because "the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group . . . This pressure, though subtle and indirect, can be as real as any other compulsion."[79] While Justices have disagreed about the scope of the coercion test—Justice Scalia, for instance, favored a far narrower definition of coercion than was relied upon by Justice Kennedy in *Weisman*—the crux of the coercion standard is that the government does not violate the Establishment Clause unless it provides direct aid to religion in such a way as would establish a state church or coerces individuals to support or participate in a religion against their will. The coercion test has been utilized by the Court's majority in a few cases but has not been widely adopted.[80]

On a few occasions, the Court has eschewed formal "tests" altogether and looked instead to historical practice. Most notably in *Marsh v. Chambers*, the Court upheld a practice of the Nebraska Legislature to open legislative sessions in prayer led by a state-paid chaplain.[81] Relying on the fact that legislative prayer has been in practice in the

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[77] Lemon v. Kurtzman, 403 U.S. 602 (1971).

[78] Lee v. Weisman, 505 U.S. 577 (1992).

[79] *Id.* at 593.

[80] *See* Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1 (2004); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000). For a more thorough consideration of the Supreme Court's use of the coercion test, *see* Cynthia V. Ward, *Coercion and Choice Under the Establishment Clause*, 39 U.C. DAVIS L. REV. 1621 (2006).

[81] Marsh v. Chambers, 463 U.S. 783 (1983).

United States for almost 200 years and that members of the first Congress engaged in the practice despite many of them having just written the Establishment Clause, the Court held that the principle of non-establishment of religion and legislative prayer could co-exist.[82] Since *Marsh*, the Court has applied this historical inquiry analysis almost exclusively in cases concerning legislative prayer.[83] The Court would almost certainly not rely on a historical practice standard in evaluating religiously motivated lawmaking of the kind considered in this Article.

Because most Establishment Clause cases that have gone to the Supreme Court have concerned the relationship between religion and public education[84] or public displays of religious symbols,[85] it is not entirely clear what test the Supreme Court would employ in evaluating the validity of a religiously motivated law, but the majority of the Court's decisions regarding the establishment of religion have prioritized the effects rather than their motivations of challenged laws in determining constitutionality.

It is likely, however, that the Supreme Court would apply the *Lemon* test when evaluating Act 137 for two reasons: First, Act 137 does not involve a longstanding practice and there is no state coercion. Second, Act 137 involves an issue of discord between stated and actual legislative purpose, and when the Court has considered issues of that nature in the past, it has used the *Lemon* test. For example, in *McGowan v. Maryland*, the Court acknowledged that a Maryland law requiring most businesses to remain closed on Sundays was "undeniably religious in origin."[86] Nonetheless, it concluded that the law did not violate either the Free Exercise or Establishment Clauses of the First Amendment because there is secular value in having a uniform day of rest and

[82] *Id.* at 790.

[83] *See, e.g.*, Town of Greece v. Galloway, 572 U.S. 565, 591 (2014) (holding that a town's practice of opening board meetings in prayer did not violate the Establishment Clause).

[84] *See, e.g.*, *Elk Grove Unified Sch. Dist.*, 542 U.S. at 1 (considering whether the words "under God" in the Pledge of Allegiance invalidated a policy of reciting the pledge daily); Wallace v. Jaffree, 472 U.S. 38 (1985) (concerning a daily moment of silence for meditation and voluntary prayer in a public school); Engel v. Vitale, 370 U.S. 421 (1962) (regarding the recitation of a daily morning prayer in a public school); Everson v. Bd. of Ed. of Ewing Twp., 330 U.S. 1 (1947) (concerning the provision of reimbursements to parents who used publicly operated buses to send children to parochial schools).

[85] *See, e.g.*, Van Orden v. Perry, 545 U.S. 677 (2005) (concerning a monument to the Ten Commandments displayed in the Texas state capitol); Cty. of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573 (1989) (considering the display of a nativity scene in a county's public holiday display); Lynch v. Donnelly, 465 U.S. 668 (1984) (considering the display of a nativity scene in a Christmas display in a public park).

[86] McGowan v. Maryland, 366 U.S. 420, 446 (1961).

most citizens, given the opportunity to do so, would choose Sunday as that day of their own accord.[87] Though decided before *Lemon*, the Court's analysis in *McGowan* demonstrates the origins of what would become the *Lemon* test.

The Court has, in some cases, struck down religious laws on purpose grounds. In *Stone v. Graham*, the Court considered a Kentucky statute that required the posting of the Ten Commandments on the walls of public school classrooms.[88] Applying the *Lemon* test, the Court found that the statute was invalid for failing to demonstrate a valid secular purpose.[89] Both *McGowan* and *Stone* considered issues similar to those created by the preemptive bills out of Arkansas, Tennessee, and North Carolina. Both cases presented questions of the validity of statutes that were obviously influenced by religion. In both cases, the Court applied the *Lemon* test (or a comparable inquiry) to determine constitutionality. Based on these cases, it is more likely than not that the Court would choose to apply the *Lemon* test if presented with a case like Act 137 in Arkansas.

2. Interpreting the *Lemon* Test

The *Lemon* test remains the primary vehicle through which the Court evaluates Establishment Clause claims despite its utilization of other tests at times. Established in *Lemon v. Kurtzman*, the test establishes three requirements for the government's engagement with religion: (1) government actions must have a secular legislative purpose, (2) the government action's principal or primary effect must neither inhibit nor advance religion, and (3) the government action must not foster an "excessive government entanglement with religion."[90] If a government action fails any one of these prongs, it is unconstitutional under the Establishment Clause.[91]

a. Secular Purpose

The secular purpose prong of the *Lemon* test seeks to ensure that legislatures do not pass overtly religious legislation. The difficulty is that overtly religious legislation is extremely rare, so the question becomes how to distinguish legislation that seeks

[87] *Id.* at 452.

[88] Stone v. Graham, 449 U.S. 39 (1980).

[89] *Id.* at 42–43.

[90] Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971).

[91] *Id.*

impermissible religious ends from legislation that merely "happens to coincide or harmonize with the tenets of some or all religions."[92] The secular purpose prong of the *Lemon* test may provide a means of invalidating statutes based on religious motivation, but the Court has been somewhat inconsistent in the role that legislative motivation plays in its secular purpose analysis.

Generally speaking, the Supreme Court has shown a great deal of deference toward a state's proffered statutory purposes. In *Lynch v. Donnelly*, the majority noted that "the Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated wholly by religious considerations."[93] The majority in *Santa Fe Independent School District v. Doe* wrote that "[w]hen a governmental entity professes a secular purpose for an arguably religious policy, the government's characterization is, of course, entitled to some deference. But it is nonetheless the duty of the courts to distinguish a sham secular purpose from a sincere one."[94] Both of these cases indicate that the Court often gives deference to stated legislative purpose, but the strength of deference has varied.

Even in cases where the benefits to a particular religion were significant, the Court has accepted legislatures' statements of secular purpose and not questioned them further.[95] For example, in *Everson v. Board of Education*, the Court upheld a New Jersey statute providing reimbursements funded by taxes for the bus fares of children who attended both public and parochial schools on the grounds that the legislature's stated purpose of enabling all children to receive a secular education was valid.[96] However, this deference is not absolute. Over time, the Court has become more receptive to the idea that governmental motives can be appropriately investigated and that, in certain circumstances, such investigation is necessary to evaluate constitutionality, though the

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[92] *McGowan*, 366 U.S. at 442.

[93] 465 U.S. 668, 680 (1984).

[94] 530 U.S. 290, 308 (2000).

[95] *See, e.g.*, Bd. of Ed. of Cent. Sch. Dist. No. 1 v. Allen, 392 U.S. 236, 248 (1968) (upholding the expressed secular purpose of furthering educational purposes to young people for a New York statute requiring school districts to provide textbooks to students in both public and religious schools); Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 672 (1970) ("The legislative purpose of a property tax exemption is neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility.").

[96] Everson v. Bd. of Ed. of Ewing Twp., 330 U.S. 1 (1947).

practice has been employed inconsistently.[97] In 2005 in *McCreary County v. ACLU*, for example, the Court considered a Kentucky statute requiring that the Ten Commandments be posted in courthouses.[98] In holding that the statute violated the Establishment Clause, the Court relied heavily on an analysis of the legislature's motivations in enacting the law.[99] Writing for the majority, Justice Souter emphasized that inquiry into legislative purpose is both "a staple of statutory interpretation" and "a key element of constitutional doctrine."[100] Furthermore, on the relationship between legislative purpose and the Establishment Clause, Justice Souter wrote that "scrutinizing purpose does make practical sense, as in Establishment Clause analysis, where an understanding of official objective emerges from readily discoverable fact, without any judicial psychoanalysis of a drafter's heart of hearts."[101]

One difficulty that the Court's reasoning in *McCreary* presents is whether there is, in theory or in fact, a distinction between legislative purpose and legislative motivation. Despite appeals from scholars to maintain a distinction between the two categories, "courts [in practice] often use both terms interchangeably."[102] *McCreary* is an example of this. In one section of the majority opinion, Justice Souter writes that "[t]he eyes that look to purpose belong to an 'objective observer,' one who takes account of the traditional external signs that show up in the 'text, legislative history, and implementation of the statute,' or comparable official act."[103] Only two paragraphs later, and within the same section, he posits that

> If someone in the government hides religious motive so well that the "objective observer, acquainted with the text, legislative history, and implementation of the statute" . . . cannot see it, then without something

[97] *See* Frederick Mark Gedicks, *Motivation, Rationality, and Secular Purpose in Establishment Clause Review*, 1985 ARIZ. ST. L.J. 677, 687 (1985).

[98] McCreary Cty. v. ACLU of Ky., 545 U.S. 844 (2005).

[99] *Id.* at 861.

[100] *Id.*

[101] *Id.* at 862.

[102] Robert C. Farrell, *Legislative Purpose and Equal Protection's Rationality Review*, 37 VILL. L. REV. 2, 5 (1992).

[103] *McCreary*, 545 U.S. at 862.

> more the government does not make a decisive announcement that in itself amounts to taking religious sides.[104]

Essentially, Justice Souter acknowledges that the same evidentiary sources—text, legislative history, and implementation—serve inquiries of both purpose and motivation, suggesting that the two categories are difficult to sever.

In another Establishment Clause case decided twenty years before *McCreary*, *Wallace v. Jaffree*, Justice Stevens wrote on behalf of the majority that government action is invalid under the First Amendment "if it is entirely motivated by a purpose to advance religion."[105] *Wallace* concerned a challenge to an Alabama statute that authorized a moment of silence in public schools.[106] In invalidating the statute, the Court found that "the record not only provides us with an unambiguous affirmative answer, but it also reveals that the passage of [the statute] was not motivated by any clearly secular purpose—indeed, the statute had *no* secular purpose."[107] Here, again, the functional distinction between motivation and purpose is blurred. It appears that, especially in cases where inquiring as to religious motive does not, to parrot Judge Souter's language, require delving into a legislator's "heart of hearts," legislative motivation and legislative purpose are used by the Court to mean roughly the same thing. This seems to be particularly true in cases such as *McCreary*, where the facts establish that legislators wore their impermissible motivations on their sleeves, so to speak.

Of course, the inquiry into legislative purpose and motivation for Establishment Clause cases depends on the Court's decision to utilize the *Lemon* test. Compare *McCreary* to *Van Orden v. Perry*, a case with almost identical facts to *McCreary* and decided by the Court on the same day but with the opposite outcome.[108] In *McCreary*, the Court held that the Kentucky statute requiring the Ten Commandments be posted in courthouses was a violation of the Establishment Clause.[109] In *Van Orden*, the same

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[104] *Id.* at 863.

[105] *Jaffree*, 472 U.S. at 38.

[106] *Id.*

[107] *Id.* at 56 (emphasis in original).

[108] Van Orden v. Perry, 545 U.S. 677 (2005).

[109] *McCreary*, 545 U.S. at 861.

Court found that a monument to the Ten Commandments displayed on the grounds of the Texas State Capitol did not violate the Establishment Clause.[110]

Two things might explain this somewhat baffling outcome. First is the Court's own explanation for the different holdings, which identifies context as the distinguishing factor. In the plurality opinion for *Van Orden*, Chief Justice Rehnquist characterized the location of the Ten Commandments monument on the State Capitol grounds as a "passive use of those texts" and noted that this setting "suggests little or nothing of the sacred."[111] He wrote:

> In certain contexts, a display of the tablets of the Ten Commandments can convey not simply a religious message but also a secular moral message . . . [a]nd . . . in certain contexts, a display of the tablets can also convey a historical message (about a historic relation between those standards and the law).[112]

By contrast, the display of the Ten Commandments in courthouses in *McCreary* lacked the historical and secular function of the display in *Van Orden*. A second, related explanation for the different outcomes is the application of the *Lemon* test in *McCreary* versus the historical inquiry test in *Van Orden*. The *Van Orden* majority eschewed the *Lemon* test, turning instead to the historical practice inquiry from *Marsh v. Chambers*.[113] The *McCreary* majority, on the other hand, used *Lemon*'s purpose prong to invalidate the display.[114]

The space created in the *Lemon* test for the consideration of legislative motives could bode well for challenges to religiously motivated preemption laws. On all five occasions on which the Supreme Court struck down laws under the secular purpose prong of the *Lemon* test,[115] it emphasized context and circumstances. In *Edwards v. Aguillard*, the

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[110] *Van Orden*, 545 U.S. at 681.

[111] *Id.* at 691.

[112] *Id.* at 701.

[113] *Van Orden*, 545 U.S. at 677–78.

[114] *McCreary*, 545 U.S. at 864–65.

[115] McCreary Cty. v. ACLU of Ky., 545 U.S. 844 (2005); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000); Edwards v. Aguillard, 107 S. Ct. 2573 (1987); Wallace v. Jaffree, 472 U.S. 38 (1985); Stone v. Graham, 449 U.S. 39 (1980) (per curiam).

Court held unconstitutional a Louisiana law requiring that where evolution was taught in public schools, creationism also had to be taught.[116] The Court found that the statute was primarily intended to advance Christianity, not to "protect academic freedom," as its preamble alleged.[117] In reaching this conclusion, the Justices relied on the bill's legislative history, the statements of its sponsors, and the context in which the law was passed: the connection between Christianity and anti-evolutionary teaching at large.[118] Justice Brennan, writing for the majority, explained that the Court need not always take at face value the proffered purpose of a law, especially when religion is involved:

> As in *Stone* and *Abington*, we need not be blind in this case to the legislature's preeminent religious purpose in enacting this statute. There is a historic and contemporaneous link between the teachings of certain religious denominations and the teaching of evolution. It was this link that concerned the Court in *Epperson v. Arkansas*, which also involved a facial challenge to a statute regulating the teaching of evolution. In that case, the Court reviewed an Arkansas statute that made it unlawful for an instructor to teach evolution or to use a textbook that referred to this scientific theory. Although the Arkansas antievolution law did not explicitly state its predominant religious purpose, the Court could not ignore that "[t]he statute was a product of the upsurge of 'fundamentalist' religious fervor" that has long viewed this particular scientific theory as contradicting the literal interpretation of the Bible.[119]

Justice Brennan acknowledged that circumstances beyond the particular facts of a case at hand, such as an established link between certain religions and teachings, can bear on the Court's assessment of the motivations of a particular legislature.

Ultimately, the first prong of the *Lemon* test is the most likely ground on which an Establishment Clause challenge to religiously motivated preemption of municipal non-discrimination law would succeed. This would depend, however, on two things: (1) the Court's decision to apply the *Lemon* test as opposed to one of its other tests, which are explained below, and (2) a more than cursory inquiry into legislative motivation under the *Lemon* test's first prong. The likelihood of

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[116] *Aguillard*, 107 S. Ct. at 2584.

[117] *Id.* at 2580.

[118] *Id.* at 2577–84.

[119] *Id.* at 2580–81 (internal citations omitted).

the Court deciding to inquire beyond Act 137's stated secular purpose is low, but certainly possible, and will be discussed in greater detail in Section III.

b. Principal or Primary Effect

The second prong of the *Lemon* test is the requirement that the principal or primary effect of a legislative action must neither inhibit nor advance religion.[120] Under this prong, a law can be invalidated irrespective of legislative intent if the impact of the action violates the principle of government neutrality with respect to religion.[121] Traditionally, the Court has upheld laws having only a trivial or incidental effect of advancing religion.[122] For example, in *Widmar v. Vincent* the Court held that the University of Missouri's refusal to allow a religious student organization to have worship services in its student center was a violation of the students' First Amendment rights, and any benefit the group would derive from the University's accommodation would not be sufficient to violate the Establishment Clause.[123] The Court reiterated this idea in *Mueller v. Allen,* stating that "any program which in some manner aids an institution with a religious affiliation" does not per se violate the Establishment Clause.[124]

To fail the principal or primary purpose prong, a law must go beyond merely conferring a benefit on a particular religion. To guide this inquiry, courts often look to whether a law violates one of the "three main evils against which the Establishment Clause was intended to afford protection: sponsorship, financial support, and active involvement of the sovereign in religious activity."[125] It is not sufficient to determine unconstitutionality to demonstrate that a law provides advantages to religious groups or

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[120] *Lemon*, 403 U.S. at 643.

[121] *See Everson*, 330 U.S. at 18 ("[The First Amendment] requires the state to be a neutral in its relations with groups of religious believers and non-believers.").

[122] *See* Carl H. Esbeck, *The Lemon Test: Should it be Retained, Reformulated, or Rejected?*, 4 NOTRE DAME J.L. ETHICS & PUB. POL'Y 513, 521 (1990).

[123] 454 U.S. 263, 273 (1981) ("It is possible—perhaps even foreseeable—that religious groups will benefit from access to University facilities . . . [but] a religious organization's enjoyment of merely 'incidental' benefits does not violate the prohibition against the 'primary advancement' of religion.").

[124] 463 U.S. 388, 393 (1983) (quoting Hunt v. McNair, 413 U.S. 734, 742 (1973)).

[125] *Lemon*, 403 U.S. at 612.

persons.[126] But the Court has, on occasion, struck down laws for failing this prong. In *Committee for Public Education v. Nyquist*, a New York statute that provided grants to parochial schools for maintenance and school repairs was held invalid under the Establishment Clause.[127] Applying the *Lemon* test, Justice Powell found that the laws had the principle effect of promoting religion because "their effect, inevitably, [was] to subsidize and advance the religious mission of sectarian schools."[128] Public education reimbursement schemes, such as the one in *Nyquist*, are a common type of law that the Court has repeatedly struck down under this prong.[129]

c. Excessive Entanglement

The third and final prong of the *Lemon* test asks if the law fosters "an excessive government entanglement with religion."[130] According to Chief Justice Burger's opinion in *Lemon*, determining whether there is an excessive entanglement between government and religion requires an examination of "the character and purpose of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."[131] The excessive entanglement prong is directed at two separate kinds of government involvement with religion: administrative and political.[132]

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[126] *See Allen*, 392 U.S. at 248 (holding that a New York state law which required public schools to lend textbooks to private, including religious, schools did not violate the Establishment Clause). The majority wrote: "We cannot agree with appellants either that all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion." *Id.*

[127] Comm. for Pub. Ed. & Religious Liberty v. Nyquist, 413 U.S. 756, 797–98 (1973).

[128] *Id.* at 779–80.

[129] *See, e.g.*, Sloan v. Lemon, 413 U.S. 825, 835 (1973) (invalidating a law in Pennsylvania that provided reimbursement to parents who paid tuition to send their children to nonpublic, usually parochial, schools); Aguilar v. Felton, 473 U.S. 402, 414 (1985) (holding that New York City's use of federal funds to send teachers into private religious schools to give remedial instruction violated the Establishment Clause).

[130] *Lemon*, 403 U.S. at 613.

[131] *Id.* at 615.

[132] *See* James A. Serritella, *Tangling with Entanglement: Toward a Constitutional Evaluation of Church-State Contracts*, 44 L. & CONTEMP. PROBS. 145 (1981).

In some cases, the Court has found that a legislative scheme necessitates the creation of an ongoing relationship between the government and a religious body or program. In *Lemon*, which concerned statutes in Rhode Island and Pennsylvania that required the state to fund some aspects of private parochial schools, the Court held that the ongoing supervision and monitoring of these schools by the state to ensure that the conditions of the grants were being met would create an excessive entanglement between the government and the religious schools that received aid.[133] This type of association violates the Establishment Clause because it "creates an intimate and continuing relationship between church and state."[134] The Court has on a number of occasions expressed discomfort with this kind of administrative entanglement.[135]

Political divisiveness is another standard by which the Court could invalidate a statute under the excessive entanglement prong, but it has rarely chosen to do so.[136] Under this doctrine, a statute is invalid if it has the potential to create political division along religious lines.[137] For example, in *Larkin v. Grendel's Den*, the Court held that a law which allowed churches to exercise veto power over the grant of liquor licenses to establishments within a certain distance of church property violated the Establishment Clause.[138] Chief Justice Burger wrote for the majority that "[t]he challenged statute thus enmeshes churches in the processes of government and creates the danger of '[political] fragmentation and divisiveness along religious lines.'"[139] Some scholars have suggested that the political divisiveness test be elevated to the level of other independent

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[133] Lemon v. Kurtzman, 403 U.S. 602, 624–25 (1971).

[134] *Id.* at 622.

[135] *See, e.g.*, Meek v. Pittenger, 421 U.S. 349, 372–73 (1975) (invalidating a textbook loan provision in a Pennsylvania statute on the grounds that it would require monitoring of parochial school teachers to ensure textbooks were being used for non-religious purposes, and this would create an excessive entanglement of government and religion); Levitt v. Comm. for Pub. Ed. & Religious Liberty, 413 U.S. 472, 481–82 (1973) (striking down a New York statute providing aid from public funds to nonpublic schools because the relationship between state aid and a religious institution could constitute an excessive entanglement).

[136] *See* Lynch v. Donnelly, 465 U.S. 668, 689 (1984) (O'Connor, J., concurring) ("Although several of our cases have discussed political divisiveness under the entanglement prong of *Lemon* . . . we have never relied on divisiveness as an independent ground for holding a government practice unconstitutional.").

[137] *Lemon*, 403 U.S. at 622.

[138] 459 U.S. 116 (1982).

[139] *Id.* at 127 (quoting *Lemon*, 403 U.S. at 623).

Establishment Clause tests,[140] but others believe that the doctrine should be abandoned entirely.[141] Like most of the Court's Establishment Clause jurisprudence, the status of the political divisiveness doctrine is unclear, but it is unlikely that it would be invoked in a case involving the standardization of non-discrimination law, such as Act 137.

d. Justice O'Connor's Endorsement Test

Since *Lemon v. Kurtzman* was decided, many Justices have expressed desires to overturn or significantly reform the *Lemon* test. Justice Scalia once described the test as being "like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried."[142] Justices Thomas and Kennedy, too, have expressed desires to replace the *Lemon* test with another standard of evaluating the establishment of religion. One such suggestion for reforming the *Lemon* test that has gained some traction is the so-called "endorsement test" proposed by Justice O'Connor in her concurrence in *Lynch v. Donnelly*.[143]

Proposed explicitly as an attempt to clarify the Court's Establishment Clause doctrine, Justice O'Connor's endorsement test suggests that "the proper inquiry under the purpose prong of *Lemon* . . . is whether the government intends to convey a message of endorsement or disapproval of religion."[144] For Justice O'Connor, the primary concern of an Establishment Clause inquiry should be whether a government action functionally creates a religious endorsement which "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[145] The standard for determining if the government has engaged in an endorsement of religion is

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[140] *See, e.g.*, David R. Schiedemantle, *Political Entanglement as an Independent Test of Constitutionality Under the Establishment Clause*, 52 FORDHAM L. REV. 1209, 1211 (1984).

[141] *See, e.g.*, Edward M. Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 ST. LOUIS U.L.J. 205 (1980).

[142] Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring).

[143] 465 U.S. 668, 691 (1984) (O'Connor, J., concurring).

[144] *Id.*

[145] *Id.* at 688.

whether a reasonable observer would think that the activity in question was a governmental endorsement of religion.[146]

In Justice O'Connor's original conception the endorsement test functioned as a gloss on *Lemon*, refining the first two prongs of the *Lemon* test to be evaluated through the lens of government endorsement.[147] According to Justice O'Connor, the utility of the test was that it gave content to the otherwise vague and highly subjective inquiries of the purpose and effect prongs of the *Lemon* test.[148] Like the *Lemon* test, the endorsement test has been criticized by other members of the Court. But since Justice O'Connor conceived it, it has been used in Establishment Clause cases, sometimes as a substitute for *Lemon* and sometimes as a supplement to it.

In 2000, the Court applied the endorsement test (in conjunction with the *Lemon* test) in *Santa Fe Independent School District v. Doe*, which involved a challenge to Santa Fe High School's practice of beginning football games with a student-led prayer.[149] Justice Stevens, on behalf of the majority, wrote:

> In this context the members of the listening audience must perceive the pregame message as a public expression of the views of the majority of the student body delivered with the approval of the school administration. In cases involving state participation in a religious activity, one of the relevant questions is "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools."[150]

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[146] *See* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring).

[147] *See* Lynch v. Donnelly, 465 U.S. 668, 687–94 (1984) (O'Connor, J., concurring); Wallace v. Jaffree, 472 U.S. 38, 67–84 (1985) (O'Connor, J., concurring).

[148] See *Jaffree* at 69–70.

[149] 530 U.S. 290 (2000).

[150] *Id.* at 308.

Justice Stevens went on to conclude that the practice was impermissible because it communicated to spectators who were non-Christians that they were outsiders, and thus violated the Establishment Clause.[151]

However, more recent cases suggest that the endorsement test is falling out of favor with the Court. *Elk Grove Unified School District v. Newdow*, a 2004 case concerning the words "under God" in the Pledge of Allegiance, presented an ideal opportunity to apply the endorsement test, but the Court declined to do so, deciding the case instead on a standing issue.[152] Nor did the court apply the endorsement test in either of the Ten Commandments cases of 2005.[153] Most recently, in 2014, the Court declined to apply the endorsement test in *Town of Greece v. Galloway*, despite the fact that the Second Circuit had expressly applied it in reaching its decision.[154] Reversing the Second Circuit, the Supreme Court relied on its historical practice standard rather than engage in an endorsement analysis.

This shift away from an endorsement standard makes sense given that the test's strongest proponents—Justices Souter, Stevens, and O'Connor—have all retired. If the Court is purposefully moving away from the endorsement test, however, it is unclear what will replace it. If Justices Kavanaugh and Gorsuch, the most recent conservative appointees to the Court, sympathize with their conservative predecessor's disdain for the *Lemon* test and support a coercive standard replacement, that could be where the Court's Establishment Clause jurisprudence is heading. Should coercion become the new test for constitutionality under the Establishment Clause, challenges to laws such as the one considered in the following section will become essentially impossible to mount.

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[151] *Id.* at 309.

[152] 542 U.S. 1 (2004).

[153] *See* McCreary Cty. v. ACLU Union of Ky., 545 U.S. 844 (2005); Van Orden v. Perry, 545 U.S. 677 (2005).

[154] Galloway v. Town of Greece, 681 F.3d 20, 30 (2d Cir. 2012) ("We conclude, on the record before us, that the town's prayer practice must be viewed as an endorsement of a particular religious viewpoint."), *rev'd* Town of Greece, N.Y. v. Galloway, 572 U.S. 565 (2014).

III. Act 137 and the Way Forward for the Establishment Clause and Legislative Motive

In August of 2014, the City Council of Fayetteville, Arkansas, passed Ordinance 5703.[155] The bill expanded Fayetteville's nondiscrimination protections to prohibit discrimination on the basis of sexual orientation and/or gender identity, specifically in the areas of housing, employment, and public accommodation.[156] The ordinance's Purpose section read, in relevant part:

> The purpose of this chapter is to protect and safeguard the right and opportunity of all persons to be free from discrimination based on real or perceived race, ethnicity, national origin, age, gender, gender identity, gender expression, familial status, marital status, socioeconomic background, religion, sexual orientation, disability and veteran status.[157]

The Ordinance was later repealed by vote and replaced by Ordinance 5781, which was substantively similar to Ordinance 5703, but featured a few changes concerning religious exemptions and penalties for violation.[158] By February 2, 2015, the Intrastate Commerce

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[155] FAYETTEVILLE, ARK., ORDINANCE 5703, ch. 119 (2014) (repealed Dec. 9, 2014), https://www.fayettevilleflyer.com/wp-content/uploads/2014/11/chapter-119-civil-rights-ordinance.pdf [https://perma.cc/h9xs-l4lw].

[156] *Id.*

[157] *Id.* at § 119.01.

[158] The ordinance was repealed by voters in December 2014. Many citizens took issue with the wording of the ordinance, arguing that it was too vague and non-specific and would open the city up to litigation. *See* City Wire Staff, *Fayetteville Voters Approve Repeal of Sexual Orientation Ordinance*, TALK BUS. & POL. (Dec. 9, 2014), https://talkbusiness.net/2014/12/fayetteville-voters-approve-repeal-of-sexual-orientation-ordinance/ [https://perma.cc/M4ZZ-A65U]. Others opposed the bill on religious grounds, claiming that it threatened the liberty interests of religious citizens and businesses. *See* Cavan Sieczkowski, *Michelle Duggar Records Transphobic Robocall Opposing Arkansas Anti-Discrimination Bill*, HUFFINGTON POST (Aug. 19, 2014), https://www.huffingtonpost.com/2014/08/18/michelle-duggar-anti-discrimination-proposal_n_5689840.html [https://perma.cc/E7A3-C4QF]. The vote to repeal was close, with 52% of Fayetteville's voters in favor. *See* Todd Gill, *Voters Repeal Civil Rights Ordinance in Fayetteville*, FAYETTEVILLE FLYER (Dec. 9, 2014), https://www.fayettevilleflyer.com/2014/12/09/voters-repeal-civil-rights-ordinance-in-fayetteville/ [https://perma.cc/KV9X-KVEC]. Despite this repeal, the City Council proposed another LGBT non-discrimination ordinance in response to the state legislature's passage of Act 137 that offered the same anti-discrimination protections to LGBT individuals but included revised language concerning religious exemptions and penalties for violating the ordinance; voters approved the new ordinance on September 8, 2015. *See* CITY OF FAYETTEVILLE LGBT "UNIFORM CIVIL RIGHTS PROTECTION ORDINANCE," ORDINANCE 5781 (SEPTEMBER 2015), https://ballotpedia.org/City_of_Fayetteville_LGBT_%22Uniform_

Improvement Act (Act 137) was on the floor of the Arkansas Senate.[159] On February 17, it became state law.

Act 137 prohibits cities and counties in Arkansas from adopting ordinances or policies that "create[] a protected classification or prohibit[] discrimination on a basis not contained in state law."[160] The bill's stated purpose is "to improve intrastate commerce by ensuring that businesses, organizations, and employers doing business in the state are subject to uniform nondiscrimination laws and obligations."[161] Opponents of the bill assert that, regardless of the stated purpose, the Act's actual purpose is to protect discrimination against LGBT people. By the time the Act went into effect on July 22, 2015, seven Arkansas cities and counties, in addition to Fayetteville, had passed LGBT-inclusive NDOs in response to the state law.[162]

Fayetteville attacked the constitutionality of Act 137 in *Protect Fayetteville v. City of Fayetteville*.[163] A conservative advocacy group, Protect Fayetteville, brought suit against Ordinance 5781 claiming that the law violated Act 137; Fayetteville, in defense of the law, argued in part that Act 137 was invalid because it violated the Equal Protection

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Civil_Rights_Protection_Ordinance,%22_Ordinance_5781_(September_2015) [https://perma.cc/PLR5-5ZW8]. The new ordinance was not repealed and is currently being litigated. The Arkansas Supreme Court already rejected one argument made by the ordinance's supporters and remanded the case for consideration of the Equal Protection challenge. Protect Fayetteville v. City of Fayetteville, 510 S.W.3d 258 (Ark. 2017); *see also infra* note 162 and accompanying text.

[159] ARK. CODE ANN. §§ 14-1-401–403 (2015).

[160] *Id.* at § 14-1-403(a).

[161] *Id.* at § 14-1-402(a).

[162] *See* John Lyon, *New Law Seeks to Bar Anti-Discrimination Ordinances, But Interpretations Vary*, ARK. NEWS (Jul. 22, 2015), http://www.arkansasnews.com/news/arkansas/new-law-seeks-bar-anti-discrimination-ordinances-interpretations-vary [https://perma.cc/2M6L-H3T6]. These cities argued that non-discrimination laws that protect LGBT individuals present no conflict with Act 137 because sexual orientation and gender identity are, in fact, protected classes in Arkansas state law. The state has an anti-bullying law that protects students from harassment based on sexual orientation and gender identity as well as a domestic violence law that prevents shelters from discriminating based on sexual identity. *See* ARK. CODE ANN. § 6-18-514 (2012); Domestic Peace Act, ARK. CODE ANN. § 9-4-106 (2012). This argument was taken up by the city of Fayetteville in *Protect Fayetteville v. City of Fayetteville*, No. CV2015001510, 2016 WL 9560283, at *2 (Ark. Cir. Ct. Mar. 1, 2016), in defense of Ordinance 5781. The Arkansas Supreme Court was unconvinced by this claim and found the anti-discrimination laws to be in conflict with state law. *Protect Fayetteville*, 510 S.W.3d at 263.

[163] No. CV2015001510, 2016 WL 9560283 (Ark. Cir. Ct. Mar. 1, 2016).

clause of the Fourteenth Amendment.[164] The Circuit Court dismissed the constitutional question at the summary judgment stage, so the issue was not preserved for appeal to the Arkansas Supreme Court.[165] Consequently, the Supreme Court remanded the constitutional question back to the circuit court where the case remains open.[166] As discussed in Part II, it seems unlikely that the Circuit Court will find the law unconstitutional on Equal Protection grounds, given that the Act presents as facially neutral and makes no reference to LGBT individuals, or even to "sex," unlike other similar legislation.

Another angle is to use the Establishment Clause. This Part considers the likelihood of a successful Establishment Clause challenge to Act 137 under current jurisprudence and concludes that it is unlikely to prevail. It then charts a way forward, suggesting how the Establishment's Clause legislative inquiry standard could be modified in order to ensure that the clause's purpose is effected and to empower localities to prevent discriminatory preemption like that occurring in Arkansas. It then also suggests that a reconceptualization of our approach to state-local federalism could strike a balance between allowing cities to implement and experiment with local policy and upholding the principles of uniformity and state control on which preemption doctrine rests.

A. Challenging Act 137 Under the Current Case Law

It seems unlikely that the Supreme Court would find Act 137 unconstitutional. Despite the strength of the evidence of impermissible religious motivation, this Court would likely not invalidate the bill under the *Lemon* test, nor is it likely to apply one of its other Establishment Clause tests.

1. The Secular Purpose Prong

Demonstrating that Act 137 fails the first prong of the *Lemon* test—requiring that legislation have a legitimate secular purpose—is likely to be the most persuasive argument against its constitutionality. Relying on the same kind of evidence that the Court used in *Edwards v. Aguillard*,[167] the facts surrounding the passage of Act 137 strongly suggest that the Intrastate Commerce Improvement Act was not, in fact,

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[164] *Id.* at *2.

[165] *Id.*

[166] Protect Fayetteville v. City of Fayetteville, 510 S.W.3d 258 (2017).

[167] 107 S. Ct. 2573 (1987).

substantially motivated by concern for the regulation of intrastate commerce, but instead by a desire to harm LGBT persons and protect religious prerogatives to discriminate. The bill's legislative history and the statements of its sponsors support the conclusion that Act 137 is a poorly disguised effort to allow discrimination against LGBT citizens on the basis of the religious beliefs of certain communities and legislators.

During the bill's debate on the Arkansas House floor, Representative Bob Ballinger, one of the bill's primary sponsors, specifically framed the issue as one of LGBT rights. In his statement on the House floor, Representative Ballinger described supporters of the bill as representing "the will of the people" having to "fight" against money coming "from the Human Rights Campaign" (the nation's largest LGBT advocacy group).[168] He went on to discuss "the experience in Fayetteville" and acknowledged that he did not approve of "the certain direction we are moving in as a country."[169]

One of the bill's other sponsors, Senator Bart Hester, explicitly told a legislative panel that he filed the bill in reaction to Ordinance 119's protection of LGBT citizens because he felt that the bill was "anti-religious."[170] Senator Hester stated that the bill "isn't about overreach, it's about protecting the basic rights of the people in these municipalities, their basic rights of religious freedom."[171] Here, Senator Hester makes explicit that the bill was not motivated by a desire to regulate intrastate commerce, but by a concern for religious liberty.

During the same House debate, others in support of the bill directly tied their support to their religious beliefs and current issues regarding religious liberty and discrimination against LGBT persons, such as by referencing *Masterpiece Cakeshop*.[172] Representative

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[168] State of Ark. House of Representatives, *Feb. 13, 2015*, WATCH LIVE (Feb. 13, 2015), at 11:22:00, https://sg001-harmony.sliq.net/00284/harmony/en/PowerBrowser/PowerBrowserV2/20160329/-1/1066#info_ [https://perma.cc/9UCH-95DR0].

[169] *Id.* at 11:23:22.

[170] *Bill to Ban Anti-Discrimination Laws at City, County Level Advances*, ARK. NEWS (Feb. 5, 2015), http://www.arkansasnews.com/news/arkansas/bill-ban-anti-discrimination-laws-city-county-level-advances [https://perma.cc/UQH9-FKGE].

[171] *Id.*

[172] Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018). *Masterpiece* concerned a Colorado baker's refusal to bake a wedding cake for a same-sex couple. The couple filed a complaint to the Colorado Civil Rights Commission, which concluded that the baker had violated Colorado's civil rights law and fined the baker. The complaint was appealed and eventually the Supreme Court granted

Copeland, speaking against the bill said, "I feel like if you were to ask the baker, if you were to ask the wedding planner . . . who have been attacked because of their religious beliefs, if they could stand here today, I feel like they would tell you that this is very much needed."[173] Echoing similar concerns for religious liberty, Representative Bentley, also speaking against the bill, after opening her remarks by stating that she is a conservative Christian, noted that:

> The reason we're bringing this forth is because little businesses out there—a baker, or a pastor—a pastor that holds a firm conviction that the word of God says that gay marriage is wrong . . . I don't think that pastor should have to form a marriage that goes against their strong religious convictions . . . [T]hose are the things that we're talking about today . . . A baker that loves the word of God, that's bringing her children up to honor God, and to worship God, should [not] have her business destroyed because she doesn't want to bake a cake for somebody who's a transgender trying to marry somebody else . . . I'm a Christian, this is the United States of America and it's time that we stand up and say enough is enough.[174]

Like Representative Bentley, Representative Copeland spoke directly to the purpose of the bill being to protect religious expression, not to regulate commercial interests.

Of course, the statements of individual House members do not necessarily speak to the reasons that the entire body voted in favor of a piece of legislation. However, only four members of the House spoke on behalf of the bill during the floor debate, so the statements of Representatives Copeland and Bentley represent half of the on-the-record support for Act 137.[175] Furthermore, many of the Representatives who spoke against the bill did so in terms of protecting LGBT rights, not within the framework of regulating

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certiorari. The Court did not decide on the merits of the case, which concerned whether a public accommodation law compelling a business owner to violate his sincerely held religious beliefs was a violation of the Free Speech and Free Exercise clauses of the Constitution, but instead remanded the case back to the lower court on procedural grounds.

[173] State of Ark. House of Representatives, *Feb. 13, 2015*, WATCH LIVE (Feb. 13, 2015), at 11:17:00, https://sg001-harmony.sliq.net/00284/harmony/en/PowerBrowser/PowerBrowserV2/20160329/-1/1066#info_ [https://perma.cc/9UCH-95DR0].

[174] *Id.*

[175] *See id.*

NDOs to ease the burden on business, further suggesting that both the purpose and impact of Act 137 was non-commercial. In fact, none of the testimony, either in favor or opposed to the bill, spoke to how Act 137 would affect intrastate commerce.

Nonetheless, current precedent suggests that the statute would be upheld. In *Cutter v. Wilkinson*, the Court rejected an Establishment Clause challenge to the Religious Land Use and Institutionalized Persons Act (RLUIPA).[176] Finding that RLUIPA, which prohibited the government from imposing substantial burdens on the ability of prisoners to practice their religions, was constitutionally permissible, the Court emphasized that the law did not grant privileges to religious persons, but merely eliminated government-imposed burdens.[177] Therefore, even if the Court agrees that Act 137 has a religiously motivated component, it may find that it is not religiously impermissible, given that it allows business owners the ability to discriminate against LGBT persons on the basis of their religious beliefs, but creates no affirmative requirements as to who they can or cannot serve or hire. It is possible that the Court would see the effects of Act 137 as analogous to those in RLUIPA—eliminating a government-imposed burden (from pro-LGBT municipal ordinances) on the exercise of religious beliefs while not explicitly granting any privileges to religious persons.

Moreover, the Court's recent decision in *Trump v. Hawaii*[178] suggests it may not be especially interested in looking behind the curtain of lawmaking motivation. In that case, the Court upheld President Trump's Executive Order instituting a "travel ban" against nationals from seven predominantly Muslim countries.[179] Surrounding the Executive Order (EO) were a series of statements made by the President, both during his presidential campaign and in the weeks leading up to the EO's issue, that suggested that the ban was little more than pretext for discriminating against Muslim immigrants.[180] These statements played a large role in the plaintiff's assertion that the official objective of the EO was to discriminate against Muslims and so violated the Establishment

[176] 544 U.S. 709 (2005).

[177] *Id.* at 720.

[178] 138 S. Ct. 2392 (2018).

[179] *Id.*

[180] *See* Jenna Johnson & Abigail Hauslohner, *'I Think Islam Hates Us': A Timeline of Trump's Comments About Islam and Muslims*, WASH. POST (May 20, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/05/20/i-think-islam-hates-us-a-timeline-of-trumps-comments-about-islam-and-muslims/?utm_term=.26dca928 [https://perma.cc/885V-6JWC].

Clause.[181] Employing rational basis review to analyze the EO, the Court held that the proclamation had an expressly legitimate purpose in protecting national security.[182] According to the Court, "because there is persuasive evidence that the entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility, we must accept that independent justification," the President's inflammatory statements about Muslims notwithstanding.[183] The decision in *Trump v. Hawaii* does not bode well for an Establishment Clause challenge against Act 137 based on legislative motivation under the *Lemon* test's first prong.

Granted, *Hawaii* is distinguishable on the facts from the circumstances surrounding Act 137 and does not necessarily bear directly on what the Court would do with a challenge to it. The Muslim Ban case was complicated by the fact that it involved national security and immigration powers, issues on which the Court generally defers to the executive.[184] Act 137 does not present issues tied to executive powers. However, *Hawaii* is the most recent Establishment Clause case in which the Court has had both opportunity and grounds to probe lawmaking motive and it declined to do so. The willingness of the Court in *Hawaii* to put aside the President's "charged statements" about Muslims may be indicative of a broader reluctance to cast aside proffered objectives in favor of an independent inquiry in motivation, particularly in the Establishment Clause context.[185]

2. The Principal or Primary Purpose Prong

Act 137 would also likely pass constitutional muster under the second prong of the *Lemon* test. Act 137 does not resemble the types of laws that have historically been invalidated under this prong. Because Act 137 impacts all citizens equally in that it doesn't target specific groups but merely requires that all municipalities refrain from creating any protections, including but not limited to protections for LGBT individuals, that do not exist in state law, it is unlikely that a court would find that the primary purpose of the bill is to advance a particular religion.

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[181] *Hawaii*, 138 S. Ct. at 2406, 2417.

[182] *Id.* at 2421.

[183] *Id.*

[184] *Id.* at 2408.

[185] *Id.* at 2447 (J. Sotomayor, dissenting).

In an article titled "Challenging and Preventing Policies that Prohibit Local Civil Rights Protections for Lesbian, Gay, Bisexual, Transgender and Queer People," Professor Jennifer L. Pomeranz argues that a challenge could be raised under this prong on the theory that "Act 137 imposes economic and other burdens on LGBTQ persons and their families to advance the religious beliefs of those accommodated. Through Act 137, the state has given the force of law to religious business owners who wish to discriminate against same-sex couples."[186] She relies on both *Estate of Thornton v. Caldor*[187] and *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*[188] for the proposition that "the state cannot give the force of law to a person's religious belief and require accommodation by others regardless of the burden."[189] This principle does emerge from the two cases, but the facts of each suggest that the Court would not find that the effect of Act 137 gives religious business owners the force of law.

In *Caldor*, the Court struck down a Connecticut law that provided that no individual had to work on the day of the week which he considered his Sabbath.[190] The Court held that this violated the second prong of the *Lemon* test and so was unconstitutional under the Establishment Clause.[191] The Court's reasoning emphasized that the statute imposed an affirmative and absolute duty on business owners to conform their business practices to the religious observances of their employees.[192] Because the statute placed the interests of Sabbath observers over all other interests, the Court concluded that the law impermissibly advanced a particular religious practice.[193]

In *Amos*, the plaintiffs alleged that Section 702 of the Civil Rights Act of 1964 violated the Establishment Clause by allowing religious employers to consider religion in

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[186] Jennifer L. Pomeranz, *Challenging and Preventing Policies That Prohibit Local Civil Rights Protections for Lesbian, Gay, Bisexual, Transgender, and Queer People*, 108 AM. J. PUB. HEALTH POL. 67, 69 (2018).

[187] 472 U.S. 703 (1985).

[188] 483 U.S. 327 (1987).

[189] Pomeranz, *supra* note 186, at 69.

[190] Estate of Thornton v. Caldor, 472 U.S. 703, 710–11 (1985).

[191] *Id.* at 709.

[192] *Id.*

[193] *Id.*

choosing employees for non-religious jobs.[194] The Court held that this was not an Establishment Clause violation.[195] The Court specifically distinguished the case from *Caldor*, writing in a footnote that the obligation imposed on business owners by the statute at issue in *Caldor* did not exist in the Civil Rights Act.[196] Because the statute imposed no duty, the mere fact that the law allowed churches to exercise discretion in advancing religion was not enough to violate the Establishment Clause.[197]

Act 137 looks a great deal like the statute at issue in *Amos*. Unlike in *Caldor*, Act 137 does not impose any kind of affirmative duty or obligation on business owners in Arkansas. It does not require that business owners discriminate against LGBT individuals or turn away customers due to their religious beliefs. It does require, however, that LGBT employees or customers of these businesses accept the religious observances of their bosses and business proprietors, or risk being fired or denied services. Both the statute in *Amos* and Act 137 essentially give license to business owners to discriminate according to their religious beliefs. As such, given its holding on similar facts in *Amos*, the Court would likely not find reason to strike down Act 137 under the *Lemon* test's second prong.

a. The Endorsement Test

The Court could, either in place of or as a supplement to the first two prongs of the *Lemon* test, choose to analyze Act 137 using O'Connor's endorsement test. Using the "reasonable observer" standard that the endorsement test establishes, there is a compelling argument to be made that an individual with knowledge of not only the specific act at issue, but also of the general history and climate surrounding the challenged act, could interpret the Arkansas legislature's actions as an endorsement of a particular brand of Christianity.[198] However, given that the Court applies the endorsement

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[194] Corp. of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 331 (1987).

[195] *Id.* at 339–40

[196] *Id.* at 337 n.15.

[197] *Id.* at 337.

[198] In her concurrence in *Capital Square Review & Advisory Board v. Pinette*, a case involving a cross displayed on public land by the Ku Klux Klan, Justice O'Connor further clarified the "reasonable observer" standard, writing that "the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears." 515 U.S. 753, 780 (1995) (O'Connor, J., concurring).

test infrequently and that current trends indicate that it is falling out of favor,[199] the likelihood of the Court adopting an endorsement test framework to assess the constitutionality of Act 137 is low.

3. The Excessive Entanglement Prong

The excessive entanglement prong would likewise probably not provide a basis on which to find Act 137 unconstitutional. Act 137 creates no ongoing monitoring or enforcement program between the state and a religious organization or program, and so does not implicate the administerial concern of the excessive entanglement prong. Nor does it violate the political divisiveness standard. Pomeranz argues that Act 137 implicates the type of political entanglement that the Establishment Clause was designed to protect against because of the religious character of many of the statements made on the House floor during the bill's debate.[200] However, given that the Court has never invalidated a law on the political divisiveness standard alone, and given that the times it has invoked the doctrine in its reasoning have involved fact patterns with much closer association between the political and the religious, it is unlikely that Act 137 would be found impermissible for reasons of creating an excessive government entanglement with religion. Ultimately, under the Supreme Court's current Establishment Clause jurisprudence, Act 137 would likely be upheld under all three prongs of the *Lemon* test. In the absence of a modified standard of legislative inquiry in Establishment Clause cases, such as that suggested below, Act 137 is constitutional.

B. A Modified Approach to Both Legislative Motive and Preemption

1. Moving Toward a But-For Inquiry for Legislative Motivation

To return to Judge Parr's observation from the Introduction, courts need not be struck with blindness when confronting patently discriminatory legislation.[201] The reality is that overtly religious legislation is extremely rare, and most legislators are knowledgeable enough to recognize the need for pretextual justifications for discriminatory laws. This does not mean, however, that we must be resigned to the fact of their validity. Courts should not be blind to religious bias, which is evident, even if that evidence is occluded by assurances of secularism. Furthermore, especially in cases like Act 137 where

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[199] *See supra* Part II.C.iv.

[200] Pomeranz, *supra* note 186, at 70.

[201] *See* Parr v. Mun. Ct., 479 P.2d 353, 356 (1971).

legislators made no attempts to hide their religious motivations in the course of public debate, courts should employ an Establishment Clause standard that substantially interrogates legislative motive.

A number of scholars have proposed modifications to the Court's current Establishment Clause tests with varying degrees of expansiveness, plausibility, and administrability.[202] One proposal has been that the Supreme Court incorporate into its Establishment Clause jurisprudence an inquiry for discriminatory intent similar to that it uses in equal protection cases. The equal protection framework for assessing legislative motivation essentially establishes a but-for test for legislative decision-making. In other words, government action is rooted in a constitutionally impermissible purpose if the law would not have been passed but-for the role that impermissible purpose played in the decision-making process.[203] The specifics of such an inquiry are fact- and context-specific.[204]

In his article "Religious Purpose, Inerrancy, and the Establishment Clause," Professor Daniel Conkle argues that this standard should migrate to the Establishment Clause, particularly for cases where a government action may have been influenced by multiple motivations.[205] Act 137 is precisely such a case. Multiple motivations exist "when individual legislators act for permissible as well as impermissible reasons, and also when some legislators act for permissible reasons, but others for impermissible."[206] For Act

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[202] *See, e.g.*, Kent Greenawalt, *Religiously Based Judgments and Discourse in Political Life*, 22 J. CIV. RIGHTS & ECON. DEV. 445 (2007); Caroline Mala Corbin, *Intentional Discrimination in Establishment Clause Jurisprudence*, 67 ALA. L. REV. 299 (2015); Daniel O. Conkle, *Religious Purpose, Inerrancy, and the Establishment Clause*, 67 IND. L.J. 1 (1991).

[203] *See* Conkle, *supra* note 202, at 1.

[204] *See, e.g.*, Vill. Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) (holding that the denial of a rezoning petition was possibly motivated by racial discrimination and that the case should be remanded for further consideration because the plaintiffs failed to carry their burden of establishing discriminatory intent). The court noted that:

> Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one . . . but . . . [w]hen there is a proof that a discriminatory purpose has been a motivating factor in the decision, this judicial deference is no longer justified. *Id.* at 265.

[205] Conkle, *supra* note 202, at 1.

[206] *Id.*

137, for example, there are two discernible motives: the first is the permissible secular purpose of regulating intrastate commerce, and the second the impermissible desire of some legislators to limit the rights of LGBT persons on the basis of their religious beliefs. Applying the equal protection test to Establishment Clause cases would enable courts to both continue to show deference to legislatively proffered purposes—if the facts suggest they are sincere and there is an absence of evidence to suggest impermissible motives—and to look behind the legislative curtain where such evidence does exist.

Of course, the kind of counterfactual inquiry required by a but-for test necessitates speculation. The inherent difficulty of speculative tests could potentially be lessened here by establishing some sort of trigger for when a more searching inquiry into legislative motive is warranted. For example, the presence of religious statements on the legislative floor or from legislators during the promotion of the bill could be used to justify a deeper inquiry into an asserted rationale. These triggers would not act as evidence in and of themselves for Establishment Clause violations—although they could be used in making that determination—but would merely provide a basis on which a court could turn to the but-for test.

In the case of Act 137, it is not a stretch to imagine that in the absence of religiously informed beliefs regarding LGBT individuals, the Arkansas legislature would not have addressed Fayetteville's NDO with such urgency, or at all. Furthermore, even if we accept the Arkansas legislature's stated purpose of standardizing non-discrimination protections statewide, in a universe where religious beliefs played no role in decision-making, incorporating sexual orientation and gender identity protections into state law would have been an equally viable method of achieving uniformity as preempting Fayetteville's ordinance. There is no evidence that the Arkansas legislature ever considered this option. The jump to preemptive action when other appropriate means existed suggests that the legislature was not interested in standardization for standardization's sake, but standardization as a means by which to legitimize discrimination.

2. Rethinking Preemption and Local Legislative Authority

The controversies surrounding Arkansas' Act 137, the Equal Access to Intrastate Commerce Act in Tennessee, and North Carolina's HB2 are only three examples of a tension that continues to build between state and municipal governments. The path to successful repeal on federal constitutional grounds for these bills is, as has been demonstrated, extremely narrow. Nonetheless, these laws flout both principles of local autonomy and of non-establishment, ideals that have animated the American ethos since

the nation's founding. As it stands, our current standards provide little protection against either preemptive or obviously pretextual legislation. Our approaches to both state-local preemption and to Establishment Clause inquiries into religiously motivated lawmaking should be adapted to account for modern political realities, including profound political polarization and an Executive branch that enables and empowers certain religious adherents over others.

3. Protecting the Autonomy of Municipalities

During the House debate over Act 137, Representative David Whitaker took the floor to speak in opposition to the bill's passage. He urged the body to vote against the Act because the ordinance it sought to preempt had been produced by a local democratic process that deserved to be respected, saying, "I do have an obligation as one of the representatives of the constituency and voters of Fayetteville to express to you their desires to run their own affairs."[207] He continued: "My constituents beg you: let them run their own affairs and we would definitely love to extend that courtesy to you, that your cities, your counties, your school districts, heck, your neighborhood associations, can govern yourselves better than we can."[208] Representative Whitaker's statement raises fundamental issues regarding the relationship between state and local governments and presents one example of the kind of city/state conflicts that are playing out across the country.

In his article, "The Challenge of the New Preemption," Professor Richard Briffault argues that the aggressive preemption we have seen from states in the past decade requires a reconsideration of how our system protects local governments and self-determination, especially in a time of increasing ideological polarization.[209] Professor Briffault writes that a system that provides little protection for municipal lawmaking authority, which is what most states have, may work when municipal and state governments are generally cooperative, but "when legislatures seem fraught with open hostility in a way they haven't been in the past, the traditional laissez faire approach risks jeopardizing the ability of local governments to play their key role in our system."[210]

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[207] State of Ark. House of Representatives, *Feb. 13, 2015*, WATCH LIVE (Feb. 13, 2015), at 11:06:00, https://sg001-harmony.sliq.net/00284/harmony/en/PowerBrowser/PowerBrowserV2/20160329/-1/1066#info_ [https://perma.cc/9UCH-95DR0].

[208] *Id.*

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

[210] *Id.* at 2017.

Even in the early twentieth century political thinkers lamented the role of cities in their own legislative affairs. In 1912, political scientist Charles Beard wrote "not only do state legislatures interfere with the fundamental rights and pettiest details of city affairs, but their consent is required for some of the most insignificant undertakings of municipal government."[211] The ensuing century has in many ways exacerbated Beard's complaints. Professor Kenneth Stahl sums up the current difficulty in the American city/state relationship: "Today, with Democrats controlling most cities and rural Republicans controlling most states, the traditional rivalry between urban and rural areas in American politics is now expressed vertically in the relationship between the state and its cities. That is evident in the preemption battles."[212] Especially as states have begun to move beyond traditional preemption laws to enacting punitive[213] and nuclear[214] preemptive legislation, it is clear that something has to give in the current state/local dynamic.

One imperfect solution would be an expanded understanding of home rule authority for municipalities to encourage greater protection of local lawmaking authority and allow the legal status of local governments to be "bolstered."[215] The boundaries of home rule should be determined with an eye, first and foremost, toward "the empowered local self-government."[216] This would create limits on state preemption while respecting the state's ultimate authority to set statewide policy.[217] Some state governments and high courts have already proved themselves amenable to increasing protections for local lawmaking authority. In California, the state Supreme Court ruled that preemption is limited to situations where the legislated subject is one of "statewide concern" and the statute that addresses it is "reasonably related to its resolution."[218]

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[211] Alan Ehrenhalt, *What Do States Have Against Cities, Anyway?*, GOVERNING (Nov. 2017), www.governing.com/columns/assessments/gov-urban-penalty-legislatures-cities.html [https://perma.cc/4PMJ-2HVZ].

[212] Stahl, *supra* note 23, at 144.

[213] Punitive preemption not only negates local laws but also punishes governments or local officials for enacting the preempted policies in the first place. Briffault, *supra* note 209, at 2002.

[214] Nuclear preemption refers to preemptive legislation that completely eliminates local lawmaking authority, either over particular fields or with respect to certain subject matter. *Id.* at 2007.

[215] *See id.* at 2018.

[216] *Id.*

[217] *See id.*

[218] *See* Cal. Fed. Sav. & Loan Ass'n v. City of L.A., 812 P.2d 916, 925 (1991).

The Ohio Supreme Court took an even more limiting approach to state preemption, holding that the state legislature cannot preempt local legislation unless the state law is of a "general nature," which the Court interpreted to mean "statutes setting forth police, sanitary or similar regulations and not statutes which purport only to grant or to limit the legislative powers of a municipal corporation to adopt or enforce police, sanitary, or other similar regulations."[219] On these grounds, the Ohio Court struck down state attempts to overturn local regulations concerning nutrition, business regulations, and hiring requirements.[220] The California and Ohio approaches, though they have not been widely adopted, would be a step toward reconciling the need for state governments to legislate uniformly with the function that local governments serve in our system as policy innovators with local autonomy.

Granted, empowering municipalities is neither a panacea nor entirely positive. There are problems associated with increased local control, such as non-uniformity of laws within the state, which can place heavy burdens on regulated parties, the risk of parochialism, and the seeming arbitrariness of municipal borders, where the regulations of one municipality can impact its neighbors.[221] It is reasonable to be wary of increased municipal power. However, and particularly in the context of the aggressive preemption action that has been taken by states in recent years, the benefits accrued by granting municipalities more flexibility in legislating are greater than the risks incurred. Cities, with the consent of support of their citizens, should be allowed to experiment with legislative solutions to local problems, respond to local concerns, and protect their vulnerable populations.

Of course, even a modified and expanded preemption standard might not ensure that progressive ordinances like Fayetteville's go un-preempted by state governments, but it would create greater latitude in the state-local system for cities to experiment with policy at the local level and to serve the needs and interests of their particular communities with a lessened fear of interference from the state. Furthermore, limiting the scope of legitimate state preemption would serve many underlying values of our federalist system, such as encouraging citizen participation in democracy and enabling responsive government.[222]

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[219] *See* Canton v. State, 766 N.E.2d 963, 968 (2002).

[220] *See* Briffault, *supra* note 209, at 2013.

[221] *See* Richard Briffault, *Our Localism, Part II: Localism and Legal Theory*, 90 COLUM. L. REV. 346, 446 (1990).

[222] *See generally* Briffault, *supra* note 209.

CONCLUSION

A number of scholars who work in this area suggest that, when the right facts come along, an Establishment Clause challenge should be considered for these kinds of non-discrimination preemption laws,[223] but it is hard to imagine a more damning set of facts than those presented by Act 137. Legislators generally understand that legislating solely on religious grounds is unconstitutional and adapt accordingly, so if advocates wait for cases that present more evidence of religious motivation than that surrounding Act 137 to explore the merits of an Establishment Clause challenge, they may wait forever. The flaws of current Establishment Clause jurisprudence and the landscape of the current use of preemption beg for a more radical judicial approach to parsing prejudice from pretext when assessing legislative motivation, especially when it comes to religiously motivated laws. Federal courts have been historically reluctant to interfere in assessing the proper balance of state and municipal power, deferring to principles of federalism in leaving those determinations almost entirely up to states. Nonetheless, courts are well within their bounds to look behind the curtain, so to speak, of legislative motivation when such an inquiry is necessary.

Allowing the but-for legislative inquiry test to migrate from Equal Protection Clause to Establishment Clause jurisprudence would give the Establishment Clause a great deal more efficacy as an avenue for striking down discriminatory state and local law. This more searching legislative motivation inquiry in combination with a broadened approach to state-local relations would help ensure that, through regulation of things like local non-discrimination laws without fear of preemption—and wider avenues for judicial challenge if they are preempted—cities are able to effect community values and protect their most vulnerable populations.

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[223] *See* BRIFFAULT ET. AL, *supra* note 4, at 13; *Legal Strategies to Counter State Preemption and Protect Progressive Localism: A Summary of the Findings of the Legal Effort to Address Preemption (LEAP) Project*, A BETTER BALANCE (Aug. 9, 2017), https://www.abetterbalance.org/resources/legal-strategies-to-counter-state-preemption-and-protect-progressive-localism-a-summary-of-the-findings-of-the-legal-effort-to-address-preemption-leap-project/ [https://perma.cc/YMV2-TPQ3].