

LOCAL BUDGETS, LOCAL DECISIONS: THE HOME RULE FOR THE 21ST CENTURY PROJECT'S STATE SUPPORT FOR LOCAL DEMOCRACY PROVISIONS*

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As scholars of local government have long noted, without adequate local revenue, home rule provides hollow legal authority. Recognizing the importance of local revenue, the National League of Cities' Principles of Home Rule for the 21st Century ("Principles") explicitly includes taxation as a power granted by home rule and articulates a constitutional commitment to adequate intergovernmental aid. To further strengthen local budgetary control, the model bans unfunded mandates and incorporates an anti-coercion principle that requires conditions on state aid relate to the purposes of such aid.

Together, the anti-coercion and unfunded mandate provisions limit state lawmakers' ability to indirectly limit home-rule authority through state purse strings. This Article applies these provisions to three recent examples of state efforts to tie local fiscal support and taxing authority to substantive state policy goals. In doing so, the Article highlights the ways the Principles might strengthen local democracy and also explores the challenge local governments face when confronting state legislatures with oppositional policy preferences.

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INTRODUCTION

Fiscal year 2020 promised another year of record economic growth, which would generate natural revenue growth for local governments.¹ Instead, local governments spent much of 2020 addressing record revenue shortfalls due to the COVID-19 pandemic. As Cincinnati Mayor John Cranley worried in the summer of 2020: “There’s no way Cincinnati or Columbus or any city can survive or thrive if local governments suffer the catastrophic loss of revenue that we are projecting right now.”²

As winter approached, it became clear that many state budgets would weather the pandemic far better than initially expected.³ The same, however,

1. See NAT’L ASS’N OF STATE AUDITORS, COMPTROLLERS & TREASURERS, STATE AND LOCAL FISCAL FACTS – 2020, at 1 (2020), http://www.nasact.org/files/News_and_Publications/White_Papers_Reports/2020_State_and_Local_Fiscal_Facts.pdf [<https://perma.cc/WFJ9-TYPL>] (“Before the COVID-19 crisis, state fiscal conditions were strong following a decade of revenue growth and bolstering reserves.”).

2. NAT’L LEAGUE OF CITIES, CITY FISCAL CONDITIONS 2020, at 7 (2020), https://www.nlc.org/wp-content/uploads/2020/08/City_Fiscal_Conditions_2020_FINAL.pdf [<https://perma.cc/XC7P-PJBK>].

3. See Barb Rosewicz, Mike Maciag & Alexandre Fall, *States Forecast Wide-Ranging Effects on Revenue Since the Pandemic’s Start*, PEW CHARITABLE TRS. (Mar. 31, 2021), <https://www.pewtrusts.org/en/research-and-analysis/article/2021/03/31/states-forecast-wide-ranging-effects-on-revenue-since-the-pandemics-start> [<https://perma.cc/6S5Z-QYJA>] (explaining that more recent state revenue forecasts are more optimistic than those issued earlier in the pandemic). State revenue projections exceeded initial forecasts for several reasons. Among the most important, most professional workers continued working—and receiving paychecks—throughout the pandemic, and both employment and the stock market recovered more quickly than anticipated. *Id.* As a result, states with income taxes, especially states with progressive income taxes, did not experience significant declines in income tax revenue. See LUCY DADAYAN & KIM RUEBEN, TAX POL’Y CTR., SURVEYING STATE LEADERS ON THE STATE OF STATE TAXES 2 (2021), <https://www.taxpolicycenter.org/publications/surveying-state-leaders-state-state-taxes/full> [<https://perma.cc/Q4VV-2BLC>]. Further, federal aid and especially extended unemployment relief meant consumer spending did not fall by nearly as much as initially predicted. See Rosewicz et al., *supra*. Moreover, shutdown orders shifted consumer consumption away from services—which are generally not subject to state sales taxes—and toward the taxable purchase of tangible property. See Danielle Moran, *Wayfair Sales Tax Case Sparked a Pandemic Windfall for States*, BLOOMBERG TAX (Mar. 5, 2021), <https://news.bloombergtax.com/daily-tax-report/wayfair-sales-tax-case-sparked-a-pandemic-windfall-for-states> [<https://perma.cc/HVN8-YDE5> (dark archive)]. For example, if you bought hair scissors to give yourself a haircut, you likely paid sales tax on the scissors; you would not have paid sales tax on the haircut that you would have otherwise gotten in a salon. Most states had already moved to tax online sales after the U.S. Supreme Court’s decision in *Wayfair* and were therefore in a good position to benefit from these changing consumption patterns. *Id.*

could not be said of local budgets. Fearful that state-level budget projections would reduce pressure to provide federal aid to struggling cities, local leaders continued to highlight their cities' significant budget challenges.⁴

These efforts succeeded. In March 2021, the federal American Rescue Plan Act ("ARPA")⁵ provided an unprecedented fiscal relief package for local governments.⁶ ARPA provided \$130 billion in aid to local governments to be distributed by formula.⁷ While Congress required local governments to use the money to address fiscal and health issues arising from the pandemic,⁸ the statute and subsequent Treasury guidance have given local governments significant latitude in how to use these funds.⁹ Local governments can use the federal aid to offset pandemic-driven revenue losses.¹⁰ In addition, ARPA allocated hundreds of billions more for program-specific aid in areas like education, transportation, infrastructure, and housing that will provide additional funding for local governments.¹¹ As a result of this new aid, local officials faced a pressing new problem: how to wisely spend this new infusion of federal dollars.¹²

In some sense, then, it is an odd time to be thinking about the adequacy of local revenue. Federal aid has temporarily limited immediate fiscal concerns and offered an opportunity for many local governments to make strategic investments in local communities. The ARPA, however, is not a solution to the

4. Alyssa Fowers & Rachel Siegel, *Why Some State and Local Governments Are Desperate for More Stimulus Aid*, WASH. POST (Feb. 15, 2021), <https://www.washingtonpost.com/business/2021/02/15/biden-stimulus-state-local-aid/> [<https://perma.cc/A6QB-AP8V> (dark archive)].

5. American Rescue Plan Act of 2021, Pub. L. No. 117-2, 135 Stat. 4 (codified in scattered sections of the U.S.C.).

6. See, e.g., *American Rescue Plan: Strategies for Local Leaders*, BROOKINGS INST. (2021), <https://www.brookings.edu/interactives/american-rescue-plan-strategies-for-local-leaders/> [<https://perma.cc/4NBV-QBXN>] (providing recommendations for how to spend the money).

7. American Rescue Plan Act of 2021, § 603, 135 Stat. at 228 (codified at 42 U.S.C. § 803(b)(1)(B)).

8. *ARPA Local Relief Frequently Asked Questions*, NAT'L LEAGUE CITIES (2021), <https://www.nlc.org/covid-19-pandemic-response/american-rescue-plan-act/arpa-local-relief-frequently-asked-questions/> [<https://perma.cc/Z3QZ-GSMT>] [hereinafter *ARPA Local Relief FAQ*].

9. *Id.*; see also American Rescue Plan Act of 2021, § 603, 135 Stat. at 231–32 (codified at 42 U.S.C. § 803(c)(1)); Coronavirus State and Local Fiscal Recovery Funds, 31 C.F.R. §§ 35.1–.12 (2021).

10. *ARPA Local Relief FAQ*, *supra* note 8; American Rescue Plan Act of 2021, § 603, 135 Stat. at 232 (codified at 42 U.S.C. § 803(c)(1)(C)).

11. See *American Rescue Plan of 2021*, NAT'L CONF. ST. LEGISLATURES (Mar. 10, 2021), <https://www.ncsl.org/ncsl-in-dc/publications-and-resources/american-rescue-plan-act-of-2021.aspx> [<https://perma.cc/GC8Y-D2GV>] (summarizing ARPA funding by program source).

12. See, e.g., Brad Whitehead, Isaac Velez & Eli Byerly-Duke, *The American Rescue Plan Opportunity Is Knocking for Local Governments. Will They Answer?*, BROOKINGS INST. (Nov. 30, 2021), <https://www.brookings.edu/research/the-american-rescue-plan-opportunity-is-knocking-for-local-governments-will-they-answer/> [<https://perma.cc/K55W-TY46>] ("For many, an improved economic outlook changes the desired impact of [the American Rescue Plan] local recovery funds from pure relief to broader economic and social change.").

long-term challenges confronting local governments; policy crafted for a once-in-a-generation crisis is a poor building block for local revenue resiliency.

Once ARPA dollars are gone, local governments will return to the status quo ante: limited and eroding fiscal authority. Local governments have limited taxing authority under most states' constitutional home-rule provisions,¹³ and as scholars have lamented, the adoption of tax and expenditure limits greatly reduce local control over property tax revenue.¹⁴ As a result, local governments often lack the legal authority to raise revenue when needed to close budget gaps.

Meaningful local democracy requires adequate local revenues. Without adequate revenue, even robust initiative authority and strong home-rule immunity leave local governments with empty legal authority.¹⁵ The *Principles of Home Rule for the 21st Century* ("*Principles*"), an initiative of the National League of Cities, offers a new vision of local fiscal authority, explicitly including taxation as a power granted by home rule¹⁶ and articulating a constitutional commitment to adequate intergovernmental aid.¹⁷

Moreover, recognizing that state mandates limit local budget discretion, the model articulated by the *Principles* also includes a ban on unfunded mandates: "The state shall not require local governments to provide additional services or undertake new activities without providing an additional appropriation that fully funds the newly mandated service or activity."¹⁸

In addition to addressing these more general and long-standing challenges of local revenue sufficiency, the *Principles* also seeks to address a newer problem: punitive preemption. As the introduction to the *Principles* discusses, states have increasingly sought to use limited local authority as a tool of regulatory preemption. Punitive preemption imposes fiscal penalties on local governments and sometimes on local officials, who adopt policies inconsistent with state law or state policy objectives.¹⁹ Recognizing that state aid could also be used as a

13. See Erin Adele Scharff, *Powerful Cities?: Limits on Municipal Taxing Authority and What To Do About Them*, 91 N.Y.U. L. REV. 292, 295–97 (2016) [hereinafter Scharff, *Powerful Cities?*] (describing limitations on municipal fiscal authority).

14. See, e.g., JOAN YOUNGMAN, A GOOD TAX: LEGAL AND POLICY ISSUES FOR THE PROPERTY TAX IN THE UNITED STATES 198 (2016).

15. See generally Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346 (1990) (suggesting that the crisis of the city is one of revenue, not authority).

16. NAT'L LEAGUE OF CITIES, PRINCIPLES OF HOME RULE FOR THE 21ST CENTURY (2020), as reprinted in 100 N.C. L. REV. 1329, 1355 (2022) [hereinafter PRINCIPLES]. I was a co-drafter of this project.

17. *Id.* at 1344–45.

18. *Id.* at 1353.

19. See Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 1997, 2004–07 (2018) (describing various fiscal penalties imposed by punitive preemption). See generally Erin Adele Scharff, *Hyper Preemption: A Reordering of the State—Local Relationship?*, 106 GEO. L.J. 1469 (2018) [hereinafter Scharff, *Hyper Preemption*] (describing punitive preemption as "hyper preemption"); Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163 (2018) (describing the challenges and dangers of punitive preemption).

tool to limit local authority, the *Principles*' aid provision also articulates an anti-coercion rule: "The state shall not place conditions on such intergovernmental aid except as those conditions relate to expenditure of that aid and the state shall not use the removal of such aid as a penalty for the exercise of a local government's home rule authority."²⁰

Together, the anti-coercion provision and the unfunded mandate provision seek to limit state lawmakers' ability to use their fiscal authority to limit local democracy. In evaluating the success of the *Principles*, this Article applies the proposed fiscal authority provisions to three recent examples of state efforts to tie local fiscal support and taxing authority to substantive state policy goals. Part I provides an overview of the current challenges to local fiscal authority. Part II discusses Arizona's S.B. 1487 and the investigation into Maricopa County's refusal to hand over server information to the state Senate's audit effort. Part III discusses Texas's H.B. 1, which threatened the state's largest cities with a reduction in property tax authority should the cities choose to reduce police funding. Part IV analyzes a hypothetical challenge to Arizona Governor Doug Ducey's modification of an educational grant program to encourage schools to forgo mask mandates.

To be clear, these fiscal provisions are only one part of the *Principles*' protections for local governments. In particular, some aspects of the states' actions would likely run afoul of provisions limiting preemption over matters of local concern. The *Principles*' "Local Support for Democracy Provisions" recognize the possibility that state legislatures would use the power of the purse to indirectly constrain local authority when home rule prevents direct constraints.²¹ Thus, there is value in considering these provisions separately. In addition, unlike the *Principles*' preemption provisions, these "local support" provisions apply equally to home-rule and non-home-rule jurisdictions. This Article concludes that the *Principles*' fiscal provisions strengthen local democracy, but also cautions that the key to protecting local authority remains in the *Principles*' articulation of the scope of home-rule immunity.

I. PURSE STRINGS AND TAXING AUTHORITY

The authority to make budget decisions is a hallmark of self-governance. Local fiscal authority is inextricably linked to state fiscal decisions, as local governments rely on state fiscal support.²² Unrestricted intergovernmental

20. *PRINCIPLES*, *supra* note 16, at 1352.

21. *Id.* at 1338–40, 1348.

22. See generally Amanda Kass, Michael Pagano & Farhad Kaab Omeyr, *How States Provide Cities with General Revenue: An Analysis of Unrestricted State Aid* 1–16 (Lincoln Inst. Land Pol'y, Working Paper No. 20AK1, 2020), <https://www.lincolnst.edu/publications/working-papers/how-states-provide-cities-general-revenue> [<https://perma.cc/X3FD-F57X>] (discussing the role of unrestricted aid in state budgets).

transfers can represent a significant source of local revenues. Such transfers, however, are not designed to influence spending choices. Rather, these unrestricted intergovernmental transfers reflect an understanding that it is often more efficient to raise revenue at the state level,²³ even when a commitment to local democracy allows for spending decisions to be made locally.

As the California Supreme Court has observed, “Autonomy with regard to the expenditure of public funds lies at the heart of what it means to be an independent governmental entity.”²⁴ However, state governments frequently use state aid to influence local spending. By design, restrictive grant programs seek to influence the spending priorities of local governments. Such financial carrots are often unobjectionable and noncoercive. Local governments that wish to accept state funding may do so, but they are also free to forgo such funding and thus be unburdened by state spending priorities.

On the other hand, state unfunded mandates impose on local governments the obligation to spend without requiring consent to the expenditures²⁵ and thus have long been criticized by local officials across the political spectrum.²⁶

On the revenue side, state law has long constrained local fiscal authority. In most states, local governments are limited in the amount and manner in which they can borrow funds by both the state constitution and statutory law,²⁷ and the majority of states do not include taxation as a home-rule power.²⁸

In recent years, states have repeatedly run roughshod over even the limited fiscal authority they have granted local governments. They have done so by imposing significant funding conditions, not simply on individual grant programs, but also on more general intergovernmental revenue sharing

23. Richard M. Bird, *Fiscal Federalism*, in THE ENCYCLOPEDIA OF TAXATION & TAX POLICY 151, 151 (Joseph J. Cordes, Robert D. Ehel & Jane G. Gravelle eds., 2d ed. 2005) (“[S]tate and local governments are likely to end up with greater expenditure responsibilities than can be financed from their own revenues. An important element of fiscal federalism from the beginning has thus been recognition of the probable need for intergovernmental grants to close the revenue gap.”).

24. State Bldg. & Constr. Trade Council v. City of Vista, 279 P.3d 1022, 1031 (Cal. 2012).

25. See RICHARD BRIFFAULT & LAURIE REYNOLDS, CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW 318 (8th ed. 2016) (“Unfunded mandates occur when states require local governments to provide or expand existing local services, or to otherwise assume costly new responsibilities, without providing their localities with the funds to cover the resulting costs.”).

26. Lawrence J. Grossback, *The Problem of State-Imposed Mandates: Lessons from Minnesota’s Local Governments*, 34 ST. & LOCAL GOV’T REV. 183 *passim* (2002) (discussing broad concerns about mandates from local officials in Minnesota); see Christopher Smith Gonzalez, *State, Local Government Look To Curb Unfunded Mandates*, TEX. TRIB. (Apr. 6, 2011), <https://www.texastribune.org/2011/04/06/state-local-government-to-curb-unfunded-mandates/> [<https://perma.cc/4U89-ZPN4>]. In many states, state laws bar or limit such mandates. PRINCIPLES, *supra* note 16, at 1373, 1382–84 (describing state prohibitions).

27. Scharff, *Powerful Cities?*, *supra* note 13, at 295.

28. *Id.* at 296–304.

programs,²⁹ as well as by imposing significant fiscal penalties on local governments.³⁰ State lawmakers have also sought direct control over local budget decisions. In the summer of 2021, both Texas and Florida took aim at local spending decisions directly, seeking to limit local discretion about both how much to spend on public safety and how to allocate such expenditures between different city programs.³¹ While there are historical precedents for such state efforts,³² this aggressive state action has few parallels in the modern era of home rule.

Home rule might, in fact, provide protections against coercion of this sort. A recent California Superior Court ruling suggests that California's home rule provides inherent protections against coercion.³³ In that case, a nonprofit challenged a state law prohibiting the state's Department of Tax and Fee Administration from administering local sales and use taxes in jurisdictions that enacted sugar-sweetened beverage taxes.³⁴ That law only applied the fiscal

29. See Act of Mar. 17, 2016, ch. 35, 2016 Ariz. Sess. Laws 161 (codified as amended at ARIZ. REV. STAT. ANN. §§ 41-194.01, 45-5029, 43-206 (2021)) (withholding state funding for any municipal violations of state law); Act of June 30, 2021, ch. 403, 2021 Ariz. Legis. Serv. (West) (codified at ARIZ. REV. STAT. ANN. § 41-194.01A–B (2021)) (same).

30. See, e.g., Act of Apr. 23, 2010, ch. 113, 2010 Ariz. Sess. Laws 450, 451, 453 (codified as amended at ARIZ. REV. STAT. ANN. § 11-1051A, H–J (2021)) (imposing fiscal penalties on local governments for adopting policies that limit or restrict enforcement of federal immigration laws); Act of Apr. 27, 2017, act 28, 2017 Ga. Laws 92 (codified as amended at GA. CODE ANN. § 20-3-10 (2021)) (same); Act of May 17, 2017, ch. 4, 2017 Tex. Gen. Laws 7 (codified at TEX. GOV'T CODE ANN. § 752.053 (2021)) (same).

31. See Act of June 1, 2021, ch. 199, 2021 Tex. Sess. Law Serv. (West) (codified in scattered sections of TEX. GOV'T CODE ANN., TEX. LOC. GOV'T CODE ANN. & TEX. TAX CODE ANN.); see also Act of Apr. 19, 2021, ch. 6, 2021 Fla. Sess. Law Serv. (West) (codified in scattered sections of FLA. STAT.).

32. See Rick Su, Anthony O'Rourke & Guyora Binder, *Defunding Police Agencies*, 71 EMORY L.J. (forthcoming 2022) (manuscript at 27–31), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3956241 [<https://perma.cc/JV6Y-3HCL>] (describing the historic origins of states funding restrictions on local governments).

33. See Tentative Ruling on Petition for Writ of Mandate at 8–10, *Cultiva La Salud v. California*, No. 34-2020-80003458 (Cal. Super. Ct. Oct. 1, 2021) [hereinafter *Petition for Writ of Mandate Ruling*].

34. *Id.* at 2. The law itself, the “Keep Groceries Affordable Act of 2018,” ch. 61, 2018 Ca. Stat. 1843 (codified at CAL. REV. & TAX. §§ 7284.8–.16 (2021)), was passed basically under duress. As Governor Brown suggested in his signing statement, in response to local interest in sugar-sweetened beverage taxes:

[T]he beverage industry has circulated a far reaching initiative that would, if passed, raise the approval threshold from 50% to two-thirds on all measures, on all topics in all 482 cities. Mayors from countless cities have called to voice their alarm and to strongly support the compromise which this bill represents. The initiative also contains language that would restrict the normal regulatory capacity of the state by imposing a two-thirds legislative vote on what is now solely within the competency of state agencies. This would be an abomination. For these reasons, I believe Assembly Bill 1838 is in the public interest and must be signed.

Petition for Writ of Mandate Ruling, *supra* note 33, at 4 (quoting signing statement).

penalty when a city imposed a tax, fee, or other assessment that was “a valid exercise of a city’s authority under Section 5 of Article XI of the California Constitution with respect to the municipal affairs of that city.”³⁵ Because the state sales tax law required this department to collect local sales taxes, the law, in effect, prohibited local governments from obtaining local sales tax revenue, should they decide to also impose a tax on sugar-sweetened beverages.³⁶ The court held this provision was “unconstitutional on its face; it violates the Home Rule Provision via financial coercion.”³⁷

The California court ruling is important, but it does not necessarily suggest that local governments in other states may be afforded similar protection. When compared to home rule in most other states, California’s home rule is generally more protective of local authority.³⁸ Elsewhere, there is little precedent suggesting such an anti-coercion principle exists under state constitutional home-rule provisions. As a result, legal arguments about the validity of these state actions are mostly speculative. Perhaps such actions violate some—as yet legally unarticulated—notion of home rule; perhaps they do not. The *Principles* made this anti-coercion rule explicit to ensure local governments such protection.

II. ARIZONA’S 2020 AUDIT AND S.B. 1487: HYPER PREEMPTION AS A TOOL OF DEMOCRATIC DE-LEGITIMACY

A. *S.B. 1487*

S.B. 1487 is Arizona’s punitive preemption law that allows any member of the Arizona state legislature to file a complaint with the state’s attorney general alleging that a local government’s action violates state law.³⁹ Under the law, if the attorney general’s investigation reveals a violation, the locality must cure it or the state will withhold the locality’s portion of state shared revenue, a substantial portion of local budgets.⁴⁰

Because there is virtually no substantive limit on what members of the legislature can ask the attorney general to investigate, S.B. 1487 complaints have challenged everything from local zoning requirements to hot potato political

35. CAL. REV. & TAX. CODE § 7284.12(f)(2) (Westlaw through Ch. 14 of 2022 Reg. Sess.).

36. Petition for Writ of Mandate Ruling, *supra* note 33, at 5.

37. *Id.* at 10.

38. See DALE A. KRANE, PLATON N. RIGOS & MELVIN B. HILL JR., HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK 476 tbl.A1 (2001) (listing California and Colorado as the only two states with “[b]road structural + functional” municipal home rule authority).

39. Act of Mar. 17, 2016, ch. 35, 2016 Ariz. Sess. Laws 161 (codified as amended at ARIZ. REV. STAT. ANN. §§ 41-194.01, 45-5029, 43-206 (2021)).

40. *Id.* at 161–62.

issues like vaccine mandates.⁴¹ It is thus unsurprising that the Arizona Senate's efforts to audit Maricopa County's 2020 election results ended in an S.B. 1487 complaint.

Arizona's much-mocked election audit was a circus.⁴² The Arizona Senate contracted with a firm called Cyber Ninjas to conduct the audit.⁴³ Cyber Ninjas had been heavily criticized for their lack of experience in election integrity and for their lax audit security protocols.⁴⁴ As part of this "audit," the state Senate subpoenaed Maricopa County's internal servers.⁴⁵ It was widely understood that the Senate would hand the servers over to Cyber Ninjas.⁴⁶ Maricopa County objected, insisting that handing over the servers would jeopardize sensitive information, including county residents' social security numbers, and leave confidential law enforcement communication systems vulnerable to hackers.⁴⁷ Before this issue could be resolved by the Arizona courts, a member of the Arizona legislature filed an S.B. 1487 complaint asking the Attorney General to determine whether the county's refusal to comply with the subpoena violated state law.⁴⁸ In August 2021, the Arizona Attorney General's Office issued an opinion concluding that the county had committed a violation.⁴⁹

In the opinion, the Attorney General determined that the county conceded the validity of the subpoena when it failed to appeal a superior court ruling upholding the validity of a separate, earlier subpoena.⁵⁰ As the opinion explains:

[T]he [Arizona] Superior Court previously decided, under circumstances materially similar to those here, that the Senators' subpoenas were valid and enforceable under Arizona law. That partial judgment, which the

41. See *SB1487 Investigations*, ARIZ. ATT'Y GEN. (2021), <https://www.azag.gov/complaints/sb1487-investigations> [<https://perma.cc/2PQW-BSG6>].

42. See Ronald J. Hansen, Yvonne Wingett Sanchez & Jen Fifield, 'You'll Get Nothing Out of This': Partisans with Limited Experience Stumble Through Gaffe-Prone 'Audit,' ARIZ. REPUBLIC (Nov. 22, 2021), <https://www.azcentral.com/in-depth/news/politics/elections/2021/11/20/arizona-audit-partisans-stumble-through-gaffe-prone-election-review/6124420001/> [<https://perma.cc/FSL4-8C95> (dark archive)] (describing the audit as "a bizarre distraction from reality led by amateurs" and "gaffe-prone").

43. *Id.*

44. *See id.*

45. *Id.*

46. See Jen Fifield & Mary Jo Pitzl, *Maricopa County and Dominion Won't Comply with New Subpoenas Issued by Arizona Senate*, ARIZ. REPUBLIC (Aug. 3, 2021), <https://www.azcentral.com/story/news/politics/elections/2021/08/02/maricopa-co-and-dominion-face-monday-deadline-ariz-senate-election-subpoenas/5434136001/> [<https://perma.cc/2GS2-Z5M2> (dark archive)] (explaining that the audit would be conducted by Cyber Ninjas).

47. *Id.*

48. MARK BRNOVICH, ARIZ. ATT'Y GEN., INVESTIGATIVE REPORT NO. 21-002, at 3–4 (2021), https://www.azag.gov/sites/default/files/docs/complaints/sb1487/21-002/MCBOS_1487_Report-8-26.pdf [<https://perma.cc/U3E9-5JC8>].

49. *Id.* at 1–2.

50. *Id.* at 4–5; *see also* *Maricopa County v. Fann*, No. CV 2020-016840, 2021 WL 804446, at *15 (Ariz. Super. Ct. Feb. 25, 2021) (finding a legislative subpoena related to election reform measures to be valid and enforceable in an earlier litigation).

Maricopa County Board of Supervisors (“MCBOS”) chose not to appeal, remains binding on MCBOS and has preclusive effect between MCBOS and the Senate.⁵¹

In a footnote in the opinion, the Attorney General’s Office then disclaimed the application of preclusion: “Whether issue preclusion technically applies is not dispositive; instead, the legal test here is whether ‘existing law clearly and unambiguously compels th[e] conclusion.’”⁵² But, as the Attorney General’s opinion makes clear, the scope of the Senate’s subpoena authority over confidential documents was an issue of first impression in Arizona’s courts. As the Arizona Supreme Court recognized, it is possible that “a local [action] arguably violates state law, but the issue is not settled by existing case law.”⁵³ In such cases, the Arizona Supreme Court held that S.B. 1487’s procedures require the Attorney General to issue a “may violate” opinion, which triggers a special action at the Supreme Court to resolve the outstanding legal question.⁵⁴ A single trial court decision does not establish clear and unambiguous law; superior court decisions are not precedential. The Attorney General concedes this when it acknowledged that the county could cure the violation through a “judicial resolution with the Senate,” presumably recognizing that the superior court might reach a different conclusion about this subsequent subpoena.⁵⁵

Even so, the Attorney General threatened Maricopa County with the loss of hundreds of millions of dollars in revenue.⁵⁶ The county and the Senate eventually reached a settlement: the county agreed to abandon its \$2.8 million claim against the Senate for damage to election machines in exchange for the Senate dropping its effort to require the county to turn its servers over to the Senate.⁵⁷

This dispute and the ultimate settlement highlight the ways S.B. 1487 turbocharges disputes between the state and its local governments. The validity of the subpoena was already before a court; the Senate had the authority to hold the county in contempt—at least once it came back into session.⁵⁸ The Attorney

51. BRNOVICH, *supra* note 48, at 4–5 (discussing *Fann*, 2021 WL 804446, at *15).

52. *Id.* at 5 n.3 (emphasis omitted).

53. State *ex rel.* Brnovich v. City of Tucson, 399 P.3d 663, 670 (Ariz. 2017).

54. *Id.* at 669.

55. BRNOVICH, *supra* note 48, at 2.

56. Mary Jo Pitzl, *Attorney General: Maricopa County Supervisors Violated Law by Not Complying with Election Audit Subpoena*, ARIZ. REPUBLIC (Aug. 26, 2021), <https://www.azcentral.com/story/news/politics/election/2021/08/26/arizona-election-audit-attorney-general-says-maricopa-county-broke-law-subpoenas/5601498001/> [<https://perma.cc/3VAV-G5KY/> (dark archive)].

57. Jerod MacDonald-Evoy, *Maricopa County, Senate Reach Agreement To End Subpoena Fight over Routers*, ARIZ. MIRROR (Sept. 17, 2021), <https://www.azmirror.com/2021/09/17/county-senate-reach-agreement-to-end-subpoena-fight-over-routers/> [<https://perma.cc/PU66-KKWL/>].

58. See Press Release, Arizona Att’y Gen. Mark Brnovich, AG Brnovich: Maricopa County Must Comply with Senate’s Legislative Subpoena or Forfeit State Funds (Aug. 26, 2021), <https://www.azag.gov/press-release/ag-brnovich-maricopa-county-must-comply-senates-legislative-subpoena-or->

General opinion short-circuited these procedures. And yet, to date, the Arizona Supreme Court has upheld the basic structure of S.B. 1487 against constitutional challenge.⁵⁹

B. *S.B. 1487 Under the Anti-Coercion Provision*

How would the S.B. 1487 fare under the *Principles*? The *Principles* limits conditions on intergovernmental aid to those that “relate to expenditure of that aid.”⁶⁰ Under this rule, conditions are subject to a nexus requirement; the conditions must “relate” to the aid.

In the context of this S.B. 1487 investigation, the relevant question under the anti-coercion provision is whether a legal requirement that the county comply with the Senate subpoena *relates* to the county’s expenditure of state shared revenues. The state-shared revenues support the county’s general fund, so the funding supports *all* ongoing operations, including the sheriff’s department, county jails, county libraries, and county parks.⁶¹ It is hard to understand in what way compliance with the audit “relates” to the operation of these programs and services.

Under this reading, the *Principles* suggests that general revenue transfers can be subject to general spending restrictions, like accounting requirements, but they cannot be withdrawn as a penalty for the exercise of local policy discretion.

The commentary provided in the *Principles* suggests that state courts could borrow from existing Federal Spending Clause jurisprudence in interpreting this rule. The commentary notes the parallel to the U.S. Supreme Court’s decision in *National Federation of Independent Businesses v. Sebelius* (“*NFIB*”).⁶² As the Supreme Court held in that case, “Conditions that do not . . . govern the use of the funds, however, cannot be justified on that basis. When, for example, such conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring

forfeit-state [https://perma.cc/JY49-7V6W]. Even if the structure of S.B. 1487 does not generally violate Arizona’s constitutional protection of the separation of powers, it is possible that the Attorney General’s decision to weigh in on an ongoing legal dispute did. See *Tucson Urging High Court To Overturn Law Penalizing Cities*, ASSOCIATED PRESS (Feb. 27, 2017), https://www.azcentral.com/story/news/politics/arizona/2017/02/27/tucson-urging-high-court-to-overturn-law-penalizing-cities/98487438/ [https://perma.cc/3XXS-9UZT].

59. See *State ex rel. Brnovich v. City of Tucson*, 399 P.3d 663, 669 (Ariz. 2017) (“Because S.B. 1487 ‘leaves the judiciary free to make its own determination based on the particular facts of a case, it comports with separation of powers.’” (citations omitted)); *State ex rel. Brnovich v. City of Phoenix*, 468 P.3d 1200, 1209 (Ariz. 2020) (finding the bond requirement of S.B. 1487 “so incomplete that we cannot enforce it” but otherwise adjudicating the case under S.B. 1487’s provisions).

60. PRINCIPLES, *supra* note 16, at 1352.

61. See MacDonald-Evoy, *supra* note 57 (estimating that the state shared revenue at stake accounted for forty-two percent of the county’s budget for the current fiscal year).

62. 567 U.S. 519 (2012); see also PRINCIPLES, *supra* note 16, at 1382.

the States to accept policy changes.”⁶³ Under this anti-coercion principle, S.B. 1487 could be challenged as placing an unduly coercive condition on the receipt of state shared revenues.

Faced with an anti-coercion challenge, the state might argue that S.B. 1487 does not impose additional requirements for local governments. Rather, it creates a separate adjudicative process for determining the scope of existing state law requirements and imposes a penalty for the failure to comply. As a factual matter, this process has proven coercive. S.B. 1487 has discouraged local governments in Arizona from adopting policies at the edge of their home-rule authority; the litigation risk is simply not worth it. For example, despite arguments that the Governor exceeded his legal authority in blocking local mask mandates by executive order,⁶⁴ no local government risked imposing such a mandate.⁶⁵

But the state might argue that this problem is distinct from the legal concerns present in the federal anti-coercion doctrine. The crux of the states’ challenge in *NFIB* was that under the Affordable Care Act,⁶⁶ states could not reject Medicaid expansion without risking their eligibility for the existing Medicaid program.⁶⁷ At the same time, Congress did not have the power to directly require states to expand Medicaid.⁶⁸ The federal anti-coercion doctrine, then, preserves a policy space for the state governments. The doctrine provides a constitutional protection for this space, freeing states from pressure to conform their budgets to the federal government’s preferences, at least when federal preferences lack a sufficient relationship to the spending program at issue.

Under this view, the scope of the state’s authority turns on whether home-rule immunity prevents the state from directly imposing the condition. As a result, anti-coercion would protect only home-rule jurisdictions, and only to the extent that home rule provides immunity from state preemption. If Arizona could require the county to comply with its subpoena request, the state could use S.B. 1487 to enforce that requirement.

63. *Nat’l Fed’n of Indep. Bus.*, 567 U.S. at 580.

64. See Josh Bendor & Erin Scharff, *Gov. Doug Ducey Is Wrong. Cities and Counties Have Broad Authority To Act on COVID-19*, ARIZ. REPUBLIC (July 9, 2021), <https://www.azcentral.com/story/opinion/op-ed/2020/07/09/gov-doug-ducey-wrong-arizona-cities-broad-power-act-coronavirus/5396125002/> [<https://perma.cc/3GA9-GHSC> (dark archive)].

65. See Allison Steinbach, *Do Arizonans Still Have To Wear Masks? Here’s What We Know After Ducey Lifts COVID-19 Restrictions*, ARIZ. REPUBLIC (Mar. 25, 2021), <https://www.azcentral.com/story/news/local/112rizona/2021/03/25/112rizona-mask-mandate-heres-what-we-know-after-ducey-relaxes-rules/7002251002/> [<https://perma.cc/J85C-QDKW> (dark archive)].

66. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 21, 25, 26, 29, and 42 U.S.C.).

67. *Nat’l Fed’n of Indep. Bus.*, 567 U.S. at 575.

68. See *id.* at 578.

Given the *Principles'* commitment to local authority and its explicit concerns about rising punitive preemption, the better reading of the provision is that it requires a nexus regardless of the state's ability to separately limit local authority. This interpretation also ensures that non-home-rule jurisdictions are protected by the anti-coercion rule. This reading highlights, however, the ways that the federal anti-coercion caselaw may not fully capture the complexities of the state-local relationship.

III. H.B. 1900 AND POLICE REFORM: HYPER PREEMPTION OF LOCAL BUDGETING

The video footage of a Minneapolis police officer murdering George Floyd sparked massive Black Lives Matter protests nationwide.⁶⁹ Among the demands of many protestors was a call to “defund the police.”⁷⁰ Advocates have differing views of the goals of the “defund” movement, from radical police abolition to the more reformist goal of reallocating portions of the police budget and public safety responsibilities to other departments.⁷¹ Few cities have made significant changes to their police budgets despite these efforts.⁷² Austin, Texas, is a notable exception.

In August 2020, the city voted to cut about a third of its police department budget.⁷³ These budget cuts included both direct cuts and shifts in spending, such as moving units like forensic sciences, support services, and victims' services into other city departments and the reallocation of \$50 million from the city's “Reimagine Safety Fund” to alternate programming.⁷⁴

Texas's state leadership was uniformly critical of Austin's decision. Governor Greg Abbott argued that “Austin's decision puts the brave men and women of the Austin Police Department and their families at greater risk and paves the way for lawlessness. . . . Public safety is job one, and Austin has abandoned that duty.”⁷⁵ Attorney General Ken Paxton asserted that the “city

69. See, e.g., Larry Buchanan, Quoctrung Bui & Jugal K. Patel, *Black Lives Matter May Be the Largest Movement in U.S. History*, N.Y. TIMES (July 3, 2020), <https://www.nytimes.com/interactive/2020/07/03/us/george-floyd-protests-crowd-size.html> [<https://perma.cc/3Y92-D928> (dark archive)].

70. See Mariame Kaba, *Yes, We Mean Literally Abolish the Police*, N.Y. TIMES (June 12, 2020), <http://www.nytimes.com/2020/06/12/opinion/sunday/floyd-abolish-defund-police.html> [<http://perma.cc/NBU7-GME8> (dark archive)].

71. Su et al., *supra* note 32, at 3.

72. See Rachel Hatzipanagos, *What 'Defund the Police' Might Look Like*, WASH. POST (June 12, 2020), <https://www.washingtonpost.com/nation/2020/06/12/black-lives-matter-defund-police-is-country-ready/> [<https://perma.cc/57NT-ENF2> (dark archive)].

73. Meena Venkataramanan, *Austin City Council Cuts Police Department Budget by One-Third, Mainly Through Reorganizing Some Duties out from Law Enforcement Oversight*, TEX. TRIB. (Aug. 13, 2020), <https://www.texastribune.org/2020/08/13/austin-city-council-cut-police-budget-defund/> [<https://perma.cc/U34D-9C3H>].

74. *Id.*

75. *Id.*

council's action to slash funding disregards the safety of our capital city, its citizens, and the many guests who frequent it."⁷⁶

Because the Texas legislature meets only biennially, the legislature was not in session to respond to Austin's funding shifts.⁷⁷ But Governor Abbott promised that the legislature would respond to "protect Austin" when it reconvened in 2021,⁷⁸ and Abbott kept this promise. This part both describes the resulting Texas legislation and analyzes it under the *Principles'* proposed anti-coercion and unfunded mandate provisions.

A. *H.B. 1900*

On June 1, 2021, Governor Abbott signed into law H.B. 1900, which places significant constraints on the ability of large Texas cities to control their own police budgets.⁷⁹

Under the law, certain jurisdictions may be declared "defunding municipalit[ies]" if the Criminal Justice Division of the Texas Office of the Governor determines that the municipality has reduced its police department funding as compared to the previous year's budget.⁸⁰ The law makes two exceptions. It does not apply when cuts to the police department budget are consistent with across-the-board cuts in the size of the city's budget.⁸¹ Nor does it apply when the governor's office approves the budget cuts.⁸²

The "defunding municipality" designation incurs a significant fiscal penalty. Cities determined to be "defunding municipalities" are prohibited from increasing property tax rates, even to adopt previously voter-approved tax rate increases, and in fact, must impose a tax cut to reflect the reduction in police spending.⁸³ Moreover, the law limits the ability of municipally owned utilities to increase rates and fees and prohibits the transfer of any revenue from rate or fee increases to the city's general fund.⁸⁴ Finally, the law allows the state

76. *Id.*

77. See *Texas Legislative Sessions and Years*, LEGIS. REFERENCE LIBR. TEX., <https://lrl.texas.gov/sessions/sessionYears.cfm> [<https://perma.cc/AV73-AW4V>] (showing that the legislature met in 2019 and 2021, but not in 2020).

78. See Venkataramanan, *supra* note 73.

79. Act of June 1, 2021, ch. 199, 2021 Tex. Sess. Law Serv. (West) (codified in scattered sections of TEX. GOV'T CODE, TEX. LOC. GOV'T CODE & TEX. TAX CODE); see also Su et al., *supra* note 32, at 18–20 (putting H.B. 1900 and Florida's H.B. 1 in the context of the historical role of state governments in limiting local police control); Megan Munce, *Gov. Greg Abbott Signs Slate of Legislation To Increase Criminal Penalties for Protesters, Punish Cities That Reduce Police Budgets*, TEX. TRIB. (June 1, 2021), <https://www.texastribune.org/2021/06/01/texas-abbott-defund-police-protest/> [<https://perma.cc/F8B8-77S8>].

80. Act of June 1, 2021, ch. 1999, 2021 Tex. Sess. Law Serv. (West) (codified at TEX. LOC. GOV'T CODE § 109.003 (2021)).

81. *Id.* (codified at TEX. LOC. GOV'T CODE § 109.004(a)(1) (2021)).

82. *Id.* (codified at TEX. LOC. GOV'T CODE § 109.004(a)(2) (2021)).

83. *Id.* (codified at TEX. TAX CODE §§ 26.044, .0501 (2021)).

84. *Id.* (codified at TEX. UTIL. CODE § 33.0211 (2021)).

to charge a “defunding municipality” for the cost of state-provided law enforcement in the jurisdiction, as determined by the governor’s office.⁸⁵ This charge is paid out of the municipality’s sales and uses tax revenue that is collected by the state on behalf of the municipality.⁸⁶

H.B. 1900 only applies to cities with populations greater than 250,000.⁸⁷ As of 2021, this limits the law’s application to eleven cities: Houston, San Antonio, Dallas, Austin, Fort Worth, El Paso, Arlington, Corpus Christi, Plano, Laredo, and Lubbock.⁸⁸ News accounts made clear, however, that the bill targeted Austin’s defunding efforts.⁸⁹ In addition to the evidence from the legislative debate, of the eleven cities potentially affected by H.B. 1900, only Austin operates a municipal electrical utility.⁹⁰ The consequences to Austin under the bill illustrate the pressure the statute places on large Texas cities to maintain current police funding levels. Among other consequences, “Austin Energy and Austin Water could be prohibited from transferring any utility revenue to the city’s general fund.”⁹¹ The *Austin-American Statesman* estimated that such a prohibition would prohibit a transfer of \$160 million, or “15% of the city’s revenue funding services like police and fire in 2020.”⁹²

Because the budget base year under the statute is 2019, the law required Austin to restore its previously enacted budget cuts, even though the statute was passed *after* Austin approved its FY 2021 budget.⁹³ Though at least one member of the city council wanted to seek a waiver from the application of H.B. 1900, the city approved a FY 2022 budget that restored the budget cuts.⁹⁴

85. *Id.* (codified at TEX. TAX CODE § 321.5025(c) (2021)).

86. *Id.* (codified at TEX. TAX CODE § 321.5025(b) (2021)).

87. *Id.* (codified at TEX. LOC. GOV’T CODE § 109.002 (2021)).

88. *List of Municipalities in Texas*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_municipalities_in_Texas [https://perma.cc/5UQP-SS69] (Dec. 7, 2021).

89. Philip Jankowski, *How Will Texas’ ‘Defund the Police’ Bill Affect Austin? Leaders Aren’t Sure*, AUSTIN AM.-STATESMAN (May 28, 2021), <https://www.statesman.com/story/news/2021/05/28/texas-defund-police-bill-heads-greg-abbott-austin-leaders-unsure-future/7453268002/> [https://perma.cc/HW86-F7L7] (staff uploaded, dark archive)] (“While HB 1900 applies to Texas’ 11 largest cities, the bill was clearly written with Austin in mind and designed to undo Austin City Council action last year that reduced Austin Police Department’s budget and reallocated millions by removing some operations from the police department.”).

90. *TPPA Member Utilities*, TEX. PUB. POWER ASS’N, <https://tppa.com/members/> [https://perma.cc/D86M-UTJS].

91. Jankowski, *supra* note 89.

92. *Id.*

93. Act of June 1, 2021, ch. 199, 2021 Tex. Sess. Laws Serv. (West) (codified at TEX. LOC. GOV’T CODE § 109.0035 (2021)) (comparing the FY 2021 budget to the highest budget in place in the previous two years).

94. Ryan Autullo, *Police Funding, Homeless Spending, Vaccination Bonuses Headline Austin Budget Discussions*, AUSTIN AM.-STATESMAN (Aug. 11, 2021, 7:19 AM), <https://www.statesman.com/story/news/2021/08/11/police-funding-homeless-spending-vaccination-bonuses-headline-austin-budget-discussions/5546802001/> [https://perma.cc/YEB5-QGUF] (“After cutting money from the Police Department last summer, the council is prepared to restore it to avoid penalties from a new state law

H.B. 1900 imposes a significant financial penalty on defunding municipalities. Even when local voters support shifting public safety dollars away from municipal policing budgets, municipal officials are unlikely to risk such a loss of property tax dollars. As a result, H.B. 1900 induces local governments to maintain their current levels of police spending, as it was intended to do. Under current Texas law, it is difficult to challenge these actions as a violation of municipal home rule.⁹⁵ The next section considers whether the *Principles* offers more protection for local budget authority.

B. *H.B. 1900 Under the Anti-Coercion and Unfunded Mandate Provision*

The *Principles* project envisions a constitutional provision that would require that conditions on intergovernmental aid relate to the expenditure of that aid and would further restrict the state from removing aid as a penalty for the exercise of a local government's home-rule authority.⁹⁶ In the commentary to the project, we suggested that courts could borrow from existing Federal Spending Clause jurisprudence, noting the parallel to the U.S. Supreme Court's decision in *NFIB*.⁹⁷ As the Court held in that case,

Conditions that do not . . . govern the use of the funds, however, cannot be justified on that basis. When, for example, such conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes.⁹⁸

H.B. 1900, however, is far from the “good deal” that Congress offered states in exchange for Medicaid expansion. There is, in fact, no deal on the table and no restriction on intergovernmental aid. As a result, there is no “unconstitutional condition” being added to state spending power and thus no problem to be addressed by the anti-coercion principle.

Instead, the state threatens significant limits on local *taxing* authority should governments adopt budgets with spending priorities that differ from the states. The question of whether such limits would meet the new, more stringent

aimed at punishing cities that remove funding from their police department budgets.”); Ryan Autullo, *Austin Council OKs \$4.5B Budget That Includes Tax Break, \$65 Million in Homeless Spending*, AUSTIN AM.-STATESMAN (Aug. 12, 2021, 11:16 PM), <https://www.statesman.com/story/news/2021/08/12/austin-city-council-oks-4-5-b-budget-includes-tax-break-65-million-homeless-spending/8110988002/> [http://perma.cc/9879-YN6G] (describing the budget passed by the Austin City Council as resembling a proposal by the city manager).

95. Though there is a legal challenge pending against Florida's efforts to restrain local police spending, no similar challenge has been filed in Texas. See Dara Kam, *Florida Cities Challenge State's Protest Law over Budget Power*, WLRN (Nov. 16, 2021, 4:26 PM), <https://www.wlrn.org/news/2021-11-16/florida-cities-challenge-states-protest-law-over-budget-power> [https://perma.cc/3B3U-9YKT].

96. PRINCIPLES, *supra* note 16, at 1352.

97. *Id.* at 1382 (discussing *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 580 (2012)).

98. *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 580.

preemption standard is beyond the scope of this Article.⁹⁹ In the end, it may be that restricting state preemption authority is the most effective way to limit state fiscal coercion. That position is in keeping with the California court's decision in *Cultiva La Salud*,¹⁰⁰ where the court expressly held that the state could not impose limits on local taxing authority in order to circumvent the immunity from state preemption granted by the California Constitution.¹⁰¹

Some aspects of H.B. 1900 might, however, be challenged under the *Principles'* unfunded mandate provision. Texas does not have a prohibition on unfunded mandates, though state law does require some tracking of these mandates.¹⁰² Under the National League of Cities' proposal, states are prohibited from either "requir[ing] local governments to provide additional services or undertak[ing] new activities without providing an additional appropriation that fully funds the newly mandated service or activity."¹⁰³

The question, then, is whether the state's requirement that the local government maintain its current level of police funding constitutes a requirement of an "additional service" or a "new activity." Certainly, there is some force to the idea that if a state wants local governments to maintain a specific police expenditure level, then the state ought to pay for this expense. However, the language of the provision does not obviously suggest that such a requirement would constitute an unfunded mandate. A city seeking to avoid designation as a "defunding municipality" is not required to provide an "additional service" or engage in a "new activity." The law does not even clearly

99. Paul Diller addresses some of these questions in his work for this Symposium. Paul A. Diller, *Is Enhanced Judicial Review the Correct Antidote to Excessive State Preemption?*, 100 N.C. L. REV. 1469 (2022).

100. Petition for Writ of Mandate Ruling, *supra* note 33.

101. *Id.* at 10.

102. See TEX. LOC. GOV'T CODE ANN. §§ 320.001–.004 (Westlaw through the end of the 2021 Reg. & Called Sess. of the 87th Leg.). Local officials have long complained about state laws that both restrict their revenue and also require significant new expenditures. TEX. ASS'N OF CNTYS., UNFUNDED MANDATES (2020), <https://www.county.org/TAC/media/TACMedia/Legislative/Legislative-Brief/Unfunded-Mandates-Aug-2020.pdf> [<https://perma.cc/96FF-RWD4>]; Sarah Lazarowitz, *Unfunded Mandate Legislation*, TEX. CNTY. PROGRESS (Feb. 1, 2021), <https://countyprogress.com/unfunded-mandate-legislation/> [<https://perma.cc/E8L6-DSAC>]; TEX. ASS'N OF SCH. ADM'RS & TEX. ASS'N OF SCH. BDS., REPORT ON SCHOOL DISTRICT MANDATES: COST DRIVERS IN PUBLIC EDUCATION 4 (2018), <https://tasanet.org/wp-content/uploads/2019/04/2018-Report-on-School-District-Mandates.pdf> [<https://perma.cc/6HUL-NCMA>]; *Legislative Update: 2021 Resolutions*, CNTY. JUDGES & COMM'RS ASS'N TEX. (Oct. 13, 2021), <https://www.cjcat.org/page/cjcat-LegislativeUpdate> [<https://perma.cc/SGW7-HQUA>]. In fact, at one time, even Governor Abbott recognized the problem, observing in his 2019 State of the State Address that "Texas must limit the ability of taxing authorities to raise your property taxes. At the same time, Texas must end unfunded mandates on cities and counties." Ross Ramsey, *Analysis: Unfunded State Mandates Have a New Enemy—the Governor of Texas*, TEX. TRIB. (Jan. 22, 2019), <https://www.texastribune.org/2019/01/22/unfunded-mandates-new-enemy-governor-texas/> [<https://perma.cc/8FRY-8CJF>].

103. PRINCIPLES, *supra* note 16, at 1353.

require an increase in police funding. Rather, the law mandates the city maintain the funding status quo.

That being said, the requirement that the city reimburse the state for “public safety costs” would seem to run afoul of the unfunded mandate. While typical unfunded mandates require local governments to provide the additional service or new activity directly, the language of the prohibition does not require such a direct service provision. It simply prohibits the state from requiring local governments to provide the service. Under H.B. 1900, Texas is requiring cities to foot the bill for a new service: state-provided public safety enforcement.

Neither the anti-coercion provision nor the unfunded mandate provision seem to limit Texas’s ability to condition local taxing authority on municipal compliance with the state spending priorities. Nevertheless, the unfunded mandate provision would prevent Texas from requiring local governments to reimburse the state for costs associated with the state’s perceived needs to increase state public safety spending within a local jurisdiction.

IV. ARIZONA’S EDUCATION GRANTS

On June 28, 2021, as part of its K-12 budget bill, the Arizona legislature enacted a number of provisions that limited the policies that public school districts could adopt to mitigate the risks of COVID-19.¹⁰⁴ The prohibitions included bans on vaccine requirements and masking requirements.¹⁰⁵ To allow for the possibility of a citizen referendum, most Arizona laws become effective ninety days after enacted.¹⁰⁶ Arizona’s public schools start in early August, and so, after some initial confusion, many school districts adopted mask requirements to remain in effect at least until the ban was in effect.¹⁰⁷

Facing backlash from anti-mask Republican activists, Arizona Governor Doug Ducey announced a \$163 million grant program that conditioned eligibility on compliance with state law.¹⁰⁸ This grant program, known as the Education Plus-Up Grant, was designed for school districts who were ineligible

104. Act of June 30, 2021, ch. 405, § 39, 2021 Ariz. Legis. Serv. (West) (codified at ARIZ. REV. STAT. ANN. § 26-307 note (2021)); Act of June 30, 2021, ch. 409, §§ 12–13, 2021 Ariz. Legis. Serv. (West) (codified at ARIZ. REV. STAT. ANN. §§ 36-672, -681 to 82 (2021)).

105. Act of June 30, 2021, ch. 405, § 39, 2021 Ariz. Legis. Serv. (West); Act of June 30, 2021, ch. 409, §§ 12–13, 2021 Ariz. Legis. Serv. (West).

106. Ninety days is the deadline for gathering signatures for a referendum, which automatically stays a statute. ARIZ. CONST. art. IV, pt. 1, § 1(3).

107. Yana Kunichoff, *Suburban School Districts in Metro Phoenix Are Rethinking Mask Mandates. Here’s Why*, ARIZ. REPUBLIC (Aug. 19, 2021), <https://www.azcentral.com/story/news/local/arizona-education/2021/08/19/suburban-school-districts-metro-phoenix-rethink-mask-mandates-court-ruling/8169145002/> [https://perma.cc/53VS-QFJB (dark archive)].

108. News Release, Off. of the Governor Doug Ducey, Governor Ducey Announces \$163 Million To Increase Per Pupil Funding in Schools (Aug. 17, 2021) [hereinafter Ducey Press Release], <http://az.governor.gov/governor/news/2021/08/governor-ducey-announces-163-million-increase-pupil-funding-schools> [https://perma.cc/F2B3-TPRH].

for previous federal relief that had been made available to high-poverty schools and school districts.¹⁰⁹ Ducey’s press release made it clear that the state law he was most concerned about was the law prohibiting mask requirements: “Parents are in the driver’s seat, and it’s their right to make decisions that best fit the needs of their children. Safety recommendations are welcomed and encouraged—mandates that place more stress on students and families aren’t.”¹¹⁰ To alleviate any doubt that schools were expected to comply with prohibitions on mask requirements even before the state law was in effect, the announcement clarified that the funding “is contingent on being in full compliance with state law, including Laws 2021, Chapter 404, the FY 2022 K-12 Budget Reconciliation Bill for the entirety of the 2021–2022 school year.”¹¹¹

As a policy matter, of course, one could object to the wisdom of the state conditioning education funding on schools flouting public health guidance. At the same time, it would seem relatively uncontroversial to require state grant recipients to follow state law. However, Ducey’s announcement went further than merely requiring compliance with state law. By requiring compliance with Chapter 404 of the session law¹¹²—which prohibited mask requirements—for the “entirety of the 2021–2022 school year,”¹¹³ Ducey prohibited mask requirements even when such requirements were allowed under state law. And when the mask ban was declared unconstitutional by an Arizona superior court judge, Ducey made his intent even clearer: he announced the grant program would be open only to schools that imposed no masking requirements.¹¹⁴

The Education Plus-Up program is funded by federal COVID-19 relief dollars,¹¹⁵ and U.S. Treasury regulations make clear that such funds can be used to implement COVID-19-related public health measures, such as mask mandates.¹¹⁶ Using that federal aid to undermine public health would seem an improper use of even the state’s broad spending discretion under the federal program.

In the context of an exploration of the *Principles*, however, this Article is concerned with whether this condition would be unconstitutionally coercive under the proposed home-rule framework. Under the anti-coercion principle, conditions on grants must “relate to the expenditure of that aid.” How tight

109. *Id.*

110. *Id.*

111. *Id.*

112. Act of June 30, 2021, ch. 404, 2021 Ariz. Legis. Serv. (West) (codified in scattered sections of ARIZ. REV. STAT. ANN.).

113. Ducey Press Release, *supra* note 108.

114. Jim Small, *Ducey: Schools Won’t Get COVID Aid Money If They Require Masks*, ARIZ. MIRROR (Aug. 17, 2021), <https://www.azmirror.com/2021/08/17/ducey-schools-wont-get-covid-aid-money-if-they-require-masks/> [https://perma.cc/UGL2-9PUT].

115. *See id.*

116. Coronavirus State and Local Fiscal Recovery Funds, 31 C.F.R. §§ 35.1–.12 (2021).

must the fit be under this requirement? Under the federalism jurisprudence of the federal courts, anti-coercion restricts Congress's ability to use its spending power. Under this Spending Clause framework, as articulated in *South Dakota v. Dole*,¹¹⁷ "conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'"¹¹⁸ And as the Supreme Court elaborated in *NFIB*, even if the condition is related to the federal interest, it may still run afoul if "'the financial inducement offered by Congress' was 'so coercive as to pass the point at which "pressure turns into compulsion.'"¹¹⁹

Applying the *Dole* framework requires an analysis of the government interest in the Education Plus-Up Grant Program.¹²⁰ According to the Office of the Arizona Governor, the grant program "is designed to further aid in the mitigation of the economic impacts of COVID-19 and further ensure financial stability to Arizona Local Education Agencies . . . in preparation for the 2021–2022 school year."¹²¹ Governor Ducey frames the ban on mask mandates as consistent with the purpose of the program, that is, getting schools open and returning to normal.¹²² That the ban on mask mandates was put in place *after* the program was announced makes it challenging to argue that the mask ban is related the program's goals. Moreover, banning mask requirements seems inconsistent with the goal of ensuring schools remain open given that the Arizona Department of Health Services was still recommending students be masked in schools when the governor made his announcement. Litigants would seem to be in a strong position to argue that the state's interest in the Education Plus-Up Grant Program was not sufficiently related to the state's interest in allowing students to attend school unmasked.

Even if a court were to find the grant program's purpose is sufficiently related to the ban on mask requirements, litigants could still pursue the anti-coercion claim. Under *NFIB*, grants can still be unconstitutional when they are "so coercive as to pass the point at which 'pressure turns into compulsion.'"¹²³

117. 483 U.S. 203 (1987).

118. *Id.* at 207 (quoting *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality opinion)).

119. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 580 (2012) (quoting *Dole*, 483 U.S. at 211).

120. *Cf. Dole*, 483 U.S. at 209 ("By enacting § 158, Congress conditioned the receipt of federal funds in a way reasonably calculated to address this particular impediment to a purpose for which the funds are expended.")

121. *Education Plus-Up (EPU) Grant Program*, ARIZ. TOGETHER (2021), <https://arizonatogether.org/educationplusup/> [<https://perma.cc/4WKN-YEL4>].

122. Yana Kunichoff, *These Arizona School Districts Received Grants from Ducey's Controversial COVID-19 Program*, ARIZ. REPUBLIC (Oct. 8, 2021), <https://www.azcentral.com/story/news/local/arizona-education/2021/10/08/these-arizona-schools-got-money-doug-ducey-covid-19-program/6024704001/> [<https://perma.cc/S8C4-S3YN> (dark archive)].

123. *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 580 (quoting *Dole*, 483 U.S. at 211).

Because the funding formula for the grant program depended on the aid school districts had previously received, the funding at stake for school districts and individual charter schools varied.¹²⁴ For some school districts, the amount of funding at stake was small. For others, however, the funding was quite significant. The two largest grants went to suburban Chandler Unified, which received roughly \$11.1 million, and suburban Tucson's Vail Unified, which received over \$12 million.¹²⁵ For Chandler Unified, the Education Plus-Up grant represented almost three percent of their projected FY 2022 budget.¹²⁶ For Vail Unified, the money represented more than ten percent of the proposed FY 2022 maintenance and operating budget.¹²⁷ For these districts, it would seem that the proposal was unconstitutionally coercive. There was simply too much aid at stake for the districts to choose to forgo the grant program.

As this analysis suggests, there are strong arguments that the Education Plus-Up Grant Program would run afoul of the anti-coercion provision contained in the *Principles*. Analyzing the program under the Supreme Court's spending jurisprudence, as commentary on the *Principles* suggests was the intent of the provision, the program's ban on mask requirements seems unrelated to its larger purpose, and especially for those districts receiving large Education Plus-Up grants, the amount of the grant itself might be considered to be unduly coercive.

V. BREAKING THE CHAINS OF FISCAL PREEMPTION

This Article is an imaginative exercise. To date, no jurisdiction has even considered adopting the *Principles*. Engaging in this exercise, however, helps us understand both the stakes and the limits of legal reform.

Texas's S.B. 1900 imposes a direct limit on local budget discretion, while Arizona's S.B. 1487 imposes fiscal sanctions that also effectively limit local policy choice. Both laws reduce local authority in areas where local majorities are in conflict with elected state leadership.¹²⁸ Arizona's Governor Ducey

124. See Kunichoff, *supra* note 122 (showing a table indicating grants ranging from \$10,676 to \$12,364,177).

125. *Id.*

126. Calculations were done by the author. See *id.* (indicating that Chandler Unified School District received \$11,104,833 from the Education Plus-Up grant); CHANDLER UNIFIED SCH. DIST., ANNUAL EXPENDITURE BUDGET (July 15, 2021), <https://www.ade.az.gov/sfsinbound/GeneralUpload/175183.xls> [<https://perma.cc/CJ8K-Z4AR>] (showing the total approved expenditures for maintenance and operations of FY 2022 as \$333,113,197).

127. Calculations were done by the author. See Kunichoff, *supra* note 122 (indicating that Vail Unified School District received \$12,364,177 from the Education Plus-Up grant); VAIL UNIFIED SCH. DIST., PROPOSED EXPENDITURE BUDGET 1 (June 25, 2021), https://core-docs.s3.amazonaws.com/documents/asset/uploaded_file/1513713/FY_2021-2022_Proposed_Expenditure_Budget.pdf [<https://perma.cc/4VXJ-WPZR>] (showing an adopted maintenance and operations budget of \$102,149,282).

128. It is unclear how statewide elected majorities feel about these debates. Certainly, the defunding movement lacks popular support in Texas statewide, but polling suggests potential state

dangled the carrot of additional state education funds in exchange for forgoing mask mandates. Questions of election integrity, police brutality, and masking are not simply hot-button flash points—the outcomes of these debates have real effects on lives and on the very strength of American democracy. In different ways, each of these efforts used the threat of local budget cuts and the elimination of local budget discretion to force local governments in line with state policy goals.

To date, legal challenges to such efforts have focused on procedural problems with their enactment or substantive questions over local home-rule authority. In at least two examples, Governor Ducey's efforts to thwart school mask mandates and S.B. 1487's punitive fiscal provisions, the *Principles* fiscal provisions provide a strong legal case for challenging state action. The *Principles* would also provide for the possibility of challenging S.B. 1487 as unduly coercive. Texas's efforts to limit local discretion over public safety budgets is probably better challenged under the model's home-rule provisions.

Efforts to thwart local control have been seemingly boundless in their creativity, especially when it comes to fiscal penalties. Efforts to restrain this creativity would also redirect it. In this respect, the importance of the *Principles* lies not simply in the ways that it offers a meaningful path to more legal protection for local authority. The *Principles* also hopefully offers an invitation to a conversation about changing the politics of the preemption debate, centered on the claim that local policy diversity might offer an escape out of endless partisan rancor. The success of this project will depend on who accepts this invitation to dialogue.

majority support for both ending the election audit in Texas and school masking requirements in Arizona. See, e.g., Yana Kunichoff, *Poll by Arizona Pro-Mask Groups Says Majority of Likely Voters Want Masks in Schools*, ARIZ. REPUBLIC (Sept. 9, 2021, 12:00 PM), <https://www.azcentral.com/story/news/local/arizona-education/2021/09/09/arizona-pro-mask-groups-poll-majority-support-school-mask-man-dates/5772050001/> [https://perma.cc/8ECS-QRD2 (dark archive)]; Ross Ramsey, *UT/TT Poll: Majority of Texans Oppose Permitless Carry, Would Ban Police Chokeholds and Taxpayer-Funded Lobbying*, TEX. TRIB. (May 3, 2021, 5:00 AM), <https://www.texastribune.org/2021/05/03/texas-voters-legislature-poll/> [https://perma.cc/SGC8-ELFZ] (discussing polls showing that seventeen percent of Texans supported decreasing police funding and sixty-four percent of Texans wanted state oversight of local decisions to reduce police funding).