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Intergovernmental Conflicts in a Time of Pandemic: State and Municipality Power Struggles in the United States and Brazil

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ABSTRACT

This article examines the issue of overlapping and competing responsibilities and competences that arose in the United States and Brazil, following the COVID-19 global emergency of 2020. It considers the way in which the diffusion of power within both federal systems generated intergovernmental conflict and the extent to which the differences in federal design shaped the way in which these conflicts could be managed and resolved.

KEYWORDS

Intergovernmental responses and conflicts, COVID-19, federal design, municipalities in a federal constitution

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Introduction

As the World Health Organisation declared the COVID-19 global health emergency officially over,[1] the United States and Brazil topped the list of countries that in terms of the number of cases and percentage of deaths by population had been worst affected.[2] The reasons for this are multifarious and much has been written concerning the absence of effective leadership on the part of the presidents of both of these countries. The United States and Brazil however are federal countries with constitutions that diffuse regulatory power away from the centre in favour of state and local governments. In the absence of strong presidential leadership, the frontline of response was at these lower levels with a resulting patchwork of responses that did little to promote public confidence in the ability of their governments to control the spread of the disease. Both countries saw popular opposition to and protests against public health emergency orders which closed businesses and schools, required masks to be worn on public transport and in public places and at their most extreme, required citizens to stay at home or 'shelter in place'. In both countries, these orders generated law suits framed in terms of infringement of constitutional rights. These cases typically turned on arguments concerning the balance to be reached when the exercise of individual rights and liberties must give way to, and can justifiably be restrained in, the public interest. The arguments are familiar, in principle if not in specifics, and are not rehearsed here. More generally however, and specifically of interest for this article, is the issue of overlapping and competing responsibilities and competences that accompany the diffusion of power within a federal system, the intergovernmental conflict that can ensue and the extent to which federal design shaped the way in which these conflicts could be managed and resolved. These conflicts foreground important differences in two federal models that typify the contrast between what Professor Hirschl identifies as old and new world constitutionalism, notably the extent to which they formally recognise and allocate a place within the federal structure to local authority and specifically to the city. [3]

Professor Hirschl's book *City, State: Constitutionalism and the Megacity* sets out to address what he considers to be "a fundamental void" within contemporary constitutional scholarship, namey the absence of serious consideration to the role of the city. This is of concern when we consider that the ever-growing numbers of people who now live in the urban agglomerations he terms 'megacities' increasingly represent the majority of the world's population and that it is the city that is now a major, if not the major, provider and regulator of the resources, infrastructure and services that support their lives. This absence, he suggests, is more than scholarly silence because it mirrors "hard wired" constitutional arrangements "featuring constitutional division of competences adopted in a pre-megacity era and increasingly detached from twenty-first century realities."[4] In this connection he draws a distinction between the "hard-wired city-subverting constitutional

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1 https://www.reuters.com/business/healthcare-pharmaceuticals/covid-is-no-longer-global-health-emergency-who-2023-05-05/.

2 https://www.statista.com/statistics/1093256/novel-coronavirus-2019ncov-deaths-worldwide-by-country/ (accessed 9 Oct. 2023).

3 Ran Hirschl, City, State: Constitutionalism and the Megacity 7-19 (2020).

4 *Id*. at 10.

frameworks" of much of the 'old world' Global North and "new world" constitutional orders, largely those of the Global South. The former, adopted over a two-hundred year period between the late eighteenth century and the 1970s include the U. S. constitutional order; the latter with "potential to facilitate accommodation with the reality of urban power" include that of Brazil.

The U.S federal model divides power between the federal government and the fifty states and has nothing further to say concerning a role for local authorities. Constitutional amendment is difficult if not functionally impossible so that decisions concerning city empowerment or restraint continue to be matters for the laws and constitutions of the individual states from which the cities draw their powers. Absent a constitutional framework that can mediate conflicts between city and state governments, law suits concerning the scope of municipal powers will be determined by reference to state law that typically accords precedence to state interests and priorities. This means that when, for example, in the current crisis, cities object to the scope of gubernatorial executive orders, city challenges are unlikely to succeed when brought by way of law suits framed in terms of demarcation of power but are more likely be resolved by means of processes of political accommodation and adjustment.

In relation to Brazil however, the position is different. Article 1 of the Brazilian Federal Constitution of 1988 (CF-88) states: "The Federative Republic of Brazil, formed by the indissoluble union of the states and municipalities and of the Federal District, is a legal democratic state […]."The new Brazilian constitution, adopted in 1988 after a 20-year military dictatorship, set out to create a decentralized three-tier federal state with specific recognition of local governments, "municípios", provided with autonomy (the right to self-organization, self-government and self-administration) and executive competencies in relation to the delivery of public services and goods.[5] As one co-author has observed: "a decentralized option was almost intuitive in a country with such a large territorial expanse and, further, such a system was already rooted in Brazilian history.[6] The challenge was to conceive a federalist model fit to create a national government that not only recognized and respected the cultural diversity of its territory but would also facilitate the ability of local governments to "act in a synchronized manner to avoid a cacophony of conflicting political standards."[7] Today, Brazil has 5,570 "municípios"[8] with exclusive power to legislate in relation to matters of local interest. The fact that Article 30 gives no definition of what constitutes a local interest means that the scope of local autonomy in practice falls to be determined by the courts.[9] Thus in contrast

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5 Art 30 CF-88 states that "The municipalities have the power to: I. legislate upon local interest". However, there is no definition of what local interest is.

6 *See* Vanice Regina Lirio do Valle, *The Brazilian Constitution: Context, Structure and Current Challenges* 9 Br. J. Am. Leg. Studies (2020) (noting that "[e]ven in its original organization as a colony under Portuguese domination, Brazil was territorially divided into "hereditary captaincies" (capitanias hereditárias).").

7 Bruce A. Antkowiak, *Contemplating Brazilian Federalism: Reflections on the Promise of Liberty*, 43 Duq. L. Rev. 599, 601 (2005).

8 *See* Vanice Regina Lirio do Valle, *The Brazilian Constitution: Context, Structure and Current Challenges* 9 Br. J. Am. Leg. Studies (2020).

9 Gilberto M. A. Rodriguez, *Are Cities Constituent Units in Brazil's Federalism?* 50 Shades of Federalism, http://50shadesoffederalism.com/case-studies/cities-constituent-units-brazils-federalism/.

to the U.S. experience and fuelled by the re-emergence of intergovernmental hierarchies that Professor Hirschl suggest may be "deeply engrained"[10] in Brazil's constitutional culture we see the judicialization of disputes concerning competences and responsibilities which have ultimately had to be decided by the country's constitutional court.

In Brazil, in the context of a conflict between a federal government led by a Covid-impact-denying President and states and municipalities seeking to put in place measures for the protection of public health and the control of the pandemic, the Federal Supreme Court of Brazil (SFT) has been asked to pronounce specifically upon the constitutional allocation of competencies on two occasions. Part I of this article considers these law suits and the context in which they arose with the premise that they have something important to contribute to our understanding of federalism and constitutional design in Brazil.

By way of contrast, Part II of this article moves to the United States where the public health concern is similar but the constitutional dynamic is different. In this Part we identify and examine disputes between five states and their municipalities. In the absence of a constitutional framework that can recognise and empower local authorities vis-à-vis the states to which, in legal terms, they belong, the disputes to date have not made it into a federal court but are framed in terms of state law under which they stand little prospect of success. We note however that in some of the court filings it is possible to discern the rudiments of an argument for independent local autonomy which its proponents claim is deeply rooted in the U.S. concept of democracy and consider whether this is an argument whose time may now have come.

Part I Brazil: Covid -19 and the Role of the Federal Supreme Court

In Brazil the pandemic tested the fragilities of constitutional design at both the intersection of federal, state, and local government competencies and the processes for managing intergovernmental disputes. What emerged was a story of a president who, for political gain, pitted himself against the federation, but in the words of UACES commentators Rodriguez and de Valera, the result was a "positive outcome for the Brazilian federal system":

> new horizontal intergovernmental relations have been strengthening subnational autonomy and decentralization. A broad recognition that states and municipalities are doing the right thing is spreading both national[ly] and internationally. The Brazilian federation will [...]not [be] the same after the COVID-19 pandemic. [11]

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[10] Hirschl, *supra* note 3 at 13.

[11] Gilberto M. A. Rodriguez & Vanessa Oliveiras de Valera, *Brazil and Covid-19: The President Against the Federation*, UACES Territorial Politics, https://uacesterrpol.wordpress.com/2020/06/05/brazil-and-covid-19-the-president-against-the-federation/

This outcome is in no small part attributable to the role of the Federal Supreme Court of Brazil (FSC) which handed down several major decisions which have had the effect of strengthening the autonomy of regional and local authorities as against the federal government.

This Part of this article now proceeds as follows. In Section A we briefly outline the early chronology of the federal and state responses to the emerging public health crisis. We note that the pattern of responses was shaped by underlying political conflicts which came before the FSC, framed in terms of constitutional competences.

In Section B we examine the FSC responses by reference to the constitutional framework that was put in place following the adoption of a new democratic constitution in 1988. We focus specifically on these issues: a) the formalization within the new federal union of a role for municipalities as equal members the union together with the states and the federal government, b) the open quality of constitutional drafting which has required the judiciary to take on an enhanced role in terms of filling the silences and omissions of the 1988 document; c) the judicialization of intergovernmental disputes as politics by another means and d) in the particular context of Covid-19 induced intergovernmental politics, the recent judicial pronouncements which have enhanced the authority of local decision-making in relation to constitutionally allocated competences. While in the context of this particular emergency, the outcome has been positive for regional government and municipal autonomy specifically, we query whether the preference for a judicial solution to what are essentially political disputes will in the longer term erode the authority of the Court which has no independent power of implementation, absent the existence of a supportive political will.

A. COVID-19 and the Judicialization of Politics

President Bolsonaro's initial response was to refuse to recognize the severity of the threat, dismissing COVID-19 as "simply flu", and stating that the risks to public health were overestimated.[12] Faced with the exponential rise of the disease in their own states, governors from São Paulo and Rio de Janeiro assumed the initiative and issued precautionary stay-at-home orders, closing business and schools. The governors of others states where rates of infection were still low, waited for directions from the central government. [13] What followed was shaped more by political considerations than those of public health.

The states of São Paulo and Rio de Janeiro are the largest in the federation. Both states were governed by political opponents of President Bolsonaro; João Doria, governor of São Paulo was a prospective presidential candidate, running against Bolsonaro; and at the time, so too was Wilson Witzel, governor of Rio de

[12] Nick Paton Walsh, Jo Shelley, Eduardo Duwe and William Bonnett, *Bolsonaro Calls Coronavirus a 'Little Flu.' Inside Brazil's Hospitals, Doctors Know the Horrifying Reality*, CNN, May 23, 2020, https://edition.cnn.com/2020/05/23/americas/brazil-coronavirus-hospitals-intl/index.html.

[13] Manuel Ventura, *Estados Esperam Socorro do Governo há 70 Dias; Ajuda Só Deve Chegar na Semana Que Vem*, O GLOBO, https://oglobo.globo.com/economia/estados-esperam-socorro-do-governo-ha-70-dias-ajuda-so-deve-chegar-na-semana-que-vem-1-24461703.

Janeiro[14]. On March 20 · 2020, Bolsonaro in an attempt to regain the initiative, issued Provisional Measures 926 and 927, altering the legal framework previously established by Federal Law 13.979/2020, and concentrating with the central government, power to: a) decide what kind of public services should be considered essential and therefore, exempt from pandemic restrictions; b) approve restrictions to intermunicipal or interstate transportation determined by states and municipalities; c) approve, through the Health Ministry, all restrictive measures determined by states and municipalities. The effect was to change the role of central government from coordination, to that of leadership of the struggle to control the pandemic.

Three days later, the constitutionality of those Provisional Measures was challenged by the Democratic Labor Party (ADI 6341[15]) and the Sustainability Network Party (ADI 6343[16]) in the Federal Supreme Court (STF) by means of ADIs 6341 and 6343.[17] In March 24th, 2020 Justice Marco Aurelio granted the Democratic Labor Party a preliminary injunction in ADI 6341, "... to make explicit, in the pedagogical field, according to STF's understanding, the concurrent competency" [among the three federative layers]. Both ADIs were submitted to a full bench.

In April 14th, 2020 in ADI 6343, the Court in a 7 to 4 ruling, confirmed the public health competencies of states and municipalities and suspended the requirement that decisions related to protective measures be submitted to the central government:

> The federal entities do not need to abide by a technical authorization provided by the central government in order to enforce every local policy designed to contain the effects of the pandemic but every local measure must be grounded by a technical or scientific justification.
>
> The Union, the states, and the municipalities may each restrict the right to movement within the country in order to contain the spread of the pandemic according to their respective constitutional powers; but they shall not restrain the essential goods and services from circulating freely.[18]

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14 The situation changed dramatically regarding Rio de Janeiro. The initiation of an impeachment process against Wilson Witzel in June 2020, based on serious accusations about corruption in contracts related to facing the pandemics eliminated his chances in the presidential candidacy running.

15 ADI 6341, Justice-Rapporteur Marco Aurélio, Justice-Editor for the ruling, Edson Fachin, ruled on April 15th, 2020.

16 ADI 6343, Justice-Rapporteur Marco Aurélio, Justice-Editor for the ruling, Alexandre de Moraes, ruled on May 6, 2020.

17 ADI stands for "unconstitutionality declaration action" in a literal translation; this is a specific procedure held at the Brazilian Federal Supreme Court to exercise abstract judicial review of laws, administrative general regulation, and even of constitutional amendments. It is also applicable to Provisional Measures, due to their legislative nature.

18 Brasil. Supremo Tribunal Federal (STF). Case law compilation [recurso eletrônico]: Covid-19 / Brazilian Federal Supreme Court. – 2d ed. rev. and updated. Brasília: STF, Secretaria de Altos Estudos, Pesquisas e Gestão da Informação, 2021. eBook (v.1, 92 p.), p. 28, available at https://www.stf.jus.br/arquivo/cms/publicacaoPublicacaoTematica/anexo/case_law_compilation_covid19_2.pdf.

On April 15th, 2020 the preliminary injunction granted in ADI 6341 was confirmed in a 7 to 4 ruling. The opinion stated:

> The head of the federal executive branch has competence to issue decrees establishing which public services and activities are considered essential, and such act does not violate the competence that the federal entities share to legislate on health matters, as long as the decree safeguards the autonomy of the states, the municipalities, and the Federal District.[19]

The arrival of vaccines, and the need to provide a public program to regulate distribution and administration prompted a second set of lawsuits which again raised the issue of the intersection of federal, state and local government responsibilities to protect public health. Here, once again, political considerations led President Bolsonaro to initially deny the need for vaccination and refuse to authorize the national roll out of the Corona-Vac vaccine, negotiations for purchase and distribution of which had been led by his political adversary João Doria, the governor of São Paulo.[20] Pending the approval of the vaccine by ANVISA (the national agency for drug administration), Doria announced the intention to start mandatory vaccination on January 2020.[21] The messages coming out of the federal government at the time were contradictory and unclear; on the one hand mandatory vaccination was said to be a violation of personal liberty and therefore, unconstitutional; on the other, even if it were permissible, the effect of FSC rulings ADI 6341 and 6343, claimed the President, was that the central government lacked competency in this area.

The federal conflict was once again submitted to the STF by the Democratic Labor Party in ADI 6586[22] and by the Brazilian Labor Party in ADI 6587.[23] These lawsuits not only raised the constitutionality of mandatory vaccination, but also whether state and municipalities were invested with authority to design and carry on their own vaccination programs. Once again, the ruling favored states and municipalities which were pronounced competent to regulate and implement health measures regarding the pandemic:

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19 Brasil. Supremo Tribunal Federal (STF). Case law compilation [recurso eletrônico] : Covid-19 / Brazilian Federal Supreme Court. – 2nd ed. rev. and updated. Brasília: STF, Secretaria de Altos Estudos, Pesquisas e Gestão da Informação, 2021. eBook (v.1, 92 p.), p. 23, available at https://www.stf.jus.br/arquivo/cms/publicacaoPublicacaoTematica/anexo/case_law_compilation_covid19_2.pdf.

20 Tom Phillips. *Bolsonaro Rival Hails Covid Vaccinations as 'Triumph of Science Against Denialists'.* The Guardian, Jan. 18, 2021.

21 Terrence McCoy. *Should a Coronavirus Vaccine Be Mandatory? In Brazil's Most Populous State It Will Be.* Wash. Post, Dec. 7, 2020. l

22 BRASIL. Supremo Tribunal Federal. ADI 6586, Justice Rapporteur Ricardo Lewandowsky, Tribunal Pleno, ruled in December 17th, 2020, DJe-063 DIVULG 06-04-2021 PUBLIC 07-04-2021)

23 BRASIL. Supremo Tribunal Federal. ADI 6587, Justice Rapporteur Ricardo Lewandowsky, Tribunal Pleno, ruled in December 17th, 2020, DJe-063 DIVULG 06-04-2021 PUBLIC 07-04-2021)

> (B) those measures, with the exposed limitations, can be implemented by the Union, and also by States, the Federal District and Municipalities, according to their respective competencies range.[24]

This landmark decision raised eyebrows in some quarters because it was out of line with the Court's own precedents but entirely "coherent with its tradition in standing up for human rights in a broad sense."[25]

The point of interest for this paper is what this tells us about the nature of federalism in Brazil and specifically the place of sub-federal governments with the Union and the role of the courts in mediating inter-governmental conflict; on both occasions, the answer to political disputes was judicialization—and a prompt and decisive response from the STF. In order to understand how the political conflict became framed in constitutional terms, one must first understand the challenges presented by Brazilian federalism.

B. Inter-Governmental Relations in a Three-Tier Constitution

The end of the military regime and the holding of democratic elections in 1985 represented an opportunity for a new constitutional beginning for Brazil. Although inspired by and intentionally modelled upon the U.S. federal constitution, the "supremely ugly" document promulgated on October 5, 1988 has been described as "a badly written, internally inconsistent, and transient constitution" that [...] has generated debate controversy and ultimately litigation raising fundamental issues of constitutional design."[26] From the standpoint of coherence and clarity this is indeed the case and the complexities of coordinate, conflicting and interacting competencies which the constitution instantiates are very much the concern of this article. Nevertheless, it should also be noted that, as Professor Reich suggests, viewed as a product of the shifting politics of regime transition, the Constitution represents a "complex and relatively successful social truce" because it "came out of a process in which society's most important actors argued, cajoled, and threatened one another, finally arriving at an ugly set of compromises that nevertheless skirted the explosive issues surrounding the transition from the military."[27]

Difficult though those compromises were to achieve—the deliberations of the National Constituent Assembly lasted for 20 months—there is no doubt about the desire for a lasting commitment to social change. During the promulgation ceremony, Ulisses Guimarães, President of the National Constituent Assembly, asserted that "the Constitution intends to be the voice, the letter, the political will towards change."[28] The inclusion of express human rights guarantees—Article 5

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[24] BRASIL. Supremo Tribunal Federal. ADI 6586, Justice Rapporteur Ricardo Lewandowsky, Tribunal Pleno, ruled in December 17th, 2020, DJe-063 DIVULG 06-04-2021 PUBLIC 07-04-2021).

[25] *See* Gilberto M. A. Rodriguez et al., *Brazil and the Fight Against Covid-19: Strengthening State and Municipal Powers* Federation, *in* Comparative Federalism and Covid-19 248 (Nico Steytler ed., 2021).

[26] Gary M. Reich, *The 1988 Constitution a Decade Later: Ugly Compromises Reconsidered*, 40 J. InterAmerican Stud. & World Aff. 5, 6 (1998).

[27] *Id.*

[28] Ulisses Guimarães. *Discurso de Proclamação da Constituição de 1988.* Diario da Assembleia Nacional Constituinte (Oct. 5th, 1988) 14380, https://www2.camara.

of the 1988 Constitution lists 79 different fundamental rights and Article 7 lists 34 social rights would be the expression, and local empowerment a reinvigorated agency of that commitment.[29]

Brazil's 2015 National Report to the UN Habitat III, declared that Brazil is considered a highly decentralized country since the 1988 Federal Constitution, which raised municipalities to the status of federative entities, [on] equal terms with states and the Union.[30] In constitutional terms, federalism as a mechanism for reconciling imperatives for local autonomy with the efficiency and unity that central government can provide, is not new to Brazil. Indeed, as Professor Reich points out, in one form or another, federalism offers a sensible model of governance for a country as large as Brazil, so that at least since 1891, governance in Brazil has "oscillated between centralized and decentralized political governance" [31] The prolonged 20 month period of political negotiation and manoeuvering over the precise nature of the institutional framework that the new constitution was to achieve culminated in the 245 articles and 70 transitory provisions of the new Brazilian Constitution, a detailed examination of which is outside the scope of this article.[32] Of specific interest for this article however are first, the recognition within the constitutional framework of a place for municipalities with specific competencies that are coordinate with those of the states and second the absence of a detailed framework for adjudicating upon intergovernmental conflict and disputes. Instead the constitution relies upon cooperation as the mechanism for regulating the intergovernmental dynamic with the details to be identified by means of legislation which to date has not materialized.[33] The result is that the task of resolution of intergovernmental conflict falls to the Federal Supreme Court (FSC) to be determined by reference to indeterminate constitutional provisions, many of which are inherently unclear.

Recognition of a formal place for municipalities within Brazil's constitutional arrangements was not, of itself, entirely new. The current (1988) constitution is the seventh iteration dating back to 1824 of attempts to adjust the competing claims of centralization and diffusion of power to the regions.[34] It reflects a longstanding discontent on the part of municipalities with their political subordination to states

leg.br/atividade-legislativa/plenario/discursos/escrevendohistoria/centenario-deputadoulysses-guimaraes/discurso-de-05101988 (Braz.).

29 *See* Vanice Regina Lírio do. Valle, *Dialogical Constitutionalism Manifestations in Brazilian Judicial Review*. 1 Revista de Investigações Constitucionais 59 (2014).

30 Available at http://uploads.habitat3.org/hb3/Brazil-National-Report-Habitat-III.pdf.

31 *Id*. at "Brazilian federalism has gone through the following five distinct phases: (1) the Old Republic (1889-1930); (2) the authoritarian rule of Getúlio Vargas; (3) the Democratic Restoration period (1945-1964); (4) the Military Regimes (1964-1985); and (5) the New Republic (1985 to the present)."

32 *See* Vanice Valle, *The Brazilian Constitution: Context, Structure and Current Challenges* 9 Br. J. Am. Leg. Studies (2019). *See also* Bruce Ackerman, *Brazil's Constitutional Dilemma in Comparative Perspective: Do Chile and Spain Cast Light on the Bolsonaro Crisis*, I-CONnect (July 16, 2020), http://www.iconnectblog.com/2020/07/brazil's-constitutional-dilemma-in-comparative-perspective:-do-chile-and-spain-cast-light-on-the-bolsonaro-crisis?

33 *See* Rodriguez, *supra* note 25, at 206.

34 *See* Bruno Carneiro Oliveira, *Federalism and Municipalism in the Political Trajectory of Brazil,* 17 Mercator 1 (2018).

particularly on the part of those in the position of state capitals with significant revenue resources and advanced economic development, The broad range of socioeconomic rights conferred by the new constitution intensified the criticism against a centralized model. After all, "cities can deliver where big government can't."[35] In the search for a tool that could promote the collaboration of the federative bodies in the public programs those social rights would require,[36] decentralization presented itself as a good solution. The 1988 constitution now recognizes municipalities as constituent federative units with political and administrative autonomy,[37] competencies under Article 23(II) in common with the Union and the States upon specific matters, which include the provision of health and public assistance[38] and specific power under Article 30 to:

> I – legislate upon matters of local interest;
> II – supplement federal and state legislations where pertinent; and
> III – institute and collect taxes within their jurisdiction, as well as to apply their revenues, without prejudice to the obligation of rendering accounts and publishing balance sheets within the periods established by law. [39]

Article 23, Sole Paragraph provides for supplementary laws to establish rules for the cooperation between the Federal Government and the states, the Federal District, and the municipalities, with a view to "aiming at the attainment of balanced development and well-being on a nationwide scope" but to date these laws have yet to be enacted. [40] Moreover, the Constitution offers no interpretation or guidance on the meaning of 'matters of local interest.'

The result is a complex constitutional sharing of powers, the contours and boundaries of which now fall to be determined by the FSC and are resolved as a matter of constitutional interpretation; power partition should be interpreted accordingly to a "predominant interest" criterion,[41] to the effect that competency should be assigned to the federative entity which manifests greater proximity with the matter.[42] This may be clear from the text of the Constitution itself in which case, there will be an absolute presumption when it comes to the holder of the predominant interest.[43] Where the Constitution is silent or there is ambiguity , the FSC will decide the issue on a case by case basis, by reference to criteria of proximity and ability to address the matter in question. Court rulings on the issue of 'predominant interest' do not preclude action by other federative entities, which retain their constitutional

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35 Ran Hirschl, City, State: Constitutionalism and the Megacity. New York: Oxford Press, 2020, p. 28.

36 Fernando Luiz Abrucio & Eduardo José Grin. *From Decentralization to Federative Coordination: The Recent Path of Intergovernmental Relations in Brazil*. International Conference on Public Policy. 2015.

37 Articles 1 & 29.

38 Article 23 II. The Union, the states, the Federal District and the municipalities, in common, have the power: (CA 53, 2006; CA 85, 2015)

39 Article 30.

40 Art. 23, Single Paragraph.

41 *See* ADI 2435, Justice-Rapporteur Carmen Lucia, Editor for the ruling, Gilmar Mendes, ruled on Dec.21, 2020.

42 *See* ADPF 567, Justice-Rapporteur Alexandre de Moraes, ruled on Mar. 1, 2021.

43 *See* RE 1181244 AgR, Justice-Rapporteur Alexandre de Moraes, ruled on Aug. 23, 2019.

competencies.[44] This is in line with the recognized constitutional intention to create a non-hierarchical model of co-operative federalism.[45] The problem is of course that the absence of a definitive constitutional or legislative mechanism for resolving intergovernmental disputes[46] means that intergovernmental disputes concerning the exercise of shared competencies can result in political standoffs, which, if not resolved, will ultimately have to be resolved by the courts as a matter of constitutional review. In the context of a global pandemic, the complexities of public health competencies and responsibilities were reviewed by the FSC on two occasions in actions of significant constitutional importance as the next section now considers.[47]

C. Public Health Competencies in the Brazilian Federation: How the FSC Draws the Line

Brazil's Unified Health System ("Sistema Único de Saúde – SUS) was set up under Article 198 of the 88 Constitution which provides for an integrated regionalized and hierarchical system underpinned by principles of decentralization, full service provision and community participation.[48] The constitutional provision was developed in Federal Law nº 8080/90, which distributed responsibilities among the federal entities, but clarification regarding boundaries continues to be with the FSC which will generally reinforce the positive duties deriving from the Brazilian constitution. Lack of clarity in the allocation of responsibilities on matters of public health is not, according to FSC jurisprudence, grounds to exempt federal entities from their constitutional duties. [49]

The first set of lawsuits was launched in the early days of the crisis in response to initiatives intended to centralize COVID-19 planning decisions with the federal government —ADI's 6341 and 6343.[50] Despite a clear awareness of the counter-majoritarian difficulties that generally require unelected judges to exercise restraint,[51] the federal court's ruling directly addressed the issue of the allocation of functions amongst the federal entities. Justice Alexandre de Moraes, concurring, stated:

> It is not conceivable that central government aspires to exercise a monopoly over the administrative management of the pandemic affecting more than five thousand municipalities. This is absolutely unreasonable. It is also not

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44 *See* RE 586224, Justice Rapporteur Luiz Fux, ruled on Mar. 5, 2015.

45 *See* ADI 3499, Justice-Rapporteur Luiz Fux, ruled on August 30th., 2019; *And* RE 194.704, Justice-Rapporteur Edson Fachin, ruled on June 29. 2017.

46 *See* ADPF 584, Justice-Rapporteur Alexandre de Moraes, Plenary, ruled on Feb. 21, 2020.

47 *Infra*.

48 Article 198.

49 "Adequate medical treatment for the needy is part of the State's duties, as it is the joint responsibility of the federated entities. The passive pole [standing as defendant] can be composed [recognized to] of any one of them, individually or jointly". RE 855178 RG, Justice-Rapporteur Luiz Fux, ruled on May 3, 2015.

50 *See* notes 7 and 8 s*upra*.

51 *See* Luís Roberto Barroso, *Reason Without Vote: The Representative and Majoritarian Function of Constitutional Courts in* Democratizing Constitutional Law 71-90 (T. Bustamente & B.G. Fernandes eds. 2016).

> conceivable that Municipalities, based on a shared competence established by the Constitution, should become autonomous republics inside Brazil itself, closing their own geographic boundaries, and preventing delivery of essential services. This is not what the Constitution establishes.
>
> The Constitution establishes an allocation of competencies based on cooperation—the so-called cooperative federalism—in relation to what is the predominant local interest.[52]

Justice Edson Fachin, Justice-Editor for the ruling, added that interpretation of the allocation of competencies required coherence with "the constitutional normative program"—meaning, the final commitments addressed to the federal entities. That argument would lead to the necessary grant of authority to all federal entities – if the core value at stake was public health – in accordance with the predominant interest criterion.

The Court's core argument is set out in the summary of ADI 6341:

> 5. It is necessary to read the rules that make up Law 13,979, of 2020, as arising from the Union's own competence to legislate on epidemiological surveillance, under the terms of the General Law of the SUS, Law 8080, of 1990. The exercise of Union competence at no time diminished the competence of the other entities of the federation in the realization of health services, nor could it- after all, the constitutional guideline is to municipalize these services.[53]

Justice Edson Fachin conceded that in certain circumstances it could be constitutionally permissible for the Union to preempt concurrent action on the part of other federative entities but this would have to be by federal legislation, which was not the case here.

> Therefore, National Congress can—and will do, if it so wishes—regulate, in a harmonized and national form, on an issue or public policy. Nevertheless in the absence of a legislative manifestation, initiated by Congress or by the Chief of the Executive branch, one cannot constrain the remaining federal entities from exercising their competencies in promoting fundamental rights.[54]

The ruling in ADI 6343 shares the same reasoning:

> […]
> 4. In relation to health and public assistance, the Federal Constitution establishes the existence of a common administrative competence between the Union, States, Federal District and Municipalities (art. 23,

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52 ADI 6341, Justice-Rapporteur Marco Aurélio, Justice-Editor for the ruling, Edson Fachin, ruled on April 15th, 2020, p. 24.

53 *Id*. at p. 2.

54 5 ADI 6341, Justice-Rapporteur Marco Aurélio, Justice-Editor for the ruling, Edson Fachin, ruled on April 15th, 2020, p. 6.

> II and IX, of the CF), as well as provides for concurrent competence between the Union and States/Federal District to legislate on health protection and defense (art. 24, XII, of the CF); allowing Municipalities to supplement federal and state legislation as appropriate, as long as there is local interest (art. 30, II, of the CF); and also prescribing the political-administrative decentralization of the Health System (art. 198, CF, and art. 7 of Law 8.080/1990), with the consequent decentralization of the execution of services, including with regard to sanitary surveillance activities and epidemiological (art. 6, I, of Law 8.080/1990). 5. It is not, therefore, incumbent upon the federal Executive Power to unilaterally reject the decisions of state, district and municipal governments that, in the exercise of their constitutional powers, have adopted or will adopt, within their respective territories, important restrictive measures such as the imposition of social distancing or isolation, quarantine, suspension of teaching activities, restrictions on trade, cultural activities and the movement of people, among other recognized effective mechanisms for reducing the number of infected people and deaths.[55]

The second opportunity for the court to review the intersection of federal, state and municipal relations in Brazil followed President Bolsonaro's refusal to comply with and attempts to veto public health protocols put in place by states and municipalities, in accordance with FSC previous rulings. [56] ADPF 672,[57] filed by the Federal Council of the Brazilian Bar Association (OAB) asked the court to grant an injunction determining that the President should comply with the WHO protocol regarding the adoption of social isolation measures and determinations of state governors and mayors related to "economic activities and public gathering rules"; and refrain from interference in the technical work of the Ministry of Health, under the parameters of WHO recommendations.[58]

The injunction was granted on April 9th, 2020, once again by Justice Alexandre de Moraes, and confirmed on October 13th, 2020, by a unanimous full bench. The shared nature of federative entities' responsibilities was again asserted by the Court:

> 4. The Federal Executive power exercises the role of a central entity in planning and coordinating governmental action related to public health, but cannot unilaterally override the decisions made by the

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55 ADI 6343, Justice-Rapporteur Alexandre de Moraes, ruled on May 6th, 2020, p. 2.

56 President Bolsonaro refused to wear a mask, even in public closed areas and was fined, *Jair Bolsonaro fined for not wearing mask at São Paulo biker rally*, The Guardian, Jun. 13, 2021; Terrence McCoy & Gabriela Sá Pessoa, *Bolsonaro Worked to Shake Brazil's Faith in Vaccines. But Even His Supporters Are Racing to Get Their Shots.* Wash. Post, Aug. 16, 2021.

57 ADPF 672-MC, Justice-Rapporteur Alexandre de Moraes, ruled on Oct. 13, 2020.

58 For a useful timeline see D. Ventura, & R. Reis, An Unprecedented Attack on Human Rights in Brazil: The Timeline of the Federal Government's Strategy to Spread Covid-19. Offprint. Translation by Luis Misiara, revision by Jameson Martins. Bulletin Rights in the Pandemic n. 10, São Paulo, Brazil, CEPEDISA/USP and Conectas Human Rights, Jan 2021, available at: https://www.conectas.org/wp-content/uploads/2021/01/10boletimcovid_english_03.pdf

> states, the Federal District and municipal governments, in the exercise of their own constitutional competencies, to adopt within their own geographical boundaries, public health measures authorized in Federal Law 13.979/2020.

The Court however declined to override the discretion of the Executive and order the President to carry out specific administrative measures.[59]

The Court's decision was welcomed not only because it offered an appropriate response to the prevailing political instability, but also because it stressed the relevance of developing mechanisms of cooperative federalism, "not only in the daily operation of public policies but above all in situations of complex intergovernmental problems."[60] However, the breadth of the powers the Court was prepared to extend to states and municipalities met with surprise in certain quarters;[61] leaving unanswered the question whether the rulings represent a new and expansive jurisprudence of federalism, or whether they should be interpreted narrowly as a specific response to the particular exigencies of the pandemic.

The latest FSC decisions in ADIs 6586[62] and 6587[63] related to mandatory vaccination. Once again the Court confirmed that both states and municipalities have competencies in relation to measures aimed to protect public health:

> "IV – The competence of the Ministry of Health to coordinate the National Immunization Program and define the vaccines that are part of the national immunization schedule does not exclude that of the States, the Federal District and the Municipalities to establish prophylactic and therapeutic measures to face the pandemic resulting from the new coronavirus, at a regional or local level, in the exercise of the power-duty to "take care of public health and assistance" that is entrusted to them by art. 23, II, of the Federal Constitution."[64]

It was this ruling that allowed the Ministry of Health to coordinate the inclusion of COVID-19 vaccines in the National Immunization Program, President's Bolsonaro anti-vax position notwithstanding.[65] As the FSC clearly recognized, in a country with an extensive territory as Brazil, effective delivery of health care

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59 ADPF 672-MC, Justice-Rapporteur Alexandre de Moraes, ruled on Oct. 13, 2020, p. 10.

60 Fernando Luiz Abrucio, et al. Combate à COVID-19 sob o Federalismo bolsonarista: Um Caso de Descoordenação Intergovernamental 54(4) Revista de Administração Pública Aug. 28, 2020. *See also* DA SP NÉRIS, Eduardo Henrique Corrêa & Rodrigo Ribeiro Bedritichuk, *Brazilian Federalism: Facing the COVID-19 Pandemic* 1. in Federalism and the Response to COVID-19 59-65 (2021).

61 "Historically, STF has struck down state and municipal legislation when it is in conflict with the federal Constitution or national legislation. It is rare, if not impossible, to find an STF decision that invalidates federal legislation for infringing on powers reserved for states or municipalities". *See* Corrêa & Bedritichuk, *supra* note 63, at 62.

62 ADI 6586, Justice-Rapporteur Ricardo Lewandowsky, ruled on Dec.17, 2020.

63 ADI 6587, Justice-Rapporteur Ricardo Lewandowsky, ruled on Dec.17, 2020.

64 ADI 6586, Justice-Rapporteur Ricardo Lewandowsky, ruled on Dec.17, 2020, p. 2.

65 Jean Kirby, *How Brazil Survived Its President's Vaccine Skepticism*, The Vox, Feb 3, 2022, 7:00am EST, https://www.vox.com/22909351/brazil-vaccines-bolsonaro-covid-19-misinformation.

provision is not something that can be undertaken without meaningful cooperation on the part of all federative entities.

D. Concluding Reflections

As the above account demonstrates, the story of COVID-19 management in Brazil has been heavily determined by constitutional design and a pattern of federalism that has sought to divert power away from the centre in favour of localities and local self-determinism. As Professor Hirschl has commented, in Brazil, as elsewhere in the global South, historically entrenched hierarchies are not easily suppressed particularly where constitutional allocations of competencies are not supported by fiscal and budgetary independence.[66] The Brazilian federal experience has traditionally been one of asymmetric relations, with a clear predominance of the central government secured not only through the broad sphere of legislative competencies, but also through a very centralized fiscal system.[67] Thus despite the clear attempt of the 1980 constitution to mitigate the grip of central government, the effect of allocating shared competencies to other federative entities has too often been political deadlock to which the solution offered in Brazilian constitutional design, is judicialization—with all that this entails in terms of judicial politicization -and debates concerning democratic deficit—and this is what we see happened in fighting the pandemic.

Despite the coherence in the FSC rulings repeatedly granting States and Municipalities their own competencies it is not clear that the transfer of responsibility for dispute resolution to the Court is a better solution. Stating competencies in a ruling is quite easy—but fighting the pandemic remains a problem that requires cooperation, and not antagonism, between the federative entities. A major public health problem will always be better served through cooperation, and this is a sort of relation that is rarely forged in the Courts.

Part II The United States: Governors versus Local Governments

In the United States, the Trump administration issued declarations of a public health emergency on January 31, 2020 and a national emergency on March 13, 2020, but the absence of a strong presidential lead placed management of the pandemic at the centre of partisan politics. When for political reasons governors either refused or were slow to act, the frontline of response shifted to the local level. As Georgetown University law professor Sheila R. Foster has observed, "the COVID-19 crisis has shown dramatically why local government, where mayors and health officials are on the frontlines of responding to global health threats like pandemics, is increasingly where effective governance happens in America."[68]

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66 Hirschl, *supra* note 3.

67 *See* Márcia Miranda Soares & Pedro Robson Pereira Neiva. *Federalism and Public Resources in Brazil: Federal Discretionary Transfers to States.* 5 (2) Br. Pol. Sci. Rev. 94 -116 (2011).

68 Sheila R. Foster, *As Covid-19 Proliferates, Mayors Take Response Lead, Sometimes in Conflicts With Their Governors*, Georgetown Law, https://www.law.georgetown.

The patchwork of gubernatorial and local orders requiring *e.g*. citizens to stay home, and or wear masks in public places, businesses to close and restricting attendance and the conduct of ceremonies at houses of worship, has been said to demonstrate U.S. federalism in action—as David Robertson, author of *Federalism and the Making of America* has recently explained: "Federalism is about doing things differently, and you see it in spades in this crisis"[69]—but most significantly it has exposed the intra-state governmental tensions which constitutional theory struggles to manage. Governors who refused to issue lock-down orders and mask mandates were challenged by local governments attempting to take action to protect the health, safety and welfare of their residents. Governors who did impose lock down measures faced local authority opposition and refusal to cooperate in implementing the restrictions.

This Part now proceeds as follows. In section A we outline briefly the orthodox explanation of the allocation of power between the two layers of government that are recognised by the U.S. federal constitution, focussing specifically on the state police power which gives to the individual states regulatory power and responsibility for ensuring the health and welfare of their citizens.

In Section B we consider intergovernmental disputes generated in the context of COVID-19 management, focussing specifically on those disputes between municipalities and their states which focussed on the allocation of intrastate power, and which actually reached court for adjudication. We notice that, given the constraints of the federal constitution which does not formally recognise a place for municipalities to exercise power, litigation that focuses directly on the state-municipality relationship is deployed primarily as a tactic to force political negotiation with varying degrees of success in the COVID-19 specific situation. In Section C, we position these disputes in the context of narratives of local democracy that aim to recalibrate intrastate relationships is such a way as to protect a zone of local self-governance that is preserved from pre-emptive state power. We conclude with the observation that despite predictions that the age of the city is upon us as Professor Hirschl points out, "cities currently lack the constitutional power to bring their own local interests to the fore."[70]

A. Allocation of Power and Responsibility in a Two-Tier Constitution

Absent a strong presidential lead, management of the pandemic response was largely undertaken by state governors. This should not be surprising. In the U.S. legal system, the federal government has enumerated powers granted by art 1 sec. 8 of the Constitution. The remaining sovereign powers of government (the so-called police-powers) are reserved to the states via the Tenth Amendment. Traditionally, this approach of division of powers has been interpreted to reflect the fact that states had powers before the creation of the Union and that the effect of the federal

edu/salpal/as-covid-19-proliferates-mayors-take-response-lead-sometimes-in-conflicts-with-their-governors/.

69 Reported in Alan Greenblatt, *Will State Preemption Leave Cities More Vulnerable*? Governing: The Future of States and Localities, Apr. 3, 2020, https://www.governing.com/now/Will-State-Preemption-Leave-Cities-More-Vulnerable.html.

70 Hirschl, supra note 3, at 49.

Constitution was merely affirmatory: "The constitution gives nothing to the States or the people. Their rights existed before it was formed; and are derived from the nature of sovereignty and the principles of freedom."[71] The powers reserved to the states are usually referred to as 'police powers', a term first used in *Gibbons v. Ogden* by Chief Justice John Marshall who described them as a 'mass of legislation which embraces everything within the territory of the state' and specifically included quarantine laws and health laws.[72]

Although the boundaries of the state 'police power' have never been precisely defined, traditionally the state police power is said to embrace health, safety, and general welfare of the public.[73] As a legal concept, as opposed to a broad set of powers, as Professor Hodge suggests, there is scope for "constant evolution."[74] It is also the case that the vertical separation of powers that characterises governance within the United States will generate inter-governmental disputes concerning overlap of regulatory authority. These disputes at the federal/state interface have required U.S. Supreme Court adjudication that is by now well documented.

In terms of the management of health emergencies, the power divide between states and federal government is a fairly settled area of law. Section 361 of the congressional Public Health Service Act[75] empowers the federal government to establish restrictions on the entry of certain travellers into the United States, a power which during the 2020 pandemic was exercised in relation to foreign nationals coming from China, Iran, the European Union, the United Kingdom and Brazil.[76] The federal government also took a lead in coordinating supplies, including the rollout of vaccines across the states and providing federal funding to support assistance and healthcare responses to individuals, families, and business affected by the COVID-19 pandemic.[77]

On the other hand, states are in charge of enforcing isolation and quarantine within their borders and they do so within the remit of the so-called police power. The origins of this power date back to the colonial era; the literature reports that the colony of Virginia passed a vital statistics law to track the health of the community in 1631 and that Massachusetts enacted the first sanitary legislation in America when it passed a maritime quarantine act in 1648 in response to the threat of disease from the West Indies.[78] Between 1784 and 1797 states passed quarantine laws related to incoming sea vessels and later created local health boards that were in charge of issuing state public health laws and regulations.[79] The courts have recognized the

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71 Gibbons v. Ogden, 22 U.S. 1, 87 (1824).

72 *Id.* at 203.

73 *See* Barnes v. Glen Theatre, 501 U.S. 560 (1991) ("the traditional police power of the States is ... to provide for the public health, safety and morals").

74 James G. Hodge, Jr., *The Role of New Federalism and Public Health Law*, 12 J.L. & Health 309, 319 (1998).

75 (42 U.S. Code § 264)

76 Travelers Prohibited from Entry to the United States, Centre for Disease Control and Prevention, https://www.cdc.gov/coronavirus/2019-ncov/travelers/from-other-countries.html (last visited 07/31/2020).

77 H.R. 748, 116th Cong. (2020) a $2 Trillion stimulus bill (March 2020) and a $900 billion pandemic relief bill (December 2020).

78 James G. Hodge, Jr., *The Role of New Federalism and Public Health Law,* 12 J.L. & Health 309, 325 (1998).

79 Maryland (1784), New Hampshire (1789), Virginia (1792), Georgia (1793), Connecticut

authority of states to enact quarantine laws and health laws that relate to matters completely within their territory.[80] In *Jacobson v. Massachusetts* (1905)[81] Justice Harlan went so far as to confirm that states can compel their citizens to receive a vaccine in the interest of public health and public safety.[82]

Decisions by a state to impose, relax or remove restrictions on the activities of its citizens are first and foremost political, requiring politicians in conjunction with their advisors to make judgments as to where the public interest best lies. These decisions can and often will, generate challenges, some of which will likely need to be resolved in court. In the context of measures to combat the Covid -19 pandemic, the courts demonstrated a clear reluctance to second guess these decisions. As Chief Justice Roberts explained:

> [o]ur Constitution 'principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect;' when those officials 'undertake[..] to act in areas fraught with medical and scientific uncertainties,' their latitude 'must be especially broad.'[83] 'Where those broad limits are not exceeded, they should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people. [84]

In contrast to the federal/ state divide, the allocation of powers between states and municipalities is much less clear. The U.S. Constitution does not mention the powers or even existence of local authorities. Constitutional theory and U.S. Supreme Court jurisprudence recognise them as creations of the state to which they belong with powers conferred and limited by the state constitution and legislative enactments[85] but as the structure of local government and the nature and extent of delegated powers vary from state to state, generalisations are not always easy to make.

The 2020 COVID-19 pandemic saw intra state conflict between governors and mayors' provisions on closures, 'stay at home' and 'masking' orders which directly raised questions concerning the allocation of intra state power. Specifically where local authorities sought to impose local restrictions such as 'masking' and 'stay at home' orders which were more stringent than those of the state governor, they were challenged on the basis that their authority in these areas must give way to the pre-emptive power of the state.

(1795), and Delaware (1797). *See* James G. Hodge, Jr., *The Role of New Federalism and Public Health Law*, 12 J.L. & Health 309, 325 (1998).

80 Jacobson v. Massachusetts, 197 U.S. 11, 25 (1905).

81 197 U.S. 11 (1905).

82 *Id*. at 31.

83 Marshall v. United States, 414 U.S. 417, 427 (1974).

84 South Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (May 29, 2020) (internal citations omitted) (Roberts, C.J. concurring).

85 Kenneth Vanlandingham, *Municipal Home Rule in the United States*, 10 W.M. Law Rev. 2 (1968) 269-314, 26. *See* Gerald Frug, *The City as a Legal Concept,* 93 Harv. L. Rev.1057 (1980).

The doctrine of pre-emption accords primacy to state legislative provisions which are either incompatible with local provisions or which demonstrate an intention to occupy a policy field and thereby preclude local authority attempts at regulation. The doctrine mirrors the principles developed by reference to the federal/state government dynamic but its contours at the intra-state level are less well developed. As with the federal jurisprudence, intra-state pre-emption can be express, because the state law clearly and directly prohibits local authority action in a particular area, or implied by means of the judicial doctrines of field and conflict pre-emption both of which depend upon necessary inference from construction of the state law in question. Both express and implied pre-emption may raise the issue of 'floor' or 'ceiling', i.e., is state pre-emptive legislation a minimum level of regulation below which municipal regulation must not drop, or does it rather set limits to what is regulatorily permissible so that local authorities which seek to put in place more extensive requirements will be pre-empted from doing so. In the context of COVID-19 the latter type of pre-emption proved to be particularly problematic.

As the pandemic swept the United States and state governors took action to contain the virus, much of the country entered into strict lockdowns. By March 31, 2020, the New York Times reported that 316 million people in at least 42 states, three counties, 10 cities, the District of Columbia and Puerto Rico [were] being urged to stay home. [86] One year on, the "months of trial and error" and the "nationwide patchwork of rules for businesses and residents" that ensued had generated over 997 law suits. Following the roll out of the vaccines and vaccination programmes many of these are now largely mooted but those that remain unresolved are still being tracked and available to view on the Ballotpedia.[87] [88] The law suits raised a spectrum of constitutional, statutory and procedural objections with varying degrees of success and, at least initially, met with a noticeable reluctance on the part of state and federal courts to overturn gubernatorial and local orders.

The federal district court decision in *County of Butler v. Wolf*[89] striking key aspects of Pennsylvania's COVID-19 emergency order including stay at home and business closure orders, was an early exception, raising the question of whether other courts would follow suit. Since then, the U.S. Supreme Court has considered the scope of restrictions on the exercise of religion, holding in *Roman Catholic Diocese of Brooklyn v. Cuomo* (2020) [90] that New York state restrictions on attendance at places of worship were not sufficiently narrowly tailored to satisfy the requirements of strict scrutiny. In *South Bay United Pentecostal Church v. Newsom* the Court granted preliminary injunctive relief against enforcement of Governor Newson's prohibition on indoor worship services in California [91] and in *Tandon v. Newsom*, a divided court granted preliminary relief from California's restrictions

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86 https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html (accessed April 11, 2021).

87 https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020-2021#Relevant_litigation, accessed April 11, 2021.

88 *See* https://ballotpedia.org/Lawsuits_about_state_actions_and_policies_in_response_to_the_coronavirus_(COVID-19)_pandemic,_2020-2021#Relevant_litigation

89 Cnty. of Butler v. Wolf, No. 2:20-cv-677 (W.D. Pa. Sept. 14, 2020.

90 592 U.S.- (2021).

91 590 U.S_(2020).

on "gatherings" as a violation of the free exercise clause to the extent that they prohibited (or severely restricted) at-home religious gatherings—notwithstanding its "clear" *South Bay* instructions that California "must place religious activities on par with the most favored class of comparable secular activities."[92] To date however only a handful of cases have raised the issue of the allocation of intra-state authority.

B. Intergovernmental COVID-19 Conflicts

By April 2021, at the height of the pandemic, of the fifty states, twenty-five had no state mandated mask requirements.[93] In seventeen of these states, local authorities put their own mask mandates in place. [94] In states such as Arizona and Florida, gubernatorial orders explicitly prohibited local authorities from enacting mask mandates or going beyond federal policies. In the section that now follows we consider city/governor COVID-19 regulation disputes from the point of view of law-as-political manoevering. These disputes mostly did not make it through the courthouse door—to date, as far as we are aware, only three of these intergovernmental disputes have actually reached court and only one reached a full hearing with two being withdrawn as moot.

In so far as legal argument was presented in these cases, the issues raised turned upon interpretation of the state constitution, the scope of the Governors' authority and whether local authority orders conflicted with gubernatorial orders, in which case they would be pre-empted or were rather properly seen as complementary or supplementary in which case they were not. We draw these disputes to attention however because we note in the various press releases, litigation filings and Attorney-General advisories an incipient articulation of a strategic narrative of inherent local democracy or local police power which does not depend upon the grant of state authority and is protected from its pre-emptive power.

In *City of Huntington Beach v. Newsom*, the City and others challenged a Directive of California Governor Newsom ordering the city and local governments in Orange County to close beaches operated by them on the grounds that the Directive "infringe[s] on the constitutional powers vested in local communities." [95] The application for a preliminary injunction was refused on the grounds that the

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92 593 U. S._(2021).

93 AL, AK,AR,AZ, FL,GE,ID,IN,IA,KS,LA,MS,MO,MT,NE,NH,ND,OK,SC,SD,TN,TX, UT,WI,WY.

94 AL: Birmingham, Montgomery; AK: Anchorage & Juneau; AR: Fayetteville, Little Rock; FL: several cities and large counties including Miami, Dade, Palm Beach, Hillsborough (including Tampa); GA: Atlanta & ors; ID: Boise; IA: Indianapolis; IA: Des Moines, Cedar Rapids, Iowa City; MS: Kansas City, St Louis, Springfield, Columbia, & several other cities & counties; MT: some counties including Gallatin, Missoula, Lewis & Clark; NE: Lincoln, Omaha; ND: several cities and towns including Nasua & Concord; ND: most of ND's largest cities including Fargo, Bismarck & Minot; OK: local mask mandates in the state's largest cities – Oklahoma City & Tulsa ended on April 30 and May 1 respectively; SC: numerous counties including Charleston & Columbia; UT: Salt Lake City; WI several large jurisdictions including the cities of Milwaukee, Racine, and Kenosha and Dane County (which includes Madison).

95 No. 30/2020-01139512-CU-MC-CJC, Cal. Super. Ct. (Orange Cty.) 05/15/2020. The authors thank Bonnie M. Ross, Esq. of Messner Reeves LLP for her assistance with obtaining this.

Governor had by then withdrawn the directive and the applicants had not shown that the order was likely to be repeated, rendering the application moot.[96]

In Georgia, it was the Governor who brought suit against the city of Atlanta for issuing local mask mandates which exceeded state Executive Order restrictions. The dispute started in April 2020 when, following the attempt of local authorities to issue local lockdowns, Governor Kemp signed a shelter-in-place order, shutting down restaurant dining rooms, barbershops, bars and gyms.[97] The Executive Order contained an explicit pre-emptive clause:

> The powers of counties and cities […] are hereby suspended to the extent of suspending enforcement of any local ordinance or order adopted or issued since March, 1 2020, with the stated purpose [of] combatting the spread of Coronavirus or COVID-19 that in any way conflicts, varies or differ from the terns of this order. Enforcement of all such ordinances and orders is hereby suspended and no county or municipality shall adopt any similar ordinance or order while this Order is in effect, except for such ordinances or orders as are designed to enforce compliance with this Order.[98]

The Order was strongly criticised by local mayors for superseding "their efforts to curb the virus's spread"[99] and creating confusion around "which businesses could stay open and which had to close."[100] Tension crystallised in summer 2020 when some local authorities, unhappy with the reopening plans and the state management of the lockdown, started to issue local mask mandates.[101] On July 8th Atlanta Mayor Keisha Lance Bottoms issued an executive order restricting restaurants to take out and curb side pick-up services, and requiring people to wear masks, shelter-in-place at their homes and only leave for essential tasks. The order went beyond state restrictions which by this time had allowed restaurants to reopen with restrictions and did not require the use of masks. Governor Kemp filed suit alleging Mayor Bottoms had "exceeded her authority by issuing executive orders which were more restrictive than his Executive Orders related to the Public Health Emergency."[102]

In the event the Governor backed down, dropped the lawsuit and issued a new order that allowed local authorities to issue a "Local Option Face Covering Requirement" for public places and on government property but restricted them from issuing mask mandates on private property. Clearly his reasons for doing so were political but the effect was that the legal arguments of the City were unresolved.

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96 *Id.*

97 2019 GA EO 477 (April 02, 2020).

98 2019 GA EO 477 (April 02, 2020).

99 Rick Rojas, *In Georgia, Shelter-in-Place Order Closes Businesses and Reopens Beaches*, N.Y. Times, April 4, 2020, https://www.nytimes.com/2020/04/04/us/coronavirus-georgia-beaches.html.

100 Wright Gazaway, *Savannah Mayor Frustrated amid Georgia's New Shelter-in-Place Order***,** WTOC, April 3, 2020 https://www.wtoc.com/2020/04/03/savannah-mayor-frustrated-amid-georgias-new-shelter-in-place-order/ (last accessed Dec. 12th, 2020).

101 Namely the cities of Atlanta, Savannah and Athens. *See* Madeleine Carlisle, *Georgia Gov. Brian Kemp Sued to Block Atlanta's Face Mask Ordinance. Here's What to Know*, July 18, 2020, https://time.com/5868613/georgia-governor-brian-kemp-face-mask-atlanta-keisha-lance-bottoms/.

102 Kemp v. Bottoms et al., 2020 WL 4036827 (Ga. Super.)

Of interest is that lawyers for the city of Atlanta put forward legal arguments that could potentially be used in future pre-emption litigation. They argued that the city has the right to take action to protect the public, and its mask mandate was not inconsistent with or pre-empted by the governor's order. They further argued that the lawsuit was barred by sovereign immunity, according to which state and local governments cannot be sued without their consent.[103] A more targeted discussion of the issue of pre-emption was undertaken in an amicus brief filed by the Georgia Municipal Association which relied on a separation of powers arguments and argued that only the legislature -and not the Governor- had the power to issue pre-emption orders because "preemption is based on legislative act and intent, not through an executive usurpation of that legislature". [104]

In Missouri, ongoing COVID-19 restrictions in St. Louis County led State Attorney-General Eric Schmitt to file suit in St. Louis County Circuit Court, arguing that St. Louis County's COVID-19 mitigation measures were "among the most aggressive and restrictive imposed by any county in the State of Missouri. "*105* St. Louis County and St. Louis rescinded most of the challenged restrictions on May 14, 2021, following new guidance for vaccinated individuals issued by the U.S. Centers for Disease Control.

Two months later on July 26, 2021, General Schmitt again filed suit against the city and county of St. Louis for re-imposing a mask mandate requiring those aged five and older to wear a mask in indoor public places regardless of vaccination status. In his petition to the court, Schmitt described the new mask mandate as "a continuation of a series of arbitrary, capricious, unlawful, and unconstitutional COVID-19 related restrictions" and argued that "St. Louis County and St. Louis City seek expanded government power that has failed to protect Missouri citizens living within their boundaries in the past and is not based on sound facts and data." On July 27, 2021, the St. Louis County Council voted 5-2 to terminate the mandate. However, following that vote, St. Louis County Executive Dr. Sam Page issued a statement maintaining that the mandate remained in effect, pending resolution of Schmitt's lawsuit. Schmitt asked the St. Louis County Circuit Court for a temporary restraining order and preliminary injunction to block enforcement of the mandate. On July 30, 2021, the defendants (including Page and other St. Louis county and city officials) filed a notice of removal to transfer proceedings from state court to the U.S. District Court for the Eastern District of Missouri. On August 1, 2021, U.S. District Court Judge Stephen Clark, ruled that state law issues predominated in the case, declined jurisdiction, and remanded the matter back to state court, writing, "The fate of the mask mandates under Missouri law belongs in the Missouri state courts."[106

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103 Kate Brumback & Jeff Amy, *Georgia Governor Backs out of Hearing on Atlanta Mask Order*, AP NEWS, https://apnews.com/article/virus-outbreak-georgia-health-lawsuits-keisha-lance-bottoms-0621ded2ee46ee4ace84cffbda178ab3.

104 Brief for the City of Atlanta as Amicus Curiae, GMA https://www.gacities.com/GeorgiaCitiesSite/media/PDF/GMA-Amicus-Brief-Governor-Kemp-v-the-Mayor-and-City-Council-of-the-city-of-Atlanta.pdf.

105 Missouri ex rel. Schmitt v. Page, Petition, *St. Louis County Circuit Court*, May 11, 2021.

106 Missouri *ex rel.* Schmitt v. Page, Case: 4:21-cv-00948-SRC Memorandum & Order, Filed: 08/01/21 E.D. Mo. (E. Div.) https://www.moed.uscourts.gov/sites/moed/files/documents/news/SchmittvPage.pdf.

In November 2021, Cole County Circuit Judge Daniel Green ruled that the Missouri law which allowed state health officials or local health departments to "create and enforce orders" to limit the spread of disease law violated the state's constitution, which gives separate powers to different branches of government, and that elected officials should be the ones to issue such mandates.[107] Green wrote in his ruling that local health officials in Missouri "have grown accustomed to issuing edicts and coercing compliance. It is far past time for this unconstitutional conduct to stop."[108] Shortly after the ruling St Louis County rescinded its public mask mandate.

Similar tussles took place in Texas where Attorney-General Ken Paxton challenged Travis County and Austin New Year's Eve restrictions which sought to limit restaurants to take-out only over the holiday weekend. In its unsigned order, the court directed the Third Court of Appeals to block enforcement of the restrictions "pending final resolution of the appeal." In his initial complaint in the Travis County District Court, Paxton argued that the local orders conflicted with Governor Greg Abbott's (R) Executive Order GA-32,[109] which both allowed restaurants and bars to operate at reduced capacity and prohibited "any conflicting order issued by local officials in response to the COVID-19 disaster." The trial court disagreed, and the Third Court of Appeals initially rejected Paxton's appeal. Following the Texas Supreme Court's ruling, Paxton thanked the court "for upholding the rule of law," saying that the court "was right to end these oppressive, illegal city and county declarations." Travis County Judge Andy Brown said he was disappointed by the decision "as it limits our ability to slow the spread of COVID-19 in our community." The restrictions expired at 6:00 a.m. on January 3, 2021.

The cases that we have discussed above represent disputes over the desirability or otherwise of COVID-19 restrictions that actually made it into court. They are not the only instances of this type of intergovernmental dispute. In Florida, Governor Ron DeSantis initially declined to issue a state-wide lockdown and left it to local jurisdictions to decide on restrictions for their own communities. However, on April 1, 2020 he issued a stay-at-home order directing Floridians to stay home except for essential trips.[110] The order was expressed to "supersede any conflicting official action or order issued by local officials in response to COVID-19 but only to the extent that such action or order allows essential services or essential activities prohibited by this Executive Order."[111] By this time, a number of local authorities had already issued orders for beach closures and restrictions on numbers attending religious services, so that the relationship between these and the Governor's order was unclear. [112] Governor DeSantis attempted to clarify the meaning of the amended Order during a Press Conference and stated:

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107 https://www.stlpr.org/coronavirus/2021-11-23/missouri-judge-rules-local-mask-mandates-other-coronavirus-orders-unconstitutional.

108 https://www.usnews.com/news/best-states/missouri/articles/2021-11-23/judge-local-health-orders-tied-to-covid-19-are-illegal.

109 Executive Oder GA-32, https://gov.texas.gov/uploads/files/press/EO-GA-32_continued_response_to_COVID-19_IMAGE_10-07-2020.pdf.

110 Executive Order 20-91 (Apr. 1, 2020).

111 Section 4, Executive Order 20-91 (Apr. 1st, 2020).

112 Janelle Irwin Taylor, *Megachurches Are Exempt from Safe-at-Home Order Following Ron DeSantis' clarification*, FLAPOL, https://floridapolitics.com/archives/326446-megachurches-will-be-exempt-from-safer-Ct-home-order-following-ron-desantis-clarification.

> We have the baseline. If folks want to do things more, then they can do more in certain situations. We want to work with the local folks. I think each region in Florida is very distinct, and some of these things may need to be approached a little bit differently."[113]

The following day, April 2, DeSantis issued a revised order which omitted the second half of the sentence and left only the wording: "This Order shall supersede any conflicting official action or order issued by local officials in response to COVID-19".[114]

The revision failed to clarify the relationship between governor and local authority regulations but in a later order (Order 20-123) enacted on May, 14th 2020 authorising Phase l of the reopening of the state the language of pre-emption appears. This order clearly set out to prevent local authorities from prohibiting the hosting of sport events and games:

> Professional sports may operate in the State of Florida and venues may host training, competitions, events and games. This provision shall pre-empt any local rule prohibiting a professional sports team conducting, or the operators of the venue from hosting, those sports activities at facilities in the State.[115]

In Iowa, following the governor's refusal to issue a state-wide mandate,[116] during summer 2020 some local authorities attempted to issue mask mandates. [117] In Muscatine, these attempts had limited effect due to the difficulty of enforcing such requirements and the conflicting views of the mayor, the county attorney and the legislature. County attorney James Barry declared that he would not prosecute infractions, and the City Council voted to prohibit the use of city staff time or funds to pursue enforcement of the order.[118] In Iowa City and Johnson County, however, local enforcement collaborated with the mayor and the mask mandate was extended to November, 13th.

To date, there has been no legal action by the Governor or Attorney General against Muscatine or Iowa City for their face covering requirements. The legal issues around pre-emption of local action are therefore unsettled in Iowa. However,

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113 Renzo Downey, Safe-At-Home Order Confusion Continues in Preemption Issue, FLORIDA POLITICS available at https://floridapolitics.com/archives/326513-safe-at-home-order-confusion-continues-in-preemption-issue, April 2, 2020.

114 Executive Order 20-92 (Apr. 1st, 2020).

115 Executive Order 20-123 (May 14th, 2020).

116 *See Local Control Dispute Brewing over Iowa Mask Mandates*, Fox42, https://fox42kptm.com/news/local/local-control-dispute-brewing-over-iowa-mask-mandates. Governor Kim Reynolds then issued a broad mask requirement for indoor public spaces on Nov. 16, 2020. *See* Public Health Disaster Proclamation 11/16/2020 available at https://governor.iowa.gov/sites/default/files/documents/Public%20Health%20Proclamation%20-%202020.11.16.pdf.

117 *See Iowa City Mayor Mandates Wearing Masks in Public, Defying Governor; Authority to Do So in Dispute,* Iowa City Press Citizens, https://eu.press-citizen.com/story/news/local/2020/07/21/iowa-city-mayor-bruce-teague-order-residents-wear-face-coverings-public-governor-kim-reynolds/5477707002/.

118 *Iowa City mayor mandates wearing masks in public, supra* note 117.

as in other states, the impression is that both the state and the local authorities are preparing for a future court battle. The Governor has asserted that Governor's emergency management authority occupies the field for purposes of pre-emption and therefore local governments are not authorized to implement face mask mandates or other local regulations. Cities argued that they can issue local mandates under their Home Rule authority which authorises them to determine their local affairs and issue orders not inconsistent with the laws of the state.[119] From a legislative point of view, the Iowa Constitution grants Home Rule power to municipalities in Art. III sec. 8,[120] and the Iowa code specifies that "An exercise of a city power is not inconsistent with a state law unless it is irreconcilable with the state law."[121] The issue that a court would need to address in a potential lawsuit is whether the mask requirement is "irreconcilable" with state law and with the Governor's emergency management action. The matter was further raised by Sen. Zach Wahls who asked for an opinion of the Iowa Attorney General Tom Miller's office. The Office issued a non-conclusive letter in which it argued that, if not pre-empted, local regulations could "likely be under the jurisdiction of local boards of health".[122] The letter also compared the enactment of mask orders with the power of local officials to issue shelter in place orders. In that case, the Attorney General concluded that local authorities could issue shelter in place orders only if such a power was delegated by the state under Iowa Code Sec. 29C.6 (8) which allows the Governor to delegate and sub-delegate any administrative authority under the Emergency Management Chapter.[123]

The situation in South Carolina is similar**.** Following the passage of local shelter in place orders by the city of Columbia and Charleston, Attorney General Alan Wilson issued a legal opinion in March 2020.[124] The opinion concluded that local authorities cannot pass shelter in place orders because such authority falls under emergency powers delegated to the Governor by the General Assembly and that such powers pre-empt those of counties and municipalities.[125] The argument relied on a previous opinion dated September 5, 1980 related to compulsory

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119 *See* Letter of the Iowa Department of Justice to Sen. Zach Wahls, p. 1 https://www.cityofdubuque.org/DocumentCenter/View/46486/City-of-Dubuque-Mask-Mandate-Memo-8520.

120 Article III, Section 38A of the Iowa Constitution, "Municipal corporations are granted home rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs and government, except that they shall not have power to levy any tax unless expressly authorized by the general assembly."

121 Iowa Code §§ 364.2(2) and (3). Section 2"A city may exercise its general powers subject only to limitations expressly imposed by a state or city law." Section 3. An exercise of a city power is not inconsistent with a state law unless it is irreconcilable with the state law.

122 *See* EXHIBIT A, Letter of the Iowa Department of Justice to Sen. Zach Wahls, supra note 122, at 5.

123 *Id.* Legal Memo from the Attorney's General Office, p. 9 https://www.cityofdubuque.org/DocumentCenter/View/46486/City-of-Dubuque-Mask-Mandate-Memo-8520.

124 Office of the Attorney General, State of South Carolina, *Updated opinion with additional citations concerning the extraordinary powers of the Governor during a state of emergency.* March 28, 2020. http://www.scag.gov/archives/40491#ixzz6ifii4W5f

125 S.C. Code Ann. § 25-1-440 (a) (2018). "The Governor, when an emergency has been declared, as the elected Chief Executive of the State, is responsible for the safety, security, and welfare of the State and is empowered with the following additional authority to adequately discharge this responsibility".

evacuations by municipalities in case of a real or threatened emergency or disaster-related situation. The conclusion there was that "there is no similar inherent 'police power' in lesser political subdivisions such as counties and municipalities, as each derives its authority from the sovereign."[126] Likewise, Attorney General Alan Wilson argued in March 2020: "The corollary to this is that while local governments retain their Home Rule powers during a state of emergency, they do not have extraordinary emergency powers. They cannot exercise the emergency powers delegated to the Governor by the General Assembly."[127] Despite this assertion, however, the opinion left the door open for potential litigation and added that a municipal ordinance is a legislative enactment and is presumed to be constitutional unless and until set aside by a court of competent jurisdiction.[128]

On the other side of the dispute, Mayor of Columbia Stephen K. Benjamin pushed back and contended that the order was within the city's authority because the Governor had not acted and had therefore not pre-empted the field.[129]

The potential legal issue for a court would therefore be to establish the extent to which such local orders can have validity in absence of state action. This remains an unsettled area since the Governor of South Carolina Henry McMaster eventually issued a stay at home order on Apr. 6th 2020 that made the legal dispute redundant.

In California on the other hand Governor Newsome issued an Executive Order rolling back the applicability of state pre-emption on the basis that local authorities, based on their particular needs, may […] determine that additional measures to promote housing security and stability are necessary to protect public health or to mitigate the economic effects of COVID-19[130] or may determine that …. promoting stability amongst commercial tenancies is also conducive to public health such as by allowing commercial establishments to decide whether and how to remain open based on public health concerns rather than economic pressures, or to mitigate the economic effects of COVID-19: " any provision of state law that would preempt or otherwise restrict a local government's exercise of its police power to impose substantive limitations on residential or commercial evictions […] is hereby suspended to the extent that it would preempt or otherwise restrict such exercise

C. Narratives of Local Democracy: Dillon's Rule, Home Rule and the Scope of Municipal Authority

As Professor Bluestein points out, "the scope and structure of delegated powers of each state are often characterized as either "home rule" or "Dillon's rule."[131] The former, sometimes known as the Cooley Doctrine after Michigan Supreme

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126 1980 S.C. Op. Att'y Gen. 142 (1980).

127 2020 WL 2044370, at *2 (S.C.A.G. Mar. 29, 2020).

128 *Id.* at *3 citing Whaley v. Dorchester County Zoning Bd. of Appeals, 337 S.C. 568, 575, 524 S.E.2d 404, 408 (1999) and Peoples Program for Endangered Species v. Sexton, 323 S.C. 526, 532, 476 S.E.2d 477, 481 (1996).

129 Columbia Stay-at-Home Ordinance to Go Into Effect Sunday, Despite Warning From Attorney General, WIS NEWS 10, https://www.wistv.com/2020/03/27/columbia-stay-at-home-ordinance-go-into-effect-sunday-despite-warning-attorney-general/.

130 Executive Order N28-20, https://www.nclc.org/images/pdf/special_projects/covid-19/CA-3.16.20-Executive-Order.pdf.

131 Frayda S. Bluestein, *Do North Carolina Local Governments Need Home Rule*, 84 N.C.L. Rev. 1983, 1985 (2006). *See also*: Jesse J. Richardson et al, *infra* 30.

Court Judge Thomas M. Cooley, yields a theory of an inherent municipal right to self-determination that the state cannot take away.[132] By contrast Dillon's rule which derives from much more restrictive narrative of the state/ local authority relationship found in the work of John Forest Dillon, chief justice of the Iowa Supreme Court,[133]offers no such right but sees local governments merely as political subdivisions of the State to which they belong and dependent upon them for their existence and their powers: "[m]unicipal 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 may it destroy. If it may destroy, it may abridge and control."[134]

In this formulation, there can be no equivalent of an inherent police power with consequences for the role of the courts as the Chief Justice later explained:

> A municipal corporation possesses and can exercise the following powers and no others: First, those granted in express words (from the state); second, those necessarily implied or necessarily incident to the powers expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation-not simply convenient, but indispensable; and fourth, any fair doubt as to the existence of a power is resolved by the courts against the corporation.[135]

This explanation of state pre-eminence over local governments was was recognised and adopted by the U.S. Supreme Court in *Barnes v. District of Columbia* (1876)[136] and again in the case of *Hunter v. Pittsburgh* (1907).[137]

> Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them. […] The number, nature, and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. […]. The state […], at its pleasure, may modify or withdraw all such powers, [and even] repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. […]. The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it.[138]

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132 *See* People v. Hurlbut, 24 Mich. 44, 95 (1871) (Cooley, J., concurring).

133 *See* 1 John Forrest Dillon, Commentaries on the Law of Municipal Corporations § 98, at 154-56 (5th ed. 1911).

134 Clinton v. Cedar Rapids & Missouri River Railroad, 24 Iowa 455 (1868). *See also* his work, The Law On Municipal Corporations (1872).

135 Merriam v. Moody's Executors, 25 Iowa 163, 170 (1868) (Dillon, C.J.).

136 Barnes v. District of Columbia, 91 U.S. 540, 544-45 (1876).

137 Hunter v. City of Pittsburgh, 207 U.S. 161 (1907).

138 *Id.* at 178–79 (1907).

The consequence then is that local government authority must be construed narrowly.[139] It must, however, be borne in mind that the rule itself does not describe the structure and powers of municipalities in a given state but is in effect a default rule of construction; in the absence of provisions in state constitutions or legislation that support a more generous interpretation, "[a]ny fair, reasonable doubt concerning the existence of power [falls to be] resolved . . . against the corporation."[140] The same rule was to apply to counties which are to be regarded as possessing little or no lawmaking authority, being nothing more than administrative arms of the state government.

Home rule, on the other hand, "refers to a broad delegation of authority by the state over matters of local concern."[141] It speaks to the desire on the part of local authorities to exercise a measure of autonomy and democratic control within their localities and is the corollary of the *Cedar Rapids/Hunter v. Pittsburgh* analysis. If the state can destroy it can also create. The movement to extend the powers of municipalities vis à vis those of the state began during the Progressive movement in America at the end of the 19th century. Progressives concerned about "legislative capture" or, to use Samuel Isaacharoff's term, "clientelism,"[142] sought to cabin the ability of state legislatures to buy political support in exchange for special privilege legislation and pushed for the amendment of state constitutions and the enactment of state laws to increase the power of local governments and decrease the ability of state legislatures to exercise power over their functioning.[143]

These early home -rule attempts granted municipalities only limited substantive lawmaking powers restricted in the main to matters of "local" concern. This meant that, should the exercise of these powers be challenged, the role of the courts was limited to ascertaining the "local" character of the regulation in question. A city acting within the sphere of "local" concern, would enjoy freedom from state interference.[144] The1950s and 1960s, however, saw a second wave of proposals aimed at extending the distribution of power to local authorities by delegating to them aspects of the state 'police power.' In 1953, the American Municipal Association published a set of Model Constitutional Provisions for Municipal Home Rule which starting from the proposition that states should delegate the full range of state legislative authority to their general purpose local governments subject always to overriding or preemptive state general law.[145] The effect was to

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139 *See* Frank Vram Zerunyan, *The Evolution of the Municipal Corporation and the Innovations of Local Governance in California to Preserve Home Rule and Local Control*, 44 Ford Urb. L.J. 220, 217 (2017); Bluestein, *supra* note 16, at 1985.

140 *See* Dillon, *supra* note 17, at 93 (2d ed. 1873) ("[Municipalities] possess no powers or faculties not conferred upon them, either expressly or by fair implication, by the law which creates them....").

141 *Id.*

142 *i.e*. the ability to buy public goods in exchange for political support. *See* Samuel Issacharoff, *On Political Corruption*, 124 Harv. L. Rev. 118 (2010); Justin R. Long, *State Constitutional Prohibitions on Special Laws*, 60 Cleveland State L. Rev. 719, (2012).

143 *See* Dale Krane, Platon N. Rigos & Melvin B. Hill, Jr., Home Rule in America: A Fifty-state handbook, CQ ix (2001) (describing the home-rule movement of the late nineteenth and early twentieth as a pro-democratic effort to increase local autonomy).

144 Paul Diller, *Intrastate Preemption*, 87 B.U. L. Rev. 1113, 1124 (2007).

145 Mun. Ass'n, Model Constitutional Provisions for Municipal Home Rule 6 (1953).

launch a wave of reform across the country but has left a 'varied landscape'[146] of home rule in which states have adapted and modified the two main historical models to produce individual models of delegated authority. All states however retain overriding authority, with state courts the ultimate arbiter of the meaning of the boundaries of delegated and reserved powers.[147]

Most recently, the National League of Cities (NCL) launched a new initiative designed to recalibrate the state-local relationship to reflect the changing economic and political significance of the city in the twenty-first century.[148] It proposes a set of interrelated "guiding principles" to recognize the values of local democracy: state home rule should i) reinforce the breadth of authority local governments need to solve the range of challenges they face; ii)advance the critical value of local fiscal authority, iii) ensure that states have sufficiently strong reason to displace local authority and iv)respect the central importance of local democracy. To reinforce and institutionalise these principles, it proposes as a starting point a model constitutional home rule article that states can tailor to suit their own local government arrangements and value choices,[149] subject always to an overriding aim "to articulate and provide means for enacting a state and local legal relationship on the right general grounds, acknowledging that variation across and within states is not only inevitable, but entirely appropriate."[150]

The challenge however, as NCL points out, is not new and the "task of reconciling new law with existing statutes and precedent is not unique to home rule."[151] That may be so but, as the Report notes and NCL has documented, in a climate of 'culture wars' where states and their cities and other local governments find themselves at odds, a constitutional jurisprudence of state overweening authority continues to represent the dominant narrative. However as the significance of the place of the modern city as a service and amenity provider with a role that is central to the lives of many, if not most of the population, continues to expand, it is a narrative that looks increasingly outdated. As we observed earlier Professor Hirschl is not immediately optimistic.[152] On the other hand, as he himself recognises: "the 21st century will not be dominated by America or China, Brazil or India, but by the city… the age of the nation-state is over. The new urban era has begun."[153]As a passionate advocate of local government autonomy has argued: "A modern jurisprudence recognizing a right of local, community self-government will only emerge as more municipal communities enact local laws securing and exercising that right."[154] The pandemic is not the only context for local authority muscle-flexing. A detailed overview is outside the scope of this article but as cities attempt to extend their regulatory ambit in relation to such contentious matters

146 Nat'l League of Cities, *Home Rule for the Twenty-First Century* 12 (2020).
147 *Id.*
148 *Id.*
149 *Id.* at 24-29.
150 *Id.* at 31.
151 *Id*. at 32.
152 Hirschl, *supra* note 3.
153 Hirschl, citing Parag Khanna, *Beyond City Limits*, 181 Foreign Policy 120, 122 (Sept/Oct 2010).
154 Thomas Linzey, *A Phoenix From the Ashes: Recognizing a Constitutional Right of Local Community Self-Government in the Name of Environmental Sustainability*, 8 Ariz. J. Envtl. L. & Pol'y 1 59 (2017).

as gun control, environmental regulation and sanctuary cities[155] the impetus for independent local democracy will surely grow.

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