COMMENT

PRETEXTUAL PREEMPTION: THE MODERN WEAPONIZATION OF PREEMPTION IN THE REGULATION OF CONCENTRATED ANIMAL FARMING OPERATIONS

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While efficient, the modern meat production system carries weighty consequences. The myriad of associated environmental and health burdens is principally shouldered by local populations. The level of government oversight and regulation of the largest of these operations, Concentrated Animal Feeding Operations (CAFOs), is not commensurate with the magnitude of their risks. CAFOs are regulated at the federal level primarily with respect to water contamination. The remaining environmental monitoring and enforcement are largely left to individual states. However, the efficacy of state programs varies widely, and many have been criticized for leaving gaps in oversight and enforcement.

In the absence of federal and state guidance, some municipalities have developed their own regulations. They have been met with hostility at every turn by state governments and various interest groups. In a maneuver that has become increasingly common, state legislatures are exercising their preemptive authority to block local regulations altogether. As local governments possess exceedingly little inherent power of their own, state preemption can neutralize the ability of local governments to protect their communities from the externalities associated with CAFOs. This trend is not limited to the agricultural industry and is merely a symptom of a seismic shift in the relationship between state legislatures and municipalities.

Although preemption is at its core a foundational aspect of the U.S. federal system, the prevalence and aggression of this particular strand of preemption is novel and has uniquely serious implications on public health, environmental justice, and democracy.

† J.D. Candidate, University of Pennsylvania Carey Law School, Class of 2022. I would like to thank Professor Cary Coglianese for his incredible guidance and support throughout my researching and writing process. I am also grateful to Stephen Jeffrey and Professor Richard Feder for their indispensable insights into the practical realities of making a preemption challenge.
The quashing of local policies for its sake alone under the pretext of preemption warrants critical evaluation, and in some instances, must be constrained where necessary. In this comment, I distinguish the modern divergence in the use of preemption against the background of the factory farming industry and identify a metric through which courts might consider limitations of its use. Specifically, courts should identify when state preemption results in the creation of regulatory vacuums such that industry actors are permitted to use their own discretion to determine the appropriate level of protection for the surrounding communities. Further, I argue that it is in these narrow circumstances, in which human health and safety are directly imperiled, that courts should find that a local regulation is preempted only where a state demonstrates a comprehensive regulatory interest and scheme.

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INTRODUCTION

Over the last century, the United States agricultural system has shifted from a large number of small, diversified livestock farms to a concentrated system of industrial facilities called Concentrated Animal Feeding
Operations (CAFOs). As modern meat operations strived to maximize profits, they significantly increased the efficiency of meat production and ushered in a new era of agricultural practices. As a result, animal feeding operations have grown in size and have become increasingly geographically concentrated. Unable to keep pace with recent advancements, traditional family farms have largely been replaced by these industrial operations. The modern livestock market is now concentrated between several large and influential production companies.

Large agricultural companies have continued to grow over the years and it is now estimated that ninety-nine percent of domestic farm animals are contained within factory farm operations. The facilities are primarily concentrated in rural America, particularly in the South and Midwest. As they expand and relocate, and populations grow, livestock operations have

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1 See CAROLYN DIMITRI, ANNE EFFLAND & NEILSON CONKLIN, U.S. DEP’T OF AGRIC., ECON. INFO. BULL. 3, THE 20TH CENTURY TRANSFORMATION OF THE U.S. AGRICULTURE AND FARM POLICY 2 (2005) (“Since 1900, the number of farms has fallen by 63 percent, while the average farm size has risen 67 percent.”).

2 See S.M. Rafael Harun & Yelena Ogneva-Himmelberger, Distribution of Industrial Farms in the United States and Socioeconomic, Health, and Environmental Characteristics of Counties, 2013 GEOGRAPHY J. 1, 1-2 (describing the various consequences of animal farming, including soil and sediment erosion, pesticide use, and antibiotic use).

3 See OFF. OF INSPECTOR GEN., U.S. ENV’T PROT. AGENCY, EPA REPORT NO. 17-P-0396, ELEVEN YEARS AFTER AGREEMENT, EPA HAS NOT DEVELOPED RELIABLE EMISSION ESTIMATION METHODS TO DETERMINE WHETHER ANIMAL FEEDING OPERATIONS COMPLY WITH CLEAN AIR ACT AND OTHER STATUTES 1 (2017) [hereinafter EPA REPORT NO. 17-P-0396] (“For more than two decades, movements to improve profitability within the agriculture industry have resulted in larger AFO facilities that often are geographically concentrated.”).


7 See FOOD & WATER WATCH, FACTORY FARM NATION: 2020 EDITION 2:3 (2020) (mapping the states with the most hog producers, with North Carolina and Iowa leading).
The externalities produced by CAFOs create serious public health and welfare concerns for the surrounding residents. A myriad of consequences from physical illness to an overall depressed quality of life plague the nearest communities. While some limited federal regulation exists, it is largely left to individual states to issue permits, site operations, and enact regulations to cope with these concerns. CAFOs produce much more than simply meat products; CAFO byproducts include expansive externalities, and the impacts of those externalities are felt acutely by those communities nearest to the source.

The U.S. Department of Agriculture (USDA) estimates that millions of tons of dry manure are generated by CAFOs annually. On traditional farms, there are both fewer animals and typically more land area, making it possible for the waste to be recycled into a “semi-sustainable feedback loop.” Comparable recycling is impossible for industrial operations given the quantity of waste produced, which quickly overwhelms local fertilizer demand. Consequently, most of the manure from CAFOs is stored within mere miles of the originating facilities. However, this waste does not remain contained within this system and can be released into the environment through natural processes or accidents—raising concerns about public health and environmental protection as residential areas are directly impacted by these events.

The externalities produced by CAFOs create serious public health and welfare concerns for the surrounding residents. A myriad of consequences from physical illness to an overall depressed quality of life plague the nearest communities. While some limited federal regulation exists, it is largely left to individual states to issue permits, site operations, and enact regulations to cope with these concerns.
protect health and safety in and around the facilities. The effectiveness of these regulations varies widely as states can choose whether to address health and safety concerns. As a result, troubling deficiencies in CAFO monitoring pervade across the country.

Despite the impacts of industrial farm waste pollution on their lives, local residents have little say in the development or oversight of the facilities. Although local governments attempt to fill regulatory gaps left by higher levels of government, their ability to do so is limited by the authority granted by the state.

Local preemption is historically based on the goals of federalism and governmental efficiency. Today, widening ideological divides and shifts in key political battlegrounds have caused some states to snuff out progressive policies under the pretext of preemption. Pretextual preemption is often used as a political tool when there is (1) an absence of regulatory guidance, (2) a law forbidding localities from enacting legislation to fill certain regulatory gaps, and (3) a failure by states to fill those gaps themselves.

This distinct manifestation of preemption may be challenging to detect and limit, but several tools can assist courts in doing so. The presence of regulatory vacuums, which are created by the elimination of local laws, is one way to assess both the motivations of the state in enacting the preemptive legislation and determining if and how it should be constrained. Additionally, the arguments advanced by rural communities in ongoing lawsuits related to this issue present another opportunity to evaluate possible solutions. For example, several Missouri counties have found themselves at the center of this political and legal battle. Currently entangled in litigation with the state, the counties defend regulations that address the health and environmental harms caused by CAFO byproduct pollution and argue that

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15 See infra Section I.B.
16 Id.
17 Id.
18 See U.S. ENV’T PROT. AGENCY, EPA 833-F-12-001, NPDES PERMIT WRITERS’ MANUAL FOR CONCENTRATED ANIMAL FEEDING OPERATIONS 3-8 (2012) [hereinafter NPDES MANUAL] (describing how permitting authorities are merely encouraged, but not required, to hold public forums and seek public comments during the NPDES permit issuance process); see also Allison Kite, As Massive Livestock Operations Move in, Fighting Them Gets Harder for Rural Neighbors, MO. INDEP. (June 14, 2021 9:00 AM), https://missourindependent.com/2021/06/14/as-massive-livestock-operations-move-in-fighting-them-gets-harder-for-rural-neighbors[https://perma.cc/Z5TK-JMHH] (discussing that beyond the ability to submit comments on a proposed permit, local communities in Missouri have little input and that the majority of their suggestions are ignored).
19 See infra note 96.
20 See infra notes 118–128.
21 See infra Section II.B.
22 See infra notes 176–207.
23 See infra subsection III.B.1.
they cannot be preempted except by state regulations on that matter.\textsuperscript{24} Similarly, the Ohio Supreme Court has adopted a four-part test which limits the circumstances under which a conflict between local and state laws are found, and which is determined in part upon whether the state law is intended to enact regulations or merely to prevent the local governments from doing so.\textsuperscript{25}

This Comment explores state preemption against the backdrop of a particularly consequential industry and advances these frameworks to determine the narrow circumstances under which a state’s otherwise legitimate exercise of its preemptive authority should be limited. In Part I, I discuss the many risks posed by the CAFO industry, describe the current regulatory regimes governing the industry at each level of government, and clarify the importance of local governance in this space. In Part II, I attempt to distinguish the traditional rationales for preemption from its modern manifestation and usage as justification for its heightened scrutiny in legal analyses. Finally, in Part III, I examine the suppressive effect of pretextual preemption, particularly when it prevents local governments from protecting their citizens against dire environmental hazards. In light of the distinction between traditional and pretextual preemption, I argue that courts should scrutinize where preemption is used to nullify otherwise legitimate exercises of local governance, specifically in areas where states refuse to govern themselves. Part III describes the ongoing Missouri CAFO litigation and lays out the Ohio Supreme Court test which investigates the purpose of preemptive action. While it is no small request, a limitation on the preemptive authority of states is appropriate in extreme circumstances, including where necessary to protect public and welfare against the otherwise unabated pollution of their communities.

\section*{I. THE EXTERNALITIES AND REGULATORY STRUCTURE OF THE CAFO INDUSTRY}

In this Part, I will examine the regulatory regime governing CAFO operations and the origins of the regulatory gap that has gone unaddressed in the age of pretextual preemption. In order to understand this policy gap, this Part will begin by describing how regulatory bodies identify CAFO operations and define scope of the harm they produce. This Part will then describe the federal, state, and local government regulatory schemes currently governing CAFOs, concluding with a brief discussion of the importance of local government-level regulation.

\textsuperscript{24} See infra subsection III.B.1.
\textsuperscript{25} See infra subsection III.B.2.
A. Animal Feeding Operations and Their Impacts

Animal feeding operations are defined by the U.S. Environmental Protection Agency (EPA) as “enterprises where animals are kept and raised in confined situations.” There are approximately 450,000 operations of this kind in the U.S. Animal feeding operations are facilities where animals “have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period” and where “vegetation . . . [is] not sustained in the normal growing season over any portion of the lot or facility.” CAFOs specifically refer to the largest of these facilities, containing more than 1,000 animal units confined for longer than 45 days annually or those operations that discharge wastewater into any waterway, regardless of the size of the operation. These operations have considerable transnational impacts spanning animal welfare, the treatment of immigrant worker populations, and climate change. Some of the most acute environmental and societal impacts, however, are experienced by the local communities closest to the source.

Animal feeding operations produce a staggering amount of waste. This material is typically collected in “vast open-air pits” or lagoons, which can...
each hold many millions of gallons of wastewater.\textsuperscript{34} The waste is then directly applied in liquid form to “sprayfield[s]” through sprinkler systems.\textsuperscript{35} While these methods provide a short-term management solution, the waste does not always remain contained. Waste material can escape into the surrounding environment through natural processes, which cause contaminants to flow into the nearby waterways and groundwater.\textsuperscript{36} These existing environmental consequences may be exacerbated further by climate change because of increased flooding and more severe weather events.\textsuperscript{37} Leakage events pose an ecological hazard,\textsuperscript{38} and EPA and USDA report that agriculture, including animal feeding operations, is the “leading contributor to water quality impairments in rivers and lakes.”\textsuperscript{39}

CAFOs are also associated with expansive health risks to which local residents are constantly exposed. Research suggests that “more than 40 diseases can be transferred to humans through manure.”\textsuperscript{40} Residents who border animal facilities are in particular danger for a variety of reasons. Rural communities rely on residential drinking wells—a source at high risk of contamination.\textsuperscript{41} Exposure to high nitrogen levels, often found in CAFO waste, can cause nitrate poisoning and has been linked to birth defects and miscarriages.\textsuperscript{42} Additionally, breathing the waste-contaminated air can cause respiratory irritation and gastrointestinal symptoms.\textsuperscript{43} Recent research

\textsuperscript{34} See WHITMAN ET AL., supra note 8, at ES8 (describing how this process can occur through runoff, erosion, direct discharges, spills, and soil leaching); see also Michelle B. Nowlin, \textit{Sustainable Production of Swine: Putting Lipstick on a Pig?}, 37 \textit{VT. L. REV.} 1078, 1087 (2013) (describing a study that found swine CAFOs in North Carolina conclusively polluting local groundwater).

\textsuperscript{35} See Katherine L. Martin, Ryan E. Emanuel & James M. Vose, Short Communication, \textit{Terra Incognita: The Unknown Risks to Environmental Quality Posed by the Spatial Distribution and Abundance of Concentrated Animal Feeding Operations}, 642 SCI. TOTAL ENV’T 887, 892 (2018) (noting that many CAFOs are located in geographically vulnerable areas and discussing the implications of climate change on these already unstable areas).

\textsuperscript{36} See WHITMAN ET AL., supra note 8, at 2-8 (explaining the various ecological hazards of pollutant leakages derived from animal feeding operations, including destruction of ecosystems and oxygen depletion for wildlife).

reveals that children living in close proximity to hog farms are more likely to develop asthma. Research also suggests that the antibiotics used on livestock, when inhaled by nearby humans, “could further undermine antibiotic effectiveness against human disease.”

The health impacts on CAFO employees demonstrate the gravity of these dangers. Studies indicate that at least a quarter of CAFO workers experience respiratory symptoms including “bronchitis, mucus membrane irritation, asthmalike syndrome, and acute respiratory distress syndrome.” Furthermore, CAFO employees sometimes experience such severe respiratory symptoms that they are forced to leave the facilities immediately.

Studies have uncovered another troubling phenomenon: CAFO neighbors demonstrate an overall depressed quality of life. Airborne pollution travels from the lagoons and sprayfields to settle on residential properties, permeating the air and coating their property and belongings in manure. Nearby homeowners have been forced to forgo outdoor activities, and some report being unable to sleep or even leave their homes because of the smell. Additionally, the pollution makes social gatherings difficult and can threaten the social health of communities.

Mental health implications


45 See Julia R. Barrett, Airborne Bacteria in CAFOs: Transfer of Resistance from Animals to Humans, 113 ENV’T HEALTH PERSPS. A116, A116 (2005) (“Several antibiotics used in animal agriculture are the same or similar to those used in human medicine; transference of resistant microbes from animals to humans could further undermine antibiotic effectiveness against human disease.”).

46 Kelley J. Donham, Steven Wing, David Osterberg, Jan L. Flora, Carol Hodne, Kendall M. Thu & Peter S. Thorne, Community Health and Socioeconomic Issues Surrounding Concentrated Animal Feeding Operations, 115 ENV’T HEALTH PERSPS. 317, 318 (2007); see also HRIBAR & SCHULTZ, supra note 12, at 6 (“Particulate matter may lead to more severe health consequences for those exposed by their occupation. Farm workers can develop acute and chronic bronchitis, chronic obstructive airways disease, and interstitial lung disease.”).

47 See Donham et al., supra note 46, at 318 (“[A] small portion of workers experience acute respiratory symptoms early in their work history that may be sufficiently severe to cause immediate withdrawal from the work place.”).

48 See D. LEE MILLER & GREGORY MUREN, NAT. RES. DEF. COUNCIL, R:19-06-A, CAFOs: WHAT WE DON’T KNOW IS HURTING US 9 (2019) (“[T]hese emissions can also harm a community’s quality of life, preventing people from spending time outside and even, according to some studies, impacting mental health.”).

49 See Wendee Nicole, CAFOs and Environmental Justice: The Case of North Carolina, 121 ENV’T HEALTH PERSPS. A182, A183 (“Sometimes, residents say, a fine mist of manure sprinkles nearby homes, cars, and even laundry left on the line to dry.”).

50 See Wing et al., supra note 43, at 1365 (reporting that local residents stop going outside, keep their windows closed, have trouble sleeping, and more because of the unbelievable fumes).

51 Donham et al., supra note 46, at 318.
have resulted from this trauma, including depression, anxiety, and even posttraumatic stress disorder.\textsuperscript{52}

The presence of CAFOs in a community can also have negative economic consequences. Although the livestock industry is often touted as a valuable source of jobs, few of them go to locals.\textsuperscript{53} The materials used to build and supply the operations are usually not sourced locally and so there is limited economic benefit conferred upon the community.\textsuperscript{54} In fact, the siting of a CAFO in a town can have a net negative financial impact on an area as property values are depressed near CAFO sites, which can complicate selling property and relocating away from the facilities.\textsuperscript{55}

These consequences are not distributed evenly across demographic groups. A 2000 research study of North Carolina hog CAFO sites revealed that the operations are more densely concentrated near communities with high poverty rates and a high percentage of nonwhite people.\textsuperscript{56} Rural communities where CAFOs are most often sited have vulnerabilities that intensify the impacts CAFO pollution exposure.\textsuperscript{57} CAFO-related health risks are magnified in these populations which are already statistically at a higher risk of asthma and heart disease.\textsuperscript{58} In addition, these communities are statistically less likely to have health insurance and access to quality medical care, both of which further exacerbate the risk of harm.\textsuperscript{59}

\textsuperscript{52} Id.

\textsuperscript{53} See Nadia S. Adawi, State Preemption of Local Control Over Intensive Livestock Operations, 44 ENV’T L. REP. *10506, *10509 (2014) (discussing that these few opportunities also pay barely above minimum wage).

\textsuperscript{54} See id. ("[L]arger farms buy feed in bulk from sources outside of the community.").

\textsuperscript{55} Id. at *10507; Steven Verburg, Property Values Drop Near Large CAFOs, State Says, WIS. STATE J. (Nov. 16, 2017), https://madison.com/wsj/news/local/govt-and-politics/property-values-drop-near-large-cafos-state-says/article_96da467-b0bc-5de9-9883-2f1466d0e439.html [https://perma.cc/69WH-QDB8].

\textsuperscript{56} Steve Wing, Dana Cole & Gary Grant, Environmental Injustice in North Carolina’s Hog Industry, 108 ENV’T HEALTH PERSPS. 225, 229 (2000).

\textsuperscript{57} See Virginia T. Guidry, Sarah M. Rhodes, Courtney G. Woods, Devon J. Hall & Jessica L. Rinsky, Connecting Environmental Justice and Community Health: Effects of Hog Production in North Carolina, 79 N.C. MED. J. 324, 326 (2018) ("Communities where CAFOs are concentrated have vulnerabilities common to other rural populations that can exacerbate exposure to pollutants and increase the risk of harmful effects.").

\textsuperscript{58} Id.

\textsuperscript{59} Id.
B. The Existing Regulatory Structure Governing CAFOs

1. Federal Regulation of CAFOs under the Clean Water Act

CAFO regulation at the federal level is primarily limited to regulation of water quality.\(^6\) The Clean Water Act (CWA) identifies CAFOs as potential sources of pollution.\(^6\) The National Pollution Discharge Elimination System (NPDES) was established to regulate such pollution discharges, and qualifying facilities, including CAFOs, must apply for a NPDES permit or provide “notice of intent for coverage” prior to operating.\(^6\) These requirements only apply to facilities that are sufficiently large under the CWA, which in turn determines the level of federal scrutiny the facility receives.\(^6\) And importantly, these designations are generally made by the states themselves, rather than EPA.\(^6\) In fact, EPA has granted authority to forty-five states to choose which operations to designate as CAFOs, which has created a system of “different state regulations govern[ing] the issuance of permits . . . .”\(^6\)

These threshold designations are crucial in determining the level of oversight exercised over each operation. However, narrow judicial interpretations of the statutory threshold requirements have hindered the efficacy of the program.\(^6\) It is estimated that only thirty-five percent of the more than 18,000 CAFOs have been required to obtain NPDES permits.\(^6\) And even for those CAFOs that qualified based on size, less than half received the required permits in 2019.\(^6\) Facilities that are not subject to the NPDES guidelines receive little federal

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\(^6\) See COPELAND, supra note 39, at 1 ("The primary regulatory focus on environmental impacts has been on protecting water resources and has occurred under the Clean Water Act.").

\(^6\) See 33 U.S.C. § 1362(14) (defining a “point source” of pollution as “any discernable, confined and discrete conveyance, including but not limited to any . . . concentrated animal feeding operation . . . from which pollutants are or may be discharged.”) (emphasis added).

\(^6\) 40 C.F.R. § 122.23(a), (d)(1) (2020); see also LAURA GATZ, CONG. RSCH. SERV., R45998, CONTAMINANTS OF EMERGING CONCERN UNDER THE CLEAN WATER ACT 2 (2021) (defining the scope of the NPDES’s permitting responsibilities under the CWA).

\(^6\) Adawi, supra note 53, at *10509.

\(^6\) Id.

\(^6\) Terence J. Centner & Jessica E. Alcorn, Preemption of Local Governmental Ordinances Regulating Concentrated Animal Feeding Operations in the United States, 4 ENV’T & POLLUTION 66, 68 (2015); 40 C.F.R. § 122.23(c)(1).

\(^6\) See Adawi, supra note 53, at *10509 ("[A]ttempts to regulate even these large [CAFOs] have been thwarted by judicial determinations that narrowly interpret the statutory language.").

\(^6\) Id.

oversight otherwise.\textsuperscript{69} Instead, each state uses a nebulous “best management practices” metric, which leaves much room for interpretation.\textsuperscript{70}

As there is no federal agency responsible for collecting and monitoring operation data, a “data void” surrounds the CAFO industry.\textsuperscript{71} In 2008, the Government Accountability Office reported that EPA lacks “comprehensive, and reliable data on the number, location, and size of the [CAFOs with] permits” and that it cannot effectively regulate CAFOs as a result.\textsuperscript{72} One result of this information gap is that EPA cannot address the implications of studies revealing serious air and water quality concerns stemming from CAFOs.\textsuperscript{73} Furthermore, due to the absence of a centralized data collection system, there is a span of at least thirty years during which it is impossible to determine precisely the number, size, and location of CAFOs.\textsuperscript{74} To estimate the number in operation, EPA relies in part on inferences drawn from the number of facilities issued permits.\textsuperscript{75} However, considering the checkered track record of NPDES permit compliance, the accuracy of this measurement is questionable.

Federal CAFO oversight relies heavily upon information gathered at the state level, and states have in turn largely depended upon CAFO facilities to self-report.\textsuperscript{76} EPA has compiled quarterly data from state permitting authorities in each EPA region since 2003, but the GAO found this data to be largely “inconsistent and inaccurate.”\textsuperscript{77} These gaps have made it nearly impossible to evaluate the effectiveness of the NPDES program and determine best management practices.\textsuperscript{78}

Groups seeking to challenge federal-level CAFO regulations face an uphill battle. In 2003, EPA issued its first comprehensive rule on CAFO regulation under the CWA since the 1970s.\textsuperscript{79} Under this rule, CAFOs would

\textsuperscript{69} See Centner & Alcorn, supra note 65, at 68 (“In general, there is no state or federal oversight over water pollutants coming from non-CAFOs.”).
\textsuperscript{70} Id.
\textsuperscript{71} See MILLER & MUREN, supra note 48, at 10 (“[N]o federal agency collects and maintains the kind of comprehensive data about CAFO size, location, and operations that would be prerequisite to an effective environmental enforcement strategy.”).
\textsuperscript{72} EPA NEEDS MORE INFORMATION, supra note 9, at 48.
\textsuperscript{73} Id. at 6.
\textsuperscript{74} Id. at 13.
\textsuperscript{75} Id.
\textsuperscript{76} MILLER & MUREN, supra note 48, at 10.
\textsuperscript{77} EPA NEEDS MORE INFORMATION, supra note 9, at 17.
\textsuperscript{78} See MILLER & MUREN, supra note 48, at 11 (“[T]he EPA's blind spots make it difficult or impossible to evaluate the effectiveness of the NPDES program, identify and permit CAFOs that discharge, promote best management practices, locate and address sources of water quality impairment, estimate the amount of pollution entering water bodies, and efficiently target resources at areas of concern.”).
\textsuperscript{79} 40 C.F.R. § 122.23 (2003); see also OFF. OF WASTEWATER MGMT., U.S. ENV'T PROT. AGENCY, CONCENTRATED ANIMAL FEEDING OPERATIONS FINAL RULEMAKING—FACT SHEET
have been required to apply for NPDES permits and comply with additional requirements for manure removal.\textsuperscript{80} CAFO industry representatives and environmental groups filed petitions for judicial review upon the regulation’s issuance.\textsuperscript{81} In \textit{Waterkeeper Alliance v. EPA}, the Second Circuit struck down the NPDES permit application requirement and the standards regarding nutrient management plans.\textsuperscript{82} EPA issued a modification requiring CAFOs to apply for a NPDES permit if there was actual discharge into navigable waters, but this regulation did not survive the subsequent lawsuit either.\textsuperscript{83} As part of that settlement, EPA was required to propose a rule under section 308 of the CWA, “to require all owners or operators of CAFOs to submit certain information to EPA.”\textsuperscript{84} In 2011, EPA proposed a rule that would have created a “national database of animal facilities” and required CAFOs to report key operational data including the CAFO operator, facility location, NPDES permit status, animal type and number, and the location and land available to the CAFO for manure disposal.\textsuperscript{85} But the rule was later withdrawn—in part because EPA found it was more “appropriate to obtain CAFO information by working with federal, state, and local partners” and that any data gaps could be filled by “site visits and individual information collection requests.”\textsuperscript{86}

Beyond wastewater, the issue of air pollution produced by CAFOs has gone largely unaddressed at the federal level. Animal waste is aerosolized as it is transferred to holding lagoons and sprayfields, but essentially no federal

\textsuperscript{80} \textit{OFF. OF WASTEWATER MGMT.}, supra note 79.


\textsuperscript{82} See \textit{Waterkeeper Alliance, Inc. v. U.S. Env’t Prot. Agency}, 399 F.3d 486, 524 (2d Cir 2005) (finding that the CWA does not support this obligation).

\textsuperscript{83} See Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines for Concentrated Animal Feeding Operations in Response to the Waterkeeper Decision, 73 Fed. Reg. 70,418, 70,418 (Nov. 20, 2008) (“EPA is modifying the requirement to apply for a permit by specifying that an owner or operator of a CAFO that discharges . . . . must apply for an NPDES permit.”); \textit{Nat’l Pork Producers Council v. U.S. Env’t Prot. Agency}, 635 F.3d 738, 756 (5th Cir. 2011) (vacating the 2008 Rule that required CAFOs that propose to discharge to apply for an NPDES permit).

\textsuperscript{84} See \textit{National Pollutant Discharge Elimination System (NPDES) Concentrated Animal Feeding Operation (CAFO) Reporting Rule}, 77 Fed. Reg. 42,679, 42,680 (withdrawn July 20, 2012) (“On May 25, 2010, the EPA signed a settlement agreement with the environmental petitioners in which the EPA committed to propose a rule, pursuant to CWA section 308, 33 U.S.C. 1318, to require all owners or operators of CAFOs to submit certain information to the EPA.”).

\textsuperscript{85} MILLER & MUREN, supra note 48, at 11.

regulation of air emissions from intensive livestock operations exists.\(^7\) According to 2017 EPA reporting, there are 18,000 animal farming operations in the United States “which can potentially emit air pollutants in high-enough quantities to subject these facilities to Clean Air Act and other statutory requirements.”\(^8\)

2. State Government Regulation of CAFOs

The federal government delegates NPDES issuance authority to states, but these state programs are widely criticized.\(^9\) States that implement CAFO oversight regulate broadly: (1) the size and structure, (2) the location, and (3) the management practices for the storage and disposal of animal waste.\(^9\) However, many states have outdated permitting regulations\(^9\) and diverge widely in the accuracy and regularity of their reporting to the federal government, with some even resisting information sharing altogether.\(^9\) For example, North Carolina is one of the largest hog producers in the country and places discharge permitting and siting requirements on all animal operations.\(^9\) Compared to other states, North Carolina has some of the most rigorous requirements—yet it still fails to protect vulnerable communities from existing CAFOs and neglects to provide information to the public about the locations and impacts of the facilities.\(^9\) In another example, EPA has found serious deficiencies in the Georgia Environmental Protection Division as well as EPA Region 4’s overall CAFO oversight.\(^9\)

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\(^7\) See Adawi, supra note 53, at *10510 (“Air emissions from intensive livestock operations are essentially unregulated because there are no federally mandated air quality monitoring programs . . . and only a small number of states have instituted their own monitoring.”).

\(^8\) EPA REPORT NO. 17-P-0396, supra note 3, “At a Glance”.

\(^9\) See Adawi, supra note 53, at *10510 (“These state programs vary widely in effectiveness, and several state programs have come under fire in recent years.”).


\(^9\) See FOOD & WATER WATCH, THE EPA’S FAILURE TO TRACK FACTORY FARMS at “At a Glance” (2011) (reporting that a mere thirty-two percent of the states that issued CAFO permits met the federal standards at the time).

\(^9\) See id. at 5 (revealing “conflicting approaches to collecting CAFO data, and even hostility on the part of some states to sharing information with the federal government.”).

\(^9\) See N.C. Sess. Laws 188 (1998) (codified at N.C. GEN STAT. § 143-215.10H (1999)) (describing the conditions under which the Commission would issue a permit for the construction or expansion of an animal waste management system). But see Nicole, supra note 49, at A188 (explaining that the 1997 moratorium on new additions of hog operations in North Carolina did nothing to rectify the issues with the existing operations).

\(^9\) See e.g., OFF. OF INSPECTOR GEN., U.S. ENV’T PROT. AGENCY, EVALUATION REP. NO. 11-P-0274, REGION 4 SHOULD STRENGTHEN OVERSIGHT OF GEORGIA’S CONCENTRATED ANIMAL FEEDING OPERATION PROGRAM at “At a Glance” (2011) (“CAFOs were operating without NPDES permits or Nutrient Management Plans, inspection reports were missing required components, and the Georgia Department of Agriculture was not assessing compliance with permit conditions.”).

\(^9\) See id. at 3 (reporting deficiencies in the water quality monitoring in the state).
The absence of sufficiently protective state-level regulations has prompted some local governments to intervene more directly. However, their ability to do so is limited by the fact that, unlike the state governments, localities possess no reserved powers.96 Municipalities were historically considered to be “creatures of the state.”97 Dillon’s Rule, which encapsulates this concept, says that local regulatory authority is limited to what is both “granted in express words” and “absolutely essential to the declared objects and purposes of the corporation.”98 Under this construction, municipal corporations cannot act unless they find “existing statutory authority or request new powers from the state.”99 In Hunter v. City of Pittsburgh, the Supreme Court defined localities as political subdivisions, confirming that states may withdraw power from local governments at will.100 This sweeping statement illustrated the subservience of municipalities to higher levels of government.

Concerns about state-level corruption evolved into an alternative theory of this relationship. Supporters of the “Home Rule” advocated for local lawmaking power that afforded local governments certain legal protections.101 Most states today have enacted some version of the Home Rule in their state constitution or legislation which “explicitly allow[s] local governments to establish a charter under which the city may regulate local areas of concern.”102 However, each state decides how to administer this limited authority, including through constitutional provisions or explicit statutory guidelines.103 In the context of factory farming, local governments argue that they must be afforded the ability to protect their communities—despite their historical, legal subservience to the state.

97 Id.
98 See Kenneth D. Dean, Comment, The Dillon Rule—A Limit on Local Governmental Powers, 41 MO. L. REV. 546, 547 (1976) (discussing the strict constraints on municipal corporation power).
99 This was the prevailing viewpoint until the 1800s. Pough, supra note 96, at 73.
100 See Hunter v. City of Pittsburgh, 207 U.S. 161, 178-79 (1907) (“The State . . . at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation.”).
101 See Pough, supra note 96, at 74 (“According to these advocates, state-level corruption and financial profligacy contributed to the era’s high municipal tax rates, massive urban debt loads, poor housing conditions, and deplorable levels of urban sanitation.”).
103 Id.
C. The Importance of Local Governance

Although local governments possess limited regulatory authority, they serve vital governance functions. To date, local governments have been involved in policy innovations such as climate change, public health and nutrition, and affordable housing. Local governments act as “laboratories” for social and economic experimentation, making them a highly valuable source of regulation. Localities hold ever-increasing value, with “[m]any cities . . . significantly more powerful, socially, economically, and politically than when they were originally created and their powers—or lack thereof—originally devised.” Not only are local governments most immediately accountable to their citizens, but they are also charged with providing essential public services to those individuals, making them arguably “the most critical level of government in terms of responding . . . to the needs and wants of [their] constituents.” Local representatives, particularly in rural areas, are immersed in the local population and are more likely to have the trust of their neighbors than are state or federal representatives who are further removed from the community.

It is noteworthy that state and local governments are not always diametrically opposed in enacting environmental policies and that both “have

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104 See, e.g., Katherine A. Trisolini, All Hands on Deck: Local Governments and the Potential for Bidirectional Climate Change Regulation, 62 STAN. L. REV. 669, 675 (2010) (describing the important role for local governments in climate change policy).

105 See, e.g., INST. OF MED. OF THE NAT’L ACADS., THE FUTURE OF THE PUBLIC’S HEALTH IN THE 21ST CENTURY 98 (2003) (discussing that while states have a key role in public health policy, it is “essential that residents of every community have access to public health protections through a local component of the public health system”).

106 See, e.g., John R. Nolon, Shattering the Myth of Municipal Impotence: The Authority of Local Government to Create Affordable Housing, 17 FORDHAM URB. L.J. 383, 384 (1989) (disputing that municipalities have no role in the creation of affordable housing and providing the example of New York where “the authority to control the development of a diversified housing stock rests firmly in the hands of local governments”).

107 See also Robert L. Glicksman, From Cooperative to Inoperative Federalism: The Perverse Mutation of Environmental Law and Policy, 41 WAKE FOREST L. REV. 719, 720–21 (2006) (emphasizing that both states and local governments have demonstrated an increased interest in enacting environmental protections but have been limited in part by federal and state preemption respectively and demonstrating that these challenging restrictions are not limited by any means to local governance).


109 See id. at 374 (“[B]ecause citizens are closer to and more in touch with their local governments, they can better monitor and hold accountable their elected and appointed officials and mitigate against the capture of their local government by special interest groups.”).

110 Id. at 373.

111 See JOHN O’LEARY, ANGELA WELLE & SUSHUMNA AGARWAL, DELoitte CTR. FOR GOV’T INSIGHTS, IMPROVING TRUST IN STATE AND LOCAL GOVERNMENT 5 (2021) (“People tend to trust their local government more than state government and trust the federal government least of all . . . “).
made efforts to move beyond federal regulatory requirements through the adoption of legislation, the issuance of environmental regulations by state environmental agencies, and the pursuit of litigation by state attorneys generals and similar officials." For example, states and local governments have worked together to address climate change through ambitious localized efforts. But while cooperation may be possible, some states are adamant in maintaining regulatory exclusivity over animal farming operations.

II. FROM TRADITION TO PRETEXT: THE ROLE OF LOCAL PREEMPTION IN A SHIFTING POLITICAL BATTLEGROUND

Preemption generally refers to the authority of higher levels of government to displace laws enacted by lower levels. The preemption of local laws follows the manner in which state laws are preempted by federal laws. Broadly, local preemption takes two main forms. First, local laws can be expressly preempted when a state forbids local governments from enacting specific regulations. Second, a local law can be preempted impliedly, either because the local law directly conflicts or because the state law already occupies the field in the particular area. In both scenarios, state law prevails over local.

Preemption itself is an uncontroversial legal principle and tool of governance based on principles of federalism and governmental efficiency. Legal scholars have recognized the modern usage of pretextual preemption as novel and have attempted to distinguish it from traditional preemption. There is presently no legal difference between the weaponized version that is spreading across the country and the preemption founded upon those originating principles. But the distinctive origins and manifestation of modern pretextual preemption distinguish it from traditional preemption and reveal the legal and political imperative to separate the two analytically.

112 Glicksman, supra note 107, at 781.
113 See id. at 781-82 ("One of the most ambitious of the recent state efforts to combat global warming has been the one involving a group of northeastern and mid-Atlantic states. These states signed a Memorandum of Agreement in December 2005 that committed them to develop a regional cap-and-trade program . . . to help control Carbon dioxide emissions from power plants.").
114 See, e.g., S.B. 391, 100th Gen. Assemb., Reg. Sess. (Mo. 2019) (barring local governments in Missouri from enacting any regulations over factory farms that are more rigorous than state-level requirements).
115 See Phillips, supra note 102, at 2233 (describing the structure of state preemption over local ordinances).
116 Id. at 2234.
A. Distinguishing Traditional Preemption of Local Government

Preemption in its traditional form is driven by an effort to harmonize levels of governance by preventing new laws from conflicting with existing ones in a way that would be harmful or confusing.\textsuperscript{118} The traditional policy rationales for preemption and the way in which it has historically manifested shed light on the distinction between traditional and pretextual uses of the doctrine.

Preemption was historically supported by several principal rationales based on the realities of concurrent governance. While less scholarship has been devoted thus far to the relationship between local and state governments as compared to state and federal, these justifications may fairly be imputed onto the state and local relationship as well because of the similarity of the relationships.\textsuperscript{119}

One customary justification for preemption relates to the practical matter of uniformity, as national standards establish minimum baselines of rights and responsibilities upon which U.S. residents can rely—including minimum levels of “safety, health, or environmental protection”—regardless of where in the country they live.\textsuperscript{120} Similarly, by extension, a uniform state standard would set the baseline for state residents in each locality. Another common justification rests on the fact that it is more cost effective and efficient for industries and businesses to operate when they can tailor their practices to a single standard, rather than adjusting to a “patchwork” of regulations varying by state or locality.\textsuperscript{121}

On the other hand, the delegation of authority to lower levels of government promotes democracy by encouraging citizen engagement in governance and creating “laboratories” for regulatory innovation on a smaller scale.\textsuperscript{122} And when the higher-level government exercises preemption in moderation, this allows lower levels to perform the important function of tailoring their legislation “to local concerns and to citizen preferences.”\textsuperscript{123}

\textsuperscript{118} Id.
\textsuperscript{119} See supra Section I.C (discussing the importance of local governments as policy laboratories and as providers of necessary daily services for constituents).
\textsuperscript{121} See Bd. of Supervisors v. Valadco, 504 N.W.2d 267, 271 (Minn. Ct. App. 1993) (“If every township were allowed to set its own pollution control conditions, the result could be a patchwork of different rules. Compliance with varying local rules would be burdensome and would have a detrimental effect on the efficient operation of the state’s agricultural industry.”); Craig v. Cnty. of Chatham, 565 S.E.2d 172, 178 (N.C. 2002) (expressing concern that if counties were permitted to develop their own regulations on livestock operations, swine farms would face an “excessive burden”).
\textsuperscript{122} Verchick & Mendelson, supra note 120, at 17.
\textsuperscript{123} Id. at 16.
In addition to these practical rationales, the historical principles of federalism have counsel a more tempered usage of preemption.\textsuperscript{124} For example, federalism suggests that some authority must remain with the states in accordance with the Framers’ conception of the separation of powers and in order to prevent the “undue concentration of power” at the federal level.\textsuperscript{125} The federalist theory of preemption is built upon the assumption that federal lawmakers are unlikely to “routinely bulldoz[e] over the states’ interests.”\textsuperscript{126} This respect for the division of power between levels of government is echoed in legal precedent, with the Supreme Court assuming a presumption against preemption in the absence of a “clear and manifest purpose of Congress.”\textsuperscript{127}

Like state governance, local governance is of incredible significance to our political system. Local decisionmaking is not only “honored by judicial rhetoric” but it is also “central to our governmental structure.”\textsuperscript{128} Concern about unfairness to local governments at the hands of state governments is serious, particularly where preemption is used as a political pretext.

B. The Rise of Pretextual Preemption

In contrast to traditional preemption, pretextual preemption is based on different policy goals and manifests itself in a novel way. In short, state preemption is increasingly divorced from the traditional goal of harmonizing levels of government and instead has evolved into a tool of political suppression. The circumstances under which pretextual preemption has spread and the forces guiding preemptive legislation necessitate its separation from traditional preemption canons as they are presently understood.

1. The Origins of Pretextual Preemption

State preemption over local government ordinances has increased dramatically in recent years to reach “epidemic proportions.”\textsuperscript{129} The reasons for this surge are not because of the traditional efficiency rationales for preemption, but because of the shifting political landscape across the country.\textsuperscript{130}

State legislatures are increasingly separated ideologically from the leadership in cities and inner-suburban counties, and scholars believe that this

\begin{footnotesize}
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\item \textsuperscript{124} Id. at 15-16.
\item \textsuperscript{125} Id. at 16.
\item \textsuperscript{126} Id. at 14.
\item \textsuperscript{127} Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).
\item \textsuperscript{128} Briffault, supra note 117, at 2019.
\item \textsuperscript{129} Kenneth A. Stahl, Preemption, Federalism, and Local Democracy, 44 FORDHAM URB. L.J. 133, 134 (2017).
\item \textsuperscript{130} See Phillips, supra note 102, at 2242-43 (blaming the “rapid adoption” of preemptive legislation on changes to the “current political landscape[“]).
\end{itemize}
\end{footnotesize}
is linked to the rise in preemption. The modern era of preemption has been traced to national Republican election wins beginning in 2010, which increased Republican control of state legislatures. This trend continued following the 2016 elections during which Republican power over state legislatures expanded further still.

Other drivers of this evolution include political polarization and gridlock at the federal level, which shift more consequential policymaking to the states. Although major policies like welfare, transportation, health care, and education are still directed by the federal government, states today play a much greater role in determining the “level and conditions of support that federal funding provides.”

This shift raised the stakes in state politics, which in turn induced interest groups to turn their attention in that direction. Industry groups are hostile toward local policymaking that may impose additional regulations. One group is notorious for its anti-local governance lobbying: the conservative nonprofit organization the American Legislative Exchange Council (ALEC). ALEC develops “model legislation” embodying its de-regulatory agenda, and some states have even adapted ALEC’s anti-regulatory model bills, many of which are “deliberately crafted to conceal their true origin and purpose.” Corporate lobbying groups have recognized that they are able to

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132 Riverstone-Newell, supra note 131, at 406.

133 Id.

134 See BEAN & STRANO, supra note 131, at 14 (describing the opportunistic shift of lobbying from the federal to state level).


136 See id. (“From 2011 through 2016, the federal government was largely deadlocked . . . . Partly for this reason, battles over taxes, labor policy, environmental regulation, immigration, and a host of issues that might otherwise be decided at the federal level played out instead in state legislatures.”); see also Liz Essley Whyte & Ben Wieder, Amid Federal Gridlock, Lobbying Rises in the States, THE CTR. FOR PUB. INTEGRITY (Feb. 12, 2016), https://publicintegrity.org/politics/state-politics/amid-federal-gridlock-lobbying-rises-in-the-states [https://perma.cc/5B8N-U8LL] (“On average, every state lawmaker was outnumbered by six companies, trade associations, unions or other groups angling for their attention from 2010 to 2014.”).

137 See BEAN & STRANO, supra note 131, at 12 (“ALEC’s local government counterpart . . . provided the template for many preemption laws.”).

138 Id.
accomplish at state level goals that are impossible in Congress, and they are repurposing the doctrine of preemption to do so.\textsuperscript{139}

Beyond the influence of interest groups, the increase in state preemption of local laws is attributable to a long-standing political bias against local governance.\textsuperscript{140} According to some, state-based federalism weakens cities “by design,” because of an enduring competition between states and local governments for political and economic power.\textsuperscript{141} Nationwide increases in state-level preemption may also therefore be a response to the perceived threat to state authority, with pretextual preemption being deployed to subserviate local government to that end alone.

2. The Modern Manifestation of Pretextual Preemption

In an attempt to provide necessary protections against industry externalities, some local governments have made themselves a target of a new, aggressive manifestation of preemption.\textsuperscript{142} In contrast to traditional preemption, pretextual preemption is marked by the influence of politics, interest groups, and targeted, punitive retaliations against the attempted regulating of local governments.

Factory farming is neither the first nor the only target of pretextual preemption driven by political designs. Beginning in the 1980s, the National Rifle Association began a successful campaign to prevent cities and towns from addressing gun violence with firearm regulations.\textsuperscript{143} Gun manufacturers pushed states for expansive legislation to preempt local governments and effectively eliminated certain avenues of gun control both at the state and local levels.\textsuperscript{144}

More recently, preemption has been used to block a myriad of progressive policies, including LGBTQ+ protections, anti-workplace discrimination laws, and minimum wage laws.\textsuperscript{145} Recent trends reveal that state legislatures are

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\item \textsuperscript{139} See id. at 9 (“[S]pecial interests . . . have shifted their lobbying activities from the nation’s capital to state capitals.”).
\item \textsuperscript{140} See Richard C. Schragger, The Attack on American Cities, 96 TEXAS L. REV. 1163, 1184 (2018) (“The recent spate of preemptive state legislation also reflects a structural bias against local government—in particular against city government.”).
\item \textsuperscript{141} Id.
\item \textsuperscript{142} See Phillips, supra note 102, at 2247 (describing personal liability for local officials as a new tactic in preemption legislation).
\item \textsuperscript{143} See Darwin Farrar, In Defense of Home Rule: California’s Preemption of Local Firearms Regulation, 7 STAN. L. & POL’Y REV. 51, 53–54 (1996) (“While the NRA has traditionally believed that the government most representative of the people is best, the recent popularity of restrictive ordinances has created the need for states to preempt such action.”).
\item \textsuperscript{144} Id. at 53.
\item \textsuperscript{145} See, e.g., Mark Dorosin, North Carolina’s H.B. 2: A Case Study in LGBTQ Rights, Preemption, and the (Un)Democratic Process, 122 W. VA. L. REV. 783, 784 (2020) (discussing the North Carolina
more likely to pass bills restricting local discretion than enhancing it, and this is particularly so for “hot button” issues. For example, in 2011 the Nashville Metropolitan Government attempted to expand a local non-discrimination ordinance to include protections for gender identity and sexual orientation in government contracts. The state legislature immediately answered with the Equal Access to Intrastate Commerce Act, which banned the enforcement of any non-discrimination protections above the level granted by the state.

Pretextual preemption is also distinguished by its use of punitive strategies intended to personally intimidate local lawmakers. This novel phenomenon, which legal scholars have labeled “super” or “punitive” preemption, represents another divergence from traditional preemption. Many states are shifting to a model of punishing local governments and specific individuals for attempting to enact regulations. These threats include consequences such as private rights of action against local officials, civil penalties and damages, the imposition of criminal liability, payment of legal fees, and even removal from office. States also use the threat of revoking funding for local governments as another means of control.

This tactic has become increasingly prevalent in the past decade. For example, the Florida legislature added a penalty provision to a firearm

“bathroom bill” which was a response to a Charlotte antidiscrimination ordinance that would have “allow[ed] transgender people to use public restrooms according to their gender identity . . . .”); Dilini Lankachandra, Enacting Local Workplace Regulations in an Era of Preemption, 122 W. VA. L. REV. 941, 944 (2020) (“Since 2010, 16 states have preempted local minimum wage increases, 9 have preempted fair scheduling policies, 17 have preempted paid leave requirements, and another 5 have preempted local additions to a comprehensive state-wide paid sick leave law.”); Alexis M. Johnson, Intersectionality Squared: Intrastate Minimum Wage Preemption & Schuette’s Second-Class Citizens, 37 COLUM. J. GENDER & L. 36, 36 (2018) (discussing the increase in municipalities enacting ordinances on labor protections including “sick leave and higher minimum wages” and the fact that state legislatures “very quickly preempted those measures with a state law dictating that no city can set a minimum wage higher than the federal standard of $7.25 an hour”).


See, e.g., ARIZ. REV. STAT. ANN. § 41-194.01(B)(2) (2021) (mandating that cities or towns found in violation must “post a bond equal to the amount of state shared revenues paid”); KY. REV. STAT. ANN. § 65.870(4) (West 2012) (providing that public servants found to enact laws in the regulation of firearms beyond those enacted by the state will have any legal immunity provided by
preemption statute in 2011 that nullified any conflicting local policies.\textsuperscript{153} The provision included the unusual addition of direct “penalties against local officials who pass gun control ordinances in violation of the state’s preemptive mandate.”\textsuperscript{154} The bill also allowed for private actions against those officials and barred them from using “public funds for their legal defense.”\textsuperscript{155} In 2014, firearm advocacy groups sued the mayor of Tallahassee after he declined to repeal local gun control ordinances.\textsuperscript{156} The mayor was then required to represent himself pro bono in the case because the Florida statute precluded the use of public funds to defend local officials specifically for gun ordinance disputes.\textsuperscript{157} Arizona adopted a similar strategy, threatening local officials with removal from office should they violate state firearms preemption legislation.\textsuperscript{158} In 2012, Kentucky made it a criminal offense for a local official to “violate the state’s gun preemption law.”\textsuperscript{159}

These intimidation tactics “go beyond protecting state policy” and set this modern strand of preemption apart.\textsuperscript{160} Traditional preemption permits local governments to “test the boundaries of that state-controlled space and determine their remaining authority.”\textsuperscript{161} It starts with the presumption that local governance is a permissible, and an even positive component of the governing process. Some state lawmakers have argued these measures are necessary to control local governments, despite it always being possible to “hold local officials in contempt for refusing to follow a court order” and that states are generally successful in asserting preemption over local governments

\textsuperscript{153} Pough, supra note 96, at 68.
\textsuperscript{154} Id.
\textsuperscript{155} Id.
\textsuperscript{156} Id. at 68-69.
\textsuperscript{158} See RICHARD BRIFFAULT, LOC. SOLS. SUPPORT CTR., \textit{PUNITIVE PREEMPTION: AN UNPRECEDENTED ATTACK ON LOCAL DEMOCRACY} 3 (2018) [hereinafter \textit{PUNITIVE PREEMPTION}] (detailing Arizona’s gun preemption law and its effects); ARIZ. REV. STAT. § 13-3108(J) (2022) (codifying Arizona’s gun preemption law).
\textsuperscript{159} \textit{PUNITIVE PREEMPTION}, supra note 158, at 3; see also KY. REV. STAT. ANN. § 65.870(4) (West 2012) (exempting state agents who violate Kentucky’s gun preemption law from immunity).
\textsuperscript{160} \textit{PUNITIVE PREEMPTION}, supra note 158, at 12.
\textsuperscript{161} Scharff, supra note 151, at 1504.
in legal actions. These harsh measures suggest a goal not of harmonizing power between state and local governments, but of stamping out local policymaking under the guise of preventing duplicative regulations.

C. Pretextual Preemption and Factory Farming

Typical local regulations regulating livestock feeding operations include zoning ordinances, “density and setback requirements . . . , detailed permitting schemes, and odor controls.” Some municipalities require local CAFOs to post a bond before operating as a form of insurance against potential environmental hazards or in the event of facility abandonment. These ordinances are among the growing list of policies targeted by pretextual preemption.

Bayfield County, Wisconsin provides a salient example of the interaction between modern preemption and agriculture. In January 2016, the county adopted regulations which set out CAFO manure storage requirements and acceptable manure spreading and treatment practices. The decision was met by cheers from Bayfield County residents. Large livestock companies publicly opposed the change, claiming that existing state standards are sufficiently protective and arguing that further regulations could harm their businesses. Within months of the county passing the ordinance, the Wisconsin Department of Natural Resources rejected it. After negotiations between the county and state broke down, the county began an action against the DNR, which was decided in favor of the DNR in July 2021. In an illustration of the intimidation tactics that have become popular, the county

162 See id. at 1506 (contrasting the effectiveness of different preemption methods in holding local governments accountable to state law).
164 See e.g., CLAY COUNTY, S.D., ZONING ORDINANCE art. III, § 3.07(6)(J) (stating that the owner of a CAFO needs “[p]roof of insurance, bond, or other assurance of adequate funds” to handle environmental issues and confinement procedures).
165 BAYFIELD COUNTY, WIS., ORDINANCES tit. 5 ch. 6 (2016).
167 Id.
169 See Clean Wis., Inc. v. Wis. Dep’t of Nat. Res., 961 N.W.2d 346, 348 (Wis. 2021) (finding that the DNR had the explicit authority to impose an animal unit maximum condition and an off-site groundwater monitoring condition).
board received a letter from the state warning that they may be criminally charged—hours before they were set to vote on the extension of a swine CAFO moratorium.\footnote{Danielle Kaeding, Groups Contend County Could Face Criminal Charges for Attempts to Regulate Large Swine Farms, WIS. PUB. RADIO (Sept. 17, 2020, 9:19 AM), https://www.wpr.org/groups-contend-county-could-face-criminal-charges-attempts-regulate-large-swine-farms [https://perma.cc/MA27-Q36K].}

Conservative organizations, including ALEC, are involved in efforts to block local livestock farming regulations. Right-to-Farm laws prevent local governments from passing more stringent laws on agriculture than at the state level. In 1996, ALEC, backed by large animal producers, introduced a model Right-to-Farm law.\footnote{Jill Richardson, ALEC Exposed: Protecting Factory Farms and Sewage Sludge?, THE CTR. FOR MEDIA & DEMOCRACY: PR WATCH (Aug. 4, 2011, 8:18 AM), https://www.prwatch.org/news/2011/08/10922/alec-exposed-protecting-factory-farms-and-sewage-sludge [https://perma.cc/EF6R-TLHJ].} The model bill places restrictions on what farm operations qualify as a nuisance and establishes financial penalties for plaintiffs who bring “more than three unverified complaints against the same farm or farm operation within three years.”\footnote{See Right to Farm Act, ALEC (Jan. 28, 2013), https://www.alec.org/model-policy/right-to-farm-act [https://perma.cc/V4ZH-NXQA] (providing model language for nuisance provisions and penalties for persistent complaints).} Several states have borrowed from the ALEC model legislation language in their Right-to-Farm laws.\footnote{See Right to Farm Laws, SOURCEWATCH, https://www.sourcewatch.org/index.php/Right_to_Farm_Laws#States That Use ALEC\textregistered Bill Language [https://perma.cc/CY5D-LW3H] (identifying states that have used ALEC\textregistered model bill language, namely Arkansas, Florida, Indiana, and Michigan).} In 2013, the North Carolina General Assembly enacted an amendment to the state's existing Right-to-Farm law further limiting “the remedies available to neighboring landowners” in terms mirroring the ALEC model bill.\footnote{See Cordon M. Smart, The “Right to Commit Nuisance” in North Carolina: A Historical Analysis of the Right-to-Farm Act, 94 N.C. L. REV. 2097, 2129 (2016) (analyzing the North Carolina Right-to-Farm Act from both historical and legal perspectives).}

Thus, pretextual preemption directly affects local government attempts to regulate CAFOs and protect citizens from CAFO-related harms. The combination of the severity of the enumerated externalities stemming from CAFO operations, and the departure of preemption from its traditional roots, necessitates a reconsideration and perhaps limitation upon the use of preemption in at least this regulatory context.

\section*{III. PRETEXTUAL PREEMPTION AND THE REGULATORY VACUUM}

The weaponization of preemption against local governments represents an unprecedented shift, “the breadth and ambition” the likes of which have “rarely been seen in American history.”\footnote{Stahl, supra note 129, at 134.} The public policy concerns implicated by modern agricultural practices, and state government's

\begin{thebibliography}{175}
\bibitem{173} See Right to Farm Laws, SOURCEWATCH, https://www.sourcewatch.org/index.php/Right_to_Farm_Laws#States That Use ALEC\textregistered Bill Language [https://perma.cc/CY5D-LW3H] (identifying states that have used ALEC\textregistered model bill language, namely Arkansas, Florida, Indiana, and Michigan).
\bibitem{175} Stahl, supra note 129, at 134.
\end{thebibliography}
systematic dismantling of local government regulations addressing this issue, necessitate a reconsideration of preemption itself. Traditional preemption is justified by efficiency and separation of powers principles. The deviation of pretextual preemption in both rationale and manifestation warrant scrutiny and restriction for the protection of the public welfare.

The challenge of such a proposal lies in determining whether a state is exercising its “legitimate” preemptive authority, or whether it has deployed preemption primarily for the purposes of stifling local governance in favor of interest groups or political gamesmanship alone. Regulatory vacuums provide a metric that can be used to identify and separate the former from the latter.

Regulatory vacuums are created when a higher level of government refuses to act in a certain regulatory sphere while simultaneously forbidding the corresponding lower level of government from acting, thereby leaving a regulatory gap over which no level of government is responsible. Courts have already begun to consider the creation of regulatory vacuums in preemption analyses. Regulatory vacuums are useful in detecting pretextual preemption because the creation of gaps in regulation indicate that the state’s interest lies not in regulating itself or avoiding policy conflicts, but merely in preventing the locality from doing so. In these instances, courts should hesitate to preempt local ordinances based on the traditional principles underlying the doctrine.

A. The Regulatory Vacuum

Regulatory vacuums raise a “recurrent conflict in a federal system between [market] centralization and state autonomy.” The creation of regulatory vacuums has significant implications on “traditional political values” associated with power divisions, experimentation at lower levels of government, and the ability of lower levels of government to “set economic and social priorities for themselves.” Policy gaps created by preemption may prevent a level of government from being able to regulate “broad spheres of harmful activity”—even where no guidance is provided at a higher level.

Concerns about the potential abuse of preemptive powers are not novel. In fact, the extent to which federal preemption should be exercised by the courts in the absence of a “clear statement of preemptive intent” has long

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176 Susan Bartlett Foote, Regulatory Vacuums: Federalism, Deregulation, and Judicial Review, 19 U.C. DAVIS L. REV. 113, 115 (1985). Regulatory vacuums have also been created between the state and federal levels, some of which have been directly created by Congress. Id.
177 See infra notes 208–228 (presenting Missouri’s preemption schemes and case holdings as an example of judicial circumvention of policies creating regulatory vacuums).
178 Bartlett Foote, supra note 176, at 115.
179 Cf. id. (discussing this phenomenon in the analogous context of federal preemption over state law).
been debated. Some scholars suggest that the courts should respond to these growing concerns by adopting a default presumption against preemption, thereby “plac[ing] the burden on the regulated industries to lobby for preemptive legislation.” According to this view, competition between levels of government should be preserved because of how it intrinsically benefits the quality of regulation.

The legal implications of policy voids created by preemption have not been widely explored by the courts yet, but the creation of regulatory vacuums is addressed in the context of the Employee Retirement Income Security Act of 1974 (ERISA), which sets minimum standards for “retirement and health plans in private industry.” In enacting ERISA, which contains strong preemptive language, Congress endeavored to protect employers who could not afford to adjust to a patchwork of regulations varying by employee locations. As ERISA has been interpreted, the courts are hesitant to employ gap-filling to “preserve meritorious claims where there is no express statutory cause of action under ERISA,” leaving employees at the “mercy of ERISA’s ‘regulatory vacuum.’” In *Aetna Health Inc. v. Davila*, some members of the U.S. Supreme Court expressed concern about this phenomenon. In *Davila*, the plaintiff’s health maintenance organization would not cover certain medical services in violation of its duty under the Texas Health Care Liability Act. The Supreme Court found that the case was not removable to federal court because the plaintiff’s cause of action was entirely preempted by ERISA section 502. In concurrence, Justices Ginsburg and Breyer expressed concern about the “regulatory vacuum” created by ERISA and advocated for Congress and the Supreme Court to

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182 *Id.* at 17.
183 See *id.* at 4 (explaining that a default presumption against federal preemption would make Congress a “more honest and democratically accountable regulator.”).
185 See Andrew L. Oringer, *A Regulatory Vacuum Leaves Gaping Wounds—Can Common Sense Offer a Better Way to Address the Pain of ERISA Preemption?*, 26 HOFSTRA LAB. & EMP. L.J. 409, 410 (2009) (“Congress hoped that such uniformity would benefit . . . employers, who would no longer have to adopt different policies depending on their employees’ location . . . .”)
186 *Id.* at 411-12 (citing *Aetna Health Inc. v. Davila*, 542 U.S. 200 (2004)).
187 See *Davila*, 542 U.S. at 222 (2004) (Ginsburg, J., concurring) (“Because the Court has coupled an encompassing interpretation of ERISA’s preemptive force with a cramped construction of the ‘equitable relief’ allowable under § 502(a)(3), a ‘regulatory vacuum’ exists: ‘[V]irtually all state law remedies are preempted but very few federal substitutes are provided.’”).
188 *Id.* at 204.
189 *Id.* at 221.
take measures to untangle a regime where “virtually all state law remedies are preempted but very few federal substitutes are provided.”

The Supreme Court has demonstrated concern about regulatory vacuums beyond the context of ERISA benefits as well—albeit inconclusively. In dissent to the Court’s holding that the Vaccine Act preempted a claim that a vaccine was defectively designed, Justices Sotomayor and Ginsburg remarked that the “decision leaves a regulatory vacuum in which no one ensures that vaccine manufacturers adequately take account of scientific and technological advancements when designing or distributing their products.” Similarly, in Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission, the Court heard a case regarding the preemption of a state energy commission in determining site capacity for spent fuel rods by the Atomic Energy Act of 1954. In determining that the state provisions were not preempted by the Act, the Court hesitated to preempt states from exercising their traditional police power of regulating nuclear plants when Congress had not indicated a “clear and manifest purpose,” as this would “force States to be blind to whatever dangers are posed by nuclear plants.” The concurring Justices were concerned that the creation of a regulatory vacuum would leave the decision over whether to build a nuclear facility to the very “public utility seeking its construction.” In interpreting congressional intent, the Court found it “almost inconceivable that Congress would have left a regulatory vacuum” and argued that Congress would have intended for states to make these decisions.

The most recent and direct consideration of the regulatory vacuum by the Supreme Court arose in Dan’s City Used Cars, Inc. v. Pelkey, in which a used car dealership refused to return a vehicle that had been towed while the owner was in the hospital. The New Hampshire Superior Court granted summary judgment to the dealership on the basis that the car owner’s claims were preempted under the Federal Aviation Administration Act of 1994. The Supreme Court unanimously held that the claims were not preempted in part because, if the state claims were preempted, “no law would govern resolution of [the] non-contract-based dispute.”

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190 Id. at 222 (Ginsburg, J., concurring).
193 Id. at 225 (Blackmun, J., concurring) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).
194 Id.
195 Id. at 208 (majority opinion).
197 Id. at 259.
198 Id. at 265. In oral argument before the Court, Mr. Pelkey’s attorney argued: “The regulation of State-created property interests is a field of traditional State regulation, and the broad sweep advocated by Dan’s City Used Auto in this case would create a regulatory vacuum because there are
which federal law is silent, the Court again demonstrated reluctance to eliminate state control where the federal government had not acted.199 While the creation of regulatory vacuums is not a dispositive factor in preemption analyses, these cases illustrate an established unease with the creation of such regimes in legal interpretation and a presumption that Congress does not intend for industries to set protective standards.

The forced blindness to known industry dangers that so concerned the Supreme Court in Pacific Gas is clearly present in the case of factory farming. When local governments are forbidden from setting regulations on animal producers, and states simultaneously do not provide guidance, states force municipalities to simply ignore the impact CAFOs have on their constituents. It is the prerogative of states to decide which of a myriad of policy options and interests to preference in the agricultural space. However, it should be of fundamental concern when industry actors—who are not democratically accountable to the people and are driven primarily by profit maximization—are given license to decide what policies are adequately protective against the externalities produced by their own operations.

Additionally, the creation of regulatory vacuums is useful in evaluating the motivations of the state. In 2015, the City Council of Birmingham passed an ordinance increasing the minimum wage in response to the state’s refusal to do so.200 The response of the state legislature was near immediate. The very next week, the Alabama Legislature passed HB 174, the Alabama Uniform Minimum Wage and Right-To-Work Act, which voided Birmingham’s minimum wage ordinance.201 Notably, there were no other state laws providing for minimum wage, and the preempting legislation likewise advised no statewide minimum wage.202

The NAACP challenged Alabama’s action on Equal Protection grounds, arguing that HB 174 violated the Constitutional Home Rule and that the Bill specifically targeted the African-American population of Birmingham.203 In its complaint, the NAACP emphasized that the bill’s preemptive impact

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199 See also Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 263-64 (1984) (Blackmun, J., dissenting) (“Because the Federal Government does not regulate the compensation of victims, and because it is inconceivable that Congress intended to leave victims with no remedy at all, the pre-emption analysis established by Pacific Gas comfortably accommodates—indeed it compels—the conclusion that compensatory damages are not pre-empted . . . .”).


201 Id. at 3.

202 See id. at 1, 3 (calling the Act "a sweeping statute nullifying Birmingham’s minimum wage ordinance and pre-empting any local regulation of matters touching upon private sector employment").

203 Id. at 17, 18, 20.
created a vacuum “because it does not substitute Birmingham's ordinance with a state law,” indicating that the legislature had no other purpose than to maintain control over this community.\textsuperscript{204}

The Eleventh Circuit on appeal found the existence of a discriminatory purpose plausible based on the rushed and reactionary nature of the legislative process.\textsuperscript{205} In considering the possible motivations of the Alabama legislature, the circuit court emphasized that the state—prior to the passage of Birmingham ordinance—“failed to take any action to establish a statewide minimum wage law and had [ ] been indifferent to efforts to establish such a law.”\textsuperscript{206} The history of the state legislature and race, combined with the suspiciously reactionary circumstances of HB 174’s passage, led the court to conclude that “discriminatory motivations were at play.”\textsuperscript{207} The court’s analysis indicates distrust of state legislation that appears to be motivated not by a desire to regulate itself, but merely to stymie local governance under the guise of traditional preemption.

In the case of CAFO regulation, factors such as the speed and nature of the response to local regulatory policies—while not dispositive—may provide a useful metric to consider the preemptive force of state action. The agriculture industry has a financial interest in the existence of regulatory gaps as they provide flexibility and discretion to guide their own operations. Certain markers, including where the legislative process appears “reactionary” in nature and where interest groups are unusually intertwined in the legislative process, evince the existence of improper motivations underlying the legislative process.

B. Defining the Existence of a State Conflict

There is a profound difference between a state preempting a local ordinance because of an existing regulatory scheme versus a state preempting a local ordinance only to leave nothing behind. To insulate localities from being left to the mercy of the market, courts must consider whether a state has taken any meaningful action in that regulatory space. This is no small feat, particularly in the context of complex agricultural regulations. Several counties in Missouri recently set forth the argument that they can only be preempted by existing state legislation, rather than simply by a state

\textsuperscript{204} Id. at 4.
\textsuperscript{205} Lewis v. Governor of Ala., 896 F.3d 1282, 1295, 1297 (11th Cir. 2018).
\textsuperscript{206} Id. at 1295.
\textsuperscript{207} Id. The case was ultimately dismissed in December 2019, not on the Equal Protection grounds, but because the Court of Appeals determined that the plaintiffs lacked standing to assert their Equal Protection claim, for failure to establish that their injuries were fairly traceable to the conduct of the Attorney General or that their injuries would be redressed with a favorable decision. Lewis v. Governor of Ala., 944 F.3d 1287, 1306 (11th Cir. 2019).
proclamation that they are preempted. Additionally, the Ohio State Supreme Court has proposed a test to determine when the state is permitted to preempt local laws and that it cannot do so to create a regulatory vacuum. These examples provide a guide for how courts can approach these complex questions.

1. Case Study: Missouri Senate Bill 391

An ongoing legal battle in Missouri is “ground zero” for the debate surrounding the aggressive preemption of local regulations related to CAFOs. In response to the public health concerns surrounding factory farms, twenty Missouri counties developed health and safety ordinances regulating local livestock production facilities. The counties' central argument is that local governments are not preempted from creating their own regulations where the state has not acted itself. Regardless of the outcome of this lawsuit, the case presents an opportunity to observe the phenomenon of regulatory vacuums with respect to CAFO regulation and a possible legal solution.

Although Missouri has established some base-level requirements for waste management, many locals are subjected to untenable smells emanating from the operations, declining property values, and fear for their health in the wake of “studies [that] found a link between CAFOs and higher nitrate levels in neighboring bodies of water.” Spurred by a lack of state guidance, several Missouri counties developed ordinances regulating local

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210 Id.
211 See infra notes 220–21.
212 See generally MO. REV. STAT., § 640.710(2) (effective June 25, 1996) (establishing buffer distances between the facilities and private residences); Timothy C. Matisziw & James D. Hipple, Spatial Clustering and State/County Legislation: The Case of Hog Production in Missouri, 35 REG’L STUD. 719, 720 (2001) (explaining that facilities of a certain threshold are required to obtain a permit from the Missouri Department of Natural Resources and that state CAFOs must dispose of waste by field-specific land application in accordance with a nutrient management plan).
CAFOs. In 2017, the Howard County Board of Health prohibited the application of liquid waste within 1,000 feet of any occupied residence. In 2018, the Cooper County Health Board approved a regulation establishing a waste spreading buffer zone and granted “the health board power to oversee CAFOs in the county.” The decision was driven by groundwater contamination concerns, which are of particular concern in rural areas where communities depend on residential wells. The regulation was further spurred by a Centers for Disease Control (CDC) report that people living near intensive animal feeding operations are at higher risk for respiratory illnesses and illness caused by E. coli. Ultimately, twenty counties across the state developed similar health ordinances designed to address the health and environmental concerns of their local residents.

In response, the Missouri state legislature enacted Senate Bill 391, forbidding county commissions and health boards from imposing “standards or requirements on an agricultural operation and its appurtenances . . . that are inconsistent with or more stringent” than any state provision. Subsequently, in August 2019, several counties and three Missouri farmers filed a lawsuit against the Governor of Missouri, the Missouri Air Conservation Commission (MACC), and the Missouri Clean Water Commission, alleging that S.B. 391 is unconstitutional. Plaintiffs argue that S.B. 391 violates the constitutional authority of Cedar County Commission and Cooper County Public Health Center in exercising their police power conferred by the Missouri Constitution.

214 Id.
215 Howard County, Mo., Ordinance 2017-02 § 5.2 (May 2, 2017). The ordinance also prohibited the construction of a CAFO without first being issued a County Health Permit by the Howard County Commission, to be renewed annually. Id. § 3.1.
216 See Claire Colby, Cooper County Health Board Approves CAFO Regulation, COLUMBIA MISSOURIAN (Aug. 29, 2018), https://www.columbiamissourian.com/news/local/cooper-county-health-board-approves-cafo-regulation/article_c5d02e78-abc8-11e8-91ba-8390f80b20a8.html [https://perma.cc/6QX2-H3JV] (“The CDC has found that air pollutants from CAFO emissions can lead to respiratory illnesses . . . Spill-off and leaks from CAFOs can also lead to contaminated ground water and illnesses such as E. coli.”).
217 Id.
218 Id.
219 See Leah Douglas, In Missouri, Lawmakers are Poised to Eliminate Local Regulation of CAFOs, THE COUNTER (May 10, 2019, 11:19 AM), https://thecounter.org/missouri-cafo-local-control [https://perma.cc/N63B-8ZKN] (describing how, for example, Missouri counties have passed ordinances requiring permits for smaller CAFOs and increased the minimum distance that CAFOs must be from residents and water sources).
222 Relator Petition, supra note 208, at 10.
The complaint further argues that the regulations adopted by Cedar County are not preempted because the state itself has not addressed those specific regulatory issues. According to the plaintiff counties, a petition was filed in 2017 with the MACC requesting that it adopt new rules regarding emissions standards for certain pollutants, which it declined to do. As a result, “[t]here are no Missouri statutes in effect that establish emission standards for air emissions of hydrogen sulfide, ammonia, or particulate matter from Class I or Class II CAFOs.” Furthermore, the state does not provide standards or requirements for CAFO siting criteria for soil types, classifications, nor site geology siting criteria for “manure land application sites that accept manure from a Class I or Class II CAFO based on site geology.”

When the state stripped the counties of their ability to enact air emission and siting regulations, it created a regulatory vacuum—in essence, leaving it to the companies themselves to decide the level of protection to afford these communities. Plaintiffs cited Friends of Responsible Agriculture v. Zimmerman, in which the Missouri Court of Appeals upheld local ordinances where “there is no federal counterpart, and . . . no standards or guidelines required for conformity” with state regulations.

The court ruled against the counties in December 2021, and the case remains pending on appeal to the Supreme Court of Missouri. Despite the uncertainty of the outcome, this case presents a useful roadmap for how courts may avoid leaving a regulatory vacuum. Specifically, local governments should be permitted to regulate in spaces where the state has refused to do so such that the local regulations would not cause conflicts or confusion.

In sum, the presence of regulatory vacuums may indicate two things. First, their creation suggests that the state is acting to prevent the locality from governing and for no other reason. Second, regulatory vacuums indicate that there is in fact no functional conflict between the state and local law because, in the absence of the local law, there is nothing in its place. While there is no conclusive precedent on this matter yet, courts should follow the indications from the Supreme Court that regulatory vacuums are indeed

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223 See id. at 15 (“Regulation 6 is not more stringent than such nonexistent standards or requirements and is not preempted by § 192.300, as amended by Senate Bill 391.”).
224 Id. at 4-5.
225 Id. at 5.
226 Id. at 15.
228 See Cedar Cnty. Comm’n v. Parson, No. 19AC-CC00373 at 2 (Mo. Cir. Ct. Dec. 23, 2021) (denying summary judgment to the counties and ruling in favor of the state on each of the county’s arguments, including with respect to preemption and alleged equal protection violations).
useful for analyzing preemptive state legislation that require scrutiny and limitations where appropriate.

2. Exceptions to Preemption: The Ohio Test

Legal protection against the creation of regulatory vacuums, while rare, are not unprecedented. The Ohio Supreme Court went the furthest when it established that “a state law preempting local regulation cannot merely block local action but must include some substantive replacement regulation.”229 This qualification tempers the state’s preemptive authority and represents a salient middle ground which could be applied in the context of CAFO regulation.

The Constitution of Ohio provides that, so long as they do not conflict with general laws, municipalities can adopt and enforce local regulations.230 In City of Canton v. State, the state of Ohio sued the City of Canton after the City expanded its definition of mobile home to include “manufactured homes,” thereby restricting the use of manufactured homes within city limits.231 The state claimed that this was preempted by state legislation which forbade political subdivisions “from prohibiting or restricting the location of permanently sited manufactured homes . . . .”232

The Supreme Court of Ohio’s analysis centered upon whether the state laws were “general laws,” which would displace a city ordinance.233 The Ohio Supreme Court adopted a four-part test to determine when a state law is a general law.234 First, the state statute that purports to preempt municipal law must be “part of a statewide and comprehensive legislative enactment” such that the legislature expressed an intent to create a comprehensive state law.235 Second, the law must also apply and operate “uniformly throughout the state.”236 Third, the statute must serve an overriding state interest beyond simply prohibiting the exercise by a municipality of its home rule powers.237

229 Briffault, supra note 117, at 2013 (emphasis added); see also City of Canton v. State, 766 N.E.2d 963, 970 (Ohio 2002) (finding that because the local laws in question “are not part of a system of uniform statewide regulation on the subject of manufactured housing, do not operate uniformly throughout the state, only purport to limit legislative power of a municipal corporation to enact police, sanitary, or similar regulations, and fail to prescribe a rule of conduct upon citizens generally,” they are not general laws).

230 OHIO CONST., art. XVIII, § 3.
231 City of Canton, 766 N.E.2d at 965.
232 Id.
233 Id. at 966.
234 Id. at 968.
236 City of Canton, 766 N.E.2d at 968.
237 Id.
Finally, the state law must “prescribe a rule of conduct upon citizens generally.”\(^{238}\) In essence, the Court established that in order to preempt, a state must first \textit{regulate}, and that it cannot act solely to limit local authority.\(^{239}\)

Applying this framework, the Ohio Supreme Court struck down a city law prohibiting licensed handgun owners from carrying concealed handguns in city parks because it conflicted with a state law allowing concealed carry licenses that applied across the state.\(^{240}\) The Court noted that the statute in question did more than “merely prevent municipalities from enacting inconsistent handgun laws” and rather that it had a legitimate intention of fostering “proper, legal handgun ownership in [the] state.”\(^{241}\) These decisions provide an example for how judicial review can temper a state’s preemptive authority without disturbing the balance of power between the state and local levels.

Ohio remains an outlier for now and, for most states, “generality requirements are mere formalities” that only prevent states from singling out specific cities for regulation.\(^{242}\) Although there remains room for courts to interpret home rules broadly and grant more local authority, few courts have been willing to do so.\(^{243}\)

The Ohio test embodies the underlying principles of preemption—that its purpose is to prevent dual and conflicting regulations where they exist—rather than to serve as a tool of democratic suppression for that end alone. This framework, or a similar metric, should be more widely employed across the courts in addressing the increasing clashes between state and local government. The alternative of leaving localities at the mercy of the respective industry standard carries untenable environmental and public health consequences.

When determining whether a state has preempted a local government from regulating animal feeding operations, courts should consider the character and extent of the state action up to that point. Particularly important is whether the local regulation or ordinance is naturally preempted by an existing, comprehensive regulatory scheme, or whether it appears more likely that the state has acted for the sole purpose of suppressing local democracy under the pretext of traditional preemption. The Ohio doctrine that “a state law preempting local regulation cannot merely block local action

\(^{238}\) Id.
\(^{239}\) Pough, \textit{supra} note 96, at 114.
\(^{240}\) Ohioans for Concealed Carry, Inc. v. City of Clyde, 896 N.E.2d 967, 968 (Ohio 2008).
\(^{241}\) Id. at 975.
\(^{242}\) Schragger, \textit{supra} note 140, at 1221; see also Briuffault, \textit{supra} note 117, at 2014 (“To date, the doctrine appears to have had no impact outside Ohio . . . .”).
\(^{243}\) See Schragger, \textit{supra} note 140, at 1221 (“To uphold the exercise of local authority where it matters, state judges have to resist the direct interests of the state legislature, and often their own policy proclivities.”).
but must include some substantive replacement regulation” already recognizes this principle.244

This test maps on well to the arguments advanced in the ongoing Missouri lawsuit. Under the Ohio framework, there is no conflict between the Missouri health and safety ordinances so long as Missouri itself does not address those issues. This interpretation does pull back the preemptive authority of the state to a significant degree. However, as the case of Ohioans for Concealed Carry demonstrates, the state does not face a prohibitive hurdle. The state must simply explain its reasoning in setting a state standard, apply this standard uniformly across the state, do more than prevent a local government from acting, and prescribe some rule of conduct for citizens.245 Under this framework, the only thing that a state would not be permitted to do would be to fail to enact a health or safety ordinance governing CAFOs for no other reason than to stifle local government’s efforts to do so. If it is possible to draw such a distinction, this is a sufficiently narrow method such that the relationship between state and local governments would not be unduly disturbed.

CONCLUSION

When determining whether a state has preempted a local government from regulating animal feeding operations, courts should closely scrutinize whether there actually is a conflict with existing, comprehensive state law. Such a policy comports both with the principles underlying the doctrine of preemption and recognizes the acute ramifications of failing to do so. This Comment has advanced the argument that regulatory vacuums provide a framework for determining both where pretextual preemption is at work and for placing necessary limits upon it. Concentrated animal feeding operations may provide a valuable source of food for millions, but they carry a steep price that is often invisible to consumers. Unfortunately, the neighbors of these operations are no strangers to these costs. While it may not be possible for CAFOs to operate without some accidents and negative externalities, the least that can be done is to ensure that the nearby residents are not stripped unnecessarily of their final line of defense—their local government.

244 Briffault, supra note 117, at 2013.
245 Ohioans for Concealed Carry, 896 N.E.2d at 974-76.