This Article sets out to pinpoint the locus of control over the police. Running the police force is one of the most important tasks assigned to local governments in America. Yet heretofore policing has not been analyzed through the lens of local government law. Through a review of state statutes, this Article reveals that the reigning notion that the police are local oversimplifies a complex legal reality. Local governments are mostly empowered to choose to establish (or not establish) a police force and to define the force’s size and role. However, they are mostly not afforded concomitant full powers over the police workforce. Issues pertaining to officers’ employment status—hiring, service terms, and, most significantly, removal—are heavily regulated through state mandates. Because these mandates are almost always geared toward aggressively protecting officers’ rights, local governments are left largely bereft of means to discipline officers who misbehave. This division of powers—whereby the local government mostly controls the objectives and functions of a public service but does not enjoy similar levels of control over the workforce providing the service—is unique to policing. Powers over other important local functions do not follow this pattern. Moreover, local government law theories cannot justify this division of powers that withholds from the local government most powers over officers’ employment patterns. A principled analysis indicates that local control of the police workforce would in many instances contribute to economic efficiency and to democratic participation, the two values normally associated with local governance.

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The Article thus concludes by suggesting multiple doctrinal reforms that could begin to realign powers over the police force. Such reforms are of particular importance today as our system continues to grapple with the challenge of widespread police violence.

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INTRODUCTION

Almost all those writing about the police note that policing in America, unlike elsewhere,¹ is a local affair.² Commentators stress that the vast majority


of police officers in the United States report to local governments, rather than to federal or state governments. The Department of Justice reports that 83% of all police officers in the United States work for “local law enforcement agencies.” But what does it legally mean that police in America are local?

Unsurprisingly, given their doctrinal and normative interests, scholars of policing have not extended much effort answering that question. Perhaps more surprisingly, scholars of local government law have also largely overlooked it. That is unfortunate, for once policing is assessed through the distinct prism of the doctrines and theories of local government law, a new understanding of the American law of policing emerges. The routine incantations about the police’s local nature conceal a much more complicated legal reality. Policing presents an unappreciated challenge for established principles of local government law.


See, e.g., Seth W. Stoughton, The Incidental Regulation of Policing, 98 Minn. L. Rev. 2179, 2197–98 (2014) (noting that policing is an “intensely local enterprise” and that police accordingly have limited power outside of their local jurisdiction).

4 Andrea M. Gardner & Kevin M. Scott, U.S. Dep’t of Just., Census of State and Local Law Enforcement Agencies, 2018 – Statistical Tables 1, 4 (2022). 59% (601,011) of state and local officers were employees by local police departments, while 24% (377,682) were employees of sheriffs’ offices. Id. In 2016, there were 100,000 federal police officers. Connor Brooks, U.S. Dep’t of Just., Federal Law Enforcement Officers, 2016 – Statistical Tables 1 (2019).

5 See Stoughton, supra note 3, at 2183 (addressing local government law but only as setting the geographical boundaries between different departments). Most commonly, they simply observe that the police force’s decentralized nature poses challenges for any attempt at reform. See Monica C. Bell, Police Reform and the Dismantling of Legal Estrangement, 126 Yale L.J. 2054, 2138 (2017) ("[T]he sheer volume of locally controlled police departments . . . creates a major barrier to systemic reform.").

6 The one exception is Anthony O’Rourke, Rick Su & Guyora Binder, Disbanding Police Agencies, 121 Colum. L. Rev. 1327, 1392–93 (2021). But that article’s focus is on the possibility of disbanding a police force, and in reviewing impeding laws, it does not clearly distinguish state law regulation from local law regulation. Furthermore, where the article’s focus is solely on state laws, its analysis and conclusion are perhaps debatable. Importantly, as will be seen, most cities probably can disband their police under state law. See infra notes 36, 389 and accompanying text.
Local government law’s main task is to divide powers between layers of government, mostly the local and the state. This Article employs local government law’s tools—doctrinal, historical, theoretical, and normative—to explain the way in which the allegedly local power over American policing is structured. The structure it identifies is paradoxical. Consider the following three pairs of examples. First, in American law, the city (with rare exceptions) freely decides on the size of its police force, and thus the number of officers. The city, however, does not so freely decide who is eligible to be hired as a police officer. The state imposes harsh limits on that power. Second, in American law, the city (almost always) freely decides whether its police will prioritize peace keeping, crime solving, or traffic regulation. The city, however, cannot so freely decide whether an officer who is ineffective in one or all of those assignments will be dismissed. The state imposes harsh limits on that power. Finally, in American law, the city (mostly) freely decides to fund, and then funds, the police. The city, however, cannot so freely decide how officers are compensated. The state imposes harsh limits on that power.

What renders these examples and the overall structure they represent anomalous is not that an allegedly local power turns out to be limited and contingent—subject, that is, to much state intervention. As students of local government law know all too well, local powers in America are never inherent. Any power local governments, such as cities and counties, exercise must be granted to them by the state. Consequently, even when awarded

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7 See Gerald E. Frug, Richard T. Ford, David J. Barron & Michelle W. Anderson, LOCAL GOVERNMENT LAW 125 (7th ed. 2022) ("The heart of local government law has traditionally been an analysis of the relationship between cities and states.").

8 See infra subsection I.A.4.

9 See infra subsection I.A.2.a.

10 See infra subsection I.A.6.

11 See infra subsection I.A.2.b.


13 See infra subsection I.A.2.b.

14 See Richard Briffault, Our Localism: Part I—The Structure of Local Government Law, 90 COLUM. L. REV. 1, 1 (1990) ("Two themes dominate the jurisprudence of American local government law: the descriptive assertion that American localities lack power and the normative call for greater local autonomy.").

15 As the Supreme Court stated in Hunter v. City of Pittsburgh:

Municipal corporations are political subdivisions of the State, created as convenient agencies for exercising such of the governmental powers of the
authority over a service or activity, a local government’s powers are hardly ever absolute or immune from interference. Even powers that are deemed (not inaccurately) quintessentially local are in practice divided between cities and states to one degree or another. The power over the police is not an outlier in this respect.

Rather, what renders the structure of American policing law anomalous as a local government law construct is the peculiar way in which the powers over policing are divided between the local and state governments. As the examples above and the argument below demonstrate, state intervention in city powers over policing takes a very specific form in our legal system. Almost all of the state’s intervention in policing focuses on regulating the employment status of police officers—their terms of hiring, benefits, work conditions, termination, and the like. Otherwise, local governments are largely left free to decide what their police forces do. American law, this Article shows, assigns to the local government the task of setting the functions and objectives of policing but concurrently limits the local government’s control over the identity of the individuals (whom it pays) implementing those policies. To a great extent, the city decides what the police are to do, but, also to a great extent, it then does not decide who will do that—and, therefore, how.

Strong as it is, the argument made here is couched in relative terms for important reasons. It is not as if the state has no powers whatsoever over policing’s functions. The state of course holds the power to define criminal offenses—most of which are indeed defined in state statutes. Similarly, it is not as if the local government exercises no powers whatsoever over the police workforce. For example, in negotiations with the officers’ union (or outside of those), it can choose to give officers benefits extending beyond those the state mandates. In each of the two realms, powers are shared between the two.

207 U.S. 161, 178 (1907).

16 See infra Section I.B. (education).

17 The power to designate crimes is first and foremost a state power. Historically, states mostly refrained from granting local governments the power to create criminal offenses. See HOWARD LEE MCBAIN, THE LAW AND THE PRACTICE OF MUNICIPAL HOME RULE 673 (1916) (explaining that powers over crime were so obviously not local that cities themselves never claimed them). Traces of that approach can still be found. See, e.g., City of Portland v. Dollarhide, 300 Or. 490, 501 (1986) (en banc) (interpreting the Oregon Constitution as necessitating a presumption that municipal criminal ordinances are invalid); MASS. CONST. art. II, § 7 (amended 2023) (reserving to the state the power to impose criminal penalties). Still today, states can, and do, prohibit or preempt local ordinances defining crimes. However, most municipalities do now create local crimes, supplementing those the state defines. See Brenner M. Fissell, Local Offenses, 89 FORDHAM L. REV. 837, 856 (2020).
levels of government. But in one realm they are shared to one extent, in the other to quite another extent. The state’s presence is much more pronounced in the realm of workforce management than in that of policymaking. Thus, in the examples above, the state might define criminal offenses, but it hardly dictates a minimum level of enforcement (let alone prioritization among the offenses), whereas it clearly defines minimum standards for officers’ treatment.

This division of powers is peculiar to policing. In other fields of action assigned to local governments, the state-local interface follows different, and arguably more coherent, patterns. In fields where the state exercises similarly high levels of control over the local labor force, the state is equally involved in regulating the substance (and funding) of the provided service. The other vital service, alongside policing, that American law entrusts to local governments—education—is illustrative. The state dictates teacher employment standards, but it also sets the curriculum those teachers teach and participates in funding their salaries.18

Still, in and of itself, the peculiarity of local government law’s treatment of policing need not be troubling. Perhaps something peculiar to the dynamics of policing normatively justifies—even necessitates—this unique legal pattern in regulating policing. If policing is inherently different from education, then the law governing it should also differ.

However, theories of local government law indicate that that is not the case. Two major approaches dominate normative thinking in the field: one invested in economic efficiency, the other in participatory democracy.19 Nothing in either supports the distinction American law currently draws between the powers granted to the city over its police and those retained by the state. That is, neither theory intimates that, of all policing issues, officer-related ones are particularly unamenable to effective local control. Quite the opposite. The state setting a floor, and a high one at that, for the treatment of police officers prevents the market from efficiently assessing, and responding to, officer quality—to the detriment of the general public.20 Perhaps more important, by removing personnel matters from the purview of local governments, the state precludes communities from democratically choosing for themselves not only what kind of police force they want, but also what kind of police officer they want.21

18 See infra Section I.B.
20 See infra Section II.A.
21 See Section II.B.
The real-world outcomes of the current law’s approach are readily observable—and concerning. The prevailing regime can block cities from effectively dealing with police officer misconduct, from diversifying the backgrounds of those serving, and from otherwise reforming their police forces.22 A city that is interested in meaningfully responding to the current crises of policing might not be able to do so. Undeniably, city officials often lack the political incentives—or willpower—to meaningfully reform police practices.23 The law’s structuring of city powers, however, exacerbates the problem. For example, in 2020, the residents of Columbus, Ohio voted to institute a civil board to oversee the local police. But then the city council was forced to render that board merely advisory to sidestep state law protections for officers.24 In Chicago, scathing governmental reports from the past decade about the Chicago Police Department all made a point of noting that officer protections—many of which, as we shall see, originate in state law—are responsible for the department’s inability to adopt a culture of accountability.25

By shifting much of the locus of power over employment conditions to the state, current law has enshrined powers over these issues in an arena that is not directly, or even mostly, controlled by those whose lives municipal policing touches the most.26 Concurrently, and perhaps inevitably, this is also an arena much more hospitable to the lobbying of those highly invested in protecting police officers’ interests: police unions.27 Leading legal scholars

22 See infra subsection I.A.2.
23 One example is the clear incentive for local officials in their negotiations with officer unions to offer concessions on discipline and accountability in exchange for lower salary commitments. This allows officials to present the public with a lower bill and thus pushes even reform-minded officials to agree to robust officer protections from discipline. Stephen Rushin, Police Union Contracts, 66 DUKE L.J. 1191, 1245-46 (2017).
25 See CIVIL RIGHTS DIV. & U.S. ATT’Y’S OFF. N. DIST. ILL., INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT 7-8 (2017) (noting that officer protections were responsible for major accountability failures); POLICE ACCOUNTABILITY TASK FORCE, RECOMMENDATIONS FOR REFORM: RESTORING TRUST BETWEEN THE CHICAGO POLICE AND THE COMMUNITIES THEY SERVE 15 (2016) (“The collective bargaining agreements between the police unions and the City have essentially turned the code of silence into official policy.”).
26 See, e.g., William J. Stuntz, The Political Constitution of Criminal Justice, 119 HARV. L. REV. 780, 786-814 (2006) (describing the harshness of substantive criminal laws and the fact that groups with the most interest in passing those state laws are often small and unsympathetic to those the criminal law system touches).
and economists have singled out the police union as a major obstacle standing in the way of police reform. This Article’s investigation explains how law has structured the police union’s power in defiance of basic precepts of local government law. Local governments do not freely choose to deal with police unions—state laws largely force their hands.

By analyzing the police force as a local government law puzzle, this Article represents another step in the evolution of the academic exploration into America’s policing law. Specifically, the Article forms part of the growing effort to analyze policing through a more diverse doctrinal lens.

Traditionally, policing was viewed as a concern for the law of constitutional criminal procedure. As a result, academic energies were focused on the Constitution’s Fourth and Fifth Amendments, which regulate police behavior by protecting the rights of the accused. About a decade ago, some scholars grew unsatisfied with the premise that citizens’ constitutional rights are the main factor dictating police behavior. This new generation of writers argued that legal scholars must also pay attention to the police as an entity. Like any other entity, the police operate through their employees,
their officers. Thus, much of the legal regulation of the police is done—or undone—through labor laws that define officers’ employment status.\textsuperscript{34} These laws and the union contracts they generate can negate the effectiveness of constitutional protections of suspects’ rights by capping the police entity’s ability to sanction individual officers who violate those rights.\textsuperscript{35}

More recently still, increased focus on the actual functioning of the police as an entity has prompted other commentators to stress that the police force is not just any entity, it is a government entity.\textsuperscript{36} The body of law that targets the concerns normally associated with government agencies—administrative law—should, therefore, apply.\textsuperscript{37} Typical procedural requirements pertaining to administrative rulemaking, such as notice and comment, should, these scholars argue, bear on police activity.\textsuperscript{38}

This Article takes seriously the fact that the police is not just an entity, and not just a government entity, but, even more specifically, a local government entity. And just as those bodies of laws dealing with entities (i.e., labor law) and government entities (i.e., administrative law) are relevant to the current failings of policing, the body of law dealing with local government entities—local government law—aids in perpetuating these failings.

Once we realize that the local government law structures of American policing are anomalous, we can commit to remedying the unfair power dynamics they entrench. To begin engaging in that effort, this Article pinpoints doctrinal means of lowering some barriers to meaningful policing reforms. Myriad doctrines—from the review of arbitration awards to Contract Clause jurisprudence, from the interpretation of state labor laws to determining home rule constitutional amendments’ scope—leave discretion to courts to ascertain the boundaries of localities’ authority to regulate their police forces. Given that existing law reins in local governments’ powers in a doctrinally anomalous and normatively unsustainable way, courts should avoid further constricting these local government powers. If courts follow this suggestion in the pertinent doctrinal settings singled out here, they will begin to align local governments’ powers over police officers with local governments’ powers over other elements of policing—and with basic normative principles of local governance.

\textsuperscript{34} See Harmon, supra note 27, at 785 (noting that laws surrounding police officer employment “can be intricately related to police misconduct”).

\textsuperscript{35} See Rushin, supra note 23, at 1241.

\textsuperscript{36} See, e.g., Christopher Slobogin, Policing as Administration, 165 U. PA. L. REV. 91, 95 (2016) (“[P]olice departments are agencies, and as such should have to abide by the same constraints that govern other agencies.”).


The Article proceeds as follows. Part I provides a comprehensive overview of the allocation of powers over police between localities and states that the literature currently lacks. It shows that states have particularly intrusive laws regulating cities’ patterns of employing officers. It finds that there are only a few similarly intrusive laws interfering with cities’ powers to set the goals of policing. It proceeds to show that this mode of intervention—heavy state regulation of employment standards but little else—does not hold in education, the other major field entrusted to local governments, and is also out of sync with the historical development of policing in America. Part II then engages in a normative assessment of this division of powers between localities and states. Relying on major theories of local government, it concludes that little commends the current regime that singles out the city’s treatment of officers for special state regulation. Part III translates this analysis into suggestions for reform. After listing necessary legislative changes, it identifies instances where, even under current statutes, courts can act to rebalance the power disparity between city and state governments in control over local police employment patterns.

No power can be reformed without knowing who wields it. Few powers are in more urgent need of reform than policing. We thus must address a seemingly simple question: Who controls the police?

I. THE LOCAL GOVERNMENT LAW OF THE POLICE

Policing in America, we are constantly told, is largely local. The average American probably need not even be told: the police officer she encounters on the street is almost always an employee of a local government—usually a city or county. As with any other facet of our lives, legal choices have constructed this social reality. And while the reality Americans encounter on the street might appear simple, the choices American law has made constructing this reality are anything but.

The starting point is straightforward. As the federal government is a government of limited powers, it does not hold general policing powers: those are not enumerated in the Constitution. With the expansion of federal criminal legislation (Prohibition naturally formed a key moment), federal police forces, such as the FBI, have been created, but they only enforce specific federal statutes. General police powers are reserved to the states. For their part, states have delegated much of their policing powers to their

39 See supra notes 1–3.
40 See supra note 4.
41 See, e.g., 28 U.S.C. §§ 535-540B (granting the FBI authority to investigate federal crimes involving government officials).
42 Harmon, supra note 2, at 876.
localities.\textsuperscript{43} From this point onward, the legal structure of policing ceases to be straightforward.

In modern American law, local governments enjoy no inherent powers.\textsuperscript{44} Consequently, subject to very rare exceptions, states can always interfere with a power a local government holds, or indeed remove that power altogether.\textsuperscript{45} In other words, the state defines local powers and exercises ultimate authority over them. Hence, to understand the actual contours of a local power, state statutes defining and limiting it must be examined. Only then can we know what the local government can, and cannot, do with the power.

This Part takes on that task for local governments’ power to operate police forces. It thereby provides the first overview of the local government law infrastructure of policing. It surveys the relevant laws and identifies an inconsistency: the state heavily regulates the local government’s patterns of employing police officers, but very little else. To stress the oddity of this arrangement, it is then contrasted with the manner in which the state regulates local powers over education. To conclude, the Part explores the history of policing to show how the oddity emerged. It finds that state-level interference in the local power to manage the police force is a relatively recent phenomenon, out of line with the traditional law of policing.

A. The Doctrine

To unpack the regime state laws set for the local control of the police, we must review the multitude of statutes that regulate that local power. I break these statutes down into five categories. The first category consists of laws enabling municipalities to establish a police force. The second category includes statutes that deal with officer personnel issues. While laws that fall into the first category deal with the force’s creation and those in the second with determining who serves in that force, the laws in the third, fourth, and fifth categories regulate how the force functions. The third category consists of laws imposing reporting requirements—the lightest form of regulation. Laws in the fourth category do more to actively regulate the functioning of the police force. They dictate the scale of the police force or the priorities the force must adopt. Laws in the fifth category are the most intrusive in regulating the force’s functioning: they preempt specific local police policies.

\textsuperscript{43} Id.
\textsuperscript{45} See supra note 15 and accompanying discussion.
1. The Power to Create a Police Force

Because local governments in America are governments of limited powers, they cannot adopt a policy without authorization. It follows that even for the most foundational step in policing—creating a police force—the local government must pinpoint a source of authority.\(^{46}\) In most states, this task is not particularly demanding. States have adopted enabling acts explicitly and specifically empowering local governments to establish police forces.\(^{47}\) These laws can authorize all municipalities to create a force,\(^{48}\) or they can authorize specific municipalities—say, cities or counties—to do so.\(^{49}\)

Even in states lacking an act explicitly declaring the local government’s power to create a police force, other related statutes can be, and have been, read to imply the power. Laws empowering the mayor or city council to appoint a police chief, or even just officials in general, serve that goal.\(^{50}\) So do laws empowering the municipality to pass and enforce police ordinances.\(^{51}\) Even under the most restrictive reading of city powers—the one associated with the traditional Dillon’s Rule—the power to establish a police force can be implied into such statutes. Dillon’s Rule holds that statutes enabling local action are to be construed narrowly, to include only powers explicitly mentioned or necessarily implied.\(^{52}\) Courts can easily find that the power to establish a police force is necessary for the exercise of a granted power to appoint a police chief or enforce police ordinances, and accordingly implied.\(^{53}\) Thus, the local power to create a police is, mostly, uncontested: it is either

\(^{46}\) See Smiddy v. City of Memphis, 203 S.W. 512, 513 (Tenn. 1918) (holding that because the city is merely an arm of the state, it must receive state authorization to establish a fire department).

\(^{47}\) See, e.g., ALA. CODE § 11-43-55 (2023); MD. CODE ANN., LOCAL GOV’T § 5-207 (West 2023); TEX. LOC. GOV’T CODE ANN. § 341.001 (West 2023).

\(^{48}\) See, e.g., OHIO REV. CODE ANN. § 715.05 (West 2023); CONN. GEN. STAT. § 7-148 (2023).

\(^{49}\) See, e.g., COLO. REV. STAT. § 31-30-101 (2023) (enabling cities or towns to create a police force); KY. REV. STAT. ANN. § 95.019 (West 2023) (cities and urban counties); NEB. REV. STAT. § 14-601 (2023) (cities of the metropolitan class). In Hawai‘i all police forces are county-run. HAW. REV. STAT. § 52D-1 (2023).

\(^{50}\) See, e.g., ALASKA STAT. § 29.20.360 (2023); ARIZ. REV. STAT. § 9-237 (2023).

\(^{51}\) See, e.g., ALASKA STAT. § 29.35.010 (2023); FLA. STAT. § 166.021 (2023); IDAHO CODE § 50-301 (2023).

\(^{52}\) JOHN F. DILLON, TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS § 55 (1872).

\(^{53}\) See e.g., Ariz. Att’y Gen., Dep’t of L., Opinion Letter 66-4 (Jan. 7, 1966) (describing a statute providing that one of a town’s officers be a chief of police, and explaining that the statute clearly indicated a legislative intent that towns be able to provide police protection). In a different context, the Florida Constitution’s general empowerment of local governments to “perform municipal functions and render municipal services,” FLA. CONST. art. VIII, § 2, was interpreted to obviously include policies that promote the “safety” of the municipality’s citizens. Greater Orlando Aviation Auth. v. Croft, 775 So. 2d 978, 981 (Fla. Dist. Ct. App. 2000).
explicitly granted or can rather easily be implied as accompanying other powers localities are routinely awarded.54

But two things stand out about these laws that municipalities rely on to establish the police. First, these laws enable the creation of a police force. They do not mandate the creation of the police.55 Rather surprisingly, in most jurisdictions, nothing in state laws explicitly requires establishing and sustaining a police force.56 Therefore, some cities refrain from setting up a police department, normally for financial reasons.57 Some affluent suburban cities contract for the service instead of operating their own force.58 Some poorer rural cities simply forsake the service.59

Second, these statutes that oversee the establishment of local police forces refrain from actually defining the entity whose creation they authorize—the police. The few state laws that speak to the matter employ broad language such as “[p]olice officers in municipalities shall be conservators of the peace.”60 Other statutes that regulate the police force once established, to be

54 The problem hardly arises precisely because the power is so easily read into even the most general and routine of powers cities are granted. For example, in 2021, a Florida town grounded its power to establish the police in the state constitution’s grant to municipalities of “the power to conduct municipal government, perform municipal functions and render municipal services.” PEMBROKE PARK, FLA., MUN. CODE § 2-300.

55 Police departments and police chiefs are distinct from sheriffs. See James Tomberlin, “Don’t Elect Me”: Sheriffs and the Need for Reform in County Law Enforcement, 104 VA. L. REV. 113, 129 (2018) (“Where state statutes allow a municipality to create a local police department, state constitutions require that every county provide for a sheriff.”).

56 With an important caveat: Certain state laws could be interpreted as forbidding the disbanding of existing police departments. See O’Rourke et al., supra note 6, at 1362. But in current law there appears to be little that demands the creation, or retention, of a local police department. The only clear exception is MONT. CODE ANN. § 7-32-4101 (2023) (“There shall be in every city and town of this state a police department.”). The statute, however, does not define the role of the department, leaving that to the cities and towns.

57 The Nebraska enabling act makes this fact explicit. It grants cities the power to appoint a chief, and police officers, “to the extent that funds may be available to pay their salaries.” NEB. REV. STAT. § 14-601 (2023).


59 See, e.g., Ariz. Att’y Gen., Dep’t of L., Opinion Letter 66-4 (Jan. 7, 1966) (advising a city that chose not to fund a department that the county sheriff is under no legal duty to provide the city with relevant police services).

60 65 ILL. COMP. STAT. 5/11-1-2 (2023); see also TENN. CODE ANN. § 6-21-602 (2023) (“It is the duty of . . . the police force to: (1) Preserve order in the city; (2) Protect the inhabitants and property owners therein from violence, crime, and all criminal acts; [and] (3) Prevent the commission of crime . . . .”); ARK. CODE ANN. § 14-52-101 (2023) (tasking the city’s governing body with establishing a police department to “preserve the peace of the city, secure the citizens from personal violence, and safeguard their property”); IND. CODE § 36-8-2-2 (2023) (“A unit may establish, maintain, and operate a police and law enforcement system to preserve public peace and order . . . .”). Arguably, Nebraska goes slightly further than other states, as its statute renders it the
reviewed later in this Section, sometimes perform that definitional task indirectly (though, as shall be seen, to a very limited extent). But it is important to note that the statutes that serve as the foundation for most of America’s police forces say little, if anything, about what those forces are to do or how they are to be constituted.61

In short, the state laws that allegedly create the police force in America do not establish the police force, or even establish what it is. They authorize local governments to choose to create an entity that those laws do not define.

2. Police Personnel

A local police force has been created under the authorizing laws just reviewed. How is it to be staffed? How is the staff, once hired, to be managed? These questions are answered by the laws falling into the second category of state statutes regulating the police. Over the past decade, laws in this category have probably garnered the most attention from academics interested in the regulation of the police. And for good reason: While the statutes establishing police forces in America are drained of details, the laws establishing the identity of those who can serve therein burst with specifics.

a. Officer Certification and Training

Logically, the first component of a personnel policy is setting the criteria for joining the relevant workforce. States are heavily invested in this component of molding local police forces. All states have adopted a Police Officer Standard and Training (POST) statute.62 These laws set requirements individuals must meet to be employed as police officers.63 The statutes institute a commission that determines, or enforces, criteria for officer certification.64 Additionally, they empower the commission to operate, or at

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61 Some laws go beyond silence, to affirmatively insist that the local government define the force’s duties. MISS. CODE ANN. § 21-21-3 (2023) (“The governing authorities of municipalities shall have the power and authority to employ, regulate and support a sufficient police force or night marshals, to define the duties thereof, and to furnish and supply all suitable and necessary equipment therefor.”).


63 See, e.g., COLO. REV. STAT. § 24-31-305 (2023); WASH. REV. CODE § 43.101.450 (2023).

64 See, e.g., ALA. CODE § 36-21-41 (2023); S.D. CODIFIED LAWS § 23-3-35 (2023); TEX. OCC. CODE ANN. § 1701.151 (West 2023).
least certify, officer training academies.\(^{65}\) In many states the commission is also authorized to decertify officers.\(^ {66}\)

The state thus controls—even if only indirectly, through officer certification and power over training—the identity and skills of the officers that local governments employ. This power can be wielded to shape officer behavior post-certification—if the state so desires. In a new law from 2021, Maryland requires its POST commission to develop a model uniform disciplinary matrix for disciplining officers, and further mandates that all police forces adopt that matrix.\(^ {67}\) Five years earlier, the state similarly directed the commission to develop a community policing program that local forces must adopt.\(^ {68}\) Maine’s POST statute now requires that all law enforcement agencies establish policies respecting the use of force, the treatment of domestic violence and hate crimes, officer misconduct, and death investigations.\(^ {69}\)

These are, however, outliers. Even states that embarked on reform attempts in reaction to recent cases of police misconduct have not come close to the effectiveness of Maryland’s, or even Maine’s, laws. A 2020 amendment to California’s POST statute merely suggested that when a police department recruits an officer, the “job description . . . emphasize community-based policing.”\(^ {70}\) The statute in fact makes a point of clarifying that this requirement is “not intended to alter the required duties of any peace officer.”\(^ {71}\)

To reformers’ chagrin, states have made very little use of their control over officer certification and training to dictate policing policies.\(^ {72}\) These statutes strictly define who can join local police forces—but they do very little to affect officers’ behavior post-certification.

b. Officer Employment Conditions

Once an officer is hired, her employment conditions must be set. Even though the officer is a local employee, state statutes heavily constrain the local government’s freedom to determine those employment conditions. Perhaps

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\(^{65}\) See, e.g., ALASKA STAT. § 18.65.220 (2023); IDAHO CODE § 19-5109 (2023); N.Y. EXEC. LAW § 840 (McKinney 2023).

\(^{66}\) See, e.g., ARIZ. ADMIN. CODE § R13-4-109 (2023); TENN. CODE ANN. § 38-8-124 (West 2023); WASH. REV. CODE § 43.101.105 (2023).

\(^{67}\) MD. CODE ANN., PUB. SAFETY § 3-105(a) (West 2023).

\(^{68}\) Id. § 3-517(b).

\(^{69}\) ME. STAT. tit. 25, § 2803-B (2023).

\(^{70}\) CAL. PENAL CODE § 13651 (West 2023).

\(^{71}\) Id.

\(^{72}\) See Rau et al., supra note 62, at 1356-58 (explaining that states generally do not set any explicit mission, goal, or purpose for POST commissions).
no facet of the legal regulation of the police has attracted as much attention over the past few years as the employment protections the law extends to officers. Commentators have noted that through protections normally associated with employment or labor law, rather than police law, our system undercuts the deterrent effects of criminal procedure rules. When criminal procedure rules are breached, a court sanctions a local police force—directly through a tort award to the injured citizen or indirectly through refusal to consider at that citizen's criminal trial evidence wrongly obtained. But the sanctioned police force cannot then freely proceed to punish the responsible officer. The officer's employment status offers her certain shields blocking such punishment or making it costly to impose.

Important recent works have highlighted the diversity and pervasiveness of these laws shielding officers. But an important thread that runs through all these many employment status protections is oft ignored: Their source is almost always state law. These are mostly state-level impositions on local governments, regulating those governments' treatment of their own employees. These impositions can be subcategorized into three groups.

First, as public employees, police officers qualify for state civil service protections. At these state laws' core is the notion of merit-based employment, which translates into preset standards for hiring, promotion, and firing. Most civil service laws establish a non-partisan state board that institutes and enforces rules governing personnel administration (recruitment, examinations, transfers, demotions, and more). The boards and the statutes creating them also limit a public employer's discretion to remove employees or discipline them. These laws thus supplement POST statutes and commissions in regulating local police forces' hiring practices. Yet, their major effect is felt after the officer is hired. They grant the employed officer, as a public servant, an expectation of continued employment, which can even

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73 See supra notes 28–32 and accompanying text.
74 See Rushin, supra note 35, at 1241 (citing collective bargaining agreements, civil service laws, law enforcement officers' bills of rights, and police union contracts as obstacles to officer accountability).
76 See, e.g., Harmon, supra note 27, at 795 (surveying the "law of the police").
77 See, e.g., COLO. REV. STAT. § 31-30-103 (2023); LA. STAT. ANN. § 33:2475 (2023); WASH. REV. CODE § 41.12.030 (2023).
78 See, e.g., MICH. COMP. LAWS § 38.507 (2023).
80 Harmon, supra note 27, at 796.
be interpreted as a property right. Consequently, these laws often offer substantive, or at least procedural, protections against reassignment or firing. When reassigned or fired—no matter the reason—a public employee enjoys due process rights, complicating, if not rendering completely impossible, a local department’s desire to enforce officer conduct standards.

Second, local governments are often prevented from freely managing their own police forces due to negotiated clauses in collective bargaining agreements (CBAs) with police officer unions. CBAs extend far-reaching protections to officers, well beyond any statutory protections. CBAs can limit civil oversight of the police, delay the investigation of an accused officer, provide an accused officer access to evidence before her interrogation, mandate the destruction of officers’ disciplinary histories, and more. One of CBAs’ most consequential stipulations in this regard is the requirement that arbitration be used in adjudicating all officer appeals of disciplinary measures. Of course, the agreements also set officers’ wages and benefits—at levels commonly perceived to be rather generous. In one notorious example, San Antonio’s CBA with its union committed the city to fund payments for officers’ divorce lawyers.

These concessions to unions are often perceived as the product of free and fair negotiations between employees and local governments. But in fact,

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82 See, e.g., ARK. CODE ANN. § 14-51-308 (2023) (requiring notice, opportunity for trial, and right of appeal); IOWA CODE § 400.18 (2023) (prohibiting arbitrary discipline and outlining disciplinary hearing procedures); 53 PA. CONS. STAT. § 55645 (2023) (outlining disciplinary hearing rights and procedures).

83 See Loudermill, 470 U.S at 546 (holding that, prior to termination, a “tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer’s evidence, and an opportunity to present his side of the story” under due process).

84 See, e.g., IND. CODE § 36-8-3.5-17 (2023); N.Y. CIV. SERV. LAW § 75 (McKinney 2023).

85 Roughly two-thirds of police officers are unionized. See Rushin, supra note 23, at 1204.


88 See id. at 1040 (noting that appeals “normally culminat[e] in binding arbitration”).

89 See Schanzenbach, supra note 28, at 1539-40 (showing that police pay relative to similar private sector pay is higher in mandatory collective bargaining states than in permissive bargaining states).


91 See, e.g., Benjamin Levin, What’s Wrong with Police Unions?, 120 COLUM. L. REV. 1333, 1366-67 (2020) (arguing that pro-officer clauses included in a CBA are the work of not only unions, but also the local governments they negotiate with).
state laws facilitate, and even mandate, negotiations with a union—thereby forcing the local government’s hand. 92 Thirty-four states require government employers to engage in collective bargaining with public-sector employees, and another nine states permit, but do not require, public-sector collective bargaining. 93 These state laws granting the right to unionize and allowing or requiring collective bargaining can, like civil service laws, apply to all public employees. But in several states, they only cover teachers, firefighters, and police officers. 94 Some states have recently banned or restricted public unions—but with an exception preserving that right for police officers. 95

Third, aside from the civil service protections and collective bargaining rights common among public employees, police officers are covered by state-level regulations that apply only to them. States’ regulation of employment rules for police officers can be intrusive. Many states have codified requirements for officer compensation, including overtime, paid leave, and retirement benefits. 96 States have also dictated the funding of mental health services to officers, and some even intervene to bar localities from requiring that police officers reside locally. 97 States can require that cities furnish legal counsel and pay costs in any civil suit brought against officers for alleged misconduct in performance of their duties. 98 This requirement can prevent cities from demanding that officers carry professional liability insurance. 99

One area of particularly aggressive state regulation of the status of police employees is officer disciplinary procedures. At least twenty-four states have adopted so-called “Law Enforcement Officer Bill of Rights” (LEOBR)

92 See, e.g., WASH. REV. CODE § 41.56.040 (2023); N.Y. CIV. SERV. LAW § 204 (McKinney 2023).
95 See TEX. GOV’T CODE ANN. § 617.002 (West 2023); TEX. LOC. GOV’T CODE ANN. § 174.002(b) (West 2023); WIS. STAT. § 111.70 (2023); IND. CODE § 4-15-17-5 (2023); IND. CODE § 4-15-17-10 (2023).
96 See TEX. LOC. GOV’T CODE ANN. § 142.0015 (West 2023) (overtime); CAL. GOV’T CODE § 38634 (West 2023) (paid leave); ARIZ. REV. STAT. ANN. § 9-912 (2023) (retirement benefits).
97 See, e.g., COLO. REV. STAT. § 31-30-109 (2023) (mental health services funding); ARIZ. REV. STAT. ANN. § 9-500.47 (2023) (residency requirement ban).
98 See, e.g., MINN. STAT. § 471.44 (2023).
99 See Bicking v. City of Minneapolis, 891 N.W.2d 304, 315 (Minn. 2017) (holding that a municipal amendment requiring police officers to obtain liability insurance conflicted with state law that required municipalities to defend and indemnify officers in civil suits).
laws.\textsuperscript{100} As the title indicates, the overriding concern of these state-level efforts is protecting officers from their employer, the local police force. These laws set procedural rights for accused officers (such as evidence that must be shared), restrict investigation methods (for example, by banning polygraph tests or demanding that legal counsel be present), and mandate an appeal process.\textsuperscript{101} The rights LEOBR laws enumerate can be rather extreme in their pro-officer bent: They may bar anonymous complaints,\textsuperscript{102} institute a waiting period before investigation,\textsuperscript{103} allow officers to expunge complaints,\textsuperscript{104} or prohibit requirements that an officer disclose their assets.\textsuperscript{105}

Each of the three sets of statutes catalogued in this Section—civil service laws, union protection laws, and police officer specific protection laws—regulates officers’ employment terms in different ways. And, as Section I.C.2 will discuss, they do so for different reasons. Their combined effect, however, is uniform and forceful. These laws tightly constrict the local government’s freedom to set police officers’ employment conditions. Even if local governments have the motivation and conviction to effectively police their own officers, state laws restrict their ability to dictate to those officers a different culture of policing or higher professional standards.

3. Reporting Requirements

After setting the contours of the local police force’s creation and its staffing policies, state regulation can turn to regulating what that force does. The most common tool states employ for this purpose is reporting requirements.

Statutes require local police departments to periodically provide state agencies with data respecting crimes and arrests.\textsuperscript{106} Special requirements are adopted for areas of particular state concern—that is, where the state is

\begin{footnotes}
\footnote{\textsuperscript{101} See, e.g., ARIZ. REV. STAT. ANN. § 38-1104 (2023); FLA. STAT. § 112.532 (2023); KY. REV. STAT. ANN. § 95.450 (West 2023); WIS. STAT. § 164.02 (2023).}
\footnote{\textsuperscript{102} See Kevin M. Keenan & Samuel Walker, An Impediment to Police Accountability?: An Analysis of Statutory Law Enforcement Officers’ Bills of Rights, 14 B.U. PUB. INT. L.J. 185, 239 (2005) (noting that no LEOBORS expressly permit anonymous civilian complaints, and that some, like those in Florida, Illinois, Maryland, Minnesota, and New Mexico, permit the officer to learn the identity of the complainant).}
\footnote{\textsuperscript{103} See, e.g., KY. REV. STAT. ANN. § 15.520 (West 2023) (instituting a forty-eight hour waiting period).}
\footnote{\textsuperscript{104} See, e.g., LA. STAT. ANN. § 40:2533 (2023) (permitting expungement of certain criminal complaints that are not substantiated within twelve months).}
\footnote{\textsuperscript{105} See, e.g., ARK. CODE ANN. § 14-52-304 (2023) (prohibiting such disclosures as a requirement for promotion or job assignment).}
\footnote{\textsuperscript{106} See, e.g., N.Y. EXEC. LAW § 837-b (McKinney 2023).}
\end{footnotes}
worried that the local police force will mishandle issues the state deems important. Unsurprisingly, therefore, the most prevalent issues to which reporting requirements apply are use of force and management of sexual assault cases.\textsuperscript{107} Increasingly aware that traffic and pedestrian stops may be racially motivated, many states now also mandate that local departments collect data on such stops.\textsuperscript{108}

Reporting mandates can take different, even conflicting, forms. The local agency could be required to implement an early warning system that includes, for example, information about each officer’s use of force.\textsuperscript{109} Conversely, it can be tasked with collecting only aggregate, anonymized data about use of force.\textsuperscript{110} Local reporting in any form is supposed to aid state officials in developing plans for improving coordination and the administration of criminal justice. For instance, a New York law enables state officials to collect data from local authorities, conduct studies on their behalf, and then make “recommendations to agencies” for improving their effectiveness.\textsuperscript{111}

The state’s use of the reports local police forces must provide indicates what reporting requirements can—and cannot—do. Reporting requirements might affect local policies. They might disincentivize certain local practices to avoid potential reputational harms. They might establish the informational foundation for later state-level interventionist regulations. However, in and of themselves, reporting requirements do not control a local government’s policies. They do not force the local police to behave in a certain way or to pursue certain priorities.\textsuperscript{112}

\textsuperscript{107} See, e.g., WASH. REV. CODE § 10.118.030 (2023) (use of force); WASH. REV. CODE § 35.21.195 (2023) (sexual assault kits).

\textsuperscript{108} See, e.g., 625 ILL. COMP. STAT. 5/11-212 (2023) (requiring officers to record, among other criteria, their subjective determination of a subject’s race each time the officer makes a traffic or pedestrian stop); see also Traffic Stop Data Database, NAT’L CONF. OF STATE LEGISLATURES (Jan. 12, 2021), https://www.ncsl.org/civil-and-criminal-justice/traffic-stop-data [https://perma.cc/5G4T-CDWZ] (reporting that at least 23 states have such statutes, but that they differ dramatically in their scope).

\textsuperscript{109} See, e.g., N.C. GEN. STAT. § 17F-10 (West 2023).

\textsuperscript{110} See, e.g., TENN. CODE ANN. § 38-8-131 (2023).

\textsuperscript{111} N.Y. EXEC. LAW § 837 (McKinney 2023).

\textsuperscript{112} For example, it is far from clear that the emphasis on reporting traffic stops—the police activity regarding which we now have the most data—has had much effect on local policies. A comprehensive study still found clear racial disparities. See Emma Pierson et al., A Large-Scale Analysis of Racial Disparities in Police Stops Across the United States, 4 NATURE HUM. BEHAV. 736, 736, 737 (2020). It might well be that local authorities’ incentives to rely on traffic stops are just too powerful to be negated by the reputational effects of reporting. Effectively addressing the problem would require much more robust state regulation, directly removing the power to make at least some such stops. See Maria Ponomarenko, The Small Agency Problem in American Policing, 98 N.Y.U. L. REV. (forthcoming 2024) (manuscript at 58-59), https://ssrn.com/abstract=4537989.
4. Scale and Priorities Requirements

More direct regulation of the local police force’s behavior and policy choices can take the form of state dictates respecting the force’s scale or its capacity to perform preordained assignments. A specific law could require that a city keep a police force of a certain size; the Louisiana Constitution, for example, demands that New Orleans levy an annual tax to maintain “a triple platoon system in the police department[.]”113 Or the law could require that the city’s police sustain certain staffing capabilities; a Missouri law requires that any local government in St. Louis County with more than 400 inhabitants maintain a police department “on a twenty-four hour per day basis so that at least one police officer will always be on duty[.]”114

These examples are exceptional, however. They apply to specific cities and are not prevalent in other states, where laws, if they address the matter at all, explicitly leave to the city the determination of the police force’s size.115 The Louisiana mandate is a relic from an earlier constitution. The Missouri mandate is part of a law whose completely unrelated interest is in facilitating contracts between cities and St. Louis County.116

Somewhat more common are laws that several states adopted recently preempting local governments from “defunding the police.” These laws try to block, or at least disincentivize, a city from decreasing its police budget.117 Any fanfare surrounding their adoption notwithstanding, these laws do not truly dictate a local police’s size or capabilities. Perhaps due to their makers’ concerns (which were wholly political) and motivations (which were wholly performative) the laws do not actually create a state-mandated floor for a local police force’s size or even its funding.118 They simply enshrine earlier local

113 L A. CONST. art. XIV, § 25 (1921).
114 M O. ANN. STAT. § 70.800 (West 2023).
115 See, e.g., O H I O REV. CODE ANN. § 737.05 (West 2023); N.D. CENT. CODE § 40-08-27 (2023). A Massachusetts law from 1968 mandating that certain towns have one foot patrol officer at all times for every ten thousand residents explicitly conditions its applicability on a town’s choice to accept its provisions. MASS. GEN. LAWS ch. 41, § 98B (2023).
116 Florida provides a similar example. The one place where its statutes address mandatory staffing, requiring that a police chief “[s]chedule at least two law enforcement officers to be on duty at all times,” is in a statute governing police communications, and this requirement is only one among three alternatives a chief can choose among. F L A. STAT. § 166.049 (2023).
117 See, e.g., F L A. STAT. § 166.241 (2023) (subjecting decreases over five percent in a local police budget to state review); T E X. TAX CODE ANN. § 26.0501 (West 2023) (limiting cities’ ability to raise property tax rates if they reduce their police budget); T E X. TAX CODE ANN. § 321.5025 (West 2023) (ordering that a portion of sales tax revenue from a “defunding municipality” be withheld); T E X. LOC. GOV’T CODE ANN. § 126.002 (West 2023) (requiring a county to hold a referendum before reducing police budget); S.B. 479, 89th Gen. Assemb., Reg. Sess. (Iowa 2021) (proposing the denial of state funds to local entities that reduce their law enforcement agency’s budget).
118 One exception is Kansas City. The city’s police force is managed by a state-controlled board that drafts a police budget. M O. ANN. STAT. § 84.350 (West 2023). The city—which, again, does
government decisions respecting those issues. Thus, while these laws explicitly regulate local choices respecting police funding (the budget can go up, not down), their effect is limited.

States do have some stand-alone statutes that require a local police force to be capable of performing certain, often very specific, tasks. For example, a Michigan law requires local police to “use every available means” to recover drowned bodies; a South Dakota law requires that a local police force assign a sufficient number of officers to preserve the peace at public meetings when the mayor is “satisfied that a breach of the peace may be reasonably apprehended”; and an Illinois law requires a local police force to report to the State’s Attorney any complaint from a retail store about “organized retail crime.” As part of its anti-defund the police law, Florida instituted a duty for cities “to allow the municipal law enforcement agency to respond appropriately to protect persons and property during a riot.”

As seen earlier, state laws enabling the police’s initial establishment do not mandate its creation or define its duties. Specific laws could do that—by mandating that the local police retain a certain scale, level of funding, or service—and some, as this Section showed, do. Strikingly, however, these laws are rare and very specific (even idiosyncratic). As a category, they express a limited vision of state-level regulation of the local police force.

5. Preempting Specific Police Practices

Aside from broad mandates designing the police force and affirmatively defining its tasks, the state can regulate the local police through narrow prohibitions targeting specific practices. The state, that is, can preempt certain local measures. Given the subservient standing of local governments not actually control the police—is then obliged to appropriate the demanded funds, as long as the funds are not in excess of one-fourth of its annual revenues. MO. ANN. STAT. § 84.730 (West 2023).

The Indiana Senate rejected such an anti-defund bill for this reason, with senators explaining that the hands of local leaders should not be tied. Brandon Smith, Indiana Senate Rejects Bill Banning ‘Defund the Police’, WFYI (Feb. 15, 2021), https://www.wfyi.org/news/articles/indiana-senate-rejects-bill-banning-defund-the-police [https://perma.cc/H2D4-V2E6].

MICH. COMP. LAWS § 51.301 (2023).
FLA. STAT. § 768.28 (2023). A breaching city is made civilly liable for damages an individual suffered due to the rioting. Id.

See Ponomarenko, supra note 2, at 59-63 (arguing that the state plays too small a role in regulating “police policies, training requirements, data collection, and monitoring”).

See JAMES F. RICHARDSON, URBAN POLICE IN THE UNITED STATES 45 (1974) (describing the success of local activists in overturning an Ohio law that dictated the structure of local police forces and the ensuing constitutional amendment that enabled cities to adopt their own governing structure for the police).
in American law, the state legislature is almost always free to block a local government from exercising a power it holds or to reverse such an exercise.

States sometimes use this power to regulate local police practices. Many states regulate municipalities’ use of novel surveillance techniques. They prohibit certain uses of drones, automatic license plate readers, and facial recognition technology. Several states prohibit local police forces from establishing arrest or citation quotas or using such quotas to assess an officer’s performance. These prohibitions have grown more common as part of the backlash to the 2014 police shooting of Michael Brown in Ferguson, Missouri. In a somewhat similar dynamic, the George Floyd murder goaded some states to enact new laws banning plainly problematic police practices. For example, in 2020, Colorado adopted a law prohibiting the use of rubber bullets and tear gas to disperse demonstrators. California did so two years later. New York prohibited chokeholds, while Florida ordered local police forces to dramatically curtail the practice. Most state lawbooks had already contained some provision relating to officers’ use of force, but recent events provided an impetus for new and often more detailed statutes. Furthermore, in states such as New Jersey, attorney general

126 See, e.g., 725 ILL. COMP. STAT. 167/10 (2023); ALASKA STAT. § 18.65.902 (2023); ME. STAT. tit. 25, § 4501(4) (2023).
127 See, e.g., ARK. CODE ANN. § 12-12-1803(a) (2023).
128 See, e.g., WASH. REV. CODE § 43.386.080(1) (2023).
129 See, e.g., 65 ILL. COMP. STAT. 5/11-1-12 (2023).
131 See COLO. REV. STAT. § 24-31-905 (2023) (effective 2020).
133 See N.Y. PENAL LAW § 121.13-a (McKinney 2023) (effective 2020).
134 See FLA. STAT. § 943.1735(2)(c) (2023) (effective 2021) (mandating that officers resort to chokeholds only “where the officer perceives an immediate threat of serious bodily injury or death to himself, herself, or another person”).
135 Statutes were necessary because under the traditional common law rule, an officer could use any amount of force, including deadly force, to seize a fleeing felon. See Tennessee v. Garner, 471 U.S. 1, 12 (1985). As a result, an officer could not be held criminally liable for any resulting injuries, including death. See id. Statutes used to codify this rule, and some still do, but most states have now curbed its application by detailing the circumstances in which the use of force is justifiable. Cf. id. at 15-17 (reviewing state statutes in 1985); see also Chad Flanders & Joseph Welling, Police Use of Deadly Force: State Statutes 30 Years After Garner, 35 ST. LOUIS U. PUB. L. REV. 109, 120-24 (2015) (updating the Court’s review of state statutes).
136 For example, CAL. PENAL CODE § 835a (West 2023), which took effect in 2021, only allows for the use of deadly force “when necessary in defense of human life.” A similar Maryland statute, which became effective in July 2022, is even more detailed. MD. CODE ANN., PUB. SAFETY § 3-524 (West 2023).

While the preemption laws reviewed so far attempt to rein in local police forces, many state statutes adopted over the past fifteen years carry the exact opposite effect: ordering localities to employ their police forces more aggressively. The most famous of these measures are so-called anti-sanctuary city laws.\footnote{138 See, e.g., N.C. GEN. STAT. § 160A-205.2 (2023); ALA. CODE § 31-13-5 (2023).} These laws prohibit local governments from restraining their police in the enforcement of federal immigration laws.\footnote{139 See, e.g., IND. CODE § 5-2-18.2-4 (2023).} They also ban cities from ordering officers to refrain from gathering, and sharing with federal authorities, information about an individual’s immigration status.\footnote{140 See IND. CODE § 5-2-18.2-3 (2023).} Outside the immigration context, other, somewhat less common, state laws serve the same goal of preemption specific local policing attitudes that the state deems too soft. A Texas law preempts any local decision ordering the police to not fully enforce federal and state drug laws,\footnote{141 See TEX. LOC. GOV’T CODE ANN. § 370.003 (West 2023).} and a new Arizona law prohibits local police from destroying guns.\footnote{142 See ARIZ. REV. STAT. ANN. § 13-3108(F) (2023).}

These Texas and Arizona laws, like the anti-sanctuary city and anti-defund the police laws mentioned earlier, embody the belligerent, and at times petty, form of state preemption that emerged after the 2010 midterms.\footnote{143 Cf. Patrick Flavin & Gregory Shufeldt, Explaining State Preemption of Local Laws: Political, Institutional, and Demographic Factors, 50 PUBLIUS 280, 292 (2020) (discussing the political genesis of the new preemption laws).} The laws reflect the political dynamics that now dominate in many places: a very conservative state legislature contending with liberal major cities. Less often, these political dynamics are reversed, and a liberal state legislature imposes its preferences on potentially more conservative cities. Sanctuary state laws, or anti-anti-sanctuary city laws, adopted in states such as California, are examples: They prohibit local police forces from enforcing immigration laws.\footnote{144 See CAL. GOV’T CODE § 7284.6 (West 2023); see also COLO. REV. STAT. § 24-76.6-102 (2024).}

Mostly—if now not solely—drafted by conservative-dominated state legislatures, recent preemption laws do not reflect any principled analysis of the state’s role in regulating local police forces. Rather, they form part of the...
“new preemption”—the wave of laws that preempt local ordinances on issues ranging from civil rights to soda taxes because such ordinances interfere with some specific policy preference of the state legislature.145 These laws address particular political concerns a legislature might have, but rarely drastically redraw the allocation of powers over the police force.146 Laws that fall into this final category of state-level regulation of the local police tend to be intrusive, but narrowly targeted and largely reactive.

6. Summary

The local nature of policing in America arises from state statutes. These statutes empower, but do not oblige, local governments to establish a police force. Enabling acts do not even define police forces and their duties. Other laws do, but to an extremely limited extent. Reporting requirements might be rather common, but actual mandates to preserve a police force of a certain size or with certain capabilities are rare. Narrow laws preempting specific practices abound, and current political trends clearly favor them. These laws can impact certain important local police practices, but when viewed in the broader context of police policymaking, their effects are limited.

Policing policy involves foundational and broad choices. The police’s functions can include crime fighting, first response, law enforcement, investigation, traffic control, patrolling, and more.147 These functions can be broken down further: The crimes a police force fights can relate to property, violence, drugs, or lifestyle.148 Which functions should be the focus of a given police force? How many officers should the force dedicate to dealing with each? Preemptive laws, because they are negative and reactive, only affect these determinations at the margins.149 Indeed, states’ current resort to targeted laws preempting individual local practices can be seen as an


146 The California anti-anti-sanctuary city law illustrates nicely. It explicitly states: “Nothing in this section shall prohibit a California law enforcement agency from asserting its own jurisdiction over criminal law enforcement matters.” CAL. GOV’T CODE § 7284.6(f) (West 2023).


148 Even the few outlier state laws that aim to address specific crimes do not determine what offenses should be prioritized. For example, Alaska requires an officer to arrest a person if they have probable cause to believe the person committed domestic violence. See ALASKA STAT. § 18.65.530 (2023). But such a provision does not require the local police to have enough officers to deal with domestic violence, to prioritize battling domestic violence over any other of its functions, or even to respond to a call about domestic violence.

admission of impotence. State legislatures must turn to these narrow laws because general laws otherwise leave most policy determinations to the local government.150 City officials, not state officials, determine how effective the police force will be. Empirical researchers have found that police funding, more so than other local functions, is impacted by a mayor’s political preferences151—indicating the high level of local government control over the matter. The local government also appoints the police force’s head.152 Paradoxically, state executive moves to cabin urban prosecutors’ discretion in pursuing certain offenses153 only attest to local governments’ wide powers. Airing the state government’s political frustrations with local powers over law enforcement, these efforts reveal the clear pattern identified here: Current state laws leave local governments mostly free to design and employ the police as they see fit.154

One group of state laws clearly buck this trend, however. Regulation of personnel, or officer employment, is the sole place where many states insist on consistently and thoroughly exercising their control over local governments. When it comes to choosing who will serve on the force, and, more importantly, how those persons will be subsequently treated, local powers are tightly constrained. State statutes dictate standards of hiring, compensation, promotion, demotion, discipline, and dismissal.

An important question now presents itself: Is the pattern established here respecting the local power over the police—broad powers to set the force’s

150 Cf. Friedman & Ponomarenko, supra note 37, at 1844 (“The salient point . . . is that . . . legislation [that governs particular aspects of policing] is episodic—a bit of a latticework, with many large holes.”).


152 See, e.g., MICH. COMP. LAWS § 70.15 (2023); N.D. CENT. CODE § 40-08-27 (2023); OHIO REV. CODE ANN. § 737.02 (West 2023). As noted above, Kansas City is an exception. See supra note 118 and accompanying discussion.

153 See, e.g., Warren v. DeSantis, 653 F. Supp. 3d 1118, 1123, 1130 (N.D. Fla. 2023), vacated, 90 F.4th 1115 (11th Cir. 2024) (condemning, but not striking down the governor’s move to suspend an elected district attorney for pledging not to prosecute violations of abortion laws); Josef Nilhas, Comment, Legislative Push Towards Supersession in Missouri, 66 ST. LOUIS U. L.J. 775, 776 (2022) (discussing a Missouri bill that would allow the state Attorney General to take over homicide cases in St. Louis if the district attorney has not filed charges); Kayla Sullivan, Bill Allowing State Attorney to Supersede County Prosecutor Passes Committee, FOX59 (Jan. 28, 2020, 7:25 PM), https://fox59.com/news/politics/bill-allowing-state-attorney-to-supersede-county-prosecutor-passes-committee/ [https://perma.cc/E5Z7-J3M7] (reporting on an Indiana bill empowering the attorney general to prosecute cases when a local prosecutor has adopted a policy not to pursue cases of that type); cf. Ass’n of Deputy Dist. Att’y’s v. Gascón, 295 Cal. Rptr. 3d 1, 37 (2022) (holding that under state laws the district attorney has no discretion to ignore a three-strikes law).

154 Local governments receive so little guidance from the state that a growing number of them now turn to Lexipol—a private company—to provide them with policy manuals. See Ingrid V. Eagly & Joanna C. Schwartz, Lexipol: The Privatization of Police Policymaking, 96 TEX. L. REV. 891, 894-95 (2018).
policy, limited powers to manage its workforce—common in American law’s treatment of local authorities?

B. The Doctrine’s Uniqueness

The above review of the state statutes molding the local power over the police identified an inconsistency. State regulations are lax or non-existent when it comes to the role of the police—indeed, state regulations generally do not even require the creation of a police force—but are extremely intrusive when it comes to the management of the police workforce. Under state law, local governments are mostly free to tell police departments what to do, but they do not enjoy a similar degree of freedom when it comes to telling police departments whom, and under what conditions, to employ. On its own terms, this pattern appears peculiar. But is it unique? If not—that is, if a similar pattern is prevalent in other areas of local control—it might be less peculiar than it first appears. To show that this inconsistency is unique, and thus demands an independent explanation, this Section will briefly review the division of powers between local and state governments in the other key field entrusted to local governments in America: education. Education is a useful comparison because, like policing (and unlike, say, the office of the city counsel), it is a purely governmental, rather than corporate, power of the city. Similarly, like policing (and unlike, say, running the fire department), education inevitably involves significant discretion and multiple policy decisions.

Education is the power that is routinely cited alongside policing as the most important function American law commits to local governments. But unlike policing, whose local government law infrastructure has heretofore been rather under-analyzed, the legal treatment of the local power over education has garnered much scholarly and judicial attention. As a result, much of the information necessary to compare education to policing is readily available. Two attributes of the regulation of education are of interest here: the degree to which the state government controls the local school workforce, and the degree to which the state government controls local schools’ functioning.

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155 Cf. O’Rourke et al., supra note 6, at 1390 (recommending comparing the “structural exceptionalism” of police agencies and school districts).

156 See Veach v. City of Phoenix, 427 P.2d 335, 337 (Ariz. 1967) (explaining that a city’s discretion in managing the fire department amounts to determining the necessary level of fire protection in the city area).

157 See, e.g., Noah M. Kazis, Special Districts, Sovereignty, and the Structure of Local Police Services, 48 URB. L. 417, 421 (2016) (“[P]olicing [is] one of the two largest local government line items after education, which dominates local spending.”).
State regulation of local school workforces shares much in common with state regulation of local police workforces. Recall that states generally determine whom local governments can employ as a police officer, and then, once an officer is hired, dictate much of their treatment as an employee.\textsuperscript{158} State policies respecting local schools’ hiring practices are similar to policies governing the hiring of local police officers. For an individual to be hired as a teacher, a state board must certify them.\textsuperscript{159} The local government is thus not free to choose whom to hire as a teacher. It can only pick among those the state deems qualified.\textsuperscript{160}

After a teacher is hired, states dictate much, though not all, of his standing as an employee in a fashion very similar to that identified for police officers. Like police officers, teachers are public employees and thus enjoy the protections of civil service laws. In most states, laws governing public employee unions treat teachers as they do police officers.\textsuperscript{161} And as states have laws specifically regulating a police officer’s employment relationship with the local police department, states also have laws that specifically dictate a teacher’s relationship with the local school. Most importantly, these laws create a tenure system for teachers. Under this prevalent system, after a probationary period defined by state law, a teacher can only be fired for cause.\textsuperscript{162} To enforce this protection, state statutes detail the disciplinary procedures that must precede removal.\textsuperscript{163} In this respect, teacher tenure laws can be viewed as tracing state statutes governing police officer disciplinary processes. Both in structure and substance, the law’s treatment of the local government’s power over school employees mirrors its treatment of the local government’s power over police employees.

However, meaningful differences do exist in some states. As noted, the recent spate of anti-public union laws created exceptions for police unions.\textsuperscript{164} Thus, in states that have enacted anti-union reforms, teacher unions are illegal while police unions persist. Perhaps more meaningfully, no equivalents of LEOBR laws exist in the education context. These popular and pro-

\textsuperscript{158} See supra subsection I.A.2 and accompanying discussion.

\textsuperscript{159} See, e.g., 105 ILL. COMP. STAT. 5/2-3.9 (2023).

\textsuperscript{160} See, e.g., N.Y. EDUC. LAW § 3001 (McKinney 2023) (stating that no person is authorized to teach in a public school unless they are in “possession of a teacher’s certificate issued under the authority of this chapter or a diploma issued on the completion of a course in state college for teachers or state teachers college of this state”).

\textsuperscript{161} See, e.g., CAL. GOV’T CODE § 3502 (West 2023) (treating all “public employees” equally regarding their right to representation in employer-employee relations); ME. REV. STAT. ANN. tit. 26, § 963 (West 2023) (same).

\textsuperscript{162} See, e.g., N.Y. EDUC. LAW § 3020 (McKinney 2023). Cause is normally defined as misconduct, ineffective teaching, or termination of the position. See, e.g., MINN. STAT. § 122A.41 (2023); MICH. COMP. LAWS § 38.91 (2023).

\textsuperscript{163} See, e.g., N.J. STAT. ANN. § 18A:6-10 (West 2023); 24 PA. CONS. STAT. § 11-1127 (2023).

\textsuperscript{164} See supra note 87.
employee laws that govern disciplinary processes protect police officers—but not other local employees such as teachers. Consequently, teachers do not benefit from the extended protections that police officers now enjoy. In fact, the trend in legal reforms respecting teachers’ discipline has been the exact opposite. Statutes have been passed to create “streamlined” procedures for removal of teachers deemed “ineffective.” These laws increase, rather than decrease, the local government’s power over its teachers. To be clear, perhaps there is good reason that police employees are granted enhanced protection in these ways as compared to teachers, given that in many states police officers are prohibited from striking.

Regardless of the reason, state intervention in the local management of the workforce is somewhat less aggressive in the educational field than in the policing field. But the difference should not be overstated: The state plays a prominent role in the management of both workforces.

Where the local-state interface in the police and education realms dramatically diverge is with respect to policymaking. We saw above that state police laws frequently do not mandate that local police departments exist at all and say little on what work those departments should do. State education laws paint a different picture.

All state constitutions require that free public education be made available. State legislatures then instruct local governments to establish schools. Even in places where courts have interpreted their constitution as not mandating as much, states participate in the funding of local schools. To differing degrees, they do not leave the financing of schools to localities’ own devices. All states also install a chief state school officer, and forty-seven empower a state board of education. The officer or board has the

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165 See Keenan & Walker, supra note 102, at 186 (“LEOBORS represent a form of special legislation for police officers. No other group of public employees enjoys equivalent legislation related to disciplinary matters.”).

166 See, e.g., N.Y. EDUC. LAW § 3020-b (McKinney 2023).

167 See SANES & SCHMITT, supra note 94, at 12-68 (surveying state laws regarding the permissibility of striking by public employees).


169 See, e.g., 105 ILL. COMP. STAT. 5/10-21.2 (2023) (establishing schools of different grades); 105 ILL. COMP. STAT. 5/10-21.5 (2023) (establishing high schools).


171 See Melanie Hanson, U.S. Public Education Spending Statistics, EDUC. DATA INITIATIVE (Sep. 8, 2023), https://educationdata.org/public-education-spending-statistics [https://perma.cc/2M5C-GWYA] (providing updated statistics indicating that all states—to very differing degrees—participate in the funding of K-12 schools).

general power to supervise all schools in the state. They set standards for schools and then assess them. They enforce state laws governing school curriculum, dictate the number of school days, and detail the length of those school days, all the way down to defining a lunch break. State bodies enact school building codes, which can go so far as to regulate the length of the sidewalk leading to a schoolhouse. In nineteen states, state boards adopt school textbooks.

State regulation of what happens within a school—and not just of whom the school employs—is pervasive, and often highly detailed. Virtually none of this substantive state-level regulation was found in the laws governing local police forces. Constitutions (or statutes) do not mandate provision of the service, statutes do not define it, no state standards are set for much of it, no state body supervises the local providers, and no general state funding is provided.

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173 See, e.g., N.Y. EDUC. LAW § 305 (McKinney 2023); 105 ILL. COMP. STAT. 5/2-3.3 (2023); KY. REV. STAT. ANN. § 156.210 (West 2023).
174 See, e.g., 105 ILL. COMP. STAT. 5/2-3.64a-5 (2023); KAN. STAT. ANN. § 72-255 (2023); 24 PA. CONS. STAT. § 26-2603-B (2023).
175 See, e.g., 105 ILL. COMP. STAT. 5/2-3.64a-5 (2023) (noting that the board of education shall "establish the academic standards," "annually assess all students," and "annually assess schools that operate a secondary education program"); 105 ILL. COMP. STAT. 5/27-5 (2023) (noting that the school boards "shall provide for the physical education and training of pupils of the schools and laboratory schools under their respective control, and shall include physical education and training in the courses of study regularly taught therein"); 105 ILL. COMP. STAT. 5/27-20.7 (2023) ("[P]ublic elementary schools shall offer at least one unit of instruction in cursive writing."); 105 ILL. COMP. STAT. 5/27-21 (2023) ("History of the United States shall be taught in all public schools and in all other educational institutions in this [Illinois] supported or maintained, in whole or in part, by public funds.").
176 See, e.g., 105 ILL. COMP. STAT. 5/10-19 (2023); MASS. GEN. LAWS ch. 69, § 1G (2023); MD. CODE ANN., EDUC. § 7-103(b)(1)(i) (West 2023).
177 See, e.g., 105 ILL. COMP. STAT. 5/10-19.05 (2023) (directing that a day of school attendance shall only count if the pupil spent at least five hours under supervision of teachers or other specified school staff); MASS. GEN. LAWS ch. 69, § 1G (2023) (ordering the state board to establish minimum length for a school day); MD. CODE ANN., EDUC. § 7-103(b)(1)(i) (2023) (requiring that schools be open for at least three hours every school day and for a minimum of 1,080 school hours during a 10-month period in each school year).
178 See, e.g., N.Y. EDUC. LAW § 813 (McKinney 2023).
182 As noted, local police forces are distinct from county sheriffs, who are constitutionally required. See Tomberlin, supra note 55, at 129.
183 See supra note 12.
This Section’s review of how states regulate local educational powers highlights what states abstain from doing when regulating local police powers. Detailed regulation of employment patterns in local schools is accompanied by detailed regulation of local schools’ functions and policies. The law is consistent. For the local power over the police, conversely, the (even more) detailed regulation of employment patterns is not accompanied by intense substantive regulation. The division of powers between the state and local governments over the police identified in Section I.A. is not only inconsistent, but unique. It is peculiar.

C. The Doctrine’s History

How did this baffling division of powers emerge? Observing the development of a body of law must be part of any serious attempt at explaining it, especially when the challenge is to account for an internal inconsistency. Accordingly, I now present the history of the local government law of the police. The brief overview will show that statutory interventions in the management of the police workforce cropped up later—in some cases, much later—than the other elements of the law of policing. These measures were largely disconnected from the traditions and policies that animated the original, and more foundational, elements of the law.

This Section will first show that the police is a service that local governments introduced independently and that states consistently acknowledged as fully local.\textsuperscript{184} Then, reviewing the later introduction of state-level regulation of officers’ employment patterns, this Section will discern the distinct concerns prompting those measures.

1. Policing’s Persistent Localism

As previously noted, policing is often recognized as one of the core functions reserved to local governments in the American scheme of governance.\textsuperscript{185} Few realize, however, that this strong and enduring commitment to localism in policing stands out even when compared to other traditionally local powers, such as education. Policing, as this Section will

\textsuperscript{184} Legal writers too easily present state authorisation for creating the original police forces as establishing the non-local origins of police. See, e.g., O’Rourke et al., supra note 6, at 1366. Because authorizing does not equate to establishing, that presentation is slightly misleading. Moreover, in some instances the state authorizing act was adopted in reaction to local agitation and lobbying. New York City is a prominent example. The state enabling act followed popular and business group demands in New York City. EDWIN G. BURROWS & MIKE WALLACE, GOTHAM: A HISTORY OF NEW YORK CITY TO 1898, at 636-38 (1999).

\textsuperscript{185} See supra notes 39–43 and accompanying text.
show, is a core local power that cities themselves initiated and then wholly managed.

The public police force is a recent arrival—as compared, say, to the public school. While the latter dates to the first decades following colonization,\textsuperscript{186} the police force is an invention of the mid-nineteenth century.\textsuperscript{187} Furthermore, while local governments originally began operating schools to comply with colonial—and later state—mandates,\textsuperscript{188} they created police forces wholly of their own volition.\textsuperscript{189}

Prior to the 1830s, the work of “policing,” to anachronistically apply the modern term,\textsuperscript{190} fell mostly to community members who volunteered for specific assignments.\textsuperscript{191} This work was undertaken by two groups of people: the constables and the night watchmen.\textsuperscript{192} Constables aided courts: They served warrants and civil litigation documents and arrested offenders.\textsuperscript{193}

Local courts were empowered to appoint constables,\textsuperscript{194} and victims of offenses or other parties to litigation sought and paid them.\textsuperscript{195} Their work was thus reactive rather than preventative—constables helped with investigating and prosecuting a crime after it had occurred. To the extent crime prevention work was done in these earlier times, it was left to the watchmen.\textsuperscript{196} The night watch's task was to patrol the streets after sunset, sounding the alarm for fires and crying out when confronted with an offense.\textsuperscript{197} Contemporary accounts indicate that the watch did very little of the latter.\textsuperscript{198} The watch consisted of

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\textsuperscript{188} Shoked, supra note 186, at 963-64.

\textsuperscript{189} See ERIC H. MONKKONEN, POLICE IN URBAN AMERICA 1860-1920, at 33 (1981) and accompanying text.


\textsuperscript{192} Id. at 34.

\textsuperscript{193} Id. at 34.


\textsuperscript{195} Id. at 32, 34. This was also the traditional view in England. See, e.g., Jerome Hall, Legal and Social Aspects of Arrest Without a Warrant, 49 HARV. L. REV. 566, 582 (1936) (describing the general
residents doing required volunteer work—or, more often, persons that those residents hired to do the work in their stead. Like the constables, the watch thus was an informal force, rather than a permanent, structured one. And the watchmen, again like the constables, were locally appointed by city leaders or judges and subject to city regulations.

This haphazard system, which in England had lasted for six hundred years, reached its breaking point in the early nineteenth century. Policing was then dramatically and enduringly transformed in 1829 with the establishment of the Metropolitan Police of London, which served as the model for American police departments.

In its design, the new London force targeted and replaced the two core attributes of the constable and night watch system: informality and localism. The Metropolitan Police of London was devised to introduce into domestic order maintenance the military’s patterns of organization. It was a regular force assuming a proactive approach to crime prevention. It was based on an ordered hierarchy with a clear chain of command and a headquarters. Its members were uniformed—and hence visible, identifiable, and accessible to all residents. In another break with the past, the new force answered to the executive branch of the government, rather than to the local judiciary.

agreement in the early nineteenth century about “the ineptitude, inefficiency, even absurdity of the parish watchmen”).

199 Sklansky, supra note 196, at 1206 (“[S]erving as constable or watchman was generally, in theory, an unpaid civic obligation, but in practice everyone who could afford to hire a substitute did so . . . .”).

200 See, e.g., FRANCIS O.J. SMITH, LAWS OF THE STATE OF MAINE 660 (1834) (citing a provision that requires justices of the peace and selectmen to elect the town watch and determine its size); PRIVATE AND SPECIAL STATUTES OF THE COMMONWEALTH OF MASSACHUSETTS, FROM THE YEAR 1780, TO THE CLOSE OF THE SESSION OF THE GENERAL COURT, BEGUN & HELD ON THE LAST WEDNESDAY IN MAY, A.D. 1805 469-70 (Boston, Manning & Loring 1805) (noting an 1802 statute authorizing the Boston Selectmen to appoint “Watchmen by night” and a “head Constable” to supervise them, and requiring the funding of such appointments).

201 See, e.g., MONKKONEN, supra note 192, at 34 (discussing the obligations of constables in Boston).

202 Id. at 35.

203 See T.A. CRITCHLEY, A HISTORY OF POLICE IN ENGLAND AND WALES 47-50 (1967) (describing the passage of the act establishing the Metropolitan Police).

204 See MONKKONEN, supra note 192, at 55 (“[T]he conspicuously successful Metropolitan Police of London served as a policing model to be adopted when any one of several precipitants occurred.”).

205 See CRITCHLEY, supra note 203, at 51 (discussing the key role of a former army officer in running the original force and structuring it).

206 The Home Secretary who had introduced and promoted the force instructed the officers that “the object to be attained is the prevention of crime,” and that “[t]o this great end every effort of the police is to be directed.” CRITCHLEY, supra note 201, at 52.

207 Id. at 51.

208 Id.

209 Id. at 50.
new system severed the police’s “centuries-old link with the magistracy and the parishes.”

This model was imported to America in the middle decades of the century, when New York and Boston (and other major American cities that then followed their lead) created new uniformed police forces focused on upholding the law and on crime prevention.

But American jurisdictions insisted on charting their own course with respect to one attribute at the heart of the original London scheme. While the Americans followed the English precedent in shifting control over law enforcers from the courts to the executive, the executive in whom Americans entrusted the responsibility was distinct from the one chosen by the English.

An important goal of the English movement toward a formal police force was centralization, not only in the internal structure of the body tackling crime, but also in external control over that body. The Metropolitan Police of London was created by a parliamentary act pushed through by the national government. Under the act, the new force answered to the Home Secretary. In America, a different path was chosen. Here, the newly formed police answered to City Hall, not to the state government. From an institutional perspective, the major thrust of the establishment of the police force in American cities was to shift the locus of peacekeeping from the local court to the mayor’s office. Consequently, American police forces,
unlike the Metropolitan Police of London, were never accorded independence from local politics.220

In fact, the police became the backbone of the nascent institutions of American local government.221 Police officers constituted some of the first municipal employees in America.222 Their daily tasks reflected this fact. Their work went far beyond the crime-prevention assignments normally associated with the police, encompassing instead the full plethora of municipal services. Officers managed traffic, returned lost children, aided accident victims, shot stray dogs, escorted drunkards home, maintained weather records, took charge of public health, enforced sanitation laws, inspected boilers, supervised street cleaning, issued licenses, and conducted annual censuses.223 The police officers also dispensed welfare: They ran soup kitchens, used their stations as homeless shelters, and more.224

Identifying the specific impetus for the creation of this new municipal force has proven challenging. Theories ascribing the advent of police to up ticks in crime,225 or in rioting,226 have not been empirically verified.227 A popular account connects the police's rise to class tensions and nativist elites' desires to maintain control over a growing immigrant urban working class.228 The most that is certain is that the pattern of police adoption corresponded to city size: larger cities followed London (the world's largest city at the time) and were then followed by smaller cities.229 The urban anonymity of a

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220 See LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 69-70 (1993) (describing the relationships between police and politicians in New York City and Boston, concluding that "American police . . . were less 'professional' than their British counterparts from the very start").

221 See Eric H. Monkkonen, From Cop History to Social History: The Significance of the Police in American History, 15 J. SOC. HIST. 575, 584 (1982) ("Never before [the introduction of the police force] had an urban service provided easy public access and centralized communication. Urbanites for the first time could have direct contact with easily visible, regularly available, and authoritative city workers.").

222 See Nirej Sekhon, Police and the Limit of Law, 119 COLUM. L. REV. 1711, 1732 (2019) (describing early police departments as part of a “broad reform movement focused on the rationalization of municipal government and services”).

223 Lane, supra note 191, at 8-9; Monkkonen, supra note 218, at 554-555.

224 Lane, supra note 191, at 9. Police forces began to reduce their role in these activities and narrow their focus to crime in the late 1890s. Monkkonen, supra note 218, at 556. By the 1920s, most of their non-crime related work disappeared. Id. at 557. Remnants remain. In Nebraska, the early twentieth century law requiring police officers to report on odors emanating from sewage and on health law violations remains in the books. NEB. REV. STAT. § 14-607 (2023)

225 See, e.g., JOHNSON, supra note 209, at 15 ("Local circumstances, especially the incidence of 'crime waves' and rioting, dictated the pace of reform in each city.").

226 See, e.g., id.; Lane, supra note 191, at 7-9 (discussing rioting as one cause of creation of police forces).

227 Monkkonen, supra note 221, at 583.

228 See LUNDMAN, supra note 211, at 29-34.

229 Using uniforming as the defining moment for establishing a force, Monkkonen found that:
booming population and “the politicization of ethnicity” led to the breakdown of the existing volunteer-based law enforcement system.\textsuperscript{230} Improvements in communication technologies, as well as the onset of bureaucratization, further facilitated the turn to a formalized police force.\textsuperscript{231}

Whether some substantive motivation was at the heart of the movement, or instead mere desire to keep up with what other cities were doing,\textsuperscript{232} one thing is incontestable: in America, the movement was spurred by local pressures and actors alone. The police force was a local creation, locally controlled either directly by mayors and city councils or indirectly through a board of commissioners the mayor appointed.\textsuperscript{233} An extreme example of local control is provided by Chicago’s Mayor Thomas Dyer, who, upon entering office in 1856, fired nearly the entire police force and hired new officers.\textsuperscript{234} The police force was often localized even further as most local governments let ward leaders appoint officers.\textsuperscript{235}

This feature was a strength. The police force derived its power and legitimacy from its local, even micro-local, nature. This nature allowed the police to reflect local communities’ values.\textsuperscript{236} Local “[d]emocratic sensitivities,” rather than state-imposed “legal norms,” were expected to govern police officers.\textsuperscript{237} Unlike the London police, whose power was institutional, American urban police officers’ authority was more “personal,” meaning they derived legitimacy less from the state government and its laws and more from the “informal expectations” and respect of the local populace.

Monkkonen, supra note 221, at 577-78.


\textsuperscript{232} See MONKKONEN, supra note 198, at 40 (noting that while the first American cities establishing a force looked to London, the following ones looked to each other for guidance).

\textsuperscript{233} Lane, supra note 189, at 12.

\textsuperscript{234} See Obert, supra note 230, at 847 (“[O]f the ninety-eight members listed on the new roster, only nine were also on the previous year’s list . . . .”). The earlier force was also almost entirely native, while seventy-five percent of the new force was Irish or German. Id.

\textsuperscript{235} JOHNSON, supra note 211, at 38.

\textsuperscript{236} Mark H. Haller, Historical Roots of Police Behavior: Chicago, 1890-1925, 10 L. & SOC’Y REV. 303, 303-04 (1976).

\textsuperscript{237} Id. at 304.
from which they hailed. As one historian puts it, “English police [were] ‘agents of a representative government, appointed by responsible rulers for the public good’ . . . American police [were] ‘servants of a self-governing people, chosen by those among whom their work lies.’”

The emergent American police forces were strongly associated with local origins and control not only in the first northeastern and midwestern cities to introduce a force, but also in cities that acted later. The Denver police, for example, were established following the formation of a community “vigilance committee” to respond to (alleged) high crime rates. The Atlanta police force was formed in 1874 as part of a local reform movement that redrafted the city’s charter. Under this new charter, a separate local administrative board controlled the police force.

Incidents of states attempting to run the local police force did occur. Most famously, in 1857, New York State moved to displace New York City’s own police force by creating a “Metropolitan Police” covering the city. The Metropolitans violently clashed with the preexisting, city-run “Municipal Police.” The New York Court of Appeals upheld the legality of the Metropolitan Police, vindicating the state’s power to replace the city police. The Missouri Supreme Court similarly endorsed a move to create a state-run police in St. Louis. In Massachusetts, ethnic conflict between Protestant native-born elites and Catholic immigrants that dominated urban politics led to the 1865 creation of a state police force. The new state police force’s focus was enforcing laws the Protestant elite felt the local Boston police were not enforcing aggressively enough.

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238 See Wilbur R. Miller, Police Authority in London and New York City 1830-1870, 8 J. SOC. HIST. 81, 84-85 (1975).
239 Id. at 95 (quoting HARRIET MARTINEAU, HOW TO OBSERVE MORALS AND MANNERS 192 (1838)).
240 LUNDMAN, supra note 240, at 20.
242 Watts, supra note 241, at 166.
243 MONKKONEN, supra note 198, at 42-43.
244 Id.
245 People ex rel. Wood v. Draper, 15 N.Y. 532, 543-48 (1857) (reasoning that the state legislature was endowed with “the whole law making power of the state” and city appointment of city police wasn’t constitutionally protected if the legislature abolished that statutorily created office).
246 State ex rel. Police Comm’rs v. Cnty. Ct. of St. Louis, 34 Mo. 546, 570-72 (Mo. 1864) (upholding a statute requiring St. Louis County to partially fund the state-created St. Louis city police).
However, attempts at state-run police forces were rare and short-lived. Even New York’s experiment with the Metropolitan Police was not truly an attempt to run a state-led police force. Rather, it represented one skirmish in the state’s broader attack on the city’s separate political existence, a reaction to the extraordinary corruption of Mayor Wood’s administration. As it was establishing the Metropolitans, the state was also cutting the mayor’s term and taking over the city’s budget. Massachusetts’s takeover of the Boston police was met with hostility, and the state-run force was abolished within ten years of its creation. Even the doctrine of state supremacy announced in the New York and Missouri cases sustaining the legality of state-run police forces soon came to carry little weight. In reaction to these and similar legislative moves, state constitutions were amended to introduce prohibitions on special legislation and then home rule charters (interestingly, Missouri was the first state to adopt a home rule constitutional amendment, in 1875), which impeded future state attempts at taking over local police forces. Some state police forces were still created with the aim of aiding small towns, but their original purpose had run its course by World War I. Thereafter, state police duties were limited to highway patrol—as highways presented a challenge that could not be handled locally.

Late in the twentieth century, a prominent sociologist attempted to explain the relative dearth of twentieth century moves toward regionalization of police services, as compared to the prevalence of such initiatives in education, health, and welfare. He simply concluded that “[l]ocal government traditions are firmly entrenched, and the belief that local control of police is an essential ingredient of local government is more firmly so.”

248 See, e.g., id. at 157-58 (describing state police in Texas and Massachusetts).
251 JOHNSON, supra note 247, at 157-58.
252 O’Rourke et al., supra note 6, at 1369.
253 See JOHNSON, supra note 247, at 159-61 (discussing Pennsylvania’s use of state police as a model for other industrial states).
254 Id. at 162-63. State police forces often also patrol state capitol buildings, see, for example, 20 ILL. COMP. STAT. 2605/2605-10 (2023), which, naturally, are located in state capitals—that is, cities. In 2023, Mississippi amended its laws to expand the original district patrolled by the Capitol Police deeper into the City of Jackson. The NAACP has brought a lawsuit contesting this displacement of the locally controlled police force. Press Release, NAACP, NAACP Files Lawsuit in Response to Passage of Unconstitutional Legislation in Mississippi (Apr. 21, 2023), https://naacp.org/articles/naacp-files-lawsuit-response-passage-unconstitutional-legislation-mississippi [https://perma.cc/G5U6-YCEK].
255 Reiss, supra note 231, at 66-67.
traditions, as this Section showed, were established early, when police forces were first introduced, and were never meaningfully questioned thereafter.

2. The Emergence of State Regulation of the Police Workforce

Yet, at around the same time when states were giving up on their (half-hearted) attempts at running police forces, they began adopting laws interfering with the local power to manage the police workforce. As Part I.A.2.b. showed, these laws take three forms: civil service laws, public-sector union laws, and LEOBR laws. This Section traces the emergence of each form to understand its background—and how it relates to the otherwise strong tradition of local power in policing.

The first state statutes interfering with local governments’ power to manage the police workforce were civil service reforms, mostly adopted early in the twentieth century. A belated reaction to the Jacksonian spoils system and an immediate one to the scandals of the post-Civil War years, the civil service reform movement began at the federal level as a “moral crusade.” To that end, “[t]he reform movement sought to create politically neutral public employees by emphasizing competence and professionalism, and advocated, as the principal technique, appointment by competitive examination.” The spoils system was viewed as corrupting—to the state and to the individual state employee—and reformers’ goal was accordingly the eradication of patronage. To that end, “[t]he reform movement sought to create politically neutral public employees by emphasizing competence and professionalism, and advocated, as the principal technique, appointment by competitive examination.” The movement had its greatest and lasting achievement in 1883 when Congress passed the Pendleton Act. The Act created a limited merit-based civil service system for the federal government with tenure for qualified employees.

The federal act initially served as inspiration for a nascent state-level reform movement, but that movement quickly stalled. The New York Civil Service Reform Association, whose founding in 1877 marked the beginning of the state-level reform drive, promoted a model state civil service bill based on the Pendleton Act. Thanks to its influence, New York and Massachusetts adopted the first state civil service systems in 1883 and 1884, respectively.

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257 Vaughn, supra note 256, at 420-21.
258 Id.
261 Id.
Yet, the New York law faced significant backlash and was rarely enforced, and it was twenty years before another state passed civil service reform.262

The onset of the Progressive Era in the first decade of the twentieth century provided the movement with the boost it had been waiting for. Above all else, Progressives believed in expertise.263 Their drive to depoliticize the public sector reflected their deep-seated suspicion of local political machines, but also an unwavering commitment to efficiency.264 Exhibiting the reinvigorated enthusiasm for civil service reform, in 1905 Wisconsin became the first state to pass such a measure since New York and Massachusetts decades earlier.265 As one commentator explained, the state’s famed Progressive governor, Robert LaFollette, “sought to carry his demand for efficient state administration to its logical conclusion by enacting a sweeping civil service act.”266 A flurry of states followed Wisconsin’s lead in the first two decades of the century.267

These state-level measures, as can now be seen, were mostly unconnected to debates about the reach of local versus state powers. Civil service reformers’ point was a denial of any politics—local or state.268 Relatedly, they enshrined the standing of the public employee not to protect the employee’s rights, but rather to protect the public’s rights, by assuring competence in government service.269

State interventionist laws explicitly geared toward protecting local employees were only adopted much later in the century. The first laws to do so were those protecting public unions. Public employee unions were relative latecomers on the American labor scene. The federal National Labor Relations Act, a New Deal measure adopted in 1935, granted employees the

262 HOOGENBOOM, supra note 259, at 259-60.
264 MIKE WALLACE, GREATER GOTHAM: A HISTORY OF NEW YORK CITY FROM 1898 TO 1919, at 506 (2017).
265 The state supreme court upheld the law as constitutional a few years later. State ex rel. Buell v. Frear, 131 N.W. 832, 833 (1911).
266 ROBERT S. MAXWELL, LA FOLLETTE AND THE RISE OF THE PROGRESSIVES IN WISCONSIN 81, 144 (1956).
267 Milton Conover, Merit Systems of Civil Service in the States, 19 AM. POL. SCI. REV. 544, 544-45 & n.1 (1925) (listing the eight other states to adopt reform, but also noting two had since terminated their civil service commissions).
268 See, e.g., Friedman & Ponomarenko, supra note 37, at 1859 (explaining that the 1931 National Commission tasked by the President to research the criminal justice system, known as the Wickersham Commission, believed that “the chief evil’ responsible for [police’s] failings was the public’s ill-considered desire to control the police”).
269 See Vaughn, supra note 256, at 421 (describing the movement’s means in terms of the public good, not the employee’s).
right to unionize, but specifically exempted government employees.\textsuperscript{270} It left it to the states to determine policies respecting state and local workers. For decades thereafter, states did not extend standing to public employee unions. At most, they enacted “meet and confer” statutes that only required management to discuss issues with unions.\textsuperscript{271} This attitude reflected a traditional hostility to public unions.\textsuperscript{272} Police unions in particular were suspect—an antagonism dating all the way back to 1919, when a Boston police officer strike led to days of rioting.\textsuperscript{274}

Significant change began in 1959, when Wisconsin legalized collective bargaining in the public sector.\textsuperscript{275} The real turning point, however, arrived three years after the Wisconsin law, when President Kennedy issued an executive order granting federal workers the right to unionize.\textsuperscript{276} In the immediate aftermath, many states adopted their own laws promoting public unions, and thanks to these state-level laws, the 1960s and 1970s saw a spurt in public unions’ power and membership.\textsuperscript{277} By 1985, forty-three states had laws authorizing collective bargaining for public employees.\textsuperscript{278}

The causes for the 1960s shift in legal attitude toward public unions were diverse. Clearly, the desire was to replicate in the public sector the private sector industrial relations model.\textsuperscript{279} By the 1950s, labor relations in the private sector were rather stable, rendering that model appealing.\textsuperscript{280} Relatedly,
commentators argued that "the merit system [instituted through civil service laws] benefits from support and criticism by alert employee groups."281 The task force President Kennedy had appointed before issuing his executive order argued that the right to organize and bargain collectively would contribute to "the effective conduct of the public business."282 Similarly, states with traditions of innovation were among the earliest adopters of public union laws.283

In an era of prosperity,284 a sense that fairness mandated that public employees be treated like private employees inevitably also played a role.285 But as was the case with civil service laws, promotion of collective bargaining among local employees was geared toward improving service.286 For example, in Philadelphia the embrace of the municipal union was associated with the decline of corrupt machine politics and the establishment of a professional public service.287

State laws recognizing public employee unions strongly interfere, as noted earlier, in local governments’ power to manage police forces. This effect has been particularly marked because the laws’ passage coincided with the rise of strong police unions. For decades, police officers had remained outside the American labor movement.288 The original police union movement was nipped in the bud by the strong public reaction to the disastrous Boston strike of 1919.289 Officers were also often perceived not as workers, but as members of the governing class.290 It was only in the 1960s that police unionism became a feature of American life.291 The cause, commentators agree, was the mostly

283 See Thomas A. Kochan, Correlates of State Public Employee Bargaining Laws, 12 J. INDUS. RELS. 322, 334 (1973) (finding “very strong correlations” between “the innovativeness of state legislatures” and how comprehensive a state’s public sector bargaining laws were).  
284 Id. at 329 (finding that higher incomes correlate with the adoption of collective bargaining laws).  
285 See WILSON R. HART, COLLECTIVE BARGAINING IN THE FEDERAL CIVIL SERVICE 1-3 (1961) (citing various critics of the federal government’s employment policies, including organized labor, scholars, and an ABA committee).  
286 A telling fact is that the early measures expanding union rights to public employees withheld from them the most powerful right afforded private unions: the right to strike. McCartin, supra note 244, at 737.  
288 See Fisk & Richardson, supra note 86, at 735-36 (noting that while states started permitting some government employees to unionize in the 1950s, “police departments routinely fired officers” attempting to unionize well into the 1960s).  
289 See supra notes 240–274 and accompanying text.  
290 See Levin, supra note 91, at 1377.  
291 Keenan & Walker, supra note 102, at 196.
White rank-and-file’s backlash to Civil Rights protests, to the attendant criticism of police practices, and to resultant court decisions enshrining citizens’ and suspects’ rights. Such new police officer accountability mechanisms amplified officers’ traditional concerns respecting their lack of protections from, and voice in, management.

The same forces—especially the opposition to calls for civilian review of officer misconduct—drove the adoption of the final component of state-level regulation of local police workforces identified earlier: LEOBR laws. With their newfound prominence, police unions immediately began campaigning for extended officer protections. A first LEOBR bill was introduced in Congress in the early 1970s. That bill did not pass, but the racial and social politics of what was fast becoming a law-and-order era facilitated the movement’s success on the state level. In 1974, Florida and Maryland were the first to pass LEOBR laws. California and Rhode Island acted next in 1976, Virginia in 1978, Wisconsin in 1979, and even more states adopted LEOBR laws in the 1980s.

LEOBR laws are thus mostly a product of the reactionary racial and political environment of the post-Civil Rights era. They do reflect, however, a potentially principled assumption: that the local police department is unlikely to treat its officers fairly. The local entity’s internal management practices are, allegedly, unsatisfactory. Left to their own devices, local departments investigating police officers for malfeasance will not accord officers their procedural (and consequently, substantive) rights. Local departments are prone to favoritism in removal and reassignment decisions. While this might be a concern for any public employee, police officers should enjoy more procedural rights than other public employees, LEOBR laws’ supporters argued, because they “must be granted the widest latitude to exercise their discretion in handling difficult and often dangerous situations[.]”

292 Id.; Fisk & Richardson, supra note 86, at 736.
293 Fisk & Richardson, supra note 86, at 736.
294 Id. at 736-37.
295 Keenan & Walker, supra note 102, at 197.
296 On the role of the “law and order” rhetoric and policies associated with Richard Nixon’s 1968 election, see, for example, MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 49-59 (10th anniv. ed. 2020).
297 Keenan & Walker, supra note 102, at 197.
298 See id. at 196-97.
300 See id. at 138 (describing transfers made “as a form of discipline or an indication of displeasure” and their earlier connection to city politics).
301 Keenan & Walker, supra note 102, at 186.
This Part’s review of the statutes governing police forces concluded that policing’s local government law infrastructure is bifurcated: one regime, that mostly empowers local governments, governs control over the police force’s functions; another regime, that mostly empowers state governments, regulates the police force’s staffing patterns. This dual nature does not characterize the other major service local governments provide: education. This unique pattern found in the law of policing is a product of the disconnected way in which the two elements of the law developed. The police force itself was a wholly local product—its antecedents were local, the desire to replace those antecedents with an organized force was local, and the moves to do so were local. Hence, local power over the police was, from the very beginning, a key and largely undisturbed feature of the system. State regulation of the local police workforce emerged on a separate, and later, track. The rationale behind these later state laws regulating the police workforce was mostly the betterment of public services—through their isolation from politics—and protection of public employees. Importantly, this form of regulation emerged independently of any conversation about the desirable distribution of governmental powers over the police.

II. THE LOCAL GOVERNMENT LAW THEORY OF THE POLICE

The structure of American local government law respecting control of the police force is, as demonstrated in the preceding Part, inconsistent. The law grants local governments many powers over creating a police force and defining its role but deprives those governments of many powers over the officers that the force employs. This structure is unique to policing. It embodies an assumption, revealed in its history, that local governments are appropriate bodies to run the police but inappropriate ones to run the police workplace. This Part puts that assumption to the normative test.

Commentators use two frameworks to assess the desirability of the local exercise of a given power. Each draws on one of the two distinct, and at times conflicting, normative values local governments can promote in our system: efficiency and democracy. Accordingly, this Part first asks whether localities are particularly ill-equipped to efficiently manage the police workforce (yet are well-equipped to efficiently set the force's goals). It then asks whether they are particularly ill-equipped to manage that workforce in a democratic fashion (yet are well-equipped to democratically set the force's goals).

It is important to note at the outset that this Part's analysis of the problem of policing through the prism of local government law theories is limited by three important caveats, all inherent to the nature of these theories as theories
of local government. First, this Article does not aim to choose between the theories or endorse either of them. Certain elements of each will undoubtedly strike some readers as far-fetched. In the case of the efficiency-oriented theory, these concerns might well be correct. But I take the theories on their own terms, without attempting to justify either. Second, as theories of local government, these theories’ focus is on the question of who should enact a policy, rather than what is the “right” policy. They aim to predict who will, in most instances, adopt the most efficient, or most democratic, policy. They make no independent judgment respecting the desired policy. The efficiency theory in particular explicitly disavows any objective benchmark separate from individual (or market) preferences. Other theories aim at identifying such desired benchmarks (and those theories should thus inform, for example, administrative rulemaking or constitutional interpretations of suspects’ rights). Third, and relatedly, these are theories of local government, and even in their limited function of merely dividing powers between the state and local governments, they express a certain pro-local bias. I probably share that bias.

A. Efficiency Theory

One potential reason to empower local governments is that they promote economic efficiency. The fundamental economic problem that the local provision of government services solves derives from the special nature of public services.\textsuperscript{302} For private services, efficient levels of production are (theoretically) easily ascertained. The market determines them. If individuals prefer one car model to another, more individuals will buy the former and more such cars will be produced. For public goods such as policing, however, consumer signals are not so effortlessly transmitted.\textsuperscript{303} Individuals do not pick and purchase a police force they like in the same way they pick and purchase a car they like. If they are unhappy with the level of protection one police force provides them, they cannot drop the force and contract with another provider as they could switch cell phone providers. Consequently, the risk exists that public goods, such as policing, will not be supplied at efficient levels (that is, levels reflecting individuals’ preferences).


This risk is alleviated, as the economist Charles Tiebout famously explained, thanks to local governments. The Tiebout Model posits that when multiple governments, rather than one central government, provide a public service, individuals do transmit their preferences respecting that service’s provision. While an individual cannot shop for a police force (or street lighting, parks, etc.), she does, in a sense, shop for a local government. She chooses where to live, and when doing that, she chooses which government she prefers. She picks among different local governments—each providing different levels of a public service, say policing, in exchange for a price, embodied in taxes. An individual will choose to live in the local government whose police force (and pricing) best fits their preferences. Localities, seeking to attract and retain residents to preserve their tax base, will adjust their services to satisfy these desires. The result is that the market for police forces, like the market for cars or cell phone providers, generates the relevant good at levels that reflect individuals’ preferences. Individuals shop for a public good with their feet—and the market does its magic.

But for the magic to happen, some ingredients must be in the mix. Specifically, the Tiebout Model requires that certain assumptions be met. Its prediction of efficiency gains through local provision of a public service only holds if there are no employment constraints (or other mobility costs) limiting individuals’ ability to relocate in pursuit of the public service; if individuals have full knowledge of the quality of the public service each government provides; and if the local provision of the service does not generate externalities.

Of course, as is the case with any other model, the Tiebout Model’s assumptions are not supposed to be realistic. For example, it is rather improbable that the whole United States population would at some point be living on interest income, and thus no American would experience employment-related constraints on her mobility. Therefore, when assessing the desirability of providing a given service locally, the question is never whether the Model’s assumptions are fully present (or fully absent). Rather, with respect to each public service whose local provision is contemplated, the question must be whether the Model’s assumptions are more or less likely to...

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305 This paragraph describes the Model as presented in id. at 418-20.
306 Id. at 419.
307 Id. These can also take the form of diseconomies of scale. Id.
308 See Keith Dowding, Peter John & Stephen Biggs, Tiebout: A Survey of the Empirical Literature, 31 URB. STUD. 767, 767 (1994) (explaining that Tiebout’s argument was "pure theory," an economic model “shorn of all ‘real-life’ complicating factors in order to highlight a particular causal or potentially causal element”).
hold. If it is probable that individuals would move in pursuit of the service, that they would have accurate information about the service, and that local provision of the service would not generate externalities, then the likelihood that local provision would promote efficient results increases.

Applied to the realities of police force provision, this efficiency framework indicates that the current division of powers between local and state governments is difficult to justify. Two of the three assumptions (mobility and knowledge) are more likely than not to hold with respect to local provision of police services, and the third (no externalities), which is somewhat less likely to hold, does not call for the current form of state regulation, but rather for its inverse.

The Model’s first assumption relates to individuals’ mobility, which in turn facilitates their ability to shop with their feet for the public service they desire. The way in which this assumption’s validity varies across different public services is not straightforward. The cost of moving (encompassing both literal moving costs and employment constraints on moving) is the same whether the relevant local service the individual is pursuing is education, policing, or street lighting. But variation across services still exists. While the cost of moving might be constant, an individual’s willingness to bear that cost varies in accordance with the importance of the service sought through the move. In other words, the question for an individual is whether a given public service is salient enough to push her to move to get a better version of that service, despite the costs of moving.

The prevalence of law-and-order politics, mentioned above, as well as the key role crime issues play in individuals’ choice of community, indicate that policing levels are a major concern animating individuals’ locational choices. It is almost impossible to overstate policing’s effects on an individual’s choice of where to live. Safety (for body and property) is

309 Shoked, supra note 19, at 1351-52.
311 Tiebout, supra note 304, at 419.
312 See Shoked, supra note 19, at 1352 (“[A]bsolute freedom to move in search of a desired public service . . . never exists. Hence it is always necessary to compare the intensity of the barriers to residential moves with the potency of the desire to consume the specific public service . . . .”).
313 Id. at 1354.
314 See supra note 296.
inevitably vital to an individual’s wellbeing. Moreover, the local police, and reliance on it for the provision of such safety, is inevitable. Whether one wants to or not, one will interact with the police. The police can never be fully replaced by a private service the individual pays for. In this respect, policing differs from other public services, like education, where one can fully resort to private alternatives, such as private schools.\textsuperscript{316} True, private security firms can be employed to protect a person’s house—even her subdivision; yet, eventually, the person must go out on the public streets. The city’s public safety measures will affect her irrespective of any private quasi-replacements she attempts to rely on. They will thus form a major consideration in any contemplated move.

The individual should also be, to a great extent, capable of assessing this public service in an informed manner, thereby increasing the likelihood that her resultant move reflects her true preferences respecting policing.\textsuperscript{317} Relevant information about policing is readily available, and thus the Tiebout Model’s second assumption (knowledge) is rather likely to hold here. Given how salient crime issues are, media coverage is abundant (arguably, over-abundant).\textsuperscript{318} Additionally, local sources—online neighborhood groups, realtors, and even cities themselves—constantly inform residents, current and prospective, on safety and crime conditions.\textsuperscript{319}

Because many individuals base their choice of city on local safety conditions, cities must adjust the quality and quantity of police services.\textsuperscript{320} To retain and attract residents, cities will compete to provide efficient—in terms of individuals’ demands—levels of policing.\textsuperscript{321} Cities will exert

\textsuperscript{316} Shoked, supra note 19, at 1366.

\textsuperscript{317} See Tiebout, supra note 304, at 449.

\textsuperscript{318} Cf. Michael O’Hear, Violent Crime & Media Coverage in One City, 103 MARQ. L. REV. 1007, 1009 (2020) (finding, in a one-year study of Milwaukee, that violent crime is disproportionately covered by local news media in comparison to more common nonviolent crimes).

\textsuperscript{319} Multiple mobile apps supply huge amounts of crime data. See Rani Molla, The Rise of Fear-Based Social Media Like Nextdoor, Citizen, and Now Amazon’s Neighbors, VOX (May 7, 2019, 12:30 PM), https://www.vox.com/recode/2019/5/7/18528014/fear-social-media-nextdoor-citizen-amazon-ring-neighbors [https://perma.cc/QCT6-NL6F] (“Apps . . . which allow users to view local crime in real time and discuss it with people nearby [] are some of the most downloaded social and news apps in the US . . . .”). Real estate services also provide guidance. See, e.g., Larissa Runkle, Is Your New Home in a Safe Neighborhood? How to Find Out, REALTOR.COM (May 9, 2022), https://www.realtor.com/advice/buy/is-your-new-home-in-a-safe-neighborhood-how-to-find-out/ [https://perma.cc/FT5C-GYEL]. For an example of a city-run service, see CITY OF CHI., CHICAGO DATA PORTAL, https://data.cityofchicago.org/Public-Safety/Crimes-Map/d9nk-7re6 [https://perma.cc/gZXW-VGEQ].

\textsuperscript{320} James M. Buchanan, Principles of Urban-Fiscal Strategy, 11 PUB. CHOICE 1, 13 (1971) (explaining that cities must strategically design their fiscal and service policies to induce valuable taxpayers to stay in the city or move to it).

\textsuperscript{321} See Stoughton, supra note 3, at 2202-03 (explaining how police agencies compete to provide benefits).
themselves to sustain a large, and effective, police force.\footnote{322}{The fact that many major cities demand candidate qualifications that far exceed the minimums set in state statutes or by state POST agencies illustrates cities’ desire to have a “better” police force than that of their peers. For example, state law often requires, at best, a high school diploma and not being a convicted criminal, whereas stronger city agencies, in particular, may require some college education. Compare COLO. REV. STAT. § 24-31-305 (2023) (requiring a high school diploma, no felonies, and no specific misdemeanor violations), with Boulder Police Dept., Job Information, NAT’L TESTING NETWORK (June 2, 2023), https://nationaltestingnetwork.com/publicsafetyjobs/fullJobDetails.cfm?agencyjobid=806&agentid =539 [https://perma.cc/8JzE-SYYJ] (requiring sixty college credit hours or military service).} A competitive market for police officers inevitably emerges. Hence, cities are highly unlikely to mistreat, and therefore repel, police officers.\footnote{323}{The fact that many major cities demand candidate qualifications that far exceed the minimums set in state statutes or by state POST agencies illustrates cities’ desire to have a “better” police force than that of their peers. For example, state law often requires, at best, a high school diploma and not being a convicted criminal, whereas stronger city agencies, in particular, may require some college education. Compare COLO. REV. STAT. § 24-31-305 (2023) (requiring a high school diploma, no felonies, and no specific misdemeanor violations), with Boulder Police Dept., Job Information, NAT’L TESTING NETWORK (June 2, 2023), https://nationaltestingnetwork.com/publicsafetyjobs/fullJobDetails.cfm?agencyjobid=806&agentid =539 [https://perma.cc/8JzE-SYYJ] (requiring sixty college credit hours or military service).} And indeed, the experience of the last few years clearly indicates that cities are doing their best to lure officers to join their police forces.\footnote{324}{The fact that many major cities demand candidate qualifications that far exceed the minimums set in state statutes or by state POST agencies illustrates cities’ desire to have a “better” police force than that of their peers. For example, state law often requires, at best, a high school diploma and not being a convicted criminal, whereas stronger city agencies, in particular, may require some college education. Compare COLO. REV. STAT. § 24-31-305 (2023) (requiring a high school diploma, no felonies, and no specific misdemeanor violations), with Boulder Police Dept., Job Information, NAT’L TESTING NETWORK (June 2, 2023), https://nationaltestingnetwork.com/publicsafetyjobs/fullJobDetails.cfm?agencyjobid=806&agentid =539 [https://perma.cc/8JzE-SYYJ] (requiring sixty college credit hours or military service).}

Paradoxically, the result is that if locally running the police force generates negative externalities to surrounding communities—in defiance of the Model’s third assumption\footnote{325}{The fact that many major cities demand candidate qualifications that far exceed the minimums set in state statutes or by state POST agencies illustrates cities’ desire to have a “better” police force than that of their peers. For example, state law often requires, at best, a high school diploma and not being a convicted criminal, whereas stronger city agencies, in particular, may require some college education. Compare COLO. REV. STAT. § 24-31-305 (2023) (requiring a high school diploma, no felonies, and no specific misdemeanor violations), with Boulder Police Dept., Job Information, NAT’L TESTING NETWORK (June 2, 2023), https://nationaltestingnetwork.com/publicsafetyjobs/fullJobDetails.cfm?agencyjobid=806&agentid =539 [https://perma.cc/8JzE-SYYJ] (requiring sixty college credit hours or military service).}—the externalities are likely to be the opposite of those that current state laws purport to cure. Current state laws, which forcefully protect officer rights, must assume that localities, left to control police officers’ employment conditions, would treat those officers too poorly. But if anything, the real risk is that they would treat them too deferentially.

In a competition to make itself attractive to officers—and thereby to residents—each city might try to outdo its peers in accommodating police officers. Cities might engage in a race to the bottom, accepting officers’ demands and adopting a permissive attitude toward their behavior.\footnote{326}{The fact that many major cities demand candidate qualifications that far exceed the minimums set in state statutes or by state POST agencies illustrates cities’ desire to have a “better” police force than that of their peers. For example, state law often requires, at best, a high school diploma and not being a convicted criminal, whereas stronger city agencies, in particular, may require some college education. Compare COLO. REV. STAT. § 24-31-305 (2023) (requiring a high school diploma, no felonies, and no specific misdemeanor violations), with Boulder Police Dept., Job Information, NAT’L TESTING NETWORK (June 2, 2023), https://nationaltestingnetwork.com/publicsafetyjobs/fullJobDetails.cfm?agencyjobid=806&agentid =539 [https://perma.cc/8JzE-SYYJ] (requiring sixty college credit hours or military service).} Some of the rewards officers can reap from this competition are not necessarily troubling, at least not in a market economy. The higher salaries for officers that inter-local competition generates, for example, while not in the best

\footnote{322}{The fact that many major cities demand candidate qualifications that far exceed the minimums set in state statutes or by state POST agencies illustrates cities’ desire to have a “better” police force than that of their peers. For example, state law often requires, at best, a high school diploma and not being a convicted criminal, whereas stronger city agencies, in particular, may require some college education. Compare COLO. REV. STAT. § 24-31-305 (2023) (requiring a high school diploma, no felonies, and no specific misdemeanor violations), with Boulder Police Dept., Job Information, NAT’L TESTING NETWORK (June 2, 2023), https://nationaltestingnetwork.com/publicsafetyjobs/fullJobDetails.cfm?agencyjobid=806&agentid =539 [https://perma.cc/8JzE-SYYJ] (requiring sixty college credit hours or military service).}

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\footnote{324}{The fact that many major cities demand candidate qualifications that far exceed the minimums set in state statutes or by state POST agencies illustrates cities’ desire to have a “better” police force than that of their peers. For example, state law often requires, at best, a high school diploma and not being a convicted criminal, whereas stronger city agencies, in particular, may require some college education. Compare COLO. REV. STAT. § 24-31-305 (2023) (requiring a high school diploma, no felonies, and no specific misdemeanor violations), with Boulder Police Dept., Job Information, NAT’L TESTING NETWORK (June 2, 2023), https://nationaltestingnetwork.com/publicsafetyjobs/fullJobDetails.cfm?agencyjobid=806&agentid =539 [https://perma.cc/8JzE-SYYJ] (requiring sixty college credit hours or military service).}

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interest of taxpayers (or poorer communities), cannot seriously be portrayed as a problematic externality.

Other concessions to officers, such as reduced training or accountability standards, may raise serious concerns. The market itself might generate a ceiling for such concessions local governments might make, through the higher taxes into which the costs of pro-officer measures (for example, expensive civil awards to wronged citizens) translate. Still, state regulation of the police officer market geared toward addressing inter-local externalities and thereby promoting efficiency in policing should set a ceiling, rather than a floor—as the law currently does—for the employment conditions local officers are offered. If state laws instated a ceiling for how lax a local force can be in managing its personnel, they could channel the competition over officers away from concessions in the arena of officer quality (probably leading to the replacement of these concessions with much less troubling concessions over salary). Such a reformed (indeed, inverted) form of state regulation would thereby negate the troubling externalities that local competition over officers creates.

So far, this Section’s externalities analysis has focused on the area of local competition over policing that state laws harshly regulate: officer employment patterns. But that analysis is also relevant to the area of local competition over policing that state laws regulate much less: police functions and priorities. In mostly refraining from intruding on those areas, current state laws assume that few worrisome externalities are generated through local control and competition in these fields. Yet inter-local externalities justifying state control over policing decisions are, arguably, much more likely to be generated by such local decisions, rather than by local decisions about personnel management. Individuals—potential victims, potential bystanders, potential offenders—routinely cross municipal lines, and therefore one locality’s choices respecting police policy are bound to affect others. A locality enforcing traffic laws too aggressively would affect neighboring localities’ residents as they drive through that locality (indeed, extracting fines from such outsiders is often the stated goal of over-policing

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327 Joanna Schwartz found that taxpayers almost always pay damage awards, including punitive damage awards, entered against police officers. Schwartz, supra note 75, at 890.

328 See Stoughton, supra note 3, at 2183 (“The nature of territorial jurisdiction, which limits the geographic area that a particular agency is responsible for, can also encourage the adoption of specific policing tactics, including intentionally displacing crime and disorder into neighboring jurisdictions.”).

The efforts one local police force dedicates to crime prevention will carry effects in neighboring municipalities, at least in their immediately bordering areas.

Our current system conceives of these externalities as tolerable, or at least as insufficient to justify centralization of police service provision in a way that would displace Tieboutian competition. This faith in Tieboutian competition here might be wrong-headed (indeed, it probably is), but it highlights the oddity of the system’s concomitant choice to not trust Tieboutian competition to fairly treat officers.

Local control of the police can, and likely does, generate several externalities—but not those externalities that current state laws imagine. Local governments’ control of policing policies generates certain externalities for outsiders. Local power over personnel issues could also generate externalities as competition over officers could lessen officer employment and conduct standards. But current state laws purport to treat a different externality altogether. They assume that local control of police employment policies will lead to maltreatment of the police force; this would result in an inability to retain officers and, ultimately, a force incapable of protecting the public. But in reality, localities have incentives, which exist independent of state law protections, to treat officers well.

When all the three assumptions are considered—citizen mobility, information accessibility, and the absence of externalities—the Tiebout Model suggests that local provision of policing can be efficient. This is largely due to the centrality of policing to individuals’ locational choices. Some (albeit limited) empirical work supports the Tiebout Model prediction. The current legal regime, then, by focusing on shielding police officers from local control, undercuts policing efficiency. This is true even when accounting for the efficiency losses that local control of the police probably does generate, such as a competition over officers or ignorance of the interests and rights of

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330 Recent literature has highlighted traffic enforcement as means to externalize costs on outsiders. In policing drivers and pedestrians, officers are often regulating non-residents. Thus, for example, fines become appealing as they are then paid by non-residents. Outsider complaints are less likely to register with local authorities. And stops might also be aimed at simply excluding those outsiders. Ponomarenko, supra note 112, at 24–28.

331 Perhaps the system also makes an assumption that local governments can bargain among themselves. Thus, one municipality will pay another to police in ways that serve the former’s preferences. Interlocal agreements are common in many fields, including policing. Yet bargaining costs are highly likely to block many efficient deals. And of course, a poor municipality will never be able to “buy” cooperation from its neighbors.

outsiders. Indeed, state-imposed restraints on local management of the police workforce might exacerbate some of these externalities.

B. Democracy Theory

Efficiency is not the sole normative value local powers can promote. Another important value that commentators and jurists routinely associate with local power is democracy. Local governance enhances democracy because it facilitates a more effective and meaningful form of citizen participation.

From canonical thinkers to current-day legal commentators, all agree that the local political arena better facilitates democratic participation than the larger state and federal arenas. Whether one’s conception of democratic participation is thin or thick, citizen participation is strengthened by small-scale decision-making.

A thin conception of citizen participation understands participation as a mechanism that facilitates governance that reflects citizen preferences. Under this framework, democracy simply requires a government whose policies correspond to citizens’ desires. Elections are a process for registering citizens’ preferences and then aggregating them. For these purposes, the smaller the decision-making arena, the better. This is because the smaller the relevant political community, the easier it is for citizens to make their voices heard. The ratio of officials to citizens is smaller. With fewer voters, each vote counts for more. Candidates’ need to respond to and tailor their message for smaller, and more distinct, groups increases. The likelihood that one would be ignored

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333 See, e.g., Letter from Thomas Jefferson to Governor John Tyler (May 26, 1810), in 12 THE WRITINGS OF THOMAS JEFFERSON 391, 393-94 (Albert Ellery Bergh ed., 1907) (“[L]ittle republics would be the main strength of the great one.”); ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 49 (New York, George Dearborn & Co. 1838) (“In the American States power has been disseminated with admirable skill, for the purpose of interesting the greatest possible number of persons in the common weal.”); Robert A. Dahl, The City in the Future of Democracy, 65 AM. POL. SCI. REV. 953, 967 (1967) (“For the city need not be so huge that, like the nation-state, it reduces participation to voting, nor so small that its activities are trivial.”); cf. Heather K. Gerken, Federalism All the Way Down, 124 HARV. L. REV. 4, 8 (2010) (“States and cities are the institutions that best fit the exit account that dominates federalism discourse. . . . But scholars have all but ignored special purpose institutions, the sites of minority rule that best fit the voice paradigm.”).

334 Cf. Frank I. Michelman, Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy, 53 IND. L.J. 145, 148-49 (1977). Michelman distinguishes an “economic” model of legitimacy, in which democracy exists to further subjective private ends, from a “public-interest” model of legitimacy, in which democracy exists to further objective public ends. Id. This framework is similar to the distinction between thin and thick democracy discussed in the pages that follow.

335 Cf. Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (noting, with respect to state versus federal decision-making, that “a decentralized government . . . will be more sensitive to the diverse needs of a heterogenous society”).
decreases. The number of “losers”—voters who do not get to see their preference enacted—decreases.336

A thick conception of participation understands citizen participation as an endeavor that goes beyond the routine casting and counting of votes.337 Under this framework, democratic participation requires that citizens become meaningfully involved in public decision-making by taking part in communal deliberation or even serving in government.338 This more involved model of democratic participation benefits both society, by enabling the pursuit of a public good independent of individuals’ preferences, and the individual, by allowing her to reach higher levels of personal fulfillment.339 The smaller local arena is superior to a broader one at enabling such meaningful participation.340 Given a government closer to its citizens, individuals can more easily attend and talk at meetings, get involved in political campaigns, and even run for office themselves.341 Because local government provides opportunities for meaningful democratic participation, it is a vital part of our democratic order.342

While local government can thus promote democratic participation under both thin and thick understandings of the concept, local government can also undercut democracy, and threaten the ability of some to meaningfully exercise their right to participate. Perhaps the most famous thinker to expound on the risk local decision-making poses to democracy was James Madison. As he argued in Federalist 10, in a smaller arena one group can more easily take over the decision-making apparatus and abuse other groups’

337 On the idea of democracy as requiring reestablishing direct involvement in decision-making, see, for example, CAROL PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 1-44 (1970).
338 Cf. Michelman, supra note 334, at 149 (describing the “public-interest” model of legitimacy, in which citizens engage in a “mutual search” for objective collective interests).
339 See HANNAH ARENDT, ON REVOLUTION 30-31 (1965) (arguing that to be free, an individual must appear in front and be heard by a community of equals). On the idea that meaningful participation in public affairs is a good in and of itself—irrespective of its effects on the outcome, see, for example, J.G.A. Pocock, Virtues, Rights, and Manners: A Model for Historians of Political Thought, 9 POL. THEORY 353, 358 (1981); see also Hanna Fenichel Pitkin, Justice: On Relating Private and Public, 9 POL. THEORY 327, 344 (1981) (stating that “[w]hat distinguishes public life . . . is action—the possibility of a shared, collective, deliberate, active intervention in our fate . . .”).
340 See Shoked, supra note 19, at 1377-88 (explaining the particular conditions under which local government provides more opportunities for participation).
341 See id.
rights.\textsuperscript{343} Tyranny of the majority,\textsuperscript{344} or commandeering of government by a well-funded minority,\textsuperscript{345} is more easily attained when the government is local. The smaller the constituency, the fewer the groups competing for power, and thus the easier for one to dominate.\textsuperscript{346}

In sum, local government’s promise in terms of democracy is a function of its ability to facilitate citizen participation. Its menace is a function of its concomitant ability to facilitate domination by one group. Assessing the value of local control of any given policy thus demands balancing the promise and risks of localism. To what extent will participation be increased through local control over the pertinent policy? How significant is the risk of one interest group taking over?

Balancing the democratic promises and threats of localism in control over the police force vindicates the law’s choice to endow local governments with powers over policing priorities—but undermines the choice to hold back powers over officers’ employment. Local control of the police force—in terms of both its priorities and employment practices—delivers on the promise of increased citizen participation with little risk of abuse of officers’ interests.

As already noted, policing issues are front and center concerns for many citizens.\textsuperscript{347} Citizens will thus participate in the political arena tasked with managing those issues if that arena is approachable.\textsuperscript{348} Hence, assuring that the government managing the police is close to citizens delivers democratic benefits.

Both the thin and thick benefits of participation are likely to accrue. Because policing is salient for voters, many base their choice of candidate on that candidate’s position respecting policing.\textsuperscript{349} They may vote for her even if


\textsuperscript{344} Cf. JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 135–36 (1980) (“[T]he duty of representation that lies at the core of our system requires more than a voice and a vote. No matter how open the process, those with most of the votes are in a position to vote themselves advantages at the expense of the others, or otherwise to refuse to take their interests into account.”).

\textsuperscript{345} Cf. Robert C. Ellickson, New Institutions for Old Neighborhoods, 48 DUKE L. J. 75, 89 (1998) (noting that cities are “vulnerable to being captured by rent-seeking groups such as political machines, municipal unions, public works lobbies, and downtown business interests”).

\textsuperscript{346} See GRANT MCCONNELL, PRIVATE POWER & AMERICAN DEMOCRACY 6, 107 (1966).

\textsuperscript{347} See supra notes 322–29 and accompanying text.

\textsuperscript{348} Cf. Allison P. Harris, Voter Response to Salient Judicial Decisions in Retention Elections, 44 LAW & SOC. INQUIRY 170, 184–89 (2019) (finding that voter participation in state judicial elections increases in response to salient judicial decisions); Nestor M. Davidson, Local Constitutions, 99 TEX. L. REV. 839, 890, 890 n. 238 (2021) (claiming that because city charter reforms are salient to residents, they attend meetings debating them).

they disagree with her positions on other, less salient issues. Election results will therefore reflect citizen preferences respecting policing relatively accurately (or at least more accurately than citizen preferences respecting other, less salient issues). Additionally, because the issue is salient, citizens may campaign and talk to others to promote their position respecting the issue. They may even (perhaps) show up for board meetings where it is discussed. Therefore, local control could, when it comes to policing, achieve its normative promise of promoting democratic decision-making in both the sense of generating decisions that reflect citizen preferences and in the sense of facilitating meaningful citizen deliberation. Current laws’ choice to entrust the work of setting the police’s scale and tasks to local governments reflects this insight.

Concurrently, laws preventing local governments from interfering with officers’ employment status reflect a belief that local decision-making on this subject raises unique risks of tyranny of the majority or capture by a well-

play an important role in their vote); Crime Overshadows All Other Issues as the Most Urgent in NYC, Quinnipiac University New York City Poll Finds; but Half of Voters Say They Expect Tourism to Increase, QUINNIPIAC UNIV.: POLL (May 4, 2022), https://poll.qu.edu/poll-release?releaseid=i3845 [https://perma.cc/ZJA3-JVAC] (finding a similar result among New York City voters); Mariah Woelfel & Tina Sfondeles, Poll: Chicago Voters Feel Unsafe, Unhappy with Police Relations—And Are Looking for a Candidate to Fix It All, WBEZ CHI. (Feb. 9, 2023, 5:00 AM), https://www.wbez.org/stories/poll-crime-tops-chicago-voters-issues-this-mayoral-election/d883f428-d268-4c39-949d-6a33566d447 (finding forty-four percent of likely Chicago voters said concerns about crime would guide their decision in an upcoming mayoral election).


351 The question whether opportunities for community involvement in policing have generated meaningful participation is difficult to answer. Some scholars examining Chicago’s experiment with community involvement concluded that it exemplified "empowered participation." ARCHON FUNG, EMPOWERED PARTICIPATION: REINVENTING URBAN DEMOCRACY 2-5 (2004). Other commentators claim that in the long run, after initial success, participation levels were unimpressive. WESLEY G. SKOGAN, LYNN STEINER, JILL DUBOIS, J. ERIK GUIDEL & AIMEE FAGAN, U.S. DEP’T OF JUST., TAKING STOCK: COMMUNITY POLICING IN CHICAGO 8 (2002). If interest ebbs and flows over time given salience, it is perhaps not surprising that the last few years have seen increased attendance in community meetings dealing with policing. See, e.g., Kelly Garcia, Is Community Oversight of Police Finally a Reality?, CHI. READER (Oct. 27, 2022), https://chicagoreader.com/news-politics/is-community-oversight-of-police-finally-a-reality [https://perma.cc/JLE7-LR2V] (noting a Chicago meeting about policing issues was "packed" with activists and community members); Kim Lyons, Pgh Mayor Gainey Addresses Safety Concerns at Packed Meeting Downtown, PA. CAPITAL-STAR (Feb. 9, 2023, 4:33 PM) https://www.penncapital-star.com/blog/pgh-mayor-gainey-addresses-safety-concerns-at-packed-meeting-downtown [https://perma.cc/CG8-CZQW] (same in Pittsburgh). Finally, we must note the risk of deriving policy recommendations from any such data. It might be that people do not participate in meetings because those meetings do not matter, and thus if more power is accorded to those community boards, members of the public will attend.
resourced minority. The justification offered for LEOBR laws approximates this normative argument. These laws, which insulate police officers’ employment standards from local political control, were promoted under the claim that officers cannot expect fair treatment from local authorities. In that smaller political arena, proponents argued, antagonistic groups would capture government and abuse officers’ rights.

In previous eras this argument might have reflected principled thinking. The spoils system of the nineteenth century provided grounds for such fears. Under the spoils system, groups that won elections abused public workers hailing from other groups. Old-style machine politics assumed a level of corruption. The machine offered public jobs only to those within the well-situated group. Civil service reformers specifically sought to fix these pathologies of local politics.

But the spoils system no longer exists, and in any case, LEOBR protections (as well as some union protections) assume an even graver failure of the political process: that local political processes are prone to mistreat police officers more than other public employees. That assumption is hard to sustain. The appeal of law-and-order politics and the competitive market for officers renders the systemic abuse of police officers (and only police officers) unlikely. Indeed, the local political process has historically been overly hospitable to police officers’ demands and correspondingly blind to the potentially competing interests of other citizens, particularly criminal suspects. The “law enforcement lobby” is powerful in impacting government policy—or, in the minds of some, in capturing government. Cities’ routine willingness to include highly pro-officer clauses in union contracts (state laws, as noted, might mandate collective bargaining, but cities then negotiate the bargain) is a clear indicator. So is the unwillingness of

352 See supra notes 292–99 and accompanying text.
354 See supra notes 254–67 and accompanying text.
355 See Kate Levine, Police Suspects, 116 COLUM. L. REV. 1197, 1222 (2016) (reporting that police officers who supported the first federal LEOBR bill felt they were being treated as “constitutionally inferior” to others).
358 See id. at 1988-92 (discussing, and reviewing the literature on, local officials’ tendency to succumb to police union demands in collective bargaining); Noam Scheiber, Farah Stockman & J.
many mayors, including those elected as reformist progressives, to break with officers and their unions. The Supreme Court’s 1960s criminal procedure jurisprudence, by extending judicial protections against police abuse of criminal suspects, suggests a related proposition: that local governments would not fairly regulate police misbehavior of their own volition. Police officers are not a discrete and insular minority. If anything, the local political process is uniquely sensitive to their interests and demands.

The democratic theory of local government can normatively justify the choice to entrust the power to define the role of the police to local governments. This choice draws on the long-standing American commitment to small-scale democracy. Local control of the police can enhance citizen participation. The current legal framework, however, does not take full advantage of this potential benefit because it is designed to protect against a democratic risk that does not exist. Indeed, the opposite risk exists. The contention that police officers are a disfavored group necessitating statutory shielding from local political processes is contrived. Suspects, not officers, are those who require protection from local political processes.

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Local government law theories help in ascertaining the desirable distribution of powers between state and local governments. But of course, these theories—and the values they often stress, namely economic efficiency and democratic participation—are not the only ones relevant to the task of assessing policing law. The need to balance administrative expertise and citizen participation, the role of court-enforced constitutional protections, and objective notions of fairness toward vulnerable communities are examples of other potentially important considerations. However, these are not


See, e.g., Erin Durkin & Sally Goldenberg, Longtime Supporters Dismayed at de Blasio’s Shift from Police Reformer to Defender, POLITICO (May 31, 2020, 9:24 PM), https://www.politico.com/states/new-york/albany/story/2020/05/31/longtime-supporters-dismayed-at-de-blasio-shiff-from-police-reformer-to-defender-1289640


A strong argument for preserving a role for expertise in policing, in defiance of recent academic calls to “democratize” criminal law, is offered in John Rappaport, Some Doubts About “Democratizing” Criminal Justice, 87 U. CHI. L. REV. 711, 809-13 (2020).
necessarily implicated by the question which government should control the police. State and local governments can both rely (or not rely) on expertise. State and local governments are both subject to any, and all, federal and state constitutional directives. State and local governments are both at times prone to target vulnerable communities.\textsuperscript{362} The specific theories of local government thus provide a useful prism for addressing this one specific question in policing law, of how powers should be divided between the two levels of government, state and local. And these theories struggle to justify the current state of the law.

III. REFORMS TO THE LOCAL GOVERNMENT LAW OF THE POLICE

As Part I demonstrated, the law of the police inconsistently distributes powers between state and local governments. It grants local governments great powers over policing’s functions, but limited ones over the police workforce. That inconsistency, Part II argued, lacks a normative justification under either of the two primary local government law theories. Of course, if the problem is the mere fact that an inconsistency exists, it can be solved by removing either of the conflicting prongs: shifting more powers over policing’s functions to the state or shifting more powers over the police workforce to the local government. This Article focuses on the latter option. True, as Part II acknowledged, local powers over policing’s functions can at times generate concerns—mostly respecting potential mistreatment of minorities or potential externalities—that theoretically could justify more state involvement in this realm. States’ track record in addressing the potential mistreatment of minorities by police, however, is spotty at best. As seen in Part I, some state preemption laws do protect vulnerable communities and suspects, but others specifically target them. Wholesale state takeovers of local police forces, both historically in places such as Boston and New York,\textsuperscript{363} and currently in places such as Kansas City\textsuperscript{364} and Jackson, Mississippi,\textsuperscript{365} often disempower minority groups. Addressing specific externalities that result from the local control of policing policies through targeted state-level regulation is a promising course of action, and one that other researchers are

\textsuperscript{362} The wave of new preemption laws targeting local policing practices perceived as too soft, see supra notes 138--145 and accompanying text, is one rebuttal to the claim that the state is necessarily more likely to pursue fairness in policing.

\textsuperscript{363} See supra notes 244--251 and accompanying text.

\textsuperscript{364} See supra note 118. On the problematic racial dynamics that ensue in these cities, see, for example, Kacen Bayless & Glenn E. Rice, State Control of KC Police Has Roots in Racism. Does MO Amendment Treat City as a ‘Colony’?, KANSAS CITY STAR (June 3, 2023, 11:14 AM), https://www.kansascity.com/news/politics-government/article267615437.html [https://perma.cc/GH2C-TGVD].

\textsuperscript{365} See supra note 254.
This Article’s main thrust is focused on removing the legal inconsistency in local powers not by shifting away from cities powers over police functions and priorities, but by shifting to them powers over the police workforce. As Part II highlighted, cities’ lack of powers in this realm is particularly normatively troubling. This Part proposes two ways in which the problem can be alleviated, if not wholly resolved. First, it reviews a straightforward solution: legislative reforms empowering cities to more freely manage their police forces. Second, it identifies doctrinal areas wherein courts can intervene in the interim to mitigate the detrimental effects of the law’s current state.

A. Legislative Reforms

The inconsistency in the local government law of the police is, as Part I clarified, a product of the fact that while American law has traditionally assigned powers to define and guide the police to local governments, legislation introduced mostly during the twentieth century has curtailed local power over officers’ employment conditions. The obvious solution is, of course, to repeal these statutes. The most recent and least justifiable of these statutes are LEOBR laws. Maryland, the first state to pass such a law in 1974, became, in 2021, the first to repeal a LEOBR law. That same year, a similar repeal bill was introduced in Rhode Island, and in late January 2024 the state senate there approved a bill that would reform the law to remove its most extreme pro-officer protections.

The other group of state laws precluding local governments from controlling officers are those protecting, and promoting, officers’ right to collectively bargain. A complete repeal of these laws is unlikely. In the early 2010s, when several midwestern states removed legal protections from public officers, several compelling such reforms are suggested in Ponomarenko, supra note 112, at 57-63. Suggestions have also been made to ensure state funding for local policing. See Rushin & Michalski, supra note 2, at 320-37. While the policy argument for such a move is strong, its likelihood of success is extremely low. Battles for state equalization of school funding have been raging for fifty years, despite the fact that, as noted, states are constitutionally compelled to provide education. They are not compelled in any way, also as noted, to provide policing.

See supra Sections I.B and I.C.

Keenan & Walker, supra note 102, at 197.


employee unions, police unions were excepted for reasons of political expediency. Where police unions were included in such a reform attempt, the reform crumbled. The reality is simple: Irrespective of their normative desirability, police unions enjoy popular support and wield real political power. Additionally, their standing raises normative concerns extending beyond this Article’s focus. Collective bargaining promotes certain—albeit contested—values. Even if separate (and harsher) treatment of police officers as employees is justified, an attack on the status of one group of public employees could affect the standing of other public employees. An argument can also be made that abolishing police unions (and not other public unions) would be discriminatory. Officers have the same rights as others to form a collective body advocating for their interests and protecting their position. The problem is not that such a body exists, but rather that it enjoys rights other such bodies do not.

Accordingly, a complete repeal of police union protective laws might not be the most desirable—let alone realistic—means of correcting the legal imbalance these laws create. This is especially true as more contained reforms could be equally or more effective. The most egregious components of the state laws disadvantaging local governments in their dealings with police unions can be rewritten without outlawing unions. Some states have moved


373 See Noam Scheiber, Public Pension Cuts Exempt Police and Firefighters, N.Y. TIMES (Mar. 19, 2015), https://www.nytimes.com/2015/03/20/business/economy/police-officers-and-firefighters-are-exceptions-to-new-public-sector-rules.html [https://perma.cc/ULN5-Y7TD] (reporting that while the Wisconsin Governor exempted police officers and firefighters from a bill that would roll back collective bargaining rights, the Ohio Governor did not and “saw his efforts undone by voters in a referendum within eight months”).


375 See Fisk & Richardson, supra note 86, at 716 (“The debates over police unions are part of a larger legal and policy debate over whether public employee unions are agents of or obstacles to government reform . . . .”).


377 Levin, supra note 91, at 1368 (“Are those of us worried about policing actually advancing a set of arguments and policy proposals that undercut unionism, particularly public-sector unionism?”).

378 Courts thus should not stop unions from advocating for their officer members. Laws favoring the unions are problematic; the concept of a union, or an interest group, need not be. Cf. In re New York City Policing During Summer 2020 Demonstrations, 27 F.4th 792, 799-800 (2d Cir. 2022) (permitting the police union to intervene in order to argue for its members’ safety interests in litigation respecting alleged unconstitutional police behavior and policies).

379 See e.g., Fisk & Richardson, supra note 86, at 720–21 (proposing that state labor laws “require police departments to meet and confer with labor representatives other than the certified police union”).
in that direction by altering the arbitration processes instituted for disputes between the local government and the police union (with which the local government must deal) or member officers. These processes have historically been tilted against local governments. Recent statutory reforms aim to ensure that arbitrators are neutral or limit arbitrators’ authority to diminish unionized officer punishments. Additionally, while inconsistency in state statutes can only be fixed by state legislators, local legislators can make certain adjustments to strengthen their control over the police workforce. Some current state statutes leave leeway to cities in their dealings with unions. Where available, cities should take advantage of these openings. For example, Texas law, while encouraging police collective bargaining, does not actually mandate that local governments engage in it. Rather, it allows local residents to vote to choose to do so—or to stop doing so. In 2021, San Antonio voters came very close to preventing the city from dealing with a union. The mere threat of such action might strengthen a city’s hand in negotiating a CBA.

Another legislative option currently available to many cities—rather surprisingly, perhaps—is to disband the police force. The irony of the legal structure identified in Part I is that while the city can do little to the police workforce, it can do quite a lot to the police department. It might not be able to discharge an individual officer, but it might be able to discharge the whole

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380 Arbitration appeals overturn discipline in roughly half of the cases brought. Rushin, supra note 87, at 1030-32. Whether these cases reflect “relief to officers aggrieved by a faulty disciplinary system,” a particularly unique set of disciplinary cases, or “incentivize[s] to compromise in order to increase [the arbitrators’] chances of being selected for future cases” is debated. Id.

381 M INN. STAT. § 626.892 (2023) (“The commissioner shall assign or appoint an arbitrator . . . from the roster . . . on rotation through the roster alphabetically ordered by last name. The parties shall not participate in, negotiate for, or agree to the selection of an arbitrator . . . .”).

382 OR. REV. STAT. § 243.706(3) (2023) (prohibiting, where an arbitrator “find[s] that misconduct has occurred consistent with” the pre-arbitration finding, “any disciplinary action that differs from” the one imposed pre-arbitration, provided that the action complied with uniform state standards).


force. Current laws mostly authorize the creation of the police; they do not mandate its creation. Some cities, accordingly, and for different reasons (including to avoid collective bargaining liabilities), have disbanded, or considered disbanding, the police force. More moderate reforms in this vein envision removing from the police department certain responsibilities and bestowing them on civilian departments better equipped to address the relevant problems. In certain situations, reformers seek to replace the police officer with a social worker or mental health professional. As this Article’s comprehensive review of the laws structuring the local power over the police illustrates, the legal barriers to such moves are often much lower than commentators sometimes assume.

But of course, the movement to disband police departments, or even just strip them of certain powers, implicates many political and practical challenges. The same is true, if to a lesser extent, respecting most of the legislative reforms reviewed in this Section. As seen in Parts I and II, political dynamics generated the legislation insulating police officers from the reach of local power. Those dynamics likely have not shifted enough to permit the undoing of those legislative measures. Thus, more attention should be placed on improvements that can be achieved while the current legislative framework persists.

387 See Dondero v. Lower Milford Twp., 5 F.4th 355, 357-60 (3d Cir. 2021) (holding an officer who otherwise had a property right in his employment could be discharged without a pre-termination hearing when the local government disbanded the police department for financial reasons). See also Camione v. Borough of Latrobe, 567 A.2d 638, 641 (Pa. 1989) (“Since the Borough has the sole right . . . to regulate the size and membership of its police force because of economic constraints, it had the right to” involuntarily retire an officer without a hearing).

388 See supra subsection I.A.1.

389 Faced with a fiscal crisis, Maywood and San Carlos, California, dissolved their forces in 2010 and contracted with the county sheriff instead. Nelligan & Bourns, supra note 58, at 72. During bankruptcy proceedings in 2008, the city of Vallejo, which declared bankruptcy in part because it couldn’t pay officers’ “previously negotiated generous salaries,” employed that threat to “wring salary and pension concessions from the police union.” Id. In 2013, Camden, New Jersey, formally disbanded its police department and replaced it with a new body, guided by a new “ethos”; as the chief explained, “We were going to have all of our officers have the identity of guardians and not warriors.” Brenda Breslauer, Kit Ramgopal, Kenzi Abou-Sabe & Stephanie Goksk, Camden, N.J., Disbanded Its Police Force, Here’s What Happened Next., NBC NEWS (June 22, 2020, 8:21 AM), https://www.nbcnews.com/news/us-news/new-jersey-city-disbanded-its-police-force-here-s-what-n1231677 [https://perma.cc/K53C-XTTP].

390 See Friedman, supra note 147, at 985-86 (“[T]he problems the police encounter are not going to be solved by the police alone, or even by the police at all. What is needed, at the least, is cooperation by the police and other agencies, as well as inter-agency coordination.”).

391 See BRUCE WESTERN, HOMEWARD: LIFE IN THE YEAR AFTER PRISON 183 (2018) (“A reimagined criminal justice will concede some jurisdiction over the policy task of public safety to other agencies—departments of housing, child services, public health, education, and labor.”).

392 See, e.g., O’Rourke et al., supra note 6, at 1392–93 (“Few municipal charters or state laws clearly authorize cities to disband and reform the police.”).
B. Judicial Reforms

While the current statutory infrastructure—peculiar as it is—may endure for some time, courts can attenuate its effects. Courts must be aware of the anomalous nature of the system, as pointed out in this Article. In different doctrinal settings, such awareness should then push them to adopt rulings strengthening the local government’s hand in its dealings with the police workforce. Courts could thus bring the local government’s powers in those specific settings more in line with its general powers over policing.

The most natural course of action for courts would be to do more to shield localities from state intervention in the management of their own police forces. State statutes removing from cities the power to manage their police workforce contradict the law’s general thrust and history, as Part I showed. They also lack principled justification, as Part II established. They thus ought to be disfavored. Courts should employ the legal doctrines they have at their disposal to protect, in appropriate cases, the sphere of local decision-making.

Under some states’ constitutions, certain municipalities enjoy home rule immunity, preventing state preemption of measures those municipalities adopt that deal with purely local affairs. Personnel issues—the setting of employment policies for the municipality’s own employees—are among the few matters that courts have sometimes been willing to characterize as purely local. And indeed, some courts have protected city police employment standards in this way. The Colorado Supreme Court immunized Denver from the state POST statute’s decrees regarding officer qualifications, and in another case struck down a state statute that would have prohibited the city from requiring that officers reside locally. The Ohio Supreme Court blocked the state from dictating to Cleveland the manner of selecting its police chief. In these cases, the courts deemed police personnel management issues a purely local matter protected from state intervention under home rule immunity clauses.

394 Id.
397 State ex rel. Lynch v. City of Cleveland, 132 N.E.2d 118, 121 (Ohio 1956); Harsney v. Allen, 113 N.E.2d 86, 88-89 (Ohio 1953) (holding that a police chief can reassign officers without the civil service commission’s consent).
398 Harsney, 113 N.E.2d at 88 (“The organization and regulation of its police . . . are within a municipality’s powers of local self-government.”); Cleveland, 132 N.E.2d at 121 (finding the “method of selecting a chief of police” fell within the constitutional grant of “all powers of local self-government”); Fraternal Ord. of Police, Colo. Lodge #27, 926 P.2d at 592 (“F.O.P. has not shown a
Another state constitutional protection that can be used in some cases to shield cities from state intervention is the prohibition on special legislation. State constitutions commonly ban laws targeting specific municipalities. These bans can protect a city from state statutes that specifically target its police workforce practices.

At the end of the day, however, these constitutional shields are of limited avail. While these avenues for blocking state mandates exist, courts can hardly be expected to employ them rigorously. In American law, cities are still mostly perceived as creatures of the state. As a result, both home rule immunity protections and special legislation prohibitions have been interpreted narrowly in most states. Courts are thus unlikely to strike down state laws removing from a local government the power to manage its police workforce.

A less radical course might be to interpret these laws—when possible—in a way that attenuates their most troubling effects. The statutes at issue here, as Part I showed, are in tension with the logic of the American law of policing and, as Part II showed, lack normative justification. Therefore, unless the pertinent statute clearly requires it, courts should not interpret a state statute as limiting local control over the police workforce.

One place where courts could act on this imperative is when interpreting statutes defining what issues are subject to collective bargaining. Laws normally permit or require local governments to engage in collective bargaining with regards to “matters of wages, hours, and other conditions of employment.” The final category, “other conditions of employment,” is the most ambiguous. Unions argue that disciplinary matters fall under the heading of “other conditions of employment” and hence the local government has substantial or pervading interest in the training and certification of Denver deputy sheriffs, peace officers of a home rule municipality with limited authority and duties.”; City & Cnty. Of Denver v. State, 788 P.2d at 772 (“[T]he residency of the employees of a home rule municipality is of local concern.”).

See, e.g., City of New York v. Patrolmen's Benevolent Ass'n of New York, 676 N.E.2d 847, 848-49, 853 (N.Y. 1996) (striking down a bill granting "exclusive jurisdiction over negotiation impasses" between New York City and its police to a state-level board). But see Black v. City of Milwaukee, 882 N.W.2d 333, 337-39 (Wis. 2016) (holding that a state law banning cities from adopting residency requirements for officers was uniform in its application and thus constitutional, although it impacted, and was meant to impact, one specific city).

See supra notes 44–45 and accompanying text.


 Courts can also interpret CBAs narrowly. See, e.g., Uniformed Fire Officers Ass'n v. De Blasio, 846 F. App'x 25, 30 (2d Cir. 2021) (holding that a CBA's requirement that disciplinary records be removed from an officer's personnel file "does not require eliminating them from all of the City's records").

See Rushin, supra note 35, at 1205 (collecting statutes).
cannot unilaterally implement pertinent reforms. Such a broad reading of the phrase “other conditions of employment” could disable local governments from managing almost all facets of the police—in complete disregard of the history and overall structure of the American law of policing. This construction should be avoided. The New York Court of Appeals thus rightly excluded officer discipline from statutorily-mandated collective bargaining, noting that state law granted localities disciplinary powers over their police forces. In a different context, the Ohio Supreme Court drew on similar concerns when it refused to accept a police union’s expansive reading of Cleveland’s CBA commitment to a grievance procedure as precluding the city from introducing a civil board to review police misconduct. Unfortunately, other courts (including in Ohio) have not always adhered to this logic—but they should.

A narrow interpretation of the statutory language assigning “other conditions of employment” to collective bargaining could also be used in a more proactive fashion to block certain protections from ever being inserted into the CBA. Courts should resort to narrow interpretations of statutes to prohibit the inclusion in CBAs “of a range of questionable procedures that may ‘protect incompetent or abusive employees.’” The New Hampshire Supreme Court accordingly held that a union proposal to include a just cause

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405 See id. at 1205-06 (describing the deference courts generally give to police unions when defining this term).
406 Cf. Corpus Christi Fire Fighters Ass’n v. City of Corpus Christi, 10 S.W.3d 723, 727-30 (Tex. App. 1999) (rejecting a similar interpretive argument respecting a fire department’s CBA and thus refusing to interpret the clause to apply to the city’s new fireman grooming and municipal employee vehicle accident investigation rules).
407 Patrolmen’s Benevolent Ass’n of N.Y.C. v. N.Y. State Pub. Empl. Rel. Bd., 848 N.E.2d 448, 454 (N.Y. 2006) (“The issue is not, as the unions argue, whether these enactments [granting local authority over police discipline] were intended by their authors to create an exception to the Taylor Law [requiring collective bargaining on conditions of employment] . . . . The issue is whether these enactments express a policy so important that the policy favoring collective bargaining should give way, and we conclude that they do.”). The Colorado Supreme Court, interpreting a city charter—rather than state statute—similarly concluded that a clause subjecting “all other terms and conditions of employment” to mandatory collective bargaining did not cover disciplinary issues and thus the city was free to unilaterally implement a discipline matrix. City & Cnty. of Denver v. Denver Firefighters Loc. No. 858, 320 P.3d 354, 358-59 (Colo. 2014).
409 See, e.g., Union Twp. Bd. of Trs. v. Fraternal Ord. of Police, Ohio Valley Lodge No. 112, 766 N.E.2d 1027, 1031-32 (Ohio Ct. App. 2001) (affirming that "the appeal of disciplinary action involving a demotion, discharge, or suspension without pay relates to the conditions of employment and is a mandatory subject of bargaining"); City of Casselberry v. Orange Cnty. Police Benevolent Ass’n, 482 So. 2d 336, 340 (Fla. 1986) (finding a city “which has established provisions for demotion and discharge of police officers in its civil service ordinance” must still collectively bargain on that issue).
410 Rushin, supra note 35, at 1239-40. Cf. Fisk & Richardson, supra note 86, at 781-82 (suggesting that “citizen review boards are not a permissible subject of bargaining”).
disciplinary provision in a CBA was excluded from the issues subject to mandatory collective negotiation.\footnote{Appeal of City of Concord, 651 A.2d 944, 946-48 (N.H. 1994) (relying on the “managerial policy exception” within the statutory definition of “terms and conditions of employment”).}

One procedure that CBAs currently include, and will probably continue to include under any statutory interpretation, is arbitration.\footnote{See supra note 87.} CBAs mandate that arbitration procedures govern a city’s attempt to discipline an officer. Unsurprisingly, arbitration processes tend to reduce officer punishments, and can thus facilitate misconduct.\footnote{Rushin, supra note 35, at 1238-39.} Still, courts tend to refrain from meaningfully reviewing the decisions of police arbitration panels.\footnote{Stoughton, supra note 3, at 2210 (”Most state laws make police arbitration binding, and judicial review of arbitration decisions is extremely limited.”); WILL AITCHISON, THE RIGHTS OF LAW ENFORCEMENT OFFICERS 98 (6th ed. 2009) (”[A]n arbitrator can be wrong on the facts and wrong on the law and a court will not overturn the arbitrator’s opinion.”).} They follow the general approach to arbitration, which is marked by a judicial reluctance to intervene.\footnote{P.R. Tel. Co. v. U.S. Phone Mfg. Corp., 427 F.3d 21, 29 (1st Cir. 2005) (noting that the Federal Arbitration Act [FAA] provides for “extremely limited judicial review”); MACTEC, Inc. v. Gorelick, 427 F.3d 821, 827 (10th Cir. 2005) (“As a general rule, judicial review over an arbitration award is very limited.”); Cf. Taylor v. Crane, 595 P.2d 129, 135 (Cal. 1979) (explaining that arbitration is “[a] favored means of resolving labor dispute[s] in this state” and overruling the lower court’s decision to strike down an arbitrator’s award in a police discipline dispute).} The common rationale for this deferential approach is that arbitration is the product of a voluntary contract to which the now-losing party earlier committed.\footnote{Cf. Apex Plumbing Supply, Inc. v. U.S. Supply Co., 142 F.3d 138, 193 (4th Cir. 1998) (“Review of an arbitrator’s award is severely circumscribed. . . . [T]o allow full scrutiny of such awards would frustrate the purpose of having arbitration . . . .”); United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960) (“[A]rbitration is a matter of contract . . . .”).} Yet, given the strong grounds supporting a narrow interpretation of measures limiting local power over the police, this attitude should perhaps be abandoned in cases of police arbitration. Because state laws press the local government to enter a CBA,\footnote{See supra notes 86–89 and accompanying text.} that government does not voluntarily assent to the contract with the union. As a result, any agreement respecting adjudication made therein arguably deserves less deference.

A recent decision expresses such willingness to diverge from the general rule of judicial deference to an arbitrator’s decision in a conflict between a city and its police union. In 2020, the Illinois Supreme Court overruled an arbitrator’s decision ordering Chicago to negotiate the union’s demand that it destroy officer misconduct files.\footnote{City of Chicago v. Fraternal Ord. of Police, Chi. Lodge No. 7, 181 N.E.3d 18, 28 (Ill. 2020).} The court deemed the arbitration
The less than fully voluntary nature of the local government's entrance into a CBA can carry weight in yet another doctrinal setting: when Contract Clause arguments are raised to shield the CBA. In the last few years, police unions have argued that any legislative reform effort that might alter processes and protections detailed in a CBA amounts to an impairment of obligations of contract in violation of the federal constitution. Thankfully, this claim has mostly failed. In spring 2022, addressing a Connecticut statute that amended the state's CBA with its police force, the Second Circuit explained that the statute served a legitimate public purpose, and because the legislature acted in the public interest rather than its own, its determination that the measure was reasonable and necessary was entitled to deference. The law thus passed Contract Clause review. Later that year, the D.C. Circuit applied the same review standard to the Washington, D.C. city council's decision to ban collective bargaining with the police union over discipline and refused to strike the decision down. These courts' holdings which grant cities leeway to manage their police forces are fully in line with the traditional entrustment of policing functions to cities, seen in Part I and normatively justified in Part II.

When the federal—rather than the state or local—government leads police reform efforts, the Contract Clause does not apply and thus CBAs seemingly do not enjoy special protections. However, unions could argue that federal interference with CBAs might violate the Due Process Clause or other

419 Id.

420 Petition for Writ of Certiorari, Fraternal Ord. of Police Chi. Lodge No. 7 v. City of Chicago, 141 S. Ct. 1072 (2021) (No. 20-673), 2020 WL 6748653, at *11. The Court has stated in the past: “[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision.” United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987).


422 Conn. State Police Union v. Rovella, 36 F.4th 54, 63-68 (2d Cir. 2022).

423 Fraternal Ord. of Police, Metro. Police Dep't Lab. Comm., D.C. Police Union v. District of Columbia, 45 F.4th 954, 961 (D.C. Cir. 2022) (rejecting the Contract Clause claim because, inter alia, the law served a “legitimate public purpose”).

424 Id. at 958 (noting that the City had a reasonable interest in assuring more flexibility in management of the police force). Interestingly, the court also noted that the union could not persuasively argue that its “right to bargain collectively over disciplinary procedures is ‘deeply rooted in this Nation’s history and tradition.’” Id. at 962.
legal protections. In 1994, Congress passed the Violent Crime Control and Law Enforcement Act, which allows the Department of Justice to bring suits against law enforcement agencies violating civil rights. Subsequently, the federal government has promoted, through charges and consent decrees, important reforms in cities whose police forces had a history of misconduct. Yet many of these reforms stopped short of removing certain officer protections, as federal officials chose to avoid interfering with CBAs and risking Due Process challenges. Consent decrees routinely include caveats that local police practices must only be changed to the extent union contracts allow. Given, again, the legal background generating these contracts and local governments’ limited power to avoid them, federal officials should reconsider this deference. The D.C. Circuit recently denied a Due Process claim in the litigation involving the Washington, D.C. city council. This position should be broadly embraced.

This Section has shown that multiple doctrines enable courts to expand local powers over police personnel matters. These possibilities convey an important message to local governments. Courts only decide cases that are brought to them. The policing issues discussed here reach courts when the local government adopts a reform and then police officers (or more often, their unions) sue to block the reform. Or the local government itself initiates litigation to stop a disciplinary issue from being negotiated or decided through arbitration. One way or the other, cities are the entities that control the process. They decide whether courts will have the opportunity to

425 United States v. City of Los Angeles, 288 F.3d 391, 400 (9th Cir. 2002) (granting a union the right to intervene in the consent decree proceedings between the federal government and the city because its contractual rights might be impaired).
428 See Adeshina Emmanuel, How Union Contracts Shield Police Departments from DOJ Reforms, IN THESE TIMES (June 21, 2016), https://inthesetimes.com/features/police-killings-union-contracts.html [https:// perma.cc/F4MY-5UEF] (listing Newark, Albuquerque, Seattle, Portland, the Virgin Islands, Los Angeles, and Pittsburgh as jurisdictions where contract protections “weakened or stalled efforts”). The first settlement, with Pittsburgh, “includes the following caveat: ‘Nothing in this Decree is intended to alter the collective bargaining agreement between the City and the Fraternal Order of Police.’” Id.
429 Id.
430 Cf. Negrete v. City of Oakland, 46 F.4th 811, 817-20 (9th Cir. 2022) (refusing to recognize a federal claim when a city sought to have officers’ challenge to its officer removal procedures—adopted following a consent decree—heard in federal courts).
431 See Fraternal Ord. of Police, Metro. Police Dep't Lab. Comm., D.C. Police Union, 45 F.4th at 962 (finding the ban on collective bargaining “is not gravely unfair: it implicates no fundamental rights, it imposes no punishment, and it has only modest prospective effect on past contractual arrangements. In addition, the union makes no argument that the right to bargain collectively over disciplinary procedures is ‘deeply rooted in this Nation’s history and tradition.’”).
empower them. Cities, thus, ought to test the boundaries of their powers over the police workforce, challenging courts to expand them. Cities should push the envelope. Reforms might stand a better chance than they—or we—tend to believe.

CONCLUSION

This Article asked one key question: Who controls the police force? The answer is complicated. The police force is supposed to be local—it is often portrayed as an arm of the local government. And the police force is local, in a way—a very peculiar way. The law grants the local government almost full powers over the police force. Whether to create the police force, how big it should be, what it should do—these are all determinations largely left to the pertinent city or county. At the same time, however, the law does not grant the local government full powers over the police workforce. Who can serve in the force, under what employment conditions, when they can be dismissed—these are all determinations state statutes aggressively interfere with. This division of powers, assigning most policy decision-making to the local government and most employment decision-making to the state government, lacks normative support. Neither efficiency reasons nor democratic concerns justify curtailing local government control over the police workforce.

State legislatures and courts can do more to alleviate this power imbalance. Cities themselves can show more initiative and force the issue on courts. Still, political realities probably preclude a complete, even if necessary, overhaul. This conclusion may appear dispiriting, and in a sense, it is. Local governments have been deprived of the tools necessary to fix much of what ails their own police forces.

But the analysis also highlighted the tools local governments do hold. In the American system of bifurcated control over the police force, local governments lack important powers—but enjoy others. While they can do little to change the police workforce, they can do a lot to change the police. The authority to set the size of the police force and its priorities is an awesome power. Local governments wield that power.

This legal fact presents a promising opening for activists. For years, activists have sought to expand the role of community members—the people who interact with the police daily—in governing the police. For these reformers, the “local” that should control the police force is not the formal

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432 See Jocelyn Simonson, Police Reform Through a Power Lens, 130 YALE L.J. 778, 813-824 (2021) (detailing local activists’ work on implementing “community control of the police”).
local government, but the informal local community. This Article’s findings show where, even given the constraints of American law, this movement can find success. The local level might not be able to do much with respect to officer misconduct—and hence opportunities for community involvement in these matters are limited. But the local level enjoys powers over setting policing priorities. These are often exceptionally important concerns for community members—who want input, for example, in determining which offenses the police should prioritize. Even under the current structure of the law, communities can be given such a say.

The American crisis of policing has many causes and facets. One that has largely gone unappreciated is the peculiar structuring of the power to control the police force. The police force is subject to the local government, but it—or rather, its officers—is also immunized from local control. We might not be able to fully reform and normalize this peculiar system. But we should note how peculiar it is, adjust, and aim for the best results imaginable within its constraints.

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433 Id. at 811–13.
434 See, e.g., Ariel Parrella-Aureli, You Can Weigh in on Your Police District’s Strategic Plan at These Community Meetings, BLOCK CLUB CHI. (Oct. 18, 2022), https://blockclubchicago.org/2022/10/18/you-can-weigh-in-on-your-police-districts-strategic-plan-at-these-community-meetings/ [https://perma.cc/T7KD-ALSG] (reporting on police officials inviting residents “to share ideas on how to develop community-driven crime reduction strategies and boost engagement priorities”).