

C O M M E N T

State Preemption of Local Government: The Philadelphia Story

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I. Introduction

We are practitioners for the City of Philadelphia with extensive experience in cases and analysis regarding the extent to which the Commonwealth of Pennsylvania has, or has not, preempted local regulation in various subjects of concern to the City. As City attorneys, our perspective is based in our role as advocates for the preservation and defense of the City's exercise of its home rule powers.

In considering the city-state relationship, many of the practical, political and cultural issues addressed in Prof. Richard C. Schragger's article, *The Attack on American Cities*, resonate with us. In a number of instances, the city has seemingly been under "attack" from outside forces that appear mistrustful and hostile to the city's exercise of its regulatory authority. Because we are the quintessential "big city" in a state with an otherwise very large suburban and rural population, the commonly cited historical tension between urban life and non-urban interests has played out in ways that we recognize in Schragger's description of the national experience.

Frequent preemption of local efforts to regulate matters of "local concern" is a common theme of our work in advising city officials on our ability to legislate in significant areas of city life. This comes up in connection with matters of core interest to the City (for example preemption of the regulation of handgun ownership, a literally life or death problem in the City) as well as matters of perhaps limited interest (such as preemption of local authority to regulate the processing of scrap metal).

We are not wholly convinced, however, that state law preemption that impacts the city's powers is the outcome of a particular hostility to urban interests in general as much as it is the outcome of the ability of "special interests," often corporate but also often "interest-group" or culturally-based, to exert outsized influence on the state legislature.

As one of the largest cities in the country, with a progressive and full-time legislative body, many active local interest groups, and a population with a high degree of poverty, we are often on the cutting edge of progressive

legislative work and tend to legislate more than most, if not all, other local government jurisdictions in Pennsylvania.¹ As just one example, we were one of the first jurisdictions in the country to establish protections in employment, housing and public accommodations for its LGBTQ community.² We have a progressive sick leave law.³ And, if left to our own devices, we would very likely adopt a worker-friendly minimum wage law.⁴ Because we often are at the cutting edge of progressive legislation, we are likely to draw the ire of groups with interests opposed to such legislation; preemption law often impacts us more than others.

We therefore are not convinced that the extensive (but heterogeneous) body of preemption law in Pennsylvania is the result of a particular animus toward cities. Rather, we are where the action is; therefore, when the special interests that oppose regulation are able to get the state to enact preemption laws, such laws often mean more for us than for other jurisdictions that just do not regulate as much. This is not to say that anti-city bias does not exist; unfair and false stereotyping is, without a doubt, abundant in the state. But we think the corpus of preemption law in Pennsylvania reflects the expression of interests that oppose our regulatory interests, more so than it reflects opposition to our (extraordinarily diverse) way of life, *per se*.

II. The City of Philadelphia's Home Rule Powers

To start with, it's clear that, absent preemption, the City has very broad home rule powers under the state constitu-

Authors' Note: The views expressed in this Comment are solely those of the authors and do not represent the formal opinion or position of the City of Philadelphia.

1. See *The Philadelphia Code*, generally (consisting of close to 2,000 printed pages).
2. See *1982 Ordinances of the Council of the City of Philadelphia*, at 1476 (adding "sexual orientation" to the classes of protected status under the City's Fair Practices Ordinance (PHILADELPHIA, PA., CODE §9-1100)).
3. PHILADELPHIA, PA., CODE §9-4100 ("Promoting Healthy Families and Workplaces").
4. See Part III.A., *infra*.

tion and state statute that allow it to regulate in Philadelphia essentially co-extensively with the state.⁵ Article IX, Section 2 of the Pennsylvania Constitution provides, in relevant part, that:

Municipalities shall have the right and power to frame and adopt home rule charters . . . A municipality which has a home rule charter may exercise any power or perform any function not denied by this Constitution, by its home rule charter or by the General Assembly at any time.

The First Class City Home Rule Act of 1949 provides,⁶ also in relevant part, that

Subject to the limitations hereinafter prescribed, the city taking advantage of this act and framing and adopting or amending its charter thereunder shall have and may exercise all powers and authority of local self-government and shall have complete powers of legislation and administration in relation to its municipal functions.⁷

Philadelphia adopted a Charter pursuant to the Home Rule Act in 1951, which accepts the state grant of authority as broadly as possible.⁸ The City therefore can legislate with respect to any police power function except to the extent the Commonwealth has specifically prohibited such regulation.⁹ Indeed, the courts have recognized that such police power authority is co-extensive with that of the Commonwealth.¹⁰

Moreover, the City's muscular exercise of those powers in significant, but controversial, areas often is *not* targeted for restriction. In 2003, for example, the City adopted extensive campaign finance limitations applicable to candidates for city office.¹¹ Many practitioners at the time scoffed at the idea that the City could exercise its authority in this way. The restrictions were upheld, however, against a challenge by several mayoral candidates (defended by, along with the City, the ultimate winning candidate), not

just as a valid exercise of the City's police powers, but also in connection with broad preemption-based challenges.¹²

Indeed, the City sometimes is even explicitly left alone by the state legislature in instances in which the state otherwise has been paternalistic to local jurisdictions. For example, most jurisdictions in Pennsylvania, other than Philadelphia, are limited in their ability to regulate zoning by the state's Municipalities Planning Code; the MPC, however, "does not apply to the City of Philadelphia, which . . . is governed instead by the Home Rule Act and [the City's own] Zoning Code."¹³

Therefore, although we now turn to a discussion of some of the many ways in which city authority has been restricted by the state, in many significant ways the City has been left to regulate itself as it sees fit.

III. Time and Again, Preemption Protects Special Interests at the Expense of the City's Protection of Its People

Pennsylvania has certainly used its preemption authority with respect to myriad subjects of potential regulation; in many cases, these preemptions significantly impact, and harm, the interests of Philadelphia and its citizens. As Schragger suggests, preemption has been with us for a long time and is abundant. In contrast to his perspective, however, much preemption (at least from the point of view of the Philadelphia story) does not appear to result from an inherent anti-urban bias (though that certainly exists). Rather, Pennsylvania's extensive and varied body of preemption law is, in our view, the result of the efforts of specific interest groups (usually, but not always, business interest groups), unhappy with the reception they receive from local legislators in Philadelphia, running to Harrisburg to override the local democratic process; and where, for reasons about which we could speculate but are beyond the scope of this Comment, such groups apparently tend to find a more receptive ear.

There are corollaries to this business-interest-protection model. Most notably, there is a strong libertarian ethos that runs through many Pennsylvania preemption statutes. This ethos, though it has long and storied historical roots in American political philosophy, has much more to commend itself in rural or sparsely populated areas, where our conduct is unlikely to have much effect on your life, than it does in crowded urban spaces, where much of our con-

5. Whether the state's constitutional grant of home rule "rights" to municipalities creates a baseline of local right to self-government into which the state cannot intrude, given the state's constitutional authority to limit home rule, is of intense interest to us, but has not, to date, been directly litigated in Pennsylvania. There is, however, an undercurrent of recognition in Pennsylvania Supreme Court case law that there may be a constitutionally-granted baseline of home rule powers regarding matters of purely "local concern." See, e.g., *Ortiz v. Commonwealth*, 681 A.2d 152, 156 n.3 (Pa. 1996).

6. By virtue of the size of its population, Philadelphia is the only City of the First Class in Pennsylvania. It is also coterminous with, and overlaps almost entirely as a governmental matter with, Pennsylvania's only County of the First Class. See generally 53 P.S. §101 (first-class city); 16 P.S. §210(1) (first-class county).

7. 53 P.S. §13131.

8. See Phila. Home Rule Charter §1-100 ("The City's Powers Defined").

9. See, e.g., *Nutter v. Dougherty*, 938 A.2d 401, 411 (Pa. 2007) (city has authority to adopt local campaign finance regulations); *Warren v. City of Philadelphia*, 115 A.2d 218, 221 (Pa. 1955) (city has authority to impose rent control measures).

10. See *Warren v. Warren*, 115 A.2d at 221 (Ga. 1965) (the city "may legislate as to municipal functions as fully as could the General Assembly").

11. See PHILADELPHIA, PA., CODE ch. 20-1000 ("Political Contributions and Expenditures").

12. *Nutter v. Dougherty*, 938 A.2d 401 (Pa. 2007). In *Nutter*, the court determined that although the legislature had likely preempted the "field" of election law, the state's own sparse campaign finance rules could in no way be considered indicative of an intent to limit regulation in that area as a global matter.

13. *Scott v. City of Philadelphia, Zoning Bd. of Adjustment*, 126 A.3d 938, 941 (Pa. 2015). The City's robust use of its Zoning Code to maintain its urban character, notwithstanding national pressures in other directions, is discussed in Section IV., *infra*.

duct has a spillover effect on the lives of our neighbors. Critically, though, from our perspective, this libertarian bias doesn't so much reflect a bias *against* urban living, as much as it is a result of a *total lack of appreciation of life* in an urban environment.

We present in this section a partial review, organized by type of our presumed main “influence-basis,” of the extensive preemption law that impedes the ability of locally elected officials from acting in what they believe is the best interests of their constituents.

A. Protection of Business Interests

We begin with pro-business preemption. From our perspective, virtually all of this type of preemption is a result of business interests, fearful or recognizing that they won't be able to get their way in City Hall, finding a receptive audience in the State Capitol. We question whether *any* of these are responsive to the needs and interests of 1.5 million Philadelphians, or why those outside of Philadelphia should be making these decisions for us.

Philadelphia has a professionally staffed buildings department (the Department of Licenses and Inspections). Construction in a crowded urban environment—where an accident might injure many people at a time; where residential buildings are regularly built (quintessentially, in row-house Philadelphia) one next to the other next to the other; and where commercial towers regularly soar hundreds of feet into the sky—raises a myriad of safety, architectural and engineering issues far different from those presented by building in much of the rest of the Commonwealth. Yet, the building industry, apparently unhappy with the legislative efforts of local officials to address these unique local interests, managed to persuade the General Assembly of the need for “uniform” construction rules, applicable throughout the Commonwealth, thus preempting Philadelphia from (with limited exceptions) adopting its own, Philly-centric, building codes.¹⁴

Philadelphia has literally thousands of food establishments. They range in price, quality and ambience from the hundreds of food cart and truck vendors that sell everything from cheesesteaks to jerk chicken to halal gyros, to posh and trendy “foodie” destination restaurants with a four-week wait for reservations. Food handling and food safety issues are of critical importance to the public health, and the issues presented by preparing a falafel sandwich in a 4' by 8' cart with no running water are very different from the issues presented by preparing sushi or lamb shoulder in a four-star restaurant. Yet, the food-service industry has managed to persuade the General Assembly that food safety certification must be uniform throughout the Commonwealth, preempting much local regulation.¹⁵

Philadelphia has the second highest percentage of residents who smoke cigarettes among the 30 largest cit-

ies in the country,¹⁶ and a significantly higher percentage than among Pennsylvania residents, generally.¹⁷ Yet, Philadelphia is preempted from regulating youth access to tobacco,¹⁸ and recent state legislation may now preempt the City from regulating the sale of tobacco generally.¹⁹

Nationally, there is a growing consensus that the federal minimum wage of \$7.25/hour is insufficient to help working Americans escape from poverty. Philadelphia, the poorest big city in the country, would like to help its own residents work their way into a better life.²⁰ The business community, however, has persuaded the legislature not to let us, preempting the City from establishing a higher, local minimum wage.²¹

In April 2001, anticipating a national problem that would form one of the underpinnings of the worst financial crisis in generations, Philadelphia City Council attempted to address the growing and pernicious problem of predatory lending, i.e., the making of loans to high-risk individuals at interest rates that the individuals cannot afford.²² No sooner than the ink of that local ordinance was dry on the paper, however, the banking industry ran to Harrisburg and freed itself from the constraints of annoying, local regulation, with a broad preemption enacted only two months later that now precludes Philadelphia from adopting any regulations that pertain to the financial or lending activities of any banking institution (the behavior of many of which were direct causes of the financial crisis).²³

Other examples speak for themselves. Pennsylvania preempts local governments from regulating, *inter alia*, truck idling²⁴; disclosures at the time of residential property sales²⁵; the processing of scrap metal²⁶; dextromethorphan (a cough syrup medication)²⁷; massage therapy²⁸; dogs (based on a determination a dog is dangerous or on a breed specific basis)²⁹; the disclosure of hazardous substances³⁰; and drones.³¹ Notwithstanding the diversity of business-friendly preemptions, however, all of them have one thing

16. See Larry Eichel & Stephen Camp-Landis, *Philadelphia Ranks High for Smoking and Other Unhealthy Behaviors*, <https://www.pewtrusts.org/en/research-and-analysis/articles/2017/07/25/philadelphia-ranks-high-for-smoking-and-other-unhealthy-behaviors> (last visited June 20, 2019).

17. See Truth Initiative, *Tobacco Use in Pennsylvania 2018*, <https://truthinitiative.org/tobacco-use-pennsylvania> (last visited June 20, 2019).

18. 53 Pa. C.S. §301.

19. 72 P.S. §232-A.

20. See City Council Resolution No. 190115 (adopted Mar. 14, 2019); Bill No. 190102 (approved Mar. 14, 2019) (placing referendum on the ballot calling for General Assembly to allow Philadelphia to set its own, local minimum wage).

21. P.S. §333.114a.

22. See PHILADELPHIA, PA., CODE §9-2400.

23. Act No. 55 of 2001, §8(504) (now codified at 7 Pa. C.S. §6152).

24. 35 P.S. §4609.

25. 68 Pa. C.S., ch. 73.

26. 73 P.S. §1943.8.

27. 18 Pa. C.S. §6322(e).

28. 63 P.S. §627.16.

29. 3 P.S. 459-507-A(c).

30. 35 P.S. §7319.

31. 53 Pa. C.S. §305. Drones seem to present a potentially acute and dangerous problem, in a high-density area like Philadelphia; but until people are actually harmed from their use—either physically or in terms of their privacy—the state is unlikely to take significant protective action or to allow the City to do so.

14. See 35 P.S. §7210.104(d).

15. 3 Pa. C.S. §6503(e).

in common: they favor a particular business interest over the interests of the general public.

B. Protection Based on Libertarian Ideology

A libertarian bias is evident in a fair number of Pennsylvania preemptions. Many of these also happen to favor particular industries, and likely are the result, to some degree, of lobbying by those favored businesses, but there can be no doubt that each of these preemptions reflects a leave-the-people-alone attitude, and purports at least to be a protection of freedom from government overreach.

The single most dramatic and significant preemption—from Philadelphia’s perspective—is the General Assembly’s preemption of almost any regulation of the ownership, possession or transfer of firearms.³² Although we in Philadelphia government tend to believe that this preemption itself deprives Philadelphia citizens of a basic and fundamental right (the right to be safe in one’s home, on the streets, and in public places), gun rights advocates see this preemption in precisely the opposite terms, as a protection of gun owners’ right to be free from meddlesome government interference in *their* right to own and carry firearms. To date, the latter conception of “freedom” has prevailed in our General Assembly.

Unfortunately, from our perspective, this *individual rights* approach to firearms ownership, which perhaps fits well in rural areas, entirely ignores the rights of *the collective* in crowded urban spaces. Libertarian principles work great in political philosophy classes and in regions where what you do is less likely to affect anyone else. But doctrinal rigidity leads to a one-size-fits-all preemption, which has severe and irreparable consequences in the real world, especially in the crowded, sometimes chaotic, often unnecessarily dangerous real world of Philadelphia.

Although we think it plainly has gone too far, libertarian philosophy with respect to firearm ownership at least has some historical roots in the Second Amendment and in hunting traditions. Pennsylvania’s libertarian approach to driving has no similar historical pedigree. Yet, Pennsylvania’s often hands-off attitude toward driving severely restricts Philadelphia from addressing the unique local driving conditions that exist on the crowded, winding Schuylkill Expressway, or in the urban bustle of the City’s streets. This manifests itself in at least two preemptions that may well allow Philadelphians to drive with impunity, without worry about government interference—a libertarian paradise—but at the expense of lives lost in crashes that could have been avoided.

In 2009, Philadelphia banned the use of mobile phones while driving, other than in hands-free mode.³³ It took the General Assembly almost three years to react (likely

because many in Harrisburg believed the local ordinance already was preempted),³⁴ but in 2011, the General Assembly expressly preempted the Philadelphia ordinance.³⁵ Libertarian philosophy prevails; public safety suffers.

And very little can demonstrate better the attitude that government interference with driving behavior is government overreach than the state’s ban on speed-monitoring radar and cameras. Radar and cameras save lives; about that, there can be no doubt. Roosevelt Boulevard, a six- to 12-lane arterial route that runs the length of the geographically large northeast section of Philadelphia (in many places, through densely populated neighborhoods) has a deserved national reputation as an overly-dangerous road, in large part because of speeding.³⁶ Yet, Philadelphia police have for many years been preempted from using radar to enforce speed restrictions, and, until late last year, the General Assembly preempted Philadelphia from using radar in conjunction with speed cameras. (In October 2018, the legislature authorized speed radar and cameras in Philadelphia, but only on Roosevelt Boulevard, and even then, accompanied by a number of paternalistic limitations.)³⁷

A final example of libertarian philosophy producing a preemption that clashes with public health or safety relates to indoor smoking. Philadelphia was a leader in restricting smoking in public places,³⁸ and we have been fortunate to have largely been spared from the reach of preemption in this field. Nonetheless, no discussion of libertarian-based preemption in Pennsylvania would be complete without calling attention to preemption (other than in Philadelphia) of no-smoking ordinances. Apparently, the rights of smokers to be left alone take precedence over the rights of all others who might get in the path of their smoke.³⁹

IV. Preemption of Taxation and Zoning

Two areas of legislation, taxation and zoning, deserve special mention, because the Philadelphia story does not clearly line up with Schragger’s analysis.

With respect to taxation, Schragger is certainly correct that, as a general matter, home rule rarely is so broad that it extends to local authority to tax without state control. But Philadelphia is fortunate in this one regard. While the power to tax is expressly excluded from our home rule authority (we are required to look to the General Assembly for express authorizations)⁴⁰ the General Assembly has, in fact, expressly granted Philadelphia broad taxing authority.

In the Sterling Act, the General Assembly has granted Philadelphia taxing authority that is largely co-extensive

32. 18 Pa. C.S. §6120. We say “almost any” because the preemption statute appears to leave open some window for some amount of local regulation, but, for the most part, Pennsylvania courts have not agreed with that reading. See generally *Nat’l Rifle Ass’n v. City of Philadelphia*, 977 A.2d 78, 82-83 (Pa. Commw. Ct. 2009).

33. PHILADELPHIA, PA., CODE §12-1132.

34. See 75 Pa. C.S. §6101.

35. 75 Pa. C.S. §3316.

36. See Jason Laughlin, *Traffic Deaths on Roosevelt Boulevard Spiked in 2018. A Safety Fix May Not Be in Place Until Fall*, PHILADELPHIA INQUIRER, Jan. 14, 2019, <https://www.philly.com/transportation/roosevelt-boulevard-fatalities-death-crash-safety-philadelphia-vision-zero-20190114.html> (last visited June 20, 2019).

37. See generally 75 Pa. C.S. §3368, 3370.

38. See PHILADELPHIA, PA., CODE §10-602.

39. See 35 P.S. §637.3.

40. 53 P.S. §13133(a)(1), (7), (8).

with the state's own taxing authority, with the important (but understandable) exception that Philadelphia cannot tax that which the state itself is already taxing, at least not without further express permission.⁴¹ Thus, although there certainly are other limitations on our taxing power that we do not have time or space here to discuss, the reality is that, when it comes to preemption, Philadelphia fares reasonably well with regard to taxing power.

With respect to zoning, Schragger insightfully notes that, when preemption and home rule come into conflict, one of the few areas of law where local government has some real chance of prevailing is zoning law. This is certainly the case in Pennsylvania.⁴² Where we part company with Schragger is in his assertion that this unique carve-out for an area of local concern that often is found to be off-limits to preemption is a uniquely pro-suburban, anti-urban power. In Philadelphia, at least, that is most definitely not true. Philadelphia has repeatedly and effectively used its zoning powers to *promote* urban values and urban living. A few examples will make the point.

The Philadelphia Zoning Code carves out certain districts in and around transit hubs as “Transit Oriented Development Districts.” Zoning rules are imposed here with the express purpose of “encourag[ing] compact urban growth patterns, opportunities for increased transportation mode choice, reduced reliance on the automobile, and a safe and pleasant pedestrian environment,”⁴³ i.e., the express opposite of the pro-suburban bias posited by Schragger.

Other zoning districts in the City require that buildings be built up to the street line, to create a lively pedestrian streetscape rather than a suburban-type series of empty front lawns.⁴⁴ Similarly, in commercial districts, the Zoning Code strongly favors active retail development on the first floor, again to promote a lively pedestrian streetscape.⁴⁵ The Code discourages take-out restaurants and drive-through windows.⁴⁶ The Code discourages curb cuts for driveway access on many streets.⁴⁷ And Philadelphia has a robust historic preservation ordinance and program that seeks to protect the beauty and character of the City's urban history.⁴⁸ Emphasis on this particular aspect of “urban renewal” is in direct counterpoint to the “Garden City”-type reforms of the 20th century and has paid off handsomely for the City in making it the best historically preserved city in the

United States (a significant basis for the City's tourism-based economy and a delight in its own right).

Bottom line: Zoning powers may well be favored by state legislatures for their ability to promote a pro-suburban, anti-urban bias. In Philadelphia, however, we have often used our zoning powers effectively and significantly for precisely the opposite purpose.

V. Conclusion

As we have attempted to show, excessive state preemption of local legislation is a significant problem in Pennsylvania and one that has a serious, and, at times, dangerous impact on Philadelphia and its citizens. In many significant respects, our government is not able to protect its citizens from avoidable harms because we are hamstrung by the state legislature. And the problem appears to be amplifying over time.

But in our view, this is more a problem of outsized influence of certain special interests, primarily business interests and those with libertarian perspectives, than it is of “anti-urban” bias, *per se*. To be sure, though, mistrust and resentment of city life significantly impact Philadelphia's relationship with its state government.

The most significant fallout from this mistrust and resentment is not, in our view, the growth of preemption law, but an irrational and stunted school funding system, which leaves areas with significant amounts of poverty (both urban and rural) at a great deficit in providing one of the core services that government in this country provides. Pennsylvania's funding system is notoriously lacking in this regard.⁴⁹ Apparently, many in Pennsylvania do not see the provision of a top-notch education to all the Commonwealth's citizens as a duty of the state. The failure to recognize that urban children are as valuable and important to the state as suburban children leads to many of the very ills that form the bases for the stereotypes' anti-urban views.

As far as solutions to the problem of state limitation of local government authority go, in our view political solutions are the only real basis for change. Unless and until elected leaders feel beholden to an interest in protecting the general public more than they are beholden to the special interests we have discussed herein, those special interests will continue to be successful in protecting themselves from local regulation through preemptive state legislation, at the expense of the general welfare.

41. 53 P.S. §15971.

42. *See, e.g.*, *Hoffman Min. Co. v. Zoning Hearing Bd.*, 32 A.3d 587, 600 (Pa. 2011).

43. PHILADELPHIA, PA., CODE §14-513(1).

44. *See, e.g.*, PHILADELPHIA, PA., CODE §§14-502(4)(a), 14-504(5)(b)(1), 14-701(3) (CMX-2.5)

45. *See, e.g.*, PHILADELPHIA, PA., CODE §14-602(4)(a)(3).

46. *See, e.g.*, PHILADELPHIA, PA., CODE §§14-502(5), 14-805(1)(c).

47. *See, e.g.*, PHILADELPHIA, PA., CODE §§14-504(7)(c)(6), 14-506(7)(a), 14-509(3)(k).

48. PHILADELPHIA, PA., CODE §14-1000 (“Historic Preservation”).

49. Pennsylvania ranks 47th among all states in percentage of public school funding that comes from the state itself (as opposed to from other sources). *See* U.S. Census Bureau, Public Education Finances, <https://www.census.gov/library/publications/2017/econ/g15-aspef.html> (last visited June 20, 2019).