

Preemption in the Philippines: Illuminating an Opaque Doctrine

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I. INTRODUCTION

A LAW by the very meaning of the term includes supremacy. It is a rule which those to whom it is prescribed are bound to observe. This results from every political association. If individuals enter into a state of society, the laws of that society must be the supreme regulator of their conduct. If a number of political societies enter into a larger political society, the laws which the latter may enact, pursuant to the powers entrusted to it by its constitution, must necessarily be supreme over those societies, and the individuals of whom they are composed. It would otherwise be a mere treaty, dependent on the good faith of the parties, and not a government; which is only another word for POLITICAL POWER AND SUPREMACY.

— Alexander Hamilton¹

On 2 February 2021, the Department of Environment and Natural Resources (DENR) announced the inclusion of plastic straws and stirrers in the list of non-environmentally acceptable products (NEAP) under Republic Act No. 9003, or the Ecological Solid Waste Management Act of 2000.² The law, enacted back in 2001, mandated the National Solid Waste Management Commission (NSWMC) to prepare a NEAP list within a year from its

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1. Alexander Hamilton, *The Federalist No. 33*, in *THE FEDERALIST: A COLLECTION OF ESSAYS, WRITTEN IN FAVOUR OF THE NEW CONSTITUTION, AS AGREED UPON BY THE FEDERAL CONVENTION, SEPTEMBER 17, 1787* 204.
 2. Katrina Hallare, *DENR Vows to Ban Use of Plastic Straw, Plastic Coffee Stirrer in PH*, *PHIL. DAILY INQ.*, Feb. 3, 2021, available at <https://newsinfo.inquirer.net/1391527/denr-vows-to-ban-use-of-plastic-straw-coffee-stirrer-in-ph> (last accessed May 11, 2021) [<https://perma.cc/VF93-JTM7>].

effectivity.³ It was only this year, 20 years since, that the NSWMC has managed to finalize its list.⁴

Pending this update, several cities and municipalities had taken the lead in regulating the use of plastic products.⁵ As of 2019, 316 Local Government Units (LGUs) had ordinances regulating or banning the use of plastic bags, including plastic straws and stirrers.⁶ The universal disfavor of plastic resonated with Filipinos, prompted by our “repute” as the third largest source of discarded plastic that ends up in the ocean.⁷

The NEAP listing, like any governmental regulation, is subject to challenge by affected interests. In Congress, there are pending efforts to impose an excise tax on single use plastics.⁸ Taxing them means permitting their use. How would a decision to impose such a tax impact the LGU bans?

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3. An Act Providing for an Ecological Solid Waste Management Program, Creating the Necessary Institutional Mechanisms and Incentives, Declaring Certain Acts Prohibited and Providing Penalties, Appropriating Funds Therefor, and for Other Purposes [Ecological Solid Waste Management Act of 2000], Republic Act No. 9003, § 29 (2001).
 4. Hallare, *supra* note 2.
 5. See Ellalyn De Vera-Ruiz, *More Coastal LGUs Calling for Ban on Single-Use Plastics*, MANILA BULL., Nov. 19, 2020, available at <https://mb.com.ph/2020/11/19/more-coastal-lgus-calling-for-ban-on-single-use-plastics> (last accessed May 11, 2021) [<https://perma.cc/PE93-3MLX>].
 6. Ma. Berlie L. Amurao, *Regulations on the Use of Plastic Bags in the Philippines and in Other Countries*, 31.5 NTRC TAX RES. J. 25, 36-37 (2019).
 7. Ocean Conservancy & McKinsey Center for Business and Environment, *Stemming the Tide: Land-Based Strategies for a Plastic-Free Ocean*, at 18, available at <https://oceanconservancy.org/wp-content/uploads/2017/04/full-report-stemming-the.pdf> (last accessed May 11, 2021) [<https://perma.cc/HYB7-L6YZ>]. See also Pia Ranada, *Why PH Is World's 3rd Biggest Dumper of Plastics in the Ocean*, RAPPLER, Oct. 6, 2015, available at <https://www.rappler.com/environment/philippines-plastic-pollution-ocean-conservancy-study> (last accessed May 11, 2021) [<https://perma.cc/M586-VJP7>].
 8. Filane Mikee Cervantes, *House Panel OKs Bill Imposing P20 Excise Tax on Plastic Bags*, PHIL. NEWS AGENCY, Mar. 15, 2021, available at <https://www.pna.gov.ph/articles/1133648> (last accessed May 11, 2021) [<https://perma.cc/Z27A-7APP>]. On 15 March 2021, the House Ways and Means Committee approved a substitute to House Bill No. 178, imposing a ₱20.00 excise tax per kilogram of plastic bag removed from the place of production or released from the custody of the Bureau of Customs. *Id.*

The case of these plastic bags, straws, and stirrers is evocative of the disorder caused by divergent strands of national and local governance initiatives.⁹ Most notable of these would be the tension resulting from the duty to uphold a clear national policy against the commitment to preserve local autonomy. For students of law, this translates to the familiar scenario of the clash of statute and ordinance in regulatory decision-making.

A. The Complex Landscape of Intergovernmental Relations

We can imagine several comparable situations where national and local policy makers differ. These include the not-in-my-backyard (NIMBY) scenarios of LGUs refusing to host common sanitary landfills;¹⁰ South Cotabato's prohibition on open-pit mining;¹¹ local smoking bans;¹² gender neutral restrooms;¹³ Davao City's firecrackers ban;¹⁴ Manila's contraception

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9. See Iya Gozum, *Communities Bear the Weight of the Philippines' Plastic Waste Problem*, RAPPLER, Dec. 9, 2020, available at <https://www.rappler.com/environment/tackling-plastic-waste-from-communities> (last accessed May 11, 2021) [<https://perma.cc/KLA9-P8NS>].
 10. Alman Dave O. Quiboquibo, *The Land Feels: Conflicts Between the Constitutional Right to a Balanced and Healthful Ecology and State Policies on Waste Management*, 74 PHIL. L.J. 147, 163 (1999) (citing Robert R.M. Verchick, *The Commerce Clause, Environmental Justice, and the Interstate Garbage Wars*, 70 S. CAL. L. REV. 1239, 1246 (1997)).
 11. B'laan Indigenous Cultural Communities, et al. v. Provincial Government of South Cotabato, SCA Case No. 094-202001012, at 28 (RTC 2020) (unreported).
 12. Katrina Hallare, *DILG Cites LGUs Complying with Smoking Ban Law*, PHIL. DAILY INQ., July 31, 2019, available at <https://newsinfo.inquirer.net/1148287/dilg-cites-lgus-complying-with-smoking-ban-law> (last accessed May 11, 2021) [<https://perma.cc/2MYD-S8XJ>].
 13. *Sangguniang Panlungsod of the City of Manila, An Ordinance for the Protection of the Rights of Lesbians, Gays, Bisexuals, Transgenders, Queers and Intersex (LGBTQI) in the City of Manila Against Any and All Forms of Discrimination Solely on the Basis of Sexual Orientation, Gender Identity, Expression (SOGIE) and Providing Penalty for Violation Thereof* [Manila LGBTQI Protection Ordinance of 2020], Ordinance No. 8695, § 10 (Oct. 26, 2020).
 14. *Sangguniang Panlungsod of the City of Davao, An Ordinance Prohibiting the Manufacture, Sale, Distribution, Possession or Use of Firecrackers or Pyrotechnic Devices and Such Other Similar Devices and the Exploding of Firecrackers or Other Similar Explosives Within the Territorial Jurisdiction of Davao City*, Ordinance No. 060-02, § 2 (Oct. 15, 2002).

ban;¹⁵ Valenzuela's suspension of the NLEX Corporations' Tollway operations;¹⁶ the Manila and Navotas Truck Ban ordinances;¹⁷ and just last month, the LGU led backlash against the Land Transportation Office's Motor Vehicle Inspection System.¹⁸

The Author does not discount the significance and impact of the foregoing examples. Most of these local government initiatives are utilized as micro-models for future macro-projects.¹⁹ Justice Louis D. Brandeis famously articulated the philosophy that “[i]t is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the

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15. See Commission on Human Rights, EO No. 003: Discriminatory or Rights Based? CHR Advisory on the Local Ordinance by the City of Manila, CHR (IV) A2010-005, at 1-2 (Oct. 7, 2010).
 16. Office of the City Mayor of Valenzuela, Implementing the Ordinance Ensuring Uninterrupted Service of Public Utilities and Services Operated by Private Corporations in the Event of Revocation or Suspension of Business Permit and Such Other Licenses Issued by the City Government of Valenzuela, Executive Order No. 2020-324, Series of 2020 [E.O. No. 2020-324, s. 2020], whereas cl. para. 3 (Dec. 7, 2020).
 17. See Gilberto M. Llanto, Cargo Truck Ban: Bad Timing, Faulty Analysis, Policy Failure (Philippines Institute for Development Studies Discussion Paper Series No. 2016-52, Dec. 2016), at 2, *available at* <https://dirp3.pids.gov.ph/websitecms/CDN/PUBLICATIONS/pidsdps1652.pdf> (last accessed May 11, 2021) [<https://perma.cc/UCU7-76AT>] & Office of the City Mayor of Navotas, An Order Implementing a Limited Truck Ban on C-3 Road, R-10 Road, and North Bay Boulevard, from the Hours of 6:00AM to 10:00AM and 4:00PM to 8:00PM Effective 1 January 2020, Executive Order No. TMT-029, Series of 2019 [E.O. No. TMT-029, s. 2019], whereas cl. para. 3 (Nov. 28, 2019).
 18. See A Resolution Directing the Committee on Transportation to Conduct an Inquiry, in Aid of Legislation, on the Capacity and Preparedness of the Land Transportation Office (LTO) and the Private Motor Vehicle Inspection Centers (PMVICs) in the Implementation of the New Motor Vehicle Inspection System (MVIS), H. Res. No. 1542, whereas cl. para. 11, 18th Cong., 2d Reg. Sess. (2021).
 19. See Hannah J. Wiseman & Dave Owen, *Federal Laboratories of Democracy*, 52 U.C. DAVIS L. REV. 1119, 1121 (2018). Federalism is often justified for promoting creative policy experimentation on the local level. Limits on federal power and the protection given to state sovereignty transform States into “laboratories of democracy” that foster the growth of governmental innovation. *Id.*

rest of the country.”²⁰ Local governments are an equally important set of “policy laboratories.”²¹ The grassroots serve as breeding grounds for endeavors that are designed to catalyze nation-wide programs.²²

In decentralized systems, the confluence of regulatory spheres between national and sub-national governments is emblematic. Inevitably, the State endures actual, justiciable cases of confrontation between local legislative issuances and national initiatives.

The “bottom line” of decentralized government is that it enhances political accountability and assures freedoms. However, it can also result in fragmented responses, disjointed national initiatives, the clash of concurrent regulatory power, and the search for mechanisms to respond to the same.

Counterpoint to the parochialist bent of local autonomy is the principle that recognizes the nation as a single economic unit, invokes the need for uniform national regulation, and acknowledges the expertise of administrative agencies.

The consequent conflict resolution scenarios see the federal or national law upheld over the state or local regulation or, obversely, the state or local law superseded by the federal or national regulation. This phenomenon of resolving these conflicts in favor of the federal or national authority has come to be known as preemption.²³

20. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (J. Brandeis, dissenting opinion).

21. See Akash Paun et al., *Devolution as a Policy Laboratory: Evidence Sharing and Learning Between the UK's Four Governments*, at 7, available at <https://www.instituteforgovernment.org.uk/sites/default/files/publications/Alliance%20Policy%20Laboratory%20paper%20v3.pdf> (last accessed May 11, 2021) [<https://perma.cc/53X8-K5D5>].

22. *Id.* at 11.

23. It was said that

the first appearance in the U.S. Reports of the term ‘preemption,’ as it is used to describe the power at issue, is ... by Justice Brandeis in *New York Central R.R. v. Winfield*, 244 U.S. 147, 169 (1917). ... Both before this first use and up until the 1940s, the term ‘superseded’ was generally used to describe the phenomenon.

Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 789 (1994) (citing *New York Central R.R. Co. v. Winfield*, 244 U.S. 147, 169 (1917) (J. Brandeis, dissenting opinion)).

This brief Essay seeks to provide an overview of preemption, as well as to contribute to the understanding of this constitutional doctrine and its cogency as a dispute settlement mechanism, by using a comparative lens between the experience of the United States (U.S.) and its less pervasive presence in the Philippines.

II. NATIONAL VERSUS LOCAL: CONFLICTING OR COMPLEMENTARY INTERESTS?

A. *Hierarchy of Laws*

Supremacy of the Constitution in the hierarchy of laws within a sovereign State is universal.²⁴ In the U.S., whose legal system is regularly resorted to for precedential instruction, the Supremacy Clause is etched in granite in its Constitution —

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any[t]hing in the Constitution or Laws of any State to the Contrary notwithstanding.²⁵

State laws and ordinances enjoy lesser preference, respectively, such that local issuances cannot supervene the Constitution or national law.²⁶

In the Philippines, though no supremacy clause is explicit in the 1987 Constitution, the same constitutional supremacy is implied from Article VIII, Section 5, to wit —

SECTION 5. The Supreme Court shall have the following powers:

...

24. See *People v. Albanese*, 104 Ill.2d 504, 550 (Ill. 1984) (U.S.) (J. Simon, concurring and dissenting opinion). “The supremacy clause establishes the primacy of the Federal Constitution,” whose provisions override all conflicting laws and doctrines without constitutional basis or significance. *Id.*

25. U.S. CONST. art. VI, para. 2.

26. *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985). The Court declared that, “for the purposes of the Supremacy Clause, the constitutionality of local ordinances is analyzed in the same way as that of statewide laws.” *Id.*

- (2) Review, revise, reverse, modify, or affirm on appeal or *certiorari*, as the law or the Rules of Court may provide, final judgments and orders of lower courts in:
 - (a) All cases in which the constitutionality or validity of any treaty, international or executive agreement, law, presidential decree, proclamation, order, instruction, ordinance, or regulation is in question.²⁷

Local government issuances are tested for their constitutionality or validity. Supremacy of law is derived from the doctrine that local governments are creatures of the legislature.²⁸ This basic postulate is to be applied in cases of conflict between statute and ordinance.²⁹

When congressional intent is explicit that local power in a regulatory area is withheld, the courts' task becomes simple. Does the ordinance fall within the area expressly withheld? If so, then it becomes a simple case of *ultra vires* analysis or inspecting whether or not the local government has exceeded its authority to act.

If there is no clear guidance from Congress, how is it to be determined if an area of conduct has been reserved by the national government to the extent that its statutes have fully covered their regulation and thereby exclude local action? In fact, how is it to be determined if there is conflict at all?

B. Constitutional Framework

Given the shared colonial history, comparative analysis with the U.S. in the search for underlying principles shows unsurprising identity in political institutions. Yet the basic structure of government, on the subject of centralization of power, is different.

U.S. federalism finds its ancestry in the States' revolt against British monarchical rule, which was then the most absolute form of unitary governance. In contrast, Philippine governance institutions have a longer

27. PHIL. CONST. art VIII, § 5 (2) (a).

28. See *Warner Cable Communications, Inc. v. Borough of Schuylkill Haven*, 784 F. Supp. 203, 211 (E.D.Pa. 1992) (U.S.). “[A] borough or other municipal corporation is not a sovereign with inherent powers, but rather a creature of the [S]tate[.]” that is completely subject to the authority of the [S]tate legislature. This creature of the legislature may do only what the legislature has placed in its power. *Id.*

29. See *Maryland v. Louisiana*, 451 U.S. 725, 747 (1981). “[A S]tate statute is void to the extent [that] it conflicts with a federal statute.” *Id.*

provenance. Philippine administrative systems even predate centuries old Spanish monarchical rule.³⁰

This same Spanish monarchical rule from the center proved to be an efficient design for colonial dominance.³¹ The U.S., upon their succession, adopted a unitary set-up for the subnational territorial and political subdivisions of these islands.³²

The divergence reflects in their respective Constitutions. In the U.S., “[t]he powers not delegated to the United States by the Constitution, nor

30. ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* 8–9 (2010).

American federalism began as a response to British metropolitan claims that only one supreme law-giving authority could exist within the empire (and the corollary claim that this authority resided in Parliament). Throughout the 1760s and 1770s, colonists and metropolitans wrangled over the possibility of dividing authority without running afoul of the traditional prohibition on *imperium in imperio*, or dominion within dominion.

Id.

31. Michael N. Pearson, *The Spanish ‘Impact’ on the Philippines, 1565-1770*, 12 J. ECON. & SOC. HIST. ORIENT 165, 167 (1969).

The Spanish retained the basic structure of the *barangay*, and it was transformed into the smallest unit of local government. The *datu* changed his title to *cabeza de barangay*, but little else about his position altered. Spain indeed erected ‘the superstructure of her political regime upon the foundations of already deep[-]rooted institutions.’

Id.

32. Leo Stanton Rowe, *The Establishment of Civil Government in the Philippines*, 20 ANNALS AM. ACAD. POL. & SOC. SCI. 9, 15 (1902).

With the formulation of a municipal and provincial law, the introduction of civil rule in the local governments was placed upon a firm foundation. One of the duties most strongly emphasized in the President’s instructions ... to the Philippine Commission was ‘the establishment of municipal governments, in which the natives of the islands, both in the cities and in the rural communities, shall be afforded the opportunity to manage their local affairs to the fullest extent of which they are capable, and subject to the least degree of supervision and control which a careful study of their capacities and observation of the working of native control show to be consistent with the maintenance of law, order, and loyalty.’

Id.

prohibited by it to the States, are reserved to the States respectively, or to the people.”³³ State tension with federal power needs more urgent resolution given the said reservation clause.³⁴ It was an offshoot of the original confederation sentiment that sovereignty resides in the States.³⁵

In contrast, the Philippine national government wields plenary power, relative to subnational governments.³⁶ If in the U.S. Constitution there is no mention of localities, Article X of the 1987 Philippine Constitution on Local Governments proclaims the Provinces, Cities, Municipalities, Barangays, and the Autonomous Regions as the territorial and political subdivisions of the State.³⁷ They do enjoy autonomy,³⁸ but only *as provided by law*, via the Local

33. U.S. CONST. amend. X.

34. See Ilya Somin, *The Supreme Court of the United States: Promoting Centralization More Than State Autonomy*, in *COURTS IN FEDERAL COUNTRIES: FEDERALISTS OR UNITARISTS?* 440 (Nicholas Aroney & John Kincaid eds., 2017).

The relative scope of federal and state power under the U.S. Constitution has been a major bone of contention for over two hundred years. Federal courts have often intervened both for and against assertions of federal authority. Judicial review has sometimes enforced substantial limits on federal authority by striking down federal laws deemed to be outside the scope of Congress’s enumerated powers under Article I of the Constitution. At the same time, federal courts have often constrained state power by invalidating state laws as violations of constitutional rights.

Id.

35. MERRILL JENSEN, *THE ARTICLES OF CONFEDERATION: AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION, 1774-81* 161 (1940). The fundamental issue in the writing of the Articles of Confederation was the location of ultimate political authority, the problem of sovereignty. Should it reside in Congress or in the States? *Id.*

36. *Philippine Association of Service Exporters, Inc. v. Drilon*, G.R. No. L-81958, 163 SCRA 386, 391 (1988) (citing *Rubi v. Provincial Board of Mindoro*, 39 Phil. 660, 708 (1919)).

37. PHIL. CONST. art. X, § 1. In contrast, the U.S. Constitution does not mention local governments.

38. PHIL. CONST. art. X, § 2.

Government Code (LGC) of 1991.³⁹ The Philippines has been called unitary, though with a quasi-federal *ethos*.⁴⁰

C. Pandemic Dynamic

At a moment in history where the contours of local autonomy continue to be molded, the response to the pandemic has had a famous “national government enabled, local government led” strategic direction.⁴¹ As in all the world, LGUs are one of the crucial front liners in the pushback against COVID-19.⁴² This is based on the principle of subsidiarity,⁴³ that the grassroots are best positioned to respond (e.g., in disasters and pandemics, given their proximity to the problem). Sadly, black swan emergencies like these expose the soft underbelly of national-local relations: the institutional overlaps, inadequate emergency preparedness, and the need for coordination.

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39. An Act Providing for a Local Government Code of 1991 [LOCAL GOV'T CODE], Republic Act No. 7160 (1991).
 40. Michael Henry Ll. Yusingco, Fellow, Ateneo Policy Center, *Intergovernmental Relations in the Philippines*, Speech at the National Conference on Intergovernmental Relations (Oct. 1, 2019) (transcript available at <http://www.iag.org.ph/think/1859-intergovernmental-relations-in-the-philippines> (last accessed May 11, 2021) [<https://perma.cc/VK88-UGC4>]).
 41. Inter-Agency Task Force on Emerging Infectious Diseases, Recommendations Relative to the Management of the Coronavirus Disease 2019 (COVID-19) Situation, Resolution No. 25, Series of 2020 [Res. No. 25, s. 2020], ¶ A (Apr. 17, 2020).
 42. Organisation for Economic Co-operation and Development, The Territorial Impact of COVID-19: Managing the Crisis Across Levels of Government, at 12, available at https://read.oecd-ilibrary.org/view/?ref=128_128287-5agkkojaaa&title=The-territorial-impact-of-covid-19-managing-the-crisis-across-levels-of-government (last accessed May 11, 2021) [<https://perma.cc/YZN7-NMAY>].
 43. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, MAKING DECENTRALISATION WORK: A HANDBOOK FOR POLICY-MAKERS 33 (2019) (citing Wallace E. Oates, *An Essay on Fiscal Federalism*, 37 J. ECON. LIT. 1120, 1122 (1999)). Subsidiarity is the “precept ... that public policy and its implementation should be assigned to the lowest level of government with the capacity to achieve the objectives.” *Id.*

The pandemic has unmasked a new dynamic between national and subnational governments.⁴⁴ If the tension between national and local governments pre-COVID-19 had eased, autonomy-wise, under Republic Act No. 11469 (*Bayanihan Law*),⁴⁵ the tension has clearly heightened.⁴⁶

Section 4 (g) of the *Bayanihan Law*⁴⁷ had LGUs reduced to minions in implementing the national policy against COVID-19.⁴⁸ In “defined” fields

44. See Organisation for Economic Co-operation and Development, *supra* note 42, at 75.

45. An Act Declaring the Existence of a National Emergency Arising from the Corona Virus Disease 2019 (COVID-19) Situation and a National Policy in Connection Therewith, and Authorizing the President of the Republic of the Philippines for a Limited Period and Subject to Restrictions, to Exercise Powers Necessary and Proper to Carry Out the Declared National Policy and for Other Purposes [*Bayanihan to Heal as One Act*], Republic Act No. 11469 (2020).

46. Pia Ranada, *How the Pandemic Changed Politics in 2020*, RAPPLER, Dec. 12, 2020, available at <https://www.rappler.com/newsbreak/iq/how-the-pandemic-changed-politics-2020> (last accessed May 11, 2021) [<https://perma.cc/DHG5-8GKV>].

47. *Bayanihan to Heal as One Act*, § 4 (g).

48. *Id.* The section provides —

SECTION 4. *Authorized Powers.* — Pursuant to Article VI, Section 23 (2) of the Constitution, the President is hereby authorized to exercise powers that are necessary and proper to carry out the declared national policy. The President shall have the power to adopt the following temporary emergency measures to respond to crisis brought by the pandemic:

...

(g) Ensure that all Local Government Units (LGUs) are acting within the letter and spirit of all the rules, regulations and directives issued by the National Government pursuant to this Act; are implementing standards of Community Quarantine consistent with what the National Government has laid down for the subject area, while allowing LGUs to continue exercising their autonomy in matters undefined by the National Government or are within the parameters it has set; and are fully cooperating toward a unified, cohesive and orderly implementation of the national policy to address COVID-19: *Provided*, That all LGUs shall be authorized to utilize more than five percent (5%) of the amount allocated for their calamity fund subject to additional funding and support from the National Government[.]

Id.

and areas, local governments were prohibited from exercising their powers and prerogatives.⁴⁹ There was no such quasi-federal *ethos* except “in matters undefined by the national government.”

49. See, e.g., Department of the Interior and Local Government, DILG to LGUs: Don't Impose Excessive Fees for Medical Certificate Required for Travel Authority of LSIs, *available at* <https://www.dilg.gov.ph/news/DILG-to-LGUs-Dont-impose-excessive-fees-for-medical-certificate-required-for-travel-authority-of-LSIs/NC-2020-1167> (last accessed May 11, 2021) [<https://perma.cc/YDA9-NV8B>]; Department of the Interior and Local Government, DILG Issues Show Cause Orders Against 3 Governors, 2 Mayors for Violating National Quarantine Policies, *available at* <https://dilg.gov.ph/news/DILG-issues-show-cause-orders-against-3-governors-2-mayors-for-violating-national-quarantine-policies/NC-2020-1094> (last accessed May 11, 2021) [<https://perma.cc/BPC2-93K9>]; Department of the Interior and Local Government, All Relief Operations Must Be LGU-Certified — DILG, *available at* <https://dilg.gov.ph/news/All-relief-operations-must-be-LGU-certified-DILG/NC-2020-1133> (last accessed May 11, 2021) [<https://perma.cc/B2P9-NKRL>]; Department of the Interior and Local Government, DILG to LGUs: No Mandatory COVID-19 Testing Needed for Returning Workers, *available at* <https://dilg.gov.ph/news/DILG-to-LGUs-No-mandatory-COVID-19-testing-needed-for-returning-workers/NC-2020-1162> (last accessed May 11, 2021) [<https://perma.cc/MVE8-FUAZ>]; Department of the Interior and Local Government, DILG Recommends Disciplinary Action to the Ombudsman Against 20 Punong Barangays for Violating ECQ Protocols, *available at* <https://dilg.gov.ph/news/DILG-recommends-disciplinary-action-to-the-Ombudsman-against-20-punong-barangays-for-violating-ECQ-protocols/NC-2020-1207> (last accessed May 11, 2021) [<https://perma.cc/4ARK-PHHU>]; Cathrine Gonzales, *Pass Ordinance on Mandatory Wearing of Face Masks, LGUs Urged*, PHIL. DAILY INQ., Apr. 6, 2020, *available at* <https://newsinfo.inquirer.net/1254520/dilg-to-lgus-on-mandatory-wearing-of-face-masks> (last accessed May 11, 2021) [perma.cc/5WKA-B8KG]; Department of the Interior and Local Government, DILG: Malls Will Be Closed if They Violate Physical Distancing Rules, Curfew Will Still Be Imposed, *available at* <https://dilg.gov.ph/news/DILG-Malls-will-be-closed-if-they-violate-physical-distancing-rules-curfew-will-still-be-imposed/NC-2020-1153> (last accessed May 11, 2021) [<https://perma.cc/42PW-6P48>]; Department of the Interior and Local Government, DILG Clarifies: Tricycles, Pedicabs Still Banned on National Highways in All GCQ and MGCQ Areas, *available at* <https://www.dilg.gov.ph/news/DILG-clarifies-Tricycles-pedicabs-still-banned-on-national-highways-in-all-GCQ-and-MGCQ-areas/NC-2020-1188> (last accessed May 11, 2021) [perma.cc/89Q8-JPN7]; Department of the Interior and Local Government, DILG: LGUs Planning to Donate Gadgets to Schools Should Comply with DepEd Technical Specs, *available at*

D. Top-Down Quarantine

Using the pandemic response as a lens, LGU initiatives are contingent on the exercise of their police power. Police power, while inherent in the nation-state,⁵⁰ is granted statutorily to LGUs through the general welfare clause (GWC).⁵¹ Aside from the GWC, the Code further vests each municipality, city, and province with the direct power to “approve measures and adopt

<https://dilg.gov.ph/news/DILG-LGUs-planning-to-donate-gadgets-to-schools-should-comply-with-DepEd-technical-specs/NC-2020-1206> (last accessed May 11, 2021) [<https://perma.cc/3GVT-G7QY>]; Department of the Interior and Local Government, DILG to Public: Breaking Quarantine Directives Is Breaking the Law, *available at* <https://dilg.gov.ph/news/DILG-to-public-Breaking-quarantine-directives-is-breaking-the-law/NC-2020-1105> (last accessed May 16, 2021) [<https://perma.cc/CA9J-S72P>]; Department of the Interior and Local Government, DILG to LGUs: Stop Spraying Disinfectants, Mists on Individuals, *available at* <https://dilg.gov.ph/news/DILG-to-LGUs-Stop-spraying-disinfectants-mists-on-individuals-/NC-2020-1102> (last accessed May 11, 2021) [<https://perma.cc/WVU7-9P3V>]; & Department of the Interior and Local Government, DILG to LGUs: Establish Bike Lanes, Motor Taxis Still Prohibited, *available at* <https://www.dilg.gov.ph/news/DILG-to-LGUs-Establish-bike-lanes-motor-taxis-still-prohibited/NC-2020-1178> (last accessed May 11, 2021) [perma.cc/BL8H-FSUA].

50. *Gerochi v. Department of Energy*, G.R. No. 159796, 527 SCRA 696, 714 (2007) (citing *JMM Promotion and Management, Inc. v. Court of Appeals*, G.R. No. 120095, 260 SCRA 319, 324 (1996)).

51. LOCAL GOV'T CODE, § 16.

SECTION 16. *General Welfare*. — Every local government unit shall exercise the powers expressly granted, those necessarily implied therefrom, as well as powers necessary, appropriate, or incidental for its efficient and effective governance, and those which are essential to the promotion of the general welfare. Within their respective territorial jurisdictions, local government units shall ensure and support, among other things, the preservation and enrichment of culture, promote health and safety, enhance the right of the people to a balanced ecology, encourage and support the development of appropriate and self-reliant scientific and technological capabilities, improve public morals, enhance economic prosperity and social justice, promote full employment among their residents, maintain peace and order, and preserve the comfort and convenience of their inhabitants.

Id.

quarantine regulations to prevent the introduction and spread of diseases.”⁵² By law, this is their actual quarantine power.

Primary quarantine authority is local within their jurisdictions.⁵³ The Philippine Integrated Disease Surveillance and Response⁵⁴ recognizes that “it is the primary responsibility of local government units to manage epidemic investigation and response. However, the next higher level will continue to exercise its technical oversight functions.”⁵⁵

The quarantine power framework of countries was not designed to confront pandemics on a national scale. In the U.S., the nightmare scenario of patchwork regulation is seen per state.⁵⁶ Whether federal or unitary, effective vertical coordination is necessary to make decentralization work. It is even more essential in crisis contexts.

By virtue of *Bayanihan*, emergency and extraordinary powers were granted to the Executive, but Congress was careful to specify a shelf life via sunset provisions.⁵⁷ According to Professor Alberto C. Agra, during this time, the President exercised more than his constitutional power of general

52. *Id.* §§ 447 (5) (xii), 458 (5) (xii), & 468 (4) (v).

53. *Id.*

54. National Epidemiology Center, Manual of Procedures for the Philippine Integrated Disease Surveillance and Response, *available at* https://www.doh.gov.ph/sites/default/files/publications/PIDSRMOP3ED_VOLI_2014.pdf (last accessed May 11, 2021) [<https://perma.cc/X6ZA-XHLV>].

55. *Id.* § 8.2.2.

56. Arian Campo-Flores, et al., *Behind New Covid-19 Outbreaks: America's Patchwork of Policies*, WALL ST. J., July 9, 2020, *available at* <https://www.wsj.com/articles/us-policy-covid-19-coronavirus-outbreaks-california-texas-florida-arizona-11594134950> (last accessed May 11, 2021) [<https://perma.cc/CA25-Q56H>].

57. Ateneo Law Alumni Association, Inc., Video, *Dos and Dont's for LGUs Under the Bayanihan Act*, FACEBOOK, June 11, 2020, *available at* <https://www.facebook.com/AteneoLawAlumni/videos/alaai-web-lecture-ep-2/588000691845027> (last accessed May 11, 2021) [<https://perma.cc/6BZJ-KSTF>]. *See also* Alberto C. Agra, *Dos and Dont's for LGUs Under the Bayanihan Act* (Formatted as PowerPoint presentation slides), *available at* <https://www.albertocagra.com> (last accessed May 11, 2021) [<https://perma.cc/P22J-YH49>].

supervision. He was actually employing what was referred to as “enhanced supervision” over local governments.⁵⁸

It may have been a case of enhanced supervision, but it was also a case of preemption.

III. DOCTRINE OF PREEMPTION

Preemption is a device in multi-scale governance contexts where the larger power is invoked to diminish the lesser power.⁵⁹ In the field of intergovernmental relations, it is the authority of national law to replace or displace state or local law.⁶⁰ Preemption is “a constitutional principle that says [] Congress may regulate an area within its power to the exclusion of state regulation, displacing state involvement without further inquiry.”⁶¹

A mainstay feature of the modern regulatory state, classic preemption analysis “harmonized the efforts of different levels of government in areas in which both enjoy regulatory authority and determined the degree to which state policies could coexist with local additions or variations.”⁶² The word describes “the legal effect of the federal government’s power to *exclude* a state *from* an area of legislation, or the constitutional impotency of the states to *intrude into* an area of legislation.”⁶³

58. PHIL. CONST. art. X, § 4. The President of the Philippines shall exercise general supervision over local governments.

59. Harrop A. Freeman, *Dynamic Federalism and the Concept of Preemption*, 21 DEPAUL L. REV. 630 (1972). “Today[, preemption] is used to describe the legal effect of the federal government’s power to *exclude* a [S]tate *from* an area of legislation, or the constitutional impotency of the [S]tates to *intrude into* an area of legislation.” *Id.*

60. *Williams v. Caterpillar Tractor Co.*, 786 F.2d 928, 932 (9th Cir. 1986) (U.S.). “A state law cause of action has been ‘completely preempted’ when federal law both displaces *and* supplants the state law — that is, when federal law provides both a superseding remedy replacing the state law cause of action *and* preempts that state law cause of action.” *Id.*

61. Jane M. Lyons, *Gade v. National Solid Wastes Management Association: Reality Check on the Preemption Doctrine*, 10 J. CONTEMP. HEALTH L. & POL’Y 563, 569 (1994).

62. Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 1997 (2018).

63. Freeman, *supra* note 59.

A. *United States of America*

1. Supremacy Clause

To balance the federal government's enumerated or limited powers against the states and as reflected in the supremacy clause, a bedrock feature of the American constitutional schema is the power of Congress to preempt state or local law.

In the U.S., the doctrine of preemption is noted as “the most frequently used doctrine of constitutional law in practice.”⁶⁴ One of the “most widely applied doctrines in public law,”⁶⁵ it has been called the “central federalism issue of our time.”⁶⁶ “The constitutional principles of [preemption], in whatever particular field of law they operate, are designed with a common end in view: to avoid conflicting regulation of conduct by various official bodies which might have some authority over the subject matter.”⁶⁷

The supremacy clause is acknowledged as the foundation of the preemption doctrine, pursuant to which a state law is superseded by federal statutes in case of conflict.⁶⁸ From the supremacy language, the U.S. Supreme Court has developed its preemption framework comprised of (1) *express* and (2) *implied* preemption.⁶⁹

64. Gardbaum, *supra* note 23, at 768.

65. Thomas W. Merrill, *Preemption and Institutional Choice*, 102 NW. U. L. REV. 727, 730 (2008).

66. Ernest A. Young, *Executive Preemption*, 102 NW. U. L. REV. 869, 869 (2008).

67. *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v. Lockridge*, 403 U.S. 274, 285-86 (1971).

68. *Gade v. National Solid Wastes Management Association*, 505 U.S. 88, 108 (1992). Any state law, no matter how clearly it is within that State's power, which “interferes with or is contrary to federal law,” must yield to the latter “under the Supremacy Clause, from which our pre-emption doctrine is derived.” *Id.*

69. *Fidelity Federal Savings and Loan Association v. de la Cuesta*, 458 U.S. 141, 152-53 (1982).

2. Two Branches

Under *express* preemption, federal law displaces state law explicitly.⁷⁰ In this, the Court simply asks, “Does the ordinance fall within the area expressly withheld?”

If the language be ambiguous, with no positive command or guidance, or, above all, if subject to conflicting interpretation, then the task is to check if preemptive intent can be discerned impliedly.

More complicated than explicit preemption, *implied* preemption analysis relies on two judicial sub-tests:

- (1) Implied *conflict* preemption would inquire as to whether state regulatory intent negates the command of federal regulatory intent;⁷¹ and
- (2) Implied *field* preemption, where courts infer from the detailed or extensive federal regulatory scheme that congressional intent was to occupy the field of regulation and exclude state or local law.⁷²

The bulk of cases involve state and federal laws that, on their face, do not conflict. They just happen to address related problems in the same field or area of law. Federal law’s implied displacement of state law may also be seen through the structure or purpose of the regulation.⁷³

3. Origin Story

The landmark case of *Gibbons v. Ogden*⁷⁴ is commonly thought to be the precursor of the preemption power.⁷⁵ The State of New York licensed Ogden

70. *Farina v. Nokia Inc.*, 625 F.3d 97, 117 (3d Cir. 2010) (U.S.). “Express preemption applies where Congress explicitly states in the language of the statute its intent to preempt state law.” *Id.*

71. *See Geier v. American Honda Motor Company, Inc.*, 529 U.S. 861, 873 (2000).

72. Alan Untereiner, *The Defense of Preemption: A View from the Trenches*, 84 TUL. L. REV. 1257, 1259 (2010). *See also Gade*, 505 U.S. at 98.

73. *Farina*, 625 F.3d at 118. However, “the presence of an express preemption provision does not end the inquiry.” Although it means that there is no need to inquire into “whether Congress intended to preempt some state law,” it is still necessary to “examine congressional intent as to the scope of the preemption provision.” *Id.*

74. *Gibbons v. Ogden*, 22 U.S. 1 (1824).

75. Gardbaum, *supra* note 23, at 787 (citing William Cohen, *Congressional Power to Define State Power to Regulate Commerce: Consent and Preemption*, in COURTS AND

to operate a ferry service.⁷⁶ *Gibbons*, who was federally authorized, was excluded from the coasting trade.⁷⁷ The Supreme Court, for the first time, invoked the U.S. Constitution's supremacy clause to decide that state law, though otherwise proper, should give way.⁷⁸

The result, per Chief Justice John Marshall, was required by the supremacy clause, which proclaims that statutes and treaties, as well as the Constitution itself, supersede state laws that "interfere with, or are contrary to" their dictates.⁷⁹ "In every such case, the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it."⁸⁰

Since then, the ratio articulated by Chief Justice Marshall has been elevated to the status of black letter law.⁸¹

4. Intrastate Preemption

The same issues faced by federal versus state conflicts are confronted when states preempt local ordinances. As previously pointed out, however, whereas states have constitutional status, local governments have no constitutional personality *de jure*.⁸² On the contrary, localities are creatures of states.⁸³

Federal preemption principles have not exactly served as a uniform model for States to follow when state law is in conflict with local regulation. These

FREE MARKETS: PERSPECTIVES FROM THE UNITED STATES AND EUROPE 538
(Terrance Sandalow & Eric Stein eds., 1982)).

76. *Gibbons*, 22 U.S. at 2.

77. *Id.*

78. *Id.* at 210.

79. *Id.* at 211.

80. *Id.*

81. Gardbaum, *supra* note 23, at 767.

82. See *Reynolds v. Sims*, 377 U.S. 533, 575 (1964). "Political subdivisions of states — counties, cities, or whatever — never were and never have been considered as sovereign entities." In contrast, the U.S. Constitution does not mention local governments. *Id.*

83. *Reynolds*, 377 U.S. at 575. "[Political subdivisions of States] have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions." *Id.*

tests are important guides, though not all States follow the exact “verbiage” of the federal framework.⁸⁴

“The question of [preemption] is important[,] ... [as it] displaces state or local laws that already occupy a field ... [and] reflect[s] the preferences of the citizens[,] ... as expressed through their elected legislators[,] ... [and] it is especially important that the Congress be clear about its intent”⁸⁵

B. Philippines

As a topic, the preemption doctrine has largely been ignored in Philippine constitutional jurisprudence. Local government scholarship on the subject is sparse. Courts do not usually reach the issue, resorting to statutory interpretation to divine legislative intent, or applying repeal or *ultra vires* analysis.⁸⁶

Regarding “the preference of citizens as expressed through their elected legislators” in Cagayan de Oro City, the decision to recognize the franchise from the Philippine Amusement and Gaming Corporation (PAGCOR) for the operation of a casino despite the express prohibition of the Sanggunian, in the case of *Magtajas v. Pryce Properties Corporation Inc.*,⁸⁷ saw agitated local citizens pouring out into the streets.⁸⁸

84. Lauren E. Phillips, *Impeding Innovation: State Preemption of Progressive Local Regulations*, 117 COLUM. L. REV. 2225, 2234 (2017). “State courts thus have greater freedom to develop their own implicit preemption case law and greater latitude to determine the contours of implicit preemption.” *Id.* at 2235.

85. U.S. Advisory Commission on Intergovernmental Relations, *Federal Statutory Preemption of State and Local Authority: History, Inventory, and Issues*, at 5–6, available at <https://library.unt.edu/gpo/acir/Reports/policy/A-121.pdf> (last accessed May 11, 2021) [<https://perma.cc/Y7K6-TY5F>].

86. A quick search of the Ateneo Professional Schools Library resources shows that there are no essays or articles treating of the subject. In a search of CDAAsiaOnline, E-SCRA and Lawphil databases, only the case of *Victorias Milling Co., Inc. v. Municipality of Victorias, Negros Occidental*, G.R. No. L-21183, 25 SCRA 192 (1968) was returned.

87. *Magtajas v. Pryce Properties Corporation, Inc.*, G.R. No. 111097, 234 SCRA 255 (1994).

88. *Id.* at 274.

Unlike states in a federal system, however, local governments have limited powers.⁸⁹ From *Magtajas*, the Court explains that

[t]he rationale of the requirement that the ordinances should not contravene a statute is obvious. Municipal governments are only agents of the national government. Local councils exercise only delegated legislative powers conferred on them by Congress as the national lawmaking body. The delegate cannot be superior to the principal or exercise powers higher than those of the latter. It is a heresy to suggest that the local government units can undo the acts of Congress, from which they have derived their power in the first place, and negate by mere ordinance the mandate of the statute.

Municipal corporations owe their origin to, and derive their powers and rights wholly from the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy. As it may destroy, it may abridge and control. Unless there is some constitutional limitation on the right, the legislature might, by a single act, and if we can suppose it capable of so great a folly and so great a wrong, sweep from existence all of the municipal corporations in the [S]tate, and the corporation could not prevent it. We know of no limitation on the right so far as to the corporation themselves are concerned. They are, so to phrase it, the mere tenants at will of the [legislature].⁹⁰

Moreover, our unitary form of government is understood to impose boundaries on local policy-making power.⁹¹ The Court clarifies in *Lina, Jr. v. Paño*⁹² that

[o]urs is still a unitary form of government, not a federal [S]tate. Being so, any form of autonomy granted to local governments will necessarily be limited and confined within the extent allowed by the central authority. Besides, the principle of local autonomy under the 1987 Constitution simply means ‘decentralization[.]’ It does not make local governments sovereign within the [S]tate or an ‘*imperium in imperio*.’⁹³

89. See *Pimentel, Jr. v. Ochoa*, G.R. No. 195770, 676 SCRA 551, 560 (2012) (citing *Ganzon v. Court of Appeals*, G.R. No. 93252, 200 SCRA 271, 281 (1991)).

90. *Magtajas*, 234 SCRA at 272-73 (citing *City of Clinton v. Cedar Rapids and Missouri River Railroad Company*, 24 Iowa 455, 475 (1868) (U.S.)).

91. See *Tan v. Pereña*, G.R. No. 149743, 452 SCRA 53, 74 (2005).

92. *Lina, Jr. v. Paño*, G.R. No. 129093, 364 SCRA 76 (2001).

93. *Id.* at 85 (citing *Basco v. Philippine Amusement and Gaming Corporation*, G.R. No. 91649, 197 SCRA 52, 65 (1991)).

I. Dillon's Rule

Traditionally, courts in the U.S.⁹⁴ and in the Philippines have been guided by Dillon's Rule in assessing local power. Also known as "the creature of the [S]tate" doctrine, Dillon's Rule is a canon of statutory interpretation.⁹⁵ In *Mandanas v. Executive Secretary*,⁹⁶ the Court enunciated its strict parameters —

A municipal corporation possesses and can exercise the following powers and no others: *First*, those granted in express words; *second*, those necessarily implied or necessarily incident to the powers expressly granted; *third*, those absolutely essential to the declared objects and purposes of the corporation — not simply convenient but indispensable; *fourth*, any fair doubt as to the existence of a power is resolved by the courts against the corporation — against the existence of the powers.⁹⁷

Mandanas underscored how this delimitation principle under common law remains in our jurisdiction notwithstanding the 1987 Constitution's mandate of local autonomy.⁹⁸

Whether in the U.S. or in the Philippines, challenges to local authority used to be premised on *ultra vires* analysis principally because of the limited law-making powers of LGUs.⁹⁹ In Dillon's law regimes, in fact, municipal corporations did not even have the broad and express grant to exercise police power unless specifically delegated by Congress,¹⁰⁰ which resulted in

94. Matthew J. Parlow, *Progressive Policy-Making on the Local Level: Rethinking Traditional Notions of Federalism*, 17 TEMP. POL. & CIV. RTS. L. REV. 371, 372 (2008). The baseline theory in the U.S. on the roles of cities in governance since the late 19th century has been that they are creatures of the State. *Id.* at 383 (citing Darin M. Dalmat, *Bringing Economic Justice Closer to Home: The Legal Viability of Local Minimum Wage Laws Under Home Rule*, 39 COLUM. J. L. & SOC. PROBS. 93, 102 (2005)).

95. John G. Grumm & Russell D. Murphy, *Dillon's Rule Reconsidered*, 416 ANNALS AM. ACAD. POL. & SOC. SCI. 120, 121 (1974). Dillon's Rule states that "there is no common-law right to local self-government and, as creatures of the [S]tate, localities may exercise only those powers expressly granted them." *Id.*

96. *Mandanas v. Ochoa, Jr.*, G.R. No. 199802, 869 SCRA 440 (2018).

97. *Id.* at 481 (citing *Merriam v. Moody's Executors*, 25 Iowa 163, 170 (1868) (U.S.)).

98. *Id.* "The modified Dillon's Rule has been followed in this jurisdiction, and has remained despite both the 1973 Constitution and the 1987 Constitution mandating autonomy for local governments." *Id.* at 482.

99. See Dalmat, *supra* note 94, at 103.

100. Paul A. Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1123 (2007).

infrequent chances at meaningful local legislation.¹⁰¹ State and local regulation hardly overlapped, leaving little potential for preemption analysis.¹⁰²

a. Expanded Power

LGUs in the Philippines do not have the equivalent constitutional anchor as states do in the U.S., and their powers are concededly limited.¹⁰³ However, they have increasingly been vested with substantial authority, enhanced autonomy, and even more regulatory elbow room.¹⁰⁴

Under Dillon’s rule regimes, local power was strictly construed. The LGC, however, has flipped this interpretative norm in its Section 5 (a), which has influenced Courts in more expansive readings of local power, to wit —

(a) Any provision on a power of a local government unit shall be liberally interpreted in its favor, and in case of doubt, any question thereon shall be resolved in favor of devolution of powers and of the lower local government unit. *Any fair and reasonable doubt as to the existence of the power shall be interpreted in favor of the local government unit concerned[.]*¹⁰⁵

LGUs have, in addition, been conferred the police power through the GWC, which comes with its own liberal interpretation canon.¹⁰⁶ LGUs, as seen in jurisprudence, can even act when the national government fails to do so.¹⁰⁷

101. *Id.*

102. *Id.*

103. *Magtajas*, 234 SCRA at 273.

104. LOCAL GOV’T CODE, §§ 2 & 3.

105. *Id.* § 5 (a) (emphases supplied).

106. *Id.* § 5 (c).

SECTION 5. *Rules of Interpretation.* — In the interpretation of the provisions of this Code, the following rules shall apply:

...

(c) The general welfare provisions in this Code shall be liberally interpreted to give more powers to local government units in accelerating economic development and upgrading the quality of life for the people in the community[.]

Id.

107. Ocean Conservancy & McKinsey Center for Business and Environment, *supra* note 7, at 37. An example is the regulation of plastics products. “[M]ovement

With greater power came the responsibility to use it, even if at variance with the national regulatory will. As shown in Table 1, there is a sampling of episodes where national and local regulations collided, and the varying outcomes at the Court's level.

Table 1. National versus Local Conflict Resolution Scorecard¹⁰⁸

LGU Triumphed	
Zoning/"Photobomber" building	Knights of Rizal v. DMCI Homes, Inc., G.R. No. 213948, 824 SCRA 327 (2017).
Department of Justice tax ordinance	Jardine Davies Insurance Brokers, Inc. v. Aliposa, G.R. No. 118900, 398 SCRA 176 (2003).
Department of Budget and Management (allowance, budget officer)	Dadole v. Commission on Audit, G.R. No. 125350, 393 SCRA 262 (2002).
Commission on Audit (RATA)	Leynes v. Commission on Audit (COA), G.R. No. 143596, 418 SCRA 180 (2003).
Department of Social Welfare and Development (devolved personnel)	Plaza II v. Cassion, G.R. No. 136809, 435 SCRA 294 (2004).
Department of Agrarian Reform (reclassify, expropriation)	Luna v. Afable, G.R. No. 188299, 689 SCRA 207 (2013).
Department of Environment and Natural Resources (ordinance)	Ruzol v. Sandiganbayan, G.R. No. 186739-960, 696 SCRA 742 (2013).
Office of the President (IRA)	Pimentel, Jr. v. Aguirre, G.R. No. 132988, 336 SCRA 201 (2000).

forward requires leadership and support from national and especially local governments in the countries where the impact is sought." *Id.*

108. Agra, *supra* note 57. Table 1 was adapted from a listing in "Dos and Dont's for LGUs Under the Bayanihan Act," a lecture by Atty. Alberto C. Agra for the Ateneo Law Alumni Association, Inc.

Board of Investments (six-year exemption)	Batangas Power Corporation v. Batangas City, G.R. No. 152675, 428 SCRA 250 (2004).
Metropolitan Manila Development Authority (subdivision)	Metropolitan Manila Development Authority v. Bel-Air Village Association, Inc., G.R. No. 135962, 328 SCRA 836 (2000).
Metropolitan Manila Development Authority (driver's licenses)	Metropolitan Manila Development Authority v. Garin, G.R. No. 130230, 456 SCRA 176 (2005).
Regulate telecommunications tower (National Telecommunications Commission)	Smart Communications, Inc. v. Municipality of Malvar, Batangas, G.R. No. 204429, 716 SCRA 677 (2014).
National Power Corporation (voltage cables)	Hernandez v. National Power Corporation, G.R. No. 145328, 485 SCRA 166 (2006).
National Victorious	
Laguna Lake Development Authority (fish pens, dumpsite)	Laguna Lake Development Authority v. Court of Appeals, G.R. No. 120865-71, 251 SCRA 42 (1995).
Philippine Amusement and Gaming Corporation (casinos)	Magtajas v. Pryce Properties Corporation, Inc., G.R. No. 111097, 234 SCRA 255 (1994).
Land Transportation Office/Land Transportation Franchising and Regulatory Board (licensing)	Land Transportation Office v. City of Butuan, G.R. No. 131512, 322 SCRA 805 (2000).
National Telecommunications Commission (cable TV franchise)	Batangas CATV, Inc. v. Court of Appeals, G.R. No. 138810, 439 SCRA 326 (2004).
Philippine Charity Sweepstakes Office (lotto outlets)	Lina, Jr. v. Paño, G.R. No. 129093, 364 SCRA 76 (2001).
Housing and Land Use Regulatory Board (national projects)	Iloilo City Zoning Board of Adjustment and Appeals v. Gegato-

	Abecia Funeral Homes, Inc., G.R. No. 157118, 462 Phil. 803-19 (2003).
Professional Regulation Commission (profession)	Acebedo Optical Company, Inc. v. Court of Appeals, G.R. No. 100152, 329 SCRA 314 (2000).
Department of Agrarian Reform (conversion)	Ros v. Department of Agrarian Reform, G.R. No. 132477, 468 SCRA 471 (2005).
Office of the President (discipline)	Joson v. Torres, G.R. No. 131255, 290 SCRA 279 (1998).
Congress (jai alai franchise)	Lim v. Pacquing, G.R. No. 115044, 240 SCRA 649 (1995).

2. Preemption by Any Other Name

When facing such national versus local encounters, it is no longer the *ultra vires* question that applies by default. The Court does not automatically launch into preemption analysis in name, but for all intents and purposes, and using indicative terminology, it does apply the doctrine. The review of whether the local law conflicts with or regulates a field already reserved for national regulation are both pillars of preemption.

a. Conflict

In *Social Justice Society v. Atienza, Jr.*,¹⁰⁹ oil companies and the Department of Energy (DOE) challenged Ordinance No. 8027 of the City of Manila as unconstitutional for contravening Republic Act No. 7638, or the DOE Act of 1992, and Republic Act No. 8479, or the Downstream Oil Industry Deregulation Law of 1998.¹¹⁰ The Court's words were replete with standard preemption lexicon —

The question now is whether Ordinance No. 8027 *contravenes* [Republic Act No.] 7638 and [Republic Act No.] 8479. It does not.

...

109. *Social Justice Society (SJS) v. Atienza, Jr.*, G.R. No. 156052, 545 SCRA 92 (2008).

110. *Id.* at 145.

Nothing in these statutes *prohibits* the City of Manila from enacting ordinances in the exercise of its police power.

...

We do not see how the laws relied upon by the oil companies and DOE *stripped* the City of Manila of its power to enact ordinances in the exercise of its police power and to reclassify the land uses within its jurisdiction.¹¹¹

The *ponencia* surveyed the following decisions where the police power measure of the LGU clashed with national laws —

In *Tan v. Pereña*, the Court ruled that Ordinance No. 7 enacted by the municipality of Daanbantayan, Cebu allowing the operation of three cockpits was invalid for violating [Presidential Decree No.] 449 (or the Cockfighting Law of 1974) which permitted only one cockpit per municipality.

In *Batangas CATV, Inc. v. Court of Appeals*, the *Sangguniang Panlungsod* of Batangas City enacted Resolution No. 210 granting Batangas CATV, Inc. a permit to operate a cable television (CATV) system in Batangas City. The Court held that the LGU did not have the authority to grant franchises to operate a CATV system because it was the National Telecommunications Commission (NTC) that had the power under [Executive Order] Nos. 205 and 436 to regulate CATV operations. [Executive Order No.] 205 mandated the NTC to grant certificates of authority to CATV operators while [Executive Order No.] 436 vested on the NTC the power to regulate and supervise the CATV industry.

In *Lina, Jr. v. Paño*, we held that *Kapasiyahan Bilang 508, Taon 1995* of the *Sangguniang Panlalawigan* of Laguna could not be used as justification to prohibit lotto in the municipality of San Pedro, Laguna because lotto was duly authorized by [Republic Act No.] 1169, as amended by [Batas Pambansa Blg.] 42. This law granted a franchise to the Philippine Charity Sweepstakes Office and allowed it to operate lotteries.

In *Magtajas v. Pryce Properties Corp., Inc.*, the *Sangguniang Panlungsod* of Cagayan de Oro City passed Ordinance Nos. 3353 and 3375-93 prohibiting the operation of casinos in the city. We ruled that these ordinances were void for contravening [Presidential Decree No.] 1869 or the charter of the Philippine Amusements and Gaming Corporation which had the power to operate casinos.¹¹²

111. *Id.* at 148-49 (emphases supplied).

112. *Social Justice Society*, 545 SCRA at 149-50 (citing *Tan*, 452 SCRA at 76; *Batangas CATV, Inc. v. Court of Appeals*, G.R. No. 138810, 439 SCRA 326, 341 (2004); *Lina, Jr.*, 364 SCRA at 85; & *Magtajas*, 234 SCRA at 269-70).

The Court found that “[t]he common dominator of all of these cases is that the national laws were clearly and expressly *in conflict* with the ordinances/resolutions of the LGUs. The inconsistencies were so patent that there was no room for doubt.”¹¹³

As an indication of where they are prepared to go as far as implied conflict preemption is concerned, the Court left no doubt on the insistence on clarity with regard to the disparity —

When these ambiguous powers are pitted against the unequivocal power of the LGU to enact police power and zoning ordinances for the general welfare of its constituents, it is not difficult to rule in favor of the latter. Considering that the powers of the DOE regarding the Pandacan Terminals are not categorical, the doubt must be resolved in favor of the City of Manila[.]¹¹⁴

b. Express Preemption

Preemption, in name, is not unknown in the Philippines. Apart from the appearance via *Bayanihan*’s Section 4 (g),¹¹⁵ it has long been a staple in the realm of taxation.¹¹⁶

Article X, Section 5 of the 1987 Constitution recognizes the power of LGUs to create their own sources of revenue subject only to the limitations from Congress.¹¹⁷ Section 133 of the Local Government Code¹¹⁸ speaks of

113. *Social Justice Society*, 545 SCRA at 150 (emphasis supplied).

114. *Id.* at 150-51.

115. *Bayanihan to Heal as One Act*, § 4 (g).

116. *See* LOCAL GOV’T CODE, § 133.

117. PHIL. CONST. art. X, § 5.

SECTION 5. Each local government unit shall have the power to create its own sources of revenues and to levy taxes, fees, and charges subject to such guidelines and limitations as the Congress may provide, consistent with the basic policy of local autonomy. Such taxes, fees, and charges shall accrue exclusively to the local governments.

PHIL. CONST. art. X, § 5.

118. LOCAL GOV’T CODE, § 133.

SECTION 133. *Common Limitations on the Taxing Powers of Local Government Units.* — Unless otherwise provided herein, the exercise of the taxing powers of provinces, cities, municipalities, and barangays shall *not* extend to the levy of the following:

(a) Income tax, except when levied on banks and other financial institutions;

-
- (b) Documentary stamp tax;
 - (c) Taxes on estates, inheritance, gifts, legacies[,] and other acquisitions *mortis causa*, except as otherwise provided herein;
 - (d) Customs duties, registration fees of vessel and wharfage on wharves, tonnage dues, and all other kinds of customs fees, charges[,] and dues except wharfage on wharves constructed and maintained by the local government unit concerned;
 - (e) Taxes, fees, and charges and other impositions upon goods carried into or out of, or passing through, the territorial jurisdictions of local government units in the guise of charges for wharfage, tolls for bridges or otherwise, or other taxes, fees, or charges in any form whatsoever upon such goods or merchandise;
 - (f) Taxes, fees[,] or charges on agricultural and aquatic products when sold by marginal farmers or fishermen;
 - (g) Taxes on business enterprises certified to by the Board of Investments as pioneer or non-pioneer for a period of six (6) and four (4) years, respectively from the date of registration;
 - (h) Excise taxes on articles enumerated under the National Internal Revenue Code, as amended, and taxes, fees or charges on petroleum products;
 - (i) Percentage or value-added tax (VAT) on sales, barter[s,] or exchanges or similar transactions on goods or services except as otherwise provided herein;
 - (j) Taxes on the gross receipts of transportation contractors and persons engaged in the transportation of passengers or freight by hire and common carriers by air, land or water, except as provided in this Code;
 - (k) Taxes on premiums paid by way of reinsurance or retrocession;
 - (l) Taxes, fees[,] or charges for the registration of motor vehicles and for the issuance of all kinds of licenses or permits for the driving thereof, except tricycles;
 - (m) Taxes, fees, or other charges on Philippine products actually exported, except as otherwise provided herein;
 - (n) Taxes, fees, or charges, on Countryside and Barangay Business Enterprises and cooperatives duly registered under R.A. No. 6810 and Republic Act Numbered Sixty-Nine Hundred Thirty-Eight (R.A. No. 6938) otherwise known as the 'Cooperative Code of the Philippines' respectively; and
 - (o) Taxes, fees[,] or charges of any kind on the National Government, its agencies and instrumentalities, and local government units.

Id. (emphasis supplied).

the common limitations on the taxing powers of LGUs, exceptions which are explicitly removed from their scope by Congress.¹¹⁹ Here is preemptive language that cleanly prescribes the displacement of the local authority — that the taxing powers “shall not extend to the levy of the following.”¹²⁰

As early as 1968, the doctrine was pointedly referenced by the Court in *Victorias Milling Co., Inc. v. Municipality of Victorias, Negros Occidental*¹²¹ in relation to local taxation —

It is correct to say that preemption in the matter of taxation simply refers to an instance where the national government elects to tax a particular area, impliedly withholding from the local government the delegated power to tax the same field. This doctrine primarily rests upon the intention of Congress. Conversely, should Congress allow municipal corporations to cover fields of taxation it already occupies, then the doctrine of preemption will not apply.¹²²

c. Field Preemption

The Court has also previously applied principles of implied field preemption in rejecting local regulation. In *Batangas CATV, Inc. v. Court of Appeals*,¹²³ the Supreme Court declared that

[i]n this regard, it is appropriate to stress that where the [S]tate legislature has made provision for the regulation of conduct, it has manifested its intention

119. *Id.*

120. *Id.*

121. *Victorias Milling Co., Inc. v. Municipality of Victorias, Negros Occidental*, G.R. No. L-21183, 25 SCRA 192 (1968).

122. *Id.* at 205. In 2019, the Supreme Court lent its imprimatur to a Court of Tax Appeals (CTA) *en banc* decision in *The City of Makati and The City Treasurer vs. CEMCO Holdings, Inc.*, G.R. No. 247373, Aug. 7, 2019. The CTA decision included this disquisition —

In particular, paragraph (a) thereof decrees that save for banks and other financial institutions, LGUs are explicitly proscribed from imposing taxes, fees or charges of any kind, on items of gain or yield which were levied income tax by the national government. The rule is animated by the doctrine of preemption, or the instance where the national government elects to tax a particular area, impliedly withholding from the local government the delegated power to tax the same field.

Id.

123. *Batangas CATV, Inc. v. Court of Appeals*, G.R. No. 138810, 439 SCRA 326 (2004).

that the subject matter shall be fully covered by the statute, and that a municipality, under its general powers, cannot regulate the same conduct. In *Keller v. State*, it was held that[‘w]here there is no express power in the charter of a municipality authorizing it to adopt ordinances regulating certain matters which are specifically covered by a general statute, a municipal ordinance, insofar as it attempts to regulate the subject which is completely covered by a general statute of the legislature, may be rendered invalid. ... Where the subject is of statewide concern, and the legislature has appropriated the field and declared the rule, its declaration is binding throughout the State.¹²⁴

This rationale, though not explicitly referred to as preemption, clearly applies preemption terminology — “subject matter shall be fully covered” and “legislature has appropriated the field.”¹²⁵ Also, from the decision, “[N]othing herein should be interpreted as to strip LGUs of their general power.”¹²⁶ Moreover, the “‘regulatory power’ shall be vested ‘solely’ in the NTC” and “[w]ithin these areas, the NTC reigns supreme.”¹²⁷ These are also all core expressions of preemption analysis.

3. *Plus ça Change*

From origin analysis of what powers were conferred, up to the current “modified Dillon’s Rule,” local regulatory power has vastly expanded.¹²⁸ Focusing on these limitations of LGUs as mere creatures of the State fails to grasp the legal and political nuances of current national versus local relations.

Preemption now has more resonance in the Philippines, given the wider spaces where national and enhanced local regulatory power overlap. Nonetheless, the categorical statement in *Mandanas* that “[t]he modified Dillon’s Rule has been followed in this jurisdiction, and has remained despite both the 1973 Constitution and the 1987 Constitution mandating autonomy for local governments”¹²⁹ implies that the limited potency of local issuances vis-à-vis national regulations will endure.

This *Mandanas* statement may be revisited in keeping with the expansion of the local regulatory sphere. To harmonize or reconcile conflicting issuances

124. *Id.* at 341.

125. *Id.*

126. *Id.* at 337.

127. *Id.*

128. *Mandanas*, 869 SCRA at 484 (citing LOCAL GOV’T CODE, § 5 (a)).

129. *Mandanas*, 869 SCRA at 482.

in order to ascertain congressional intent is still the first order of business. If not feasible, then preemption may be resorted to.

IV. PREEMPTION'S EXISTENTIAL QUESTION

A. Confused, Confusing

Numerous cases and articles on the preemption doctrine have captioned it complex, not too clear, perplexing, confused, and messy.¹³⁰ In the U.S., federal preemption law is muddled, with decisions that are fractured and confusing.¹³¹ Justice Antonin Scalia described the doctrinal “chaos” as the “Court’s make-it-up-as-you-go-along approach to preemption.”¹³²

The doctrine is highly formulaic, though the formal categories fail to provide significant guidance in resolving cases.¹³³ Justice Hugo Black provides an oft-cited reality check —

There is not — and from the very nature of the problem there cannot be — any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress. This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula.¹³⁴

The absence in the Philippines of developed preemption jurisprudence begs the question of whether the same should even be reached locally. That other logically accessible arguments are resorted to by our courts is axiomatic. Yet, to the extent it has been applied, the same disorientation marks the local, limited preemption doctrine.

130. Diller, *supra* note 100, at 1116.

131. Untereiner, *supra* note 72, at 1263.

132. Jesse Merriam, *Preemption as a Consistency Doctrine*, 25 WM. & MARY BILL RTS. J. 981, 983 (2017) (citing *Oneok, Inc. v. Learjet, Inc.*, 135 S.Ct. 1591, 1603 (U.S.) (2015) (J. Scalia, dissenting opinion)).

133. Merrill, *supra* note at 65, at 738.

134. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

In *Magtajas*, while the Court conceded the city's power to regulate gambling, it proceeded to finesse the grant to cover only illegal gambling.¹³⁵ Since what was regulated was otherwise authorized by national law, they deemed the local regulation to be *ultra vires*.¹³⁶ It set forth that “[f]or all their praiseworthy motives, these ordinance[s] are contrary to [Presidential Decree] No. 1869 and the public policy announced therein and are therefore *ultra vires* and void.”¹³⁷

The Court reached that conclusion despite acknowledging the concurrence of regulatory authority between national and local governments.¹³⁸ As such, there were other avenues open, both for the city and the Court. The Cagayan de Oro city council could have amended their ordinance or repealed it. The Court could have, instead, declared the ordinance preempted given that it was arguably *intra vires*.

Victorias was a 1968 case, but it involved a 1956 ordinance at a time when the limiting effect of Dillon's rule was at its height.¹³⁹ It was only three years after in 1959, with the passage of Republic Act No. 2264, or the Local Autonomy Act of 1959,¹⁴⁰ that the strict Dillon canon of interpretation was relaxed into its more liberal Philippine version.¹⁴¹

135. *Magtajas*, 234 SCRA at 269.

136. *Id.* at 274.

137. *Id.*

138. *Id.* at 269.

139. Virginia Law Review, *Dillon's Rule: The Case for Reform*, 68 VA. L. REV. 693, 693-94 (1982). The rule was first articulated by Chief Justice John Forrest Dillon of the Supreme Court of Iowa in *City of Clinton v. Cedar Rapids and Missouri River Railroad* in 1868. “The philosophy underlying Dillon's Rule provides significant insights into the nineteenth century view of local government.” *Id.*

140. An Act Amending the Laws Governing Local Governments by Increasing Their Autonomy and Reorganizing Provincial Governments [Local Autonomy Act], Republic Act No. 2264 (1959).

141. *Id.* § 12 (1).

SECTION 12. *Rules for the Interpretation of the Local Autonomy Act.* —

- (1) Implied power of a province, a city or municipality shall be liberally construed in its favor. Any fair and reasonable doubt as to the existence of the power should be interpreted in favor of the local government and it shall be presumed to exist.

...

Id.

In *Victorias*, it can be seen that the formulation of the implied preemption rule was imprecise. It was premature to aver that once the national government taxes a particular area, it impliedly preempts local power over the same field. And it was specious to assert that when municipal corporations simultaneously cover a field already occupied by statute, then the preemption doctrine becomes inapplicable.

B. Concurrence, Concurrence, Concurrence

These statements conflict with the truism that conflict preemption, by definition, involves concurrent regulatory regimes.¹⁴² Clearly, before any such preemption may be confirmed, an elaborate ex post analysis is necessitated.

The fact is that the National Government, in its plenary legislative power exercised through Congress, may elect to regulate an area which it has previously authorized LGUs to regulate, in the same way that it may tax a field which it has also allowed LGUs to tax.

This is ever the starting point: concurrence, concurrence, concurrence. Unless and until there is a challenge to the power of the LGU on the basis of a clash, contravention, inconsistency, or violation with the national regulation, these concurrent powers may co-exist without incident.

C. The Analytical Touchstone

It is difficult enough to divine congressional intent in express preemption cases, though at least, there is statutory language as a starting point for analysis. Implied preemption cases are even more complex, as the person is in the dark and proceeding from the muteness of the legislature.¹⁴³ Implied field preemption has been criticized as “a naked judicial policy judgment unmoored from statutory text.”¹⁴⁴

Congressional intent is always the analytical touchstone of preemption analysis.¹⁴⁵ But the existence at all of the preemption doctrine attests to the

142. See *Geier*, 529 U.S. at 873.

143. See *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 388 (2000). The Court noted that “[t]he State’s inference of congressional intent [was] unwarranted ... simply because the silence of Congress [was] ambiguous.” *Id.*

144. Diller, *supra* note 100, at 1154.

145. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). The Court’s “analysis of the scope of the statute’s pre-emption [was] guided by [the] oft-repeated comment, initially made in *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963),

historical difficulty experienced by Congress in specifying that the lower law is superseded or to clarify whether it displaces the same from a field or area. Courts are, thus, forced to step in with educated guesses. These are actually policy determinations in disguise, but judges will always deny that they are engaging in judicial legislation. Accordingly, their *ad hoc* decisions become less transparent, appear inconsistent, and seem formalistically reasoned.¹⁴⁶

D. The Emperor's New Clothes

There are local government scholars who believe that preemption issues should be resolved simply through the application of ordinary rules of statutory interpretation and not through doctrinal categories such as conflict or field preemption that distort the determination of what Congress has done.¹⁴⁷

It is hard to ignore this contrary viewpoint. In many cases, the same results might have been reached on other constitutional grounds rather than by articulating the same in terms of preemption. Are we seeing something that is not there?

Professor Gardbaum makes a cohesive argument. The concurrence of regulatory power, as suggested by Hamilton,¹⁴⁸ is the only scenario where the issue of preemption arises. Congressional intent may clearly express that there is no delegated local power in the specific subject of regulation or in the field or area taxed.¹⁴⁹ Under our definitions, this would constitute express preemption. But there is, in fact, no preemption to invoke because of the absence of local regulatory authority.¹⁵⁰ Hence, there is no concurrence and no lower power that exists to be preempted.

Neither will the supremacy of the Constitution or of law apply when the local government is not authorized to enact regulations that collide with the national sphere.¹⁵¹ In this case, simple *ultra vires* analysis will suffice.

that 'the purpose of Congress is the ultimate touchstone' in every pre-emption case." *Id.*

146. Erin O'Hara O'Connor & Larry E. Ribstein, *Preemption and Choice-of-Law Coordination*, 111 MICH. L. REV. 647, 656 (2013).

147. Gardbaum, *supra* note 23, at 770.

148. See Hamilton, *supra* note 1.

149. LOCAL GOV'T CODE, § 133.

150. Gardbaum, *supra* note 23, at 770.

151. *Id.*

E. Case to Case

Whatever the conflict, supremacy of the higher power, of itself, does not displace the lower power's authority. The analysis is interstitial, involving specific state or local issuances as against specific federal or national laws. Should they clash, supremacy clauses are triggered as oracles to confirm that the higher regulation prevails. But it does not operate to nullify the entire lower regulatory power.

Preemption per se, particularly when it is implied, deprives the lower unit of authority to act at all in a given field. This is "strong medicine."¹⁵² Whereas supremacy resolves conflict, preemption is a "jurisdiction-stripping concept."¹⁵³ Co-equal powers continue with supremacy. In the case of preemption, co-equal powers terminate.¹⁵⁴

Seen through this lens, the decoupling of preemption from supremacy leaves it as an ordinary legislative power, and simple statutory interpretation analysis should be enough to determine what Congress truly intended.

However, most preemption cases compel a subjective determination of the "permissible degree of tension" between national and local regulatory issuances.¹⁵⁵ Tools of statutory interpretation are simply not equipped to answer the question of whether conflict, in its different shades, does or does not exist.

V. CONCLUSION

The overview in this brief Essay may aid in framing the discussion of a doctrine in search of its place in Philippine jurisprudence, subject to richer accounts of preemption review covering national versus local confrontations in article-length research.

In multi-level governance contexts, preemption becomes a critical legal concept when analysis goes beyond mere *ultra vires* or repeal determinations. The inevitable overlap of regulatory spheres will require mechanisms to resolve the conflicts created.

The LGC generously concedes the liberal interpretation of any local power in favor of devolution and the liberal interpretation of the GWC in

152. Merrill, *supra* note 65, at 732.

153. Gardbaum, *supra* note 23, at 771.

154. *Id.*

155. Merrill, *supra* note 65, at 729.

order to accelerate economic development and upgrade the quality of life of people in the community.¹⁵⁶ Interestingly, President Rodrigo Roa Duterte's reaction to the recent controversial suspension of the NLEX Toll Plaza's business permit by the City of Valenzuela was an admission in favor of the LGU and against the interest of a national government agency (the Tollway Regulatory Board concessionaire).¹⁵⁷ The President was emphatic, saying that the agency "cannot come barging in and overruling them because they (LGUs) have that inherent right."¹⁵⁸

Preemption means "barging in and overruling" these very efforts by LGUs to respond to critical local concerns, to experiment and innovate, and to espouse community values.

Unlike the general understanding of the term "preemption," which contemplates "prior seizure or appropriation [, or] a taking possession before others,"¹⁵⁹ preemption in this context displaces state or local law *after* it occupies a field.¹⁶⁰ These are the citizens' preferences as expressed through their elected legislators.¹⁶¹ Hence, in every case, Congressional intent should be cautiously clarified lest judicial authority exceed its limits.

In defense of preemption, autonomy can be parochial, exclusionary, and mindless of externalities.¹⁶² As against autonomy, centralism is equally a value.

156. LOCAL GOV'T CODE, § 5 (c).

157. Gabriel Pabico Lalo, *Duterte Says He Can't Blame Gatchalian for Fuming at NLEX Traffic Mess*, PHIL. DAILY INQ., Dec. 17, 2020, available at <https://newsinfo.inquirer.net/1372674/duterte-says-he-cant-blame-gatchalian-for-fuming-at-nlex-traffic-mess> (last accessed May 11, 2021) [<https://perma.cc/DQJ6-YVLH>].

158. ABS-CBN News, *'I Understand Him': Duterte Backs Valenzuela's Gatchalian in Tollway Row*, ABS-CBN NEWS, Dec. 17, 2020, available at <https://news.abs-cbn.com/news/12/17/20/i-understand-him-duterte-backs-valenzuelas-gatchalian-in-tollway-row> (last accessed May 11, 2021) [<https://perma.cc/N6LZ-8BTC>].

159. Merriam-Webster Dictionary, Definition of Preemption, available at <https://www.merriam-webster.com/dictionary/preemption> (last accessed May 11, 2021) [<https://perma.cc/VKZ5-BEWF>] (emphasis supplied).

160. U.S. Advisory Commission on Intergovernmental Relations, *supra* note 85.

161. *Id.*

162. Paradigmatic here is the Manila Truck Ban Ordinance of 2014 that resulted in runaway port congestion and placed a stranglehold on the country's main supply chain out of Metro Manila. The estimated economic cost was ₱43.85 Billion.

This is the core dilemma of vertical allocation of power that cabins the task of illuminating an opaque doctrine.

Llanto, *supra* note 17, at 9-10. The then President Benigno C. Aquino III could only remark that, “It’s a city ordinance that perhaps, nobody envisioned how bad this would amount to.” Andreo Calonzo, Aquino Blames Erap’s Truck Ban for Port Congestion in Manila, *available at* <https://www.gmanetwork.com/news/money/economy/378221/aquino-blames-erap-s-truck-ban-for-port-congestion-in-manila/story> (last accessed May 11, 2021) [<https://perma.cc/BWP6-8RN4>].