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# Navigating the Waters between Local Autonomy and State Preemption

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## Executive Summary

Local government continues to be the source of new and innovative solutions to specific problems confronting the lives of residents. However, local officials across the country have expressed strong concerns about the recent growth in state restrictions and preemptions of municipal and county authority. State restrictions are increasing in the wake of other actions since the Great Recession that have frustrated local leaders efforts to serve and improve their communities. These include cutbacks in discretionary financial aid, off-loading functional responsibilities without commensurate revenues, and unfunded mandates. Due to political stalemate in Washington, D.C., combined with inaction in many state legislatures, a resurgence of fend-for-yourself federalism may be on the horizon. However, many local governments are forging ahead with innovations and experiments in a wide range of policy areas. Some legislators and governors want to rein in local governments, not empower them. As a result, state-local relations have become more contentious and adversarial. This paper examines these trends and provides a framework for helping local government officials understand how best to navigate these governance issues while states continue to wrestle with the questions of how best to meet the needs of their citizens.

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## Introduction

The late Robert Dahl asked one of the most famous and fundamental questions in the field of political science: *Who governs?*<sup>1</sup> Volumes have been written in response to this question, even before Dahl articulated it. In the United States, the answer is pretty complicated. In fact, some scholars and pundits have argued that it's the wrong question. Rather, the better question to ask is: *Who govern?* This small change is enormously important because in the U.S. we have built an extensive array of governing institutions premised on the ideal of *separation of powers* as well as separation of responsibilities. So it isn't a question of which individual wields public authority. Rather, it is which people exercise this authority in their geographic area, in their particular branch of government, and over the public responsibilities assigned to their unit of government.

Unlike most other nations, the U.S. built a federal system of government, codified in the Constitution, which specifies the separation of responsibilities into three branches. Furthermore, the "federal" nature of the Constitution attempts to delineate between the responsibilities that are national in scope from those that are reserved to the state governments.

But what about the responsibilities of municipal and county general purpose governments? On this, the Constitution is silent. The federal system is a two-tiered system, and it never mentions local government once. As a result, the role of local government as a vehicle for the delivery of public services has varied and evolved considerably since the Founding and across each of the states.

It was not until 1868 that Iowa Supreme Court Judge John Dillon set down a legal precedent that became known as "Dillon's Rule" and that today serves as the fundamental governance principle underlying contemporary local government in the United States.<sup>2</sup> The rule established the concept that local governments exist only as extensions of their host state government with the mandate to carry out specific activities as specified in the state constitutions or through legislative actions. In short cities are "creatures of the state" and have no independent sovereignty.<sup>3</sup> In the strictest sense, cities (and all other local governments) cannot exercise public authority without the express directive from the state to do so.

Other jurists challenged this concept almost immediately,<sup>4</sup> but in 1903 the U.S. Supreme Court handed down a decision that confirmed the Dillon Rule as the law of the land.<sup>5</sup> Still, there was a resistance to the idea, particularly in the western states, that gave rise to a push for state constitutional changes or legislative grants of authority to local governments allowing these jurisdictions to operate with greater autonomy from their state governments. This came to be referred to as "home rule."

This debate over the balance between state authority and local autonomy continues to this very day. As a result of the federal system, separation of powers, fragmentation of responsibilities in the face of social and technological changes, and the continued muddled boundaries between state and local government, today's municipal and county leaders face a complex environment in which to attempt to address new issues that commonly arise for the citizens in their jurisdictions. This complexity

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<sup>1</sup> Dahl, R. (1961). *Who Governs? Democracy and Power in an American City*. Newhaven, CT: Yale University Press.

<sup>2</sup> *City of Clinton vs. Cedar Rapids and Missouri Railroad Company*, 24 Iowa 455 at 461 (1868).

<sup>3</sup> Frug, G. (1980). "The City as a Legal Concept," *Harvard Law Review*, 93(6): 1059-154.

<sup>4</sup> *People vs. Hurlburt*, 24 Michigan 44 (1871).

<sup>5</sup> *Atkins vs. Kansas*, 191 U.S. 207 at 220-21 (1903). See also, *Hunter vs. Pittsburgh*, 207 U.S. 161 (1907).

often lends itself to a hesitancy to act, which can stifle the innovations that are critical for local governments that need to address these new situations.

This discussion paper highlights the contours of this governance challenge, maps where the nation currently stands, and provides a framework for local leaders to identify where their discretion allows for greater action, where they should rely on state government for action, or where they should partner with their state government officials to address the issue. The paper includes a review of two specific policy areas where state governments have intervened to preempt local authority: telecommunications and minimum wage regulation. We also provide two discussion cases tied to these issues to highlight the application of the framework.

## A Nation of Governments

The 2012 Census of Governments reports 90,056 local governments in the United States. Of these, 38,910 (43.2 percent) are general purpose local governments with a wide range of policy responsibilities. These local governments include 3,031 counties, 19,519 municipalities, and 16,360 townships. In terms of special purpose governments, the U.S. is home to approximately 13,000 independent school districts. Additionally, there are about 38,000 special districts that focus on a single policy area, which may be for economic development, transportation, parks, sewer-sanitation, water conservation, mosquito abatement, or library districts, to name but a few.<sup>6</sup>

The 2012 Census of Governments also shows that the numbers of local governments vary considerably by state.<sup>7</sup> For instance, Hawaii is home to the fewest total number of local governments with 21 while Illinois has the most with almost 7,000. The average across the 50 states is 1,801 per state. When taking a state's population into account, there is also significant variation by state. For instance, while Hawaii still has the fewest governments by population (0.2 units of local government per 10,000 population), North Dakota exhibits the most with 38.4 units of local government per 10,000 population. Local government employment rates also vary widely, even taking population into account. Delaware has the lowest average number of local government employees at 63 employees per 10,000 population. Wyoming maintains the highest rate of local government employment with 286 local government employees per 10,000 population.<sup>8</sup>

The number of governments has changed considerably over time, with the growth in the nation and the migration patterns of the population. But growth is not the only factor influencing the number of jurisdictions. Technological changes, emerging social issues, and fiscal constraints can also influence the number of jurisdictions as well as the distribution of public service responsibilities among local government jurisdictions. So the complexity arises from multiple factors and increases the difficulty for local policy makers and administrators to know where their authority ends and state's begins.

Overlapping jurisdictions among school districts, other special districts, townships, municipalities, counties, and the state create a confusing quilt work of governance. These arrangements can also

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<sup>6</sup> Hogue, C. (2013). [Government organization summary report: 2012](#). Government Division Briefs, U.S. Department of Commerce, Economics and Statistics Administration, U.S. Census Bureau. 26 September 2013, G12-CG-ORG. Retrieved June 2, 2017.

<sup>7</sup> "Number of Local Governments by State." *Governing*. Data section. Retrieved October 1, 2016.

<sup>8</sup> Mossberger, K., Swindell, D., Parkhurst, N., & Tai, K. (Forthcoming, 2018). "Policy Analysis and Evidence-Based Decision Making at the Local Level," in J. Hird (Ed.), *Policy Analysis in the USA*. Bristol (England): The Policy Press.

create overlaps in service responsibilities or even gaps in service where no jurisdiction is sure who should be providing for those needs of the citizens.

When these doubts arise, communities now face three basic governance environments in their states to help guide their thinking: Dillon's Rule (i.e., strict construction), local autonomy (i.e., home rule), and state preemption.

## Dillon's Rule<sup>9</sup>

The current legal status of local governments in the United States today rests ultimately on the concept derived from the legal writings of Judge John Dillon. The "Dillon's Rule" doctrine actually predates his legal opinions,<sup>10</sup> but his work was the clearest articulation of the notion that local governments were not the equals of state governments (as the states were of the national government). Furthermore, Dillon argued that unlike the federal relationship between the national and state governments, local governments were not somehow separate or semi-sovereign from their states. Rather, he argued that local governments were simply administrative subdivisions of state government, empowered to carry out tasks for the state.

Dillon's legal scholarship provided guidance for determining the scope of local government powers. His rule stated that the powers of a local government are limited to:

First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation—not simply convenient, but indispensable. Any fair, reasonable, substantial doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.<sup>11</sup>

Dillon was writing at a time in the latter half of the 19<sup>th</sup> Century when states in the Midwest were home to cities that were significantly controlled by the graft and corruption of political machines. Much of his motivation was to rein in these forces and allow the more trustworthy state governments to intercede in local affairs, where necessary, to improve the activities of local governments.

His rulings and the subsequent decisions of the U.S. Supreme Court meant that local governments could only undertake those tasks or exercise those powers expressly given to them by their state constitutions or legislative statutes. Additionally, if there was any uncertainty about which level of government had authority or jurisdiction, it would default to the state government and the state judiciary would resolve it going forward.<sup>12</sup> "If local government supersedes the authority it is given, the state has the power to modify or revoke the local actions and powers. Ultimately under the Dillon

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<sup>9</sup> There is an extensive literature on the history and meaning of Dillon's Rule. For those interested in the historical evolution of the concept, we recommend the 1993 ACIR report (see next footnote for full citation). For those interested in a more in-depth legal analysis, we recommend: Frug, G. (1980). The City as a Legal Concept, *Harvard Law Review*, 93(6): 1059-154.

<sup>10</sup> Advisory Commission on Intergovernmental Relations. (1993). *Local Government Autonomy: Needs for State Constitutional Statutory, and Judicial Clarification*. A-127. Washington, D.C.: ACIR.

<sup>11</sup> Dillon, J. (1911). *Commentaries on the Law of Municipal Corporations, Volume I of V* (5th Edition). Ithaca, NY: Cornell University Press.

<sup>12</sup> Coester, A. (2004). "[Dillon's Rule or Not?](#)" *Research Brief*, 2(1). Washington, D.C.: National Association of Counties. Retrieved June 29, 2017.

Rule, local governments are tenants of the state.”<sup>13</sup> Even today, in states such as North Carolina, it is still up to the courts to determine whether a local government is authorized to act under the enabling legislation.<sup>14</sup>

## Local Autonomy

While Judge Dillon was not shy about his lack of trust in the Midwest’s local governments, his viewpoint was not universal. While he was writing about state supremacy, a counter viewpoint arose shortly thereafter. In this alternative view, some argued that local governments should have local autonomy (due to their distrust of *state* governments).<sup>15</sup> Broadly speaking, the concept of local autonomy is “...a *system* of local government in which local government units have an important role to play in the economy and the intergovernmental system, have discretion in determining what they will do without undue constraint from higher levels of government, and have the means or capacity to do so.”<sup>16</sup>

The 1993 ACIR report offers a more specific approach to the concept and bases its definition on the work of another scholar: Gordon Clark’s principles of autonomy.<sup>17</sup> “These principles distinguish between a local government’s power of initiative and its power of immunity. By initiative, Clark means the power of local government to act in a ‘purposeful goal-oriented’ fashion, without the need for a specific grant of power. By immunity, he means ‘the power of localities to act without fear of the oversight authority of higher tiers of the state.’”<sup>18</sup> Clearly, this runs counter to Dillon’s Rule in many regards.

The local autonomy initiatives began in the western states, became known as “home rule,” and found their way into law for the first time in 1913 in the state of California.<sup>19</sup> Today, 44 states have adopted some form of local autonomy through either a defined home rule charter or the “optional” form of home rule.<sup>20</sup> These states that have adopted local autonomy provisions typically offer their counties and municipalities one of these two options, and a few offer both.

A home rule charter is analogous to a local “constitution” that is written and voted upon by local citizens. A full formal charter provides a greater degree of autonomy in which the local government has more authority over operational, structural, and financial characteristics of its governance arrangement.

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<sup>13</sup> Russell, J. and Bostrom, A. (2016). “[Federalism, Dillon Rule and Home Rule.](#)” White Paper. A Publication of the American City County Exchange. Retrieved June 29, 2017.

<sup>14</sup> Bluestein, F. (2012). “[Is North Carolina a Dillon’s Rule State.](#)” Coates’ Canons: NC Local Government Law. Retrieved May 1, 2017.

<sup>15</sup> Coester, A. (2004). “[Dillon’s Rule or Not?](#)” *Research Brief*, 2(1). Washington, D.C.: National Association of Counties. Retrieved June 29, 2017.

<sup>16</sup> Wolman, H., et al. (2008). “[Comparing Local Government Autonomy Across States.](#)” GWIPP Working Paper. Washington, D.C.: George Washington Institute of Public Policy. Pp. 4-5. Retrieved June 29, 2017.

<sup>17</sup> Clark, G. (1988). *Judges and the Cities, Interpreting Local Autonomy*. Chicago: University of Chicago Press.

<sup>18</sup> Advisory Commission on Intergovernmental Relations. (1993). *Local Government Autonomy: Needs for State Constitutional Statutory, and Judicial Clarification*. A-127. Washington, D.C.: ACIR. P. 7.

<sup>19</sup> Coester, A. (2004). “[Dillon’s Rule or Not?](#)”

<sup>20</sup> Russell, J. and Bostrom, A. (2016). “[Federalism, Dillon Rule and Home Rule.](#)”

The optional form of home rule permits a local government to choose the type of structure it will adopt from a specific list of alternatives (e.g., the council-manager, council-executive, elected administrator, etc.). While this does not include the more important aspects of financial controls, these structural characteristics can still provide increased control better tailored to a specific community's needs.

But regardless of the form of local autonomy a community might opt to pursue, it does not change the fundamental legal principle that local governments are still creatures of the state. Rather, as Frug and Barron note, these local autonomy options are still just grants of authority, some of which are substantive. But other powers remain denied to local governments.<sup>21</sup>

## State Preemption

As noted, most states provide some degree of autonomy to local governments. However, with some regularity, new issues emerge that fall into a grey area in terms of whether a local government has the authority to act on its own. Sometimes, local officials will proceed and act in good faith, believing that their existing arrangement for local autonomy provides the authority to do so. And in some of those situations, their state government will take exception to those local government actions and will intervene in some manner to reverse those actions. These are instances of state preemption of local authority.

Preemption occurs when a higher level government uses its legal authority to cancel out a lower level government's actions. As noted in the recent National League of Cities report on preemption: "Preemption is the use of state law to nullify a municipal ordinance or authority. State preemption can span virtually all policy areas."<sup>22</sup> State governments have the legal authority to preempt local actions based on the legal doctrine of Dillon's Rule, which remains the foundation of local government law in the nation.

Preemption is not limited to states preempting their local governments. While the 10<sup>th</sup> Amendment to the U.S. Constitution reserves to state governments powers not expressly given to the national government, the national government has preempted numerous state actions over the years often through the incorporation of the Bill of Rights to the states through the Fourteenth Amendment. One recent example of preemption that has occurred in multiple states is the issue of drone ordinances that local governments adopt to regulate the increased usage of unmanned aerial vehicles. Phoenix was engaged in a deliberative process to regulate and carve out allowable air space for drones in the city. The Arizona legislature intervened and preempted *all* local governments from regulating drone utilization, reserving that authority to the state. Shortly after, the Federal Aviation Administration issued a statement preempting state governments from regulating drones and claimed regulatory jurisdiction for all airspace down to the ground. Recently, the U.S. House of Representatives passed a bill preempting state governments from barring automated cars from their roads, including state safety regulations on those cars.<sup>23</sup>

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<sup>21</sup> Frug, G. and Barron, D. (2008). *City Bound: How States Stifle Urban Innovation*. Ithaca, NY: Cornell University Press.

<sup>22</sup> DuPuis, N., et al. (2017). [\*City Rights in an Era of Preemption: A State-by-State Analysis\*](#). Washington, D.C.: National League of Cities. P. 4. Retrieved April 23, 2017.

<sup>23</sup> Shepherdson, D. (September 6, 2017). ["House Unanimously Approves Sweeping Self-Driving Car Measure."](#) *Reuters*. Retrieved September 6, 2017.



The motivation for the Local Government Research Collaborative (LGRC) to undertake research of state preemptions over local autonomy is due to the perceived increase in the exercise of state preemption activity. In fact, as we found in the research for this paper and is echoed in other recent research on local autonomy, state preemption of local actions *has* accelerated over the last several years.<sup>24</sup>

Local officials react to preemptions that they find offensive or interfering in a variety of ways. These include informal negotiations with state agencies and legislators, various forms of disobedience, and law suits. But with the rise of tensions between cities and their states over contemporary preemption practices, there is a significant concern when states impose penalties for non-compliance by local governments as part of state preemption legislation. Such penalties include reductions in state aid and exposure of local officials to personal liability in third-party lawsuits.<sup>25</sup>

## Examples of Autonomy, Preemptions, Restrictions, and Penalties

There are numerous illustrative examples of local autonomy actions, preemptions, restrictions, and penalties imposed by states. The majority of these changes have been in terms of preemptions over the past ten years. Perhaps the most notorious in terms of national attention emerged from North Carolina. Charlotte, the state's largest city and the nation's second largest banking center, passed a local ordinance in which the city banned discrimination against LGBTQ individuals and provided for transgendered individuals to use the bathroom of their choice.

The state legislature responded in great haste with H.B. 2 (a.k.a., the "Bathroom Bill") that not only overruled Charlotte's local ordinance, but also preempted all local governments in the state from passing any other non-discrimination ordinances. The bill went on to preempt the state's municipalities from establishing minimum wages that exceed the state minimum wage level. But the most infamous component of this bill was the requirement that students in all schools (k-12 as well as higher education institutions) had to use the bathroom that matched the student's gender as specified on their birth certificate.<sup>26</sup> The bathroom element of the bill was repealed in part in March, 2017, in response to considerable pressure from the community and business groups.<sup>27</sup> But the repeal left in place the preemption of local governments from legislating issues of bathroom access, non-discrimination regulation, and establishing minimum wage levels higher than the state level.

While North Carolina's Bathroom Bill received extraordinary coverage nationwide, the issue was not the most extreme state preemption in recent years. In Michigan, a state that had a long tradition of local autonomy has in recent decades seen legislative actions and court rulings change that trend. The article "Michigan: A State of Home Rule, Local Autonomy, and Emergency Managers," explains how the state has adopted the most invasive intervention policy in the nation: the Emergency Financial Manager Law.<sup>28,29</sup> This law and its various incarnations have triggered state takeover of

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<sup>24</sup> DuPuis, N., et al. (2017). [City Rights in an Era of Preemption: A State-by-State Analysis](#).

<sup>25</sup> Riverstone-Newell, L. (2017). "The Rise of State Preemption Laws in Response to Local Policy Innovation." *Publius: The Journal of Federalism*, 47(3): 403–425.

<sup>26</sup> Graham, D. (March, 2016). ["North Carolina Overturns LGBT-Discrimination Ban."](#) *The Atlantic*. Retrieved July 1, 2017.

<sup>27</sup> Hanna, J., Park, M., & McLaughlin, E. (March 30, 2017). ["North Carolina Repeals 'Bathroom Bill'."](#) *CNN*. Retrieved April 1, 2017.

<sup>28</sup> Gross, E. (December 3, 2011). ["Michigan: A State of Home Rule, Local Autonomy, and Emergency Managers."](#) *Michigan Policy Network*. Retrieved June 29, 2017.

<sup>29</sup> Nickels, A. (2016). "Approaches to Municipal Takeover: Home Rule Erosion and State Intervention in Michigan and New Jersey." *State and Local Government Review*, 48(3): 194-207.



more than a dozen city and county governments in Michigan over the past 20 years. The most prominent was the 21-month takeover of Detroit by an Emergency Manager who steered the city through the largest municipal bankruptcy in the nation's history.

Below is a small sampling of preemptions and other interventions that highlight the range of issues over which states are exercising their control, as well as the range of states within which these preemptive actions are unfolding. These examples also illustrate how preemptions can take the form of legislative actions, court cases, as well as punitive "threats" against local officials.

- **Denton (TX)** passed an ordinance limiting the exercise of hydraulic fracturing (a.k.a., fracking) for purposes of capturing natural gas as an energy resource within the city limits. Spurred on by the state's oil and gas lobby, the state legislature and governor quickly passed a law overturning Denton's ordinance (which Denton subsequently rescinded), and preempted any local governments in the state from passing regulatory ordinances that interfered with the practice of fracking.<sup>30</sup>
- **New Mexico** was the first state to ban schools from the practice of "lunch shaming" (not allowing a student to have lunch if his/her lunch bill was not paid up to date). While responding to federal pressure and not a specific incident, New Mexico and several subsequent states placed student health needs above school budgetary concerns, preempting school districts from employing such a practice.<sup>31</sup>
- **New York City (NY)** had passed an ordinance to impose a \$0.05 fee on plastic bags in an attempt to curb the use of such bags based on environmental and aesthetic concerns. However, just before fee was to go into effect in early 2017, Democratic Governor Cuomo joined with Senate Republicans and House Democrats to preempt the city from imposing the fee.<sup>32</sup>
- **Phoenix (AZ)** has a large immigrant population. In the years leading up to the election of Donald Trump, several cities established "sanctuary city" policies indicating their intention to limit their police departments' participation in ICE efforts to deport non-criminal suspects. With the election, this concern increased and additional cities established sanctuary city policies. Many Phoenixians wanted the city to adopt a similar policy. However, the state legislature had already preempted this move with a punitive measure in S.B. 1070 that fines any city declaring "sanctuary" status \$5,000 per day, cuts off the city's access to state shared revenue, and limits its access to federal monies.<sup>33</sup> Similarly, Texas' Republican Governor Abbott signed a bill that would remove any police officials from office if caught not cooperating with federal immigration officials, and would also fine them and sentence those officials to one year in jail.<sup>34</sup>

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<sup>30</sup> Shale, B. (June 16, 2015). "[Denton City Council Repeals Fracking Ban](#)." *Fort Worth Star-Telegram*. Retrieved April 17, 2017.

<sup>31</sup> Wogan, J. (April 11, 2017). "[Federal Pressure Could Spur More 'Lunch Shaming' Bans](#)." *Governing*. Retrieved April 12, 2017.

<sup>32</sup> McKinley, J. (February 14, 2017). "[Cuomo Blocks New York City Plastic Bag Law](#)." *New York Times*. Retrieved February 15, 2017.

<sup>33</sup> Sunnucks, M. (February 16, 2017). "[Why Phoenix Didn't Become a Sanctuary City as Other Big Cities Fight Trump](#)." *Phoenix Business Journal*. Retrieved February 20, 2017.

<sup>34</sup> Herskovitz, J. (May 7, 2017). "[Texas Governor Signs into Law Bill to Punish 'Sanctuary Cities'](#)." *Reuters*. Retrieved May 8, 2017.

- **Bloomington (IN)** had planned to annex a nearby area that was home to 15,000 residents. The city was proceeding according to the process laid out in state code (annexation is an administrative exercise in Indiana). Unexpectedly, the state legislature added an amendment to the state budget bill that “prohibits annexation of all properties proposed after December 31, 2016 and before July 2017.” Bloomington’s was the only annexation in the state proposed in that period. This amendment was added in the final hours of passing the budget and local leaders were caught by surprise. The city must now wait five years to proceed with their annexation plans.<sup>35</sup>
- **Hillsborough County and the City of Key West (FL)** had been trying to regulate ride-share services such as Uber and Lyft. Governor Scott interceded by signing legislation that preempted city and county governments from regulating these services. The legislation moves all regulatory control over these services to the state to ensure these companies operate under one set of rules across the state.<sup>36</sup>

As recently as August, the Florida legislature was pursuing other preemptive strategies relative to their local governments. Working with a collection of business groups, the Florida House considered H.B. 17. Called a “super preemption,” this bill would have prevented local governments in the state from passing *any* new business regulations.<sup>37</sup>

But perhaps the most ardent supporter of state control over local governments is Texas Governor Abbott. Earlier this year, the governor said: “As opposed to the state having to take multiple rifle-shot approaches at overriding local regulations, I think a broad-based law by the state of Texas that says across the board, the state is going to pre-empt local regulations, is a superior approach.”<sup>38</sup> While such a bill did not materialize during the 2017 legislative session, the comment was made during a flurry of bills aimed at preempting local autonomy in several public service areas.

The current level of state preemption activity underway suggests a significant increase over previous years. The research we conducted as part of this discussion paper highlights the varied public services that these preemptions target, as well as the fact that local autonomy issues are active in almost every state. We include seven brief case studies conducted in Arizona, Georgia, Iowa, North Carolina, Pennsylvania, Tennessee, and Utah. These provide more detail than the examples above and appear in the appendix.<sup>39</sup>

While changes to local autonomy are clearly occurring at an increasing rate, there remains the question of why? What are the arguments that support a call for more local autonomy? What are the arguments for greater state control? The next section highlights a range of answers to each of these questions.

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<sup>35</sup> Brocher, B. (April 28, 2017). “[What’s Next for Bloomington’s Annexation Proposal.](#)” *Indiana Public Media*. Retrieved May 8, 2017.

<sup>36</sup> Auslen, M. (May 10, 2017). “[Florida Bans Local Uber/Lyft Laws.](#)” *Governing*. Retrieved May 17, 2017).

<sup>37</sup> Keller, A. (August 20, 2017). “[How State Preemption Became a ‘Serious Problem’ for Local Governments in Florida.](#)” *Route Fifty*. Retrieved August 20, 2017.

<sup>38</sup> Svitek, P. (March 21, 2017). “[Abbott Wants ‘Broad-based Law’ that Pre-empts Local Regulations.](#)” *The Texas Tribune*. Retrieved July 1, 2017.

<sup>39</sup> The pilot studies included Colorado originally, but we expanded that case into one of the two full discussion cases at the end of the paper.

## The Arguments

Several local government outlets such as the National League of Cities, the Brookings Institution, Governing magazine, and Route Fifty, have devoted considerable attention to the issue of local autonomy and state preemption. But the argument that emerges from these outlets, as well as scholarly research, is a more subtle argument than simply local autonomy versus state control. A recent study of Michigan local government administrators highlights the nuances.

A large majority of Michigan's local officials (70 percent) believe that state government takes too much local decision-making authority away. However, that belief varies depending on the policy area. A majority of the respondents did not think the state took away too much authority on issues related to anti-discrimination, social justice, business, environment, and natural resources. They were more prone to this belief on issues related to local economic development, public financing, and taxes.<sup>40</sup>

While these results are only reflective of local government officials in Michigan, the idea that opinions about state control versus local control would vary by policy or public service area is intuitively appealing. Different policies and services have different scales of effect and thus can be better delivered by different sized jurisdictions to capture those scales. Furthermore, individuals' personal political perspectives may influence their opinions on these matters. Some people may be strong proponents of state government regulating issues of employee discrimination, but only as long as the state's policies align with their opinion about what those policies should be. The same can be seen among proponents of local autonomy.

Below is a summary of some of the common arguments heard to support both viewpoints and synthesized from scholarly literature, political actors, and think tanks.

### **In Support of Local Autonomy**

- From public officials like Alice Rivlin and Michael Bloomberg to scholars like Benjamin Barber and Richard Florida, there is broad consensus that cities and their urban areas are economic engines and the originators of our most innovative ideas involving economics, technology, architecture, governance, and art. Local communities should be allowed to vary in order to create stronger innovation laboratories. Curbing diversity among communities in how they operate will suppress innovation.
- Empowering local governments to run their own local affairs means the state government will be free to focus on state-level matters. This will actually improve the overall efficiency and effectiveness of government throughout the state.
- Similarly, creating a default presumption of local autonomy (instead of a strict construction like Dillon's Rule) will reduce the need for judicial interference in local governance and free the courts to focus on other issues.
- Local governments with control over their own local finances will create greater responsiveness by local officials to citizen demands rather than state officials far removed from the community.

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<sup>40</sup> Horner, D. & Ivacko, T. (May, 2017). "[Improving Communication, Building Trust Are Seen as Keys to Fixing Relationships Between Local Jurisdictions and the State Government.](#)" *Michigan Public Policy Survey*. The Center for Local, State, and Urban Policy, Gerald R. Ford School of Public Policy, University of Michigan. Retrieved July 1, 2017).

- Some feel that business interests are using state control as a means to circumvent local preferences regarding how businesses operate in their community or to restrict practices supported by industries, effectively using the state to get an exemption from local regulations.<sup>41</sup>
- Local autonomy can provide more opportunity for citizen engagement because citizens will be better able to see the effects of their participation better than trying to affect policy or service changes at the statewide level. This strengthens the civic fabric of communities. Put another way, local autonomy is better able to reduce the sense of disaffection many citizens feel toward government due to the perceived lack of awareness or concern about local issues expressed by state officials.
- As noted by Robert Shalhoub, the president *pro tem* for the Florida town of Lake Clarke, in response to the Florida's recent efforts to pass a super-preemption bill: "It's been touted that they [the legislators] know better than we do. Wrong. Absolutely wrong. We know what's best for our neighborhoods. We know what's best for our constituency. We live it every day."<sup>42</sup> This reflects the idea that local autonomy can facilitate faster responses to public problems since citizens are more familiar with the situation and the resources in a community than are distant state legislators and governors. Different communities have different needs and a one-size-fits-all approach by a single state government that is home to a diverse set of communities is not likely to meet the needs of most. This is especially true when the state legislature is dominated by representatives elected from rural areas and small communities.
- Finally, likely due to the political culture of the United States, many citizens feel that self-government is akin to a moral right.

### **In Support of Dillon's Rule and State Control**

- Perhaps the most common argument in support of state control is that statewide policy, particularly in terms of the regulation of businesses, creates a better business climate. Consistent requirements and regulations across an entire state lowers uncertainty and bureaucratic hurdles for businesses, thereby making them more profitable and supporting the economy of the state.
- State level governments attract more employees with technical expertise than is available across a multitude of lower jurisdictions. This expertise can be brought to bear to solve local problems that have regional consequences that spill over local jurisdictional boundaries.
- Complete devolution of certain powers can hinder the responsiveness of government when there is significant fragmentation of authority, such as in responses to natural and man-made disasters with effects that cross jurisdictional boundaries. The same is true with planning, where abutting jurisdictions need to coordinate wetlands and flood plain planning to mitigate the effects of storms like Hurricane Harvey.
- Dillon's Rule allows states to grant authority to local governments to be the lead agencies on very local scale issues (e.g., planning, zoning, and certain aspects of public financing).

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<sup>41</sup> Grabar, H. (September 9, 2017). "[The Shackling of the American City](#)." *Slate*. Retrieved August 8, 2017. Highlights an example from the 1990s of widespread preemption supported by ALEC-banned restrictions on smoking in response to pressure from the tobacco industry.

<sup>42</sup> Keller, A. (August 20, 2017). "[How State Preemption Became a 'Serious Problem' for Local Governments in Florida](#)."

- In those situations where a local government would like to exercise greater control than what the Dillon's Rule state allows, local officials can petition the state for a grant of that authority that can be made to that single jurisdiction (if special legislation or "local bills" are permitted in the state).
- The Dillon's Rule approach allows for experimentation by allowing a select number of local governments to "test drive" new powers without running the risk of all local governments taking a new power and some creating problems as a result (when a state is willing to allow experimentation).
- State officials argue that Dillon's Rule provides for a more efficient service delivery system as opposed to the state setting a standard and having a multitude of delivery systems that need to be established to meet that standard.
- Dillon's Rule can provide local officials "cover" for not acting on the desires of the community when what the community wants is bad for the jurisdiction.
- Dillon's Rule allows state governments to curb the worst aspects of irresponsible, corrupt, or uncooperative local governments.
- Home rule advantages suburban communities while placing central cities in a disadvantageous position. Dillon's Rule is better able to protect all cities through redistributive policies that individual cities likely cannot afford or would choose not to do.<sup>43</sup>
- Dillon's Rule allows states to protect individual rights that could too easily be trampled by the parochial nature of local communities.

These arguments for local autonomy and state control are not mutually exclusive of one another and individuals could hold positions from both sets of arguments. As our framework highlights below, Dillon Rule states and "home rule" states are not the only two options and, in fact, neither actually exists in its purest sense. Rather, all states have elements of both.

And further complicating this picture in terms of how these arguments play out in the real world, one cannot dismiss or ignore the role politics and partisanship play in these decisions.<sup>44</sup> The idea of local control and moving decision-making authority closer to the individual and away from "the government" has traditionally been a philosophical foundation stone of the modern Republican Party. State legislatures and governorships are dominated today by Republicans. And yet most of the state preemption efforts to centralize authority in state government and away from local government is happening in Republican dominated legislatures. This is particularly acute in the relations between "red" statehouses and "blue" central cities.

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<sup>43</sup> Opponents of Dillon's Rule counter that state control actually protects better off suburban communities *from* redistributive policies that would help central cities.

<sup>44</sup> Richardson, L. & Milyo, J. (2016). "Giving the People What They Want? Legislative Polarization and Public Approval of State Legislatures." *State and Local Government Review*, 48(4): 270-281.

## Where We Are Today

Of particular concern for local officials in recent years has been the rise in preemption legislation, a change in the basic purpose of preemption, and an increase in the punitive consequences for non-compliance. Research has found a steady increase in preemption bills across the country since 2011.<sup>45</sup> The recent survey by the National League of Cities, for example, found that 42 states had preempted local authority in ride sharing, 24 had done so regarding minimum wage, 17 had preempted paid leave policy, and another 17 had restricted municipal broadband authority.<sup>46</sup>

To understand better the changing dynamics of state-local relations in terms of both restrictions and empowerment of local governments, we conducted a nationwide electronic review of state legislative actions in eight pilot states covering any issue involving a limitation or expansion of local authority. We examined these from 2001 to mid-2017. The appendix to this paper summarizes seven of the eight pilot cases in more detail.<sup>47</sup> Upon completion of the pilot studies, we examined the legislative actions of the remaining states but with a more limited focus on two specific policy areas: minimum wage policy and telecommunication issues. These more focused reviews provide the basis for the Discussion Cases at the end of this paper.

Overall, we collected data on state actions that preempt or expand local authority between 2001 and mid-2017. We identified 164 laws, covering a wide range of policy areas. Highlights from this legislative review include:

- In general, the number of actions taken per year has increased since 2007, at the rate of about 0.4 additional state laws limiting or expanding local power each year (see Figure 1).
- Just over half (52 percent) of state actions were enacted by Republican trifectas, meaning Republicans controlled both state houses and the governorship. Just under one-quarter (24 percent) were enacted by Democratic trifectas, meaning that states are more likely to pass legislation regarding local government powers when one party controls both the executive and legislative branches of state government (see Figure 2).
- The vast majority (73 percent) of the actions taken by states limited local governments' power or authority in economic, social, and environmental policy areas (see Figure 3).
- In most cases, there was no clear event that triggered state action.
- Regionally, no Northeastern states passed a preemptive statute on either minimum wage/conditions of employment or telecommunications/broadband between 2001 and mid-2017. During this time period, nine Southern states (especially Texas, Louisiana, and Arkansas) took 22 preemptive actions, eight Midwestern states took 12 actions, and three Western states took six actions.

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<sup>45</sup> Riverstone-Newell, L. (2017). "The Rise of State Preemption Laws in Response to Local Policy Innovation."

<sup>46</sup> DuPuis, N., et al. (2017). "[City Rights in an Era of Preemption: A State-by-State Analysis.](#)"

<sup>47</sup> The eighth, Colorado, is expanded in more detail as one of the two discussion cases at the end of the paper.

Figure 1

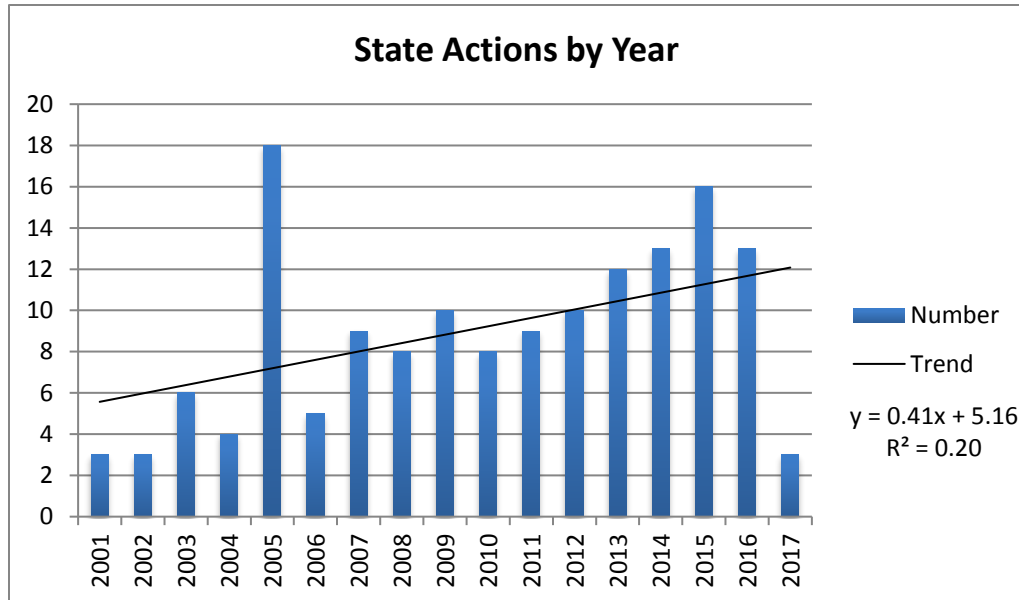


Figure 2

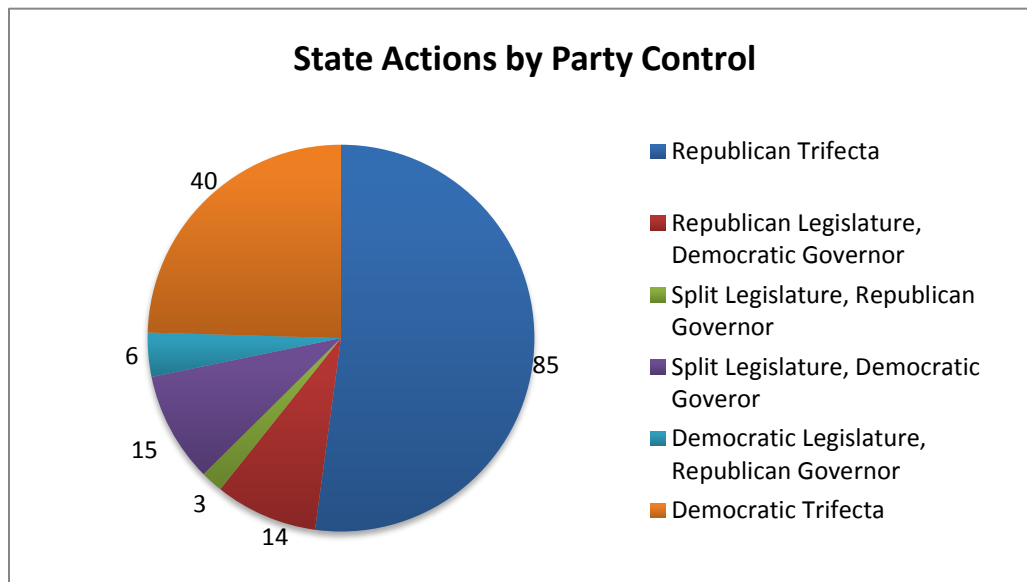
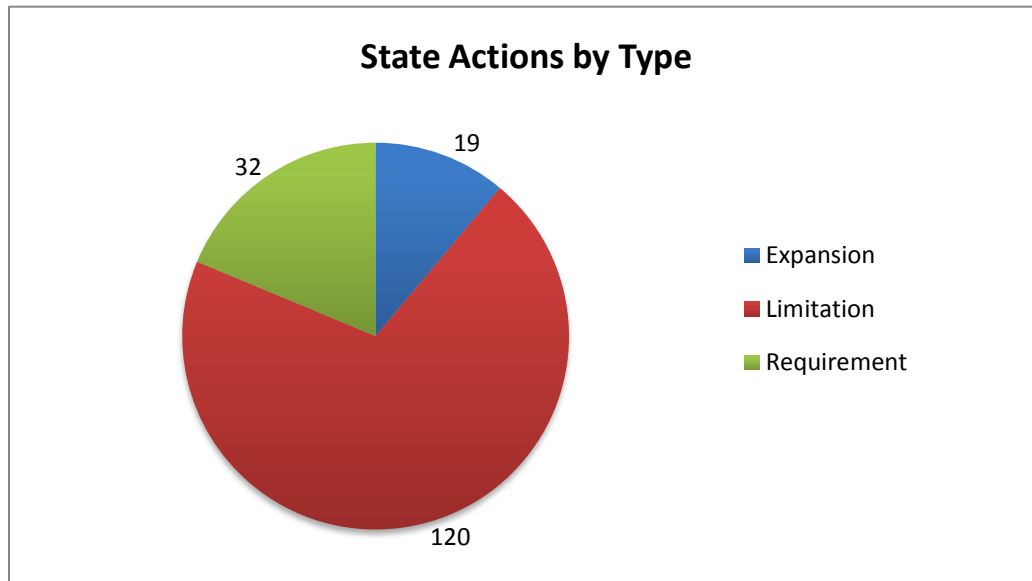




Figure 3



Our review of state legislative enactments reveals other actions in addition to preemptions. These included *bans* (e.g., plastic bags, breast-feeding in public), *restrictions* (e.g. local election dates), and *requirements* (e.g., allow use of sign walkers, prohibit driving on unpaved surfaces that are not streets or roads, American flags that are displayed by local governments must be manufactured in the United States, and distribution of information pamphlets prior to an election on bond, sales, or property tax measures). States also passed laws protecting local regulatory authority and allowing for more stringent local regulation (e.g., time limits of idling automobiles, elevator safety, building codes, open containers, low-efficiency plumbing features and water conservation). Furthermore, some laws declared an area to be an issue of statewide interest or concern, but did not preempt local authority (e.g., regulation of massage therapy, internet sweepstakes cafes, poison control services, trap grease, wireless facilities).

Most of the state actions involved preemption of local authority and in many cases the preemptions were in very specific fields that did not involve core services. The subjects of these preemptions included regulation of:

- local firearms and ammunition;
- sale and use of consumer fireworks;
- pest management;
- livery vehicles, taxis, and limousines;
- trampoline parks;
- expansion of fire access roads;
- private employee benefits, compensation, leave, and breaks;
- knives and knife manufacturing;
- individual and business reporting or measuring energy usage;

- spyware and consumer information collection;
- licensing for plumbing, HVAC, sheet metal professionals and contractors;
- use of telephones and electronic devices while driving;
- lotteries; and
- non-profit gaming.

## **A Framework for Assessing Local Government Autonomy**

The goal of this paper is to help elected and administrative local government officials better understand the environment in which local autonomy and state control are evolving. Our hope is that officials will be better able to take actions that meet their local community needs while being aware of and sensitive to the governance situation in which they are operating. In this section, we bring together many of the elements and the lessons learned from the previous review and research above into a framework to aid in understanding where one's community sits in this governance environment.

Part of developing this awareness is realizing that the nature and breadth of state delegation of authority to local governments is only one of a number of factors that shape the autonomy of local governments in a state. It is useful to think of state-local relations as a range of interactions. States may permit local action, restrict local action, and/or require local action. The exact form of these approaches may differ in home-rule and Dillon's-rule states, but they can all occur in all states. They are expressed in different types of actions. These features are presented in Table 1.

**Table 1. Factors Contributing to Variations in Local Autonomy**

Nature of state-local interaction	Type of state-local legal relationship		Type of action
	Home rule states or local governments	Dillon's rule/non-home-rule states or local governments	
<b>Permit local action</b>	Broad authorization to all or to designated municipalities plus specific authorization in laws	Express powers granted to city in charters or in state law	Broad or specific authorization <sup>48</sup>
	Use classification to permit some cities to act	Local bill to grant power to a specific city ( <i>if local legislation is allowed</i> ) or group of cities	Limited or targeted authorization
<b>Restrict local action</b>	Fail to include in general authorization <sup>49</sup>	Fail or refuse to grant express power	Omission
	Use classification to prevent some cities from acting	Intervention in single jurisdiction ( <i>if local legislation allowed</i> )	Targeted restriction
	Nullify local policy/program/practice in conflict with state laws	Nullify local policy/program/practice that is not expressly granted or fairly implied	Nullification
	Forbid local action that is not consistent with state law <sup>50</sup>	Forbid local action that is not consistent with state law	Prohibition
	Sanctions imposed for specified actions <sup>51</sup>	Sanctions imposed for specified actions	Penalize
	Preemption	Preemption	Preempt the authority of local gov'ts to act in specified areas
<b>Require local action</b>	Set standards that all governments must meet <sup>52</sup>	Set standards that all governments must meet	Requirements
	Require all governments to act (e.g., unfunded mandate) or comply with requirements	Require all governments to act (e.g., unfunded mandate) or comply with requirements	Mandates

<sup>48</sup> Cities and counties must agree to use the authority. Only one city in Utah uses a home rule charter.

<sup>49</sup> Iowa provides home rule in the state constitution, but does not permit local fiscal autonomy.

<sup>50</sup> For example, forbidding "lunch shaming" programs.

<sup>51</sup> For example, penalties for "sanctuary cities".

<sup>52</sup> For example, requiring local governments to apply the same property tax rate to all property owners regardless of income.

### **Permit Local Action**

States must authorize local governments to act. Home rule states permit action by a broad authorization to all or selected cities. For example, in California, “charter cities” have broad authority but general law cities do not. In non-home-rule states, cities have the express powers that are included in their charter approved by the state or in state laws that grant specific powers. It is important to recognize that the availability of authority does not mean it will be accepted and utilized by local governments. An effort to determine the extent of local autonomy should begin with an examination of the authority that is available. In Utah, even though cities have the opportunity to become charter cities and have greater freedom of action, only Tooele City continues to operate as a charter city. Local governments do not necessarily choose to use all the legal authority that has been granted to them.

Home rule states can provide selective authorization by using a classification system that permits cities meeting a qualification to exercise the specified authority (e.g., population over 100,000). The same approach can be used in non-home-rule states, but more targeting is possible as well. If “local legislation” is permitted as is the case in 21 states, an authorization of power can be granted to a specified local government.<sup>53</sup>

Although a local bill can represent state intrusion into the affairs of a local government, in the past such actions were often used to provide local choice and experimentation. Local bills were developed at the request of local government officials in cooperation with the state legislative delegation from the county. When the delegation unanimously supported the local bill, the legislature as a whole typically would approve it. This process does not work as smoothly when there are partisan differences between the urban area requesting the change and the majority of the legislature. For instance, the request may simply be denied. Alternatively, some local officials might fear that the request will be altered by the legislative majority to impose an unwanted change on the local government. Thus, local governments appear to be more cautious in requesting local legislation.

### **Restrict Local Action**

Restrictions on local government action come in many forms. Given that powers have to be authorized by the state in broad or specific language, omitting a power from those specified or refusing to grant a power is a major limiting factor. New York City attempted to replicate the traffic control measures adopted in London and other large cities abroad, but its grant of limited home rule in the state constitution did not override a prohibition on setting charges and fees for the use of public highways.<sup>54</sup> During Mayor Bloomberg’s administration, city officials requested authorization from the legislature to set a congestion charge, but the legislature denied the request.

Local legislation can be used to restrict as well as to allow local action. Restrictions may be imposed selectively when applied to certain classes of cities in home rule states. For example, Orange County, North Carolina, was recently denied its power to charge impact fees on developers to provide funds for the educational system, because legislators believed the county was charging

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<sup>53</sup> Krane, D., Rigos, P., & Hill, M. (eds.). (2001). *Home Rule in America: A Fifty-State Handbook*. Washington, D.C.: Congressional Quarterly Press. (Table A1).

<sup>54</sup> Frug, G. and Barron, D. (2008). *City Bound: How States Stifle Urban Innovation*.

excessive fees. Other local governments in North Carolina still have the expressly granted power to impose these fees.

Local governments' powers are subject to challenge in state courts and are therefore subject to nullification. For home rule governments, the basis for the challenge may be inconsistency with state law. In Dillon's rule states, judges use the rule as a guideline to determine whether to permit or overturn an established power. In addition, the legislature can intervene to overrule a practice that it objects to in a single jurisdiction.

The broadest form of restriction is preemption. States may preclude local governments from acting in selected areas of policy. As noted previously, the number of state preemptions has risen in the past decade. This reflects differing political perspectives in state government and demonstrates a strong assertion that states have the right to control policies within local jurisdictional boundaries. The American Legislative Exchange Council (ALEC) has assisted in advancing the practice of preemption developing model preemption laws in a wide range of areas, including local wage ordinances, pesticide and GMO restrictions, public broadband, internet taxation, rent control, gun control, cell phone regulation, and charter school authorization.<sup>55</sup> According to one observer, "Thanks in part to ALEC's promotion of the concept, preemption has become the most powerful statehouse tactic of our time."<sup>56</sup>

Unlike nullifying or overriding an existing local law, preemption occurs before local governments can approve a policy in the targeted area. There is only a minor difference in the number of preemptions by the type of state-local legal relationship. The ten states classified as "home rule" states in the 1980 ACIR report had an average of 1.6 preemptions among the six types examined by the National League of Cities. The non-home-rule states had an average of 2.2. On the other hand, 60% of the home rule states had zero or one preemption compared with 35% of the non-home-rule states, and none of the former had more than three preemptions. Seven of the non-home-rule states had four or five preemptions. Thus, home rule status is not a full protection against state preemption, but non-home-rule states appear to be more vulnerable.

The two types of action can be combined. In North Carolina, the Charlotte ordinance protecting rights of persons regardless of their sexual orientation or sexual identification was nullified by legislative action. In the same general act, all other local governments in NC were preempted from taking similar action. The same combination occurred in Texas when Denton's 2014 attempt to control fracking was nullified, and then a Texas statewide prohibition of local government controls of fracking was passed in 2015. The minimum wage increase approved in St. Louis in 2015 was overturned by the legislature, and all other local governments are prohibited from mandating the minimum wage starting in August, 2017.

Preemption is particularly disruptive of the relationship of state and local governments because the prohibition of involvement covers all local governments in the state and because of the nature of preemption itself. The established pattern in Dillon's-rule states was that local governments would initiate a new policy or program with the possibility of a later challenge in court. Preemption overrides this process and does not permit local governments to experiment in new areas. Furthermore, the decision about the appropriateness of local government action is being made by the legislature with

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<sup>55</sup> Bottari, M. & Fischer, B. (May 30, 2015). "[The ALEC-Backed War on Local Democracy](#)." *Huffington Post*. Retrieved May 25, 2017.

<sup>56</sup> Grabar, H. (September 9, 2016). "[The Shackling of the American City](#)." *Slate*. Retrieved May 25, 2017.

no clear criteria for what local governments will be permitted to do in place of the cautious but clear tests of compliance with state law and/or express authorization.

### **Require Local Action**

The final area of interaction is state *requirements* of action by local governments. Standards set limits or impose responsibilities that affect autonomy. According to the National League of Cities, 42 states have some sort of tax and expenditure limitation on their local governments, including all ten states they classify as “home rule” states. The local autonomy that is supposed to be available to these local jurisdictions is constrained by the limited capacity to raise or spend resources.

Additionally, states may require local governments to provide services with expenses covered from the local budget. These “unfunded mandates” require commitments of funds that are not available for other purposes. Recently, federal and some state governments have required that local governments cooperate in specific ways with federal immigration authorities in identifying and turning over persons who are undocumented. Many local governments object that they cannot be incorporated into the federal government enforcement process because they have to fulfill their own responsibilities to protect the safety and well-being of all local residents. Furthermore, if residents cannot trust local law enforcement, jail, and court officials to protect their identity, they will fear cooperating with officials to combat criminal activity they observe or of which they are victims. As noted previously, some state governments have passed legislation threatening sanctions for local governments they consider to be providing “sanctuary” to undocumented residents.

The imposition of requirements can also have *indirect* effects on the capacity to innovate, as illustrated by the slow development of affordable housing in California. In many states, local governments are not permitted to require the inclusion of affordable housing in new developments.<sup>57</sup> California would seem to be a favorable setting for promoting affordable housing because of the high level of need, and the clear signal from state government to expand affordable housing. Other factors in California, however, including the relationship between state and local government and the extensive state requirements for local government action, hamper success on this policy goal. As one observer summarized the local-state relationship: “it’s hard to exaggerate how little control California communities have over their fate.”<sup>58</sup>

The biggest impediments to increasing the number of affordable housing units appears to be state (and some local) growth controls, state environmental regulations that slow down and increase the cost of construction, and the state limits on local taxes (especially Proposition 13) that create disincentives to building housing. According to an article by Mathews: “This state of affairs fuels NIMBYism. With their local representatives having relatively little power, local communities cling to the power they do have: saying no to change in their communities. California’s direct democracy allows communities to use local ballot initiatives to limit growth restrictions, no matter the statewide need for more housing.”<sup>59</sup>

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<sup>57</sup> For example, inclusionary zoning is not permitted in North Carolina. Arlington County is the only local government in Virginia with this authority (which it has used to great advantage).

<sup>58</sup> Mathews, J. (July 31, 2017). [“Will California’s Housing Shortage Epidemic Infect the Rest of the West?”](#) *Zocalo*. Retrieved August 4, 2017.

<sup>59</sup> *Ibid.*

Taken together, the factors in Table 1 are strongly tilted toward restricting locally initiated action and away from permitting local government action. Given this environment within which local officials must operate, what options are available over the different kinds of governance structures in which local governments are embedded?

## How Local Governments Can Take Action

If a community is considering a new approach to address a local goal or need, then local officials can use the factors in Table 1 as a checklist of opportunities and constraints. A community can use these factors to assess what the prospects are for being able to proceed into new policy areas or service responsibilities. The opportunities or constraining factors may differ depending on the policy being considered.

Along with this assessment of opportunities and constraints, the community can consider how it might move forward to accomplish the change it seeks to make. Table 2 provides a summary of possible approaches.

**Table 2. How Local Governments Can Take Action**

<b>Type of state-local legal relationship</b>		
<b>Home rule states or local governments</b>	<b>Dillon's rule/non-home-rule states or local governments</b>	<b>Type of action</b>
Locally initiated legal action within broad powers. Take advantage of home rule option if available	Locally initiated legal action within granted powers	Use legal powers and test the limits
Seek broad authorization for all cities from legislature for previously ungranted power	Seek specific authorization from legislature for all local governments or request local bill to permit action	Request additional powers
Find method that is consistent with state law	Find method that complies with or circumvents restrictions	"Workaround"
Change state policies		Referendum
Resist preemptions and limitations		Defiance
Awareness raising by the government and partnerships with nongovernmental organizations to promote preferred policy outcome		Advocacy and voluntary efforts



### **Use Legal Powers and Test the Limits**

The first option is to determine whether the local government can make a plausible case that it has the authority to act. Being the first government in a state to enter a new area of policy does not necessarily mean that it is not permitted. Furthermore, it is possible that the constraint is not the lack of legal authority but the presence of other requirements or expectations that interfere with setting a clear policy commitment (as illustrated in the case of the barriers to affordable housing in California mentioned above). The approach needed may be to untangle constraints and develop a clear commitment to act in the needed policy area.

This general approach may include testing the legal limits of local government action. Seattle has recently established an income tax of 2.25% for individuals with an income over \$250,000 per year. Opponents argue that there are constitutional and legal obstacles to this tax. Seattle's actions will determine what Washington law will permit. Testing the limits is an appropriate approach, but it must be done in a reasonable way taking state law into consideration. Claiming or exercising a power that is clearly beyond the scope of expressed powers can not only be nullified by court or legislative action, the action may lead to penalties and needless court costs. Since 2011 in North Carolina, a judge may award attorney's fees and court costs to challengers that prevail in suits against local governments if the judge finds that the local government "acted outside the scope of its legal authority."<sup>60</sup> As noted in the North Carolina "bathroom bill" example, testing the limits can also provoke state intervention to nullify one local government's actions and then go further by passing a preemption measure limiting all other local governments in the state.

### **Request Additional Powers**

Second, the government can seek authorization either through a grant of power that would apply to all cities and/or counties or by requesting local authorization. A consequence of this approach is that it clearly signals local government's hope to enter the new policy area and is an acknowledgement that the power is not currently available for local governments to use.

### **Work Around the Limits**

Third, the government can seek to find a method of action that is consistent with state law in home rule states. In other states, the local government could attempt to find a way to pursue the policy by finding a method that complies with or circumvents restrictions. An example is a current effort in Durham (NC) to find a way to offset sharp increases in property appraisals and tax bills in gentrifying neighborhoods. City revitalization efforts and changing market conditions have increased the attractiveness and elevated the housing prices in neighborhoods close to downtown with adverse effects for long-term, low-income homeowners.

North Carolina law requires that properties be appraised based on the market value of nearby properties, and all property owners are required to pay the same property tax rate. The city has considered providing some form of tax relief to low-income families who do not qualify for the existing state relief programs aimed at elderly and handicapped homeowners. Although the city cannot change the appraisal or tax rate for a low-income homeowner, it considered using its

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<sup>60</sup> Bluestein, F. (2012). ["Is North Carolina a Dillon's Rule State."](#)

community development and housing improvement powers to provide housing stabilization assistance to low-income homeowners in neighborhoods with escalating property values. Using what one council member referred to as a “Durham workaround,” the city council has approved neighborhood stabilization grants to the residents of one neighborhood next to downtown equivalent to the amount of their recent tax increase.<sup>61</sup> This workaround approach would create a local tax relief program while efforts continue to broaden the state relief programs. Creativity and determination are required to find such approaches.

### **Put Initiative on State Ballot**

There are three additional approaches that can be taken in most states regardless of the legal position of local governments. The most ambitious of these three is to change state policies and legal stipulations through the state initiative process. A successful example of this is the movement in Arizona to raise the minimum wage. This effort in 2016, which survived court challenges in 2017, raised the state minimum wage to \$10 in 2017, and then incrementally to \$12 by 2020. The efforts in several other cities to raise the minimum wage that were being threatened with state nullification became a uniform approach statewide. Similar efforts were successful in Colorado, Maine, and Washington in November, 2016. This approach is a major undertaking that would obviously require a collective effort by local governments in a state, probably with coordination assistance by the state’s league of cities and counties or other similar organizations.

### **Defy State Restrictions**

Local governments can defy state restrictions and approve programs/actions that counter state law. Kansas City voters approved an increase in the minimum wage on August 8, 2017. It will run into the state limit of \$7.70 an hour that takes effect on August 28. The action, though largely symbolic, may help to activate the groups that started a petition drive on August 8 to put an initiative on the ballot for voters throughout the state to set a higher limit.

### **Advocacy and Voluntary Approach**

If establishing a new policy in law is not possible at least in the short run, governments can be advocates for change and seek to promote their policy objectives through their own internal policies and voluntary action in their communities. Efforts can focus on raising awareness by the government and forming partnerships with nongovernmental organizations to promote preferred policy outcome. As part of the effort, the government can look at its own practices to make certain that they are consistent with the policy objective. For example, regarding higher wages, the government can make certain that it pays all of its employees a living wage, including those who are part-time and/or seasonal. It can support efforts in the community to adopt living wages and help draw attention to employers that pay wages at this level. Assembling a network of nongovernmental organizations to

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<sup>61</sup> The city council is planning on broadening the scope of the program in the next fiscal year, possibly by using deferred loans in the amount of taxes paid that exceed a specified percent of income payable when the property changes hands and with a limit on the number of the annual liens that would have to be repaid.

promote the desired outcome can expand the scope of support and broaden understanding of the issue.

## Conclusion

Local governments are subject to greater scrutiny and have more limits placed on their freedom of action than in the past. They should not allow these conditions to deter them from considering emerging policy issues and addressing the distinctive opportunities and problems that are present in their communities. They certainly should not assume that they are powerless to move into new areas of policy. If there are substantial restrictions, they should identify them and look for ways to counter them. When all other options are ruled out (and in some cases when using the law to advance a policy would be an option), they should consider whether advocacy and networking with other governments and nongovernmental organizations in their community is a better approach to stimulating change.

## Discussion Case 1: Local Minimum Wage Regulation

Limiting or expanding local control of minimum wages has been a persistent topic in state legislatures since 2011, with the majority of state actions occurring in 2016 (five actions). The 2005 legislative sessions also saw several states pass legislation related to local minimum wages (see Figure 4). Of the 15 states that passed such legislation between 2001 and 2017, 13 limited local governments' ability to regulate the minimum wage. Of the remaining two that passed, one expanded local authority and the other placed a requirement on localities (see Figure 5). About three of every four (77 percent) of these local minimum wage bills were enacted in states with a Republican Trifecta (see Figure 6).

Figure 4

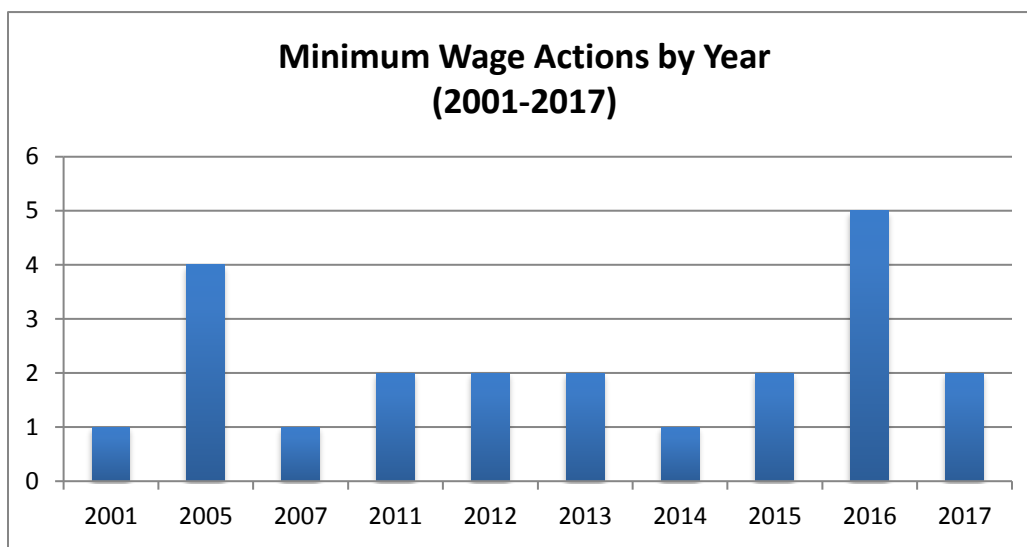


Figure 5

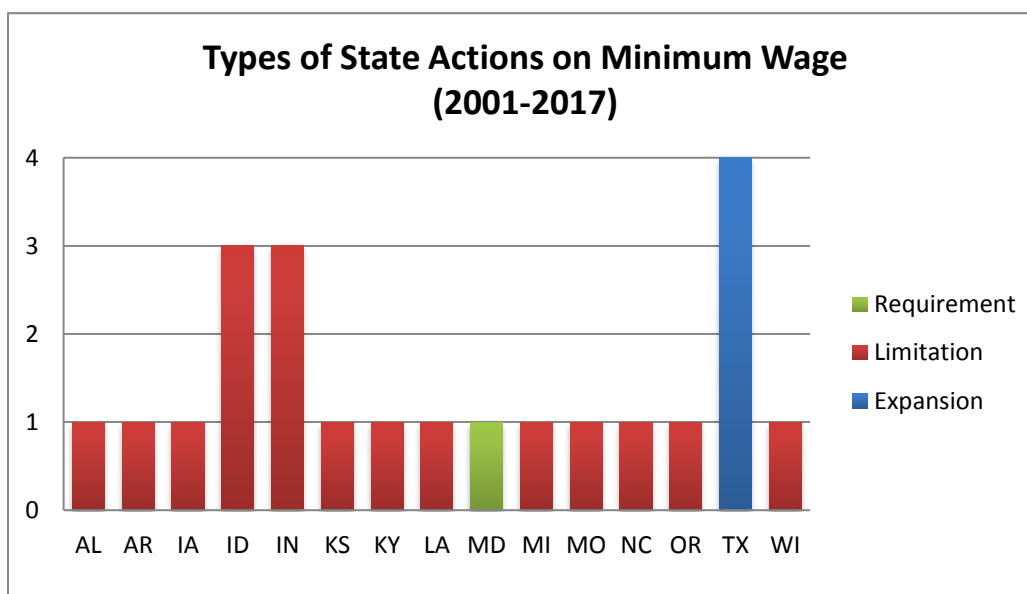
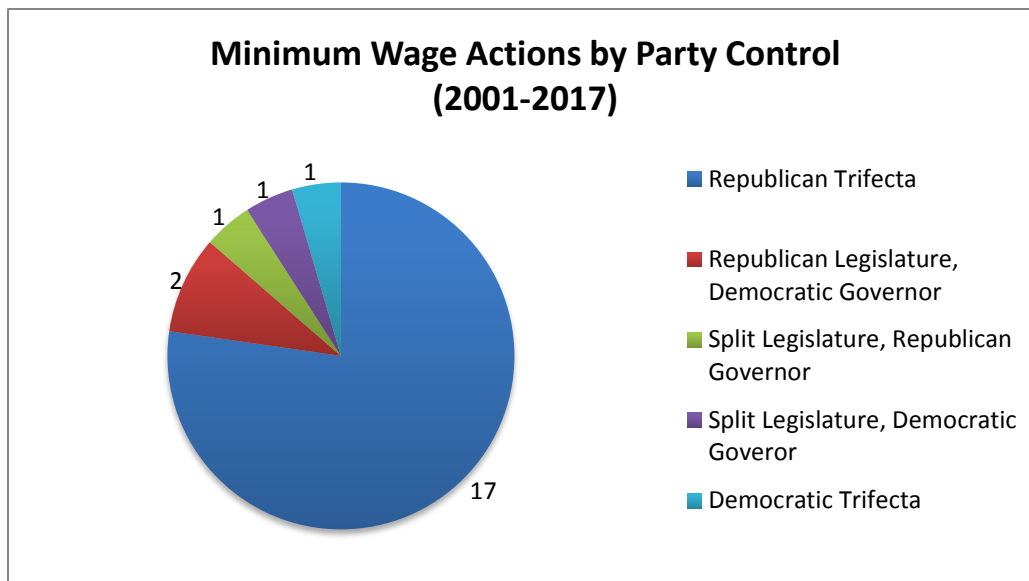


Figure 6



### **Birmingham, Alabama**

Birmingham is one of the communities that recently wrestled with the local minimum wage issue. According to 2015 population estimates, the city is home to 212,211 residents and is the largest city in the state.<sup>62</sup> It is a majority-minority city with African-Americans constituting approximately 72.6 percent of the total population. The city's median household income is \$31,061 (relative to the Alabama median household income of \$43,623 and the national median of \$53,889). The city's unemployment rate is 13.3 percent and 30.9 percent of the population lives below the poverty line.

Birmingham has faced significant economic challenges over the past several decades due to declines in manufacturing from which the city has never fully recovered. This contributed to significant declines in population that continue today. While Jefferson County continues to recover from a recent fiscal challenge,<sup>63</sup> the city of Birmingham is in a relatively stable fiscal position. A recent analysis of the 116 cities in the U.S. with populations over 200,000 ranked Birmingham 53<sup>rd</sup> in overall fiscal health based on an index of several factors.<sup>64</sup>

Birmingham has a mayor-council (strong mayor) form of government. The city council includes nine members elected from districts. The elections are ostensibly nonpartisan, but are perceived to be dominated by councilors with Democratic leanings. Voters in Birmingham tend to vote Democratic.

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<sup>62</sup> U.S. Census Bureau. "2011-2015 American Community Survey 5-Year Estimates." [FactFinder](#). Retrieved August 28, 2017.

<sup>63</sup> Jefferson County, home to Birmingham, is experiencing many of the same long-term economic effects as Birmingham. But these were magnified when the financing of a large-scale sewer project went bad and led to the county filing the largest local government bankruptcy in American history in 2011 (though it only held the dubious distinction for two years until Detroit's bankruptcy in 2013).

<sup>64</sup> Joffe, M. (2017). "[How Strong Are Your City's Finances? 116 US Cities Ranked](#)." *The Financial Times*. Retrieved August 28, 2017.

## Alabama

The state of Alabama is home to approximately 4.8 million residents.<sup>65</sup> Over two-thirds of the population is white (68.5 percent) and another 26.2 percent is African-American. The state's unemployment rate is 9.3 percent and a poverty rate almost half that of Birmingham (18.8 percent).

The state ranks 12<sup>th</sup> among the fifty states in terms of fiscal health based on 2015 financials.<sup>66</sup> However, its fiscal future is somewhat unsure due in large part to unfunded pension liabilities.<sup>67</sup>

Alabama is a strongly Republican-leaning state and is one of the current “Republic Trifecta” states in which the state Republicans controls the governorship and both chambers of the legislature. Both chambers of the statehouse have Republican supermajorities. The Alabama House of Representatives has 105 members of which 72 are Republicans (68.6 percent) and 33 are Democrats (31.1 percent). The Senate has 35 members of 26 are Republicans (74.3 percent), which eight (8) are Democrats (22.9 percent) one (1) is an Independent (2.9 percent). Approximately 62 percent of Alabama voters voted for Donald Trump in the 2016 election.

In Alabama, municipalities have no home rule. It is one of only two states classified as a pure Dillon's Rule state with no examples of even limited structural, functional, or fiscal autonomy for cities.<sup>68</sup> These governance guidelines for cities are based on the 1901 state constitution. Only three of the state's 67 counties have been given limited home rule through an amendment to the state constitution. More to the point, the state constitution “enumerates specific powers and prohibitions and does not make broad grants of authority.” It has been estimated that approximately 70% of the state's constitutional amendments apply to a single city or county.<sup>69,70</sup> No “local” legislation is permitted based on a 1978 court interpretation of the constitution, but the state legislature passed an amendment expanding the definition of general law to include laws that apply to one or more municipalities on the basis of eight population categories. Constitutional amendments can still apply to a single jurisdiction.

Unlike most states, a large portion of Alabama's tax code is written into the constitution, necessitating its amendment over minor tax issues. Adding to the problem is the requirement that any constitutional amendment must be submitted for a statewide vote if it is not *unanimously* approved by the legislature. This has resulted in amendments relating to local counties and municipalities being overwhelmingly approved in the affected areas, but rejected at the statewide level.

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<sup>65</sup> U.S. Census Bureau. “2011-2015 American Community Survey 5-Year Estimates.” [FactFinder](#). Retrieved August 28, 2017.

<sup>66</sup> Norcross, E. & Gonzalez, O. (2017). [Ranking the States by Fiscal Condition](#). Mercatus Research, Mercatus Center at George Mason University. Retrieved August 28, 2017.

<sup>67</sup> Dove, J. & Smith, D. (2016). [Alabama at the Crossroads: An Economic Guide to a Fiscally Sustainable Future](#).“ Mercatus Research, Mercatus Center at George Mason University. Retrieved August 28, 2017.

<sup>68</sup> Krane, D., Rigos, P., & Hill, M. (eds.). (2001). *Home Rule in America: A Fifty-State Handbook*.

<sup>69</sup> Wall, A. (2014). [“Chapter 1: State Constitutions.”](#) *Book of the States 2014*. Council of State Governments. Retrieved September 1, 2017.

<sup>70</sup> The Alabama Constitution currently contains 287 sections and 926 amendments (including 14 new amendments passed last year), making it by far the longest state constitution of the fifty states. See [Constitution of Alabama 1901](#) for links to the sections and amendments.

## **Birmingham vs. The State: Minimum Wage Control**

Alabama is one of five (5) states without a state-mandated minimum wage.<sup>71</sup> Several cities in the state were contemplating the establishment of a local minimum wage, and in the summer of 2015, the Birmingham city council unanimously passed an ordinance to increase the minimum wage in a two-step, graduated fashion to \$10.10 per hour, with the first increase to be in July, 2016 and the second the following July. The ordinance was expected to affect about 40,000 workers.

The subsequent sequence of events highlights the importance both sides placed on this effort. Following the passage of the ordinance, but before the first wage increase was to go into effect, the state legislature launched H.B. 174 to preempt any perceived local autonomy over this policy issue and specify that no local government could determine specific minimum wage policies.<sup>72</sup> The House initially voted 71-31 in support of the preemption on February 16<sup>th</sup>, 2016. At that point, the Birmingham city council chose to move up the date of the increase from July 1<sup>st</sup> to February 24<sup>th</sup>. The next day, however, the legislature sent H.B. 174 to the Senate which hastily approved it and the governor then signed it into law one hour later.<sup>73</sup> The state vote was largely along party and racial lines, with Republican legislators voting overwhelmingly in support of the bill.<sup>74</sup>

The state legislature claimed that increasing the minimum wage would harm economic development in the state and harm low-wage workers by reducing the number of jobs available for them. Legislators also argued that they wanted to avoid a “patchwork” of local legislation that would make it difficult for businesses to operate in the state.<sup>75</sup>

This conflict between the state and local government has resulted in a suit brought by the local NAACP chapter against the state. The suit claims that the majority white state legislature was racially motivated in the decision to preempt the majority African-American city council of Birmingham. The NAACP claims that the state law violates the Equal Protection Clause and the Voting Rights Act of 1965. The Legislative Black Caucus in the statehouse later joined the suit arguing that the state’s actions violated Birmingham citizens’ voting rights.<sup>76</sup>

The state claims that because of the statewide nature of the preemption, the charges of racism are unfounded and that 16 other states have already passed similar preemptions with no claims of racial bias. A federal judge dismissed the suit in February, 2017. The NAACP has appealed the decision which is under review at the time of this writing.<sup>77</sup>

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<sup>71</sup> U.S. Department of Labor. (2017). “[Minimum Wage Laws in the United States – July 1, 2017](#).” *Wage and Hour Division*. Retrieved August 18, 2017.

<sup>72</sup> Alabama HB 174. (2016). [Alabama Uniform Minimum Wage and Right-to-Work Act](#). *LegiScan*. Retrieved August 14, 2017.

<sup>73</sup> Kasperkevic, J. (February 26, 2016). “[Alabama Passes Law Banning Cities and Towns from Increasing Minimum Wage](#).” *The Guardian*. Retrieved August 16, 2017.

<sup>74</sup> Sharp, J. (January 29, 2017). “[Racially Tinged Battle over Minimum Wage Intensifies in Alabama](#).” *Alabama Media Group*. Retrieved August 19, 2017.

<sup>75</sup> Fox News. (February 27, 2017). “[Alabama Passes Law Barring Cities and Towns from Increasing Minimum Wage](#).” Retrieved August 19, 2017.

<sup>76</sup> Chandler, K. (March 2, 2017). “[Appeal Filed in Lawsuit over Alabama Minimum Wage Law](#).” *U.S. News and World Report*. Retrieved August 19, 2017.

<sup>77</sup> *Ibid*.



## Discussion Case 2: Telecommunication Regulation

The importance of telecommunication infrastructure and services has never been more important for an increasingly interconnected world. While initially centered on telephony services, today's telecommunications needs are far more extensive and considerably more complex. Rapid uploading and downloading of massive quantities of data are critical to many business needs as well as public services. As additional infrastructure for these needs emerges in terms of Wi-Fi, mesh, and fiber-optic networks, additional uses continually arise that drive additional infrastructure and bandwidth needs in a mutually reinforcing cycle. Currently, we are seeing the rise of autonomous vehicles and drone technologies that will create additional bandwidth needs. Also, the "internet of things" is growing exponentially in terms of networked appliances and "smart homes." And, of course, the rise of "smart cities" is also taking advantage of networked devices to improve the effectiveness and efficiency of public service delivery.

Providing access to such services for a large population of diverse geographies (e.g., urban versus rural areas) is one of the more daunting challenges for governments. Providing access for populations of citizens with varying means of resources raises the additional challenge of equity. This is particularly important as the economy continues its shift away from manufacturing and service jobs and increasingly relies on information technology-oriented jobs that require a basic familiarity with information systems and data access. Addressing the employment needs of the under- and unemployed requires that all citizens have access to the telecommunications infrastructure in a way that will facilitate learning and training while also unleashing the creativity of more citizens that will be able to succeed in this new economy.

In responses to these pressures to build out such infrastructure and facilitate the private sector's participation in this build out, local governments have been at the front lines where these needs run up against the preferences of their citizens across a range of these telecommunication issues. These issues relate to zoning and right-of-ways for cell towers, broadband systems, and laying fiber optic cables. Local government officials have had to add these considerations to their calculations while continuing to address long-term challenges related to deferred maintenance of more traditional physical infrastructure and ongoing pension liability issues.

Not surprisingly, local governments began responding to these mounting needs with increased interest after the changes in federal telecommunications policy in 1996. Many European cities established their own broadband networks. Several U.S. cities began making plans to do the same. However, as local governments began to increase their activities in this policy area, state governments were similarly moved to ensure that local actions did not interfere with the growth of this industry and infrastructure.

As our legislative review indicates, half of the state telecommunication legislation from 2001 to mid-2017 was passed in 2004, 2005, or 2009. Telecommunication regulation has been less of a state legislative priority since 2009, and has rarely been the focus of bills that have passed since 2015 (see Figure 7). With respect to the types of state actions taken relative to local authority, telecommunication policy is more varied than minimum wage policy, with only two of 10 states limiting local control. Three other states placed requirements on local governments, while the remaining five enacted a mix of requirements, limitations, and/or expansions within their states (see Figure 8). In terms of the role of political party, 47% of telecommunication legislation was enacted by Democratic trifectas, with an additional 24% enacted by Republican trifectas, again indicating the greater likelihood of legislation targeted at local governments when one party controls all branches of state government (see Figure 9).

Figure 7

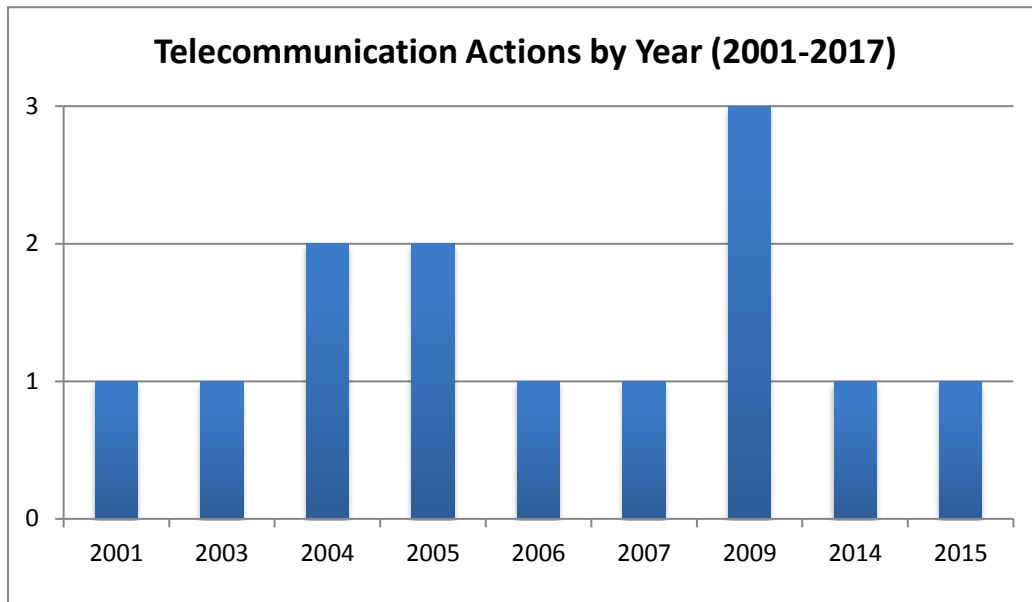


Figure 8

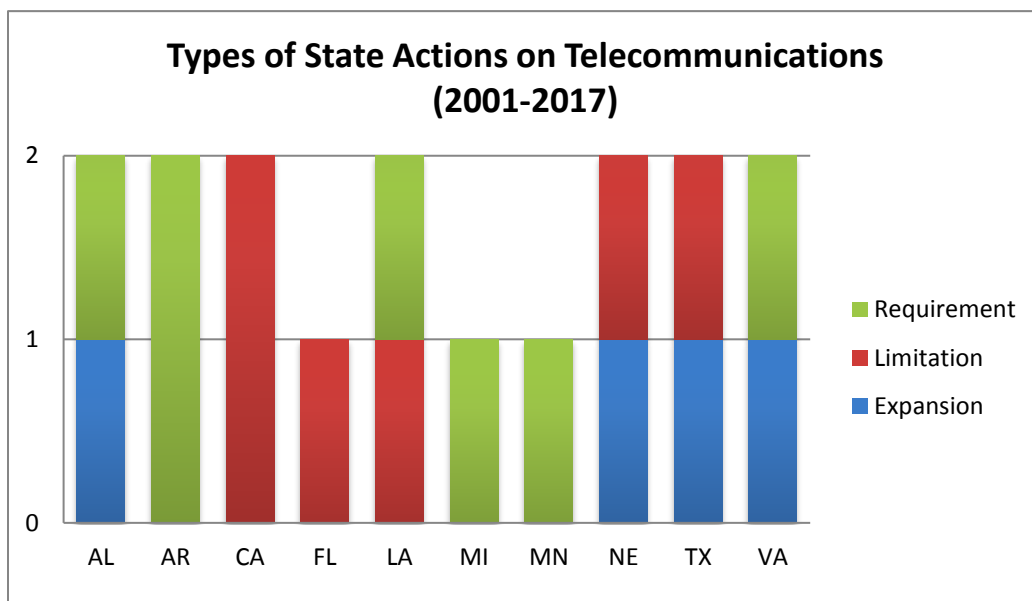
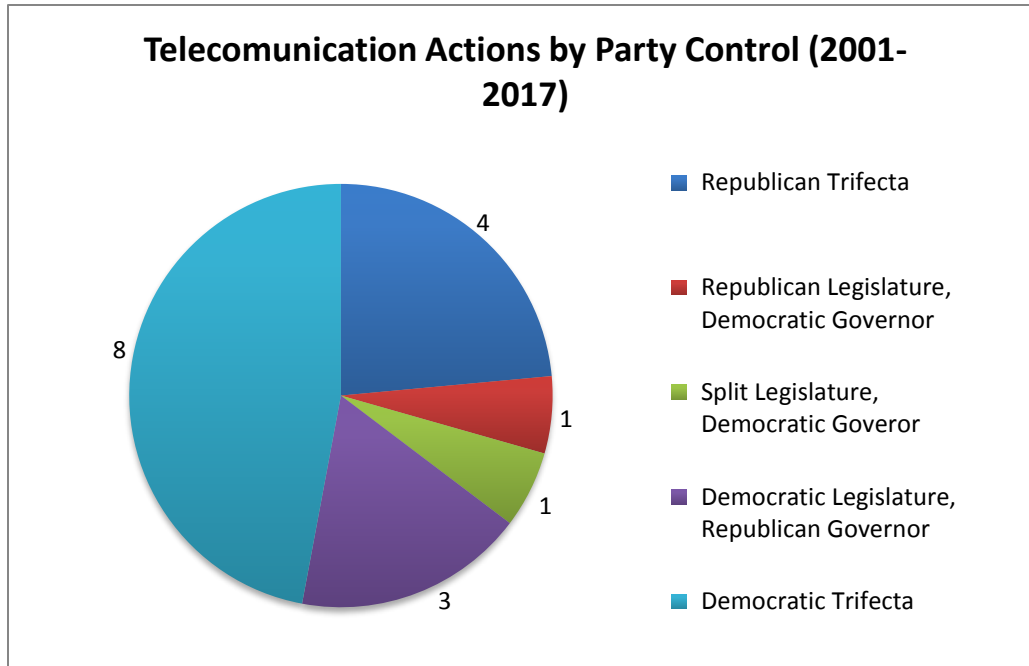


Figure 9



### **Colorado**

The state of Colorado is home to an estimated 5.5 million residents.<sup>78</sup> More than four out of five residents are white (84.2 percent).<sup>79</sup> The rest of the state's population includes a wide array of racial groups, with African-Americans being the largest of these with 4.0 percent of the state population. The state's median household income is \$60,629 (relative to the national household median income of \$53,889). The state's unemployment rate is 6.9 percent and 12.7 percent of the population lives below the poverty line.

The state ranks 30<sup>th</sup> among the 50 states in terms of fiscal health based on 2015 financials.<sup>80</sup> This is a lower ranking over prior years due to an increase in liabilities relative to assets. Similar to the Alabama case (as well as several other states), Colorado has experienced an increased challenge to long-term solvency because of unfunded pension liabilities.

Prior to the 2016 elections, Colorado had been a Democratic trifecta state. However, the party lost control of the state Senate by one seat. Currently, the state is headed by a Democratic governor. The 65-seat House includes 37 Democrats and 28 Republicans. The 35-seat Senate today includes 18 Republicans and 17 Democrats. Approximately 47.2 percent of the state's voters voted for Clinton in the 2016 election and 44.4 percent voted for Trump.

<sup>78</sup> U.S. Census Bureau. "2016 Population Estimates." [FactFinder](#). Retrieved September 1, 2017.

<sup>79</sup> U.S. Census Bureau. "2011-2015 American Community Survey 5-Year Estimates." [FactFinder](#). Retrieved September 1, 2017.

<sup>80</sup> Norcross, E. & Gonzalez, O. (2017). [Ranking the States by Fiscal Condition](#). Mercatus Research, Mercatus Center at George Mason University. Retrieved August 28, 2017.

As Stilwell and Gage note in their analysis of Colorado local autonomy:

“Home rule in Colorado has produced substantial authority for local governments, with minimal state interference. In matters of purely local concern, ordinance adopted by home rule municipalities supersede conflicting state statutes. In matters of mixed statewide and local concern, state statutes and municipal ordinances may coexist if they do not conflict; if they do, the courts hold the state statutes supreme. In matters of purely statewide concern, state law entirely preempts municipal legislation. Home rule is a grant of authority from the people, not the state. Thus, the state is not able to remove a home rule municipality’s authority.”

Of Colorado’s 272 cities and towns, 99 currently have adopted home rule.<sup>81</sup> These jurisdictions continue to enjoy more control over their municipal laws than the remaining statutory cities. Many of Colorado’s statutes from the past two decades have sections that clearly indicate that the state is not meant to preempt the power of localities.

However, the Colorado legislature has preempted cities – including home rule cities – over the past two decades in certain areas. The language of such statutes frequently refers to the issue being one of “statewide concern” or need, but do not usually have sections that explicitly specify that the legislation is meant to preempt local legislation. There are statutes that require municipalities to create intergovernmental agreements to solve problems that spill over multiple municipalities – such as wild fires – rather than preempting the authority of local governments altogether.

The Colorado Supreme Court has been involved in preemption analyses that determine whether or not various statutes passed by the legislature are in line with the state constitution. In 2016, the state supreme court determined that fracking laws passed by the home rule city of Longmont could be preempted by the state legislature by declaring fracking to be a statewide concern.<sup>82</sup> However, in a mixed result on gun control from a split court in 2004, justices ruled that some issues like open-carry, assault rifle bans, and safe storage ordinances are local issues in nature and therefore home rule cities cannot be preempted on these issues.<sup>83</sup>

### **Telecommunications and Broadband Technology in Colorado**

During the late 1990s and early 2000s, the cable industry in Colorado and across the country saw a number of company sales and mergers that reduced the net number of providers in the marketplace. In Colorado, a number of small, locally-owned companies were bought out by larger national corporations. This often led to job losses and concerns about equal access to infrastructure and services.

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<sup>81</sup> This count includes the constitutional recognized cities of Broomfield and Denver. Only two of the state’s 65 counties have home rule authority. Colorado Department of Local Affairs. (2017). [“Active Colorado Municipalities.”](#) Retrieved September 7, 2017.

<sup>82</sup> Finley, Bruce. (June 23, 2016). [“Colorado Supreme Court Rules State Law Trumps Local Bans on Fracking.”](#) *Denver Post*. Retrieved September 10, 2017.

<sup>83</sup> Other aspects of this gun control case, however, highlighted that home rule *can* be preempted when the focus is on concealed handguns, firearms in vehicles, and furnishing firearms to juveniles are preempted. Allen, R. (December, 2012). [“Municipal Regulation of Firearms in Colorado.”](#) *Knowledge*. Colorado Municipal League. Retrieved September 10, 2017.

As a result, cities like Denver considered regulating telecommunication and cable companies to ensure residents could maintain low-cost service and that smaller firms could compete with national giants.<sup>84</sup> In response to a growing patchwork of regulation around the state by 2005, the Colorado legislature passed S.B. 152, which preempted local governments in the state from regulating telecommunication, cable, and internet service or providers. The stated purpose of this legislation was to provide for “competition in utility and entertainment services.”<sup>85</sup> Opponents maintained that the law benefited private companies while decreasing rural residents’ access to internet, wireless, and broadband services.<sup>86</sup> However, S.B. 152 did leave an opt-out option for local governments by providing a referendum process local communities could follow to explore providing their own broadband and other services to citizens.

Responding to the popularity of municipal broadband in 2010, the Federal Communications Commission began discussing the idea of overturning laws like Colorado’s that limited the power of local governments to provide broadband to citizens.<sup>87</sup> Industry groups and Congress pushed back on this, however. By 2014, the FCC had not yet taken any action. Colorado municipalities, on the other hand, had begun to exercise their opt-out option. For instance, citizens in seven municipalities voted in November 2014, to allow their cities to provide broadband and other “advanced” services.<sup>88</sup> The state also tasked the state Department of Local Affairs with supporting local government efforts in broadband activities.<sup>89</sup>

Once these communities had the authority to explore providing broadband or other services, their local governments had to decide what form those services would take. Some, like Longmont, decided to provide government-owned and operated services.<sup>90</sup> They can also use a hybrid model in which government-owned facilities and infrastructure are leased to a service provider for operation. Another hybrid alternative involves contracting with a private provider for both the infrastructure and service. Collaborative approaches involving multiple local governments that also jointly provide service is another option, as long as each has passed opt-out votes. At the time of this writing, the Colorado cities of Superior and Louisville are considering a system to provide broadband to citizens in their jurisdictions.<sup>91</sup>

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<sup>84</sup> Cantwell, Rebecca. (January 20, 1999). “[Internet Regulation Debated: Denver Considers Whether to Add Equal-Access Clause.](#)” *Rocky Mountain News*. Retrieved August 25, 2017.

<sup>85</sup> Colorado Revised Statutes (C.R.S.) 29-27-101.

<sup>86</sup> Fellman, K. (February 14, 2005). “[Local Interests Hurt by Telecom Bill.](#)” *Rocky Mountain News*. Retrieved August 25, 2017.

<sup>87</sup> Wilson, B. (June 22, 2010). “[States Ride Broadband Wave.](#)” *Stateline Story*, Pew Charitable Trusts. Retrieved August 25, 2017.

<sup>88</sup> Scola, N. (7 Nov. 2014). “[7 Colorado Communities Just Secured the Right to Build Their Own Broadband.](#)” *The Washington Post*. Retrieved August 25, 2017.

<sup>89</sup> [Colorado Department of Local Affairs Broadband Program.](#) Retrieved August 25, 2017.

<sup>90</sup> Hahn, A. (July 9, 2017). “[Superior Urges Slow Approach to Pursuit of Faster, Cheaper Broadband.](#)” *Daily Camera Superior News*. Retrieved August 25, 2017.

<sup>91</sup> *Ibid.*

In 2014 and partially in response to local exemption votes, the Colorado state legislature passed H.B. 1327 to streamline the process for private investment in broadband. The bill also created a fund to provide rebates to private providers who expand broadband access in rural areas.<sup>92</sup> In 2017, Colorado passed legislation to clarify that the expedited permitting process and access to public right-of-ways also applied to small cell facilities, which are used to expand 4 and 5G wireless service. While both of these bills were meant to favor private expansion of broadband over public provision, neither has apparently slowed the trend of local governments exploring their options for providing broadband service. As of July 2017, voters in at least 65 cities had voted to allow their municipality to explore providing broadband services.<sup>93</sup>

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<sup>92</sup> Schrader, M. (May 9, 2014). "[New Laws Could Help Bring Internet to Rural Colorado.](#)" *The Gazette*. Retrieved August 25, 2017.

<sup>93</sup> Hahn, A. (July 9, 2017). "[Superior Urges Slow Approach to Pursuit of Faster, Cheaper Broadband.](#)"

## Appendix: Additional Illustrative Mini Case Studies

The research team explored the legislative records of a pilot study of eight states to determine how their local autonomy has evolved since 2001. After we completed the pilots, we examined the remaining states to capture any local autonomy or state preemption changes related specifically to issues of the minimum wage and telecommunications issues dating back to 2001. One of the pilot states, Colorado, is the focus of one of the two discussion cases above. The results of the specific policy areas are presented earlier. Below are summaries of the seven remaining initial pilot cases that identify changes to local autonomy in these states more broadly.

### Arizona

Since 2001 Arizona has continued as a state that proactively and reactively preempts the authority of local governments. Most of the legislation passed since 2001 that deals with the direct preemption of local laws includes blanket restricts on issues that the state legislature determines to be a “matter of statewide concern”. The language in the legislation is consistent and clear that no further regulations or laws may be made by local governments regarding the subject of the bill. Infrequently there are portions of text that allow localities to regulate more or less stringently than the state level, depending upon the context.

For issues such as firearm regulation and commercial fireworks, the state does allow municipalities some areas in which they can regulate. However, amendments to these pieces of legislation have given less power to local governments in recent years.

### Georgia

Georgia has several preemption laws, but not as many as Arizona. Many of their statutes deal with a more limited form of preemption. Often, the state requires local governments to adhere to a minimum or maximum requirement, rather than preempting the issue altogether. There is legislation that completely preempts local authority dealing with spyware and ridesharing, but those are arguably handled more effectively at the state level. It appears that while Georgia is a Dillon’s Rule state, they are less proactive than Arizona in preempting local autonomy.

### Iowa

Iowa had less legislation captured in the analysis during the pilot phase relative to Arizona or Colorado. However, in those relatively few instance, most were instances of state preemption. These included instances of complete preemption of local autonomy over the ability to regulate the quality of agricultural materials. The agricultural preemptions were broad and proactively preempted any local ordinance dealing with the issue (even if a state law did not specifically conflict with it). Of the ten (10) preemptions identified in the legislative review, seven are arguably of issues that lend themselves to more state control (i.e., the use of devices while driving and ride-share services), while the other three are more amenable to local control.



## **North Carolina**

While most well-known for preempting local governments' ability to regulate employment practices, wages, and nondiscrimination policies, a number of other issues are also subject to preemption in the state. On environmental issues, the state preempts a number of water quality and preservation topics in whole or in part (sedimentation and erosion, riparian buffers, watershed). One of the most stringent preemptions centers on gun control. A new statute specifies that localities trying to regulate gun ownership in any way will be sued for damages. Other areas of preemption include: sale of motor vehicles to recyclers or salvage yards, utility marking, bans (explicit or effective) on mobile homes, sale of OTC pseudoephedrine, lottery, hazardous and radioactive waste management, coal combustion residuals and products, and fracking. The power to regulate adult- or sexually-oriented establishments remains at the local level.

## **Pennsylvania**

Some of Pennsylvania's preemptions are unique in the subset of states examined in that their preemptions have effective dates, allowing older regulations to stand while preempting any future local regulations. Examples of this include: tobacco regulation (pre-January 1, 2002 regulations allowed; later regulation preempted), and food safety and protection training (local programs in place before September 1, 1994 allowed; all others preempted by the state program). Other areas of nonqualified state preemption include: gas tax, regulation of oil and gas operations (including fracking), agricultural regulation, texting-while-driving, and the ability to penalize (arrest/fine) those who call police or other emergency service if they reasonably believe that assistance was needed. Goals for and participation in a state-wide workforce development strategy is also required for local governments.

Along with preemptions, two statutes specifically grant powers to local governments. Local governments are specifically allowed to allocate funding or open additional space to land trusts, and incorporate their own nonprofit land trusts. The state also specifically does not preempt local regulation of air rifles.

## **Tennessee**

Tennessee was the only state examined where preemption of counties differed from municipalities on at least one issue: development impact fees. Counties are preempted from utilizing this revenue tool while municipalities retain the ability to levy such impact fees. Like Arizona, Tennessee also has a "sanctuary city" preemption. Other areas of preemption include: the lottery, gambling and nonprofit gaming (charity raffles); sale of dextromethorphan (cough syrup); gun control and production and sale of knives; smoking prohibitions, other than around hospitals; wage theft regulation (but not minimum wage); tax refund anticipation loans; regulation of veterinary medicine; and public breastfeeding bans. Similar to North Carolina, local governments in Tennessee retain the ability to regulate adult- and sexually-oriented establishments, as well as the ability to institute a local option transit surcharge in the form of various taxes, if adopted as part of a transportation improvement project and approved by voters.

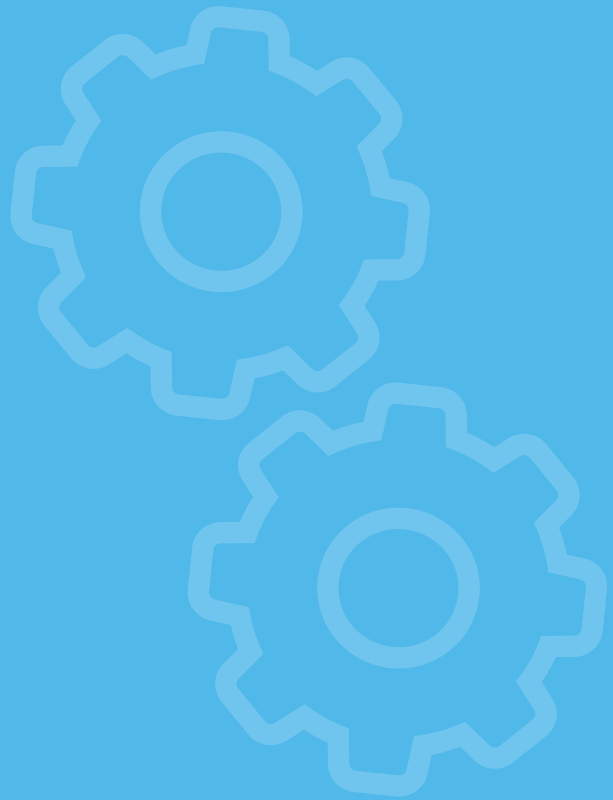
## Utah

Utah preempts local regulation of the following topics:

- Commercial feed, fertilizer, pesticides, and seeds
- Pawn or secondhand business transactions
- Engine coolant bittering agent – if the retail container is less than 55 gallons, local governments cannot regulate the inclusion/exclusion of a bittering agent
- Transportation network companies/drivers
- Biotechnologically created materials
- Drones
- Private security – armed or unarmed
- Licensing of lie detector operators
- Traffic signal preemption devices
- Phishing and Pharming
- Housing discrimination (Utah Fair Housing)
- Cigarette ignition strength
- Employment discrimination – but the state protections are fully inclusive
- Definition and penalty of the crime of leaving a child unattended in a motor vehicle

The state also limits, but does not fully preempt, the manner and amount of collection fees and damages local governments can collect when service payments are past due. Two statutes specifically grant additional powers to local governments. One allows the creation of a special “local government disaster fund,” where allocated funding may be used only to respond to a declared disaster, and up to 10% of annual expenditures may be used for disaster preparedness. The other allows municipalities and districts only to cancel local elections if the number of open seats is greater than the number of candidates and there are no other provisions on the ballot.

Along with these preemptions and grants of authority, the state also has four areas that are defined as statewide needs: interoperability of wireless and data/information-sharing technology; regional sewage and wastewater facilities; the recycling of waste tires; and utility facility construction. These topics are not expressly preempted, but the legislature has expressed a desire for a statewide focus or coordination.



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