



GRABBING MARKET SHARE, TAMING ROGUE CITIES AND CRIPPLING COUNTIES

Views from the Field on **State Preemption of Local Authority**

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Broadband
Small cell
Firearms
Airbnb
Uber
Minimum wage
Fracking
Plastic bags
TELS



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March 2020

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Acknowledgements

This research was supported in part by funding from the Agricultural and Food Research Initiative of the USDA National Institute of Food and Agriculture [2017-67023-26226] and Local Solutions Support Center.

We would like to thank Allison Tse, Alfie Reynolds and Cory Mann for help conducting the interviews, and Professor Yunji Kim formerly of the Department of Planning and Landscape Architecture at the University of Wisconsin-Madison, for help leading the focus groups.

We would like to thank the National Association of Counties, National League of Cities, National Association of Towns and Townships and International City County Management Association for permitting us to hold focus groups with their members. We would also like to thank ChangeLab Solutions and Local Solutions Support Center for inviting us to present this work at their Preemption Convening in Chicago, IL in May 2019.



EXECUTIVE SUMMARY

What is state preemption?

Preemption involves state usurpation of local authority in areas from taxation and expenditure, to the regulation of utilities, the environment and the economy. With fiscal stress, states have passed more service responsibilities down to local government while constricting their fiscal capacity. As new sectors emerge, such as broadband access, the sharing economy and green energy, local governments are often at the forefront of regulation, designing policies to balance public and private interests. But state preemption has grown in recent years, causing many local officials to worry that states are stifling innovation and undermining local governments' ability to protect public interests.

This report

This report showcases the results of a nationwide research project on state preemption across the fifty states. Fifty-eight local experts from statewide municipal and county associations were interviewed on the nature of state preemption, its impact on local government finance and ability to face new challenges, and the driving forces behind preemption. Qualitative results are displayed under four major themes and illustrated with quotes and short case studies. We then compare our findings to available scholarship on state preemption.

Our findings

- Despite a focus in the literature on preemption targeting cities, we find that preemption is not just an urban issue. It also **affects counties and rural communities**.
- Preemption often **targets urban policy authority**, but the impact of these bills spreads to local governments statewide.
- Preemption can contribute to the **loss, usurpation or diversion of revenue sources**, such as municipal revenue sharing. States are simultaneously **shifting their fiscal responsibilities to local governments**, for example, in mental health services and road maintenance.

- States can **usurp traditional local regulatory powers**, such as zoning, land use regulation and fees for the use of the rights-of-way. Interviewees showed widespread concern regarding broadband access and the deployment of small cell infrastructure. States can limit the authority of local governments and public utilities to finance and build their own fiber-optic networks, provide internet services and determine the amount charged for use of utility poles.
- Lastly, while partisan and ideological divide contribute to preemption, we find that preemption flourishes in states under **substantial one-party control**. State legislators from both parties can engage in state preemption in order to advance industry interests. Corporate penetration at the state level is a key driver of state preemption, with organizations such as the American Legislative Exchange Council (ALEC) facilitating the passage of “model bills” by providing guidance to state legislators across the country.
- **Two major themes emerge from our research.**
 - ***Taming rogue cities and crippling counties***

Preemption is wielded by states to curb local power and override policies as diverse as utility pole siting and road maintenance. Thus, state preemption is essentially an issue of control and guarding state rights, and not necessarily an ideological or partisan issue. However, while state preemption may target larger, wealthier urban enclaves or be inspired by policies from San Francisco and New York City, its impact is often felt in smaller, rural municipalities. Limitations to local revenue-raising and expenditure authority can cripple localities and prevent them from addressing new service demands. This is especially important for counties, which rely heavily on property taxes and are responsible for the delivery of a myriad of services.
 - ***Grabbing market share and giving away monopoly power***

Preemption often represents corporate penetration of state legislatures to gain market control over areas traditionally under local regulatory authority (broadband, home sharing, taxi services). For example, preemption has been used to limit municipal competition with large private telecommunication providers even in markets which they do not intend to serve. Private providers have lobbied against the expansion of neighboring municipal broadband in underserved low-income and rural areas. When statewide regulation benefits private interests, it can prevent local governments from expanding access to services.

We need to strike a balance between state control and local authority. States should set a floor on local regulations which recognizes the diversity of local need and capacity and allows for local innovation. Public values and democracy should be at the core. However, our work finds state legislatures are being penetrated by corporate interests, who favor setting a ceiling on local authority or removing it altogether, at the expense of local well-being. New mechanisms to shield local governments from preemption need to be identified so that the balance, so crucial to effective federalism, can be maintained. Preserving local autonomy is essential to promote local leadership and innovation to address emerging local needs and global challenges.

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1 INTRODUCTION

Back in 2008, the city of Wilson, NC, launched their own municipal broadband service. Nearby communities expressed interest in having the service expanded to their jurisdictions. Two years later, the state of North Carolina passed a bill which, among other things, prevented local governments from delivering telecommunication services outside of their jurisdictions. Despite the city's efforts to have the law repealed, Wilson was forced to cease service to its neighbors. Today, twenty-five states have passed legislation limiting municipal broadband delivery to varying extents (Chamberlain, 2019).

In 2012, the city of Bisbee, AZ, adopted a ban on plastic bags. Three years later, the state passed a law prohibiting local governments from regulating plastic bags. Then in 2016, the state passed another law authorizing the investigation of any local ordinance at the request of a member of the Legislature. The state would withhold funds from local governments with ordinances that were found to violate state law. Bisbee's plastic bag ban was investigated, and the city was forced to repeal it. Today, fifteen states preempt local authority to ban plastic bags (Haddow et al., 2019).

The last decade has seen a rise of similar conflicts: Local governments are increasingly addressing issues outside of the traditional scope of local authority, such as environmental protection, gun control, public health and civil rights (Riverstone-Newell, 2018; Schragger, 2018). Additionally, technological progress has hatched new fields, such as broadband access and the sharing economy, which call for local regulation due to their impact on local economies. In turn, states have reacted with legislation that limits or removes the authority of local governments to regulate these issues (Briffault, 2018; NACO, 2017; NLC, 2018). This is defined as **state preemption of local authority**.

The rising political influence of cities has fueled tension between cities and states. Because of a popular narrative that often identifies cities with grassroots progressivism and the Democratic Party, and states with conservative values, corporate lobbying and the Republican party, the media has often painted state preemption as both a partisan and ideological issue (Blest, 2017; Kasakove, 2018). Yet states historically have reacted warily to assertions of local authority – a concern that has not always been unfounded.

The notion of local autonomy can be a slippery slope: Municipalities have been responsible for promoting discriminatory housing and land use policies, and they have given away monopoly and franchise power (Frug, 1999). Nevertheless, the power imbalance between states and local governments allows states to protect their interests by preempting local ordinances. Local governments, on the other hand, lack effective protection against preemption (Schragger, 2018).

Our contribution. This report is not a comprehensive report on individual preemption bills passed in each state. Rather, it sheds light on the concerns of both city and county representatives over the rise of preemption across the fifty states, the challenges when addressing community needs, and the external forces shaping state policy at the expense of local autonomy. Which areas have seen a rise in state preemption? Can local governments face rising challenges, such as the opioid crisis, the housing crisis and climate change, in an era of rising preemption? What are the driving forces and institutions behind preemption?

What is state preemption?

State preemption occurs when states override local ordinances through regulation of their own. When state law is ambiguous, broad or non-existent for a specific issue, local governments may attempt to address it themselves – e.g. with home sharing and ridesharing. In states where local governments are given broader authority to act, local ordinances may predate state law. As not all localities share the same concerns, cities individually take the initiative to ban fracking or plastic bags, raise the minimum wage, regulate short-term rentals or ridesharing, etc. However, states may regard these policies as conflicting with state interests or an overreach of local power. Though it would rarely be more than one locality at a time attempting to address an issue, state preemption affects localities statewide (unless exempted). State law can serve as a foundation for more consistent statewide regulation, or be used to usurp local authority.

Why is it concerning?

Legal scholars, advocacy groups and local government associations such as the **National League of Cities** (2018?) and the **National Association of Counties** (2017) have expressed concern over the current nature of state preemption. State legislation has customarily set a “floor” for local regulation,

but state preemption can now go as far as banning local regulation (e.g. sugary drinks in Wisconsin, plastic bags in Arizona). States may even attempt to deter local intervention with fiscal and/or criminal penalties, as has occurred recently in Florida and Arizona. Other states, where no local governments had shown interest in regulating plastic bags (Missouri) or sugary drinks (Wisconsin), have become proactive at passing legislation limiting or removing local authority to do so.

Why is state preemption a fiscal issue?

Local governments have not only seen a rise in state preemption of their policy authority, but in fiscal restrictions as well. From Maine to Louisiana, the Great Recession led to state fiscal stress, which in turn, was pushed down to local governments. States have imposed tax and expenditure restrictions, while at the same time they devolved fiscal responsibilities to the local level, reduced state aid and municipal revenue sharing and shifted the collection of some revenue sources to the state level (Kim and Warner, 2018; Wen et al. 2018). Demand for local government services has increased, but state preemption limits the authority of local governments to address it.

Today, local governments are responsible for providing a wide array of services. Counties, in particular, are responsible for a myriad of local and regional services: utilities, roads, local courts, jails, libraries, social services, etc. (Benton, 2003). Perhaps most critically, counties are responsible for delivering welfare services and healthcare - including “hidden costs” such as mental health services for inmates, for which county jails lack resources. Yet counties are heavily dependent on property taxes, which are insufficient to meet rising service demands. Property taxes are frequently the target of state limits and these “tax caps” can be especially challenging for rural counties, which lack alternative revenue sources.

Our findings

We sought a local government perspective on the nature of preemption in each state; its effect on local regulatory power, fiscal autonomy and service delivery, and the factors contributing to preemption. We were interested in the concerns of both municipal and county governments, and how they might differ. We conducted interviews with fifty-eight experts from statewide associations of city and county governments from July to December of 2018. This report showcases the major themes found across our interviews, illustrated by quotes and short case studies provided by interviewees.

- ***Preemption and anti-urbanism.*** We find that local governments are concerned with the punitive character of recent state preemption, which appears to chastise local leadership in emerging issues, such as broadband, home and ride sharing. While these issues may lie outside of the traditional scope of local authority, local governments face demand from their constituents to provide solutions. To states, however, local leadership can represent a threat to state power, regardless of the nature of the local ordinance or its popularity with local constituents. States have become proactive at passing legislation that limits or removes local authority in various matters. State preemption may be a reaction to local leadership in cities, but the statewide scope of impact means that all local governments will be subject to these limitations, warranted or not.
- ***Preemption, counties and local fiscal health.*** We find that preemption can be used to curb local fiscal autonomy. This is a primary concern of counties, which already operate under tight fiscal restrictions and heavily rely on property taxes to fund service delivery. We provide accounts from local representatives on the subtle ways in which states are using preemption to: (a) shift responsibilities to local governments, from road maintenance to healthcare services; (b) reduce revenue sources, such as municipal revenue sharing, (c) shift the collection of specific revenue sources to the state level, and (c) limit local authority over land use, zoning and fees, when they interfere with industry interests.
- ***Preemption and new monopolies.*** We find that preemption not only limits local regulation, but also prevents local governments from addressing the demand for new services. For example, the gap in broadband access is a predominant concern for local governments, especially in rural areas. However, despite lack of interest from private providers in delivering or upgrading their internet services, corporations and special interest organizations still lobby for restrictions on municipal broadband. While some cities have sought to expand access through municipal broadband, some states are preventing local governments from expanding their municipal broadband services, or charging fees to local governments who offer the service and prohibiting subsidization to make municipal broadband more affordable.
- ***Preemption and partisanship.*** Preemption is not just a partisan issue. It can be advanced by Democrat and Republican legislators. According to our interviewees, in Legislatures where majority party votes (either Republican or Democratic) substantially overpower minority votes, preemption

is more likely. In these cases, there is less incentive to reach a middle ground before turning to preemption. The minority party, regardless if Republican or Democratic, will likely champion local control in order to counterbalance the overwhelming influence of the party in power.

- ***Preemption and external influence.*** We find that corporate penetration has influenced the growth of state preemption. Organizations such as the American Legislative Exchange Council (ALEC) can operate as channels between state legislators and corporate lobbyists that provide assistance in drafting legislation and facilitate the passage of preemptive legislation across states (Hertel-Fernandez, 2019). Local officials have recognized signs of external influence when the language of the bill introduced is inconsistent with their constitution. “Model bills” have tackled issues ranging from municipal broadband to home sharing, ride sharing and plastic bag regulation.

2 BACKGROUND

Concern over growing state interference in local affairs, deteriorating local fiscal health, unequal access to public services and increasing political polarization has spurred numerous contributions to preemption scholarship in the past years. Academic publications have discussed the evolving nature and growth of preemption (Diller, 2007; Riverstone-Newell, 2017; Schragger, 2018; Briffault, Davidson and Reynolds, 2019), factors behind preemption growth (Fowler and Witt, 2019), fiscal penalties (Scharff, 2019), home rule reform (Guenthner, 2017), corporate influence (Hertel-Fernandez, 2019; O’Dell and Penzestadler, 2019), fiscal decentralization (Kim and Warner, 2018), and the concerns of public health officials regarding state preemption (Rutkow et al., 2019).

The growth of preemption

On April 2, 2018, the National League of Cities (NLC) released an updated edition of their 2017 report “City Rights in an Era of Preemption: A State-by-State analysis”. Their report focused on preemptive legislation in seven fields: minimum wage, paid leave, anti-discrimination, ride sharing, home sharing, municipal broadband and tax and expenditure limitations. In 2019, the Local Solutions Support Center and the State Innovation Exchange issued a report on state preemption passed in that year, “The Growing Shadow of State Interference” (Haddow et al., 2019).

Table 1

PREEMPTION TODAY

LABOR RIGHTS

Minimum wage. As of 2018, the NLC reported that twenty-eight states limited local authority over minimum wage to some degree. In 2019, the National Employment Law Project (NELP) reported that twenty-five states expressly preempted minimum wage ordinances as of May 29, 2019. In 2019, North Dakota preempted local governments from adopting a minimum wage higher than the state’s own, which is the same as the federal minimum wage (\$7.25). On the other hand, Colorado repealed its 1999 minimum wage preemption (NELP, 2019).

Paid leave. Twenty-three states forbid local governments from passing laws requiring employers to provide paid leave (NLC, 2016; Haddow et al., 2019).

	<p>Anti-discrimination. Three states (Tennessee, Arkansas and North Carolina) preempt local anti-discrimination ordinances. A well-known example is North Carolina’s HB2 or “bathroom bill”, which prevented municipalities from regulating access to public facilities. Additionally, this bill stripped local governments of their authority to regulate minimum wage (NLC, 2018; Schragger, 2018).</p>
<p>THE SHARING ECONOMY</p>	<p>Ride sharing. As of today, the District of Columbia and all fifty states, except Oregon, have passed some type of legislation regarding Transportation Network Companies (Moran et al., 2017; Borkholder et al., 2018; Racabi, 2018; Haddow et al., 2019). States can shift regulation to the state level (Indiana, North Dakota, Texas) or authorize local regulation (New York). As of October 2018, forty-three states preempted local governments from regulating TNCs (Racabi, 2018). In June 2019, Louisiana passed legislation to regulate TNCs at the state level (Sentell, 2019).</p> <p>Short-term rentals. In 2018, the NLC reported that four states had passed Airbnb-related preemptions. As of December 2018, Gandhi et al. (2019) reported that nine states had passed legislation concerning local regulation of short-term rental platforms. States can prohibit local governments from prohibiting or restricting short-term rentals (Arizona, Idaho), explicitly authorize local regulation (Massachusetts) or set limits to it (Indiana).</p>
<p>MUNICIPAL BROADBAND AND SMALL CELL</p>	<p>Twenty-five states have passed legislation concerning municipal broadband delivery (Chamberlain, 2019) These statutes vary in terms of severity, from restricting service delivery to outright banning it. Additionally, twenty-three states limit local authority to regulate small cells (Morton, 2019).</p>
<p>TAX AND EXPENDITURE LIMITATIONS (TEL)</p>	<p>As of 2018, forty-seven states had adopted some type of tax and expenditure limitations (TEL) (NLC, 2018; Wen et al. 2018). TELs are limitations imposed on local revenue-raising and expenditure, such as tax caps and limits on tax levy growth.</p>
<p>FIREARMS</p>	<p>In 43 states, localities are preempted from adopting stricter gun control regulation than authorized by state law (NLC, 2018).</p>
<p>PLASTIC BAGS</p>	<p>Fifteen states now preempt local authority to ban plastic bags (Haddow et al., 2019). But three states now ban plastic bags at the state level - CA, NY and CT (Shukla et al., 2018).</p>

Why is preemption spreading?

Political polarization. Some argue that increasing interest in identity politics and political polarization are factors in the deterioration of state-local relations. Recent publications such as, *The deepening divide between the South's blue cities and red states* (Blest, 2017), *Red State, Blue City* (Graham, 2017), *How Red States Stifle Blue Cities* (Kasakove, 2018) and *The Political Outlook Isn't Good for Blue Cities in Red States* (Strano, 2019) are a few examples. The media often conflates cities with progressive politics, grassroots involvement and a large Democratic voter base, while their suburban and rural counterparts are dominated by conservative and religious values, concern for the protection of private property rights and a large Republican voter base.

Thus, when Republican-dominated Legislatures limit the authority of cities under Democratic leadership, partisan division appears to be the cause for state preemption. This narrative is consistent with academic publications that find a link between preemption growth and Republican domination of state legislatures, as Democratic voters are more clustered in urban areas (Riverstone-Newell, 2017; Schragger, 2018; Fowler and Witt, 2019). Others argue that preemption flourishes when one party has substantial hold of the state legislature, be it Republican or Democratic (NLC, 2018; Swindell et al, 2018).

Corporate penetration. Recent publications have looked at the influence of corporate lobbying in state policymaking, as state preemption has been used to scale back or remove local regulation of various industries (e.g. plastic bags, carbonated drinks, firearms). Several scholars have taken note of the American Legislative Exchange Council (ALEC), a conservative organization founded in 1973, for their long trajectory in developing and successfully advancing conservative and special interest initiatives among state legislatures (Riverstone-Newell, 2017; Kim and Warner, 2018; Schragger, 2018; Swindell et al., 2018; Hertel-Fernandez, 2019). ALEC strategically operates as a channel for lawmakers to connect with corporate lobbyists and potential campaign donors (Hertel-Fernandez, 2014). For example, the language of a 2016 bill introduced in Alabama to explicitly preempt local minimum wage ordinance authority was similar to a model draft displayed by ALEC in their website (NLC, 2018).

On April 4, 2019, O'Dell and Penzestadler's two-year investigation on "copycat model bills", a joint effort between *USA TODAY*, *The Arizona Republic* and the Center for Public Integrity, found that over the last eight years, at least 10,000 bills introduced by state legislators all over the nation were reproduced from "model" legislation. The majority of these bills were originally drafted by special

interest groups, who at times provided experts to endorse these bills as well. Once introduced, these bills were likelier to propagate. Additionally, a significant majority of bills introduced, as well as bills passed, were promoted by special interest groups and conservative legislators.

Who is tracking preemption?

Various organizations keep track of preemption bills, including the National League of Cities, National Association of Counties, State Innovation Exchange, ChangeLab Solutions, Pew Research Center, the Economic Policy Institute (worker rights), the National Employment Law Project (worker rights), Grassroots Change (public health, public safety and civil rights), National Policy & Legal Analysis Network to Prevent Childhood Obesity (public health), Freedom for All Americans (local control and civil rights), and the *Arizona Republic* and Center for Public Integrity (copycat model bills).

3 METHODOLOGY

Between July 2017 and March 2018, we conducted focus groups with the National Association of Counties (July 2017), the International City/County Management Association (September 2017), the National League of Cities (November 2017) and the National Association of Towns and Townships (March 2018). We were interested in learning about the fiscal impacts of state preemption on local government finance, a major concern for local officials. We asked about the impacts of state preemption on revenue, expenditure and policy authority (see Table 2 below). The focus groups provided examples in which states usurp local government revenue or subtly shift expenditure responsibility to local government. While some state preemptions are relatively easy to track, such as Tax and Expenditure Limitations (TELS, see Wen et al. 2018 for a data base), others are more subtle. Many local leaders described cuts and revenue restrictions in a wide range of areas which increase local fiscal burden through “*death by a thousand cuts*”.

Table 2

FOCUS GROUPS 2017-2018

QUESTIONS	CONCERNS
<p>1. How does state policy affect your government’s ability to raise <u>revenues</u> from sources other than property taxes?</p>	<p>Local officials were concerned that states are taking over local revenue sources (e.g. franchise fees, public rights-of-way fees, inspection fees) or cutting them (e.g. manufacturing machinery taxes, occupational license taxes). States can also withhold money from revenue sharing funds and limit local taxation authority (TELS).</p>
<p>2. How does state policy affect your government’s ability to manage <u>expenditures</u>?</p>	<p>States can push down responsibilities to municipalities while failing to provide funding (e.g. social services) or retain the revenue source at the state level (e.g. licenses and fees). States also mandate local expenditures, such as health insurance and retirement pensions, which can add to local government fiscal stress.</p>
<p>3. How has the state recently constrained your government’s <u>policy-making authority</u>?</p>	<p>Local governments are seeing a rise in state preemption of local policy authority. For example, in the area of telecommunications, some states are preempting municipal broadband, deployment of small cell infrastructure in the public rights-of-way and franchise fees.</p>

Interviews

We decided that a second stage of our research would focus on interviews with directors and research directors of statewide associations of local government to understand the nature of these more subtle preemptions. We reached out to the state associations of municipal and county governments across all fifty states. Between June and December of 2018, we conducted telephone interviews with state directors of local government associations. Telephone interviews were between 30 and 60 minutes long, and addressed four questions (Table 3).

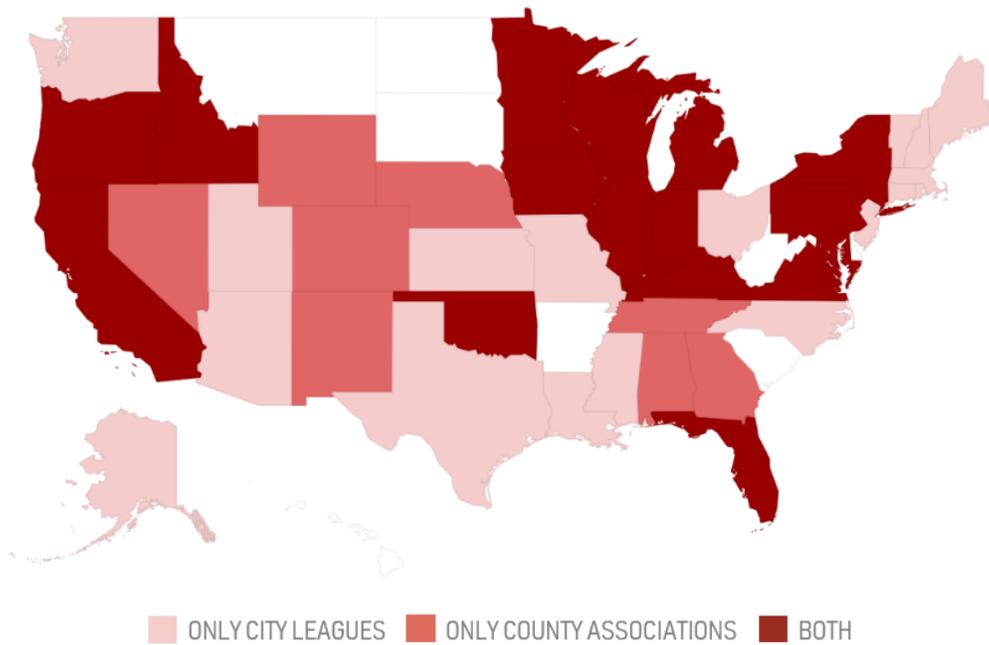
Table 3	
INTERVIEW QUESTIONS	
QUESTIONS	WHAT WE LOOKED FOR
1. What is the nature of preemption in your state, and how has it changed over time?	We looked for context or background information regarding the rise of preemption in each state. We expected interviewees to highlight the ways in which local fiscal autonomy has been affected by state preemption.
2. How has preemption affected revenue and expenditures for local government in your state?	We gave specific emphasis to the fiscal impact of state preemption.
3. What are the needs/new challenges you are trying to address that state preemption is facilitating or making more difficult?	We looked for information on the impact (positive or negative) preemption might have on local governments' ability to meet community needs, such as public service delivery and infrastructure investment and maintenance.
4. What are the politics behind preemption in your state?	We were interested in gathering information on the influence of partisanship, term limits, advocacy groups and corporations and urban-rural differences in the state legislature.

A total of 58 interviewees from 42 states responded to our request to be interviewed (see Table 4). We were able to interview both municipal and county experts from 16 states. In 34 states, we interviewed municipal association leaders. In 24 states, we interviewed county leaders.

Overarching themes across our interviews were identified and serve as the basis for the structure of this report. We present our findings below, under the major themes we observed in the

interviews. These findings are supported by illustrative cases offered by interviewees and quotes from our interviews. Additional research on each case was incorporated to provide a more detailed background. Finally, we present a discussion on our findings and expectations based on the literature review and previous focus groups.

For a list of our interviews by state, please see the next page.



***Map 1: Interviews with Municipal Leagues and County Associations
(Cornell University, 2018)***

TABLE 4

INTERVIEWS ON PREEMPTION CONDUCTED BY AUTHORS
Cornell University, June – December 2018

	<i>State</i>	<i>Interview with Municipalities Expert</i>	<i>Interview with Counties Expert</i>		<i>State</i>	<i>Interview with Municipalities Expert</i>	<i>Interview with Counties Expert</i>
1	Alabama		Yes	26	Montana		
2	Alaska	Yes	NA	27	Nebraska		Yes
3	Arizona	Yes		28	Nevada		Yes
4	Arkansas			29	New Hampshire	Yes	
5	California	Yes	Yes	30	New Jersey	Yes	
6	Colorado		Yes	31	New Mexico		Yes
7	Connecticut	Yes	NA	32	New York	Yes	Yes
8	Delaware			33	North Carolina	Yes	
9	Florida	Yes	Yes	34	North Dakota		
10	Georgia		Yes	35	Ohio	Yes	
11	Hawaii	NA		36	Oklahoma	Yes	Yes
12	Idaho	Yes	Yes	37	Oregon	Yes	Yes
13	Illinois	Yes	Yes	38	Pennsylvania	Yes	Yes
14	Indiana	Yes	Yes	39	Rhode Island	Yes	NA
15	Iowa	Yes	Yes	40	South Carolina		
16	Kansas	Yes		41	South Dakota		
17	Kentucky	Yes	Yes	42	Tennessee		Yes
18	Louisiana	Yes		43	Texas	Yes	
19	Maine	Yes		44	Utah	Yes	
20	Maryland	Yes	Yes	45	Vermont	Yes	NA
21	Massachusetts	Yes	NA	46	Virginia	Yes	Yes
22	Michigan	Yes	Yes	47	Washington	Yes	
23	Minnesota	Yes	Yes	48	West Virginia		
24	Mississippi	Yes		49	Wisconsin	Yes	Yes
25	Missouri	Yes		50	Wyoming		Yes

NA = State does not have a municipal or county organization.

Total interviews with city leagues = 34

Total interviews with county associations = 24

4A PREEMPTION TARGETS CITIES

What is the nature of preemption in your state and how has it changed over time? Based on the findings in the 2018 NLC report, we expected to find that preemption has escalated in recent years and primarily threatens local governments' fiscal stability. We expected the burden placed on local governments to vary in accordance with their fiscal resources, policy and taxing authority. The literature further suggests that preemptive legislation is increasingly aimed at cities due to the socioeconomic influence they wield and states' desire to exert control over cities' ability to create and adopt policies.

We found preemption is used as a disciplinary tactic on cities, and other municipalities that might consider following their lead. This can lead to restrictions on traditional local government powers – taxes and expenditures, land use, franchises – and have a negative impact on local revenue.

A.1 Preemption can be used as a punitive or disciplinary tactic.

Briffault (2018), and Schragger (2018) characterize “punitive” preemption as anti-urban legislation that seeks to control and discipline “subversive” cities, discouraging or punishing them for passing local legislation. State law or state interests, which may primarily seek to protect private property rights and values, is thus in conflict with local legislation. Interviewees highlighted instances in which preemption was perceived in this manner as attempts to “reign in local overreach” (Idaho Counties). Examples included efforts to limit regulation of both long-existing and emerging industries, provide services to underserved communities, or raise current sources of revenue or find new ones.

Punitive preemption can range from corrective to vindictive, when preemption is deeper and more restrictive than local actions warrant. Measures observed include removing local authority to provide, regulate or ban a service; removing, withholding or cutting state aid, “criminalizing” local initiatives with civil or criminal penalties against local officials, liability fines, and shifting responsibilities without the corresponding funding. These actions can threaten municipalities' fiscal stability and autonomy and coerce local officials' decision-making authority.

Punitive preemption may not necessarily ban local intervention but does interfere with local governments' freedom to take initiative, as one interviewee noted: "Instead of just outlawing them [cities], they [state legislators] make legislation that stops their initiatives and prevents them from spreading" (Pennsylvania Municipalities). Preemption is not always a reaction to a coordinated statewide effort from municipalities to assert their authority over a particular matter. It can often be a reaction to a single city or a few attempts by large cities. While punitive preemption primarily seeks to tame rogue cities, the impact is felt by every other local government in the state as well. As one interviewee observed, "We get punished for the sins of the city" (Michigan Counties).

2016 Arizona SB1487: Withholding shared revenues

"If any legislator thinks a city or town is doing anything against the state, they have to change or lose shared revenues."

Arizona Municipalities

The 2016 Arizona State Bill 1487 is a notorious example of punitive preemption (Briffault, 2018). At the request of one or more members of the Legislature, the Attorney General can investigate any local ordinance, regulation or action that a legislator alleges conflicts with state law. If the ordinance does violate state law, the state will withhold shared revenues from the municipality. In case of ambiguity, the matter can be brought to court. In the meantime, municipalities will still be required to post a bond equal to the amount of shared revenues paid to local governments.

Back in 2012, the city of Bisbee had enacted an ordinance which banned the sale of plastic bags in their jurisdiction and imposed a 5-cent fee for recyclable bags. Three years later, the state passed a statewide law that prohibited local governments from regulating, taxing or banning "auxiliary containers", which included bags, cans, bottles and boxes of various types and materials.

In October 2017, Bisbee's ordinance was found to be in violation of Arizona law by the Attorney General, as a result of an investigation requested by Republican Senator Warren Petersen. **The city of Bisbee was given a period 30 days to withdraw the ordinance or else the Treasurer's Office would withhold state-shared revenue.** Bisbee agreed to remove the ban (Arizona Central, 2017).

Though the constitutionality of SB1487 has been criticized, the Arizona Supreme Court upheld it in 2017 case raised against the city of Tucson, where the city had adopted an ordinance that required police officers to destroy seized firearms (Arizona Capitol Times, August 17, 2017).

Memphis, TN: Removal of Confederate statues and loss of grant funds

While punitive preemption is often associated with the removal or limitation of local authority, states can retaliate against local initiatives that, though strictly legal, “displease” state legislators.

For the 50th anniversary of the assassination of Dr. Martin Luther King (April 4, 2018), the city of Memphis had planned a citywide commemoration. The city sought to get rid of three monuments, dedicated to Confederate General Nathan Bedford Forrest, Confederate President Jefferson Davis and Captain J. Harvey Mathes. To this purpose, they applied for authorization to the Tennessee Historical Commission, following the guidelines of the Tennessee Heritage Protection Act.

Enacted in 2013, the Act prohibits the removal, relocation or renaming of a historical military memorial located on public property without permission from the Commission. Thus, the city opted to transfer ownership of the public parks (in which the statues were located) to nonprofit, Greenspace, for \$1,000. The removal of the statutes was challenged by the Sons of Confederate Veterans, but it was found to be legal since the parks were now private property.

In April 2018, state legislators passed an amendment to the 2013 Tennessee Heritage Protection Act that required permission from the Commission for transfer of ownership. Furthermore, **the Tennessee House of Representatives withheld a \$250,000 grant for the city’s bicentennial celebration, an act inspired by Memphis’ “apparent violation of the law”** (Sisk, 2018).

2011 Amendment to Florida Statute §790.33: Criminalizing local regulation on guns

In 2011, the state of Florida amended their 1987 statute §790.33, which barred local governments from regulating firearms and ammunition, but lacked enforcement mechanisms (“Florida Legislature Amends State Law To Reduce Restrictions On Firearms”, 2011). The amendment created punitive provisions which made local governments and local officials liable for attempting to adopt gun control ordinances. The statute imposed a \$5,000 fine on any local official who was found attempting to have “violated” the statute, prevented them from using public funds to pay for any related costs (such as attorney’s fees) and could be cause for removal from office or termination of employment by the Governor (“Preemption of Local Laws in Florida”, 2019). The Governor gave ninety days for cities to repeal their gun control ordinances (Hanks, 2018).

The Marjory Stoneman Douglas High School Public Safety Act, signed into law in 2018, would set new barriers to firearm acquisition, such as raising the purchasing age, authorizing the confiscation of firearms and preventing individuals with a mental illness from purchasing firearms. However, it did not relieve local governments from restrictions to adopt gun control ordinances, nor did it remove the penalties. However, on April 2018, ten Florida municipalities announced they were filing a lawsuit to have the penalizing provisions in §790.33 repealed (Milberg, 2018). On July 26, 2019, the court ruled the penalties unconstitutional, but the state filed an appeal. The sanctions remained (Huriash, 2019).

A.2 The ripple effect: Pro-active preemption

States may try to anticipate local intervention. Despite no ordinance addressing the subject matter, or interest from local governments in regulating it, state governments might impose limitations or outright ban local regulation in a specific area. Briffault (2018) labels this type of legislation as “nuclear preemption”, which effectively takes away local governments’ freedom to act without express state consent first. “Nuclear preemption” represents absolute state domination of local governments as creatures of the state.

Various interviewees highlighted how preemption increasingly targets issues of (seemingly) small importance to them, but which are being debated somewhere else – often Democratic cities and states. Progressive initiatives from California were often mentioned as a reference for state legislators in conservative states, unchaining a “ripple effect” over the rest of the country. As one interviewee explained: “They [state legislators] see something going in California or Massachusetts [...] *We can’t have that happen [here]. We’ve got to preempt that*” (Louisiana Municipalities).

Large-size Soda Ban: From New York to Wisconsin

“We’ve seen business groups or industry come in and convince the legislature to pass legislation, even though individual communities in [here] have not done anything to cause them to be concerned. But they’ve seen it in other parts of the

country. [...]: They're doing this in other parts of the country. They're going to come and do it here. [...] *It's **paranoia on the part of business groups.***"

Wisconsin Municipalities

Although no communities in Wisconsin had a ban on the sale of large-size soda, former New York City Mayor Michael Bloomberg's proposal for a ban on large sugary drinks was cited as a factor behind Wisconsin Statute §66.0418, which prohibits local regulation of certain foods and beverages (Michail, 2013). In 2012, Bloomberg announced his plan to ban the sale of large sodas and other sugary drinks at restaurants, movie theaters and street carts. The limits of the ban were challenged in court and in June 2014, the ban was rejected by the New York State Court of Appeals (Ax, 2013). The Wisconsin state ordinance, which was signed into law in 2014, forbids local governments from regulating or prohibiting the sale of food or nonalcoholic beverages based on any nutritional criteria including calories and portion size.

Louisiana's Eminent Domain Act, Amendment 5 (September 2006)

One interviewee proposed that *Kelo vs. City of New London* (2005), which upheld the use of eminent domain to transfer private property to a private party with the purpose of furthering economic development, has had a similar nationwide "trickle down" or ripple effect.

In 2001, the city of Shreveport, Louisiana, had filed two suits to expropriate three tracts of land owned by Chasse Gas Corporation and Harold S. Hollenshead, for the purpose of building a convention center complex. The District Court found this purpose to be a legitimate public interest, and parties proceeded to a compensation trial. However, conflict arose regarding the payment of attorney fees and costs. Owners sought both the restoration of their property and reassessment of attorney fees and costs (Ledet, 2006).

On September 30, 2006, the state passed the Louisiana Eminent Domain Act, Amendment 5, which proposed to limit the ability of the state or a political subdivision to take private property for economic development projects. Notably, public ports, airports and industrial development were exempted from this limitation.

"Even though there was no evidence that Louisiana's cities and parishes were even using [eminent domain]. In fact, evidence showed that it was energy companies and railroads who were actually abusing this expropriation power. They had properly exempted that from the Constitution Amendment.

*[...] The only example they showed was a case up in Shreveport [City of Shreveport vs Chasse Gas Corporation]. That's just kind of an example of **a national issue that***

trickled down here, and it was like a firestorm of, ‘Oh, local governments and parishes are abusing their appropriation power’.”

Louisiana Municipalities

A.3 Preemption is made “with a very broad brush.”

Various interviewees observed that states interfere in issues that could be more efficiently handled at the local level, such as land use regulation and delivery of public services. **“They use a shotgun to address the issue when it could very easily be addressed with a local bill”** (Louisiana Municipalities).

Schragger (2018; p.30) observes “courts tend to treat land, education and housing as quintessentially local, while the municipal regulation of commercial and other market actors is often rejected based on the imperative of statewide uniformity.” However, states can still intervene in local matters to protect state interests, replacing local regulation with standardized, “one-size-fits-all” legislation made “with a very broad brush” (Idaho Counties). Preemption can ignore the asymmetries across municipalities - in terms of population, wealth, challenges, needs and even authority.

“Our revenues are different, our services are different, our growth opportunities are somewhat different [...] The legislature tends to lump them all together and not look at us as individual entities”.

Florida Counties

Various interviews cited local municipal broadband and small cell preemption, affecting land use to franchise fees, as an example of uniform statewide legislation that can impact underserved communities negatively.

Interviewees argued that preemption impacts cities and counties differently as well. An interviewee from Nebraska Counties observes: “Municipalities have significantly more ordinance authority. [...] We [counties] have to go back to state legislature”. Counties are perceived as

“creatures of the state”, strictly adhering to state mandates. Well-behaved counties “have not been active in pushing back on state preemption” (Minnesota Cities).

Counties’ relationship with the state can be significantly less antagonistic than cities. “Because counties are seen as part of the state, the state feels comfortable asking them to do other things, rather than seeing them as separate entities” (California Counties). This represents a challenge for counties, as cities generally have more policy and revenue-raising authority than counties. “Counties want to push for equal taxing authority” (Virginia Counties).

Louisiana’s Post-Katrina statewide building codes

An interviewee from Louisiana notes that preemption often emerges from issues taking place in Jefferson Parish, specifically New Orleans.

“We’ve had mandatory building codes preempting us from being able to have our own building codes. That was done post-Katrina back in 2006. [...] A lot of that was because of New Orleans, and just the issue with the floods and the winds, and that the insurance industry wanted to mandate a uniform minimum standard of building codes.

*Sometimes one size does not necessarily fit all. **What’s good for New Orleans may not be good for the buildings of the local parish.** You had some communities that may not have had building codes. After Katrina, the insurance industry came and said: We’ve got to have uniform building codes in order to save lives and to cut the insurance policy down.”*

Louisiana Municipalities

Prior to Hurricane Katrina, a Uniform Building Code Task Force had been created to develop a study of existing construction regulations and recommend appropriate legislative changes. It was to be submitted no later than March 1, 2007, and the first meeting was scheduled to take place on August 31, 2005 (FEMA, 2006). Hurricane Katrina, however, landed on Louisiana a day before.

On November 29, 2005, SB44 was signed into law. It required the enforcement of the International Building Code (IBC) and the International Residential Code (IRC), as well as the creation of a State Uniform Construction Code Council. It contained emergency wind and flood mitigation provisions that were to be adopted by every community statewide, not just parishes and municipalities in areas affected by Hurricane Katrina.

The interviewee continued:

“The state mandated a mandatory uniform building code and required each entity, local entity, to have a certified building official. At the time, there were only two certified building officials in the entire state of Louisiana. So, what that created was municipalities had to either train someone, hire new certified building officials, or it had provisions from contracted third party providers, which could have increased costs.”

Louisiana Municipalities

Conclusion

We found that interviewees were more inclined to identify preemption with the loss of policy and regulatory authority than with limitations over taxing power and expenditure capacity. Given that policy authority and fiscal health cannot be divorced from each other, preemptive legislation that targets the former, may still contain fiscal penalties (such as the withholding of funds) that threaten the latter.

While interviewees shared a common view that preemptive legislation has become increasingly anti-urban, they reject the notion that cities carry a heavier burden than counties. State-county relations may be less competitive, but counties continue to be bound by their limited taxing authority and dependence on property taxes and revenue sharing.

The literature suggests that statewide uniformity is pursued primarily in market regulation, given that fields under traditional local authority such as land use, zoning and building codes are entirely subject to the unique attributes of each municipality. However, we found that “one-size-fits-all” preemptive legislation is expanding to these traditionally local fields, and its impact can result in both loss of regulatory authority and upward pressure on expenditures.

4B TAKING AWAY REVENUE AND SHIFTING THE FISCAL BURDEN

How has preemption affected revenue and expenditures for local governments in your state? Based on the literature addressing the fiscal impact of preemption, we expected to find that the growth in fiscal restrictions and their effect on expenditure needs were primary concerns among local governments. The question addressed our interest in the impact of preemption on local fiscal health.

We found that shared revenue diversion and expenditure shifts were more subtle. Respondents were more concerned with the loss of taxing or fee authority, and the deterioration of the collaborative state-local partnership.

B.1 Diversion of local revenues

Interviewees observed that loss of policy authority and devolution of responsibilities are no less threatening to local fiscal health than direct fiscal revenue and expenditure restrictions, but they are subtler and thus less likely to draw public scrutiny. One mechanism cited by participants was the decrease in local share from state revenues. “The risk of preemption and actions by the Legislature that attack local governments is different - it’s not about shifting finances, but about policy” (California Cities).

Maine: “A pot of money that’s easy to raid.”

“[Revenue sharing] provides around \$170 million dollars for municipalities annually.

Over the last ten years, the Legislature has been poking around with that fund, and reserving for itself some of those revenues. In a ten-year period, over seven hundred million dollars, that would have otherwise been dedicated to municipalities through the former revenue sharing, have been reserved for the State.

So not only are municipalities merely, exclusively, reliant on property tax, now the State has put additional pressure on that property tax by withholding more and more and more of the revenue sharing. Essentially, now we are receiving

40% of what we would otherwise receive. We're receiving \$65 million when they really owe \$170 million."

Maine Municipalities

Maine legislation dictates that five percent of revenues from state sales and income tax must be shared with municipalities. Since the establishment of Maine's Municipal Revenue Sharing in 1971, state expenditures on revenue sharing grew until the 2007-2008 fiscal year, when it peaked at approximately \$133 million dollars. Since then, it has declined at an alarming rate. According to the Maine Office of the State Treasurer, it fell to \$63.5 million dollars in the 2014-2015 fiscal year. Revenue sharing began to recoup slowly during the following years, rising to \$69 million dollars the 2018-2019 fiscal year.

The interviewee continued:

"It's a pot of money that is easy to raid. The revenue sharing program has been on the books since 1972. It was a program that the Legislature and the governor were committed to. They didn't touch that, because they believed in the reasons why the program was important. But once the recession hit, they started to dip in it. And once they got an appetite for that revenue, they weren't satiated."

Texas: "Reverse governmental aid"

*"Financially, Texas has been relying on what we call a **three-legged stool**. Number one, Texas cities get essentially no money from the state of Texas. [...] About three or four percent of the average Texas city's budget is revenue that was generated from the State and shared back with cities.*

*In addition, **Texas cities raise revenue and then give it back to the State to provide State programs -we call it "reverse governmental aid."** For example, to get a State highway built in a Texas city, Texas cities have to give money to the Texas Department of Transportation to assist in the construction of that highway. Municipal courts have 89 dollars' worth of fees on every traffic ticket that is given back to the State to fund State programs.*

*And finally, there's administrative costs for State agencies. In Texas, the State comptroller collects the local portion of the State sales taxes - up to 2 cents. **The comptroller keeps a percentage of that sales tax as an administrative fee.** They keep two per cent, actually -and that amount of money is enough to run the entire Texas Comptroller's Agency, just **on the back of cities.**"*

Texas Municipalities

New Jersey: Usurpation of local revenues

*“There are certain revenue streams that were originally dedicated to municipal governments. Those revenue streams have been diverted by the State, for the State’s use. Probably the biggest piece of that puzzle has been **energy taxes**.*

*Originally, prior to 1997, **energy taxes were paid directly to the municipalities**, by the energy company, for the use of the rights-of-way. So, municipalities would not impose a property tax on wires and poles that were on the rights-of-way, and instead the energy companies would pay an energy tax to the municipalities.*

*In 1997, the State decided that it would be much more efficient for energy companies to send **only one check to the State**, and then the **State would redistribute that money** back to municipalities.”*

New Jersey Municipalities

In July 1997, the Energy Tax Receipts Property Tax Relief Fund (ETR) and the Consolidated Municipal Property Tax Relief Aid (CMPTRA) were established. CMPTRA is comprised by the Business Personal Property Taxes, the Financial Business Taxes and the Class II Railroad Property Taxes, all of which are collected by the state. ETR is a special dedicated fund in the State Treasury that collects utility taxes and redistributes them back to municipalities. It replaced the Public Utility Gross Receipts and Public Utility Franchise Tax were repealed.

A provision mandated that, should the state fail to distribute to each municipality the amount set in the original law, it would lose its power to collect energy taxes (Moran, 2018). Beginning in fiscal year 2002, the amount distributed to municipalities was to increase annually according to inflation, which again if the state failed to do so, it would lose its powers to collect.

The interviewee continued:

“It worked out for a while. But then the State took a look at all the money flowing through. They started keeping a little more, and a little more, and a little more...”

On June 4th, 2018, New Jersey 8th District Assemblymen Ryan Peters and Joe Howarth introduced a NJ ACR-176 Amends Constitution to require ETR aid and CMPTRA programs to be fully funded each year, with dedicated amounts distributed to municipalities. According to Assemblyman Howarth: “These two programs were always meant to be property tax relief generators for municipalities. Once the State started skimming off the top of them to satisfy its own budget, it never stopped” (Insider NJ, June 4, 2018).

B.2 Preemption is being used to shift the fiscal burden.

Devolution and shifting of responsibilities unto local government, especially counties, was mentioned across various interviews as a major fiscal issue. While local governments are often protected from receiving state mandates without the proper funding, state governments may find alternative, subtler mechanisms to “balance” this dynamic.

Louisiana: “Rightsizing” roads

“Years ago, when they wanted to widen the highway or road, they would move utilities, which of course costs a lot. Cities couldn’t afford it. The State said: Look, we’re going to relocate the utilities. We’ll send you a bill, but you don’t ever have to pay for it.

Some of these are from twenty years ago, but now according to the State and the federal administration, Hey, we need the money for reimbursement for those relocations. So, then the State is sending a bill for \$500,000 for relocation of utilities back in 1991. The State said, You owe us \$500,000. We will in exchange give you \$500,000 worth of State roads inside your branch or municipality that you would be responsible for, and not have to pay that debt.

So, some folks have just had to suck that up because they didn’t have \$500,000 or \$1 million to cut a check from their budget. [This] was heavy going for about four or five years ago”.

Louisiana Municipalities

In a 2009, the Louisiana Department of Transportation and Development (LA DOTD) reported to the Commission on Streamlining Government that the state was responsible for over twenty-seven percent of the public road mileage in Louisiana, a significantly higher percentage than the national average of nineteen percent. Because the 16,683 miles of state roads included several local roads, the DOTD recommended transferring five thousand miles of state-owned roads to cities and parishes (DOTD, 2009).

On June 9, 2010, Louisiana passed a resolution requesting the DOTD to study downsizing the number of state highway miles for which the state was responsible (LA H.R. Con. Res. 38, 2010). The roads would be transferred to the corresponding cities and parishes, though participation was voluntary.

Local governments would be compensated with an increase in funds coming from the Parish Transportation Fund. The Fund was receiving forty-six million a year from the state in 2009, which included revenues from the one penny from the state’s twenty-cent gas tax.

However, with the transfer, an additional sixty million a year could become available to local governments. Still, both Rep. Sam Jones (D-Franklin) and Dr. Eric Kalivoda, then Assistant Secretary of the Planning Division of the DOTD, acknowledged there was a risk the state would not be able to deliver these amounts (Anderson, 2009).

The interviewee continues:

*“The State is currently turning over a lot of the road miles to the cities and parishes, and we’re required to maintain them. Yet, we don’t really have the ability to fund it because we have no gas tax. They have a parish transportation road fund, but it’s constantly a fight to even get funded. [...] **It’s a voluntary program, but they tried to mandate it.**”*

New Mexico and inmate mental health services

“There have been unfunded mandates imposed on local governments, especially counties, with regard to, for example, funding hospitals, Medicaid program, Medicaid base rate increase and uncompensated care. So, counties had to pay into that.

The state has pretty much abdicated its responsibility regarding services for people with behavioral health issues. Our county jails have become de facto mental health hospitals. And the cost of operating county jails is escalating every year. Right now, almost one of every three general fund dollars for county governments goes towards operating county jails. That doesn’t even include capital costs or liability.

And so, we’re put between a rock and a hard place. A lot of counties have had to raise local taxes, for operating jails to provide mental and health services. Those services are not being provided for the most part by the state, or by municipalities in a lot of cases. A lot of essential services are being pushed on to local governments, and local governments have had to raise taxes in order to be able to pay for those [services].”

New Mexico Counties

In a 2014 interview with KUNM, Bernalillo County, NM jail staff observed that that county jails are the largest providers of mental health services in the state (DeMarco, 2014). Mental health services require specialized staffs and treatment, which increases costs for county jails. Former Bernalillo County Jail Chief Ramon Rustin estimated that, on February of 2014, half of Bernalillo County jail’s medical budget was spent on mental illness diagnosis and treatment. In 2016, the New Mexico Association of Counties estimated that thirty-five percent

of inmates in New Mexico county jails were prescribed psychotropic medication (New Mexico Association of Counties, 2016). Mental illness may have been a factor in their arrest, and jail conditions are likely to aggravate their condition (Sharp, 2018).

Idaho: Dedicating counties' share of liquor funds to fund education

In Idaho, a constitutional provision allocates up to 50% of counties' share of revenues from the liquor sales to fund out-of-district community college tuitions.

*"Idaho is [an alcoholic beverage] control state. All liquor in the State is distributed through a state distribution system -you can't just go to the liquor store and get it. **The proceeds from the sales are distributed between the State, the cities and counties.***

The cities -there's no limitation on how they can use that money. They can use it for any general purpose. The counties do have limitations on how they can use that money. A portion of that money, it's a small portion, it has to be dedicated for magistrate court services [...] The other dedicated service is for out-of-district community college tuition.

*Basically, in Idaho, if you have a community college in your county, there's a taxing district in your county that supports that community college. If you're a county that doesn't have a community college, and you have county residents that attend a neighboring community college, your county is billed for an out-of-district tuition charge. [...] You're required by statute to spend up to 50% of that liquor fund money on those community college fees, and if there's anything left over **after that, after magistrate court and community college, it goes into the county general fund.**"*

Idaho Counties

Conclusion

The impact of state preemption on municipal fiscal autonomy is not just via tax and expenditure limitations. Across our interviews, we identified that an increase in the fiscal burden is associated with a) the loss of policy authority and loss of municipal revenue sharing, and b) the transfer of state

responsibilities to local governments without funding. These measures are subtle enough to be imposed without drawing public scrutiny.

4C

USURPING AUTHORITY AND GIVING AWAY MONOPOLY POWER

What are the community needs/new challenges you are trying to address that state preemption impedes or facilitates? We expected preemption to have a significant impact on local taxing and expenditure capacity; thus, we sought to gather data on how these restrictions affect local ability to provide public services, invest in infrastructure and face ongoing public health crises. We found that interviewees were concerned with the loss of their ability to deliver municipal broadband or regulate the deployment of small cell infrastructure. Local land use and franchise granting power are being undermined as states give attempt to streamline the deployment process.

Cities have traditionally been able to control the entry of capital and give away franchise and monopoly power, a level of influence that has long been contested by business coalitions (Frug, 1999). The private sector has welcomed state intervention, perceiving it as less restrictive than municipal oversight and potentially easier to influence. To seek relief from perceived excessive municipal oversight at the state level is a tactic often used by lobbying groups. Even where state regulation has granted local governments wide discretion, local officials tread carefully before drawing further scrutiny from the State: “If it goes into the legislative arena, it is a ripe place for preemption” (Idaho Counties).

Telecommunications

Access to high-speed internet is a key factor in socioeconomic development. Lack of adequate coverage has given rise to a digital divide in the US for lower income urban areas and rural communities (Berdik, 2018; Gallardo et al., 2018; Horrigan, 2019; McDonough, 2019; McHugh, 2019) and can preserve gaps in income (Gallardo and Whitacre, 2019), access to employment and education (Berdik, 2018) and access to healthcare (Bresnick, 2017; Turner, 2019). Where private providers are unwilling to deliver or improve their service, a rising number of municipalities are choosing to invest in their own fiber optic networks (e.g. Chattanooga, TN; Fort Collins, CO; Mont Belvieu, TX; Wilson, NC) or request access to neighboring municipal broadband services (e.g. Pinetops, NC; Trumansburg, NY).

However, municipal leadership in the market has spurred the rise of both federal and state legislation preempting local authority to deliver and regulate municipal broadband (Silbey, 2018c). Twenty-five states regulate municipal broadband to varying degrees (Chamberlain, 2019; NCSL, 2019; Kienbaum, 2019). States can set limitations on implementation, competition with private providers, expansion, funding and financing. Regarding small cell, states can place a cap on the amount municipalities can charge for the use of the rights-of-way to place new poles, or for the attachment of equipment to existing poles.

Participants observed that, despite interest from local governments to cooperate with telecommunication corporations, states have adopted legislation that limits or outright bans local regulation concerning use of rights-of-way, franchise fees and municipal broadband provision. They remark on how misperceptions on the role of local government in regulating utility companies has interfered with local efforts to preserve their regulatory authority.

*“The underlying principle that we are fighting as municipalities [...] is that somehow **there’s this belief that cities are fundamentally trying to slow down, impede, or even block the deployment of this technology and nothing could be further from the truth** [...] We cities have a stake in this and need the resources to deploy this technology.*

*At the same time, **this technology depends upon the ability to occupy the public rights-of-way to operate. Elected officials have every responsibility to properly manage those rights of way, and along with that, major issues related to things like quality of life and proper budget management to adhere to.** [...]*

*[...] So for the Feds or the State to come in with **one-size-fits-all siting requirements, regulations, fee structures**, etc., flies in the face of a situation where cities are able to negotiate one-on-one individually, either through ordinance or individual contract, with the telecommunications and broadband service providers. We want to maintain that facility.”*

Oregon Cities

C.1 Limiting the expansion of municipal broadband delivery

Various interviewees highlighted how preemption on municipal broadband provision represents a challenge for states with a significant number of underserved rural communities. Two similar cases, Chattanooga, TN and Wilson, NC, were discussed in light of the involvement

of the Federal Communications Commission. The FCC sought to preempt state law that prevented municipalities from providing broadband services outside of their jurisdictional boundaries, but the United States Court of Appeals for the Sixth Circuit upheld state authority to preempt municipal broadband in 2016 (Gonzalez, 2018a).

Chattanooga, TN

In 1996, the city of Chattanooga's Electric Power Board (EPB), a publicly owned utility company, authorized the construction of the first segment of a fiber optic cable network throughout the city. According to Mitchell (2012), EPB "hoped another provider would build the full fiber system, but the costs of building fiber-to-the-home, even with the benefit of EPB's existing network, proved too daunting for private companies worried about the return of investment" (p. 32).

The Tennessee Public Acts of 1999 authorized cities to provide cable TV services within the boundaries of their electric utility services. In 2000, EPB began providing services to local businesses. In 2007, Chattanooga announced their intention to expand their coverage to the entire city, causing backlash from existing private providers. Internet service provider Comcast would even file a lawsuit requesting a stop to the EPB's plans ("Comcast Sues EPB In Hamilton County On Eve Of Bond Issue", 2008). The city would officially begin offering their services on September 15, 2009. It was able to offer fast Internet plans (100 Mbps and 1Gbps) at competitive prices (Mitchell, 2012).

The EPB intended to expand their service to neighboring areas (Jeffrey, 2017). On February 2015, the Federal Communications Commission (FCC) voted to preempt state legislation in North Carolina and Tennessee that prevented expansion of municipal broadband services. Both states challenged the decision, and in August 2016, the US Court of Appeals for the Sixth Circuit ruled in the states' favor (Flessner, 2016).

On May 2017, Tennessee Governor Bill Haslam signed into law the Tennessee Broadband Accessibility Act, which established the provision of \$45 million dollars, over the course of three years, in grants and tax credits to enable broadband provision in underserved areas - \$30 million in grants, and approximately \$15 million in tax credits to private service providers (West, 2018). According to the Tennessee Department of Economic and Community Development, it allows private, nonprofit electric cooperatives to provide broadband service, which they were previously restricted from doing.

One interviewee from Tennessee notes that backlash from private providers was stronger for large cities like Chattanooga than for rural communities:

“The areas that are rural are much more difficult and much less profitable to provide the services. They did not push back on those as hard, and [they] were more open to allowing the rural electric cooperatives to get into that”.

Tennessee Counties

Wilson, NC

“A lot of our municipalities are not served by high speed broadband and we do have governments around the state who would either be interested in, if not providing the service directly themselves, investing in dark fiber or whatever it might be that they could then lease to a private operator [...] I do think occasionally cities get called upon by their residents to take actions that they just don't have the legal authority to do.

[...] When we were discussing the broadband issue, I remember our lobbyists saying: We're happy to give telecommunication companies the right of first refusal to serve these areas. I have to assume it must not make economic sense to serve these areas, or they would be served already.”

North Carolina Municipalities

In 2008, the city of Wilson, NC, with a population of 50,000, launched its own fiber optic network. Nearby communities, to which Wilson provides other utilities, expressed interest in being supplied broadband services as well. One of these communities, the town on Pinetops, had expressed interest back in 2010. However, in 2011, North Carolina passed House Bill 129, or the Level Playing Field/Local Government Competition Act, with the purpose of regulating local government competition in the market (N.C. House Bill 129, Session 2011).

Any city interested in providing communications service to an underserved area would have to petition the North Carolina Utilities Commission - and give proof that the area was underserved. Any private service provider or interested party would be able to object to the petition if the area was, in fact, not underserved, or the city was not qualified to provide the service. It would further prevent a city from providing the service outside of its own jurisdictional boundaries. This led Pinetops and Wilson to bring the case to the Federal Communications Commission.

Given that Wilson already had fiber in Pinetops, the city began providing Internet access after the FCC voted to preempt state law in 2015. But Wilson would be forced to cease provision to Pinetops and sell the infrastructure under its ownership in the town after North Carolina (and Tennessee) successfully challenged the FCC decision and the US Court of Appeals for the Sixth Circuit ruled in the states' favor (Handgraaf, 2018).

However, in 2019 the North Carolina’s House of Representatives and the North Carolina Senate introduced two separate bills aimed at relieving barriers for broadband delivery in rural areas (Johnston, 2019).

C.2 Usurping local zoning authority

Local governments can regulate the siting of small cells through zoning, building codes, licensing, etc. However, preemptive legislation can impose restrictions or completely override local zoning authority concerning siting and construction of small cell transmission towers and use of rights-of-way. Both examples were frequently mentioned across our interviews.

Small cells are radio access points that, due to their small size, can be attached to existing poles (e.g. streetlights, street signs) and buildings. They require dense deployment to operate due to their short range. Major telecommunication companies have sought to deploy them in public rights of way (where traditional cable providers have laid lines). The “**red tape of local control**”, as described by an interviewee from Maryland Municipalities, is important because small cell relies on local public land. It changes the character of communities.

Local regulation of small cell siting

“This, right now [July 2018], is being debated at the federal level to preempt the siting of small cell towers. The next generation of cell services, 5G cell services, relies a lot on very small but a lot of mini towers -and they’re trying to get the FCC to issue regulations that will preempt that nationwide.”

Wisconsin Municipalities

On September 26, 2018, the Federal Communications Commission voted to issue an order (“Streamlining Deployment of Next Generation Wireless Infrastructure Declaratory Ruling and Third Report and Order”) that limits local authority over siting, the amount of administrative fees that can be charged for use of rights-of-way, aesthetic and undergrounding requirements and timeframes for deployment of infrastructure.

“The new rule effectively gives away the market value of publicly-owned assets (rights-of-way) by severely limiting the annual rents that may be charged for each structure.”

Virginia Counties

However, another interviewee proposed that, due to the unique nature of small cell, regulation of small cell may not be pragmatic at the local level. It requires the deployment of many more towers than with a regular cell tower. However, it is still in the interest of local governments to retain authority over the use of rights-of-way:

“We tried to work cooperatively with our telephone companies this last year [2017] on the small cell legislation notes [...] They wanted to have a streamlined process or put some restrictions on local authority over permitting for these new types of cell towers.

*With traditional cell towers, you might have a tower every quarter of a mile. With 5G technology, they may have a small facility on top of a telephone pole or a light pole every 100 feet. So, there are going to be many, many more of these. **We can't go through the same process we do for a large cell tower we built every quarter of a mile for towers.***

At the same time, we [local governments] were protecting local control over the right-of-way because they wanted to have easier access to places and public rights-of-way.”

Tennessee Counties

North Carolina: Taking away involuntary annexation authority

Another case, unrelated to telecommunication, was cited as an illustrative case of usurpation of local land use authority.

The 1959 Annexation Act granted North Carolina cities the authority to annex private property with or without consent of the targeted area, should a determined criterion be met. “City-initiated annexation”, or “involuntary annexation”, allowed municipalities to vote to annex a nearby (almost always contiguous) area once it reached a certain density and its need and use of city services increased, among other conditions. However, opposition from targeted areas rose from the fact that cities were not required to provide services to the residents in the targeted area at the moment of annexation, yet residents would still be subject to city regulation (including taxes and fees) immediately.

In 2011, House Bill 845 “An Act to reform the involuntary annexation laws of North Carolina” allowed annexations to be terminated should owners of 60% of the parcels in the

area oppose annexation. Cities were required to extend services to properties in the targeted area within three and a half years should they be requested to by the property owners.

In 2012, the 2011 law was replaced with House Bill 925, “An Act to require a vote of the residents prior to the adopt of an annexation ordinance initiated by a municipality”, was signed into law. Cities are now required to notify residents of the targeted area of its intention one year before the process would take place and hold a referendum on the proposed annexation (Leslie, 2012).

C.3 Usurping franchise fee authority

*“When municipalities are not allowed to collect fees for things like cable television, or wireless services being installed in the rights-of-way. Those kinds of preemptions create a revenue gap - **death by a thousand cuts**, when you look at that.”*

New Jersey Municipalities

“We’re seeing bills that are preempting local units of government from collecting fees for inspections, from requiring more funds or insurance for some of our road work. You’ve got telecommunication companies that want to bury lines in the road. They want us to forego our revenue on our inspection, or [our] advance in insurances, in case they mess it up, so that they can just get more profit off of it.

So, again, that’s another very business friendly, anti-local government policy that they’re trying to shove through. They’re trying to tell us we have to have our big towers and poles, so they’ve got more internet connectivity, but you know, they’re taking away our zoning rights on it.”

Michigan Counties

Conclusion

Interviewees often highlighted **how preemption was increasingly targeting local regulation of the telecommunication industry, usurping land use power and authority to impose franchise fees**. Concern over the impact of state law on service access in rural, underserved communities was widespread. As observed in previous sections, “one-size-fits-all” legislation can disregard the asymmetries across local jurisdictions, to the disadvantage of small rural communities, which lack

quality access to telecommunication services. State preemption can be used as a channel for usurpation of local authority over traditional local matters, such as land use and zoning, when they affect market interests.

4D DRIVERS OF PREEMPTION

What are the politics behind preemption in your state? Based on the literature, we expected to find that preemption is partisan, with support or opposition to local autonomy tied to the public and private values championed by Republicans or Democrats. The literature suggests that external forces, such as lobbying groups, have a central role in driving preemption. We found interviewees were more concerned with corporate penetration than with political partisanship, given the involvement of groups like ALEC in drafting model legislation and promoting their passage.

D.1 Preemption is driven by external players.

Interviewees highlighted the role of external players (special interest groups, corporations and conservative/libertarian think tanks) in bringing certain matters to the attention of state legislators - often related to local regulatory power over industries. “The industry got tired of dealing with the locals”, explained one participant (Louisiana Municipalities). Another said: “The business community [...] is always looking for ways to minimize any sort of regulatory burden or inconsistency” (Wisconsin Municipalities).

This dynamic was described as corporations treating the state as a “one stop shop” for external stakeholders who “don’t want to deal with the patchwork of local jurisdictions and local regulations. [...] **They’re providing the state with their perspective that local governments, through their ordinance authority, are stifling innovation, development and competition.** In conservative states, that’s very compelling” (Idaho Counties).

State government as the “ideal” medium for lobbying

*“I see it like a parallel to Goldilocks and the Three Bears. You’ve got the federal government, the state government and the local government. There’s this growing perception, at least amongst state players and I think amongst some activist groups nationwide, that the federal government is too big and dysfunctional, and **you can’t do anything at the federal level.***

*The local government, in some respects, **can’t be trusted.** They’re small, flying under the radar... And then you’ve got the state government, which is this **happy medium.** [...] There has*

*been this **massive push to really reign in** what's perceived as **local government overreach**, at the state level, through preemption."*

Idaho Counties

Several interviewees mentioned the **American Legislation Exchange Council (ALEC)** as an influential force behind preemption legislation over local regulatory authority: "They want to get rid of local government", one interviewee from Louisiana explained. Interviewees were well-aware of ALEC's counseling role in the development of "model" ordinances. At the same time, while lobbying efforts focus at the state level, local representatives can receive offers of guidance to draft these ordinances well.

*"It has been offered by one lobbyist to represent independent businesses, to model legislation, to model ordinance language. If I would like to sit down and talk with him about that. He's offered to help us come up with **model ordinance language** to deal with the **small cell** issue."*

Kentucky Counties

Florida: The incoherent language of "model" ordinances

"We believe a lot of the preemption language that [Florida local governments] have had to deal with has originated from the model legislation that's been developed by ALEC, as well as model local government regulations.

*There is a large contingent of [Florida] legislators that are members of ALEC, and we've had to address various proposals that were generated through ALEC as well as the wireless industry at the national level. [...] The wireless industry may have had a little bit more of an arm in actually creating the language, but I think that they probably worked in conjunction with ALEC in order to **convince legislators that local governments were hindering the roll out of 5G service.***

*What we see is **proposals that fly in the face of some of our constitutional provisions and just don't jive well with the current statutory framework** [...] The state legislature [probably] didn't have a whole lot of activity to craft the language. **It was language that was provided to them.** After, we spend a considerable amount of time educating them [...] on how this kind of generic language needs to be significantly modified in order to work properly within the structure that we have here. It becomes pretty apparent that **someone, somewhere is***

hatching some ideas primarily through some preemption language that will tailor to some special interest somewhere.

*For example, public-private partnerships had been going on in [here] for decades. We didn't need a state-wide law that set up a six-month long structure that basically hindered the introduction, acceptance and operation of public private partnerships. Well, unfortunately, **someone had some model legislation they got from somewhere** [...] They passed it, and then **two years later there was a complete re-write**. They recognized that it didn't operate within the structure of the [Florida] constitution or statutes, and it actually did hinder public-private partnerships."*

Florida Cities

D.2 Is preemption a partisan issue?

Several scholars note the link between preemption growth and Republican domination of state legislatures in the last decade (Riverstone-Newell, 2017; Schragger, 2018; Fowler and Witt, 2019). However, we find that a significant number of interviewees share a more nuanced view on the subject. Interviewees sustained that preemption cannot be exclusively attributed to a conservative ideology. Partisan control, regardless of which party is in the majority, is inclined to promote preemption. The minority party is likely to champion local control, be it Democratic or Republican, to retain some degree of independence.

*"We have generally resisted accepting the notion that preemption is something that's appeared in the last decade - because in our experience, that tends to (...) turn it into a partisan argument. **The reality is that preemption is a bipartisan problem.** Democrats have tended to do it as much as Republicans [...] **I would ascribe [preemption growth] to unified partisan control as opposed to simply the fact that Republicans like preemption** [...] I think if you say that, it's an oversimplification."*

Wisconsin Municipalities

"We have preemptions under both [parties], so I don't think it's necessarily grounded in the party. Back in the 1980's, we had the tobacco as well as the firearm preemptions passed, and that's when the Democrats controlled basically all of the Legislature and the governor's office. Since then, with the Republicans starting back in probably the late

1990s, we had a considerable number of additional special interest preemptions -the utilities industry, the wireless industry, the agricultural interests.”

Florida Municipalities

“They [Republicans] never have to think about any alternative [when making policy]. If we had one chamber, one part of the legislative process under Democratic control, it would be a totally different picture. When we’re lobbying, we have to keep going back over and over again to a small handful of moderate Republicans who are able to swing votes if they’re inclined to agree with them. **We can get all the minority party votes we want, but they’re never going to be making policy because they can never get enough votes.**”

Arizona Municipalities

“**It is clearly in the Republican playbook to run on a platform of tightly controlling government spending.** So that’s when you see things like levy limits. [...] Typically, when the Democrats were in control of Wisconsin, it was usually labor-related stuff. We would have less ability to regulate our own employees and family medical leave preemptions, or whatever the case might be. **With Republicans in control, it’s more business groups that tend to be listened to and successfully push uniform regulations and preemption.**”

Wisconsin Municipalities

“The notion of local control and local choice [in California] tends to be more Libertarian or Republican. [...] **Sometimes you see extremes lining up, far right and far left in “no growth” coalitions.**”

California Municipalities

“It used to be the Republicans that were far more about local control, and now they’ve gotten so far away from that. They know better.”

Michigan Counties

“AB32 Climate Change Legislation¹ (...) was a huge issue for the League of Cities. [We] even lost some members over the issue. Bigger cities were really pushing to get this passed, arguably some of [AB32] threatened local control for small towns. A whole

¹ AB32 California’s Global Warming Solutions Act of 2006 required the California Air Resources Board to establish a plan to reduce California’s GHG (Greenhouse Gas) emissions to 1990 levels by 2020.

group of cities in Orange County voted against it, and even left the League of Cities over that dynamic.”

California Municipalities

Conclusion

We found that a significant number of participants rejected the notion that preemption can be subscribed to any specific political party or ideology. Instead, they suggest that one-party rule or a significant majority rule system is a fertile ground for preemption, independently of which party is in power. Interviewees agree that industry-specific preemption has proliferated over the years due to the involvement of lobbying groups such as the American Legislation Exchange Council (ALEC) in drafting model legislation, providing guidance and serving as a channel that connects primarily conservative and libertarian legislators across the nation.

5 DISCUSSION

The concerns found in our interviews can be categorized under two major themes: **Taming rogue cities** and **grabbing market share**. Based on the literature, we expected to find a focus on the fiscal impact of preemption, but interviewees were equally concerned with the loss or usurpation of local policy and regulatory authority, the shifting of fiscal responsibility from states to local governments, the loss or diversion of shared revenues, one-party control of the Legislature and the passage of industry-specific preemption in telecommunications.

Taming rogue cities (and crippling counties)

Preemption targets cities.

Briffault (2018) argues that classic preemption is a system in which state and local governments co-exist harmoniously, with states granting local governments' wide discretion in local matters such as land use, education, housing and public safety. On the other hand, "new preemption" is an emerging type of state legislation that actively undermines local authority. Schragger (2018), on the other hand, argues that anti-local and anti-urban legislation are historical components of the American legislative system, with the boundaries between state and local authority in permanent conflict due to their tendency to compete for power and resources.

Our findings indicate that preemption has in fact become increasingly anti-urban, with large Democratic cities being used as "very convenient whipping boys" by conservative Legislatures. Examples of "punitive preemption" cited by participants, such as the 2016 Arizona State Bill 1487 and the Florida Statute §790.33, show that preemptive legislation can be used as a coercing tactic on local governments and local officials, the impact of which is exacerbated by lack of effective protection from state sovereignty over local government.

Our findings hint that provisions like home rule, which grant local governments broader authority to act, cannot shield local governments from state preemption. Home rule power can be curbed through subtle but impactful fiscal measures (shifting responsibilities, diverting shared revenues and reducing state aid) or through more drastic tactics where local decision-making power is

criminalized, or completely removed and fiscal autonomy threatened by the withholding of funds (“punitive” or “nuclear” preemption).

Preemption can be used to shift the fiscal burden onto local governments, usurp their authority and divert their revenues.

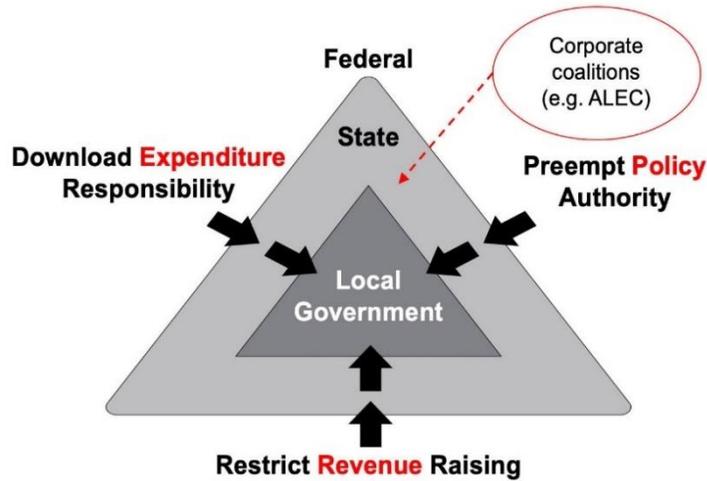
Due to differences among local governments in terms of resources and the extent of their policy and taxing authority, we expected the impact of preemption to vary across local governments. However, our expectation was that cities bore the higher fiscal burden due to their emerging role as the nation’s economic drivers and platforms for progressive social policies. We found that interviewees rejected this notion, as counties are the principal deliverers of utility, infrastructure, health and social services, but essentially depend on property taxes and shared revenues from the states. Preemption scholarship largely focuses on how preemption is used to tame rogue cities, but we find that it cripples counties as well.

The burden of infrastructure maintenance and operational funding can be gradually shifted to local governments through less direct mechanisms. These include: using transfer of state responsibilities as “currency” to repay old infrastructure project bills (as seen in Louisiana), reducing the local claim to shared revenues (as seen in Maine and Texas), or taking away taxing power with the promise to redistribute (as seen in New Jersey). Given increased demand for higher property and business tax exemptions, local governments are “sinking” (as seen in Louisiana) under the pressure of an increasing fiscal burden and reducing taxation and policy power.

Interviewees stressed the importance of understanding when a tax exemption or decrease in state government expenditure means a shift of the load onto the shoulders of local governments. “The legislature is writing the check, but it’s not coming out of their checkbook. It’s coming out of the checkbook of cities and counties” (Florida municipalities, 2018).

We find that our results are consistent with Kim and Warner’s (2018) observations of a “state rescaling” process between subnational states and local governments. Local governments are seeing an expansion of their fiscal responsibilities, while simultaneously experiencing a loss of policy authority and erosion, usurpation or removal of their sources of revenue (Graph 1). Counties, in particular, have

historically assumed the execution and partial financing of state responsibilities devolved by the federal government – roads, healthcare and social services.



Graph 1: Components of State Rescaling

Source: Kim and Warner (2018, p. 428)

Counties already operate under severe limitations to their policy, regulatory, taxing and spending authority, while their fiscal responsibilities expanded significantly in the latter half of the 20th century. Tax and expenditure limitations have increased counties' reliance on state aid (which is declining), shared revenues and fees (which can be usurped by states). Considering punitive preemption can be enforced through fiscal penalties, counties may not be in the same position as cities to amass the necessary political influence and fiscal resources to successfully challenge these penalties.

Preemption is driven by external players and private values.

State legislators do not operate in a vacuum: The impact of progressive local initiatives from cities is not isolated and can spread across state boundaries, precipitating the surge of preemptive legislation in conservative states where such policies are not in local discussion. As observed by watchdog groups and organizations tracking preemption, participants identified a nationwide effort by lobbying groups to halt the potential expansion of progressive policies. These groups offer assistance in drafting bills to legislators who work on a limited time frame.

The literature attributes the growth in preemptive legislation to long-time Republican control of the Legislature, a notion that was rejected by interviewees. It should be noted that industry-specific preemption dominated the discussion, and divergence between conservative and progressive agendas is best illustrated with social, not market, policies: “The not-so-irresistible force of cities pushing progressive agendas increasingly runs into the immovable object of conservative state resistance, manifested by aggressive preemption” (Briffault, 2018, p. 1998). Identity politics can be used as “a smokescreen for the corporate anti-regulatory agenda” (Kim and Warner, 2018: 437). American citizens define themselves in favor or in opposition to *city* values, yet underneath, *market* values and property rights continue to be the driving force of conservative politics and preemptive legislation.

The paradox of state legislatures is that they both hold a significant amount of power and yet are structured in a way that makes them vulnerable to external influence. Kim and Warner (2018) observe that perception of state government as the “scale most easy to penetrate in the federal system” (p. 435) has contributed to the rise in influence of external players in preemption. With legislators working part-time and within a restrictive time frame (Teaford, 2002), business coalitions and non-governmental organizations like the American Legislative Exchange Council (ALEC) offer guidance and expertise during the process of lawmaking.

Grabbing market share

Preemption can be used to usurp local regulatory authority and give away monopoly power.

Widespread mistrust of local and state power over business regulatory authority and utility monopoly power is not a new phenomenon. It has encouraged a back-and-forth shifting between state and local governments over the years. Frug (1999) observes that the “auctioning” of franchises (“monopoly power”) and land by local officials has been the basis for legislation that restricts local autonomy.

Others have reported a rise in preemption for broadband and the sharing economy (NLC 2018, Kim and Warner 2018), which is consistent with our findings. According to the 2018 NLC report, at least twenty-five states had preempted their municipalities from providing the service. Industry-specific legislation can primarily seek to bar or discourage local involvement (providing or regulating the

service), but interviewees observed the inclusion of fiscal provisions that limit or remove their fee authority. These provisions are yet another example of subtle tactics to limit local revenue-raising capacity via “death by a thousand cuts”.

Both the literature and our findings suggest that there is widespread misconception regarding the role of industry-specific local regulation: “The idea of local power conveys a picture of the strangulation of nation-wide businesses by a maze of conflicting local regulations and the frustration of national political objectives by local selfishness and protectionism” (Frug, 1999, p. 19). To seek relief from perceived excessive municipal oversight at the state level is a tactic often used by lobbying groups.

Participants underline that preemption of this nature is not new. Local land use power has historically conflicted with the need for statewide uniform regulation of public utilities. As public utilities expand beyond local boundaries, they can be granted eminent domain power by state governments. Subjecting public utilities to each locality’s regulatory system would potentially render them ineffective to serve citizens across boundaries (Gaddis, 2009). Should emerging services like broadband be assigned under the same category as other public utilities, with regulation retained at the local level?

6 CONCLUSION

This report provides a local perspective on preemption across the fifty states, its evolving nature and the individual concerns of municipal and county representatives. We provide accounts on the shift of fiscal responsibilities to local governments; the decline, loss or usurpation of local revenue sources, and the growth of preemption in emerging fields (such as municipal broadband and small cell). Finally, this report provides a more nuanced perspective on the role of partisanship as a driver of state preemption.

What we learned

- ***Punitive preemption targets local authority and fiscal autonomy.*** Local governments are concerned with the punitive character of preemption, which can threaten local governments' regulatory authority, erode their fiscal health and halt the local policymaking process. Fiscal penalties can be used to withhold shared revenue, aid or grants, while states are simultaneously devolving fiscal responsibilities (such as road maintenance and mental health services) to the local level. Counties were especially concerned with how preemption can contribute to the growth of their fiscal burden and the loss or usurpation of their sources of revenue.
- ***States are trespassing the boundaries of traditional local powers.*** There is concern with rising state intervention in traditional local matters like land use, zoning and franchise power, as observed with municipal broadband and the deployment of small cells. States can choose to curb or usurp local regulatory power, or choose to remove any type of local and state regulation in a policy area. Municipal broadband legislation can halt local governments' ability to deliver or improve Internet access in unserved and underserved areas, increasing the socioeconomic divide between metropolitan areas and rural communities.
- ***Preemption is driven by "one party" control and corporate influence.*** Interviewees were cautious about the notion that preemption is a partisan issue. Both Democratic and Republican state legislators engage in preemption, which flourishes in state legislatures where one party holds a substantial majority. Additionally, the involvement of business coalitions and lobby organizations

like ALEC has spurred the passage of industry-specific “model” bills. Corporate penetration and the promotion of private interests are driving forces behind state preemption and the unraveling of the local regulatory patchwork.

- ***Preemption is a burden to both cities and counties.*** While the concerns of cities and counties may diverge, their concerns are not removed from each other. Fiscal penalties, such as the usurpation of revenue sources and removal of aid, are an important enforcing mechanism used by states. These penalties allow states to keep local power in check, and local governments in competition with each other. The threat to local fiscal health and lack of effective legal protection from preemption can discourage less wealthy and less influential local governments from joining larger efforts to challenge preemption. **States can continue to tighten the reins on local governments, using preemption to erode local power, sweep away local regulation and coerce local compliance.**

Final words

Preemption can be interpreted as an attempt to undermine local autonomy, depending on how it intersects with private interests. We found that preemption can be driven by multiple factors - anti-urbanism, competition between local and state governments for power and resources, the urban-rural divide, partisanship and the preservation of traditional local powers. However, it is first and foremost about guaranteeing state control, protecting private property rights and promoting corporate interests.

While the antagonistic relationship between Democratic cities and Republican states has become a popular narrative regarding preemption of local authority, our research casts doubt on this black-and-white view of the issue. Both Democratic and Republican legislators engage in preemption to protect state rights, which can serve as a façade for a bipartisan effort to reduce the regulatory power of local government. As long as private values continue to be the common denominator between the key performers in lawmaking (state legislators, corporations, corporate think tanks and non-profits), preemption cannot be fully subscribed to a single ideology or political party.

Because the externalities of several issues vary across jurisdictions, not all municipalities will be motivated to demand broader regulatory authority or challenge preemption that removes that power. The tax base, concerns, needs, powers and restrictions of local governments vary. This patchwork of

local regulation reflects local differences and suggests that all local governments are unlikely to reach a consensus over specific policy approaches. We hope that further study of individual policy areas will shed light on which areas are better suited for local or state regulation. Future attention should be given to strategies that enable a restoration of the balance between state and local power, and empower local governments to adequately provide services, regulate emerging market sectors and protect the public interest.

7

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