

Local Power

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This Article is about “local power.” We use that term in two distinct but complementary ways. First, local power describes the authority of local governments to enact regulatory policies in the interests of their citizens. Second, local power describes the authority of local governments to exercise proprietary control over the sources and delivery of electric power to their citizens. This dual meaning of local power is particularly important today, as an increasing number of local governments are seriously considering “municipalizing”—taking control of local electric power systems—at the same time that, outside the electric power sector, many states are constraining local regulatory power by displacing or “preempting” local initiatives in a broad range of environmental, economic, and social policy arenas.

Building on this dual meaning of local power, this Article constructs a new and important link between two existing bodies of legal scholarship: (1) state and local government law, with a focus on the recent, aggressive state preemption of local environmental, economic, and social regulatory policies, and (2) energy law, with a focus on the broad authority that exists in virtually every state for local governments to act in a proprietary capacity to control the generation and delivery of electric power to their citizens to meet a broad range of economic, environmental, political, social, and racial equity goals. In establishing this new connection between the two scholarly fields, we illustrate how local communities’ exercise of control over electric power systems creates a potential safe harbor from the well-documented trend of increased state preemption of local regulatory authority in many states across the country. This creates opportunities for local governments to use their long-standing proprietary powers to supply electricity to their citizens as a means to meet many of the same economic, environmental protection, and social and racial equity goals they have historically attempted to achieve through traditional

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regulation. This analysis also provides a new perspective on the renewed scholarly debates over “localism” and shows how local control over power systems can counteract historic parochialism concerns associated with renewable energy projects that are critical to a U.S. clean energy transition.

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INTRODUCTION

This Article is about “local power.” We use that term in two distinct but complementary ways. First, local power describes the

authority of local governments to enact regulatory policies in the interests of their citizens.¹ Second, local power describes the authority of local governments to exercise proprietary control over the sources and delivery of electric power to their citizens. Exploration of this dual meaning of local power has important theoretical and practical implications because it allows a focus on local governments beyond their traditional regulatory capacity. It creates opportunities to consider local governments as providers of a critical service—electricity—that today is laden with many of the same economic, environmental protection, and social and racial equity goals local governments may simultaneously attempt to achieve through traditional regulation.

This inquiry is particularly important as an increasing number of local governments consider “municipalizing”—taking control of local electric power systems from private, investor-owned utilities² to advance goals that include lower power prices; reduced greenhouse gas (“GHG”) emissions; improved customer service, accountability, and transparency; job creation; “energy democracy”;³ and “energy justice.”⁴ Moreover, this growing interest in municipalization is taking place at the same time that, outside the electric power sector, many states are actively constraining local regulatory power by displacing or “preempting” local initiatives in a broad range of environmental, economic, and social policy arenas.⁵

1. This formulation draws on Richard Schragger’s definition of “city power” as both “the city’s *formal authority* to engage in particular activities” as well as “the city’s *actual capacity* to govern—its ability through its policies to improve the material well-being of its citizens.” RICHARD SCHRAGGER, *CITY POWER: URBAN GOVERNANCE IN A GLOBAL AGE 1* (2016). Throughout this Article, we use the terms “local governments,” “municipal corporations,” “cities,” and “subnational governments” to refer to the exercise of legislative power and, in some cases, proprietary authority, by nonstate and nonfederal governmental authorities. We recognize that in other contexts not relevant to this Article, these terms may have very different meanings from one another and are not as easily interchangeable. *See, e.g.*, Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 347 (1990) (stating that the term “city” is “a political, economic and social concept that conjures up associations with respect to size, economics, politics, social life and history that the blander ‘local government’ does not”).

2. *See infra* Part I.A (defining and discussing investor-owned utilities).

3. *See infra* notes 232–237 and accompanying text (defining and discussing energy democracy).

4. *See infra* note 307 and accompanying text (defining and discussing energy justice).

5. *See, e.g.*, Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. 954, 957 (2019) (“As rising political and cultural polarization exacerbates long-standing urban/rural conflicts, . . . progressive cities find themselves increasingly at odds with conservative state legislatures. . . . States in recent years have preempted local initiatives and removed local authority across a wide array of policy domains.”); Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 1997 (2018) (“This decade has witnessed the emergence and rapid spread of a new and aggressive form of state preemption of local government action. . . . The rise of the new preemption is closely connected to the interacting polarizations of Republican and Democrat, conservative and liberal, and nonurban and urban.”).

Building on this dual meaning of local power, this Article constructs a new and important link between two existing bodies of legal scholarship: (1) state and local government law, with a focus on the recent, aggressive state legislative preemption of local environmental, economic, and social regulatory policies, and (2) energy law, with a focus on the broad authority that exists in virtually every state for local governments to “municipalize,” or act in a proprietary capacity to control the generation and delivery of electricity to their citizens to meet a broad range of economic, environmental, political, and social policy goals.⁶ In creating this new link between these two fields of legal study, we illustrate how local communities’ exercise of control over electric power resources and delivery creates a potential safe harbor from increased state preemption of local policy initiatives.

Moreover, this analysis provides a new perspective on the renewed scholarly debates over “localism” in response to contemporary state preemption actions arising from increased political polarization between states and local governments.⁷ When local governments exercise their power to municipalize—either to actually create a municipal electric utility or to use their authority to do so as a bargaining chip in negotiations with the existing investor-owned utility—it provides a powerful platform for local policy development and experimentation that poses less risk of parochialism and other concerns historically associated with localism.⁸

6. See, e.g., Johanna Bozuwa, *Energy Democracy: Taking Back Power*, NEXT SYS. PROJECT 7–10 (Feb. 2019), <https://thenextsystem.org/sites/default/files/2019-03/EnergyDemocracy-2-star-Final.pdf> [<https://perma.cc/53FE-XNNF>] (discussing how proponents of contemporary municipalization efforts are relying on “energy democracy” principles that include embracing renewable energy, greater citizen political participation in energy system decisions, progressive economic ideals surrounding energy such as community ownership, wealth distribution, and diversity in leadership); OFF. OF THE N.Y.C. PUB. ADVOC., MUNICIPALIZING NEW YORK CITY’S ELECTRIC GRID 16–19 (Aug. 7, 2020), https://www.pubadvocate.nyc.gov/static/assets/Municipal%20Grid%20Report_OPA.pdf [<https://perma.cc/5FAL-NXHA>] (advocating for a New York City municipal utility and including among its goals: “accountability to the people it serves,” the ability to operate independently from “outside” corporate or governmental authority and instead be accountable to a directly elected local board, a “just transition for all utility workers,” and a “just and expeditious transition to a renewable energy future while keeping costs to the ratepayer down”).

7. See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 1 (1990) (“The scholarly proponents of greater local power—what I will call ‘localism’—make their case in terms of economic efficiency, education for public life and popular political empowerment—a striking harmonization of the otherwise divergent values of the free market, civic republicanism and critical legal studies.”); see also Davidson, *supra* note 5, at 958–60, 963–64 (describing resurgence of interest in localism and scholarly debates over the same); BRUCE KATZ & JEREMY NOWAK, *THE NEW LOCALISM: HOW CITIES CAN THRIVE IN THE AGE OF POPULISM* 4–6 (2017) (defining and exploring “new localism”); *infra* Part III.

8. See, e.g., Briffault, *supra* note 7, at 1 (“Localism reflects territorial economic and social inequalities and reinforces them with political power. Its benefits accrue primarily to a minority

It is widely recognized that as political polarization has become more widespread throughout the United States, conflicts have increased significantly between states and the cities within them.⁹ In recent years, cities across the country have enacted a broad range of progressive environmental, social, and economic policies in response to the desires of their citizens. These include GHG emission reduction policies,¹⁰ plastic bag bans,¹¹ restrictions on oil and gas hydraulic fracturing (or “fracking”) operations,¹² protection for the LGBTQ community in housing and employment,¹³ “living wage” ordinances and other workplace protections,¹⁴ restrictions on the use of natural gas in new building construction in favor of decarbonized electricity,¹⁵ and the like. These policies build on a long history of progressive local policymaking, particularly when it comes to protecting the health and economic well-being of local citizens as well as, in some instances, protecting racial minorities within the community.¹⁶

of affluent localities, to the detriment of other communities and to the system of local government as a whole.”); *see also infra* Part III.

9. *See, e.g.*, RICHARD BRIFFAULT & LAURIE REYNOLDS, *CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW* 358 (8th ed. 2016) (discussing range of disputes between states and local governments on “hot button” issues where the circumstances or political preferences of local residents, particularly in big cities, diverge significantly from those of the rest of the state” and citing, in particular, local regulation of guns and LGBTQ rights).

10. Katrina M. Wyman & Danielle Spiegel-Feld, *The Urban Environmental Renaissance*, 108 CALIF. L. REV. 305, 309–11, app. a (2020) (discussing city environmental ordinances and initiatives to reduce GHG emissions and plastic waste); *see also infra* Part I.A (discussing local ordinances and litigation over the same).

11. *See infra* note 63 and accompanying text.

12. Hydraulic fracturing, or “fracking,” refers to extraction techniques developed in Texas in the 1990s to obtain oil and gas resources from shale rock and tight sandstones. These techniques involve pumping large quantities of water, chemicals, and “proppants” (like sand) into a subsurface well at high pressure—first vertically and then horizontally (a practice known as “directional drilling”)—to create fissures or “fractures” in the rock that allow the oil and gas to flow back up through the well for recovery. *See* ALEXANDRA B. KLASS & HANNAH J. WISEMAN, *ENERGY LAW* 47 (2d ed. 2020) (discussing the fracking process); *see also infra* notes 53–56, 62 and accompanying text (discussing local fracking bans and litigation over the same).

13. *See infra* note 59 and accompanying text.

14. *See* BRIFFAULT & REYNOLDS, *supra* note 9, at 375–76 (discussing legal challenges to municipal living wage ordinances and municipal enhanced sick leave ordinances based on state preemption of local authority); *see also infra* note 59 and accompanying text.

15. *See infra* notes 65–66 and accompanying text.

16. *See, e.g.*, R.A. Lenhardt, *Localities as Equality Innovators*, 7 STAN. J. C.R. & C.L. 265, 269 (2011) (discussing why local governments have the institutional capacity and experience to create innovative policies to address racial inequality); Davidson, *supra* note 5, at 974–78 (discussing local governments as historic centers of policy experimentation and summarizing scholarly debates over localism, parochialism, and the appropriate balance of power between states and local governments); Wyman & Spiegel-Feld, *supra* note 10, at 312–18 (discussing early efforts by cities to reduce smoke and smog and provide citizens with clean water and waste disposal services); Lauren E. Phillips, Note, *Impeding Innovation: State Preemption of Progressive Local Regulations*, 117 COLUM. L. REV. 2225, 2238 (2017) (discussing literature on role of cities in civil rights movement and stating that “[l]ocal governments are closely connected to their constituents and

However, states can pose often insurmountable barriers to progressive local policy development. While cities today increasingly reflect a more concentrated population of progressive, diverse, well-educated constituencies, the same is not true for many states. These “red states” often embrace countervailing policies designed to reduce regulations, lower taxes, and respond to more rural and, in many cases, conservative constituencies.¹⁷ As a result, when local governments enact environmental, energy, social, and economic policy, a frequent response by states is to displace or “preempt” those policies by legislation in favor of a statewide ban on local government initiatives in the regulatory area in question.¹⁸ While state preemption of local policy choices is nothing new, the scope and intensity of preemption has increased in recent years in parallel with the rise of political polarization across the country between urban and rural areas, educated and less educated voters, and white and minority citizens.¹⁹

Richard Briffault has described this “new” preemption as including both “punitive preemption”—imposing significant financial penalties on local governments and local government officials for policy choices disfavored by the state legislature; and “nuclear preemption”—eliminating entirely the power of local governments to regulate without express state permission.²⁰ One might add to these new forms of preemption “anticipatory preemption”—states preempting local governments from taking a particular policy action before they have even considered adopting it in order to send a warning to local

thus may be better able to experiment with solutions to a variety of issues affecting local communities, particularly socioeconomic inequality and discrimination”); Matthew J. Parlow, *Progressive Policy-Making on the Local Level: Rethinking Traditional Notions of Federalism*, 17 TEMP. POL. & C.R. L. REV. 371, 373 (2008) (“[L]ocal governments can be viewed as perhaps the most critical level of government in terms of responding—through regulation, goods, or services—to the needs and wants of its constituents.”). *But see* Davidson, *supra* note 5, at 976–78 (discussing critiques of “localism” that include the tendency of local governments to “foster exclusion,” engage in parochialism, and create negative externalities with their policy choices).

17. *See infra* Part I.B.

18. *See infra* Part I.B.

19. *See* NICOLE DUPUIS, TREVOR LANGAN, CHRISTINA MCFARLAND, ANGELINA PANETTIERI & BROOKS RAINWATER, NAT’L LEAGUE OF CITIES, CITY RIGHTS IN AN ERA OF PREEMPTION: A STATE-BY-STATE ANALYSIS 3 (2018), <https://www.nlc.org/wp-content/uploads/2017/02/NLC-SML-Preemption-Report-2017-pages.pdf> [<https://perma.cc/9F88-CNE2>] (“State legislatures have gotten more aggressive in their use of preemption in recent years. Explanations for this increase include lobbying efforts by special interests, spatial sorting of political preferences between urban and rural areas, and single party dominance in most state governments.”).

20. Briffault, *supra* note 5, at 1997; *see also* Richard Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1164, 1182–83 (2018) (“The last few years have witnessed an explosion of preemptive state legislation challenging and overriding municipal ordinances across a wide range of policy areas.”).

governments not to follow the lead of cities in other states.²¹ Responding to these state legislative trends, Richard Schragger declared in 2018 that “American cities are under attack” due to an “explosion” of state laws preempting a broad range of local policies, often “accompanied by an increasingly shrill anti-urban politics.”²² Nestor Davidson observed in 2019 that “[t]his wave of preemption reflects a mix of deregulatory libertarianism—particularly focused on employment, the environment, and technology—and social conservatives’ concerns about religious liberty and reducing immigration, forming a shared agenda of reducing local power.”²³ In many instances, these state deregulatory agendas follow intense lobbying by regulated businesses as well as by interest groups like the American Legislative Exchange Council (“ALEC”).²⁴

Because the U.S. Constitution makes no mention of cities and grants them no independent authority, local governments are dependent on state constitutions and state statutes for their authority.²⁵ Thus, when local government policies conflict with state policies, courts generally invalidate the local policy.²⁶ Since many of the local governments enacting these progressive policies represent large percentages of minority citizens, the elimination of local government

21. See, e.g., Amy Turner, *Municipal Natural Gas Bans: Round 2 (The Evolution of State Preemption Law)*, COLUM. L. SCH. SABIN CTR. FOR CLIMATE CHANGE L.: CLIMATE L. BLOG (July 29, 2020), <http://blogs.law.columbia.edu/climatechange/2020/07/29/municipal-natural-gas-bans-round-2-the-evolution-of-state-preemption-law/> [<https://perma.cc/WW75-UJPV>] (reporting on increasing number of local governments banning natural gas connections in new buildings and state legislative responses to the same); see also Phillips, *supra* note 16, at 2244–45 (discussing the Ohio legislature’s ban on local government ordinances that would increase the minimum wage within their borders before any such increases were enacted and an Arizona law preempting local governments from giving workers rights with regard to setting work schedules prior to the enactment of any local ordinances on the topic).

22. Schragger, *supra* note 20, at 1164.

23. Davidson, *supra* note 5, at 964.

24. See, e.g., Schragger, *supra* note 20, at 1170 (noting that “[i]n many cases, there appears to be a partnership between the private interests that seek to avoid local regulation and legislators at the state level”); Briffault, *supra* note 5, at 1997 (stating that new preemption measures are “[o]ften propelled by trade association and business lobbying”). As described on its website, ALEC is “America’s largest nonpartisan, voluntary membership organization of state legislators dedicated to the principles of limited government, free markets and federalism” and provides model legislation to member legislators on a range of subjects including criminal justice, workplace regulation, environmental protection, energy, education, and free speech. See *About ALEC*, AM. LEGIS. EXCH. COUNCIL, <https://www.alec.org/about/> (last visited Dec. 21, 2021) [<https://perma.cc/GPT8-EYSQ>].

25. See, e.g., BRIFFAULT & REYNOLDS, *supra* note 9, at 73 (discussing lack of U.S. constitutional status for local governments and discussing the three approaches to the appropriate legal role for local governments—(1) as state instrumentalities, (2) as de facto autonomy coupled with “a normative commitment to local self-governance,” and (3) as quasi-proprietary firms similar to business corporations); SCHRAGGER, *supra* note 1, at 80–81 (“The bottom line is that, as a general matter, cities are constitutionally subordinate to states, and thus states are mostly unrestrained by U.S. constitutional law in limiting cities’ formal powers.”).

26. See *infra* Parts I.A and I.B (discussing state-local authority and preemption).

authority in favor of state authority transfers political power away from minority citizens in favor of white citizens who hold more power on a statewide basis.²⁷

However, there is one area where local governments have exercised authority with the blessing of states and the federal government for over a century—the power to take control of their electricity systems. The authority of local governments to “municipalize” and create locally owned, not-for-profit, self-regulating electric utilities is reflected in all but one state’s laws or constitution.²⁸ Cities in both “red states” and “blue states” and led by both Republican and Democratic mayors and city councils have taken advantage of their authority to municipalize for a broad range of policy objectives that include lowering power costs; promoting local autonomy and democratic self-determination; addressing dissatisfaction with the existing investor-owned utility serving the community; and, increasingly, reducing GHG emissions and addressing social and economic equity goals.²⁹

Municipal utilities exist in Los Angeles, California; Austin, Texas; Cleveland, Ohio; Seattle, Washington; Omaha, Nebraska; and thousands of small cities and towns across the country.³⁰ When a local government chooses to municipalize and provide electricity services to its citizens, rather than contract those services out through a franchise agreement with a private, investor-owned electric utility, state law generally provides that the city itself, not the state public utility commission, becomes the sole regulator of electricity prices and

27. See, e.g., Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1748 (2005) (explaining that “[d]isaggregated institutions create the opportunity for global minorities to constitute local majorities” and “thus allow dissenters to decide, to act on behalf of the state”); HUNTER BLAIR, DAVID COOPER, JULIA WOLFE & JAIMIE WORKER, ECON. POL’Y INST., PREEMPTING PROGRESS 2 (2020), <https://www.epi.org/publication/preemption-in-the-south/> [<https://perma.cc/DUD4-LUW8>] (“Through preemption, state lawmakers [in the South] have obstructed local communities—often majority-Black-and-Brown communities—from responding to the expressed needs and values of their residents through policies strengthening workers’ rights.”); Briffault, *supra* note 5, at 2009 (“Some preemption measures have the effect of shifting decisionmaking authority from majority-minority local governments to a white-dominated state government.”).

28. See *infra* Part I.D (all states except Hawaii include the power for local governments to municipalize).

29. See *infra* Part II.B (discussing public power goals).

30. *Stats and Facts*, AM. PUB. POWER ASS’N, <https://www.publicpower.org/public-power/stats-and-facts> (last visited Dec. 21, 2021) [<https://perma.cc/2DTG-FCTK>]; AM. PUB. POWER ASS’N, 2020 STATISTICAL REPORT (2020), https://www.publicpower.org/system/files/documents/2020-Public-Power-Statistical-Report_0.pdf [<https://perma.cc/J46M-D74H>]; *Public Power for Your Community*, AM. PUB. POWER ASS’N 12 (2016), https://www.publicpower.org/system/files/documents/municipalization-public_power_for_your_community.pdf [<https://perma.cc/8XH5-FQDS>].

services.³¹ In other words, when a local government exerts its power to municipalize, state authority decreases rather than increases, providing significant local government autonomy to achieve environmental, social, and economic goals through its power systems.³²

Moreover, as a matter of state and local government law, when a city takes action through its municipal electric utility, it is acting in its “proprietary” capacity rather than its regulatory capacity and thus has far more autonomy from the state with regard to policies, revenues, contracts, and property rights.³³ Once created, the local utility has physical assets, long-term power purchase contracts, employees, constituents in the form of local electricity customers, and a durable governance structure. There is limited formal authority or political will for a state to interfere with a local government’s decisions regarding the delivery of power to citizens. In other words, once a local utility creates a physical and regulatory framework for delivery of electric power, that structure can serve as a platform for pursuing a broad range of local goals relating to energy, environmental protection, economic security, social equity, and democratic participation.

As Shelley Welton has documented, many current municipalization efforts “reclaim public ownership as a method of implementing social policy” consistent with “the Progressive-era history of municipalization in the United States” as well as more contemporary policy efforts to address climate change.³⁴ She suggests that local control over electricity systems provides a potential for local governments to “gain more say in setting priorities for their electricity systems, be they economic development or environmental goals” such as encouraging locally sourced power or “to keep jobs and resources within the community.”³⁵ Likewise, Uma Outka has argued that a transition to locally owned power provides “the possibility for reinvention” of the delivery of electricity, providing citizens with low carbon power as well as “new modes of delivering energy services.”³⁶ Finally, Shalanda Baker has recognized that these energy policy

31. For example, municipal utilities in Minnesota are self-regulating unless they actively elect to become subject to regulation by the public utilities commission. MINN. STAT. § 216B.025 (2021). The law is similar in many other states. See *infra* Part II.A.

32. See, e.g., Wyman & Spiegel-Feld, *supra* note 10, at 340 & n.219 (recognizing that cities with municipal utilities have greater control over their energy generation mix than cities in franchise agreements with investor-owned utilities, allowing cities with municipal utilities to regulate the “supply side of the economy” in addition to the “demand side”); *infra* Part II.A.

33. See *infra* Part I.C.

34. Shelley Welton, *Public Energy*, 92 N.Y.U. L. REV. 267, 270 (2017).

35. Shelley Welton, *Grasping for Energy Democracy*, 116 MICH. L. REV. 581, 586 (2018).

36. Uma Outka, *Cities and the Low-Carbon Grid*, 46 ENV'T L. 105, 109–10 (2016).

choices can shape “every single aspect of life, particularly for poor people and people of color.”³⁷

This momentum in favor of creating local utilities to serve a growing variety of economic and social welfare goals has extended beyond cities to Indian tribes. An increasing number of tribal leaders have expressed interest in creating tribal utilities to achieve many of the same economic, political, and environmental protection goals in the name of “energy sovereignty.”³⁸ Tribal leaders have articulated goals that include lowering electricity costs, reducing GHG emissions, taking control over power supplies, enhancing local sovereignty and self-governance, and using the tribal utility to promote on-site clean energy generation and local job creation.³⁹ In this way, “local power” extends beyond local governments to encompass a broader range of governing authorities using power systems to transform their communities.

Part I provides a brief summary of state and local government regulatory authority, followed by a discussion of contemporary actions by states to preempt local government regulatory initiatives in a growing number of economic, environmental, and social policy arenas. It ends with a discussion of the circumstances under which local governments can act in a “proprietary” or business-like capacity—

37. SHALANDA H. BAKER, *REVOLUTIONARY POWER: AN ACTIVIST’S GUIDE TO THE ENERGY TRANSITION* 30 (2021).

38. See, e.g., Pilar M. Thomas, *Tribal Utility Development: Energy Development and Services on Tribal Land*, ARIZ. ATT’Y 26, 26–28 (2019); see also *17 Tribes Awarded Federal Grants to Support Energy Sovereignty*, TRIBAL BUS. NEWS (Dec. 9, 2020), <https://tribalbusinessnews.com/sections/energy/13265-17-tribes-awarded-federal-grants-to-support-energy-sovereignty> [<https://perma.cc/SA9L-48NS>] (reporting on Tribal Energy Development Capacity program that “will go toward bolstering tribes’ managerial and institutional capacity to develop energy resources, as well as develop the organizational and business structures to manage those projects”); *Tribal Utility Formation: Three Key Considerations for Tribal Electric Utility Formation*, AVANT ENERGY, <https://www.avantenergy.com/2018/02/tribal-utility-formation-three-key-considerations-tribal-electric-utility-formation/> (last visited Dec. 21, 2021) [<https://perma.cc/4E5N-SSAH>] (“A tribal electric utility gives the Tribe the authority to decide how to generate or procure power, how to invest in tribal infrastructure, and how to provide customer service to electric customers on Reservation.”); *infra* Part II.B.

39. See Frank Jossi, *Crowdfunded Solar Puts Red Lake Nation on a Path to Energy Sovereignty*, ENERGY NEWS NETWORK (Nov. 13, 2020), <https://energynews.us/2020/11/13/crowdfunded-solar-puts-red-lake-nation-on-a-path-to-energy-sovereignty/> [<https://perma.cc/7P79-GFAF>] (tribal member stating that creating a tribal utility for the Red Lake Nation in Minnesota will “eventually pay off in energy self-sufficiency, higher-paying jobs and a healthier psychological and physical environment”); RENEWABLE RES. PROGRAM, W. AREA POWER ADMIN., *TRIBAL AUTHORITY PROCESS CASE STUDIES: THE CONVERSION OF ON-RESERVATION ELECTRIC UTILITIES TO TRIBAL OWNERSHIP AND OPERATION*, at iii (2010), https://www.energy.gov/sites/prod/files/2016/04/f30/tribal_authority_case_studies_report.pdf [<https://perma.cc/TM2T-QEGT>] (documenting existing tribal utilities in the United States and reasons for creation, including increased self-determination and economic growth); *infra* Part II.B.

including as an electric utility—and in that way avoid some of the power of states to displace local policy choices.

Part II explores the history of local efforts to take control of the generation and delivery of electricity to citizens through municipalization and the economic, environmental, political, and social equity rationales underlying local power campaigns. It also details how these local power campaigns have extended to Indian tribes seeking “energy sovereignty” to accomplish similar economic, environmental, and social justice goals.

Part III returns to the distinct but complementary meanings of “local power.” It illustrates in more detail how local communities’ exercise of control over electric power resources and delivery can create a potential safe harbor from increased state preemption of local authority in other contexts. Moreover, this analysis provides a new perspective on the renewed scholarly debates over “localism” and the concerns of local government parochialism.⁴⁰ In the energy context, parochialism concerns often take the form of local government opposition to solar, wind, and other renewable energy projects critically needed for a U.S. energy transition to address global climate change. While in the past scholars and regulators have turned to state preemption to address these “not-in-my-backyard” or “NIMBY” concerns in the energy sector, another option is increased local ownership of energy systems. Such an increase in “local power” has the potential to overcome parochialism concerns in the energy sector by enhancing the economic and participatory benefits associated with new energy projects in the community.

I. LOCAL POWER I: LOCAL REGULATORY AUTHORITY AND LIMITS

This Part provides a basic explanation of the division of power between state and local governments in the U.S. constitutional system. Section A explains how as a federal constitutional matter, local governments have no protected status or rights. States have granted local governments extensive authority to regulate within their borders through their state constitutions and statutes. Still, states have the power to displace or “preempt” such local laws when they choose. Section B describes how state legislatures have increasingly preempted local laws on a range of environmental, economic, and social policy issues. Moreover, these state legislative actions are more punitive and sweeping than in the past, reflecting increased political polarization between states and local governments. Importantly, though, as

40. See, e.g., Davidson, *supra* note 5, at 975–83 (describing scholarly debates).

described in Section C, for over a century courts and commentators have recognized that local governments have significantly greater autonomy when they act in their private or “proprietary” capacity rather than in their regulatory capacity. Notably, one of the ways in which a local government acts in its private or proprietary capacity is when it creates and operates a municipal electric utility. Section D summarizes state constitutions and laws governing the formation and operation of municipal utilities, while Section E highlights court decisions that illustrate the surprising scope and strength of local power when cities act in their capacity as municipal utilities.

A. Home Rule, Local Authority, and State Preemption

The U.S. Constitution contains specific grants of authority for the federal government and preserves plenary authority for the states, but says nothing at all about local governments.⁴¹ In 1907, the U.S. Supreme Court declared in *Hunter v. City of Pittsburgh* that cities are political subdivisions of the state, “created as convenient agencies” for exercising governmental powers the state entrusts to them, but that the state “at its pleasure, may modify or withdraw all such powers,” take their property without compensation, reduce or eliminate their territory, or destroy them entirely all “with or without the consent of the citizens, or even against their protest.”⁴² According to the Court, such actions are allowable because “in all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States.”⁴³ In its decision, the Supreme Court weighed in on an active debate over whether the Constitution contained any right to local self-government. It ultimately sided with the position of legal scholar and Iowa Supreme Court Justice John Dillon, who contended that local governments had no authority apart from that expressly given to them under state law.⁴⁴ The opposing view, championed by Justice Thomas Cooley of the Michigan Supreme Court, relied on early American history and local practice to argue that local

41. U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”). See generally BRIFFAULT & REYNOLDS, *supra* note 9, at 73–74 (“The Constitution is utterly silent on the subject of local government.”).

42. 207 U.S. 161, 178–79 (1907) (affirming lower court decision consolidating the cities of Pittsburgh and Allegheny upon a positive vote of the citizens of Pittsburgh, a negative vote of the citizens of Allegheny, and state legislative action ordering the consolidation).

43. *Id.* at 179.

44. See BRIFFAULT & REYNOLDS, *supra* note 9, at 79, 326–29 (citing legal authorities).

government autonomy should be protected as a matter of state constitutional law or at least as a matter of historical practice.⁴⁵

Since that time, courts and commentators have used “Dillon’s Rule” as “a standard of delegation, a canon of construction, and a rule of limited power” that reflects the view that local governments have only the powers that the state expressly grants them or that can be fairly implied from powers the state has expressly granted.⁴⁶ This served to limit the number of governmental entities that could regulate private conduct; if it was unclear whether the local government had authority to act, courts resolved any uncertainty against the local government.⁴⁷

From the outset, however, local governments pushed back against Dillon’s Rule and advocated for their states to adopt what became known as “home rule” authority for local governments. States responded beginning in 1875 with amendments to their state constitutions providing local governments with the power to regulate in certain policy areas even in the absence of express state authority. Today, the vast majority of states have a constitutional provision or statute granting at least some local governments home rule authority in matters of “local” concern.⁴⁸

For instance, in Colorado, the state’s constitution provides that each city or town has the power to enact laws that extend “to all its local and municipal matters,” and that such laws “shall supersede within the territorial limits . . . any law of the state in conflict therewith.”⁴⁹ According to the Colorado Supreme Court, both state law and local law can exist in areas of local concern, in areas of “mixed state and local concern,” and in areas of statewide concern.⁵⁰ When local law and state law are in conflict, local law prevails over conflicting state law in

45. *Id.*

46. Briffault, *supra* note 7, at 8; *see also* BRIFFAULT & REYNOLDS, *supra* note 9, at 327–28.

47. Briffault, *supra* note 7, at 8 (“[W]henever it is uncertain whether a locality possesses a particular power, a court should assume that the locality *lacks* that power.”); BRIFFAULT & REYNOLDS, *supra* note 9, at 327–28 (noting the same).

48. BRIFFAULT & REYNOLDS, *supra* note 9, at 330 (stating that thirty-seven states had enacted constitutional or statutory home rule provisions by 1990 for at least some of their cities); JON D. RUSSELL & AARON BOSTROM, AM. CITY CNTY. EXCH., FEDERALISM, DILLON RULE AND HOME RULE (Jan. 2016), <https://www.alec.org/app/uploads/2016/01/2016-ACCE-White-Paper-Dillon-House-Rule-Final.pdf> [<https://perma.cc/SR5C-SGGG>] (white paper publication of the American City County Exchange showing which states follow Dillon’s Rule, which states provide local governments with home rule authority, and arguing for limited local government authority regardless of which rule is used).

49. COLO. CONST. art. XX, § 6; *City of Longmont v. Colo. Oil & Gas Ass’n*, 369 P.3d 573, 579 (Colo. 2016).

50. *City of Longmont*, 369 P.3d at 579. *But see* *City of Northglenn v. Ibarra*, 62 P.3d 151, 155 (Colo. 2003) (stating that in matters of statewide concern, home-rule cities may act only when authorized by state constitution or statute).

matters of “local” concern. However, state law prevails over local law if the matter is one of statewide concern or of “mixed state and local concern.”⁵¹

Thus, in any case where both state and local law regulate the same issue, a court must first determine whether the matter is one of local, statewide, or mixed local and statewide concern. Once it does that, if it determines the matter is one of solely local concern, it upholds the local law. If, however, the court finds the matter is one of either mixed local and statewide concern or solely of statewide concern, it must determine whether state law expressly preempts local law by statute, impliedly preempts local law by occupying the entire field of regulation, or whether there is an “operational conflict” between state and local law.⁵²

The Colorado Supreme Court conducted precisely this analysis in 2016 in *City of Longmont v. Colorado Oil & Gas Ass’n*, a case in which the Colorado Oil and Gas Association challenged the City of Longmont’s ban on fracking operations within its borders.⁵³ The court first found that fracking was a matter of mixed local and statewide concern because of the state interest in uniform oil and gas regulation and the local interest in regulating land use and zoning within municipal borders.⁵⁴ The court then found no express or implied preemption of local fracking authority in state law⁵⁵ but did find an operational conflict between the local ban and state law based on the extensive nature of state regulations governing the fracking process. Because the local ban prevented oil and gas operators from using fracking techniques that complied with state regulations, the local law “materially impede[d] the effectuation of the state’s interests.”⁵⁶

51. *City of Longmont*, 369 P.3d at 579; see also Briffault, *supra* note 5, at 2011–13 (discussing different judicial approaches to state preemption of local policy); Phillips, *supra* note 16, at 2233–35 (discussing courts’ analyses of implied preemption in various states using different formulations than that used in Colorado in the context of local living wage ordinances).

52. *City of Longmont*, 369 P.3d at 582.

53. *Id.* at 577.

54. *Id.* at 580.

55. *Id.* at 583–84. By contrast, Texas, Oklahoma, Louisiana, and New Mexico have all enacted laws expressly preempting local governments from regulating oil and gas development within their borders, and courts in those states upheld the states’ preemptive actions. See KLASS & WISEMAN, *supra* note 12, at 75–77 (discussing cases); see also BRIFFAULT & REYNOLDS, *supra* note 9, at 471–74 (discussing cases and legal scholarship on state preemption of local hydraulic fracturing regulations).

56. *City of Longmont*, 369 P.3d at 585; see also *City of Fort Collins v. Colo. Oil & Gas Ass’n*, 369 P.3d 586 (Colo. 2016) (striking down similar ban). Notably, in 2019, the Colorado legislature enacted new legislation specifically giving local governments authority to regulate certain aspects of hydraulic fracturing but leaving open the question of whether an outright ban would survive legal challenge. KLASS & WISEMAN, *supra* note 12, at 76–77 (citing new legislation).

This example shows that even in home rule states, local governments remain vulnerable in their ability to regulate a wide range of environmental, economic, and social policy matters. So long as the issue in question has at least some statewide impact in addition to local impact, a state can expressly preempt local law by eliminating local authority over the matter, or a regulated entity can challenge local law if either the state regulation is sufficiently comprehensive (implied preemption) or there is an operational conflict between state and local law. As shown below in Section B, state legislatures have frequently used express preemption to eliminate local laws regulating fracking, plastic waste, use of natural gas in buildings, living wages, fair scheduling in employment, gun control, and LGBTQ discrimination, among other areas. Based on over a century of case law, as explained above, states are well within their state and federal constitutional authority to take such actions, regardless of the policy implications.

B. Contemporary Preemption Battles

As of October 2021, Republicans controlled thirty state legislatures (as compared to eighteen for Democrats), twenty-seven governor seats (as compared to twenty-three for Democrats), and twenty-three “trifectas”—control of both houses of the legislature as well as the governor’s seat—(as compared to fifteen for Democrats).⁵⁷ At the same time, Democrats control most major U.S. cities, and have increasingly enacted progressive economic, social, and environmental protection measures such as minimum wage laws, fracking bans, plastic bag bans, decarbonization goals and mandates, and protection for LGBTQ residents.⁵⁸ This growing split between conservative state

57. *State Partisan Composition*, NAT’L CONF. OF STATE LEGISLATURES (Sept. 14, 2021), <https://www.ncsl.org/research/about-state-legislatures/partisan-composition.aspx> [<https://perma.cc/CN7A-B7DV>]; *2021 State & Legislative Partisan Composition*, NAT’L CONF. OF STATE LEGISLATURES (May 1, 2021), https://www.ncsl.org/Portals/1/Documents/Elections/Legis_Control_5.2021.pdf [<https://perma.cc/U56M-BN2V>]; see also Elaine S. Povich & Sophie Quinton, *Republicans Fend Off Democrats in Statehouse Fights*, PEW CHARITABLE TRS.: STATELINE BLOG (Nov. 5, 2020), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2020/11/05/republicans-fend-off-democrats-in-statehouse-fights> [<https://perma.cc/JF5F-XSUF>] (discussing Republican “trifectas” in Texas, Iowa, New Hampshire, and Montana).

58. See Derek Thompson, *Why Big-City Dominance Is a Problem for Democrats*, ATLANTIC (Nov. 26, 2020), <https://www.theatlantic.com/ideas/archive/2020/11/why-big-city-dominance-problem-democrats/617161/> [<https://perma.cc/BAY9-YGJ5>] (discussing growing Democratic party dominance in U.S. city governance and among urban residents, resulting in what the author terms “Instagram socialists,” who are “highly educated, but not necessarily high-earning, urbanites who shop like capitalists and post like Marxists and frequently do so in adjacent tabs”); see also Davidson, *supra* note 5, at 965–68 (detailing range of local ordinances on economic, environmental protection, and social issues preempted by state legislative actions); Briffault, *supra* note 5, at

governments and progressive local governments has resulted in states more aggressively limiting local authority over these often contentious environmental, social, and economic policy issues.⁵⁹ In some cases, state legislatures preempt local laws by replacing them with a uniform statewide policy on the subject—like statewide regulations governing hydraulic fracturing—while in other cases, state laws preempt local laws by completely eliminating the ability of local governments to legislate in the area in question or withholding funds from local governments that attempt to enact such policies.⁶⁰

Nestor Davidson summarized this “sea change” of state laws displacing local regulatory authority in a 2019 Yale Law Journal essay:

On civil rights, North Carolina preempted Charlotte’s authority to add LGBT antidiscrimination protection to its local ordinances, leading to turmoil that brought preemption conflicts to the national conversation. Arkansas and Tennessee have similarly preempted local antidiscrimination laws, and so-called “bathroom bills” have become a significant flashpoint in many states. Relatedly, on immigration, at least nine states now have legislation limiting so-called sanctuary cities, with a wave of new legislation still emerging.

Similar issues have arisen in other policy areas. In workplace regulation, at least twenty-five states preempt local minimum wage rules, at least nineteen states preempt local sick-leave policies, and at least twelve states preempt local regulation of other types of employee benefits. Similarly, with regard to public health, thirty-one states now preempt in some form local regulation of tobacco products, and at least seven states preempt local regulation of e-cigarettes or alternative tobacco products; at least twelve states preempt local nutrition and food policies; and at least forty-four states preempt local authority related to firearms. On local environmental protection, at least eight states preempt local regulation of oil and gas drilling and conservation efforts, at least twelve states preempt

1999–2002 (same). *But see* Emily Badger, ‘Democrat Cities’ Aren’t as Partisan or as Powerful as the President Suggests, N.Y. TIMES (Sept. 2, 2020), <https://www.nytimes.com/2020/09/02/upshot/trump-democratic-cities.html> [<https://perma.cc/5977-52TS>] (discussing an increase in the number of Democratic mayors in big cities over time but citing studies concluding that the partisanship of mayors has little impact on societal indicators such as crime, social policy, and economic outcomes, because of the limited power of city government over those issues); SCHRAGGER, *supra* note 1, at 102–03 (discussing inherent structural limits in city and mayoral authority).

59. *See, e.g.*, Davidson, *supra* note 5, at 964 (discussing recent state preemption actions); *see also* Lori Riverstone-Newell, *The Rise of State Preemption Laws in Response to Local Policy Innovation*, 47 J. FEDERALISM 403, 405 (2017) (describing how recent state preemption laws differ from prior ones); *Worker Rights Preemption in the U.S.*, ECON. POL’Y INST., <https://www.epi.org/preemption-map/> (last updated Aug. 2019) [<https://perma.cc/GJB6-C6XY>] (detailing states with preemption laws that target key worker rights); DUPUIS ET AL., *supra* note 19, at 3–4 (showing state preemption of local worker rights provisions by state and stating that “we are continuing to observe aggressive moves by state legislatures nationwide to usurp local authority”).

60. *See* Briffault, *supra* note 5, at 1997 (“New preemption measures frequently displace local action without replacing it with substantive state requirements. Often propelled by trade association and business lobbying, many preemptive laws are aimed not at coordinating state and local regulation but at preventing any regulation at all.”).

localities from regulating or placing fees on plastic bags, and at least forty-two states preempt local pesticide regulation.⁶¹

On the environmental protection front, while the preemption battles between state and local governments over fracking regulation⁶² and plastic bags bans⁶³ dominated headlines in the early to mid-2010s, 2019 brought new conflicts over the continuing use of natural gas and other fossil fuels in commercial and residential buildings.⁶⁴ Since 2019, over fifty California cities including San Francisco, San Jose, and Oakland, as well as New York City, have enacted local ordinances restricting natural gas connections in new residential and commercial construction to phase out the use of fossil fuels for heating and cooking in favor of electricity—which is increasingly generated with carbon-free energy in many parts of the country.⁶⁵

In 2020, Arizona, Oklahoma, Tennessee, and Louisiana all enacted what could be called “anticipatory preemption” laws,

61. Davidson, *supra* note 5, at 964–68 (footnotes omitted) (citing state legislation).

62. See *supra* notes 53–56 (discussing preemption litigation over local fracking regulations in multiple states); see also Keith B. Hall, *Oil and Gas Rights in Louisiana: Local Regulation of Hydraulic Fracturing*, LORMAN (Oct. 1, 2018), <https://www.lorman.com/resources/oil-and-gas-rights-in-louisiana-local-regulation-of-hydraulic-fracturing-17352> [<https://perma.cc/V569-BVFE>] (discussing state laws preempting local zoning and other regulations governing hydraulic fracturing operations in Colorado, New York, Ohio, Louisiana, West Virginia, and Texas and court decisions on the same).

63. See, e.g., *State Plastic Bag Legislation*, NAT’L CONF. OF STATE LEGISLATURES (Feb. 8, 2021), <https://www.ncsl.org/research/environment-and-natural-resources/plastic-bag-legislation.aspx> [<https://perma.cc/FNS6-FMRL>] (showing that as of 2021, eighteen states had preempted local governments from regulating plastic packaging and bags in retail establishments, with most of these laws enacted since 2015); Sarah Fox, *Home Rule in an Era of Local Environmental Innovation*, 44 ECOLOGY L.Q. 575, 599–603, 616–23 (2017) (discussing preemption battles over plastic bag bans). By contrast, at least eight states have placed their own bans on plastic bags and certain plastic packaging consistent with the policies of numerous cities. See, e.g., Mike Catalini, *NJ Governor Signs Bill to Ban Single-Use Plastic, Paper Bags*, ASSOCIATED PRESS (Nov. 4, 2020), <https://apnews.com/article/environment-legislation-new-jersey-973a1fe0018c35ca1c934dd6c9d11ca1> [<https://perma.cc/VH8A-GD3R>] (citing New Jersey and eight other states with such bans).

64. See, e.g., Rebecca Leber, *An “Attack on American Cities” Is Freezing Climate Action in its Tracks*, VOX (Sept. 29, 2021), <https://www.vox.com/22691755/gas-utilities-fight-electrification-preemption> [<https://perma.cc/FW52-2SKY>]; Brad Plumer & Hiroko Tabuchi, *How Politics Are Determining What Stove You Use*, N.Y. TIMES (Dec. 16, 2021), <https://www.nytimes.com/2021/12/16/climate/gas-stoves-climate-change.html> [<https://perma.cc/ZA32-5YE3>].

65. See Kristin Musulin, *San Jose, Oakland, Join Growing List of California Cities to Ban Natural Gas Construction*, SMART CITIES DIVE (Dec. 4, 2020), <https://www.smartcitiesdive.com/news/san-jose-oakland-join-growing-list-of-california-cities-to-ban-natural-gas/591507/> [<https://perma.cc/DS6U-VE3P>]. In 2021, New York City became the largest city in the country to ban natural gas connections in new buildings. Anne Barnard, *N.Y.C.’s Gas Ban Takes Fight Against Climate Change to the Kitchen*, N.Y. TIMES (Dec. 15, 2021), <https://www.nytimes.com/2021/12/15/nyregion/nyc-gas-stove-heat-ban.html> [<https://perma.cc/JT7T-TGN5>]. The ban is predicted to have a significant impact on natural gas policy given that New York City is responsible for five percent of nationwide natural gas use in buildings. *Id.*

prohibiting local governments from imposing similar bans on natural gas use in new construction even though no local governments in those states had imposed such bans.⁶⁶ In enacting such laws, these states sent a message to local governments to avoid even engaging in a policy debate on the issue in question to determine whether it would be in the interests of local citizens because such a debate would be fruitless.⁶⁷ By 2021, the total number of states enacting such prohibitions on local governments had risen to nineteen.⁶⁸

These recent actions by state legislatures to limit the power of local governments to enact economic, environmental, and social policies have led commentators to highlight the significant racial equity concerns associated with these actions, particularly during the COVID-19 pandemic.⁶⁹ This is because broad scale preemption generally serves to shift regulatory power from local governments representing minority communities to state governments more responsive to the desires and politics of white citizens.⁷⁰

While state preemption of local ordinances regulating environmental, public health, economic, and social issues is certainly

66. See, e.g., Jeffrey Tomich, *Gas Ban Backlash Spreads Across the U.S.*, E&E NEWS (Feb. 2, 2021), <https://www.abralliance.org/wp-content/uploads/2021/02/Gas-ban-backlash-spreads-across-the-U.S.-EE-Energywire-2-2-21.pdf> [<https://perma.cc/RLU5-KUXP>] (reporting on state legislative actions to preempt local natural gas bans, even in states where none has been proposed, and describing the level of activity as “expos[ing] a more localized power struggle between state and city governments”); Jeff Brady & Dan Charles, *As Cities Grapple with Climate Change, Gas Utilities Fight to Stay in Business*, NPR (Feb. 22, 2021, 4:19 PM), <https://www.npr.org/2021/02/22/967439914/as-cities-grapple-with-climate-change-gas-utilities-fight-to-stay-in-business> [<https://perma.cc/QH5E-9FH3>] (discussing industry and legislative efforts to preempt local natural gas bans).

67. See Phillips, *supra* note 16, at 2244–45 (discussing similar “anticipatory” preemption laws in Ohio and Arizona, which both enacted laws prohibiting local governments from enacting worker rights policies (a living wage in Ohio and fair scheduling in Arizona) before a single city in either state had enacted such a law); see also Briffault, *supra* note 5, at 2009–11 (discussing potential First Amendment implications when states act to stifle local government debate or voting).

68. Tom DiChristopher, *Gas Ban Monitor: Building Electrification Evolves as 19 States Prohibit Bans*, S&P GLOB. (July 20, 2021), <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/gas-ban-monitor-building-electrification-evolves-as-19-states-prohibit-bans-65518738> [<https://perma.cc/8DEE-5XZG>].

69. See *supra* notes 16–18, 27, and accompanying text (discussing racial equity concerns associated with recent state preemption efforts, including with regard to COVID-19). For example, a proposed bill in Texas in 2021, S. 14, would eliminate local governments’ ability to mandate paid sick leave. S. 14, 87th Leg., 2d Called Sess. (Tex. 2021). In addition, the bill would prohibit local governments from requiring construction workers be given periodic water breaks. *Id.*; Ariel Wittenberg, *‘People Can Die’: Texas Bill Would Strip Worker Water Breaks*, E&E NEWS (Aug. 17, 2021), <https://www.eenews.net/articles/people-can-die-texas-bill-would-strip-worker-water-breaks/> [<https://perma.cc/U9JR-6768>]. The bill is viewed as a Republican-led attempt to retaliate against progressive cities like Austin and Dallas, which enacted ordinances to protect workers during the pandemic. Wittenberg, *supra*.

70. See *supra* notes 16–18, 27, and accompanying text (discussing political implications of state preemption of local government authority for racial minorities).

not a new phenomenon, state laws preempting local policy initiatives have become increasingly combative and punitive in recent years.⁷¹ For instance, in the area of gun regulation, several states have enacted laws that impose significant fines, civil and criminal liability, and removal from office for local officials who enact or enforce gun control measures inconsistent with state laws preempting such local regulations.⁷² Laws in Kentucky and Florida also include private rights of action for damages by individuals and organizations against local officials for violating the letter or “spirit” of the state gun preemption law.⁷³ More broadly, in 2016, Arizona enacted SB 1487, which eliminated state aid to local governments with preempted laws on their books.⁷⁴ Under SB 1487, a state legislator may request that the attorney general investigate and report on claims that local governments have violated the law.⁷⁵ If the attorney general finds that a local law “may” be preempted, the attorney general must bring an immediate action in the state supreme court and, in order to respond to the action, the local government in question must post a bond “equal to the amount of shared revenue” it received over the past six months.⁷⁶ The state treasurer shall withhold local government funds until the violation is resolved.⁷⁷ The law has resulted in multiple investigations of local government laws, including ones related to gun control, plastic bag bans, and truck regulations.⁷⁸

Finally, legislatures in Oklahoma, Texas, and Florida have considered what Richard Briffault terms “nuclear preemption”—eliminating entirely the ability of local governments to exercise legislative power in any area where state law exists rather than selectively preempting that authority in particular subject areas such as gun control, hydraulic fracturing, or setting a minimum wage.⁷⁹

71. See, e.g., Briffault, *supra* note 5, at 1997 (describing the “new preemption” as “sweeping state laws that clearly, intentionally, extensively, and at times punitively bar local efforts to address a host of problems”).

72. *Id.* at 2002–07; Phillips, *supra* note 16, at 2247–51.

73. Briffault, *supra* note 5, at 2002–04; KY. REV. STAT. ANN. §§ 65.870(2)–(3), (6), 522.020-.030 (West 2021).

74. Briffault, *supra* note 5, at 2005–06; Act of Mar. 17, 2016, ch. 35, 2016 Ariz. Sess. Laws 161 (codified as amended in scattered sections of the Arizona Revised Statutes); ARIZ. REV. STAT. ANN. § 41-194.01 (2021).

75. ARIZ. REV. STAT. ANN. § 41-194.01(A).

76. *Id.* § 41-194.01(B)(2).

77. *Id.*

78. See *SB 1487 Investigations*, ARIZ. ATTY GEN., <https://www.azag.gov/complaints/sb1487-investigations> (last visited Oct. 2, 2021) [<https://perma.cc/QA7D-JJ8E>]; Briffault, *supra* note 5, at 2004–07 (discussing Arizona law).

79. See Briffault, *supra* note 5, at 2007–08; see also Erin Adele Scharff, *Hyper Preemption: A Reordering of the State-Local Relationship*, 106 GEO. L.J. 1469, 1502–04 (2018) (discussing same phenomenon as “blanket preemption”).

While no state has yet enacted such a law, corporations and other interest groups will undoubtedly continue to push for elimination of local government power over land use, business practices, and worker rights. With the continued deep political divide between cities and states, such laws may find a growing receptive audience in state legislatures.

C. A Way Out? Local Governments as “Proprietors”

State and local government scholars generally articulate three distinct roles for local governments in the U.S. constitutional framework.⁸⁰ The first treats local governments solely as instrumentalities of the state—the state can grant local governments power but can also eliminate that power if it chooses. This approach is reflected in both Dillon’s Rule and *Hunter v. City of Pittsburgh*,⁸¹ discussed in Part I.A. The second approach considers local governments as autonomous actors based on their history and practice as self-governing entities. This approach embraces a greater commitment to localism and is reflected in court decisions upholding local voting rights or otherwise upholding local action in the face of state opposition.⁸² The third approach, discussed in this Section, is where the local government acts in a “proprietary” capacity like a private corporation. In this role, “[l]ocal constituents are seen more as consumers or investors than as members of a democratic community, and local services are treated as relatively private—providing distinct benefits to particular local taxpaying constituents—rather than broadly public.”⁸³ Although local governments can act in a proprietary capacity in a number of situations, including business improvement districts, water districts, and sanitation districts, they can also do so when acting as a municipal electric utility.⁸⁴

80. See, e.g., BRIFFAULT & REYNOLDS, *supra* note 9, at 73–75.

81. 207 U.S. 161, 179 (1907).

82. BRIFFAULT & REYNOLDS, *supra* note 9, at 73–75; see also Hannah J. Wiseman, *Rethinking Municipal Corporate Rights*, 61 B.C. L. REV. 591, 598 (2020) (contending that “municipalities’ important status as corporations that provide essential public services—particularly to people who otherwise would struggle to obtain those services—and project their citizens’ views on an increasingly national and international platform needs explicit recognition,” and that this “status should factor prominently in the balancing tests that courts often deploy when deciding intrastate preemption questions”).

83. BRIFFAULT & REYNOLDS, *supra* note 9, at 74.

84. See generally Hugh D. Spitzer, *Realigning the Governmental/Proprietary Distinction in Municipal Law*, 40 SEATTLE U. L. REV. 173 (2016) (discussing seven areas of law where proprietary powers have been distinguished from governmental powers and arguing for a reassessment of this distinction). The provision of broadband internet service, an exercise of local government proprietary powers, has emerged in recent years as another flashpoint in state and local

Since as early as *Hunter v. City of Pittsburgh* in 1907, courts have treated local governments quite differently when acting in their proprietary capacity than when acting in their regulatory capacity. In *Hunter*, the Court qualified its declaration of local government subservience to the state by noting that “in describing the absolute power of the state over the property of municipal corporations, we have not extended it beyond the property held and used for governmental purposes.”⁸⁵ Instead, according to the Court, when local governments act in their private capacity, “the legislature is not omnipotent.”⁸⁶

Courts have overwhelmingly embraced this deference to local governments acting in their proprietary capacity as municipal electric utilities. For instance, in *City of Tacoma v. Taxpayers of Tacoma*,⁸⁷ the Washington Supreme Court in 1987 upheld the ability of the Tacoma municipal utility to pay for the installation of energy conservation devices in homes when residents challenged such payments as an unconstitutional gift of public funds.⁸⁸ In affirming the city’s power to invest in the conservation program, it first cited Dillon’s Rule, and found that the city had discretion in how it carried out its operations as a municipal utility because the state had expressly granted cities the power to form and operate municipal utilities.⁸⁹ It then discussed the importance of the regulatory/proprietary distinction with regard to local power:

Like other state supreme courts, we have historically taken different approaches to construing municipal powers according to whether the power exercised is governmental or proprietary in nature. When a governmental function is involved, less opportunity exists for invoking the doctrines of liberal construction and of implied powers. But when the Legislature authorizes a municipality to engage in a business, “[it] may exercise its business powers very much in the same way as a private individual” Actions taken pursuant to [the municipal utility statute] serve a business, proprietary function, rather than a governmental function.⁹⁰

government relations. See Jon Reid, *Municipal Broadband War Reignited in Biden’s Infrastructure Push*, BLOOMBERG L. (Apr. 1, 2021, 4:00 AM), <https://news.bloomberglaw.com/tech-and-telecom-law/municipal-broadband-war-reignited-in-bidens-infrastructure-push> [<https://perma.cc/S9PD-LE9P>]. While there are over 140 citywide municipal broadband networks, and many more municipal networks with partial coverage, nineteen states place limitations on the ability of local governments to provide broadband service. *Id.*

85. *Hunter*, 207 U.S. at 179.

86. *Id.*; see also Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1111 (1980) (noting fifty years of court decisions distinguishing “the city’s governmental functions, which were subject to absolute state power, from its proprietary functions, which received the constitutional protection afforded to rights of private property”).

87. 743 P.2d 793 (Wash. 1987).

88. *Id.* at 794.

89. *Id.* at 799–800.

90. *Id.* at 800–01 (citations omitted).

Thus, when it comes to municipal utilities, even a state that applies Dillon's Rule does not impose a strict rule of construction on local government authority when the local government is acting in its role as a municipal utility.

Finally, courts have held that municipal utilities have even *more* power than private companies when acting in their proprietary capacity—most notably the power to avoid state regulation of their prices, services, and actions. For instance, in 1921, in *Springfield Gas & Electric Co. v. City of Springfield*,⁹¹ a private electric utility sought to prevent the City of Springfield—a municipal utility in Illinois—from selling electricity to private consumers without first filing and posting rate schedules with the state public utility commission, as was required for all private electric utilities in the state.⁹² The state statute in question subjected private utilities to extensive state public utility commission regulation of rates, charges, and services but expressly exempted municipal utilities from those regulations.⁹³

In rejecting the company's argument that the distinction between private utilities and municipal utilities with regard to state regulation violated the Fourteenth Amendment to the Constitution, Justice Holmes explained why such a distinction was justified. He stated that:

The private corporation[,] whatever its public duties[,] is organized for private ends and may be presumed to intend to make whatever profit the business will allow. The municipal corporation is allowed to go into the business only on the theory that thereby the public welfare will be subserved. So far as gain is an object it is a gain to a public body and must be used for public ends. Those who manage the work cannot lawfully make private profit their aim, as the plaintiff's directors not only may but must.⁹⁴

Accordingly, *Hunter* stands for the proposition that local governments possess enhanced power and autonomy when acting in a proprietary capacity and *Springfield Gas & Electric Co.* holds that when they do so, they are acting in the public interest, providing a separate justification for their freedom from state control.

D. State Laws and Constitutions Governing Municipalization

Today, every state except Hawaii explicitly authorizes the creation of a municipal electric utility. The vast majority provide the

91. 257 U.S. 66 (1921).

92. *Id.* at 68–69.

93. *Id.*

94. *Id.* at 70.

authority to do so by statute,⁹⁵ while six states grant such authority in their state constitutions.⁹⁶ A few home rule states devolve this authority to the local level and allow creation of a municipal utility only when the municipality's charter itself reflects the right to do so.⁹⁷ The ability to operate a utility outside the territorial limits of the municipality, if authorized at all, is usually more circumscribed.⁹⁸

While there is state-to-state variation in the precise steps required to establish a municipal electric utility, most contemporary municipalization efforts follow a similar pattern. Interest in municipalization normally arises as the expiration of the municipality's franchise agreement with its investor-owned utility approaches.⁹⁹ As discussed in Part II.B, the basic form of the franchise agreement grants an investor-owned utility the exclusive right to operate in the community and to use the city's rights-of-way in exchange for a franchise fee.¹⁰⁰ Modern franchise agreements often include other concessions from the investor-owned utility, for example, regarding postconstruction cleanup or locating electric infrastructure underground.¹⁰¹

95. Thirty-nine states grant local governments the power to municipalize by statute. See Abby Briggerman, Radu Costinescu & Ashley Bond, *Survey of State Municipalization Laws*, AM. PUB. POWER ASS'N (May 2012), https://www.publicpower.org/system/files/documents/municipalization-survey_of_state_laws.pdf [https://perma.cc/J5RY-JYXB] (citing statutes from Alabama, Alaska, Arizona, Arkansas, Connecticut, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming).

96. *Id.* (citing constitutions of California, Colorado, Florida, Michigan, Ohio, and South Carolina).

97. *Id.* (citing statutes from Delaware, Maryland, Oregon, Pennsylvania, and Texas).

98. Several states allow municipal utilities to furnish service outside their corporate boundaries with conditions. Briggerman et al., *supra* note 95 (citing statutes from California, Colorado, Indiana, Kansas, Montana, New York, Ohio, Oklahoma, South Dakota, Tennessee, Utah, and Wyoming).

99. Hawaii, Maine, Montana, North Carolina, and Wisconsin prohibit cities from negotiating their own franchise agreements. Jeffrey J. Cook, Bryn Ursula Grunwald, Alison Holm & Alexandra Aznar, *Wait, Cities Can Do What? Achieving City Energy Goals Through Franchise Agreements*, 144 ENERGY POL'Y, Sept. 2020, at 5. Investor-owned utilities and their regulation are discussed in detail in Part II.A.

100. AM. PUB. POWER ASS'N, *Public Power for Your Community*, *supra* note 30, at 14. In practice, the investor-owned utility routinely passes on to consumers the costs of the franchise fee instead of bearing them as legitimate business expenses. *Id.*

101. *But see* Paul Hughes, *Renegotiating a Municipal Franchise During Electricity Restructuring and Deregulation*, AM. PUB. POWER ASS'N (July 2002), <http://www.informedcynic.com/SEC/buyout-docs/Renegotiating%20a%20Franchise.pdf> [https://perma.cc/S9LN-HM7T] (stating most municipalities do not maximize the regulatory potential of the franchise agreement and proposing several strategic negotiation goals).

With terms of ten, twenty, or even up to fifty years,¹⁰² the expiration of the franchise agreement is a significant opportunity for a municipality to reassess its relationship with its investor-owned utility. Whether or not a city ultimately elects to municipalize, the threatened loss of franchise rights gives it leverage to request a host of beneficial stipulations: to achieve cost savings, to improve reliability, to invest in the community, or to incorporate substantive policy goals.¹⁰³ A favorable new agreement is often sufficient to dissuade most communities from pursuing municipalization.¹⁰⁴

For communities that are not satisfied with the potential terms the investor-owned utility has offered in the new franchise agreement, the local government will generally commission an outside firm to conduct a feasibility study to assess the costs and benefits of leaving the investor-owned utility and establishing a municipal electric utility.¹⁰⁵ Feasibility studies consider both the economic viability of the project as

102. An example of a fifty-year franchise agreement is the one governing electricity delivery in San Diego, which signed its prior franchise agreement with San Diego Gas & Electric in 1970. Rob Nikolewski, *San Diego Renegotiating Utility Franchise Agreement for the First Time in 50 Years*, SAN DIEGO UNION TRIB. (Oct. 11, 2019, 6:00 AM), <https://www.sandiegouniontribune.com/business/energy-green/story/2019-10-11/franchise-agreement> [https://perma.cc/4Z9C-DZFT].

103. See Cook et al., *supra* note 99, at 2 (discussing potential to achieve renewable energy objectives through commitments in franchise agreements).

104. AM. PUB. POWER ASS'N, *Public Power for Your Community*, *supra* note 30, at 31.

105. See, e.g., R. W. BECK, INC., PRELIMINARY MUNICIPALIZATION FEASIBILITY STUDY: CITY OF BOULDER, COLORADO (Oct. 2005), https://www-static.bouldercolorado.gov/docs/energy_future_2005_Preliminary_feasibility_study_from_RWBek-k-1-201306061215.pdf [https://perma.cc/T38C-KW37]; MIKE BULL ET AL., CTR. FOR ENERGY & ENV'T, MINNEAPOLIS ENERGY PATHWAYS: A FRAMEWORK FOR LOCAL ENERGY ACTION (Feb. 2014), https://d36iur3orme9ke.cloudfront.net/wp-content/uploads/2019/01/www.ci_minneapolis.mn_us_www_groups_public_citycoordinator_documents_webcontent_wcms1p-121587.pdf [https://perma.cc/DDT9-MW5U]; CONCENTRIC ENERGY ADVISORS, PRELIMINARY FEASIBILITY STUDY: CITY OF PUEBLO, COLORADO MUNICIPALIZATION (Sept. 2019), <https://ceadvisors.com/wp-content/uploads/2019/09/Pueblo-Feasibility-Study.pdf> [https://perma.cc/22Q2-D4AV]; CONCENTRIC ENERGY ADVISORS, PRELIMINARY FEASIBILITY STUDY: CITY OF PITTSBURG, KANSAS MUNICIPALIZATION (July 2019), <https://www.evergy.com/media/documents/community/concentric-preliminary-feasibility-study-pittsburg-municipalization-july-2019.pdf?la=en> [https://perma.cc/L48W-NAXE]; THOMAS VITOLO ET AL., SYNAPSE ENERGY ECON., INC., AN ANALYSIS OF MUNICIPALIZATION AND RELATED UTILITY PRACTICES (Sept. 2017), <https://doee.dc.gov/sites/default/files/dc/sites/ddoe/publication/attachments/An%20Analysis%20of%20Municipalization%20and%20Related%20Utility%20Practices.pdf> [https://perma.cc/SBP8-GYVC]; S.F. WATER POWER SEWER, PRELIMINARY REPORT ON ELECTRIC SERVICE OPTIONS (May 2019), https://sfpuc.org/sites/default/files/about-us/policies-reports/PreliminaryReportElectricServiceOptions_13may2019.pdf [https://perma.cc/5PWM-7DSY]; OFF. OF THE N.Y.C. PUB. ADVOC., *supra* note 6 (municipalization feasibility study for New York City); NEWGEN STRATEGIES & SOLS., PRELIMINARY MUNICIPAL UTILITY FEASIBILITY STUDY: CITY OF CHICAGO, ILLINOIS (Aug. 2020), https://www.chicago.gov/content/dam/city/depts/dgs/supp_info/City_of_Chicago_20200828_Preliminary_Municipal_Utility_Feasibility_Study.pdf [https://perma.cc/E5D6-36NL].

well as the likelihood that creating a municipal utility will achieve the local government's specific objectives.¹⁰⁶ If the feasibility study determines municipalization is possible, practical, and desirable, the city holds a referendum to proceed with municipalization.¹⁰⁷ Once these initial hurdles are cleared, the negotiations then begin with the incumbent investor-owned utility to purchase the existing assets and distribution infrastructure serving the locale.¹⁰⁸ Local governments usually face fierce resistance in these negotiations;¹⁰⁹ consequently, many states authorize the exercise of eminent domain authority to acquire the necessary distribution facilities from the incumbent investor-owned utility.¹¹⁰ In some cases, an independent state agency may play a role in approving the final price paid by the municipality, particularly if it is difficult to separate investor-owned utility assets used to serve the local government from assets used to serve other nearby communities.¹¹¹ All told, municipalization usually involves several years of sustained community effort; depending on the

106. See *infra* Part II.B for a discussion of common goals and policies.

107. Statutory requirements delineate the subject of the referendum. It may concern the general prospect of proceeding with municipalization, or it may more specifically authorize the purchase or condemnation of investor-owned utility infrastructure. See, e.g., ARIZ. REV. STAT. ANN. § 9-514 (2021) (election for “authority to engage in utility business”); N.Y. GEN. MUN. LAW § 360(5) (McKinney 2021) (referendum for construction of new facilities or acquisition of investor-owned utility facilities); VA. CODE ANN. § 15.2-2109(B) (2021) (referendum for acquiring investor-owned utility facilities); WIS. STAT. § 197.01(1) (2021) (voter approval for purchasing investor-owned utility facilities).

108. Although a municipality technically may bypass the incumbent altogether and build its own new facilities, the inefficiencies created by duplicating distribution infrastructure make this method of municipalization rare in practice. See Suedeem Kelly, *Municipalization of Electricity: The Allure of Lower Rates for Bright Lights in Big Cities*, 37 NAT. RES. J. 43, 44 (1997) (discussing options for municipal ownership and control of distribution facilities). “Muni-lite” briefly presented a third pathway to municipalization boldly attempted by several cities in the 1990s. *Id.* at 44–45. “Muni-lite” consisted of a municipality merely installing its own meter at the end of the incumbent’s distribution line in each house and business. *Id.* The Federal Energy Regulatory Commission (“FERC”) soundly rejected this approach as insufficient ownership or control of distribution facilities; i.e., “muni-lite” constituted a “sham” attempt to create a municipal utility. See Michael J. Doane & Daniel F. Spulber, *Municipalization: Opportunism and Bypass in Electric Power*, 18 ENERGY L.J. 333, 338–41 (1997).

109. See *infra* Part II.B.

110. See Briggerman et al., *supra* note 95 (citing eminent domain authority in Alabama, Alaska, California, Colorado, and Florida, among others).

111. S.F. WATER POWER SEWER, *supra* note 105, at 45; see, e.g., KAN. STAT. ANN. § 12-811 (2021) (requiring a court-appointed commission to appraise facilities and subsequent approval by the court); MINN. STAT. § 216B.45 (2021) (state agency determines compensation for facilities when municipality and investor-owned utility cannot agree on a price); see also Application of the City of Boulder, Colorado for Approval of the Proposed Transfer of Assets From Public Service Company of Colorado to the City, Proceeding No. 15A-0589E, Decision No. C17-0750, Colo. Pub. Utils. Comm’n (Sept. 14, 2017), at ¶¶ 97, 149 (discussing need for state agency to provide oversight on separation and valuation because the “highly integrated” nature of Boulder’s grid system meant Xcel would need to use “significant facilities” within the city post-separation to serve nearby communities); *infra* Part II.B (discussing Boulder’s municipalization effort).

onerousness of the procedural requirements and the litigiousness of the incumbent, it can take upwards of a decade.¹¹²

Once formed, municipal utilities are significantly freer from state and federal regulation of rates, charges, and services than investor-owned utilities.¹¹³ As discussed in Part II.A., the Federal Power Act explicitly exempts municipal and other governmental utilities from Federal Energy Regulatory Commission (“FERC”) regulation and most states similarly exclude municipal utilities from state regulation.¹¹⁴ Instead, municipal utility retail rates and charges are determined by the utility leadership itself, which usually takes the form of either a democratically elected city council or a commission appointed by local elected officials.¹¹⁵ This exemption from state regulatory oversight relieves municipal utilities of a substantial regulatory burden. State regulation of investor-owned utilities extends far beyond rate-setting to encompass approval of, for example, the

112. Because of the significant burdens associated with breaking away from an existing investor-owned utility, legislatures in ten states—all of which are restructured and no longer have vertically integrated utilities—have enacted so-called Community Choice Aggregation (“CCA”) laws to give local governments more authority over power resources short of full municipalization. *CCA by State*, LOC. ENERGY AGGREGATION NETWORK U.S., <https://www.leanenergyus.org/cca-by-state> (last visited Oct. 2, 2021) [<https://perma.cc/XP9T-E9FW>]; ERIC O’SHAUGHNESSY, JENNY HEETER, JULIEN GATTACIECCA, JENNY SAUER, KELLY TRUMBULL & EMILY CHEN, NAT’L RENEWABLE ENERGY LAB’Y, COMMUNITY CHOICE AGGREGATION: CHALLENGES, OPPORTUNITIES, AND IMPACTS ON RENEWABLE ENERGY MARKETS (Feb. 2019), <https://www.nrel.gov/docs/fy19osti/72195.pdf> [<https://perma.cc/F9LM-DL58>].

CCA laws allow a group of local governments to purchase their electricity from a preferred provider while relying on their existing utility for transmission and distribution. *Community Choice Aggregation Policies*, NAT’L CONF. OF STATE LEGISLATURES (Jan. 12, 2015), <https://www.ncsl.org/research/energy/community-choice-aggregation.aspx> [<https://perma.cc/CCZ3-GT2K>]. CCA laws thus allow local governments to exercise control similar to municipalization while avoiding the litigation and expense associated with acquiring an incumbent investor-owned utility’s infrastructure. See generally Welton, *supra* note 34, at 310; JOHN FARRELL, INST. FOR LOC. SELF-RELIANCE, COMMUNITY CHOICE ENERGY 3 (Feb. 2020), <https://ilsr.org/wp-content/uploads/2020/02/CommunityChoiceEnergyReportILSR.pdf> [<https://perma.cc/5ZQ5-392C>].

113. Under the Federal Power Act, FERC regulates wholesale electricity sales in interstate commerce and interstate transmission, while state commissions have jurisdiction over retail electric sales. See Federal Power Act § 201, 16 U.S.C. § 824; *infra* Part II.A.

114. See *infra* Part II.A. Only six states authorize full rate regulation of municipal utilities by the state’s public utility commission—Indiana, Maine, Maryland, Rhode Island, Vermont, and Wisconsin. *Authority of State Commissions to Regulate Rates of Public Power Utilities*, AM. PUB. POWER ASS’N (June 2014), <https://www.publicpower.org/system/files/documents/Rate%20Regulation%20of%20PP%20chart%20412.pdf> [<https://perma.cc/WSS6-HDDA>]. Additionally, public utility commission rate oversight exists in several states where a municipal utility operates outside its territorial limits or under other specific circumstances. *Id.*

115. *What is Public Power*, AM. MUN. POWER, <https://www.ampppartners.org/consumers/what-is-public-power> (last visited Dec. 21, 2021) [<https://perma.cc/6W4N-X3HL>].

utility's power supply,¹¹⁶ energy efficiency and conservation measures,¹¹⁷ and even the ability to disconnect delinquent customers.¹¹⁸ To the extent municipal utilities are not beholden to a state regulator for permission to undertake similar measures, they have greater flexibility to experiment with and implement innovative policies.¹¹⁹

E. Municipal Utilities in the Courts

Local government authority is almost impervious to outside attack once a municipal utility is formed. In its unique proprietary role, municipal utilities can expand their territory,¹²⁰ condemn property,¹²¹ compete with other electricity providers,¹²² and delegate their authority,¹²³ among other actions. Litigation between municipal

116. At least thirty states have enacted renewable portfolio standards, which require investor-owned utilities to source a certain percentage of their electricity from renewable or carbon-free resources. *Renewable & Clean Energy Standards*, N.C. CLEAN ENERGY TECH. CTR. (Sept. 2020), <https://s3.amazonaws.com/ncsolarcen-prod/wp-content/uploads/2020/09/RPS-CES-Sept2020.pdf> [<https://perma.cc/88KE-MX79>]. A similar number of states mandate that utilities submit to the public utilities commission an integrated resource plan detailing their load forecast, resource additions and retirements, and performance assumptions over the next ten to twenty years. *See, e.g.*, Coley Girouard, *Understanding IRPs: How Utilities Plan for the Future*, ADVANCED ENERGY ECON.: ADVANCED ENERGY PERSPS. BLOG (Aug. 11, 2015, 4:59 PM), <https://blog.aee.net/understanding-irps-how-utilities-plan-for-the-future> [<https://perma.cc//43DP-NA6R>].

117. *See, e.g., Energy Efficiency Resource Standards*, AM. COUNCIL FOR AN ENERGY-EFFICIENT ECON., <https://database.aceee.org/state/energy-efficiency-resource-standards> (last visited Dec. 21, 2021) [<https://perma.cc/CV6X-MSYB>] (listing energy efficiency portfolio standards imposed by state public utility commissions on investor-owned utilities); Megan Cleveland, Logan Dunning & Jesse Heibel, *State Policies for Utility Investment in Energy Efficiency*, NAT'L CONF. OF STATE LEGISLATURES (Apr. 2019), https://www.ncsl.org/Portals/1/Documents/energy/Utility_Incentives_4_2019_33375.pdf?ver=2019-04-04-154310-703 [<https://perma.cc/7P26-R2L5>] (discussing public utility commission mechanisms to incentivize energy efficiency including decoupling, lost revenue adjustment mechanisms, and shared net benefits, among others).

118. During the COVID-19 pandemic, more than thirty-six states imposed on investor-owned utilities some form of prohibition against disconnections for nonpaying customers. *Map of Disconnection Moratoria*, NAT'L ASS'N OF REGUL. UTIL. COMM'RS, <https://www.naruc.org/compilation-of-covid-19-news-resources/map-of-disconnection-moratoria/> (last updated Sept. 9, 2021) [<https://perma.cc/8WJN-ZAU9>].

119. Outka, *supra* note 36, at 128–29 (citing discussion of Osage, Iowa, energy efficiency improvements in RICHARD F. HIRSH, POWER LOSS: THE ORIGINS OF DEREGULATION AND RESTRUCTURING IN THE AMERICAN ELECTRIC UTILITY SYSTEM 157–58 (1999)).

120. *See infra* notes 129–137 and accompanying text (discussing Tri-County Elec. Ass'n, Inc. v. City of Gillette, 584 P.2d 995 (Wyo. 1978)).

121. *See infra* notes 124–128 and accompanying text (discussing *In re* Petition of the Town of Springfield to Condemn Certain Distrib. & Transmission Facilities of Cent. Vt. Pub. Serv. Corp. in Springfield, 469 A.2d 375 (Vt. 1983)).

122. *See infra* note 137 (discussing Poudre Valley Rural Elec. Ass'n v. City of Loveland, 807 P.2d 547 (Colo. 1991)).

123. *See infra* notes 139–142 and accompanying text (discussing Frank v. City of Cody, 572 P.2d 1106 (Wyo. 1977)).

utilities and other power providers illustrates the wide range of autonomous actions municipal utilities may take without state interference.

The right to create a municipal utility itself underscores the independence of local governments in this area from the outset. For instance, in 1982, Vermont's Public Service Board ("PSB") denied the Town of Springfield's petition to condemn the property of its incumbent electricity provider, submitted after the duly required referendum, based on the PSB's authority to alter and establish utility service territories.¹²⁴ The PSB reasoned this authority allowed it to determine whether Springfield's electric utility would be "consistent with the general good of Vermont."¹²⁵ In *Petition of the Town of Springfield*, the Vermont Supreme Court reversed, holding that where a municipality complied with the statutory notice and referendum requirements, the PSB's jurisdiction did not extend to "the unfettered right accorded [to] municipalities" to establish an electric utility.¹²⁶ The court emphasized the "determination of the town voters to establish such a utility [is not subject] to any board overview whatsoever."¹²⁷ Furthermore, the PSB had no role in reviewing Springfield's condemnation of incumbent property lying within the town borders.¹²⁸

The boundaries of a municipality are not static, of course, and a municipal electric utility has the right to expand along with the population it serves. A case from Wyoming, *Tri-County Electric Ass'n, Inc. v. City of Gillette*, illustrates the perils for any electricity provider operating adjacent to a municipal utility.¹²⁹ The City of Gillette and Tri-County—a rural electric cooperative serving the surrounding area—entered into an agreement in 1960 defining their respective territories.¹³⁰ The Wyoming Public Service Commission ("PSC") approved the contract at the time, but a year later the Wyoming legislature removed from PSC jurisdiction any authority over municipal utility operations within their corporate limits.¹³¹ Gillette subsequently underwent "phenomenal growth" and embarked on a series of territorial annexations to accommodate its new population. During these annexations, the city issued an ordinance requiring a franchise agreement prior to any construction of new electrical facilities or service

124. *Town of Springfield*, 469 A.2d at 375 n.1, 376.

125. *Id.* at 376.

126. *Id.* at 378.

127. *Id.*

128. *Id.* at 380.

129. 584 P.2d 995 (Wyo. 1978).

130. *Id.* at 998.

131. *Id.*

to new customers.¹³² In 1970, Tri-County requested permission to build a transmission line to serve territory allocated to it in the 1960 agreement; failing to obtain Gillette's consent, Tri-County nonetheless proceeded with construction and service.¹³³

In resolving Tri-County's assertion of a right to serve the area in question, the Wyoming Supreme Court found that any territorial rights from the 1960 agreement only arose through the approval of the PSC.¹³⁴ Since the PSC had no jurisdiction over municipal electric utility operations within the bounds of the municipality after 1961, any exclusive territorial right held by Tri-County was extinguished with Gillette's lawful expansion into the disputed area.¹³⁵ The court observed that it was the nature of cities to expand and, thus, "anyone claiming electric utility rights pertaining only to rural territory entering areas contiguous to a city does so with notice that the municipality will very likely expand and is subject to that event."¹³⁶ Accordingly, in states where municipal utilities have an absolute right to operate within municipal boundaries, they also hold a virtually absolute right to accrue new territory and new customers.¹³⁷ In taking these actions, the municipal utility's decisions are generally "immune" from state regulation.¹³⁸

Due to their "proprietary" nature, municipal utilities also have the right to delegate authority in ways that would be illegal if the municipal government was acting in a regulatory capacity. In *Frank v. City of Cody*, the mayor of Cody, Wyoming, attempted to block the city's participation in the formation and financing of a joint power agency with the municipal utilities of nearby small towns for the construction

132. *Id.* at 999.

133. *Id.*

134. *Id.* at 1004 ("The contract created no territorial rights; whatever territorial rights came into being were created by the Certificate of Convenience and Necessity issued by the P.S.C.").

135. *Id.* at 1005:

The legislature has bestowed power on a city or town to operate an electric utility within its corporate limits, as expanded from time to time. The P.S.C. has had taken from it any power to function within the boundaries of a city in carrying out its assignment of utility regulation in granting territorial rights for utility service.

136. *Id.* at 1006.

137. *Id.*; see also *Poudre Valley Rural Elec. Ass'n v. City of Loveland*, 807 P.2d 547, 551–53, 556–58 (Colo. 1991) (municipal utility has power to selectively choose which areas of adjacent territory to annex and which facilities to condemn despite protests of neighboring, competing rural electric cooperative).

138. See, e.g., *City of Colo. Springs v. Mountain View Elec. Ass'n*, 925 P.2d 1378, 1383 (Colo. Ct. App. 1995) ("[T]he City is immune from [state] regulation of its ownership or operation of an electric utility."); see also *id.* at 1382 ("The rationale for this rule is that, inasmuch as persons dissatisfied with the utility's service may use the municipal elections to express their discontent, there is no one who requires protection by the [state regulators] when the utility is owned by a municipality.").

of new power plants.¹³⁹ The Mayor protested the venture as an unconstitutional delegation of municipal authority—first, because the agency would control Cody’s electric supply and, second, because a private company would manage the construction and operation of the new facilities.¹⁴⁰

In 1977, the Wyoming Supreme Court rejected both contentions, observing that only delegations of municipal functions were unconstitutional; the “business of selling electricity to its inhabitants” is a proprietary function.¹⁴¹ The involvement of a private company made no difference: “[a]s long as the municipality and its representatives retain their powers of judgment, discretion and management, there is no objection to an alliance with private enterprise, with the latter performing ministerial and executive functions requiring special skills.”¹⁴²

These cases show the durable and expansive scope of local power when the local government is acting in its proprietary capacity as a municipal utility. In some states, this is due to the constitutional nature of local government authority. In others, it may be attributable to the bipartisan nature of municipal electric utilities—existing for over a century in both conservative and progressive, as well as urban and rural, communities. This durability lays the groundwork for local governments today to use either their existing status as a municipal utility—or simply the power to municipalize when negotiating with the investor-owned utility currently serving the city—to achieve a variety of economic, social, and environmental protection goals. These current efforts are discussed in Part II, which describes in more detail precisely how local governments have used this enhanced power to create and operate municipal electric utilities in the interests of their citizens to promote a wide range of policy goals. As shown below, these policy goals have shifted over time in response to developments in economics, technology, climate science, public opinion, and social and racial equity.

II. LOCAL POWER II: LOCAL AUTHORITY OVER POWER SYSTEMS

Today there are over two thousand large and small municipal utilities throughout the country, including Los Angeles, California; Austin, Texas; Cleveland, Ohio; and many others.¹⁴³ Part II begins with a brief discussion of the electricity sector before detailing historic and

139. *Frank v. City of Cody*, 572 P.2d 1106, 1107–08 (Wyo. 1977).

140. *Id.* at 1108–11.

141. *Id.* at 1110.

142. *Id.* at 1111.

143. AM. PUB. POWER ASS’N, *Public Power for Your Community*, *supra* note 30, at 7.

contemporary municipalization efforts. It explores the history of local actions to take control of the delivery of electricity to citizens and the range of economic, environmental, and political rationales underlying local power campaigns. This Part also illustrates how the goals of municipalization have evolved over time to include environmental protection, climate change, energy democracy, and racial and economic equity.

A. *Electricity 101*

In the United States, public and private “electric utilities” sell electric energy from over ten thousand large fossil fuel, nuclear, and renewable energy power plants (primarily wind and solar) to other electric utilities (wholesale sales) and end-use residential, commercial, and industrial customers (retail sales), through a vast network of long-distance electric transmission and distribution lines.¹⁴⁴ These large-scale power plants are in addition to the growing number of smaller scale “distributed energy resources” such as rooftop solar panels, community solar gardens, small-scale geothermal plants, and the like that also provide electric energy resources to a growing number of power providers and consumers.¹⁴⁵ Although the share of total electricity derived from fossil fuels has decreased significantly in the last decade, it remains a substantial share of total U.S. electricity generation.¹⁴⁶ In 2020, fossil fuel plants—powered almost exclusively by coal and natural gas—constituted approximately 60% of total U.S. electricity generation; nuclear made up just under 20%; renewable wind energy, hydropower, and solar energy were 8%, 7%, and 2%,

144. See *How Many Power Plants Are There in the United States?*, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/tools/faqs/faq.php?id=65&t=2> (last updated Nov. 18, 2020) [<https://perma.cc/XLU5-BLLX>] (“As of December 31, 2019, there were 22,731 electric generators at about 10,346 utility-scale electric power plants in the United States. Utility-scale power plants have a total nameplate electricity generation capacity of at least 1 megawatt (MW).”); James W. Coleman & Alexandra B. Klass, *Energy and Eminent Domain*, 104 MINN. L. REV. 659, 692–97 (2019) (discussing the scale and scope of the electric grid).

145. See, e.g., GABRIEL CHAN, STEPHANIE LENHART, LINDSEY FORSBERG, MATTHEW GRIMLEY & ELIZABETH WILSON, BARRIERS AND OPPORTUNITIES FOR DISTRIBUTED ENERGY RESOURCES IN MINNESOTA’S MUNICIPAL UTILITIES AND ELECTRIC COOPERATIVES 9 (Feb. 2019), <https://hdl.handle.net/11299/201624> [<https://perma.cc/ZHH6-9FK9>] (discussing growth in distributed energy resources).

146. See, e.g., *Electricity Explained*, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/energyexplained/electricity/electricity-in-the-us.php> (last updated Mar. 18, 2021) [<https://perma.cc/L4BE-BEDY>]; Nadja Popovich & Brad Plumer, *How Does Your State Make Electricity?*, N.Y. TIMES (Oct. 28, 2020) (showing change in electricity generation resources nationwide and in each state from 2001 to 2019).

respectively, and the remainder—mainly biomass and geothermal energy—were just under 2%.¹⁴⁷

There are three different types of electric utilities that provide power to end-use customers: (1) private investor-owned utilities, (2) rural electric cooperatives, and (3) municipal utilities and other government-owned “public power” providers.¹⁴⁸ Investor-owned utilities—also known as a “publicly-regulated utilities” or “public utilities”—are for-profit, private companies subject to long-standing and extensive regulation by FERC and state public utility commissions to ensure their rates (i.e., prices) for energy, transmission, and other services are “just and reasonable” and nondiscriminatory.¹⁴⁹ Approximately 180 investor-owned utilities provide electricity to over 67% of U.S. residential, commercial, and industrial end-use customers.¹⁵⁰ Over eight hundred rural electric cooperatives—member-owned, nonprofit entities exempt from most federal and state regulation of prices and services¹⁵¹—sell power to 13% of U.S. end-use electricity customers in rural and, increasingly, suburban areas.¹⁵² Municipal utilities and other public power providers, which number over two thousand, constitute approximately 14% of total electricity sales to U.S. end-use customers.¹⁵³ Like rural electric cooperatives, municipal utilities are exempt from FERC regulation under the Federal Power Act and are subject to minimal, if any, regulation by state public utility commissions as a matter of state law.¹⁵⁴ These public power providers

147. *What Is U.S. Electricity Generation by Energy Source?*, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/tools/faqs/faq.php?id=427&t=3> (last updated Mar. 5, 2021) [<https://perma.cc/N27B-T3S6>].

148. *Investor-Owned Utilities Served 72% of U.S. Electricity Customers in 2017*, U.S. ENERGY INFO. ADMIN. (Aug. 15, 2019), <https://www.eia.gov/todayinenergy/detail.php?id=40913> [<https://perma.cc/W5XC-8TQA>]; see also Jim Lazar, *Electricity Regulation in the U.S.: A Guide*, REGUL. ASSISTANCE PROJECT 11–15 (2016) (discussing different types of electricity providers).

149. See KLASS & WISEMAN, *supra* note 12, at 193–94 (discussing regulation of investor-owned utilities); see also William Boyd, *Public Utility and the Low-Carbon Future*, 61 UCLA L. REV. 1614, 1617–18 (2014) (discussing investor-owned utilities); William Boyd & Ann E. Carlson, *Accidents of Federalism: Ratemaking and Policy Innovation in Public Utility Law*, 63 UCLA L. REV. 810, 822–35 (2016) (discussing state regulation of investor-owned utilities).

150. AM. PUB. POWER ASS'N, 2021 STATISTICAL REPORT 10 (2021), <https://www.publicpower.org/system/files/documents/2021-Public-power-Statistical-Report.pdf> [<https://perma.cc/5X34-8YZB>]; see also *Form EIA-861M (formerly EIA-826) Detailed Data*, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/electricity/data/eia861m/> (last updated Sept. 29, 2021) [<https://perma.cc/EZ49-NGDR>]; U.S. ENERGY INFO. ADMIN., *supra* note 148 (discussing different types of electricity providers).

151. CHAN ET AL., *supra* note 145, at 10.

152. *Electric Co-op Facts & Figures*, NAT'L RURAL ELEC. COOP. ASS'N (July 19, 2021), <https://www.electric.coop/electric-cooperative-fact-sheet> [<https://perma.cc/5T88-S2CR>].

153. AM. PUB. POWER ASS'N, *Public Power for Your Community*, *supra* note 30, at 12; CHAN ET AL., *supra* note 145, at 10.

154. CHAN ET AL., *supra* note 145, at 10.

are both large and small, ranging from the Los Angeles Department of Water and Power serving over one million customers to thousands of small and medium size cities and towns across the country.¹⁵⁵

FERC regulates wholesale sales of electricity in interstate commerce and the transmission of electricity in interstate commerce under the Federal Power Act to ensure that such sales are “just and reasonable” and nondiscriminatory.¹⁵⁶ Importantly, the Federal Power Act only regulates public utilities and exempts from the definition of “public utility” all municipal utilities and virtually all rural electric cooperatives.¹⁵⁷ Thus, the bulk of FERC regulation under the Federal Power Act is directed to the actions of investor-owned utilities. As noted above, states—which retain jurisdiction over retail and intrastate electricity sales and transmission—either do not regulate or only lightly regulate municipal utilities and rural electric cooperatives.¹⁵⁸

As recently as the 1990s, investor-owned utilities owned the bulk of the nation’s power plants and were “vertically integrated”—owning power plants and transmission and distribution assets, and selling power at retail to end-use customers in state-authorized monopoly territories at prices set by state public utility commissions using cost-of-service ratemaking.¹⁵⁹ Beginning in the 1990s, however, first FERC and, later, state legislatures began to lay the groundwork for competition in wholesale and retail electricity markets.¹⁶⁰ This was prompted both by market-based developments in other fields, such as natural gas and telecommunications, as well as Congress’s enactment of the Energy Policy Act of 1992, which gave FERC additional authority to order utilities to grant transmission access to other power generators.¹⁶¹

In 1996, FERC enacted its landmark Order 888, which required all transmission owners to provide “open access” transmission of energy

155. AM. PUB. POWER ASS’N, *Public Power for Your Community*, *supra* note 30, at 7, 16–17.

156. *See* 16 U.S.C. § 824(b)(1); KLASS & WISEMAN, *supra* note 12, at 198–207 (discussing federal regulation of investor-owned utilities). FERC does not regulate wholesale electricity sales of the transmission of electricity in Texas, Alaska, or Hawaii because those states do not transmit electricity in interstate commerce. *Id.* at 219–20; *New York v. FERC*, 535 U.S. 1, 7 (2002).

157. *See* 16 U.S.C. § 824(f) (excluding from regulation the United States, states, political subdivisions of states, and electric cooperatives that meet certain requirements); Paul Ciampoli, *FERC Says It Does Not Have Jurisdiction Over JEA/MEAG Power PPA*, AM. PUB. POWER ASS’N (Feb. 22, 2019), <https://www.publicpower.org/periodical/article/ferc-says-it-does-not-have-jurisdiction-over-jeameag-power-ppa> [<https://perma.cc/GR2N-ZFTA>] (discussing scope of the Federal Power Act’s exemption for municipal and other government electric utilities).

158. *See supra* Part I.D.

159. *See* KLASS & WISEMAN, *supra* note 12, at 203–07.

160. *Id.* at 204–07.

161. *Id.*; Energy Policy Act of 1992, Pub. L. No. 102-486, § 721, 106 Stat. 2915 (amending section 211 of the Federal Power Act).

on a nondiscriminatory basis pursuant to a “transmission tariff” to any electric generators that wished to use the line to sell power at wholesale or retail on a space available basis.¹⁶² Order 888, by providing enhanced access to transmission services, allowed smaller power providers—including municipal utilities without their own electric generating plants—to purchase wholesale power more easily from a range of power generators. This made these municipal utilities and other small power providers far less dependent on investor-owned utilities which, for decades, had used their monopoly power over the transmission grid to block such electricity sales.¹⁶³ Today, independent power providers, electric utilities, and other types of electricity generators and transmission owners buy and sell a range of energy, transmission, and ancillary services in wholesale markets that exist in approximately half the country, called Regional Transmission Organizations (“RTOs”) or Independent Service Operators (“ISOs”) with FERC oversight.¹⁶⁴

At the state level, the majority of states are “traditionally regulated,” which means state law continues to allow all types of electric utilities to remain vertically integrated and operate within monopoly territories.¹⁶⁵ Since the late 1990s, however, seventeen states (Texas, most northeast states, and a few midwestern states) have “restructured” their electricity markets to at least some extent so that investor-owned utilities operating in the state are no longer vertically integrated and retail customers have a choice among electricity providers.¹⁶⁶ New laws in these states required investor-owned utilities to sell off most or all of their power plant assets and purchase the energy they provide to retail customers from independent power producers and

162. Order No. 888, Promoting Wholesale Competition Through Open Access Non-discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 61 Fed. Reg. 21,540 (Apr. 24, 1996) (codified at scattered sections of 18 C.F.R. pts. 35, 37, 385); KLASS & WISEMAN, *supra* note 12, at 205–06 (discussing Order 888); *New York v. FERC*, 535 U.S. 1 (2002) (upholding Order 888 as within FERC’s authority under the Federal Power Act).

163. *See New York*, 535 U.S. at 8–10 (discussing FERC justification for Order 888). Prior to Order 888, investor-owned utilities, which owned the bulk of the nation’s electric transmission infrastructure, could—and regularly did—use their monopoly power over the transmission grid to block sales from energy generators to smaller electric utilities, forcing those utilities to purchase both energy and transmission services from the investor-owned utility. *See infra* Part II.B (discussing investor-owned utility exercise of monopoly power); *see also* KLASS & WISEMAN, *supra* note 12, at 203–05.

164. *RTOs and ISOs*, FED. ENERGY REGUL. COMM’N, <https://www.ferc.gov/industries-data/electric/power-sales-and-markets/rtos-and-isos> (last updated Apr. 15, 2021) [<https://perma.cc/JSP8-ZQL6>]; Boyd & Carlson, *supra* note 149, at 831–32 (discussing RTOs and ISOs).

165. Lazar, *supra* note 148, at 13–14, 17–18.

166. *Id.* at 18–19.

other power generators in RTO/ISO markets.¹⁶⁷ Investor-owned utilities in those states generally still own the transmission and distribution assets they use to transmit power to end-use customers, but customers in many states can now choose alternative retail energy providers.¹⁶⁸ Even in restructured states, however, rural electric cooperatives and municipal utilities continue to serve monopoly territories and thus are exempt from state laws providing retail choice for customers of other electric utilities.¹⁶⁹

B. Municipalization Eras

Municipal utilities are as old as the electricity industry itself—Wabash, Indiana, established the first such utility in 1880.¹⁷⁰ In the early days of electrification, private utility companies as well as local municipal utilities often competed for customers within the same area.¹⁷¹ At that time, state law nationwide generally required local approval for private utilities to operate in a community through a “franchise agreement.”¹⁷² Today, such franchise agreements continue to serve as the contractual agreement between a local government and a private utility for the delivery of electricity to the local government’s citizens. The basic form of the franchise agreement grants an investor-owned utility the right to operate in the community and to use the city’s rights-of-way in exchange for a franchise fee.¹⁷³ Franchise agreements are long-term contracts with durations of ten, twenty, or even up to fifty years.¹⁷⁴

167. *Id.*; Boyd & Carlson, *supra* note 149, at 837–38 (describing regulation of investor-owned utilities in traditionally regulated and restructured states).

168. Boyd & Carlson, *supra* note 149, at 837–38; LISA M. QUILICI, DANIELLE S. POWERS, GREGG H. THERRIEN, BENJAMIN O. DAVIS & OLIVIA A. PRIETO, CONCENTRIC ENERGY ADVISORS, INC., RETAIL COMPETITION IN ELECTRICITY: WHAT HAVE WE LEARNED IN 20 YEARS? 15 (2019), <https://ceadvisors.com/wp-content/uploads/2019/07/AEPG-FINAL-report.pdf> [<https://perma.cc/FJ5J-W79R>] (discussing traditionally regulated and restructured states).

169. *See, e.g.*, QUILICI ET AL., *supra* note 168, at 1 (“Municipal (‘Munis’) and Cooperative (‘Coops’) utilities are typically exempted from retail restructuring.”).

170. Delia Patterson, *Public Power: A Rich History, A Bright Future*, AM. PUB. POWER ASS’N (Feb. 15, 2018), <https://www.publicpower.org/blog/public-power-rich-history-bright-future> [<https://perma.cc/7UGE-HZH8>].

171. Welton, *supra* note 34, at 286.

172. Scott Ridley, *Local Government: The Sleeping Giant in Electric Industry Restructuring*, 10 ELEC. J., Nov. 1997, at 13, 16.

173. AM. PUB. POWER ASS’N, *Public Power for Your Community*, *supra* note 30, at 14. In practice, the investor-owned utility routinely passes on to consumers the costs of the franchise fee instead of bearing them as legitimate business expense. *Id.*

174. *See supra* note 102 and accompanying text (discussing duration of franchise agreements).

1. Early Development of Municipal Utilities and Investor-Owned Utilities

The first franchise agreements were nonexclusive, and it was common for multiple private electric utilities to compete for the opportunity to serve customers in a single locale.¹⁷⁵ As competition failed to stabilize prices,¹⁷⁶ and as the “natural monopoly” tendencies of the electricity industry became apparent, investor-owned utilities increasingly sought to be the sole electricity provider in their area.¹⁷⁷ Eager to capture growing urban populations,¹⁷⁸ investor-owned utilities regularly bribed local officials to sign exclusive franchise agreements that favored their corporate interests which, unsurprisingly, led to insufficient protection for consumers with regard to both price and service.¹⁷⁹

The earliest municipalization campaigns to sever ties with existing investor-owned utilities responded to community frustration with these predatory contracts.¹⁸⁰ Proponents of municipalization hoped to “lower electricity rates and raise living standards, end bribery of city officials, and increase public participation in local

175. See William J. Hausman & John L. Neufeld, *The Market for Capital and the Origins of State Regulation of Electric Utilities in the United States*, 62 J. ECON. HIST. 1050, 1054 (2002) (documenting the competition for franchise agreements in New York and Chicago); DAVID W. WILMA, WALT CROWLEY & THE HISTORYLINK STAFF, POWER FOR THE PEOPLE: A HISTORY OF SEATTLE CITY LIGHT 34, 48–49, 57, 62 (2010) (discussing ongoing competition for customers between Seattle municipal utilities and investor-owned utilities).

176. See Shelley Ross Saxer, *Government Power Unleashed: Using Eminent Domain to Acquire a Public Utility or Other Ongoing Enterprise*, 38 IND. L. REV. 55, 61 (2005) (competition created “price wars” resulting in “deteriorated operations and service”); Ridley, *supra* note 172, at 16 (“Public scandal and criticism . . . emerged over the competition between private utilities for local franchises.”).

177. Boyd, *supra* note 149, at 1639 (“[T]he basic idea [of the natural monopoly] being that because of declining average costs across the relevant demand curve, the [electric] industry was served most cost-effectively by a single firm.”).

178. Saxer, *supra* note 176, at 61.

179. See Welton, *supra* note 34, at 286 (describing investor-owned utilities’ lack of incentive to maintain quality of service); Outka, *supra* note 36, at 112 (noting consumer “[d]issatisfaction with private utilities”). Even Thomas Edison deployed worldly enticements to obtain his franchise agreement for New York City. See Thomas P. Hughes, *The Electrification of America: The System Builders*, 20 TECH. & CULTURE 124, 131 (1979) (describing Edison’s presentation of a “lavish ‘spread’ from famous Delmonico’s,” one of New York’s finest restaurants, to the mayor and a cohort of aldermen).

180. See Outka, *supra* note 36, at 112 (citing Carmen Randolph, *Municipal Ownership of Public Utilities*, 22 YALE L.J. 461, 476 (1913)) (observing “the early ‘campaign for municipal ownership’ as stemming from anger against investor-owned utilities for their ‘greed,’ ‘negligence,’ and ‘overreaching the community in getting franchises’”).

government.”¹⁸¹ Alternatively, smaller communities spurned by investor-owned utilities from the outset for lack of profit potential had no choice but to create their own electric utilities.¹⁸² By 1907, municipal utilities supplied 30% of electricity in the United States and popular enthusiasm for public power showed little sign of slowing down.¹⁸³ Large urban centers embraced municipalization early in the twentieth century—Cleveland in 1906,¹⁸⁴ Los Angeles in 1909,¹⁸⁵ and Seattle in 1910,¹⁸⁶ all of which remain municipal utilities today.

As municipalization threatened private utilities’ bottom lines, industry leaders began to strategize as early as 1904 about how to cement private ownership as the prevailing utility model.¹⁸⁷ Samuel Insull, founder of Commonwealth Edison, convinced his peers to pursue state regulation on grounds that if “efficient,” it could secure “fair treatment” for the public, placate municipalization advocates, and ensure the long-term dominance of investor-owned utilities.¹⁸⁸ In exchange for submitting to state regulatory oversight of electricity rates and charges, an investor-owned utility would be guaranteed an exclusive franchise in its territory as well as the certainty needed to attract financing for the capital-intensive infrastructure development required to provide electricity to the public.¹⁸⁹

Aiding these efforts to persuade the public—and state legislatures—of the benefits of the new regulatory scheme was evidence that municipal ownership had failed to prevent “widespread corruption” in local government.¹⁹⁰ Criticism of public ownership as an anti-

181. Welton, *supra* note 34, at 286–87.

182. DAVID E. NYE, *ELECTRIFYING AMERICA: SOCIAL MEANINGS OF A NEW TECHNOLOGY 1880-1940*, at 179 (1990).

183. Welton, *supra* note 34, at 287 (citing RICHARD F. HIRSH, *POWER LOSS: THE ORIGINS OF DEREGULATION AND RESTRUCTURING IN THE AMERICAN ELECTRIC UTILITY SYSTEM 15* (1999)).

184. *History*, CLEV. PUB. POWER, <https://www.cpp.org/history> (last visited Oct. 3, 2021) [<https://perma.cc/3Y7J-W7Y6>].

185. The construction of the Los Angeles Aqueduct, which brought both water and electricity to the city, precipitated the establishment of the Bureau of Los Angeles Aqueduct Power, predecessor to the current Los Angeles Department of Water and Power. *Power: Past*, L.A. DEPT OF WATER & POWER, <https://www.ladwp.com/ladwp/faces/ladwp/aboutus/a-power/a-p-pastandpresent/a-p-pp-past?> (last visited Dec. 21, 2021) [<https://perma.cc/K7F9-RSBR>].

186. Similar to Los Angeles, a 1902 hydroelectric project on the Cedar River led to the later creation of Seattle’s electric utility. *About Us: History*, SEATTLE CITY LIGHT, <https://www.seattle.gov/light/history/brief.asp> (last visited Oct. 3, 2021) [<https://perma.cc/HV2D-X966>].

187. That year, the trade association of private electric utilities formed a committee to study the seriousness of this threat. Alan Richardson & John Kelly, *The Relevance and Importance of Public Power in the United States*, 19 NAT. RES. & ENV’T 54, 55 (2005).

188. *Id.*

189. Boyd, *supra* note 149, at 1643.

190. *Id.* at 1640–41.

American, socialist menace to free enterprise also contributed to shifting popular sentiment.¹⁹¹

From these successful lobbying efforts were born state public utility commissions, premised on the idea that an independent scientific commission could best balance ratepayer and shareholder interests.¹⁹² The first commissions were created in Wisconsin and New York in 1907, and by 1930 every state except Delaware had one.¹⁹³ The establishment of public utility commissions did not immediately stem the tide of municipalization, and publicly owned electric utilities reached a peak of almost 3,100 in 1923.¹⁹⁴

Though state public utility commissions helped moderate prices, they could not prevent the period of rampant consolidation of investor-owned utilities that followed their creation. In the absence of federal regulation to restrain the mergers of private utility holding companies, by the mid-1930s less than two dozen private companies controlled the bulk of the nation's electricity sector.¹⁹⁵ Public systems were purchased by and absorbed into these now massive corporations as they realized economies of scale.¹⁹⁶ In 1932, while essentially acknowledging the ubiquity of investor-owned utilities, presidential candidate Franklin Delano Roosevelt touted municipalization as an important counterweight and bargaining chip for local governments:

[T]he very fact that a community can, by vote of the electorate, create a yardstick of its own, will, in most cases, guarantee good service and low rates to its population. I might call the right of the people to own and operate their own utility something like this: a "birch rod" in the cupboard to be taken out and used only when the "child" gets beyond the point where a mere scolding does no good.¹⁹⁷

191. Saxer, *supra* note 176, at 61–62; see also RICHARD RUDOLPH & SCOTT RIDLEY, *POWER STRUGGLE* 32 (1986) (detailing the prolonged fights over whether local governments or private companies would "control electricity" with the stakes including "the control not only of markets and geographic territories, but the expansion of political and economic influence, and ultimately the future of an industry to be worth hundreds of billions of dollars").

192. Boyd, *supra* note 149, at 1641.

193. *Id.* at 1640.

194. Richardson & Kelly, *supra* note 187, at 55.

195. Garrick B. Pursley & Hannah J. Wiseman, *Local Energy*, 60 *EMORY L.J.* 877, 906 (2011). Samuel Insull typified the voracious appetite of private companies in this period; in 1930, the utilities he controlled produced one-tenth of America's electricity. Richardson & Kelly, *supra* note 187, at 55. The Insull "monstrosity," so-called by then-presidential candidate Franklin Delano Roosevelt, collapsed in a series of corporate investment scandals directly tied to the byzantine structuring of his holding companies. *Id.*; see also JOHN F. WASIK, *THE MERCHANT OF POWER: SAM INSULL, THOMAS EDISON, AND THE CREATION OF THE MODERN METROPOLIS* 143–207 (2006).

196. Welton, *supra* note 34, at 289; see also Outka, *supra* note 36, at 114 (noting a "dramatic consolidation effect").

197. Franklin D. Roosevelt, President of the U.S., Campaign Address in Portland, Oregon on Public Utilities and Development of Hydro-Electric Power (Sept. 21, 1932), <https://www.presidency.ucsb.edu/documents/campaign-address-portland-oregon-public-utilities-and-development-hydro-electric-power> [https://perma.cc/J6Z2-6JPA].

By the time Congress enacted New Deal legislation in the 1930s to address the monopolistic expansion of utility holding companies,¹⁹⁸ municipalization had lost its momentum.¹⁹⁹ One significant exception to that trend was Nebraska, which used the leverage created by the new federal legislation to support municipal and other public power utilities' buyout of all the investor-owned utilities in the state.²⁰⁰ Nebraska remains the only state where all residential, commercial, and industrial customers are served by public power utilities and rural electric cooperatives.²⁰¹

2. Investor-Owned Utilities on Offense

From the 1930s until the 1990s, public power then entered a period of stasis,²⁰² with relatively few communities pursuing municipalization. When local governments did attempt to municipalize in this period, they faced protracted obstruction from investor-owned utilities loathe to relinquish territory. Sacramento's struggle to establish its own utility and the well-known tale of subterfuge by Otter Tail Power Company in Minnesota exemplify the tactics employed by investor-owned utilities to stymie municipalization campaigns.

Sacramento citizens voted overwhelmingly to establish a public power system in 1923,²⁰³ although it took the city more than two decades to break away from Pacific Gas & Electric ("PG&E") and establish the Sacramento Municipal Utility District ("SMUD"). Frustration with PG&E's failure to follow through on a promised hydroelectric project motivated the effort.²⁰⁴ Once local advocates mustered enough support to purchase PG&E's assets,²⁰⁵ PG&E launched a suite of legal attacks against the city. It appealed the

198. See Public Utility Holding Company Act of 1935, Pub. L. No. 74-333, 49 Stat. 803, 803–38 (repealed 2005).

199. Welton, *supra* note 34, at 288.

200. DON SCHAUFELBERGER & BILL BECK, *THE ONLY STATE: A HISTORY OF PUBLIC POWER IN NEBRASKA* 138–46 (2010).

201. *Id.*; see also *About Our Members*, NEB. RURAL ELEC. COOP. ASS'N, <https://www.nrea.org/our-members/about-our-members> (last visited Dec. 21, 2021) [<https://perma.cc/965X94PF>].

202. The number of municipal electric systems has hovered around two thousand since the 1950s. Welton, *supra* note 34, at 290.

203. Eighty-seven percent of voters approved the initial referendum to municipalize. Lance Armstrong, *SMUD's History Began Through Local Voters' Approval in 1923*, VALLEY CMTY. NEWSPAPERS (Aug. 8, 2015), <https://www.valcomnews.com/smud%E2%80%99s-history-began-through-local-voters%E2%80%99-approval-in-1923/> [<https://perma.cc/23AA-QDVQ>].

204. Nicholas Iovino, *Public v. Private: How a State Takeover of PG&E Might Look in California*, COURTHOUSE NEWS SERV. (Nov. 12, 2019), <https://www.courthousenews.com/public-v-private-how-a-state-takeover-of-pge-might-look-in-california/> [<https://perma.cc/3NEK-839Q>].

205. Voters approved a \$12 million bond for the acquisition in 1934. *Id.*

validation of the bonds issued for the asset purchase on the grounds that the taxes necessary to pay for the bonds would constitute a taking of its property.²⁰⁶ When the appeal proved unsuccessful, PG&E filed its own lawsuit in federal court on the same grounds but did not prevail.²⁰⁷ PG&E continued to litigate—challenging the valuation of its property in SMUD’s condemnation proceeding—but lost again.²⁰⁸ SMUD finally began operation in 1946.²⁰⁹

One of the most well-known municipalization battles in energy law and antitrust circles involves efforts by small towns in South Dakota, North Dakota, and Minnesota to create municipal utilities to replace Minnesota-based investor-owned utility Otter Tail Power Company.²¹⁰ Twelve towns endeavored to replace Otter Tail with their own municipal utility between 1945 and 1970, but aggressive litigation by Otter Tail ultimately caused all but three of them to give up and renew their franchise agreements.²¹¹ Otter Tail rejected requests to sell electricity at wholesale for distribution by the towns,²¹² and then, when the towns found other power suppliers, Otter Tail refused to allow use of its transmission lines to deliver the electricity.²¹³ The substantial costs of building new transmission infrastructure meant it was not “economically feasible or practical” for the towns to obtain power by any other means.²¹⁴ Like PG&E, Otter Tail also used coercive litigation to weaken the towns’ resolve:

[T]he litigation sponsored by [Otter Tail] was carried to the highest available appellate court and although all of it was unsuccessful on the merits, the institution and maintenance of it had the effect of halting, or appreciably slowing, efforts for municipal ownership. The delay thus occasioned and the large financial burden imposed on the

206. See *Sacramento Mun. Util. Dist. v. All Parties*, 57 P.2d 506 (Cal. 1936) (upholding the validity of the bonds).

207. See *Pac. Gas & Elec. Co. v. Sacramento Mun. Util. Dist.*, 92 F.2d 365, 368 (9th Cir. 1937), *cert. denied*, 303 U.S. 640 (1938) (“The [municipal electric] district is not required to spring, like Minerva, full panoplied from its Jovian head, the state of California.”); see also *Sacramento Mun. Util. Dist. v. Pac. Gas & Elec. Co.*, 128 P.2d 529 (Cal. 1942), *cert. denied*, 318 U.S. 759 (1943) (awarding SMUD attorneys’ fees for its defense in the prior cases).

208. See *Sacramento Mun. Util. Dist. v. Pac. Gas & Elec. Co.*, 165 P.2d 741 (Cal. Dist. Ct. App. 1946).

209. *Our History*, SACRAMENTO MUN. UTIL. DIST, <https://www.smud.org/en/Corporate/About-us/Company-Information/Our-History> (last visited Dec. 21, 2021) [<https://perma.cc/N75Z-VARX>].

210. See *Otter Tail Power Co. v. United States (Otter Tail Power Co. II)*, 410 U.S. 366, 370 (1973).

211. *Id.*

212. *United States v. Otter Tail Power Co. (Otter Tail Power Co. I)*, 331 F. Supp. 54, 60 (D. Minn. 1971), *aff’d in part, vacated in part, Otter Tail Power Co. II*, 410 U.S. at 366.

213. *Otter Tail Power Co. I*, 331 F. Supp. at 62.

214. *Id.* at 59–60 (footnote omitted). Even when the town of Elbow Lake, Minnesota, managed to build its own generation plant, it had to rely on Otter Tail for backup capacity. *Id.* at 60. Otter Tail refused to provide it until ordered by the Federal Power Commission. *Id.* (citing *Otter Tail Power Co. v. Fed. Power Comm’n*, 429 F.2d 232 (8th Cir. 1970)).

towns' limited treasury dampened local enthusiasm for public ownership. In some instances, Otter Tail made offers to the towns to absorb the towns' costs and expenses, and enhance the quality of its service in exchange for a new franchise.²¹⁵

Rejecting Otter Tail's claims that municipalization would lead to its demise, the U.S. Supreme Court ruled that Otter Tail had violated the Sherman Antitrust Act and upheld the district court's remedy for the violation by requiring Otter Tail to allow its transmission lines to be used to "wheel" power to the towns.²¹⁶ According to the Court, although Otter Tail lawfully held a monopoly in its territory, its refusal to deal with the towns in terms of providing wholesale power and transmission services constituted an impermissible attempt to preserve that monopoly power.²¹⁷ While Otter Tail was eventually forced to cooperate with the remaining towns that had not yet renewed their franchise agreements, its tactics illustrate the uphill battle local governments face when trying to municipalize. The resource mismatch between local governments and increasingly larger investor-owned utilities helps explain why between 1947 and 1996, only 125 new municipal electric systems were formed.²¹⁸

3. The Deregulation Era of the 1990s

A new era of interest in municipalization began in the 1990s, as the changes wrought by deregulation of wholesale electricity sales presented an opportunity to lower power supply costs.²¹⁹ First, the rise of independent power producers after the Energy Policy Act of 1992 led to the development of smaller, more efficient generation sources like combined-cycle natural gas plants.²²⁰ Second, FERC's Order 888 requiring open-access transmission and newly created RTO/ISO markets meant municipal utilities could purchase this cheaper electricity if they qualified as "resellers."²²¹

To qualify, the wholesale purchaser had to use "transmission or distribution facilities that it owns or controls" to deliver the electricity to the final retail customer,²²² thus spurring the drive by local governments to acquire these facilities through the creation of a municipal utility. Additionally, many local governments hoped to lower their citizens' electricity rates by no longer paying for poor decisions

215. *Id.* at 62 (footnote omitted).

216. *See Otter Tail Power Co. II*, 410 U.S. at 374–76.

217. *See Otter Tail Power Co. I*, 331 F. Supp. at 62.

218. *See Doane & Spulber, supra* note 108, at 350–51.

219. *See supra* Part II.A.

220. Kelly, *supra* note 108, at 47.

221. *Id.* at 48; *see also supra* Part II.A.

222. Federal Power Act § 212, 16 U.S.C. § 824k(h)(2)(B).

made by their investor-owned utilities in the 1970s, when a miscalculation of load forecast led many to overbuild generation capacity.²²³ In this way, local governments also viewed municipalization as a means of reasserting local control over their energy decisions.

The renewed attention to municipalization generated lively debate about public power's place in a competitive market.²²⁴ Scholars in support pointed to the "long pro-competitive history of public power" to reject the contention that restructuring in the industry rendered it obsolete.²²⁵ Writing in the midst of this transition, David Penn argued public power helped all consumers, not just the municipal utility's local customers, by "delivering the benefits of diversity, comparison, choice, and a cost-effective insurance policy against the risks that electricity industry restructuring may not go as well as hoped for."²²⁶ However, despite more than forty active municipalization campaigns in 1997,²²⁷ many local governments abandoned municipalization when faced with the daunting realities of the lengthy process of establishing their own utility and engaging in protracted litigation with the investor-owned utility to condemn the necessary transmission and distribution facilities to operate the new utility.²²⁸

4. Contemporary Municipalization Efforts

Local governments contemplating municipalization in recent years have aimed to achieve some of the same objectives as their predecessors of the early twentieth century—reduced rates, reliable service, and enhanced local control. While investor-owned utilities were able to persuade the public in the early twentieth century that state public utility commissions could better ensure affordability than publicly owned utilities when all models of utility ownership were new and untested, data now shows that municipal utility customers pay the lowest average rates across all customer classes.²²⁹ Reliability and

223. See Kelly, *supra* note 108, at 46–47.

224. See, e.g., Richardson & Kelly, *supra* note 187, at 56 ("Regulators, economists, and industry leaders suggested that public power could not survive in such an environment, and in any case, its very existence was incompatible with such an environment.").

225. See, e.g., David Penn, *Competition, the Consumer, and Local Decision Making: Public Power's Important Role*, 10 ELEC. J., Nov. 1997, at 30, 32 ("Public power is well positioned to play an important role in the electricity industry's future.").

226. *Id.* at 36.

227. Doane & Spulber, *supra* note 108, at 333.

228. See *id.* at 350 (describing the deterrent effect of the legal, transactional, reputational, and financial costs of condemnation).

229. See AM. PUB. POWER ASS'N, *Public Power for Your Community*, *supra* note 30, at 20 ("On a national basis, average electricity rates for all investor-owned utility customers in all customer

rapid response to outages continue to be high priorities for consumers, especially with the increased incidence of extreme weather events; public power customers experience fewer outages of shorter duration than customers of investor-owned utilities.²³⁰ And it remains true that public power entities are more accountable to ratepayers than investor-owned utilities, since they are subject to mechanisms like open meeting laws, citizen advisory committees, and the democratic process.²³¹

Contemporary public power advocates, however, are motivated by a host of additional interrelated policy goals including racial equity, addressing climate change, economic development, integrating new technologies, and enhanced local involvement in energy systems. All of these goals can be understood as facets of energy democracy, a concept often escaping precise definition²³² but generally encompassing “a vision to restructure the energy future based on inclusive engagement, where genuine participation in democratic processes provides community control and renewable energy generates local, equitably distributed wealth.”²³³

a. Energy Democracy and Self-Determination for Local Governments

Shelley Welton has identified three main themes within the concept of energy democracy—consumer choice, local control, and access to process.²³⁴ Consumer choice entails giving consumers more options in energy purchasing decisions, such as the type of resource generating their electricity (with a general preference for renewable energy) as well as the locus of its production (centralized or distributed).²³⁵ Local control embeds decisionmaking authority over these choices within the community itself.²³⁶ Lastly, access to process

classes are 6.9 percent higher than average rates paid by public power customers.” (emphasis omitted)).

230. See Anodyne Lindstrom & Sara Hoff, *U.S. Customers Experienced an Average of Nearly Six Hours of Power Interruptions in 2018*, U.S. ENERGY INFO. ADMIN. (June 1, 2020), <https://www.eia.gov/todayinenergy/detail.php?id=43915> [<https://perma.cc/G3U3-DZPF>] (comparing outages of customers served by publicly owned utilities with those served by investor-owned utilities).

231. See AM. PUB. POWER ASS’N, *Public Power for Your Community*, *supra* note 30, at 12. By contrast, “the typical investor-owned utility has a large service territory and will likely have its headquarters located far away; board meetings are conducted in private, and decisions are made behind closed doors.” *Id.*

232. See Welton, *supra* note 35, at 585 (exploring the different and sometimes conflicting meanings of “energy democracy” within literature about energy reform).

233. Bozuwa, *supra* note 6, at 1.

234. Welton, *supra* note 35, at 585.

235. See *id.*

236. See *id.* at 613 (“Calls for localism demand that control be *devolved* from higher levels of government, and that control be more directly *public*, via either direct public ownership or other

increases the amount of meaningful participation in decisionmaking among citizens.²³⁷

The municipalization effort by the City of Boulder, Colorado, illustrates this trend. In 2010, Boulder citizens voted overwhelmingly to authorize a tax of \$4 million per year to support the city's efforts to create a locally owned utility to replace the investor-owned utility Xcel Energy, which had provided electricity services to the city for decades under long-term franchise agreements.²³⁸ Driving the municipalization effort was a desire to shift to providing citizens with 100% renewable energy, unhappiness with the pace of Xcel's decarbonization efforts, and the goal of creating a local utility that "will support a robust energy economy, with more control of energy supply and investments, as well as community participation in the creation of services."²³⁹

Over the next decade, Boulder spent over \$27 million on efforts to acquire the physical facilities and other rights needed to create a local utility, engaged in protracted litigation with Xcel over acquisition of physical facilities and how to value those facilities, and watched as Xcel responded to pressure by Boulder and other franchise cities by adopting aggressive corporate decarbonization goals for its operations across the country.²⁴⁰ Nevertheless, municipalization remained popular in the community throughout 2013 and 2014, with voters approving a price cap on the cost of acquisition of Xcel's infrastructure and the city council passing two critical ordinances—one formally authorizing the acquisition of Xcel's facilities and another establishing a "light and power utility."²⁴¹

forms of directly controlling utility decisionmaking. Energy is thus democratized by putting people back in charge." (footnote omitted) (internal quotation marks omitted).

237. *See id.*

238. *Boulder Local Power: A History*, EMPOWER OUR FUTURE, <https://empowerourfuture.org/boulder-municipalization-a-history/> (last visited Oct. 4, 2021) [<https://perma.cc/5AG7-PFML>].

239. *Local Power, CITY OF BOULDER*, <https://web.archive.org/web/20201204211739/https://bouldercolorado.gov/local-power> [<https://perma.cc/9LRZ-ZT7F>].

240. *See* Shay Castle, *Xcel, Boulder, Reach Muni-Ending Deal for Voters to Weigh this Fall*, BOULDER BEAT (July 28, 2020), <https://boulderbeat.news/2020/07/28/boulder-xcel-municipalization-settlement/> [<https://perma.cc/4LAA-NEDS>]; *Working with Xcel Energy*, CITY OF BOULDER, <https://web.archive.org/web/20210705034122/https://bouldercolorado.gov/local-power/working-with-xcel-energy> [<https://perma.cc/3HZT-Y2CW>].

241. *See City Council Agenda Item: Update on Boulder's Energy Future Municipalization Exploration Project*, CITY OF BOULDER 2 (Dec. 17, 2013); *Pub. Serv. Co. v. City of Boulder (Pub. Serv. Co. I)*, 410 P.3d 680, 682 (Colo. App. 2016) (describing enactment of Ordinances 7918 and 7969), *rev'd*, *Pub. Serv. Co. II*, 420 P.3d 289 (Colo. 2018); *Pub. Serv. Co. II*, 420 P.3d at 292 (describing Xcel's challenge to Ordinances 7918 and 7969).

In 2019, Xcel ignored three offers by Boulder to purchase Xcel's assets—starting at \$68.5 million²⁴² and increasing to a final offer just shy of \$94 million²⁴³—prompting the city to begin condemnation proceedings in court.²⁴⁴ Facing strained financial health due to the COVID-19 pandemic on top of regulatory and legal challenges from Xcel, the city revised its municipalization plan in July 2020 to delay any final go/no-go vote.²⁴⁵ Despite the active desire of many community members to continue with municipalization, the city council decided to put a new franchise agreement with Xcel on the ballot instead. In November 2020, voters narrowly passed the franchise measure and approved a new partnership with Xcel along with it.²⁴⁶

However, Boulder's decision to ultimately sign a new franchise agreement does not mean its municipalization effort was for naught, as Xcel's engagement with decarbonization has accelerated appreciably since the initial negotiations in 2008. Xcel has since moved to convert or decommission multiple coal plants serving Boulder,²⁴⁷ and in 2018 Xcel became the first investor-owned utility in the country to commit to

242. *City Offers Xcel Energy Nearly \$94 Million for Assets Necessary for Local Electric Utility*, CITY OF BOULDER (Nov. 22, 2019), <https://web.archive.org/web/20201204030919/https://bouldercolorado.gov/newsroom/city-offers-xcel-energy-nearly-94-million-for-assets-necessary-for-local-electric-utility> [<https://perma.cc/EQ5L-9PNR>].

243. Notice of Intent to Acquire & Final Offer Letter from Lyman R. Ho, Land Acquisition Strategies LLC, on behalf of the City of Boulder, to John Lupo, Senior Manager, Siting & Land Rights, Xcel Energy Servs., Inc. (Nov. 20, 2019), https://www-static.bouldercolorado.gov/docs/NOI_and_Final_Offer_11-20-19-1-201911211325.pdf [<https://perma.cc/J867-NXYG>].

244. CITY OF BOULDER, *supra* note 242. Colorado allows a municipality to either purchase or condemn at fair market value an incumbent provider's system. COLO. REV. STAT. ANN. § 31-15-707(1)(a)(II) (West 2021).

245. See Jane S. Brautigam et al., *Information Item: Boulder's Local Power/Municipalization Update*, CITY OF BOULDER, at 3–4 (July 21, 2020), https://www-static.bouldercolorado.gov/docs/Local_Power_Muni_Update_Q1_Q2_2020_FINAL-1-202007160858.pdf [<https://perma.cc/J52T-4AXW>].

246. *Boulder Voters Pass New Franchise with Xcel Energy and Partnership-Funding Measure*, PROGRESSIVE PARTY U.S.A., <https://progressivepartyusa.com/climate-change/boulder-voters-pass-new-franchise-with-xcel-energy-and-partnership-funding-measure/> (last visited Oct. 3, 2021) [<https://perma.cc/KY2Y-YAKA>]; see also Deborah Swearingen, *Organization Key as Boulder Moves Forward with Xcel Franchise, Partnership*, DAILY CAMERA (Nov. 7, 2020, 10:00 AM), <https://www.dailycamera.com/2020/11/07/organization-key-as-boulder-moves-forward-with-xcel-franchise-partnership/> [<https://perma.cc/L3PK-XCCY>] (“With 53% of the vote, the franchise agreement had the tightest margins of the five Boulder ballot initiatives.”).

247. See *Xcel: Valmont Plant Has “Burned Its Last Trainload of Coal,”* POWER ENG'G (Apr. 10, 2017), <https://www.power-eng.com/coal/xcel-valmont-plant-has-burned-its-last-trainload-of-coal/> [<https://perma.cc/746B-E9L6>] (describing conversion of last coal-fired unit at Valmont Power Station to natural gas); Miranda Willson, *Colo.'s Largest Utility Announces Shutdown of Coal Plant*, GOVERNORS' WIND & SOLAR ENERGY COAL. (Jan. 6, 2021), <https://governorswindenergycoalition.org/colo-s-largest-utility-announces-shutdown-of-coal-plant/> [<https://perma.cc/JW6X-9WQY>] (noting Xcel's plan to close its coal-fired Hayden Generating Station eight years ahead of schedule).

100% decarbonization of its fuel supply.²⁴⁸ Moreover, the new franchise agreement contains significant additional conditions for Xcel regarding community input on grid planning, graduated emissions caps, and undergrounding investment, and gives Boulder the right to restart municipalization efforts if Xcel does not meet those conditions.²⁴⁹

In other cities, municipalization efforts continue, with a focus on spurring economic investment in the community, addressing historical inequities, integrating new technologies, and reducing carbon emissions. For example, as of 2021, New York City was considering municipalization to make its energy system “safer, greener, cheaper, and more accountable to the public” following a series of “unexplained” blackouts by Consolidated Edison in 2019 and 2020.²⁵⁰ Noting that “deferral of necessary repairs, a near complete lack of transparency, and little to no true accountability” are conditions “endemic” to investor-owned utilities, the city aims to “ensure a just and expeditious transition to a renewable energy future” which is also cost effective.²⁵¹

In Chicago, dissatisfaction with Commonwealth Edison (“ComEd”) led the city to consider municipalization in 2019 as the end of its franchise agreement approached.²⁵² Signed in 1991, Chicago’s franchise agreement was the first in the nation to incorporate any substantive energy policy goals.²⁵³ It is not surprising, then, that the city’s municipalization investigation was informed by a number of goals: affordable, reliable power; environmental stewardship; support for economically disadvantaged neighborhoods and communities; investment in new technology; and support for minority- and women-owned businesses.²⁵⁴ The Chicago chapter of the Democratic Socialists of America launched a #DemocratizeComEd campaign, explaining that

248. Julia Pyper, *Xcel Energy Commits to 100% Carbon-Free Electricity by 2050*, GREENTECH MEDIA (Dec. 4, 2018), <https://www.greentechmedia.com/articles/read/xcel-commits-to-100-carbon-free-electricity-by-20501> [<https://perma.cc/AN7A-U7RE>] (quoting Xcel’s CEO Ben Fowke: “We’re accelerating our carbon-reduction goals because we’re encouraged by advances in technology, motivated by customers who are asking for it and committed to working with partners to make it happen” (internal quotation marks omitted)).

249. *City of Boulder - Xcel Energy Partnership*, CITY OF BOULDER, <https://web.archive.org/web/20210627181537/https://bouldercolorado.gov/energy-future/xcel-partnership> [<https://perma.cc/BL2K-KTUA>].

250. OFF. OF THE N.Y.C. PUB. ADVOC., *supra* note 6, at 2.

251. *Id.* at 1.

252. See Iulia Gheorghiu, *Cutting Ties with ComEd Could Cost Chicago \$8.8B, Report Finds*, UTIL. DIVE (Sept. 1, 2020), <https://www.utilitydive.com/news/cutting-ties-with-comed-could-cost-chicago-88b-report-finds/584474/> [<https://perma.cc/43CB-H886>].

253. See Cook et al., *supra* note 99, at 1.

254. NEWGEN STRATEGIES & SOLS., *supra* note 105, at 3-1.

as a private monopoly, ComEd is “minimally accountable, not transparent and just is outside of our public control.”²⁵⁵

Chicago’s pursuit of municipalization came to a swift end after its feasibility study determined that taking over ComEd’s infrastructure would be prohibitively expensive and result in higher rates through 2039.²⁵⁶ However, in the wake of ComEd’s bribery scandal,²⁵⁷ Mayor Lori Lightfoot’s administration continued to place the pursuit of “Energy and Equity” at the center of franchise negotiations.²⁵⁸ Lightfoot emphasized any new agreement would need to include “expansive ethics reforms,” as well as elimination of late fees and disconnections, improved infrastructure in the South and West Sides, and a commitment to diversity hiring targets.²⁵⁹ In short, Chicago viewed the franchise agreement as an opening to extract a “significant commitment from [ComEd] to right historic wrongs.”²⁶⁰ While negotiations with ComEd were ongoing in 2021, Mayor Lightfoot solicited other utilities for proposals to take over providing electricity for the city that incorporates these terms.²⁶¹

255. Alex Schwartz, *Whose Grid? Our Grid! Chicago’s Campaign to Put Electricity Under Public Control*, IN THESE TIMES (Sept. 17, 2019), <https://inthesetimes.com/article/chicago-democratic-socialists-comed-municipalization-electric-utility> [<https://perma.cc/7FAZ-BVVK>] (internal quotation marks omitted).

256. Gheorghiu, *supra* note 252.

257. See, e.g., Iulia Gheorghiu, *ComEd Admits to Bribery Charge in Illinois, Agrees to Pay \$200M Fine*, UTIL. DIVE (July 20, 2020), <https://www.utilitydive.com/news/comed-admits-to-bribery-charge-in-illinois-agrees-to-pay-200m-fine/> [<https://perma.cc/WY9F-YDFQ>].

258. Brett Chase, *Lightfoot to ComEd: End Shutoffs, Commit to Ethics Reform and Clean Energy to Keep City Franchise*, CHI. SUNTIMES (Sept. 22, 2020), <https://chicago.suntimes.com/city-hall/2020/9/22/21451064/comed-chicago-franchise-agreement-lightfoot-demands-disconnections-climate-change> [<https://perma.cc/BQ4W-FY62>].

259. Letter from Lori E. Lightfoot, Mayor, City of Chi., to Joe Dominguez, CEO, Commonwealth Edison Co., at 1, 3 (Sept. 21, 2020), <https://news.wttw.com/sites/default/files/article/file-attachments/9.21.20%20Letter%20to%20Joseph%20Dominguez.pdf> [<https://perma.cc/5G8Q-UC5M>].

260. David Roeder & Fran Spielman, *To Keep Franchise, ComEd Must Reform, Lightfoot Warns*, CHI. SUNTIMES (July 27, 2020), <https://chicago.suntimes.com/city-hall/2020/7/27/21341075/comed-chicago-franchise-lightfoot-warns-ceo-ethics-reform-madigan> [<https://perma.cc/BKX6-CZ3F>] (internal quotation marks omitted).

261. See Mariah Woelfel, *Chicago Seeks Competitors For ComEd’s Utility Franchise Deal Within the City*, WBEZ CHI., <https://www.wbez.org/stories/chicago-seeks-competitors-for-comeds-utility-franchise-deal-with-the-city/51ed3d0a-a2e5-4052-be4d-da6c5fbb61da> (last updated Apr. 30, 2021, 4:23 PM) [<https://perma.cc/4JGL-44GQ>]; Heather Cherone, *While ComEd Negotiations Remain Stalled, Lightfoot Extends Deadline for New Proposals*, WTTW NEWS (June 7, 2021, 2:37 PM), <https://news.wttw.com/2021/06/07/while-comed-negotiations-remain-stalled-lightfoot-extends-deadline-new-proposals> [<https://perma.cc/Z62W-T2QX>]. As of August 2021, negotiations with ComEd remained at an impasse. Becky Vevea, *Why the Talks to Renew ComEd’s Deal to Supply Power to Chicago Are Stalled*, WBEZ CHI. (June 10, 2021, 4:14 PM), <https://www.wbez.org/stories/why-the-talks-to-renew-comeds-deal-to-supply-power-to-chicago-are-stalled/d8f77785-f2ba-4b76-98e2-0a97986e84e5> [<https://perma.cc/U484-RWV7>].

In California, as of 2021 PG&E was confronting calls for its ouster in communities across the state because of a deterioration in safety and reliability, liability for catastrophic wildfires in the state in 2019 and 2020, and evidence of budget manipulation.²⁶² In San Francisco, officials viewed replacing PG&E as a way to more actively achieve clean energy and equity goals: “Public power expansion provides the opportunity for the City to significantly increase its own [energy efficiency, low-income and community development] program offerings, and to align those programs with San Francisco’s legislative priorities and policies, such as the GHG target of net zero emissions by 2050 and electrification of transportation.”²⁶³ Facing mounting debt from the repercussions of wildfire damage, PG&E filed for bankruptcy in January 2019, prompting San Francisco to offer \$2.5 billion for its distribution assets in the city.²⁶⁴ PG&E mostly skirted these existential threats to its business by restructuring its debt, establishing a fund to compensate wildfire victims, and paying penalties to the California Public Utilities Commission.²⁶⁵ However, in 2021, as evidence mounted that PG&E was potentially responsible for sparking the Dixie Fire, the largest single fire in California’s history, the utility faced growing pressures to undertake significant reforms.²⁶⁶

262. See Tom Perkins, *Publicly Owned Utilities “Not a Panacea” But Can Produce Customer Benefits*, ENERGY NEWS NETWORK (Dec. 16, 2019), <https://energynews.us/2019/12/16/publicly-owned-utilities-not-a-panacea-but-can-produce-customer-benefits/> [<https://perma.cc/Z877-XC79>] (“Critics say PG&E has prioritized profits over system maintenance.”); J.D. Morris, *PG&E Diverted Millions From Putting Lines Underground, Audit Finds*, S.F. CHRON., <https://www.sfchronicle.com/business/article/PG-E-diverted-millions-from-burying-overhead-14897319.php> (last updated Dec. 11, 2019, 4:00 AM) [<https://perma.cc/5B7F-B9W6>] (describing diversion of \$123 million intended for undergrounding to unknown expenses); Sonja Hutson, *San Francisco Offers to Buy PG&E Electric Grid in the City for \$2.5 Billion*, KQED (Sept. 8, 2019), <https://www.kqed.org/news/11773007/san-francisco-offers-to-buy-pge-electric-grid-in-the-city-for-2-5-billion> [<https://perma.cc/CQ5W-MCRD>].

263. S.F. WATER POWER SEWER, *supra* note 105, at 28.

264. Hutson, *supra* note 262; Marisa Lagos, Lisa Pickoff-White & Dan Brekke, *PG&E Files for Chapter 11 Bankruptcy*, KQED (Jan. 29, 2019), <https://www.kqed.org/news/11721861/pge-files-for-chapter-11-bankruptcy-protection> [<https://perma.cc/V6WS-B7LC>].

265. Ivan Penn, *PG&E, Troubled California Utility, Emerges From Bankruptcy*, N.Y. TIMES (Jul. 28, 2020), <https://www.nytimes.com/2020/07/01/business/energy-environment/pge-bankruptcy-ends.html> [<https://perma.cc/2ULQ-5AYQ>]; Michael Liedtke, *PG&E to Ante Up \$150M for Botched Outages, Recent Wildfires*, ASSOCIATED PRESS (May 26, 2021), <https://apnews.com/article/environment-and-nature-government-and-politics-business-2ef8a7bb65b1f7a896bedde4b18c3192> [<https://perma.cc/N76S-ZF5V>].

266. Aaron Williams, Timothy Bella & Maria Lusa Paúl, *Judge Orders Utility PG&E to Explain Role in Start of Dixie Fire That’s Tearing Through California*, WASH. POST (Aug. 7, 2021), <https://www.washingtonpost.com/nation/2021/08/07/dixie-fire-california-missing-people/> [<https://perma.cc/CYZ9-MNNZ>]; Colby Bremel, *Dixie Fire Becomes Largest Single Wildfire in California History*, POLITICO (Aug. 6, 2021), <https://www.politico.com/states/california/story/2021/08/06/dixie-fire-becomes-largest-single-wildfire-in-california-history-1389651> [<https://perma.cc/D33B-3VCE>].

b. Energy Sovereignty for Indian Tribes

Finally, a growing number of Indian tribes have embraced many of the principles of energy democracy under the umbrella of “energy sovereignty.”²⁶⁷ For many Indian tribes, the push to create a full tribal utility or invest in smaller, tribally owned energy projects has arisen from a desire to increase self-determination and improve economic conditions. Despite the substantial energy resources present on tribal lands²⁶⁸ and some support from the federal government for energy development,²⁶⁹ Indian households face disproportionate energy insecurity.²⁷⁰ The geographic characteristics of reservations—rural, dispersed, sometimes with challenging terrain—make them more expensive to serve than concentrated population centers; historically, this has meant investor-owned utilities were unwilling to expand

267. The Energy Sovereignty Institute explains:

Energy sovereignty applies the concepts of tribal sovereignty to energy resources and uses. It is “. . . the right of conscious individuals, communities and peoples to make their own decisions on energy generation, distribution and consumption in a way that is appropriate within their ecological, social, economic and cultural circumstances”

About, ENERGY SOVEREIGNTY INST., <https://energysovereigntyinstitute.org/the-energy-sovereignty-institute/> (last visited Dec. 4, 2021) [<https://perma.cc/PR82-V2BN>].

268. Tribal lands contain 5% of the total U.S. renewable generation potential. *Developing Clean Energy Projects on Tribal Lands: Data and Resources for Tribes*, OFF. OF INDIAN ENERGY, U.S. DEP’T OF ENERGY 3 (Apr. 2013), <https://www.nrel.gov/docs/fy13osti/57748.pdf> [<https://perma.cc/Y4QV-F3DP>]; see also *About Natural Resources Revenue Data*, OFF. OF NAT. RES. REVENUE DATA, U.S. DEP’T OF THE INTERIOR, <https://revenue.data.doi.gov/> (last visited Oct. 3, 2021) [<https://perma.cc/UL8B-5FGN>] (documenting revenue paid to tribes from energy and mineral extraction on reservations); ENERGY INFO. ADMIN., U.S. DEP’T OF ENERGY, ENERGY CONSUMPTION AND RENEWABLE DEVELOPMENT POTENTIAL ON INDIAN LANDS 23–26 (Apr. 2000), <https://www.energy.gov/sites/prod/files/2017/06/f34/EIA2000.pdf> [<https://perma.cc/M354-DFCV>] (identifying renewable resources on reservations).

269. The Office of Indian Energy, within the U.S. Department of Energy, is authorized to provide financial assistance to tribal governments for energy efficiency and renewable energy projects. Energy Policy Act of 1992, Pub. L. No. 102-486, §§ 2603, 2606, 106 Stat. 2776, 3114–3115, 3118 (codified at scattered sections of 16 and 42 U.S.C.); *DOE Announces \$15 Million to Deploy Energy Infrastructure on Tribal Lands*, U.S. DEP’T OF ENERGY (Nov. 13, 2019), <https://www.energy.gov/articles/doe-announces-15-million-deploy-energy-infrastructure-tribal-lands> [<https://perma.cc/THD9-XRRX>]; *U.S. Department of Energy Awards \$12 Million to American Indian and Alaska Native Communities to Maximize Deployment of Energy Technology*, U.S. DEP’T OF ENERGY (July 13, 2021), <https://www.energy.gov/indianenergy/articles/us-department-energy-awards-12-million-american-indian-and-alaska-native> [<https://perma.cc/L2XK-XSFL>].

The Department of the Interior also has a grant program for tribal energy development. See *17 Tribes Awarded Federal Grants to Support Energy Sovereignty*, TRIBAL BUS. NEWS (Dec. 9, 2020), <https://tribalbusinessnews.com/sections/energy/13265-17-tribes-awarded-federal-grants-to-support-energy-sovereignty> [<https://perma.cc/KDT3-QM7L>]; *Department of Interior Seeks Applications for Tribal Energy Capacity-Building Grants*, TRIBAL BUS. NEWS (June 15, 2020), <https://nativenewsonline.net/business/department-of-interior-seek-applications-for-tribal-energy-capacity-building-grants> [<https://perma.cc/HT8Y-45HV>].

270. See ENERGY INFO. ADMIN., *supra* note 268, at ix (noting “14.2 percent of Indian households on reservations had no access to electricity, as compared to only 1.4 percent of all U.S. households”).

service to such areas to serve remote customers.²⁷¹ The Navajo Tribal Utility Authority, for example, was formed in 1959 specifically to address the absence of investor-owned utilities in the twenty-seven thousand square-mile Navajo Nation, and is now the largest multi-utility enterprise owned and operated by an Indian tribe.²⁷² Routine mismanagement by the federal government of tribal resources²⁷³ and investor-owned utility dismissiveness of tribal customers' concerns²⁷⁴ give Indian tribes additional reasons to form a tribal utility.²⁷⁵

Creation of a tribal utility, then, provides the opportunity to escape the "federal paternalism permeat[ing] all Indian energy development."²⁷⁶ Even a single project can allow a tribe a greater degree of control over its energy security. Indeed, Tribal Council Chair Darrell Seki of the Red Lake Nation in northern Minnesota described the Tribe's growing number of solar arrays as setting the Tribe on a path to a future where "members receive free energy and the danger of being disconnected no longer exists."²⁷⁷ As a result of the project, tribal

271. RENEWABLE RES. PROGRAM, *supra* note 39, at 6 ("For many years, most homes did not have electricity service as a result of both the vast distances between homes and the poverty status of the reservations. While most reservations had some type of electric service, it was often limited to larger towns and villages.").

272. NAVAJO TRIBAL UTIL. AUTH., <https://www.ntua.com/> (last visited Oct. 3, 2021) [<https://perma.cc/2N62-ZM9V>]. The Navajo Tribal Utility Authority sees its mandate as more than just providing utility service: it aims to "promote employment opportunities on the Navajo Nation, and to improve the health and welfare of the residents of the Navajo Nation while improving the standard of life." *Id.*

273. *See, e.g.*, Patrick Reis, *Obama Admin Strikes \$3.4B Deal in Indian Trust Lawsuit*, N.Y. TIMES (Dec. 8, 2009), <https://archive.nytimes.com/www.nytimes.com/gwire/2009/12/08/08greenwire-obama-admin-strikes-34b-deal-in-indian-trust-1-92369.html> [<https://perma.cc/5XM7-H8RT>] (discussing historic settlement for Department of Interior mismanagement of tribal land trust accounts); Felicia Fonseca, *Navajo to Get \$554 Million in Settlement with US*, ASSOCIATED PRESS (Sept. 25, 2014), <https://apnews.com/article/cd9ef2efd2dd4ff1b1290a88a6b36bef> [<https://perma.cc/TYT4-GG9N>] (describing the federal government's mismanaged extraction of natural resources on Navajo land as well as its failure to appropriately invest revenue from these contracts); *see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO-15-502, INDIAN ENERGY DEVELOPMENT: POOR MANAGEMENT BY BIA HAS HINDERED ENERGY DEVELOPMENT ON INDIAN LANDS 1 (2015), <https://www.gao.gov/assets/gao-15-502.pdf> [<https://perma.cc/DA9Z-M74U>] (documenting how shortcomings of the Bureau of Indian Affairs resulted in missed development opportunities, lost revenue, and jeopardized projects).

274. ENERGY INFO. ADMIN., *supra* note 268, at 3–5.

275. *See* Nicholas M. Ravotti, *Access to Energy in Indian Country: The Difficulties of Self-Determination in Renewable Energy Development*, 41 AM. INDIAN L. REV. 279 (2017) (describing the legal basis for the formation of a tribal utility and the complex jurisdictional issues governing tribal energy development).

276. *Id.* at 308.

277. Frank Jossi, *Red Lake Nation Uses Crowdfunding to Bet Big on Solar Energy*, USNews.com (Nov. 21, 2020), <https://www.usnews.com/news/best-states/minnesota/articles/2020-11-21/red-lake-nation-uses-crowdfunding-to-bet-big-on-solar-energy> [<https://perma.cc/4PEL-6494>].

member Bob Blake created a new solar installation company to train tribal members for future projects.²⁷⁸

Any funds received from electricity payments remain within the community, meaning tribal utilities capture economic benefits for their reservation which would otherwise be funneled to an outside entity.²⁷⁹ Tribal utilities can implement workforce development programs to create new jobs for their members²⁸⁰ and ensure business decisions are aligned with the political, social, and cultural priorities of the tribe.²⁸¹ Given the high proportion of Native Americans living below the poverty line, these opportunities can meaningfully improve the quality of life on a reservation.²⁸² Thus, in addition to increased political sovereignty from recapturing decisionmaking authority, the creation of a tribal utility can increase the economic sovereignty and self-sufficiency of the community.

C. Municipalization Limits and Opportunities

It is important to stress that municipalization may not be the silver bullet that vaults communities' goals from desirable to achievable. Regarding renewable energy goals, municipal utilities may still rely heavily on electricity generated by fossil fuel resources, although they often have the ability to pivot away from them more quickly than investor-owned utilities that must be responsive to the demands of public utility commissions and corporate shareholders. For instance, Nebraska, the only state where all customers are served by public power utilities,²⁸³ still relies on coal for more than half of its

278. Kelsey Misbrener, *IPS Solar Empowers Minnesota Tribe to Take Control of Their Energy and Save Their Lake*, SOLAR POWER WORLD (July 21, 2021), <https://www.solarpowerworldonline.com/2021/07/ips-solar-empowers-minnesota-tribe-take-control-of-energy-save-lake/> [<https://perma.cc/JG4H-35MU>].

279. Pilar M. Thomas, *Tribal Utility Development: Energy Development and Services on Tribal Land*, ARIZ. ATT'Y 26 (Apr. 2019), <https://www.azattorneydigital.com/azattorneymag/201904/MobilePagedArticle.action?articleId=1476899#articleId1476899> [<https://perma.cc/2Y8T-SMPJ>].

280. *Id.*; RENEWABLE RES. PROGRAM, *supra* note 39, at 36 (asserting “unemployment has decreased from 80 percent to 34 percent” in the Fort Mojave Tribe partially due to the creation of the Aha Macav Power Service).

281. RENEWABLE RES. PROGRAM, *supra* note 39, at 32 (describing Tribal Council oversight of the Aha Macav Power Service).

282. The poverty rate among Native Americans, the highest among any race group, is almost double that of the nation as a whole: 26.2% compared to 14%. *See American Indian and Alaska Native Heritage Month: November 2017*, U.S. CENSUS BUREAU (Oct. 2017), <https://www.census.gov/content/dam/Census/newsroom/facts-for-features/2017/cb17-ff20.pdf> [<https://perma.cc/9MEC-R4PW>] (“The median household income of single-race American Indian and Alaska Native households in 2016 [is \$39,719]. This compares with \$57,617 for the nation as a whole.”).

283. *See supra* notes 200–201 and accompanying text (discussing public power in Nebraska).

electricity generation, but in 2021 became the first Republican state to embrace decarbonization when all three of the largest publicly owned utilities in the state voted to set goals of net-zero electricity by 2050.²⁸⁴ Furthermore, as Shelley Welton has noted, one community's decision to purchase more renewable energy to reduce its carbon emissions may merely displace them onto another community.²⁸⁵

Contrary to the goals of energy democracy activists, municipalization may undermine equity insofar as high costs make it difficult to achieve for any but the most affluent communities.²⁸⁶ When wealthier, larger customers break away from their investor-owned utility, rural and poorer ratepayers in neighboring communities can bear a greater cost burden for grid maintenance.²⁸⁷ In their haste to decarbonize, municipal utilities may perpetuate environmental racism by siting renewable energy facilities in communities of color where they are not wanted.²⁸⁸

Like their private counterparts, municipal and tribal utilities can also fall prey to mismanagement. The capital-intensive nature of the electric industry means any electric utility involved in infrastructure development (building transmission or generation) is vulnerable to construction delays, cost overruns, and lackluster performance results.²⁸⁹ These factors, as well as mundane afflictions

284. *Nebraska: State Profile and Energy Estimates*, U.S. ENERGY INFO. ADMIN., <https://www.eia.gov/state/?sid=NE> (last visited Oct. 3, 2021) [<https://perma.cc/394M-Z999>] (55% of electric generation from coal in 2019); Adam Aton, *Neb. Decarbonization Vote Was Years in the Making*, E&E NEWS: CLIMATEWIRE (Dec. 10, 2021), <https://subscriber.politicopro.com/article/eenews/2021/12/10/neb-decarbonization-vote-was-years-in-the-making-284154?source=email> [<https://perma.cc/S&MV-3B87>] (reporting on decarbonization commitments made by elected officials at Nebraska Public Power District, Omaha Public Power District, and Lincoln Electric System which, together, provide electricity to almost the entire state).

285. Welton, *supra* note 35, at 641 (noting the “limited impact on the composition of the larger grid” of a single community’s energy choices).

286. Casey Demoss, Opinion, *Changing a Utility’s Owner Won’t Put Out the Fire*, HILL (Nov. 11, 2019), <https://thehill.com/opinion/energy-environment/469853-changing-a-utilities-owner-wont-put-out-the-fire> [<https://perma.cc/8U7V-WH3V>].

287. *Id.*

288. See, e.g., Kristi E. Swartz, *Fla. Solar Plans Stoke Fight Over ‘Environmental Racism,’* E&E NEWS (June 3, 2021), <https://www.eenews.net/energywire/stories/1063733977> [<https://perma.cc/LH9G-U2Q7>].

289. See, e.g., DAVID SCHLISSEL, INST. FOR ENERGY ECON. & FIN. ANALYSIS, LONG-TERM POWER PLANT CONTRACTS SADDLE AMP COMMUNITIES WITH HIGH ELECTRICITY PRICES (Sept. 2020), https://ieefa.org/wp-content/uploads/2020/09/AMP-Communities-Saddled-With-High-Electricity-Prices_September-2020.pdf [<https://perma.cc/DW62-9PKK>] (documenting how municipal utility customers in Kentucky, Michigan, Ohio, Virginia, and West Virginia overpaid for wholesale electricity because of poor decisions by their power purchasing agency, American Municipal Power).

like organizational dysfunction and aging facilities, mean public power may not always present a low-cost alternative for communities.²⁹⁰

Nevertheless, as President Roosevelt suggested as far back as the 1930s, cities can use their power to leave the investor-owned utility to obtain significant concessions during the franchise renegotiation period. The example of Boulder's efforts, described above, is a case in point, with Xcel taking significant steps to decarbonize its operations nationwide and address other demands by the city.²⁹¹

Opportunities to partner with a willing investor-owned utility or develop smaller-scale projects can provide a community an alternative path to achieving their policy goals, forestalling the need to create a utility. For example, Red Lake Nation in Minnesota developed a small, crowdfunded solar array it will fully own while simultaneously partnering with Allete—the parent company of nearby investor-owned utility Minnesota Power—to build a utility-scale solar installation.²⁹² The partnership arose after Minnesota Power demonstrated its good will toward the tribe by engaging in outreach and consultation as it planned a transmission project near the Red Lake reservation.²⁹³ Tribal leaders have stated that these solar projects will fulfill the Red Lake Nation's economic and environmental objectives without the financial risk and red tape of establishing a full-fledged utility.²⁹⁴ And the city of St. Louis, Missouri, has partnered with its utility Ameren and local nonprofits to increase access to electric vehicles in low-income neighborhoods and communities of color.²⁹⁵ The new charging stations

290. See *City Council Launches Cleveland Public Power Hearings*, WOSU PUB. MEDIA (Aug. 31, 2020), <https://www.ideastream.org/news/city-council-launches-cleveland-public-power-hearings> [<https://perma.cc/NS58-TN5A>]; Ron Regan, *Cleveland Public Power Lacks Transparency in Outage Reports*, ABC NEWS (Mar. 30, 2021), <https://www.news5cleveland.com/news/local-news/investigations/cleveland-public-power-lacks-transparency-in-outage-reports> [<https://perma.cc/HD2U-M3JV>]; Press Release, U.S. Att'y's Off. for the Dist. of Colo., U.S. Dep't of Just., Six More Defendants Sentenced for Embezzlement from the Ute Mountain Ute Tribe (Apr. 10, 2019), <https://www.justice.gov/usao-co/pr/six-more-defendants-sentenced-embezzlement-ute-mountain-ute-tribe> [<https://perma.cc/2SY9-LNNJ>] (describing fraud and embezzlement charges within tribal utility).

291. See *supra* notes 247–249 and accompanying text (discussing Xcel decarbonization efforts).

292. Jossi, *supra* note 39.

293. *Id.*; *Minnesota Power Energizes Great Northern Transmission Line to Move Company Closer to 50 Percent Renewable Energy by 2021*, BUS. WIRE (June 11, 2020), <https://www.businesswire.com/news/home/20200611005106/en/Minnesota-Power-Energizes-Great-Northern-Transmission-Line-to-Move-Company-Closer-to-50-Percent-Renewable-Energy-by-2021> [<https://perma.cc/GEF3-E44Q>] (describing seventy-five voluntary meetings and outreach forums held by Minnesota Power during transmission route planning process).

294. Jossi, *supra* note 39 (describing the projects' twin purposes of hiring local workers and protecting the earth).

295. Susan Cosier, *The Electric Car Revolution Shouldn't Leave Anyone Behind*, NAT. RES. DEF. COUNCIL (May 27, 2021), <https://www.nrdc.org/stories/electric-car-revolution-shouldnt-leave-anyone-behind> [<https://perma.cc/X9SS-HRXW>].

and car-share program will help the nonprofits serve their elderly and disabled clients while making electric car use convenient for other residents.²⁹⁶

In 2021, Ann Arbor, Michigan, released a report advocating for the creation of a municipally owned “sustainable energy utility” (“SEU”).²⁹⁷ The SEU would operate as a parallel energy service to Ann Arbor’s current electricity provider, DTE Energy (“DTE”), and focus exclusively on localized strategies to help Ann Arbor meet its goal of carbon neutrality by 2030.²⁹⁸ City leaders observed the growing community momentum around the creation of a traditional municipal utility, yet desired to avoid costly acquisition of DTE’s aging infrastructure and the possibility of lengthy litigation.²⁹⁹ Ann Arbor for Public Power, a local municipalization activist group, reacted to the proposal with support for the city’s “innovative and constructive” concept while maintaining a traditional municipal utility would provide greater benefits.³⁰⁰ The SEU report was fast-tracked for release³⁰¹ in anticipation of an impending decision by Ann Arbor’s Energy Commission on the pursuit of a feasibility study, the next step towards the creation of a traditional municipal utility.³⁰² Voters may have their choice of an SEU or a traditional municipal utility on the ballot in 2022.³⁰³ Either way, the SEU proposal demonstrates another way local governments can nimbly and creatively respond to challenges in electricity provision under current municipalization laws.

Thus, whether or not a local government or Indian tribe actually creates a municipal utility, the authority to do so is an important facet

296. *Id.*

297. CITY OF ANN ARBOR, ANN ARBOR’S SUSTAINABLE ENERGY UTILITY (Oct. 2021), https://www.a2gov.org/departments/sustainability/Sustainability-Me/Documents/A2_Sustainable_Energy_Report_2021_v7.pdf [<https://perma.cc/NP2D-CBAF>].

298. *Id.* at 4, 10. These strategies include energy efficiency programs, installation of microgrids between neighboring households, on-bill financing, district geothermal systems, community solar programs, and programs specifically for low-income and underserved residents. *Id.* at 11.

299. *Id.* at 5 (“Every dollar we don’t spend in litigation or to buy [infrastructure] . . . [is a] dollar[] we can use to immediately provide reliable, clean, and affordable public power to everyone.”). See also Jeffrey Tomich, *Mich. City Offers New Model for 100% Clean Power*, E&E NEWS: ENERGYWIRE (Nov. 15, 2021), <https://www.eenews.net/articles/mich-city-offers-new-model-for-100-clean-power/> [<https://perma.cc/F3HNQJLX>].

300. Ryan Stanton, *Ann Arbor’s Latest Idea Doesn’t Offer Clear Path to 100% Renewable Energy, Group Says*, MLIVE, <https://www.mlive.com/news/ann-arbor/2021/10/ann-arbors-latest-idea-doesnt-offer-clear-path-to-100-renewable-energy-group-says.html> (last updated Oct. 18, 2021, 4:15 PM) [<https://perma.cc/2BKZ-E3TD>].

301. CITY OF ANN ARBOR, *supra* note 297, at 8.

302. Ryan Stanton, *Ann Arbor Voters Could Ultimately Decide on Shift Away from DTE Energy*, MLIVE, <https://www.mlive.com/news/ann-arbor/2021/09/ann-arbor-voters-could-ultimately-decide-on-shift-away-from-dte-energy.html> (last updated Sept. 8, 2021, 1:48 PM) [<https://perma.cc/E65P-KDCA>].

303. *Id.*

of local power and self-determination. In other words, local governments' power to own, manage, and shape municipal utilities to serve their citizens provides an opportunity to consider ways in which local governments can use control over electricity services to achieve a broad range of economic, social, and environmental protection goals free from state interference. Part III turns to that issue.

III. LOCAL POWER III: IMPLICATIONS AND INTERSECTIONS

Part III returns to the distinct but complementary meanings of “local power.” It considers the extent to which the assertion of local control over electric power delivery can enhance local authority and capacity more broadly. It illustrates in more detail how local communities' exercise of control over electric power resources and delivery can create an important safe harbor from the increased state preemption of local regulatory authority in other contexts, without many of the parochialism-related drawbacks of localism. Section A evaluates local government policies and goals regarding energy both when local governments act in a regulatory capacity and when they act in a proprietary capacity as a municipal utility. These policies include not only aggressive decarbonization policies for the energy sector but also programs to enhance energy services and economic benefits for minority and low-income communities. Section B reconsiders the debates over localism and parochialism in the context of local energy projects and systems. It suggests that one way to address the “not in my backyard” or “NIMBY” tendencies of local governments is to enhance the ability of the community in question to take ownership of the projects themselves, either through a municipal utility or in partnership with the incumbent investor-owned utility.

A. Local Energy Policies: Decarbonization, Distributed Energy, and Energy Justice

Recent years have seen a noticeable increase in local government action to address climate change, both in response to lack of Congressional leadership on the issue and four years of Trump Administration efforts to reverse progress made during the Obama Administration.³⁰⁴ With U.S. cities emitting more carbon per capita

304. See, e.g., Nadja Popovich, Livia Albeck-Ripka & Kendra Pierre-Louis, *The Trump Administration is Reversing 100 Environmental Rules. Here's the Full List.*, N.Y. TIMES, <https://www.nytimes.com/interactive/2020/climate/trump-environment-rollbacks-list.html> (last updated Jan. 20, 2021) [<https://perma.cc/6ZJ8-CDUN>]; Sara Fox, *Localizing Environmental Federalism*, 54 U.C. DAVIS L. REV. 133, 149–51 (2020) (discussing efforts by local governments to

than their global peers, policy choices at the local level stand to have an outsized impact on slowing climate change.³⁰⁵ While local government action alone will not solve the global climate crisis, such action can create pressure on both state and federal government actors. Further, local government action builds broad-based political support, as evidenced by the Sunrise Movement, faith groups focused on climate change, and growing focus on the Green New Deal and similar large-scale energy transition platforms.³⁰⁶ Importantly, many of these local policies are explicitly guided by principles of “energy justice”—seeking a “just transition” to repair historic energy disparities and prevent their further exacerbation as the nation decarbonizes the energy sector.³⁰⁷

enact climate policies “in response both to the local reality of environmental problems, as well as the political reality of federal and state retreat”).

President Biden has expressed his intent to focus on climate change, and in particular environmental justice; he has introduced several policy initiatives aimed at reducing emissions and installed a cadre of officials with environmental justice backgrounds, including Shalanda Baker as Deputy Director for Energy Justice in the Department of Energy. *See* Exec. Order No. 14,008, Tackling the Climate Crisis at Home and Abroad, 86 C.F.R. 7619 (Jan. 27, 2021); Exec. Order No. 14,007, Establishing President’s Council of Advisors on Science and Technology, 86 Fed. Reg. 7615 (Jan. 27, 2021); Press Release, The White House, Fact Sheet: The American Jobs Plan (Mar. 31, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/31/fact-sheet-the-american-jobs-plan/> [<https://perma.cc/XR7C-BMAC>]; Press Release, The White House, Fact Sheet: Biden Administration Advances Electric Vehicle Charging Infrastructure (Apr. 22, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-biden-administration-advances-electric-vehicle-charging-infrastructure/> [<https://perma.cc/A7N9-LZUT>]; Press Release, The White House, Fact Sheet: President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies (Apr. 22, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies/> [<https://perma.cc/NC7Z-Y6AT>]; *President’s FY 2022 Budget Advances Equity Across Government*, OFF. OF MGMT. AND BUDGET, EXEC. OFF. OF THE PRESIDENT (2021), <https://www.whitehouse.gov/wp-content/uploads/2021/06/FY22-Budget-Equity-Fact-Sheet.pdf> [<https://perma.cc/T9QF-N52Y>]; Jeff Brady, *‘Energy Justice’ Nominee Brings Activist Voice to Climate Plans*, NPR, <https://www.npr.org/2021/06/08/1004059950/energy-justice-nominee-brings-activist-voice-to-bidens-climate-plans> (last updated June 8, 2021, 11:50 AM) [<https://perma.cc/8CWN-JTTA>]. Even if successful, however, the viability of President Biden’s proposals is uncertain, and they are unlikely to bear fruit for several years.

305. *See* Shreyas Vangala, Ellery Tomaszkiwicz & Joe Brady, *Making Climate Change Local: Municipalities and Communities Key to Decarbonization*, 37 CLIMATE & ENERGY 1, 4 (2021) (citing data showing seventy-two of the top five hundred cities with the highest carbon emissions are in the United States and highlighting local government climate action plans).

306. *See, e.g.*, Juana Summers, *Progressives Gear Up for Broad New Push on Climate Action*, NPR (Jan. 13, 2021, 5:00 AM), <https://www.npr.org/2021/01/13/956192132/progressives-gear-up-for-broad-new-push-on-climate-action> [<https://perma.cc/QZ99-LM5Y>]; *see also* Katherine A. Trisolini, *All Hands on Deck: Local Governments and the Potential for Bidirectional Climate Change Regulation*, 62 STAN. L. REV. 669, 672–78 (2010) (discussing limits and potential of local government action on climate change).

307. “Energy justice” is distinct from energy democracy in expressing the idea that “all individuals should have access to energy that is affordable, safe, sustainable and able to sustain a decent lifestyle, as well as the opportunity to participate in and lead energy decision-making processes with the authority to make change.” Sanya Carley & David M. Konisky, *The Justice and*

Katrina Wyman and Danielle Spiegel-Feld have attributed the expansion of environmental policymaking at the local level, at least in large urban centers, to three central factors—a perceived link between environmental protection and economic growth, more resources to hire environmental policy experts, and the concentration of liberal partisans in cities.³⁰⁸ But it is not only the handful of large, Democratic-leaning metropolises in the United States that are choosing to act. Since 1991, over six hundred local governments in the United States have adopted some form of climate action plan that includes an emissions reduction target.³⁰⁹ For more than 170 jurisdictions, these targets involve a transformative commitment to powering their community with 100% renewable electricity.³¹⁰ The deadlines to complete this transformation vary, from the relatively modest (e.g., 2050) to the more ambitious (e.g., 2030), and so do the rigor and detail of the plans accompanying these pledges.³¹¹ In addition to addressing the source of their electricity, local governments are deploying similar strategies to make progress on emissions reduction outside the electricity sector, including investing in alternative transportation infrastructure, updating building codes, and

Equity Implications of the Clean Energy Transition, 5 NATURE ENERGY 569, 570 (2020). A just transition “establishes the importance of equity and justice in the planning, implementation, and assessment of every socio-energy system change that shapes the energy transition.” *Id.* Several notable negative impacts are associated with the transition to renewable energy—job loss, wider economic depression in areas of former fossil-fuel industry, a sense of cultural displacement, and greater energy insecurity. For a discussion of these impacts, see *id.*

308. Wyman & Spiegel-Feld, *supra* note 10, at 328–33.

309. SAM MARKOLF, INÉS M.L. AZEVEDO, MARK MURO & DAVID G. VICTOR, BROOKINGS, PLEDGES AND PROMISES: STEPS TOWARD GREENHOUSE GAS EMISSIONS REDUCTIONS IN THE LARGEST CITIES ACROSS THE UNITED STATES 1 (Oct. 2020), <https://www.brookings.edu/research/pledges-and-progress-steps-toward-greenhouse-gas-emissions-reductions-in-the-100-largest-cities-across-the-united-states/> [<https://perma.cc/3ZQ3-6DN4>]; see also *About the Network: Who We Are*, CLIMATE MAYORS, <https://climatemayors.org/who-we-are/> (last visited Sept. 10, 2021) [<https://perma.cc/E2LM-HKPC>] (“Climate Mayors, founded in 2014, is a bipartisan, peer-to-peer network of more than 470 U.S. mayors demonstrating climate leadership through meaningful actions in their communities.”).

310. *Committed*, SIERRA CLUB, <https://www.sierraclub.org/ready-for-100/commitments> (last visited Sept. 10, 2021) [<https://perma.cc/AK2Q-CMH3>].

311. See *id.*; see also, e.g., Salt Lake City, Utah, Joint Resolution of the Salt Lake City Council and Mayor Establishing a Community Renewable Energy Goal for Salt Lake City (Aug. 27, 2019), <http://www.slcdocs.com/slgreen/SLC-2030.pdf> [<https://perma.cc/246R-N3SJ>] (committing Salt Lake City to 100% renewable energy by 2030); CITY OF BOS., CLIMATE ACTION PLAN: 2019 UPDATE 5 (Oct. 2019), https://www.boston.gov/sites/default/files/imce-uploads/2019-10/city_of_boston_2019_climate_action_plan_update_2.pdf [<https://perma.cc/ANG3-VHF2>] (describing Boston’s goal of carbon neutrality by 2050); Emma Penrod, *Following Google’s Footsteps, Des Moines Pledges 24/7 Clean Electricity by 2035*, UTIL. DIVE (Jan. 15, 2021), <https://www.utilitydive.com/news/following-googles-footsteps-des-moines-pledges-247-clean-electricity-by/593456/> [<https://perma.cc/V9X4-RVV7>] (reporting on unanimous resolution of Des Moines City Council to establish the first local government 24/7 clean energy goal).

overhauling zoning strategy.³¹² Through careful attention to where and how these programs are implemented, local governments have intentionally embedded economic and racial justice principles into their climate action plans.³¹³

Local governments with an existing municipal utility (or considering the feasibility of creating one) have an even greater capacity to address energy justice imperatives. Without a specific focus on the energy justice implications of new projects, energy programs intended to improve the social welfare of the community as a whole may fall short of their potential, or, worse yet, may merely pay lip service to these values.

Take the rise of distributed solar resources, for example. At first glance, rooftop solar seems to align with principles of energy justice: more renewable energy on the grid, democratization of energy through dispersal of ownership, greater community engagement in energy decisionmaking, and reduced costs for ratepayers through compensation for the energy generated. However, rooftop solar in most communities tends to be installed by affluent, white households; as such, some investor-owned utilities “deftly used the poor as scapegoats” to argue against the further proliferation of rooftop solar.³¹⁴ At the same time, other investor-owned utilities have proposed “community energy” programs using utility-scale solar arrays, touted as a way to increase generation opportunities for low-income ratepayers.³¹⁵ Shalanda Baker has argued, however, that these programs do little to advance local control or energy justice objectives since they “replicate an approach to scale and siting that maintains the paradigm of utility-oriented energy development.”³¹⁶ Without a true community ownership model that

312. See, e.g., Vangala et al., *supra* note 305, at 6–10 (discussing initiatives in New York City, Chicago, Los Angeles, Honolulu, Charlotte, and Denver).

313. See Jesse Klein, *8 Cities Share How Racial Justice is Embedded into Their Climate Plans*, GREENBIZ (July 20, 2020), <https://www.greenbiz.com/article/8-cities-share-how-racial-justice-embedded-their-climate-plans> [<https://perma.cc/JU56-3SG2>].

314. Shalanda Baker, *Unlocking the Energy Commons*, in LAW AND ECONOMIC POLICY FOR A NEW AGE 211, 215 (Melissa Scanlan ed., 2017); see also Shalanda Baker, *Anti-Resilience: A Roadmap for Transformational Justice Within the Energy System*, 54 HARV. C.R.-C.L. L. REV. 1, 29 (2019); Deepa Shivaram, *Shalanda Baker and the Energy Crisis Plaguing Black and Brown Americans*, NBC NEWS (Mar. 9, 2021), <https://www.nbcnews.com/news/nbcblk/shalanda-baker-energy-crisis-plaguing-black-brown-americans-n1260047> [<https://perma.cc/R6QG-8FSX>]; Tom Perkins, *Is It Community Solar If the Utility – Not Community – Owns the Panels?*, ENERGY NEWS NETWORK (June 29, 2021), <https://energynews.us/2021/06/29/is-it-community-solar-if-the-utility-not-community-owns-the-panels/> [<https://perma.cc/9E27-JK4H>].

315. Baker, *Unlocking the Energy Commons*, *supra* note 314, at 216.

316. *Id.* at 223; see also Andrew Hazzard, *Minnesota’s Community Solar Program Leads the Nation. Poorer People, Often Residents of Color, Are Left in the Shade.*, SAHAN J. (Apr. 1, 2021), <https://sahanjournal.com/climate/community-solar-minnesota/> [<https://perma.cc/GLF5-7EM7>]

incorporates the input of the historically excluded, simply switching to renewable sources does not mitigate investor-owned utility reliance on “extraction, exploitation, and getting [projects] done for the lowest cost.”³¹⁷

By contrast, local governments with a municipal utility can ensure any purported benefits of an energy program are actually captured by their community. The municipal utility of Waverly, Iowa, offers energy efficiency rebates paid in gift certificates which can be used anywhere in the town, thus fostering entirely local economic development.³¹⁸ In 2011, Los Angeles’ municipal utility created the Utility Pre-Craft Trainee Program to develop a workforce capable of implementing its renewable energy initiatives.³¹⁹ A five-year benchmark of the program found its trainees are racially and ethnically diverse, are proportionately more female than workers in similar industries, and come from low-income neighborhoods with high unemployment rates.³²⁰ The program thus embodies a just transition by prioritizing underserved community members for the stable jobs created by clean energy integration.

Returning to distributed energy resources, multiple tribal utilities have instituted renewable energy development mechanisms to address energy poverty and access on their reservations.³²¹ The Navajo Tribal Utility Authority rents out renewable generation units to tribal members located in non-grid areas.³²² In 2014, the Moapa Band of Paiutes Tribe created a microgrid for its business district powered by a hybrid solar generator, reducing reliance on diesel generation and saving the tribe an estimated \$700,000 a year.³²³ As “Indian-driven

(describing limited access to community solar among low-income households and communities of color in Minnesota).

317. Tara Lohan, *Justice First: How to Make the Clean Energy Transition Equitable*, REVELATOR (Jan. 11, 2021), <https://therevelator.org/energy-justice-baker/> [<https://perma.cc/2MWN-M3UY>] (detailing an interview with Shalanda Baker).

318. AM. PUB. POWER ASS’N, *Public Power for Your Community*, *supra* note 30, at 25; *Energy Efficiency Rebates*, WAVERLY UTILS., <http://www.waverlyutilities.com/electric/residential/rebates/> (last visited Sept. 11, 2021) [<https://perma.cc/TFE3-GDMF>].

319. AM. PUB. POWER ASS’N, *Public Power for Your Community*, *supra* note 30, at 16; MEGAN EMIKO SCOTT & CAROL ZABIN, U.C. BERKELEY LAB. CTR., TRAINING FOR THE FUTURE II: LOS ANGELES’S UTILITY PRE-CRAFT TRAINEE PROGRAM 5 (2016), <https://laborcenter.berkeley.edu/pdf/2016/Training-for-the-Future-2.pdf> [<https://perma.cc/P9HW-FJ5Z>].

320. SCOTT & ZABIN, *supra* note 319, at 3.

321. Ravotti, *supra* note 275, at 314–17.

322. *Id.* at 314.

323. *Id.* at 315; Barry Cassell, *New Solar Project Completed at Moapa Tribal Facility in Nevada*, TRANSMISSION HUB (Apr. 9, 2014), <https://www.transmissionhub.com/articles/2014/04/new-solar-project-completed-at-moapa-tribal-facility-in-nevada.html> [<https://perma.cc/W2S5-T39L>].

solutions to Indian problems,” these projects directly respond to the needs of the community free from investor-owned utility diversion of benefits.³²⁴

Municipal utilities can partner with other entities in their community to pioneer equity initiatives that would be outside the purview of a traditional investor-owned utility. In 2020, in response to the COVID-19 pandemic’s unequal impact on lower-income school children,³²⁵ Chattanooga, Tennessee’s, Electric Power Board announced a first-of-its-kind project giving free internet access and hardware to homes with school children on free or reduced lunch programs.³²⁶ This program illustrates municipal utilities’ ability to quickly respond to newly identified disparities.³²⁷

Finally, local governments can raise the possibility of municipalization to inscribe energy justice into their franchise renewal agreements. When Minneapolis renewed its franchise agreement with Xcel Energy after threatening municipalization,³²⁸ it required the investor-owned utility to form a joint Minneapolis Clean Energy Partnership to ensure progress towards an energy system which “sustains the city’s economy and environment and contributes to a more socially just community.”³²⁹ Salt Lake City, Utah, and Boulder, Colorado, formed similar partnerships with their investor-owned

324. Ravotti, *supra* note 275, at 317. In another example of a tribal utility creatively responding to the challenge of energy access, in 2021 the Navajo Tribal Utility Authority formed a unique partnership with Los Angeles’ municipal utility to extend powerlines to remote communities in the Navajo Nation. *Partnership Extends Powerlines to Navajo Nation Homes*, ASSOCIATED PRESS (Dec. 10, 2021), <https://apnews.com/article/business-44affb0a9b1382ab15fa251be733316f> [<https://perma.cc/L6EW-UBX4>]. The exchange allows the Los Angeles Department of Water and Power to train its work crews in powerline installation in rural, rugged terrain. *Id.* The partnership demonstrates the type of innovative cooperation municipal utilities have the freedom to pursue absent the strictures of PUC regulation.

325. See, e.g., Victoria Collis & Emiliana Vegas, *Unequally Disconnected: Access to Online Learning in the US*, BROOKINGS: EDUC. PLUS DEV. BLOG (June 22, 2020), <https://www.brookings.edu/blog/education-plus-development/2020/06/22/unequally-disconnected-access-to-online-learning-in-the-us/> [<https://perma.cc/5ANT-U7SN>].

326. See Ry Marcatillio-McCracken, *Chattanooga Uses Municipal Network to Give Students Free Internet Connections*, INST. FOR LOC. SELF-RELIANCE (July 30, 2020), <https://ilsr.org/chattanooga-uses-municipal-network-to-give-student-free-internet-connections/> [<https://perma.cc/5NUZ-FSH4>].

327. FAQ: *What is HCS EdConnect?*, HCS EDCONNECT, <https://www.edconnect.org/faq/> (last updated Mar. 23, 2021) [<https://perma.cc/2Y76-Z949>] (“This program helps ensure no child is left behind as schools continue to provide online learning as we deal with the effects of the COVID crisis.”).

328. *About the Partnership*, MINNEAPOLIS CLEAN ENERGY P’SHIP, <https://mplscleanenergypartnership.org/about/> (last visited Aug. 29, 2021) [<https://perma.cc/3GHU-Z3ZC>].

329. MINNEAPOLIS CLEAN ENERGY P’SHIP, 2019 ANNUAL REPORT 2 (Aug. 2019), https://mplscleanenergypartnership.org/wp-content/uploads/2020/08/2019-CEP-Annual-Report_FINAL-DRAFT.pdf [<https://perma.cc/WB3R-9UGF>] (internal quotation marks omitted).

utilities as a condition of signing new franchise agreements.³³⁰ In 2020, the San Diego City Council granted San Diego Gas & Electric a temporary six-month extension of its franchise agreement, aiming to pressure it into including provisions that address the city's climate goals while "provid[ing] equitable access to environmental benefits" for all members of the community.³³¹ During the extension, San Diego solicited franchise agreement bids from other utilities in an effort to stimulate competition.³³² While San Diego Gas & Electric was the only company to submit an offer, the franchise agreement approved by the city council in June 2021 includes \$20 million to achieve San Diego's climate equity goals and an additional \$10 million for renewable energy programs in underserved communities.³³³ Neither of these contributions from San Diego Gas & Electric will come from ratepayer funds, and a new citizen-focused Franchise Compliance Review Committee will ensure oversight by the public.³³⁴ And as discussed in

330. See *Clean Energy Implementation Plan*, ROCKY MOUNTAIN POWER & SALT LAKE CITY CORP. 2 (Mar. 28, 2017), <http://www.slcdocs.com/slcgreen/SLCRMP%202019.pdf> [<https://perma.cc/5UYT-WFZV>]; *Xcel Energy Partnership*, CITY OF BOULDER, <https://bouldercolorado.gov/projects/xcel-energy-partnership> (last visited Oct. 3, 2021) [<https://perma.cc/DL3W-RNAN>].

331. *San Diego City Council Reluctantly Extends SDG&E Franchise Agreements Through June*, KPBS (Dec. 30, 2020, 9:56 AM), <https://www.kpbs.org/news/2020/dec/30/city-council-extends-sdge-franchise-agreement-june/> [<https://perma.cc/W5WG-A6UK>].

332. *On 2nd Try, San Diego Gets Only SDG&E Minimum Bid for Franchise Agreement*, Times San Diego (Apr. 16, 2021), <https://timesofsandiego.com/politics/2021/04/16/on-2nd-try-san-diego-gets-only-sdge-minimum-bid-for-franchise-agreement/> [<https://perma.cc/EZX9-JP83>].

333. *Id.*; Rob Nikolewski, *San Diego City Council Gives Final Approval on New Electric and Gas Franchise Agreement with SDG&E*, SAN DIEGO UNION TRIB. (June 8, 2021), <https://www.sandiegouniontribune.com/business/energy-green/story/2021-06-08/franchise-vote-number-2> [<https://perma.cc/LYS2-UJW3>].

334. *San Diego City Council Agrees to Franchise Agreements with SDG&E*, ABC10 NEWS SAN DIEGO, <https://www.10news.com/news/local-news/san-diego-news/san-diego-city-council-agrees-to-franchise-agreements-with-sdg-e> (last updated May 25, 2021, 6:50 PM) [<https://perma.cc/4B46-Q368>]; Nikolewski, *supra* note 333.

The new franchise agreement is not without its detractors. As of August 2021, two lawsuits had been filed seeking to void the agreement based on alleged violations of the city's government transparency laws and its Climate Action Plan. See Rob Nikolewski, *Lawsuit Seeks to Overturn San Diego's New Electric and Gas Franchise Agreement with SDG&E*, LA JOLLA LIGHT (June 18, 2021, 12:38 PM), <https://www.lajollalight.com/news/story/2021-06-18/lawsuit-seeks-to-overturn-san-diegos-new-electric-and-gas-franchise-agreement-with-sdg-e> [<https://perma.cc/6FWH-2WGN>]; Ken Stone, *City Attorney Zaps Request for Outside Law Firm in SDG&E Franchise Lawsuits*, TIMES SAN DIEGO (July 19, 2021), <https://timesofsandiego.com/politics/2021/07/19/city-attorney-zaps-request-for-outside-law-firm-in-sdge-franchise-lawsuits/> [<https://perma.cc/D4MH-TSCQ>]; Rob Nikolewski, *San Diego City Attorney Withdraws Law Firm's \$250,000 Contract to Help Defend New Franchise Deal with SDG&E*, SAN DIEGO UNION TRIB. (July 20, 2021, 4:01 PM), <https://www.sandiegouniontribune.com/business/story/2021-07-20/sd-city-attorney-council-withdraws-250-000-contract-with-law-firm> [<https://perma.cc/447D-GP98>].

Part II.B, as of 2021, Chicago continued to hold out for a new franchise agreement with ComEd centered around “Energy and Equity.”³³⁵

It is true that states concerned about municipalization as a mechanism to bypass state policy prerogatives could enact legislation preempting the ability of local governments to municipalize entirely, at least where the right to do so is statutory. However, several factors make widespread preemption unlikely. First, local governments with existing municipal utilities span the political spectrum, and the communities considering municipalization are not a progressive monolith. Any legislation enacted to preempt municipalization would inevitably impact the constituents of the majority party. Second, it would be difficult for legislators concerned about the political blowback from a blanket preemption law to craft a bill narrow enough to preempt a single municipality. Third, the economic and social policies pursued by local governments through municipalization are embedded in the government’s proprietary, rather than regulatory, powers. Fourth, municipalities can meet at least some of these goals through the negotiation process with existing or future investor-owned utilities, a process outside the purview of the local-state relationship. Last, legislating and regulating in the energy arena is technical and complex; the allure of the status quo and legislative inertia should not be underestimated. Although state governments are certainly becoming more active in addressing local energy initiatives,³³⁶ even a law signed in June 2021 by Florida Governor Ron DeSantis restricting local governments from directing utilities to switch to renewable energy contained an exemption for municipal utilities.³³⁷

B. Localism Revisited: Overcoming Parochialism in Energy Projects Through Local Power

Evaluating the dynamics of local utilities and local energy projects provides a new perspective on the renewed scholarly debates

335. See *supra* notes 256–261 and accompanying text (discussing Mayor Lori Lightfoot’s demands for a new franchise agreement).

336. See Liz Crampton, *‘Rogue City Leaders’: How Republicans Are Taking Power Away From Mayors*, POLITICO (June 23, 2021, 4:30 AM), <https://www.politico.com/news/2021/06/23/rep-publicans-are-taking-power-away-from-mayors-495564> [https://perma.cc/3EAJ-KBHF].

337. Sam Sachs, *Local Florida Governments Can’t Restrict ‘Dirty Energy’ Usage Under New Law Signed by DeSantis*, WFLA NEWS CHANNEL 8, <https://www.wfla.com/news/florida/local-florida-governments-cant-restrict-dirty-energy-usage-under-new-law-signed-by-desantis/> (last updated June 22, 2021, 3:30 PM) [https://perma.cc/B6CU-RW26].

over “localism.”³³⁸ Opponents of localism have often raised the specter of local governments, notably suburbs, engaging in exclusionary zoning or otherwise acting contrary to the interest of racial minorities or low-income residents as reasons to support state oversight and to be cautious of increased local control.³³⁹ Others counter that today’s polarized politics and gerrymandering at the state level render state government more suspect today than in the 1990s, when the original disputes over localism were last the subject of intense debate.³⁴⁰ Yet others focus on the increased ability of racial minorities to have a voice in policymaking at the local level, creating new arguments in favor of increased local power when it comes to local-state relations.³⁴¹

All these debates, understandably, focus on local governments acting in their regulatory capacity. They consider the ability of local governments to engage in zoning; regulate economic activities within their borders like living wage laws, fair scheduling laws, and antidiscrimination protections for citizens; or impose environmental protection provisions on businesses such as regulating plastic waste or placing conditions on new buildings with regard to use of natural gas or energy efficiency.³⁴² As detailed in Part I, while local governments generally have the authority to engage in such regulation as a matter of home rule, states can easily displace that authority through expressly preempting those policies in favor of no policy at all or a uniform state policy.³⁴³

338. See, e.g., Davidson, *supra* note 5, at 975–83 (describing renewed scholarly debates in light of political polarization at the state level and preemption battles between states and local governments); *supra* notes 7–9 and accompanying text.

339. See Davidson, *supra* note 5, at 976–78 (discussing scholarship and stating that “these strands of the critique of localism coalesce into an overriding concern with a particularly toxic vein of local parochialism that hardens a range of socioeconomic and racial inequalities”); Briffault, *supra* note 7, at 1 (“Localism reflects territorial economic and social inequalities and reinforces them with political power.”).

340. Davidson, *supra* note 5, at 980–81 (citing scholarship and noting that states “have become unreliable arbiters of the normal and legitimate oversight functions they have traditionally undertaken in less polarized times” due to “sophisticated partisan gerrymandering” that has resulted in state politics that “structurally marginalize their urban residents in particular”); see also Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859, 862 (2021) (“Recent years have seen a rash of [state] antidemocratic behavior across the country—efforts to thwart popular majority rule that have nothing to do with protecting vulnerable minorities or individual rights.”).

341. See, e.g., Davidson, *supra* note 5, at 979–80 (summarizing arguments in favor of local control); Heather K. Gerken, *A New Progressive Federalism*, DEMOCRACY, no. 24, Spring 2012, <https://democracyjournal.org/magazine/24/a-new-progressive-federalism/> [<https://perma.cc/L8A9-AFMW>] (“Eliminating opportunities for local governance to protect racial minorities and dissenters also means eliminating the very sites where they are empowered to rule.”); *supra* notes 16–18, 27, and accompanying text.

342. See *supra* Part I.B.

343. See *supra* Part I.A.

But what do the debates over localism look like when it comes to local energy projects such as distributed solar, wind energy projects, or related infrastructure? In this context, parochialism often takes the form of NIMBYism—people are in favor of renewable energy development but not in their own communities because of aesthetic and other potential adverse impacts.³⁴⁴ Energy and environmental law scholars have long lamented the practice of local governments restricting or banning rooftop solar, wind farms, and other critical energy projects needed to address climate change and support a clean energy transition.³⁴⁵ In some cases, states have acted to preempt local government authority to ban or restrict certain renewable energy projects, addressing the same parochialism concerns local government scholars have warned of for decades in nonenergy contexts.³⁴⁶ In other cases, renewable energy developers offer tax benefits or other economic benefits to obtain community acceptance of projects.³⁴⁷

There is evidence, however, that these energy parochialism concerns can also be addressed through community ownership of new projects. It is one thing for a community to oppose a new energy project

344. See, e.g., Robert Bryce, *Warren Buffett's Iowa Wind Power Expansion Derailed by the Bridges of Madison County*, FORBES (Jan. 13, 2021), <https://www.forbes.com/sites/robertbryce/2021/01/13/iowa-wind-expansion-derailed-by-the-bridges-of-madison-county/?sh=3bdff717a0ce> [https://perma.cc/YUS7-PMV6] (discussing increasing number of local government restrictions on renewable energy projects across the country).

345. See, e.g., J.B. Ruhl & James Salzman, *What Happens When the Green New Deal Meets the Old Green Laus?*, 44 VT. L. REV. 693, 713 (2020) (“Local NIMBY opposition has been a prominent battleground. Commercial-scale solar and wind power projects, which take up large areas and are highly visible, have enjoyed no ‘halo effect’ at the local level.” (footnote omitted)); Troy A. Rule, *Renewable Energy and the Neighbors*, 2010 UTAH L. REV. 1223, 1223 (stating that neighboring landowner opposition to renewable energy projects leads to “zoning ordinances and subdivision covenants in communities throughout the country [that] restrict or prohibit the installation of green energy devices” (footnote omitted)); Hannah J. Wiseman, *Taxing Local Energy Externalities*, 96 NOTRE DAME L. REV. 563, 572–73, 581–84, 589–92, 616–18 (2020) (discussing power of local governments to block renewable energy projects and ways to address that opposition, including tax benefits for local governments and state preemption of local regulatory authority); see also Amy J. Wildermuth, *Is Environmental Law a Barrier to Emerging Alternative Energy Sources?*, 46 IDAHO L. REV. 509 (2020) (discussing the extent to which existing environmental laws pose barriers to clean energy development).

346. See Rule, *supra* note 345, at 1248–54 (discussing state preemption of local government restrictions on renewable energy projects but cautioning against such a “one-size-fits-all” approach that ignores local concerns); Wiseman, *supra* note 345, at 591–92 (discussing state preemption); Uma Outka, *The Renewable Energy Footprint*, 30 STAN. ENV'T L. REV. 248, 278–79 (2011) (same); see also Briffault, *supra* note 7, at 6 (discussing need for state oversight to address local government parochialism).

347. See Rule, *supra* note 345, at 1267–76; Wiseman, *supra* note 345, at 594–602; see also Ignacio Herrera Anchustegui, *Distributive Justice, Community Benefits and Renewable Energy: Offshore Wind Projects*, in SUSTAINABLE ENERGY DEMOCRACY AND THE LAW 214 (Ruven Fleming, Kaisa Huhta & Leonie Reins eds., 2020) (discussing community benefits agreements and payments in Northern Europe for offshore wind projects).

proposed by an outside developer or an investor-owned utility that will be planned, built, and operated with little, if any, local ownership or involvement. It is quite another matter when the local government itself plans and staffs the project and the employees come from the local community. These projects provide exciting opportunities for local governments to engage in clean energy development in ways that involve the entire community and integrate energy justice and racial justice priorities.

For example, Fayetteville, North Carolina, became home to the first municipal community solar farm in the state in 2019, which was built to create “long-term sustainable growth, community growth, and economic development.”³⁴⁸ Austin, Texas, has planned a new community solar array close to the city, creating clean energy jobs for its citizens.³⁴⁹ The Red Lake Nation’s solar arrays discussed above were financed through crowdfunding, a first for solar installations in Minnesota, demonstrating the enthusiasm for renewable projects with community-tailored benefits.³⁵⁰ The Standing Rock Sioux Tribe’s SAGE Development Authority in North Dakota launched a similar crowdfunding initiative to build a 235-megawatt wind farm which will embody their “cultural values by prioritizing people, land, and nature over profit.”³⁵¹

Moreover, the argument that local governments are in a superior position to innovate and experiment with policy initiatives is particularly true in the context of municipal utilities. As noted earlier, not all municipal utilities have always embraced clean energy. Instead, many of them have made heavy use of coal-fired power for decades because it was often the lowest cost option. Today, however, with wind

348. *Fayetteville Public Works Commission’s Community Solar Farm the First Municipal Community Solar Farm in North Carolina*, N.C. CLEAN ENERGY TECH. CTR. (Oct. 25, 2019), <https://nccleantech.ncsu.edu/2019/10/25/fayetteville-public-works-commissions-community-solar-farm-the-first-municipal-community-solar-farm-in-north-carolina/> [https://perma.cc/E9X6-QQBC].

349. *Construction Begins on Pflugerville Solar Project, Edging Austin Energy Closer to Renewable Energy Goals*, AUSTIN ENERGY (Aug. 18, 2020), <https://austinenergy.com/ae/about/news/news-releases/2020/construction-begins-on-pflugerville-solar-project-edging-austin-energy-closer-to-renewable-energy-goals> [https://perma.cc/L5BB-XNFM].

350. Jossi, *supra* note 39.

351. *SAGE Development Authority Launches Crowdfunding Initiative Seeking Critical Phase One Support for New 235-Megawatt Wind Farm to Benefit the Standing Rock Sioux Tribe*, GLOBE NEWSWIRE (Oct. 2, 2020), <https://www.globenewswire.com/en/news-release/2020/10/02/2103071/0/en/SAGE-Development-Authority-Launches-Crowdfunding-Initiative-Seeking-Critical-Phase-One-Support-for-New-235-Megawatt-Wind-Farm-to-Benefit-the-Standing-Rock-Sioux-Tribe.html> [https://perma.cc/H7GX-V3CG]; *see also Frequently Asked Questions*, ANPETU WI WIND FARM, <https://anpetuwi.com/frequently-asked-questions/> (last visited Oct. 15, 2021) [https://perma.cc/N9WX-VMKU].

and solar energy the lowest cost forms of energy, local utilities have been able to pivot more quickly than communities without their own utilities and embrace cleaner, less expensive energy resources.³⁵² This is true not only in historically progressive cities with municipal utilities like Los Angeles or Seattle but also medium and smaller cities with a history of fossil fuel reliance like Kodiak Island, Alaska, which transitioned from diesel to 100% renewable energy years ahead of its 2020 goal.³⁵³ In a remarkable story of transformation, the conservative town of Greensburg, Kansas, rebuilt itself as a model of sustainability, powered entirely by wind, after 95% of the town was destroyed by a tornado in 2007.³⁵⁴ The municipal utility serving Lincoln, Nebraska has rapidly cut its carbon emissions by 42% in the past decade and aims to be at net zero emissions by 2040, a significant reversal of its past reliance on coal.³⁵⁵ These examples provide a new perspective on localism debates and energy parochialism that may be helpful as the nation attempts to accomplish a clean energy transition that will require buy-in from communities across the country.

CONCLUSION

This Article provides a new perspective on local power. While local governments cannot address climate change, racial justice, or economic inequality on their own, their efforts to use their regulatory powers to innovate in these areas are well documented. On the other hand, local government regulatory power is subject to significant limits

352. The notable accomplishment of being the first city to be powered entirely by renewable energy belongs to Burlington, Vermont, which has had its own municipal electric utility since 1905. Colin Woodard, *America's First All-Renewable-Energy City*, POLITICO MAG. (Nov. 17, 2016), <https://www.politico.com/magazine/story/2016/11/burlington-what-works-green-energy-214463/> [<https://perma.cc/3QYN-FR29>]; *Our History*, BURLINGTON ELEC. DEP'T, <https://burlingtonelectric.com/index.php/history> (last visited Jan. 15, 2021), [<https://perma.cc/M4D9-DWNC>].

353. Laurie Stone, *An Alaskan Island Goes 100% Renewable*, ROCKY MOUNTAIN INST.: BLOG (May 19, 2015), https://rmi.org/blog_2015_05_19_an_alaskan_island_goes_one_hundred_percent_renewable/ [<https://perma.cc/XW94-ZBDH>]; *Second Largest Island in U.S. Goes 100% Renewable*, ECOWATCH (May 20, 2015), <https://www.ecowatch.com/second-largest-island-in-u-s-goes-100-renewable-1882043985.html> [<https://perma.cc/KU5P-6DCL>].

354. Annie Gowen, *The Town that Built Back Green*, WASH. POST (Oct. 23, 2020), <https://www.washingtonpost.com/climate-solutions/2020/10/22/greensburg-kansas-wind-power-carbon-emissions/> [<https://perma.cc/X4KP-LRRC>]; Catherine Morehouse, *Road to 100: How a Demolished Kansas Town Became a Model of DOE Renewables Resilience*, UTIL. DIVE (Dec. 4, 2019), <https://www.utilitydive.com/news/road-to-100-how-a-demolished-kansas-town-became-a-model-of-doe-renewables/568392/> [<https://perma.cc/4VYH-3F7J>].

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if state legislatures wish to make different policy choices. As political polarization increases, state-local policy conflicts have resulted in states engaging in aggressive preemption of local government policies, reducing community-based innovation and autonomy. However, when local governments act in their proprietary capacity as municipal utilities, there is a significant opportunity to pursue a broad range of energy justice, energy democracy, and community-engaged projects that can help achieve many of the same environmental, economic, and social equity objectives. Thus, municipal utilities' long-standing role as proprietary actors can create a potential safe harbor against the state-local preemption battles taking place on the regulatory front. Moreover, the analysis in this Article sheds a new light on the renewed debates over localism. In the energy context, the parochialism concerns raised by local government scholars in other contexts often take the form of local objections to renewable energy projects critical to a U.S. clean energy transition. Here too, municipal utilities can play an important role in ensuring that the economic and social benefits of these projects, not only the costs, remain in the community and are consistent with energy justice and energy democracy principles.