

TACKLING PREEMPTION

Fighting State Efforts to Block
Municipal Climate Action



CLIMATE **X**CHANGE
[SCPN]

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Introduction

Kristen Soares



State Climate Policy
Network Manager

State Climate Policy Network (SCPN)

- Network of 16,000 policymakers, advocates, business leaders and experts pushing for effective and equitable climate policies in their states
- Host monthly national calls and webinars
- Share updates, research, and analysis on various climate policy topics

How can we help you?

We specialize in state climate policy design and analysis. Reach out to kristen@climate-xchange.org with your questions on:

- **Bill drafting**, analysis, and technical design
- **Gap analysis** of your state's climate policy landscape
- Best **example states** to follow for a given policy

Or, check out our **State Climate Policy Dashboard**, which tracks state-level climate policy and resources across all 50 states.



Speakers

Sara Zimmerman



Director,
Climate Equity Policy Center

Logan Welde



**Staff Attorney and Legislative
Director,**
Clean Air Council

Speakers

Sara Zimmerman



Director,
Climate Equity Policy Center

Jane West



Policy and Planning Director,
1000 Friends of Florida

Logan Welde



**Staff Attorney and Legislative
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Climate Equity Policy
Center

Preemption: Deep Dive

Climate Equity Policy Center

Sara Zimmerman, Director



Climate Equity Policy Center

We're a national nonprofit that supports local communities in adopting & implementing climate policies that advance fair, healthy & equitable communities.

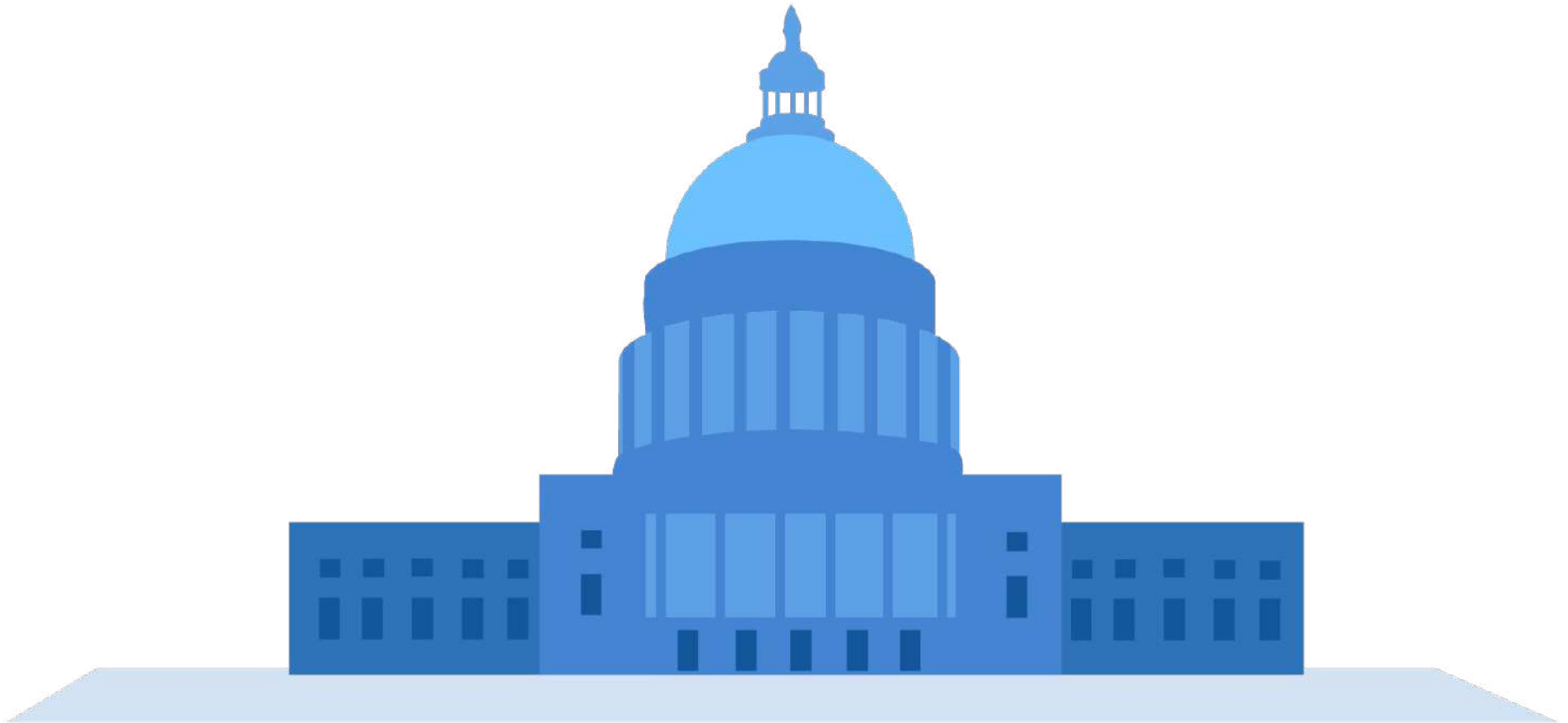
- We work with local, state & national community members, advocates & policymakers
- We support communities in developing & adopting climate policies that center racial justice & equity
- We work by:
 - developing model policies
 - researching legal & practical challenges
 - supporting communities in advocating for & adopting policies



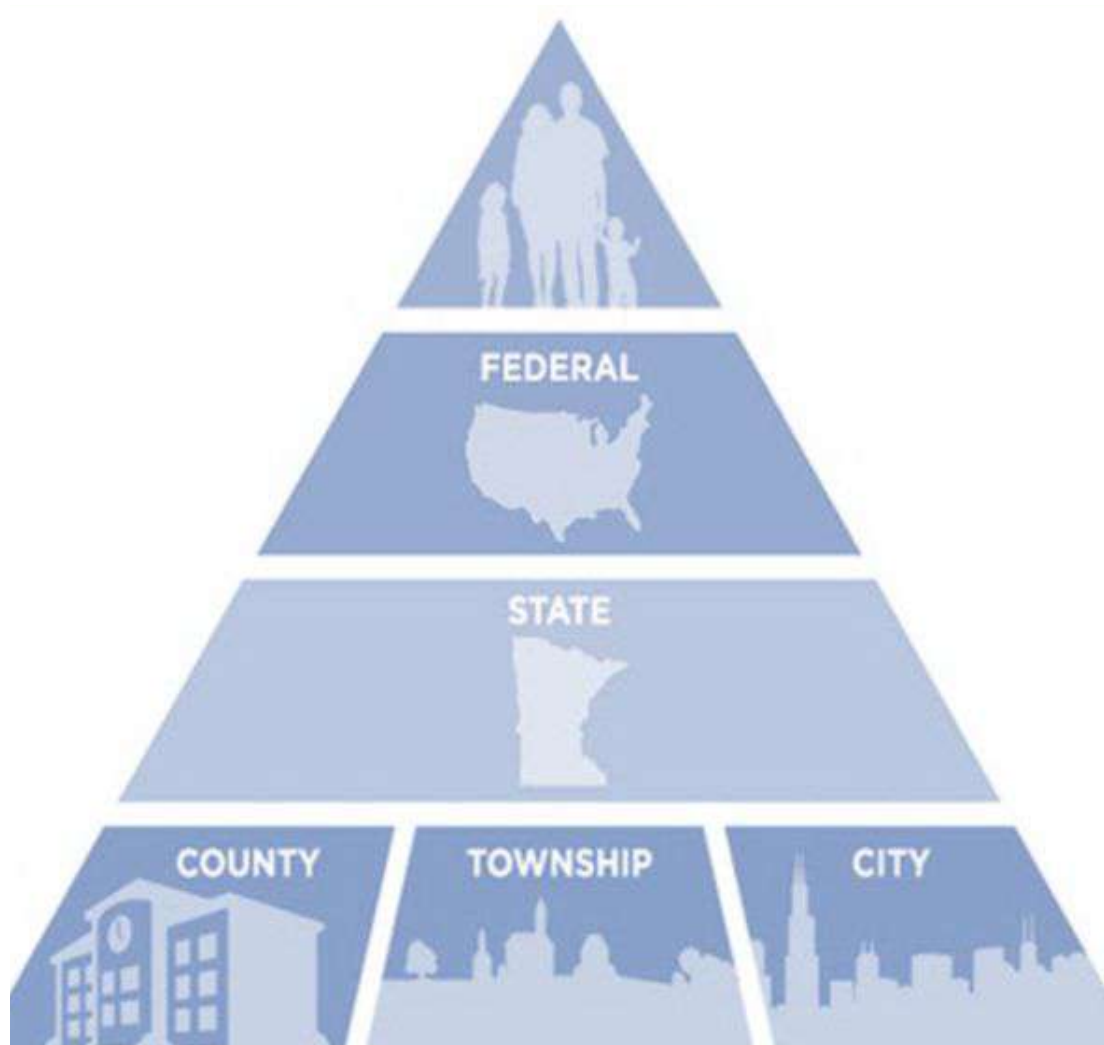
Preemption Basics



Preemption occurs when a state or the federal government removes the authority of a lower level of government to pass laws on a topic.



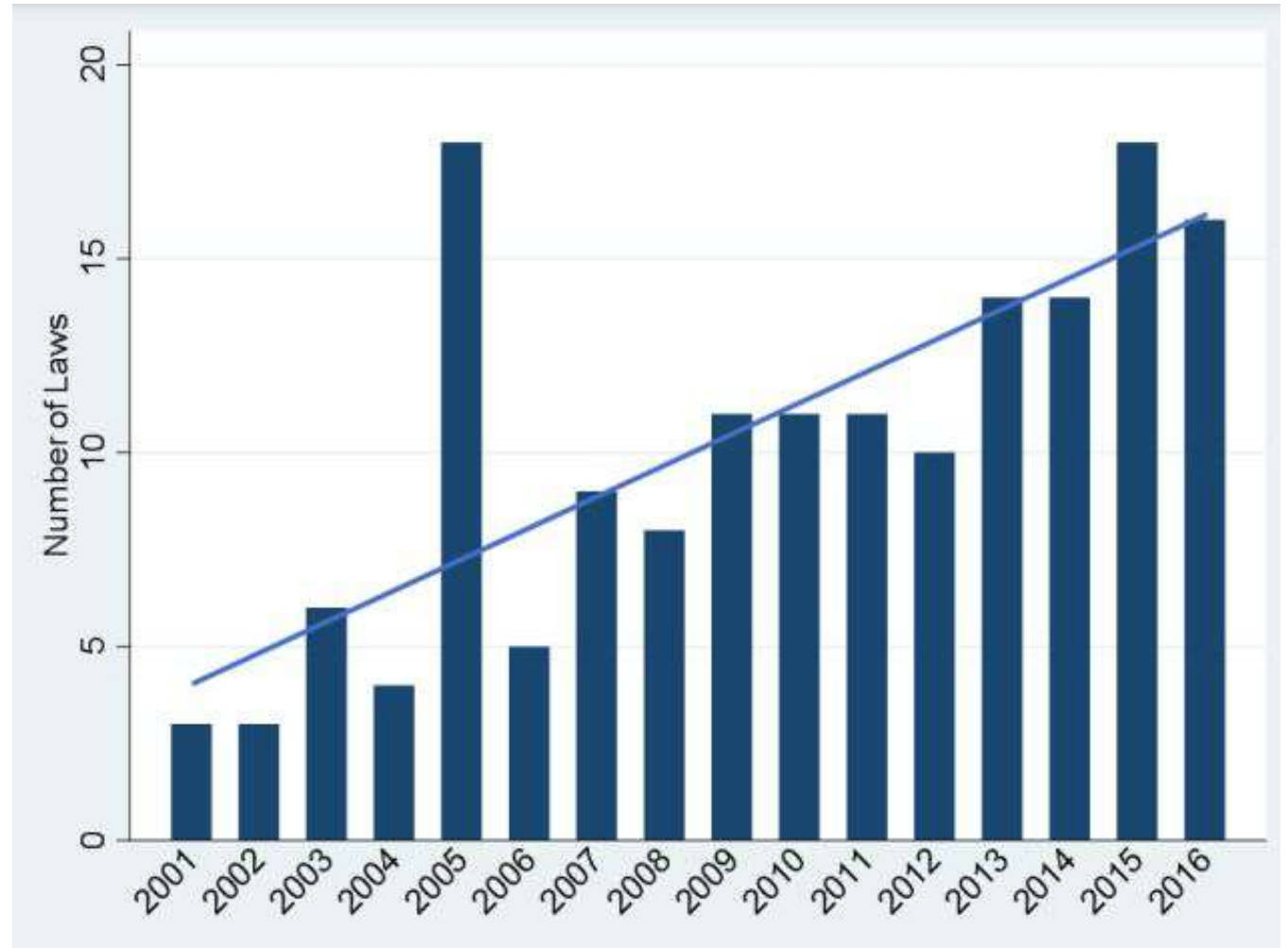
Levels of Government



- Federal & state governments named in Constitution
- Local governments (counties, towns, cities) are arms of state government
- In a conflict of laws, higher level usually prevails

- Research has found steady increase in state laws restricting local authority
- “Era of state preemption”
- Most commonly enacted when Republican trifecta

Increase in preemption attempts & successes





Attacks on Democracy

Preemption efforts are occurring within a broader context of attacks on democracy more generally:

- Preemption efforts
- Attacks on voting rights
- Attacks on direct democracy & ballot initiatives

Preemptive Language

Example of Preemptive Language

“No ordinance or regulation of local government may prohibit or in any way attempt to regulate any matter relating to [topic].”



Savings Clause

Example of Savings Clause:

“Nothing in this act shall prevent any city or county from regulating on [topic], as long as such regulation is at least as stringent as that in this act.”



Why Does Preemption Matter for Climate Equity?

Key goal for humanity:

Climate equity policies

Policies that move us rapidly toward a just transition

Examples of laws under attack by preemption:

Climate/ Environment

- Bans on natural gas in new buildings
- Pesticide use restrictions
- Limits on fracking
- Bans on plastic bags or styrofoam

Economic & Racial Justice & LGBTQ Rights

- Living wage policies
- Rent control & affordable housing requirements
- Anti-discrimination ordinances
- Regulations on ride-sharing/gig economy
- Removal of confederate statues
- Ban the box

Public Health Regulations of:

- Tobacco advertising & indoor air quality
- Firearms
- Sugar sweetened beverage taxes
- Covid protections like masking or vaccine requirements
- Authority to require quarantine, etc.



Legislators use
preemption as a tool to
maintain **profits** and
racial and economic
hierarchies

One report found:
“Preemption laws in the
South are passed by
majority-white legislatures
and tend to create barriers
to economic security in
cities whose residents are
majority people of color.”

Why does it matter?

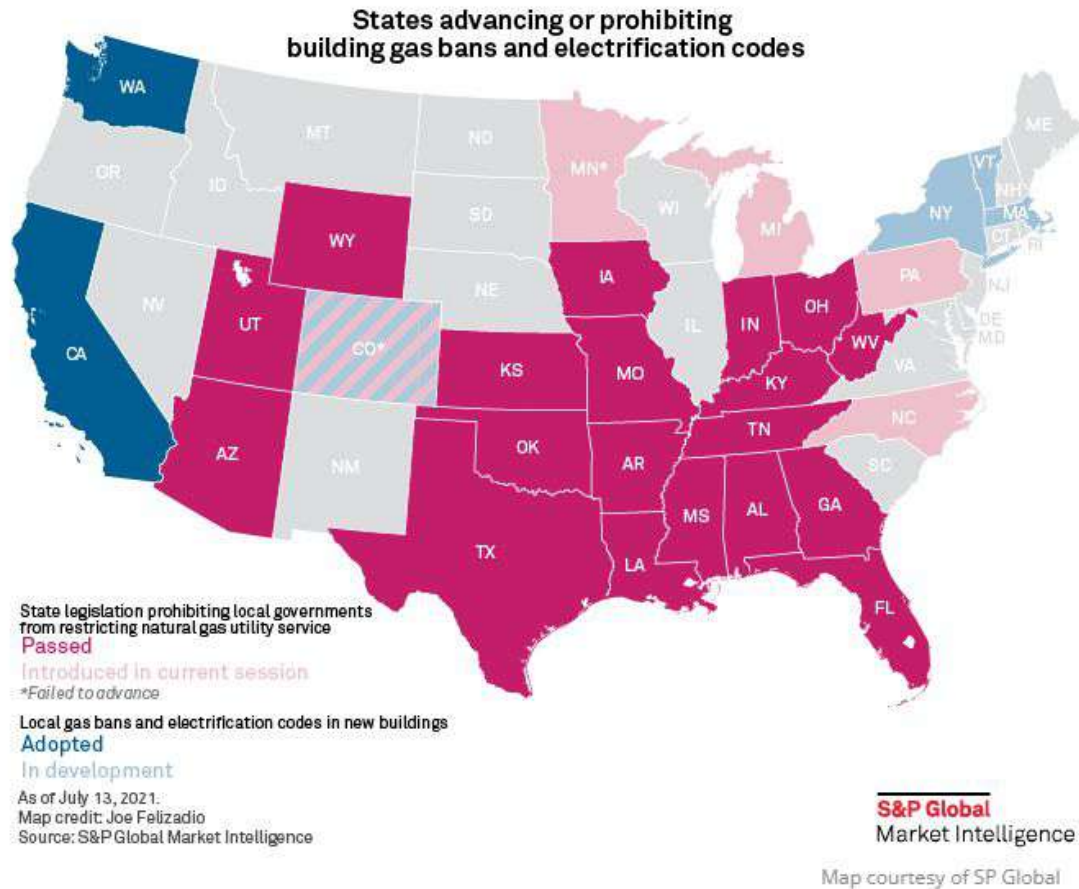


- Different levels of government have different strengths
- Innovation & implementation often happen at city/county
- Local policy is closer to people's demands
- Blue cities can bring progressive policy to red states
- Key policies for climate & equity happen at the local level



- **Consistency matters** in some policy areas (traffic law)
- **Sometimes preemption protects the rights** of a group that is in the minority (e.g. federal Voting Rights Act, California state law barring state & local law enforcement from aiding federal immigration enforcement)

Natural Gas Bans



- First natural gas ban in new construction passed in Berkeley in 2019
- Since then, 54 cities & counties have followed suit
- Innovation continues: Petaluma, CA & Ithaca, NY
- Natural gas has significant health, safety, climate & equity impacts
- Since 2020, 20 states have preempted local natural gas bans

Protecting Local Decisionmaking



**Recognize
Preemption**

**Work
Across
Issue Areas**

**Protect
Local
Democracy**

How We Fight Preemption

- Build political power
- Block or repeal preemption efforts
- Enact savings/enabling clauses
- Litigate... if that is wise
- Engage in work-arounds
- Fight another day



PREEMPTION A THREAT TO CLIMATE EQUITY



**Defending Local Power to Protect
Communities & Fight Pollution**



Preemption Toolkit & Factsheet



Preemption: A Threat to Climate Equity

Defending Local Power to Protect
Communities & Fight Pollution



Using a legal tool called preemption, powerful polluters are trying to weaken the ability of cities, towns, and counties to protect community members from toxics and pollution and to fight climate change.

Across the country, business interests are using campaign donations and political influence to persuade state legislators to limit the authority of cities and towns to advance climate equity. In many states, legislatures have preempted local governments from acting to address environmental injustices, phase out natural gas, reduce plastic use, protect affordable housing, and raise the minimum wage, among other policy areas.

Preemption tilts the playing field, making it harder for community members to influence decisions by elected officials. Preemption undermines democracy, stifles frontline voices, and interferes with the ability to pass policies to meet local needs.

The good news is that communities are coming together to fight for climate equity and democracy. But preemption is a powerful tool that can be used to undermine local efforts to protect the environment and fight climate change.

What is Preemption?

Preemption occurs when a state or the federal government strips a lower level of government of the authority to pass laws on topics such as pesticide use, oil and gas drilling, or living wage policies.

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newsletter for updates:
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Speaker

Jane West



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**Staff Attorney and
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Tackling Preemption: A Look At Climate Preemption, How To Prepare for It, and Defeat It

May 17, 2022

Logan's Bio

Staff Attorney, Legislative Director

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Areas of focus include state preemption, energy law, and waste reduction through policy, litigation, and legislation. Before joining the Council in August 2012, Logan was a Captain in the U.S. Air Force, a financial analyst at Credit Suisse, manager of toy operations at Marvel Comics, and financial analyst at Blue Man Group. Logan received his law degree from Temple University and his Bachelor's from University of Vermont.

Clean Air Council

Formed in 1967

A member-supported environmental organization serving the Mid-Atlantic Region. The Council is dedicated to protecting and defending everyone's right to a healthy environment. The Council works through a broad array of related sustainability and public health initiatives, using public education, community action, government oversight, and enforcement of environmental laws.

Main Areas of Work

Advocacy & Outreach

We work with communities to amplify their voices to decision makers in order to maintain and strengthen environmental protections.

Transportation

Aims to encourage healthy active living and sustainable travel in order to reduce transportation sector pollution and greenhouse gas emissions.

Law & Policy

We participate in permitting, rulemaking, and other public processes and litigate when necessary to ensure polluters and government are held accountable to environmental laws.

Powers Given to Local Municipalities

- The founding document of the United States, the Constitution, is silent on local governments. Instead, the Ninth and Tenth Amendments reserve all other powers not previously delegated or prohibited to the states and the people. Therefore, each state is responsible for granting broad or limited authority to each local branch of government, such as counties, municipalities, school districts, and other political subdivisions.
- There are two guiding principles of governance for local governments: the Dillon Rule and Home Rule.

(source - https://nebraskalegislature.gov/pdf/reports/research/snapshot_localgov_2020.pdf)

Dillon Rule

- Local government only exercises (1) powers expressly granted by the state, (2) powers necessarily and fairly implied from the grant of power, and (3) powers crucial to the existence of local government.
- Named after Iowa Supreme Court Justice John F. Dillon and is based on a municipal philosophy he expressed in an 1868 case. In the court opinion, Justice Dillon emphasized that local governments are considered an extension of the state and power is distributed to those local governments according to the state constitution.

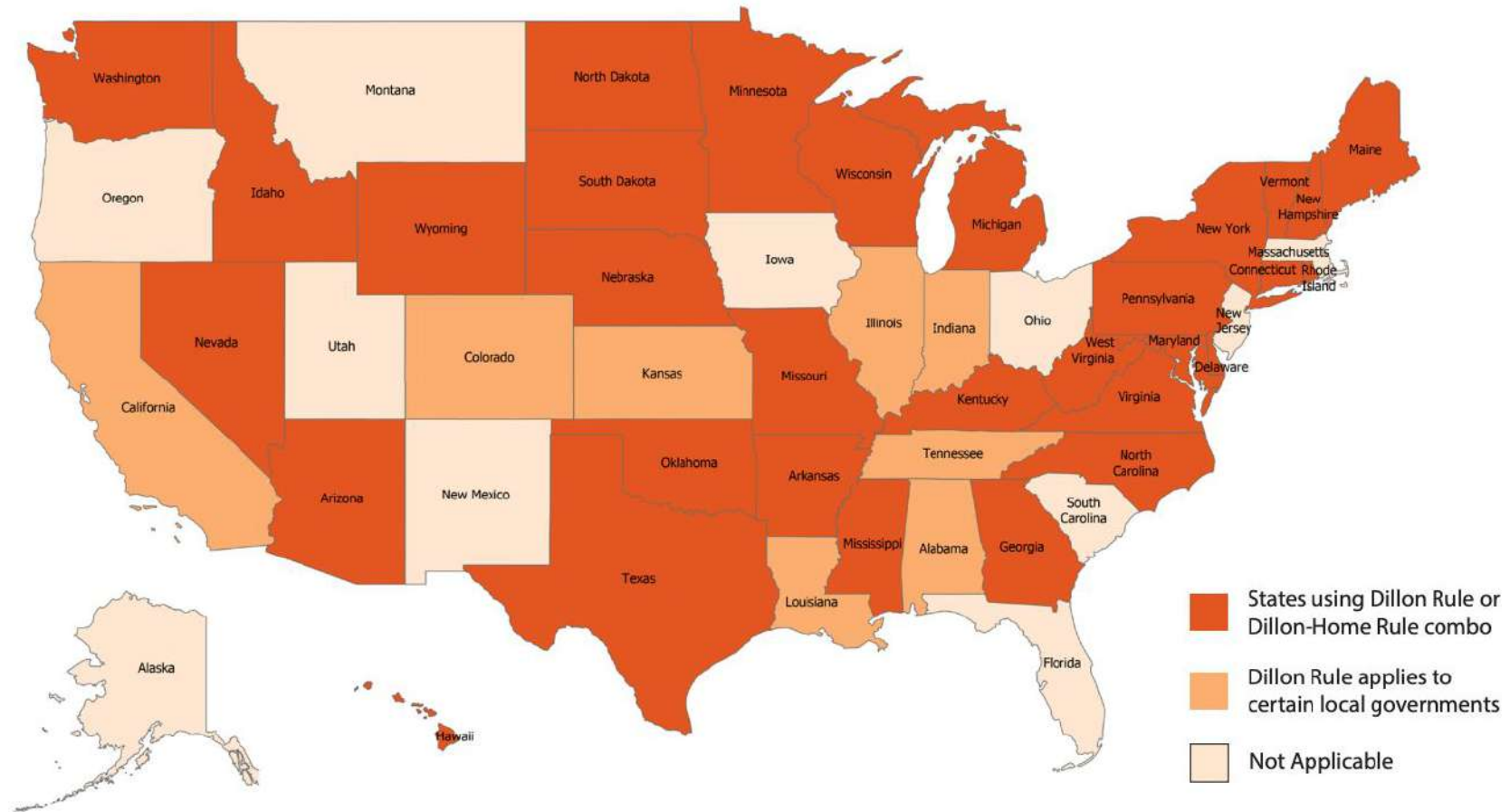
(Source -https://nebraskalegislature.gov/pdf/reports/research/snapshot_localgov_2020.pdf)

Home Rule

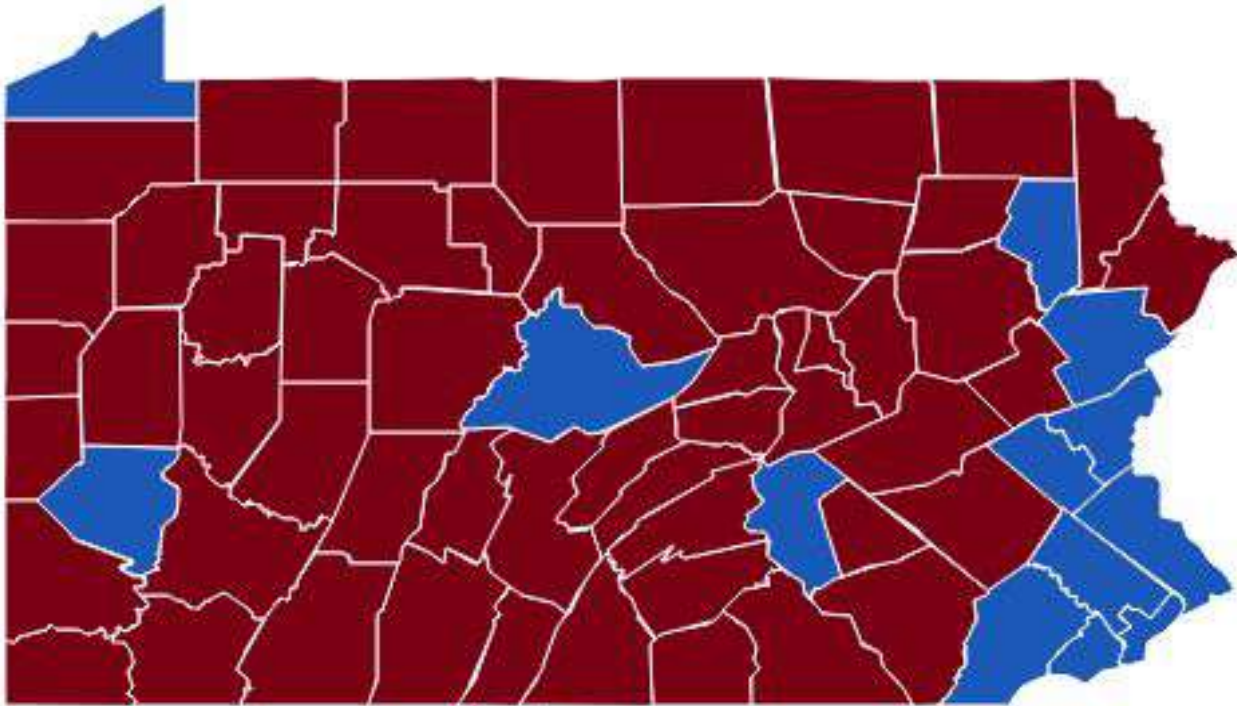
- Granted by state constitution or state statute and allocates some autonomy to a local government, if the local government accepts certain conditions. Home Rule implies that each level of government has a separate realm of authority. Therefore, state power should not infringe on the authority of local government in certain areas.

(source - https://nebraskalegislature.gov/pdf/reports/research/snapshot_localgov_2020.pdf)

Dillon Rule and Dillon-Home Rule States



Why Preemption Proliferates in Pennsylvania



● Donald Trump ● Joe Biden

Pennsylvania is a very attractive state for Preemption Laws.

- Essentially a deeply red state with a few (significant) outliers
- Largest fulltime state legislature
- Republicans control House (203, 112-88, 3 vacancies) and Senate (50, 28-20, 1 (I), 1 vacancy)
- Governor is a democrat – Cannot run again, election is Nov 8, 2022
- Supreme Court is controlled by democrats (5-2) **

• ** Big Deal!

Preemption Landscape in Pennsylvania

- Preemption in general: when the state government blocks a subordinate municipality from enacting/enforcing a law (policy)
- Home rule state: municipalities can adopt a charter and have an established, elected local government. But under the state Constitution, the Legislature is still given the power to restrict a home rule locality's actions
- Except for Philadelphia (first class city) municipalities may not “determine duties, responsibilities or requirements” of private businesses

ALEC is Alive in PA

- ALEC state chairs Rep. Seth Grove, Sen. Kristin Phillips-Hill, and Rep. Eric Nelson led the effort in PA to overturn the 2020 presidential election results
- Extensive work on voter disenfranchisement:
 - pushed a model Voter ID Act that disenfranchised disabled, low-income, elderly, people-of-color, and student voters
 - a resolution in opposition to the public financing of elections
 - a resolution opposing “false statement” laws designed to make sure campaign ads do not misinform voters, and many others
- Seth Grove - “has drafted comprehensive legislation to preempt local governments from passing labor law ordinances on private businesses. Local governments should be focused on public safety, infrastructure, zoning and recreation, not socialist policies meant to harm the free market”

Examples of Climate Preemption in PA

- Act 13 (2012) – Required all municipalities to allow oil & gas drilling. Preempting almost all local restrictions.
- Plastics/Styrofoam - Act 23 § 1706-E(d) prohibits “a local governmental body or agency” to “enact or enforce a law, rule, regulation or ordinance imposing a tax on or relation to the use, disposition, sale, prohibition or restriction of single-use plastics.”
- Gas Preemption – SB 275 prohibits municipalities from adopting policies to restrict or prohibit methane gas use in new homes and buildings, in favor of using electricity.

Act 13 According to DEP

- Act 13 of 2012 enacted stronger environmental standards, authorized local governments to adopt an impact fee and built upon the state's ongoing efforts to move towards energy independence as unconventional gas development continues. Among the Act's provisions are increased setback requirements for unconventional gas development; enhanced protection of water supplies; and strong, uniform, consistent statewide environmental standards. As a result of these provisions, the Department of Environmental Protection will continue to ensure the responsible development of this important resource.

(source -<https://www.dep.pa.gov/Business/Energy/OilandGasPrograms/Act13/Pages/default.aspx>)

Act 13 in Practice

- Act 13 of 2012 was a comprehensive rewrite of the Oil and Gas Act intended to address the increase in natural gas operations as a result of findings in the Marcellus Shale in northern and western Pennsylvania. **For one, Act 13 severely restricted local regulation of oil and gas activities by permitting wells, pipelines and impoundments in all zoning districts**, utilizing setbacks instead of general prohibitions to limit activity in high-density areas, and it permitted compressor stations and processing plants in industrial and agricultural zones. **Moreover, it limited the ability of municipalities to consider the effects of oil and gas operations in a manner different than other land uses.** Act 13 also granted DEP near total authority over oil and gas operations near streams and wetlands.

(source -

[https://www.landuselawinpa.com/court-rulings/robinson-twp-v-commonwealth/#:~:text=Commonwealth%2C%20623%20Pa.,564%20\(Pa%202013\).&text=Summary%3A,the%20powers%20of%20eminent%20domain.](https://www.landuselawinpa.com/court-rulings/robinson-twp-v-commonwealth/#:~:text=Commonwealth%2C%20623%20Pa.,564%20(Pa%202013).&text=Summary%3A,the%20powers%20of%20eminent%20domain.))

Act 13 Reaction – Groundbreaking Robinson Twp. v. Commonwealth, 623 Pa. 564 (Pa 2013)

- Municipalities immediately challenged Act 13 arguing it violated certain provisions of the Pennsylvania Constitution that protected inherent rights, limited eminent domain, and preserved natural resources.
- The Pennsylvania Supreme Court took the case on appeal and the majority invalidated the land-use regulations among other provisions of Act 13.

(source -

[https://www.landuselawinpa.com/court-rulings/robinson-twp-v-commonwealth/#:~:text=Commonwealth%2C%20623%20Pa.,564%20\(Pa%202013\).&text=Summary%3A,the%20powers%20of%20eminent%20domain.](https://www.landuselawinpa.com/court-rulings/robinson-twp-v-commonwealth/#:~:text=Commonwealth%2C%20623%20Pa.,564%20(Pa%202013).&text=Summary%3A,the%20powers%20of%20eminent%20domain.))

Reclassifying Plastic – Advanced Recycling

- Governor Wolf signed a bill on November 25, 2020, amending the Pennsylvania Solid Waste Management Act (SWMA) to exclude post-use polymers converted using advanced recycling technologies from regulation as solid, municipal, or residual waste. Act 127 further provides that advanced recycling of post-use polymers does not constitute waste processing or treatment.
- The upshot of these changes is to exempt advanced plastics recycling facilities from the lengthy and expensive process of obtaining SWMA processing or treatment permits.

Single-use Plastics

- Plastic Preemption
- State has tried repeatedly to preempt all municipalities from enacting plastic/Styrofoam legislation, finally succeeded by using the fiscal code
- Many municipalities have passed limits on single-use plastic (bags and straws)
- Philadelphia, other munis, plus Clean Air Council sued the state when it inserted plastic/Styrofoam preemption in the state's fiscal code
- Did not receive judicial scrutiny as the preemption expired and was not reinserted into the newest fiscal code

Plastic Lawsuit

- Munis and groups sued over the fiscal code
- PA Constitution:
 - Article III, § 3 of the Pennsylvania Constitution, which provides that “no bill shall be passed containing more than one subject, which shall be clearly expressed in its title, except a general appropriations bill or a bill codifying or compiling the law or a part thereof.”
 - Article III, § 1 of the Pennsylvania Constitution, which provides that “no bill shall be so altered or amended, on its passage through either House, as to change its original purpose.”
 - Article I, § 27 of the Pennsylvania Constitution, which provides that “[t]he people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.”

Landmark Ruling?

- Pa. Rest. & Lodging Ass'n v. City of Pittsburgh
- Pittsburgh was sued by restaurants and an industry group that claimed the city overstepped its home rule powers. Lower courts agreed that, under the state's home rule law, Pittsburgh wasn't allowed to require paid sick leave for private employers
- The PA SC ruled in favor of Pittsburgh: Justice Wecht, writing for the majority, said the court needed to find a “middle ground” between allowing home rule municipalities to govern and preventing them from burdening private businesses
- City Solicitor – “[T]his creates a path for other municipalities to fight for workers' rights as well. So I think it's a historic day for workers and economic justice”

<https://www.penncapital-star.com/government-politics/preemption-explained-how-pennsylvanias-biggest-city-and-the-legislature-grapple-over-power/#:~:text=According%20to%20the%20report%2C%20Pennsylvania,the%20House%20and%20Senate%2C%20Gov>

Upcoming Challenges

- More preemption
 - Covid created a surge of preemptions
 - Florida law: “Businesses whose revenues decline by 15% or more as a result of a local ordinance or local citizens initiative will now be allowed to sue cities and counties for damages”
- Ballot Questions
 - Pennsylvania Supreme Court: “shall consist of seven justices, to be elected from seven judicial districts which shall be established by law, one of whom shall be the justice”

Legislature Stripping Governor's Powers –Using the Ballot Option

- Covid – Governor Wolf introduced Covid restrictions
- State legislature introduced proposed constitutional amendments on the May 2021 (primary) ballot to limit the governor's ability to issue orders during a state of emergency.
- On the May 2021 ballot voters voted to limit the Governor's powers
- Republicans introduced legislation to appear on the 2023 ballot to:
 - limit the length of any executive order to 21 days
 - Allow the legislature to block any order with a simple majority vote
- "The legislation would not only limit the governor's powers, however. It would put a significant amount of power back in the hands of the state legislature, which has been Republican controlled for years."

What has Worked?

- Litigation – single-use plastics, Act 13
- Early action (LSSC), understanding what's likely coming – Gas Preemption
- Working with Municipal Leagues, local leaders, local legislators
- Go after their dues
- Our Coalition – If you are in Pennsylvania please join us – lwelde@cleanair.org

Q&A

Thank you for joining!

**Reach out to
kristen@climate-xchange.org with any
additional questions!**