Dear Ms. Councilwoman, “What Can You Do About Uber in the City?”: The Role of Local Governments in the Post-Regulatory Landscape of Transportation Network Companies

“Over the past four years, transportation network companies, primarily Uber and Lyft, have convinced legislators in the vast majority of states to overrule and preempt local regulations and strip drivers of rights. The speed and sweeping effectiveness of the industry’s use of this strategy . . . is unprecedented.”

I. INTRODUCTION

In 2018, Vermont became the forty-ninth state to pass statewide regulations for transportation network companies (TNCs), such as Uber and Lyft. After these emerging companies entered the marketplace, many states grappled with whether these services should be regulated as traditional taxi and livery services within existing regulatory schemes or as something else. In many localities,


3. See Sophie Quinton, How Should Uber Be Regulated?, Pew Charitable Trs.: Stateline (Nov. 24, 2015), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2015/11/24/how-should-uber-be-regulated [https://perma.cc/AUE6-M38D] (discussing rise of TNCs and uncertain regulatory landscape). Initially, states did not have clear guidelines for taxing these companies, enforcing safety requirements for drivers, or to determine whether to impose fee-based surcharges, but almost all have since passed regulation for TNCs. See id. (describing debates over San Jose driver protections and fee proposals in states); see also infra notes 52-55 and accompanying text (summarizing states’ regulatory approaches to TNCs).
TNCs persuasively argued that they do not fit into the existing regulatory framework, creating a legal “gray area” for regulators to address.\(^4\)

In contrast, municipalities have historically regulated taxi and limousine companies, creating a fragmented scheme of control and directives.\(^5\) A central debate regarding TNCs and taxis is whether states or municipalities should regulate the two services uniformly.\(^6\) Courts, however, have made clear that the services are differentiated enough from taxis to prevent challenges on equal protection grounds and have held that taxi medallion holders do not have a vested property interest in those licenses.\(^7\) Thus, challenges to the regulatory landscape of TNCs have taken place in the legislative branch of state governments and will likely continue for the foreseeable future.\(^8\) These state initiatives will shape the future of the transportation-for-hire industry through statewide regulatory schemes and the distribution of governmental authority.\(^9\)

While the federal government must act in accordance with the enumerated powers the U.S. Constitution granted to it, state governments hold plenary power.\(^10\) States’ plenary power provides broad latitude to regulate; local governments, however, which derive their power from the state, do not share in this power.\(^11\) This difference in inherent authority creates a unique challenge for state legislatures, as lawmakers must choose what powers to delegate to local governments.


\(^7\) See III. Transp. Trade Ass’n v. City of Chicago, 839 F.3d 594, 598 (7th Cir. 2016) (denying equal protection claim because city had justification for different regulatory scheme), cert. denied, 137 S. Ct. 1829 (2017); infra Section IIE (discussing early legal challenges alleging TNCs violate Takings and Equal Protection Clauses).


\(^9\) See infra Section III.A (outlining local regulation in post-regulatory landscape).


governments, often balancing the advantages of statewide uniformity and the specific needs and concerns of local communities. As municipalities grapple with the impact TNCs have on municipal affairs, such as their ability to generate revenue from these services or impose more stringent safety requirements, preemption clauses in statewide regulations may hinder these efforts.

This Note will discuss regulatory reforms states have undertaken in regard to TNCs and the policy-innovation obstacles the preemption of local control has created. Part II will provide a background of how TNCs came into existence, their position within the larger sharing economy, and the traditional regulatory landscape of transportation services. Part II will also discuss the relative power balance between state and local governments and recent decisions by courts regarding legal challenges against TNCs. Part II will then highlight different state approaches to preemption, using two states as case studies: New York, which exemplifies a more flexible preemption approach, and Texas, which bars any municipal regulation. Finally, Part III will argue that restrictive preemption provisions may constrain innovative policy approaches and statewide TNC legislation may need to be revisited, especially in light of overall judicial restraint regarding these services.

II. HISTORY

A. Emergence of TNCs in the Transportation Market

Rapid expansion and growth marked the emergence and legalization of TNCs. TNCs first entered the consumer space in 2009 when Travis Kalanick.

14. See infra Parts II-IV.
15. See infra Sections II.A-C.
16. See infra Sections II.D-E.
17. See infra Section II.F.
18. See infra Part III.
and Garrett Camp founded Uber. They launched three years later. Since the development of app-based ridesharing services, Uber and Lyft have dominated the market and dramatically transformed the transportation industry.

TNCs seek to provide customers the benefits of black car services and the convenience of hail-based livery services. TNCs allow users to download an app on their cell phones and request a ride. The platforms then match customers with a nearby driver after the customer enters their location on their phone. Rides are priced on a variety of factors including mileage, time traveled, various company fees, and applicable taxes. Unlike traditional taxis, TNCs have unique advantages such as the ability to store payment information and provide passengers with advance notice of their driver’s identity and location.


23. See Crespo, supra note 4, at 81 (describing benefit of ride-sharing industry); Hartmans & Leskin, supra note 20 (noting Uber’s launch blended black car services with traditional taxi accessibility).


25. See, e.g., How to Request a Ride, UBER HELP, supra note 24 (detailing pickup process); How to Request a Ride, LYFT HELP, supra note 24 (noting app requires enabling of user’s Global Positioning System (GPS) locating).


27. See Caleb Holloway, Article, Uber Unsettled: How Existing Taxicab Regulations Fail to Address Transportation Network Companies and Why Local Regulators Embrace Uber, Lyft, and Comparable
have the exclusive ability to engage in “street hails,” further differentiating them from TNCs. 28

The emergence of TNCs and other shared services, including home and car sharing, are a byproduct of both the organization of cities into neighborhoods and growth opportunities created by existing taxi services. 29 Dense urban populations create a natural market for sharing services, where both consumers and sharing economy workers are readily available and in need of products. 30 The existing taxi industry was generally costly, underserved poorer areas, and had lower quality services. 31 These disadvantages of the taxi industry are advantageous to TNCs and have allowed them to quickly find an audience with consumers who find that TNCs are more efficient, cost effective, and more likely to serve diverse communities. 32

B. How TNCs Fit into the Larger Sharing Economy

The rise in TNCs is also part of a larger, nationwide market trend towards a “sharing economy” or “gig economy.” 33 Within the past decade, services have emerged that allow individuals to share their homes, cars, and workspaces, and workers have found increased employment opportunities for performing discrete tasks as independent contractors. 34 TNCs have proven particularly popular with

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28. See id. at 25-26 (noting only taxis permitted to solicit passengers via “street hails”).
30. See id. at 218 (noting urban areas provide proximity and critical mass necessary for sharing services to flourish).
32. See Rebecca Elaine Elliott, Note, Sharing App or Regulation Hack(ney)?: Defining Uber Technologies, Inc., 41 Iowa J. Corp. L. 727, 738 (2016) (noting efficiency of TNC’s compared to taxis and lower costs); Rogers, supra note 31, at 95 (noting ‘taxis’ long history of discrimination and Uber’s service in poor neighborhoods). TNCs’ ability to track data may help recognize and mitigate racial discrimination in service. See Rogers, supra note 31, at 95.
younger populations and those in urban areas. Providers have capitalized on the willingness of these populations to share services, introducing product features that allow individuals to pool rides with other users in the nearby vicinity. Notably, a number of the industries governed at the local level are disrupted by sharing-economy services. Within the sharing economy, companies have resisted municipal regulatory efforts and have used fragmented rules to their advantage.

C. TNCs’ Place in the Transportation Economy and Legalization Efforts

The contrast between TNCs and taxis, the market incumbents, is apparent within their regulatory schemes. Municipalities have long regulated taxi services with a shared focus on protecting the economic interests of workers and the health, safety, and fair treatment of their consumers. Municipal regulation technology/california-gig-economy-bill.html [https://perma.cc/57BT-9LG2] (suggesting law “could reshape the gig economy”). This progress, however, suffered a significant step backward in November 2020 when California voters approved Proposition 22, which classified gig-economy workers, including TNC drivers, as independent contractors. See Carolyn Said, Lyft Plans Next Gig-Work Move: Making Peace with Unions that Opposed Proposition 22, S.F. CHRON. (Nov. 4, 2020), https://www.sfchronicle.com/local-politics/article/Lyft-shares-soar-following-passage-of-15701236.php [https://perma.cc/B8DZ-9CD8] (noting TNCs and gig companies spent over $200 million to pass proposition).

35. See Jiang, supra note 19 (noting ride-hailing more common across certain demographic groups). In 2018, over half of surveyed adults between the ages of eighteen and twenty-nine had used ride-hailing services, compared to 24% of adults ages fifty and above. See id. Similarly, those in urban areas were more likely to use the services than those in rural areas, with 45% of respondents in urban communities reporting they have used a TNC versus only 19% of rural respondents. See id. Studies have also noted a similar trend across the sharing economy, likely driven by the density and larger population of urban areas. See supra note 30 and accompanying text (noting urban density supports sharing services).


37. See Davidson & Infranca, supra note 29, at 217 (arguing unlike other disruptive industries, local issues shape sharing economy). As these sharing-economy companies enter marketplaces, they are faced with traditional local regulatory requirements such as “zoning codes, hotel licensing regimes, taxi medallion requirements, [and] insurance mandates.” Id.

38. See id. at 239 (explaining companies define and structure firms in manner to evade regulations). In the home sharing industry, resistance to fragmented regulation is also apparent. See id. at 250. One major provider, Airbnb, remains reluctant to change its platform to comply with different systems of local regulations. See id. Often, sharing-economy companies’ efforts to evade regulations is point of tension between emerging companies and existing providers. See id. at 239.


of taxi companies is consistent with cities’ and towns’ traditional role of regulating issues of transportation. By granting this authority to localities, communities are able to oversee taxi drivers and impose requirements that ensure that taxis service all neighborhoods and passengers, maintain service standards, and provide reasonable and nondiscriminatory rates. A number of communities impose a requirement on taxis that licenses only be granted to operators if they can establish a “public convenience and necessity.” Opponents of specific taxi regulations have argued that states designed these schemes to create a natural monopoly in the market. Amidst this debate, lawmakers found themselves in the difficult position of determining how TNCs fit into these existing regulatory schemes.

As TNCs entered the marketplace, they found themselves operating in a legal “gray area.” Municipalities struggled to determine whether TNCs shared the same legal status as traditional taxis, thus subjecting them to a comprehensive series of regulations, or if they were unique products, which would effectively put them outside the scope of any existing regulations. TNCs advocated that their unique status did not make them traditional taxis and thus not subject to local regulations for those services. TNCs capitalized on this legal “gray area” in many jurisdictions, launching their services in cities that did not have a clear answer whether they could legally operate. States and municipalities varied in

41. See Buck v. California, 343 U.S. 99, 102 (1952) (noting “the operation of taxicabs is a local business”); Davidson & Infranca, supra note 29, at 255-56 n.196 (noting legal system typically tasks local governments with transportation oversight).


43. See Dempsey, supra note 40, at 79-86 (noting requirements in Los Angeles, Houston, Chicago, St. Louis, Minneapolis, and Denver). These “public convenience and necessity” standards provide an important mechanism for cities to control the number of taxis based on factors such as public demand and traffic safety. See id. at 80-81 (outlining standards Houston and Chicago use to determine public necessity).

44. See Elliott, supra note 32, at 747-48 (noting restriction on total taxi licenses available may reduce competition and inflate prices). Studies have proposed a counterargument that deregulating taxis does not produce any benefit to the consumer. See Hubert Horan, Will the Growth of Uber Increase Economic Welfare?, 44 TRANSP. L.J. 33, 74 (2017) (noting taxi deregulation in seventeen cities failed to provide greater consumer benefits).

45. See Heaton, supra note 6 (noting initial controversy over how TNCs fit into regulatory schemes).

46. See Crespo, supra note 4, at 81 (noting sharing economies’ competitive and collaborative factors create uncertain regulatory approach).

47. See id. at 82-83 (highlighting some cities exempted TNCs from regulations while others prohibited them entirely).

48. See Ward, supra note 39 (noting Lyft and Uber deem themselves technology companies); Posen, supra note 5, at 424 (reiterating Uber’s contention service not taxi for regulation purposes).

49. See Travis Kalanick, Uber Policy White Paper 1.0: Principled Innovation: Addressing the Regulatory Ambiguity Around Ridesharing Apps, BLOG.UBER (Apr. 12, 2013), http://www.benedelman.org/uber/uber-policy-whitepaper.pdf [https://perma.cc/CWH6-6GYC] (highlighting Uber policy to expand to cities which tacitly approved TNCs). In the absence of regulatory schemes, Uber announced a policy to implement their own “safeguards” that it determined would go above and beyond those that local bodies placed on commercial transportation. See id.
their willingness to accept TNCs’ argument that they were unique products outside of traditional regulatory frameworks, setting up a fragmented regulatory system across the United States.\textsuperscript{50}

As these platforms gained prominence, states began to experiment with regulatory schemes to address the absence of rules for these products.\textsuperscript{51} Efforts in some states focused on establishing minimum insurance requirements for drivers utilizing their personal vehicles for TNC purposes.\textsuperscript{52} These “insurance only” bills sought to promote the safety of drivers and passengers without subjecting the companies to a complex series of comprehensive regulations.\textsuperscript{53} Other states took a more comprehensive approach and enacted legislation that would require background checks for drivers, limit the use of surge pricing, restrict total driving hours, and collect data on rides, among various other requirements.\textsuperscript{54}

After Colorado passed the first statewide TNC regulation in 2014, all but one state followed suit and passed a regulatory scheme, making TNCs legal across the entire United States within five years of Colorado’s initial regulation.\textsuperscript{55} TNCs actively involved themselves in lobbying efforts leading to their legalization, hoping to shape a more relaxed regulatory approach than traditional taxi regulations for their services.\textsuperscript{56} TNCs not only lobbied state legislatures, but also

50. See Elliott, supra note 32, at 736-37 (noting variety of early regulatory approaches in Alaska, Nevada, and Virginia). An early Alaska court decision determined that Uber would be barred if it continued to charge fees and failed to comply with transportation regulations. See Mun. of Anchorage v. Uber Techs., Inc., No. 3AN-14-009530 CI, 2014 WL 8764776, at *2 (Alaska Super. Ct. Oct. 13, 2014) (granting temporary restraining order on Uber services). In 2014, Nevada banned the services entirely until its legislature passed regulatory framework in May of 2015. See Elliott, supra note 32, at 737 & n.99. New York also took a more restrictive approach to these new technologies, with the Attorney General enjoining the services for failure to comply with the state’s minimum insurance requirements. See infra Section II.F.1 (outlining history of TNCs emergence in New York State).

51. See Posen, supra note 5, at 427-28 (explaining early regulation focused on background check and insurance while not enforcing taxi regulations); see also infra notes 52-54 and accompanying text (expanding on early regulatory approaches taken to address legal “gray areas”).

52. See Moran et al., supra note 8, at 21 (noting five states passed bills only regulating insurance requirements).

53. See id. (noting “insurance only” approach sets only these minimum standards). Standards for insurance coverage are common across states regulating TNCs. See id. at 20 tbl.2 (highlighting all states of surveyed regulated insurance in TNC legislation). Although states vary in their approach, legislation distinguishes insurance requirements in three distinct periods: first, while a driver is searching for a ride, sometimes known as “pre-engagement”; second, while a driver is en route to a matched passenger, “engagement”; and third, while a driver is transporting a passenger to their destination. See Holloway, supra note 27, at 43 (describing structure of insurance minimums for TNCs). The statutes then apply distinct insurance coverage requirements based on the respective period. See id.

54. See Moran et al., supra note 8, at 20 tbl.2 (describing unique regulatory requirements states enacted).

55. See id. at 17 (noting by August 2017 forty-eight states passed statewide legislation); see also Weiss-Tisman, supra note 2 (noting Vermont since passed statewide legislation bringing total to forty-nine states).

56. See Borkholder et al., supra note 1, at 18 (noting TNCs spent at least four million dollars in lobbying from 2016 to June 2017); Rosalind S. Helderman, Uber Pressures Regulators by Mobilizing Riders and Hiring Vast Lobbying Network, WASH. POST (Dec. 13, 2014), https://www.washingtonpost.com/politics/uber-pressures-regulators-by-mobilizing-riders-and-hiring-vast-lobbying-network/2014/12/13/3f4395c6-7f2a-a1l1e4-958-95a1876c4177_story.html [https://perma.cc/D63Y-PWAH] (noting in 2014 Uber employed lobbyists in fifty cities and states). TNCs have vigorously defended their advocacy agenda. See Helderman, supra. In one instance,
participated in efforts to shape and encourage the adoption of model legislation for their products.\textsuperscript{57} The TNCs’ model bill emphasized insurance requirements and background checks for drivers, and specifically sought to exempt municipal governments from regulating these services.\textsuperscript{58} TNCs and others have argued that statewide regulation allows for necessary uniformity essential to their companies’ survival.\textsuperscript{59} State legislators overwhelmingly accepted these arguments and included some sort of preemption language for local governments in 91\% of states.\textsuperscript{60}

\section*{D. Relative Authority of Local Governments}

Although not specifically discussed in the U.S. Constitution, local governments play an important role in the U.S. federalist system and governance.\textsuperscript{51} Local governments serve as subsidiaries of state governments.\textsuperscript{62} Thus, local governments must derive any power they exercise from a superior state government

Uber sent a mass mailing to a California legislator’s constituents after he introduced legislation to implement more stringent insurance requirements for TNCs. See id. Additionally, TNCs have used their apps to mobilize their customers to reach out to legislators on behalf of their agenda. See id. (noting Uber emailed Illinois users online petition to urge Governor to veto strict TNC bill). In New York City (NYC), after Mayor Bill de Blasio announced a measure to limit licenses of TNCs, Uber implemented a “de Blasio’s Uber” option on the app that showed no available drivers or displayed significant wait times, then asked users to voice their opposition to the bill. See Fitz Tepper, Uber Launches “De Blasio’s Uber” Feature in NYC with 25-Minute Wait Times, TECHCRUNCH (July 16, 2015, 2:59 PM), https://techcrunch.com/2015/07/16/uber-launches-de-blasios-uber-feature-in-nyc-with-25-minute-wait-times/. TNCs have also aggressively lobbied against proposals to classify their drivers as employees. See Said, supra note 34 (discussing over $200 million spent in opposition of Proposition 22).

\textsuperscript{57} See BORKHOLDER ET AL., supra note 1, at 20 (noting Uber wrote or co-wrote early drafts of authorizing regulations in Oregon and Ohio). Additionally, TNCs’ model bill language from ALEC, which regulated background checks and insurance, has appeared in many states’ final enacted TNC statutes. See id. at 11. Although Uber and Lyft formally renounced their memberships in ALEC in 2014, connections remained between the two groups: Uber lobbyists presented to ALEC in 2017 on state legislation that would prohibit municipalities from regulating the sharing economy. See id. at 11-12 (noting Uber presentation and Lyft’s connection to lobbying group shaping ALEC’s involvement in TNC regulation).

\textsuperscript{58} See id. at 11-12 (noting statewide legislation backed by TNCs prevents local government regulation). By advocating for background checks and insurance requirements, TNCs can shift costs to drivers. See id. at 11.

\textsuperscript{59} See MORAN ET AL., supra note 8, at 32 (noting TNC opposition to patchwork regulations). But see BORKHOLDER ET AL., supra note 1, at 12-13 (arguing patchwork argument “especially odd . . . coming from savvy, nimble, tech companies like Uber”).

\textsuperscript{60} See MORAN ET AL., supra note 8, at 20 tbl.2 (detailing percentage of states with preemption language in August 2017). Most states expressly prohibit any local regulations of TNCs, while others have permitted specific cities to regulate aspects of TNCs or allow municipalities to opt-out of statewide regulations. See WASH. STATE JOINT TRANS. COMM., REGULATION OF TRANSPORTATION NETWORK COMPANIES: POLICY GUIDE 6 (2019), https://leg.wa.gov/JTC/Documents/Final%20Studies/TNC_PolicyGuideFinal.pdf [https://perma.cc/BB9P-4SXE].


\textsuperscript{62} See MANDELKER ET AL., supra note 10, at 6 (explaining relative balance of local governments).
that grants such authority. Unlike the federal government, state governments have plenary power. While the federal government can only act upon enumerated powers set forth in the U.S. Constitution, state governments have generalized power to act on any area not prohibited by the Constitution. The Tenth Amendment further constrains the federal government from interfering in local activities.

While local governments’ authority derives from the public, state governments significantly limit these powers. This principle is embodied by Dillon’s Rule, which emerged in the late nineteenth century and is named for judge and legal theorist John Dillon. The rule states that a municipal corporation can only exercise powers that a state government explicitly grants them or those that an express power implies. The rule highlights the practical limitations that arise from municipalities’ relationship with state governments, mainly that they cannot take action without the consent or express authority from the state. Dillon’s Rule not only serves as a legal theory, but also as a common-law principle that some states still follow.

As a response to the evolving needs of local governments, many states enacted reforms during the late nineteenth and early twentieth century to allow for greater

63. See Barron, supra note 61, at 390 (explaining states have power to establish and structure local governments).

64. See id. (highlighting broad powers states hold); MANDELMER ET AL., supra note 10, at 6 (contrasting state and federal government power).

65. See MANDELMER ET AL., supra note 10, at 6 (defining balance of power in federalist system); THE FEDERALIST NO. 45, at 289 (James Madison) (Clinton Rossiter ed., 1961) (contrasting “few and defined” federal government powers with “numerous and indefinite” state government powers).

66. See U.S. Const. amend. X; see also Sullivan, supra note 61, at 1937-38 (summarizing Tenth Amendment language reserves powers not delegated to states to “the people”). Earlier versions of the Tenth Amendment sought to reserve powers not delegated by the Constitution to the states respectively. See Sullivan, supra note 61, at 1938-39. Nevertheless, this language was not accepted by the Senate, supporting the idea that certain powers are reserved to the people. See id. at 1939 (arguing reservation of powers to “the people” provides local self-determination and implicitly authorizes local governments).

67. See MANDELMER ET AL., supra note 10, at 6 (explaining local governments subsidiaries of state governments).

68. See id. at 79 (tracing development of Dillon’s Rule); see also Cities 101 – Delegation of Power, supra note 11 (explaining Dillon’s Rule).


70. See City of Clinton v. Cedar Rapids & Mo. River R.R. Co., 24 Iowa 455, 477 (1868) (holding legislature authorized to grant use of city street to private entity without city’s consent). In this decision, Judge Dillon famously explained that “[m]unicipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature.” See id. at 475. Due to this authority structure, state legislatures retain the ability to not only authorize actions of local governments but also to eliminate these municipal corporations. See id. (noting “[a]s it creates, so it may destroy”).

71. See Marcus Cable Assocs. v. City of Bristol, 237 F. Supp. 2d 675, 678-79 (W.D. Va. 2002) (finding Dillon’s Rule bars municipality from operating cable television services without express delegation). In its decision, the court relied on Dillon’s Rule and noted neither state nor federal law authorized a municipality to undertake such activities. See id. A year later, the legislature enacted a law that would give municipalities such authority to operate these services. See Martinsville Cable Inc. v. Time Warner N.Y. Cable, LLC, 445 F. Supp. 2d 668, 675 (W.D. Va. 2006) (noting Virginia General Assembly passed Municipal Cable Law in response to Marcus Cable).
municipal control through home rule provisions.\textsuperscript{72} States vary in their approaches to local municipal control, with some states adopting state constitutional provisions that delegate enumerated powers to local governments and others granting local governments the full plenary powers of the state unless otherwise restricted.\textsuperscript{73} Broadly, home rule provisions act as a mechanism to enumerate authority to municipalities to act in matters of local concern.\textsuperscript{74} Proponents of more expansive home rule posit more autonomy allows municipalities to tackle unique problems and increase policy innovation.\textsuperscript{75} Nevertheless, home rule opponents note that it fuels fragmentation across states, a frequent argument in the TNC legalization debate.\textsuperscript{76}

In the face of these additional home rule powers, state governments retain the authority to restrict a locality’s ability to act upon these authorities through preemption.\textsuperscript{77} Similar to federal preemption, intrastate preemption bars a local government from legislating in a field that the state legislature has already regulated.\textsuperscript{78} Preemptive language may expressly bar a locality from acting in a particular area, or the language of the statute may simply imply preemption instead.\textsuperscript{79} Most states frame implied preemption through the familiar standards of the U.S. Supreme Court, recognizing situations of either “field” or “conflict”

\textsuperscript{72} See David J. Barron, Reclaiming Home Rule, 116 Harv. L. Rev. 2255, 2288-89 (2003) (noting rapid population increases in cities developed home rule movement despite Dillon’s Rule). Pressures in cities regarding rising tax rates, sanitary conditions, and housing issues spurned much debate regarding municipal governance in the late nineteenth and early twentieth century marked the departure away from strict adherence to Dillon’s Rule. See id. at 2289.

\textsuperscript{73} See MANDELKER ET AL., supra note 10, at 89-90 (explaining various formulations in state constitutions for home rule provisions); see also Barron, supra note 72, at 2347 (noting how constitutional provisions restrain reach of various home rule provisions). Within their home rule amendments, some states only permit local governments to act in areas of “local” concerns, others bar regulation on “private or civil affairs,” and some bar local taxing authority. See Barron, supra note 72, at 2348-49. While seemingly a grant of the state’s police powers, some home rule amendments do not have a sweeping liberalization effect on local governments. See id. at 2349. Ambiguities in a municipality’s authority to act with respect to a confining home rule provision permits courts to further develop and explain the relative authority of local governments in the states. See id.

\textsuperscript{74} See Barron, supra note 61, at 392 (comparing home rule provisions to “mini-Article I for local governments”).

\textsuperscript{75} See Barron, supra note 72, at 2339-41 (explaining advantages of local control in exporting innovative policy solutions); see also Paul A. Diller, Why Do Cities Innovate in Public Health? Implications of Scale and Structure, 91 Wash. U. L. Rev. 1219, 1221-22 (2014) (suggesting local regulation of public health models how cities can innovate). In addition to addressing unique local challenges, this system also encourages other local communities to import and model other schemes which have proven successful in other communities. See Barron, supra note 72, at 2340-41 (noting export of living wage movement and uniformity of local building codes after local success).

\textsuperscript{76} See Barron, supra note 72, at 2261-62 (explaining anti-sprawl reformers argue localism encourages “extreme jurisdictional fragmentation”); BORKHOLDER ET AL., supra note 1, at 12-13 (presenting and questioning TNCs’ arguments against fragmentation); see also Davidson & Infranca, supra note 29, at 251-52 (detailing examples of TNCs’ resistance to regulatory schemes).


\textsuperscript{78} See Paul Diller, Intrastate Preemption, 87 B.U. L. Rev. 1113, 1140-42 (2007) (outlining potentially superior state legislature could bar local governments from regulating via preemption).

\textsuperscript{79} See id. at 1115-16 (distinguishing implied preemption and express preemption).
preemption. Field preemption bars a municipality from acting when state law has “fully occupied” a particular field. Critics claim this doctrine introduces considerable judicial judgment into determining the interrelation between state and local regulations. In contrast, conflict preemption seeks to address issues when adherence to a local law would cause a regulated party to be in conflict with state law. Reviewing state courts have developed a variety of tests to resolve these disputes; many courts, however, employ the “permit/prohibit” rule that bars a locality from permitting an act which state law prohibits and conversely prohibiting an act which state law permits.

State preemption issues have proved challenging for many reform-minded local governments and in debates surrounding TNC regulation. In recent years, state legislatures have enacted restrictive preemptive provisions to foreclose local governments from passing legislation in multiple areas. For example, states have preempted local laws regarding single-use plastic bags, gender identity anti-discrimination protections, minimum wage protections, and a host of other policies. Opposition to local regulation has also led some state legislatures to

80. See id. at 1141 (noting state preemption analysis closely mirrors Supreme Court’s approach to federal preemption); see also JAY B. SYKES & NICOLE VANATKO, CONG. Rsch. Serv., R45825, FEDERAL PREEMPTION: A LEGAL PRIMER 1 (2019), https://fas.org/sgp/crs/misc/R45825.pdf [https://perma.cc/6EE2-BZDM] (outlining Supreme Court’s approach and categories of federal preemption). Although Utah is the only state to expressly adhere to the Supreme Court’s analysis, most state courts have employed the familiar categories of field and conflict preemption. See Diller, supra note 78, at 1141.

81. See Diller, supra note 78, at 1153.

82. See id. at 1154-55 (noting argument field preemption requires significant judicial judgment). In determining field occupation, many state courts rely on a review of legislative intent to determine if the legislature intended state law to supplant any local regulations. See id. at 1155. Relying on legislative intent creates its own difficulty, however, as the absence of express preemption language may raise an inference that a legislature did not consider the potential for future local regulation or could not reach an agreement on the matter. See id. (highlighting lack of express intent may indicate intent to reserve powers).

83. See id. at 1140-41 (defining conflict preemption). Conflict preemption can be further broken down into two subcategories: “physical impossibility” and “obstacle.” Id. at 1140. The physical impossibility subcategory notes that compliance with both schemes is untenable, and the obstacle subcategory denotes when local regulation runs counter to the objectives of superior state law. See id. (defining conflict preemption categories).

84. See id. at 1142 (explaining rule and prevalence in state common law).

85. See Griffault, supra note 77, at 1997, 1999 (observing aggressive preemptive measures by state legislatures marked last decade); BORKHOLDER ET AL., supra note 1, at 10 (highlighting local preemption in forty-one state TNC laws).

86. See BORKHOLDER ET AL., supra note 1, at 10 (setting forth use of preemption to block legislation); see also Griffault, supra note 77, at 1999 (noting preemption more prevalent after local governments expand worker rights). Trade associations and business lobbying groups often support these measures with the intention of reducing the regulatory landscape. See Griffault, supra note 77, at 1999 (describing business groups’ efforts at state level to combat undesirable local reforms). Advocacy groups, such as ALEC, assist state legislatures by providing templates and advocacy for these preemptive measures. See id. at 2001 (explaining ALEC’s involvement in counteracting local plastic bag bans); see also BORKHOLDER ET AL., supra note 1, at 10 (outlining ALEC’s opposition to local policymaking).

87. See Griffault, supra note 77, at 1999-2002 (summarizing local proposals preempted by state governments).
consider so-called “nuclear preemption” that would implement outright bans on local regulation.88

E. Court Challenges to TNC Regulation

Facing multiple threats to their business model, including uncertainty about the future of the transportation industry, taxi operators commenced various legal challenges against TNCs.89 These challenges alleged that allowing market entry to unregulated TNCs violates both the Takings Clause of the Fifth Amendment and the Equal Protection Clause of the Fourteenth Amendment.90 TNC opponents have had minimal success contesting broad state preemption authority on constitutional grounds.91

One challenge taxi professionals raised rested on the fact that TNCs’ market entry threatened taxi operators’ property interests in licenses granted by municipalities and thus constituted an illegal regulatory taking under the Fifth Amendment.92 In Illinois Transportation Trade Ass’n v. City of Chicago, the Seventh Circuit held that taxi operators could not establish a property interest in medallions that the City of Chicago had issued them.93 Following TNCs’ introduction

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88. See id. at 2007 (highlighting broad preemptive legislative proposals in Oklahoma, Florida, and Texas). Opposition to local regulations has garnered prominent support, including Governor Greg Abbott, who stated that Texas should adopt a “ban across the board on municipal regulations.” Id. Although the legislature did not adopt Governor Abbott’s proposal, reservations regarding local regulations can still be seen in Texas’s approach to TNC regulation. See infra notes 144-145 and accompanying text (describing state action preempting local TNC regulations).

89. See Wyman, supra note 40, at 28 (discussing issues taxi operators face). Taxi drivers have brought unsuccessful challenges on constitutional grounds in Florida, Massachusetts, New Jersey, California, New York, and Wisconsin. See id. at 5-6 nn.8-9 (providing citations to legal challenges).

90. See id. at 5-6 nn.8-9 (highlighting early legal challenges following TNCs entry into local markets). Taxi operators argued that, by failing to impose equal regulatory terms, the government effectively diminished the value of a taxi medallion and upended a government practice of limiting entry to the taxi business. See id. at 93-94 (emphasizing operators’ argument government actions amount to sudden contractual change and frustrate expectations).

91. See id. at 5 n.8 (cataloging unsuccessful equal protection challenges); id. at 6 n.9 (noting courts rejected all Takings Clause challenges).

92. See Petition for Writ of Certiorari at 19-20 & n.18, Ill. Transp. Trade Ass’n v. City of Chicago, 839 F.3d 594, 598 (7th Cir. 2016), cert. denied, 137 S. Ct. 1829 (2017) (citing Chicago cab drivers’ declaration of 35-40% revenue loss following Uber’s arrival). The Fifth Amendment requires private property shall not “be taken for public use, without just compensation.” U.S. CONST. amend. V. In determining whether a regulatory taking took place, the Court has noted several factors including: the economic impact of the regulation, the extent the regulation interferes with distinct investment backed expectations, and the character of the governmental action. See Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978) (explaining Court does not apply “set formula” in takings claim but applies outlined factors).

93. See Ill. Transp. Trade Ass’n, 839 F.3d at 596 (holding claim meritless due to lack of physical property confiscation). The court emphasized that although these products are disruptive, they do not affect the right of taxi medallion holders to operate in the city. See id. The court illustratively analogized Chicago authorizing TNCs to the city granting permission to operate a coffee shop in the city and how that would not prevent the city from granting a business license to a tea shop. See id.
to Chicago, the medallion market essentially collapsed.\(^\text{94}\) TNC operators benefitted from not having to adhere to the regulations imposed on cab drivers including driver and vehicle qualification, regulations on fares, and handicap accessibility requirements.\(^\text{95}\) Despite the disparate treatment, the court held the plaintiffs failed to establish that the city had actually confiscated or taken any property.\(^\text{96}\) The court further elaborated that although a locality may vest a property interest in an actor, that does not necessarily grant a right to be free from competition.\(^\text{97}\) In a companion case, *Joe Sanfelippo Cabs, Inc. v. City of Milwaukee*,\(^\text{98}\) the plaintiffs contested Milwaukee removing an existing cap on the number of taxi permits issued by the city that subsequently allowed new taxis and TNCs to flood the market.\(^\text{99}\) The court held Milwaukee’s action was permissible even though it encouraged competitor services and caused a significant decline in the “property” value of former permits.\(^\text{100}\)

Similar to the Seventh Circuit’s ruling in *Illinois Transportation Trade Ass’n*, a number of trial courts have been reluctant to hold that TNCs’ impact on medallion prices generally constitutes an illegal taking.\(^\text{101}\) In two Massachusetts cases, impacting both Boston and the nearby city of Cambridge, trial courts rejected the notion that taxi medallion ownership created a property interest in the transportation-for-hire market itself.\(^\text{102}\) Although taxi operators throughout the

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94. See Petition for Writ of Certiorari, *supra* note 92, at 8 (noting Chicago unable to sell fifty new medallions at auction in 2013). Additionally, monthly medallion sales saw a significant decrease in Chicago, dropping from 37 sold in a month to 1.4, and lenders that refinanced medallions left the market. See *id.* (summarizing market impact of TNCs’ emergence in Chicago).

95. See *id.* at 7 (discussing significant costs of taxi operation in Chicago). The city required taxi operators to pay over $300,000 for an operating license, maintain $4,300 in primary liability insurance per car, purchase new vehicles every four to six years, and provide wheelchair accessible vehicles—requirements not imposed on TNCs. See *id.* (outlining numerous mandates on taxi operators).

96. See *Ill. Transp. Trade Ass’n*, 839 F.3d at 596 (noting claim for city-confiscated medallion would have merit). The Seventh Circuit did not apply the factors outlined in *Penn Central* for a regulatory taking and instead rested its analysis on the fact that plaintiffs could not establish a property interest. See Petition for Writ of Certiorari, *supra* note 92, at 24 (arguing lower court failed to apply *Penn Central* in determining petitioners’ right to just compensation).

97. See *Ill. Transp. Trade Ass’n*, 839 F.3d at 596 (noting property interests do not equate to freedom from competition). The court further explained new technologies often have a similar disruptive effect and “a common result is the decline or even disappearance of the old.” See *id.* at 596-97.

98. 839 F.3d 613 (7th Cir. 2016).

99. See *id.* at 615 (outlining plaintiff’s argument local cap created property interest for drivers).

100. See *id.* (holding taxi permit only confers right to operate and not property interest in permit’s valuation). The court noted that although taxi permit holders have experienced a significant decline in value of their former permits, a locality may reconsider its approach to licensure and permit other services into the market. See *id.* (analogizing city which issues one grocery store operating license may increase licenses when population grows).

101. See Wyman, *supra* note 40, at 6 & n.9 (noting series of trial court cases rejecting takings claims); *Ill. Transp. Trade Ass’n v. City of Chicago*, 839 F.3d 594, 598 (7th Cir. 2016) (holding no merit to takings claim, *cert. denied*, 137 S. Ct. 1829 (2017)).

country have experienced a significant decline in business following the introduction of TNCs, arguments that this loss amounts to an impermissible taking have largely failed.103 Courts have also rejected constitutional challenges to the disparate treatment of taxi companies and TNCs on equal protection grounds.104 In *Illinois Transportation Trade Ass’n*, the Seventh Circuit held the differences between TNCs and taxis were significant enough to “justify different regulatory schemes.”105 Although taxi operators and other advocates debate the distinctions the court relied on, the court held regulators had sufficient rational basis to distinguish between the treatment of taxis and TNCs.106 Sister circuits and other trial courts have dealt with legal challenges from taxi operators in a similar manner, holding that the distinctions between taxis and TNCs are enough to justify disparate treatment by regulating authorities.107

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104. See Wyman, *supra* note 40, at 5 n.8 (noting various unsuccessful equal protection challenges to TNCs authorization).

105. See *Ill. Transp. Trade Ass’n*, 839 F.3d at 598. The court noted that unlike taxis, TNC users sign up for the service and enter a contractual relationship with the company that specifies “fares, driver qualifications, [and] insurance.” See id. Further, the court noted that differences arise because TNCs take a primary role in screening driver’s qualifications and the on-demand system impacts the amount of mileage these part-time drivers may utilize on local roads. See id.

106. See id. at 598-99 (rejecting trial court’s equating of taxis’ and TNCs’ purposes within equal protection analysis).

107. See Progressive Credit Union v. City of New York, 889 F.3d 40, 51 (2d Cir. 2018) (holding NYC could treat TNCs and licensed cabs differently); Newark Cab Ass’n v. City of Newark, 901 F.3d 146, 159 (3d Cir. 2018) (commenting Equal Protection Clause “not the proper avenue” to address distinct regulations); Checker Cab Operators, Inc. v. Miami-Dade Cnty., 899 F.3d 908, 922 (11th Cir. 2018) (holding plaintiff overstated differences between taxicabs and TNCs and county distinctions rational); VTS Transp., Inc. v. Palm Beach Cnty., 239 F. Supp. 3d 1350, 1355 (S.D. Fl. 2017) (holding rational basis existed for Uber’s temporary operating agreement); Wyman, *supra* note 40, at 5 n.6 (summarizing fate of challenges on equal protection grounds).
More recently, some taxi operators have begun to challenge specific TNCs on antitrust grounds. In Philadelphia Taxi Ass’n v. Uber Technologies, taxi owners alleged that Uber’s entry into the city was marked by anticompetitive behaviors that violated the Sherman and Clayton Antitrust Acts. In affirming the trial court’s dismissal, the Third Circuit rejected characterizations that TNCs blocked competition in the local market. Scholars have noted that antimonopolistic behavior in “big tech” companies may pose future problems for TNCs; nevertheless, at this moment, any monopolistic challenge to these companies appears to be in the political rather than judicial realm.

F. Role of Localities Post-Legalization: Two Approaches

As states throughout the country developed regulatory approaches to TNCs, important questions remained as to whether these entities were more appropriately regulated at the state or local level of government. Most jurisdictions embraced TNCs’ and ALEC’s arguments that explicit preemptive language was necessary to avoid patchwork regulations. A closer look at two states’
approaches to preemption helps elucidate how legislatures can approach these issues.\footnote{See infra Section II.F.1-2 (discussing regulatory approaches of New York and Texas).}

\section*{1. New York: A Permissive Role for Local Governments}

TNCs were formally legalized in the state of New York in April of 2017 with the signing of the 2017-2018 state budget by Governor Andrew Cuomo.\footnote{See Press Release, New York Governor Andrew M. Cuomo, Governor Cuomo Announces Passage of the FY 2018 State Budget (Apr. 10, 2017), https://www.governor.ny.gov/news/governor-cuomo-announces-passage-fy-2018-state-budget [https://perma.cc/NNZ2-YRXG] [hereinafter 2018 Budget Press Release] (highlighting 2018 budget provisions regarding ride hailing authorization).} TNCs were previously authorized to operate in NYC through an arrangement with the city.\footnote{See JVG, New York City Approves Controversial Taxi E-Hail Pilot Program, VENTURE BEAT (Dec. 13, 2012, 8:46 AM), https://venturebeat.com/2012/12/13/nyc-tlc-e-hail-pilot [https://perma.cc/E4Q3-PL5E] (outlining approval of pilot program for TNCs following uncertain regulatory landscape upon launch).} TNCs briefly operated in areas outside of NYC, but the New York State Attorney General pursued court action, citing drivers’ insufficient insurance requirements.\footnote{In response, Lyft entered into a settlement with the Attorney General that left upstate New York and Long Island without TNC services and sparked movement toward legalization and regulation. Throughout the debate, local governments and advocacy groups argued municipalities should have the ability to regulate these actors similarly to the licensure of taxi operators in their jurisdictions.}\footnote{See infra Section II.F.1-2 (discussing regulatory approaches of New York and Texas).} In response, Lyft entered into a settlement with the Attorney General that left upstate New York and Long Island without TNC services and sparked movement toward legalization and regulation. Throughout the debate, local governments and advocacy groups argued municipalities should have the ability to regulate these actors similarly to the licensure of taxi operators in their jurisdictions.\footnote{See infra Section II.F.1-2 (discussing regulatory approaches of New York and Texas).}

In New York, it is important to note that NYC has been active in regulating the TNC landscape in recent years by passing legislation to cap the number of drivers on the city’s streets, guarantee certain wages for drivers, and limit the amount of time drivers can cruise in NYC’s most congested areas.\footnote{See James D. Cole, Constitutional Home Rule in New York: “The Ghost of Home Rule”, 59 ST. JOHN’S L. REV. 713, 715 (1985) (highlighting state legislature plays role in delineating local powers despite New York home rule provision).} While this Note focuses on statewide regulations in New York, it is important to note that NYC has been active in regulating the TNC landscape in recent years by passing legislation to cap the number of drivers on the city’s streets, guarantee certain wages for drivers, and limit the amount of time drivers can cruise in NYC’s most congested areas.\footnote{See infra Section II.F.1-2 (discussing regulatory approaches of New York and Texas).} These efforts have had mixed success: A district court recently vacated NYC’s cruising limitation. See Zehn-NY LLC v. N.Y.C. Taxi & Limousine Comm’n, No. 159195, 2019 N.Y. Misc. LEXIS 6789, at *1, *8 (N.Y. Sup. Ct. Dec. 23, 2019) (finding requirement arbitrary and capricious after objecting to calculation of cruising time).}

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In the 2016 legislative session, the chairs of each legislative chamber’s insurance committee introduced bills that sought to authorize TNCs outside of NYC.121 Initially, both the Senate and Assembly bill drafts retained a significant degree of local control for municipalities.122 Ultimately, neither proposal gathered enough support to pass both houses.123

In his 2017 State of the State address, Governor Cuomo announced that he was including a legislative proposal for the expansion of TNCs into upstate New York and Long Island in the state budget.124 Due to the unique budget process of the New York State Legislature, inclusion of this proposal highlighted its likely passage and the political will and urgency surrounding authorization of these services.125 After a series of negotiations, the final budget language contained provisions that authorized TNCs’ services outside of NYC and instituted minimum insurance thresholds, mandatory background checks, and mechanisms for the state’s Department of Motor Vehicles to regulate TNCs.126

drivers, and pervasive state regulations may stall their ability to impose additional requirements. See id. (quoting Nassau County official on county’s driver qualifications for taxi services).


122. See N.Y. S.B. S04108D § 4 (noting municipalities may adopt regulations regarding TNCs including driver background checks); N.Y. Assemb. B. A08195B § 1(8)(g) (permitting municipalities to regulate registration, licensing, and TNCs’ pickups and drop-offs).


125. See Seymour P. Lachman with Robert Polner, Three Men in A Room: The Inside Story of Power & Betrayal in an American Statehouse 155-57 (2006) (discussing New York’s executive budgeting system and Governor’s role designing and controlling policy proposals). New York’s budget process permits the executive to submit legislative proposals related to appropriations, and the legislature maintains only a limited role in critiquing the Governor’s proposals. See id. at 157 (discussing role of legislature in budget process).

126. See 2018 Budget Press Release, supra note 116 (highlighting significant role in TNC regulatory scheme). Throughout the budget negotiation process, leaders in the Assembly continued to advocate for additional local control. See Vielkind, supra note 120 (highlighting Assembly introduction of bill permitting local regulation following executive budget language).
Despite support from some counties, the final budget language did not expressly denote a role for localities in TNC regulation. Nevertheless, the budget language did include a carve-out that permitted counties and any city with a population over 100,000 individuals to opt out of the statewide regulatory framework. Although this provision presents an option for local control, to date no city or county has exercised this right.

2. Texas: Restrictive Preemption

TNCs first arrived in Texas shortly after the companies launched. TNCs mainly established their services in cities and large population areas. TNCs relied on a series of local agreements to continue their operation within local municipalities.

TNCs fought one of their most prominent battles in Austin. The city initially passed an “interim” city law that permitted TNCs to operate within its boundary in October 2014. In December of 2015, the City Council altered regulations on TNCs, imposing a mandatory fingerprint background check system for all ride-hailing drivers within the city. TNCs fiercely opposed the

127. See supra note 126 and accompanying text (noting final budget agreement’s emphasis on state oversight); Vielkind, supra note 120 (noting support for local control by New York’s three most populous counties outside of NYC).
130. See Moran et al., supra note 8, at 9 (noting Dallas first Texas city to receive TNC services in 2012).
131. See id. (explaining twenty cities approved TNC regulations between 2014 and 2016).
132. See id. (discussing local ordinances regulated background checks, passenger protection, and permits).
135. See id. (noting bill’s wide-margin passage despite significant opposition from TNCs). The fingerprint background requirement sought a more extensive criminal background check on drivers after reports of sexual assaults by drivers with ride-hailing services. See id. Supporters of the bill acknowledged that these checks would not identify all potential threats, but argued they would help detect more individuals with criminal records. See id.; see also Zeilin, supra note 133 (noting TNCs deemed background checks “unnecessary precaution”).
passage of fingerprint background check, threatening to pull out of the city if the Council enacted the proposal.136 In a close vote, voters opted to maintain fingerprint background checks and rejected self-regulation for TNCs, despite TNCs spending nearly $9 million in support of self-regulation.137 Following the voters’ rejection, both Uber and Lyft suspended services within the City of Austin.138

The conflict in Austin drew up support for a statewide TNC regulatory system that would usurp the intervention of cities like Austin.139 Representative Christopher Paddie introduced House Bill 100 in February of 2017.140 The bill’s language notably contained a provision that would expressly prohibit any municipal regulations regarding TNCs.141 The bill faced opposition from a number of local municipal leaders and the Texas Municipal League, who argued that local regulations help ensure TNCs remain accountable to local officials and standards.142 Additionally, lawmakers offered amendments to permit municipalities to conduct fingerprint background checks on drivers; however, these amendments were rejected by the legislature.143

On May 29, 2017, Governor Greg Abbott signed legislation that authorized TNCs’ operation and prohibited the adoption of any municipal regulations over the companies.144 Shortly after signing the bill, Governor Abbott noted the bill’s

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137. See Alex Hern, Uber and Lyft Pull Out of Austin After Locals Vote Against Self-Regulation, GUARDIAN (May 9, 2016), https://www.theguardian.com/technology/2016/may/09/uber-lyft-austin-vote-against-self-regulation [https://perma.cc/5TEB-T7TU] (noting significant investment of TNCs supporting proposition despite only $100,000 spent against).

138. See id. (reporting withdrawal of Uber and Lyft in Austin following failed referendum).

139. See Zeitlin, supra note 133 (noting Uber and Lyft turned attention to Texas statehouse following proposition’s failure in Austin).


142. See HOUSE RSRCH, ORG., BILL ANALYSIS, H. 85-100, 85th Leg., Reg. Sess., at 1, 7 (Tex. 2017) (noting objections also came from representatives of Dallas, San Antonio, and Houston city governments).

143. See HOUSE JOURNAL, H. 85, 85th Leg., Reg. Sess., at 1600 (Tex. 2017) (rejecting amendment to House Bill 100 expressly permitting municipalities to require fingerprint background checks).

restrictive nature, tweeting, “[t]oday I signed a law to overturn the City of Austin’s regulation that trampled freedom [and] free enterprise.”¹⁴⁵

III. ANALYSIS

TNCs have cemented themselves as part of the modern sharing economy and transportation infrastructure across the United States.¹⁴⁶ In light of this reality, we must continue to analyze the post-regulatory landscape to understand the legal statuses of these companies and how states and municipalities will grapple with and delegate policy choices that arise from TNCs’ rapid emergence.¹⁴⁷ While state lawmakers focused on developing some kind of regulatory scheme and uniformity over the past six years, TNCs’ aggressive approach in advocating for strict preemption of local control will stymie policy innovation and accountability in the industry.¹⁴⁸

A. Centralized Regulatory Approaches Ignore Benefits of Local Control

The rapid development of TNC regulations has resulted in largely centralized statewide regulatory schemes that encourage registration, compliance with insurance laws, passenger safety, and rider fee collection.¹⁴⁹ States have appropriately recognized the need to close the legal “gray area” that existed in the early years of the TNCs’ market entry.¹⁵⁰ Although state legislatures have largely succeeded in closing in on these unregulated markets, enacting regulatory statutes should


¹⁴⁶. See Davidson & Infranca, supra note 29, at 264 (noting sharing economies dramatically impact way individuals move across cities). TNCs’ emergence also provided an opportunity for communities to complement existing transportation systems. See id. at 263 (outlining L.A. County partnership with Lyft to solve “first-mile/last-mile” problem); see also Jiang, supra note 19 (explaining large number of Americans utilize TNCs).

¹⁴⁷. See Borkholder et al., supra note 1, at 10 (summarizing state legalization efforts successful in forty-eight states). Although commentators have focused political considerations towards legalization efforts, there has not been any significant consideration of how TNCs fit in the larger legal framework of home rule and local autonomy. See Wyman, supra note 40, at 76-77 (describing choice of regulation level “second-order issue”); Moran et al., supra note 8, at 22 (providing brief history of role of local governments in TNCs regulation).

¹⁴⁸. See Borkholder et al., supra note 1, at 8, 27 (noting preemption precludes locally-elected lawmakers from regulating their own transportation systems and supporting local workers).

¹⁴⁹. See Moran et al., supra note 8, at 18, 19 tbl.1 (summarizing main policy considerations in state legislative schemes).

¹⁵⁰. See Crespo, supra note 4, at 101 (highlighting preregulatory “insurance gap” in which TNCs did not provide insurance for drivers between rides). Regulatory reform has allowed states to address issues such as the “insurance gap,” along with other public safety initiatives. See Moran et al., supra note 8, at 20 tbl.2 (noting out of forty-four states, all regulated insurance requirements). States have directly closed the “insurance gap” through legislation. See, e.g., N.Y. VEH. & TRAF. LAW § 1693 (McKinney 2020) (effective June 29, 2017) (outlining New York insurance limits for each period of TNC services). Additionally, states have collected untapped revenue and fees previously unavailable during TNCs’ unregulated period. See Enwemeka, supra note 13 (highlighting Massachusetts collected $16 million from TNCs in 2018). This revenue can play an important role in supplementing transportation initiatives in state governments, local governments, and even the struggling taxi industry. See id.
be the first step in an ongoing process to monitor and regulate this area of the transportation marketplace. Initially, state governments were under significant pressure to act quickly because of consumer demand for TNC services, but this time sensitivity is now generally eliminated which may balance the bargaining positions of TNCs and local regulating bodies. Local governments may not be able to capitalize on this improved bargaining position because of preemption; state legislatures, however, retain this advantage and could utilize it to revisit TNC regulations. Continued legislative oversight and regulation of TNCs are needed to ensure that these statewide regulatory frameworks appropriately promote the public welfare. At the statewide level, TNCs displayed a concerning amount of lobbying power in the initial legalization debate, creating a significant concern that state legislatures may not have the political capital needed to enact meaningful future reforms. Most concerning is the limited role that the majority of state legislatures have carved out in their enacting legislation for local governments to regulate TNCs. TNCs correctly noted inefficiencies and market barriers existed in the for-hire transportation regulation at the local level. A patchwork system of regulations poses both logistical and economic challenges for companies as

151. See Rosenberg, supra note 34 (highlighting states interest in revisiting driver classification after California passed A.B. 5). States must not only revisit larger economic issues, such as legal status of TNC employment, but must also ensure that revenue collection matches expectations and facilitates the larger intended goals of legalization of TNCs. See Enwemeka, supra note 13 (noting Boston Mayor contends additional TNC fee revenue needed to support city’s transportation needs); see also JVG, supra note 117 (noting New York City Council efforts to amend TNC regulations). New York City Council’s measures may serve as a model for other communities on how to monitor these services and tweak regulatory framework in response to TNCs’ impact on congestion and other goals. See JVG, supra note 117.

152. See Borkholder et al., supra note 1, at 21 (outlining TNCs’ threats to pull out of communities rather than negotiate adverse regulations); supra notes 118-19 (highlighting need for New York Legislature to act rapidly following Attorney General halting services). TNCs initially threatened to leave markets entirely if municipalities did not structure regulations in an acceptable way. See Borkholder et al., supra note 1, at 21 (noting legislators often relent in hard-nosed negotiations in populous areas).

153. See Borkholder et al., supra note 1, at 28-29 (recommending state lawmakers reverse TNC laws stripping workers’ rights and urging local legislative advocacy).

154. See id. at 28 (highlighting both statewide and local reform of TNC laws necessary).

155. See supra note 56 and accompanying text (discussing significant lobbying efforts of TNCs in legalization debate). While local officials were still subject to intense lobbying, organizations representing cities remained steadfast in their efforts in advocating that localities should be able to regulate TNCs. See Borkholder et al., supra note 1, at 20 (pointing to organizations representing cities in Florida, Oregon, and Ohio advocating for local control).

156. See Borkholder et al., supra note 1, at 10 (noting forty-one states explicitly or implicitly restrained local governments’ role of regulating TNCs).

157. See Elliott, supra note 32, at 752; O’Connor, supra note 113, at 606 (arguing regulating TNCs at state level provides uniform regulations and reduces barriers to entry). Despite supporting uniform regulations, some drivers and commentators acknowledge that cities have distinct advantages in recognizing areas of local concern. See Elliott, supra note 32, at 752; O’Connor, supra note 113, at 608 (noting cities can most directly understand local factors).
drivers increasingly travel across local boundaries.\textsuperscript{158} Nevertheless, local governments play an important role in establishing policies that meet the unique needs of their communities.\textsuperscript{159} For centuries, states respected local governments’ ability to meet the unique needs of their communities, and delegated authority on transportation matters in order to actively monitor regulations and limit these services based on public convenience and necessity.\textsuperscript{160} Notably, few states require individual drivers or TNCs’ vehicles to have a permit, thus preventing communities from determining a TNCs’ necessity before entering their market.\textsuperscript{161} By eliminating this aspect of licensure, most local lawmakers have lost an important tool in dealing with congestion in their cities and towns.\textsuperscript{162} Additionally, by evading local regulatory control TNCs are subject to state authorities that do not exert the same heightened level of attention and concern over their regulated industries.\textsuperscript{163}

Local governments have a keen interest in tackling the negative externalities TNCs create with respect to congestion, passenger safety, and local workforces.\textsuperscript{164} For example, in light of recent reports indicating a significant number

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\item \textsuperscript{158} See Moran et al., supra note 8, at 32 (noting conformance with multiple TNC regulations may impose administrative costs); Borkholder et al., supra note 1, at 12 (noting Uber’s statement that Washington legalization with multiple regulatory schemes poses “significant costs”). Despite this contention from TNCs, there are no reported studies that patchwork regulation has stalled the expansion of TNCs to different states. See Moran et al., supra note 8, at 32.
\item \textsuperscript{159} See Davidson & Infranca, supra note 29, at 255 (adding national regulation stifes nuanced local response); Barron, supra note 72, at 2277 (highlighting local governments particularly well-equipped to address rapid changes). Local governments are also “particularly well suited” to be involved in regulation because of the data-heavy nature of the industry. See Davidson & Infranca, supra note 29, at 255-56 (noting local governments have traditionally regulated data-heavy policy areas). Scholars suggest that local government’s experience regulating and interpreting place-based information, such as property tax records and school district data, makes municipalities uniquely equipped to operate regulatory schemes in the sharing economy. See id.
\item \textsuperscript{160} See supra notes 40-43 and accompanying text (outlining role of municipalities in transportation systems and active monitoring of taxi services and availability). By regulating TNCs at the state level, most communities also lost the ability to impose vehicle safety standards and conduct their own inspections. Compare Elliott, supra note 32, at 732 (noting NYC taxis subject to quarterly inspections), with Moran et al., supra note 8, at 46 (commenting statewide regulatory schemes typically hold TNC vehicles to standards of private vehicle).
\item \textsuperscript{161} See Moran et al., supra note 8, at 20 tbl.2 (noting in 2017 only six states required licenses or permits for TNC operators); Dempsey, supra note 40, at 75 (contending traditional taxi regulation involves community determination of public convenience and necessity).
\item \textsuperscript{162} See Moran et al., supra note 8, at 8 tbl.5 (summarizing TNCs’ impact on congestion in six U.S. cities).
\item \textsuperscript{163} See Diller, supra note 78, at 1115-16 (outlining local governments’ interest in innovating policy solutions); Balding et al., supra note 102, at 8 tbl.5 (summarizing TNCs’ impact on congestion in six U.S. cities).  
\end{itemize}
of sexual assaults in TNC vehicles, communities may seek to provide additional screenings such as fingerprint background checks to protect both passengers and drivers. States may also seek to follow models set by the New York City Council to address wage and employment security issues in the sector. See supra note 135 and accompanying text (outlining sexual assault prevalence in TNCs and efforts in Austin to impose fingerprint background checks).

State legislatures are poorly positioned to respond to many of these concerns as intervention into local affairs has been sporadic and thus decreases the likelihood the state will pass new laws to respond to evolving concerns of TNCs. State legislatures are poorly positioned to respond to many of these concerns as intervention into local affairs has been sporadic and thus decreases the likelihood the state will pass new laws to respond to evolving concerns of TNCs. Local governments are also better positioned to deal with policy issues expeditiously due to their more streamlined and localized legislative process. By situating regulation in a local government, citizens will have an opportunity to more directly petition and influence their representatives on these issues.

B. Minimal Success of Litigation Claims Against TNCs Suggests Future Reforms More Likely in Legislative Sphere

Although taxi operators had hoped that taxis and TNCs would be regulated on a level playing field, the lack of success on disparate treatment claims heightens the need for any changes of TNCs to be taken up in the legislative sphere. As recent legal challenges to TNCs evidence, courts remain reluctant to sustain constitutional challenges to the states' permissive approach to TNCs' market metropolitan regions); Safety Report, supra note 135, at 58, 59 tbl.12.5 (noting risk and prevalence of sexual assault in Ubers). Local governments may also seek to follow models set by the New York City Council to address wage and employment security issues in the sector. See N.Y.C, N.Y., RULES OF THE CITY OF N.Y., tit. 35, § 59B-24 (2021) (effective Jan. 10, 2019) (mandating minimum driver payment requirements); see also Barron, supra note 72, at 2341 (noting local governments often copy innovative strategies from other municipalities).

165. See supra note 135 and accompanying text (outlining sexual assault prevalence in TNCs and efforts in Austin to impose fingerprint background checks).

166. See supra note 1, at 4 (arguing states have taken away localities' ability to set standards for TNCs); supra note 13 and accompanying text (highlighting increased interest in TNC fees and Boston's efforts imposing TNC surcharge required state approval).

167. See Barron, supra note 72, at 2307 (outlining Professor Frank Goodnow's argument state legislators lack capacity to provide frequent oversight). Legislatures that meet biennially are particularly ill-suited to adapt to the needs and changes of TNC services. See Moran et al., supra note 8, at 33 (highlighting local policy makers more adept for addressing TNCs than biennial legislatures).

168. See Diller, supra note 75, at 1266 (noting municipalities' streamlined legislative structures makes passage of legislation more likely). In comparison to Congress or state legislatures, many municipalities are unicameral, nonpartisan, and have streamlined committee processes that facilitate legislative efficiency. See id. at 1266-67.

169. See id. at 1256-57 (suggesting proximity to government decisionmakers and constituents may facilitate policymaking); Barron, supra note 72, at 2341 (remarking small size of local governments creates "civic capacity" necessary to tackle difficult policy challenges).

170. See Ill. Transp. Trade Ass'n v. City of Chicago, 839 F.3d 594, 598 (7th Cir. 2016) (dismissing taxi organizations equal protection and takings claims), cert. denied, 137 S. Ct. 1829 (2017); Joe Sanfelippo Cabs, Inc. v. City of Milwaukee, 839 F.3d 613, 616 (7th Cir. 2016) (holding taxi permit does not confer property right); Progressive Credit Union v. City of New York, 889 F.3d 40, 51 (2d Cir. 2018) (dismissing challenge against NYC TNC regulations).
entry. 171 This is consistent with the minimal rational basis review that courts apply to economic regulations. 172 In upholding regulatory schemes that allow disparate treatment of taxis and TNCs, courts have consistently shown deference to state legislatures’ policy choices. 173 Although these distinctions may not rise to constitutional violations, claimants’ concerns warrant attention from regulating entities in order to provide fairness to existing taxi operators and protect consumers. 174 Litigants’ lack of success in these claims does not bode well for the potential of TNCs to fall within the purview of existing local regulations as a matter of constitutional concern. 175 Additionally, individual companies’ dominance in their respective markets have not yet risen to a level that legal challenges on antitrust grounds will be successful. 176 This effectively forecloses the potential of federal intervention into the TNC market and therefore further emphasizes the importance of recently enacted statewide regulatory schemes. 177 Interestingly, even the Third Circuit in Philadelphia Taxi Ass’n acknowledged the adverse effect of TNCs on existing taxi business noting that they eliminated competitors while “inundating the Philadelphia taxi cab market.” 178

C. Lessons Learned from Differing Legalization Approaches

The enabling legislation passed in both New York and Texas provides distinct models on how state legislatures treat the role of local government in TNCs regulation. 179 Within the New York legalization debate, inclusion of local control provisions in both the Assembly’s and Senate’s initial version of TNC bills

171. See supra Section II.E (highlighting litigants unsuccessful challenging TNCs on constitutional grounds).

172. See Progressive Credit Union, 889 F.3d at 49 (explaining different classifications or regulatory schemes presumed valid due to minimal rational basis review).

173. See Ill. Transp. Trade Ass’n, 839 F.3d at 599 (concluding legislature by creating statutory regime therefore not precluded from amending it); Progressive Credit Union, 889 F.3d at 51 (explaining deference appropriate since no requirement legislature articulate reasoning). In Illinois Transportation Trade Ass’n, the court explained that states’ permissive approach to TNCs may reflect a legally permissible choice consistent with a deregulation movement beginning in the 1970s. See 839 F.3d at 599.

174. See Petition for Writ of Certiorari, supra note 92, at 9-10 (outlining various requirements Chicago imposes on taxi operators). These requirements serve as an example that local governments retain an interest in promoting some consumer protection by mandating requirements, such as driver fingerprint background checks, driver safety courses, vehicle standards, and fare regulation. See id. at 9.

175. See Ill. Transp. Trade Ass’n, 839 F.3d at 598 (noting significant enough differences between TNC and taxis to “justify different regulatory schemes”).

176. See Phila. Taxi Ass’n v. Uber Techs., 886 F.3d 332, 340 (3d Cir. 2018) (holding Uber’s conduct not anticompetitive despite impact on taxi market). But see Molla, supra note 22 (explaining Uber and Lyft collectively account for 98% of TNCs market).

177. See Phila. Taxi Ass’n, 886 F.3d at 338 (noting federal court has jurisdiction over Sherman Act claims); Bindman, supra note 113, at 179 (concluding federal regulation unlikely because TNCs local issue). But see O’Connor, supra note 113, at 592-93 (positing despite argument Congress could regulate TNCs via Commerce Clause has not done so).

178. See Phila. Taxi Ass’n, 886 F.3d at 340 (qualifying Uber’s market entry may benefit consumers).

179. See supra Section II.F (contrasting New York’s permissive approach of local regulations against Texas’s prohibitive approach).
recognized the compelling interest local governments had in regulating the affairs of these companies and would have made for a better statewide regulatory scheme.\textsuperscript{180} New York’s carve-out provision recognizes the advantages of local autonomy and calls for more of it, but ultimately this compromise approach may not provide the flexibility these communities need to modernize for-hire transportation and protect consumers.\textsuperscript{181} A more encompassing provision that expressly permits municipalities to supplement state regulations would better promote local government’s ability to address the challenges TNCs pose.\textsuperscript{182}

Texas’s approach is a dangerous example of how a state can severely restrict a local government’s ability to participate in TNCs’ developments and regulation.\textsuperscript{183} Following the Austin City Council’s progressive approach in regulating public safety mechanisms, Texas TNC legislation precluded any similar local government action in the future.\textsuperscript{184} The law falls into a concerning legislative trend in Texas of barring local governments from having any role in regulatory affairs in the state.\textsuperscript{185} Such draconian preemption provisions stifle policy innovation in communities and ignore the objectives of the home rule movement.\textsuperscript{186} The legislation is particularly troubling as other states can use it as a model and strict preemption provisions can be found in over thirty other state statutory schemes.\textsuperscript{187}

While both of these regulatory schemes are still in the preliminary stages, they showcase the challenges that local communities face in regulating TNCs.\textsuperscript{188} In states with a more flexible approach, communities will have to work within

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\textsuperscript{180} See supra note 122 and accompanying text (noting both bills reserved some regulatory functions for local governments).  
\textsuperscript{181} See supra note 129 and accompanying text (positing despite lawmakers recognizing benefits of more autonomy no county or city affirmatively opted out).  
\textsuperscript{182} See Vielkind, supra note 120 (quoting Assembly bill sponsor stating statewide regulations deprive municipalities of catering regulations to their needs); see also, e.g., H.B. 3379, 80th Leg. Assemb., Reg. Sess. § 2(1) (Or. 2019) (proposing system in which state and local government share licensing authority).  
\textsuperscript{183} See Zeitlin, supra note 133 (arguing Texas legislation set precedent for state laws stripping powers from municipal lawmakers).  
\textsuperscript{184} See id. estimating following Austin vote TNCs spent $2 million lobbying legislation for statewide bill).  
\textsuperscript{185} See Briffault, supra note 77, at 2007 (noting Governor’s support for barring all municipal regulations).  
\textsuperscript{186} See id. at 2023 (arguing preemption effectively reinstates Dillon’s Rule and may eviscerate local self-government).  
\textsuperscript{187} See Borkholder et al., supra note 1, at 25 (noting TNCs used language similar to Texas legislation to lobby Washington State Legislature); Moran et al., supra note 8, at 31 (noting thirty-three states preempted all local regulations current through August 2017).  
\textsuperscript{188} See supra Section II.F (highlighting both New York and Texas preempted municipalities from regulating TNCs).
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allocated parameters to innovate on TNC policy. In states like Texas, however, where all local control is preempted, local governments are not able to innovate at all; if they seek to legislate in this space, they will need to petition the state legislature to rollback these provisions altogether.

IV. CONCLUSION

Over the past decade, TNCs have increased their share of the transportation economy. By acting quickly to pass regulatory schemes, states mitigated TNCs’ legal “gray areas.” Significant lobbying efforts and public pressure, however, dominated these legalization efforts. By enacting statewide regulations for TNCs, states disrupted the traditional role of municipalities in regulating transportation.

The failure of legal challenges over the disparate treatment of taxis and TNCs increases the necessity of legislatively-enacted schemes and continued reform. Reviewing courts appropriately recognized that these decisions are largely legislative matters; nevertheless, this deference puts the onus on state legislatures to balance the need to modernize transportation with the ability of the state to protect the health, safety, and welfare of TNC passengers and employees.

In approving these measures, states consciously excluded local governments from any regulatory oversight. These restrictive preemptory provisions run counter to the objectives of home rule and handcuff local governments from dealing with increased concerns of congestion, passenger safety, and needed revenue. Most egregiously, some states, such as Texas, have enacted draconian preemptory provisions that stifle any local authority. In contrast, even permissive approaches, such as the one taken in New York, seem to have limited impact in the face of intense pressures by TNCs for uniformity and minimally intrusive regulations. As states monitor these new statutory provisions, emphasis should be placed on determining areas where collaboration with local governments is possible and how local governments can complement the goals of statewide regulatory schemes. Unfortunately, state legislatures, in a race to legalize TNCs and under significant political pressure, largely dismissed the advantages and deep experience of local governments in regulating for-hire transportation and effectively let TNCs write their own rules. While consumers have benefitted from the widespread availability of TNCs and implementation of some base-level consumer protections, TNCs may have successfully evaded regulatory accountability and oversight for many years to come.

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189. See BORKHOLDER ET AL., supra note 1, at 28 (recommending local lawmakers support policies to ensure equitable services, protect privacy, and improve labor standards).

190. See id. at 29 (calling on local lawmakers to call attention to preemption and litigate state interference); Diller, supra note 78, at 1114 (highlighting preemption “primary threat to local innovation”).