THE SMALL CELL PREEMPTION CAMPAIGN: INTERGOVERNMENTAL TAKING, STATE CONSTITUTIONALISM, AND THE LORETTO *PER SE* TEST

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INTRODUCTION

A concerted attack on local autonomy is being waged by cell phone carriers in the name of 5G. 5G means "5th Generation," but it is more than just another incremental upgrade. According to the Federal Communications Commission (FCC), the deployment of 5G will, "in many ways, represent a more fundamental change than the transition to prior generations of wireless service."[1] Many herald 5G as a remarkable new technology with the

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[1] FED. COMMC'NS COMM'N, ACCELERATING WIRELESS BROADBAND DEPLOYMENT BY REMOVING BARRIERS TO INFRASTRUCTURE INVESTMENT, DECLARATORY RULING AND THIRD REPORT AND ORDER, FCC 18-133, 2 (Sep. 27, 2018), https://docs.fcc.gov/public/attachments/FCC-18-133A1.pdf [hereinafter FCC Order].

potential to enable a host of new systems and services like autonomous vehicles and the "Internet of Things."[2] The wireless industry claims it will invest $275 billion in 5G infrastructure that will supposedly generate $500 billion in economic growth.[3] But some skeptics posit that 5G is a mere marketing ploy, a metonymy for the innovations it is purported to foster.[4]

To be sure, 5G is a requisite upgrade. As society's reliance on high-speed mobile broadband grows, it is becoming increasingly necessary for everyone and everything to stay connected.[5] That requires copious data carriage, which the traditional cell phone "tower model" is proving incapable of providing.[6] As a result, wireless carriers feel enormous pressure to unlock high-bandwidth mmWave spectrum by erecting hundreds of thousands of additional small cell wireless antennas, a process called "ultra-densification."[7] This is the essence, but not the entirety, of 5G.[8]

There are three main components of 5G that enable wireless networks to accommodate significantly more wireless traffic.[9] The first is the utilization of higher frequency radio waves that have, by and large, been vacant or useless. These higher, "mmWave" bands of electromagnetic spectrum (or

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[2] *See generally* IHS ECONOMICS, THE 5G ECONOMY: HOW 5G TECHNOLOGY WILL CONTRIBUTE TO THE GLOBAL ECONOMY (2017); THOMAS K. SAWANOBORI, CELLULAR TELECOMMS. IDUS. ASS'N, THE NEXT GENERATION OF WIRELESS: 5G LEADERSHIP IN THE U.S. (Feb. 9, 2016) [hereinafter CTIA WHITE PAPER].

[3] CELLULAR TELECOMMS. INDUS. ASS'N, GLOBAL RACE TO 5G (April 2018) [hereinafter RACE TO 5G].

[4] *See* Karl Bode, *The 'Race To 5G' Is a Giant Pile of Lobbyist Nonsense*, TECHDIRT (Jan. 27, 2020, 6:23 AM), https://www.techdirt.com/articles/20200116/08134343743/race-to-5g-is-giant-pile-lobbyist-nonsense.shtml?fbclid=IwAR2g5MYvy39L4DpnghSECOPoqbjSU0ZaLEmRwn8STj3qI1j_%206zWoIMrVw4M; *see also* AT&T Business, *The Dawn of the 5G World*, WASH. POST BRAND STUDIO (Dec. 14, 2018), https://www.washingtonpost.com/brand-studio/wp/2018/12/14/the-dawn-of-the-5g-world/?utm_term=.f3616299dce7.

[5] William Lehr & Douglas Sicker, *Would You Like Internet With or Without Video*, 2017 U. ILL. J.L. TECH & POL'Y 73, 93-94 (2017) (discussing the exorbitant increase in consumer Internet video traffic, in part due to mobile video streaming services, such as Netflix).

[6] *See* Colin Gibbs, *AT&T's Hogg: The Tower Model Is Unsustainable*, FIERCEWIRELESS.COM (May 10, 2017), https://www.fiercewireless.com/wireless/at-t-s-hogg-tower-model-unsustainable (quoting AT&T's President of Technology Operations claiming the company believes "the tower model is unsustainable"); *see also* Colin Gibbs, *Report: Sprint to Cut $1B by Moving Towers to Government Owned Land, Backhaul to Microwave*, FIERCEWIRELESS.COM (Jan. 15, 2016), https://www.fiercewireless.com/wireless/report-sprint-to-cut-1b-by-moving-towers-to-government-owned-land-backhaul-to-microwave.

[7] *See* NEXT GENERATION MOBILE NETWORKS, NGMN 5G WHITE PAPER 41 (2015) ("Given the constraints on spectrum efficiency and higher frequency band deployments…network site densification will be an important approach to deliver substantial data rate and capacity gains, *particularly as it also supports the use of higher frequency spectrum*" [emphasis added]).

[8] *See generally* 5G PPP ARCHITECTURE WORKING GRP., VIEW ON 5G ARCHITECTURE (2016); Jeffrey G. Andrews et al., *What Will 5G Be?*, INST. ELEC. & ELEC. ENG'RS J. ON SELECTED AREAS COMM. (2014).

[9] Andrews et al., *supra* note 8, at 1065; *see also* 5G PPP ARCHITECTURE WORKING GRP., *supra note* 8, at 38; NEXT GENERATION MOBILE NETWORKS, *supra* note 7, at 41.

"spectrum") are capable of transmitting more data at faster speeds than lower frequency bands, and at lower power.[10] The catch is that mmWave spectrum is fragile and quickly attenuates; it can only be used to transmit signals across relatively short distances and has extra difficulty transmitting through and around buildings, trucks, trees, and even rain.[11] Even still, mmWave spectrum has the potential to increase network capacity and energy efficiency, since mmWave spectrum has more bandwidth.[12]

The second component of 5G is ultra-densification.[13] This component is integrally related to the first: in order to enable widespread use of the poorly-propagating mmWave spectrum, new wireless antennas—i.e., small cells—must be placed closer to end users. Whereas traditional "macro" cells—which often are placed atop tall cell towers and use lower-frequency or "beachfront" spectrum—are capable of transmitting signals through brick walls or over multiple miles, small cells using mmWave spectrum are incapable of transmitting signals beyond a few hundred meters without signals significantly attenuating.[14] As a result, 5G networks require many more wireless antennas—possibly as many as sixty small cell sites for every macro cell tower—in order to meet the growing demand for data.[15]

The third component of 5G is massive multiple-input multiple-output (MIMO).[16] Massive MIMO improves spectral efficiency, and generally helps resolve mmWave spectrum's poor propagation characteristics. The technological details of massive MIMO are beyond the scope of this Essay.

In order to densify their networks and unlock the full potential of vacant mmWave spectrum, the nation's largest cell phone carriers (the "Telcos") are wielding 5G as a political weapon against local governments. Through this "Small Cell Preemption Campaign" (the "Campaign") the Telcos have supported state legislative preemption of broad domains of local government authority so that they can install next-generation wireless telecommunications equipment on every block, in every locality, and at below-market rates. Their targets are existing municipal infrastructure, including streetlights and traffic signals, and other structures conveniently located in public rights-of-way. Over the past few years, the Telcos have

[10] Andrews et al., *supra* note 8, at 1069-70.
[11] *Id.*
[12] *Id.*
[13] *Id.* at 1066-69.
[14] *Id.* at 1069-70.
[15] *Id.* at 1066-68.
[16] *Id*. at 1070-72.

devoted massive resources[17] to the Small Cell Preemption Campaign[18]—a campaign that has been largely successful. Since 2016, twenty-five states have enacted far-reaching preemption statutes that effectively grant Telcos an entitlement to attach small cell wireless equipment to any locally owned and maintained property that could function as a "wireless support structure."[19] In spite of their name, these small cells are intrusive—a small cell wireless antenna may be the size of a minifridge or microwave, and often comes with additional transmission and cooling equipment the size of a lawn shed.[20] More importantly, the property commandeered by small cell preemptions effectively transfers $2 billion in revenue from local governments (and their taxpayers) to wireless carriers.[21]

The Small Cell Preemption Campaign and its commandeering of local property has been given little attention by legal scholars to date,[22] but it raises a novel legal question: whether local governments are afforded constitutional protection from state-initiated regulatory takings. This Essay proposes and appraises three innovative intergovernmental takings claims, examining whether state courts might recognize and reinforce the property rights of local governments under state constitutional takings doctrines. Although this Essay surveys three different versions of that claim as applied to multiple state small cell bills, it weaves a common thread throughout by examining the status of local governments under the Colorado Constitution. Although the small cell bill enacted in Colorado is not the most preemptive, the Colorado Constitution is arguably one of the most protective of local governments in the United States. But by no means is Colorado the only state in which an intergovernmental takings claim is likely to succeed; on the contrary, this Essay contends that the Small Cell Preemption Campaign has brought about a peculiar set of circumstances and statutes across the country which offer ripe opportunities to test whether the current federalism

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[17] *See, e.g.*, AT&T Political Engagement Report: July 2016 – December 2016 (2016), https://investors.att.com/~/media/Files/A/ATT-IR/governance-documents/political-engagement-report-2016-2nd-half-v2-2017-03-07-17-final.pdf; Verizon, 2016 Political Contributions Report (2016), https://www.verizon.com/about/sites/default/files/2016-Year-End-Political-Report.pdf.

[18] Also referred to as simply "the Campaign."

[19] *See* Appendix.

[20] In addition to "small cells," 5G will use other antennas, such as "pico cells" and "femto cells," some of which are much smaller than the above description. For simplicity, this Essay groups these wireless facilities into the single phrase "small cell."

[21] *See* Tom Wheeler, *5G in Five (Not So) Easy Pieces*, BROOKINGS (July 9, 2019), https://www.brookings.edu/research/5g-in-five-not-so-easy-pieces/.

[22] *See infra* Part I.

zeitgeist[23] and the renaissance of state constitutionalism[24] will foster judicial experimentation and innovation in actuality.[25]

It is equally important to acknowledge this Essay's limitations. In particular, the question of whether state small cell bills provide "just compensation" in exchange for takings is largely beyond its scope. One of the main reasons for this is that formulations of just compensation require fact-intensive inquiries. However, this Essay does identify an area for future research that implicates the just compensation requirement: potential facial challenges to regulatory takings where the availability and mechanics of just compensation may impact judicial determinations of standing and ripeness. The takings claims developed in this Essay may be primarily suited for challenges as applied to invocations of the entitlements granted by state small cell bills. That is not to say future litigants have little chance of seeing a facial constitutional challenge decided on the merits. Rather, this Essay is meant to get the ball rolling on a solid foundation; it intends to demonstrate that some as applied challenges to state small cell bills have a high chance of success.

Part I of this Essay provides an overview of the Campaign by analyzing certain features of state small cell legislation alongside recent scholarship and within the broader political context of "new preemption."[26] Part II starts by questioning whether an intrastate intergovernmental takings claim is judicially cognizable. Accordingly, Part II identifies four legal justifications supporting the justiciability of intrastate intergovernmental takings in state courts. Part III examines whether state small cell bills constitute takings under the *Loretto per se* test for permanent physical occupations.[27] Finally, Part III develops and evaluates three *Loretto*-focused claims, which are modeled off the small cell bills enacted in Colorado, Texas, and Florida.

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[23] *See generally* Nestor M. Davidson, *Cooperative Localism: Federal-Local Collaboration in an Era of State Sovereignty*, 93 VA. L. REV. 959 (2007); Heather K. Gerken, *Federalism 3.0*, 105 CALIF. L. REV. 1695 (2017); Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4 (2010); Michael A. Livermore, *The Perils of Experimentation*, 126 YALE L.J. 636 (2017).

[24] *See also* Younger v. Harris, 401 U.S. 37, 44 (1971) (discussing "Our Federalism"); William J. Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977). *See generally* Jeffrey S. Sutton, *State Constitutions in the United States Federal System*, 77 OHIO ST. L.J. 195 (2016).

[25] *But see* James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761 (1992).

[26] *See generally* Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995 (2018).

[27] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).

I. THE SMALL CELL PREEMPTION CAMPAIGN

A nationwide resurgence in state preemption efforts has grabbed the attention of local government scholars in recent years.[28] Richard Schragger has described this epidemic of "new preemption" as state legislatures' efforts to "aggressively [override] whole swaths of local regulation, to such an extent that they threaten to constrict municipal authority to a barely discernible sphere."[29] Indeed, many of the numerous, recent and ongoing battles over local autonomy—from gun control to sanctuary cities—are contentious and have taken up much of the nation's bandwidth.[30] All the while, the Small Cell Preemption Campaign has been almost entirely overlooked by local government scholars.[31] While Professor Schragger makes brief mention of litigation that arose after the Ohio General Assembly violated a single subject requirement in enacting a preemptive small cell bill,[32] only two law review articles have discussed the Small Cell Preemption Campaign in any detail, and those articles do not evaluate it within the "new preemption" context.[33] Instead, those articles are primarily concerned with federal efforts to accelerate 5G deployment. The only other scholarly attention being paid to small cell technology has been focused on its Fourth Amendment implications.[34]

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[28] *See* Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163 (2018) [hereinafter *Attack on American Cities*]. *See also* Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995 (2018); Paul A. Diller, *Reorienting Home Rule: Part I—The Urban Disadvantage in National and State Lawmaking*, 77 LA. L. REV. 287 (2016); Lauren E. Phillips, *Impeding Innovation: State Preemption of Progressive Local Regulations*, 117 COLUM. L. REV. 2225 (2017); Bradley Pough, *Understanding the Rise of Super Preemption in State Legislatures*, 34 J.L. & POL. 67 (2018); Lori Riverstone-Newell, *The Rise of State Preemption Laws in Response to Local Policy Innovation*, 47 PUBLIUS: J. FEDERALISM 403 (2017); Erin Scharff, *Hyper Preemption: A Reordering of the State and Local Relationship?*, 106 GEO. L.J. 1469 (2018); Kenneth A. Stahl, *Preemption, Federalism, and Local Democracy*, 44 FORDHAM URB. L.J. 133 (2017).

[29] Richard Schragger, *Federalism, Metropolitanism, and the Problem of States*, 105 VA. L. REV. 1537, 1566 (2019).

[30] The list of issues over which local governments have recently been preempted is long and includes matters related to fracking, plastic bag bans, minimum wage laws, soft drink bans, ride-sharing, vacation rentals, and many others, *see supra* note 28.

[31] *See Attack on American Cities*, *supra* note 28, at 1169 n.26; *see also* Kim S. Haddow, *Local Control is Now "Loco" Control*, 49 ENVTL. L. REP. 10767, 10769 (2019).

[32] *See Attack on American Cities*, *supra* note 28, at 1169 n.26.

[33] *See* Michael R. Bradley & Vincent Rotty, *Fixing the Glitch: The Smart Rollout of 5G Small Cell Wireless Networks Balancing Private and Public Interests*, 63 S.D. L. REV. 483 (2019); William M. Lawrence & Matthew W. Barnes, *5G Mobile Broadband Technology—America's Legal Strategy to Facilitate its Continuing Global Superiority of Wireless Technology*, 31 NO. 5 INTELL. PROP. & TECH. L.J. 3 (2019).

[34] *See, e.g.*, Robert M. Bloom & William T. Clark, *Small Cells, Big Problems: The Increasing Precision of Cell Site Location Information and the Need for Fourth Amendment Protections*, 106 J. CRIM. L. & CRIMINOLOGY 167, 176–82 (2016).

Small cell bills should be examined within the political context of new preemption and alongside other products of this era, not only because elements of state small cell bills are comparable to other forms of new preemption that legal scholars have spilled much ink over lately,[35] but also because the property-commandeering form of preemption contained in most small cell bills is unprecedented. Moreover, this novel preemption may not have been politically feasible were it not for the groundswell of animosity towards local government authority that is foundational to the new preemption movement. Even still, it has found success. Since the acceleration of new preemption in late-2016, the Telcos have successfully pushed through preemptive legislation in twenty-five states, tying the hands of local governments to clear the way for 5G.[36]

There are five notable features shared by a majority of the small cell bills enacted in those twenty-five states that should be examined alongside other products of the new preemption movement. First, every small cell bill includes municipally-owned streetlights, traffic signals, sign posts, or similar publicly owned structures within its statutory definition of wireless support structure or utility pole.[37] Second, every small cell bill imposes a "price ceiling" on the annual rates (or "rent") that local governments may charge for individual small cell attachments, ranging from as low as $20 to $200 per attachment.[38] Third, all but two bills include "deemed-approved shot clocks," which are often combinations of provisions designed to expedite permit applications for small cell attachments and installations.[39] These combo-provisions preemptively "deem" permit applications "approved" to collocate on municipal poles and/or install new poles in rights-of-way upon expiration of statutorily defined "shot clocks" (i.e. the time within which localities must process siting requests).[40] Fourth, eighteen small cell bills prohibit localities from exacting in-kind services from Telcos as a condition of permit approval.[41] Fifth, all but three state small cell bills include "broad preemption" provisions that outright deny local authority to regulate small cell attachments, apart from a narrow set of exceptions.[42] Generally, these exceptions only go so far as to grant localities authority to restrict the height of new poles and antennas.[43]

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[35] *See supra* note 28.
[36] *See* Appendix.
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.*

For multiple reasons, state small cell bills are a strong form of new preemption.[44] For example, the broad preemption provisions common among state small cell bills may even be characterized as a subject-matter-specific form of "nuclear preemption" that has "walled off [a] whole new [realm] where governments aren't allowed to govern at all."[45] In 2017, high-ranking members of the Florida Legislature attempted to prohibit all local regulation of "businesses, professions, and occupations" that were not expressly authorized by state law.[46] Admittedly, short of such legislative attempts to effectively codify Dillon's rule, it may be alarmist to give a new name to subject-matter-specific preemptions, however broad-sweeping, since the legal concept of "field preemption" has been around for a while.[47] Nevertheless, the fact that the central subject matter of small cell bills reduces to land use controls does represent a significant reduction in local government authority, since land use is traditionally a matter of local concern.[48] Likewise, by prohibiting localities from seeking in-kind services from Telcos in exchange for use of their property, these small cell bills strip localities of their oldest form of land use control.[49] Whereas before a locality may have conditioned use of its property on furtherance of some public good—or conditioned attachment to its streetlights and traffic signals on acquiescence to terms that would encourage the equitable rollout of 5G or that would help reduce the cost of providing municipal services such as public safety—localities are prohibited from doing so by the ban on exacting in-kind services. In this way, the small cell bills are also comparable to preemptions of inclusionary zoning ordinances, which insulate developers from having to build affordable housing in order to receive building permits from various local governments.[50]

By and large, the state small cell bills fit within Richard Schragger's category of *industry-specific* preemption, which he describes as legislation that is typically the product of partnerships between private interests seeking to avoid local regulation and state legislators, "exemplified" by the political activity of organizations such as the American Legislative Exchange

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[44] *See* Schragger, *supra* note 29.

[45] *See* Briffault, *supra* note 28, at 2007.

[46] H.R. 17, 25th Leg., Reg. Sess. § 1 (Fla. 2017).

[47] Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 227 (2000).

[48] *See* Ashira Pelman Ostrow, *Land Law Federalism*, 61 EMORY L.J. 1397, 1399 (2012) (discussing the consensus among scholars that "local governments have retained primary authority to regulate the use of land").

[49] HENDRICK HARTOG, PUBLIC PROPERTY AND PRIVATE POWER: THE CORPORATION OF THE CITY OF NEW YORK IN AMERICAN LAW 1730-1870, at 3-4 (1983).

[50] RICHARD SCHRAGGER, STATE PREEMPTION OF LOCAL LAWS: PRELIMINARY REVIEW OF SUBSTANTIVE AREAS 11 (2017), https://www.abetterbalance.org/wp-content/uploads/2017/08/State-Preemption-of-Local-Laws.pdf.

Council (ALEC), a national, pro-business lobbying organization.[51] As the firearm and pesticide industries have done, the Telcos relied on the help of national lobbying organizations like ALEC and the Cellular Telecommunications Industry Association (CTIA) in waging their campaign.[52] Many small cell bills appear to be based on model legislation disseminated by ALEC, and probably owe their political success at least in part to the wave of antipathy towards local governments characteristic of the new preemption era, which organizations like ALEC were instrumental in drumming up.[53] For instance, the new preemption era has involved various forms of *punitive* or *vindictive* preemption, that is, a form of "retaliatory" preemption in which states would preempt "more local authority than is necessary" to achieve the state legislative majority's specific policy goals, like North Carolina's infamous "bathroom bill."[54] Stakeholders subject to local regulations or party to a contract with local government entities probably perceived the punitive preemptions passed in states like North Carolina as a green light to pursue preemptive agendas in other ideologically similar state legislatures. For example, the first major small cell bill was enacted late in 2016 during a "lame-duck" session[55] of the Ohio General Assembly, during which a modified version of ALEC's model legislation hitched a ride as an amendment to a bill that proposed to regulate puppy mills and ban municipal minimum wage laws.[56] Indeed, the savvy political opportunism of the Campaign is made even more apparent by the fact that the vast majority of small cell bills enacted during the height of the new preemption movement are much more extreme than ALEC's model legislation and many of the other industry-specific preemptions of the era, for that matter. They are extreme because they effectively enable business corporations to commandeer local-government-owned property

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[51] *Attack on American Cities*, *supra* note 28, at 1170-74.

[52] *See id.*; CTIA WHITE PAPER, *supra* note 2. *See also* Vanessa Zboreak, *"Yes, in Your Backyard!" Model Legislative Efforts to Prevent Communities from Excluding CAFOs*, 5 WAKE FOREST J.L. & POL'Y 147, 171 (2015) (discussing model legislation proposed by the ALEC regarding Concentrated Animal Feeding Operations).

[53] *See Attack on American Cities*, *supra* note 28, at 1170 ("[ALEC] seeks to facilitate relationships and efforts between state legislative branches and private industries by providing model legislation, networking opportunities, and lobbying services on behalf of its members."); Allan Holmes, *Local Governments and Residents Fight to Retain Control Over Millions of New Small Cells*, CTR. FOR PUB. INTEGRITY (Mar. 2, 2018), https://www.publicintegrity.org/2018/03/02/21475/5g-wireless-pits-cities-against-telecoms-and-their-friends-fcc (last visited Feb. 5, 2019).

[54] *Attack on American Cities*, *supra* note 28, at 1181-83.

[55] A lame-duck session occurs when a legislative body meets after its successor is elected, but before the successor's term begins.

[56] S. 331, 131st Gen. Assemb., 2015-2016 Sess. (Ohio 2016) (entitled "DOGS—PET STORES—LICENSES AND PERMITS—OTHER PROVISIONS").

The precise operation of small cell bills is discussed more thoroughly in Part III. In general, the bills either 1) explicitly grant Telcos a legally enforceable right to occupy certain property, like in Colorado's H.B. 17-1193;[57] or 2) eliminate local governments' discretion to deny permit applications for the attachment of small cells to light poles, traffic signals, and other similar facilities.[58] In either case, the rent local governments may charge for use of their property is also set by statute at significantly reduced rates. In effect, these small cell bills authorize business corporations to commandeer local infrastructure. Normally, when a regulation has that effect on property owned by a natural person or a business entity, the regulation would be considered an unconstitutional taking. That may be the case here too, but before examining whether this type of property-commandeering preemption is a regulation that "goes too far,"[59] we must first address a preliminary matter—whether an intrastate intergovernmental takings claim is even justiciable.

II. INTERGOVERNMENTAL TAKINGS AND STATE CONSTITUTIONALISM

Intergovernmental takings are strange and understudied. Cursory examination of the U.S. Constitution's Fifth Amendment might suggest the takings doctrine is inapplicable to government property. Indeed, the Takings Clause of the Fifth Amendment provides: "[N]or shall *private* property be taken for public use, without just compensation."[60] Based on its ordinary meaning, it might not seem like that language would support a legal challenge to state small cell preemptions, since locally owned streetlights and rights-of-way are commonly understood to be *public* property.[61] However, the term "private property" is far from having any uniform meaning.[62]

Indeed, the U.S. Supreme Court has long held that the federal government can run afoul of the Fifth Amendment by taking from states and localities without just compensation. In *United States v. Carmack*, the Court declared

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[57] H.B. 17-1193, 2017 Gen. Assemb., Reg. Sess. § 338-5.5-104.5 (Colo. 2017) (providing that "a telecommunications provider . . . has the right to locate or collocate small cell facilities or small cell networks on the light poles, light standards, traffic signals, or utility poles in the rights-of-way owned by [a] local government entity").

[58] *See infra* Section 3.02(c).

[59] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[60] U.S. CONST. amend. V. (emphasis added).

[61] *See* Gerald Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1099–1109 (1980) (discussing the origin and development of the public/private distinction).

[62] *See generally* Thomas Gray, *The Disintegration of Property*, 22 PROPERTY 69 (1980); Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of* Takings, 88 COLUM. L. REV. 1667 (1988);.

that "when the Federal Government thus takes for a federal public use the independently held and controlled property of a state or a local subdivision, the Federal Government recognizes its obligation to pay just compensation for it."[63] Decades later, in *50 Acres of Land*, Justice Stevens articulated a broader conception of the sovereign's duty to compensate for the intergovernmental taking of a local sanitary landfill. Justice Stevens wrote that when the federal government "condemns a local public facility, the loss to the public entity, to the persons served by it, and to the local taxpayers may be no less acute than the loss in a taking of private property."[64] "Therefore," he continued, "it is most reasonable to construe the reference to 'private property' in the Takings Clause of the Fifth Amendment as encompassing the property of state and local governments when it is condemned by the United States."[65] In spite of the Court's clear recognition of intergovernmental takings in that case, the question of whether constitutional protection applies when *states* take local government property remains open.

An article by Michael Schill has brought the most attention to this issue.[66] In that article, Schill suggests that municipalities receive protection from the federal Takings Clause for property used in a "proprietary" as opposed to a "governmental" capacity, that is, property utilized by a municipality as a market participant rather than, say, a regulator.[67] Other scholars who examined the concept of intrastate intergovernmental takings prior to Schill came to similar conclusions.[68] With respect to intergovernmental takings, in general, Schill and other scholars agree that judicial recognition that intergovernmental takings are justiciable is important in order to "[reduce] the incentive for a faction to gain political power for the purpose of appropriating property for its own benefit."[69]

Apart from those circumstances involving property used in a proprietary capacity, however, Schill contends that "states have considerable freedom

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[63] United States v. Carmack, 329 U.S. 230, 242 (1946).

[64] United States v. 50 Acres of Land, 469 U.S. 24, 31 (1984).

[65] *Id.*

[66] Michael H. Schill, *Intergovernmental Takings and Just Compensation: A Question of Federalism*, 137 U. PA. L. REV. 829, 830 (1989) (coining the phrase "intergovernmental taking").

[67] *Id.* at 840 n.39.

[68] *See, e.g.*, Ralph W. Dau, *Problems in Condemnation of Property Devoted To Public Use*, 44 TEX. L. REV. 1517 (1966); Rudolph V. Parr, *State Condemnation of Municipally-Owned Property: The Governmental-Proprietary Distinction*, 11 SYRACUSE L. REV. 27 (1959); John M. Payne, *Intergovernmental Condemnation as a Problem in Public Finance*, 61 TEX. L. REV. 949 (1983); Note, *The Sovereign's Duty to Compensate for the Appropriation of Public Property*, 67 COLUM. L. REV. 1083 (1967).

[69] *See* Schill, *supra* note 66, at 864; *see also* Daniel A. Farber, *Economic Analysis and Just Compensation*, 12 INT'L REV. L. & ECON. 125, 134 n.42 (1992).

to take local government property without compensation," since local governments are generally deemed "creatures of the state."[70] This *state-creature* legal tradition is often attributed to *Hunter v. City of Pittsburg*, in which the U.S. Supreme Court infamously declared "[m]unicipal corporations are political subdivisions of the State . . . [and the state] may take without compensation such property . . . and destroy the corporation."[71] Not only does the state-creature tradition represent a formidable obstacle to any takings claim brought in federal court, but the U.S. Supreme Court is notoriously fickle when invoking the governmental/proprietary distinction, on which the justiciability of intrastate intergovernmental takings claims purportedly relies. In *Garcia v. San Antonio Metropolitan Transit Authority*, for example, the Court reaffirmed that "the distinction between 'governmental' and 'proprietary' functions was 'untenable' and must be abandoned."[72] Furthermore, in light of federalism concerns, federal courts prefer to practice self-restraint and respect the division of power between states and localities.[73] For all of these reasons, local governments are almost certainly barred from prevailing on intergovernmental takings claims brought against states in federal courts under the federal Takings Clause.

Fortunately for localities, state courts may beg to differ when interpreting state law, as federal Fifth Amendment jurisprudence does not preclude state courts from finding intrastate intergovernmental takings justiciable under their own state constitutions. Although some state courts do not like to stray from federal constitutional doctrine when their state constitutional provisions are in textual parity or have substantial overlap, the existence of a federal intergovernmental takings doctrine suggests that state judicial recognition of intrastate intergovernmental takings would not be a doctrinal departure, but rather an extension of the very principles that animate federal intergovernmental takings doctrine.

To better understand this reasoning, consider the following hypothetical. The federal government is a *top-tier* government, state governments are *middle-tier* governments, and local governments are *bottom-tier* governments. Although top-tier courts do not serve as arbiters of takings disputes between middle and bottom-tier governments, top-tier courts *do* protect all lower tiers from takings affected by the top tier—the federal government. As a general principle, then, for constitutional doctrine to

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[70] *See* Schill, *supra* note 66, at 840 n.39.

[71] Hunter v. City of Pittsburg, 207 U.S. 161, 178-79 (1907).

[72] Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 542 (1985) (citing New York v. United States, 326 U.S. 572, 583 (1946)).

[73] *Cf.* Printz v. United States, 521 U.S. 898, 935 (1997) (prohibiting commandeering of state executive officials); New York v. United States, 505 U.S. 144, 188 (1992) (prohibiting commandeering of legislative authority); Gregory v. Ashcroft, 501 U.S. 452 (1991).

remain in lockstep, it is the obligation of a court to protect all lower tiers from takings by that court's own tier. Otherwise, the rationale for recognizing intergovernmental takings—i.e., guarding against exploitative political faction—is circumvented by devolution of government power. Thus, state courts must protect bottom-tier, local governments from takings by its own middle-tier in order to maintain consistency with federal takings doctrine.[74]

Ultimately, state courts have final say over how their constitutions are interpreted. I therefore now turn to four legal justifications that state courts could embrace in interpreting their own state constitutions to accommodate intrastate intergovernmental takings challenges to small cell preemptions that commandeer local public property.

A. State Constitutional Variation

Every state in the union has a constitutional takings provision, with the lone exception of North Carolina.[75] Although the texts of most state takings provisions track the Fifth Amendment, a handful of them have textual differences. Notably, eleven state constitutional takings provisions do not use the phrase "private property."[76] Instead, these state takings clauses use phrases like "[n]o person's property"[77] or "no man's… property."[78] Four states whose legislatures have passed small cell preemptions—Indiana, Nebraska, Tennessee, and Texas—have constitutional takings provisions featuring one of these alternative phrases.[79]

The existence of textual differences in state takings provisions provides the first justification for the state judicial recognition of intrastate intergovernmental takings claims. As an initial matter, neither the phrase "no man's property" nor "no person's property" is likely to be limited to their

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[74] This same reasoning could be extended as far as devolution goes.

[75] *See* Maureen Brady, *The Damagings Clauses*, 104 VA. L. REV. 341, 349 n.30 (2019); *but see* Beroth Oil Co. v. North Carolina Dept. of Transp. 757 S.E.2d. 466, 472–73 (N.C. 2014) ("While North Carolina does not have an express constitutional provision against the 'taking' or 'damaging' of private property . . . . [takings principles are] considered in North Carolina as an integral part of 'the law of the land' within the meaning of Article I, Section 19 of [North Carolina's] State Constitution."). Although Kansas does not have a general takings provision, it does have a narrower provision, which says "No right of way shall be appropriated to the use of any corporation, until full compensation [be made]." KAN. CONST. art. XII, § 4.

[76] Donna M. Nakagiri, *Takings Provisions in State Constitutions: Do They Provide Greater Protections of Private Property than the Federal Takings Clause?*, 20 n.128 (1999) (J.D. fellowship essay, Michigan State University) (on file with the Michigan State Law School Library), https://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1004&context=king.

[77] IND. CONST. art. I, § 21; TEX. CONST. art. I, § 17; *see also* NEB. CONST. art. I, § 21.

[78] TENN. CONST. art. I, § 21.

[79] *See supra* notes 77, 78.

plain meaning. For example, it is unfathomable in this day and age that any state constitutional takings provision might not apply to property owned by a woman. In addition, the word "person" is usually construed broadly in other constitutional[80] and statutory[81] contexts, and not infrequently includes local governments.[82] In Texas, for example, "person" may mean "government or governmental subdivision or agency."[83] And in Indiana, "person" extends to "bodies politic and corporate."[84] Finally, those alternative phrasings avoid the literal invocation of the public/private distinction, which may be an obstacle to intergovernmental takings claims brought by localities, in general.[85] Nevertheless, that obstacle may be overcome by one of the additional justifications that follow.

B. State Judicial Innovation

Second, state courts retain authority to ratchet up constitutional protections as they see fit, even when they are interpreting constitutional provisions with similar, or even identical federal analogues.[86] It used to be that state courts were the primary bulwark against uncompensated takings.[87] In fact, prior to the incorporation of the Fifth Amendment, state courts spent about a century creating new property rights in takings law.[88] Takings and local government scholar Maureen Brady observed that, during that period, state courts were more prone to recognize new property interests in response to "encroachments of some new technology deployed for public purposes."[89] The state small cell preemptions fall squarely within this category, since they

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[80] *See, e.g.*, Elizabeth Pollman, *Reconceiving Corporate Personhood*, 2011 UTAH L. REV. 1629, 1631-46 (2011) (chronicling the development of corporate personhood).

[81] *See, e.g.*, 1 U.S.C. § 1 ("the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals;"); *see also* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 708 (2014) ("[n]o known understanding of the term 'person' includes *some* but not all corporations.") (emphasis in original).

[82] *See* Nat'l Conf. of State Legis., Default Definitions of "Person" in State Statutes (2014), http://www.ncsl.org/documents/lsss/tue_haskins_handout2.pdf.

[83] TEX. GOV'T CODE ANN. § 311.005 (2019).

[84] IND. CODE ANN. § 1-1-4-5 (2019).

[85] *See* Frug, *supra* note 61.

[86] *See* M. Jason Hale, *Federal Questions, State Courts, and the Lockstep Doctrine*, 57 CASE W. RES. L. REV. 927, 927 -49. (2016) (stating that state courts view federal decision as merely persuasive); *see also* Brakke v. Iowa Dep't of Nat. Res., 897 N.W.2d 522, 542 (Iowa 2017) (the court applied "the established federal standards regarding takings, but reserve[d] the right to apply [those] standards in a fashion different than the federal courts").

[87] *See* Maureen E. Brady, *Property's Ceiling: State Courts and the Expansion of Takings Clause Property*, 102 VA. L. REV. 1167, 1169-70 (2016).

[88] *Id.*

[89] *Id.* at 1214.

are enacted primarily to accelerate the buildout of next-gen wireless infrastructure and win the "race to 5G."[90]

Additionally, state courts have been more inclined to extend state constitutional provisions to cover local matters when federal courts have punted, so to speak. According to state constitutional law scholar George Alan Tarr, "state courts have undertaken major initiatives involving school finance, exclusionary zoning, the rights of defendants, and the right to privacy" in recent decades.[91] Tarr also notes that, "In several instances the state courts intervened because the U.S. Supreme Court had refused to grant relief, and thus the initiatives would have been impossible without the new judicial federalism."[92] Since intrastate intergovernmental takings are an area federal courts are prone to avoid—in large part due to their state-creature conception of local governments that tilts the balance of power between states and localities heavily in favor of the former—Tarr's observations indicate state courts are the proper forum to hear intrastate intergovernmental takings claims.

C. The Intersection of Constitutional Home Rule and Takings

The third justification revolves around home rule. Comparable to the Tenth Amendment to the U.S. Constitution,[93] home rule generally affords local governments broad authority to legislate in areas of law not preempted by the state. Forty state constitutions include "home rule" provisions,[94] and all but two states where small cell preemptions have been enacted have constitutional home rule.[95] Interestingly, the early history of these constitutional safeguards of local self-governance is analogous to the Small Cell Preemption Campaign.

Home rule arose in response to a growing predominance of the state-creature tradition as articulated in *Hunter*. [96] Following the age of manifest destiny and the corresponding expansion of the railroad and telegraph, state-court adoption of the state-creature tradition emboldened self-dealing legislatures to exploit local governments for their own gain and that of crony

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[90] *See* RACE TO 5G, *supra* note 3.

[91] GEORGE ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 166 n.126 (1999).

[92] *Id.*

[93] U.S. CONST. amend. X.

[94] Kenneth Vanlandingham, *Constitutional Municipal Home Rule Since the AMA (NLC) Model*, 17 WM. & MARY L. REV. 1, 4 n.9 (1975).

[95] *Id.* Although, those states—Indiana and North Carolina—do have statutory home rule. IND. CODE § 36-1-3 (2019); N.C. GEN. STAT. §§ 53A-121, 160A-11 (2019).

[96] David Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2260 (2003) ("while law once treated local governments as mere creatures of the state, all but two states now have express constitutional or statutory home rule provisions").

natural monopolists.[97] Local government scholar Howard Lee McBain aptly recounted after the first wave of home rule amendments that "the large rewards which lay in cities' offices, their contracts, *and the franchises in their streets* [had become] the mark of the political spoilsman in the state legislature."[98] Simply put, home rule provisions were originally conceived to both empower local governments and define their relationships with states, especially in order to check state legislatures' exploitative dominion.[99]

With respect to supplying constitutional protection from property-commandeering preemption, it is possible that the force of state takings provisions may be augmented by the coexistence of constitutional home rule. Constitutional law scholars Kerry Abrams and Brandon Garrett observe that "many constitutional cases involve multiple constitutional claims that gain meaning when heard together and amplify the cognizable harm."[100] Abrams and Garrett point out that the U.S. Supreme Court "has repeatedly recognized that due process, equal protection, freedom of association, freedom of speech, free exercise, and other constitutional protections are overlapping and interrelated."[101] Further, they claim that the Court has recognized these "intersectional rights" in a litany of cases, including *Griswold*,[102] *Zablocki*,[103] *Romer*,[104] *Lawrence*,[105] and *Obergefell*,[106] among many others.[107]

Constitutional law scholar Michael Coenen has argued a similar "combination analysis" can also be found in the U.S. Supreme Court's structural arguments pertaining to vertical federalism.[108] Coenen explains how "collections of clauses" have "come together to demonstrate a textual

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[97] *Id.* at 2286 ("The premise that cities were mere creatures of the state legislature seemed only to encourage state legislators to think of local power as an extension of their own"); JAMES BRYCE, THE AMERICAN COMMONWEALTH, 576-77 (Liberty Fund 1995) (rev. ed. 1914) ("The transfer of the control of municipal resources from the localities to the (State) capitol had no other effect than to cause a like transfer of the methods and arts of corruption, and to make the fortunes of our principal cities the traffic of the lobbies.").

[98] HOWARD LEE MCBAIN, THE LAW AND PRACTICE OF MUNICIPAL HOME RULE, 6 (1916) (emphasis added).

[99] Paul A. Diller, *Reorienting Home Rule: Part 2–Remedying the Urban Disadvantage Through Federalism and Localism*, 77 LA. L. REV. 1045, 1064-66 (2017).

[100] Kerry A. Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. REV. 1309, 1330 (2017).

[101] *Id.* at 1316.

[102] Griswold v. Connecticut, 381 U.S. 479 (1965).

[103] Zablocki v. Redhail, 434 U.S. 374 (1978).

[104] Romer v. Evans, 517 U.S. 620 (1996).

[105] Lawrence v. Texas, 539 U.S. 558 (2003).

[106] Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

[107] Abrams & Garrett, *supra* note 95, at 1331.

[108] Michael Coenen, *Combining Constitutional Clauses*, 164 U. PA. L. REV. 1067, 1098 (2016).

basis for a structural principle that carries its own constitutional force."[109] As an example of such augmentation, Coenen examines *Alden v. Maine*,[110] in which the Court found that sovereign immunity covered actions brought under federal law against states in their own courts through "many different clauses understood together."[111] Citing Art. III, § 2, Art. IV, §§ 2–4, and Art. V of the U.S. Constitution, the Court noted how those "various textual provisions . . . assume the states' continued existence and active participation in the fundamental process of governance."[112] Additionally, the Court emphasized that the Tenth Amendment "was enacted to allay lingering concerns about the extent of the national power."[113]

Although it does not appear that any state court has found its Takings Clause to be augmented by other constitutional provisions, that does not bear on a state court's authority to analyze the intersection between its state constitutional takings doctrine and home rule provisions in the future. In fact, a combination analysis of state constitutional takings and home rule is an area in which state courts retain total judicial independence. Even if a particular state court is prone to interpreting its own constitution consistent with the federal Constitution, the existence of constitutional home rule may warrant an unprecedented expansion upon clause-specific constitutional doctrine. Such an expansion would be consistent with the U.S. Supreme Court's text-based combination analysis from *Alden*. Not only are constitutional home rule provisions analogous to the Tenth Amendment, but most state constitutions also have other provisions, often related to local taxation,[114] that assume local governments' "continued existence and active participation in the fundamental process of governance."[115]

Take Colorado, for example. Colorado has an especially strong form of home rule called "*imperio* immunity" that insulates local democratic processes from state intervention over matters of local concern.[116] The Colorado Constitution mandates that ordinances dealing with "local and municipal matters . . . shall supersede within the territorial limits and other

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[109] *Id.*

[110] Alden v. Maine, 527 U.S. 706, 712 (1999).

[111] Coenen, *supra* note 108, at 1099.

[112] *Alden*, 527 U.S. at 713.

[113] *Id.* at 713-14.

[114] *See generally* Erin Adele Scharff, *Powerful Cities?: Limits on Municipal Taxing Authority and What to Do About Them*, 91 N.Y.U. L. REV. 292 (2016).

[115] *Alden*, 527 U.S. at 713.

[116] *See* Richard Briffault, *Our Localism: Part I – The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 10 (1990) (discussing the *imperium in imperio* style of home rule that provides municipalities some immunity from legislative interference); Diller, *supra* note 99, at Appendix B; McBain, *supra* note 98, at 114-17.

jurisdiction of said city or town any law of the state in conflict therewith."[117] According to Justice Brewer, "the intent and scope of [an *imperio*] charter are to vest in the city a very enlarged control over public property and property devoted to public uses within the territorial limits."[118] Furthermore, Colorado's *imperio* home rule provision is just one of the many mentions of local governments in its state constitution. The subject of home rule itself encompasses its own article with thirteen different sections.[119] On top of that, the Colorado Constitution has dozens of other provisions that assume continued and active participation by localities in the fundamental process of governance—from local government debt[120] to municipal taxation[121] to county courts.[122] A Colorado court may, surveying the state's legal landscape and particular respect for local control, feel compelled to intervene to prevent intergovernmental takings that seem to upset the balance of power.

In addition, considering the history and policy behind constitutional home rule provisions alongside the prophylactic rationale that justifies the justiciability of intergovernmental takings may persuade a court to conclude that constitutional takings and home rule intersect when local public property is commandeered. Again, consider Colorado. One of the pressures that led to the adoption of constitutional home rule there was the recurring threat of violent uprising in Denver.[123] Indeed, the former Mayor of Denver lamented at the turn of the 20th century: "The police force came to be looked upon as a political force. In the performance of its duties as the conserver of the ambition of the political bosses, the honest citizen found it extremely hazardous at times to attempt to vote under his own name."[124] The "ambition" of which the Mayor spoke involved the state more or less auctioning off franchises to public-service corporations, which charged exorbitant and exploitative service fees to line the pockets of state legislators.[125] That sort of "rent-seeking" behavior by powerful political

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[117] COLO. CONST. art. XX, § 6.

[118] *See* City of St. Louis v. Western Union Tel. Co., 149 U.S. 465, 469 (1893).

[119] COLO. CONST. art. XX.

[120] COLO. CONST. art. XI, § 6.

[121] COLO. CONST. art. X, § 7.

[122] COLO. CONST. art. VI, § 17.

[123] *See generally* CLYDE LYNDON KING, THE HISTORY OF THE GOVERNMENT OF DENVER WITH SPECIAL REFERENCE TO ITS RELATIONS WITH PUBLIC SERVICE CORPORATIONS 211 (1911).

[124] *Id.* at 173.

[125] *Id.* at 172 ("All the party candidates [to the state legislature], not excepting, it is held, the judiciary, were named by the same capitalistic group interests that determined . . . the cost of Denver's every public service, whether water, gas, light, or street railway service.").

faction is the very sort of government action that takings jurisprudence has evolved to prevent.[126]

Recall that the point of conducting a combination analysis is that "multiple rights-based provisions of the Constitution might sometimes require the invalidation of government action that would be permitted if each provision were considered in isolation."[127] Although the bulk of intersectional rights jurisprudence has involved the individual rights of natural persons, the analogous structural arguments examined by Coenen indicate that it would be doctrinally consistent for state courts to analyze takings and home rule provisions – among the many others that speak to local self-governance – in combination.[128] The argument to be made is that constitutional home rule and takings intersect over the exploitative commandeering of local public property, and thus require a combination analysis under a unique constitutional standard more protective of local governments and taxpayers.

D. The Governmental / Proprietary Distinction

A fourth potential justification rests on the governmental/proprietary distinction, in spite of the U.S. Supreme Court's apparent aversion to it.[129] In some jurisdictions, if a locality uses property for a private purpose—in other words, if property is held in a "proprietary" as opposed to a "governmental" capacity, such as through the business-like provision of electric or water utility services[130]—then that property may not be taken by the federal or state government without just compensation.[131] It is fairly common for local governments to lease space to Telcos on water towers and other locally-owned structures at fair market rates,[132] which may suggest that

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[126] *See supra* note 64; *see also* RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN, 281 (1985) ("[T]he takings clause is designed to control rent seeking and political faction. It is those practices, and only those practices, that it reaches.").

[127] Coenen, *supra* note 108, at 1070.

[128] *Cf.* Josh Bendor, *Municipal Constitutional Rights: A New Approach*, 31 YALE L. & POL'Y REV. 389 (2013).

[129] *See* Hugh D. Spitzer, *Realigning the Governmental/Proprietary Distinction in Municipal Law*, 40 SEATTLE U. L. REV. 173, 196-98 (2016).

[130] *Cf. id.* at 177-79 (listing various governmental/proprietary rationales, such as, for example, an activity may be deemed governmental "either because it is an attribute of sovereignty . . . includ[ing] the police power, the power of eminent domain, and budgeting and appropriation").

[131] *See, e.g.*, City of Cambridge v. Comm'r of Pub. Welfare, 257 N.E.2d 782, 785 (Mass. 1970); Town of Winchester v. Cox, 26 A.2d 592, 594-95 (Conn. 1942); State v. Super. Ct. for Jefferson Cnty., 157 P. 1097, 1098-99 (Wash. 1916).

[132] *See, e.g.*, *Leasing of Government Property for Siting of Telecommunications Facilities*, MRSC (Apr. 2, 2021) https://mrsc.org/Home/Explore-Topics/Public-Works/Telecommunications/Leasing-of-Government-Property-for-Siting-of-Telec.aspx.

leasing space for small cells on street lights and traffic signals would similarly be considered a proprietary use. This may be more likely in states in which the proprietary powers of municipalities are expressly acknowledged in state constitutional home rule provisions, such as in Florida.[133] However, the governmental/proprietary distinction has fallen out of favor in many jurisdictions, and is usually deployed in other contexts, such as sovereign immunity.[134] Nevertheless, its invocation may weigh in favor of extending takings protection to some forms of local government property.

Colorado also provides an example of this distinction's application. In *City and County of Denver v. Qwest Corporation*, the Colorado Supreme Court invoked the governmental/proprietary distinction to hold that *50 Acres* did not extend protection to *all* local public property, indicating that only local property serving a proprietary function would receive protection.[135] Recall that in *50 Acres*, Justice Stevens specifically referred to municipal "facilities," rather than land, implying that the taking of the local landfill without just compensation inflicted an unconstitutional harm on the local taxpayers who paid for the construction and maintenance of that facility.[136] Notably, in *City and County of Denver*, the Colorado Supreme Court found that a law granting telecommunications providers a right to occupy public rights-of-way was not a compensable taking because public rights-of-way are held in a governmental capacity.[137] Arguably, the right to attach small cells to local light poles, traffic signals, and other similar structures is dissimilar from the right to occupy land held in the public trust, which tax dollars were not necessarily used to acquire or maintain. More importantly, many localities in Colorado provide telecommunications services in a proprietary capacity, especially broadband.[138] So if Telcos want to attach antennas to locally owned structures to provide a similar service, then it is most reasonable for those structures to be categorized as proprietary.

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[133] *See* FLA. CONST. art. VIII, § 2 ("Municipalities shall have . . . proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services.").

[134] *See* Spitzer, *supra* note 129, at 189-93.

[135] City of Denver v. Qwest Corp., 18 P.3d 748, 760-62 (Colo. 2001).

[136] United States v. 50 Acres of Land, 469 U.S. 24, 31 (1984).

[137] 18 P.3d at 760-62.

[138] Tamara Chuang, *19 More Colorado Cities and Counties Vote in Favor of City-Owned Internet, While Fort Collins Approves $150 Million to Move Forward*, DENVER POST (Nov. 8, 2017), https://www.denverpost.com/2017/11/08/19-more-colorado-municipalities-vote-for-city-owned-internet-fort-collins-approves-150-million.

In summary, since the federal Takings Clause applies to lower units of government as interpreted by the federal courts, it is consistent for state takings clauses to apply to lower units of government as interpreted by state courts. Accordingly, this Part has put forth four additional justifications for the claim that challenges to property-commandeering preemptions in general, and state small cell bills in particular, are judicially cognizable under state takings clauses. Together, these justifications and this novel form of preemption present state courts with the opportunity to extend federalism all the way down and revive state constitutionalism as it applies to intergovernmental takings.[139]

III. RETAKING CONTROL OVER 5G WITH *LORETTO*

Assuming that one of the four justifications offered in Part II could render intergovernmental takings claims justiciable under state constitutional takings provisions, this Part analyzes the merit of those challenges. Specifically, this Part applies the regulatory takings doctrine developed by the U.S. Supreme Court in *Loretto v. Teleprompter Manhattan CATV Corporation*[140] to the small cell preemptions enacted in Colorado, Texas, and Florida.[141] The small cell preemptions in those three states offer a comprehensive survey of the major issues raised by the other state small cell bills.

Before delving into these analyses, it is important to note that the cases discussed in this Part are federal cases. There are two main reasons to consider the application of federal takings doctrine to state small cell bills. First, although federal takings doctrine is not controlling when states interpret their own constitutional takings provisions, the U.S. Supreme Court's guidance has been important in fashioning the substantive takings tests.[142] That is certainly true in Colorado, in which the Colorado Supreme Court "has interpreted the Colorado Takings Clause as consistent with the federal clause," with a single irrelevant exception.[143] The Supreme Court of Tennessee recently declared, "An overwhelming majority of states whose constitutions or statutes contain provisions similar to the [federal] Takings Clause have interpreted these provisions as encompassing regulatory

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[139] *See supra* notes 23-25.

[140] 458 U.S. 419 (1982).

[141] H.B. 17-1193, 71st Gen. Assemb., 1st Reg. Sess. § 38-5.5-104.5 (Colo. 2017); C.S.C.S.H.B. 687, 25th Leg., 1st Reg. Sess. (Fla. 2017); S.B. 1004, 85th Leg., Reg. Sess. (Tex. 2017).

[142] *See* STEVEN J. EAGLE, REGULATORY TAKINGS §7-6 (5th ed. 2012) (discussing permanent physical invasions as categorical takings); Brady, *supra* note 75, at 347 n.17.

[143] Animas Valley Sand & Gravel, Inc. v. Bd. of Cnty. Comm'rs of La Plata, 38 P.3d 59, 64 (Colo. 2001).

takings, and these states have used the analytical framework developed by the United States Supreme Court when adjudicating regulatory takings claims."[144] Second, a number of state courts – including the highest courts in Colorado, Texas, and Florida, the three states with small cells bills analyzed in this Part – have specifically cited to *Loretto* when interpreting their own state constitutional takings provisions.[145]

A. The Loretto Per Se Test

Under *Loretto,* permanent physical occupations are *per se* takings.[146] Since *Federal Communications Commission v. Florida Power Corporation*[147] and *Gulf Power Company v. United States*[148] help to define the contours of the *per se* test set out in *Loretto*, this subsection will synthesize the analyses from *Loretto*, *Florida Power*, and *Gulf Power Co*. The underlying issues in *Loretto*, *Florida Power*, and *Gulf Power Co.* bear a number of similarities to the Small Cell Preemption Campaign. Notably, these cases spawn from the cable "pole-attachment wars" that started in the 1970s.[149] Each of the cases discussed below spawned from a regulation aimed at encouraging widespread adoption of new Community Access Television (CATV or "cable" TV) technology. In each case, a regulation was challenged for modifying the rights of cable companies to attach cable lines to someone else's property.

At issue in *Loretto* was a New York statute that sought to prevent landlords from acting as intermediaries between cable companies and tenant-subscribers by prohibiting landlords from "interfer[ing] with the installation of cable television facilities upon [their] propert[ies] or premises."[150] The statute also prohibited landlords from demanding payment from any tenant for permitting cable television services or demanding payment from any cable television company "in excess of any amount which

[144] Phillips v. Montgomery Cnty., 442 S.W.3d 233, 240-41 (Tenn. 2014) (citing four dozen cases from various jurisdictions in support of this claim).

[145] *See* Edwards Aquifer Auth. v. Day, 369 S.W.3d 814, 838-39 (Tex. 2012) ("[I]n construing article I, section 17 of the Texas Constitution, we have generally been guided by the United States Supreme Court's construction and application of the similar guarantee provided by the Fifth Amendment to the United States Constitution"); *Animas Valley Sand & Gravel, Inc.*, 38 P.3d at 66 n.5; Storer Cable T.V. of Fla., Inc. v. Summerwinds Apartments Assocs., Ltd., 493 So. 2d 417, 419 (Fla. 1986) (affirming decision that applies *Loretto* to the Florida Constitution's taking provision).

[146] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982).

[147] FCC v. Fla. Power Corp., 480 U.S. 245 (1987).

[148] Gulf Power Co. v. United States, 187 F.3d 1324 (11th Cir. 1999).

[149] SUSAN P. CRAWFORD, CAPTIVE AUDIENCE: THE TELECOM INDUSTRY AND MONOPOLY POWER IN THE GILDED AGE 39 (2013).

[150] *Loretto*, 458 U.S. at 423.

the [State Commission on Cable Television] shall, by regulation, determine to be reasonable."[151] Acting under this law, a cable company installed two four-inch by four-inch directional taps and a 30-foot long cable, roughly one-half inch in diameter, just above the rooftop of a building that was later purchased by Jean Loretto, a Manhattan landlord.[152] Arguing that the involuntary occupation of her property by the cable wires constituted a taking without just compensation, Ms. Loretto brought a class action suit against the cable company on behalf of all owners of real property in the state on which the defendant had placed CATV components.[153] Ultimately, Ms. Loretto's suit led the U.S. Supreme Court to establish a *per se* rule that "a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve."[154]

Florida Power and *Gulf Power Co.* arose after *Loretto* in response to the federal Pole Attachment Act and one of its later amendments. [155] By the 1970s, many, if not most, households had already been connected to electrical transmission networks to receive power; therefore, cable companies would negotiate pole attachment agreements with electric utilities to run cables across their utility poles.[156] Attachment agreements were cheaper for cable companies than having to erect their own infrastructure,[157] but these arrangements gave significant bargaining power to the electric utilities who often possessed a local monopoly on utility poles. This led cable companies to seek relief from federal regulators and lobby for the enactment of the Pole Attachment Act, which established regulations on attachment rates.[158] Specifically, the Pole Attachment Act put forward a process for setting a price ceiling on the rates that electric utilities could charge cable providers for access to their utility poles.[159]

Florida Power concerned an electric utility's resistance to rates dictated by the FCC pursuant to the Pole Attachment Act.[160] Florida Power

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[151] *Id.*

[152] *Id.* at 422.

[153] *Id.* at 424.

[154] *Id.* at 426.

[155] Act of Feb. 21, 1978, Pub. L. No. 95-234, 92 Stat. 33 (codified as amended at 47 U.S.C. § 224); Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified as amended at 47 U.S.C. § 224(f)); FCC v. Fla. Power Corp., 480 U.S. 245, 245-46 (1987) ("[T]he Act, as interpreted by the FCC, requires utility companies to give cable companies space on utility poles."); Gulf Power Co. v. United States, 187 F.3d 1324, 1327 (11th Cir. 1999) (describing the Act's "mandatory access provision").

[156] *Florida Power*, 480 U.S. at 247.

[157] *See* Daniel F. Spulber & Christopher S. Yoo, *Access to Networks: Economic and Constitutional Connections*, 88 CORNELL L. REV. 885, 998-1001 (2003) (arguing that pole attachment rates should be based on fair market value).

[158] *Florida Power*, 480 U.S. at 247-48.

[159] *See* 47 U.S.C. § 224(d)(1).

[160] *Florida Power*, 480 U.S. at 248-50.

Corporation first entered into a pole attachment agreement with Cox Cable Company in 1963, and signed other contracts in the years thereafter.[161] Following the enactment of the Pole Attachment Act in 1978, Florida Power's CATV-tenants issued complaints with the FCC that the rates they had previously agreed to were exorbitant.[162] After the FCC ordered Florida Power to lower its attachment rates significantly, Florida Power challenged the rate reduction order as an unconstitutional regulatory taking under *Loretto*.[163] The U.S. Supreme Court noted that the Pole Attachment Act did not *require* electric utilities to permit cable companies access to their utility poles.[164] In other words, the Pole Attachment Act did not grant cable companies an entitlement to attach their wires. Because the utility had already *invited* the particular cable company to lease space on its poles, the Court concluded that there was no unconstitutional taking in *Florida Power*: "[I]t is the invitation, not the rent, that makes the difference."[165]

The Supreme Court also made clear in *Florida Power* that it had not decided "what the application of [*Loretto*] would be if the FCC in a future case *required* utilities, over objection, to enter into, renew, or refrain from terminating pole attachment agreements."[166] The Eleventh Circuit was presented with that future case in *Gulf Power Co*.[167] In 1996, Congress amended the Pole Attachment Act and added a "mandatory access provision." In response, Gulf Power Company and six other electric utilities sued the federal government, alleging that the new provision was a "facially unconstitutional" taking of property without just compensation.[168]

The mandatory access provision stated that a "utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it."[169] The amendment went on to establish that "[t]he only exceptions to a utility's mandatory obligation to provide access are where there is insufficient capacity or some safety, reliability, or other engineering problem."[170] In contrast to the directive at issue in *Florida Power*—which had only authorized the FCC to "regulate the rates, terms, and conditions for

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[161] *Id.* at 248.
[162] *Id.*
[163] *Id.* at 249-50.
[164] *Id.* at 252-53.
[165] *Id.*
[166] *Id.* at 251 n.6 (emphasis added).
[167] Gulf Power Co. v. United States, 187 F.3d 1324, 1329 (11th Cir. 1999) ("Today, that future case is before us: the element of required acquiescence lacking in the pre-1996 version of the [Pole Attachment Act] is now present.") (internal quotations omitted).
[168] *Id.* at 1327.
[169] *Id.* (quoting 47 U.S.C. § 224(f)(1)).
[170] *Id*. (quoting 47 U.S.C. § 224(f)(2)).

pole attachments"[171]—the mandatory access provision granted an entitlement to cable companies to attach wires to other companies' poles. As a result, the Eleventh Circuit held that the mandatory access provision was a facial taking, consistent with both *Loretto* and *Florida Power*, because it "require[d] a utility to acquiesce to a permanent, physical occupation of its property."[172]

The legal directives in both *Loretto* and *Gulf Power Co*. were deemed *per se* takings, but the provision at issue in *Florida Power* was not. What separates *Loretto* and *Gulf Power Co.* from *Florida Power* —i.e., what is required for a legal directive to constitute a *per se* taking—is the "element of required acquiescence."[173] That means a price ceiling does not factor into the *Loretto per se* test.[174] For an intrastate intergovernmental takings challenge to state small cell preemptions to succeed, the plaintiffs must satisfy the element of required acquiescence by demonstrating that Telcos have been granted an entitlement to attach small cells to local public property. In other words, the small cell bills *require* local governments to allow attachments.

B. Challenging State Small Cell Preemptions under Loretto

The vast majority of state small cell bills probably satisfy the element of required acquiescence and, thus, constitute takings under *Loretto*'s permanent physical occupation test. Although Part II identifies multiple similarities shared by most state small cell bills, the text and structure of these bills vary enough that articulating the strongest takings claims for each individual bill is too tedious to undertake in this Essay. Consequently, this Section proposes and appraises three different claims pertaining to three

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[171] 47 U.S.C. § 224(b)(1).

[172] *Gulf Power Co.*, 187 F.3d at 1329 (ultimately holding that the mandatory access provision provided just compensation as required by the Fifth Amendment).

[173] FCC v. Fla. Power Corp., 480 U.S. 245, 252 (1987) ("[The] element of required acquiescence is at the heart of the concept of occupation."); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 440 (1982) ("So long as these regulations do not *require* the landlord to suffer the physical occupation of a portion of his building by a third party, they will be analyzed under the multifactor inquiry generally applicable to nonpossessory governmental activity.") (emphasis added); *Gulf Power Co.*, 187 F.3d at 1329 (discussing *Florida Power*, the court stated that "[w]ithout the 'element of required acquiescence,' there was no taking under *Loretto*."); *see also* Iowa Assurance Corp. v. City of Indianola, 650 F.3d 1094, 1098 (8th Cir. 2011); Cablevision Sys. Corp. v. FCC, 570 F.3d 83, 98 (2d Cir. 2009); Bldg. Owners & Managers Ass'n Int'l v. FCC, 254 F.3d 89, 97 (D.C. Cir. 2001); GTE Sw. Inc. v. Pub. Util. Comm,'n of Tex., 10 S.W.3d 7, 11-12 (Tex. App. 1999); Aspen-Tarpon Springs Ltd. P'ship v. Stuart, 635 So. 2d 61, 66 n.3 (Fla. Dist. Ct. App. 1994); Media Gen. Cable of Fairfax, Inc. v. Sequoyah Condo. Council of Co-Owners, 991 F.2d 1169, 1180 (4th Cir. 1993); Yee v. City of Escondido, 503 U.S. 519, 527 (1992).

[174] It might be relevant to a determination of just compensation, but a recent U.S. Supreme Court decision suggests that does not bear on whether a taking is unconstitutional. *See infra* Section 3.02(c)(ii).

different state small cell bills. These different claims are not mutually exclusive. Combinations of these claims may be brought in some states, and at least one of them is applicable in every state. Colorado's statute is used as an example to continue the thread woven throughout other Parts of this Essay, although its explicit entitlement grant does not align perfectly with the test articulated in *Loretto*.[175] Texas is featured since its state Takings Clause does not protect "private" property, but rather a "person's" property, and its localities have shown an interest in challenging their state's small cell bill. Note also that Texas has constitutional home rule. Finally, Florida is included since it also has constitutional home rule, and some Florida localities have undertaken preliminary legal action to invalidate property-commandeering preemption under their state constitutional takings provision.

i. Explicit Entitlement Grants

Several small cell bills explicitly and un-circuitously grant entitlements that, by themselves, satisfy the element of required acquiescence. For example, Colorado's H.B. 17-1193 states, "a telecommunications provider . . . *has the right to locate or collocate small cell facilities* or small cell networks on the light poles, light standards, traffic signals, or utility poles in the rights-of-way owned by the local government entity."[176] As state small cell bills go, this language is the most explicit grant of an entitlement to permanently occupy municipally-owned property, and it is reminiscent of the mandatory access provision at issue in *Gulf Power Co.* Based on this language alone, it seems likely that a small cell attached to local public property under H.B. 17-1193 would satisfy the element of required acquiescence and, therefore, constitute a *per* se taking under *Loretto*; that test is exclusively concerned with whether a property owner's right to exclude has been permanently compromised, no matter how small the trespass may be.[177]

Recall that the Colorado Supreme Court established in *Animas Valley Sand and Gravel* that Colorado courts interpret their state Takings Clause "consistent with the federal clause," with one irrelevant exception.[178] Importantly, the Colorado Court indicated that *Loretto* would have been applied if the case had involved a "physical invasion" of property.[179]

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[175] *See infra* note 182.

[176] H.B. 17-1193, 71st Gen. Assemb., 1st Reg. Sess. § 38-5.5-104.5 (Colo. 2017) (emphasis added); *see also* H.B. 2131, 86th Leg., Reg. Sess. § 1(d)2(A) (Kan. 2016).

[177] *Loretto*, 458 U.S. at 436.

[178] Animas Valley Sand & Gravel, Inc. v. Bd. of Cnty. Comm'rs of La Plata, 38 P.3d 59, 64 (Colo. 2001).

[179] *Id.* at 66 n.5.

Therefore, it is reasonable to conclude that a Colorado court would invoke *Loretto* if faced with a taking challenge to H.B. 17-1193.

However, any challenger of H.B. 17-1193 would need to anticipate a counterargument based on other provisions of the bill that may make the explicit entitlement grant more defensible from a takings challenge.[180] In apparent conflict with the explicit entitlement grant, § 38-5.5-106(1)(a) adds that nothing in the article authorizes Telcos to "construct any . . . small cell networks" within a locality "without first obtaining [its] consent."[181] Further, § 38-5.5-106(1)(c) adds that any prior consent given by localities does not extend to the "location of new facilities."[182]

However, this purported consent requirement may not defeat a takings claim brought under *Loretto* for two reasons. First, § 38-5.5-106(1)(a) is too general to give effect to a locality's objection to the physical occupation of a particular piece of property. This is due to federal law. If a locality were to say it did not consent, in general, to a particular Telco providing 5G service within its political boundaries, a Telco would most likely prevail in seeking recourse under both 47 U.S.C. §§ 253 and 332. Those federal statutes prohibit localities from erecting barriers to entry,[183] discriminating between wireless service providers,[184] and effectively prohibiting the provision of wireless services.[185] In other words, despite the statute purportedly requiring a Telco to obtain consent before its general entitlement to collocate on municipal poles becomes effective (or is *turned on*), localities are required by federal law to consent, generally, to that Telco's operation within their jurisdictions. Therefore, by federal law, localities must consent to the provision of 5G within their boundaries by any Telco seeking to offer the service, so the more pertinent question is whether that general consent suffices to turn on the explicit entitlement grant.

Second, § 38-5.5-106(1)(c) indicates that the federal requirement that a locality must generally consent to the provision of wireless service within its jurisdiction *does* in fact turn on (or effectively activate) the explicit entitlement grant to attach small cells to some local public property. Section 38-5.5-106(1)(c) states that a locality's prior consent given to a Telco to

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[180] For an explicit entitlement grant less open to convoluted counterargument, *see* S.B. 1388, 56th Leg., 2d Reg. Sess. § 3(D) (Okla. 2018); *see also* S.B. 602, 92d Gen. Assemb., Reg. Sess. 2019 § 23-17-506(c) (Ark. 2019); S.B. 3, W.Va. 2019 Reg. Sess. § 31-H-2-1(f)(2)(B) (W. Va. 2019). Note that Oklahoma courts also look to *Loretto*. *See* Bogart v. CapRock Commc'ns Corp., 69 P.3d 266, 271 (Okla. 2003).

[181] H.B. 17-1193, 71st Gen. Assemb., 1st Reg. Sess. § 38-5.5-106 (Colo. 2017).

[182] *Id.*

[183] *See* 47 U.S.C. § 253(a).

[184] *See* 47 U.S.C. § 332(c)(7)(B)(i)(I).

[185] *Id.* at § 332(c)(7)(B)(i)(II).

"erect or construct any poles, or to *locate or collocate* communications and broadband facilities on vertical structures in a right-of-way, does not extend to the *location* of new facilities."[186] Note how this consent provision leaves out the word "collocation" in the last clause. By omitting collocation from the consent provision, the explicit entitlement grant may resultingly give *any* Telco a right to attach small cells to *any* light pole, light standard, traffic signal, or utility pole in a right-of-way that is presently occupied by *any* type of broadband facility, no matter who owns the facility. That means the explicit entitlement grant would apply to any structure supporting a municipal broadband facility.[187] Further, what counts as a "broadband facility" is very broad in Colorado.[188] To appreciate the potential breadth of that omission, consider the following example—if any light pole or traffic signal is equipped to collect and transmit congestion-monitoring data, then it appears *any* Telco would be entitled to attach small cells to those structures. Therefore, since the purported consent provision does not entirely *turn off* the explicit entitlement grant, H.B. 17-1193 probably constitutes a taking under *Loretto*.[189]

ii. Mandated Approval Provisions, e.g. Texas S.B. 1004

A handful of small cell bills instruct localities that they must approve permit applications to collocate small cells on local public property.[190] These provisions effectively grant Telcos an entitlement to install small cells on anything that falls within the class of applications that must be approved. Some of these "mandated approval provisions" are more complicated than others. Texas S.B. 1004 says "a [Telco] is authorized, as a permitted use, *without need for a special use permit or similar zoning review and not subject to further land use approval*, to do the following . . ."[191] That

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[186] H.B. 17-1193, 71st Gen. Assemb., 1st Reg. Sess. § 38-5.5-106(1)(c) (Colo. 2017) (emphasis added).

[187] *See supra* note Part II(d).

[188] COLO. REV. STAT. § 29-27-402(1.5); *see also* 7 U.S.C. § 950bb(b)(1) (broadband service means "any technology identified by the Secretary as having the capacity to transmit data to enable a subscriber to the service to originate and receive high-quality voice, data, graphics, and video").

[189] In Colorado the question may then become whether and what property serves a proprietary function, but then again it may not. *Compare* City of Denver v. Qwest Corp., 18 P.3d 748, 760-62 (Colo. 2001), *with* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) ("[A] permanent physical occupation authorized by government is a taking *without regard to the public interests that it may serve*.") (emphasis added).

[190] H.B. 2365, 53d Leg., 1st Reg. Sess. § 9-592K (Ariz. 2017); S.B. 1451, 100th Gen. Assemb., Reg. Sess. §15(d)(9) (Ill. 2018); S.E.A. 213, 120th Gen. Assemb., 1st Reg. Sess. § 9(d)(5) (Ind. 2017); S.B. 14, 53d Leg., 2d Reg. Sess. § 5C (N.M. 2018); S.B. 1388, 56th Leg., 2d Reg. Sess. § 36-504C (Okla. 2018); S.B. 342B, 2017 Leg. Sess. § 39-32-4 (R.I. 2017); S.B. 1004, 85th Leg., Reg. Sess. § 284.101 (Tex. 2017).

[191] S.B. 1004, 85th Leg., Reg. Sess. § 284.101(a) (Tex. 2017) (emphasis added).

provision goes on to list a wide range of activities, which generally covers attaching small cells to local infrastructure and erecting new poles in public rights-of-way. In addition, S.B. 1004 provides "[a] municipality *shall approve*" applications for small cell installations "that [do] not require zoning or land use approval."[192] In effect, these provisions amount to an entitlement to install small cells; together, they mandate that localities *shall approve* a special class of applications.

Even if a specified class is small, insofar as entitlements are granted within that class, those directives would likely satisfy the *per se* test from *Loretto* and the element of required acquiescence. S.B. 1004 probably satisfies the *Loretto* test because it carves out a class of local infrastructure from which local governments' right to exclude permanent physical occupation of their property is removed. Note here the meanings of the word acquiesce: "to accept or comply tacitly or passively"; "[to] accept as inevitable or indisputable"; and "to remain submissive."[193] The language of S.B. 1004 does not say localities "shall accept" or "shall process" applications,[194] or that they "shall approve or disapprove" applications,[195]— which would at least imply that acquiescence to occupation is not required. Rather, S.B. 1004 mandates that localities "shall approve" applications that fall within the carve-out, thus requiring them to submit to the physical occupation of that infrastructure by small cells.

A counterargument could be made that the mandated approval provision in S.B. 1004 does not satisfy the element of required acquiescence because § 284.056 says that attachments to municipal infrastructure become exempt from zoning or land use approval – thus *turning on* the mandatory approval requirement – only after a pole attachment agreement has been struck between a municipality and a Telco. Section 284.056 provides "a municipality, [1] *subject to an agreement with the municipality* [2] *that does not conflict with this chapter*, [3] *shall allow* [attachment] of [small cells] on [municipal] poles."[196]

For two reasons, a response to the counterargument further highlights why S.B. 1004 appears to satisfy the element of required acquiescence. First, pole attachment agreements are also mandatory, since municipalities "shall allow" attachments pursuant to § 284.056. The logic here is basically the same as that regarding mandatory approval provisions, like § 284.154.[197]

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[192] *Id.* at § 284.154(c) (emphasis added).
[193] *See Acquiesce*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1993).
[194] *Cf.* C.S.C.S.H.B. 687, 25th Leg., 1st Reg. Sess. § 7(d) (Fla. 2017).
[195] *Cf.* VA. CODE ANN. § 15.2-2316.4(B)(1) (2017).
[196] *See* S.B. 1004, 85th Leg., Reg. Sess. § 284.056 (Tex. 2017) (emphasis added).
[197] *See supra* notes 191-93.

Likewise, by mandating that municipalities allow small cell attachments to their poles, § 284.056 directs municipalities to enter into pole attachment agreements, and, thus, requires inevitable acquiescence to the occupation of local public property by small cells.

Second, the requirement in § 284.056 that pole attachment agreements not conflict with the rest of the chapter[198] is a major qualification. Recall that in *Gulf Power Co.*, the court held that the mandatory access provision was a taking even though it was subject to a number of exceptions. The qualification that pole attachment agreements not conflict with other directives operates similarly to the exceptions to the mandatory access provision in *Gulf Power Co*. Specifically, none of the terms over which localities are authorized to negotiate when forming pole attachment agreements impact whether a locality may refuse attachments to its poles. Out of the exceptions to S.B. 1004's broad preemption provision,[199] which grant localities some authority to regulate small cell attachments, none effectively abate required acquiescence to inevitable occupation. In total, negotiation of a pole attachment agreement may only consist of a locality agreeing to charge less than the statutory price ceiling;[200] adjusting the rent for inflation;[201] imposing reasonable design or concealment measures in historic and design districts;[202] adopting a design manual;[203] requesting design information and other certificates;[204] extending statutory construction deadlines;[205] charging a capped application fee;[206] asking for advance notice of work done in rights-of-way;[207] and denying a Telco the right to replace or upgrade a *municipally owned* pole.[208] Although the negotiable terms may lessen the extent of the invasion, the U.S. Supreme Court indicated in *Loretto* that such conciliatory factors are primarily relevant to the determination of how much compensation is due, not to whether a taking occurred.[209] Therefore, the counterargument likely fails upon scrupulous examination of S.B. 1004.

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[198] The chapter refers to Ch. 591 of (2017) Texas Session Laws, which means it refers to S.B. 1004.
[199] S.B. 1004, 85th Leg., Reg. Sess. § 284.151 (Tex. 2017).
[200] *See id.* at § 284.053(b).
[201] *Id.* at § 284.054(b).
[202] *Id.* at § 284.105.
[203] *Id.* at § 284.108.
[204] *Id.* at § 284.153.
[205] *Id.* at § 284.155(b).
[206] *Id.* at § 284.156.
[207] *Id.* at § 284.157(d)(1).
[208] *Id.* at § 284.157(d)(2).
[209] *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 437-38 (1982).

Admittedly, Texas's mandatory approval claim is quite complicated. Some other states' mandatory approval provisions are less so.[210] Nevertheless, localities in Texas also have the option of bringing a claim based on S.B. 1004's "deemed-approved shot clock," the third and final way to challenge state small cell bills.

iii. Deemed-Approved Shot Clocks, e.g. Florida H.B. 687

The most common way for Telcos to obtain entitlements to put up small cells is through a combination of shot clock and deemed approved provisions, or "deemed-approved shot clocks." Take Florida's H.B. 687, for example, and note first that this bill has a broad preemption provision, which states, "Except as provided in this subsection, [a locality] may not prohibit, regulate, or charge for the collocation of [small cells] in the public rights-of-way."[211] Additionally, section 7(d) of H.B. 687 dictates that localities "shall accept applications for permits and shall process and issue permits subject to [specific] requirements."[212] According to this paragraph, an application is automatically "deemed complete" after fourteen days, absent express approval or objection by a locality. Furthermore, a complete application is automatically "deemed approved" after sixty days, absent express approval or objection.[213] Working in tandem, these two provisions demonstrate that – in the twenty-three states with deemed-approved shot clocks[214] – Telcos *shall* be granted entitlements for any and all permit applications to attach small cells to local public property without any approval or objection from a locality. The only condition is a little patience.[215]

Here, it is worth considering how a takings challenge to the deemed-approved shot clocks could be brought in two different ways: first, as a facial constitutional challenge to the preemptive law as in *Gulf Power Co.*, and second, as an as applied challenge to its operation in practice as in *Loretto*.

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[210] *See supra* note 191.

[211] C.S.C.S.H.B. 687, 25th Leg., 1st Reg. Sess. § 7(c) (Fla. 2017).

[212] *Id.* at § 7(d)(7) (emphasis added).

[213] *Id.* at § 7(d)(8).

[214] *See* Appendix.

[215] H.B. 687 is structured so that denial is not really an option Telcos face. Pursuant to § 7(d)9, if a locality denies an application, it must "specify in writing the basis for denial, including the specific code provisions on which the denial was based." C.S.C.S.H.B. 687, 25th Leg., 1st Reg. Sess. § 7(d)9 (Fla. 2017). The legitimate bases for which an application may be denied are restricted by the broad preemption provision to the bill's meager grants of discretion. Further, H.B. 687 provides for an expedited resubmission process with a thirty-day shot clock, during which "review shall be limited to the deficiencies cited in the denial." *Id.* Although the bill's resubmission process does not appear to have a deemed approved provision, applicants who cure their resubmission of deficiencies would probably not need one during that stage. Because subsequent review is limited, applicants are much more likely to seek injunctions if their cured resubmissions are not approved within the thirty-day shot clock. Arguably, then, the procedures outlined in H.B. 687 remove denial from a locality's list of realistic options.

The appropriate defendant depends on which path is pursued, but it is worth delineating both avenues due to standing and ripeness issues that are implicated by a facial challenge. Ideally, a facial challenge could be initiated immediately following the enactment of small cell preemption legislation in any state, but an as applied challenge would not be available to a municipality until a Telco utilizes the legal entitlement to attach small cells to local infrastructure. Both should have a strong chance of prevailing on the merits.

a. Facial Constitutional Challenge

The first approach was taken by the local-government plaintiffs in *Florida League of Cities v. Moody*, who sought declaratory and injunctive relief to invalidate H.B. 687.[216] That litigation did not proceed far and resulted in the plaintiffs agreeing to the dismissal of their complaint without prejudice.[217] Interestingly, the plaintiffs' motion agreeing to dismissal was filed following a Motion to Dismiss by the state-defendant. The state-defendant's motion claimed that the plaintiffs failed to state a cause of action upon which relief could be granted; the state asserted that the plaintiff's alleged injury was "hypothetical" because none of the three cities named as plaintiffs "[had] actually been requested for a Small Cell Statute permit by a wireless service provider."[218] The state emphasized that "no wireless services provider has launched 5G service in Florida and no 5G service is imminent"—two years after the enactment of H.B. 687.[219]

The hypothetical nature of the local governments' claim raises interesting questions of standing and ripeness. The U.S. Supreme Court's recent decision in *Knick v. Township of Scott* suggests that the local-government plaintiffs would have had success proceeding with their facial constitutional challenge.[220] Indeed, *Knick* appears to affirm the proposition that some takings claims "ripen with the mere enactment of a law."[221] A Florida court

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[216] Fla. League of Cities, Inc. v. Moody, No. 2019 CA 001071, 2019 WL 3884145 (Fla. Cir. Ct. June 24, 2019).

[217] Plaintiff's Notice of Dismissal Without Prejudice of the First Amended Complaint for Declaratory and Injunctive Relief, Fla. League of Cities, Inc. v. Moody, No. 2019 CA 001071 (Fla. Cir. Ct. Aug. 12, 2019).

[218] *Fla. League of Cities, Inc.*, No. 2019 CA 001071, 2019 WL 3884145.

[219] *Id.* (internal quotations omitted).

[220] Knick v. Twp. of Scott, 139 S. Ct. 2162, 2172 (2019) (Roberts, J., tracing the precedential support of his conclusion back to a dissent by Brennan, J., which "explained that 'once there is a "taking," compensation *must* be awarded' because '[a]s soon as private property has been taken, whether through formal condemnation proceedings, occupancy, physical invasion, *or regulation*, the landowner has *already* suffered a constitutional violation.'") (emphasis in original) (quoting and citing San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621, 654 (1981) (Brennan, J., dissenting)).

[221] Leading Case, *Fifth Amendment—Takings Clause—State Litigation Requirement*—Knick v. Township of Scott, 133 HARV. L. REV. 322, 329 (2019).

opinion has similarly noted that Florida's Takings Clause does not require implementing legislation,[222] citing *Knick* and implying that takings claims in Florida should be litigable "automatically," "immediately," or "as soon as the government takes . . . property."[223] Exactly *when* a taking occurs – in the sense of when a litigable interest arises – has often been a complicated inquiry with regulatory takings.[224] After *Knick*, questions about when regulatory takings claims become ripe, and whether a plaintiff has standing, appear even less clear and ought to be explored further.[225]

Knick's relationship with *Loretto* is unclear as well.[226] Prior to *Knick*, it may have been the case that, in order to adequately state a claim challenging the facial constitutionality of a regulatory taking, the just compensation requirement needed to be addressed. With respect to a litigable *Loretto* claim, in addition to alleging that acquiescence to physical occupation is required, a plaintiff bringing a facial challenge may have been required to adequately allege that the statutory or regulatory process for awarding compensation was unjust in some manner.[227] But *Knick* suggests there is no longer such a requirement (if ever there was).[228] Either way, the local-government plaintiffs in *Florida League of Cities* likely would not have failed because they briefed the just compensation issue, so it is difficult to say why they did not pursue the litigation.[229] Nevertheless, these complicated questions must be set aside for legal scholars to take up down the road.

There is another argument worth discussing that was available to the state-defendant in *Florida League of Cities*. Had the local-government plaintiffs overcome the Motion to Dismiss, the state-defendant could have subsequently asserted localities' ostensible option to deny permits as a reason why acquiescence is not actually required by H.B. 687. A Florida

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[222] Fla. Dep't of Agric. & Consumer Servs. v. Dolliver, 283 So. 3d 953, 965 (Fla. Dist. Ct. App. 2019) (Badlamenti, J., concurring specially) (citing *Knick*, 139 S. Ct. 2162).

[223] *Knick*, 139 S. Ct. at 2170-71.

[224] Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985), *overruled by Knick*, 139 S. Ct. 2162.

[225] Leading Case, *supra* note 222 ("[T]he majority's conception of workability overlooks troubling uncertainties created by *Knick* in allowing some takings claims *to ripen with the mere enactment of law*. This uncertainty is particularly likely in cases like *Knick* in which a regulation effects a per se limitation on the right to exclude . . . . ") (emphasis added).

[226] *Id.*

[227] *See* Gulf Power Co. v. United States, 187 F.3d 1324, 1331 (11th Cir. 1999) (citing *Hamilton Bank*, 473 U.S. 172, which was overruled by *Knick*, to hold that the mandatory access provision was not unconstitutional, even though it was held a *per se* taking under *Loretto*).

[228] *Knick*, 139 S. Ct. at 2180 ("The majority today holds, in conflict with precedent after precedent, that a government violates the Constitution whenever it takes property without advance compensation—no matter how good its commitment to pay.") (Kagan, J., dissenting).

[229] Plaintiff's First Amended Complaint for Declaratory and Injunctive Relief at 21, Fla. League of Cities, Inc. v. Moody, No. 2019 CA 001071 (Fla. Cir. Ct. May 13, 2019).

court may have found that denying permits is not a realistic option for localities, however, since permits may only be legitimately denied if based on limited exceptions, similar to the directive in *Gulf Power Co*.[230] Indeed, H.B. 687 is structured so that denial is not a real possibility that Telcos face. Pursuant to § 7(d)9, if a locality denies an application, it must "specify in writing the basis for denial, including the specific code provisions on which the denial was based."[231] There are five legitimate bases for denial included in § 7(d)11, such as localities' discretion to deny a proposed attachment if it "[m]aterially interferes with the safe operation of traffic control equipment."[232]

The state-defendant likely would argue that the fifth enumerated basis, which allows for denial if a proposed attachment "[f]ails to comply with applicable codes," affords localities significant discretion.[233] However, H.B. 687's broad preemption provision renders that fifth basis circular and meaningless, since it preempts localities from prohibiting or regulating small cell attachments "[e]xcept as provided" by H.B. 687 and subsequent amendments to that subsection of the Florida Statutes.[234] Thus, the procedures outlined in H.B. 687 remove denial from a locality's list of realistic options. Accordingly, a facial challenge to H.B. 687 would have a strong chance of success on the merits, since an inability to deny occupation surely equates to required acquiescence. Nevertheless, localities may wish to consider an alternative approach to a facial constitutional challenge, given the ripeness and standing uncertainties.

b. As Applied Constitutional Challenge

Under an alternative approach, localities may choose to sit on their hands, letting the shot clocks toll and applications become "deemed approved." Then, if a locality challenges a small cell bill as applied, i.e., after Telcos attach small cells to local public property, a court's inquiry will hinge on its application of the *Loretto per se* test.[235] Recall that H.B. 687 grants localities meager discretion to deny permits. Surely, a local-government challenger should still argue that H.B. 687 required its acquiescence to the newly-attached small cells, since denial was never a realistic option. An allegation of a locality's inability to deny collocation requests would probably be well received by a court, even as applied to particular attachments authorized

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[230] *Gulf Power Co.*, 187 F.3d at 1328-29.
[231] *See* C.S.C.S.H.B. 687, 25th Leg., 1st Reg. Sess. § 7(d)9 (Fla. 2017).
[232] *Id.* at § 7(d)11.a.
[233] *Id.* at § 7(d)11.e.
[234] *Id.* at § 7(c).
[235] *See* Storer Cable T.V. of Fla., Inc. v. Summerwinds Apartments Assocs., Ltd., 493 So. 2d 417, 419 (Fla. 1986); *see also supra* notes 144-45.

pursuant to deemed-approved shot clocks. That alone is probably sufficient for the court to find that a taking has occurred under the *Loretto* test.

In response, a state-defendant may try to argue that it had received implied consent to put up small cells, since the locality did not exercise its statutory option to deny its permit requests.[236] To put it differently, a state-defendant may attempt to shift the *post hoc* inquiry from whether denial was realistic to whether a locality tried to object. On the one hand, *Florida Power* establishes that prior, voluntary consent to the occupation of one's property thwarts the necessary element of required acquiescence.[237] On the other, *Florida Power* may also suggest that the element of required acquiescence is only satisfied after a property owner has explicitly objected to an invasive occupation.[238] However, it is hardly worth considering whether a property-owner must have previously objected to an occupation in order to satisfy *Loretto*; the primary source of that purported objection requirement is a lone footnote that does not concretely establish whether an explicit objection is necessary.[239] If anything, the *Florida Power* footnote only indicates that governmental authorization of an invasive occupation *over objection* is normally sufficient to satisfy *Loretto*, not that it is a necessary condition. Furthermore, courts' consistent use of the word "acquiescence," in both *Florida Power* and elsewhere, connotes an understanding that objecting would ultimately be fruitless.[240] So why require it? Prior objection cannot be a requirement, since "acquiescence" denotes "remaining submissive" to an "inevitable" outcome, as well as "indisputability."[241] These as applied challenges, therefore, are likely to prevail on the merits.

* * *

There are three main features of state small cell preemption bills that may satisfy the element of required acquiescence under the *Loretto per se* test for permanent physical occupations. A few states, such as Colorado, explicitly grant Telcos an entitlement to collocate on local public property in a manner that most likely constitutes a taking. The other two arguments have a solid chance of success, and nearly every enacted small cell preemption includes a deemed-approved shot clock. Local governments in Colorado, Texas, and

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[236] *See generally* Desnick v. Am. Broad. Cos., 44 F.3d 1345, 1351 (7th Cir. 1995) (discussing the legal doctrine of implied consent as it relates to trespass).

[237] FCC v. Fla. Power Corp., 480 U.S. 245, 252-53 (1987).

[238] *Id.* at 251-52, n.6.

[239] *Id.* at 251 n.6; *see also* Yee v. City of Escondido, 503 U.S. 519, 528 (1992).

[240] *See supra* note 173.

[241] *See supra* note 194.

Florida should consider challenging these property-commandeering preemptions, either as facial takings or takings as applied.

While legal challenges to small cell preemptions have been brought by a few local governments, none alleging state constitutional takings have been decided on the merits, nor have any been dismissed with prejudice. Local governments in Ohio successfully challenged their state's small cell bill, but they prevailed on a claim about the General Assembly's violation of a single-subject rule.[242] The only other litigation over state small cell bills occurred in Texas, but those claims were brought under the federal Takings Clause and ultimately fell by the wayside. [243] As a result, the three intrastate intergovernmental takings claims described herein would be a matter of first impression in any state court in the United States.

CONCLUSION

Following the rise of the smartphone, and through the buildout of the current generation of wireless networks, the number of cell towers across the United States has grown to well over 150,000.[244] Unfortunately for some Telcos, the cell tower model is proving unsustainable because of increasing data usage and growing operating costs. 5G networks are the solution, but an essential ingredient of those networks is the ultra-densification of small cellular infrastructure. The Telcos recognize that the most efficient means of building these new networks is by attaching small cells to existing locally-owned streetlights, traffic signals, stop signs, and other public property.

To this end, the Telcos have waged an attack on local autonomy through the Small Cell Preemption Campaign. This campaign has resulted in twenty-five states enacting a noteworthy and unique form of property-commandeering preemption which effectively subsidizes the rollout of 5G infrastructure. Viewed through another lens, however, property-commandeering preemptions are not all that novel. What is unique are the parties involved: state and local governments. These peculiar small cell bills present an opportunity that is ripe for a revival of state constitutionalism. As demonstrated in this Essay, there are plenty of valid legal reasons and rationales on which state courts could base a finding that intrastate intergovernmental takings are justiciable. Such determinations are critical, since most state small cell bills seem to constitute regulatory takings under

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[242] City of Bexley v. State, 92 N.E.3d 397 (Ohio Ct. Com. Pl. 2017).

[243] *See, e.g.*, City of Austin v. Texas, No. 1:17-CV-806-RP, 2017 WL 7052303 (W.D. Tex. Aug. 31, 2017).

[244] CELLULAR TELECOMMS. INDUS. ASS'N, *Industry Data*, https://www.ctia.org/the-wireless-industry/infographics-library (last visited Feb. 5, 2019).

the *Loretto per se* test. Without judicial recognition and scrutiny of these regulatory takings, one worries what other forms of preemption might manifest in the future that commandeer local public property for the advantage of a few powerful business entities.

APPENDIX

Statute	**Bill**	**Small Cell Support Structure (n. 37)**	**Price Ceiling (n. 38)**	**Deemed Approved Shot Clocks (n. 39)**	**In-Kind Ban (n. 41)**	**Broad Preempt (n. 41)**
ARK. CODE ANN. § 23-17-501	S.B. 602, 92d Gen. Assemb., Reg. Sess. 2019 (Ark. 2019)	S.B. 602 § 23-17-503(22)(A)	S.B. 602 § 23-17-511(c)(1) ($100/yr)	S.B. 602 § 23-17-510(d)(7)	S.B. 602 § 23-17-510(d)(1)	S.B. 602 § 23-17-510(b)
ARIZ. REV. STAT ANN. § 11-1801 (2020)	H.B. 2365, 53d Leg., 1st Reg. Sess. (Ariz. 2017)	H.B. 2365 § 9-591.27(iv)	H.B. 2365 § 9-595C. ($50/yr)	H.B. 2365 §§ 9-592K, L	H.B. 2365 § 9-593G.1.	H.B. 2365 § 9-593B.
COLO. REV. STAT. §§ 29-27-401, 38-5.5-101 (2019)	H.B. 17-1193, 71st Gen. Assemb., 1st Reg Sess. (Colo. 2017)	*H.B. 17-1193 § 38-5.5-104.5(3)(a)	H.B. 17-1193 § 38-5.5-108 (cost**)	--	--	--
FLA. STAT. ANN. tit. 26, § 337.401 (2019)	C.S.C.S.H.B. No. 687, 25th Leg., 1st Reg. Sess. (Fla. 2017)	C.S.C.S.H.B. No. 687 § 7(b)11	C.S.C.S.H.B. No. 687 § 7(f)3. ($150/yr)	C.S.C.S.H.B. No. 687 §§ 7(d)7, 8	C.S.C.S.H.B. No. 687 §§ 7(d)1	C.S.C.S.H.B. No. 687 § 7(c)
GA. CODE ANN. § 36-66C-1	S.B. 66, 2019-2020 Reg. Sess. (Ga. 2019)	S.B. 66 § 36-66C-2(26)	S.B. 66 § 36-66C-5(a)(1) ($100/yr)	S.B. 66 §§ 36-66C-7(b)-(e)	S.B. 66 § 36-66C-16	S.B. 66 § 36-66C-20(c)

HAW. REV. STAT. ANN. tit. 13, § 206N-1 (2019)	H.B. No. 2651, 29th Leg., Reg. Sess. (Haw. 2018)	H.B. No.2651 § 2	H.B. No.2651 § 7(d) (reasonable)	H.B. No.2651 § 6(9)	H.B. No.2651 § 6(4)	H.B. No. 2651 § 3
ILL. COMPILED STAT. ANN., § 840/1 (2019)	S.B. 1451, 100th Gen. Assemb. (Ill. 2018)	S.B. 1451 § 10	S.B. 1451 § 15(i)3 ($200/yr or cost)	S.B. 1451 §§ 15(d)7, 8	S.B. 1451 § 15(d)1	S.B. 1451 § 15(b)
ANN. IND. CODE tit. 8 § 8-1-32.3-1 (2019)	S.E.A. No. 213, 120th Gen. Assemb., 1st Reg. Sess. (Ind. 2017)	S.E.A. No. 213 § 12(2)	S.E.A. No. 213 § 26(d)1. ($50/yr)	--	--	--
IOWA CODE ANN. tit. 1, § 8C.1 (2019)	S.F. 431, 87th Gen. Assemb., 1st Reg. Sess. (Ia. 2017)	S.F. 431 § 1.14	S.F. 431 § 3.4. (cost)	S.F. 431 § 3.c.(2)	--	S.F. 431 § 3.1.a.
KAN. STAT. ANN. § 66-2019 (2019)	H.B. No. 2131, 86th Leg., Reg. Sess. (Kan. 2016)	H.B. No. 2131 § 1(b)21	H.B. No. 2131 § 2(n) (cost)	H.B. No. 2131 §§ 1(h) 3, 5	H.B. No. 2131 § 2(h)(4)	--
MICH. COMPILED LAWS ANN. § 460.1301 (2019)	S.B. No. 637, 99th Leg., Reg. Sess. (Mich. 2018)	S.B. No. 637 § 9(a)	S.B. No. 637 § 13(3)(a) ($20/yr)	S.B. No. 637 § 17(2)(d)	S.B. No. 637 § 15(2)(a)	S.B. No. 637 § 11(1)

MINN. STAT. ANN. §§ 237.162, 237.163 (2019)	H.F. No. 739, 90th Leg., 1st Reg. Sess. (Minn. 2017)	***H.F. No. 739 § 10.Subd.16.	H.F. No. 739 § 17.Subd.6.(g)(1) ($150/yr)	H.F. No. 739 § 15.Subd.3c.(c)	--	H.F. No. 739 § 18 subd.7.(e)
ANN. MO. STATE. tit. 6, § 67.5110 (2019)	H.B. No. 1991, 99th Gen. Assemb., 2d Reg. Sess. (Mo. 2018)	H.B. No. 1991 § 67.5111.(21)	H.B. No. 1991 § 67.51164.(1) ($150/yr)	H.B. No. 1991 § 67.5113.3.(8)	H.B. No. 1991 § 67.5113.3.(1)	H.B. No. 1991 § 67.5113.2.
NEB. REV. STAT. §§ 86.1240-86.1244.	L.B. 184, 106th Leg., 1st Sess. (N.B. 2019)	L.B. 184 § (28)	L.B. 184 § 29(3) ($20/yr)	L.B. 184 § 37(5)(h)	L.B. 184 § 37(5)(a)	L.B. 184 § 37(2)
N.M. STAT. ANN. § 63-9I-1 (2019)	S.B. No. 14, 53d Leg., 2d Reg. Sess. (N.M. 2018)	S.B. No. 14 § 2.Q.	S.B. No. 14 § 6.C. ($20/yr)	S.B. No. 14 § 4.E.(3)	S.B. No. 14 § 4.J.(1)	S.B. No. 14 § 4.B.
N.C. GENERAL STAT. REV. § 160A-400.50 (2019)	H.B. No. 310, N.C. 2017 Gen. Assemb., 1st Sess. (N.C. 2017)	H.B. No. 310 § 160A-400.51.(3)(3b)	H.B. No. 310 § 160A-400.56(a) ($50/yr)	N.C. H.B. No. 310 §§ 160A-400.54(d)(3), (4)	H.B. No. 310 §§ 160A-400.54(d)(1)	H.B. No. 310 § 160A-400.54(a)
OHIO REV. CODE ANN. tit. 49, § 4939.01 (2019)	Sub. H.B. No. 478, 132d Gen. Assemb., 2017-18 Sess. (Ohio 2018)	Sub. H.B. No. 478 § 4939.01(V)	Sub. H.B. No. 478 § 4939.0322(B) ($200/yr)	Sub. H.B. No. 478 § 4939.031(C)	--	Sub. H.B. No. 478 § 4939.031(D)

OKLA. STAT. ANN. tit. 11, § 36-501 (2019))	S.B. No. 1388, 56th Leg., 2d Reg. Sess. (Okla. 2018)	S.B. No. 1388 § 36-502.22.	S.B. No. 1388 § 36-506E. ($20/yr)	S.B. No. 1388 §§ 36-504D.6., 7.	S.B. No. 1388 § 36-504D.1.	S.B. No. 1388 § 36-504B.
R.I. STAT. § 39-32-1 (2019)	17-S 342B, R.I. 2017 Leg. Sess. (R.I. 2017)	17-S 342B § 39-32-1(7)	17-S 342B § 39-32-5(a) ($150/yr)	17-S 342B §§ 39-32-4(a), (b)	--	17-S 342B § 39-32-2(b)
TENN. CODE ANN. tit. 13, § 13-24-401 (2019)	H.B. No. 2279, 110th Gen. Assemb., 2d Reg. Sess. (Tenn. 2018)	H.B. No. 2279 § 13-24-402(15)	H.B. No. 2279 § 13-24-407(a)(2) ($100/yr)	H.B. No. 2279 §§ 13-24-409(b)(5), (6)	H.B. No. 2279 § 13-24-407(e)(4)	H.B. No. 2279 § 13-24-406(4)
TEX. STAT. AND CODE ANN. tit. 9, § 284.001 (2019)	S.B. No. 1004, 85th Leg., Reg. Sess. (Tex. 2017)	S.B. No. 1004 § 284.002(21)	S.B. No. 1004 § 284.056 ($20/yr)	S.B. No. 1004 § 284.154(d)	S.B. No. 1004 § 284.151(b)	S.B. No. 1004 § 284.151(a)
UTAH CODE ANN. tit. 54, § 54-21-101 (2019)	S.B. 189, 62d Leg., General Sess. (Utah 2018)	S.B. 189 § 54-21-101(28)(a)	S.B. 189 § 54-21-504 ($50/yr)	S.B. 189 §§ 54-21-302(6)(a), (b)	S.B. 189 § 54-21-601(6)(b)(ii)	S.B. 189 § 54-21-301(2)
ANN. CODE OF VA. §§ 15.2-2316.3, 56-484.26 (2019)	S.B. No. 1282, Va. 2017 Reg. Sess. (Va. 2018)	S.B. No. 1282 § 15.2-2316.3.	S.B. No. 1282 § 56-484.31.B. (cost)	S.B. No. 1282 § 15.2-2316.4.B.1.	S.B. No. 1282 § 56-484.27.B.	S.B. No. 1282 § 56-484.27.A.

WIS. STAT. §§ 66.0404, 66.0414.	S.B. 239, 2019-2020 Leg. (Wi. 2019)	S.B. 239 § 66.0414 (x)	S.B. 239 § 66.0414 (2)(c)5 ($20/yr)	S.B. 239 § 66.0414 (3)(c)1.f.	--	S.B. § 66.0414 (3)(a)
W. VA. CODE ANN. §§ 31H-1, 31H-2	S.B. 3, W.Va. 2019 Reg. Sess. (W. Va. 2019)	S.B. 3 § 31H-1-2(24)[A]	S.B. 3 § 31H-2-1(d) ($25/yr)	S.B. 3 § 31H-2-2(c)(7)	S.B. 3 § 31H-2-2(c)(1)	S.B. 3 § 31H-2-1(b)

* This provision does not supply a definition, but explicitly refers to light poles, etc.

** The attachments rates are set not to exceed those authorized by 47 U.S.C. § 224.

*** This provision gives localities discretion to determine what is a wireless support structure, within reason.

[A] Streetlights and traffic signals are included under the definition of "utility pole."