# CLIMATE CRISIS PITS LOCAL GOVERNMENTS AGAINST 19TH-CENTURY LEGAL DOCTRINE

As austerity shrinks already meager national programs, local governments are facing heightened pressure to take up the slack—and even to re-imagine public services in an age of climate crisis and resource stress. The wave of so-called "re-municipalization" efforts around the world, seeking to return electric and water utilities to community hands, is a key example of how this new reality is playing out. Municipalities are tackling a variety of public initiatives neglected by central authorities.

Cities cannot meet these responsibilities without the necessary means. Yet in 2010alone state aid to local governments was cut by $12.6 billion in the United States; in Nebraska, it was eliminated. We have no choice but to resuscitate a debate over local spending, one that has played a pivotal role in US history.

In the United States, municipalities are *public* corporations. Just like private corporations, they can borrow money, issue bonds, go into debt, develop credit scores, and own utilities. Though the financial powers of localities are quite limited today, this was not always the case.

The Panic of 1837, a financial crisis that saw many states default on their debt, inaugurated an era of local spending: between 1840 and 1880, municipal debt in the United States grew by 3,300 percent. By 1902, localities were spending more than states and the federal government combined.

Those ideologically opposed to public intervention in the economy were wary of this development. As corporate lawyer and federal circuit court justice John F. Dillon wrote in 1872: “It has, unfortunately become quite too common with us to confer upon [municipal] corporations extraordinary powers, such as the authority to aid in the construction of railways, or other undertakings, *which are better left to private enterprise*.” (Emphasis added.)

“To late nineteenth century conservatives,” legal scholar Joan C. Williams has explained, “the primary threat to the private sphere was intrusion on property rights through redistributive programs (such as bonding, regulation, or the income tax).” This view led to “Dillon’s desire to limit the frenzied issuance of bonds by municipalities in the post-Civil War era.”

In the United States today, there are over 2,000 community-owned electric utilities (including all of North Dakota’s electric utilities), countless more publicly owned water and sewage utilities, a handful of municipal broadband networks, and a few local public health services. But these are the exception, not the rule, and most were established a century ago.

Wherever it is proposed, going public means confronting a legal structure that protects corporate property and meeting aggressive corporate resistance—and for years, it has been almost unheard of.

In 2012, citizens of Thurston County, Washington moved to create a community-owned electric utility, hoping to join Washington's 28 other Public Utility Districts (PUDs). Unlike the private Puget Sound Energy (PSE) corporation that has controlled electricity in the county for years, the PUD would be not-for-profit and run by elected commissioners.

After Thurston citizens gathered more than 11,000 valid signatures to qualify the initiative for the ballot, PSE spent over $640,000 to successfully defeat the initiative, quintupling Thurston's previous record for spending on a county-wide election, according to pro-municipalization activists. And that's not even counting what PSE spent on an array of public relations gimmicks, like giving away of refrigerators in the days leading up to the vote.

In La Cruces, New Mexico, where citizens succeeded in voting to municipalize in 1991, resistance persisted well after the law's passage. With the city already facing the costs of taking over power infrastructure, the outgoing private utility forced the city to pay an extra $53 million in compensation for the investments it had made in future profits.

Eventually, the municipalization effort was nixed, an example of private property protections making it impossible for democratic majorities to pry their communities from the grip of private interests.

The citizens of wealthy, progressive Boulder, CO have voted multiple times in the past few years in favor of a public power utility—and even in the face of numerous court cases and retaliatory initiatives to defend the private status quo, the city's commitment to municipalization appears to be steadfast. Victory, however, is uncertain; most US public utilities were established in the 1800s, and Boulder is venturing into "uncharted legal and financial territory," says Sarah Huntley, a spokesperson for the city. A constitutional fight over localities' power of eminent domain is just getting started in Colorado.

Unlike Boulder, many cities do not have the means to pursue municipalization or to take on the resulting corporate backlash. On top of the political showdowns, local governments have increasingly been forced to defend an oft-challenged policy, dating back to 1913, that makes it cheaper for municipalities to issue bonds. An acknowledgement of a degree of local financial sovereignty, the policy exempts municipal bond revenues from the federal income tax, thus lowering interest rates. That makes it more affordable for local communities to take on the debt required for public projects.

But the exemption has long been criticized for denying the federal government revenue, with persistent efforts to abolish it: the Treasury persuaded Franklin Delano Roosevelt to oppose the exemption in 1938, and in 1988 the Supreme Court rejected constitutional protections for state and local borrowing, directly putting the measure on the chopping block. Obama has continued this pattern, proposing substantial cuts to the exemption in his new 2016 budget, while advocating for an expansion of public-private partnerships at the local level. Those defending the exemption include Heather Bailey, director of energy strategy for the city of Boulder. She says, “tax-exempt municipal bonds are what make public [electricity] affordable, so [cities] don’t have to pay dividends to share holders.”

Bailey is not alone: the Government Finance Officers Association, the National League of Cities, the America Public Power Association and many others have spoken out strongly in support of the policy.

Bringing utilities under community control is expensive, as those who oppose public ownership will always emphasize. The tax exemption lightens this burden.

Still, the power of municipalities to raise and spend money remains severely limited by century-old restrictions. At the end of the 19th century, states clamped down on local borrowing and taxation.

The definition of “public purpose” projects that localities could fund was narrowed considerably, establishing “the basic framework within which local governments were to invest throughout the next century,” as Alberta Sbragia summarizes in her 1996 book *Debt Wish*.

For example, in 1875, the Kansas Supreme Court struck down a social program that had empowered local governments to aid drought-stricken farmers, on the grounds that it did not fulfill a “public purpose.” As the modern example of Boulder makes clear, public municipal corporations—cities—have little ability to harness private property for public purposes. The comparatively uncontroversial power of private corporations to confiscate property for their own projects, like the laying of pipeline, reveals much about how the legal framework governing corporations has evolved.

Sbragia identified three legal realities that have shaped local spending in the United States for over a century. First, “neither state government nor the federal government is legally a corporation, but the municipality is.”

Second, as a “public corporation,” municipalities are subject to “numerous controls not applied to private corporations.” Municipalizing is treated much differently than privatizing.

Finally, thanks to "Dillon's Rule," adopted by the Supreme Court in 1903 and named after John F. Dillon, the powers of municipalities can be arbitrarily taken away by state legislatures. We see an egregious example of this today in Michigan, where state-appointed "emergency managers" can unilaterally govern cities.

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