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Richard Briffault
Joseph P. Chamberlain Professor of Legislation
Columbia Law School

Preemption of City Authority in America

Preemption refers to a state's displacement of local decision-making. States have long restricted local authority. Tax and expenditures limitations affect local revenue-raising and spending. State laws dealing with municipal government employment or contracting or imposing unfunded mandates have long burdened local service delivery. But in recent decades – starting in the late 1990s, picking up in the 2010s, and accelerating further in the last few years – state legislatures have moved forcefully to block local law-making over a wide range of subjects, from economic regulation, to environmental protection, to social and cultural “hot button” issues. This “new preemption” broadly substitutes state-level preferences for the views of local voters. Many of these measures are deregulatory – they do not replace varying local laws with a state standard but simply bar all government action on the subject. And increasingly preemption is punitive – it not only displaces local efforts but calls for punishing local officials or cities when they try to disagree. This year, preemption moves have become even more aggressive, directly challenging local self-government.

The rest of this memo spotlights: (i) some of the areas where states have been most active in displacing local governments; (ii) the most punitive preemptive techniques; and (iii) and this year's turn to attacking local government itself with sweeping measures that disrupt local self-government in the capital cities of Mississippi and Tennessee, and sharply curtail if not eliminate local law-making in Florida and Texas.



Areas Targeted by States for Preemption¹

Environmental Protection

- Energy transition: 20² states preempt local laws that would limit the use of fossil fuels
- Plastic Bag bans: 5 states prohibit local governments from banning single-use plastic bags

Firearms

- 45 states preempt local firearms regulation

Housing

- Rent regulation/rent control – 31 states preempt local action
- Inclusionary zoning – 11 states preempt local action
- Restrictions on short-term rentals – 10 states preempt local action

Municipal Broadband

- 21 states

Police Reform

- 4 states now limit or prohibit the ability of cities to reduce their funding for law enforcement
- 2 states have passed laws limiting the role of civilians on local police-civilian oversight boards

Public Health

- Nutrition labeling: 9 states prohibit measures like calorie count displays
- Pesticide regulation: 43 states preempt local pesticide regulation
- Responses to COVID-19: 19 states prohibit local mask or vaccine requirements; 14 states now limit local public health authority to issue emergency orders
- Tobacco: 22 states preempt local youth access restrictions

Ride-sharing

- 41 states prohibit local regulation of ride-sharing

“Sanctuary”

- 9 states have passed laws prohibiting or punishing local governments that have adopted so-called “sanctuary” policies that limit cooperation with federal immigration law enforcement

Workplace Protections

- Minimum Wage: 27 states bar local minimum wage requirements
- Paid Leave: 23 states bar local laws that would require paid sick, family or medical leave
- Fair Scheduling: 9 states preempt local fair scheduling laws

¹ Preemption always varies to some degree. Some state laws prohibit all local action on the subject; some permit a limited amount of local action that conforms to state law; some create barriers to local action or limit the scope of amount of local action.

² All numbers are approximate, as states are constantly adding, subtracting or modifying their rules.



Punitive Preemption

The traditional effect of state preemption laws was simply to nullify local measures inconsistent with state policy. But over the past several years, some states have gone further and now impose harsh penalties on local officials — civil and sometimes criminal penalties and removal from office — who implement or even simply propose or endorse local laws that may be subject to preemption. States also penalize the cities and counties that adopt preempted laws with loss of state aid and exposure to civil suits by hostile interest groups. The most punitive measures have focused on local efforts to regulate firearms or to pursue their own policies in dealing with undocumented aliens. States with such punitive laws include Arizona, Florida, Iowa, Kentucky, Oklahoma, and Texas.

Until recently, the most punitive state law was Arizona's SB 1487, which provides for the cutoff of state aid to localities for any local law the state attorney general determines is preempted and which the local government then fails to promptly repeal. Under SB 1487, a single state legislator from any district may request the state attorney general to investigate and report the legislator's claim that a local official action violates state law. If the attorney general concludes the local measure is preempted, he must notify the offending local government; if the local government "fail[s] to resolve the violation within thirty days," the attorney general must then notify the state treasury who must withhold "state shared monies" from the locality until the violation is resolved.

2023: Direct Attacks on Local Self-Government

This year witnessed a heightening of the state challenge to local self-government, with laws in Mississippi and Tennessee directly attacking the governments of those states' largest cities, and laws currently awaiting the signatures of the governors of Florida and Texas that would broadly strip the cities in those states of most legislative authority.

Jackson, Mississippi: Two new state laws create a new court of state-appointed judges with jurisdiction over criminal matters and the vehicle and traffic laws in the Capitol Complex Improvement District (CCID), a special district in Jackson centered around the state capitol building with its own police force. The laws also expand the CCID's boundaries in order to give the Capitol Police jurisdiction over all of Jackson, and authorize the state attorney general to appoint new prosecutors for the district. Challenges to these laws under the state constitution and as racial discrimination — Jackson is 80% Black, but the state government officials empowered to appoint the judge and prosecutors for the CCID are white -- under the federal Equal Protection Clause are currently pending.

Nashville, Tennessee: The Tennessee legislature passed a law cutting the size of the Nashville-Davidson County Metro Council legislature in half.

Florida: The Florida legislature has passed a measure, currently³ awaiting Governor DeSantis's signature, that authorizes suits against city or county ordinances that are either expressly preempted by the state constitution or state law or are "arbitrary or unreasonable." When such a lawsuit is filed, the municipality or county must immediately suspend enforcement of the ordinance. A prevailing plaintiff may win up to \$50,000 in attorneys fees, costs, and damages. In addition, before adopting new ordinances, counties and cities must now prepare "business impact estimates" of the effect of any ordinance on local private, for-profit businesses.

Texas: The Texas legislature has passed a measure, currently⁴ awaiting Governor Abbott's signature, which would preempt all local regulation of matters subject to the state's Agriculture, Business & Commerce, Finance, Insurance, Labor, Natural Resources, Occupations, and Property Codes. Any person claiming to be injured by a municipal or county violation of this sweeping preemption measure can bring an action for injunction relief, costs, and attorneys' fees.

³ As of TODAY, May 31, 2023

⁴ As of TODAY, May 31, 2023