



Blanket Preemption: A Troubling Effort to Stifle Progressive Local Policymaking & Block Local Democracy

Prepared by Professor Laurie Reynolds and A Better Balance
March 2018





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In recent years, state lawmakers have become more aggressive in interfering with local lawmaking through their use of “preemption” –stopping local governments from passing laws and invalidating local laws that have already been enacted. Used sparingly and properly, preemption can serve the common good, by imposing minimum statewide standards and adopting uniform state policies. Unfortunately, preemption is now being used to stop local innovations across a broad and growing range of issues, including labor standards, environmental protection, civil rights, broadband access, fracking, public health, and gun safety. This misuse of state preemption power perpetuates racial and economic inequality, limits local anti-discrimination efforts, and systemically strips local governments of their power to set standards that reflect the views and values of their citizens.

To detail the effects of these abuses of state power, the Local Solutions Support Center, a clearinghouse that works to track, coordinate and create opportunities to protect local progress, is publishing a series of white papers written by local governance experts designed to explain the threat facing local democracies.

One of the most troubling recent trends is the rise of “blanket” preemption in the states, described by the New York Times as efforts to “...[wall] off whole new realms where local governments aren’t allowed to govern at all.”¹

What Is Blanket Preemption, and Why Is It So Extreme?

Those who work with municipal governments to craft solutions to local problems are no stranger to state preemption. These laws, which are designed to limit local lawmaking and power, span the policy spectrum. In the last decade, for example, the Florida Legislature has preempted local regulation of smoking, fire sprinklers, vacation rentals, agri-tourism, styrofoam, beekeeping, wireless alarm systems, minimum wages, bio-medical waste, moving companies, paid sick leave and other employment benefits, fuel terminals, hoisting equipment, and even regulations related to milk products and tree trimming. These state statutes are not the result of careful legislative consideration of competing policies, nor do they seek to advance uniform statewide regulation or to set minimum statutory floors. Rather, they simply withdraw local initiative power, resulting in a regulatory vacuum. In short, they do nothing other than invalidate the decisions of locally elected officials who have embraced policies that differ from the preferences of a state legislative majority.

In recent years, however, state legislators across the country—including officials in Tennessee, Pennsylvania, Florida, Oklahoma, and Texas—have introduced bills that would have raised preemption to new levels in those states, and the trend continues into the current legislative session. Their legislative efforts mark a major turning point in the state’s treatment of local governments, revealing that the government’s preemption aspiration has changed from a “one power at a time” approach to attempts to gut the essence of local democracy and authority in one fell swoop. This new and more extreme tactic, which can be described as “blanket preemption,” would remove broad swaths of local power in one piece of legislation, by prohibiting local ordinances that are inconsistent with state law, or by removing the ability of local governments to regulate whole sectors of the economy or to enact any measure that has an effect on business or commerce. Advocates around the country need to be on alert to this new approach, since it is likely that state legislatures will continue to propose similar measures.

The potential scope of blanket preemption is breathtaking. Broad bans on local business regulations, for example, obviously prohibit things like minimum wage increases, paid sick time requirements, and “ban the box” efforts that prohibit employers from using application forms that ask about a potential employee’s criminal history. They would likely also preempt personnel policies like fair scheduling requirements, measures that prohibit employers from asking job

applicants about their salary histories, and other local laws that aim to create more equitable workplaces. But they might also preempt nondiscrimination and equal benefits ordinances as applied to businesses, health and safety regulations like licensure requirements for child-care facilities, local environmental protections, and more.

Preemption laws that completely prohibit all local ordinances that differ from state law would go even further, essentially returning states to a regime, often called “Dillon’s Rule” after the nineteenth-century judge who crystalized the restrictive approach, where localities have to petition state legislatures for the authority to pass any law at all. .

While this white paper on blanket preemption focuses on state laws that take away the power of localities to legislate across broad substantive areas or at all, it should be noted that they combine with other hostile state acts to form a broader push to limit local lawmaking power. Punitive preemption, for example, where states impose civil and criminal penalties on cities and local legislators, can have the same effect as blanket preemption, which is to chill local efforts to enact policies that are not explicitly sanctioned at the state level. But blanket preemption, because of its apparent intent to cripple local authority over local matters, raises novel legal concerns that this paper outlines.

Examples of Efforts to Enact Blanket Preemption

Although only one state has enacted a blanket preemption statute as yet, many legislators express support for the idea and have introduced legislation to remove broad swaths of municipal power. These statutes are often backed by conservative groups like the American Legislative Exchange Council and the American City County Exchange, which support the expansive use of preemption to promote conservative and corporate goals.ⁱⁱ

Michigan was one of the first states to foray into the realm of blanket preemption, and is so far the only state to have enacted what can be described as a blanket preemption statute. In 2015 the legislature passed H.B. 4052, which prohibited any local regulation of the minimum wage, employment benefits, work stoppage or strike activities, paid or unpaid leave, scheduling, or apprenticeship programs.ⁱⁱⁱ It also prohibited localities from requiring any benefits that would incur any expenses or create a remedy for wage, hour, and benefits violations.^{iv}

That same year, an even more sweeping blanket preemption proposal emerged in Texas: S.B. 343 would have prohibited any local ordinance, rule, or regulation that differs from existing state law on the subject.^v Oklahoma toyed with a similar bill in 2016: S.B. 1289 would have prevented municipalities from enacting ordinances that did not conform to state law.^{vi}

In Tennessee and Florida, blanket preemption efforts have taken the form of bills that prevent localities from “discriminating” against businesses for their internal policies that are in compliance with state law.^{vii} S.B. 127 in Tennessee and H.B. 871 in Florida would thus prevent cities from even enacting procurement policies that would allow them as market participants to contract only with companies with more equitable labor policies.

The Florida Legislature also introduced two other sweeping and extreme blanket preemption bills in 2017, H.B. 17 and S.B. 1158. Under the terms of H.B. 17, a local government “may not adopt or impose a new regulation on a business, profession, and occupation unless the regulation is expressly authorized by general law.”^{viii} S.B. 1158 was similar in intent, but more extreme in its sweep. The law would have prohibited local regulation that has extraterritorial effects or has an “adverse impact on economic growth.”^{ix}

The risk of blanket preemption has even extended to Florida’s Constitutional Revision Committee, which is convened every twenty years to propose amendments to the state Constitution. In 2018, members of the Commission considered Proposal 95, which would have enshrined blanket preemption in the Florida Constitution. Proposal 95 would have created a constitutional prohibition against any county, municipality, or special district’s regulation of any type of commerce, trade, or labor, unless such regulation operated exclusively within the respective entity’s own boundaries in a manner not prohibited by law. Although the Proposal’s sponsor pulled it from consideration, he has noted that he is considering a “compromise” proposal that might add blanket preemption language to another proposed amendment.^x

Looking Forward: Blanket Preemption Is an Imminent Threat

Though the future is opaque and advocates,^{xi} local governments,^{xii} and editorial boards have come out against blanket preemption, vocal proponents will likely

continue to be support and introduce legislation to strip local powers in the foreseeable future.

In 2016, for example, Texas Governor Greg Abbott endorsed the concept of blanket preemption, saying that “[a]s opposed to the state having to take multiple rifle-shot approaches at overriding local regulations, I think a broad-based law by the state of Texas that says across the board, the state is going to preempt local regulations, is a superior approach.”^{xiii} Governor Abbott’s call to reduce, restrict and prohibit local regulations is part of nationally-coordinated and supported strategy (by corporate lobbyists and conservative special interest groups) to consolidate power at the state level and to weaken local control in policy areas where cities have been innovating for progressive change. Florida State Representative Randy Fine, who introduced H.B. 17, expressed his intent at the end of 2017 to reintroduce the bill or something similar in the future. House Speaker Richard Corcoran is reportedly a “big fan” of this idea.^{xiv}

In short, support for blanket preemption reflects its proponents’ belief that, as Ohio State Senator Keith Fabor put it, “[w]hen we talk about local control, we mean state control.”^{xv}

Fighting Back Against Blanket Preemption

It is a truism of state and local government law that local governments derive their powers from the state sovereign that created them. Expansive state power over local governments, however, does not justify any and all state attempts to remove local powers and to shut down local authority. Though there will be tremendous variation from state to state depending on the type of bill and state law backdrop, viable legal arguments can be used in many states to attack blanket preemption laws in court. This paper lays out the contours of the legal arguments most likely to be available, but a specific analysis of a particular state’s constitutional provisions, common law, and statutes is necessary to evaluate the strength of these arguments in any given state.

Constitutional Protection of Home Rule Powers

At least forty state constitutions contain clauses that either explicitly or through judicial interpretation establish constitutional protection for home rule, which grants municipalities substantive lawmaking authority. Constitutional protection for home rule does not provide absolute immunity from state legislative preemption, but it does provide a defense against state laws that evidence a legislative intent to destroy or seriously cripple local regulation of local matters. The intent behind blanket preemption, of course, is just that – to eliminate local initiative powers and to return the state to the pre-home rule days when local governments needed state authorization to do anything at all.

In some ways, blanket preemption is more vulnerable to legal challenge in states with constitutional home rule than the narrowly targeted preemption statutes that remove only one local power at a time. By attempting to eliminate significant areas of constitutionally guaranteed local powers, blanket preemption attempts to execute an “end run” around the fact of constitutional protection of local initiative. This move runs afoul of a very basic principle of legislative authority – that the state cannot do indirectly that which it cannot do directly. The argument here is that the state is seeking to eviscerate home rule, yet the constitution clearly protects home rule from legislative destruction. The only way to eliminate home rule is via constitutional amendment, and not via a state statute of blanket preemption.

Not all state constitutional provisions regarding home rule are as strong as others, so understanding how to combat blanket preemption requires a state-specific approach.¹ The strongest constitutional protection against blanket preemption is in those states where the Constitution includes explicit textual guarantees of local power to act, such as Illinois (stating that “Except as limited by this Section, a home rule unit may exercise any power and perform any function pertaining to its government and affairs”). But there are also states whose courts have interpreted less precise language as guaranteeing constitutionally protected home rule authority for local governments. In Oregon, for instance, the state constitution says only that “The legal voters of every city and town are hereby granted power to enact and amend their municipal

¹ For a state-by-state analysis of municipal home rule authority, see <http://leap-preemption.org/50-states.html>.

charter, subject to the Constitution and criminal laws of the State of Oregon...” But the Supreme Court of Oregon has made clear that those words establish home rule and are intended “to allow the people of the locality to decide upon the organization of their government and the scope of its powers under its charter without having to obtain statutory authorization from the legislature[.]” *La Grande/Astoria v. PERB*, 576 P.2d 1204, 1208 (1978).

A few state constitutions provide local government immunity from some state attempts to preempt local laws. Colorado is the only state in which that immunity is explicitly declared: “local and municipal matters . . . shall supersede . . . any law of the state in conflict therewith.” Colo. Const. art. XX, § 6. The courts in that state have struggled to define the boundaries between immune local laws and those impinging on a statewide concern and thus subject to preemption, but the limit is a substantive one. Another 17 state courts have interpreted their constitutions’ home rule language as providing varying amounts of local immunity from state preemption. Because blanket preemption laws have such a vague, broad sweep, it is likely that many of them could be challenged as impermissibly interfering with immune local activities.

There is, unfortunately, a group of states, such as Alabama, Delaware, Indiana, and North Carolina, where home rule has no constitutional basis and is conferred solely by statute. And local governments in the states of Virginia and Nevada have no home rule powers of any kind. Opponents of blanket preemption in any state without a constitutionally protected core of home rule authority, of course, will be unable to raise the argument described in this section, which offer the strongest challenge to blanket preemption. Yet advocates and local governments in such states should consider other arguments, including the remaining legal challenges described below.

Blanket Preemption as an Abuse of Legislative Power

In states whose constitutions contain neither an express nor an implied guarantee of home rule powers, the legal challenges to blanket preemption become increasingly more creative and less obvious. One argument to consider in these states, however, is that blanket preemption exceeds the permissible limits of preemption and is in reality an abuse of legislative power. After all, the preemption power is meant to give

state legislatures a tool with which to adjust the state-local relationship, not to eliminate local government authority altogether.

It is true that numerous courts have allowed their legislatures to exercise the power of express preemption. Cases can be found in all states in which courts quickly and routinely defer to explicit legislative statements of intent to preempt local powers. It is worth referring to those cases in a specific state, however, to understand the factual contexts in which this deferential judicial language and attitude have arisen. In Florida, for instance, every case involving express preemption has been decided in the context of a statute that was based on a careful legislative consideration of competing concerns, resulting in the adoption of a comprehensive statewide scheme which, in the legislature's estimation, would make local regulation unwise or contrary to state policy. In other cases, express preemption is used by a state legislature to establish a statutory floor, prohibiting local regulation that would undercut state minimums but not removing local power to go beyond the minimums established by state law. Blanket preemption statutes, of course, do none of this.

Blanket preemption statutes neither articulate a uniform state policy nor establish statewide minimum standards. They have but one goal – to create a regulatory vacuum by seeking to strip local governments of the power to address issues of unquestionable local concern. Because of this essential difference between “normal” preemption and “blanket” preemption, there is an argument that the legal doctrinal framework and the accompanying judicial deference that apply to the express legislative preemption in the context of a specific statewide regulatory scheme are simply inapplicable here. Rather, blanket preemption is unhinged from general state policy and implemented solely as a hostile denial of local power. For that reason, opponents can argue that blanket preemption should not be entitled to the same deferential judicial acceptance that it has traditionally received in preemption cases.

Depending on the case law in a specific state, it may be worth trying to distinguish the typical express preemption cases, in which state law imposes a statutory minimum or sets uniform statewide standards in important regulatory areas, from blanket preemption that simply removes local power wholesale. After all, blanket preemption rests on an entirely different state legislative conceptualization of the state-local relationship than the typical express preemption statute, in which—theoretically,

although not always in practice—the state respects local autonomy and initiative and acts carefully to remove that power only to the extent necessary to achieve overriding state goals. In many ways, then, blanket preemption is really preemption in name only. It is so extreme in its clear intent to destroy local powers in their entirety that it goes well beyond the bounds of normal preemption statutes and is in fact an abuse of legislative power.

State Power to Preempt by “General Law”

Some state constitutions and/or statutes create explicit limits on the ability of the state to single out local governments for preemption. That is the case in Ohio, for example, whose constitution says that “Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, *as are not in conflict with general laws.*”^{xvi} (Emphasis added.) Using that “general laws” language, proponents of home rule in Ohio have made considerable progress defending local laws from state attempts to create a regulatory vacuum pursuant to preemption.

In a series of cases, the Ohio Supreme Court has invoked the general laws principle to fashion a substantive limitation on the preemption power. That is, in the court’s words, the legislature’s preemptive power is limited to the adoption of “statutes setting forth police, sanitary, or similar regulations and not statutes which purport only to grant or to limit the legislative powers of a municipal corporation to adopt or enforce police, sanitary or other similar regulations.” In other words, the Ohio courts have interpreted the state’s constitution as preventing state preemption that merely seeks to displace local powers, as opposed to preemption that seeks to replace it with substantive statewide regulation.

The “general laws” limitation, as interpreted by the Ohio courts, strongly suggests the invalidity of blanket preemption, which is, of course a law that purports “only to . . . limit the legislative powers of a municipal corporation.” Although not widely recognized, this argument may gain traction as state courts confront the sweeping breadth of blanket preemption. It is well worth a look to see if your state constitution or statutes refer to preemption of local ordinances by general laws. The “general laws” language offers the seeds of a doctrinal argument that blanket preemption is

not within the state's preemptive power, and that preemption to create a regulatory vacuum is not a legitimate exercise of a power whose purpose is to adjust the respective regulatory spheres of states and their local government.

Conclusion

All in all, basic principles of inherent state sovereignty and expansive state control over local governments make legal challenges to blanket preemption difficult but not impossible. We can hope that the political process itself—together with organizing and communications support—will expose these misguided efforts as unacceptably hostile attempts to strip local governments of local powers, but in the event of legislative enactment, the legal challenges described in this memo might provide a basis for judicial action.

ⁱ Emily Badger, *Blue Cities Want to Make Their Own Rules. Red States Won't Let Them*, N.Y. Times, July 6, 2017, <https://www.nytimes.com/2017/07/06/upshot/blue-cities-want-to-make-their-own-rules-red-states-wont-let-them.html>.

ⁱⁱ Henry Grabar, *The Shackling of the American City*, Slate, Sept. 9, 2016, http://www.slate.com/articles/business/metropolis/2016/09/how_alec_acce_and_pre_emptions_laws_are_gutting_the_powers_of_american_cities.html.

ⁱⁱⁱ Mich. Comp. Laws Ann. §§ 123.1384-123.1390 (West 2015)

^{iv} Mich. Comp. Laws Ann. §§ 123.1391-123.1392 (West 2015)

^v S.B. 343, 84th Reg. Sess. (Tex. 2015).

^{vi} S.B. 1289, 2016 Reg. Sess. (Okla. 2016).

^{vii} S.B. 127, 110th Reg. Sess. (Tenn. 2017); H.B. 871 2018 Reg. Sess. (Fla. 2018).

^{viii} H.B. 17, 2017 Reg. Sess. (Fla. 2017).

^{ix} S.B. 1158, 2017 Reg. Sess. (Fla. 2017).

^x Matt Dixon, *CRC Panels Kill "Home Rule" Proposals, but Compromise Could Be in Works*, Politico, Feb. 2, 2018, <https://www.politicopro.com/states/florida/story/2018/02/02/crc-panels-kill-home-rule-proposals-but-compromise-could-be-in-works-234402>.

^{xi} Gil Ziffer, *Opinion: CRC Proposal 95: Bad for Business, Bad for Cities*, Tallahassee Democrat, Jan. 23, 2018, <http://www.tallahassee.com/story/opinion/2018/01/23/opinion-crc-proposal-95-bad-business-bad-cities/1057018001/>.

^{xii} Gus Bova, *Texas' War on Local Control is Part of National Trend: Nearly 150 Progressive Officials Gathered in Austin Last Weekend to Build the Fight Against GOP-controlled State Legislatures*, Texas Observer, Aug. 1, 2017, <https://www.texasobserver.org/texas-war-local-control/>.

^{xiii} Patrick Svitek, *Abbot Wants 'Broad-Based Law' That Pre-empts Local Regulations*, Tex. Trib., Mar. 21, 2017, <https://www.texastribune.org/2017/03/21/abbott-supports-broad-based-law-pre-empting-local-regulations/>.

^{xiv} Bill Cotterell, *Cities and Counties Are Playing Defense in 2018 Session*, Tallahassee Democrat, Sept. 16, 2017,

<http://www.tallahassee.com/story/news/politics/cotterell/2017/09/16/cotterell-cities-counties-playing-defense-session/105686982/>.

^{xv} Reid Wilson, *GOP Aims to Rein in Liberal Cities*, The Hill, Jan. 5, 2017,

<http://thehill.com/homenews/campaign/312766-gop-aims-to-rein-in-liberal-cities>.

^{xvi} Ohio Const. Art. SVIII, § 3.