

Legal Strategies to Counter State Preemption and Protect Progressive Localism
A Summary of the Findings of the Legal Effort to Address Preemption (LEAP) Project
May 2017

Introduction

“As 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.”

- Texas Governor, Greg Abbott, March 2017

American cities are facing a growing challenge. Since the 2010 midterm elections, state lawmakers have become more aggressive in their use of preemption to stop local lawmaking across a broad and growing range of issues, including labor standards, environmental protection, civil rights, broadband, fracking, and public health. Preemption is now being used to negate elections, perpetuate racial and economic inequality, and limit local anti-discrimination efforts.

Efforts to consolidate power at the state level and stop local progress across a wide range of issues have succeeded and at an alarming rate. As of May 2017:

- 24 states now preempt local minimum wage raises
- 18 states preempt local laws guaranteeing paid sick days
- 3 states ban local LGBTQ anti-discrimination ordinances
- 6 states preempt local fracking bans
- 37 states limit local authority to regulate ride sharing
- 8 states ban local plastic bag bans
- 17 states preempt localities from establishing municipal broadband service
- 7 states preempt local e-cigarette regulations

Since 2011, express preemption bills have become wider in scope, punitive, and more hostile to home rule:

- In 2015, Michigan’s legislature passed a “Death Star” preemption bill that preempted local regulation of nine wage and benefit policies all at once.
- This session, legislators in Florida, Pennsylvania, and Tennessee introduced blanket preemption bills to keep local governments from regulating entire sectors of the economy altogether.
- Arizona passed a similar bill last year that requires municipalities to rescind ordinances found in conflict with state law or face the loss of state funding.
- Also on the rise are punitive preemption bills that not only block local governments from enacting regulations, but give corporations, organizations like the NRA, and individuals the right to sue cities, counties, and individual officials if they don’t comply.

In addition, cities now face the threat of federal preemption. Five days after being sworn in as President of the United States, Donald Trump issued an Executive Order that would block federal funding to cities that refuse to help with enforcement of federal immigration law. In early 2017, at least ten states introduced bills that bar sanctuary policies by cities, schools, or other public institutions.

I. The Profound Need for Assistance

The sheer number, significant reach, and punitive nature of these preemption laws have overwhelmed local officials and advocates, and sapped the innovative, problem-solving power of local governments critical to moving progressive policies, and the nation, forward. They have also created a need and demand for legal strategies to help cities fight back.

Although there have been scattered and discrete victories against preemption, until now there has been no comprehensive or coordinated effort to provide cities with the legal and legislative research or resources they need to counter this growing threat. In response, the Legal Effort to Address Preemption (LEAP) project—a coalition of legal scholars and advocates—has been working to devise strategies and create resources to protect the authority and power of cities to enact inclusive, innovative, evidence-based, and equitable laws.

There is a profound and urgent need in cities for legal help to fight preemption laws. In addition to the rising risk of federal preemption, city attorneys across the country are overwhelmed by state efforts to limit their clients' lawmaking powers. Many mid-sized and small cities have small offices with significant responsibilities and limited capacity, while some don't have full-time city attorneys at all.

In addition, advocacy groups on the front lines of the fights for progressive policies now find themselves defending hard-fought municipal victories against preemption or opting not to pursue policy fights for fear of triggering state interference.

The need for legal help is immediate and pervasive.

II. Overview of the LEAP Project and Research Findings

Members of the LEAP Project's research team included law professors with expertise in local governance and other areas related to the project (from Columbia, Fordham, NYU, University of Illinois, University of Virginia, and Willamette) and advocates from A Better Balance, the Partnership for Working Families, and Rockefeller Family Fund.

Key areas of research focus for the LEAP Project included:

Preemption Landscape and Background

- Mapping: On a state-by-state basis, the team researched and documented nearly 40 types of state preemption laws across a range of issue areas such as public health, environment, education, taxation, housing and land use, municipal contracting, labor issues, anti-discrimination, immigration, public safety, and campaign finance.
- Case Summaries: Recent preemption cases show that successful preemption litigation is possible. Despite state-specific factors, the team analyzed how these legal principles and arguments can be applied—and built on—elsewhere.
- Federal Preemption and “Sanctuary Cities”: The team prepared a legal “primer” on federal preemption. A second memorandum analyzed and offered potential legal challenges to President Trump’s “sanctuary jurisdictions” Executive Order.

Home Rule Overview and Constraints on State Preemption

- Home Rule Overview: The team summarized the variations in state “home rule,” or the authority of local governments to act and resist state preemption. Important home rule differences include the source (i.e., state constitution, statutes, or a hybrid); the structure; the different areas in which localities can act; and whether any types of local laws are *immune* from state preemption.
- Home Rule State-by-State Summaries: The team is finalizing state-specific fact sheets detailing the home rule variations above and relevant case law for all 50 states.
- Punitive Preemption: The team researched and outlined potential defenses to “punitive” preemption laws that create fiscal sanctions for local governments or establish civil or criminal penalties for elected officials.
- Other State-Law Grounds for Challenging Preemption: The team outlined other potential state-law challenges to preemption, such as prohibitions on laws that target specific cities and procedural constraints on how bills are drafted and passed.

Federal Constitutional Law

- Equal Protection: The team analyzed potential federal equality law challenges to state preemption laws, with a focus on anti-discrimination and minimum wage laws.
- Establishment Clause: The team researched whether preemption laws based upon religious preferences violate the federal Constitution’s Establishment Clause, which prohibits laws “respecting an establishment of religion.”

Proactive Approaches to Strengthening Progressive Localism

- Model Language and Approaches: To support reforms that strengthen progressive localism, the team analyzed potential model home rule amendments, non-preemption language for state bills, and advice for repealing preemption laws.
- Alternative Approaches in the Face of State Preemption: The team outlined the potential for localities to advance progressive policies through techniques like contracting conditions, community benefits agreements, and affirmative litigation.
- Ballot Initiatives: The team researched which states would have the strongest protections for voter-initiated laws that counter preemption.

In addition to preparing memoranda on many of these topics, LEAP team members—as described in the following sections—are developing this research into tools and resources that can be shared and used to counter preemption.

III. Key Legal Strategies to Challenge Preemption

While it is important not to underestimate the difficulty in challenging state authority to preempt local policymaking, the LEAP project’s research and strategizing offer hope and plausible paths forward. Based on the research described above, the attorneys and advocates collaborating on the project have identified lines of attack and opportunities for legal and legislative action to counter preemption and strengthen home rule.

Litigation Strategies to Challenge Preemption

- Challenges to Preemption Based on Home Rule: Depending on state law, the details of which can vary significantly, cities may be able to challenge preemption laws based on home rule. Home rule in the U.S. is widespread, with at least 40 states delegating some significant authority to localities to legislate without prior state authorization. Particularly in the 25 or more states that enshrine home rule in their constitutions, the state may be limited in its ability to preempt local enactments on certain subjects. The LEAP project’s comprehensive state-by-state analysis of local authority can equip cities with information on home rule that can be used to bolster litigation against preemption.
- Challenges to Punitive Preemption: Punitive preemption laws appear vulnerable on a range of grounds, such as free speech; legislative immunity; due process; and potentially the structure of home rule in states that have established local autonomy in their constitutions.
- Challenges to Preemption in the Absence of State Replacement Policies: In states with strong constitutional home rule, flat-out repeals of local regulatory authority in the absence of any replacement may be challenged on the argument that states cannot preempt them from acting on a policy, unless the state itself acts on the issue.
- Challenges to Preemption Laws that Target Individual Cities: More than two-thirds of states provide some legal barrier against legislative singling out of particular local governments, an increasing issue as preemption becomes more focused. Even though courts provide significant deference to state legislatures in challenges based on these “generality” or “uniformity” provisions, some courts have stepped in where they believe specific cities have been targeted.
- Procedural Challenges to Preemption Laws: Since preemption laws are often politically unpopular, state legislatures have taken steps in many cases to rush or obscure passage of the laws, potentially violating procedural requirements. Some of these requirements are specific to preemption, such as notice mandates, while many generally protect against procedural maneuvering, such as “single subject” requirements that prevent the legislature from grouping otherwise distinct measures and “clear title” requirements that require the title to clearly state and reflect the bill’s subject.

- *Use of Federal Constitutional Equal Protection*: Cities and advocates can consider constitutional equal protection challenges to state statutes that effectively preempt local anti-discrimination ordinances. There are also possible theories that would make use of equal protection analysis to challenge preemption where it can be argued that passage of the preemption law was motivated by racial bias.
- *Establishment Clause Challenges to Preemption Laws*: Some state preemption laws may be based upon religious preferences—particularly laws that affect LGBTQ individuals and women’s reproductive choice. These religiously motivated laws could implicate the federal Constitution’s Establishment Clause. When a good fact pattern is present, and sufficient legislative or similar record to surface religious motivation, an Establishment Clause challenge should be considered.

Strategies to Counter Preemption Bills Prior to Passage

- *Education of Advocates and Local Officials on Legal Standards and Arguments*: Even prior to passage of a preemption bill, advocates and cities can be equipped with legal research and arguments that can be used to develop a successful strategy for opposing a preemption bill and anticipating any potential litigation.
- *Questioning Legality and Developing the Record*: Based upon the litigation strategies above, similar legal arguments can be raised *prior* to passage of a preemption bill to discourage state legislators from passing bills that could be subject to a legal challenge, or at a minimum, to establish an appropriate legislative record for future challenges.

Legislative and State Constitutional Strategies

- *Cities Enhancing Their Own Authority*: In states with hostile legislatures and governors, but where home rule is recognized in the state constitution or in strong legislative enactments, cities may be able to minimize preemption vulnerability by focusing on local progressive ordinances that pertain to matters traditionally within local control. These include how local government is structured and treatment of a locality’s own employees as well as the ability to control contracts with the city for goods and services.
- *Proactively Strengthening Home Rule and Bolstering Local Authority Through State Law*: Proactively limiting preemption can also involve including non-preemption language in state laws and ballot initiatives that are proposed on specific issues. For example, if a state law is being passed—or a ballot initiative proposed—raising the statewide minimum wage, the legislation or ballot measure could also include language specifically protecting localities’ ability to enact higher minimum wage laws. More broadly, state legislation could be advanced strengthening home rule generally, especially in states that allow ballot initiatives; a strategy of strengthening home rule through constitutional amendments could also be targeted to block punitive preemption or enumerate specific local subject areas that are immune from state override.
- *Repealing Preemption Laws*: Another legislative strategy is to repeal preemption language that was previously included in specific state laws.

- Exploring a First Step “Home Rule Pilot Project” in States Without Home Rule: Home rule pilot projects, like one that has benefitted participating cities in West Virginia, could be a model for introducing home rule to states that do not currently have it. Even though the West Virginia model has been limited by the legislature, a more robust pilot project can be imagined. A first step pilot project could be explored in states that have limited local authority but are open to fostering local innovation; some members of the LEAP Project have engaged in landscape assessments to help determine which states could be most receptive to such reforms.

Clearly, implementation of such legislative and state constitutional strategies would require political and public organizing campaigns.

Finally, in advancing these legal strategies, it is important to acknowledge that local autonomy does not always embody progressive goals or operate inclusively, and that state oversight of local governments can, at times, be an important tool to check parochialism and exclusion. While it will be difficult in practice to promote home rule and oppose preemption in ways that only support local progress, advancing these strategies with a consistent, clear vision of inclusive, equitable local democracy can, in the long run, shape how both the public and the legal system understand the power of cities to innovate and act.

IV. Next Steps for Implementing Legal and Legislative Strategies

Actions can be taken immediately to encourage and arm cities to take counter-actions. This can be accomplished through: direct legal assistance to both proactively counter preemption efforts and support litigation challenging preemption laws; education and outreach that is both private and broadly public-facing; and distributing research findings, tools, and resources.

Building on the Research: How the LEAP Project Can Immediately Help the Field

Deploying technical assistance and support

Cities need information, strategies, and technical assistance to push back against preemption. The LEAP project is preparing to:

- Provide and facilitate legal support to city attorneys, including:
 - Technical assistance on an as-requested basis on both defensive and proactive strategies against state and federal preemption, helping to fill resource gaps for city attorneys, especially in lower-capacity small- and medium-sized cities that face capacity challenges in litigation
 - Facilitate peer networking for city attorneys that enables them to share information and face preemption challenges together
 - Develop a network of pro-bono firm attorneys who can assist with litigation
- Develop amicus briefs and an amicus “brief bank” to support litigation efforts

Educating the legal, elected, and advocacy communities

To disseminate the LEAP project’s findings and strategies through outreach and education, team members will:

- Provide briefings (in person and through webinars) for elected officials and advocates about local government law and options for countering state interference
- Work with attorneys in the field to refine effective litigation tactics and strategies for preemption cases
- Create an information “pipeline” using existing and new peer networks to ensure city and other attorneys know about preemption litigation in cities and states other than their own
- Facilitate strategy sessions with city attorneys, mayoral chiefs of staff
- Host workshops for elected officials, staffs, and grassroots advocates
- Offer briefings for frontline private attorneys, foundations, and research and policy organizations

Develop and distribute LEAP research findings, tools, and resources

The following tools and resources are—or will soon be—available:

- Foundational home rule, preemption defense, and related research—a state-by-state landscape
- A preemption resource library that will be housed at the Fordham Law School’s Urban Law Center that will include, among other documents, a collection of existing journal articles, academic research on home rule and preemption, public advocacy publications, and existing city and state strategies
- Examples and considerations for model legislation to both strengthen home rule and repeal preemption in states where that may be a viable strategy
- Cities Know Your Rights tool kit resources, including: a check list of legal issues and approaches to consider in the face of preemption threats (prior to becoming law); case studies and lessons; and replicable legal strategies and litigation approaches to consider once preemption bills become law

Looking Forward to Longer-Term Activities and Goals

In addition to these immediate actions to share the LEAP Project’s research and implement new legal strategies, the Project has surfaced additional longer-term strategies and activities that should be considered together with legal, policy, and advocacy partners. In addition to building on efforts to develop research and advise policymakers on how to counter preemption, implementing the following multi-year strategies would help change the current operating environment:

- Help establish and/or advise a pilot project in a state or region designed to strategically trigger and counter preemption
- Help establish and/or advise campaigns to repeal specific preemption laws

- Advise on model legislative language to protect or strengthen home rule or repeal preemption
- Expand number of law school clinics supporting city attorneys' office
- Create a curriculum for CLE classes and make them available to law clinics and schools
- Author and distribute issue briefs

Finally, there is no denying it was the long-term commitment to reframing the legal debate and training judges and lawyers made by conservative funders starting three decades ago that has helped define and given rise to the current, daunting legal and legislative environment. To prevail ultimately, a similar investment of resources over time will need to be made in progressive localism.

While the LEAP research, tools, and legal strategies outlined in this document are an important first step, especially to counter the escalating threat of preemption, it is important to consider how this work could constitute a start on a long-term law reform movement. Through strategies like constitutional and legislative reform, work with think tanks, training of judges and state/local government attorneys, and linking with broader progressive local movements, such an effort could ultimately transform the legal and legislative landscape and support adoption of a robust, progressive view of local authority.

More Information

For more information regarding the research and resources described in this memorandum, please contact:

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