

# RESTORING CITY RIGHTS IN AN ERA OF PREEMPTION

## A MUNICIPAL ACTION GUIDE



**NLC** NATIONAL  
LEAGUE  
OF CITIES

CENTER FOR CITY SOLUTIONS

## About the National League of Cities

The National League of Cities (NLC) is the voice of America's cities, towns and villages, representing more than 200 million people. NLC works to strengthen local leadership, influence federal policy and drive innovative solutions.

NLC's Center for City Solutions provides research and analysis on key topics and trends important to cities and creative solutions to improve the quality of life in communities.

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## Acknowledgements

NLC would like to thank the Kresge Foundation and the Open Society Foundation for their support in making this report and the convenings that informed it possible. NLC would also like to thank ChangeLab Solutions for its helpful contributions to this guide and foundational work examining preemption, public health, and health equity.

## About the Guide

This municipal action guide is the result of a deeper commitment by the National League of Cities to explore the impact of state preemption and its consequences on local democracy. The guide is informed by member engagement throughout the past two years, highlighted by

two Mayors' Institutes—one held in Orlando, Florida, in April 2018; and one held in Dearborn, Michigan, in October 2018—which brought together mayors, members of their staff, and outside experts in hands-on working sessions to share their experiences and identify potential solutions. We sincerely thank all the mayors listed below who took the time to join these Mayors' Institutes and to share their insights with us.

## Mayors' Institute Participants

**The Hon. Stephen K. Benjamin**,  
Mayor, City of Columbia, South Carolina

**The Hon. Andy Berke**,  
Mayor, City of Chattanooga, Tennessee

**The Hon. Denny Doyle**,  
Mayor, City of Beaverton, Oregon

**The Hon. Buddy Dyer**,  
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**The Hon. Karen Majewski**,  
Mayor, City of Hamtramck, Michigan

**The Hon. John B. O'Reilly Jr.**,  
Mayor, City of Dearborn, Michigan

**The Hon. Paul Soglin**,  
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Former Mayor, City of Little Rock, Arkansas

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# Foreword

Cities, towns and villages are amazing places. They are where hard problems breed innovation, where collaboration supports a diversity of opinions and where solutions are ultimately rooted in distinct local preferences. Our communities are not without challenges, but they are at their best when policies reflect the values of those who live and work there.

Over the past few years, however, the National League of Cities (NLC) has documented the misuse and abuse of preemption, where a state removes local authority over policymaking, effectively short-circuiting the dynamism of local government. State interference has targeted ordinances passed by city or town councils and has overturned local referendums, ignoring the will of voters and eroding the core of local democracy.

These actions threaten a foundational value of local democracy—representation. In response, NLC has conducted research on the extent of preemption on several social and economic issues. We have also built coalitions with local leaders and state municipal leagues.

Now, NLC is taking the next step in supporting local democracy by providing local leaders with tools and strategies to advance decision-making in the face of preemption. This municipal action guide provides tangible strategies for officials to communicate the problem of state interference to constituents, build a broad-based local campaign, and determine how and whether to pursue litigation. This guide would not be possible without the hard work of local leaders and advocates tirelessly advancing the position of cities, towns and villages.

Every day, mayors and council members are on the ground, identifying problems in their communities and engaging their residents to find solutions. It's time to ensure that these voices are heard. It's time to move local democracy forward.

Sincerely,



**Clarence E. Anthony**  
CEO and Executive Director, NLC



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Every day, mayors and council members are on the ground, identifying problems in their communities and engaging their residents to find solutions.

# Introduction

**E**very day, city leaders are working to improve the health and welfare of their communities and the people who live there. And as new challenges have found their way to cities' doorsteps—economic restructuring or climate change or income inequality—mayors and council members have developed or adopted new tools and policies to help solve them. City leaders are eager problem solvers and innovators. They are also eager to partner with other levels of government to support and compliment local efforts

But instead of partnership and support, many cities in recent years have confronted state politics and interference. When state-local relationships break down, and when state governments unduly limit local authority, city leaders are left with fewer tools and reduced power to solve problems. This breakdown impacts voters too. Local democracy should be defined not only by the ability to elect representatives, but also by the opportunity to see preferred policies implemented. When state law interferes in that process without a strong justification, city residents are left wondering what their votes are worth.

State preemption laws, which remove local authority over policymaking, have proliferated and, in some instances, have started to erode the fundamental core of local democracy. This guide builds on work at the National League of Cities over the past two years that sought to expose the extent of preemption laws impacting cities

across the country. With the right tools, local leaders can counter such state interference.

In addition to background on preemption, this playbook specifically provides local leaders with guidance on:

- how to talk about preemption to constituents and to legislators;
- how to build coalitions with new partners that can advocate affirmatively for local power; and
- how to use legal challenges if necessary.

It is our hope that the proactive efforts of city leaders across the country will reverse the trend of preemption, preserve and expand the fundamental roles and rights of local governments, and enable stronger, more productive partnerships with state governments.

# What is Preemption?

**P**reemption occurs when a higher level of government supersedes the authority of lower levels. For the purposes of this report, we are focused on the use of state law to nullify municipal ordinances or authorities. As a legislative tool, preemption is neither inherently good nor bad. It has historically been used by legislators to align different laws across different levels of government, often resulting in improved policies statewide. But preemption can be harmful, especially when it limits the ability of cities to expand rights, increase prosperity or promote innovation.

The National League of Cities began tracking state-level preemption laws in 2017 as it became apparent that preemption was limiting the ability of local leaders to do their jobs. A survey of seven key policy areas found that cities in most states faced significant limitations in areas from social policy, to economic and taxation policy. A 2018 update of that survey confirmed that preemption in those areas was expanding, with 19 new laws passed in that year's legislative sessions. According to a report from the Local Solutions Support Center reflecting 2019 legislative sessions, there were at least 30 new preemptions across 15 policy areas, ranging from autonomous vehicles to plastic bags.<sup>1</sup>

## From Preemption To State Interference

The abuse of preemption is a growing problem not only because of the number of new laws, but also because of the rising severity of those laws. More and more, state legislatures are using

their power to stymie local policy preferences, to punish localities and local elected officials, and to stifle the voices of local democracy. This increasingly hostile state interference was recently termed “the new preemption” by legal scholar Richard Briffault and takes three different forms: vacuum preemption; ceiling preemption; and punitive preemption. We also discuss a fourth type that has emerged, overturning referendums.<sup>2</sup>

## Vacuum Preemption

Increasingly, state legislatures are using preemption to create regulatory vacuums that have the potential to negatively impact everything from public health to economic opportunity. Vacuum preemption occurs when the state legislature prohibits cities from regulating in a certain area without the state setting any standards of its own. For example, in 2014 the city of Austin, Texas, enacted a law preventing landlords from rejecting tenants who pay part of their rent with federal housing assistance so long as they satisfy all other tenancy qualifications.<sup>4</sup> The Texas Legislature responded by adopting a law invalidating Austin's ordinance and prohibiting all other municipalities from enacting such legislation, despite the absence of any specific protections in state law against voucher discrimination.<sup>5</sup> Other states have used vacuum preemption to thwart employment regulation (e.g., earned sick leave and fair scheduling), nutrition policy and beyond. Vacuum preemption is particularly troubling insofar as it strips localities of power to enact a policy remedy without any action or solution from the state.

### Floor Preemption

In contrast with ceiling preemption, floor preemption occurs when a state enacts a law that sets a minimum standard and expressly allows cities to enact laws with more rigorous requirements. Returning to the minimum wage example, a state legislature may set a statewide minimum wage, but allow cities within their state to set their own higher minimum wage requirements. Floor preemption affords everyone in the state a set of minimum protections while allowing for local tailoring and innovation to further protect the public's health and well-being, or to address inequities.

### Ceiling Preemption

Ceiling preemption occurs when a state prohibits cities from requiring anything more or different from what state law already mandates. When used appropriately, it can be beneficial, like in the case of health insurance, where city-by-city variation in regulation could be chaotic and unwieldy. In many cases, however, ceiling preemption stifles local innovation and prevents cities from addressing uniquely local issues. A state legislature may enact a statewide minimum wage, for instance, but prohibit cities from enacting a higher minimum wage. Residents across the state would enjoy the benefits of the statewide minimum wage. But by acting as a ceiling, the state law would prevent a city with

a particularly high cost of living or with vast economic inequities from addressing these by setting a higher local minimum wage.<sup>3</sup>

### Punitive Preemption

The escalation of conflicts between city and state law has resulted in a particularly insidious form of preemption that is uniquely threatening to democratic ideals. In several states, legislatures have passed bills that take punitive measures if local laws are deemed in conflict with state law. Examples include Florida, where local officials are personally liable and can be expelled from office for enacting local gun control measures—an effort now being challenged in court; Texas, where cities face fines of up to \$25,000 a day for passing so-called sanctuary city ordinances; and Arizona, where the state threatens to withhold shared revenue from cities that have laws believed to conflict with state law. For many cities, that can mean sacrificing one-quarter of their budget to challenge the state's determination.<sup>6</sup>

This strain of punitive preemption is chilling for several reasons. First, it subjects local elected leaders who express their constituents' policy preferences through legislative action to potential liability that state and national elected officials are explicitly granted immunity from. Second, punitive preemption effectively squashes local policy innovation by putting a high cost on deviations from the state norm. And third, many of the provisions strongly

disincentivize cities from pursuing remedy in the courts, limiting the ability of cities to argue for their rights.

In addition to the three forms of “new preemption” identified by Briffault, we have identified another way that the misuse of preemption is occurring: overturning referendums.

### Overturing Referendums

Aggressive use of preemption has now gone beyond the ordinances passed by city councils and toward the votes of citizens themselves. These instances involve local ballot measures, such as when nearly 59% of voters in Denton, Texas, passed a referendum to ban fracking. The next legislative session, Texas preempted local regulation of oil and gas production, nullifying the Denton vote.<sup>7</sup>

The message to voters in these situations is clear: Civic engagement at the local level can be overturned by the state in the next legislative session. In a day and age of low trust in government, it is important for citizens to feel that their voices are heard.

### What Is Driving The New Preemption?

It’s worth considering the multiple root causes of this worsening hostility between statehouses and local democracy: Special interests have significantly increased their lobbying efforts at the state level; more states are under single-

party control; and cities are broadening their policy reach.<sup>8</sup>

**Special interest lobbying.** Corporate lobbying and influence are an especially significant factor at the state level. For instance, between 2002 and 2015, beer, wine and liquor companies reported more than \$111 million in lobbying expenses in the 50 states, and annual contributions increased fivefold over this period, after adjusting for inflation.<sup>9</sup> These expenditures buy access and relationships, engendering steady lines of communication that are difficult for public health proponents to match. Business groups lobbying at the state level, with the American Legislative Exchange Council (ALEC) being one of the most active, are often primarily interested in the economic impact of new regulations, as opposed to the long-term effects of those regulations on public health and well-being.

**Single-party statehouses.** Unified control of state government is a leading indicator of preemption legislation, and the number of trifectas (a single party occupying majorities in both chambers of the legislature and the governor’s mansion) reached 36 in 2019.<sup>10</sup> The impact of one-party rule is exacerbated by ideological mismatches between many states and their largest cities, which has given rise to the narrative of blue city, red state conflicts.<sup>11</sup>

**Growing local policy innovation.** City leaders have expanded their issue portfolios in recent years, increasing conflict with some of their

statehouses. Faced with real and growing challenges, and often in the absence of state and federal action, many cities are experimenting with new approaches to old problems. In the public health sphere specifically, there is a widespread acknowledgment that health outcomes rely on a broad set of environmental factors that can be addressed directly through public policy. These “social determinants of health” include housing, employment and education—all policy areas under the purview of local governments.<sup>12</sup>

### What’s The Right Balance?

A secondary effect of these preemption abuses is that they have undermined a pragmatic conversation about the appropriate balance of state and local authority. In no way should the excesses of state overreach negate the importance of state and federal preemption in certain circumstances.

Higher levels of government can and should serve as a bulwark against discrimination and in favor of fundamental civil rights. State and federal laws in these areas are solid floors for protections guaranteed to residents—cities may provide additional protection, but not less. Preemption by states is also necessary to legislate in areas where the actions of one city

may create significant negative externalities for a neighboring city. For example, if one city were to attempt to eliminate pollution regulations that would clearly harm their neighbors, it would be appropriate for state government to step in. Similarly, state action may be required to ensure sites for essential services that may be locally undesirable. A city may not want a landfill within its borders, for instance, even if one is needed in the region.

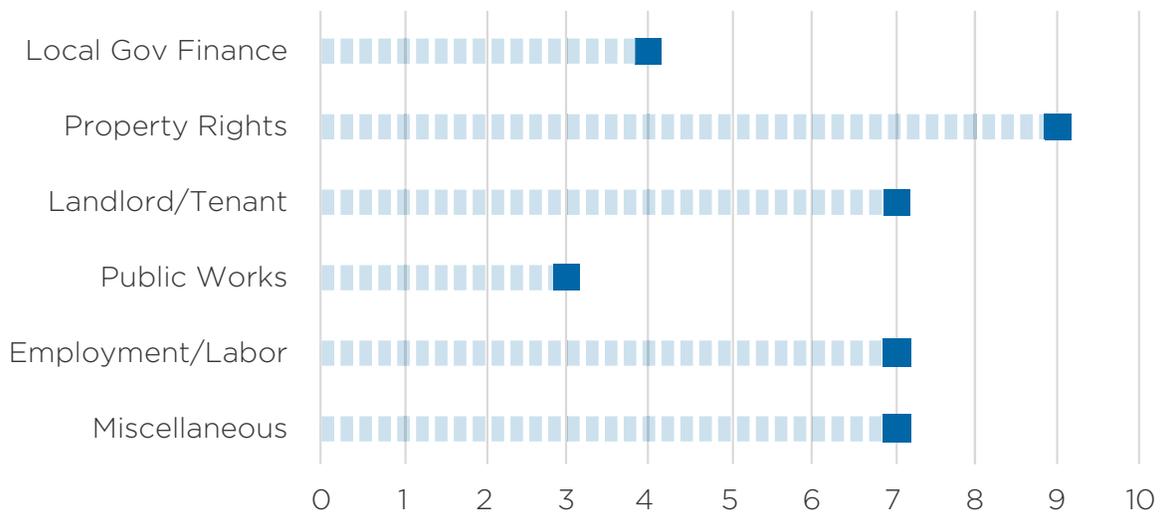
These are all reasonable circumstances for a negotiation between local and state power. They show preemption as a legal tool that can be used to solve a clear problem, and state legislators should hold themselves to that standard when considering a vote to remove local authority.

Reversing the current trend of preemption will require concerted action by local leaders. The general public needs to be educated about the impact of preemption and its effect on local decision-making. Mayors and their allies need to pull together big-tent coalitions to pursue a campaign to protect and reenergize local democracy. And preemption laws need to be challenged and negotiated in the court systems. The next section details the importance of each of these steps and outlines specific strategies for mayors and city leaders to pursue.

## One City, 37 Preemptions

Between 2011 and 2018, the city of Madison, Wisconsin, has been subjected to 37 instances of state preemption across a host of policy areas (see figure 1). These range from prohibiting municipalities from banning bow hunting to preempting local family and medical leave laws. While this is an example of just one city, it shows how pervasive state limits can be on local policymaking. The full list of preemptions can be found in Appendix A.

**Figure 1: City of Madison Preemptions 2011-2018**



# Strategy One: Communicating the Problem

The 2018 legislative session had the potential to be a bruising one for Florida’s cities, with dozens of preemption bills on the docket. But a successful campaign by the Florida League of Cities (FLC) thwarted such efforts.

The onslaught of bills came as cities across the state were joining a lawsuit to fight back against an especially punitive preemption law that holds local officials personally liable for implementing gun control measures that exceed state standards. It was a moment that demanded a new message to protect local authority from further losses and the Florida League of Cities delivered with their “Let Cities Work” campaign. The campaign, which celebrated the 50th anniversary of the state home rule amendment, included op-eds on the issue, a Home Rule handbook that gave mayors and council members advice on making the issue resonate with voters, and a Home Rule rally at the FLC’s annual conference.

Armed with great resources and a message that worked, members of the Florida League of Cities were reenergized advocates of their rights. While being careful to avoid overstating the success of the communications strategy, not a single preemption bill passed in that potentially damaging 2018 legislative session.

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Motivating lawmakers, advocates and the public to oppose the misuse of state preemption and its consequences will take a combination of education and persuasion to raise awareness,

shape public opinion, and build demand for an end to the erosion of local control.

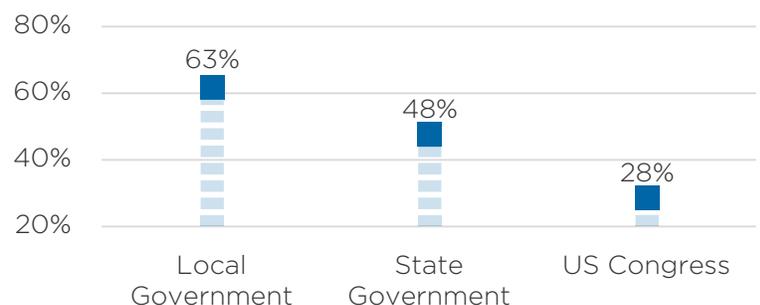
Education is key: Voters—even some elected officials—lack a basic understanding of preemption and its consequences. National polling conducted for the Local Solutions Support Center in January 2018 shows that two-thirds (66%) of people have either heard very little or nothing at all about state preemption. In-person and online focus groups conducted in June and July of this year affirmed the poll findings and helped hone the following messaging.



## To Educate And Move Voters, City Leaders Need To Start By Understanding Residents’ Values, Beliefs And Concerns.

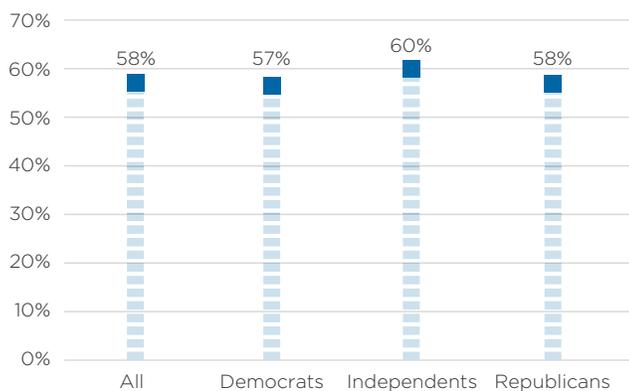
Polling consistently shows voters trust the government closest to them. By a large margin, voters feel most positively about local government ([see figure 2](#)).

**Figure 2: Percent of People Who Favorably Rate the Levels of Government**



The idea that “locals know best” may be the strongest argument for protecting local power from preemption. Six out of 10 voters (58%) agree that, “Local governments are more connected to the needs of the community and therefore can pass policies that reflect their community’s values.” That statement holds true across political parties (see figure 3).

**Figure 3: Percent of People Who Agree “Local Governments are More Connected to the Needs of the Community”**



This top-performing message asserts that every community is different and should have the ability to develop their own policies to reflect the unique needs and values of the people living there. Constituents understand that what works in a big city is not always the same as what works in a small town, which is why local governments exist.

Voters view local government as their best opportunity to get what matters to them done. Support for local democracy grows even stronger when faced with facts about preemption:

**68%** agree that “when state legislators prevent local communities from passing laws or striking down local laws, they threaten local democracy and silence the voices of the people.”

People believe that local governments are less likely to be pressured by special interest lobbyists and that state lawmakers are heavily influenced by corporate lobbying:

**70%** of people agreed that preemption happens because corporate special interests and lobbyists convince state lawmakers to block a local law that these groups believe would hurt profits.

Voters support local communities improving upon state law:

**69%** said that state legislators should be able to establish laws that act as a minimum standard or floor, and that local communities should be allowed to build and improve on these laws. This is consistent across party lines: 72% of Democrats, 66% of Independents and 68% of Republicans all agree with localities improving upon state law.

Voters of both parties do not like the punitive nature of some preemption laws, e.g., cutting off state funding from local government or taking criminal action against local politicians. This seems petty and counterproductive to voters.

Finally, the process of overturning election results is seen as an abuse of power, ignoring the will of the people and undermining the point of voting. This is an especially powerful argument against state interference in local decision-making.



### To Advance The Case Against Preemption, Use Language And Arguments That Connect To Voters.

The top-performing messages are:

- Every community is different and needs the ability to develop their own policies to reflect the unique needs and values of the people living there.
- City councils and local governments know the values of their community and what is best for the people who live there. These leaders are people we see every day at the grocery store, at school events, walking their dogs—they can best respond to the changing needs of the community.

- Voters believe government is most effective and accountable at the local level. Research shows that voters see local officials as more attune to the values and views of the people who live in their communities. And, local democracy allows cities to create policies that fit the unique needs of their communities.
- Industry lobbyists have successfully pushed state lawmakers across the country to put their interests and profits ahead of efforts by local governments to support healthy families, a clean environment, good jobs, and safer communities.

While preemption isn't a partisan issue, the examples used when describing it can trigger partisan responses. One way to avoid this is to talk about an issue where there is common ground, such as broadband. People of all political stripes and from both urban and rural regions understand the consequences of not having access to the internet, as they are personally affected when municipalities are prevented by state preemption laws from developing or strengthening their own local networks.

# Messaging Do's & Don'ts

## Do's

- Do use the terms “local democracy,” “local decision-making” and “local control.”
- Do make the message about the people, not about local officials. Voters strongly agree with the idea that “decisions made for our communities should be made by the people who make up that community.”
- Do remind audiences that corporate special interests are undermining local democracy.
- Do use real-world examples that illustrate how preemption hurts people and their local communities, such as the inability to raise wages to meet local costs, to decide how close fracking wells are located to schools or private homes, to access health care, online classes or register to vote online.
- Do talk about the “misuse” or “abuse” of preemption. As a legislative tool, voters believe preemption is value neutral.
- Do reaffirm the purposes of local government.
- Do emphasize the importance of local decision-making—local decisions should be made locally.
- Do acknowledge that local control is a dual-edged sword that is not always used for good.
- Do be prepared to fight values with values. Preemption advocates argue that preemption is necessary to escape the “oppression of local control” and that local regulations are being used to violate liberty and freedom. Counter those claims with the publicly shared values of local democracy, control and the community’s ability to best meet unique views, values and needs.

## Don'ts

- Don't use the word “preemption.” Make it clear what's transpiring, and use the term “state interference” instead.
- Don't make state lawmakers the villains.
- Don't use overheated references, such as “an attack on cities,” “assault on local democracy” or “cities under siege.” Voters believe that if the threat was so bad, they would have heard about it.
- Don't make this a partisan issue. People believe corporations and special interests are influencing state politicians to act—not just Republicans or Democrats. They do not see this as a partisan strategy.
- Don't make this a process discussion about the role of state versus local government and when preemption is appropriate.
- Don't disparage the role of state government. People believe that there are issues best dealt with by the state as long as local governments are free to build and improve on state minimum standards.
- Don't accept the argument that preemption is needed to avoid a patchwork of laws inside a state. Businesses deal with different city laws, tax rates and health standards every day. If state lawmakers believed that “one size fits all,” they would pass statewide standards and protections, rather than blocking them altogether.

## Strategy Two: Building a Coalition

In some states, it can feel like every legislative session brings a fresh example of local decision-making power being lost to state interference. At the same time, the opposition to these bills is often dispersed, with various interest groups or advocacy organizations only engaging when their issues are affected. That is why grassroots groups with little in common except for the belief in the need to protect local policymaking are forming cross-issue coalitions in several states. These alliances are seeking to raise awareness of the increase in the abuse of state preemption and its effects, lobby against efforts to weaken local control and mobilize local lawmakers.

One example of this is the coalition LOCAL Maryland, that is working to blunt the increased use of preemption by joining the forces of multiple stakeholders and prioritizing the preservation of local authority. The groups involved, which include health advocacy organizations such as Sugar Free Kids and employment advocacy groups like the National Employment Law Project, all realized that when they were advocating individually for local authority on their own issues, they were losing. Their solution was building a set of principles—supporting healthy families, a clean environment and good jobs—that any organization could sign on to and commit to activating their full network in response to threats to local authority around those issues.

LOCAL Maryland launched at the beginning of the 2018 legislative session and worked successfully to help keep preemption from being attached to a bill increasing the state minimum wage in 2019.

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Countering and repealing preemption in the statehouse will require turning the communications strategy into a campaign. The good news is that city leaders are not alone. The abuse of preemption has become a major issue for a wide range of advocacy and interest groups because it has limited local policymaking on environmental issues, employment issues, health and safety, and human rights protections.



### **Build A Statewide Coalition And Look For Nontraditional Partners.**

Local government has always been a vocal opponent of unjustified state interference, and at times it might have been a lonely fight. But today, with the spread of new laws that limit policymaking in myriad areas and, in some cases punish local lawmakers, more and more organizations and stakeholders are becoming interested in opposing preemption. Since city governments are implicated in all potential legislation, elected leaders and state leagues are best positioned to identify and unite allies that may currently only be active in their own siloed policy area. One successful long-term example is the Metropolitan Mayors Caucus in Illinois, a nonpartisan membership group made up of the

Chicago region's 275 cities, towns and villages. The group works to decide and implement collaborative programs and policies regionally. It also works—often with the Illinois Municipal League—in the state legislature to advance or lobby against bills, most particularly around budget and funding issues.

Similarly, local leaders may be the best candidates to make the case to potential allies that preemption in one area sets bad precedent in any number of other areas—that a loss for one priority area impacts everyone who cares about local policy innovation. Taking this approach can help unite city, suburban and rural elected officials and convert issue-by-issue allies into more persistent advocates in opposition to state interference.



### **Empower And Elevate The Voices Of Those Who Are Impacted By State Interference.**

Another benefit of bringing a broad coalition together is that it will include voices outside of city government who can speak to the harm that preemption causes. Communications research shows that stories about the impacts of preemption are more likely to energize voters and persuade lawmakers. And the most compelling stories won't be about policy; they will be about people. Stories can also be used to push back on the perception that preemption is only an issue between big cities and states.

Smaller towns and even rural areas can be just as affected by the inability to set their own rules or advance their own priorities. For example, broadband internet access remains uneven in both urban and rural parts of the country. Therefore, state laws that preempt local communities from investing in their own broadband infrastructure affects big and small cities alike. Preemption of regulations around pollution or plastics impacts large cities, but also may prevent smaller tourist communities from protecting the natural assets that power their local economy.



### **Coalitions Make Repealing Preemption Possible.**

In 2019, Colorado repealed its minimum wage, tobacco tax, and oil and gas siting preemptions and Arkansas repealed key elements of its municipal broadband preemption.<sup>13</sup> In Arkansas, a broad-based coalition of legislators was key to demonstrating the importance of municipal broadband for everyone in the state.<sup>14</sup> As the momentum built for allowing rural communities to build their own networks, the Arkansas Municipal League provided guidance and emphasized that preemption removes the ability of municipalities to tailor solutions to their needs.



### **Finally, Making The Political Case For Local Decision-Making Can Be Much Easier When City Leaders Have An Affirmative Vision For The Role Of Local Government.**

The animating principle underlying these stories is that local government is often best positioned to understand their communities and to be responsive to their constituents. In turn, residents trust the government closest to them and believe that their local elected leaders should be empowered to deliver policies that reflect their needs and preferences. This relationship is fundamental to our notion of self-governance and local democracy.

In most states, those rights are enumerated in some version of local Home Rule—whether in state statutes or the constitution. Home Rule itself is the result of campaigns to preserve local government autonomy from state interference that began at the end of the 19th century and continued into the early 20th century. Cities in many cases fought for and won the ability to legislate on issues and exert powers over local activity that were not explicitly granted by the state government. That right of initiative allows cities to lead and to pursue a policy agenda informed more by what their residents need than by what the state enables.

Still, times have changed since the last revisiting of Home Rule – and the relationship between cities and states has changed in turn. At a time when there is significant momentum around democratic reform in many states, cities can be opportunistic about seizing openings to change the language of Home Rule to better reflect the realities of today.

In 1953, NLC’s predecessor, the American Municipal Association, released the first Model Constitutional Provisions for Municipal Home Rule. The ideals spelled out in the provisions launched a wave of reform across the country codifying local decision-making. In 2020, NLC will release a new set of Home Rule principles—updated for the first time since 1953—that will articulate local power in the 21st century and be a template for cities and states to enshrine local democracy.

## Strategy Three: Pursuing Litigation

In 2015, Pittsburgh passed a citywide ordinance granting paid sick leave to roughly 50,000 lower-income workers.<sup>15</sup> The ordinance was immediately challenged and the city initially lost. Both the trial and intermediate appellate courts ruled that the city's home rule powers did not allow for regulation of businesses and employers in such a manner.

But Pittsburgh took the case to the Pennsylvania Supreme Court, which reversed the lower courts and ruled that the city had the ability to regulate for disease prevention and control. The decision, handed down in 2019, vindicated the city's grant to workers of up to 40 hours a year of paid sick leave in businesses with 15 or more employees, and up to 24 hours in businesses with fewer than 15 employees.

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As critical as it is to have effective communications about state interference and to leverage campaigns to protect local democracy, legal strategies are essential in any broad-based approach. These strategies can be proactive, such as exercising the power city leaders have and drafting laws to avoid preemption. But at the end of the day, sometimes cities can't avoid litigation. Therefore, it is important to understand the potential and limitations of such challenges.



### Know Your Legal Powers—And How To Use Them.

Home rule involves the power to initiate policy, but can also, more importantly, provide a shield against the displacement of local authority by the state. Home rule is not monolithic—it can derive from state constitutions, statutes or a hybrid, and often takes litigation to define its boundaries. Home Rule can apply across a range of local powers, from regulatory matters, fiscal authority, local political structure and personnel, to contracting, property and other proprietary functions. Not all cities have the same home rule powers, even within a given state. City attorneys know this constitutional, statutory and judicial landscape well and can help municipalities navigate their home rule powers. Mayors and other city leaders can proactively work to affirm local powers. Half the battle of home rule is often making the first move.



### Try To Minimize Conflicts With The State By Writing Ordinances The Right Way.

Another important step in responding to the threat of state interference is working with the city's legal team and legislative leadership to craft ordinances that minimize as much as possible potential conflicts with state law. Some preemption conflicts involve local laws that run afoul of existing state law. While writing ordinances in such a way can leave room for

local policy, this strategy has its limitations. States will often step in to remove local authority after cities act. But drafting new legislation creatively to navigate the existing landscape of state law is worth trying as a first step.



### Litigation In State Or Federal Court Must Remain An Option.

Traditionally, when states expressly preempt local power, cities are at disadvantage. While it remains the case that states generally have more formal power than local governments, cities have managed some litigation victories in recent years. Courts are increasingly open to checking the current misuse of state power.

As litigation has proceeded in state after state, several theories are emerging to protect the power of cities.

First, as with Pittsburgh’s challenge, some cases implicate core questions of home rule, including the power it provides to initiate policy and to protect against the displacement of local authority by the state. Here city attorneys can help craft the strongest grounds for challenges. Another legal constraint on state preemption comes from state constitutional provisions—found in roughly 37 states—that require some form of “generality” or “uniformity” or that conversely prohibit “special” or “local”

legislation. Although the law varies from state to state, statutes may be vulnerable if they too clearly single out specific local governments or even just local governments as a class. Furthermore, existing state laws can protect against some of the worst abuses of punitive preemption. In Florida, a 2019 trial court decision found that a Florida statute that authorized fines and even removal from office of officials passing potentially preempted local legislation was unconstitutional. The rulings cited legislative immunity and other theories.

If Home Rule, bans on special legislation and legislative immunity are substantive grounds for protecting local democracy, state law can also offer procedural grounds on which to challenge state interference. Some state constitutions require specific processes to pass local or special laws. There are general constraints as well, such as “single subject” and clear title requirements meant to forestall logrolling and prevent attaching unpopular riders to popular bills. Given the haste and lack of transparency with which preemption legislation can be passed, these once obscure procedural requirements have taken on new life. The single subject rule, for example, led the Missouri Supreme Court to invalidate the state’s attempt to preempt St. Louis’s 2015 minimum wage ordinance. Missouri ultimately repassed the preemption legislation in a constitutional manner, but St. Louis’ challenge shined a powerful light on the state’s interference.

Many recent preemption fights involve critical questions of federal law. The challenge by the tiny border town of El Cenizo and other Texas cities and counties against the state’s punitive anti-sanctuary law raised important First Amendment, Fourth Amendment and federalism questions—even if the plaintiffs largely did not succeed in the litigation.

Finally, some cities have pursued litigation even in the face of difficult odds. Why? A high-profile court case can force states to defend

unreasonable actions and can work with other elements of a broad communications and coalition-building strategy. This can help change the way the public understands the role of cities, as with the group of cities and local leaders who decided to challenge Florida’s punitive firearms preemption law in the wake of the Parkland tragedy. And litigation may ultimately stop harmful state legislation.

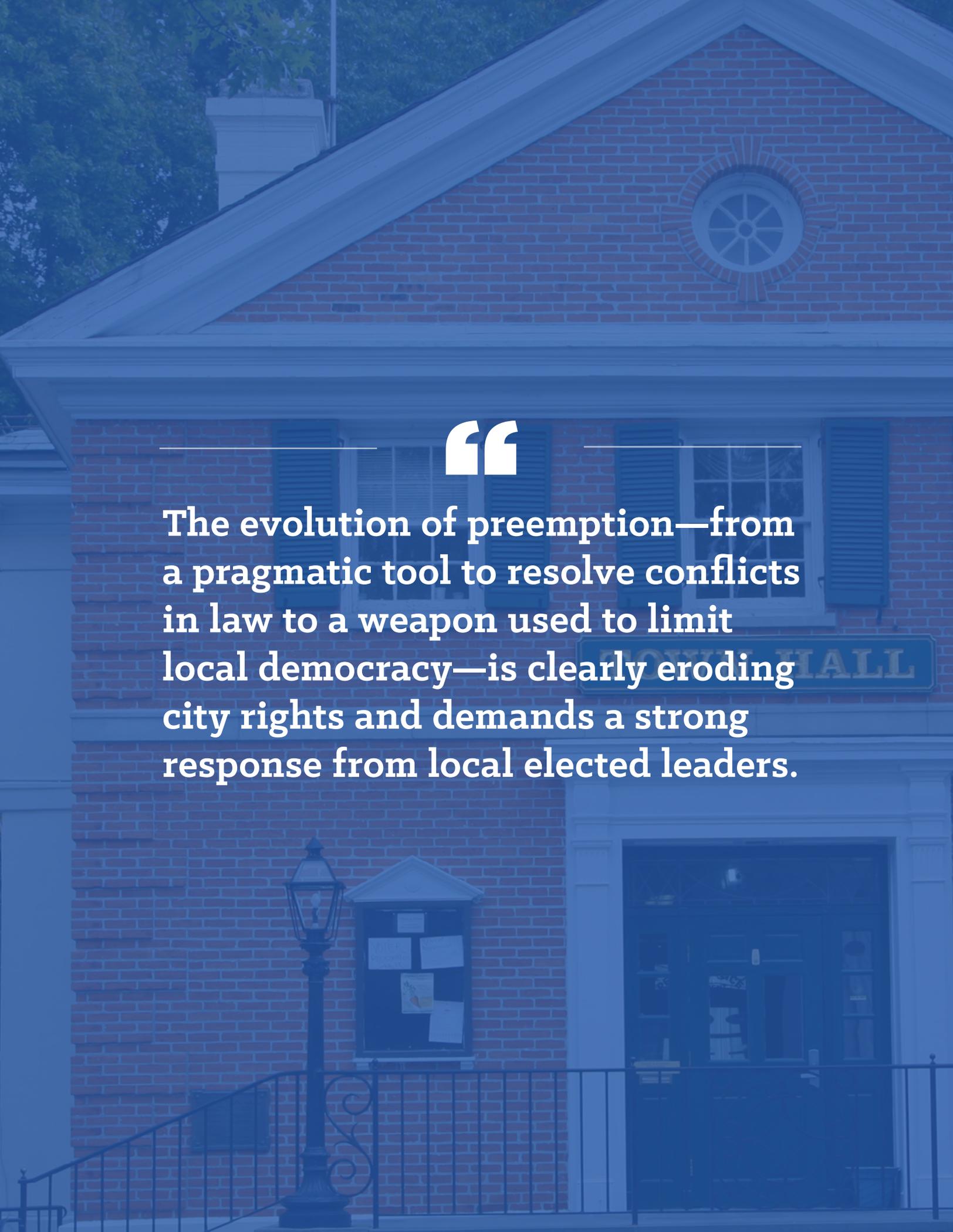


## Conclusion

**T**he evolution of preemption—from a pragmatic tool to resolve conflicts in law to a weapon used to limit local democracy—is clearly eroding city rights and demands a strong response from local elected leaders.

Our hope is that by reversing the current trends, cities can get back to doing what they do best: listening and responding to the concerns and challenges of their residents and experimenting with policies and practices to solve them.

The core principles of local democracy are being tested. By communicating the problem to connect with residents, building campaigns and coalitions, and pursuing litigation when necessary, local leaders can use their positions to combat state interference and affirm local control.



“

The evolution of preemption—from a pragmatic tool to resolve conflicts in law to a weapon used to limit local democracy—is clearly eroding city rights and demands a strong response from local elected leaders.

# Appendix A: The cumulative effect of preemption in Madison, Wisconsin

In prior efforts to track preemption across the country, Wisconsin consistently measures highly on the total number of preemptions: it was tied for the most preempted state in a 2018 NLC survey of seven policy areas, with preemption laws covering six of the areas. But even those surveys miss the breadth of preemption laws facing some cities.

At one of our Mayors' Institutes, former Madison Mayor Paul Soglin presented the following list of preemption laws that have impacted his city since 2011. His conclusion was clear: There is a cumulative impact to so much preemption activity at the state level. It discourages policy innovation at the local level and chills the spirit of local democracy among constituents.

## Local government finance

- New stricter levy limits with no inflationary adjustment
- Increase in certain fees (garbage, snow removal, etc.) triggers reduction of levy
- Repeal of Regional Transit Authority (RTA) authorizing resolution
- Dictate how room tax funds are spent and requires independent board to make the spending decisions

## Employment/labor issues

- Preempted local family and medical leave laws
- Preempted authority to regulate hours, shift scheduling, benefits
- Municipalities may not set minimum wages for employees performing contracted work for the city
- Prohibited project labor agreements
- Eliminated local prevailing wage
- Prohibited residency requirements for employees
- Prohibited local governments from providing health insurance to domestic partners

## Public Works

- Prohibited the use of condemnation for the establishment of bike or walking trails
- Prohibited giving preference to local companies in public works bidding
- Prohibited city from performing work for which a private person is responsible, e.g., cannot replace sewer line even if property owner pays full cost

## Landlord/tenant

- May not require ticketing before towing cars from private property
- No licensing or registrations of rental property or landlords
- State prescribed methods for how frequently rental units can be inspected and the fees for inspections
- Cannot regulate or limit the use of information on a tenant's occupation, credit history, arrest/ conviction record, social security number
- Cannot regulate security deposits
- Cannot require the communication of any information to a tenant unless required by state or federal law, e.g., no voter registration information
- Cannot require the landlord to communicate any information to the municipality unless it is required by state or federal law, or is solely information to allow someone to contact the owner

## Property rights

- Required a court to resolve any ambiguity in the meaning of a word or phrase in a zoning ordinance in favor of the free use of private property
- Directed courts to give agency decisions of law restricting a property owner's free use of the owner's property no deference when reviewing such a decision
- Ban on prohibition of banners on construction site fences

- Prohibited from requiring more than 90% runoff control for new development
- Imposed 90-day shot clock on approving urban service area amendments
- Strict conformity with state electrical code
- Prohibited local time of sale requirements—local governments cannot require property owners to take certain actions (improvements, electrical system, building code, etc.) or pay fees at time of sale
- Short-term rentals: municipalities may not prohibit the rental of residential dwellings for periods of seven days or longer and may not limit the total number of days of such rentals to less than 180 per year
- Strict conformance with statewide water quality standards

### Miscellaneous

- Prohibited municipalities from banning bow hunting
- Banned plastic bag bans: Municipalities may not prohibit, restrict or regulate the use, sale or disposition of containers (cups, bottles, cans, packaging)
- “Big Gulp law:” May not prohibit or regulate the sale of food or nonalcoholic beverages based on the calories, portion size or other nutritional criterion
- Prohibited from regulating rideshare companies
- Regulation of knives—treats knives like firearms in eliminating local authority to regulate the purchase, sale, transport, etc.
- Eroded local billboard bans: If a municipality has banned future billboards, and the state Department of Transportation must condemn a billboard in that community, municipalities will either have to make an exception for the replacement of the billboard or pay for the condemnation
- Drug testing/housing authority: Require local housing authorities to screen residents to determine which ones are “able-bodied” and underemployed or unemployed, and require drug testing of any such residents if there is suspicion of drug abuse

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# Notes

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