

## Concern Over Increased State Preemption of Some Local Initiatives

State preemption of local environmental initiatives is on the rise—and that concerns some local governments, advocacy groups, and scholars. The Rockefeller Family Fund’s Local Solutions Support Center explains that local governments have “become a critical source of innovation across a wide array of policy areas” and have “taken the lead . . . in responding to emerging environmental threats,” but “the last seven years has seen an increase in the use of preemption to stop local lawmaking.”

The center contends that this trend is troubling because “for America to progress, cities, counties, and towns must remain hubs of innovation and solutions testing.” The situation has led University of Virginia law professor Richard Schragger to conclude that “American cities are under attack” due to the “explosion of preemptive state legislation.”

Although most preemption statutes address economic issues, such as minimum wage and ride sharing, states have preempted

local authority in myriad environmental policy areas as well. These include plastic bag bans and restrictions on concentrated animal feeding operations, pesticides, and genetically modified crops.

Local efforts to rein in fracking through zoning ordinances, ballot measures, and other means are front and center. In a 2017 article, Illinois State University professor Lori Riverstone-Newell reported that local bans had been enacted in 13 states in which fracking was active. Subsequently, eight of those states successfully preempted the local bans (CO, LA, NC, OH, OK, NM, TX, WV). Only two state preemption laws were overturned by courts (PA, NY).

States also are preempting local bans

and fees on plastic bags. The National Conference of State Legislatures reports that 10 states have preempted various types of local plastic bag ordinances (AZ, FL, IA, ID, IN, MI, MN, MS, MO, WI).

In addition, Grass Roots Change counts 13 states that have preempted local regulation of animal feed operations (AZ, IA, ID, IL, KS, MI, MO, MS, ND, PA, SC, TN, WI). A Pennsylvania statute, for example, preempts local ordinances that prohibit or limit “normal agricultural operations.”

And, 43 states have preempted local pesticide regulation. 29 explicitly preempt local regulation of pesticides sale or use, and 14 delegate exclusive regulatory authority to a state entity. Furthermore, Beyond Pesticides reports that 17 states preempt local restrictions on genetically engineered crops.

The increase in state preemption reflects today’s contentious political landscape. Columbia University law professor Richard Briffault concludes that the rise in preemption “is closely linked to the partisan

and ideological polarization between red states and their blue cities.” The League of Cities agrees and adds to the list: “Lobbying efforts by special interests,” “spatial sorting of political preferences between urban and rural areas,” as well as “single party dominance in most state governments.”

The conservative American Legislative Exchange Council, which supports preemption efforts by providing model state legislation and conducting training sessions for government officials, offers a similar perspective: “Because many state legislatures are strongly committed to ALEC limited government, free market principles, many from Washington, DC, have developed strategies focused on progressive change at the local level.” ALEC’s annual report



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contends that its American City County Exchange is the “needed barrier to government control and progressive policy at the local level.”

Most scholars agree that from a legal perspective the deck is stacked against localities, as they are political subdivisions of and derive their authorities from states. Yet, a growing body of scholarship focuses on how localities can creatively use the limited legal and political tools available to challenge state preemption—whether they are located in home rule states in which they are granted substantial authority or so-called Dillon Rule states in which their authorities are narrower.

But the same scholars also recognize that preemption can be a valuable tool. While conservative organizations emphasize the need for uniform regulation rather than a patchwork of requirements that can be costly for businesses to navigate, the American Constitution Society recognizes that localities can be “parochial and exclusionary” and that “there are fundamental constitutional values that must remain state-wide and national in scope as a baseline.”

The question, however, is not whether preemption is ever appropriate, but whether states are currently overusing it as a political tool—at the expense of local innovation. Although views may differ on the answer to this question, most would agree with a recent Pew Research Center preemption blog post which succinctly predicts: “Expect more conflict between cities and states.”

**Are American cities under attack from states as they try to fix local problems?**