

C O M M E N T

# Local Control Is Now “Loco” Control

by Kim S. Haddow

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Cities have become a critical source of innovation across a wide array of policy areas that advance inclusion, equitable opportunity, and social justice. In the absence of state and federal action, cities and other local governments have taken the lead in enacting minimum wage and paid sick leave policies, expanding the boundaries of civil rights, tackling public health challenges, responding to emerging environmental threats, and advancing new technologies.

But this expansion in the role of cities has been met with an increase in the use and scope of state preemption laws now crafted deliberately to strip local governments of their power to regulate.<sup>1</sup>

While this wave of “New Preemption,” seems without precedent, Prof. Richard Schragger’s article, *The Attack on American Cities*, reminds us that “hostility to city government is not new.”<sup>2</sup> In fact, the recent surge in state preemption is built on a long history of anti-urbanism “that is deeply embedded in the structure of American federalism”<sup>3</sup> and a function of enduring cultural biases.

Schragger makes a compelling case that the recent explosion of preemptive state legislation is the latest in a long-term unbroken attack on cities. But it is important to note this most recent siege is distinctive in its magnitude, malice and disruption of democratic norms.

In the past, preemption was used to nullify local measures inconsistent with state law, where the state interest in uniformity, comprehensive regulation, or other legitimate priorities was clear. Preemption has also been used to advance well-being and equity. The federal Civil Rights Act of 1964, for example, allowed states and cities to increase protection for individual rights, but prohibited them from doing less than what was required under federal law. But, “New Preemption,” as defined by Columbia law professor Richard Briffault, “clearly, intentionally, extensively, and at

times punitively bar local efforts to address a host of local problems . . . . Often propelled by trade association and business lobbying, any preemptive state laws are aimed not at coordinating state and local regulation but preventing any regulation at all.”<sup>4</sup> This New Preemption is also being used to overturn the outcomes of municipal ballot elections, perpetuate racial and gender inequity, cut deep into the traditional core powers of local governments, and punish cities and local officials who defy their states.

In his article, Schragger identifies several long-standing structural and cultural impediments to city power that provide the foundation for current efforts to limit local control, including:

- Vertical redundancy. States share so much political and policymaking space with their local governments that state preferences are likely to predominate.
- The malapportionment of the U.S. Senate. Because every state has equal suffrage, less populated rural states have an inherent advantage over highly populated states, resulting in “significant underrepresentation of urban interests.”
- Partisan gerrymandering and geographical sorting by political affiliation. This clustering and consolidation of populations also magnifies the legislature’s anti-urban bias.

In addition, Schragger cites the failure of home rule—the concept of local legal authority—to protect local authority. Home rule, he argues, “permits local governments wide discretion in initiating legislation, but no or very limited protection against state law preemption” and that the authority granted in home rule provisions is “easily effaced when locals seek to regulate powerful commercial

1. National League of Cities, *City Rights in an Era of Preemption: A State-by-State Analysis*, 2018 Update, February 2018.

2. Richard Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163 (2018), at 1166.

3. *Id.* at 1232.

4. Richard Briffault, *The Challenge of the New Preemption*, STANFORD L. REV., Vol. 70 (June 2018), at 1995.

and financial actors.”<sup>5</sup> Schragger also notes that the “current version of home rule favors suburban power to protect property values over urban power to promote equality.”<sup>6</sup>

Finally, Schragger argues that cities face an enduring and negative narrative that they are “badly governed, bad for citizens’ welfare, and bad for the nation.”<sup>7</sup> Not only do Americans believe that cities are “abysmally governed, more corrupt than state and national politics, and more prone to capture by special interests,” according to Schragger, but their size, diversity and density stand as counters to traditional American values of individualism and personal freedom. He argues that “Antigovernment anti-urbanism draws a direct connection between bigness and the loss of liberty, centralization and the absence of self-government. . . .” And Schragger notes that “present day anti-urbanism is driven by ethnic and racial hostility as well.”<sup>8</sup>

All of the strains of anti-urbanism identified by Schragger are necessary, but not sufficient conditions to explain the present, virulent use of preemption laws. This foundation of anti-urban prejudices has been in place for more than a century, with roots that stretch back to our earliest days. Conservative organizations, including the American Legislative Exchange Council (ALEC), laid plans and wrote policies to limit local regulation decades ago. Industry groups and trade associations first began pressuring state legislatures to rein in their cities in the late 1980s, according to political scientist Lori Riverstone-Newell.<sup>9</sup>

So, why are we seeing this explosion in state preemption now? Despite the broad success of state preemption strategies deployed by the gun and tobacco industries in the 1980s and 1990s, why are we only now seeing the amped-up use of preemption laws to expressly block local regulation across an unprecedented number of policies?

Evidence shows two events in 2010 contributed to the sharp increase in the misuse of preemption we are witnessing now—the U.S. Supreme Court’s ruling in *Citizens United v. Federal Election Commission* in 2010 and the results of that year’s midterm elections. Those two events led to the election of legislatures that were steeped in the anti-urban biases identified by Schragger—and demonstrably more conservative and ideologically-driven to enact an anti-regulatory agenda.

At the beginning of that year, the Supreme Court handed down a ruling that reshaped the political landscape. In *Citizens United*, the Court declared political spending to be protected under the First Amendment, allowing corporations and unions to spend unlimited (and largely undisclosed) amounts of money on political activities, if it was done independently of a party or candidate.

According to the National Council of State Legislatures, at the time of the *Citizens United* decision there were 24 states that prohibited or restricted corporate and/or union spending on candidate elections.<sup>10</sup> Since that ruling, many of these states have repealed or re-written their campaign finance laws to avoid legal challenges. Opening the door on corporate and union giving at the federal level also opened the same door in state races, directly affecting the composition and political leanings of legislatures since then.

According to economist Gordon Lafer of the Economic Policy Institute, the ruling resulted in a “flood of money” contributing to candidates in state elections and “a wave of conservative Tea Party candidates” being elected to state office in November 2010.<sup>11</sup> Recent research shows “strong evidence that removing bans on the funding of outside spending increases the electoral success of Republican [state legislative] candidates and leads to ideologically more conservative state legislatures.”<sup>12</sup>

“Partisan control affects cities,” notes Riverstone-Newell. “Republican state leaders are geographically and ideologically distant from city interests. They are elected by constituents who are removed from the types of challenges that cities face, challenges that accompany economic and social diversity and concentrated populations. They have little reason to support anything uniquely ‘city,’ and are likely to be ideologically opposed to the progressive social policies favored by most who live there.”<sup>13</sup>

At the end of the 2010, the midterm elections produced a tectonic shift in power in the states. The Republicans picked up 675 legislative seats, the biggest gain in the legislature made by any party since 1938. They went from controlling 14 legislatures to 25, and from nine to 21 state trifectas where they controlled both houses and the governorship. As Dan Balz at the *Washington Post* noted, these gains gave Republicans “the power to work their will in the states in ways they can’t begin to think about doing in Washington.”<sup>14</sup> And work their will they have.

Every year since 2011 has seen more preemption activity than the last. And, as a result, local governments have lost power in every legislative session since 2011.<sup>15</sup> Today, local governments in 25 state states cannot raise their minimum wage—15 (60%) of those preemption laws were put in place in 2011 or after. Before 2011, only one state, Georgia, had preempted paid sick days; now 22 states do. The three states that bar localities from passing and enforcing local

5. Richard Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163 (2018) at 1193.

6. *Id.*

7. *Id.* at 1195.

8. *Id.* at 1208.

9. Lori Riverstone-Newell, *The Rise of State Preemption in Response to Local Policy Innovation*, PUBLIUS: THE JOURNAL OF FREEDOM, Vol. 47, Issue 3, July 2017, 403-25, at 405.

10. National Conference of State Legislatures, *Citizens United and the States*, Updated July 21, 2016, at <http://www.ncsl.org/research/elections-and-campaigns/citizens-united-and-the-states.aspx>.

11. Jay-Anne B. Casuga & Michael Rose, *Are State Workplace Preemption Laws on the Rise?*, BLOOMBERG NEWS (July 19, 2016).

12. Abdul-Razzak et al., *After Citizens United: How Outside Spending Shapes American Democracy* (Apr. 17, 2018).

13. Lori Riverstone-Newell, *The Rise of State Preemption in Response to Local Policy Innovation*, PUBLIUS: THE JOURNAL OF FREEDOM, Vol. 47, Issue 3, July 2017, 403-25, at 406.

14. Dan Balz, *The GOP Takeover in the States*, WASH POST, Nov. 13, 2010, at <http://www.washingtonpost.com/wp-dyn/content/article/2010/11/13/AR2010111302389.html>.

15. *Workers Rights Preemption in the U.S.*, Economic Policy Inst., 2018, at <https://www.epi.org/preemption-map/>.

LGBTQ nondiscrimination laws all enacted their provisions in 2011 or after: Tennessee (2011), Arkansas (2015), South Carolina (2016).

There has also been a steep increase number of preemption laws that benefit specific industries since 2011. Lobbying by AT&T and Verizon has resulted in 21 states banning local control over 5G technology, all of them in the 2017 and 2018.<sup>16</sup> As a result of pressure from the plastics industry, 11 states now prohibit local plastic bag regulation.<sup>17</sup> Most of those bans were put in place starting in 2015. Since 2016, four states lobbied hard by the American Beverage Association have preempted local soda taxes: Arizona, California, Michigan, and Washington. The preemption in Arizona and Michigan occurred before efforts to tax sugarsweetened beverages were on local advocates' agenda.

The tactics used by the American Beverage Association at the end of the 2018 session to win a 12-year preemption of local taxes on sugary beverages from the California Legislature signaled a chilling new phase in industry demands for an end to local regulation. The trade group—which represents Coca Cola and Pepsi—agreed to drop a planned ballot initiative which would have seriously weakened the ability of local communities to raise revenues—but only if the state legislature agreed to ban local soda taxes until 2030. The California Legislature had no choice but to acquiesce.

Preemption is being used to advance the interests of both corporations and conservatives and to implement an agenda that limits government regulation and oversight and consolidates power at the state. New Preemption measures frequently outlaw local action on an issue, even when the state itself has no existing policy standard or regulation set in place and has no plans to put a statewide law in place. Increasingly, preemptive state laws are aimed at preventing any regulation at all.

Anti-regulatory lawmakers say they are imposing preemption to fight the “oppression” of local control and local government’s encroachment on “liberty,” clearly following the anti-urban narrative so well documented by Schragger.<sup>18</sup> At a 2019 Texas Public Policy Foundation event, Texas Sen. Donna Campbell demonstrated the open contempt for local government that is driving some state preemption efforts; audience member, Justin Keener, a former Texas Senate and House staffer tweeted: “‘When local control becomes loco control,’ is the time for #TxLege to reign in cities, says @DonnaCampbellTX.”

While New Preemption clearly has its roots in traditional anti-urbanism, states are now acting more broadly

on that animus and aiming to eliminate any regulatory action by local governments. States are passing sweeping preemption bills that seek to end local regulation of whole sectors of the government, including policy areas that have traditionally been “purely local.” According to the *New York Times*, “states aren’t merely overruling local laws; they’ve walled off whole new realms where local governments aren’t allowed to govern at all.”<sup>19</sup> In response to what they argue is “oppressive” local control, states are using preemption to “rein-in local government.”<sup>20</sup> Texas Gov. Greg Abbott has called “for legislation that reduces, restricts and prohibits local regulations,”<sup>21</sup> and asserts that a “broad-based law by the state of Texas that says across the board, the state is going to pre-empt local regulations, is a superior approach.”<sup>22</sup>

In 2015, Michigan became the first state to pass a “Death Star” bill—a sweeping measure which eliminated local control over broad swaths of wage and workplace standards. In one bill (HB 4052), Michigan prohibited local actions on minimum wage, benefits, sick leave, union organizing and strikes, wage disputes, apprenticeship programs, and “ban the box” policies (blocking employers from asking about felony convictions). In 2017, Iowa preempted in one bill (House File 295) all local ordinances on employment leave, hiring practices, employment benefits, scheduling practices, and other terms or conditions of employment. The law also included sweeping preemption on plastic bags and other containers made of a cloth, paper, plastic, and a range of other materials. And in 2018, Wisconsin (AB 748) prohibited, among other things, local regulation of: employee hours and overtime, employment benefits, wage claims and collections, an employer’s right to solicit salary information of prospective employees, employment discrimination, and professions regulated by the state.

A prime example of the growth of this kind of sweeping blanket bill is HB 3 introduced in the 2019 session of the Florida Legislature. This bill, described as a “wrecking ball,” would eliminate all local business regulations as of July 1, 2021, “nullifying everything from anti-discrimination ordinances to Key West’s ban on sunscreens that harm coral reefs.”<sup>23</sup> The bill would also require an economic impact analysis and a supermajority approval every two years for local regulations, no matter how clearly protective of public health and welfare, to be reauthorized.

16. National Conference of State Legislatures, *Mobile 5G and Small Cell 2018 Legislation*, Dec. 31, 2018, at <http://www.ncsl.org/research/telecommunications-and-information-technology/mobile-5g-and-small-cell-legislation.aspx>.

17. National Conference of State Legislatures, *State Plastic and Paper Bag Legislation*, Feb. 27, 2019, at <http://www.ncsl.org/research/environment-and-natural-resources/plastic-bag-legislation.aspx>.

18. Tom Lindsey, *State Regulation of Cities Does Not Illegitimately Infringe on “Local Control.”* FORBES, July 24, 2017, at <https://www.forbes.com/sites/tomlindsay/2017/07/24/state-regulation-of-cities-does-not-illegitimately-infringe-on-local-control/#6688c39b98ca>.

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

20. Ashley Goudeau, *Reducing City Regulations on Agenda for Texas Special Session*, KVUE, July 11, 2017, at <https://www.kvue.com/article/news/local/reducing-city-regulations-on-agenda-for-texas-special-session/269-455609887>.

21. *Id.*

22. Patrick Svitek, *Abbott Wants “Broad-Based Law” That Preempts Local Regulations*, TEX. TRIB., Mar. 21, 2017, at <https://www.texastribune.org/2017/03/21/abbott-supports-broad-based-law-pre-empting-local-regulations/>.

23. Mark Lane, *New Legislative Session Starting, So Watch This Space.*, DAYTONA BEACH NEWS-J., Mar. 5, 2019, at <https://www.news-journalonline.com/news/20190305/mark-lane-new-legislative-session-starting-so-watch-this-space>.

And in the 2018 sessions, several legislatures worked to undermine core powers traditionally reserved for cities, passing bills that preempted the power of cities to require certain wage and benefit standards from their own contractors (WI, AZ), to control their own elections (AZ) and to regulate zoning in the form of short-term rentals (multiple states).

This new preemption trend also seeks to punish cities and city officials. One state—Arizona—has taken a chilling and punitive approach to all local laws subject to state preemption.<sup>24</sup> Under SB 1487, “the mother of all preemption bills,”<sup>25</sup> if the state Attorney General finds a local law contradicts state law, the offending city can either repeal the law or face the loss of state revenue sharing funds—which can make up as much as 40 percent of a small city’s budget. While the Arizona law is uniquely broad, the threat of withholding state funds as a form of punishment is becoming more commonplace. In 2018, Tennessee and Iowa passed sanctuary city bills that threaten cities with the elimination of state funds and grants monies for refusing to comply with federal immigration programs and policies.

Beyond attacks on local power, local officials themselves are also being individually targeted for punishment. Provisions that single out elected and occasionally administrative or law enforcement officials for fining, firing, civil liability even criminal action are seen most often in sanctuary city and firearms preemption laws. Texas’ sanctuary city preemption bill, SB 4, included civil penalties for local officials who spoke out against the policy or directed their staff to follow different procedures. An official could face misdemeanor charges and even removal from office. Additionally, the official’s local jurisdiction would incur civil penalties up to \$25,000 per day per violation. After a court challenge, this punitive provision remains in place for non-elected officials and on hold for elected officials, pending further litigation.

Several states, including North Carolina, Pennsylvania, Tennessee, and Wyoming, have gun control bills that allow for a “private right-of-action” giving “individuals or groups the right to sue local governments and, in some cases, local officials, if they believe they are enforcing local firearms laws.”

States are now targeting popular democracy as well. Starting in 2011, preemption laws were used for the first time to override the results of local ballot elections. The Wisconsin state legislature overturned Milwaukee’s paid sick days initiative, which had been approved by voters 69% to 31%.

Legislatures in at least five other states have used preemption to nullify local ballot election results since then:

- Denton, Texas, Fracking Ban: Passed 59% to 41% (2015);
- Fayetteville, Arkansas, Nondiscrimination Ordinance: Passed 53% to 47% (2015);
- Nashville, Tennessee, Local Hire Law: Passed 57% to 43% (2016);
- Austin, Texas, Defeated UBER’s efforts to escape regulation: Passed 56% to 44% (2017); and
- Tempe, Arizona, Campaign Finance Disclosure Law: Passed 91% to 8% (2018).

Finally, putting this all together, it has become clear that over the last eight years the New Preemption has had the consequence of perpetuating economic and racial inequity. Many of the local laws being preempted—minimum wage, paid sick time, pay equity, local hire laws—would disproportionately help low wage workers, people of color and women. Research shows that preemption legislation is often passed by predominantly white legislatures to block laws benefiting and supported by majority communities of color.<sup>26</sup>

In the case of *Lewis v. Governor of Alabama*, in a ruling that has now been vacated, the U.S. Court of Appeals for the Eleventh Circuit allowed a challenge to the state of Alabama’s preemption of Birmingham’s minimum wage ordinance to proceed noting “the disproportionate effect of the Minimum Wage Act on Birmingham’s poorest black residents; the rushed, reactionary, and racially polarized nature of the legislative process; and Alabama’s historical use of state power to deny local black majorities authority over economic decisionmaking.”

Schrager has developed an important paper, one that clearly nests current efforts to strip cities of their powers into a larger historical, legal, and cultural context. His paper helps to explain how an “institutional system overtly dedicated to the principles of devolution can be so hostile to the exercise of city power.”<sup>27</sup> By examining the long standing political and cultural differences among cities and their states, Schrager makes a distinction between local autonomy and city power and concludes that the “U.S. intergovernmental system supports local autonomy of a certain form; it does not support city power.”<sup>28</sup>

But states’ use of New Preemption to weaken or eliminate city power comes at a cost and cannot last. The loss of local autonomy and authority limits cities’ ability to act on the unique views, values and needs of their residents and respond in a tailored manner to fast-changing economic, social and environmental problems. New Preemption is also closing off opportunities for innovation and policy change. “Indeed, state leaders’ aggressive pursuit of pre-

24. Alia Beard Rau, *Legislature Keeps Its Thumb on Arizona Cities*, ARIZ. CENTRAL, May 9, 2016, at <https://www.azcentral.com/story/news/politics/legislature/2016/05/09/legislature-keeps-its-thumb-arizona-cities/83842924/>.

25. Adam Edelman, *Cities Have a Good Idea? Not Unless the State Says So*, NBC NEWS, Sept. 30, 2017, at <https://www.nbcnews.com/politics/politics-news/cities-have-good-idea-not-unless-state-says-so-n805951>.

26. *State Preemption of Local Laws Are an Extension of Jim Crow*, Partnership for Working Families, Aug. 29, 2017, at <https://www.forworkingfamilies.org/blog/states-preempting-local-laws-are-extension-jim-crow>.

27. Richard Schrager, *The Attack on American Cities*, 96 TEX. L. REV. 1163 (2018), at 1167.

28. *Id.* at 1168.

emption will undoubtedly have a chilling effect in the full range of policy matters affecting localities,” according to Riverstone-Newell.<sup>29</sup>

Changing demographic and economic dynamics will require changes in the city-state relationship. According to Schragger,

Cities and their wider metropolitan areas now contain the bulk of the American population and are the primary economic drivers of their states, regions, and the nation. The focus on states in ‘Our Federalism’ distracts from this important long-term demographic and economic shift. If federalism is to have any force as an idea, it must wrestle with this current reality.<sup>30</sup>

In addition, city leaders and advocates have recognized and are committed to addressing the structural shortcom-

ings of home rule, which saw its last comprehensive reform effort in 1953, at a time when cities were not the population and economic giants they are now. The National League of Cities, working with their state Municipal Leagues, and a group of local governance scholars, led by Fordham Law School Professor and Urban Law Center Director Nestor Davidson, and including Professor Schragger, are drafting modern home rule principles that acknowledge cities are at the center of America’s place in the global economy and that local governments are increasingly called upon to meet the needs and reflect the values of a large, diverse, and growing population. New Preemption, built on longstanding structural obstacles and outdated cultural biases, has left cities far too limited in authority and autonomy to respond effectively to these demands. Developing and adopting new home rule provisions to clarify the power of cities and define the limits of state constraint is a timely first step.

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29. Lori Riverstone-Newell, *Beyond Legal Subordination: Local Governments as Political Actors*, in *THE NEW PREEMPTION READER*, West Academic Publ., Jan. 2019.

30. Richard Schragger, *The Attack on American Cities*, 96 *TEX. L. REV.* 1163 (2018), at 1168-69.