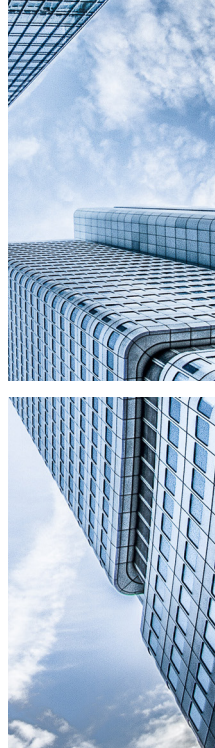


The Growing Shadow of State Interference

Preemption in the 2019 State Legislative Sessions



STATE INNOVATION EXCHANGE





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TODAY,

many of America's cities, towns, and counties have less power than they did at the start of the year to protect the health and safety of their communities or to respond to the unique needs and values of their residents. That's because between January and June 2019, state legislatures across the nation continued a troubling trend of passing more laws forbidding or "preempting" local control over a large and growing set of public health, economic, environmental, and social justice policy solutions. This legislative session, state lawmakers made it illegal for locally-elected officials to enact a plastic bag ban in Tennessee, raise revenues in Oregon, regulate e-cigarettes in Arkansas, establish minimum wages in North Dakota, protect county residents from water and air pollution produced by animal feedlots in Missouri, or protect immigrants from unjust incarceration in Florida.

Some states this session went further, with bills aimed at abolishing core powers long held by cities, including their ability to negotiate and set employment terms with their own contractors, enact and implement local land use laws, and control their own budgets and finances.

But the tide may be turning. The 2019 legislative

session also saw an unexpected and unprecedented number of bills filed to repeal state preemption laws and return legal authority for local decision-making in several states. Bills to repeal state preemption of local minimum wage laws, rent control, tobacco tax, oil and gas well regulation, plastic bag bans and broadband were introduced in legislatures across the country. Earlier this year, Colorado became the first state to legislatively repeal minimum wage preemption, countering a decade-long trend of state overreach. Also, in 2019, cross-issue coalitions working at the grassroots succeeded in killing or weakening preemption bills and more state and local lawmakers pushed back on state interference and became public champions of local democracy.

This end-of-the 2019 session report, a joint product of the Local Solutions Support Center (LSSC) and the State Innovation Exchange (SiX), is not an encyclopedic scan of every state preemption bill passed in 2019. It is, instead, an illustrative look at the preemption trends observed this session.

New Preemption: A Threat to Local Democracy

“ If Americans don’t start paying closer attention to what’s happening in statehouses across the country, the republic may never recover.”

– *New York Times*, March 19, 2019

Preemption is a tool, like the filibuster, that can and has been used by both political parties. In the past, preemption was used to ensure uniform state regulation or protect against conflicts between local governments. Preemption has also been used to advance well-being and equity. State civil rights laws, for example, allow cities to increase protections, but prohibit them from falling below what was required under law. Traditional preemption emphasized balance between the state and local levels of government. While state policy still had primacy, according to Columbia Law School professor Richard Briffault, it was understood that “state policies could coexist with local additions or variations.”

This is not what we are seeing now. “New Preemption” laws, according to Briffault, “clearly, intentionally, extensively, and at times punitively, bar local efforts to address a host of local problems.” Some of this is propelled by a disdain for local lawmaking and urban lawmakers seen as too liberal, intent on “oppressing” the free market and “trampling” on individual liberty. According to Texas State Senator Donna Campbell, “When local control becomes loco control, it is time for #TxLege to rein in cities.”

Another primary driver of new preemption is the opportunity conservatives now have to deliver on a long-promised anti-regulatory agenda – an agenda that disproportionately and negatively affects women, people of color and low income communities. These new preemption laws are being used to prohibit local regulations without adopting new state standards in their place, effectively preventing any regulation or policy remedy at all.

The efforts to consolidate power at the state level and end local authority over a wide range of issues are part of a national long-term strategy often driven by trade associations and corporate interests. Much of this effort has been orchestrated by the American Legislative Exchange Council (ALEC), an industry-funded organization made up by lobbyists and a quarter of all state lawmakers that writes and distributes model bills. Their strategy has succeeded at an alarming rate.

Types of Preemption Laws

From 2011 – 2019, the quantity and reach of new preemption laws has skyrocketed. Here's a breakdown of where preemption stands in the states:

25 states

now preempt local minimum wage laws – North Dakota was added, but Colorado was removed from the list in 2019. ([Source](#))

23 states

now ban local paid sick days laws – including [Maine's law](#) passed this year that does ensure paid leave across the state, but also preempts localities passing their own policies (2019). ([Source](#))

44 states

now ban local regulation of ride sharing networks. ([Source](#))

43 states

limit local authority to regulate guns or ammunition. ([Source](#))

20 states

block or ban municipal broadband networks. ([Source](#))

23 states

have banned local control over 5G technology. ([Source](#))

15 states

ban local plastic bag bans – adding in Tennessee (2019) and Pennsylvania (2019). ([Source](#))

31 states

bar local rent control. ([Source](#))

At least 11 states

preempt local sanctuary policies – adding in Arkansas (2019). ([Source](#))

At least 10 states

preempt local regulation of e-cigarettes – adding in Arkansas (2019), Texas (2019), and Utah (2019). ([Source](#))

At least 9 states

preempt local fair, predictable scheduling laws. ([Source](#))

5 states

have preempted local fair hiring, “Ban the Box” laws – Indiana, Michigan, Mississippi, New Jersey, Tennessee.

4 states

now ban soda taxes – Arizona, California, Michigan, Washington.



Why the Rise in State Preemption Now?

At least two factors contributed to the increase in the use of “new preemption.” At the beginning of 2010, the U.S. Supreme Court handed down a ruling that reshaped the political landscape, [*Citizens United v. Federal Election Commission*](#). In *Citizens United*, the Court declared political spending to be protected under the First Amendment, allowing corporations to spend unlimited (and largely undisclosed) amounts of money on political activities, if it was done independently of a party or candidate. Opening the door to corporate giving at the federal level also opened the same door in state races, directly affecting the composition and political leanings of legislatures since then. [Recent research shows](#) “strong evidence that removing bans on the funding of outside spending...leads to ideologically more conservative state legislatures.”

At the end of 2010, the midterm elections produced a tectonic shift in power in the states. The Republicans picked up 675 legislative seats. They went from

controlling 14 legislatures to controlling 25, and from 9 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.” Every year since the 2010 midterms has seen more preemption activity than the last. As a result, local governments have lost power to enact equity-promoting policies in every legislative session since 2011.

The confluence of increased corporate money and muscle in the states made it possible to move the anti-regulatory, pro-industry model bills developed and disseminated by the American Legislative Exchange Council (ALEC) – some of them dating from the eighties and nineties – into law in more states.

State Overreach

“ I think the heavy hand of state government maybe has gotten a little heavier [this session.]”

– Council Bluffs, Iowa, Mayor Matt Walsh, *The Gazette*, May 3, 2019

2019 has seen a historically large number of preemption bills filed in some states. For example, according to the Florida Municipal League, more than 35 preemption bills were considered in Tallahassee. The Center for Public Policy Priorities in Texas identified **62 preemption bills** filed in Austin. Even the trifecta blue state of [Oregon](#) passed bills with preemption attached, and blue [Maine](#) passed one as well.

The new preemption trends that emerged in 2011 drove the 2019 sessions, too: the bills filed by state lawmakers covered a broad scope of policy areas, but most focused on policies of interest to corporations. State lawmakers crafted bills to deny local governments power over both wide swaths of business regulations and the narrower, core powers traditionally held by cities, towns, and counties. These bills also continued to undermine LGBTQ nondiscrimination ordinances and policies that disproportionately helped women and people of color, while also including provisions that punish local governments and local officials for representing the values of their communities.





2019 PREEMPTION TREND

The state-by-state chipping away of local power over individual issues continued in 2019

“ When the state legislature passes bills preempting municipal local control authority, the ‘will’ of a majority of 132 legislators essentially trumps the ‘will’ of the 8.5 million Ohioans that call an Ohio city or village home. We believe the continued erosion of Home Rule authority by the legislature cannot continue.”

– Kent Scarrett, Executive Director of the Ohio Municipal League, *The Ohio Star*, June 14, 2019

Preemption is being used to implement a nationally-driven agenda that limits local government regulation and oversight and consolidates power at the state. Multistate lobbying for preemption of the same issues means some bills will fail but increases the odds of some wins occurring each session that aggregate to a larger national effect. For example, in 2019:

- **North Dakota** became the 26th state to preempt local minimum wage laws.
- **Oklahoma, Pennsylvania** and **Tennessee** became the 13th, 14th, and 15th states to ban local plastic bags bans.
- **Arkansas** and **Florida** became the 10th and 11th states to prohibit the establishment of “sanctuary cities.”
- **Maine** became the 23rd state to bar local action on paid sick time.
- **Pennsylvania** is poised to become the 24nd state to bar local regulation of 5G small wireless cell deployment.



2019 PREEMPTION TREND

Industry achieved its aims

Corporations prefer to work at the state level where their lobbyists and allied groups have the most influence and can be most effective. It is more efficient to push policy in 50 state capitals than in 19,000 cities and more than 3,000 counties. This approach continued to have success for industry in the 2019 sessions.

“ We could never win at the local level... [the] first priority has always been to preempt the field...”

– Victor L. Crawford,
Former Tobacco
Institute Lobbyist,
*Journal of the
American Medical
Association*, 7/19/95

[**Banning Plastic Bans**]

“ We can’t continue to fight back just at the reactive stage when things are emotionally charged. We have to take the offensive.”

– William Carteaux,
President of the
Society of the Plastics
Industry, 2009



State lawmakers introduced at least 95 bills in 2019 related to plastic bags according to the National Council of State Legislators. While five states (Maryland, Maine, New York, Oregon and Vermont) made progress reducing plastic pollution, other states moved in the opposite direction, preempting local government regulation of plastic bags and other plastic products. Industry trade groups, the Plastics Industry Association and the American Progressive Bag Alliance, added four new states to the list of states that ban local action on plastic bags, bringing the total to 15.

✓ **North Dakota** - [HB 1200](#) prohibits a political subdivision from regulating an “auxiliary container” including plastic bags, bottle, straws and other packaging. *(ENACTED)*

✓ **Oklahoma** - [SB 1001](#) preempts local governments from regulating, taxing, or restricting the sale or use of an “auxiliary container,” such as plastic bags, plastic water bottles, or disposable food containers. *(ENACTED)*

✓ **Pennsylvania** - [SB 712](#), the state’s budget bill included adopted bag and container preemption. The fiscal code amendment prohibits any ban, taxes or regulations on single-use plastics, reusable plastics, auxiliary containers, wrappings and polystyrene containers until two reports to the General Assembly are complete. *(ENACTED)*

✓ **Tennessee** - [HB 1021](#) made it illegal for local governments to impose bag bans, or restrictions on Styrofoam containers and other disposable products. *(ENACTED)*

[Regulating E-Cigarettes]

For years, public health advocates have pushed to increase the age of sale for tobacco products from 18 to 21. But that effort has been hijacked by the e-cigarette industry, led by Juul Labs and its dramatically expanded corps of lobbyists, up 300 percent between 2017 and 2019. Now tobacco companies (Altria, once known as Phillip Morris, owns 35 percent of Juul Labs) back Tobacco 21 or (T 21) regulations to outlaw e-cigarettes for kids in exchange for banning local regulations that treat the new smoking tools like normal tobacco products -- which face taxes, advertising limits and use constraints. Public health advocates say this is a tactic from the old tobacco playbook -- a public relations ploy that helps the industry look good by supporting statewide legislation that includes multiple exemptions, weak enforcement and nullifies and preempts tougher local rules.



“ The bill is a Big Tobacco bill, what I now call Big Vape.”

– *Arizona state Sen. Heather Carter, The Center for Public Integrity, May 23, 2019*

Six states (California, Hawaii, Maine, Massachusetts, New Jersey, and Oregon – as well as Washington, D.C., and Guam) enacted T 21 laws in 2018. Meanwhile, during this year’s state legislative sessions, T 21 laws were proposed in 28 states and passed in 10 – Arkansas, Connecticut, Delaware, Illinois, Maryland, Texas, Utah, Vermont, Virginia, and Washington state. Three of the laws passed this year include state preemption provisions:

- ✓ **Arkansas** - HB 1565 prohibits people under 21 from obtaining tobacco in any form and preempts local jurisdictions from adopting more restrictive provisions for tobacco products. (*ENACTED*)
- ✓ **Utah** - HB 324 raises the age for of sale for tobacco products to 21 by 2021 and bars local governments from changing the minimum wage of sale. (*ENACTED*)
- ✓ **Texas** - SB 21 raises the age of sale for tobacco products to 21 but also bars local governments from making the age of sale higher. (*ENACTED*)

[Blocking local broadband and 5G regulation]

The telecom industry’s lobbying efforts to either roadblock or ban municipally-owned broadband networks have been effective. In 2018, the industry spent over \$92 million on lobbying to protect its business interests at the national and state level. As a result, there are now 20 states with laws on the books that either roadblock or ban outright municipally-owned broadband networks.

Since 2016 the telecom industry has also been working to keep cities from regulating new 5G wireless technology, lobbying for preemption laws that ban local government ordinances for permitting, fees and aesthetics. Now 23 states have preempted some form of local regulation of 5G networks. And even

though an order last year from the FCC gave wireless companies broad powers to sidestep local control over the public right-of-way, San Jose and 21 other cities have gone to court to block the order and the industry continues to work at the state level. In 2019, the industry passed a preemption bill in Florida that removes many of the concessions made to cities in the original preemption bill passed in 2017.

- ✓ **Florida** - SB 1000 repeals provisions of the 2017 Wireless Facilities law and further strips cities of the ability to regulate the placement of communications equipment in public rights-of-way. (*ENACTED*)

[**Preemption of local control over agriculture**]

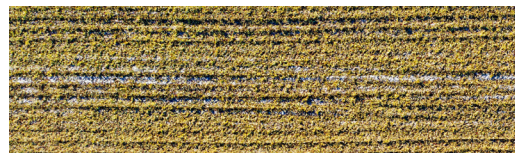
“Right to farm” legislation has also been used to promote the agenda of industrial agriculture by limiting both the rights of individuals to file civil action against an agricultural operation for nuisance violations and to prevent local governments from creating, amending, or enforcing local nuisance laws. For example, last year Virginia passed a bill ([SB 567](#)) to expand its preemption of local nuisance ordinances effecting farming operations by removing an exemption for negligent or improper operation. This expansion of preemption has continued in 2019.



Missouri – [SB 391](#) makes a blanket preemption of county commissions and county health center boards by prohibiting any order, ordinance, rule or regulation that imposes standards or requirements on an agricultural operation that are inconsistent with or more stringent than any state law, rule, or regulation relating to environmental control and air conservation, and water pollution. ([ENACTED](#))



Utah – [SB 93](#) creates additional barriers to nuisance actions against farms and states that a municipal ordinance creating or regulating nuisance actions against farms “does not apply to an agricultural operation that is conducted in the normal and ordinary course of agricultural operations or conducted in accordance with sound agricultural practices.” ([ENACTED](#))



West Virginia – [SB 393](#) makes it more difficult to sue a farm for nuisance actions and limits the authority of local governments by prohibiting local law-enforcement agencies from bringing “criminal or civil action against an agricultural operation for an activity that is in compliance with all applicable state and federal laws, regulations, and permits” and by preventing annexed farm lands from being regulated by the municipality whose corporate boundaries the farm is now part of. ([ENACTED](#))

[**Transportation networks blitzkrieg through the states**]

Even though the transportation network companies (TNCs), primarily Uber and Lyft, failed to pass state preemption in Oregon in the 2019 session, the industry’s massive lobbying efforts to dodge stricter local regulation from cities and counties have set a new industry standard for speed. Since 2014, the ride-sharing companies used extraordinary lobbying efforts to convince 44 state legislatures to [ban local regulation of their industry](#). Five other states have passed partial preemption laws that include caveats for major cities, making Oregon the last state to not have any statewide law regulating TNCs. A [report](#)

from the National Employment Law Center (NELP) and the Partnership for Working Families details how this industry has now surpassed the gun lobby in its efforts to secure state preemption laws and circumvent local democracy (gun safety laws are preempted in 43 states).

Oregon - [HB 3023](#) would have required statewide licensing of Uber and Lyft, eliminated worker and consumer protections currently in place in some Oregon cities and preempt future local regulation ([FAILED](#))

[Autonomous vehicles]

Thirty states and the District of Columbia have enacted autonomous vehicle legislation, according to the National Conference of State Legislatures. Several of these bills, including 2017 IL HB 791 (Act 352), 2018 NE LB 989, 2015 TN SB 598 (Ch. 307), and 2017 TX SB 2205, expressly preempt local regulation of self-driving vehicles.

In 2019, Oklahoma enacted an autonomous vehicle preemption law.



Oklahoma - SB 365 preempts localities from prohibiting, restricting or regulating the testing or operation of vehicles equipped with driving automation systems. (*ENACTED*)



The American Legislative Exchange Council (ALEC) and Preemption

For the past 40 years, the American Legislative Exchange Council (ALEC) has worked with companies, trade associations, and conservative lawmakers to write and promote model bills. ALEC bills designed to advance the interests of their corporate and conservative members have become pervasive in the American legislative process. ALEC has claimed that its members introduce more than 1,000 bills based on its models each year and about 20% become law.

ALEC has a long history of promoting preemption bills as part of its anti-regulatory, pro-industry agenda. Here are some key examples of model ALEC bills that are used as the basis for many of the state preemption bills now being enacted with increased frequency.

- ➔ **Minimum Wage.** Since 1991, ALEC has promoted a so-called “model” bill to preempt local increases to the minimum wage.
- ➔ **Municipal Broadband.** Backed by AT&T, Verizon, and Comcast, ALEC has pushed industry-backed measures to preempt cities and counties from providing citizens with basic local broadband – and now 5G.
- ➔ **Sugar Taxes.** Backed by the American Beverage Association, ALEC has sought to preempt cities from taxing sodas or requiring that restaurants provide nutrition information about their menus.
- ➔ **Sanctuary Cities.** ALEC adopted a bill that effectively barred sanctuary cities by creating new crimes of “trespass” for people without federal immigration papers and allowing private suits against police if they do not “fully” enforce immigration laws.
- ➔ **Rent Control.** Another ALEC bill would bar cities from adopting rent control measures.
- ➔ **Plastic Bags.** This ban on local container bans concludes, “The free market is the best arbiter of the container.”
- ➔ **5G Wireless.** ALEC readopted a 2006 model bill in 2015, just a year before some states began passing small-cell laws.
- ➔ **Pesticides.** This ALEC bill banning local regulation of pesticide sale or use was written in 1995 and has been readopted twice since then.

Punishment for localities and local legislators who defy the state

2019 PREEMPTION TREND

One especially troubling characteristic of the new preemption laws is the inclusion of provisions punishing local governments for enacting regulations contrary to state goals. For example, Arizona's extensive preemption law, [Arizona Statutes § 41-194.01](#) (enacted in March 2016 through [SB 1487](#)), imposes steep monetary consequences for local governments that pass ordinances found to be in violation of state law and has effectively chilled local initiative in the state. In addition, many states have passed legislation

to penalize local officials personally for passing or refusing to repeal regulations in defiance of the state. And state legislators continue to find creative ways to punish localities. For example, Arizona's newly enacted state budget ([HB 2756](#)) includes a measure designed to chill local action by requiring local governments that raise the minimum wage above the state minimum to compensate the state for its additional costs incurred in complying with the higher minimum wage.

[Punishment for sanctuary cities]

Punitive state preemption has been used most often in gun legislation, but in the 2019 legislative session, punitive measures were targeted at localities and local officials who fail to comply with anti-sanctuary laws. In fact, anti-sanctuary city and immigrant enforcement bills were filed in more states than any other type of preemption bill. According to the [National Council of State Legislatures](#), anti-sanctuary and anti-immigration bills are still pending in 30 states as of June, 2019. Of these states, 20 states have proposed legislation prohibiting sanctuary policies, most of them with punitive measures attached.

✓ **Arkansas** - [SB 411](#) prohibits local government from adopting "sanctuary policies" for undocumented immigrants and authorizes the Attorney General to "withhold discretionary money from any municipality found in violation of this act, provided through funds or grants administered by the state, until they it is determined that the sanctuary policy is repealed." ([ENACTED](#))

✓ **Florida** - [SB 168](#) requires local and state law enforcement officials and entities to honor federal "immigration detainer" requests, which ask a law enforcement agency to detain someone on probable cause that they are "removable" under federal immigration laws. It also requires local governments to go into a contract agreement with the federal government regarding detaining individuals for ICE and prohibits local officials from implementing "sanctuary" policies and gives the governor the power to initiate judicial proceedings against local officials who do not comply with the policy. ([ENACTED](#))

✓ **Massachusetts** - [HB 1807](#) would have prohibited cities or towns from failing to enforce federal immigration laws by designating themselves as sanctuary cities and withholding unrestricted general government aid to cities and towns for non-compliance. ([ENACTED](#))

Montana - [HB 146](#), which was vetoed by the Governor, would have prohibited state agencies and local governments from adopting sanctuary policies and empowered the Attorney General to bring a civil action against the state agency or local government if they violated provisions of the law. ([VETOED](#))

North Carolina - [HB 135](#), which is still moving through the legislature, would make it illegal for cities, counties, local law enforcement agencies, and constituent institutions of the University of North Carolina to limit or prohibit law enforcement agencies from enforcing immigration laws. The law would authorize the withholding of state revenue distributions to cities, counties, and local law enforcement agencies determined to be in violation of state immigration law and subject a city or county that enacts a sanctuary ordinance to a private cause of action by a citizen of the city or county. ([ACTIVE](#))

Wisconsin - [AB 138](#) would ban local ordinances, resolutions, and policies that prohibit the enforcement of federal or state law relating to undocumented immigrants or their immigration status and provides a reduction in shared revenue payments to localities found in violation of the law. ([ACTIVE](#))



2019 PREEMPTION TREND

Efforts to overturn, prohibit, or weaken LGBTQ protections

While there were fewer transparently discriminatory “bathroom bills” this session, there has been a trend toward more anti-LGBTQ bills related to preemption, as well as state bills that would supersede any local-level LGBTQ protections or block municipalities from passing them.

[**Freedom to discriminate**]

Bills were introduced but failed to move this session in Colorado ([HB 19-1140](#)), Tennessee ([HB 563](#) and [SB 364](#)), and Texas ([HB 1035](#), [HB 4357](#), and [HB 4497](#)) that would have provided businesses with the freedom to discriminate against LGBTQ individuals. A related bill in Texas did pass this session:



Texas - [SB 1978](#) prohibits a governmental entity from taking any adverse action against a person/entity based in whole or part on membership in, affiliation with, or contribution, donation, or other support provided to a religious organization. This bill basically protects people and organizations that discriminate. (**ENACTED**)

[**Elimination of local non-discrimination ordinances**]

While often couched in the more traditional anti-worker preemption language of preventing localities from requiring improved wage and benefit standards, a number of bills were introduced this session that could have also removed non-discrimination protections, including bills that failed to move in Florida ([HB 3](#) and [SB 432](#)), Texas ([SB 15](#) and [HB 3899](#)), and West Virginia ([HB 2708](#)). One related bill in Pennsylvania is still active as of June 2019:

Pennsylvania - [HB 331](#) would broadly preempt “employer policies or practices,” including “terms and conditions of employment,” which could sweep in nondiscrimination practices and therefore would likely implicate local nondiscrimination ordinances. (**ACTIVE**)

Preemption and the perpetuation of racial and gender inequity

2019
PREEMPTION
TREND

The loss of local power to enact policies that promote and protect the health, safety, civil rights, and economic well-being of its residents has consequences for every resident – but most especially for women, communities of color, and marginalized populations. These are the people who would benefit most from the laws that are being preempted, laws that would alleviate poverty, outlaw discrimination, and promote equity – minimum wage, paid sick days, predictive scheduling, sanctuary cities, nondiscrimination ordinances, rent control, and others.

A recent report by the Partnership for Working Families details the disproportionate effect of state wage, affordable housing, and paid sick days preemption laws on women and people of color, explaining, “Each of these policy arenas has outsized influence over the day-to-day experiences of women, due to historical, structural, and cultural factors.” The report explains, “Often, as state legislatures prevent local governments from enacting regulation that would correct these structural gender and racial inequities, they simultaneously refuse to enact such legislation at the state level as well. In this way, legislatures are helping corporate actors ensure that these inequities become even more pronounced. This not only creates hardship for women individually but adds barriers to women and people of color from participating fully in our democracy and society.”

According to the most recent data from the National Council of State Legislatures, state legislatures

are 83 percent white and 71 percent male. State preemption too often involves predominantly white legislatures blocking local programs and policies designed to help people of color to overcome structural and historical barriers. Some legislatures are using preemption as a tool to deny cities of color self-determination and to preserve long-standing racial inequities. The fight between the state of Alabama and the city of Birmingham over the authority to set a minimum wage is illustrative.

Days before a local minimum wage increase from \$7.25 to \$10.10 an hour was to take effect in Birmingham, the Alabama Legislature fast-tracked and passed a preemptive minimum wage law. The new law was retroactive and made the Birmingham ordinance null. A group of fast-food workers from Birmingham, the NAACP, and other worker groups filed suit, arguing that the state’s majority white legislature discriminated against the majority black city. The 11th U.S. Circuit Court of Appeals agreed, reversing a judge’s earlier decision to dismiss the workers’ suit. The Eleventh Circuit panel found that the state preemption law had the effect of denying a higher hourly wage to “37 percent of Birmingham’s black wage workers,” and concluded that plaintiffs had made a plausible claim that the state’s preemption law violated the 14th Amendment’s equal protection rights. The court noted that the state’s actions were “rushed, reactionary, and racially polarized.” That ruling, however, was vacated, and the full U.S. Court of Appeals for the Eleventh Circuit heard arguments in late June 2019 to determine whether a challenge by advocates can proceed.



Efforts to wall off whole domains from local governing

Conservative lawmakers in several states have repeatedly introduced bills that would effectively eliminate local government regulation of business. Texas Governor Greg Abbott's intention "to reduce, restrict and prohibit local regulations" is shared with conservative lawmakers in other states. All of the bills below – except for Pennsylvania's HB 331 – failed this session. But in terms of trends, there was an increase in the number of bills introduced this session with the goal of wiping out most or all of local government's ability to oversee business operations and standards.

Florida - [HB 3](#) In addition to preempting local licensing of all professions and occupations, HB 3 would have preempted local governments from adopting or imposing any regulation of businesses or business entities and repeal all current regulations by 2020. This bill would have implicated local nondiscrimination ordinances and conversion therapy bans. *(FAILED)*

Florida - [HB 1299](#) would have limited the ability of municipalities to annex land, prohibited them from levying taxes on tobacco products, establishing minimum age for tobacco sales, regulating single-use plastic straws, and regulating over-the-counter proprietary drugs and cosmetics, such as sunscreen. *(FAILED)*

Florida - [SB 432](#) would have preempted local regulations concerning conditions of employment, specifically predictive scheduling which does not yet exist in Florida, along with wage theft ordinances across the state. *(FAILED)*

Pennsylvania - [HB 331](#) is still alive and would prohibit local governments from passing labor policies and would broadly preempt "employer policies or practices," including: (1) wages, other compensation or benefits; (2) hiring or termination of employees; (3) workplace management, including scheduling and workplace procedures; (4) the relationship between employers and employees, including employee discipline; (5) paid or unpaid employee leave; and (6) terms and conditions of employment. *(ACTIVE)*

“According to *The New York Times*, “The states aren’t merely overruling local laws; they’ve walled off whole new realms where local governments aren’t allowed to govern at all.”

– [New York Times](#), July 6, 2017

Texas - [HB 3899](#) would have imposed sweeping and severe limitations on the ability of municipalities to pass laws regulating businesses. Under HB 3899, no municipality would be allowed to adopt or enforce any ordinance, rule, or police regulation that imposes a restriction, condition, or regulation on commercial activity unless the regulation falls into one of the statute's categorical exceptions. As written, HB 3899 would have had wide-ranging consequences, implicating currently enacted as well as prospective municipal ordinances related to employment, discrimination, public health, and more. *(FAILED)*

Texas - [SB 15](#) included language directed at paid sick leave ordinances passed in Austin, San Antonio, and Dallas, but was drafted broadly enough to block local governments from adopting or enforcing essentially any regulation on private sector businesses related to employment terms or standards. *(FAILED)*

West Virginia - [WVA 2708](#) would have explicitly blocked cities in West Virginia from enacting nondiscrimination regulations that are more protective than the state's and would have preempted a host of other labor standards issues, such as: ban-the-box and salary history bans; wages; fringe benefits; paid or unpaid leave; work stoppages or strike activities; required participation in any educational apprenticeship or apprenticeship training program; hours and scheduling; sale or marketing of consumer merchandise. Notably, the bill also included preemption of containers/plastic bags. *(FAILED)*

2019 PREEMPTION TREND

Erosion of core local powers

“ Year after year, the Legislature gets bolder and more outrageous in...‘weaponizing’ of the concept of preemption...to prohibit local governments from passing progressive legislation. Among the most sacred rights granted to cities under the Florida Constitution is their right to ‘home rule,’ which means that all cities have the individual right to craft their own local laws, as they see fit, so long as those laws don’t conflict with State or federal law.”

– Miami Beach City Attorney Raul Aguila,
Miami New Times, May 12, 2019

Historically, cities have had authority over their own elections, contracts, court actions, land use, and revenues and expenditures. No more. In 2018, Arizona passed a bill preempting local campaign finance law, targeting an ordinance approved by 91% of Tempe’s voters that required the disclosure of municipal campaign donations. In 2019, we saw more core local powers targeted by preemption bills in several states.

[**Limiting local elections authority**]

✓ **Florida** - [HB 5](#) will make it harder for groups and citizens to put proposed constitutional amendments on the ballot; it also put new provisions on local elections, requiring that local tax referendums be held at a general election. *(ENACTED)*

✓ **Florida** - [SJR 274/HJR 229](#) limits the number of terms a member can serve on local school boards. *(ENACTED)*



Maine - [LD1372](#), which was defeated, called for a constitutional amendment that would have specified that only U.S. citizens may vote in state, county and municipal elections. Republicans submitted the bills in response to an effort by Portland leaders to allow non-citizens to vote in the city’s local elections. *(FAILED)*

Texas - [SB 2078](#) would have prohibited municipal regulation “in an area in which the residents are ineligible or have only limited eligibility to vote in municipal elections.” *(FAILED)*



[**State preemption of local taxing and spending authority**]

- ✓ **Florida** - [HB 7123](#) forces revenue raised from future local initiatives to be shared with charter schools, a stipulation specifically outlawed by many previous local referenda to increase public school funding. *(ENACTED)*
- ✓ **Iowa** - [SF 634](#) caps the amount a city or county can increase its spending to at 2% unless a supermajority of the council or board of supervisors approves. The law also gives the state more oversight over local government spending, requiring local governments to release more information about how they collect or raise revenue from property taxes. The bill that passed was a compromise. Original bills filed would have required Iowans to approve increased property taxes of more than 2% and placed a 3% cap on annual property tax revenue growth. *(ENACTED)*
- ✓ **Texas** - [SB 2/HB 2](#) forces cities and counties to hold a “rollback” election, which allows residents to vote to “roll back” a tax increase, any time they raise property taxes by more than 3.5 percent above the previous year’s revenue. *(ENACTED)*
- ✓ **Oregon** - [HB 3427](#) created a new Corporate Activities Tax that will be used to establish the “Fund for Student Success.” The legislature preempted local jurisdictions from imposing their own commercial activity taxes. The preemption does not apply, however, to ordinances or other laws adopted and operative on April 1, 2019 or which were adopted by initiative or referendum at an election held prior to March 1, 2019. *(ENACTED)*

[**State measures limiting local zoning, housing, and land use authority**]

- ✓ **Arizona** - [HB 2115](#) was a broad preemption of city and town authority to enact or enforce any regulations related to landlord-tenant issues, including evictions. *(FAILED)*
- ✓ **Florida** - [HB 7103](#) limits the authority of Florida municipalities and counties to establish mandatory and voluntary inclusionary housing policies. It allows municipalities and counties to continue to enact inclusionary zoning policies but would require them to provide incentives to developers that “fully offset” the costs of their affordable housing contribution. Miami recent passed a mandatory inclusionary housing policy. *(ENACTED)*
- ✓ **Florida** - [SB 82](#) preempts any local ordinance or regulation of vegetable gardens on residential property. The bill’s author says the bill is needed to protect “basic freedom” and “fundamental property rights.” *(ENACTED)*
- ✓ **Texas** - [HB 852](#) prohibits municipalities from requiring disclosure of information related to the value of or cost of construction or improving a residential dwelling as a condition of obtaining a building permit. *(ENACTED)*
- ✓ **Texas** - [HB 2439/SB 1266](#) limits local regulation of building products, materials, or methods of construction. *(ENACTED)*

[State preemption designed to chill local initiative by limiting the ability of local government to legally challenge state preemption]



- ✓ **Florida** - [HB 829](#) requires courts to award attorney fees, costs and damages against a local government if the local government's ordinance is determined by a court to have been preempted by state law. According to bill sponsors, the purpose is to deter "rogue" local governments that adopt or enforce ordinances in willful disregard of clear legislative preemptions. *(ENACTED)*

[Eliminating local contracting authority]

- ✓ **Florida** - [SB 1000](#) is a 5G deployment law that removes many of the provisions that were agreed to by the wireless industry when the Advanced Wireless Deployment Act (the 2017 Act) was passed and adds limitations on municipal and county authority to regulate and manage municipal & county roads or rights-of-way. It prohibits municipalities and counties from imposing permit fees and prohibits municipalities and counties from actions relating to aerial or underground communications facilities in conjunction with 5G installations. *(ENACTED)*
- Maryland** - [HB 654](#) would have limited local decision on small cell deployment, forced cities to pay the cost of managing the permitting process, and taken away local control over the aesthetics and safety of the installations. *(FAILED)*
- ✓ **Texas** - [SB 22/HB 1929](#) prohibits cities from using taxpayer money to fund transactions with abortion providers (i.e., Planned Parenthood) or affiliates (whether or not the affiliate provides abortion services). *(ENACTED)*
- Texas** - [SB 29/HB 281](#): would have limited the political advocacy abilities of local governments and prohibited cities from using tax revenue to pay for lobbyists. The Senate bill passed the senate and died in a vote on the house floor during third reading. *(FAILED)*

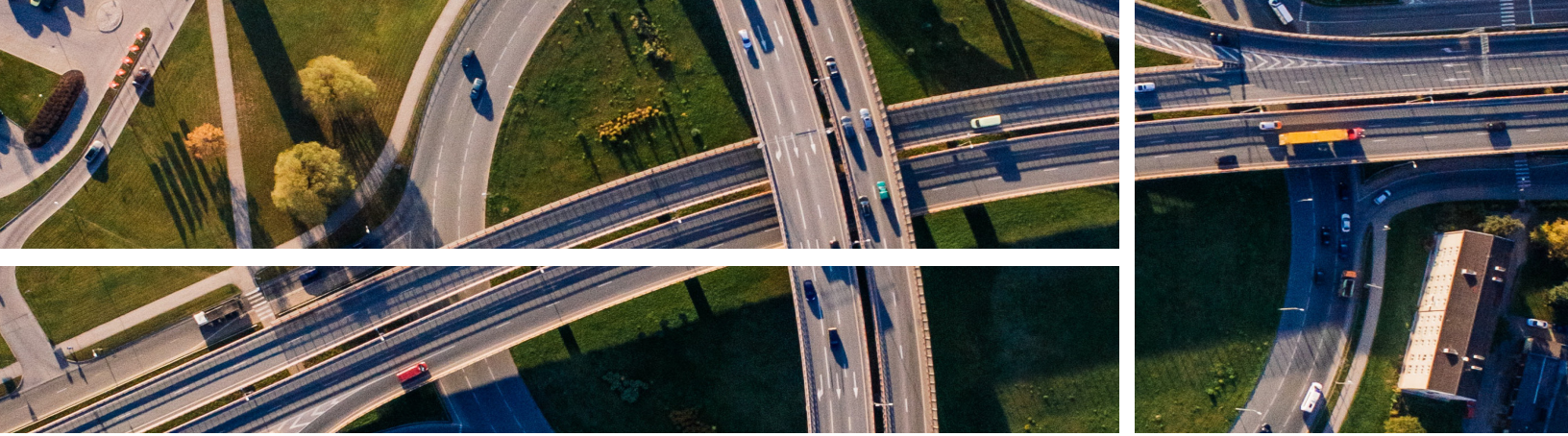


Successful Efforts to Repeal & Push Back Against Preemption in 2019

“ No one understands the cost of living better than local government officials. It makes sense for the State of Colorado to allow local governments to respond to higher costs of living by letting them to adopt local minimum wage policies. I was proud to work on repealing the state preemption because it will mean more money in the pockets of Colorado’s lowest wage workers.”

– Colorado state Sen. Dominick
Moreno, July 9, 2019

The 2019 session could mark an inflection point in efforts to counter state abuse of preemption. State legislators, advocacy organizations and coalitions made significant progress in repealing preemption laws, killing and weakening preemptive bills, and recruiting and promoting new allies and champions to defend local democracy. Planning and preparations to build on that momentum for the 2020 session are already underway.



2019 Steps Against Preemption

An unprecedented number of repeal bills across several issue areas were filed and passed during 2019 legislative sessions.

[Enacted & currently active legislation as of June 2019:]

Arkansas

✓ **SB 150** repealed parts of the state law preempting municipal broadband. *(ENACTED)*

Colorado

✓ **HB 19-1210**, the “Local Wage Option” bill, passed and made Colorado the first state in the nation to repeal minimum wage preemption. This bill allows localities to decide their own minimum wage. *(ENACTED)*

✓ **HB 19-1033** repealed a law that has been on the books since the 1970’s and that prevented localities from attempting to regulate or tax tobacco. The new law allows localities to raise the age of sale for tobacco products to 21 and to tax and regulate cigarettes and other tobacco products. *(ENACTED)*

✓ **SB 19-181** gives local governments control over the approval of oil and gas drilling sites and forces the Colorado Oil and Gas Conservation Commission to reprioritize its work to put public health and safety and the environment first in making decisions about the industry. *(ENACTED)*

Michigan

HB 4500 would repeal existing law preempting local ordinances regulating the use, disposition, or sale of, prohibiting or restricting, or imposing any fee, charge, or tax on certain containers. *(ACTIVE)*

North Carolina

HB 431 would repeal limits on the provision of local broadband services. *(ACTIVE)*

Ohio

HB 34 would allow municipalities, townships, and counties to set a minimum wage rate that exceeds the state minimum wage. The bill would repeal the current preemption of local ordinances setting higher minimum wage rates. *(ACTIVE)*

Wisconsin

AB 177 would have repealed current law limiting the authority of a political subdivision to regulate auxiliary containers. *(ACTIVE)*

[Examples of introduced repeal legislation that did not pass:]

Arizona - [HB 2497](#) would have repealed existing preemption law and establish a bag ban and disposable cup/straw/utensil fee. *(FAILED)*

Colorado - [SB 19-225](#) would have repealed the state's rent control law and allowed localities to take action to stabilize rents in their jurisdictions. *(FAILED)*

Florida - [FL 694](#) would have deleted preemptions of local law relating to the regulation of auxiliary containers, wrappings, or disposable plastic bags; repealing the preemption of local laws. *(FAILED)*

Georgia - [HB 573](#) would have allowed all local government entities to establish their own minimum wage laws. *(FAILED)*

Hawaii - [HB 96](#) would have authorized each county to establish a minimum wage that was higher wage than the state minimum wage. (Note: Hawaii does not currently expressly preempt local wage laws). *(FAILED)*

Idaho - [HB 58](#) would have repealed existing law preempting local regulation of auxiliary containers, including plastic bags. *(FAILED)*

Illinois - [HB 255](#) would have repealed preemption of local rent control laws. *(FAILED)*

Indiana - [SB 82](#) would have repealed the prohibition by local jurisdictions from establishing, mandating, or requiring certain employee benefits. The bill would have allowed local jurisdictions to maintain a higher minimum wage rate than the state's minimum wage. *(FAILED)*

Kansas - [HB 2017](#) would have restored local control over wage levels and benefits for construction projects. *(FAILED)*

Kentucky - [SB 51](#) would have allowed local governments to establish minimum wage ordinances in excess of the state minimum wage. *(FAILED)*

Louisiana - [HB 422](#) would have allowed a governing authority of any parish or municipality to establish within its jurisdiction a mandatory minimum wage. The bill would also have allowed a parish or municipality to establish a mandatory minimum number of vacation or sick leave days, whether paid or unpaid, that a private employer would be required to pay or grant employees. *(FAILED)*

Minnesota - [HF 511](#) would have repealed the prohibition on local ordinances governing bans of carryout bags. *(FAILED)*

Mississippi - [SB 2150](#), [SB 2321](#), and [SB 2370](#) would have authorized municipal and county governing authorities, at their discretion, to mandate a wage that is more than the state minimum wage. *(FAILED)*

New York - [SB 2228](#) would have permitted a municipality to establish and enforce in its jurisdiction payment of a wage higher than the state minimum. (Note: New York does not currently expressly preempt local wage laws, but a court decision has interpreted state law to preempt such local policies). *(FAILED)*

New York - [AB 5441](#) would have permitted a county, city, town, village, or public benefit corporation to adopt higher wage, hours, or other working conditions standards. (Note: New York does not currently expressly preempt local wage laws, but a court decision has interpreted state law to preempt such local policies). *(FAILED)*

Oklahoma - [HB 1131](#), [HB 2466](#), and [SB 713](#) would have repealed the preemption by the Oklahoma Legislature of local laws mandating minimum wage and employee benefits. *(FAILED)*

Texas - [HB 328](#) would have allowed municipalities and counties of the state to adopt a minimum wage that is greater than the state minimum wage. *(FAILED)*

Texas - [HB 514](#) would have allowed each city to decide how to regulate the use of plastic bags in their communities. *(FAILED)*

Virginia - [HB 2631](#) would have established a procedure by which a local alternative minimum wage may be imposed in any locality. *(FAILED)*

Virginia - [HB 2095](#) would have given localities the authority to ban single use plastic and Styrofoam products and to impose a fee. *(FAILED)*



2019 Steps Against Preemption

In several states, cross-issue coalitions found traction – and success

In 2018, the **Maryland** Legislature passed a paid sick days bill but with preemption attached. Coordinated outreach, education and media efforts helped lawmakers understand the consequences of preemption. And this session, Local Maryland, a cross-issue coalition organized and supported by Voices for Healthy Kids, helped pass legislation (**SB 280**) increasing the minimum wage to \$15 an hour without a preemption clause, thereby setting a statewide wage floor instead of a ceiling.

A cross-issue coalition in **Florida** led by the Statewide Alignment Group (SWAG), that included labor unions, Dream Defenders, Equality Florida, Faith in Florida, Central Florida Jobs with Justice, Florida Immigration Coalition, New Florida Majority, Organize Florida, American Heart Association and more, coordinated strategies and responses to preemption bills during the session. Their efforts to spotlight the negative consequences of **HB 3**, the broad anti-local business regulation bill, forced lawmakers to reconsider core provisions of the bill – including its effect on nondiscrimination ordinances. That bill was ultimately defeated, as were **HB 1299**, which included seven preemption measures ranging from local prohibitions on annexing land to levying taxes on tobacco, and **SB 432**, which would have given the state the sole right to regulate conditions of employment, including wage rates, predictive scheduling and wage theft.

The coalition was also successful in helping to weaken bills, most notably **SB 168** – the anti-immigrant “sanctuary cities ban,” which would have allowed agencies or municipalities to be fined up to \$5,000 for each day that a sanctuary-city policy was in place; created an “anonymous complaint” web portal in the attorney general’s office for any person to submit an alleged violation of the policy; and threatened the removal of state grant funding for entities with so-called “sanctuary policies.”

In **Texas**, the Coalition Against State Interference (CASI), led by the Texas Center for Public Policy Priorities, included Faith in Texas, the state AFL-CIO, Equality Texas, Workers Defense Project, Planned Parenthood Texas Votes, Sierra Club and others. Their efforts killed **SB 15**, which would have not only nullified paid sick leave ordinances passed in Austin, San Antonio, and Dallas, but was drafted broadly enough to also block local governments from adopting or enforcing essentially any regulation on private sector businesses related to employment terms or standards. After the Senate suspended its rules to allow **SB 15** to be broken up into four separate bills, the cross-issue coalitions helped defeat them. All four of them passed the Senate and were reported favorably from the House State Affairs Committee but were never placed of the House calendar for a floor vote. Those Texas preemption bills were:

- ➔ **SB 2485**, which would have prohibited local governments from adopting or enforcing ordinances related to terms of employment relating to employment benefits, including health, disability, retirement, profit-sharing, death, and group accidental death and dismemberment benefits. *(FAILED)*
- ➔ **SB 2486**, which would have banned local employment scheduling ordinances or “fair scheduling” laws. *(FAILED)*
- ➔ **SB 2487**, which would have banned local communities from adopting or passing any ordinances related to employment leave, including paid sick days, paid days for holidays, vacation, and personal necessity. *(FAILED)*
- ➔ **SB 2488**, which would have banned local “fair chance” hiring ordinances limiting employer’s ability to request, consider, or take employment action based on the criminal history record information of an applicant or employee, also known as “ban the box.” *(FAILED)*



2019 Steps Against Preemption

New champions, including governors, state legislators, mayors, and municipal leagues emerged this session

- ➔ In **Wisconsin**, Governor Tony Evers has become the first governor in the nation to make the reinstatement of local authority an administration priority. In his budget address, Evers said he “seeks to restore local control measures wherever possible,” including repealing preemption of paid leave, wage claims, employee benefits, hours of work and overtime, and the solicitation of salary histories.
- ➔ In **Colorado**, state legislators passed three new laws to grant important power back to local governments. HB-1210 made Colorado the first state in the country to repeal a ban on cities setting their own minimum wage, allowing cities to address the rising costs of living. An important measure to protect public health and safety, SB19-181 allows local governments to regulate the development of oil and gas drilling sites. Taking on big tobacco, HB 19-1033 repealed a law that has prevented localities from regulating or taxing tobacco and allows them to raise the age of sale for tobacco products to 21.
- ➔ **Pittsburgh** Mayor Bill Peduto supported three city ordinances designed to stem gun violence and prevent another tragedy like the mass shooting at the Tree of Life Synagogue. When the district attorney for Allegheny County, which has Pittsburgh as its seat, warned the Mayor he could be arrested if he proceeded in defiance of the state’s gun preemption laws, Peduto tweeted, “Arrest me.”
- ➔ More than 30 mayors in **Florida** have filed a suit challenging the punitive provisions in the state’s gun law and the Florida Municipal League organized a broad cross-section of mayors to protest the 2019 state legislature’s efforts to limit local democracy.
- ➔ In **West Virginia**, former mayor and president of the National League of Cities Jim Hunt published an op-ed opposing a bill that would have preempted local nondiscrimination ordinances.
- ➔ In **Utah**, the traditional state vs. local control power struggle ended differently this session, with the state’s Municipal League spearheading successful efforts to stop state preemption of local laws regulating gravel pits, plastic bags and more.
- ➔ In **Iowa**, three mayors, one of them a Republican, went public with their concerns about state overreach.



Conclusion

LOCAL

governments lost power again in 2019. Many state legislatures continued the trend started in 2011 of passing more, broader, and punitive preemption laws. Those laws, driven almost exclusively by special interests, once again stopped cities, towns and counties from acting to protect and promote the health, safety and civil rights of their residents. But the 2019 legislative sessions also saw the introduction and passage of an unprecedented number of preemption repeal bills, successful

efforts by cross issue coalitions to kill and weaken proposed state interference laws, and the emergence of vocal local and state lawmakers championing local control and the ability of local governments to address their own unique problems and act on the need and values of their residents. The 2019 session may mark the start of the turning of the tide.



STATE INNOVATION EXCHANGE

