

21ST CENTURY NEIGHBORHOODS

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When States Interfere With City-Level Innovation: Preemption and Implications for Cities

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This policy brief is the first in a series of briefs developed as a follow-up to the [21st Century Neighborhoods symposium](#) organized by the 21st Century Cities Initiative on September 15, 2016. The briefs explore key themes raised during the conference that cities are currently grappling with in their efforts to improve conditions in all neighborhoods and for all residents.

Background

At the 21st Century Cities symposium, held in Baltimore in September 2016, city leaders from across the country described innovative strategies they are using to address inequality in their communities. Employing revenues from a new beverage tax, the city of Philadelphia is expanding pre-kindergarten into low-income communities and supporting other educational programs targeting underserved children. To address affordable housing challenges, the city of Seattle is requiring the inclusion of proportional affordable housing units in all new residential housing developments. Strategies such as those in Philadelphia and Seattle highlight the role of city leaders in addressing unique challenges

of their residents by devising and implementing appropriate, locally-driven policies and programs.

As city leaders discussed strategies for addressing local concerns at the symposium, many also described an increasing problem in which state legislatures and governors stifle city agendas and local innovation. This procedural process is known as preemption, a legal term that refers to the power granted to higher levels of government to enact laws that override laws passed by lower levels of government. Most typically, state legislatures use preemptive powers to override legislation passed by local governments. While the limits placed on states in their use of preemptive action varies nationally, all states govern under the general principle that local law must be consistent with any existing state or federal laws.

In addition to the legal act of preemption, city leaders at the symposium also discussed another form of state authority in limiting local policymaking through executive branch actions on federal block grants and other state and local funding vehicles and programs, such as Medicaid, Temporary Assistance for Needy Families and Social Security Block Grants. One example



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discussed at the symposium comes from Rockford, Illinois where city leaders were seeking to use Medicaid to fund home visits by fire department paramedics to provide preventive health services to residents struggling with mental illness and substance abuse. The action requires state approval to submit a federal waiver. In this case, after some delay, the governor did approve the waiver. In another example, the Republican governor of Maryland cancelled plans for a new light-rail line in Baltimore, which resulted in the forfeiture of nearly \$1 billion in federal funds promised for the project, as well as a redistribution of state funding to the state road system outside of Baltimore.

More cities are becoming aware of the preemption process as state legislatures use this strategy to eliminate a wide range of city-level regulations. Widespread use of preemption is concerning for the ways in which it infringes on the importance of local-level decision making and the value of innovation and experimentation for identifying the most effective policies to reduce inequality and increase social mobility. A variety of policies that address urban inequality have emerged from locally-developed programs, and preemption threatens the ability of cities to engage in these types of policy development. Additional attention to preemption is needed to understand its impact on city priorities, monitor its use nationally and develop additional strategies for cities to effectively respond.

An Increasing Problem?

In recent years, anecdotal evidence suggests that state legislatures have increasingly used preemption to target and nullify local legislation that they find objectionable. The incidence of preemption cases is difficult to track nationally, but several factors help explain any increase in its use.

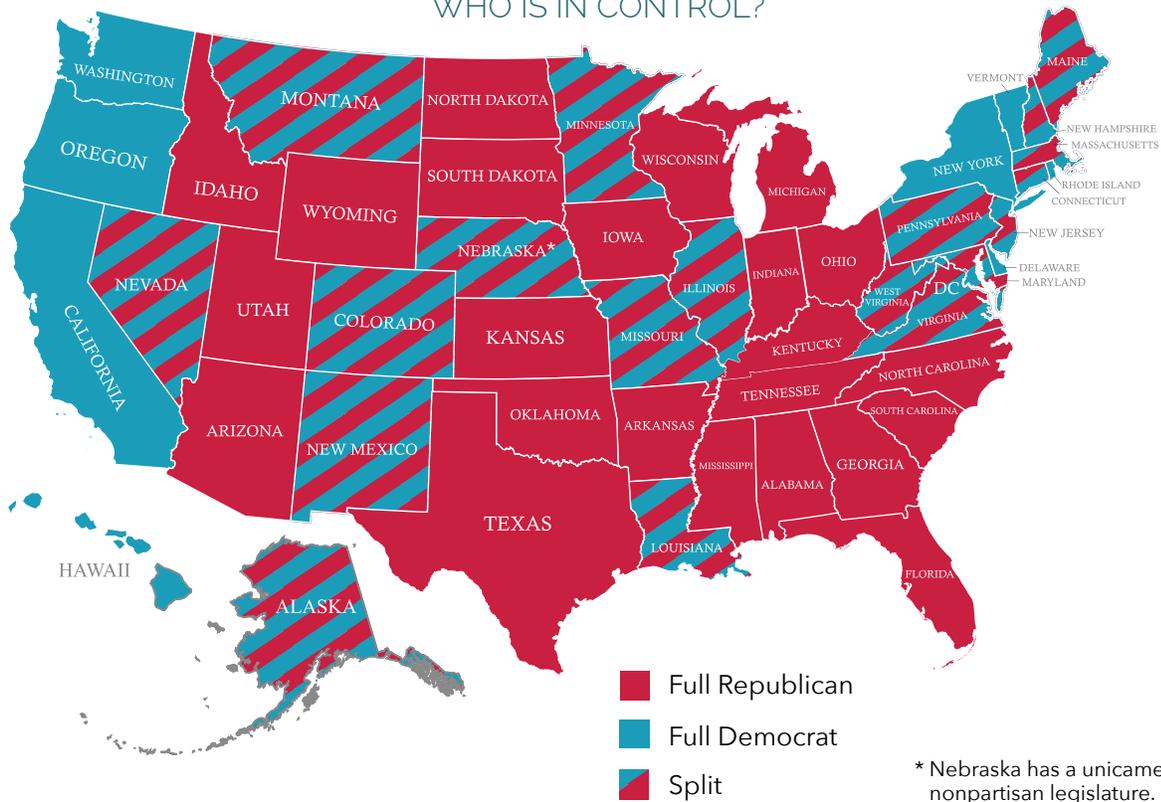
Lobbying efforts. Lobbying organizations have increasingly targeted state legislatures, particularly as a means of promoting the interests of various business sectors such as the tobacco and firearms industries. These organizations have used state-level preemption to override city laws that conflict with industry priorities.

Spatial sorting. The 2016 presidential election highlighted that geography can be a significant predictor of political preferences. As migration to urban areas continues, American cities are becoming increasingly diverse demographically, and city residents are more likely to vote for candidates and policies that address economic or social inequality. As a result, city governments are typically more likely to actively pursue such policies than rural or suburban jurisdictions, often in response to inaction on these issues at the state or federal level.

Single party dominance in most state governments. Despite the growing size and diversity of many urban cities, the Republican party now controls 67 of the 98 partisan state legislative chambers, in many cases with large super-majorities, holding the largest proportion of state legislative seats since 1920. In addition, 33 states now have Republican governors. State-level lobbying efforts have contributed substantially to these Republican electoral successes, resulting in many states that contain GOP-controlled state legislatures. For example, several large states, including Georgia, Michigan, Ohio, Pennsylvania and Wisconsin, have Republican governors and Republican controlled legislatures, and all have experienced recent preemption efforts by state legislatures in response to city level legislation.

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STATE LEGISLATURES AND GOVERNORS: WHO IS IN CONTROL?



Local Issues Affected by Preemption

State preemption efforts have impacted local laws and ordinances across a number of policy domains, including the areas below.

Economic Inclusion

- At least 19 states ban any local municipality from passing a **minimum wage** law set higher than the state minimum wage.
- At least 15 states, including a majority of states with minimum wage preemption laws, have also set **paid sick leave** bans.

Human Rights

- At least three states prohibit any local municipality from passing a **sanctuary city** ordinance.

Sanctuary cities typically protect undocumented immigrants from deportation by limiting enforcement of federal immigration laws or cooperation with federal immigration agencies by local law enforcement and may prohibit police officers from asking about immigration status. At least seven states are currently considering legislation banning sanctuary cities during legislative sessions in 2016.

- The North Carolina state assembly preempted the city of Charlotte's **LGBT anti-discrimination** ordinance earlier this year. At least three other states have laws banning any local non-discrimination laws that include sexual orientation or gender identity if the law is more expansive than existing state non-discrimination policy.

Public Health

- At least 12 states have enacted legislation that limits or prohibits local regulation of **smoking bans** in public places or government buildings.
- At least six states restrict local regulation of the sale, distribution or marketing of **e-cigarettes**, including youth sales.

Public Safety

At least 41 states limit local regulation of **firearm safety** policies. The extent to which these state laws limit local control of gun safety varies widely, but firearm preemption laws most commonly prevent local municipalities from enacting any firearm restrictions that are more restrictive than existing state law.

Addressing Preemption

Cities have historically been part of many innovative policy solutions to address economic and social inequities affecting their residents. The prevalence and wide policy scope of state-level preemption efforts are creating a situation in which urban policies are increasingly at risk of being influenced by state legislation, to a degree that stifles local innovation and disenfranchises city residents. While the use of preemption and its impacts on cities will be difficult to halt completely, cities have some options for addressing community needs in the face of preemption efforts.

Legal challenges to preemption. There have been various interpretations of powers given to states to override local regulations. To address the ambiguity, there have been recent legal challenges to preemption efforts in several states, including the following ongoing cases:

- Fast-food workers in Alabama are currently suing the state over its minimum wage law preemption. More legal challenges are expected as cities seek to protect municipal legislation from state involvement.
- State and city legislators in Arizona filed a lawsuit challenging the constitutionality of a recent state law that prohibits cities from passing any laws that require employers to provide paid sick leave.

Public knowledge of preemption and further research. There is little awareness of preemption as an issue and the extent to which states use preemption to prevent action around municipal priorities. City voters, responsible for electing city leaders as well as state legislators, should be aware of the various ways in which state legislatures have curtailed the power of municipal governments to set policies that may benefit them. At the same time,

there is a need for more research into the scope and scale of preemption nationwide, as well as the costs and benefits to communities and residents.

Non-regulatory solutions. Some issues may not necessarily require legal remedies, and cities may benefit from examining non-legal solutions to address certain city issues. Particularly in the areas of public health, safety and human rights, actions such as media campaigns and messaging may be equally effective and will not be subject to preemption concerns.

Federal-city partnerships. Another strategy is for cities to develop more direct working relationships with federal agencies in addressing local challenges and opportunities. This work is thriving in a number of cities through the Obama administration's place-based initiatives, such as Strong Cities, Strong Communities and Promise Zones. These initiatives and others like them seek to reverse a "one-size-fits-all" approach to working with local communities by creating more direct city-federal links to access available and appropriate resources, find creative solutions to stubborn problems, connect with new partners locally and nationally, and cut red tape. While these specific place-based initiatives and areas of focus may change under a new administration at the federal level, cities and federal agencies can build on this collaborative approach and continue to work together to address local issues.

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The 21st Century Cities Initiative supports cross-disciplinary, applied research that examines urban policy and informs the future possibilities of cities as dynamic hubs of opportunity, inclusion and innovation.

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