



A Troubling Trend: States are Turning Towards “Blanket Preemption” to Stifle Progressive Local Policymaking and Block Local Democracy

What is Blanket Preemption, and Why is it so Extreme?

Preemption of local laws by state statute has accelerated dramatically in recent years. In less than a decade, for instance, the State of Florida has passed nearly 20 laws whose sole purpose is to preempt local legislation dealing with a particular topic – from plastic bags to bio-medical waste to vacation rentals and beyond. These targeted removals of discrete home rule powers do not follow the commonly understood parameters of preemption, in which the State adopts a general policy or uniform standards and declares its application to be exclusive across the state. States have become fond of using preemption as a means of creating a regulatory vacuum, adopting statutes whose sole purpose is to invalidate the decisions of locally elected governments whose policies differ from the preferences of the state legislative majority.

But during the 2017 legislative session, state legislators in Florida, Pennsylvania, and Tennessee introduced new and more expansive preemption laws. These bills would have preempted broad swaths of preexisting home rule powers; one bill, HB 17 in Florida, provided that a local government “may not adopt or impose a new regulation on a business, profession, and occupation unless the regulation is expressly authorized by general law.”

The term “blanket preemption” has emerged to describe this type of law, to distinguish it from the previous (and ongoing) rash of narrow, targeted removals of individual regulatory powers. Although these specific bills died in committee and have not been subjected to broad legislative debate, proponents have indicated that blanket preemption is very much still on the legislative radar screen.

What Legal Arguments Can Local Policymakers and Advocates Use to Counter This Power Grab?

In some ways, blanket preemption’s breadth makes it more susceptible to legal doctrinal challenge. As a state legislature becomes more extreme in its attempts to unravel home rule, and as it uses the preemption power in what can be described as hostile abuses of power, two legal arguments are easier to articulate.

First, opponents can argue that “blanket preemption” is so extreme that it cannot be defended as an exercise of the preemption power, but has rather become an arbitrary abuse of that preemption authority. Not only is it preemption solely for the purpose of creating a regulatory vacuum, its hostility to local government powers and home rule seek to establish a degree of micromanagement and control over home rule units that is unprecedented in modern times.

Second, and closely related to that argument, blanket preemption can be challenged as an end run attack on home rule powers. This argument, of course, is predicated on the assumption that there is some constitutional protection of home rule in the state. If there is not, state supremacy in its most extreme form may be unchecked by the state constitution.

As we have seen in Florida, blanket preemption bills may contain unusual enforcement mechanisms in their proposals. The bill introduced in the Florida Senate, in addition to its broad substantive preemption of local powers, also would have adopted some legally vulnerable enforcement mechanisms. Essentially, the bill would have allowed one local government to “nullify” the law of another if it believed that the local law violated the blanket preemption statute. Those procedures ignore the limits of normal government operations and process that are envisioned and established in most state constitutions. If the next round of blanket preemption bills includes this or some similarly unusual enforcement mechanism, the case law and constitutional structures in many states suggest arguments based on separation of powers and violation of constitutional requirements of lawmaking.

What Can You Do When Blanket Preemption is Proposed?

It is important to bear in mind that legal challenges to blanket preemption will vary widely depending on state law. If you have questions—about blanket preemption generally or about blanket preemption in your state—please do not hesitate to reach out to the Local Solutions Support Center and A Better Balance. **You can reach the Local Solutions Support Center at LSSC@supportdemocracy.org.**