An Attack on Local Authority

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In the 2021 legislative sessions, Republican state lawmakers introduced a glut of preemption bills aimed at giving states more power over the administration of local government operations, signifying a new, deeper level of state interference into the inner workings of cities and counties.

The use of state preemption to limit local policymaking intensified after the GOP made extensive gains in 2010 midterm elections. Many of those preemption laws were driven by an industry-backed anti-regulatory agenda intended to block a broad range of local initiatives – from minimum wage hikes to fracking bans. In the 2020 midterms, the GOP again made gains in state legislatures. The party now controls 60 of the 99 state legislative chambers (National Council of State Legislatures 2021).

Entering the 2021 legislative sessions, Republican state lawmakers used their power to respond to the events of 2020 – the pandemic, the racial justice movement, the presidential election, and what they perceived to be local government overreach (Brownstein 2021) – by introducing a surge of preemption bills aimed at appropriating the machinery of local government operations. As a result, some states now dictate how local elections are run, determine the process for issuing local public health orders, decree how much local governments can cut or shift funds in their budgets for policing, and threaten to give state actors the authority to intervene in local criminal cases. Combined, these and other laws constitute an unprecedented state intrusion into the day-to-day management of cities and counties.

Voting and Elections

In 2021, state preemption came to local election administration. The fundamentals of election law – registration, whether and what kind of ID may be required, availability of early and absentee voting – are set by the states, but elections are actually run by local officials at the county or city level, who conduct registration and ballotting processes (Briffault 2020). The successful administration of the 2020 election is a testimonial to the efforts of hundreds of thousands of local officials who – despite facing an unprecedented pandemic – managed to run a virtually fraud-free process that resulted in a record number of Americans casting ballots.
As part of that process, many local election officials, particularly in urban areas, used the discretion they enjoyed under existing laws to make it easier for Americans to vote under pandemic conditions. This included sending absentee ballot applications to all eligible voters; creating mobile voting units; authorizing curbside and drive-thru voting; establishing 24-hour voting; and, to deal with the problems posed by an unreliable postal service, establishing drop-boxes in convenient locations throughout their communities where voters could return their absentee ballots (Corasaniti 2021a; Izaguirre 2021; Weber 2021; Corasaniti 2021b). Rather than reward this initiative, multiple red state legislatures moved to preempt local authority to promote voting and to punish local election officials trying to do the work of democracy.

These preemption measures have taken two forms (States United Democracy Center 2021a). First, states have targeted the democracy-enhancing measures local officials took last year. Arizona, Florida, Georgia, Iowa, and Kansas now prohibit sending absentee ballot applications to voters who do not request them. In addition, Florida, Georgia, Iowa, and Indiana have imposed new limits on the number, location, or availability of ballot drop boxes (Brennan Center 2021). As a result, for example, whereas Georgia provided 94 drop boxes in the four counties of metropolitan Atlanta in 2020, those counties could provide, at most, 23 drop boxes today. Additionally, local officials provided 24-hour access to drop boxes in 2020; however, the new law requires that drop boxes be positioned indoors, in government buildings and early voting sites, thus making them unavailable to voters after business hours. Mobile voting centers, which were provided by Fulton County in 2020, are now prohibited unless the governor authorizes their use (Corasaniti and Epstein 2021).

Iowa now limits the discretion of local officials to establish satellite polling stations (Gruber-Miller 2021). A pending Texas bill – which Democrats managed to block by a parliamentary maneuver in the regular legislative session, but which will be taken up in a special session – would outlaw 24-hour voting, drive-thru voting, and sending absentee ballot applications to voters who have not requested them (Weber 2021). Finally, five states have barred or tightly limited the ability of local election administrators to accept non-partisan philanthropic donations for election expenses; such donations were critical in enabling some chronically underfunded election offices to meet the costs of running a pandemic election (Brennan Center 2021).

Second, states are now applying “punitive preemption” to election law by providing for the removal of local election officials and the criminalization of official actions deemed contrary to state code (States United Democracy Center 2021b). Georgia authorized the State Elections Board – now controlled by the Republican state legislature – to suspend and temporarily replace local election officials (Corasaniti and Epstein 2021). Local election officials who disobey guidance from the Iowa Republican Secretary of State are subject to fines of up to $10,000 for “technical infractions” of the election law. The state also made it a crime for election officials to obstruct partisan poll watchers (Rakich 2021; Brennan Center 2021). Arkansas authorized the State Board of Election Commissioners to decertify local election officials and take over local election administration (Brennan Center 2021). Arizona made it a felony to modify an election-related date or deadline unless ordered to do so by a court (States United Democracy Center 2021b). A pending Texas bill, S.B. 7, provides for criminal penalties for election administrators and workers in fourteen situations that involve activities such as “counting ballots, dealing with mail in ballot applications, mailing early voting material…” and more (States United Democracy Center 2021b). Similar legislation is pending in other states.
Local Prosecution

Preemption has opened another new front – local prosecution. Decisions concerning which laws to enforce, and how vigorously to enforce them, has long been left to locally-elected prosecutors. The rise of urban “progressive prosecutors” who have signaled a disinclination to prosecute certain offenses such as low-level drug crimes, sex work, or activities in connection with political protests, has triggered a state response (Murray 2021). In a measure blatantly targeting the current Philadelphia district attorney, Pennsylvania has granted the state attorney general concurrent jurisdiction to prosecute certain crimes, but only in Philadelphia, and only during the term of the current district attorney (Goldrosen 2021). No similar law has been enacted in any other state, but bills have been introduced in Indiana and Missouri that would either grant the state attorney general concurrent jurisdiction with the district attorney to prosecute certain crimes in certain cities, or to appoint a special prosecutor for crimes the district attorney has declined to prosecute as a matter of policy. The Ohio, Pennsylvania, and Tennessee legislatures have considered measures – introduced in the aftermath of the 2020 Black Lives Matter protests – that would give the state attorney general concurrent statewide jurisdiction over crimes related to protest and damage to monuments.

These measures differ from other uses of preemption in that they do not formally prohibit local action, which is what preemption typically does. But by giving state officials power with respect to a matter which has long been locally controlled, they preempt the discretion of locally elected and accountable officials to decline to act and so also effectively preempt local authority.

Public Health

This year, in response to local public health actions taken during the pandemic, ten states passed bills to curtail local public health authority and orders (National Association of City and County Health Officials 2021). In five of these states, Florida, Indiana, Missouri, Montana, and Ohio, the power to approve the scope and duration of local public health regulations – even when there is no public health emergency – was taken by the state.

Budgets

Three states, Georgia, Florida and Texas, responded to last year’s wave of racial justice protests by enacting local budget control bills to prohibit, hamper, or punish localities that attempt to reallocate and reduce police budgets. The Wisconsin legislature has sent a local budget control bill to the governor who is expected to veto it. A Texas bill punishes cities for reallocating police funds by freezing property tax rates and redirecting local sales tax dollars to state law enforcement (Engel 2021). In Florida, West Palm Beach Mayor Keith James opposed the state’s budget control bill saying, “This is the evisceration of home rule on steroids” (Palm Beach Post 2021).
Local officials and policy advocates are fighting back. Public health advocates and their allies in Alabama and Oklahoma successfully lobbied against bills that would have transferred local public health authority to the state. In Florida, the anti-preemption coalition weakened the state’s “Combating Public Disorder” act (HB1) (2021) by having a section removed that would have allowed any citizen to challenge a local budget; now only elected officials have that authority.

Litigation is also being used to challenge these bills. In Florida, for example, advocates are challenging new voting restrictions (Calvan 2021). Florida’s HB1 is also facing multiple suits in federal court (Ferdman 2021). And the City of Gainesville has taken steps to authorize a challenge to protect its local budgeting authority from infringement.

Long-term, there are two structural fixes that would slow or stop state interference with local authority. First, current administrations need to be elected out of office. In Colorado, now a blue trifecta state, minimum wage, firearm, and plastic bag ban preemptions have all been repealed in the past two years and the power to make policy in these realms has been returned to local governments. Second, home rule needs to be reformed. To that end, the National League of Cities partnered with the Local Solutions Support Center to provide local governments with a new vision and legal framework for updating and reforming home rule to meet the challenges of the 21st Century (Local Solutions Support Center 2020).

About the Authors

Richard Briffault

Richard is the Joseph P. Chamberlain Professor of Legislation at Columbia Law School. His research, writing, and teaching focus on state and local government law, legislation, the law of the political process, government ethics, and property.

Briffault has written more than 75 law review and journal articles as well as books and monographs. He co-authored The New Preemption Reader and the fifth, sixth, seventh, and eighth editions of the casebook, State and Local Government Law. Briffault is an elected member of the American Law Institute’s project on principles of government ethics. He is also vice-chair of Citizens Union of the City of New York.

In 2014, Briffault was appointed chair of the Conflicts of Interest Board of New York City. He was a member of New York State’s Moreland Act Commission to Investigate Public Corruption from 2013 to 2014, and served as a member of, or consultant to, several city and state commissions in New York dealing with state and local governance, including the New York State Commission on Local Government Efficiency & Competitiveness (2007-2008); the Temporary New York Commission on Constitutional Revision (1993-1995); the New York City Real Property Tax Reform Commission (1993); and the New York City Charter Revision Commission (1987-1989).

Briffault was law clerk to the Honorable Shirley M. Hufstedler of the 9th U.S. Circuit Court of Appeals and was assistant counsel to New York Gov. Hugh L. Carey. He received his J.D. from Harvard University and his B.A. from Columbia University. He joined the Columbia Law School faculty in 1983.

Kim Haddow

Kim Haddow is a Strategic Consultant for the Local Solutions Support Center, where she lends her expertise and historical perspective to LSSC’s strategic and planning process, research efforts, trends tracking, and message testing. Haddow founded LSSC in 2017 and served as the project’s director through 2020. As president of Haddow Communications, Inc, Haddow has worked with the Rockefeller Family Fund starting in 2012 to pass paid sick day laws in cities and states across the country.

Haddow has also worked as the National Communications Director for the Sierra Club and at Greer, Margolis, Mitchell, Burns (GMMB), a Washington, DC-based media consulting firm, advising political, cause-related marketing campaigns and non-profits. Haddow began her career at WWL-AM in New Orleans where she worked as a reporter and assignment editor and managed the news department.
References: “An Attack on Local Authority”


