

Preemption: A Basebuilding Strategy

I. Introduction

With the rollback of progress of many victories, more groups are aware of the threat posed by state preemption on local governance. This report does not serve to restate what has already been said, but rather to succinctly outline the threat, with particular attention to Super Preemption, as well as to summarize what the New World Foundation believes can be an effective strategy to take on these attacks to local democracy.

II. Summary

For some time now, the Right and their corporate allies have had their eye on statehouses and local elections with the intention on solidifying their control at every level of government. Not only are Republicans in control of 25 statehouses and governorships across the country to Democrat's 6 (having gained 2 while Democrats lost 1), but select Republicans have been perfecting a strategy to hold off any gains to be made on the local level: namely **state preemption of local authority**, which has seen a dramatic increase since 2013. In 2015, 29 states considered at least 1 preemption bill, and 17 states passed them. We are on track to exceed those numbers in 2016.

Where progress is made across the spectrum of the issues we care about, as with minimum wage, immigrant rights, LGBTQ rights, fracking regulations, or state college recognition of collective bargaining rights, right-wing controlled states are overturning those gains with preemption and hunkering down on this strategy as a long-term and deep challenge to our work. What began as a strategy by the pro-gun and tobacco industries has now expanded to impact our rights as workers, our gender expression and our right to regulate our natural environment, to name a few: some of the most important foundations of healthy communities and a healthy democracy.

Preemption is not inherently bad. In fact, as a legal "floor", preemption can ensure minimum protections or standards at the federal or state level, like the federal minimum wage, for example. However, "ceiling" preemptions can set weak standards that limit local governments' ability to set higher standards in their localities. Many experts no longer consider floor preemptions preemption at all, and they are not the kind of policies we are interested in here.

The following states have passed preemption laws that create a ceiling on how local authorities can regulate the following issues:

Minimum Wage (17): FL, GA, IN, KS, LA, MO, MS, NC, OK, OR, PA, RI, SC, TN, TX, UT, WI
Sick Leave (13): MI, WI, IN, TN, GA, AL, MS, LA, OK, KS, OR, MO, FL

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LGBTQ Discrimination (3): AR, TN, NC (Bills were filed in 2015 or 2016 in MI, MS, TX, WV and MO but either failed or remain pending.)

Fracking (7): TX, OK, CO, OH, PA, LA, NM

Factory Farms (13): AZ, ID, IL, IA, KS, MI, MS, MO, ND, PA SC, TN, WI

Nutrition (8): AL, AZ, FL, GA, MS, WI, OH, UT

Guns (43): ME, NH, VT, RI, PA, DE, MD, WV, OH, VA, MI, WI, IN, KY, NC, TN, SC, AL, MS, LA, TX, OK, KS, NE, SD, ND, MT, WY, CO, NM, AZ, OR, WA, AK, AR, FL, GA, IA, MN, MO, NV, TX, UT

“Sanctuary Cities” (3): AZ, NC, MO (PA just passed and is waiting for Governor’s signature, recently failed in FL due to strong opposition. A similar bill failed in LA. TX is expected to consider statewide legislation in their 2017 session)

Not only have state governments limited the ability of local governments to enact proactive progressive policies, stunningly, they are attaching penalties to local elected officials who attempt to do so. Florida, Alabama, Indiana and Kentucky have attached personal penalties to local elected officials who enact local gun control regulations – so called **“Super Preemption”**. Elected officials can face hefty individual financial and civil penalties that they must pay out of pocket. In Florida this includes a fine of up to \$5,000 against elected or appointed officials, the inability to use public funds for officials to defend themselves, and legal fees up to \$100,000 potentially paid to the prevailing plaintiffs. These lawsuits can be brought by groups in or out of state.

Super Preemption bills are pending in a number of states, including Michigan and Pennsylvania, and was recently defeated by one vote (in a cloture vote) in Nebraska in January 2016: a grassroots victory led by a group of progressive women who formed Nebraskans Against Gun Violence. They had strong support from Nebraska Senator Ernie Chambers of Omaha, as Omaha and Lincoln, the two largest cities in the state, have gun regulations that are more stringent than what the state requires. This was seen largely as an attack on those two cities and their regulations. Omaha, Nebraska’s largest city, also happens to have the highest population of African Americans in the state. While the legislation initially looked like a shoe-in, Nebraskans Against Gun Violence led a campaign that even brought the police forces in both cities on board. It’s likely the legislation will be brought back in NE. The 43 states that currently have gun preemption are particularly at risk for Super Preemption.

More recently we’ve seen a new iteration of Super Preemption emerge in Arizona, where localities receive 15% of state taxes levied from income, sales and transportation taxes that normally go to local services like fire and police departments. The state government passed a law that cuts this funding to localities whose laws exceed state standards, taking particular aim at local gun regulations, paid sick, minimum wage and LGBTQ rights campaigns. The city of Tucson is currently defending their local gun regulations and may lose their funding as a result. The member cities of the Arizona League of Cities have committed to making up the funding deficit should Tucson indeed lose this significant portion of their financial support from the state.

Behind this appropriation of state power, there are select industries, the usual suspects: oil, tobacco, alcohol, the National Rifle Association, the National Restaurant Association and factory farms. They come together with the American Legislative Exchange Council (ALEC) to export

bills from state to state very quickly. This is then exacerbated by the current hyper-partisan environment, which is more prevalent in statehouses than on the local levels, where elected officials are much more willing to work across the aisle.

III. Fighting Ceiling Preemption: A Range of Approaches

NWF is working with grantees to explore how they might engage preemption. Some of these foci are organizing, political and legal strategies. Strategies for specific campaigns must be well thought out, nimble, collaborative across sectors and of course, adequately funded.

Legal Challenges Already Underway

There are currently varied legal challenges to preemption in states including Missouri, North Carolina, Alabama, Florida and Arizona.

In Alabama, the Birmingham City Council passed a minimum wage increase to \$10.10 in February 2016. The Alabama state legislature, led by representatives from majority-White districts, swiftly passed a preemption bill to invalidate the measure, taking power away from a majority-Black city, Birmingham. There is currently a legal challenge by the Alabama NAACP and Greater Birmingham Ministries, arguing that the law is tainted by "racial animus" and that it violates the Equal Protection clause of the U.S. Constitution.

Preemption is constitutionally protected; indeed, it forms a basis for how our federal, state and local governments interact with one another and will likely need constitutional arguments to fend off the most brutal attacks to local government that ceiling preemption and Super Preemption are wreaking on our communities.

There remains room to grow in creative and forward-thinking strategies, like the example in Birmingham, that push the edges of legal arguments around preemption. Ultimately, when smart legal and political strategies are based in organizing and galvanize the communities most impacted, we can set ourselves up to win.

Organizing and Legal Strategies

Much of what this form of state preemption currently does negatively impacts local communities – which, for the large part, are not currently adequately engaged or organized on these issues. Given NWF's past experiences in movements for social change, we know that ongoing base-building and organizing will be crucial for taking on preemption. Legal challenges are both necessary and give organizing strategies focus in specific states, regions or issue-areas. Similarly, organizing campaigns can bring additional weight to a legal challenge and shift public opinion along the way. In order to win, we cannot have one without the other. We face a strategic assault that takes away democracy and local power, so our strategy must be one that builds power and re-centers democracy where it should be: in the hands of those most directly impacted.

The Long Game: Taking Back Statehouses

Inherently related to organizing, the ultimate solution to state preemption threats to localities is taking back statehouses from right-wing and corporate control to make them more democratic and accountable. In our effort to rethink a strategy around statehouses, can we identify friendly legislators who are at risk of being voted out who need to be protected? Are there members of organizations who can be groomed for and supported to succeed in political power at the state level? We need to be employing these types of strategies for the long-term to regain control so that government is responsive to community needs.

Issue-Based Strategies

Preemption offers us an opportunity to organize across sectors, around the issues that we care about. Health, for example, can bring together communities who want to tax sugary drinks, funders who care about children's health, gun control advocates, environmental and reproductive justice activists. Thinking outside the box about who might be invited into a conversation will help broaden our reach, capacity as well as funding.

Strategies to Protect Local Authority

Any and all of the above strategies will benefit from funder coordination and a funding pool to allow for rapid response among grassroots groups and legal teams. Organizing groups need to respond quickly and have available funds to combat a state-level attack on local authority. Since a preemption bill can go through a statehouse in two weeks' time, coordination between grantees and funders must be in place well in advance of a potential threat and must not be reactive, but prepared and ready to respond if, or rather when, the threat arises.

It is important to keep in mind that preemption bills can be stand-alone or amendments to larger bills that sometimes slip through the radar. For this reason, when thinking about strategy, one legal expert advised that we would need to be "relentless." Even when smart and coordinated organizing holds back a preemption bill, it can still be tacked on to something else, potentially completely unrelated. Finally, most legal take-downs of preemptions are at *how* the bills were enacted, not at their inherent legality, so corporate interests may simply go back and rush a bill back through, and in fact they often do.

When crafting legislation, groups must be sure to include a savings clause in the language of the bill, which protects against ceiling preemption.

Ballot Initiatives & Referendums

NWF is exploring how citizen initiated methods of amending constitutions or passing legislation can be utilized in the effort to bolster local democracy. 39 states allow ballot initiatives and referendums in at least some cities, primarily in "charter cities", cities governed by their own charters, not "general law" cities, governed by the general law of the state. States can have cities with both general law and charter cities.

More than twenty states allow for these initiatives in all of the cities in their states. The strongest fifteen states allow cities to both initiate statutes and amend their states' constitutions: CA, OR, NV, AZ, MT, CO, ND, SD, NE, OK, AR, MO, OH, MI and MA.

Recently, activists in Colorado worked to get two constitutional amendments on the November 2016 ballot to regulate fracking after the CO Supreme Court preempted local bans in Longmont and Boulder, among other cities. Their effort was outspent more than 45 times by the oil and gas industry: industry spent upwards of \$20 million (unprecedented in the state) to the grassroots' \$430,000. For context, the average ballot initiative campaign in Colorado spends \$3 million. Industry's funds led counter-campaigns that were purposefully confusing, called "Protect Colorado" and "Colorado Concern" urging voters to "decline to sign." Ultimately, the Colorado Secretary of State's office found that there were not enough valid signatures based on a random 5% sample of the submitted signatures. Organizers are currently considering whether or not to appeal the decision.

Activists are just beginning to explore how this avenue can be best utilized to fight back against preemption. Colorado's effort was very close to making the ballot. Funders had the opportunity in Colorado to ensure that this ballot initiative made it to the ballot in November and organizer voters to see where people really stood on this issue. A ballot initiative in Colorado did make the cut for the 2016 election led by a pro-business group to make it more difficult to amend the state constitution by citizen initiative. In an atmosphere when corporations are able to outspend citizen groups many times over, this is yet another attack on the diminishing avenues for local and direct democracy. Time and time again we hear variations on a theme in California, Texas, and Colorado, among others: "The people are with us, if we just had enough time and money, we could do it. They are killing us over here."

IV. Current & Potential Partners

NWF is working and in conversation with a range of players impacted by and fighting back against preemption. This is a snapshot of our partners and the types of sectors we believe will be integral to defeating this attack on local democracy.

Local Governments

Tallahassee, FL: Florida Carry v. COT

Tallahassee Mayor Andrew Gillum (then a member of the Tallahassee City Commission), John Marks, former Mayor of Tallahassee, City Commissioner Gil Ziffer, City Commissioner Nancy Miller, and the City of Tallahassee are currently fighting back against a Super Preemption lawsuit from Florida Open Carry and Second Amendment Foundation, two pro-gun special interest groups. The groups are suing the city of Tallahassee to remove two statutes from their books that regulate guns and are now preempted by state law. The city has refused to do so, since they are preempted and now invalid. The city government has essentially taken a stand and the special interest groups, with the backing of the state government, has the authority to

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“represent its members.” Herein lies the crux of the conflict. Which group will receive more representation: the citizens of Tallahassee or proponents of open carry from across Florida?

The Tallahassee government has acquired Amicus Curiae support from the Florida League of Cities, The League of Women Voters of Florida, The Law Center to Prevent Gun Violence, States United Against Gun Violence, 6 Florida Mayors, a Florida City Councilwoman, and State Legislators from Florida and Michigan. They plan to continue to exert their ability to govern locally and hope to bring attention to the issue that Tallahassee is facing currently: a city government, stripped of its ability to fight with the public funds and representation, forced to outsource to private funds and representation all while taking a stand for its city’s public health and good.

NWF has also been in conversation with electeds from Arizona who are facing similar challenges regarding Super Preemption and who are willing to take a brave stand on this issue on behalf of their values and constituents. We are also in conversation with national networks that support elected officials, such as the *Mayors Innovation Project*, *Local Progress* and *Young Elected Officials Network* are all monitoring and interested in how preemption impacts their members.

Grassroots Movements

Anti-fracking campaigns, locally in Denton, TX and statewide in Colorado were both successful in their local campaigns then confronted by brutal statewide, corporate-funded counter-campaigns to preempt their exertion of local regulations of hydraulic fracturing in their communities. In Florida, anti-fracking activists have been successful in holding off a statewide preemption in 2016 and are gearing up to fight preemption in the years to come while pushing for a statewide ban. Additionally, many of our longtime statewide grantees are confronting an ever-deepening threat of preemption as they try to expand workers’ rights, LGBTQ protections and migrant rights.

National Organizations

Partnership for Working Families

A national network of regional grassroots advocacy organizations working primarily on economic and environmental justice. Working at the local level puts their partners at the forefront of the threat of state preemption, partners in Tennessee, for example, just lost what was big win in a local hire ordinance to state preemption. PWF have been ahead of the game in thinking through what a proactive strategy would look like for their network, combining both legal and organizing avenues.

Astraea Lesbian Foundation for Justice

The current cohort of grantees made collaboratively with Astraea spans a number of issues and states impacted by preemption. Grantees are highly concentrated in the south and in Arizona and are focusing on intersecting issues of LGBTQ rights, migrant rights, and anti-criminalization and detention. In addition to North Carolina’s HB2 and similar copycat bills, preemption can

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make impossible some of the local gains for migrant justice, things like municipal IDs in Arizona for example, all of which Astraea-NWF grantees are currently working on.

Policy Organizations

Grassroots Change

Grassroots Change's [Preemption Watch](#) program provides some of the most up-to-date and comprehensive information on preemption across the issues of e-cigarettes, factory farms, guns, nutrition, paid sick days, and smokefree. They are valuable partners to the grassroots and know better than anyone that what can happen in one sector can soon be seen in another. Our staff and Board have worked closely with them to understand this issue more deeply.

Labor

NWF is in conversation with the leadership of the national labor unions and various state union leaders about how this issue is impacting policies they are interested in advancing in localities across the country. We view this as a potential area of joint funding, or as overlapping with current areas of joint funding.

Philanthropy

NWF is leveraging our relationships in the philanthropic sector to bring more partners to this work. As mentioned, we are engaging our partners at the *Astraea Lesbian Foundation for Justice*, who work with us closely on our LGBTQ Fund, and the *11th Hour Project*, a project of the Schmidt Family Foundation, who partner with us on the Fracking Fund, a collaborative fund housed at NWF.

On both issues, preemption is gaining visibility while deeply impacting communities, whether it's North Carolina's state preemption local rights ordinances or Colorado's Supreme Court ruling that the state laws preempt local regulation of oil and gas issues, philanthropy is paying attention because it is impacting our work across the board.

There are two funders who have been engaged on this issue for a number of years. *Robert Wood Johnson Foundation* focuses broadly on traditional public health issues and has funded Americans for Nonsmokers Rights for more than 20 years. They first became aware of this issue through the lens of tobacco and have seen the proliferation of preemption into other health-related issues that they care about. As a result, RWJF has funded Grassroots Change in their work monitoring preemption since 2009. *Rockefeller Family Fund* has also helped to coordinate a number of gatherings on preemption.

NWF Board and staff is now working toward grantmaking partnerships since the field is mobilizing and it's important for foundations to move from simply monitoring and convening to active support.

V. Building a Grassroots Super Preemption Strategy

Mayor Andrew Gillum’s “Campaign to Defend Local Solutions” in Florida is built upon his legal case in Florida, but is much more than that. He and his team are building a coalition of partners representing the many issues that face preemption: paid sick, minimum wage, fracking, LGBTQ rights, styrofoam and plastic bag bans, immigrant rights and nutrition. While working to build state-wide partnership across Florida, they are also collaborating with local elected officials and community organizations in other “Super Preemption states” like Arizona and Pennsylvania.

At its core, Super Preemption is an effort to intimidate elected officials and their communities. There is a real opportunity to contest the constitutionality of Super Preemption while building real power in the face of this intimidation across sectors.

VI. Conclusion: Building Partnerships to Win

We must begin to form partnerships and gather real resources to succeed in resisting, reforming and remaking the conditions of effective local progressive government. We welcome partners committed to building this strategy from the ground up and who are ready to take brave positions in the face of the threats against us.

Appendix - Definitions

Express preemption: When a legislature passes a bill to expressly state that something is within the state's jurisdiction only, expressly forbidding localities from regulating a certain issue.

Example: Texas' HB 40, which was passed after Denton, TX banned fracking there by ballot initiative in November 2014. HB 40 was passed in May 2015, only 69 days after it was introduced, and prevents localities from regulating oil and gas activities.

Implied preemption: The umbrella under which field and conflict preemption fall under. Implied preemption does not, like express preemption, explicitly state that something is preempted (hence, implied) but rather, when a higher body passes a law, it can be argued that it implies preemption.

Conflict preemption: When something conflicts with preexisting law of a higher governmental body. Since someone cannot comply with two conflicting laws at the same time, the higher body will always win: federal to state, state to local.

Example: A proposed ballot initiative in Minnesota is currently being contested, with conflict preemption as the main argument. A coalition in Minneapolis is pushing for a ballot initiative that would require police officers to carry their own personal liability insurance to provide "coverage for willful and malicious acts and acts outside the scope of the officer's employment by the city."¹ However, a judge has ruled that since the city already bargains with the police union in good faith, which it is required to do by the state, and is required to provide insurance under that contract, the proposed measure is preempted by the state.

Field preemption: When the state has already passed so much legislation on a certain issue that it "occupies the field."

Example: The same proposed initiative in Minneapolis was also argued to be invalid because of field preemption, according to the judge. She argued that the financial responsibility of police officers was already the "subject of extensive regulations," i.e. the field is already "occupied" and thus did not require any further regulations by local authorities.

Savings clause: A section within legislation that prohibits ceiling preemption.

Example: "Nothing herein shall be construed to restrict the power of any county, city, town, or village to adopt and enforce local laws, ordinances, or regulations that comply with at least the minimum applicable standards set forth in this act."²

¹ <https://www.minnpost.com/politics-policy/2016/08/two-proposed-ballot-measures-minneapolis-face-two-very-different-outcomes-wh>

² <http://protectlocalcontrol.org/docs/nonpreemptionclauses.pdf>