

WHO REALLY HOLDS THE POWER IN THE US?

# Disunited States of America

Policy shaping daily life in the US is less about who’s president than who controls the government of each of its 50 states. Their laws are as important as federal law

Richard Keiser | Original text in English



In 2017 Arkansas pre-empted protections of LGBTQ residents and tourists that had been passed in Fayetteville. North Carolina and Texas have pre-empted laws in Charlotte and Houston that required private businesses to have bathroom policies that don’t discriminate against transgender citizens

Above Police at a Covid-19 lockdown protest in Lansing, Michigan, May 2020

LAST NOVEMBER, the world was focused on the race between Joe Biden and Donald Trump for the US presidency. Yet Americans knew that elections for Congress, and county elections and referendums in each of the 50 states, would produce far more real policy. Federal legislation from Washington on issues on which Democrats and Republicans diverge has become difficult to pass because of the conundrum of divided government, where the Presidency, House and Senate are divided between the parties, which is impossible in parliamentary democracies. The power vacuum left by Washington – at least on questions unrelated to defence or foreign policy – has been filled by the states, and it is the states, and not just California or Texas, which deserve our attention.

In the states that produce the most policy experiments, one party controls the governor’s office and has a majority in both the state House and Senate; this is known as the ‘trifecta’. Currently, there are 23 states in which Republicans are the majority in both houses of the legislature and the governor is a Republican; for Democrats, there are 15 of these trifectas of unified government. In the remaining 12 states, there is a risk of policy paralysis, as in the federal government.

This is a sharp shift. In 1992 there were only 19 trifecta states. In the other 31 states the governor faced at least one legislature controlled by the other party. States in which voters leaned toward the Democrats have become even more Democrat and the same is true for Republican states, and this has often paralysed national government.

Legislative ideas, lobbying dollars

The parties and their supporters, frustrated for decades by Washington’s inability to pass policy, have brought their legislative ideas and lobbying dollars to the states; the 10th amendment to the Constitution reserves all powers to the states other than those specifically given to the federal government. Washington can overrule states,

and they cannot pass laws that directly contradict federal laws, though this leaves much leeway.

For example, in the absence of any coherent policy from Congress and the President, many states have passed laws legalising or banning same-sex marriage; between 2009 and 2015, 12 chose to legalise it before the Supreme Court set federal law (*Obergefell v Hodges*, 26 June 2015).

Another policy area in which Washington has failed to act since the 1970 Controlled Substance Act is marijuana law. California led the way with proposition 215 (1996) in passing laws to make marijuana legal for medical use. Others soon followed and now that is the law in 36 states. Since 2012, 15 states have decriminalised recreational consumption of marijuana by adults, even though it remains technically illegal because of gridlock in Washington.<sup>1</sup>

There is also the issue of abortion: although the Supreme Court made this legal in the US in 1973 (*Roe v Wade*), the federal government has refused to reconsider the question of using public funds. At least 15 states with Republican governors and legislatures (including Louisiana, Utah and Arkansas) have passed laws to halt all state funding of Planned Parenthood, the primary provider of reproductive health services – contraception, voluntary interruption of pregnancy and infertility prevention – for the uninsured.<sup>2</sup> Conversely, seven heavily Democratic states have moved to fund abortion through Medicaid (federal aid to the poor) and nine others have adopted this policy due to court orders.<sup>3</sup>

And as the administration dragged its feet on climate change, 14 state legislatures have passed laws setting greenhouse gas emission targets stricter than those of the federal government.<sup>4</sup> Similarly, while Republican efforts to weaken labour unions have been stymied by Democrats in Washington, six states have since 2000 passed laws that give businesses significant tools for defeating union efforts to organise workers.<sup>5</sup>

When protections disappear

Should these instances of state policy-making be seen as expressions of democracy? In comparison to Washington’s repeated inability to pass even a budget, the answer seems to be a resounding yes. But unfortunately, this organised partisan power at the state level has, with increasing frequency, shut down the voices of dissent and weakened democratic representation.

In particular, states governed by conservative Republicans often ignore the voices of liberal Democrats in their big cities. Large American cities, regardless of whether they are in Democratic or Republican states, have populations that are generally better educated, less religious and more tolerant of diversity than those of rural areas in the same state, and who put their faith in city governments that are authorised to act on issues such as the minimum wage, defending immigrants, fighting racism or protecting the environment. If a state government objects to one of these laws, it has the power to pass state legislation that nullifies (pre-empts) the city law.

There are hundreds of examples of conservative states nullifying laws passed in their large cities, but very few instances of conservative city laws against the hiring of undocumented migrants, bans on sex offenders or bans on medical marijuana being pre-empted by the federal government or a state.

In 2017 the state of Arkansas pre-empted protections of LGBTQ (lesbian, gay, bisexual, trans and queer) residents and tourists that had been passed in the city of Fayetteville. North Carolina and Texas have passed legislation pre-empting laws in Charlotte and Houston that required private businesses to create bathroom policies that do not discriminate against transgender citizens.<sup>6</sup> Texas pre-empted laws to protect non-citizen refugees that had been passed in Austin, Dallas, San Antonio and Houston; the state also required that city police assist Immigration and Customs Enforcement (ICE) in enforcing federal immigration law.<sup>7</sup> Nine other states (eight with Republican trifecta power), including Georgia in 2010 and Florida in 2019, have passed laws prohibiting sanctuary cities for clandestine migrants. Eight states (of which seven with Republican-controlled governments) have passed laws that nullify current city laws against the use of plastic grocery bags.<sup>8</sup>

In 2016 the state of Alabama overturned a Birmingham city law that raised the minimum wage to \$10.10 an hour in response to the federal failure since 2007 to raise it from \$7.25. Alabama is among 24 states to pre-empt local increases in the minimum wage; 22 of those states are governed solely by Republicans.<sup>9</sup> States have passed similar pre-emptive legislation, much of which has been written by business lobbying associations like ALEC,<sup>10</sup> to prevent cities from enacting gun control laws, increasing taxes, regulating Uber and Airbnb (including pre-emptions of local bans), requiring employers to grant mandatory sick leave or parental leave, or regulating broadband Internet and cable television.<sup>11</sup> Most recently, states have overturned cities’ Covid-related closures of non-essential businesses including nail salons, golf courses, gun shops and local beaches.<sup>12</sup>

Pre-emption, particularly in Republican-dominated states with big cities, has undermined Americans’ belief in self-governance. Although local autonomy is a long-standing value in the US, it is unlikely that courts will side with cities against states. Intervention from the federal government appears to be the best hope for cities seeking respite from punitive state power ●

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1 ‘Marijuana legalization and regulation’, The Drug Policy Alliance, [drugpolicy.org](http://drugpolicy.org) 2 Leah Jessen, ‘A 10th State defunded planned parenthood. Why there’s so much momentum now’, *The Daily Signal*, 23 February 2016, [www.dailysignal.com](http://www.dailysignal.com) 3 ‘Medicaid funding of abortion’, Guttmacher Institute, January 2020, [www.guttmacher.org](http://www.guttmacher.org) 4 ‘US state greenhouse gas emissions targets’, Center for Climate and Energy Solutions, C2ES.org 5 ‘Right-to-work resources’, National Conference of State Legislatures, [ncsl.org](http://ncsl.org) 6 Ben Kessler, ‘Gay-friendly towns in red states draw LGBTQ tourists: “We’re here to be normal for a weekend”’, NBC News, 26 April 2019; Manny Fernandez and Dave Montgomery, ‘Texas moves to limit transgender bathroom access’, *The New York Times*, 5 January 2017 7 Maggie Astor ‘Texas’ ban on “sanctuary cities” can begin, Appeals Court rules’, *The New York Times*, 13 March 2018 8 Reid Wilson, ‘GOP aims to rein in liberal cities’, *Thehill.com*, 5 January 2017 9 Kim Chandler ‘Appeal filed in lawsuit over Alabama minimum wage law’, *The Montgomery Advertiser*, 3 March 2017 10 Henry Grabar, ‘The shackling of the American city’, *Slate*, 9 September 2016, [www.slate.com](http://www.slate.com) 11 Nicole DuPuis et al, ‘City rights in an era of preemption: a state-by-state analysis’, National League of Cities, 2018, [www.nlc.org](http://www.nlc.org) 12 Alan Greenblatt, ‘Will state preemption leave cities more vulnerable?’, *Governing*, 3 April 2020, [www.governing.com](http://www.governing.com)

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ISSN 1478-6591