Preemption, Public Health, and Equity in the Time of COVID-19

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SUMMARY. Preemption is a legal doctrine that allows a higher level of government to limit or eliminate the power of a lower level of government to regulate a specific issue. As governments seek to address the myriad health, social, and economic consequences of COVID-19, an effective response requires coordination between state and local governments. Unfortunately, for many localities, the misuse of state preemption over the last decade has increased state and local government friction and weakened or abolished local governments' ability to adopt the health- and equity-promoting policies necessary to respond to and recover from this crisis. The broad misuse of preemption has left localities without the legal authority and policy tools needed to respond to the pandemic. Existing state preemption of paid sick leave, municipal broadband, and equitable housing policies, for example, forced local governments to start from behind. Moreover, many state executive orders issued in response to COVID-19 outlawed local efforts to enact stronger policies to protect the health and wellbeing of communities. And, preemption in the time of COVID-19 has exacerbated the health and economic inequities affecting people of color, low-wage workers, and women. Conflict between state and local governments has cost lives, delayed effective responses, and created confusion that continues to undermine public health efforts. The new coronavirus pandemic has made it clear that the overwhelming majority of state preemption occurring today harms public health efforts and worsens health inequities. The crisis also has underscored the need to reform and rebalance the relationship between states and local governments.

Introduction

Preemption is a legal doctrine that allows a higher level of government to limit or eliminate the power of a lower level of government to regulate a specific issue. Under the Constitution, federal law takes precedence over state and local law. Similarly, if a local law conflicts with a state law, the state law generally takes precedence. Depending on the type of preemption, lower level governments may be prevented from passing any laws affecting a particular policy realm or from passing certain types of laws affecting that realm.

Historically, preemption was used to ensure uniform statewide regulation, protect against conflicts between state and local governments, and sometimes advance wellbeing and equity. Indeed, preemption is not inherently adversarial to public health, equity, or good governance. Targeted preemption has the power to promote fairness and equity when state or local governments enact harmful policies or when they fail to address systemic injustices (Carr et al., 2020). For example, states such as California and Oregon have preempted certain local laws to facilitate the production of more affordable housing.

However, in many state legislatures, preemption increasingly has been weaponized by well-organized anti-regulatory advocates to prevent local communities from enacting laws that could reduce inequities and enhance wellbeing. Rather than attempt to balance or integrate the interests of state and local governments, "new preemption" is characterized as "sweeping state laws that clearly, intentionally, extensively, and at times punitively bar local efforts to address a host of local problems" (Briffault, 2018).

New preemption is often driven by corporations, trade associations, and conservatives opposed to local regulation across a broad range of policies. These include policies related to minimum wage; commercial tobacco control; paid sick days; safe, stable, and affordable housing; and other laws that would directly benefit individuals such as low-wage workers, people of color, and women (Partnership for Working Families, 2019; Huizar & Lathrop, 2019; Policy Surveillance Program, 2019). The combined impact of existing preemption laws and preemption laws enacted in the context of COVID-19 has undermined local governments' ability to effectively and equitably respond to the health, social, and economic consequences of the pandemic.

Preemption has profoundly affected the public health response to COVID-19. Preemption laws that predated COVID-19 and those enacted during the crisis have made it more challenging for local governments to respond to and recover from COVID-19. Moreover, existing and newly enacted preemptive laws have made it more difficult to address the myriad inequities exposed and compounded by the pandemic.

Effects of Preemption Laws Enacted Prior to COVID-19

Since 2011, states have increasingly preempted local authority across a broad and growing range of economic, civil rights, health, and environmental issues. The consequence of this misuse of state preemption is that many local governments lack the authority to enact laws and policies that can reduce health inequities among underserved populations, such as people of color, low-wage workers, and women—the same communities disproportionately harmed by the health and economic effects of COVID-19 (Carr et al., 2020; APM Research Lab, 2020).

Widespread preemption during the years leading up to the pandemic meant that municipalities could not, for example, immediately adopt paid sick leave policies to cover health care and other frontline workers. State-level emergency paid sick leave policies were required in states such as Indiana, Michigan, and North Carolina, among others (A Better Balance, 2020). In some states, including Tennessee and Florida, advocates requested that their governors suspend paid sick leave preemption so local governments could do more to protect residents.

Similarly, the pandemic's economic fallout worsened the existing housing crisis. Some local and state governments implemented eviction and foreclosure moratoria to keep residents from losing their homes. In some states, however, existing state preemption interfered with local governments' ability to adopt such policies (Local Solutions Support Center, n.d.). In Wisconsin, the Tenant Resource Center explained that local governments are "prevented from doing so due to state preemption." In contrast, California's governor issued an executive order to suspend state preemption of certain types of local eviction protections.

With Americans forced to work, learn, and find medical treatment online, COVID-19 has also made fast, affordable, and reliable internet access essential. But in many states, preemption prohibits local governments from building or expanding access to municipal broadband—limitations that disproportionately hurt people of color, low income, and rural residents even before the pandemic (Community Networks, n.d.). Many states—including those with municipal broadband preemption—have acted to increase internet access and decrease costs. For example, the Nebraska Public Service Commission allocated funds to reimburse internet providers for providing service to low income families. Although some state action to expand broadband access may have been necessary irrespective of municipal broadband preemption, the inability of local governments to proactively address broadband access in the years leading up to the pandemic amplified the scope and urgency of state intervention.

Figure 9.1

POLICY AREAS AFFECTED BY NEW PREEMPTION	
New state preemption laws have restricted or eliminated local authority to protect public health and equity across a range of issues, including:	
Economic Policies Minimum wage, paid sick time, wage theft, local hire, pensions, fair scheduling	**Public Health and Safety Laws** Gun safety, tobacco and e-cigarette policies, food labeling, sugary drink regulation
Local Zoning and Affordable Housing Inclusionary zoning, rent control, source-of-income nondiscrimination, short-term rentals	**Technology** Broadband, 5G, self-driving vehicles
Civil Rights Antidiscrimination, sanctuary cities, immigration	**Environmental Protection** Factory farming, plastic bags, styrofoam, energy benchmarking, fracking

Preemption in COVID-19 Executive Orders

Many state COVID-19 executive orders include express preemption that has hampered localities' ability to protect their communities. State executive orders, including stay-at-home orders, have included three forms of preemption: floor, ceiling, and vacuum.

In some states, governors issued statewide stay-at-home orders but allowed local governments to implement additional restrictions based on local conditions. By establishing a **regulatory floor**, the executive orders did not prevent local governments from taking additional action to protect their residents. For example, Maryland's governor lifted the state's stay-at-home order but allowed for a flexible community-based approach, with local leaders making decisions regarding the timing of reopening. Prince George's County, Montgomery County, and the City of Baltimore—home to the state's largest Black and Latinx populations—opted to reopen more slowly.

Unfortunately, this collaborative approach is not the norm. In many states—Arizona, Florida, Georgia, Mississippi, South Carolina, Tennessee, Texas, and West Virginia, among others—the statewide stay-at-home orders established a **regulatory ceiling**. That is, the statewide orders prevented local governments from imposing stricter requirements than the state. For example, Arizona's governor issued an executive order prohibiting any county, city, or town from issuing any order or regulation "restricting persons from leaving their home due to the COVID-19 public health emergency." Similarly, the Texas attorney general warned officials in Austin, Dallas, and San Antonio to roll back "unlawful" local emergency orders that imposed stricter COVID-19 restrictions—and hinted that litigation would ensue if they did not.

Some states, such as Iowa, did not have any statewide stay-at-home orders in effect but still preempted local governments from issuing their own orders, creating a **regulatory vacuum**. For example, although the Iowa governor did not issue a statewide stay-at-home order, she and the state attorney general informed local officials that cities and counties lack the authority to close businesses or order people to stay at home.

As cases of COVID-19 surge, local governments have demanded the authority to respond with mandatory mask-wearing and other safety precautions, intensifying state-local government conflict. Governors in Oregon and Utah paused their reopening plans following steep increases in COVID-19 cases. In other hotspot states, however, governors initially refused to reimpose restrictions, frustrating local leaders who are preempted from enacting their own stay-at-home or physical distancing orders. Although the governors of Arizona, Florida, and Texas ultimately reversed state preemption of mandatory masking orders, at the same time, Nebraska's governor warned local governments they would not receive federal COVID-19 funds if they imposed masking or other local rules.

After California's governor issued a statewide mandatory masking order, several local law enforcement agencies announced they would not enforce the order. The mayor of Nevada City encouraged residents to defy the mandate to "prevent all of us from slipping down the nasty slope of tyranny." California localities that do not comply with minimum statewide health and safety standards will be ineligible for $2.5 billion in state aid for local governments; however, unlike Nebraska, California does not intend to penalize localities that adopt more restrictive local orders. Governors in Pennsylvania, Illinois, North Carolina, and New Mexico, among other states, have also threatened to cut funding or take legal action against defiant localities.

Preemption and the Recovery

The misuse of state preemption is also undermining local governments' ability to effectively and equitably address long-term recovery from COVID-19. Areas of state and local conflict with the potential to impede recovery include preemption of local fiscal authority, worker safety laws, tenant and mortgage holder protections, emergency powers, stay-at-home orders, mandatory masking orders, sanctuary city protections, and elections.

For example, 48 states limit local fiscal authority to raise and spend revenue—known as tax and expenditure limits (TELs)—which will impede the economic recovery of localities with significant consequences for people who rely on local public health and safety, education, and other services (Policy Surveillance Program, 2019). As a result of these restrictions on tax revenues, cities are now cutting services when the community needs them most, laying off and furloughing employees, and mothballing capital projects, which has consequences for local employment, business contracts, and overall investment in the economy and community.

In the aftermath of the 2007–2008 housing crisis, moreover, local fiscal distress led to municipal bankruptcies, the imposition of state emergency managers, and other state takeovers of local governments. As the water crisis in Flint, MI, attests, this kind of fallout can have dire consequences. Similar state interventions in the recovery ahead appear likely given the impact of the current downturn on local finances.

Housing, which has been a critical issue in acute responses to the COVID-19 emergency, is likely to remain an issue during recovery. Evictions and foreclosures disproportionately affect people of color, women, and low-wage workers. Although local governments are considering a range of tenant protections, such protections are among the many equitable housing policies preempted by states across the country, including rent regulation, inclusionary zoning, and source-of-income antidiscrimination (Local Solutions Support Center, n.d.).

Effects on Racial, Socioeconomic, and Other Preexisting Inequities

As local governments develop innovative solutions to advance health equity and improve health and wellbeing, preemption most often serves to impede such efforts (Carr et al., 2020). These impediments have substantial consequences generally and within the context of COVID-19 specifically.

For example, given the stark racial and socioeconomic disparities in health outcomes related to COVID-19—disparities directly attributable to racism and other forms of structural discrimination—state preemption of local preventive measures to reduce the spread of COVID-19, such as more protective local stay-at-home orders, is almost certain to worsen existing health inequities. This is particularly true when health status, including the existence of preexisting conditions that worsen negative outcomes related to COVID-19, is intimately tied to zip code, and can vary substantially over short distances.

State preemption laws affecting the social and structural determinants of health are also likely to create or worsen inequities. Governments at all levels have adopted emergency policies, including tenant protections, broadband access, paid sick and family leave, and economic supports like increased unemployment and nutrition assistance benefits. However, once the current pandemic subsides and these temporary policies expire, widespread state preemption means that the same underserved populations unfairly harmed by COVID-19 will once again be unable to take action to protect their health and economic security. From an equity perspective, the misuse of state preemption to block local health and equity-promoting policies makes it harder for individuals and communities to care for themselves and their families. Indeed, because many states prohibit localities from enacting policies across a broad array of issues, millions of people—many of them from communities of color and low income communities—have been excluded from the opportunities and health benefits that those laws would provide (Partnership for Working Families, 2019; Huizar & Lathrop, 2019).

Similarly, state TELs that constrain the means by which local governments may raise revenues are also likely to undermine health and equity. The inability to raise revenue means that localities may lack the resources to provide the services and

supports necessary to counter the health and economic effects of COVID-19. Because COVID-19 has disproportionately affected underserved communities, these gaps in services and supports will further reinforce such inequities. Moreover, state TELs force local governments to turn to alternative forms of revenue generation, which often means fines and fees. Data show that people of color and residents who have low income are disproportionately affected by fees and fines for low-level offenses. "These fines and fees can affect credit scores, plunge families into debt, result in loss of a driver's license, or lead to incarceration"—all outcomes that can negatively affect health (Watts & Michel, 2020).

Used appropriately, targeted preemption has the power to promote fairness and equity. For example, federal civil rights laws passed during the 1960s to counter government-sanctioned discrimination by states and localities were, in fact, preemption laws that established minimum nationwide protections. Those laws exemplify the use of preemption to advance equity and extend opportunity to people who were previously excluded (Carr et al., 2020).

In the COVID-19 context, targeted state preemption can help protect public health and advance health equity when local laws, government officials, or community opposition stand in the way of an effective response—by blocking testing centers or quarantine sites, for instance, or by lifting stay-at-home orders before state health officials determine it is safe to do so. Similarly, statewide stay-at-home orders can establish baseline protections for all residents while allowing local governments to impose additional restrictions that address variations in local conditions.

The COVID-19 emergency reminds us that the overwhelming majority of preemption laws sweeping the country represent a coordinated assault on the political power of communities of color, low income workers, and other marginalized groups. But it is critical to recognize that inequities result from decisions at all levels of government. As the country responds to and recovers from the COVID-19 pandemic, governments and public health decisionmakers must seek to repair and rebalance the relationship between state and local governments by combating the misuse of preemption while leveraging its potential to create and protect safety and opportunity for all. It is also critical to evaluate how state and federal preemption has affected both equitable responses to COVID-19 and ongoing recovery efforts, especially effects on underserved communities such as people of color, persons with low-incomes, and women.

Federal Preemption

Under the Constitution's "Supremacy Clause," federal law takes precedence over lower-level laws. The federal government has "limited powers," meaning it only has those powers enumerated by the Constitution such as to tax, spend, and regulate interstate commerce. Despite these limitations, the federal government has the authority to make and enforce important laws related to public health and equity, including the ability to enact laws that preempt some or all state and local laws on particular issues. Indeed, while federal preemption has garnered less attention in recent years, it nevertheless remains a relevant consideration for responding to and recovering from the COVID-19 pandemic.

As with state preemption, federal preemption can sometimes advance public health and equity. The federal government, for example, exercised its authority under the Public Readiness and Emergency Preparedness (PREP) Act to preempt state and local laws restricting the ability of pharmacists to order and administer COVID-19 tests (U.S. Dept. of Health & Human Services, 2020). Despite operating as a constraint on state and local authority, such action is likely to support COVID-19 response efforts by increasing the availability of testing, particularly in underserved communities with limited access to health care services.

In other instances, federal preemption laws that predate COVID-19 and new proposals to preempt certain state and local laws have the potential to threaten effective and equitable response and recovery efforts. Proposals to take federal action to shield businesses from state laws imposing civil liability for harms resulting from COVID-19, for example, would remove incentives for businesses to proactively implement health and safety protections, as well as the ability to hold businesses accountable should they cause harm to customers or employees. In a similar way, federal preemption of state and local laws that limit mandatory arbitration clauses in employment contracts closes courts to workers and tends to favor employers. This may exacerbate health inequities given that many employees working in essential businesses are people of color, people with low incomes, and other individuals from underserved communities.

For additional information on various ways in which the federal government may constrain state and local authority, see Chapters 7 (restrictions imposed as a condition of federal funding), 8 (potential federal preemption of state and local stay-at-home orders), and 10 (Tribal authority).

Recommendations for Action

Federal government:

- Congress should adopt legislation prohibiting states from preempting local governments from building or expanding access to municipal broadband.
- Congress should not pass legislation shielding businesses from liability for failing to protect the health of customers and employees.
- Congress should amend the Federal Arbitration Act (FAA) to allow state and local laws restricting or prohibiting mandatory arbitration between employers/employees and businesses/consumers.
- The president should appoint judges receptive to legal theories protective against the misuse of state and federal preemption.

State governments:

- State governments should permanently remove state preemption of more protective local laws related to COVID-19 response (e.g., mask and physical distancing mandates), economic security (e.g., minimum wage, paid leave, employment protections), equitable housing (e.g., eviction moratoria, rent control, source-of-income antidiscrimination), municipal broadband, and civil rights (e.g., antidiscrimination laws, sanctuary cities).
  - Governors and other authorized officers should use their emergency powers to suspend preemptive laws preventing effective and equitable local responses.
  - Where necessary, state legislatures should amend state emergency laws to authorize the suspension of preemptive laws.
- Legislatures should repeal all state preemption laws that penalize localities or local officials that enact, enforce, or attempt to enact or enforce preempted or potentially preempted laws (e.g., laws subjecting localities and local officials to fines, civil liability, removal from office, and loss of funding).
- Legislatures, and voters in states that allow voter initiatives, should adopt structural reforms to strengthen home rule in alignment with the National League of Cities Principles of Home Rule for the 21st Century.
- Those responsible for appointing judges, and voters in states that elect judges, should select judges receptive to legal theories protective against the misuse of state preemption.

Local governments:

- Local governments and residents should support resolutions, lobby state lawmakers, and call for state executive action in support of local authority to enact more protective laws related to COVID-19 response (e.g., mask and physical distancing mandates), economic security (e.g., minimum wage, paid leave, employment protections), equitable housing (e.g., eviction moratoria, rent control, source-of-income antidiscrimination), municipal broadband, and civil rights (eg, antidiscrimination laws, sanctuary cities).
- Local governments and residents should advocate for state legislation or ballot measures expanding home rule authority in alignment with the National League of Cities Principles of Home Rule for the 21st Century.

About the Authors

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