Preemption & the Pandemic

New Trends in State-Local Conflict and the Imperative for Structural Change

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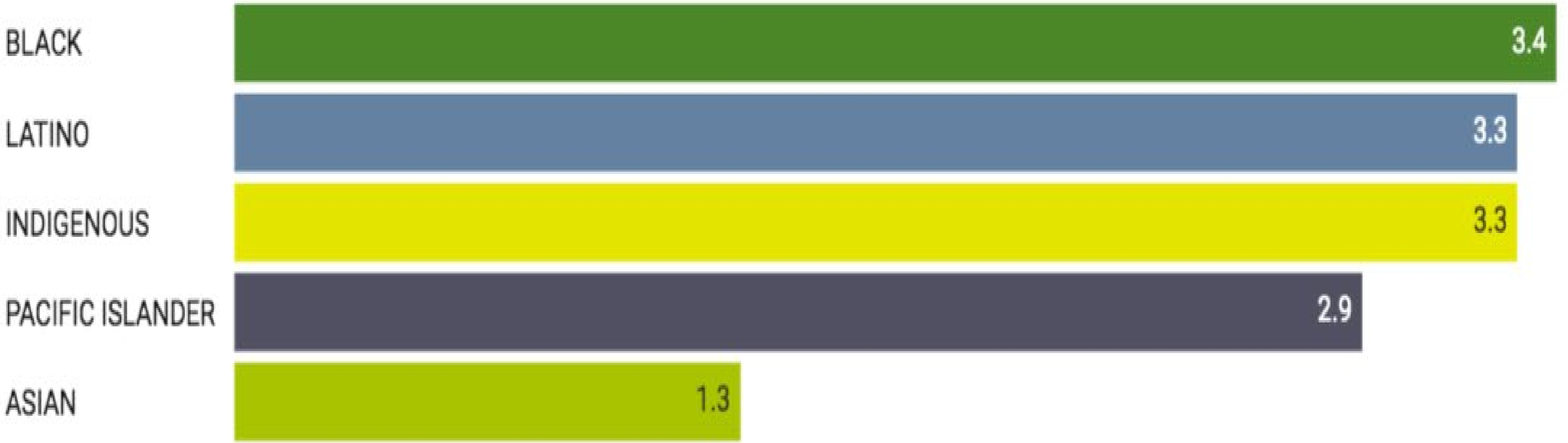
Past and New Preemption Laws Limit Local Efforts to Protect Public Health

- The pandemic has laid bare the high cost of a decade of state preemption designed to undermine local authority and independence.
- Preemption has hampered local response; made it harder to protect lives and livelihoods.
- Policies preempted before the pandemic, including paid sick days, equitable housing, minimum wage, and broadband forced cities to start from behind.

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Adjusted for age, other racial groups are this many times more likely to have died of COVID-19 than White Americans

Reflects mortality rates calculated through Sept. 15.



Indirect age-adjustment has been used.

Source: APM Research Lab • Get the data • Created with Datawrapper

Preemption & The Pandemic: Trends

- Emergency Paid Sick Leave Laws
- Evictions/ Foreclosures
- Local Stay-at-Home Orders
- Local Mask Requirements/ Distancing
- Emergency Broadband
- Pausing Past Laws (E.g., Minimum Wage Increases)

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COVID-19: State Executive Orders and the Preemption Patchwork

- In some states - Louisiana and Maryland, governors issued statewide stay-at-home orders but allowed local governments to implement additional restrictions based on local conditions, establishing a **regulatory floor**.

- In other states - Georgia, Florida, Texas, Arizona, the statewide stay-at-home orders established a **regulatory ceiling** banning efforts by cities and counties to impose stricter requirements.

- And, some states like Iowa didn't have any stay-at-home orders in effect but still preempted local governments from issuing their own orders.

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Executive Orders Handcuff Local Governments

- A Mississippi executive order issued on March 24 forbade political subdivisions (including cities, and counties) from imposing social distancing regulations or business shut-downs stricter than the state's (LSSC 2020a).

- On April 7, the Governor of South Carolina issued an Executive Order explicitly disallowing local stay-at-home orders stricter than the state's (S.C. Exec. Order 2020)

- On March 26, the Governor of Arkansas issued an Executive Order prohibiting local stay-at-home requirements, arguing that such regulations would interfere with essential operations and commerce (LSSC 2020b).

- Iowa Governor Kim Reynolds: "Schools that choose not to return to school for at least 50% in-person instruction are not defying me. They're defying the law."

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States Threaten Cities

- Georgia Governor Brian Kemp sued Atlanta Mayor Keisha Lance Bottoms to stop her from issuing a mandatory mask order and extending a local stay at home ordinance.

- Texas Attorney General Ken Paxton threatened to sue local officials in Austin, Dallas, and San Antonio unless they rolled back “unlawful” local emergency orders that imposed stricture public health safety measures than the state allowed.

- Nebraska’s Governor Pete Ricketts warned local governments they would not be receiving federal COVID-19 funds if they imposed mask or other local rules.

- Florida Governor Ron DeSantis threatened to withhold up to $200 million in funding from the Hillsborough County School District, which covers Tampa and is one of the nation’s largest, if it did not reopen for in-person learning.

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Past and New Preemption Will Impede the Recovery

48 states limit local fiscal authority

Equitable housing policies preempted in 33 states

City Bankruptcies
Emergency Managers
State Takeovers

Emergency Powers
Worker Safety

Elections/Voting
Vaccines

Corporate liability
Limiting municipal litigation

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Emergency Powers: Key to COVID Response

- Can a **broad grant of emergency authority** to localities **avoid preemption** that would apply under normal circumstances?
- Searching for **precedent**
- What have we learned from a close look at grants of emergency authority in **AZ, FL, and TN?**

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Emergency Authority Examples: AZ, FL, TN

Arizona:

Ariz. Stat. Ann. § 26-307:

"[C]ounties, cities and towns ***may make, amend and rescind orders, rules and regulations*** necessary for emergency functions but such ***shall not be inconsistent with orders, rules and regulations promulgated by the governor***."

"***Existing laws***, ordinances, orders, rules and regulations ***in conflict with*** this chapter or orders, rules or ***regulations issued under authority of this chapter are suspended*** during the time and to the extent that they conflict."

Ariz. Stat. Ann. § 26-311(B):

"If an emergency is declared . . . , ***the mayor or the chairman*** of the board of supervisors shall . . . ***shall have the authority to impose all necessary regulations to preserve the peace and order of the city***, town, or unincorporated areas of the county, including but not limited to . . . ."

Florida:

Fla. Stat. Ann. § 252.38(3):

"In carrying out the provisions of ss. 252.31-252.90, each political subdivision shall have the power and authority . . . [t]o . . . ***provide for the health and safety of persons and property***, including emergency assistance to the victims of any emergency . . . ."

Tennessee:

Tenn. Code Ann. § 58-2-110(3):

"In carrying out this chapter, each political subdivision has the power and authority to . . . ***provide for the health and safety of persons and property***, including emergency assistance to the victims of any emergency . . . ."

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Worker Protections: Who Is At Risk?

- Protecting worker health is necessary to protect public health
- Black and indigenous workers and workers of color, including immigrants, are at increased risk.
- Workers in low-wage jobs, workers in health care, retail and service industries, airport workers, maintenance workers, home care providers, meat and poultry processing workers, and others in the informal economy are also at increased risk.

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Source: National Employment Law Project, Worker Safety & Health During COVID-19 Pandemic: Rights & Resources (April 2020)

Worker Protections: Failure of OSHA to Protect Workers

- OSHA and CDC have published only *voluntary* guidance.
- OSHA retaliation complaints process is generally very slow.

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Worker Protections: What Do Workers Need?

- Social distancing
- Mask requirements
- Flexibility in where and when to work
- Access to soap/running water/hand sanitation
- Workers should not share equipment
- Good housekeeping & cleaning/disinfecting after exposure
- Strong sick leave policies
- Clear policies when workers become exposed at work
- Notification when a co-worker has COVID-19

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Worker Protections: The Role of Local Government

- State & local governments can implement mandatory standards to protect workers
- Here is NELP's guide with sample ordinance language
- Some examples of local protections:
  - Los Angeles Worker Protection Order (April 2020)
  - Philadelphia COVID-19 Whistleblower Ordinance (July 2020)
  - Various Texas Cities Require Customers to Wear Masks

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Evictions, Foreclosures, and Local Governments

- Federal and state efforts – limited and ending
- Local role, preemption, and constitutional challenges

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Taxation & Spending Conflicts

Revenue Challenges

Structural Constraints

Intergovernmental Aid?

Lessons of the Housing Crisis

New Tools?

Thinking Long Term

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Preemption & The Pandemic: Structural Change

Efforts to Suspend/Repeal Preemption

Bills to Affirm/Expand Local Authority

Home Rule Reform

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Additional Resources

Richard Briffault, *Election Law Localism in the Time of COVID-19* (June 2020), The University of Chicago Law Review Online (link here)

Local Solutions Support Center COVID-19 Resources (e.g., “Decision Tree” to determine local authority in general, on housing & homelessness policies, and broadband; Model Resolutions calling for local authority; Issue Briefs on the impact of COVID-19) (link here)

Paul Sonn & Deborah Berkowitz, National Employment Law Project, *Protecting Worker Safety & Health in the COVID Crisis: A State & Local Model Policy Response* (April 2020) (link here)

A Better Balance: Model Law: Establishing Public Health Emergency Leave for a Public Health Emergency That Covers the Private-Sector Gaps in the Federal Families First Coronavirus Response Act (link here)

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A national hub that coordinates and creates efforts to counter the abuse of preemption and strengthen local democracy.

Goals are to raise awareness of state preemption and its consequences, reduce the use of this threat to democracy, and strengthen the power of cities to advance policies that promote equity, inclusion, public health, and civic participation.

www.supportdemocracy.org

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