



The Local Power & Politics Review

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Introduction

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In 2018 and 2019, ChangeLab Solutions and the Local Solutions Support Center partnered to confront the ongoing misuse of state preemption legislation against the nation's cities. Over a series of four convenings, invited researchers, practitioners, advocates, and funders from across the country met and discussed the trends and effects of preemption on local housing policy, public health, and policies promoting economic opportunity and equity. Through these discussions, the scope of state efforts to diminish local governing capacity and authority became increasingly clear, as did the hostility and political motives of those seeking to constrain local power, and the potential effects of that hostility on local democracy, community well-being, and citizens' lives.

The hyper-partisanship that has infected the national and state political environment rewards non-cooperation, grand gestures, caustic hyperbole, and hardline position-taking. Instead of rising above the fray, many state leaders have embraced negativity, taking aim at progressive localities, local leaders, policies, and programs by weaponizing preemption legislation and other means of control. Local powers and policies targeted for preemption over the past decade involve a broad and expanding range of activities and interventions aimed at improving the local quality of life by, for example, protecting the natural environment and securing public safety, fair labor practices, public health, and safe and affordable housing. The big winners are the various industries that benefit from fewer regulations and restrictions, and state politicians who secure favor among their peers, funders, and like-minded constituents – most of whom live outside of preemption-affected areas.

Of course, preemption is not the only tool by which state leaders constrain local responsiveness. Threats to preempt are quite often just as effective, as are threats to withhold funding, refusal to cooperate on other matters, threats to curtail unrelated local authorities and

responsibilities, public admonition, and more. Reliance on these political tools, rather than on solution-oriented political tools of compromise (bargaining, collaboration, negotiation, etc.) often has devastating effects that are borne disproportionately by the most vulnerable people in our communities, including individuals of color, low-wage workers, the LGBTQ community, children, and women. This is especially true when state leaders are unwilling or unable to fill the policy vacuum that they have created with policy remedies of their own.

The onset of COVID-19 cast the state-local legal and political arrangement, and its inherent flaws, into further relief. It also exposed the lengths to which some state leaders will go – and what they are willing to sacrifice – to continue their assault on local control. As of June 1, eighteen governors preempted local governments from enacting virus mitigation laws such as face mask mandates, stay-at-home orders, orders to close businesses, among others, some threatening to withhold funding for local defiance (Haddow, et al. 2020). (This, in contrast to the seventeen governors who gave their local governments permission to impose greater restrictions than required by the state.) More recently, Florida's governor reopened bars and restaurants and preempted local governments from fining residents who defy pandemic-related mandates, "including requirements that residents wear masks" (Local Solutions Support Center 2020). Georgia's governor mandated masks in public places, but not private businesses, citing the need to protect "property rights and personal freedoms" (Local Solutions Support Center 2020). Where governors have imposed orders to prevent the spread of the virus, such as by closing schools and businesses, and limiting public gatherings, some find their state legislatures moving to curtail gubernatorial executive order power (Local Solutions Support Center 2020). As noted in the articles that follow, the public health impact of these orders is potentially devastating (e.g., Doughton 2020).

Those who attended the preemption convenings could not have predicted state hostility and preemption within the context of the pandemic, but they did predict a continuation of state hostility, and they connected that hostility to its ability and likelihood to negatively impact human health and well-being. Calls for the sharing of ideas, intervention strategies, and information



and resource needs followed. From these discussions came repeated appeals for better connections between researchers and research findings and advocates, as well as between researchers working within different policy fields.

The Local Power and Politics Review was created to address this disconnect. Fourteen authors were tasked with working as advocate-researcher co-authors to produce short articles highlighting recent research findings, emerging issues, and data and research needs across seven policy fields: Public Health; Local Fiscal Authority; Labor Policy; Environmental Policy; Civil Rights and Discrimination; Housing Policy; and Emerging Technologies.

The resulting articles offer insight into the state-local political environment as it appears in each policy field. The authors suggest the potential effects of local constraints and, when available, point the reader to evidence-based research findings. Attempts to recover local power are discussed, often with calls for research into the efficacy of specific approaches, such as preemption repeal or litigation. Finally, each article suggests specific avenues for future research.

Comments and recommendations are welcome! You will find contact information at the end of this document.

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Public Health

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The coronavirus pandemic and the erratic governmental response has highlighted the importance of public health leadership for cities, states, and the federal government. The disproportionate death rates among African Americans, Native Americans, Pacific Islanders, and Hispanics/Latinos, have been a grim reminder of the unequal distribution of good health, disease prevention, and access to health care in the United States.

Local governments play an important role in promoting the health, safety, and welfare of their communities through the provision of public health services and regulation. Many have proactively enacted policies targeting inequalities in health-related efforts and outcomes. A short selection of these policies includes those designed to limit consumption of potentially harmful products, such as soda or tobacco; programs to promote healthful lifestyles; and regulations that support healthful behaviors and public places by, for example, requiring employer-provided paid sick leave. Other local policies have less obvious, but significant, connections to public health outcomes, like raising the minimum wage and protecting low-income renters from displacement.

States that are opposed to local efforts to promote public health may preempt local regulations and policies by direct legislative action, voter initiative, or via a judicial ruling of “implied



preemption.” Recently, however, states have turned to more aggressive tactics that might be called “punitive preemption” (Briffault 2018). These tactics include sweeping preemption of long-established local powers, as well as threats to withhold funds or authority from noncompliant localities (Briffault 2018; Scharff 2018).

Local officials are acutely aware of these threats, and substantial majorities of those surveyed report being dissuaded from adopting policies by the specter of preemption (Rutkow, et al. 2018). Those who have plowed forward in the face of threats, or resisted state efforts to preempt, have done so through litigation and grassroots political organizing, with mixed success (Hodge, et al. 2018). Preemptive state firearm laws, for instance, make it very difficult in many states for local communities to pass stricter gun violence prevention measures despite overwhelming public support for gun violence prevention, intense media scrutiny, and intergenerational grassroots movements (Giffords Law Center 2019).

Of course, preemption can be used, at least in theory, to promote better health outcomes. To guide policymakers and advocates in deciding on whether preemption is beneficial, some advocates and scholars have urged an “equity-first” framework that uses evidence-based criteria for determining whether an instance of preemption is likely to enhance or inhibit health equity (Carr, et al. 2020).

Is it a floor that lifts everyone in the state up to a certain level of health benefit? Or a ceiling that impedes communities from providing a greater health benefit than the state? To assist with applying this framework, proponents of an equity-first framework encourage future research to assess the effects of policies—and preemption of those policies—on health outcomes and inequities. Researchers should include members of the communities whose health is jeopardized by preemption in their research design and analysis of findings, and public health advocates should employ equity in their own campaign practices by including these community members, as well.

Rather than focus solely on changing conditions that contribute to poor health, savvy advocates are collaboratively working to dismantle a political source of the inequity by repealing or defending against preemption. Cross-issue coalitions are emerging as a powerful and practical response, uniting various interests for the sole purpose of defending against preemptive state laws that perpetuate inequity. The advocacy groups need not sign on to one another’s primary

mission to stand together against preemption. In Florida, for example, the cross-issue coalition includes representation from groups advocating against preemptive laws to limit local authority over things as diverse as business licensing, guns, employment conditions, wages, immigration enforcement, rent control, pet stores, sunscreen, and more. In West Virginia, a looser collection of advocacy groups has come together to defend against preemption of political subdivisions, guns, consumer marketing, and more. In these states and others, the advocates take the Three Musketeers position of ‘one for all and all for one’ against preemption while remaining publicly agnostic on the specific issues in jeopardy.

One area of public health in which local officials have been at the vanguard is the regulation and taxation of soda and other sugar-sweetened beverages to combat obesity and dental decay (Diller 2014; Shoked 2016; Dana and Nadler 2018). These cities have encountered policy



objections and legal obstacles to their efforts, such as lawsuits from the beverage industry asserting implied state preemption (Dana and Nadler 2018; Roache, et al. 2018). According to one study, cities have largely successfully fended off implied preemption challenges to soda and other excise taxes in the courts (Shoked 2016). Cities have been more vulnerable, however, to outright express preemption by legislatures, usually passed at the behest of the beverage industry in response to a recently enacted or proposed local soda tax (Dana and Nadler 2018; Pomeranz, et al. 2019; Diller 2020). The beverage industry has sometimes achieved success by joining forces with other food and agricultural industries, often lobbying for comprehensive preemption of local regulation of food, soda, and other nutrition-related targets (Pomeranz and Pertschuk 2019). On the other hand, collaborative efforts among public health advocates and others can fend off industry campaigns for preemption. Such was the case with the beverage industry's failed attempt to preempt and repeal Philadelphia's local beverage tax (McCrystal 2020).

More research would be helpful—and is hopefully forthcoming—regarding other areas of local regulation that have the potential to promote public health and equity, and state efforts to preempt. These include areas in which the push-pull of state-local control have played out for years, such as tobacco control, as well as newer areas, like vaping, and other health-related policy areas, such as paid sick leave, housing, infrastructure, and minimum wage. There are also calls for greater scholarly attention to the potential for change via local government class action, such as that brought by forty-nine cities and counties against companies involved in the making, marketing, and distribution of prescription opioids (In Re: National Prescription Opioid Litigation 2020). Finally, increased funding for advocacy efforts to combat preemption is needed.

The COVID-19 pandemic has laid bare the vast inequities in health outcomes in the United States. It has also exposed the relative powerlessness of cities in certain states where



governors exercising emergency authority have overridden local interventions like face mask or social distancing mandates (Burriss, et al. 2020). New research is needed to investigate the ways in which gubernatorial declarations of emergency can alter the state-local balance of power. A better understanding of the role that preemption plays in creating the conditions underlying inequities is vital as the nation seeks to recover from the devastating pandemic. ■

About the Authors

Paul Diller

Paul Diller's professional work focuses on the legal structures, including federalism and gerrymandering, that constrain or empower local policymaking. Diller's work on state preemption of local power has been widely cited; his recent work argues that some forms of preemption are more democratically legitimate than others. In September 2017, Diller authored an amicus brief on behalf of several municipal organizations and local government law professors in a Supreme Court case challenging gerrymandering of state legislative districts. Diller has written extensively on cities' authority to regulate for the promotion of public health.

Diller graduated from the University of Pennsylvania and the University of Michigan Law School, both magna cum laude. After law school, he clerked for Chief Judge Edward R. Becker of the U.S. Court of Appeals for the Third Circuit. He was a trial attorney in the Civil Division of the U.S. Department of Justice in Washington, D.C.

Diller teaches State and Local Government, Property, and Public Health Law, and has also taught First Amendment and State Constitutional Law and a course on Legal Implications of the Covid-19 Pandemic. Diller has directed Willamette Law's Certificate Program in Law and Government since 2014.

Lori Fresina

Lori Fresina is the Vice President and Executive Director of Voices for Healthy Kids, American Heart Association. Through her leadership, direction and dedication, Fresina has made a significant contribution to making communities healthier through effective public policy. Her expertise includes campaign planning, community mobilization, multi-stakeholder collaboration, grassroots development and effectively communicating health messages to public officials.

Before joining the American Heart Association in March 2019, Fresina served as senior vice president and New England office director for M+R Strategic Services. Here and since the launch of the Voices for Healthy Kids initiative, Fresina worked closely with Voices for Healthy Kids and its Strategic Advisory Committee, playing a pivotal role in grantee and advocate training, stakeholder engagement and evaluation.

Prior to joining M+R, Fresina worked for the Campaign for Tobacco-Free Kids and the American Cancer Society, as well as was on the front lines on tobacco work in the New England states beginning in 1994.

Fresina received a bachelor's degree in communications from Emerson College and a master's degree in public policy and citizen participation for Tufts University.

¹ An example might be state housing policies that preempt local zoning codes and promote more affordable housing and more walkable communities (e.g., Oregon House Bill 2001, 2019). Another is increased state control of annexation and incorporation decisions to promote public health by limiting the ability of wealthier municipalities to exclude lower-income communities (Anderson 2018).

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Civil Rights & Discrimination

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One major flashpoint in the on-going conflicts between states and cities has been in the area of civil rights, especially LGBTQ rights.

Although federal law does not explicitly protect against employment discrimination based on sexual orientation or gender identity, the Supreme Court's recent decision in *Bostock v. Clayton County* interpreted Title VII of the Civil Rights Act of 1964 to protect LGBTQ individuals due to the law's prohibition on discrimination based on sex (*Bostock v. Clayton County* 2020). Although *Bostock* extends employment nondiscrimination protections to many LGBTQ individuals, Title VII of the Civil Rights Act only applies to employment discrimination and only to businesses with 15 or more employees. Additionally, many state civil rights laws do not include protections for LGBTQ persons. Numerous cities have sought to fill this void and to build on state and federal nondiscrimination protections, generating opposition in some statehouses.

Three states—Tennessee, North Carolina, and Arkansas— expressly forbid localities from enacting LGBTQ-inclusive nondiscrimination ordinances (*Equal Access* 2011; *North Carolina General Statutes* 2019; *Interstate Commerce* 2015). Though these laws are facially neutral—they prohibit localities from enacting nondiscrimination ordinances that go beyond state protections—it is telling they were passed soon after cities in those states enacted LGBTQ protections. North Carolina's nondiscrimination preemption law additionally limits local authority to protect transgender individuals' bathroom access, which Charlotte had sought to protect (*Charlotte, N.C. Ordinance* 2016; *Harrison* 2016). Texas and West Virginia have considered similar laws that would preempt local LGBTQ protections, and seventeen states have considered legislation limiting local authority to protect transgender individuals' bathroom



access (Movement Advancement Project 2018). Idaho also recently become the first state to bar public schools and colleges from allowing transgender women to play sports on teams consistent with their gender identity (Fairness in Sports 2020). Another eighteen states have considered similar bans (e.g., Equality Federation; American Civil Liberties Union 2020).

Some state preemptive laws affect LGBTQ rights in less obvious ways. For example, laws limiting local authority around professional licensing, like those considered in Texas (S.B. 1209 2019) and Florida (Preemption of Local Occupational Licensing 2019), could implicate local conversion therapy bans. Additionally, Florida and Tennessee have seen bills that would prohibit localities from imposing any kind of penalty on businesses based on the internal policies or practices of that business, which would not only prohibit local business regulations like paid sick leave requirements, but also local employment nondiscrimination policies (Government Actions Discriminating Against Businesses 2018; H.B. 54 2018; H.B. 563 2019). States have also adopted religious freedom or “right to discriminate” bills that purport to exempt businesses from LGBTQ-inclusive local or state public accommodation or employment discrimination laws (e.g., Barber v. Bryant 2017), and religious liberty has been invoked by businesses refusing to serve

same-sex couples in violation of state or local laws mandating equal treatment (Masterpiece Cakeshop v. Colorado Civil Rights Commission 2018).

The conflict between states and cities is slightly different in the context of race, as more federal anti-discrimination laws establish a floor of equal treatment in employment, public accommodations, and housing. Nevertheless, preemption has emerged as a barrier to remedying certain forms of structural injustice.

State responses to local efforts to prevent the spread of COVID-19 in their communities present a clear example. One of the more disturbing facets of the COVID-19 pandemic in the United States is that Native American, Black, and Hispanic or Latinx individuals are more likely than other demographic groups to contract the disease and experience more severe effects from it (e.g., Centers for Disease Control and Prevention 2020; Millett, et al. 2020; van Dorn, et al. 2020). Some states have responded by hamstringing cities when it comes to establishing health and safety measures to protect those communities. Georgia’s governor, for example, has prohibited cities from adopting stay-at-home orders, mask requirements, or other COVID-19-related responses that are stricter than the state’s (Kemp 2020). Mississippi, Florida, Texas, and Arizona also saw state efforts to curtail local COVID-19 responses (Mallinson 2020).

The Black Lives Matter protests highlight other flash-points between state and local authority. Consider recent conflicts over Confederate monuments, which pit cities seeking to remove local monuments against states that want them maintained. A number of states have enacted

statutes preventing localities from removing “historical” statues (Schragger and Retzloff 2019). Another five states have considered bills that would protect those monuments (2019). Virginia recently repealed its original “statue statute,” making it the first state with an existing restriction to do so (War Memorials for Veterans; Removal, Relocation, etc. 2020).

Preemption of local workplace regulations also presents a barrier to local efforts to remedy structural discrimination. Minimum wage preemption is a prime example. Since African-American and Latinx workers are more likely to work in lower-wage jobs, they stand to gain more from a higher minimum wage (Huizar and Gebreselassie 2016). But twenty-five states preempt local minimum wage increases (Huizar and Lathrop 2019). It is notable that several minimum wage preemption laws were passed in direct response to local minimum wage increases in majority-minority communities, as has happened in Atlanta, GA; Birmingham, AL; Cleveland, OH; Durham, NC; Memphis, TN; New Orleans, LA; and St. Louis, MO (Partnership for Working Families 2017). A three judge panel of the Eleventh Circuit permitted minimum wage employees in Birmingham to bring an equal protection challenge against the state’s preemptive



legislation on the grounds that it was motivated by racial animus (*Lewis v. Governor of Alabama* 2018). The full panel of the Eleventh Circuit reversed, however, holding that the employees did not have standing (*Lewis v. Governor of Alabama* 2019).

Another workplace regulation with racial justice implications, often referred to as “ban-the-box,” prohibits employers from asking job applicants whether they have an arrest or conviction record until after the initial screening process, with the intention of increasing job opportunities for workers with a criminal record (National Employment Law Project 2017). Given the racial disparities in our criminal justice system, that population is disproportionately minority. At least five states preempt private sector ban-the-box policies (Partnership for Working Families 2020).

The racial implications of workplace preemption are particularly ripe for further research. For instance, one justification often used in favor of statewide regulation is that the state economy benefits from regulatory uniformity, lowering costs for business. There is little solid evidence supporting such claims, however. Advocates could also benefit from data that disaggregates the impact of policies like minimum wage increases, paid sick leave requirements, and fair hiring policies by race, gender, and LGBTQ status.

One final example of how state preemption harms minority communities is the emergence of state laws limiting local authority to create human rights commissions or police oversight boards. When Nashville instituted a community oversight board in January 2019 that had the authority to investigate police misconduct, the Tennessee legislature responded by stripping citizen boards of their authority to issue subpoenas (Allison 2019).

The use of state preemption to undermine local anti-discrimination laws reflects the increasingly well-documented gap between cities and their state legislatures, especially in “red” states (Schragger 2018). Some explanations for this gap include: (1) cities’ increasing willingness to



legislate civil rights protections; (2) the political gap between rural and urban constituencies; (3) state legislative gerrymandering that disfavors urban areas; and (4) the nationalization of local and state politics. LGBTQ issues have been most salient because of the absence of protective laws at the federal level. But cities are also seeking to pursue structural civil rights remedies to protect core urban constituencies who are politically and culturally distinct from the state as a whole. These remedies invite state resistance and overrides of local laws. ■

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Dilini Lankachandra directs A Better Balance's Defending Local Democracy Project. She works with local advocates and policymakers to empower communities to promote progressive policies in the face of state interference.

She graduated from UC Berkeley School of Law (Boalt) in 2015. During law school she worked extensively with the East Bay Community Law Center's Green-Collar Communities Clinic to draft and pass a law creating a business entity specifically for California worker cooperatives.

Prior to joining ABB she worked at Brightline Defense, a San Francisco-based policy advocacy nonprofit committed to bringing clean energy and jobs to marginalized communities in California. She completed her undergraduate studies in Classics and Political Science at Columbia University.

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Schragger has published in the Harvard, Yale, Chicago, Virginia and Michigan law reviews, among others. He has been a visiting professor at Columbia, Quinnipiac, Georgetown, NYU, Chicago and Tel Aviv. He is the author of *City Power: Urban Governance in a Global Age* (Oxford University Press, 2016).

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Environmental Policy

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Academic research into the preemption of local environmental efforts has generally applied a broad, national lens to the problem. Such research tends to assess environmental preemption efforts in light of other preemption trends, and to discuss possible remedies that local governments may have within the home rule frameworks that exist in many parts of the country.

Mostly, however, the research has suggested that such remedies are limited. Specific suggestions supporting environmental efforts include resorting to state constitutional environmental protections, where they exist.

Such findings reflect current limitations of home rule authority resulting, at least in part, from recent changes in the national and state political arenas. The massive political shift in state chambers in 2010 and the dramatic increases in corporate spending in elections due to the Citizens United decision has led to increasingly aggressive state action against localities, including an expansive use of preemption legislation (Evers-Hillstrom 2020). These efforts are often driven by state legislators who are ideologically-driven or pressured by special interests to constrain local authority in a variety of economic, social, and environmental areas that are unique to, and concentrated within, cities (Diller 2020). In the environmental realm, some of the more common local environmental policies being challenged relate to plastic pollution, fracking, and climate change.



Images of islands of plastic in the ocean and the science around microplastics has led several cities to ban the use of plastic bags. Local governments, which are generally responsible for waste disposal, face increased costs and logistical difficulties from managing plastic pollution (see, e.g., Fox 2017; Sternbergh 2015). Plastic bag bans may be motivated by cost reduction, as well as a broader desire to promote local sustainability practices (see, e.g., Flower 2012). As of October 2019, 471 local plastic bag ordinances had been passed in twenty-eight states (Romer 2019). To date, fifteen states have also taken some form of preemptive action on plastic bags (Maldonado, Ritchie, and Kahn 2020). State preemption of local action on plastics can be attributed to corporate pressure from the plastics industry (Maldonado, Ritchie, and Kahn 2020) as well as broader interest group pressure from organizations like the American Legislative Exchange Council (ALEC), which has included plastics preemption as one of its model pieces of legislation (2015).

Similar state preemptive efforts have targeted hydraulic fracturing—fracking—regulation. In November 2014, residents of Denton, Texas, went door to door to promote a ballot initiative to protect their schools, backyards, and community from the effects of fracking (Krauss 2014). The

initiative passed, making Denton off limits to the fracking industry, despite industry attempts to defeat the initiative and outspending community organizers 10-1 (Krauss 2014). In response, the Texas legislature adopted the American Legislative Exchange Council's model bill which, in 2015, stripped all regulatory authority over the oil and gas industry from all Texas municipalities, effectively prohibiting Denton from protecting its community. The outcome in Texas mirrors the preemption of local bans on fracking that has occurred in other states, including Oklahoma, North Carolina, and others (Corriher 2017).

Another emerging issue in the state-local authority fight concerns building electrification. Cities, primarily in California, have stepped up to address the state's climate goals and wildfire threat by requiring that all new construction forgo natural gas in favor of electric-only hookups for appliances and heating and cooling devices (see, e.g., Gough 2020). With buildings contributing roughly ten percent of the U.S. carbon emissions, this is an important step forward in decarbonizing the economy and protecting communities from the most damaging effects of climate change. In 2020, despite studies showing significant improvements in indoor air quality and savings on utility bills in electric-only buildings, the state legislatures in Arizona, Louisiana, Tennessee, and Oklahoma restricted municipal authority over choice of utility provider (see, e.g., Groom and Valdmanis 2020). Notably, no municipality had introduced or moved forward with bans on natural gas hook-ups in the states that passed preemptive legislation. Thus, these state laws were not passed in response to local actions, but rather to broader national trends.

Advocates across the spectrum of issues have come together, seeking to repeal preemption laws as political power has shifted within state legislatures. In 2019, Colorado was able to repeal restrictions around local siting of wells. Eight additional states introduced legislation to repeal preemption efforts but have yet to pass a bill. In 2021, preemption prevention and repeal efforts will continue, particularly after a lobbying campaign by the plastics industry to delay or eliminate

plastic bag bans in response to COVID-19. Despite evidence that reusable bags are safe with proper washing, and that COVID-19 can live on plastic for up to 72 hours, efforts to reduce single use plastic have been delayed (van Doremalen, et al. 2020).

There is an opportunity for more and better scholarship on the political conditions that lead to these forms of preemption of environmental efforts, and the kinds of environments in which local governments have been more successful in asserting their ability to govern.

While a national lens is helpful for placing environmental preemption in context, that lens also runs the risk of eliding nuances in state preemption of local environmental efforts. For example, preemption of environmental efforts by the state has different functional effects depending upon whether a state law exists to fill in the gap left by preemption. Preemption of local fracking bans in states with a comprehensive oil and gas scheme is arguably distinct from preemption of local plastic bag bans or climate efforts where no state law fills in the gaps. Speaking in general terms about preemption of environmental efforts also neglects the very particular environmental conditions that exist from one local government to another.

Thus, an important next step for scholars is to step away from a uniform national gaze and to localize the conversation about environmental efforts, taking into account the particular conditions regarding local authority and environmental conditions across the country. In doing so, scholarship may be able to bridge the gap between national trends and local realities

to offer useful information to advocates on the ground. In addition, by acknowledging the limitations of local protection within the home rule framework, it becomes clear that the remedy for local governments may not be in the courts, but in state legislatures and city halls. ■



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Sarah Fox is an assistant professor at Northern Illinois University College of Law. Her research focuses on environmental law and land use, particularly the unique environmental issues facing cities and the capacity that local governments may have to solve those problems. In consequence, her work has highlighted the importance of local action on a variety of environmental health and safety issues, and, necessarily, the preemption barriers that often face local governments trying to take that kind of action.

Prof. Fox previously worked as a clinical teaching fellow in the environmental law clinic at Georgetown University Law Center, where she represented numerous non-profit organizational clients and supervised student work on cases addressing environmental issues in state and federal court, and was also a litigation associate in the New York offices of Jones Day and Quinn Emanuel Urquhart & Sullivan LLP.

Jennifer Hensley

Jennifer Hensley started her career with Sierra Club by working as an organizer in Western IL. The goal of the campaign was to inject environmental issues relating to water quality and Confined Feeding Operations (CAFO) into the IL 17th Congressional race.

In 2001, Jen moved into a position with the Sierra Club Illinois Chapter where she continued running their water programs, but began to add more policy and political work to her portfolio. As Program Manager for the Illinois Chapter, she built campaigns and engaged in lobbying activities around issues like clean energy, endangered species management and toxics.

In 2014, Jen was named the Director of State Lobbying and Advocacy where she works with Sierra Club staff and volunteers across the country to promote and protect a wide swath of environmental issues in state capitols.

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Emerging Technologies

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As new technologies have become increasingly pervasive, altering private enterprise and public governance alike, local governments' power to regulate emerging technologies is shifting.

State legislatures have preempted local regulation of gig economy firms, efforts to bring municipal broadband to cities, and local regulation of autonomous vehicles. At the same time, local efforts to constrain facial recognition and other surveillance technologies are perhaps stronger than ever before, representing a new avenue for progressive advocacy.

The gig economy is ground zero for state efforts to preempt or forestall local regulation related to emerging technologies. Many of these efforts are the product of special interest pressure. For example, as the ridesharing industry expanded, it lobbied the states to preempt local regulatory authority related to their activities (Davidson and Reynolds 2019). These efforts have been largely successful, although some states have made exception for their largest cities, allowing them to regulate the ridesharing industry, at least temporarily. The result tends to be deregulatory. Because localities usually regulate taxi companies, removing ridesharing companies from the traditional ambit of taxi regulation creates a regulatory gap, making it impossible for local governments to, for example, require ridesharing drivers to undergo the criminal background checks that have become customary for taxis.

One major exception is California's enactment of AB5 last year, which—while not specifically targeted at ridesharing—extends state labor protections to gig workers, including Uber and Lyft drivers (Dubal and Paul 2019). AB5 illustrates the importance of cross-sectoral regulation



in addressing the range of issues created by ridesharing companies rather than simply treating ridesharing as a mode of transportation.

States are increasingly preempting local regulation of other sectors of the gig economy, as well. As concerns over the impact of short-term rentals on affordable housing and rental markets have grown, cities have moved to enforce existing zoning regulations or impose new ones to curtail negative effects. In 2019, for example, North Carolina enacted a bill that prevents local governments from requiring rental permits, a measure widely understood to be targeted at Raleigh's Airbnb regulations (Billman 2019). Employing state courts, Airbnb has also brought a series of successful challenges to local regulations around the country, asserting that efforts to require the company to disclose user data, take down listings, or verify that hosts have the required licenses violate Section 230 of the Communications Decency Act, which preempts conflicting state and local laws (Goldman 2019).

Not every effort to forestall local regulation has been successful, however. In Florida, a bill that would have preempted local regulation of Airbnb and other online homesharing platforms

recently died in committee (Vacation Rentals 2020). And last year, the Pennsylvania Supreme Court held that areas zoned for “single housekeeping units” did not permit short-term rentals, keeping the power to regulate homesharing squarely in local hands (Slice of Life, LLC v. Hamilton Township 2019).

Municipal broadband has similarly been an area of conflict between state and local government. Local governments, libraries, and other local facilities have long tried to expand Internet access to underserved populations. However, state laws have limited local authority to invest in their own broadband networks or to partner with independent companies to create new options in the broadband market. Nineteen states specifically preempt and discourage municipal broadband networks and partnerships (Kienbaum 2019).

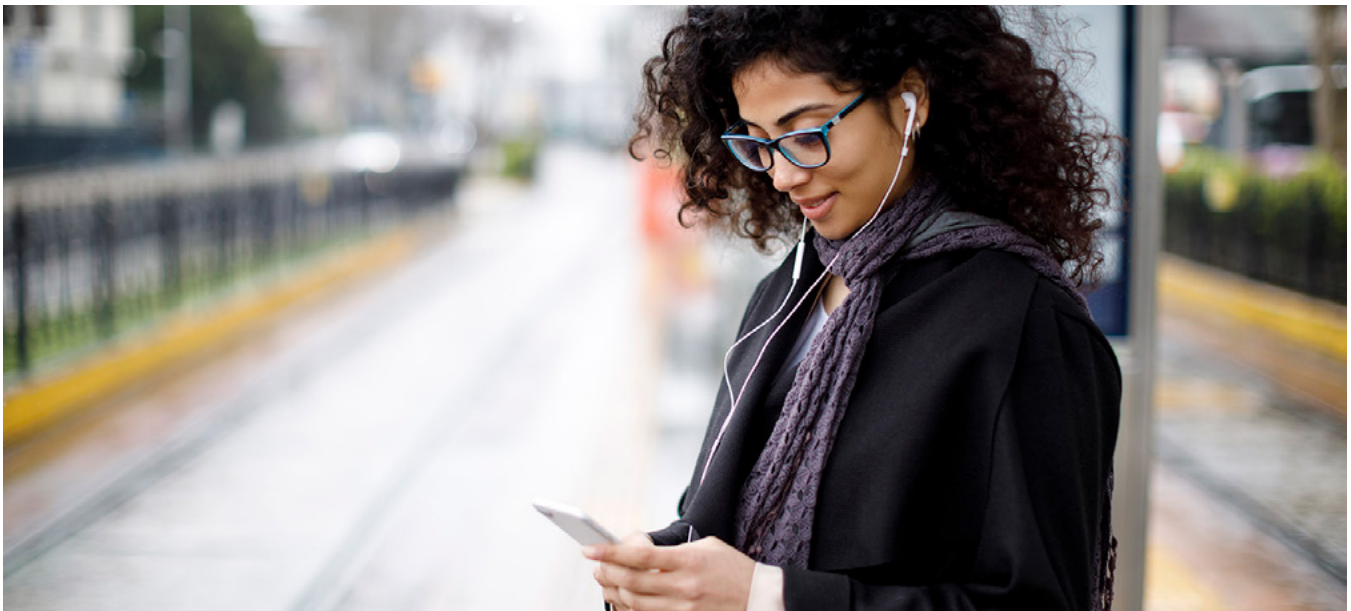
Proponents of such measures argue that preemption is necessary to encourage private sector investment. The reality, however, is less certain. Since North Carolina passed a law preempting municipal networks, none have been built. Today, many areas of North Carolina, some within a few miles of major population centers, still lack adequate Internet access (Brown 2020; Killian 2020). A recent study by Brian Whitacre and Roberto Gallardo found that restrictions on municipal and cooperative networks “decrease general broadband availability by 3 percentage points” (Whitacre and Gallardo 2020).

The COVID-19 pandemic has revealed the danger of leaving Internet access solely to the private sector; McKinsey predicts the learning loss will be greatest for low-income and families of color, in part due to significant disparities in-home Internet access (Dorn, Hancock, and Sarakatsannis 2020). Chattanooga was able to navigate Tennessee’s preemption, ensuring low-income children within the city have high-speed home access to the Internet (Brand 2020).

Since 2015, several states, including Michigan, Missouri, Georgia, Kansas, and Virginia, considered creating new restrictions to discourage municipal networks but abandoned them

in the face of public opposition. A 2017 Pew survey showed strong majorities of Republicans, Democrats, and Independents believe the decision whether to build a municipal network should be made by the community itself (Anderson and Horrigan 2017). Yet efforts to reverse preemption laws have rarely succeeded, perhaps because of the telecom industry's political clout (Barber 2012). California was perhaps the first state to reverse any preemption of municipal networks, affecting a law that only applied to small rural public entities (Chamberlain 2020). In 2019, Arkansas amended its preemption law to allow cities to build a network, but only if they received a federal grant to help fund it, an effort to bring more federal funding to the state (Gonzalez 2019).

The Federal Communications Commission compiled a lengthy record analyzing state preemption of municipal broadband and found that removing those preemptions would result in more investment in broadband and other positive outcomes (Federal Communications Commission 2015). More research on how outcomes from municipal networks differ from the outcomes of national cable and telephone companies could help change the discussion, which has largely



been about the presence of broadband rather than specific outcomes related to health care, poverty, education, and other factors indirectly tied to broadband networks.

Perhaps the most successful example of local regulation of emerging technologies has been in the area of local control of police surveillance.

As Ira Rubinstein and others have suggested, some of the most meaningful regulations of privacy and surveillance are being enacted at the local level (Rubenstein 2018a). Some of these local regulations attempt to address the transparency deficits that plague surveillance technology. Catherine Crump has documented how law enforcement agencies often begin new surveillance programs and acquire surveillance tools without disclosing those activities to city council and other oversight agencies, let alone the public. A web of non-disclosure agreements, some of which purport to override state open records obligations, often surrounds policing technologies that are supplied by private-sector vendors (Crump 2016; Bloch-Wehba 2020).

In cities such as Nashville, Seattle, and Cambridge, local governments have enacted new laws regulating police surveillance technology and requiring a cost-benefit analysis and opportunities for public input before the police procures new tools. A similar initiative is underway in New York, where the City Council has been considering the Public Oversight of Surveillance Technology Act (Fight for the Future 2020). Some states have adopted even stronger legislation: Washington recently enacted a new law that will require state and local agencies to prepare an “accountability report” before developing, procuring, or using facial recognition technology. While some state laws might affect local governments’ data retention and disclosure practices, states have so far largely deferred to local government authority on policing and surveillance issues (Rubenstein



2018b). At the time of writing, it is too early to say whether ongoing demonstrations during the spring and summer of 2020 might prompt a realignment toward either local empowerment or more state control of law enforcement.

As technology radically transforms the American economy, cities and states are also starting to confront 5G infrastructure, cybersecurity, autonomous vehicles, and a range of other tech policy issues. While progressive advocates have found success at city councils and mayors' offices on some of these issues, the economic downturn and budget crises emerging from the pandemic may hinder some of these new advances. As COVID-19 has rapidly transformed American cities – highlighting economic precarity, increased surveillance, and privatization – technology's role has never been more essential. Yet both cities and states may turn to governance tools like public-private partnerships to cut costs in an atmosphere of increasing austerity. Given these shifts, and the technology industry's outsized influence in state legislatures, new challenges for accountability and transparency are likely. These fights over local and state authority to govern new technologies are just beginning. ■

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In 2019, the Coalition for Local Internet Choice gave Mitchell its “Indispensable” Award and the Blandin Foundation of Minnesota presented him with a “Courageous Leadership” award. In 2015, the White House used Mitchell’s research as building blocks in a National Economic Council report encouraging community networks. He was honored as one of the 2012 Top 25 in Public Sector Technology by *Government Technology*, which honors the top “Doers, Drivers, and Dreamers” in the nation each year. That same year, the National Association of Telecommunications Officers and Advisors named ILSR the Broadband Organization of the Year. Christopher Mitchell helped to found Next Century Cities and served as its Director of Policy for its first five years. He tweets @communitynets.

- ¹Editor's note: Chattanooga accomplished this by building a city-owned utility (Electric Power Board of Chattanooga (EPB)) in 2010. The project cost \$330 million, which was largely generated by private contributions, nonprofit support, public partnerships, and federal funding. Comcast sued and lobbied the state, eventually succeeding in "bar[ring] the city from expanding its fiber optic system beyond its electric footprint" (Stewart 2020). Current efforts include 130 hotspots (completed) and an \$8.2 million effort to place special routers in the homes of 28,000 low-income students. The EPB's ongoing work-around involves providing its Internet service to low-income students "at no cost to the customer" rather than for "free," as the state does not allow subsidized service. "...[I]t's had to engage in some wonky calculations to make it work" (Stewart 2020).
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Housing Policy

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Francesca Menes, *Local Progress*



Systemic and institutional racism has long contributed to inequities and disparities in housing and exacerbated patterns of residential segregation.

Land is a finite resource and as cities confront an ever-shifting landscape and limited resources, Black, Latino, Indigenous and other people of color often find themselves adversely affected by the decisions of those in power while being denied access to decision-makers.

States traditionally delegate authority over zoning and housing policies to local governments, reasoning that municipalities possess distinct expertise regarding local conditions and preferences. Unfortunately, many local governments have been slow to liberalize their zoning policies, exacerbating the lack of sufficient housing to meet their communities' growing demand (Gabbe 2019). In response, a number of states have recently taken steps to override components of local zoning, particularly in single-family neighborhoods and in areas near public transit. For example, California and Oregon now require cities to allow two to four housing units on any land currently zoned exclusively for single-family housing (House Bill 2001; Dillon 2019; Land Use 2019). A separate California proposal would mandate a specific amount of aggregate housing and then allow local governments to determine where new development can occur (Turner Center 2020).

These efforts build upon earlier measures to encourage or require housing-stressed localities to permit sufficient development to meet local and regional housing demands. For example, Massachusetts' Chapter 40B, California's Housing Element Law, and New Jersey's Mount Laurel doctrine constrain local control over zoning in various ways, but have had limited success in producing new affordable units (Freeman and Schuetz 2017).



Beyond these “fair share” measures, states have preempted other land use and housing laws (Lemar 2018). Thirty-two states prohibit rent-control statewide (Rajasekaran, Treskon, and Greene 2019) and a growing number of states proscribe local mandatory inclusionary zoning programs (Ramakrishnan, Treskon, and Greene 2019). States have also constrained, and in some instances expressly prohibited, local efforts to regulate short-term rentals (Davidson and Infranca 2019). Although the motivations for, and practical effects of, these interventions differ, they reveal a willingness to displace local authority in a range of contexts related to housing and land use. Notably, these interventions are often not the product of thoughtful policymaking, but rather of intense lobbying by interested groups.

Calibrating the appropriate balance between state and local power over housing and land use policy demands careful consideration of factors such as equity, efficiency, and democratic representation, as well as a better understanding of the relationship between specific regulations and the supply and cost of housing. Increasing supply will not address discrimination in the marketplace. State restrictions on the ability of local governments to

protect renters and homeowners and limit the localized effects of certain uses, such as short-term rentals, can stymie effective efforts to address unique local conditions and threats to vulnerable communities. At the same time, the mechanics of local participation demand careful consideration. Research on neighborhood participation in local land use processes suggests that those who participate are not representative of the general population in their communities (Einstein, Glick, and Palmer 2019). Seeking to address mistakes of the past, community members are increasingly demanding more open and transparent zoning and land use approval processes and a more participatory zoning process (e.g., Bronx Coalition for a Community Vision 2015).

A growing number of studies find a relationship between both rising housing costs (Gyourko and Molloy 2015) and residential segregation (Lens and Monkkonen 2016) and overly restrictive zoning. Recent research suggests that new development, including market-rate development, lowers housing costs - not just at the city-level, but also in the immediate neighborhood (Asquith, Mast, and Reed 2019; Li 2019). While necessary, building more housing will not automatically increase affordability, particularly for low-income households (Manville, et al. 2019). California and Oregon recently established statewide rent regulation to confront affordability issues (Dake 2019; Dougherty and Ferré-Sadurní 2019). This type of regulation, or state-level protections for local rent regulations, could be used elsewhere to complement efforts to increase housing production.

The COVID-19 pandemic has precipitated a housing emergency, particularly threatening lower-income households.

A number of cities and states have imposed moratoria on evictions and foreclosures (Eviction Lab 2020). In the coming months, rental and mortgage assistance or forgiveness

will likely be necessary (Levin 2020) and financing such efforts will likely require state and/or federal intervention. Statewide action offers the benefits of uniformity but may result in weaker and less effective protections than certain local governments might need to impose. Recognizing this potential, California's governor instituted a two-month, statewide delay on residential evictions for tenants affected by COVID-19, while allowing local governments to impose stricter measures, as necessary (Executive Order N-37-20). This type of state action provides a floor of statewide protection while permitting local governments to institute stronger measures. It also highlights the potential for successful collaboration between local, state, and federal governments.

Local governments remain particularly well-suited to identify local concerns and community needs, even as addressing those concerns may require action or financial assistance at a higher-level of government. To maximize the effectiveness of state and federal programming, local governments must possess the authority and discretion to extend needed services and protections to their constituents. Thus, states should set a regulatory floor upon which local governments can build, rather than unnecessarily preempting local discretion and the ability of local governments to address community needs.

To protect our communities and address such issues as the ever-rising cost of housing, limited housing supply, the commodification of housing, and displacement, housing advocates should center their organizing efforts on accomplishing a combination of local and state legislative and administrative changes. It is crucial to plan for the long haul. From grassroots base building, to the passage of legislation, policy implementation, enforcement and accountability, it is paramount that advocates anticipate the moves of the opposition, remain engaged throughout the process, and be prepared to pressure for necessary amendments to existing policies and laws to ensure that housing-related legislation achieves its goals and is not undermined by unnecessary state interference.



The nation's housing crisis predates the current pandemic; however, pandemic-related housing issues highlight the disproportionate impact of the housing crisis on low-income and working-poor Black and Brown communities. Empirical research examining the effects of various regulatory strategies, including preemption of local zoning, rent regulation, inclusionary zoning, and eviction moratoria on low-income and minority communities is needed. Given the history of systemic, institutional, and structural racism, the principles of participatory action research (Pain, et al. n.d.) should inform current and future research. Data should be produced in concert with community needs and demands. The data must tell a story rooted in a struggle for power: Who has it? Who has the right to wield it? On behalf of whom? The method by which research is produced must engage individuals and communities directly affected, grassroots organizations, those who leverage power, as well as policy makers. ■

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John Infranca is a Professor of Law at Suffolk University Law School, where he teaches courses in property law, land use law, urban law and policy, and religion and law.

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Francesca Menes is the Deputy Organizing Director for Local Progress, a movement of local elected officials advancing a racial and economic justice agenda through all levels of local government. She works to break down barriers between government and community while centering individuals who historically have been excluded or marginalized. Francesca also works to develop our network caucuses, supports the expansion of the Progressive Governance Academy and organizes with network members, national partners and allied organizations to protect local democracy from ever-growing threat of state interference and preemption to advance policy solutions.

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Labor

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Preemption of local labor policies remains an active, concerning field, and recent research has shed new light on the consequences of such preemption for women, people of color, and all workers.

However, the COVID-19 crisis has prompted local labor policy experimentation that could expand structural reform efforts, deepen resistance to state preemption, and spark new research on the consequences of labor standards preemption for public health and equity.

In recent years, the states have increasingly introduced labor preemption bills of various types and targets. One trend, sometimes referred to as “blanket” preemption, includes bills that block a broad range of labor issues (Reynolds and A Better Balance 2018). For example, a recent Iowa law preempted counties and cities from adopting “a minimum or living wage rate, any form of employment leave, hiring practices, employment benefits, scheduling practices, or other terms or conditions of employment” (An Act Prohibiting Counties and Cities from Establishing Certain Regulations...2017).¹

In comparison to “blanket” preemption measures, many labor preemption bills are issue-specific. In 2019, for example, North Dakota became the twenty-fifth state to preempt local minimum wages (Economic Policy Institute 2020). Notably, preemption of minimum wage laws increased exponentially as the Fight for \$15 gained momentum (Huizar and Lathrop 2019). As more jurisdictions guarantee a minimum amount of paid sick time, some states have moved in the opposite direction; seventeen states preempt local paid sick time laws without establishing any statewide paid leave standard (Economic Policy Institute 2020). Six states have preempted local paid leave in favor of enacting a statewide standard expressly prohibiting local governments from supplementing or building upon state-level policies regarding paid sick leave or paid time off (A Better Balance 2020a). A consequence of this type of preemption—whether on paid sick



time or other labor issues—is that it can prevent local innovation and responsiveness to unique local conditions and preferences, as well as to rapidly changing conditions to which the states might be slower to respond, if at all. For example, in the early weeks of COVID-19, several local governments in California passed emergency leave protections that exceeded those provided by the state. Local leaders' willingness, flexibility, and proximity to changing conditions prompted a rapid response, demonstrating the importance of preserving local labor policy authority (e.g., CBS SF BayArea 2020; ABC 7 2020).

New research has highlighted the consequences of increased minimum wage and paid sick leave preemption. A 2019 National Employment Law Project (NELP) study examined 12 cities and counties that adopted local wage laws only to see them preempted (Huizar and Lathrop 2019). NELP found that workers in these jurisdictions lose nearly \$1.5 billion in wages annually and confirmed that people of color and women were disproportionately affected. A 2019 report by the Partnership for Working Families similarly showed the disproportionate impact of minimum wage, paid sick time, and housing preemption on women and people of color through case studies of Pennsylvania, Colorado, Tennessee, and Louisiana (Partnership for Working Families 2019).

Labor preemption extends to other issues, as well (Kim, Aldag, and Warner 2020; Bravo, Warner, and Aldag 2020). Since 2015, nine states have preempted local worker scheduling laws, a response to growing efforts to ensure that workers—especially low-wage workers—have fair and predictable schedules (Economic Policy Institute 2020.) And states are increasingly targeting labor protections concerning criminal justice, equal pay, and LGBTQ rights. Seven states have preempted local laws regulating the job application process. This type of preemption blocks important criminal justice and equal pay measures, such as ban-the-box (preventing employers from soliciting conviction history on an initial application) and salary history laws (banning employers from asking or relying upon an applicant’s previous salary) (e.g., Wong 2019). Three states preempt local nondiscrimination laws that exceed state protections. Although facially neutral, these laws were passed in response to local efforts to prohibit discrimination against LGBTQ individuals (Freedom for All Americans 2020a; 2020b; 2020c).

Labor-related preemption has been fiercely contested by workers’ rights advocates. In addition to challenging new preemption legislation, advocates have also focused on repealing preemption laws and pursuing other proactive strategies. For example, in 2019, Colorado became the first state to repeal a minimum wage preemption law (Quinnell 2019; Huizar 2019). In Michigan, a bill introduced in 2020 would repeal what has been termed the “Death Star” preemption bill that, in 2015, preempted a wide range of employment and labor policies (Geiss 2020). In Tennessee, a coalition has demanded that the governor use emergency powers to suspend preemption laws and restore local authority on paid sick leave and minimum wage (Stand Up Nashville 2020; Jeong 2020).

While the path to successful repeal can be a multi-year effort, each new call for repeal provides an organizing opportunity and signals broader understanding of preemption’s harms and the importance of local democracy.

Due to gaps in federal support, inaction from many state governments, and the disproportionate impact of COVID-19 on communities of color, the pandemic has brought new urgency to calls for structural reform and creative workers' rights solutions at the local level. For example, Los Angeles and Dallas County have issued workplace protection requirements for a subset of essential workers, and cities like New York, Boston, and Chicago, are establishing or expanding access to funds for workers left out of state and federal emergency relief programs (Garcetti 2020; Jenkins 2020; City of New York 2020; City of Boston n.d.; City of Chicago 2020). A proposed New York City Essential Workers Bill of Rights would secure pay premiums for non-salaried essential workers at large employers, prohibit firing essential workers without just cause, and expand paid sick leave access for gig workers (New York City Council 2020). Local governments that adopt worker health and safety protections may spur a wave of local activity in a space where state and federal regulation has traditionally dominated. Additional local reform could also add important pressure at the state level to enact statewide protections.

Going forward, local advocacy and innovation will benefit from research looking at the health and equity costs of labor standards preemption, as well as the disproportionate consequences for low-wage individuals, women, and people of color. The COVID-19 pandemic and resulting financial crisis will continue to lead to new battles around state labor preemption, and the stakes for American workers could not be greater. ■





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Laura Huizar joined the National Employment Law Project (NELP) in 2015. She supports NELP's efforts to create a good jobs economy by providing legal and technical assistance to local, state, and national campaigns to raise the minimum wage and to enforce federal overtime regulations and other protections.

As Legal Director of the Local Solutions Support Center (LSSC) Joint Project with NELP, Huizar oversees and coordinates LSSC's legal work focused on proactive legal strategies to help communities resist and reverse state preemption laws.

Huizar's background includes a variety of social and economic justice-related work, including an Equal Justice Works Fellowship at LatinoJustice PRLDEF and a Marvin M. Karpatkin Fellowship with the American Civil Liberties Union's Racial Justice Program.

Jared Make

Jared Make is Vice President of A Better Balance, a national legal advocacy organization dedicated to advancing the rights of working families, promoting fairness in the workplace, and helping workers across the economic spectrum care for themselves and their families without risking their economic security. A member of ABB's staff since 2010, Make has worked with advocates and coalitions to draft and pass dozens of state and local laws that guarantee paid sick time and paid family and medical leave.

In 2014, Make co-founded ABB's LGBTQ Rights Project to advocate for the rights of LGBTQ workers, raise awareness about the diversity of family structures, and enact workplace policies that cover a range of caregiving relationships.

Make also helped to launch ABB's Defending Local Democracy Project, part of a nationwide effort coordinated by the Local Solutions Support Center, to strengthen, protect, and defend progressive, local laws.

¹Additional examples of this trend have been seen, for example, in an unsuccessful 2019 Florida bill seeking to prohibit almost all local business regulation (HB 3 Fla. 2019; SB 1748 Fla. 2019) and an unsuccessful Texas bill in 2019 that would have preempted most local ordinances pertaining to “terms of employment” (SB 15 Tex. 2019).

²More than 12 state laws and dozens of local laws are now on the books (see A Better Balance 2020a).

³Several of these states grandfathered in or accounted for pre-existing local sick time laws (see A Better Balance 2020a). New York State passed a statewide paid sick time law in April 2020, to be codified in N.Y. Lab. Law § 196-b, which preempted local paid sick time measures except for cities with one million or more people, which preserves New York City’s existing paid sick time law. Maryland’s paid sick time law grandfathered in Montgomery County’s paid sick time law (see Md. Code Ann. Lab. & Empl. § 3-1301 et seq). Oregon’s paid sick time law preempted local paid sick time measures but accounted for Portland’s prior paid sick time law by lowering certain employer size thresholds for businesses in Portland (see Or. Rev. Stat. §§ 653.256 et seq., 659A.885).

⁴Local fair scheduling measures include protections like advance notice of schedules, pay for certain “on-call” shifts, a right to a minimum amount of time off between closing and opening shifts, and the right to request scheduling changes without fear of retaliation (see, e.g., Wykstra 2019; Vox 2019).

⁵Michigan preempts local governments from regulating information obtained on an employment application, while Mississippi preempts local governments from limiting an employer’s ability to become fully informed about the background of an employee or potential employee (see Mich. Comp. Laws § 123.1384; Miss. Code Ann. § 17-25-33). Wisconsin specifically preempts local governments from limiting the solicitation or use of prospective employees’ salary history (Wis. Stat. § 103.36). Indiana specifically preempts local ban-the-box measures (Ind. Code § 22-2-17-3). Tennessee law states that local governments cannot “as a condition of doing business within the jurisdictional boundaries of the local government or contracting with the local government, prohibit an employer from requesting any information on an application for employment or during the process of hiring a new employee” (Tenn. Code § 7-51-1802). Although New Jersey is counted as a state that has preempted local ban-the-box ordinances, it stands in its own category on this issue, since the state preempts local ban-the-box measures as part of a statewide ban-the-box law (N.J.S.A. 34:6B-11 to -19). Iowa prohibits cities and counties from adopting local laws that provide “for any terms or conditions of employment that exceed or conflict with the requirements of federal or state law” relating to “hiring practices,” and pending litigation is considering whether that language preempts local ban-the-box policies (Iowa Code Ann. § 364.3; Iowa Code Ann. § 331.304; *The Iowa Ass’n of Bus. and Industry v. City of Waterloo, et al.* (Iowa Sup. Ct. No. 20-0575, filed Jan. 2, 2020).

⁶This is a practice that perpetuates the gender pay gap and sex-based discrimination.

⁷These three states are Tennessee, Arkansas, and North Carolina (T.N. Code Ann. § 7-51-1802; Ark. Code Ann. §§ 14-1-401 to 403 (West 2015); North Carolina H.R. 142, 2017). Note that Section 3 of North Carolina’s H.R. 142, which states “[n]o local government in this State may enact or amend an ordinance regulating private employment practices or regulating public accommodations,” sunsets on December 1, 2020, although preemption of regulations on “access to multiple occupancy restrooms, showers, or changing facilities” will remain in law but could face further litigation.

⁸Congress, for example, enacted a temporary paid sick leave law with enormous gaps (A Better Balance 2020b; Findlay 2020). Investments in Unemployment Insurance have provided some support but antiquated and poorly funded systems struggle with unprecedented demand (Lee 2020). As emphasized by the U.S. Centers for Disease Control and Prevention, “[l]ong-standing systemic health and social inequities have put some members of racial and ethnic minority groups at increased risk of getting COVID-19 or experiencing severe illness, regardless of age. As of June 12, 2020, age-adjusted hospitalization rates are highest among non-Hispanic American Indian or Alaska Native and non-Hispanic black persons, followed by Hispanic or Latino persons” (U.S. Centers for Disease Control and Prevention 2020). Workers in industries like health care, meat processing, and transportation must risk infection as the federal government refuses to issue mandatory standards (National Employment Law Project 2020).

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Local Fiscal Authority

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The emergence of COVID-19 brought the public health and safety consequences of preemption and non-cooperation between the levels of government into sharp relief. The federal government's failure to create a uniform and comprehensive response to COVID-19 continues to leave the nation's governors in charge, resulting in a patchwork response.

The lack of response in some states, and the incomplete or insufficient response in others, has forced local officials in these states to craft public health responses to COVID-19 without state support or guidance. These interventions, including stay-at-home orders, business reopening guidelines, face mask requirements, and tenant protections, have been challenged by state leaders, often with threats to withhold funds, preemption, and public admonition.

These fights reflect a long-term political trend: The United States' political environment has fostered increasing levels of hostility among many state leaders toward their local governments. As part of this trend, states have preempted and otherwise constrained local authority in a wide range of policy areas, hampering local governments' ability to implement the policy preferences of their residents. This movement, especially preemption, has been widely covered in popular and academic literature; however, often overlooked are state efforts to restrict local governing capacity by constraining their authority to perform necessary, yet basic, local functions.



State limitations on local taxing and spending authority have long constrained local capacity and the ability of local governments to implement policies addressing equity-related concerns. In the context of pandemic-induced economic recession, however, the impact of these limits is severe. In many states, reduced consumer spending, especially in the service sector, led to a rapid decline in sales tax revenue and, thus, to revenue shortfalls which led many local governments to begin furloughing workers only weeks into the pandemic (Romm 2020). Such reductions in the public sector workforce affect localities' ability to maintain existing services, let alone provide for the additional public health, equity, and welfare needs of their communities. This is expected to intensify as states, facing their own revenue shortfalls, will likely close shortfall gaps by reducing intergovernmental aid, a strategy that they have previously employed. To that point, state revenue projections are currently worse than they were during the Great Recession (McNichol, Leachman, and Marshall 2020). As of the beginning of July, seven states face fiscal year 2020 shortfalls of more than 10 percent, and 21 states face fiscal year 2021 shortfalls of 10 percent or more (National Conference of State Legislatures 2020).

Our system of fiscal federalism – the division of functional and financial responsibility between and among the levels of government – was not working before this crisis.

The classic account of the division of governmental responsibilities assumes that higher levels of government will take responsibility for redistributive functions. But, as Kim and Warner argue, the states have abdicated their responsibility for social service programs by shifting them onto local governments (2018). This shift in responsibility, however, has not been accompanied by an increase in local fiscal authority (Wen, et al. 2020). Rather, the trend has been to impose greater restrictions on the ability of local governments to raise revenue. For example, in 2018, Arizona voters prohibited the state and its local governments from imposing new taxes or tax increases on services, binding the state to a sales tax regime that experts have long criticized as both inequitable and inefficient (Arizona Constitution, Article 9, Section 25). Missouri voters enacted a similar constitutional provision in 2016 (Missouri Constitution, Article 10, Section 26). And, in 2019, Texas imposed additional and significant limitations on local governments' ability to increase property tax revenue (Senate Bill 2 2019).

Limitations on local fiscal authority and local revenue shortfalls may lead to remedial policies that have disparate effects within the jurisdiction, with disproportionate damages redounding to Black, Indigenous, and people of color (BIPOC) communities (Atuahene and Barry 2016; Atuahene 2019). In a recent ethnographic study of Detroit's home foreclosure crisis, Atuahene describes the fiscal pressures of the Great Recession as turning Detroit and other cities into "predatory cities" that take private property from vulnerable communities by inflating property taxes beyond owners' ability to pay. Financially strapped cities may also turn to other predatory practices to extract revenue from citizens, such as civil forfeiture, excessive court fines and fees,

and inflated fines associated with policing or local code enforcement (2020). Many have argued that revenue needs have increased local (and state) governments' reliance on criminal justice fines and fees (U.S. Commission on Civil Rights 2017); however, fiscal pressures alone may not explain these increases (Singla, et al. 2020). Criminal justice fines and fees disproportionately affect people of color, rendering monetary penalties an important part of criminal justice reform efforts (Martin, Smith, and Still 2017).

The economic pressure that COVID has placed on local governments highlights their limited fiscal authority and the great need for more revenue flexibility. Of course, the best hope for local fiscal recovery in the short term lies in federal aid, though as of the time of publication such aid is not forthcoming. Providing federal aid to local governments would ensure the continuation of important services, including public health and social service programs. Longer term, the pandemic highlights the need to reconsider the allocation of authority and responsibility at the local level. Local governments cannot ensure the continuity of vital social services without adequate fiscal authority. For an excellent and timely overview of local fiscal authority, see Reschovsky (2019).

The time may be right for such reforms. Williamson, for example, offers new and compelling insights into Americans' attitudes toward taxation and their lived experience with taxes, highlighting the ways that rising income inequality contributes to taxpayers' perceptions of both the tax system and government spending (2017). Kleiman argues that many limits on local taxation undermine local democracy and offers suggestions for reforming these limits (2020). Local property tax systems are the most enduring targets for local tax reform. Youngman provides an excellent list of policy alternatives to consider (2016). The property tax is often praised because it offers governments a stable source of revenue during economic downturns, as property values (and assessments) do not change as quickly as income and consumption behaviors. However, recent work by Hayashi reveals the costs of this stability as he highlights



the equity concerns of cashless tax bases: property owners face difficult choices when their incomes decline but their property taxes do not (2020).

Scholars could do more to aid local officials who are looking for new revenue options. Too often, scholarship on local taxation simply concludes that local taxes are inefficient and poorly-designed. Scholars should devote more attention to policy design questions focusing on local income and sales taxes. Continuing to advance policies based in first-best fiscal federalism concerns suggests a Beckett-like optimism about the possibility of change. Rather, local governments, and the diverse communities which they serve, would benefit more from access to additional sources of local revenue. With well-constructed revenue and spending strategies, coupled with state support, local governments could find the fiscal strength they need to lead the way to recovery. ■

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Joaquin Rios serves as the Arizona State Director for the State Innovation Exchange, also known as SiX. SiX is an advocacy organization that supports state legislators who work to strengthen our democracy, fight for working families, and defend civil rights and liberties. SiX does this through policy and research support, training, leadership development, and forging strategic alliances between its national legislative network and grassroots movements.

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