



Preemption and Its Impact on Policy Responses to COVID-19

Local Autonomy during the Pandemic

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This brief examines the relationship between state preemption of local lawmaking and policy responses to the COVID-19 pandemic. Although multiple states have passed regulations that bar local COVID-19-specific restrictions and guidelines,¹ our concern is more general. We ask whether a state's history of preempting local regulations across a range of policy areas affects time-sensitive policymaking in volatile situations (like during a pandemic) and, if so, what that suggests for recovery efforts and policy innovation more broadly.

We find some evidence that state willingness to preempt tends to limit rapid-response policymaking at both the local and state level. In states that use preemption broadly to block a range of local government actions, fewer COVID-19-related policies tended to be enacted, at both the municipal and state levels. Conversely, in states with fewer preemptive laws, municipal and state-level policy responses to COVID-19 tended to be more expansive. This negative association between a state's preemption of local laws (its preemption level) and local-level COVID-19-related policymaking is stronger for some policy areas, such as education and child care, mobility and transit, and COVID-19 prevention and "flattening the curve." These claims are not causal, and we are not controlling for other factors. However, our findings indicate support for our two hypotheses that a greater willingness to preempt local actions limits rapid-response policymaking.

In this report, we test two related hypotheses on the relationship between a state's preemption of local laws and the number and type of policies enacted in response to COVID-19:

- **Municipalities in states with more preemption laws enact fewer COVID-19 policies.** The logic here is that even if a given law is not expressly preempted, frequent preemption has a chilling effect on municipal-level policymaking.
- **States with more preemption laws pass fewer state-level bills related to COVID-19.** States could be preempting local policies because of a belief that lawmaking is best handled at the state level. But they could also be preempting local policies because of a belief that lawmaking is not appropriate at either the local or state level. In the first case, one would expect that states preempting local laws would be *more* likely to enact state-level policies; in the second case, one would expect that states preempting local laws would be *less* likely to enact state-level policies.

Background

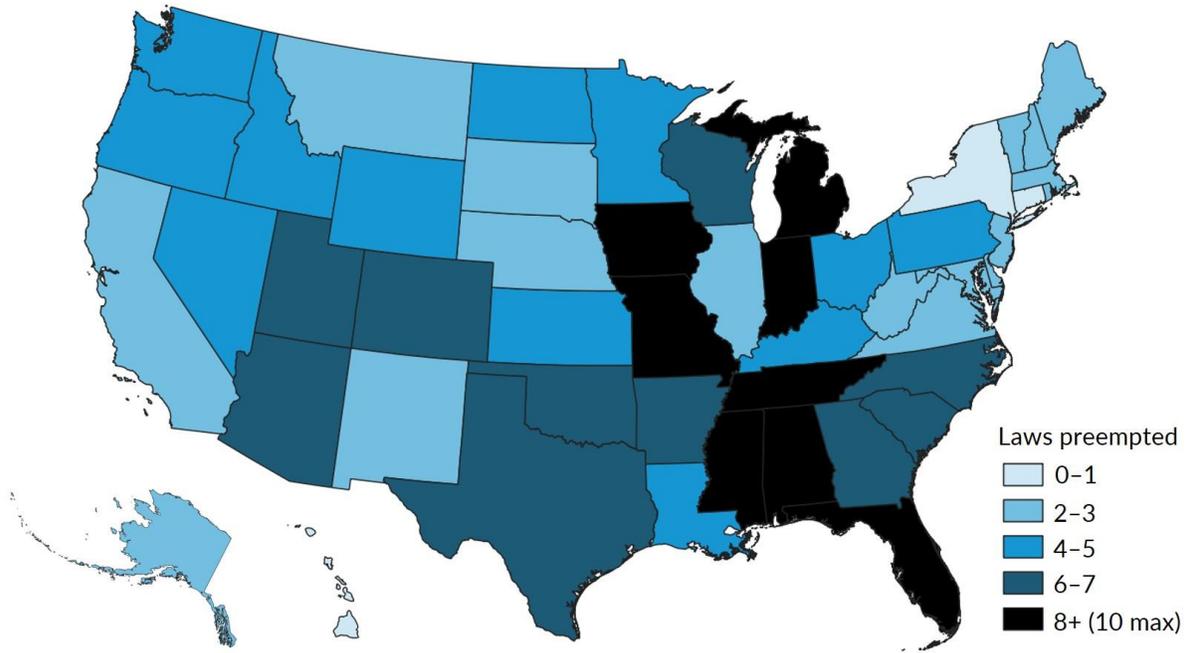
Both municipalities and states have been struggling to respond to the COVID-19 pandemic, and part of that struggle has been to determine the most appropriate level of government for response. Since the Coronavirus Aid, Relief, and Economic Security Act passed in March 2020, the federal policy response has been limited, leaving states and local governments to negotiate their responses among themselves. In some cases, this has led to states' preempting or otherwise limiting municipal and county policymaking. For instance, in Maryland, the state overruled Montgomery County's directive that ordered nonpublic schools to keep classrooms closed at the start of the fall 2020 semester.² In Georgia, shortly after the cities of Atlanta and Savannah enacted mandatory mask ordinances, Governor Brian Kemp issued an executive order that sought to strip cities of their authority to enact mask requirements.³ Kemp also sued the Atlanta City Council and Mayor Keisha Lance Bottoms in an effort to invalidate that city's COVID-19-related policies (the lawsuit was later withdrawn, although debate is ongoing).⁴

Although these examples are of COVID-related policymaking, this analysis examines the effects of preemption more broadly. States across the United States have preempted local lawmaking across a range of policy areas, leading to the loss of local policymaking control (DuPuis et al. 2018). A recent report by the Local Solutions Support Center and State Innovation Exchange illustrates how these preemption debates have played out across the country (Haddow, Gad, and Fleury 2019). Figure 1 shows the extent of states' policy preemption across 12 policy areas examined in the report: minimum wage, paid sick leave, ride sharing, firearms, local broadband and 5G, plastic bags, rent control, sanctuary city protection (limiting cooperation with federal immigration law enforcement), electronic cigarettes, local fair and predictable scheduling (requiring that employers provide sufficient notice on work schedules), ban the box (removing job application check-boxes that ask whether applicants have a criminal record), and soda bans. States with higher levels of preemption tend to be in the Southeast and Midwest.⁵

FIGURE 1

State Preemption across 12 Policy Areas

Number of policy areas in which a state enacted a law preempting local legislation, through 2019



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Source: Kim Haddow, Anthony Gad, and Katy Fleury, *The Growing Shadow of State Interference: Preemption in the 2019 State Legislative Sessions* (Local Solutions Support Center and State Innovation Exchange, 2019).

Note: The 12 policy areas tracked are minimum wage, paid sick leave, ride sharing, firearms, local broadband and 5G, plastic bags, rent control, sanctuary city protection, electronic cigarettes, local fair and predictable scheduling, ban the box, and soda bans.

Methods

In addition to the Local Solutions Support Center and State Innovation Exchange’s preemption tracker, this analysis uses data from tools that track municipal and state legislation related to COVID-19. For municipal legislation counts and topic areas, we use a COVID-19 policy tracker created by the National League of Cities (updated through July 2020).⁶ For state-level COVID-19 legislation, we use data from the Kaiser Family Foundation (updated through July 2020).⁷ Finally, we add the number of policy areas in which states have preempted local legislation, using the 12 policy areas examined in the Local Solutions Support Center and State Innovation Exchange’s report as a guide. As a robustness check, we examine an alternative preemption index that includes a measure of a state’s Dillon’s Rule application (Dillon’s Rule states grant narrower sets of powers to local governments, even absent explicit preemption).⁸ Although results were generally similar no matter the index used, we note where results diverge.

We use these indices to identify correlations between local and state legislation and state preemption of local policymaking. These are simple correlations between the count of local or state

policies related to COVID-19 (with local law counts adjusted for state population) and the number of policy areas (out of the 12 examined) that were preempted in a given state. We group individual laws into categories based on data trackers. For local laws, we use the National League of Cities' definitions of policy areas to examine 14 local-level COVID-19 policy areas (table 1) and eight sources of local policy action (table 2). For state laws, we examine 16 state-level COVID-19 policies that the Kaiser Family Foundation tracker identifies as either restricting behavior that could spread COVID-19 or helping people cope with the virus and the pandemic's economic fallout (table 3).

Results

In this section, we present results from three correlation analyses: the relationship between state preemption level and passage of local COVID-19 laws across several policy areas, the relationship between state preemption level and the passage of local COVID-19 policymaking across local sources (for instance, whether the source is an executive order or city council action), and the relationship between state preemption level and state-level policymaking responses to COVID-19.

Local Policy Innovation

Table 1 presents findings from our correlation analysis of state preemption level and local COVID-19 policymaking, with policy areas sorted from those with the strongest negative association with state preemption to those with the strongest positive association. Negative numbers indicate that the more preemptive a state is, the less common local COVID-19 policymaking in that policy area is, while positive numbers indicate that the more preemptive a state is, the more common local COVID-19 policymaking in that area is. Numbers close to zero mean that we found little association between a state's preemption level and local COVID-19 policymaking in an area. Although they do not establish causality, these relationships suggest that preemption may be tied to less forceful local responses to COVID-19 pandemic.

Based on our analysis, several COVID-19 policy responses were less common in more preemptive states, particularly those that deal with education and child care, mobility and transit, and COVID-19 prevention and flattening the curve (this category includes policies such as travel bans, social distancing and mask requirements, and closures of businesses and public spaces). Digital connectivity and housing policies were also negatively correlated with state preemption, although the strength of those relationships varies according to the preemption measure we used. Other policy areas had weaker relationships or correlations that varied more substantially depending on the preemption measure we used.

We also found the opposite (positive) relationship between preemption and municipal policy actions related to COVID-19 in certain areas. In municipalities subject to higher levels of preemption, responses that focused on communicating with the public about the virus (e.g., developing notices and web pages) were more common, as were changes to governmental operations (e.g., canceling public meetings, modifying or limiting building access, changing contracting practices). They also took more

action on utilities (e.g., modifying or suspending utility cutoff practices), although the strength of this relationship was weaker when we used the alternative measure of state preemption that included Dillon’s Rule status.

TABLE 1

State Preemption and Local COVID-19 Policy Action: Policy Area

COVID-19 policy area	Correlation with state preemption level
Education and child care	-0.22
Mobility and transit	-0.22
Prevention/flattening the curve	-0.14
Individual/family financial stability	-0.13*
Digital connectivity	-0.11
Housing	-0.09
Re-opening	-0.07*
Medical/behavioral health	-0.04*
Food/nutrition	-0.02*
City fiscal stability	0.01*
Participatory governance	0.07*
Government operations	0.11
Utilities	0.19*
Communication	0.19

Sources: National League of Cities COVID-19 policy tracker and the Urban Institute’s preemption indices.

Notes: Negative correlations mean that municipalities in states with higher preemption levels took fewer pandemic-related actions in the given policy area, compared with cities in states that had lower preemption levels. In contrast, positive correlations mean municipalities in states with higher preemption levels took relatively more actions in the given policy area. An asterisk indicates results where our robustness check using the Dillon’s Rule preemption index substantially diverged from the index here (with a ratio of [base preemption index]/[Dillon’s preemption index] smaller than 0.5 or greater than 2) and should be treated more cautiously. State preemption level is based on laws passed in 12 policy areas: minimum wage, paid sick leave, ride sharing, firearms, local broadband and 5G, plastic bags, rent control, sanctuary city protection, electronic cigarettes, local fair and predictable scheduling, ban the box, and soda bans.

We also examined municipal actions on COVID-19 by the types of governmental authority exercised. According to our analysis, executive actions such as emergency declarations or executive orders had the strongest negative association with state preemption (table 2). In other words, local-level executive actions happened less in states with more preemption. Meanwhile, local-level actions that explicitly responded to federal, county, or state laws (for instance, altering city operations in response to a state-level directive) had positive associations with state preemption, meaning that they occurred more frequently in states with more preemption. City council action is also positively related here, although this relationship disappeared when we used the alternative measure of state preemption that included Dillon’s Rule status.

TABLE 2

State Preemption and Local COVID-19 Policy Action: Source of Local Action

Source of local action	Correlation with state preemption level
Executive order	-0.23
Emergency declaration	-0.10
Court order	0.03*
Ordinance	0.05
Response to state law	0.09
Response to county order	0.18
City council action	0.20*
Response to federal law	0.26

Source: National League of Cities COVID-19 policy tracker and the Urban Institute’s preemption indices.

Notes: Negative correlations mean that municipalities in states with higher preemption levels took fewer pandemic-related policy actions via the given source, compared with cities in states that had lower preemption levels. In contrast, positive correlations mean municipalities in states with higher preemption levels took relatively more actions via the given source. An asterisk indicates results where our robustness check using the Dillon’s Rule preemption index substantially diverged from the index here (with a ratio of [base preemption index]/[Dillon’s preemption index] smaller than 0.5 or greater than 2) and should be treated more cautiously. State preemption level is based on laws passed in 12 policy areas: minimum wage, paid sick leave, ride sharing, firearms, local broadband and 5G, plastic bags, rent control, sanctuary city protection, electronic cigarettes, local fair and predictable scheduling, ban the box, and soda bans.

State Policy Innovation

Our analysis of state policy innovation identifies “restrictive” and “supportive” policy areas, following the Kaiser Family Foundation’s groupings of these policies. Here, “restrictive” policies are those that restrict behavior to stop the spread of COVID-19, while “supportive” policies are means of helping people cope with the virus and its economic fallout (table 3).

We find states that preempt local laws more often tend to have passed fewer COVID-19-related restrictive or supportive policies. The restrictive policies that are most strongly negatively correlated with state preemption levels are mandatory quarantine for travelers, bans on large gatherings, and postponement of primary elections (limits on restaurants and closures of nonessential businesses were somewhat positively correlated). The “supportive” policies that are most strongly negatively correlated with state preemption levels are the extension of special enrollment periods for Affordable Care Act health insurance marketplaces, broadened access to telehealth, mandatory paid sick leave, and provision of free COVID-19 vaccines when available.

TABLE 3

State Preemption and State COVID-19 Policy Action

	Correlation with preemption level
Restrictive policies (overall)	-0.28
Mandatory quarantine for travelers	-0.52
Large gatherings ban	-0.20
Primary election postponement	-0.20
Face covering requirement	-0.08
Closure of bars	-0.05*
Stay-at-home order	-0.03
Closure of nonessential businesses	0.05
Restaurant limits	0.10
Supportive policies (overall)	-0.40
Marketplace special enrollment period	-0.37
Expanded access to telehealth services	-0.34
Mandatory paid sick leave	-0.31
Free vaccine when one becomes available	-0.24
Prior authorization requirement waived for COVID-19 tests	-0.19*
Premium payment grace period	-0.12
Early prescription refills	-0.10*
Cost sharing waived for COVID-19 treatment	0.01*
Restrictive and supportive policies combined	-0.39

Source: Kaiser Family Foundation's state COVID-19 policy tracker and the Urban Institute's preemption index.

Notes: Negative correlations mean that states with higher preemption levels took fewer of the given pandemic-related policy actions, compared with states that had lower preemption levels. In contrast, positive correlations mean that relatively more actions were taken by states with higher preemption levels. An asterisk indicates results where our robustness check using the Dillon's Rule preemption index substantially diverged from the index here (with a ratio of [base preemption index]/[Dillon's preemption index] smaller than 0.5 or greater than 2) and should be treated more cautiously. State preemption level is based on laws passed in 12 policy areas: minimum wage, paid sick leave, ride sharing, firearms, local broadband and 5G, plastic bags, rent control, sanctuary city protection, electronic cigarettes, local fair and predictable scheduling, ban the box, and soda bans.

Overall, states that preempt less often tended to have more expansive policy responses to COVID-19. For example, Massachusetts, with a relatively low level of preemption, had both extensive local- and state-level action: in Boston, for instance, Mayor Marty Walsh oversaw an initiative to test every unhoused person in the city's shelter network; the state, meanwhile, passed a mandatory quarantine for all travelers crossing state lines and a face-covering requirement. Wisconsin, by contrast, with a relatively high level of preemption, has instituted a limited number of state-level actions.

Conclusion

Our main takeaway from this analysis is that a relationship seems to exist between local and state policymaking during the COVID-19 pandemic and state preemption more generally. In states that preempt more laws, municipalities focus less on policies that reflect proactive attempts to respond to the crisis (whether designed to "flatten the curve," support residents, or regulate business operations) and more on communications and responding to legislation passed at other levels of government. Conversely, in states with fewer preemptive laws, local proactive policymaking has been more widespread. At the state level, more preemptive states engaged in less state-level policymaking. This

indicates that preemption may be less about a belief that states are a more appropriate venue for some sorts of policymaking and more about a general reluctance to legislate and desire to stop local actions to do so.

This is a limited correlative analysis. We do not claim any causal relationship between preemption and policymaking related to COVID-19, nor do we focus on targeted state preemption of local COVID-19 policy responses. We also do not explore the relationship between preemption and county-level pandemic responses.⁹ However, the associations we find indicate that a state's tendency to preempt local laws may not only affect preempted policies but may also influence policymaking more generally. In the case of the COVID-19 pandemic, which has highlighted the importance of timely and targeted policy responses, this has ramifications for the ability of policymaking to effectively respond to rapidly evolving needs.

Notes

- ¹ Nestor M. Davidson and Kim Haddow, "State Preemption and Local Responses in the Pandemic," *Expert Forum* (blog), American Constitution Society, June 22, 2020, <https://www.acslaw.org/expertforum/state-preemption-and-local-responses-in-the-pandemic/>.
- ² Jack Moore, "Montgomery County Backs Down on Keeping Nonpublic Schools Closed," WTOP, August 7, 2020, <https://wtop.com/montgomery-county/2020/08/montgomery-county-backs-down-on-keeping-nonpublic-schools-closed/>.
- ³ Meagan Flynn and Marisa Iati, "Georgia Gov. Brian Kemp Sues Atlanta over Mask Requirement as Coronavirus Surges in the State," *Washington Post*, July 16, 2020, <https://www.washingtonpost.com/nation/2020/07/16/kemp-georgia-mask-mandates/>.
- ⁴ Vanessa Romo, "Governor Drops Lawsuit against Atlanta Mayor over Masks, but Fight May Not Be Over," NPR, August 13, 2020, <https://www.npr.org/sections/coronavirus-live-updates/2020/08/13/902347003/governor-drops-lawsuit-against-atlanta-mayor-over-masks-but-fight-may-not-be-ove>.
- ⁵ These policies tend to skew in a specific ideological direction, with state preemption often targeting policies that are considered "progressive." In recent years, state preemption has become increasingly common in states with Republican-led state governments and Democrat-led cities. See Henry Grabar, "The Shackling of the American City," *Slate*, September 9, 2016, <https://slate.com/business/2016/09/how-alec-acce-and-pre-emptions-laws-are-gutting-the-powers-of-american-cities.html>.
- ⁶ "COVID-19: Local Action Tracker," National League of Cities, accessed July 9, 2020, <https://covid19.nlc.org/resources/covid-19-local-action-tracker/>.
- ⁷ "State Data and Policy Actions to Address Coronavirus," Kaiser Family Foundation, accessed July 16, 2020, <https://www.kff.org/health-costs/issue-brief/state-data-and-policy-actions-to-address-coronavirus/>.
- ⁸ For this index, we produced scores of 4 (full Dillon's Rule implementation), 2 (partial implementation), and 0 (no implementation) and added them to our core preemption index. Based on Richardson, Gough, and Puentes 2003.
- ⁹ For one resource, see "COVID-19 Pandemic Response: County Declaration and Policies," National Association of Counties, updated April 15, 2020, <https://ce.naco.org/?dset=COVID-19&ind=Emergency%20Declaration%20Types>.

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