Tensions in State-Local Intergovernmental Response to Emergencies: The Case of COVID-19*

Bruce D. McDonald, III† *North Carolina State University*

Christopher B. Goodman *Northern Illinois University*

Megan E. Hatch *Cleveland State University*

The U.S. emergency and disaster response system is designed to operate bottom-up, meaning responses are intended to begin at the local level with state and federal governments stepping in to assist as needed. The response to the current COVID-19 outbreak, however, has been something else entirely, as each level of government competes with the others over resources and authority. Some states preferred a local response with state support, while other states took a more uniform, state-mandated response enabled by state preemption of local actions. The latter has revealed an often-dormant means of state preemption of local ordinances: the executive order preemption. Local government managers will have to be creative in balancing responsiveness to their constituents in this time of crisis while also being constrained by their states. The administrative choices are likely to have both immediate and long-term consequences for future emergencies.

Keywords: Intergovernmental affairs, preemption, pandemics

Introduction

The current outbreak of severe acute respiratory syndrome coronavirus (SARS-CoV-2), the virus that causes Coronavirus Disease 19 (COVID-19), has spurred a large governmental response from all levels of the U.S. intergovernmental system. The emergency and disaster response system of the United States is designed to be bottom-up, meaning responses are intended to begin at the local level with state and federal governments stepping in to assist as needed (Rubin and Barbee 1985; Schneider 1995; Schneider 2008). The response to the current outbreak, however, has been something else entirely, as each level of government competes with the others over resources and authority.

We examine how the U.S. intergovernmental system of emergency response is designed, how state and local governments have responded to the COVID-19 crisis thus far, and how this crisis has further exposed tensions in the state-local intergovernmental system. We use the National League of Cities' (2020) COVID-19 Local Action Tracker to examine city and state responses to the pandemic. We argue state-local intergovernmental response is associated with many issues with intergovernmental relations broadly, particularly conflict about the "best" emergency services provider. This leads some states to prefer a local response with state support and other states to prefer a more uniform, state-mandated response enabled by state preemption of local actions. The latter has revealed an often-dormant means of state preemption of local ordinances: the

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executive order preemption. Accessible through the emergency powers afforded to U.S. governors, this type of preemption is uncommon because it is overshadowed by legislative and judicial preemptions. These preemptions vary in their content, with some representing policy minimums, others maximums, and some a combination of the two. Yet all types of preemption have substantial effects on what local government administrators can do to respond to their constituency's needs. Such constraints can be challenging in normal times but are potentially catastrophic in emergencies. Administrators will need to be creative in balancing responsiveness to their constituents within a limiting policy environment.

Intergovernmental Responses to Emergencies

The intergovernmental response to emergencies and disasters in the United States was designed to operate from the bottom up (Rubin and Barbee 1985; Schneider 1995; Schneider 2008). Policies for emergency response and preparedness are based on the assumption that those closest to the emergency have the best perspective on what help is needed. Accordingly, the response to an emergency begins with local governments, typically led by the county, and follows a prescribed series of steps as the emergency escalates to include both the surrounding local governments and the state, and eventually the federal government as needed (Kapucu 2008; Waugh 1994). This bottom-up structure places local governments at the center of emergencies and natural disasters. By starting emergency responsibilities at the local level, officials can address the needs and specific conditions of the community that others may be unaware of. In anticipation of an event, local governments develop emergency preparedness and response plans that adhere to certain state and federal guidelines to outline how the government will respond to a crisis and how it will coordinate its response with all levels of government (Kapucu, Lawther, and Pattison 2007).

As higher levels of government become involved, their intended role is to assist in the coordination of services and to support the local response rather than supersede or replace it (Kapucu and Hu 2016; Schneider 2008). Much like the local governments before them, states maintain a response plan that lays out how state-based resources will be deployed and how they will support and coordinate with their cities and counties in times of need. Though there is some variation on the structure of the plans from state to state, these plans identify the responsibilities assigned to state officials during an emergency to minimize confusion and maximize the effectiveness of the state's response.

The bottom-up approach to emergency response does not mean states do not play an important role. As the chief executives of their states, governors play key roles in emergency responses (Waugh 2007). Governors are typically given a wide breadth of powers during emergencies, allowing them to declare states of emergency, order evacuations, and mobilize the National Guard. It is only after both local and state resources are exhausted that governors issue requests for federal assistance during a response. This approach to emergency response allows for what Schneider (2008, p. 718) refers to as a "'pull' system of intergovernmental relief."

This emergency response structure has faced some challenges due to concerns surrounding homeland security. Since September 11, 2001, Birkland (2009) notes that the federal government has preferred the top-down approach allowing the federal government to use its experts in times of need rather than relying on local expertise during events that have national implications. Such events are rare, however, allowing the default bottom-up structure to continue.

In the context of a pandemic, the structure of an emergency response remains uncertain due to the novelty of the situation. Research into bioterrorism preparation indicates the federal government might push for a top-down response due to the national interest of a terrorist released bio-agent and the capacity of the federal government's expertise to track and treat those sickened due to the release (Sutton 2001). Limitations of authority, however, hinder the ability of the federal government to lead the response, as Gibbons v. Ogden reassured the authority of state control, which includes the capacity to regulate public health and impose quarantines. Without planning and clarification by local, state, and federal governments on how the response might differ in an emergency, the default response to the emergency is the bottom-up structure previously outlined. Within the emergency response community, support for this approach is based on the Center for Disease Control and Prevention's strategic plan for bioterrorism preparedness and response, which focuses on assessing local capacity and then augmenting that capacity as needed to achieve positive outcomes (Koplan 2001). This approach is further supported by the literature emerging out of the crisis in terms of what local and state governments expected to have happen (see Dzigbede, Gehl, and Willoughby 2020; Kettl 2020; Maher, Hoang, and Hindery 2020).

City and State Responses

Despite the planning and preparation for emergencies that all levels of government conduct, actual governmental policy responses to the COVID-19 pandemic have been more complicated. To examine the actions municipalities are taking, we turn to the National League of Cities' (2020) COVID-19 Local Action Tracker. This website tracks actions taken by municipalities in response to the pandemic. These data are self-reported by city officials and citizens. Overall, this database represents 1,731 policy actions taken by 494 cities in 48 states plus the District of Columbia beginning in late February and ending on May 26, 2020. While not a representative sample, these data represent 179 of the 250 largest cities in the U.S. and account for 91.3 million residents.[1] The median city size is 74,238 residents (average size is 184,806).

Figure 1 plots the number of city-level policy adoptions as a function of date. Policy adoptions begin in late February (February 28 being the earliest recorded adoption) and reach a peak in the week beginning March 16. These early policy changes are nearly all from cities on the U.S. west coast; however, there are outliers in states such as Michigan and Texas (see figure 2 for a state distribution). The majority of city-level implementations were in the weeks beginning March 16 and March 23, during which time nearly 2/3rds of all policies were implemented.

States have their own responses, but these tend to be in the coordination realm (Kapucu and Hu 2016; Schneider 2008). These include *but are not limited to* official emergency declarations (e.g., activating state response plans), major disaster declarations, activation of the state's National Guard, and in some instances placing limitations on large group gatherings and closing schools.[2] Because states and local governments are somewhat autonomous, each can act without the other, leading to discrepancies in the timing of local-level and state-level policy adoption. We explore this in figure 2, where local-level policy implementation by state is graphed in a manner similar to figure 1, and vertical lines are introduced for when a state closed schools (dashed line) and when

[1] These account for 100 percent of the top 50 cities by population, 97 percent of the top 100 cities, 33 state capitals, and the largest city in 47 states.

[2] See the National Governor's Association (2020) and National Conference of State Legislatures (2020) for more specific information on state-level responses. Both organizations outline the state-specific responses, executive and legislative.

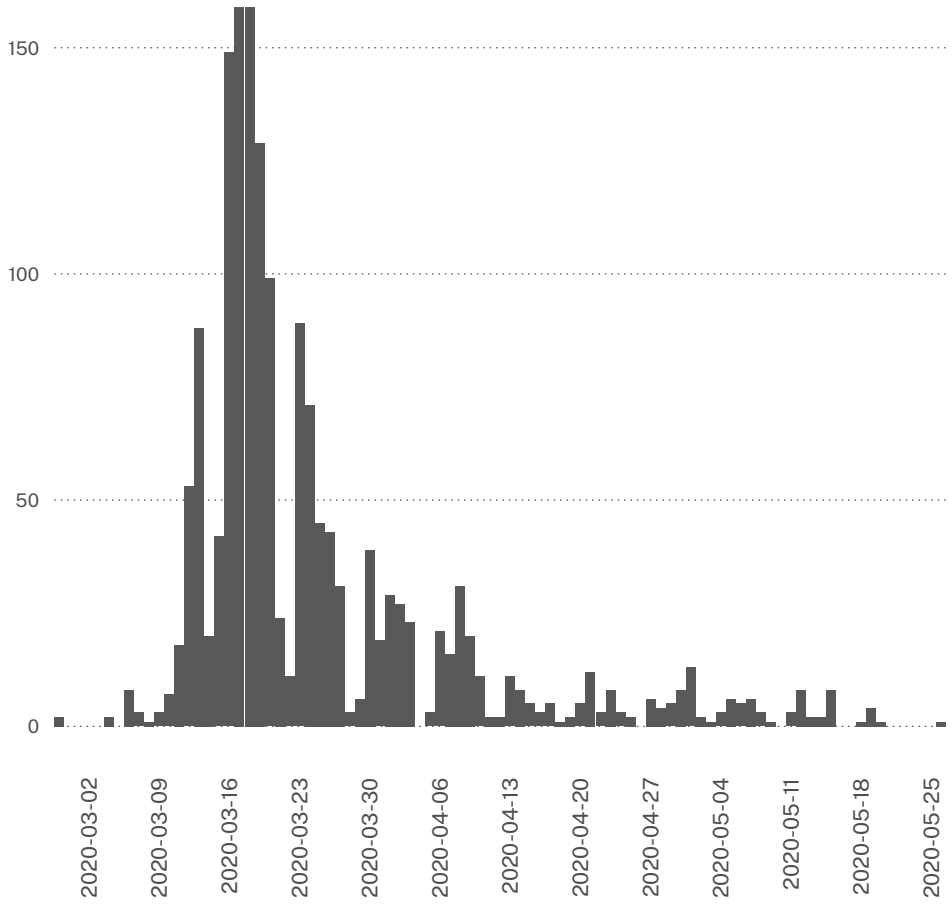

Figure 1: City Policy Adoption by Date

a state implemented a statewide "stay at home"/"shelter in place" order (solid line).[3] We chose these two actions because the former is a relatively uniformly implemented limitation on large group gatherings (as opposed to actual limits on large groups that vary considerably by state in their stringency) and the latter is on the more extreme end of policy action. Both are also ordered via gubernatorial executive order. The distance between these two actions can be seen as the time it took for a state to begin limitations on activity to fully implementing such a limitation.[4] We do not intend these two policy actions to summarize the entire state response; however, these are two signaling events for local governments about whether they should continue their own responses or accept state-level intervention. Whether this actually happened is a question we will return to in the conclusion.

Consistent with our expectations, the timing varies between local and state action. In many states, local action predated the first large-scale state action, but once statewide school closures were ordered, local policy action increases. This is particularly evident in large states such as California, Florida, Illinois, and New York. However, each of these states has its own trajectory with California and New York having very little time between the two orders (0 and 1 days, respectively), Illinois having a somewhat larger gap (5 days), and Florida having a significant gap (17 days). Local responses filled in the gap between the two state responses. In many cases, local response tailed off after the state "stay at home"/"shelter in place" was ordered. In several states (those with either dashed or solid boxes in figure 2), these orders were accompanied by broad preemptions of local governments' ability to respond.

Executive Orders and State Preemption

As shown in the figures above and in line with the expected intergovernmental response to emergencies and disasters, many U.S. cities passed laws to protect public safety and health in response to the COVID-19 pandemic. However, many governors also responded to the pandemic with executive orders (more than 1,000 executive orders and/or agency orders have been issued about COVID-19, see Federman and Curley (2020) for more information), in some cases preempting their cities from taking action.[5] In the 43 gubernatorial executive orders ordering states to stay-at-home or shelter in place, we observe 20 orders preempting local ordinances that order local sheltering in place or locally defined essential activity/business.[6]

In figure 2, states with floor preemptions have dashed boxes and states with ceiling or floor and ceiling provisions have solid boxes. Forty-five percent of these preemptions set policy minimums, called floor preemptions, in which the state establishes a baseline and local governments are free to set their own policies at higher levels (Goodman, Hatch, and McDonald III 2020; Wagner et al. 2019). Alabama enacted a floor preemption when the State Health Officer stated specific local

[3]The exact timing of these dates is aggregated by Ballotpedia (2020).

[4]Seven states have not fully implemented a stay at home/shelter in place order.

[5]It is generally thought that strong home rule powers serve as a counterbalance to state preemption (see Swanson and Barrilleaux 2020); however, it is unclear how this legal relationship operates when governors are afforded broad emergency powers. For example, it is the opinion of the South Carolina Attorney General that while municipalities retain their general home rule powers in emergencies, they are forbidden to exercise emergency powers because these powers are reserved for the governor (Cook 2020).

[6]Other COVID-19 related executive orders can and do preempt local response. For instance, California's executive order declaring a state of emergency preempts local noise ordinances as they inhibit the "delivery of food products, pharmaceuticals, and other emergency necessities distributed through grocery stores and other retail or institutional channels, including, but not limited to, hospitals, jails, restaurants, and schools" (California EO-N-35-20).

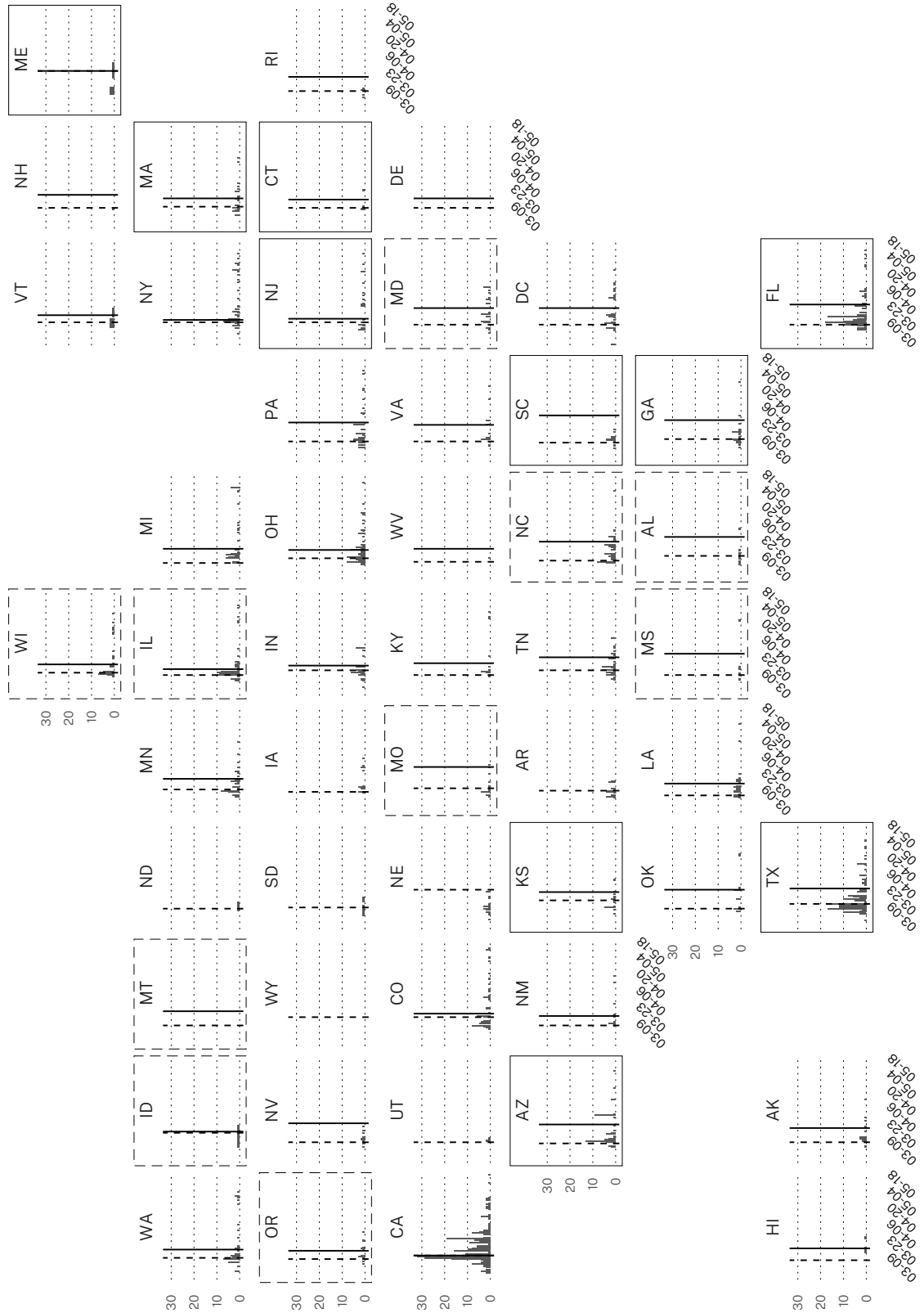

Figure 2: City and State Policy Adoption by State

governments may be authorized to adopt more stringent response measures. Another quarter of preemptions set policy maximums, called ceiling preemptions, which prevent local governments from exceeding a state-imposed policy or regulation. Georgia's Executive Order 03.14.20.01 is a ceiling preemption in that it says no local government can adopt a similar ordinance. The remaining 30 percent contained both floor and ceiling provisions. As a result, there is significant variation in the number and scope of policies aimed at addressing the crisis across states. This poses considerable challenges for local government managers in both their immediate and long-term emergency responses.

States have preempted their cities since at least the latter half of the nineteenth century (Zimmerman 2012). Goodman, Hatch, and McDonald III (2020) identify four preemption epochs: tax and expenditure limitations, unfunded mandates, public health, and the new preemption. State preemptions in response to COVID-19 have elements of the penultimate epoch. During the 1990s and early 2000s, public health preemptions often limited the extent to which states could regulate behaviors such as smoking. Mowery et al. (2012) emphasize tobacco regulation preemptions hindered social norm development surrounding the lack of desirability of smoking. Preemptions around COVID-19 responses, such as Mississippi's Executive Order 1463, which disallowed local government actors from imposing additional social distancing limitations, may have a similar effect on social norms. Just like the earlier public health preemptions, other state COVID-19 preemptions may increase public health. In Maine, Executive Order 28 preempted local governments from adopting less restrictive stay-at-home orders. While the majority of COVID-19 preemptions to date have not taken this form, there is nothing inherently dangerous to public health about them; the content and form of the preemptions are the important features.

While COVID-19 preemptions are structurally and substantively similar to the public health preemptions in the 1990s and early 2000s, the format is different. The earlier preemptions were mostly enacted legislatively. In contrast, COVID-19 preemptions are predominantly issued via executive order, reflecting the emergency powers of Governors. Governors in various states have used the wide power and discretion issued to them during emergencies to determine what local governments can and cannot do (Waugh 2007).

Such preemptions create path dependencies, limiting the ability of local governments to respond to emergencies in the expected bottom-up manner (Rubin and Barbee 1985; Schneider 1995; Schneider 2008). In times of crisis where policymakers' decisions are literally questions of life and death, this is a dangerous void. Fast action, particularly by local governments, appears to be associated with a significant decrease in the rate of new COVID-19 cases (Dave et al. 2020). Previous responses to state preemptions, such as lobbying the state legislature, working with interest groups, and turning to constituents for support citeprutnowetal2019, wagneretal2019, are unlikely to be feasible in the limited time environment of a pandemic. Policy path dependency suggests that without a long-term strategy, local governments will face similar constraints from their states in any future emergencies.

Conclusion

The COVID-19 pandemic has led to unprecedented policy responses as officials at all levels of government react to the crisis. Traditionally, disaster management in the United States has operated from the bottom up (Rubin and Barbee 1985; Schneider 1995; Schneider 2008). Many governors, however, have used their emergency powers to issue executive orders aimed at coordinating their

state's response to the pandemic and limiting what their local governments can do. These types of preemptions are reminiscent of the public health preemptions in the 1990s and early 2000s, but in a form not commonly seen. State preemptions are often legislative (Riverstone-Newell 2017) or judicial (Swanson and Barrilleaux 2020), but the COVID-19 pandemic has shown how the executive branch also participates in limiting the ability of local governments to make locally responsive policy. City actions fell off in all states after state orders.

Further research should explore whether and to what extent state preemptions had a role in stemming local responses. In order to answer this question, more complete data is needed on the number and content of state preemptions and local responses to the pandemic. Information on local responses should focus on both policies and local government managers' perceptions (Schuster et al. 2020). As concerns regarding a second wave of the pandemic emerge, a better understanding of the intergovernmental relationship between state and local governments, as well as the emergency responses systems that help guide the relationships during a pandemic, is needed. Early research suggests partisanship (Murray and Murray 2020) and having a female head of the state health agency (Shay 2020) are both associated with the timing and content of state responses to the pandemic. Researchers have also found a relationship between state preemptions and partisanship (Fowler and Witt 2019; Goodman and Hatch 2020). As more complete data become available, scholars should examine these and other factors explaining governors' decisions to preempt their cities.

In addition to why states preempted (or did not preempt) their cities, an open question remains what consequences path-dependent preemptions will have in the future. Preemptions create uniformity within states, perhaps to the detriment of innovation and context-specific adaptation. We do not yet know what effect, if any, the preemptions had on the spread and mortality rates of COVID-19.

While we focus on emergency response and state preemptions, this is part of a broader pattern of states limiting local governments' policymaking ability. Both the specific example and broader trends should be a concern for public administrators and scholars. As preemptions shift the relationship between states and their local governments, administrators will need to adjust. Local government managers have a responsibility to their constituents, and restrictions limit their responsiveness (Sances, forthcoming). For these managers, balancing these responsibilities and constraints might be one of the most difficult administrative challenges during the pandemic and beyond.

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