

State Preemption of Local Laws: Origins and Modern Trends*

Christopher B. Goodman[†] *Northern Illinois University*

Megan E. Hatch *Cleveland State University*

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

American cities are creatures of their states, with states both granting and limiting the power of their cities. This relationship is characterized by how cooperative or competitive states are with cities in their legislation. Despite the recent attention given to state preemption of local laws, this is not a new phenomenon. Part of the confusion surrounding preemption is that there is no shared definition or understanding of its forms. The purpose of this article is to begin to create that shared conception. In doing so, we define preemption according to its historic origins. We argue modern state preemption of local laws can be divided into four phases, each with their own policies and mechanisms. We show how preemption has changed over time, shifting the functional and legal relationship between states and their cities. Together, these phases help assist policymakers and administrators in understanding the nature of state preemption, and thus how to create and implement local policies in an environment where the distribution of power between governments is competitive and changing.

Keywords: Preemption, Local government autonomy, Intergovernmental relations

Introduction

American cities are creatures of their states, with states both granting and limiting the power of their cities. Bowman (2017, 2) argues the nature of the relationship between states and their cities is fundamentally a question of the “relative distribution of power.” However, Hicks et al. (2018) maintain this relationship is also characterized by how cooperative or competitive states are in their legislation. One illustration of this relationship that in recent years has increasingly become a topic of both public and academic discourse is state preemption of local legislation. For example, the North Carolina “Bathroom Bill” (H.B. 2) limited cities rights to pass antidiscrimination laws (among others). This led to national press coverage and boycotts that cost the state more than \$395 million (Ellis 2016).

Despite the recent attention given to state preemption of local laws, this is not a new phenomenon. In the latter half of the nineteenth century, it was common practice for state legislatures to pass so-called “ripper” legislation that removed service delivery responsibilities from cities without their input or consultation (Zimmerman 2012). In many ways, this led to the modern home rule movement, even if the role of cities in the broader intergovernmental system has always been at the whim of state policymakers, with states taking steps to ensure that the behavior of local governments falls in line with state preferences. However, preemption is about more than

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whether a state has home rule or Dillon's Rule. Even defining what institution preempts is unclear, as some studies focus on legislative preemption (Riverstone-Newell 2017), while others examine court-driven preemption Swanson and Barrilleaux (2018). Part of the confusion surrounding preemption is there is no shared definition or understanding of its forms. The purpose of this article is to begin to create that shared conception. In doing so, we define preemption according to its historic origins.

We argue modern state preemption of local laws can be divided into four epochs, each with its own policies and mechanisms. We show how preemption has changed over time, shifting the functional and legal relationship between states and their cities. Together, these epochs help policymakers and administrators understand the nature of state preemption of local laws. We begin with the modern era of preemption typified by the tax revolts and tax and expenditure limitations (TEs) of the 1970s and 1980s. The second epoch is the era of unfunded mandates that alter the spending priorities of local governments that were popular in the late 1980s and early 1990s. The third epoch largely deals with public health issues and occurred in the late 1990s and early 2000s. Finally, we examine the fourth and current epoch of state preemption, which is less typified by the policy areas preempted and more by the level of policy restrictiveness and punitiveness.

The recent uptick in research on state preemption of local ordinances (see, for example, Crosbie, Schillinger, and Schmidt 2019; Diller 2020; Flavin and Shufeldt 2019; Fowler and Witt 2019; Swanson and Barrilleaux 2018) suggests this is a growing and important area of interest among scholars of intergovernmental affairs as well as state and local governments. What is missing from the literature is a comprehensive understanding of the nature of state preemption. We intend for this analysis to chart the history of state preemption of local ordinances, identify how local governments have reacted to these changes, and determine what changes if any have occurred in local governments. In doing so, we chart a research agenda focused both on how to evaluate the impact of state preemption on local government managers and on local government systems more broadly.

We begin by examining the history of state-local relations in the United States with a focus on state policymaking related to local governments. Next, we define preemption in the state context and explore its various forms. We then move on to an analysis of the four epochs of preemption (i.e., TEs, unfunded mandates, public health, and the new preemption). Finally, we close with a discussion of the potential problems that preemption poses for local government managers and chart a future research agenda for how to examine preemption in light of our analysis.

Background

State-Local Relations in the United States

Local governments in the United States are constructs of their respective states. States decide the relative level of autonomy of different forms of local government. This relationship between state and local governments has been recognized by federal and state courts since Judge John Dillon's 1868 court ruling in *City of Clinton v. Cedar Rapids & Missouri River Railroad*. In a series of court cases, Dillon lays out a doctrine of complete subservience of municipal corporations to state legislatures. As (Bowman and Kearney 2014, 3) explain, the strictest interpretation of Dillon's Rule means that "any doubt regarding the legality of a specific local government power is resolved in favor of the state." Currently, thirty-nine states have adopted Dillon's Rule (Richardson 2011). In

thirty-one of those states, Dillon's Rule applies to all local governments, while in the remaining eight states it applies only to specific jurisdictions.

Even in Dillon's Rule states, some state legislatures have granted local governments home rule powers that allow local areas to tailor their public policies to meet local needs without consultation with the state legislature (Briffault 1990). For a time, concurrent with Judge Dillon's ruling, there was a legal movement to concede the powers of self-government to local government, largely free from interference from the state. Known as the Cooley Doctrine, this approach to local government autonomy faded as a legal doctrine once Dillon's Rule was upheld by the U.S. Supreme Court in 1903 (Richardson 2011). Nonetheless, states have continued to grant limited home rule powers to their local governments (McDonald III and Gabrini 2014). In doing so, states have not completely given up their oversight powers, but rather have decided that some areas of oversight are less important than others. Currently, forty-eight states grant some or all local governments home rule powers; however, the amount of powers and local governments ability to access them vary highly by state.

There is a rich literature attempting to determine the exact nature of local autonomy among the states. Given the legal and political ambiguity of home rule powers, this is no small feat. In general, it is thought that local governments have been losing power and authority to states for the last forty years. Stephens (1974) outlines and Bowman and Kearney (2011) update a measure of state centralization composed of three dimensions: fiscal responsibility, service delivery, and public personnel. Each dimension measures the balance between state responsibility and local government responsibility. The trend from 1957 until 2008 was toward increasing centralization among the three dimensions with interstate variation.¹ Some states have become considerably more centralized, while others have become more decentralized (Bowman 2017). Perceptual measures of centralization also point to a loss of local autonomy (Bowman and Kearney 2012).

Given Dillon's Rule, the granting of limited home rule powers, and changes in state centralization over time, local governments are at a disadvantage relative to the state in matters of local policymaking. This relationship necessarily leads to conflict between local governments and the state. The changing political landscape at the state level (trending more conservative) and the local level (trending more liberal) amplifies this conflict as the two sides see each other as political adversaries (Einstein and Glick 2017), constituting a marked departure from previous time periods when local government exerted significant lobbying pressure on state legislatures (Berman 2003). It is within this complicated context that state legislatures decide to pass legislation preempting their cities.

The Role of State Legislatures

As local governments are constructs of the state, state legislatures play a large role in determining how local governance will be arranged. Historically, state legislatures have spent a significant amount of time considering issues of local affairs (Burns and Gamm 1997). Between 1871 and 1921, state legislatures in Alabama, Massachusetts, and Michigan had numerous committees related to local affairs and between 25 to 50 percent of legislation pertained to local issues. Burns et al. (2009, 61) note the prominence of legislation related to local affairs continues in state legislatures and the importance of such legislation cannot be understated, going as far as contending "local

¹The research concerning state centralization has not been updated since this time; however, it appears the trend continues to this day.

policy outcomes often occur in the state legislature.” They further assert that unity among the urban delegation with respect to “big city;” bills limits conflict about such bills and allows the urban delegation to manage the legislative process effectively. The effects of disunity among the urban delegation can spell disaster for local legislation (Gamm and Kousser 2013), particularly when larger urban delegations break along party lines. As Gamm and Kousser (2013) explain, this process only gets worse the larger the urban delegation is. However, legislators with prior local government experience are more attentive to local issues in the state legislature and this previous service can potentially moderate any disunity effects (Lovrich and Newman 2004).

Bowman and Kearney (2014) describe the more recent (2011-2012 biennium) treatment of local governments in state legislatures. They find nearly 2,500 new laws pertaining to general purpose local governments (excluding school districts and special districts) with high variance among states. These laws are classified as empowering or restricting so as to give an average of state-specific legislation related to local governments. During the 2011-2012 biennium, thirty-three states empowered local governments, twelve restricted them, while in five states empowering and restricting legislation canceled each other out. Bowman (2017) observes the legal status of local governments (Dillon’s Rule or home rule) is not influential in the passage of empowering or restricting legislation. In general, the prevalence of local legislation in state legislatures declined over the twentieth century; however, local bills still made up 20 percent of all legislation in 2000 (Gamm and Kousser 2010). While legislatures have put local affairs on the back burner, they are still active in the management of local government affairs.

Preemption of City Ordinances

What is clear from the preceding discussion is that state legislatures are in control of local governments destinies and have been increasingly willing to move powers away from local governments. At the same time, residents strongly support empowering local governments to solve local problems (Schneider, Jacoby, and Lewis 2011). Among those scholars who study local autonomy, the general consensus is that, absent a compelling reason for state centralization,² “[l]ocal decisions are best made by locals” Hooghe and Marks (2009, 232) because local governments solve local problems with local ideas (Frug and Barron 2008). Unsurprisingly, municipal officials also feel the local level is the best place for policy decisions to be made (DuPuis et al. 2018).

As Frug and Barron (2008) note, the current legal structure in most states affords local governments too little flexibility to effectively solve local problems. At the same time, state legislatures do not debate local issues in a serious or nuanced manner, thus leaving local governments in a bind. Local governments can push forward with dubious legal authority or leave local voters demands unfulfilled. In more recent years, local governments have turned to the former by adopting policies with dubious legal authority to do so.

When a local government wanders into policy territory a state believes is inappropriate, the state is faced with a choice of what to do. If a state deems a local government to have stepped outside of its current legal authority as clearly defined in law, the state may use the courts to enforce current rules (Swanson and Barrilleaux 2018). This method of preemption, namely, court-driven preemption, requires a local ordinance to be adopted to begin the process. A plaintiff may view a local ordinance as unfair and sue to stop its enforcement; however, the courts may find such laws to be consistent with current state law. Therefore, this method does not guarantee preemption.

²Examples include eliminating spillovers, issues of fiscal equivalence, or incompetent and/or corrupt local officials.

A second mechanism is legislatively-driven preemption. Although this method of preemption requires no specific action be taken by a local government, legislative preemption is often spurred by the passage or threat of passage of a particular local ordinance (Boswell 2018). Under this method of preemption, a state legislature alters the rules of the game for local governments, thereby reducing their legal authority to enact local ordinances in a particular area. A third preemption mechanism is referendum preemptions (Boswell 2018). These referenda may begin with the legislature but require public approval before they are enacted. In this paper, we primarily focus on the latter two mechanisms.

As explained by Briffault (2018) and Wagner et al. (2019), regardless of the means of preemption, there are various styles of state preemption that influence the range of potential actions that can be taken by local governments. Wagner et al. (2019) classifies these into four different types: vacuum, ceiling, floor, and punitive preemptions. Vacuum preemptions occur when the state preempts local action without setting a statewide standard for this policy area. This style of preemption leaves a policy/regulatory vacuum where cities are prevented from regulating an activity that the state has chosen not to regulate. The aim is not to determine which entity should regulate, but rather to deny regulation entirely (Briffault 2018). Ceiling preemption is when the state prevents local governments from exceeding a state-imposed policy/regulation. The prototypical example of a ceiling preemption is state minimum wage laws that often include provisions whereby localities cannot exceed the state imposed minimum wage. This style of preemption precludes any attempt to tailor local policy to local circumstances and is generally justified by state governments as eliminating regulatory hurdles for business. Rather than contending with a myriad of local regulations, the state imposes uniformity on the process. Floor preemptions are the near opposite of ceiling preemption. Rather than prohibiting any policy/regulatory action above a state minimum, floor preemption sets the statewide minimum as the baseline and localities are free to set their own higher levels. This is a preemption in so much as a locality is not free to set a policy/regulation lower than the state minimum. Finally, punitive preemption is not necessarily an independent preemption style, but rather a feature of newer preemption laws. Punitive preemptions attempt to hold local officials criminally or civilly liable for being out of compliance with state law. Punishment can include fine or removal from office for local elected officials or the denial of state aid to the local government (Briffault 2018; Wagner et al. 2019). This type of preemption law is sometimes referred to as super-preemptions (Riverstone-Newell 2017).

In addition to the form and type of preemption, these state actions also vary in their scope. Preemptions may be very broad, such as Arizona's 2016 law preempting local governments from passing legislation that contradicts state law, as defined by Arizona's Attorney General (Sanchez and Rau 2016). State preemptions may also be quite specific and targeted, such as bans on local governments regulation of plastic bags in Arizona, Idaho, Michigan, Missouri, and Wisconsin (DuPuis et al. 2018).

In summary, the relationship between state governments and their cities is complex and changing. States are now less likely to take up local issues, yet still choose to restrict local policymaking through preemption. This preemption can take several different forms. The next section examines four epochs of preemption (i.e., TELs, unfunded mandates, public health, new) to identify similarities and differences in the styles of preemption enacted, the impact on local governments, and the responses of those governments to preemption.

The Four Preemption Epochs

The 1970s and 1980s: Tax and Expenditure Limitations

One of the first forms of preemption to be used by states was tax and expenditure limitations (TEs) (Mullins 2004; Stallmann et al. 2017). As a type of fiscal policy, TEs aim to curb or restrict the budget process of a government in order to limit the ability of the government to grow (Mullins and Joyce 1996). As the name points out, the constraint on growth is achieved by placing a restriction on a governments tax revenue or spending. The mechanism by which a TEL is imposed, however, varies considerably. The most common approach is tying the growth of expenditures to the growth of the local economy, typically measured as personal income, or tying the limitation to a specific level, such as a fixed share of the local economy or a predefined rate of increase (Stallmann et al. 2017).

Initially, TEs were adopted as a form of government protest in the early 1800s, though they began to emerge in earnest during the tax revolt of the 1970s and 1980s with the adoption of property tax limits, such as Californias Proposition 13 and Massachusetts Proposition 2 1/2 (Atchison 1992; Deller, Stallmann, and Amiel 2012; Mullins and Wallin 2004). The string of recessions between 1969 and 1982, combined with the fact that tax codes were not indexed for inflation, left many households struggling financially (Domitrovic 2014). The movement of TEs by states can thus be seen as a means of limiting the ability of local governments to impose a financial hardship on their constituencies. However, in an era of conservatism, it can also be viewed in the light of limiting the social programming local governments provided. By limiting the tax revenues available or restricting the ability to spend, local governments were forced to choose between providing core public services and other public goods and services that met the social needs of the community. The TEs that emerged in the tax revolt of the 1970s and 1980s were just as focused on the state limiting the capacity of local governments to provide social programs as they were on controlling the growth and expansion of the effected governments (Park, Maher, and Ebdon 2018; Stallmann et al. 2017).

The TEL movement to restrict the authority of local governments has typically been presented as a grassroots or public choice initiative; however, their origins are more closely linked to state-level action (Mullins 2004). Often emerging from a small group of state reformers, the statutory and constitutional provisions that comprised the TEs were usually broad in their scope and applied to nearly all local governments within the state. The limitations left little discretion to the local governments in their applications, thus placing a significant limit on local choice (Mullins and Joyce 1996). Mullins (2004) reports the impact of the TEs imposed by states has altered the relationship between local governments and their constituencies, while also significantly altering their capacity to provide public goods and services.

The imposition of TEs by states forced local governments to innovate, and the most common form of innovation was the establishment of special districts (Bowler and Donovan 2004). Like municipalities and counties, special districts are legal creations of the state that come with an established set of powers (Foster 1997), including the power to tax, charge fees, issue debt, and appropriate land (Burns 1994). Most importantly, special districts also come with the capacity to provide public goods and services similar to those that may be provided by a municipality. While the TEs imposed by states to preempt local government action or expansion included both cities and counties in the provisions, they often omitted special districts (Bowen 1984; Gerber et al. 2001). As states sought to preempt local government action in the 1970s and 1980s, local gov-

ernments began to turn to special districts as a means of escaping the preemption traps established by states. By creating special districts, local governments could shift the burden of some services from their own shoulders while also controlling the behavior of the district (Bowler and Donovan 2004; Carr and Farmer 2011). This burden shifting can be seen in the data, with the Census of Government reporting a fairly stable number of municipalities but a 63 percent increase in the number of special districts between 1978 and 1987 (Bowler and Donovan 2004; Burns 1994). The majority of these new districts centered on providing social programs, such as housing and community development, libraries, and public health.

The 1980s and Early 1990s: Unfunded Mandates

Although unfunded mandates do not necessarily fit into the definition of preemption as we have currently laid out, they do have many features of preemption that makes examining the local reaction to state-imposed unfunded mandates warranted. The issue of state-imposed unfunded mandates is not new. As Zimmerman (2012) explains, Goodnow (1895) complained about state legislative mandates on local governments; however, the issue of state (and federally) imposed mandates on local governments reached a head in the 1980s and early 1990s, as the federal government attempted to deal with fiscal stress by devolving many programs to the state level, with states in turn mandating local action (Advisory Commission on Intergovernmental Relations 1990; Berman 2003). While not exactly preemption, state-imposed unfunded mandates have features of preemption. Specifically, “mandates distort local priorities, restrict managerial flexibility, and impose costs that have to be paid though local revenues” (Berman 2003, 78). In essence, an unfunded mandate substitutes the state legislatures policy priorities for the local governments policy priorities. This occurs in a similar manner to preemption, but rather than restricting the ability of a local government to make a policy choice, the legislature has mandated an action.

Evidence of the number of unfunded mandates imposed on local governments in the United States is sparse. Local elected officials in Minnesota identified 150 “objectionable” rules and laws they would consider unfunded mandates (Nobles and Brooks 2000). In the 1980s, the state of Florida outlined 362 unfunded mandates imposed on cities and counties (Florida Advisory Council on Intergovernmental Relations 1991; Benton 2002). Over a similar time period, one in twelve in Ohio imposed an unfunded mandate on local governments and that number was closer to one in four in Tennessee (Benton 2002). Although this is anecdotal evidence, state-imposed unfunded mandates were of particular concern in the 1980s and early 1990s.

Generally, local governments have little legal recourse against unfunded mandates. Home rule may provide some limited resources; however, the courts have been more inclined to side with state legislatures than local governments in the realm of mandates. In a number of states, another response by local governments to the increase in unfunded mandates was to lobby the state legislature to impose constitutional or statutory requirements to reimburse local governments for the cost of such mandates (Berman 2003). As of 2012, fifteen states had amended their constitutions to limit unfunded mandates by 1) prohibiting them altogether without the acquiescence of the affected local government, 2) requiring reimbursement of some or all costs, 3) delaying the imposition of such mandates, 4) allowing local governments to ignore such mandates, 5) requiring supermajorities in the legislature to impose unfunded mandates, or 6) allowing governors to suspend such mandates (Zimmerman 2012). With some overlap, sixteen states have enacted similar limitations on unfunded mandates by statute.

An examination of one such limitation, Florida's constitutional Amendment 3 in 1990, suggests the constitutional limitations on unfunded mandates restricted the use of such mandates and expanded the role of the state of Florida in service provision relative to a synthetic Florida that never adopted Amendment 3 (Ross 2018). Prior research suggested Amendment 3 was successful in passage because voters were convinced that without it, taxes would rise and local priorities would be supplanted by state ones (MacManus 1991). Overall, Zimmerman (2012) asserts constitutional limitations on unfunded mandates are more effective at actually constraining state behavior relative to statutory limits that are easier to circumvent. Overall, local governments had little legal success at limiting the impact of unfunded mandates but saw more success at passing legislation and/or referenda to blunt the impact.

The 1990s and Early 2000s: Public Health

The third epoch of state preemptions relates to policies affecting public health, such as tobacco use and advertising, food labeling and nutrition, and firearm safety. These preemptions were predominantly from the 1990s and early 2000s, although some authors cite them as going back as far as the 1980s (Pomeranz and Pertschuk 2017). For example, the pace of tobacco regulation preemptions peaked in the mid-1990s and plateaued after 1996, until repeals of the preemptions started in 2002 (Mowery et al. 2012). Firearm safety preemptions were a very common form of preemption, with forty-three states having some form of gun preemption (Pomeranz and Pertschuk 2017).

Many of the public health preemptions limited the extent to which cities could regulate health-related industries. According to Pertschuk et al. (2013, 213), “[i]n public health, the term ‘preemption’ typically refers to ‘ceiling’ preemption, by which a higher level of government takes away the power of lower jurisdictions to adopt *stronger* laws.” For example, preemptions banned cities from being stricter than their states in restricting smoking (Babb, Tynan, and MacNeil 2010). This is contrary to the advice of public health experts. Indeed, the Institute of Medicine recommends that states set minimum standards (Pomeranz and Pertschuk 2019), allowing cities to set stricter standards if they so choose.

The most common explanation for whether states decided to preempt public health policies during this epoch was the influence of powerful interest groups. In particular, the tobacco lobby was especially instrumental in getting states to adopt preemptions of tobacco regulation and clean air bills (Givel and Glantz 2001; Siegel et al. 1997). Monadari and Glantz (1998) find larger tobacco industry campaign contributions are associated with legislators acting in ways that are more favorable to the tobacco industry, including introducing and voting for tobacco regulation preemptions. This pattern of interest group influence existed across a variety of public health areas (Pertschuk et al. 2013), including the firearms and alcohol industries (Gorovitz, Mosher, and Pertschuk 1998). In Pomeranz and Pertschuk’s (2017) study of legislative testimony, multinational corporations and an ALEC model bill backed Kansas preemption of food, nutrition, and agricultural policy.

Interest groups such as the tobacco industry were effective at getting states to preempt policies unfavorable to their interests because of economies of scale. While public health organizations are more effective at the local level (Givel and Glantz 2001), larger industries cannot lobby every local government (Gorovitz, Mosher, and Pertschuk 1998). Instead, when these industries “pool their resources in trade associations or other collective bodies, [they] can afford to protect their interests at the state level, through state or regional offices” (Gorovitz, Mosher, and Pertschuk 1998, 37). Industry interest groups, therefore, were able to pass preemptions of policies, whereas public health groups were more influential at the local level. For example, local interest groups

were able to partner with schools, businesses, and a city to institute social norm changes that led to tobacco policy changes, even in a state such as Oklahoma which preempted tobacco laws (Douglas et al. 2015).

Public health officials worry about the negative impacts of preemption on public health, particularly when the preemption bills include penalties for local governments that choose to ignore the preemption (i.e. punitive preemption) (Pomeranz and Pertschuk 2017). For example, in states where there was a preemption law for tobacco, there were fewer conversations about smoke-free environments, thus hindering the change of social norms surrounding smoking (Mowery et al. 2012). In a survey of health officials in cities of 150,000 people or more, Rutkow et al. (2019) find 72 percent of health officials and 60 percent of mayors delayed or abandoned policymaking due to state preemptions. Over 90 percent of both groups said preemption was an obstacle to local policymaking. However, approximately 60 percent of respondents said they attempted to counter future preemption, mostly commonly by working with advocacy organizations and the state legislature.

When given the opportunity, cities acted quickly to counteract preemptions. For example, North Carolina's tobacco preemption bill included a three-month rollout period whereby any existing tobacco control laws would be allowed. More than half of the counties in the state proposed a tobacco regulation during that period and the number of local smoking regulations went from sixteen to 105 (Conlisk et al. 1995).

Towards the end of this epoch, public health preemptions decreased over time. Babb, Tynan, and MacNeil (2010) observed that between December 31, 2004 and December 31, 2009, seven states (declining from nineteen to twelve) no longer preempted laws banning smoking in government work sites, private-sector work sites, and/or restaurants. However, public health advocates still worried about the negative consequences of these preemptions.

The 2000s to Today: "The New Preemption"

The usage of state preemption of local ordinances appears to be accelerating in the current time period (DuPuis et al. 2018). Unlike the previous epochs, there does not appear to be a discernible pattern to the policy areas preempted (Briffault 2018). Rather, these new preemptions seem to be preventing local regulation in general without any concurrent state regulation (i.e. vacuum preemption). Riverstone-Newell (2017) suggests this is a response to a burgeoning amount of local policy innovation aimed at filling a void left by inaction on the part of state and federal policymakers. Local action has drawn the ire of state policymakers and they have responded by limiting local policymaking authority in increasingly punitive ways.

Some of the new preemptions contain provisions that go beyond the traditional intent on preemption (Scharff 2018). These punitive preemptions contain terms that all but require absolute compliance or face harsh penalties. These penalties, imposed on elected officials, administrators, or both, can include removal from office, fines levied against a person, or imprisonment (Scharff 2018; Swindell, Svara, and Stenberg 2018). Additional sanctions may also be imposed on non-compliant local governments (Briffault 2018); however, some states have entertained the idea of eliminating the ability of local governments to impose municipal regulations of any kind. Briffault (2018) refers to these as nuclear preemptions and argues that, if passed, they would redefine local self-governance in the United States. Scharff (2018) defines these somewhat differently explaining narrow punitive preemption is focused on particular actors (elected officials or managers), broad punitive preemption is focused on non-complaint local governments generally, and blanket pre-

emptions are similar to Briffault's explanation of nuclear preemption. Taken together, the new preemption is typified by vacuum preemptions aimed at reducing local government regulatory powers and, in some circumstances, adding punitive elements to these preemptions to all but ensure compliance.

Not all new preemptions are punitive, but nearly all punitive preemptions are in the new era. As mentioned above, the new preemption epoch is typified by a broad range of policy areas preempted. These include (but are not limited to) limitations on local firearms regulations, workplace regulations, public health regulations, plastic bag bans, anti-discrimination regulations, and adoption of municipal broadband internet services (Briffault 2018)). Many of these are vacuum preemptions—preventing local regulation while not providing any state guidance. As Riverstone-Newell (2014) mentions, the careers of local officials are dependent upon their ability to satisfy constituent demands. The wide-ranging nature of the new preemptions suggests a strategy to stifle a large amount of local policy making authority. In turn, this prevents the officials from satisfying constituents.

Both Briffault (2018) and Scharff (2018) outline a number of preemptions that fall into the category of punitive preemptions. Arizona's S.B. 1487 appears to be the most extreme version of punitive preemption. Under S.B. 1487, the Arizona attorney general had broad powers to investigate whether any local governments are out of compliance with Arizona state law and punish non-compliant local governments [see Briffault (2018) and Scharff (2018) for a detailed legal explanation of the process]. As Scharff (2018) mentions, it appears this process is designed to stifle any local policy action in areas that are current preempted or might be preempted in the future.³ Though S.B. 1487 is the most extreme of the punitive preemptions, it combines the two approaches that are common in this era, vacuum preemption and punitive preemption.

The nature of these new preemptions has led to claims that these preemptions are more partisan than in the past. In particular, some scholars argue preemptions are responses by Republican controlled state governments to their more liberal, Democrat controlled cities (Flavin and Shufeldt 2019; Fowler and Witt 2019; Phillips 2017). However, other studies find the party in control is less important than the existence of an ideological difference between states and their cities (Barber and Dynes 2019). Until recently, longitudinal data on a variety of state preemptions has not been available, so the causal relationship between partisan and preemption could not be explored. Early studies with this new data across some policy areas suggest ideology does influence the likelihood of a state adopting a new preemption (Goodman).

Given the often-punitive nature of the new preemption, local governments have limited options on how to respond. Recently, the National League of Cities (NLC) released a report suggesting a three-pronged response strategy (Wagner et al. 2019). This includes communicating the problem of preemption to local voters and state elected officials, forming coalitions to fight preemption, and using the court system when available. Swindell, Svava, and Stenberg (2018) suggests six potential routes to coping with preemption at the local level. The first is defiance of new preemptions. Given the features of the new preemption, this approach is not without risk. Potentially less risky is to rely heavily on existing or remaining legal authority and/or home rule powers to respond. Third is to attempt to use state referenda, where available, to directly change the law. Fourth and similar to the second is to devise circumvention methods that are consistent with existing law but allow action to continue. Fifth is to lobby the state legislature to expand the

³Under S.B. 1487, a local government can be considered non-compliant if they do not repeal local laws that are subsequently preempted.

powers of local governments. The final recommendation is similar to the approach of NLC and raise awareness of the impacts of preemption in an effort to educate state policymakers about the repercussions of their actions. These two approaches suggest working within the potential punitive constraints of the new preemption may be the only real option available to a great many local governments.

Toward a Comprehensive Understanding of Preemption

The preceding sections outlined the four preemption epochs. The first modern preemptions, in the 1970s and 1980s, were TELs, which restricted local governments tax revenue and/or spending. Local governments responded by innovating, often by establishing special districts. In the 1980s and early 1990s, state preemption more often took the form of unfunded mandates. The most common response by local governments was to lobby the state legislature to create requirements making it difficult to impose unfunded mandates or reimbursing the local governments their cost. The third epoch, in the 1990s and 2000s, saw a rise in preemptions of laws related to public health, limiting local governments abilities to regulate health-related industries. Although many of these preemptions were eventually repealed, local governments also enacted legislation to counteract the preemptions when that option was available to them. Finally, the new preemption epoch began in the 2000s. These state actions are often vacuum preemptions that prevent local regulation and punitive preemptions that punish local governments who try to counteract the preemptions. Local governments are still struggling with how to respond to these preemptions, and working through existing mechanisms such as public involvement, referenda, and the courts appear to be the most promising responses. While the four epochs represent different types of preemption, each form represents challenges to local government innovation and the ability of sub-national jurisdictions to determine local solutions to local problems.

Despite this challenge, preemptions are not inherently normatively good or bad. There are examples of preemptions that have had serious negative consequences, such as preemption of tobacco regulation which harmed public health or North Carolinas H.B.2 “Bathroom Bill” which eventually cost the state hundreds of millions of dollars in lost revenue. However, other preemptions have had positive outcomes, such as New Yorks ban on hand-held phones while driving (Berman 2003) or Oregons preemption of local zoning ordinances to encourage more and denser housing development (Grabar 2019). Given that state governments have the constitutional right to limit the actions of their local governments, it seems unlikely that states will stop preempting their local governments.

However, state governments preempt their local governments at their own peril. Big cities are the economic drivers of their states, and if state preempt their cities, they are hindering cities abilities to enact economic policy. This was apparent in several of the preemption epochs, with local governments having to innovate by creating special districts or lobbying their state governments in order to have the control over their budgets to achieve their policy priorities. While many of the blanket preemptions are still too recent for proper data collection and policy evaluation, future research should explore the extent to which these preemptions harmed the economy of the states large cities, and therefore the overall economic health of those states.

Theoretically, state preemptions raise questions about efficiency and competition within states. If Tiebout (1956) is correct, states would ideally be comprised of a large number of local governments, each with their own bundle of services and taxes. This heterogeneity increases efficiency

by allowing citizens to choose their preferred bundle. While there are critiques of this theory (Howell-Moroney 2008), state preemption would decrease efficiency by limiting the options available to local governments. These local governments would behave in increasingly similar ways, limiting their responsiveness to their citizens and decreasing competitiveness. Given the reality of state preemptions, it is essential for local government policymakers and managers to understand how to work within the new preemption regime while remaining responsive to their local constituents. As Sances (forthcoming) observes, local governments are responsive to public opinion when they are not constrained by state policies. More constraints may, therefore, decrease responsiveness.

For policymakers such as mayors and City Council members, the challenge is how to implement policy responsive to their constituents needs within a restrictive preemption environment. In general, local governments can either comply or fight back against state preemptions. Darcy and Holman (2019, 3) suggest local governments are *rationaly expressive*, seeking “to signal commitment to local needs while avoiding costs associated with non-compliance.” This action can take a number of forms. Working with state legislators is one approach these policymakers often take in essence attempting to change the rules of the game (Rutkow et al. 2019). In other cases, local policymakers sensitive to the requirements of preemptions are able to move quickly to pass legislation before the preemption goes into effect (Conlisk et al. 1995). A final approach has been to turn to the constituents themselves, through public relations campaigns or referenda, to put pressure on the state to repeal the preemption (Douglas et al. 2015; Swindell, Svara, and Stenberg 2018). While these three approaches have had some limited success, they may not be available to all local policymakers. Therefore, mayors and City Council members will need to think about how to best create and implement local policies in an environment where the distribution of power between governments is competitive and changing. Organizations such as the National League of Cities, as well as within-state urban delegations, could be helpful in sharing information and best practices.

For local government managers, these big policy strategy questions play out in the day-to-day implementation of policies. Revenues still need to be raised, services still need to be provided. In order to achieve this, managers will need to be both proactive and reactive. Rather than just focusing on their local context, these managers need to consider the political environment of their state. Local governments may have some power of self-governance (see McDonald III (2015) and (McDonald III and Gabrini 2014)), but the political tides at play within a state can fluctuate the environment in which they operate, and their freedom within that environment (Kim, McDonald III, and Lee 2018). In implementing policy, they will also need to be aware of what actions their state government restricts. This will be particularly challenging in the new epoch where preemptions frequently leave policy vacuums. Managers will have to adapt quickly to new policy challenges, such as short-term rentals, where states have prohibited regulation but questions about the proper role of government intervention remain. By examining the history of local governments responses to preemption we discussed in previous sections, it seems clear that it will be up to managers and policymakers to innovate new ways to respond to the new policy environment, such as the development of special districts as a response to TELs in the 1970s and 1980s. We expect the need to innovate to be heightened in states where both the demand for local policy action and preemption activity are high.

Conclusion

State preemptions of city ordinances is increasingly common in practice and academic study, yet little is known about the nature of these responses. We argue a barrier to knowledge and best practice generation has been a lack of a coherent definition and understanding of the history and nature of state preemptions. This paper contributes to the creation of this shared understanding by situating preemptions into four epochs. Within each of these epochs, the causes, form, and local government responses to preemption vary. Understanding the preemption form scholars are examining will help make sense of the varying conclusions reached by research about state preemption. Much of the current literature on state preemption of local laws considers all preemptions as derived from the same process by lumping them together (Flavin and Shufeldt 2019; Fowler and Witt 2019; Swindell, Svava, and Stenberg 2018); however, the preceding analysis would suggest this is not an appropriate course of action due to the differences in the preemption epochs.

Understanding the history of state preemptions moves scholars and practitioners closer to understanding the causes and consequences of preemptions, but there is still much to learn about the new relationship between states and their cities. We believe there are several big questions that future research should address. First, what does this changing relationship mean for local government managers? How can these administrators follow state law, avoid the penalties of preemptive preemptions, and still perform all the necessary local government functions? In particular, how do local managers address the policy vacuum left by some preemptions? Second, what impact does preemption have on state control of or responsibility for local governments? When states preempt their local governments they inject themselves into local affairs, but the legal implications behind this injection is unclear. It may be that preemption has minimal implications, but it may also shift the burden of responsibility for programs and services onto the shoulders of the state.

Third, what policies are most likely to be preempted by what type of states? Answering this question will likely involve substantial data collection and organization, perhaps along the lines of Wagner et al. (2019) typology of preemption types. A useful methodological tool may be text analysis, which would allow researchers to identify common language and policy features (Garrett and Jansa 2015; Linder et al. 2018; Wilkerson, Smith, and Stramp 2015) in preemption legislation as well as city ordinances that triggered the preemption. Longitudinal and causal analysis are necessary to supplement existing cross-sectional conclusions. For example, while studies find a relationship between partisanship and preemption (Flavin and Shufeldt 2019; Fowler and Witt 2019), this needs to be confirmed with time series analyses across a variety of policy areas.

Last, clarity should be sought to establish when and how preemption should be used. While media accounts often point to preemptions with negative consequences for certain groups, as Frug and Barron (2008) point out, the decision of a state to preempt can have positive benefits. Given the possibility of a positive aspect, preemption should not be cast aside. Rather, a framework needs to be established that clarifies the use and nature of preemption and makes a normative argument for how it should be used. This is inherently a challenging question, one that involves complex statistical analysis, ethical considerations, and legal debates. In an era of preemption, however, it is, perhaps, the most important of the questions that we need to answer.

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