

# New Preemption as a Tool of Structural Racism: Implications for Racial Health Inequities

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**Abstract:** Preemption is a substantial threat to achieving racial equity. Since 2011, states have increasingly preempted local governments from enacting policies that can improve health and reduce racial inequities such as increasing minimum wage and requiring paid leave.

## Introduction

Following the murder of George Floyd in the summer of 2020, a racial reckoning unfolded in the United States. There were calls for truly addressing structural racism — the policies, systems, and institutions that cause racial health inequities. In fact, over 170 cities, counties, and states declared racism as a public health crisis. However, preemption, the ability of a higher level of government to limit or eliminate the power of a lower level of government, threatens to derail that momentum and the accompanying policy changes. Historically, the federal government has preempted states and localities from enacting discriminatory policies, and state preemption was reserved to determine if a new local law conflicted with existing state law.<sup>1</sup> However, preemption is now being used to intentionally thwart local action or punish localities. Briffault<sup>2</sup> coined this aggressive form of state preemption of local governments as “new preemption” to differentiate it from previous uses. In this paper, I will make the case that the current iteration of preemption, new preemption, is being used as policy tool (i.e., mechanism) of structural racism.

Structural racism can be described as “the totality of ways in which societies foster discrimination, via mutually reinforcing systems of discrimination (e.g., in housing, education, employment, earnings, benefits, credit, media, health care, criminal justice, etc.) that in turn reinforce discriminatory beliefs, values, and distribution of resources).”<sup>3</sup> For example, racial residential segregation, a primary pathway connecting structural racism to health outcomes, was established through the federal government’s housing policies and the judicial system.<sup>4</sup> Policies like redlining

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and highway construction resulted in people of color being more likely to live in under-resourced neighborhoods that lack access to employment, health care, green space, clean air, fresh food, and other social supports that are important for health.<sup>5</sup> Additionally, the mass incarceration of Black people, and the adverse health consequences of incarceration, is a direct result of policy choices such as three-strike laws, the War on Drugs, and mandatory minimum sentences. These intersecting systems of racism are independently and collectively associated with adverse health outcomes including premature mortality,<sup>6</sup> adverse birth outcomes,<sup>7</sup> myocardial infarction,<sup>8</sup> and breast cancer<sup>9</sup>

“when the federal government regulates state authority, and the states regulate local authority in the area of public health, their actions, wherever appropriate, should set minimum standards (floor preemption) allowing states and localities to further protect the health and safety of their inhabitants.”<sup>14</sup> Because ceiling preemption is most commonly being used in the era of new preemption, I am referring to ceiling preemption when discussing the current iteration of state preemption of local governments in this paper.

Cities are creatures of states, and states have always had the power to confer and limit authority to cities. Preemption has been around since the nineteenth

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among Black people and less access to adequate health care among Latinx.<sup>10</sup> Yearby positions law as the tool of structural racism that codifies and enforces those inequities.<sup>11</sup> These policies create differential access to resources and different conditions for white people and people of color. Colorblind laws and policies, like new preemption, are a primary mechanism of structural racism.<sup>12</sup>

### **Preemption as a Tool of Structural Racism**

Preemption is “the invalidation of one jurisdiction’s law by the law of a higher jurisdiction.”<sup>13</sup> Federal law can trump state law, and state law can trump local law. There are two types of preemption, floor preemption and ceiling preemption. In ceiling preemption, a higher level of government prohibits or limits the authority of a lower level of government to adopt stronger laws. In floor preemption, the higher level of government sets a minimum standard and lower jurisdiction are able to adopt stronger laws. A 2012 report by the Institute of Medicine recommended that

century and preemptive policies and mechanisms have evolved over time.<sup>15</sup> Additionally, preemption is a policy tool and is not inherently negative or positive. Therefore, an equity lens must be employed when evaluating the application of preemption. Using an equity-first lens, new preemption is different from past uses and is illustrative of colorblind racism described by Bonilla-Silva.<sup>17</sup> He characterizes colorblind racism as lacking explicit racial terminology, pursuing a racial agenda through political matters (e.g., states’ rights, personal responsibility, and state intervention) and working through invisible mechanisms. In the next sections, I will discuss how new preemption has been enacted through a political agenda of state intervention, uses covert tactics to pass and justify policies, and does not use explicitly racial terminology.

### *Preemption and Concentration of Power at the State-Level*

Due to inaction at the federal and state level, cities have taken the lead on public health, environmental, and

worker-related policies with much of this innovation happening in more liberal cities. Many of these liberal cities are in states with Republican controlled state legislatures. This dynamic has resulted in states passing preemption laws after progressive policies have been passed at the local level.<sup>18</sup> Consequently, local governments are increasingly unable to enact policies that may reduce inequities and improve health such as increasing the minimum wage, requiring paid leave, regulating firearms, and adopting smoke free laws.<sup>19</sup> States are limiting the authority of localities without offering alternatives that tackle the issues localities are interested in.<sup>20</sup> This concentrates power at the state-level where localities must rely on state legislatures to enact policies that target the needs and desires of their communities. This becomes problematic when local governments are willing but unable to address local issues and state governments are not providing any solutions either. It appears the goal of preemption is not to address problems but to maintain the status quo.

Although this trend is seen across the country, preemption is more prevalent in the South. Furthermore, majority white state legislatures are often preempting policies that would disproportionately benefit Black people and other people of color. For example, the majority white Alabama legislature blocked a city minimum wage ordinance in Birmingham where 69% of the residents are Black. The Texas legislature blocked a paid sick leave ordinance in Dallas that would have overwhelmingly benefited Black and Latinx workers.<sup>21</sup>

Racialized language is also used when new preemption is being applied. New preemption is driven primarily by the American Legislative Exchange Council (ALEC), trade associations and corporations, and conservative animosity of urban lawmakers who are seen as too liberal and interfering with free market principles. ALEC is comprised of state legislators, conservative philanthropies, wealthy donors, right-leaning advocacy groups, and private-sector businesses. Their major strategy for advancing their agenda is the development and dissemination of model bills.<sup>22</sup> Although ALEC has been writing preemptive bills since the 1990s, the rise of new preemption has been fueled by polarization (e.g., urban vs. rural, liberal vs. conservative) and the Republican control of state governments that began in 2011. The majority of states are controlled by Republican governors, but most cities are led by Democrats.<sup>23</sup> ALEC has stated that “local governments have become victims of far left organizations manipulating the public and local officials to create policies that hurt economic development and individual freedom.”<sup>24</sup> To combat this perception, ALEC

has used and popularized state preemption. Research by Hertel-Fernandez attributes some of ALEC’s success to their organization filling a void — providing political strategy, research assistance, prewritten bills, and talking points to state legislators with limited time and resources.<sup>25</sup> Efforts to address new preemption should consider the underlying factors that have led to ALEC’s success.

Conservative disdain of urban lawmakers is beyond a political ideology grounded in limited government and free markets and cannot be divorced from larger racial dynamics. The term *urban* is associated with Black people and other people of color and is often used in contrast to rural which reads as *white*.<sup>26</sup> This concept and coded language is often present when majority white (i.e., rural) legislatures dismiss issues as only urban problems or enact preemptive policy directed at the urban constituents in the state. I have witnessed this pattern in my home state of Tennessee when the city of Memphis removed a Confederate monument. The state legislature passed new legislation limiting local governments’ ability to remove statues and withheld state grants from the city of Memphis. Unfortunately, Tennessee is not unique. Seven other southern states preempt local control over monument removal. Unsurprisingly, many of these same states also preempt minimum wage and paid sick leave laws.<sup>27</sup>

#### *Invisible Tactics Used to Pass Preemption Bills*

Pomeranz and Silver conducted the only comprehensive analysis of tactics used by state legislatures to pass preemption bills. They found states employ practices like (1) quickly passing bills (2) adding preemption to pre-existing bills on unrelated topics (3) bundling preemption bills with multiple unrelated topics and (4) using titles that do not reflect the substance of the bill.<sup>28</sup> Kentucky introduced and passed a paid leave preemption bill in four days, Missouri in one day, and Ohio introduced and passed the bill on the same day. In addition to passing a bill quickly, Ohio’s paid leave preemption bill is an example of bundling unrelated topics. Ohio’s paid leave preemption was included in its “Petland Bill” that regulates dog sales and license pet stores.<sup>29</sup>

Arkansas’ “Intrastate Commerce Improvement Act” is an example of using a title that does not reflect the substance of a bill. In 2015, Arkansas passed a bill that preempted localities from creating new protected classifications. This retaliatory bill was passed after the Fayetteville City Council passed a bill prohibiting discrimination based on sexual orientation or gender identity.<sup>30</sup> The title of the preemptive bill obscures both the content and purpose of the legislation. In

addition to using a title that is unrelated to the topic of the bill, this is yet another example of how a broad, yet targeted preemption bill disproportionately effects structurally marginalized groups.

Another strategy is coupling preemption with other punitive strategies (i.e., preemption plus), such as threatening agencies or officials, withdrawing or denying local funds, or stripping agencies of regulatory authority.<sup>31</sup> A common preemption plus policy is prohibiting localities from enacting policies that limit their cooperation with federal immigration officials and imposing financial penalties for violating the preemptive policy.<sup>32</sup> These tactics limit the ability to debate these bills, obfuscates the purpose of the bill, and does not allow constituents to organize and mount opposition to the bills. Legislators also do not have time to discuss the effects of these bills with their constituents.

#### *Preemption Policies as a Form of Colorblind Racism*

Law is a tool to disrupt or legitimize social stratification of groups. From the inception of the United States to the 1960s, the dominant form of racism was explicit and characterized by overt acts of discrimination in education, housing, jobs, and health care in both the public and private sector. This form of racism was government sanctioned and commonly called Jim Crow racism, redneck racism, or old-fashioned racism.<sup>33</sup> Due to the Civil Rights Movement and other mass protests by Black people in the 1960s and 1970s, Jim Crow racism effectively ended and was replaced by a more covert form of racism still undergirded by negative beliefs about Black people and Black culture but expressed through formally race-neutral policies that maintain and reify the racial hierarchy of Jim Crow racism.<sup>34</sup> Bonilla-Silva refers to this racism as colorblind racism, but others have labeled it as modern racism, symbolic racism<sup>35</sup>, or laissez-fair racism.<sup>36</sup>

Colorblind interpretation of the law treats race as a category that reflects only skin color and/or country of origin ignoring the historical and social implications of race in America.<sup>37</sup> Proponents of colorblind approaches to the law believe these approaches are superior to race-conscious approaches because they are based on merit alone and are not corrupted by considering race. They believe that considering race is unfair and makes a decision seem “political” or “special interest.”

Colorblind policy is a myth. In order to be colorblind, one has to acknowledge race and then actively choose to ignore it.<sup>38</sup> These policies acknowledge group identity but ignore the consequences of group identity. Ultimately, this approach has racially explicit consequences and reinforces white dominance in the

racial hierarchy.<sup>39</sup> New preemption policies function in this same way. Preemptive policies are enacted without considering the historical and social aspects of race or how preemptive policies may have different effects on said groups because of the larger context of race.

Under federal law, colorblind policies that disproportionately impact minorities are deemed discriminatory and violate Title VI, regardless of the intent of the law.<sup>40</sup> There is growing evidence and interest in the racially disparate effects of preemption policies. In my previous work, state preemption of local inclusionary housing policies was associated with poor health outcomes, particularly among Black people.<sup>41</sup>

Clearly outlining how new preemption is being utilized as a legal tool of structural racism will inform interventions and mitigation efforts. This understanding is also important because colorblind policies are often politically acceptable because they focus on providing equal opportunity. The ideology of equal opportunity is paired with a political focus on personal responsibility and individual rights. If individuals are given equal opportunities, regardless of systemic and historical burdens, the inequalities in outcomes and consistent disparities are inevitable and acceptable.<sup>42</sup> If racial inequities are a product of colorblind policies, those inequities are not happening because of the policies. Inequities must be a product of other factors like genetic differences or cultural deficiencies.<sup>43</sup> This creates a misdiagnosis of the problem and an inability to offer the correct remedy. If new preemption is not understood as a tool of structural racism that causes racial health inequities, policy will not be deemed an appropriate tool for addressing those inequities.

#### **Preemption and Racial Health Inequities**

Preemption of mandatory paid sick leave laws and local police budgeting are important examples of how new preemption relates to racial health inequities. These policies were chosen because they highlight two different pathways connecting new preemption to racial health inequities (1) disparate effects due to colorblind application of laws and (2) direct targeting of policies intended to improve the health of people of color.

#### *Paid Sick Leave and Racial COVID-19 Inequities*

Access to paid sick leave during the coronavirus pandemic is a recent example of how colorblind preemption policies contributed to racial health inequities. Paid sick leave allows people to care for themselves and other family members when they are not well. Lack of paid leave forces people to choose between economic security and their health. When faced with the choice between economic security and health, many workers

may choose to go to work. Going to work while sick increases the risk of getting sick for both the individual and the larger community. Lack of access to paid leave is even more consequential when trying to contain an infectious disease like COVID-19.

Before the pandemic, 23 states had preempted localities from enacting mandatory paid sick leave laws.<sup>44</sup> Localities in these states were at a disadvantage when trying to contain the pandemic in their communities. Some local governments were unable to pass emergency paid sick leave laws<sup>45</sup> that would have protected frontline workers who are disproportionately people of color, particularly women of color.<sup>46</sup> Advocates in many states recognized the importance of this policy and asked their governor's to suspend preemption of paid sick leave to address COVID-19.<sup>47</sup>

Yearby and Mohapatra name paid sick leave as one of the primary mechanisms connecting systemic racism and COVID-19 pandemic response policies.<sup>48</sup> Preemption of paid sick leave laws is a colorblind policy. These policies do not explicitly deny Black and Latinx people access to paid leave or force them to work jobs that do not offer them. Yet, these policies are disproportionately harmful to Black and Latinx communities.

Structural racism is compounding and interconnected. Preemption of paid leave policies amplifies longstanding racial discrimination in all aspects of employment including hiring,<sup>49</sup> pay,<sup>50</sup> and promotion.<sup>51</sup> Full-time workers and higher wage workers are more likely to have access to paid sick leave.<sup>52</sup> Low-wage workers, who are disproportionately Black and Latinx<sup>53</sup> have less access to benefits such as health insurance and paid leave.<sup>54</sup> In 2017, an estimated 68.8% of white workers had access to paid leave compared to 65.4% of Black workers and 56.6% of Latinx workers. The differences between low-wage and higher-wage earners is even more stark. Only 24.4% of lower-wage workers had access to paid sick leave compared to 74.4% of higher wage workers.<sup>55</sup>

Because the United States does not have a national paid leave policy and only 13 states and the District of Columbia have adopted paid family medical and leave policies, employers largely determine which workers have access to paid leave.<sup>56</sup> Depending on employers to provide access to paid leave is not a comprehensive policy solution. As of June 2020, only 25% of private industry employers had responded to the pandemic by creating a paid sick leave plan or adding additional days to an existing plan.<sup>57</sup> Leaving the health of workers, especially historically marginalized workers, to private industry is not an equitable policy solution. Instead of creating policy to counteract racial discrimination in the private market, state governments have

used preemption to block access to paid leave without providing an alternative. State policy choices are critically important for health inequities. While the federal Families First Coronavirus Response Act (FFCRA) expanded access to emergency paid sick leave, only 20% of workers were eligible.<sup>58</sup> Employers with more than 500 workers were exempt from the policy, and employers with fewer than 50 employees could opt out of the policy.<sup>59</sup> Ultimately, state preemption of paid leave, in concert with other systems of oppression, resulted in increased COVID-19 related morbidity and mortality among Black and Latinx people.

### *Local Police Budgeting and the Health of Communities of Color*

Following the police shooting deaths of George Floyd, Breonna Taylor and countless others, longstanding calls for police reform, defunding the police, and abolition of the police became part of the public conversation. Some localities tried to take steps in this direction by reallocating police budgets. Yet, preemption stands in the way.

In response to these actions and discussions at the local level, seven states proposed bills threatening localities for cutting or reallocating their police budgets. A Missouri bill would make localities ineligible for state funding if they decrease the law enforcement budget by more than 12% relative to other items in the proposed budget. A bill in Louisiana would allow the state legislature to reduce sales tax appropriations to a locality if the locality reduces the annual police department budget and the legislature determines that the reduction will have a significant adverse effect on public safety. Similar bills were filed in Indiana, Arizona, New Jersey, and Texas.<sup>60</sup> The city of Austin decided to divert some of its police budget to pay for supportive housing programs and other services. However, the governor of Texas publicly criticized their approach and voiced support for legislation prohibiting cities from cutting their police budgets. Other states are considering similar legislation preventing localities from reducing and/or diverting funds from their police and public safety budgets.<sup>61</sup> Previous research has found that police budgets are associated with health outcomes. Ronzio et al.<sup>62</sup> found that higher city police expenditures were associated with higher all-cause mortality and premature mortality.

State preemption of local police budgeting is a colorblind policy that maintains the existing racial hierarchy. The bills are enacted under the guise of public safety and do not explicitly mention race. However, whose safety are states interested in protecting? States are opposing local government actions that are trying to address police violence against Black people. Pre-

emption is a convenient and effective policy tool of structural racism.

Black, Latinx, and Indigenous communities are more likely to be victims of lethal and non-lethal police violence with Black men and boys being particularly vulnerable.<sup>63</sup> Research has found that both lethal and non-lethal police violence have negative health consequences for Black people and other people of color.<sup>64</sup> Black people of all socioeconomic backgrounds are more likely to be killed by police than white people.<sup>65</sup> One analysis found that Black males are 21 more times likely to be killed by the police than white males.<sup>66</sup>

Police violence also has far-reaching effects on Black people who do not personally experience police violence. Bor et al.<sup>67</sup> found that police killings of unarmed Black people within a state were associated with worse mental health among all Black people within the state where the killing took place. Watching videos of police killings of unarmed people of color is associated with poor mental health outcomes among adolescents. The adverse health effects are not limited to poorer mental health. Both personal and vicarious experiences of police mistreatment have negative physiological effects as well.<sup>68</sup>

It is not possible to reduce racial health inequities without addressing the interactions between law enforcement and Black people.<sup>69</sup> Preemption threatens local government's ability to align their budgets with their goals and address the needs of their communities, particularly around racism as a public health crisis.

## Conclusion

New preemption has created racial health inequities and threatens future efforts to ameliorate those inequities. One of the many dangers of new preemption is its ability to stifle the implementation of solutions at the appropriate level. Some states are emboldened by the actions of other state legislatures, and local governments are discouraged and less likely to even attempt to implement innovative policy solutions for fear of their laws being preempted or implementing laws that are in violation of existing policies. Preemptive policies are notoriously difficult to overturn. If they are overturned, it takes an average of 11 years to repeal them.<sup>70</sup> Localities are using three major tactics to fight preemption: grassroots movement, legally challenging the constitutionality of preemption efforts, and invoking home rule provisions in state constitutions or statutes.<sup>71</sup> However, the volume of and speed at which new preemptive policies are being enacted suggests that these tactics are not enough. Structural racism is comprehensive and sophisticated. A multifaceted strategy to address new preemption is needed that focuses on

(1) preventing these policies from being passed in the first place (2) mitigating the negative effects of preemptive policies in communities of color (3) helping local governments address needs without triggering state intervention (4) developing creative, potentially new, legal approaches to repealing and challenging these laws.

As a researcher, I cannot speak to specific legal approaches for challenging preemption policies. However, researchers, particularly public and population health researchers, have an important role to play. First, understanding new preemption as a tool of structural racism places the use of this legal tool in the longer legacy of racist policies in the United States. Secondly, that contextual understanding can inform empirical research on the racially disparate effects of new preemption. Lastly, evidence is helpful to amplify ongoing grassroots movements against new preemption and can potentially inform creative legal efforts to combat new preemption.

## Note

The author does not have any conflicts of interest to disclose.

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