



The Local Power & Politics Review

Third Edition

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State-Level Preemption Accelerates in Response to Local Equity Efforts

Lori Riverstone-Newell, *Illinois State University*

As many localities fought to advance equity, public safety, and democracy in 2022, state leaders and special interest groups accelerated their attack on local authority. Over 1,000 abusive preemption bills were introduced during the legislative session, more than double the number introduced in 2021.¹

The range of targeted policy areas also grew, implicating “dozens of issue areas... from guns to labor to the environment,”² to public education, LGBTQ+ rights and

protections, public health authority, policing and firearm regulation, democracy and voting rights, and homelessness.³



Abusive state preemption strikes at the heart of local capacity and authority, delivering a potentially permanent loss of power. The possibility or threat of preemption is often sufficient to “chill” local initiatives and responsiveness. At its worst, localities may experience a “learned helplessness,” or a sense that local innovation is impossible, that the risks make trying too costly.⁴ The reality is that preempted or threatened localities often have more power than they realize.⁵ Indeed, local leaders and advocates across the nation are

finding creative ways to pursue their policy goals and fight back against state overreach. Some of their strategies and suggestions are presented below in three categories: work together, fight well, and find and share information.

Work Together: Preemption prevention and repeal campaigns continue across the states. Local leaders and advocates are critical to the success of these campaigns, often lending their support and membership in broad, or cross-issue, coalitions that have been difficult to achieve and sustain in the past. A survey of advocates conducted in spring 2022 confirmed the importance of cross-issue coalitions to preemption prevention and repeal. Moreover, many now recognize preemption as sufficiently threatening to overcome past impediments to cooperation, such as their hesitancy to working with groups that have divergent goals and strategies. One respondent noted that her coalition intentionally focused on the fact of preemption, rather than group-specific goals and objectives, which helped to prevent coalition “split,” a phenomenon that had been experienced with other issues in the past.⁶ Following this train of thought, local leaders might consider cooperation with other localities as a necessary defense against state overreach. While interlocal cooperation is often difficult to achieve and sustain, and the recent partisan framing of local preferences and policies may further complicate cooperation between politically mismatched jurisdictions, local leaders who recognize that preemption weakens all localities may see the value in working together to preserve local autonomy.

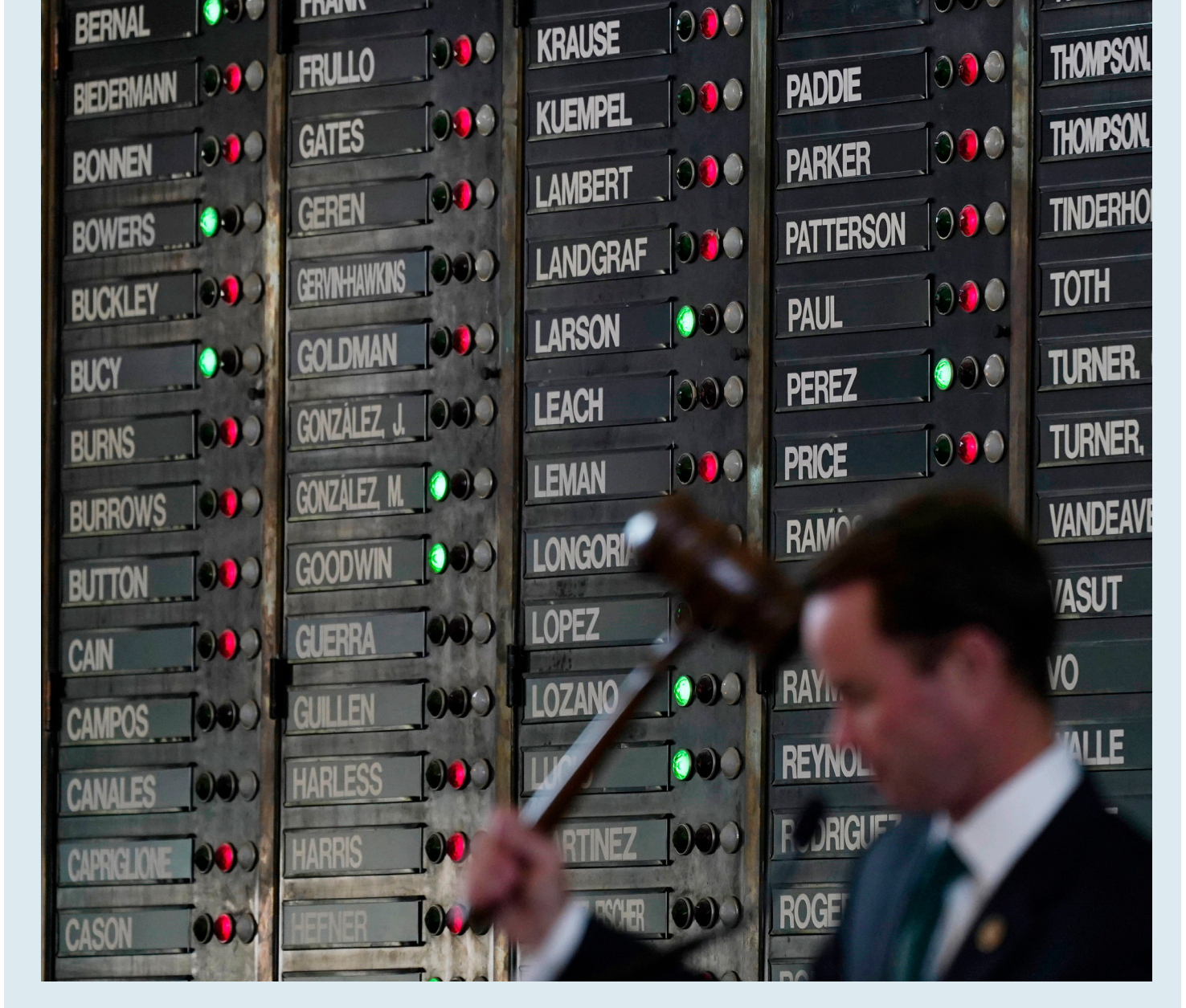
Fight Well: The fight for local autonomy requires different strategies depending upon whether no preemption currently exists, an immediate risk of preemption exists, or a preemption law is already in effect, and ChangeLab Solutions’ toolkit addresses each of these scenarios.⁷ Additionally, see Luke Fowler and Ramón Cruz’s article included in this edition. These authors argue that smaller localities may be able to do what larger, more visible, localities cannot. Previous research on policy diffusion and the cumulative effect of local policy adoption on state-level acceptance suggests the positive potential of a quieter, yet deliberate, approach.⁸ Also, Fowler and Cruz offer examples of how some localities have avoided raising red flags and opposition through creative policymaking.

More broadly, advocates and local leaders can encourage or join direct democracy campaigns to combat state overreach.⁹ Twenty-one states allow

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citizens to circumvent their legislatures by placing proposed laws directly on the ballot. Eighteen states allow citizen-led constitutional amendments, as well. In the 2022 midterm election, voters considered 137 proposals, including “the most abortion-related ballot measures on record.”¹⁰ Finally, the push for a recommitment to, and renewal of, home rule protections is key to durable local empowerment.¹¹ This is true, in part, because strong home rule protections presume local autonomy and policy discretion. While many localities currently possess some form of home rule authority, most remain subject to state overreach. Strong home rule protections would force states to justify removing local control, a political and legal burden that might go a long way toward ending abusive state interference.¹²

Find and Share Information: Any effort to prevent, adapt to, or repeal abusive preemption requires trustworthy and current information about preemption trends, incidence, and effects. Advocates and researchers likely have a trusted mainstay of sources; however, sources and types of information are rapidly expanding. Those wading back into the data will find a few places to start in the endnotes.¹³ Amicus briefs are another good source for case studies, statistics,



and framing. Amicus briefs are submitted to courts (mostly appellate) by third parties who wish to present a specific perspective on a current case, or the possible implications of a court decision.¹⁴ According to Marissa Roy, these briefs are only sometimes posted by the courts, but are often available on advocacy organization or legal team sites. Advocates and researchers might note the value of case studies and statistics that do not directly relate to one's own work. Resources pertaining to state interference in any one policy area can provide new insights on the types of data that might be collected, ways that data might be disseminated, workaround strategies, and coalition activities, among others.¹⁵

The articles that follow inspect recent and emerging concerns involving state preemption and other forms of overreach across five policy domains. Each article is written by a researcher-advocate team who combine their experiences and knowledge to present recent

trends and threats to local power in their policy domain, the associated costs of local disempowerment, and potential strategies to combat or adapt to abusive state preemption and other forms of state overreach. Randy Perez and Stephanie Witt discuss the events that led some state leaders to attack local elections authority. The authors review and categorize recent bills related to elections and voting and explain the various impacts of state interference in elections decisions. Perez and Witt also provide insights into how advocates and local officials are coping with threats and changes in elections authority and an increasingly hostile environment.

Adam Snipes and Lindsay F. Wiley present local officials' ongoing struggle to retain public health authority. The authors note that while state preemption can produce public health benefits, many recent preemption laws have done harm. Snipes and Wiley present recent cases of state preemption and other efforts to control

public health authority, likening them to earlier cases of politically motivated, interest-backed preemption efforts. The authors note that state efforts to control public health authority has, in some cases, led to federal action and centralization of said authority to the national level.

Luke Fowler and Ramón Cruz present localities as important environmental actors and introduce helpful, innovative strategies to achieve local environmental goals in contested states. Local governments are encouraged to coordinate strategic political campaigns to counter state and industry targeting of local environmental action. The authors present several strategies that local governments and advocates may use to defend local efforts against outsider attacks.

Steven Nelson and Stacy Seward note state interference in local educational authority has many important battlefronts. Often obscured in the media, yet vitally important, is the ongoing incidence of state takeovers of schools and school districts. The authors present the case of Lawrence, Texas, as evidence of the not-so-hidden racist motivations behind many school takeovers, as well as the far-ranging impacts of school takeover on local populations, local democracy, and representation.

Finally, Jorge Camacho and Marissa Roy review recent controversies related to public safety before explaining



why, despite recent demands for policy change, public safety policy remains largely unchanged and entrenched. The authors offer case evidence and incidents of recent preemption activity aimed at preventing local public safety reforms. They also demonstrate how widely supported reform efforts are often complicated by structural and legacy factors. The authors suggest ways that states and localities might work together to reform their justice systems.

About the Author

Lori Riverstone-Newell

Lori Riverstone-Newell is an Associate Professor of Politics and Government at Illinois State University. She graduated with a Master of Public Administration, and a Doctorate in Political Science from the University of Tennessee-Knoxville. Her teaching centers on subnational politics and policy and public administration and her research interests currently include the intergovernmental arrangement, state preemption, and how, despite their legal subordination in the federal system, localities strive to meet their needs.

Lori has published in various journals and is the author of *Renegade Cities*, *Public Policy*, and *The Dilemmas of Federalism*. She has presented her work in meetings and conferences across the nation and has been interviewed by national and regional media outlets including *The New York Times* and *The Wall Street Journal*.



Shifting Authority: Public Health Policy

Adam Snipes, *Oklahoma Campaign Organizer, Local Solutions Support Center*
Lindsay F. Wiley, *Professor of Law and Faculty Director of the Health Law
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Abusive state preemption of local authority to protect the public's health and promote health equity has become bolder since the COVID-19 pandemic began.

Riding the political backlash against pandemic restrictions and mandates, many state officials and legislators introduced and adopted sweeping measures, stripping local governments of all or some public health authority. The resulting disputes between the states and their local and tribal jurisdictions have since grown and evolved. The state-local tensions that emerged as state executive officials sought to seize control of the pandemic response have since worsened as the states and others continue their campaign to

diminish local public health emergency authority and local authority to pass public health measures more generally.¹⁶

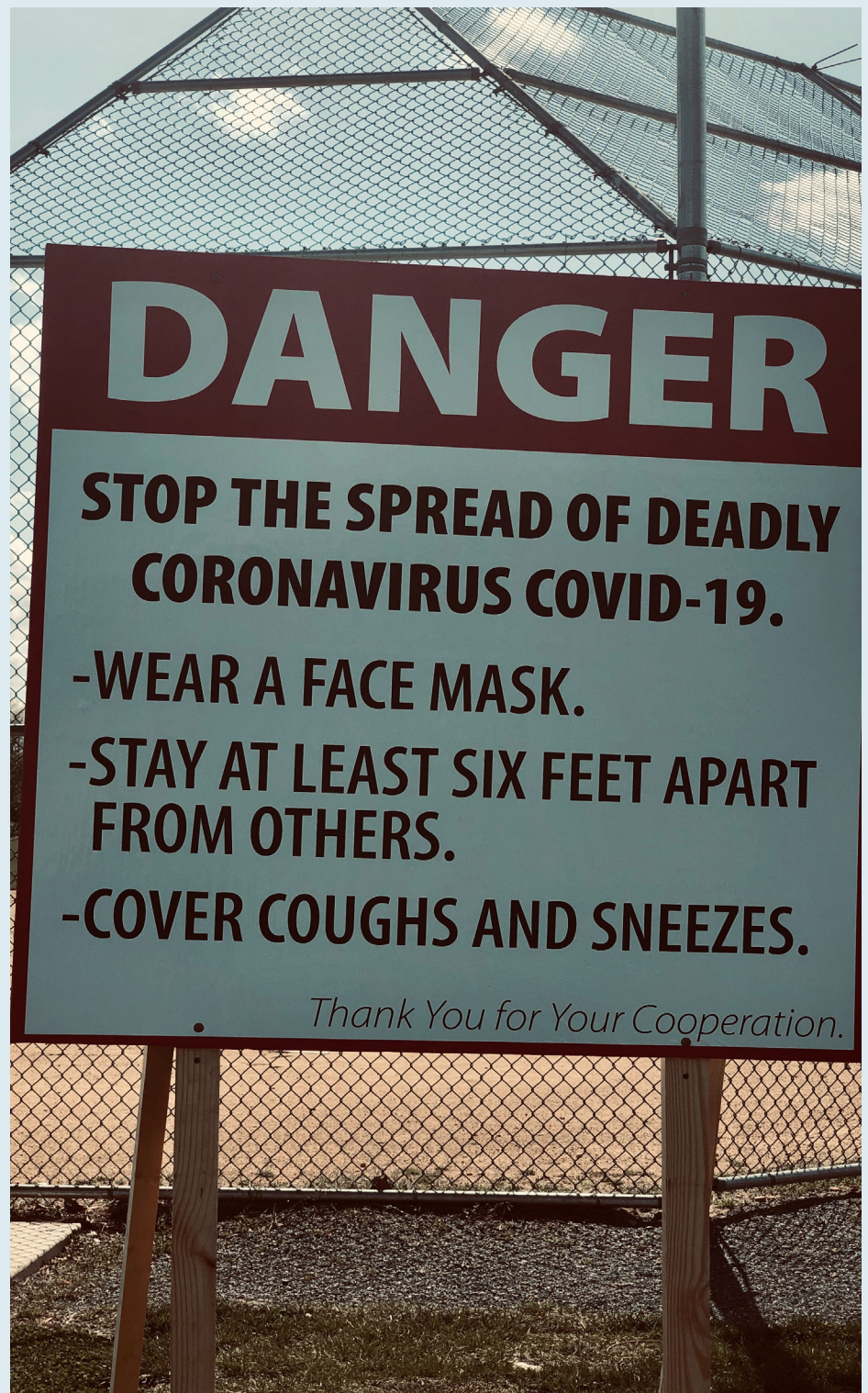
State preemption legislation and executive orders passed during and since the outbreak of COVID-19 have varied in scope and intent. Some of these endeavors have been limited to pandemic mitigation measures. For example, several governors issued orders prohibiting local governments from requiring COVID-19 vaccinations while making no changes to other existing vaccination laws. Yet, other state preemption efforts extend far beyond pandemic-related concerns, signaling a growing state interest in matters that have long been left to local discretion. For example, local public health officials in Montana are now prohibited from requiring quarantine for those known to have been exposed to the Ebola virus; state universities in Arizona are

now prohibited from requiring meningitis vaccinations for dorm residents; and Oklahoma school districts are no longer permitted to send home children found to be infected with headlice.¹⁷

Perhaps the most impactful changes to local public health authority since COVID-19 involve efforts to permanently move some or all control over public health policy to the state level. For example, leaders in Oklahoma attempted to take over local boards of health, despite strong and effective pandemic responses by local and tribal governments. This effort was thwarted with the help of advocates, lobbyists, and a funding system that supports local boards of health with local property taxes rather than state funding. Having been defeated, the state followed in 2021 with a successful bid to preempt local boards of health from passing regulations more stringent than state laws or rules.¹⁸ This push to remove local public health authority in Oklahoma reflects a broader movement.¹⁹ For example, between January 1, 2021, and May 20, 2022, 14 states (Alabama, Arizona, Arkansas, Florida, Indiana, Kansas, Kentucky, Montana, New Hampshire, Ohio, South Carolina, Tennessee, Utah, and Wyoming) adopted one or more new pieces of legislation that limit local authority to issue public health emergency orders.²⁰

Recent preemption activity signals an acceleration and expansion of a long-standing strategy wherein powerful interests back litigation, legislation, and executive actions to counter local regulation and laws that affect their profits or agenda. Early public health preemption disputes focused on gun control, food and beverage regulation, and tobacco. These continue alongside more recent disputes relating to communicable disease control, reproductive health care, and gender affirming care. Despite its misuse, preemption legislation is not inherently harmful to

public health and health equity. Ascertaining the potential benefits or harms of preemption legislation requires a case-by-case assessment to determine its effects. Derek Carr and his coauthors offer guidance to policymakers and others via a framework for assessing the effects of preemption on equity and public health.²¹ Their equity-first framework



“recognize[s] preemption’s double-edged sword by supporting local governments’ ability to innovate and respond to the needs and values of the people they represent while also acknowledging the need for states and the federal government to block local actions that are likely to create or perpetuate inequities.”²²

One effect of state preemption and other restrictive actions is the further centralization of public health authority at the federal level. When state actions constrain local or individual choice, federal involvement can provide relief. For example, the Biden administration has asserted that in cases where a mother’s health is in serious jeopardy, the federal Emergency Medical Treatment and Labor Act (EMTALA) preempts state laws that prohibit hospitals and clinicians from terminating a pregnancy. The dispute over abortion in the event of a medical emergency is now being litigated in at least two cases. The Department of Justice has sued the State of Idaho, whose abortion criminalization statute includes an exception for abortions to spare the life – but not the health – of the mother. The Biden administration is simultaneously defending a

suit brought against it by the Texas attorney general. Texas’s exception for abortions to prevent “substantial impairment of major bodily function” does not align precisely with EMTALA’s mandate that hospitals who participate in Medicare (and the clinicians who work in them) must provide medical treatment to stabilize an emergency medical condition for any patient who comes to their emergency department.

Federal preemption of discriminatory state laws could also be used to protect transgender patients’ access to gender-affirming care. So far, however, federal officials have declined to do so under Section 1557 of the Patient Protection and Affordable Care Act, the first federal civil rights law to broadly prohibit discrimination on the basis of sex in federally funded health care programs. In its 2020 rule on Nondiscrimination in Health and Health Education Programs or Activities, the Trump administration’s Department of Health and Human Services claimed “it is appropriate not to preempt States’ diverse views on [gender dysphoria and sexual orientation] without a clear mandate from Congress to do so.”²³ In the meantime, a growing number of states have passed laws restricting access to gender-affirming care, putting them on a collision course with the Biden administration’s interpretation of what Section 1557 requires from clinicians, hospitals, clinics, insurers, and state Medicaid programs.

While state leaders have the authority and tools necessary to improve public health, their recent overriding of local policies that are intended to improve health and reduce health inequities demonstrate a commitment to politics over public health. Often, these efforts are punitive, particularly when state political agendas are misaligned with local policy preferences. In cases where local autonomy is, to some degree, protected, highly politicized preemption disputes and state-level threats can have a chilling effect, causing some localities to avoid actions that might bring unwanted attention.²⁴ In the current administration, federal officials and legislators have occasionally taken steps to support local officials in their efforts to overcome state-level barriers to public health and health equity. The tables could certainly be reversed in the future, however, depending on the results of upcoming elections.

Recent preemption activity signals an acceleration and expansion of a long-standing strategy wherein powerful interests back litigation, legislation, and executive actions to counter local regulation and laws that affect their profits or agenda.

About the Authors

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Adam Snipes has over a decade of experience in government affairs and advocacy organizing and is known for crafting persuasive strategies to shift public narratives around controversial issues. He has extensive experience working tough campaigns in the South and across the Great Plains. Adam's experience includes national advocacy director, regional campaign manager, deputy chief of staff, and advisor to national organizations, members of congress, and local politicians. He is an experienced leader known for developing high performing teams centered on relational organizing and equitable leadership development practices.

Adam serves on the boards of the National Center for Transgender Equality, the Oklahoma City-County Health Department, and the Partners in Public Health Foundation. He operates a consulting practice focused on coalition building, commanding community action, driving earned media, analyzing public policy, directing project management and campaign execution. Adam's work has been published in the American Political Science Review and TIME magazine.

Lindsay F. Wiley

Lindsay F. Wiley is a professor of law and Faculty Director of the Health Law and Policy Program at UCLA Law where she teaches torts, public health law, and access to health care. Her research focuses on access to health care and healthy living conditions in the United States and globally. She is the author of *Public Health Law: Power, Duty, Restraint* and *Public Health Law and Ethics: A Reader* (with Lawrence O. Gostin) and the forthcoming *Feminist Judgments: Health Law Rewritten* (with Seema Mohapatra).

Wiley is the U.S. Rapporteur for the Lex-Atlas COVID-19 Project, a global project comparing responses to COVID-19, sponsored by the University College London, King's College London, and the Max Planck Institute of Comparative Public Law and International Law in Heidelberg, Germany. She is the Founder and Co-Chair of the Health Justice: Engaging Critical Perspectives in Health Initiative, cosponsored by ChangeLab Solutions, LLC, the Institute for Healing Justice and Equity, and the Satcher Health Leadership Institute. She is a current member of the Board of Directors of ChangeLab Solutions, LLC, a former president and member of the Board of Directors of the American Society of Law, Medicine, and Ethics, and a former member of the National Conference of Lawyers and Scientists, a joint standing committee of the American Association for the Advancement of Science and the American Bar Association's Section of Science and Technology Law.

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Climate Change: Strategies for Local Environmental Action in Contested States

Ramón Cruz, *President, Sierra Club*

Luke Fowler, *Associate Professor & Faculty Director, School of Public Service, Boise State University*

State preemption of local environmental laws is one of the many recent battlegrounds of local governance occurring in the U.S.

These efforts include state bans of local regulations on natural gas in new construction, plastic bags, no-idling zones, investments in alternative fuel fleets, and energy efficiency requirements, among others.²⁵ Federal laws like the Clean Air Act and Clean Water Act also give states de facto authority to preempt local governments from implementing more stringent protocols than their states, further hampering local efforts and impacting state-local relationships.²⁶ As politics around issues like climate change have become increasingly nationalized

and polarized, the ability of communities to self-govern on issues vital to their health and long-term sustainability has become ever more constrained.

Despite those constraints, state efforts to curb local governance have not stopped localities from challenging state authority. In fact, some of the most important strides on climate action originate from the local level. The recent Supreme Court ruling in *West Virginia v. EPA* (2022) positions local governments to play a crucial role in shaping U.S. climate action. While this appears to be a win for local governance, local leaders must be careful not to relinquish this opportunity for change. Research shows that local leaders are often responsive to broader state politics when adopting policies. Localities in conservative states have, as a result, avoided controversial approaches to the

environment by, for instance, opting to focus on pollution prevention efforts as opposed to clean energy or smart growth initiatives.²⁷

To affect broad scale positive environmental change, it is necessary that local governments engage in the same type of coordinated, nationally focused, political advocacy efforts that conservative groups undertake (e.g., American Legislative Exchange Council), and for which preemption has become a key weapon.²⁸ Many cities, for example, have adopted local building codes that require enhanced energy efficiency and/or less reliance on fossil fuels to operate. There has been some coordination of these efforts via entities like the Green Building Council and through professional and personal networks of city leaders. The resulting policy diffusion has, however, sparked conflicts with state legislatures. In Arizona, for example, state leaders responded by preempting local authority to establish energy efficiency requirements in new construction.²⁹ Although the move to preempt halts local improvements to the building code, it also exposes both state and local action to the public which can, in turn, energize environmental advocacy.

Of course, these efforts also help fuel national environmental campaigns that target both state and local governments, particularly as it becomes increasingly apparent that whoever controls sub-national governments will drive U.S. responses to climate change. They also create wedge issues for voters who may not be too concerned about local building codes but are concerned about the state taking authorities away from local communities. Notably, Republicans are forced to thread the needle as long-time advocates against centralized government who now must defend taking powers away from the level of government closest to the people.³⁰ Thus, while direct political warfare over preemption may not bring great short-term returns, it does promise to shift the political balance over the long-term as conservative legislatures risk taking a step too far with every new preemption bill.



There is, however, a quieter strategy for change being used by local governments. Here, rather than drawing attention to their initiatives through direct challenge, cities develop and implement quiet but effective policies that avoid buzzwords or that are otherwise newsworthy. Often, these policies employ administrative structures that are commonly overlooked by external parties, so they fly under the radar of state legislators, watchdogs, and news outlets. Also flying under the radar are the professional and personal networks that play a big role in helping to diffuse ideas and coordinate efforts across cities.³¹

There are several good examples of this approach. For instance, El Paso recently adopted a resolution that asserted the city's right to protect air quality, as well as its authority to protect reasonably priced electricity and its planning perspective on the construction of new power plants.³² While a resolution affirming a local government's rights to regulate electricity pricing and the building of new power plants in Texas would likely draw fire from legislators, by wrapping the resolution in clean air, as opposed to words that would have triggered backlash, it was largely ignored

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by outside interests. It also stops short of spelling out concrete actions that could be preempted. Rather, the resolution reads as a statement of values that will inform the administrative processes and concrete actions in ways that are harder to nail down by those seeking to stop it.

Policy diffusion among smaller jurisdictions is another way to achieve widespread change. Ketchum, Idaho, for example, implemented anti-idling zones without much fanfare, opening the door for neighboring

towns to do the same.³³ These policies survive even as bigger cities, like Boise, run afoul of the legislature for similar efforts, like banning plastic bags.³⁴ The difference is clear: what happens in Ketchum is not seen as a challenge to the authority of the state, but what happens in Boise is.

Austin, Texas, created an online environmental dashboard to draw attention to various efforts undertaken by the city.³⁵ Implicit within the dashboard is a series of administrative and policy choices that cumulatively move the needle on the environment. This creates too fluid a target for the state legislature to preempt, allowing the city to highlight and support environmental issues without inviting backlash. In other words, trying to preempt Austin's efforts would require a lot of work to unravel and would not make a good political narrative for conservative legislators seeking a win.

Of course, there are pros and cons to direct and indirect strategies to confront abusive state actions. Local leaders and advocates should consider the goals of local environmental action when making strategic choices. Certainly, there is a need to both explicitly challenge the authority and values of state legislatures on environmental issues and push them to take more aggressive actions against climate change. However, there may also be opportunity and cause to pursue local action quietly, avoiding the obstacles created by state legislatures that are hyper-focused on national party agendas. Leaders and advocates working together and learning from one another may find that quieter actions accumulate and connect to create a broader path forward.

About the Authors

Ramón Cruz

Ramón Cruz has over 20 years of experience intersecting the fields of sustainability, environmental policy, urban planning, energy and climate change. He has worked in the public sector as the Deputy Director of the state environmental regulatory agency in Puerto Rico and held senior positions at the Sierra Club, Environmental Defense Fund, the Partnership for New York City, and the Institute for Transportation and Development Policy.

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Public Safety's Preemption Problem

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The politics of public safety swing along a wide pendulum. Throughout the past century, high-profile controversies have predictably sparked policy shifts in one direction or another in virtually all areas of public safety, including policing, prosecution, and punishment.

The two-year span from 2020 to 2022 offers a microcosmic glimpse into this trend. In early 2020, incidents of police violence instigated calls for reform and revisitation of many municipalities' carceral public safety policies, but by 2022 emergent crime trends had fueled a countermovement to retrench those same policies. This period also saw both the rise of progressive local prosecutors and coordinated efforts to oust them from office, as well as demands to defund the police followed by calls to substantially increase police spending. If any takeaway is clear, it is that the political discourse of public safety is fraught, highly malleable, and sensitive to the demands of public – or at least vocal – opinion.

One would therefore be forgiven for intuiting that local policymakers possess an omnipotent ability to easily shape and reshape public safety policy as the political winds shift. However, the reality is not only more complicated, but also rather distant from this intuition. In fact, an examination of recent experience shows that achieving drastic change in public safety policy is exceptionally difficult to achieve. With only some exceptions, like the reform of bail laws in New York or the repeal of punitive federal drug laws, the status quo of public safety policy has seen only moderate change over the past few decades.

Part of the relatively static nature of public safety policy is rooted in the fact that so much of the status quo is built into the very institutions targeted for reform. More precisely, our public safety institutions – including the courts, police, and correctional systems – are products of a tangled web of state and local laws that often operate with overlapping authority. Because of this, these institutions can be highly resistant to being reshaped, even when public demand for reform rises to historic peaks. Although the complex legal structures that undergird public safety systems may

themselves were deliberately designed decades ago, they frequently contain anachronistic provisions that, today, stubbornly prevent the achievement of fundamental reform. These impediments have confronted policymakers in recent years as they try to meet the public demand for change, though it has impacted local policymakers most acutely.

Particularly, the barrier of state preemption has prevented local governments from reforming the public safety institutions in their jurisdictions, even though these institutions are often municipal agencies (like municipal police departments) or are answerable to the local electorate (like locally elected district attorneys). Many states have moved to block local reforms proposed in response to calls for racial justice and accountability in policing. As millions rose up to protest police brutality against African Americans, calling on local governments to shift funding from policing to needed social services, 24 bills were introduced in nine states to preempt local governments from reducing their law enforcement budget. Four of those bills passed in Florida, Missouri, Georgia, and Texas.³⁶ Two states, Arizona and Tennessee, passed laws to reduce civilian oversight in favor of law enforcement, with Arizona requiring law enforcement officials to make up two-thirds of the membership of civilian oversight commissions.³⁷ States that are hostile to criminal justice reform are therefore able to use preemption to stymie and block reform at the local level.

Even in states that are more open to criminal justice reform, existing laws may hinder reform at the local level. In California, for example, the City of Berkeley has publicly considered the possibility of removing police officers from traffic enforcement and shifting that responsibility to civilians under the city's Department of Transportation, an idea fervently supported by many residents. This idea, however, has failed to move forward because the statewide California Vehicle Code specifically tasks police officers with the responsibility of enforcing the state's traffic laws.³⁸ Instead, Berkeley is exploring changes that fall within its authority, including the adoption of evidence-based practices for traffic enforcement and eliminating stops for low-level offenses, among other local policy changes.³⁹ Although these changes are important and are intended to respond to local calls for reform, they nonetheless fall substantially short of the reimagination of policing that local policymakers initially attempted to undertake.⁴⁰ This shortfall is particularly frustrating given that the California Vehicle Code's designation of police officers as enforcers of its traffic laws is

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almost certainly an example of the public tendency to default responsibility to police officers for anything safety related, rather than a deliberate policy choice to preclude other state agents from serving as traffic enforcers. Thus, the preemptive effect of the Vehicle Code is more likely an unintended obstacle to local policymaking, rather than one specifically devised to keep local officials in check in the name of statewide policy uniformity. Nonetheless, the impact is the same.

New York City faced similar constraints in 2017 when the state enacted a law – known as the Raise the Age law – that, among other mandates, prohibited the city from housing persons under the age of 18 years on Rikers Island,⁴¹ the city's primary correctional facility and one of the most notorious municipal jails in the country. The law required youth held in local correctional custody to be housed in an off-island facility operated by the city's Administration for Children's Services (ACS) "in conjunction with the New York city department of corrections at a specialized juvenile detention facility."⁴² Although the law's meaning and intent is largely plain on its face – namely, to shift primary custodial responsibility for minors toward a city agency dedicated to youth services rather than one dedicated to adult correctional services – the law was silent as to the precise division of labor between ACS and the city's Department of Corrections.

The city, pressed by children's advocates, sought to assign exclusive authority to ACS.⁴³ However, when the state legislature enacted the Raise the Age law, it left unchanged an existing law that required either police officers or peace officers – a term that includes correctional officers but excludes ACS staff – to perform the "duty of maintaining the custody and supervision of persons detained or confined in a correctional facility,"⁴⁴ which includes the "specialized juvenile detention facility" designated in the Raise the



Age law. The combination of statutory ambiguity and the preemptive effects of New York's legacy laws on custody and supervision of correctional detainees frustrated efforts to separate youth from correctional staff immediately upon the Raise the Age law's enactment. Consequently, youth held in New York City's specialized juvenile detention facilities maintained substantial contact with correctional staff after the law's enactment despite the objections of both children's advocates and the labor union that represents New York City corrections officers.⁴⁵ Although ACS now enjoys near exclusive custody of youth held at its specialized juvenile detention facility, the uncertain preemptive effects of New York's laws on correctional custody no doubt frustrated crucial early efforts to re-house New York City's youths into age-appropriate facilities.

These examples illustrate the many faces of preemption and the danger it poses to democratic public policy. The task for policymakers and advocates alike is therefore plain. First, they must be vigilant in recognizing and responding to the legal and structural complexity of the institutions they seek to reform. Failing to do so will result in incomplete policies that, at best, only partially achieve their intended results. Second, they must work to alter the balance of power between states and local governments so that both levels are readily capable of enacting reform when democratic will demands it. This includes further empowering local governments to freely shape their local justice systems while using state governmental power to enact minimum statewide justice standards.⁴⁶ Finally, policymakers and advocates must resist attempts to undermine democracy through the enactment of laws intended either to limit the participation of reform-minded groups or to reverse hard-fought political wins. Only by consistent deployment of these core strategies can lasting reform be realized.

About the Authors

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Jorge Camacho is a Clinical Lecturer in Law and the Policing, Law, and Policy Director of the Justice Collaboratory at Yale Law School. Prior to joining Yale, he served as Senior Counsel at the New York City Mayor's Office of Criminal Justice, as Senior Counsel in the Legal Counsel Division of the New York City Office of the Corporation Counsel, and as an Assistant District Attorney at the Manhattan District Attorney's Office.

Marissa Roy

Marissa Roy is the Legal Team Lead at the Local Solutions Support Center. Marissa has spent her career working with local governments to engage in high-impact litigation. As a Deputy City Attorney for the City of Los Angeles, Marissa helped bring one of the Office's first large-scale workers' rights lawsuits to hold accountable port trucking companies that were classifying truck drivers as independent contractors rather than employees and deducting thousands of dollars from their wages. In addition to protecting workers' rights, Marissa worked with the City of Los Angeles and later the County of Los Angeles to challenge the Trump Administration's hostile immigration agenda, from the federal district court all the way to the U.S. Supreme Court. Marissa earned a J.D. from Yale Law School as well as a Master in Public Diplomacy and B.A. in Philosophy, Politics, and Law from the University of Southern California.



State Preemption and Elections

Randy Perez, Program Director, Voting Rights Lab

Stephanie L. Witt, Professor, School of Public Service, Boise State University

The freedom to vote is a critical part of building a multiracial and representative democracy in the United States. Who can vote, when votes are cast, how votes are counted, and dozens of other election administration practices are produced within a complex system involving federal, state, and local election officials.

The balance of authority in this policy arena, as with all policy arenas in the federally structured United States government, is subject to shifting political, economic, and other conditions. Four such conditions converged in recent years to create an environment wherein the balance of power over elections and voter access decisions has been moved from local officials to the states. In most cases, the apparent intent is to limit BIPOC and other underrepresented groups' access to the polls.

Of the four conditions leading to the recent erosion of local election authority, the COVID-19 pandemic and the subsequent changes made

to local election systems in preparation for the 2020 election are the most commonly acknowledged. Not all local election administrators, past or present, have worked to expand access to the ballot – indeed, some have restricted access, leading to the need for federal protections like those found in the 1965 Voting Rights Act – yet the extensive use of absentee ballots, early voting, ballot drop boxes, online ballot tracking, and other innovations have been in use for many years in some jurisdictions. These ballot access measures grew during the pandemic as many local officials worked to allow voting to proceed while also protecting public health. On the positive side, these measures permitted elections to proceed despite a global pandemic. Moreover, the public became interested in normally behind-the-scenes election administration practices and local election officials who failed to protect voter access faced widespread criticism.

Unfortunately, local efforts to increase ballot access collided with a second, related set of conditions which center on the former President Trump's false assertions of widespread voter fraud. Those claims, and the conspiracy-based legal theories that accompanied them, led to a wave of state legislation intent upon centralizing elections authority at the state level. As a result, voter access was constrained in several states, many of which have known patterns of historic and ongoing racial discrimination. These states preempted local election activity, nullified existing local laws, and created civil and criminal penalties for local officials who fail to comply. The resulting election systems suppress local

“ **How, and the extent to which, states define local election rules has led to growing conflict between state and local governments in recent years. ... Neighboring jurisdictions and communities often have very different levels of voting access.** ”

innovation and make it harder for citizens, as well as the civic engagement and civil rights organizations that organize them, to vote, drive turnout, and hold officials accountable for their decisions.

Two additional events encouraged the centralization of election administration. The first was the gutting of the Voting Rights Act by the U.S. Supreme Court in *Shelby County v. Holder* (2013). While election administration is largely left to the states, the federal government protected historically disenfranchised Americans with the Voting Rights Act and Civil Rights Act.⁴⁷ *Shelby County v. Holder* drastically reduced this federal protection. In a 5-4 opinion, the court eliminated the requirement for jurisdictions with a history of racial discrimination to obtain Department of Justice preclearance for voting law changes. Other federal protections found in various statutes and amendments are currently under similar threat.⁴⁸

The fourth condition responsible for centralizing power at the state-level involves the growing political and voting strength of BIPOC communities across the country which has threatened traditional centers of power in many ways, not least with increased demands for leadership accountability. In response, opponents to the growing BIPOC presence in the political arena have launched aggressive efforts to suppress the vote.

How, and the extent to which, states define local election rules has led to growing conflict between state and local governments in recent years. This conflict has occurred in both Republican- and Democrat-held states, as the former have often acted to curb local efforts to increase voter access, while some of the latter have acted to expand and protect voter rights.⁴⁹ As a result, neighboring jurisdictions and communities often have very different levels of voting access.⁵⁰

In any case, the centralization of election authority is generally unwanted by local officials and advocates. Efforts are, nonetheless, widespread: Forty-one states enacted 234 election-related bills (out of 3,676 introduced) in 2022, most of which resulted in shifting authority previously held at the local level to the state.⁵¹ A similar number of states (45) enacted 292 bills in 2021.⁵² These bills, and those that preceded them in recent years, generally fall into four functional categories.⁵³

1. **Nullification.** The bill nullifies a local policy, program, or practice that is not expressly granted or fairly implied in state laws; or in the case of a home rule state, nullifies a local policy, program, or practice in conflict with state laws. For example, Iowa's Secretary of State issued a directive to invalidate the practice of several counties in which absentee ballots were prefilled with name and address by county election officials.⁵⁴
2. **Prohibition.** The bill forbids local actions not consistent with state law. An example of this would be new state laws prohibiting the receipt of private funds for election administration.⁵⁵ These laws were created largely in response to grants provided by the Zuckerberg Foundation-funded Center for Technology and Civil Life to thousands of localities across the U.S. in 2020. These grants were intended to ensure that the 2020 election could be safely conducted during the pandemic but have since been criticized by election deniers who claim that “Zuckerbucks” influenced election outcomes. Private investment in local elections have been opposed by Democrats and others, as well. Some states have acted to make this practice illegal since the 2020 election.
3. **Penalization.** The bill imposes state sanctions for specified actions taken by local election officials. An example of this is the wave of laws adding criminal penalties to local officials found to be violating state election rules. The criminalization of elections threatens local election officers and has contributed to widespread attrition, a movement that is also fueled by a rising incidence and extremity of threats and harassment.⁵⁶ Thirty-one of the 35 new penalties enacted since 2020 were in GOP-controlled states.⁵⁷
4. **Preemption.** The bill preempts local authority to act in specific areas. For example, Georgia's new law, SB202, also called the “Election Integrity Act of 2021,” allows the state legislature to dismantle and supersede local boards of elections that it deems to be engaging in activities that threaten the validity of the vote.⁵⁸



Overall, the flood of bills recently enacted by state legislatures limit local innovation in election administration, making it harder for local jurisdictions to increase voter turnout and find new ways to extend ballot access. Thus, historic trends of disenfranchisement and disempowerment of BIPOC and low-income communities continue.

Civic engagement and advocacy organizations have adapted to recent changes to the legal, political, and narrative landscape around voting and elections in innovative ways. Even before the 2020 election, BIPOC and grassroots organizations in states like Arizona, Florida, and Wisconsin were hiring staff to work with local election administrators to expand voter access, better share information, and increase officials' visibility and accountability to the voters they serve.⁵⁹ These changes also signify a major shift in national funding institutions' interests, an expansion from their traditional investment in white, policy oriented, and legal organizations to do "democracy work." By connecting their movement and base directly with local election administrators, civic engagement and advocacy organization leaders realized that they could directly influence election policy and expand access to the ballot for underserved communities, resulting in clear policy wins and increased voter turnout. (In response, many states have worked to reduce the influence of BIPOC and other underrepresented communities by preempting and otherwise limiting local election officials' authority to expand ballot access.) The challenge the pro-democracy movement must now confront is how to leverage and build power to hold local, state, and federal officials with authority over elections accountable and committed to expanding voter access, while confronting a potentially ascendant and well-funded anti-democracy movement the likes of which we have not seen since the Jim Crow Era.

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The State Takeover of Public Schools as State Preemption: Evidence from Lawrence, Massachusetts

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States' abusive (and sometimes punitive) preemption of local school boards has taken center stage as cultural wars have erupted across the United States.

In general, conservative states have leveraged their authority over education law, policy, and practice to restrict and reshape how education policymakers, educators, and communities imagine schools and schooling. States have a long history of intervening in local school board affairs, and sometimes state intervention moves society closer to equitable educational opportunities and outcomes. For instance, the State of Pennsylvania employed state-level legislation to force the City of Philadelphia to address de facto segregation, exceeding federal mandates to address de jure segregation.⁶⁰ Likewise, the State of Illinois recently forced schools to address racially

disparate school disciplinary outcomes.⁶¹ Thus, we do not argue that all state preemption is inherently bad, wrongheaded, or inequitable. However, conservative state leaders have also used their powers to resist, thwart, and rollback movements towards educational equity and injustice. For instance, multiple states – almost exclusively with Republican leadership – have leveraged state authority over education policy to restrict the ways in which communities discuss and learn about race and gender.⁶² These efforts betray the national mood on these topics, even considering political affiliation. According to Polikoff et al, there is a general, bipartisan agreement that students should be taught what are referred to as controversial topics.⁶³

While issues around race and gender have monopolized the national dialogue, a longstanding form of preemption continues without much attention: the state takeover of public schools. Despite a considerable amount of research suggesting that state takeovers of public schools are ineffective⁶⁴

and have racially disparate impacts,⁶⁵ states continue to strip Black and Brown communities – particularly in urban settings – of their authority to control their schools at the local level.⁶⁶

Claims of state preemption of local education policy are inherently complicated. The Constitution of the United States is silent on education; thus, states rely on their police powers which afford them the ability to regulate the citizenry for the public interest. Typically, state constitutions grant states broad powers and duties to develop and implement education policy. In almost all cases, states have delegated those broad powers and responsibilities to local school districts, which develop and implement education policies that comply with state legislative priorities. Therefore, the state takeover of public schools and school districts – on its face – appears to be an example of the state reclaiming authority that it already possesses. However, the unilateral takeover of public schools and school districts or coercion of local school districts to surrender authority over their schools for purportedly academic reasons runs counter to the historical organization of schools and schooling in the United States. Likewise, recent state takeovers of public schools and school districts suggest that state takeovers of public schools and school districts employ discriminatory tactics and aims.

The state takeover of public schools and school districts is not a recent trend in education policy. As early as the late 1980s, states were taking over public schools and school districts that were under threat of financial insolvency.⁶⁹ According to Wong and Shen, financial distress, at this point, was the primary driver for state takeovers of public schools and school districts.⁷⁰ In the years after the implementation of the No Child Left Behind Act, states began to target public schools and districts for takeover based primarily on purported poor academic performance.⁷¹ The outcome of these takeovers is that 85 percent of districts that have been taken over are disproportionately Black and Brown.⁷² These takeovers are discriminatory, issue harsh sanctions to predominantly Black and Brown school districts, and often dismantle the predominantly Black and Brown elected school boards in these districts, replacing them with white policymakers who are not accountable to local residents.⁷³ The strategy of taking over public schools and school districts while dismantling or disempowering the locally elected school board serves to unravel democracy in the communities these deposed school boards serve.

A growing number of scholars are starting to study recent trends and implications of the state takeover of

“States, while imbued with the authority to regulate education policy, have typically allowed local control over education policy. However, recent trends to take over local schools and school districts are a power grab by states.”

public schools and school districts.⁷⁴ The consensus is that state takeovers of public schools and school districts do not lead to improved academic outcomes.⁷⁵ Moreover, scholars are beginning to critique the inequities that arise from strategies that lead to the unilateral state takeover of public schools and school districts. This is precisely the case when one considers race, ethnicity, and immigration status.⁷⁶ Yet, very little systematic research investigates the inequity and unjust impacts of state takeovers of public schools and districts on historically and contemporarily marginalized, disenfranchised, contained, dispossessed, dehumanized, and otherwise oppressed peoples in the context of the politics of education.⁷⁷ For the remainder of this piece, we highlight key findings from a forthcoming research project that address how state takeovers of public schools serve to disrupt the democratic process, thereby removing marginalized peoples from both power and the political process and maintaining and sustaining (effectively assuring and reinforcing) racial and ethnic oppression. We rely on interview data from Lawrence, Massachusetts.

Background Information: In January 2010, the State of Massachusetts enacted An Act Relative to the Achievement Gap. This act required districts with schools designated as underperforming to immediately take steps to turn around struggling schools. At the time, there was overwhelming support for the “No Child Left Behind” legislation that promised more equitable access to quality education for our most underserved and vulnerable students. In 2011, the state Department of Elementary and Secondary Education (DESE) issued a critical report titled “Lawrence Public Schools District Review.” After meeting with the DESE Commissioner, then-mayor of Lawrence, William Lantigua, decided that the district could no longer wait to receive the

resources the students deserved. He asked the state for resources, oversight, and reform that he believed could only be provided if the receivership process was started.⁷⁸ This began a political helping narrative that has plagued the district for over a decade.

Unfortunately, this narrative came with a cost to the residents of Lawrence, resulting in the loss of their ability to shape education policy through the popular election of a school committee. Residents of Lawrence, a city where 92 percent of the students are Latino, lost their ability to vote for individuals to represent them in developing, implementing, and evaluating education policy. Thereafter, the state appointed a receiver to serve as both the superintendent and school committee. Immediately, residents expressed concerns over the state takeover. However, community members and elected officials were reassured that students would be better off with state intervention. Later, an article featuring a white priest titled, "Lawrence, City of the Damned," provided some of the political cover needed to justify the state takeover. The author suggested that the city and its residents had been dammed by poverty, demographic shifts, corruption, and budget cuts.⁷⁹ For many of Lawrence's residents, the timing of the publication suggested a more nefarious motive for the takeover. There was no coincidence that the city was only declared "damned" after it elected its first Dominican mayor, even though many of Lawrence's problems predated Mayor Lantigua's term.

The residents of Lawrence had their initial concerns about a potential racialized political attack confirmed over time. Ultimately, the philosophical resistance and concerns initially raised by white-led nonprofit organizations faded and disappeared. Eventually, these resistances and concerns gave way to complicity and maintenance of racial injustice in the takeover as contracts were reworked to increase the involvement of nonprofit organizations in Lawrence's public schools. This racialized political attack had direct and indirect political ramifications for the citizens of Lawrence. We discuss these ramifications in brief below.

Direct Political Ramifications: In general, participants in our forthcoming study shared the perception that the state takeover of Lawrence Public Schools alienated peoples of color from the democratic process. Specifically, they conveyed stories that position the state takeover of Lawrence Public Schools as a political attack. For instance, one participant, Johnnie, equated the state takeover to colonialism, stating, "there was never an effort to empower people

from the community to be in leadership positions... within the receivership group." Another participant, Pedro Freire, confirmed this understanding of the state takeover. He noted, "nobody brought up any concerns, as far as I know, about the lack of representation that will occur, the impacts in the long term of not having a voice in our schools and having a mostly white state apparatus run our schools." Pedro Freire and Johnnie represent the participants in the study. Almost 90 percent of participants found the state takeover of Lawrence Public Schools to be disruptive to Black and Brown peoples' engagement in the democratic process.

The issues that Pedro Freire and Johnnie highlight have had downstream impacts on the political process in Lawrence. In particular, the state's actions related to taking over Lawrence Public Schools diminished engagement in the democratic process. For example, Bob suggested that the current appointed leadership of the school district has made an enemy of the citizenry and that political "engagement has diminished greatly." Another participant, Oliver, noted that local school board elections in Lawrence had paved the way for Black and Brown people to ascend to higher political office. He also noted that the disassembly of the local school committee in Lawrence contributed to an inability to field peoples of color for other local elections.

Indirect Political Ramifications: It is widely accepted that descriptive representation (or whether we can get people of color on school boards) leads to substantive representation (the development and implementation of policies that improve the outcomes and experiences of peoples of color). To that point, our participants broadly noted several education policy-related issues that trickle down from a lack of descriptive representation in education policy in Lawrence. For instance, Frederick said there had been recent decreases in academic performance (as measured by performance on standardized tests). Rosa hypothesized that the decreased performance is the byproduct of the state receiver's narrowing of the curriculum to focus on those very same tests. In essence, Rosa argued that the state might very well be prioritizing raising test scores as opposed to assuring that students are gaining the skills necessary to be college and career ready. Similarly, Oscar noted that under the state receivership, the district has struggled to recruit, hire, and retain teachers of color. Oscar shared, "there were more minority teachers and as soon as... the state takeover happened, they were one of the first ones pushed out... [The teaching force] became more white and a lot of the minority teachers

were either fired or let go or just pushed out.” Finally, the state takeover of public schools in Lawrence led to disparate disciplinary outcomes, specifically around culture, climate, and push-out. Emilia noted that many of her constituents identified the schools as a “war zone.” Johnnie spent a considerable segment of his interview noting how the schools have abandoned any true sense of restorative practices that might keep Black and Brown students in school. Finally, Oscar noted that the schools had exacerbated the truancy rate in Lawrence by pushing students out of school, both actively – through disciplinary procedures – and more covertly – through narrowing the curriculum, creating disengagement.

As noted above, scholars have taken aim at the various ways in which state takeovers of public schools serve to target and disadvantage Black and Brown communities. In particular, scholars have noted the ways that state takeovers contribute to the school-to-prison nexus through the implementation of harsh disciplinary practices and outcomes. Likewise, scholars have addressed the multitude of ways that state takeover districts contribute to the maintenance of a disproportionately white teaching force. Similarly, scholars are beginning to address how Black and Brown peoples’ political representation and Black and Brown peoples’ engagement in the democratic process is disrupted by state takeover policies and practices. This work supports each of those arguments.

To date, little to no research positions state takeover policy and practices as part and parcel of the new wave of state preemption of local authority and power. This work seeks to explicitly link the state takeover of public schools and school districts to efforts to preempt local authority and power. In doing so, we argue that states, while imbued with the authority to regulate education policy, have typically allowed local control over education policy. However, recent trends to take over local schools and school districts are a power grab by states. More specifically, we argue that the state takeover of public schools and school districts is an abuse of state preemption in that some states are likely to target predominantly Black and Brown school districts for takeover. These state takeovers disproportionately remove Black and Brown communities from the democratic process, disallowing residents of these communities the opportunity to engage in setting policy agendas through the selection of policymakers who are accountable to the will of the community.



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Steven L. Nelson is an associate professor of education policy and leadership at the University of Nevada, Las Vegas. He earned his Ph.D. from the Pennsylvania State University's Department of Education Policy Studies and his J.D. from the University of Iowa College of Law. Dr. Nelson's work interrogates the intersections of law, policy, politics, and urban education. Specifically, his work considers the impact(s) of law and policy on the educational and schooling experiences of peoples of color in urban and urbanizing communities. As a Critical Race Theorist, Dr. Nelson is most interested in exploring and exposing the ways in which purported civil rights-related law and policy reproduce and reinforce educational injustices.

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Stacy Seward is a long-time Lawrence resident who served on the district's elected school committee from 2018-2020. Stacy is also the founder and executive director of The Dream Network, a justice-based nonprofit organization in Lawrence, Massachusetts. Stacy is a certified mediator and diversity professional and holds a Master's degree in Rehabilitation Psychology and Counseling from UNC Chapel Hill. Stacy is currently pursuing her Ph.D. in Community and Social Psychology at the University of Massachusetts Lowell. Her areas of interest include examining the impact of policy, power, and inequity in black and brown communities.



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