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Equity First: Conceptualizing a Normative Framework to Assess the Role of Preemption in Public Health

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Policy Points:

- Preemption is a legal doctrine whereby a higher level of government may limit or even eliminate the power of a lower level of government to regulate a certain issue. Some state legislatures are using preemption with increasing regularity to thwart local policies that have the potential to reduce health inequities.
- Despite recent trends, preemption is not inherently adversarial to public health, equity, or good governance but rather reflects its wielder's goals and values. Existing frameworks for assessing preemption fail to reconcile its potential to both advance and hinder health equity.
- An equity-first preemption framework can facilitate case-by-case assessments of whether preemption is likely to worsen inequities or whether it is an appropriate response to address existing inequities. Robust empirical evidence is needed to develop and operationalize such a framework.

Context: Due to the inequitable distribution of various social determinants of health, disparities in health and well-being are tied to where an individual lives. In the United States, a zip code often better predicts a person's health than their genetic code. As communities seek to redress these inequities, many

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find that, due to state preemption, their zip code also dictates their ability to pursue more equitable laws through local government action. Preemption is a legal doctrine whereby a higher level of government may limit or even eliminate the power of a lower level of government to regulate a certain issue.

Methods: We conducted a literature review to survey existing scholarship about the effects of preemption on public health and health equity using online databases such as PubMed, WestLaw, and Google Scholar. We also cohosted a series of cross-sector, interdisciplinary research convenings with preemption, public health, and equity experts. Based on our findings, this article reviews the role of law and policy in the genesis of health inequities and highlights how preemption has both created and alleviated such inequities. We demonstrate how a normative framework rooted in redressing health inequities can advance a more just approach to preemption and outline a research agenda to support future action.

Findings: Law and policy have been central to creating health inequities, and while those same tools can promote health equity, some state legislatures are using preemption with increasing regularity to thwart local policies that may improve health and equity. Nevertheless, preemption is not inherently adversarial to public health, equity, or good governance. Preemptive federal civil rights laws, for example, have countered government-sanctioned discrimination. However, existing frameworks for assessing preemption fail to reconcile its potential to both advance and hinder health equity.

Conclusions: Shortcomings in existing preemption frameworks demonstrate the need for new approaches to elevate equity as a central consideration in assessing preemption. We propose the development of an equity-first preemption framework to establish evidence-based criteria for assessing when preemption will enhance or inhibit equity and a research agenda for developing the evidence necessary to inform and operationalize the framework. An equity-first reconceptualization of preemption can help ensure that local governments remain places of innovation while allowing states and the federal government to block local actions that are likely to create or perpetuate inequities.

Keywords: preemption, public health, equity, social determinants.

THE UNITED STATES IS EXPERIENCING A HEALTH CRISIS: LIFE expectancy has declined since 2015.[1] The crisis cannot be blamed on any single epidemic; it has percolated for decades. Not all places and populations perform poorly, however. Where individuals live has a substantial effect on health, wealth, and life expectancy.[2] States like New York and Minnesota, for example, continue to make

gains in life expectancy, while others, like Mississippi and Kentucky, lag behind.[3,4] Similar divisions play out at the local level, with substantial disparities between neighborhoods mere miles apart.[2] In the United States today, a person's zip code can often predict their health and longevity better than their genetic code.[5-7]

Many of these disparities in health and well-being are driven by the inequitable distribution of various social, economic, and political factors, commonly referred to as social determinants of health (SDOH), such as housing, education, environmental quality, and financial stability.[8-10] Although the causes are varied and complex, these inequities are not the result of accident or happenstance. Myriad federal, state, and local laws and policies have played a significant and underappreciated role in establishing and perpetuating health inequities.[11-13] As localities seek to redress these entrenched inequities, some have found that, due to state preemption, their zip code also dictates their ability to pursue more equitable laws and policies through local government action.

This article aims to demonstrate how the development of a normative framework rooted in redressing health inequities can advance a more just approach to preemption, and to outline a research agenda for building the empirical evidence base necessary to catalyze and support future action. Through an "equity-first" reconceptualization of preemption, this article offers an initial road map for developing a framework to help policymakers, researchers, advocates, and other stakeholders understand how local governments can remain places of innovation while protecting against the invocation of "local control" to shield oppressive systems and institutions.

Background

Preemption is a legal doctrine whereby a higher level of government may limit or even eliminate the power of a lower level of government to regulate a certain issue.[14] In recent years, some state legislatures have increasingly used preemption to prevent local communities from enacting laws, such as raising the minimum wage, that could reduce inequities and enhance community well-being.[15] Some states even impose harsh penalties on localities that attempt to adopt preempted policies.[16,17]

Recent scholarship has documented the rise in state preemption and warned of its potential to undermine local efforts to protect public

health.[15,17,18] Preliminary research supports this concern: states that removed local authority to raise the minimum wage, mandate paid leave, or regulate firearms have made smaller gains in life expectancy since the 1980s and now find themselves on par with middle-income countries.[3] Despite these recent trends, preemption is not inherently adversarial to public health, equity, or good governance. Preemptive federal civil rights laws, for example, have served to counter government-sanctioned discrimination by states and localities, and preemptive state laws have played a similar role in responding to discriminatory local actions.[19]

Yet contemporary approaches to assessing preemption fail to reconcile its potential to both advance and hinder health equity. Individuals focused on traditional public health concerns often frame preemption as generally negative or rely exclusively on the distinction between preemptive laws that establish minimum standards and those that prohibit more stringent local regulation, finding the former beneficial and the latter problematic.[20,21] Social justice and civil rights advocates recognize the increasing misuse of preemption but, noting the history of local control as a tool of oppression, also caution against unchecked local authority.[19] This divide reflects differing experiences: decades-long fights against industry-backed preemption foster a reflexive instinct to oppose preemption in any form, whereas the struggle against Jim Crow laws and racial subordination inform a deep skepticism of local government.

This tension and the varying effects of preemption on health and health inequities highlight the imperative for more nuanced inquiries grounded in the advancement of health equity—a "state in which everyone has the opportunity to attain full health potential and no one is disadvantaged from achieving this potential because of social position or other socially defined circumstance."[22] Such inquiries would recognize that preemption itself has no point of view but rather is an expression of the wielder's goals and values. New frameworks would facilitate case-by-case assessments of whether preemption is likely to worsen inequities or whether it is an appropriate response to address existing inequities.

Health Inequities: The Role of Law and Policy

Recognizing preemption as both a cause of and a means to alleviate the inequitable distribution of SDOH requires understanding (1) how law

and policy have been central to creating these inequities, and (2) how those same law and policy tools can promote health equity. Decades of interrelated policies have cumulatively influenced where investment and opportunity have concentrated and who has access to them. The result is that underserved populations are more likely to live near environmental hazards, reside in substandard housing, lack access to public transportation, receive low-quality education, lack access to healthy food and beverage options, and be exposed to potentially harmful substances such as alcohol.[23]

The robust evidence connecting health inequities with racial subordination sanctioned or enforced by government actors exemplifies how laws and policies have influenced disparities in health and well-being across numerous other demographic factors such as gender, socioeconomic status, and immigration status.[24,25] At the federal level, New Deal–era housing policies, first enacted in the 1930s and enforced for decades thereafter, used redlined maps that discriminated against nonwhite neighborhoods and increased the racial wealth gap by effectively preventing home ownership by persons of color.[24,26] Beginning in the 1950s, when siting and constructing public infrastructure projects, the same segregated communities shaped by past government policies were targeted for redevelopment, leading to displacement for some and exposure to even greater environmental harms and lack of opportunity for others.[27] Subsequent policies such as mortgage tax incentives enacted in the 1980s further entrenched racial inequities in home ownership and wealth.[28] Beyond the built environment, other federal laws—from labor reforms in the 1930s to the 1944 GI Bill and the social safety net—increased racial inequities because their design or implementation ensured that the benefits accrued primarily to white populations.[12,13,24,26]

State and local governments also have long used the law for discriminatory purposes. This misuse includes historical policies such as explicit race-based exclusionary zoning and covenants—which, although outlawed, continue to be used to enforce spatial segregation rooted in racial discrimination—and current policies that seem neutral but produce discriminatory effects, such as restrictions on the development of multifamily housing and land use policies that concentrate heavily polluting industries in underserved communities.[24,29,30] The cumulative and intergenerational effects of these policies on underserved populations include higher housing costs, longer commutes, limited access to opportunities such as jobs and schooling, increased risk of chronic

diseases such as respiratory illness and cancer, reduced cognitive ability, higher infant mortality rates, and lower life expectancy.[7,23,31,32]

In response to discriminatory state and local laws and the ongoing civil rights movement, Congress enacted preemptive federal legislation establishing nationwide antidiscrimination protections, including the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act. In addition to outlawing explicit discrimination, several of these laws also prohibit neutral laws that disproportionately harm protected classes.[19] Although some viewed the preemptive nature of these laws as undue interference with state and local authority, subsequent research demonstrated their positive effect on public health and health equity.[33] Indeed, federal civil rights legislation exemplifies the use of preemption to foster more equitable systems, institutions, and health outcomes. Similarly, preemptive state legislation that provided more expansive and robust antidiscrimination protections than federal law helped to counter discriminatory local laws.[34] Some states have also used preemption to respond to local laws that, although not always overtly racist or discriminatory, perpetuate health and economic inequities.[35,36]

Local Democracy and State Preemption

The persistence of racial and socioeconomic inequities underscores the inherent limitations of reliance on federal and even state protections. These constraints are amplified by a political environment hostile to reforms at the federal and, in many instances, state levels.[37] Shifts in Supreme Court jurisprudence have also made it more difficult to invoke federal civil rights protections and narrowed the scope of available remedies for racial and socioeconomic inequities.[37-40] Within the void created by the inability or unwillingness of Congress, the federal judiciary, and many state legislatures to address systemic discrimination, local governments have become a locus for policy reforms with the potential to remedy past and present inequities.

Local efforts to improve health and advance health equity have resulted in policy innovations focused on SDOH, such as increased minimum wage, guaranteed paid employment leave, inclusionary zoning, first-source hiring requirements, and expanded antidiscrimination protections.[37,41] As some scholars have observed, these policies

frequently serve as extensions of more traditional civil rights laws by leveraging "mechanisms targeted at historically excluded groups."[37] Many of these local policy innovations reflect the unique challenges and experiences of individual communities and often rely on powers traditionally exercised by local governments.[42]

However, recent uses of state preemption have stymied many communities' pursuit of healthier, more equitable futures.[15,43] These preemptive efforts appear motivated by "ideological or practical opposition to specific measures" rather than by a true need for uniform statewide regulation.[37,41] Indeed, such abuses can pose an existential threat to local governments' ability to be representative of and responsive to the needs and lived experiences of their constituents. These abuses are especially alarming because they fail to assess potential health equity implications and impede local efforts to remedy past harms, which require understanding and addressing local conditions and historical context.

Two notable examples illustrate the growing breadth of preemptive state laws and their discriminatory impact. When Birmingham, Alabama—where African Americans constitute nearly 75% of the population—enacted a minimum wage ordinance intended to address economic inequities, the state legislature immediately invalidated the ordinance and prohibited localities across the state from regulating employee wages, benefits, and work schedules.[44] Not a single African American state legislator supported the preemptive state legislation, and many viewed it as another example of Alabama lawmakers manipulating state political and legal processes to disenfranchise African American communities.[44]

Similarly, Austin, Texas, sought to address racial and socioeconomic discrimination in rental housing by prohibiting landlords from rejecting otherwise qualified tenants based solely on their source of income (eg, federal housing assistance).[45] The state legislature responded by nullifying Austin's ordinance and preempting municipalities from enacting similar antidiscrimination laws, despite the absence of any statewide protections for recipients of housing assistance and despite clear evidence that source-of-income discrimination disproportionately harms people of color.[46,47] Similar stories have developed across the country as statehouses have stripped communities' ability to pursue policies related to paid leave, pay equity, employment and housing discrimination, local hiring preferences, housing affordability, and traditional public health issues such as tobacco control and the taxation of sugary drinks.[48,49]

Despite these recent abuses of state preemption, ample evidence shows that local governments have not always acted to promote health, equity, and inclusion, nor do they always do so today. Harmful local policies such as exclusionary zoning were a catalyst for many federal civil rights laws, and municipalities still "perpetuat[e] and exacerbat[e] segregation and racial disparities in housing, education, employment, and criminal justice."[19] Preemptive laws seeking to advance health equity can provide a critical counterbalance.

In 2017, for example, California passed legislation stripping local governments' authority to regulate and ultimately deny certain multi-unit housing developments.[50] The state took this drastic action to ensure that local governments could no longer avoid responsibility for a severe and worsening housing crisis.[51] Although the law significantly limits the power of California municipalities as it pertains to housing, it is expected to ultimately promote health equity by facilitating more affordable units in places that need them, and it may reduce displacement in underserved communities.

Targeted state preemption can also counteract other local laws that produce health-harming outcomes and disproportionately affect underserved communities. Chronic nuisance laws, which exist in thousands of local jurisdictions and are intended to keep communities safe by curbing public health and safety risks, offer a particularly cogent example. Many of these laws classify repeated 911 calls as a nuisance regardless of whether the calls are for legitimate purposes such as to report crimes, request protection from domestic violence, or seek medical assistance.[52-54] Individuals or property owners who receive citations for repeated 911 calls face penalties as extreme as eviction. Moreover, the inequitable enforcement of these laws disproportionately harms people of color and persons with physical and mental health conditions.[52-54] In response to these inequities, several states, including California and Pennsylvania, have preempted these types of "911 nuisance" laws.[35,36]

State laws curtailing local occupational licensing regulations provide another example of equity-promoting preemption. Many local governments require licenses to engage in a variety of professions, ranging from hairstylist to interior designer. These local regulations often duplicate existing state licensing laws and impose burdensome fees, qualifications, and training requirements. This can, in turn, limit economic opportunity and mobility, especially for low-income populations, without furthering any substantial public health or safety purpose.[55] Multiple states,

including Ohio, Tennessee, and Wisconsin, have invalidated some or all of these local regulations with preemptive state legislation.[56-58]

Conceptualizing an Equity-First Preemption Framework

Existing legal, political, and normative frameworks fail to account for the varying effects of preemption on health equity. The same arguments for allowing local governments to mandate fair employment policies (eg, paid leave) despite state opposition may also allow municipalities to ignore or invalidate, for example, state laws designed to increase affordable housing.[19,59] These shortcomings in existing preemption frameworks demonstrate the need for new approaches that elevate equity as a central consideration in assessing preemption.

One promising avenue to address these considerations is the development of an equity-first preemption framework. Such a framework would establish evidence-based criteria for assessing whether an instance of preemption is likely to enhance or inhibit health equity and make such assessments a determinative factor in supporting or opposing a preemptive measure. An equity-first preemption framework would recognize 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. Importantly, the development of an equity-first preemption framework is intended to foster among policymakers, researchers, advocates, and other stakeholders a more nuanced understanding of how preemption affects health and equity. The framework would not, however, supplant existing legal frameworks employed by courts when assessing preemptive state and federal laws.

An equity-first preemption framework would have several advantages. From a normative perspective, such a framework would center the preemption narrative on how certain health inequities came to exist and why these inequities differ by place and population, emphasizing whether preemption will help or hinder the redress of health inequities. Moreover, by highlighting the role of law and policy in the genesis of poor health outcomes and inequities, an equity-first framework would encourage consideration of the structures, institutions, and power dynamics

that produced these inequities and how law and policy can help address them. Such consideration would underscore the need to give voice to and empower those most affected by past and present policy decisions.

An equity-first framework also would alter how we distinguish various forms of preemption. Under existing frameworks, preemption laws are classified primarily on the basis of their mechanical operation – that is, whether the law establishes a regulatory floor that allows lower-level governments to impose further regulations, a regulatory ceiling that prohibits any additional regulation, or a regulatory vacuum in which a higher-level government does not establish any regulations of its own but still prohibits lower-level governments from enacting any regulations related to the given subject.[14] An equity-first framework, in contrast, would classify preemption based on its anticipated impact on health and health equity.

Consider the examples of minimum wage and nuisance laws. Because greater incomes are associated with improved health outcomes,[60] both traditional and equity-first preemption frameworks would categorize laws preempting local authority to impose more stringent requirements—that is, preempting local increases in the minimum wage—as harmful. In contrast, nuisance laws that penalize individuals who repeatedly call 911 often exacerbate inequities due to disproportionate enforcement against members of underserved communities.[52] Whereas a traditional public health preemption framework would classify laws that preempt local governments from enacting such "911 nuisance" laws as harmful because they impose a regulatory vacuum, an equity-first framework would categorize such preemption laws as beneficial because the absence of local regulation is likely to protect health and health equity.

The broad scope of SDOH—encompassing everything from economic stability to education, food security, the built environment, health care, civil rights, and more—means that an equity-first preemption framework focused on such issues would provide a unique opportunity to align interests and resources. Rather than stakeholders fighting isolated, issue-specific campaigns, the framework could facilitate a comprehensive approach to preemption by integrating with and building on the existing infrastructure and interdisciplinary networks of advocates, scholars, community-based organizations, anchor institutions, and government entities committed to addressing various SDOH. Moreover, focusing on how preemption influences tangible issues affecting people's everyday

lives may prove advantageous to building and sustaining public support and political will.

From Concept to Action: Research and Advocacy

The varied applications of preemption illustrate its potential to advance and hinder public health and health equity, and existing frameworks focused solely on the mechanical operation of preemption laws fail to account for such varied potential. However, developing and operationalizing an equity-first preemption framework requires more robust empirical evidence than currently exists. We propose a research and advocacy agenda to provide such evidence.

First, we must identify and expand on empirical research establishing the effects of laws, policies, and other government action on health outcomes and inequities. This research can elucidate how some governments have used their authority to create and perpetuate discriminatory systems and institutions that result in health inequities, as well as how other governments have used their authority to improve health and advance health equity. Empirical research is also needed to understand to whom the costs and benefits of specific policies accrue (eg, residents versus corporations) and the effects on population health, economic productivity, health care utilization, and the environment.

Research addressing the health and equity effects of a policy serves as a useful proxy for evaluating the health and equity implications of preempting that policy, but an equity-first framework will require more than exclusive reliance on such extrapolations. Additional research should focus on how the various forms and instances of preemption themselves protect or constrain efforts to improve health outcomes and reduce health inequities. This type of research will require longitudinal datasets of preemption laws, qualitative and quantitative assessments of local policy adoption, and overlays of various demographic and health outcome data.

Based on these bodies of research, additional analyses can explore whether, when, and to what extent preemption has disproportionately impacted, for better or worse, health outcomes and inequities in specific places and populations. Research should prioritize understanding the effects of preemption on populations that have faced disproportionate

marginalization, subordination, and exclusion from political processes and government action. Such research must also contextualize any empirical data with the lived experiences and stories of those who experience or are affected by past or present health injustices.

Although demonstrating direct causal effects may prove challenging, rigorous and transparent methodological practices can insulate against attacks on evidentiary sufficiency. Such practices include the use of legal epidemiology—the "scientific study . . . of law as a factor in the cause, distribution, and prevention of disease and injury in a population."[61] The research should involve multidisciplinary and cross-sector teams that bring together political scientists, historians, sociologists, economists, legal and policy experts, and other scholars. Additionally, because an equity-first preemption framework would be predicated on understanding preemption as a neutral tool, any empirical research should remain nonpartisan, despite the potential need to employ partisan rhetoric in subsequent awareness and policy campaigns.

Finally, advocates and scholars must leverage this empirical evidence to develop innovative strategies for evaluating preemption through the lens of health equity. Initial efforts should focus on establishing evidence-based criteria for public health and equity stakeholders to use when assessing whether an instance of preemption is likely to enhance or inhibit health equity and the redress of government-inflicted or government-sanctioned harm. In addition, the evidence that is generated may help identify and inform future efforts to develop new jurisprudential approaches that integrate equity as a core consideration when courts uphold or invalidate preemptive state laws. To those ends, those conducting the research should work closely with advocacy groups, policymakers, and the judiciary to ensure that their studies directly inform policy debates and legal challenges about preemption. Efforts to educate the public about preemption and its health equity implications are needed, as are improved tools for tracking preemption legislation under consideration in statehouses, as well as transparency measures to reveal the lobbying groups and financial support that are backing preemptive legislation.

Conclusion

When misused, state preemption can threaten local democracy and the ability of local governments to represent and respond to the needs and

values of the people and communities they serve. Moreover, because local governments often serve as a locus of policy innovation related to health equity, abusive state preemption, left unchecked, is likely to exacerbate inequities in the distribution of social determinants of health and health outcomes.

Despite this distressing reality, those seeking to protect health equity and representative, responsive local democracy must remain mindful that these inequities result from decisions made at all levels of government, including local government. Like law and policy in general, preemption has both created and alleviated health inequities. Each level of government serves as a counterweight to the others' actions and inactions. History thus cautions against unconditional local control and underscores the need for preemption to check local governments.

Nevertheless, existing frameworks for assessing how best to allocate authority among different levels of government have proven untenable, and conditions appear ripe for reimagining our approach to these relationships. The combination of federal deregulation and retrenchment on civil rights has produced a groundswell of progressive state and local action to address health injustices, and the ever-expanding state preemption of local initiatives has surfaced long-standing tensions in state and local relations.

This landscape provides an opportunity to develop new approaches that situate the advancement of health equity at the center of the preemption debate. Developing and operationalizing an equity-first preemption framework will require ambitious research and advocacy efforts, significant resource investments, and robust stakeholder support. But what is at stake could not be more important: ensuring that a community's zip code does not impede its ability to pursue equity-promoting laws and policies that may ultimately dictate whether they have an opportunity to achieve good health and prosperity.

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