The Preemption Puzzle

Local governments have a long history of innovating in the housing space: rent control, inclusionary zoning, anti-discrimination ordinances, and, more recently, requiring legal counsel for eviction proceedings and eliminating single-family zoning (see "Minneapolis Evicts Single-Family Zoning," March 2019: planning.org/planning/2019/mar/news). They are often best positioned to respond quickly and effectively to the concerns of residents and have piloted many efforts upon which federal policies are based. However, local policy initiatives aimed at ensuring access to safe, affordable, and high-quality housing are increasingly being thwarted by the abuse of state preemption.

In light of the intensifying housing crisis across the U.S., it is critical for planners to understand preemption and how it is being deployed so they can effectively work toward protecting, preserving, and expanding safe, affordable, and high-quality housing for their local communities.

Balancing act

On its face, preemption—when the law of a higher level of government limits or even eliminates the power of a lower level to regulate a particular issue—is not inherently good or bad. It is merely an articulation of the exercise of powers between federal, state, and local governments. In fact, some of our most robust tools for equal protection under the law come from preemptive federal and state legislation.

More recently, however, preemption has become the tool of choice among some state legislatures seeking to strip local governments of their power to innovate and create laws across a wide range of issues, including laws that significantly affect housing. For example, even if a city has the legal authority to enact an inclusionary zoning ordinance, a state could pass legislation preempting that authority and prohibiting the ordinance's passage.

While state and federal preemption can sometimes be a poison pill, unfettered local power is not necessarily the antidote. History has shown that localism can facilitate segregation and inequality, too—and entrench those outcomes. For example, responding in part to discriminatory local action, Congress enacted the federal Fair Housing Act in 1968 for the very purpose of establishing nationwide anti-discrimination protections. Although this preemptive law intentionally interfered with state and local authority, most would now agree it played an essential role in protecting minorities from the "tyranny of the majority" in the housing arena.

Similarly, state preemption can be an effective way to combat NIMBYism and promote affordable housing. Take California. In 2017, the state adopted legislation limiting local governments' authority to regulate and ultimately deny certain multi-unit housing developments. In the midst of a severe and worsening housing crisis, the state deemed such action necessary to prevent local governments from impeding efforts to increase production of affordable housing.

Shadow side of preemption

But, just as there is historical precedent of preemption's positive role in the housing space, there is also a long history of its abuse. Back in 1973, an Illinois state senate staffer formed a group to promote a vision of small government. Initially called the Conservative Caucus of State Legislators, the group's animating focus was to work at the state level to unravel some of the wage and price controls championed by the Nixon administration.

Rent control was one of their first targets. Eventually dubbed the American Legislative Exchange Council, the group developed model language state legislatures could use to preempt local rent control ordinances, and by 1986, just 13 years after the group's formation, 36 states had enacted such legislation.

Due in part to its strategic deployment by groups like ALEC and powerful corporations, preemption has become a popular mechanism to constrain and overturn exercises of local democracy. In 2014, Austin, Texas, sought to address discrimination in the rental housing market by prohibiting landlords from rejecting tenants who pay part of their rent with federal housing assistance so long as they satisfy all other tenancy qualifications. Across the country, only one in three voucher households is protected by nondiscrimination laws like Austin's.

Despite this need, and despite research demonstrating that source-of-income discrimination disproportionately harms people of color, the Texas legislature overturned Austin's ordinance and preempted other municipalities from enacting similar anti-discrimination laws. Austin's experience demonstrates that while rent control was an early casualty of what many would consider an abuse of state authority, it certainly wasn't the last.

Laboratories of democracy

Earlier this year, Oregon became the first state in the country to mandate rent control. The legislation upended an almost 35-year ban on local rent control ordinances and was fueled by a variety of local innovations as cities responded to the state's housing crisis.

Cities and counties across the nation are facing urgent and complex housing problems that require creative solutions. To lay the foundation for a future of good policy, planners must first understand and confront the misuse of state preemption and protect the role of local governments to act as "laboratories of democracy." The promotion of safe, affordable, and high-quality housing depends on planners' indispensable role in piloting new practices that respond to current conditions.

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