



## The Misuse of Preemptive Laws and the Negative Impact on Public Health A Policy Statement from the American Heart Association

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### Summary

Preemption occurs when a higher level of government supersedes the authority of a lower level of government; it is a constraint on local policymaking power. Traditionally, preemption is a neutral legal policy tool used to avoid conflicting laws across different levels of government. However, in recent years, it has become an increasingly common legislative tactic that removes the regulatory power of local governments across a variety of issues while also limiting the average person's ability to participate in our democracy. Special interest groups are using their significant resources to make sure their interests and bottom lines are protected by supporting the consolidation of power at the state level, effectively stopping local policy innovation. The American Heart Association (AHA) supports science-based policy solutions at all levels of government, recognizes the importance of local policymaking to promote and protect public health and advance health equity, and believes in protecting local governmental power and the democratic process from state and federal overreach.

### Background

Preemption is a legal doctrine that allows a higher level of government to restrict or remove the power of a lower level of government. The federal government has broad preemptive authority over state and local laws, and states typically have wide-ranging power to preempt local laws.

There are different types of preemption, and they vary in how they are used. If a law establishes a minimum federal or statewide standard, but allows lower levels of government to pursue more stringent standards if desired, then the law has established a protective legal floor. Floor preemption (i.e., minimum standards or baseline standards) afford basic protections while providing a solid foundation upon which lower levels of government may build. (e.g., Federal minimum wage requirements.) In contrast, ceiling (i.e., true) preemption prohibits lower levels of

## The Misuse of Preemptive Laws and the Negative Impact on Public Health

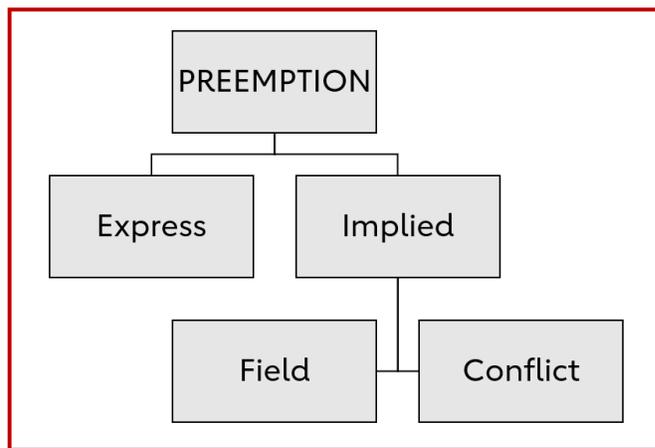
government from passing or enacting laws that require different or more stringent standards than the higher level of government, stripping the power of lower levels of government to regulate certain issues. There can also be vacuum preemption, when a higher level of government prohibits lower levels of government from regulating an issue, while also failing to enact its own policies, therefore creating a policy vacuum that leaves an issue entirely unregulated.

Preemption may be either express or implied. It is express when a higher level of government clearly states that it intends to supersede the laws of a lower level of government on a specific issue. Implied preemption occurs when a court of law determines that a higher level of

government intended to preempt more-local regulation based on the law's structure and purpose. There are two types of implied preemption: conflict and field. A court may find implied conflict preemption if a lower-level law conflicts with a higher-level law, making it impossible to comply with both.

Additionally, there may be implied conflict preemption if a lower-level law is deemed to interfere with the intended purpose of a higher-level law.

Implied field preemption occurs when a court concludes that the higher-level of government intended to occupy the entire field of regulation on a certain issue, leaving no room for additional regulation by lower-level policymakers. Implied preemption can be avoided if a savings clause – an explicit statement noting that a lower-level of government is not preempted from enacting stronger laws – is included in the legislation.



Source: Congressional Research Service Report R45825

In and of itself, preemption is a neutral policy tool used to avoid incompatible regulations that would make it difficult, and sometimes impossible, to operate. Historically, it has been used to ensure necessary regulatory uniformity, to protect against conflicting laws, and occasionally to advance public health, well-being, and equity.<sup>1</sup> One example of neutral preemptive standards is the federal prohibition on smoking on airplanes, which protects passengers from second-hand smoke and allows airplanes to cross state (and international) boundaries without the impossible burden of complying with different states' laws.<sup>2</sup> Examples of important protective preemption include the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act, which are key policies for advancing civil rights that function, at least

## **The Misuse of Preemptive Laws and the Negative Impact on Public Health**

in part, by preempting discriminatory state and local laws that drive racial inequities and other injustices.”<sup>1</sup>

### **The Misuse of Preemption**

Preemption is not inherently bad, and as noted above, can be a useful and necessary legal policy tool. The problem is not preemption itself, but rather the aggressive misuse of preemption. The misuse of preemption “clearly, intentionally, extensively, and at times punitively bar[s] local efforts to address a host of local problems.”<sup>3</sup> Unnecessarily restricting local policymaking has become an increasingly common legislative tactic that stands in the way of evidence-based policy solutions.

### **Prioritizing Industry Interests & Deregulation**

Preemption of lower levels of government is typically not necessary, and frequently misused to support the interests of powerful industries. Driven by corporations, trade associations, and special interest groups, preemptive laws are enacted at the state or federal level that are weaker than bills being proposed at more-local levels of government, enabling industry to avoid stringent regulations and ensure the industry must only comply with one set of laws rather than different laws across the country. Supporters of deregulation work to bypass local governments and consolidate power at the state level by using their vast resources to lobby a few state legislators willing to strip local policymakers of their power.<sup>1</sup>

Many proponents of preemption argue that local laws create a harmful “patchwork” of regulations that make it difficult and costly for regulated industries to operate. However, research finds little evidence that varied local laws harm businesses or consumers. In fact, when proponents of preemption are pushed to provide examples of the supposed harms of local laws, their arguments are often against regulations in general instead of the burden of a patchwork of local laws.<sup>4</sup> More often than not, the goal is to avoid any regulation, not just local regulation.

### **Stifling Policy Innovation**

The misuse of preemption stands in the way of progress that supports and protects public health. The ability of lower levels of government to address public health issues within their populations has long been essential to public health. In fact, localities have historically been, and continue to be, at the forefront of adopting innovative public health and equity policies.

Local control permits elected representatives to address issues pertinent to their constituency and allows experimentation at the local level. Policymaking at lower levels of government allows for innovation and encourages progress in a way that isn't

## The Misuse of Preemptive Laws and the Negative Impact on Public Health

always possible on a larger scale because implementation, enforcement, and adjustment are often easier on a smaller stage. Local policy experimentation can evolve into widescale adoption of public health policies. Many important policies evolved at the local level; traditional public health promoting strategies like smoke-free air laws and the regulation of tobacco and alcohol sales, as well as efforts to address social determinants of health through paid sick leave laws, mandatory inclusionary zoning, and expanded anti-discrimination protections.<sup>1</sup>

**“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”**

**- Justice Louis Brandeis<sup>5</sup>**

Preemptive laws can effectively stop progress in public health policymaking and eliminate the ability of local governments to act to protect their citizens.

### Chilling Local Officials

Preemption can also be misused when legislation is drafted with imprecise, overly broad, or ambiguous language. When a state law does not explicitly preempt local authority, but the language implies that preemption may be possible, the simple possibility of preemption can have a chilling effect on local lawmakers. “A recent survey found that over 70% of local health officials and 60% of mayors reported abandoning or delaying local policymaking efforts because of the threat of state preemption. Local policies chilled by the threat of preemption included efforts to regulate commercial tobacco, environmental hazards, firearms, minimum wage, safe housing, and transportation, among others.”<sup>6</sup> The chilling affect around the possibility of preemption is even greater when state legislatures pursue laws that threaten punishment – fines, criminal and/or civil liability, cuts in funding, removal from office – for local governments and elected officials who attempt to regulate a preempted topic. This punitive preemption can prevent local efforts “to test the legality or scope of preemption or raise a dissenting opinion” for fear of repercussions.<sup>7</sup>

### Disenfranchising Everyday People

In addition to hamstringing local governments, preemption can also limit democratic engagement and undermine grassroots movement building, effectively striping many people of the opportunity to meaningfully participate in policymaking efforts. Typically, the most accessible and trusted level of government is the local government. It is easier to interact with your local elected official or department head directly than it is to travel to your state capitol or Washington, DC and hope to meet

## **The Misuse of Preemptive Laws and the Negative Impact on Public Health**

someone in a position of power.<sup>8</sup> When local governments lose policymaking power, the average person's ability to engage with their representatives and participate in meaningful policymaking is diminished. Additionally, higher levels of government often offer less-reflective representation. There is a noticeable lack of diversity amongst state elected officials, with nearly every state legislature failing to achieve racial and gender parity when compared to the makeup of the population.<sup>9</sup> Often the people most impacted by preemption are women and people of color, while the policymakers leading the effort to pass these preemptive laws are frequently white men who receive campaign donations from special interest groups that stand to gain financially from state preemption.<sup>10</sup> Grassroots movements made up of passionate citizens pushing for policy change are also undermined by preemption; when the issue around which the movement is organized is effectively preempted, the original incentive to organize is gone and the movement may disband.

### **The Negative Impacts from the Misuse of Preemption**

As the misuse of preemption has grown in recent years, so has the body of evidence noting the negative impact of misused preemption. Research suggests that the misuse of preemption may, in part, explain diverging trends in mortality between some states. For example, life expectancy at birth in New York and Mississippi differed by 5.5 years in 2014, up from a 1.6-year difference in 1980. Since 1980, Mississippi has preempted health-promoting local laws related to paid sick days, a higher minimum wage, stricter firearm regulations, and requiring that calorie counts be posted, while New York has passed no preemption laws in these areas and actively promoted other public health efforts.<sup>11</sup>

Unnecessarily limiting local control and blocking policies promoting health and equity has severe – and preventable – consequences. The consequences can be significant, and too often disproportionately affect women, people of color, and communities with high rates of poverty. The misuse of preemption covers a wide range of policies, including, but not limited to:

#### **Tobacco Control**

Cigarette smoking continues to be one of the leading causes of preventable disease and death in the U.S., claiming over 480,000 lives per year.<sup>12</sup> While advocates have successfully pushed back against the tobacco industry in recent years, 31 states still preempt local tobacco control to some degree, including local policies related to tobacco retail licensure, smokefree indoor air, youth access, and e-cigarettes and other alternative nicotine products.<sup>13</sup> Tobacco preemption can be a health equity issue; Black Americans are more likely to live in areas without state-wide smoke free

## The Misuse of Preemptive Laws and the Negative Impact on Public Health

laws, and where such local policies have been prohibited by state legislatures.<sup>14</sup> This inequitable access to smoke-free environments increases exposure to tobacco smoke in workplaces, restaurants, and bars, perpetuating tobacco-related health disparities.<sup>14</sup>

### Nutrition & Food Policy

Eating habits and nutrition influence many risk factors for chronic diseases, including heart disease, stroke, and type 2 diabetes.<sup>15</sup> Nevertheless, some states preempt local policies related to food and nutrition, including efforts to regulate nutrition labeling, nutrition standards, portion sizes, and laws aimed at “reducing food-based health disparities.”<sup>16</sup>

Several states have also expressly prohibited local taxes on sugary drinks, removing a policy tool to reduce sugar consumption and raise revenue to address community needs.<sup>17</sup> Families with low incomes and communities of color are exposed to more sugary drinks ads and experience disproportionately higher rates of sugary drink-related chronic diseases than their peers from other racial or ethnic groups.<sup>18</sup> As a result, studies show that these groups would experience the largest gain in health and greatest reduction in health care costs if sugary drink taxes were implemented in their cities.<sup>18</sup>

### Employment Standards

In the last 25 years, 25 states have preempted local governments from setting a minimum wage that is higher than the state minimum wage, making it difficult for workers to afford basic necessities in places where the cost of living is significantly more than the state average.<sup>19</sup> A 2019 report analyzing 12 local minimum wage laws that were later invalidated by state preemption found that on average, workers are losing over \$4,000 individually per year, which is nearly \$1.5 billion per year on aggregate.<sup>20</sup> None of the state minimum wages that preempted the higher local minimum wages were sufficient to meet the needs of single adults in the preempted localities, let alone the needs of working people with dependents.<sup>20</sup>

Almost half of the states have passed laws prohibiting local governments from requiring employers to offer paid sick leave or other forms of paid family or medical leave.<sup>19</sup> While 64% of private-sector workers do have paid sick time as an employee benefit, there is unequal access among higher-wage workers compared to lower-wage workers.<sup>21</sup> Lower-wage workers, who are least likely to be able to afford to take unpaid time off, are also least likely to have access to paid sick leave benefits, forcing them to choose between going to work sick or jeopardizing their income.<sup>21</sup> There is also disparate access to longer-term paid family or medical leave based on race/ethnicity,

## The Misuse of Preemptive Laws and the Negative Impact on Public Health

worker socioeconomic status, employment status (full-time v. part-time), and employer size.<sup>22, 23</sup>

### American Heart Association Position on the Misuse of Preemption

The AHA is dedicated to evidence-based, nonpartisan, equitable public policy that promotes and protects the health and wellness of all people. The AHA recognizes the importance of local lawmaking to support public health and advance health equity. Local control can encourage innovation and allows policy solutions to be tailored to meet the unique needs of a community and its citizens. The AHA believes that all levels of government should operate with a presumption against preemption, reserving the use of ceiling preemption for rare cases when uniformity is essential or when it is necessary to stop lower levels of government from perpetuating social inequalities or inadequately addressing systemic injustices. The AHA is committed to advocating against the misuse of preemption and supporting local policy innovation and equity advancements.

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## The Misuse of Preemptive Laws and the Negative Impact on Public Health

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## The Misuse of Preemptive Laws and the Negative Impact on Public Health

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