

Preemption: What it is and How it is Evolving

What is Preemption?

Preemption happens when a higher form of government discourages, limits, or even eliminates the ability of a lower form of government from taking action on an issue. Federal preemption laws can restrict state and local governments. And state preemption laws—as long as they don't conflict with federal laws—can restrict the power of city and county officials in that state.

In addition to blocking local lawmaking, another emerging preemption threat has seen states looking to punish cities and local lawmakers for passing local laws, such as by fining local lawmakers or withholding state funding for municipalities. This hurts local democracy and can perpetuate health disparities.

Evolution of Preemption at the State Level

Preemption didn't always work this way. For a long time, preemption was used by state governments to set minimum standards for regulations at the local level. This is referred to as “floor preemption,” and it gives local governments the opportunity to put in place stronger laws that can be tailored to the needs of their community and go beyond what the state law requires.

Although local governments are uniquely positioned to meet the needs of the people in their communities, local control is not always best, and states and the federal government have a role to play in creating a safe and equitable society. In some cases, local governments have passed laws that discriminate and segregate, and states or the federal government have needed to step in to create laws that set a minimum standard that localities must meet.

More recent use of preemption, however, involves states limiting local governments from passing their own laws or strengthening laws set by the state. This is sometimes called “ceiling preemption” and is a tremendous concern for public health and equity. This type of preemption can be attributed, in part, to efforts by special interest groups to limit and prevent policies at the local level that could negatively affect their bottom lines.

Industry Influence: Tobacco Companies and the NRA

State legislatures first began feeling the pressure from industry and trade associations in the late 1980s. From that time, until the mid-1990s, tobacco companies successfully pushed states to pass preemption laws in an effort to limit local smoking restrictions.

Taking a cue from the tobacco industry's success, the National Rifle Association (NRA) began its own efforts in the 1990s to push for preemption of local gun laws. Today, 43 states still have preemption laws limiting local control of firearms.

In recent years, advocates have successfully repealed or weakened some of the tobacco preemption laws, although 12 states still preempt local smoke-free laws.

Continued Rise in Preemption

Preemption is becoming an increasingly common state legislative tactic and extending to a greater number of issue areas—from sugary drink taxes and other food and nutrition policies to minimum wage, paid sick leave, and municipal broadband.

Other special interest groups and organizations, including the American Legislative Exchange Council, have followed the tobacco company playbook in pushing for preemption laws to block local governments from passing laws on these issues.

American Legislative Exchange Council (ALEC)

ALEC is a membership organization made up of state lawmakers and industry representatives. It's known for giving a forum for members to collaborate on drafting and sharing model legislation.

These model bills—some intended to preempt local governments' ability to pass their own laws—are then taken by lawmakers and introduced into statehouses across the country. The creation of these model preemption bills makes it easier for similar preemption efforts to be introduced in multiple states, potentially at the same time.

The push by ALEC and other special interest groups, along with the increase in single party control in state governments, has contributed to the rise in preemption across the country in recent years.

- ▶ In 2017 alone, at least 19 new preemptive laws were passed across multiple policy areas.
- ▶ As of 2018, 13 states had passed nutrition-related preemption laws, including four that preempt sugary drink taxes.

Importance of Local Innovation

While some may argue preemption is necessary to avoid a patchwork of laws throughout a state, doing so limits local governments' ability to create and adapt policies based on what they know is best for their communities and residents. What works for a city or town in one part of a state may not work for communities in another part of the state. That is why local governments exist—to create laws that most accurately reflect the unique views, values, and needs of the people who live there.

Good ideas often start locally, including policies that help create healthier communities. Local governments have proven that they can step in and find a solution when it hasn't been addressed by either the state or federal government. By ensuring local governments have the ability to innovate and enact laws that are effective in promoting health and equity, it can lead to adoption by other communities or even the state.

After efforts to create smoke-free public places in California were defeated, cities throughout the state began to pass their own clean indoor air laws. Other cities across the country followed suit, and eventually, California and other states passed statewide clean indoor air laws.

A growing number of cities have adopted sugary drink taxes to encourage healthier beverage choices and raise funds for local priorities that range from funding pre-K to providing support for public health programs to benefit residents. As of 2019, multiple states have been working to pass state-wide sugary drink taxes.

<https://academic.oup.com/publius/article/47/3/403/3852645>
<https://www.nlc.org/sites/default/files/2017-03/NLC-SML%20Preemption%20Report%202017-pages.pdf>
<https://cityspeak.org/2018/07/13/mayors-agree-states-and-cities-must-work-together/>
<https://grassrootschange.net/preemption-watch/#/category/smokefree>
<https://grassrootschange.net/preemption-watch/#/category/guns>
<https://grassrootschange.net/preemption-watch/#/category/nutrition>
<http://www.publichealthlawcenter.org/topics/other-public-health-law/preemption-public-health>
<https://www.annualreviews.org/doi/full/10.1146/annurev.publhealth.29.020907.090920>
<https://www.cnn.com/2018/09/07/sugary-drinks-tax-could-be-on-2020-ballot-in-california.html>