

Fact Sheet: Preemption

- **Preemption** occurs when higher levels of government (federal or state) eliminate or limit the authority of lower levels. *Express* preemption occurs when a law contains preemptive language (a “preemption clause”). *Implied* preemption happens when a court finds that a law is preemptive even in the absence of preemptive language. To guarantee that a federal or state law is not preemptive, advocates must include a “**savings clause**” which preserves the authority of lower jurisdictions, for example, “Nothing in this law preempts more restrictive local regulations or requirements.”
- Concerns about the negative impacts of preemption are nearly universal in public health, having been raised in **alcohol** policy, **nutrition**, **tobacco** control, **pesticide** regulation, **agriculture**, **gun violence** prevention, **food** safety, **fracking**, and **fire prevention**.
- In June 2011, the **Institute of Medicine** published a groundbreaking report that considered preemption as a crosscutting issue in public health. The IOM recommended that federal and state policy makers “should set minimum standards... allowing states and localities to further protect the health and safety of their inhabitants,” and “should avoid language that hinders public health action.”
- In public health, the term “preemption” usually refers to *ceiling* preemption, by which a higher level of government takes away the power of lower jurisdictions to adopt stronger laws. Congress and state legislators have the option of setting minimum standards, also known as *floor* preemption, without invalidating stronger state or local laws.
- Preemption is often supported by an industry that believes it will benefit from the elimination of state or local authority. **Industry lobbyists** are generally more powerful in Washington and the state capitols than representatives of public health, creating an uneven playing field.
- Preemption has a negative impact on **grassroots movement building**. Preemption eliminates the opportunity to promote state or local policy change -- a key reason that advocates join together to take action.
- Preemption can be appropriate, as in the case of the Airline Smoking Ban. Aircraft may pass through numerous state and local jurisdictions several times an hour. Because commercial aircraft pass rapidly from one jurisdiction to another, airline safety and health are best regulated at the federal level. However, in public health such examples are rare. The IOM concluded that (ceiling) preemption is appropriate only in “situations where national uniformity is absolutely necessary and only after the impact on public health and enforceability has been thoroughly assessed and mitigated.”

Institute of Medicine. *For the Public's Health: Revitalizing Law and Policy to Meet New Challenges*. Washington, DC: The National Academies Press, 2011; Mowery PD, Babb S, Hobart R, et al. The Impact of State Preemption of Local Smoking Restrictions on Public Health Protections and Changes in Social Norms. *Journal of Environmental and Public Health*. New York, NY: Hindawi Publishing Co. 2012; Pertschuk M, Pomeranz JL, Aoki JR, Larkin MA, Paloma M. Assessing the Impact of Federal and State Preemption in Public Health: A Framework for Decision Makers. *Journal of Public Health Management and Practice*. 2012.



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