

Combatting and Preventing Preemption: A Strategic Action Model

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Progress in public health policy innovation often starts at the local level and spreads to state and federal laws. In many cases, these local policies seek to improve community health in a way that may impact business interests, such as taxes on unhealthy products or restrictions on harmful business practices. As a result, some businesses have used their relative political strength at the federal and state levels to stop public health policy making at the outset, by lobbying Congress and state legislatures to enact preemptive laws. The term “preemption” refers to “ceiling preemption,” by which higher jurisdictions withdraw or limit the power of lower jurisdictions to adopt stronger protections.¹ On the contrary, setting minimum federal or state public health standards, which can be referred to as “floor preemption,” is rarely of concern and can support public health.²

The threat of preemption to public health is so great that the Institute of Medicine (IOM) devoted a full chapter to the risks associated with preemption in its 2011 report, *For the Public's Health: Revitalizing Law and Policy to Meet New Challenges*.³ The IOM recommendations include “when the federal government regulates state authority, and the states regulate local authority in the area of public health, their actions ... should set minimum standards (floor preemption) allowing states and localities to further protect the health and safety of their inhabitants. Preemption should avoid language that hinders public health action.”^{3(p276)}

To prevent the loss of local authority, public health advocates must actively combat preemption before it is enacted. On the basis of research from the IOM and others,¹⁻⁵ as well as real-world experience in the fields of grassroots movement building and preemption,^{6,7} we developed a 4-part strategic model with associated tools on effective methods to track and counter preemption.⁸ We convened 2 national meetings in December 2017 and February-March 2018 to train public health advocates and practitioners, during which we solicited feedback and refined the model and tools.⁹ This commentary describes the 4-part action model for monitoring and combatting preemption. Although this model was initially developed for use by food and nutrition advocates, it applies equally to other public health issues.

Strategic Action Model

Our research and practice identified 4 strategic activities to combat and ultimately discourage the introduction of preemption to preserve local control: (1) monitor and anticipate; (2) engage grassroots; (3) unify allies; and (4) utilize media advocacy (Figure). The model is circular to demonstrate that in order to successfully prevent and combat preemption, local advocates, nonprofits, practitioners, and other stakeholders should continuously engage in these 4 activities to counter preemption, maintain local control, and support changes in the political culture discouraging preemption. Tobacco control advocates have effectively used these 4 elements to counter and even repeal statewide preemption of local authority over smoke-free policies beginning in the late 1980s.¹⁰ Ideally, these antipreemption activities should be undertaken concurrently with proactive public health advocacy and policy making (as in the case of the grassroots soda tax movement that routinely faces the threat of preemption).

Monitor and anticipate

The first component of the strategic model recommends that stakeholders assume preemption will be

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The authors declare no conflicts of interest.

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DOI: 10.1097/PHH.0000000000000956

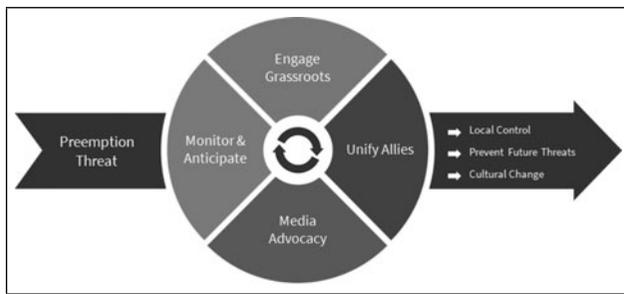


FIGURE Combatting Preemption Strategic Action Model^a
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proposed in 1 or more forms in their state legislature. This is true even in those states that have resisted preemption in the past. For example, in California, at the instigation of the soda industry, the state legislature swiftly preempted local authority to adopt sugar-sweetened beverage (SSB) taxes in June 2018.¹¹ Stakeholders must monitor bills on both related and unrelated topics throughout the legislative process to anticipate that preemption may be added at any point in the legislative process, especially toward the end when numerous bills are considered and amended in a short period of time. For example, in 2017, while Santa Fe, New Mexico, was debating a local initiative to tax SSBs, 4 types of preemptive legislation were proposed or considered in the state legislature: (1) a stand-alone preemption bill; (2) a last-minute effort to amend preemptive language into a statewide SSB tax bill; (3) a bill proposing a very low cap on future soda taxes that would render them ineffective; and (4) a proposed amendment to a tax reform bill.

Typically, the best practices for monitoring preemption include a combination of monitoring media; communicating with legislators and legislative staff members; monitoring states' official legislative tracking Web sites; and sharing intelligence with grassroots advocates. Because it is difficult to monitor all bills, this element of the strategic model recommends that local stakeholders form relationships with state legislators and staff before preemption is introduced to create an early warning network, specifically to alert them when preemption is being considered and before it is introduced.

Engage grassroots

Public health policy stakeholders should partner with grassroots activists and movements, as well as nontraditional allies and partners, before preemption is introduced in their state. A grassroots public health movement is a type of social movement formed to address threats to the health and safety of the community, led by activated individuals and organizations that devote resources to building grassroots capacity.

A grassroots movement is typically built around a single issue or concern that energizes individuals who join together in a common cause.¹ Grassroots leadership and engagement ensure that local perspectives are heard and incorporated into proposed legislation and that policy makers hear from their constituents.¹² Ongoing communication between movement leaders and legislative insiders allows for a quick response to preemption. This component of the model recommends that allies are enlisted to strengthen the voice against preemption, both within the public health field and in related issue areas threatened by preemption (eg, family leave). Nontraditional allies and partners become especially relevant when a bill is written to preempt more than 1 issue. For example, in Kansas, 2 bills were combined that preempted unrelated topics: food policy and rent control.¹³

Unifying allies

Stakeholders fighting preemption should ensure that all allies are unified in and committed to their position on preemption.¹⁴ Allies may include grassroots advocates, voluntary health agencies, local health departments, elected officials, and statewide organizations representing local officials, among others. During the legislative process, there is often an inducement to “trade” preemption for a statewide standard that is weaker than what local governments are considering or enacting.² Stakeholders should agree in advance on whether they are willing to accept preemption. Previous experience, for example, in gun violence prevention, suggests that weak state standards and preemption can be harmful to public health.^{7,15,16} Among all groups, it is important to speak frankly and openly about preemption because secrecy and backroom negotiations may lead to preemption. One recommendation for this strategic component is that allies at the state level agree to include and advocate for a clear and unambiguous “savings clause” to explicitly preserve local control in any proposed public health measure.¹⁷ Including a savings clause is essential to avoid confusion and litigation.¹⁷

Media advocacy

Media advocacy is the strategic use of mass media to advance policy or social change.¹⁸ Stakeholders should develop a consistent and effective strategy to alert, educate, and prepare the media prior to the introduction of preemptive bills or amendments. Media outreach should be developed on the basis of state-specific research and experience and should include tracking and exposing those industries that typically support preemption.^{4,19} For example, in some states, the concept of “local control” is embraced (eg, in Pennsylvania in discussions regarding

preemption of Philadelphia's beverage tax^{20,21}), whereas in other states, exposing an industry's support for preemption resonates with voters.²² Public health policy stakeholders should create nonpartisan, value-based messages based on the twin goals of supporting public health and the value of local democracy.²³ Media advocacy can also be used to support local businesses while exposing the drivers behind preemption as out-of-state multinational corporations. In addition, the media can expose the negative impacts of preemption, such as increased health disparities in locations where public health laws are preempted, industries' desire to avoid regulation at the expense of public health, exposing industry front groups that pose as fake grassroots movements, and revealing backroom politics to add preemption late in the legislative process.

Conclusion

Monitoring preemption, engaging grassroots, unifying allies, and leveraging media advocacy combine to create a strategic model to successfully combat preemption. This 4-part model provides a framework for strategies that have been used effectively by public health advocates, most notably in the tobacco control arena,^{24,25} who have countered and even repealed state preemption of local smoke-free policies since the late 1980s.²⁶ An outgrowth of this success has been the creation of a culture in which state legislators feel increasingly uncomfortable undermining local democracy through preemption. Armed with this 4-part strategic model, stakeholders can and should create a similar antipreemption culture surrounding other public health issues to preserve local control, support democracy, and ultimately combat and prevent preemption.

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