

State Preemption: Threat to Democracy, Essential Regulation, and Public Health

Preemption occurs when a higher level of government removes or limits the authority of a lower level of government to act on a particular issue or across issues. The federal government can preempt state and local governments, and states can preempt local control. In 2011, the Institute of Medicine asserted that the federal government and states should avoid preempting public health policies through “ceiling preemption” and instead should set minimum requirements (also called “floor preemption”) to allow localities to provide additional protections.¹

Minimum standards are appropriate to provide baseline support for the entire population and are responsible for some of the most important policy achievements in US history. For example, the federal Civil Rights Act provides baseline protections to certain groups of people but also allows for additional protections by state and local governments (e.g., for LGBTQ [lesbian, gay, bisexual, transgender, or questioning] individuals). Likewise, minimum state standards can provide broad public health protections while allowing communities to address their specific needs. For example, Kansas’s Indoor Clean Air Act provides a floor for secondhand smoke protection across the state and expressly allows communities to enact additional protections.

Contrary to the Institute of Medicine’s recommendations, state legislators across the political spectrum are increasingly supporting ceiling preemption (hereafter referred to as preemption) of policies intended to improve community health and address social and economic disparities, including policies related to tobacco control, firearm safety, food and nutrition, paid sick days, minimum wage, fire sprinklers, factory farming, fracking, and LGBTQ civil rights.² When state governments prohibit localities from innovating or addressing a topic of importance to their own community, they halt policy experimentation and public health progress and remove voters’ ability to determine the direction of their own communities. This use of state preemption may undermine public health and is our focus here.

Industry lobbyists and legislators who support state preemption often use similar arguments across policy issues. Each of these pro-preemption arguments can be countered with evidence-based information revealing that in the vast majority of cases the true motivations for preemption lay elsewhere. Typical arguments in support of preemption are inconsistent with the reality of modern-day preemption, which is advocacy for

deregulation of businesses and a retreat from democratic ideals, both of which have dangerous consequences for public health.

COUNTERING PRO-PREEMPTION ARGUMENTS

Proponents of state preemption argue that preemption is necessary to provide uniformity across a given state and avoid a patchwork of local laws. However, each state is made up of diverse communities with varying needs, socioeconomic backgrounds, health risks, and access to healthy and unhealthy products, as well as other unique factors. Uniformity in the form of preemption cannot adequately address communities’ diverse needs or values.

Proponents of state preemption also argue that preemption is necessary to support businesses and consumers and to protect businesses from regulatory burdens. Four aspects of this

argument can be readily countered. First, businesses have an obligation to comply with different types of laws, including various federal, state, or local laws depending on the type of business. Although there certainly may be additional costs to doing business across jurisdictions with varying laws, this is a typical cost of doing business in multiple locations where the ultimate goal is to increase profits. Therefore, this argument likely amounts to an underlying interest in deregulation and not a compliance concern. On this point, business arguments for “uniformity” probably signify an interest in uniform deregulation rather than an actual interest in uniform public health standards.

Second, arguing that businesses need protection from regulatory burdens may reflect a concern that more regulation will expose or undermine pernicious business practices, such as gun dealers knowingly permitting straw purchases on behalf of “prohibited purchasers” who were not able to pass background checks, using toys and prizes to induce children to eat unhealthy food, locating industrial livestock production facilities near human housing or water sources, labeling unhealthy products as healthy, and providing coupons to reduce the effects of public health taxes

ABOUT THE AUTHORS

Jennifer L. Pomeranz is with the College of Global Public Health, New York University, New York, NY. Leslie Zellers and Patricia A. Sullivan are consultants in Oakland, CA. Michael Bare and Mark Pertschuk are with Grassroots Change | Preemption Watch, Oakland.

Correspondence should be sent to Jennifer L. Pomeranz, JD, MPH, 715 Broadway, 10th Floor, New York, NY 10003 (e-mail: jlp284@nyu.edu). Reprints can be ordered at <http://www.ajph.org> by clicking the “Reprints” link.

This editorial was accepted November 1, 2018.

doi: 10.2105/AJPH.2018.304861

(e.g., on tobacco). Because deregulation may come at the expense of human and environmental health, consumers and communities are better supported when businesses are subject to sensible regulation adopted through a fair democratic process.

Third, regulation does not necessarily harm local businesses and may foster competition. Some regulations directly support businesses and consumers alike; for example, smoke-free ordinances can actually improve business for restaurants.³ Other regulations increase transparency (e.g., labeling) and create a level playing field for businesses. Provision of complete information about product risks across manufacturers allows consumers to make informed decisions. Businesses opposing such rules may fear that they will not be competitive in the face of increased information or level-setting regulations.

Fourth, truly local businesses may remain neutral or even support local policies because they benefit their own communities. Therefore, it is important to expose the fact that the true drivers behind preemption are often multinational corporations, their trade associations, and front groups.⁴ For example, the American Legislative Exchange Council (ALEC)—an entity funded by multinational corporations that has sitting state legislators as members—supports preemption across multiple domains through creation of model bills, legislative member training, and political advocacy groups that lobby for preemption in state legislatures. As one county representative argued, ALEC's policies seek “to impose the views of its big money corporate members on every county, city and citizen in America.”⁵

Lastly, proponents of preemption often point to the fact that the US Constitution does not mention local governments as evidence that state preemption is how American democracy is intended to operate. In reality, preemption is decidedly undemocratic because it withdraws the ability of community members to participate in the democratic process and determine what is best for their communities. Thomas Jefferson, in 1816, explained why local control strengthens democracies, and these considerations remain valid today: “what has destroyed liberty and the rights of man in every government which has ever existed” is “concentrating” powers into one legislative body or an autocrat, because then they “become more and more oligarchical” and less of a republic.⁶ Jefferson supported “dividing and subdividing” the government so that each level of government functions according to its competencies.⁶

Local governments are the closest to the people, so local officials know the values and needs of their community and can aptly respond to those needs. Local governments are also often best positioned to address health and social disparities caused by inequities that are not present or obvious at a statewide level. Because values and needs at the local level may differ from those at the state level, states are increasingly using their preemption power to nullify progressive local policies that reflect differing values between state and local (often urban) populations. It is thus important to expose how preemption undermines community self-determination and reflects a broader retreat from democratic values.⁷

CONCLUSIONS

Modern preemption represents the convergence of industry-sponsored deregulation and an undermining of local democracy, with potentially dangerous consequences for public health. State legislatures have gone so far as to eliminate their own ability to act on a wide range of issues while preempting local control over these same issues.⁵ States also have enacted punitive preemptive measures under which local governments and officials can be subject to civil and even criminal penalties for adopting legislation that may be contrary to state law.² Stakeholders and advocates across public health topic areas can work together to present a stronger opposition to preemption and support minimum standards that strengthen the health of all communities. **AJPH**

Jennifer L. Pomeranz, JD, MPH
Leslie Zellers, JD
Michael Bare, MPH
Patricia A. Sullivan
Mark Pertschuk, JD

CONTRIBUTORS

J. L. Pomeranz wrote the first draft based on prior discussions with the other authors, who provided feedback that was incorporated into the final version of the editorial. All of the authors contributed to the writing and editing of the editorial.

CONFLICTS OF INTEREST

No conflicts of interest.

REFERENCES

1. Institute of Medicine. *For the Public's Health: Revitalizing Law and Policy to Meet New Challenges*. Washington, DC: National Academies Press; 2011.
2. Pomeranz JL, Pertschuk M. State preemption: a significant and quiet threat to public health in the United States. *Am J Public Health*. 2017;107(6):900–902.
3. Knox B. Smoke-free laws do not harm business at restaurants and bars. Available at: <https://www.tobaccofreekids.org/assets/factsheets/0144.pdf>. Accessed December 9, 2018.
4. Waters R. Soda and fast food lobbyists push state preemption laws to prevent

local regulation. Available at: <https://www.forbes.com/sites/robwaters/2017/06/21/soda-and-fast-food-lobbyists-push-state-preemption-laws-to-prevent-local-regulation/#3e39758e745d>. Accessed December 9, 2018.

5. Kansas Legislature. HB 2595 committee minutes and testimony. Available at: http://www.kslegislature.org/li_2016/b2015_16/measures/HB2595. Accessed December 9, 2018.

6. National Archives. Letter from Thomas Jefferson to Joseph C. Cabell, February 2, 1816. Available at: <https://founders.archives.gov/documents/Jefferson/03-09-02-0286>. Accessed December 9, 2018.

7. Krugman P. Why it can happen here. Available at: <https://www.nytimes.com/2018/08/27/opinion/trump-republican-party-authoritarianism.html>. Accessed December 9, 2018.