

Local Policymakers' New Role: Preventing Preemption

 See also Rutkow et al., p. 1107.

Preemption—when a higher level of government withdraws or limits the authority of a lower level of government to enact policy—has become a leading threat to local governments' ability to enact public health protections nationwide.¹ Much of the research to date has focused on the divide between preemption proponents—industries that would be subject to local regulation but for preemption—and public health groups seeking appropriate regulation.² In this issue of *AJPH*, Rutkow et al. (p. 1107) report the results of the first national survey of mayors and local health officials' perspectives on preemption. This study provides new insight into the practical consequences of preemption for local public health policymaking and encourages examination of the role local policymakers may play to prevent and oppose preemption.

SURVEY RESULTS

Previous research described concerns that preemption undermines local democracy and results in deregulation.^{3,4} Rutkow et al. provide compelling evidence on these points. Local policymakers reported that preemption impeded policymaking across 23 topic areas—22 of them intended to improve public health and the social determinants of health, including addressing social injustices. When faced with preemption, the majority of survey respondents reported abandoning or delaying

policymaking efforts. This indicates that preemption forced local policymakers to permanently or indefinitely forgo policy initiatives aimed at addressing the needs and values of their communities. The survey's focus on policymakers from large US cities is especially compelling because these officials may have the authority, motivation, and community support to enact such policies.

The survey additionally provided valuable insight into three important points warranting further discussion: whether there is beneficial preemption, which level of government impedes the majority of local policies, and local policymakers' responses to preemption.

BENEFICIAL PREEMPTION?

Rutkow et al. found that a small proportion of survey respondents agreed that preemption has been “beneficial” to their cities. This would seem counter to other findings, but there are three possible interpretations that reveal nuances relevant to preemption debates. First, because the survey did not differentiate between ceiling preemption (the legal term for the prohibition on local policymaking) and floor preemption (which provides minimum standards), respondents may have identified the benefits of floor preemption's provision of baseline standards that allow additional protections.⁵ For

example, the federal Civil Rights Act permits states and localities to provide more expansive rights beyond federal (floor) requirements. It is important to note that these terms capture two very different concepts that may confuse the discussion and foster distrust of the evidence related to the negative consequences of (ceiling) preemption.

An alternative rationale for respondents' agreement with beneficial preemption could be identification of the limited occasions when the federal or state government enacted a valuable or comprehensive policy that simultaneously preempted local control. For example, Congress enacted the federal menu labeling law, requiring disclosure of calorie content on menus and additional nutrition information available upon request; the restaurant industry supported the law in exchange for broad preemption. Local policymakers may find that the federal law contains sufficient requirements, freeing up resources for other issues. Thus, successful enactment of the law in exchange for preemption might have been deemed beneficial.

The final rationale for the survey response could be that local policymakers did not actually want to engage in policymaking on the preempted topic. This may occur because of concern about a policy's effect in

their cities (e.g., stronger minimum wage laws), ties with an industry that opposes preempted policy (e.g., political donations from opponents of plastic bag bans), support for deregulation over an issue (e.g., unfettered Second Amendment rights at the expense of gun safety legislation), or the incredibly rare occasion a state has used preemption to support public health or social justice (e.g., Oregon's sanctuary state law). Finding preemption beneficial in these cases would indicate alignment on the topics preempted.

STATE-LEVEL PREEMPTION

Rutkow et al. highlight that local policymakers experience preemption from both the federal and state governments. Although the survey did not differentiate between the levels of government serving as an obstacle to local policymaking, the federal government has preempted policies in several topics identified, such as food-labeling requirements and tobacco product standards, whereas the states have preempted 100% of the topics identified by local policymakers. By preempting the ability of communities to address 23 issues, states have gone beyond instituting statewide values on cities with different needs and values to engaging in deregulation of public health issues. State legislatures routinely preempt a wide range of policies without simultaneously filling

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the regulatory void, including policies related to paid sick leave, food and nutrition, firearm safety, fire sprinkler requirements, and lesbian, gay, bisexual, transgender, queer civil rights.¹

In addition to state statutes preempting local policymaking on the topics identified, 22.0% to 38.5% of survey respondents expressed concern about preemption absent relevant laws or lawsuits. This may indicate awareness of a potential preemption threat or reflect the fact that state laws sometimes use vague language, so local policymakers are not entirely clear which policies are preempted.² Vague statutory language “chills” a broader range of policies than may have been debated during the bill hearing stages and thus goes beyond what some state legislators may have intended.

A NEW ROLE FOR LOCAL POLICYMAKERS

The findings of Rutkow et al. enrich the discussion of local policymakers' roles in responding to and preventing preemption. The majority of survey respondents reported trying to counter preemption by working with state legislatures and advocacy organizations. Their experience with preemption across 23

topic areas and previous research documenting state preemption as a national strategy¹ indicate that it is now essential for the prevention of preemption to become part and parcel of substantive policy work.⁶

Concurrent with supporting evidence-based and innovative public health policies, local officials and advocates can engage and educate state legislators, the media, and grassroots organizations in opposition to preemption, and they can add savings clauses in model state and federal legislation.⁶

More than a third of survey respondents also reported attempting to change preemptive laws, likely referring to efforts directed at state-level policymakers. Nonetheless, local policymakers are in a prime position to educate and motivate constituents to support the repeal of preemptive laws and vote in favor of state-level policymakers who support local governments.

Local policymakers have a bully pulpit from which to educate voters, communities, and the media on the realities of preemption and the values of local governance. In addition to the direct role municipal governments play in daily life (e.g., fire, sanitation, schools, housing, zoning), local officials' ties to their communities have deep implications. Unlike state legislators, local officials know their

constituents through formal meetings and informal community life. Local policymakers can continue to clarify for voters that because of state law, they are often legally unable to engage in the policymaking that communities seek. For example, after the Parkland school shooting, local officials in Florida pointed to state preemption and legislatively sanctioned punitive measures that may be imposed on local officials for passing firearm safety laws as an impediment to enacting additional protections.⁷ The resulting grassroots movement in favor of firearm safety laws expressly included an anti-preemption component.

CONCLUSIONS

The study by Rutkow et al. provides new and compelling evidence that preemption has real consequences for public health policymaking across a wide range of topic areas. Local policymakers' responses confirmed that preemption may undermine local democracy, prevent policymakers from addressing the needs and values of their communities, and lead to deregulation. Local policymakers are now in a position to have to educate community members, state officials, and the media on the realities of preemption and the values of local control. **AJPH**

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CONFLICTS OF INTEREST

The author has no conflicts of interest to declare.

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