

## All Politics are Local: Preemption and Public Health

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In 2014, the Robert Wood Johnson Foundation (RWJF) made a commitment to build a Culture of Health in America, in which every resident has access to affordable, quality health care and healthy places to live, work, learn, and play. To accelerate progress toward this vision, RWJF supports grantees who promote policy and environmental change to create healthier communities (no RWJF funds are used for lobbying).

But neither RWJF nor its grantees can achieve a Culture of Health alone. Engaged citizens who understand that “we are all in this together” and who collectively advocate for healthy local solutions to local problems are an essential ingredient. A Culture of Health requires people working together to put in place policies and laws that promote equity and encourage local innovation.

A legal term unfamiliar to many health professionals and the general public, “preemption” occurs when a higher level of government restricts, or eliminates, the ability of a lower level of government to regulate an issue. Preemption is a feature of our hierarchical legal system and inherently is neither good nor bad. It is a tactic that all sides—grassroots activists, industry, legislators in both parties—use strategically to accomplish their goals. There are two basic types of preemption: **floor preemption** establishes a minimum standard at the federal or state level and then permits local communities to set even higher standards, to promote health and civic engagement. Floor preemption can be a positive force for public health and is recommended by the Institute of Medicine.

But **ceiling preemption** can do the opposite, typically by setting a weak standard, or none at all, at the higher level of government and then limiting the power of lower-level jurisdictions to adopt stronger protections that fit the local context and needs. The result can be to impede local control and stifle innovation and grassroots movements. From here on in this article, “preemption” refers to “ceiling preemption.”

Preemption has been used to override local movements on a wide range of issues—from smoke-free-air laws, to menu-labeling requirements, to handgun regulations, to the ability of a parent to take time off to care for a sick child. For decades, advocates for smoke-free environments have been aware of the threat posed by preemption, which strips people of their power to affect destiny and can lead to a sense of helplessness that suppresses civic engagement. Since the 1980s, the tobacco industry, fearing increasing grassroots activism, has

pushed hard to preempt local smoke-free laws. As of 2015, 13 states restrict some or all local tobacco-control efforts.

### AN ESCALATING TREND

As more communities enact policies to promote a Culture of Health, efforts are also growing to block local action and create one-size-fits-all circumstances through state preemption laws. Menu labeling and earned (paid) sick time are two areas where state preemption is hindering local action.

- In 2008, responding to epidemic rates of heart disease, obesity, and diabetes, Philadelphia passed a law requiring labeling of sodium, fat, and carbohydrates as well as calories. However, the 2010 passage of the national menu-labeling law reflects pressure from restaurant industry groups in its requirement that chain restaurants disclose information on calories only. It also preempted more stringent regulations from local jurisdictions. Philadelphia’s more comprehensive law became unenforceable once the weaker federal bill passed. The city has formally requested an “exemption from preemption” from the federal Food and Drug Administration, but while the decision is pending, its local law—and the health of its residents—remain in limbo.
- Across the country, cities are leading the movement for paid (or “earned”) sick days and are being met with opposition pushing for state preemption. In 2011, Seattle became one of the first cities to pass a paid sick and safe days ordinance. Critical to its success was a strong coalition of diverse stakeholders—grassroots leaders, workers, businesses, and policymakers—who organized for the successful passage of the bill. Movement leaders leveraged research, media advocacy, and education to win, including meeting with the opposition to hear and address their concerns. Seattle’s grassroots paid sick days movement is a model for engaging a broad spectrum of constituents and leaders working across public health and civil rights issues, including workers’ health and safety.

These examples are only the tip of the iceberg. Federal and state preemptions have been applied to dozens of other issues, including e-cigarettes, guns, factory farms, hydraulic fracturing (“fracking”), genetically modified organisms (GMOs), minimum wage laws, and more.

## GETTING SMART ABOUT PREEMPTION

To accelerate progress toward healthier communities, one of the most important things foundations can do is protect local control by helping their grantees, policymakers, public health advocates and the general public “get smart” about preemption. Some best practices include:

- **Challenge the assertion that public health policies hurt business.** Business interests often argue that preemption makes economic sense, and that a “patchwork” of local regulations will be costly to business. However, a growing body of evidence points to the contrary—public health policies such as smoke-free ordinances and menu-labeling laws actually *promote* sales. Evidence that such policies are good for the bottom line should be widely disseminated.
- **Challenge the assertion that business motivations inherently hurt the public’s health.** Don’t assume that all businesses are in opposition. Business leaders who share common goals or see shared value in an issue or a community can bring an influential and unexpected voice to the issue.
- **Keep the public and the media informed.** Veteran advocates stress the importance of simple materials to help people understand that preemption is a tried-and-true strategy that can stifle civic engagement and local innovation. A media kit with fact sheets and resources can provide information about where preemption is happening.
- **Be on the alert for preemptive intent, even when it “hides” behind a variety of legal terms and phrases.** Requiring that local laws and policies be “consistent with” or “no more stringent or restrictive than” state or federal rules often indicates preemption. When a legislature declares an issue a “matter of statewide concern” or asserts an intention to “occupy the field,” preemption is the likely objective.
- **Monitor preemptive activities.** Organizations like [Grassroots Change](#), the [National Partnership for Women and Families](#), and [Americans for Nonsmokers Rights](#) track preemptive legislation state by state and provide technical assistance to help local communities counter it.
- **Weigh the pros and cons of preemptive legislation.** When preemption gets on the table, public health advocates need to understand its implications, not just for the issue at hand, but also for its long-term effect on the health of a community. The advantages of a compromise bill, such as the 2010 national menu-labeling law, may be outweighed by its impact in stifling more innovative local regulations for years to come.
- **Don’t let the threat of preemption prevent you from advocating for policies and laws.** Preemption at the state level doesn’t prevent advocating for passage of local laws and policies on issues communities care about. Even if the law is preempted, advocacy can be a way of highlighting the communities’ priorities and organizing people around the idea that local action is important.
- **Get to know your state legislator.** Knowing the representative and informing him or her about issues the community cares about decreases the likelihood that local regulations will be preempted.

- **Look for bipartisan issues.** Understand the local context and community priorities. Organize and advocate around issues that have strong, bipartisan support, and issues that can engage broad support from an array of stakeholders, such as grassroots leaders, health and civil rights groups, and local business leaders.
- **Shine a light on outside influence.** Communities value local control and resent interference from industry, national interest groups and, in some cases, big government. Advocates for public health need to recognize and expose these influences on local decisionmaking. When people become aware of these outside influences, they often become galvanized around an issue, even if they hadn’t been engaged before.
- **Mobilize academics and other legal experts to counter preemption and promote public health policy.** A number of membership groups affiliated with certain special interests actively recruit legal and policy talent who can conceptualize and develop strategies that often conflict with public health regulation. Academic centers like [Public Health Law Research](#) or organizations like [ChangeLab Solutions](#) are untapped resources to counterbalance such efforts. They can help develop legal arguments and policy models, and conduct public opinion research and public information campaigns to raise awareness and understanding about the reasonableness of public health regulation.
- **Break down issue silos.** Advocates across many issues—public health, safety, workplace reform, and civil rights—are often working towards a similar goal: to ensure that their communities and constituents can live healthy, safe, fulfilling lives. Many are facing similar threats of preemption and should look for areas of common ground across issues rather than developing campaigns in isolation.

## SOURCES

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