

# Fundamentals of Preemption

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*Preemption is a legal doctrine that can have sweeping consequences for local policymaking. This fact sheet explains how preemption works, to help local decisionmakers and community leaders understand how preemption can be used to advance or impede health equity.*



## What Is Preemption?

Preemption is a legal doctrine that allows a higher level of government to limit or even eliminate the power of a lower level of government to regulate a specific issue. Under the Supremacy Clause of the US Constitution, federal law takes precedence over state and local law. Similarly, cities are “creatures of the state,” and therefore state law generally takes precedence over the laws of a local jurisdiction.<sup>1</sup>

Preemption itself is neither bad nor good; it is simply a legal concept. Preemption historically has been used as a legislative and judicial tool for resolving problems that arise when different levels of government adopt conflicting laws on the same subject.<sup>2</sup> In recent years, however, states have increasingly used preemption to protect the power and financial interests of established political or commercial entities and thwart local jurisdictions’ efforts to adopt laws that advance health equity; some states even punish local officials and local governments that adopt such laws.<sup>3</sup>

## Types of Preemption

Preemption can take many forms. For example, state and local governments may be preempted from passing or enforcing laws that are *less protective* than the higher-level law. Conversely, state and local governments may be preempted from passing or enforcing laws that are *more protective* than the higher-level law. State and local governments may also be preempted from enacting *any* laws or regulations on an issue, even if there is no higher-level law regulating that issue. These forms of preemption are known as *floor preemption*, *ceiling preemption*, and *vacuum preemption*, respectively.

### Floor Preemption

The most common form of preemption is floor preemption,<sup>4</sup> which occurs when a higher level of government passes a law that establishes a minimum set of requirements and allows lower levels of government to pass and enforce laws that impose more rigorous requirements.<sup>5</sup> Lower levels of government may not, however, establish lower standards.

For example, the federal Fair Labor Standards Act establishes a national minimum wage of \$7.25 per hour but allows states and localities to pass their own minimum wage laws establishing a higher minimum wage.<sup>6</sup> Similarly, federal law sets the minimum legal age for sale of tobacco products at 18<sup>7</sup> but allows state and local governments to adopt more stringent requirements,<sup>8</sup> as California did by increasing the minimum legal age for sale of tobacco products to 21.<sup>9</sup>

For local policymakers, floor preemption is an attractive option because it establishes a minimum statewide or federal standard and still leaves local governments free to enact more robust regulations. However, if a state or federal law doesn’t clearly permit further regulation by lower levels of government, is silent about preemption, or uses ambiguous language, there is a risk that the courts could interpret the law as preempting any local regulation.

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### Ceiling Preemption

Ceiling preemption is what most people are referring to when they talk about preemption.<sup>10</sup> Ceiling preemption occurs when a higher level of government prohibits lower levels of government from requiring anything more than or different from what the higher-level law requires.<sup>11</sup>

For example, the federal law regulating warning labels on cigarette packages expressly prohibits states from imposing additional warning requirements.<sup>12</sup> Similarly, while the federal minimum wage law establishes a floor, many states have passed state-level minimum wage laws that preempt localities from establishing a minimum wage higher than the one set by state law.<sup>13</sup>

Ceiling preemption can be problematic for local policymakers when it limits local governments' ability to adopt laws addressing important public health, public welfare, or consumer protection issues.

### Vacuum Preemption

Vacuum preemption (also referred to as *null preemption*)<sup>14</sup> occurs when a higher level of government chooses not to enact any regulations on a particular topic but still forbids lower levels of government from doing so, creating a regulatory vacuum. This form of preemption occurs frequently in the context of broader deregulatory movements in which state laws are passed with the intent of blocking local laws even in the absence of any state regulation relating to the preempted subject matter.

For example, in 2016, Alabama passed the Uniform Minimum Wage and Right-to-Work Act, which expressly preempted local governments from establishing minimum wage laws but did not create a state-level minimum wage.<sup>15</sup> This law effectively created a regulatory vacuum at the state and local levels, leaving only the federal minimum wage law in effect in Alabama. Similarly, Iowa state law preempts local governments from requiring that employers provide paid sick leave for employees even though Iowa state law has no regulations on paid sick leave.<sup>16</sup>

Vacuum preemption can be extremely challenging for local policymakers when it leaves an issue of concern entirely unregulated.

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## How Preemption Operates

### Express Preemption & Implied Preemption

Preemption can operate in several ways. **Express preemption** occurs when a law explicitly states that it is meant to preempt lower-level lawmaking authority.<sup>17</sup> For example, a state law that says, “No unit of local government shall impose requirements on the sale of tobacco products” expressly preempts a town’s authority to adopt an ordinance raising the minimum legal age for sale of tobacco products to 21.

**Implied preemption** means that a law contains no explicit preemption-related language but nevertheless may be found by a court or legislature to preempt state or local authority.<sup>18</sup> For example, in Maryland, the Court of Appeals found that even though state law<sup>19</sup> does not expressly prohibit local regulation of tobacco product sales, it “comprehensively regulates the packaging, sale, and distribution of tobacco products, including cigars, and thus preempts [local regulation of] this field.”<sup>20</sup> However, it is not always clear whether implied preemption is present in a law; courts sometimes have trouble deciding whether preemption is present if it is not explicit.

### Field Preemption

Preemption can be broad or narrow. Field preemption occurs when a higher-level government prohibits lower-level governments from passing or enforcing *any* laws on an issue, reserving the entire area (the field) of regulation to itself. Alternatively, a higher-level government may choose to preempt lower-level laws affecting only *specific components* of an issue. For example, South Dakota preempts the field of tobacco product regulation (that is, the state preempts all regulation of tobacco products).<sup>21</sup> In contrast, California preempts only local taxation of tobacco products.<sup>22</sup>

### Punitive Preemption

States have recently begun to adopt laws that not only preempt local laws on a particular subject but also punish local officials and local governments that attempt to enact or enforce preempted laws.<sup>23</sup> For example, several states have adopted laws that subject local officials to fines, civil liability, and removal from office for passing or enforcing local gun control laws.<sup>24</sup>

Beyond subjecting local officials to increased legal exposure, some punitive state preemptive laws seek to punish the local governments themselves by subjecting them to fines<sup>25</sup> or cutting off state funding. For example, Arizona passed a law in 2016 that halts state funding to any city that is determined by the attorney general to have a city ordinance that is preempted by state law.<sup>26</sup> What makes Arizona’s punitive preemption even more notable is that it is not limited to specific topic areas, as most other punitive state laws have been, but applies in a sweeping manner to any local governments with laws that violate – or may violate – *any* provision of state law or the Arizona constitution.<sup>27</sup>

## Preemption in Action

Given that preemption is neither bad nor good, what really matters is how it is used. Despite recent trends, preemption is not inherently adversarial to public health, equity, or good governance. For instance, as the civil rights movement took hold, the federal government responded to discriminatory state and local policies with preemptive federal laws. Congress enacted legislation establishing nationwide anti-discrimination protections, including the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act.<sup>28</sup>

Further, state preemption seeking to advance health equity can sometimes provide a critical counterbalance to harmful local policies. For example, in 2017, California passed legislation stripping local governments' authority to regulate and ultimately deny certain multi-unit housing developments.<sup>29</sup> The state took such drastic action to ensure that local governments could no longer avoid responsibility for a severe and worsening housing crisis. Although the law significantly limits the power of California municipalities in regard to housing, it should ultimately promote health equity by allowing more affordable units to be created in places that need them, and it may reduce displacement in underserved communities.

In recent years, however, many state legislatures have increasingly used preemption to prevent local communities from enacting laws that could reduce inequities and enhance community health.<sup>30</sup> Since 2011, sweeping deregulatory and punitive preemption has skyrocketed. For example, states have passed laws preempting local regulations on paid sick leave without establishing state-level requirements for paid sick leave, leaving localities without recourse to protect workers.<sup>31</sup> Similarly, many states have passed laws preempting local minimum wage,<sup>32</sup> smokefree air,<sup>33</sup> and anti-discrimination laws.<sup>34</sup> And punitive preemption makes it even more difficult for local governments to improve community health.<sup>35,36</sup>

## Conclusion

As with any tool, preemption's impact on public health outcomes and health equity depends on how it is wielded. While preemptive laws at the state and federal levels can provide important protections that reach many people, the current environment of state-level preemption poses a substantial threat to local policymaking and public health. It is critical to ensure that cities remain places of innovation where local governments – and the people they represent – have the power to pass their own laws to effect positive change. It is equally important to structure any state or local policy intervention around the advancement of health equity and subsequently assess how preemption factors into accomplishing that goal.

## Resources

The following companion resources are available from ChangeLab Solutions:

- [The Consequences of Preemption for Public Health Advocacy](#)
- [Negotiating Preemption: Strategies and Questions to Consider](#)
- [Preemption: What It Is, How It Works, and Why It Matters for Public Health](#)

Additional resources on preemption can be accessed via the following links:

- [Local Solutions Support Center](#)
- [Grassroots Change - Preemption Watch](#)
- [Partnership for Working Families - State Interference](#)
- [Voices for Healthy Kids - Preemption Toolkit](#)

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## Notes

1. *Coleman v. Miller*, 307 U.S. 433, 59 S.Ct. 972, 83 L.Ed. 1385 (1939). Mermin T. Preemption: *What It Is, How It Works, and Why it Matters for Public Health*. Oakland, CA: National Policy & Legal Analysis Network to Prevent Childhood Obesity (NPLAN), ChangeLab Solutions; 2009.
2. Briffault R, Davidson NM, Reynolds L. *The New Preemption Reader*. St. Paul, MN: West Academic Publishing; 2019.
3. Briffault R. *Punitive Preemption: An Unprecedented Attack on Local Democracy*. New York, NY: Local Solutions Support Center; 2018.
4. Briffault R, Davidson NM, Reynolds L. *The New Preemption Reader*. St. Paul, MN: West Academic Publishing; 2019.
5. Briffault R, Davidson NM, Reynolds L. *The New Preemption Reader*. St. Paul, MN: West Academic Publishing; 2019.
6. Fair Labor Standards Act of 1938 29 U.S.C. §§ 206(a), 218(a) (2012).
7. Federal Food, Drug, and Cosmetic Act 21 U.S.C. § 387f(d)(3)(A)(ii) (2012).
8. Federal Food, Drug, and Cosmetic Act 21 U.S.C. § 387p (2012).
9. See Cal. Bus. & Prof. Code § 22951.
10. See, eg, *Interim Briefing Paper Presented by NAAG to President-Elect Obama and the Transition Team*. Washington, DC: National Association of Attorneys General; 2009 (listing federal preemption of state laws as a top issue of concern); *Preemption Monitor*. July 14, 2009;5(2) (Denver, CO, & Washington, DC: National Conference of State Legislatures) (noting that pressure for Congressional and White House support for “federal usurpation of state authority” “continues to mount”).
11. Briffault R, Davidson NM, Reynolds L. *The New Preemption Reader*. St. Paul, MN: West Academic Publishing; 2019.
12. 15 U.S.C. § 1334 (2012).
13. *Fighting Preemption: The Movement for Higher Wages Must Oppose State Efforts to Block Minimum Wage Laws*. New York, NY: National Employment Law Project; 2017.
14. See generally Nash, JR. Null preemption. *Notre Dame Law Rev.* 2010;85(3):1015-1079.
15. Alabama Uniform Minimum Wage and Right-to-Work Act, Ala. Code §§ 25-7-40 et seq.
16. Iowa Code § 331.304(12) (2018).
17. See, eg, 15 U.S.C. § 1334(b) (“No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.”).
18. See, eg, *Altadis USA v. Prince George’s County*, 431 Md. 307, 316 (MD 2013) (“In light of . . . other implied preemption cases previously cited, we hold that state law comprehensively regulates the packaging, sale, and distribution of tobacco products, including cigars, and thus preempts this field.”).
19. Md. Code Ann. Bus. Reg. §§ 16.5-101 – 16.5-218 (2012).
20. *Altadis USA v. Prince George’s County*, 431 Md. 307, 316 (MD 2013).
21. “For the purposes of equitable and uniform regulation and implementation, the Legislature through this chapter is the exclusive regulator of *all matters* relating to the distribution, marketing, promotion, and sale of tobacco products.” S.D. Codified Laws § 34-46-6 (emphasis added).
22. “The taxes imposed by this part are in lieu of all other state, county, municipal, or district taxes on the privilege of distributing cigarettes or tobacco products.” Cal. Rev. & Tax. Code § 30111 (1989).
23. Briffault R. *Punitive Preemption: An Unprecedented Attack on Local Democracy*. New York, NY: Local Solutions Support Center; 2018.
24. Briffault R, Davidson NM, Reynolds L. *The New Preemption Reader*. St. Paul, MN: West Academic Publishing; 2019.
25. Tex. Gov’t Code § 752.056(a)-(b) (2017).
26. S.B. 1487, 52d Leg., 2d Reg. Sess. (Ariz. 2016) (codified at Ariz. Rev. Stat. Ann. § 41-194.01 2016).
27. May RP. Punitive preemption and the First Amendment. *San Diego Law Rev.* 2018;55(1):1-53.
28. Silverstein T. Combating state preemption without falling into the local control trap. *Poverty & Race*. 2017;26(4):1-2, 9-12.
29. Cal. Gov’t Code §§ 65400, 65582.1 (2017).
30. Riverstone-Newell L. The rise of state preemption laws in response to local policy innovation. *Publius*. 2017;47(3):403-425.
31. *State Interference Primer: An Introduction to the Growing Threat of “New Preemption.”* New York, NY: Local Solutions Support Center; 2018.
32. Worker rights preemption in the U.S. Economic Policy Institute website: [epi.org/preemption-map/](http://epi.org/preemption-map/). Accessed May 24, 2019.
33. Preemption map: smokefree. Grassroots Change website: <https://grassrootschange.net/preemption-watch/#/category/smokefree>. Accessed May 24, 2019.
34. Preemption map: discrimination. Grassroots Change website: <https://grassrootschange.net/preemption-watch/#/category/non-discrimination-policies>. Accessed May 24, 2019.
35. Briffault R. The challenge of the new preemption. *Stanford Law Rev.* 2018;70(6):1995-2028.
36. 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.

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