

# Consequences of Preemption for Public Health & Equity

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ChangeLab Solutions

*Preemption can threaten the ability of local governments to implement innovative solutions that advance health equity. Yet preemption can also be used to ensure that local governments do not hinder health equity. This fact sheet helps policymakers and advocates consider the potential consequences and benefits of preemption.*



## 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. Federal laws can preempt state and local laws, and state laws can preempt local laws.

Preemption can be used to ensure uniform state regulation, to protect against conflicts between local governments, and sometimes to advance well-being and equity. However, in some state legislatures, preemption has increasingly become the tool of choice to prevent local communities from enacting laws aimed at reducing inequities and enhancing community well-being; in some cases, the enactment of preemptive laws has overturned successful local ballot initiatives.<sup>1</sup> This “new preemption” differs from traditional preemption in form, substance, and application.<sup>2</sup> Whereas traditional preemption attempted to balance the needs and interests of state and local governments, “new preemption” laws are eliminating local authority to address a wide range of issues, such as housing and paid sick leave, and sometimes punishing local officials and local governments that attempt to enact or enforce preempted laws.<sup>3</sup>

Despite the recent trend toward sweeping and punitive preemptive laws, preemption isn't inherently adversarial to public health or equity. On the contrary, landmark federal laws such as the Civil Rights Act of 1964, the Voting Rights Act of 1965, and the Fair Housing Act are critical tools for advancing civil rights, and all three do so, at least in part, by preempting discriminatory local and state laws – from race-based exclusionary zoning and covenants to Jim Crow segregation – that drove racial inequities and other injustices.<sup>4</sup> Some local governments have continued this history of discriminatory local policies – for example, through land use regulations that restrict affordable housing developments to specific neighborhoods<sup>5</sup> or penalties on tenants or landlords for using emergency services to aid victims of abuse or a crime.<sup>6</sup> In these situations, state preemption has been used in an equity-promoting manner. For example, preemptive laws passed in California in 2017<sup>7</sup> and Oregon in 2019<sup>8</sup> seek to address the affordable housing crisis by reducing local barriers to creation of affordable units in order to reduce displacement in underserved communities. Likewise, preemptive state laws passed in Minnesota<sup>9</sup> and in Pennsylvania<sup>10</sup> in 2014 promote health equity by prohibiting local governments from penalizing tenants or landlords for using emergency services.<sup>11</sup>

For more information on what preemption is and how it operates, please refer to ChangeLab Solutions' fact sheet [Fundamentals of Preemption](#).

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## Who Is Behind the “New Preemption” Laws?

Often propelled by trade association and business lobbying, many preemptive state laws are aimed not at coordinating state and local regulation but at preventing any regulation at all.<sup>12</sup> Many of these new preemptive state laws are part of a long-term strategy by corporate interests to consolidate power at the state level and end local authority over a variety of issues. Businesses are generally concerned with profit, which reflects revenues, costs, inventories, marketing, and legal compliance, among other things. New regulations can affect all of these things. Accordingly, business and industry have increasingly used preemption to protect their financial interests and thwart local efforts to enact policies aimed at advancing health equity.<sup>13</sup> Much of this effort has been orchestrated by the American Legislative Exchange Council (ALEC), an industry-funded organization that has written and distributed model bills to its members, which include lobbyists and a quarter of all state lawmakers. These models have served as the basis for many of the “new preemption” laws.<sup>14</sup>

## What Are the Consequences of Preemption for Public Health & Health Equity?

The consequences of preemptive laws can be significant. Public health innovations often start at the local level, with cities and counties serving as “laboratories of democracy” where new and innovative policies can be tested. Indeed, local governments often serve as a hub for policy innovations and reforms with the potential to improve community health outcomes and reduce health inequities. These innovations include traditional public health policies such as those that ensure equitable access to smokefree environments, regulate tobacco and alcohol sales, and promote healthy eating and active living. They also include efforts to advance public health by addressing the social determinants of health – for instance, through paid sick leave laws, mandatory inclusionary zoning, or expanded anti-discrimination protections. By removing local decisionmaking authority, preemptive laws can stymie communities’ pursuit of a healthier, more equitable future and undermine local efforts to protect public health.<sup>15,16,17</sup> For example, preliminary research indicates that states that removed local authority to raise the minimum wage, mandate paid employment leave, or regulate firearms have made smaller gains in life expectancy than those that did not.<sup>18</sup>

New preemption laws are especially alarming from a social justice perspective because they fail to take into account potential health equity implications and because they impede local efforts to remedy historical harms. Two examples illustrate the interplay between preemption and equity:

- In 2014, Austin, Texas, sought to address racial and socioeconomic discrimination in rental housing by prohibiting landlords from rejecting tenants based solely on their source of income (for example, Section 8 vouchers).<sup>19</sup> In response, the state legislature quickly nullified Austin’s law and preempted other municipalities from enacting or enforcing similar anti-discrimination laws,<sup>20</sup> despite the fact that state law provided no such protections for recipients of housing assistance and despite clear evidence that source-of-income discrimination disproportionately harms people of color.<sup>21,22</sup> In fact, across the country, only 1 in 3 voucher households is protected by nondiscrimination laws like Austin’s.<sup>23</sup>

- In 2016, Birmingham, Alabama – a city where African Americans make up nearly 75% of the population – enacted a minimum wage ordinance intended to address economic inequities. Almost immediately, the state legislature invalidated the Birmingham ordinance and prohibited localities across the state from regulating employee wages, benefits, and work schedules. Not a single African American state legislator supported the preemptive state law, and many characterized it as another example of lawmakers' manipulation of the political and legal process to disenfranchise communities of color.<sup>24,25</sup>

## Preemption & Public Health Priorities

State preemption can pose a significant threat to a wide range of public health priorities. The following sections examine the implications of preemption for important public health priorities in areas such as affordable and fair housing; food and beverages; tobacco, alcohol, and guns; and economic well-being.

### Affordable & Fair Housing

Local governments have taken many approaches to advancing equitable policies that promote healthy, affordable, and accessible housing for their residents. Some of the most successful strategies include housing voucher nondiscrimination laws, inclusionary zoning ordinances, regulations on short-term rentals, rent control ordinances, proactive rental inspection programs, and expanded housing code requirements. Yet many state legislatures have misused preemption to thwart local adoption of these equity-promoting strategies.

- **Housing voucher nondiscrimination.** Local governments in Indiana and Texas are preempted from protecting people from landlord discrimination based on their source of income.<sup>26</sup> As a result, local governments in those states have limited ability to expand housing options for families who receive federal assistance.
- **Inclusionary zoning.** Nearly 1 in 5 states preempt local governments from adopting inclusionary zoning requirements that require new housing developments to include affordable rental and homeownership units.<sup>27</sup>
- **Short-term rentals.** Nearly 1 in 5 states preempt local governments from regulating short-term rentals, despite evidence suggesting that short-term rentals are contributing to housing affordability issues.<sup>28</sup>
- **Rent control.** More than half of states preempt local governments from enacting rent control requirements to protect tenants from being priced out of their housing.<sup>29</sup>
- **Proactive code enforcement.** A few states have preempted local governments from establishing rental property registries and proactively inspecting rental housing units to ensure safe and habitable rental housing.<sup>30</sup>

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### Food & Beverages

Local governments have been at the forefront of developing policies to promote healthy eating – for example, requiring children’s meals in restaurants to meet nutrition standards or adopting procurement policies that emphasize healthy foods.<sup>31</sup> Several localities have enacted taxes on sugary drinks to reduce consumption and raise revenues to address health and social justice issues in underserved communities.<sup>32</sup> Some cities have considered limiting portion sizes of sugary drinks or requiring warnings about sugar on menus or advertisements.<sup>33</sup> However, many of these types of policies have been preempted by state legislation.

- **Sugary drinks.** A handful of states – including Arizona,<sup>34</sup> California,<sup>35</sup> Michigan,<sup>36</sup> and Washington<sup>37</sup> – now preempt local sugary drink taxes.

In Stockton, California, youth advocates saw their years-long advocacy efforts to enact a sugary drink tax fall short after the beverage industry, using tactics described by some as “blackmail,” successfully lobbied the state legislature to preempt such taxes.<sup>38</sup> After placing an initiative on the ballot that would have decimated local government finance and threatened the ability to fund basic services like police and fire protection, the beverage industry withdrew the initiative in exchange for the preemptive state legislation. As a result, local governments in California are preempted from enacting any new sugary drink taxes or increasing any existing ones until 2031.

- **Nutrition standards.** While most state and local regulations on menu labeling are preempted by the federal government, more than 1 in 4 states have expanded preemption of nutrition-based regulations in areas ranging from portion sizes to nutritional labeling to promotional games and toys.<sup>39</sup> In two notably extreme instances, Kansas<sup>40</sup> and Mississippi<sup>41</sup> use vacuum preemption (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) to prohibit local governments from enacting almost any law related to food and nutrition, including any local law that aims to reduce “food-based health disparities.” The Kansas and Mississippi laws mirror model legislation promoted by ALEC.<sup>42</sup>

### Tobacco, Alcohol, & Guns

Local governments have used several policy approaches to advance equitable health outcomes related to potentially dangerous products, including tobacco, alcohol, and guns. Examples include development of laws that ensure smokefree air, regulate the sale of e-cigarettes, limit the density of alcohol outlets, and promote gun safety. Yet business and political interests have influenced many states to preempt these and other health- and equity-promoting strategies.

- **Tobacco control.** More than 1 in 5 states have preempted local governments from passing smokefree air policies that ban smoking indoors and in designated public areas.<sup>43</sup> Additionally, nearly 1 in 6 states have acted on behalf of business interests to preempt local regulation of e-cigarettes, which are sometimes referred to as *vapor products* or *alternative nicotine products*.<sup>44</sup>

The tobacco industry has used preemption frequently and effectively to obstruct and weaken state and local tobacco control campaigns.<sup>45,46</sup> As one former tobacco lobbyist bluntly described it, “the Tobacco Institute and tobacco companies’ first priority has always been to preempt the field, preferably to put it all on the federal level, but if they can’t do that, at least on the state level, because the health advocates can’t compete with me on a state level. They never could.”<sup>47</sup>

- **Alcohol control.** Alcohol is one area in which states have long preempted local regulation, setting caps on tax rates as well as regulating alcohol outlet density, alcohol advertising and marketing, and the time and place of sales.<sup>48</sup> States historically have had strong alcohol regulations, but since the 1990s, business interests have significantly eroded state-level alcohol control; alcohol taxes are stagnating, alcohol advertising controls are loosening, and state monopolies are being privatized.<sup>49</sup> However, while state regulation has grown weaker, state preemption of local regulation remains; nearly 2 out of 3 states preempt local alcohol taxes,<sup>50</sup> and several states preempt local governments from regulating alcohol outlet density.<sup>51</sup>
- **Gun safety.** In 2018, the United States experienced nearly 40,000 gun deaths – the most gun deaths in a single year since 1968.<sup>52</sup> However, despite the need for improved gun safety laws – such as stricter background checks, mandated waiting periods between firearm purchase and acquisition, restrictions on certain types of high-capacity guns, and limits on the amount of ammunition that can be purchased<sup>53</sup> – more than 4 out of 5 states preempt some or all local laws related to gun safety.<sup>54</sup>

### Economic Well-Being

Local governments have tried to advance health equity by passing laws promoting equitable labor practices such as paid sick leave, minimum wage, fair scheduling, and prevailing wage requirements. Yet business and political interests have aligned in many states to preempt these equity-promoting strategies.

- **Paid sick leave.** Nearly half of states preempt local governments from requiring employers to provide paid sick leave, despite the absence of any such requirements in state law,<sup>55</sup> leaving employees in those states to choose between being paid and doing what is best for their health.
- **Minimum wage.** The minimum wage varies between and within states, and the current federal minimum does not keep pace with the basic costs of living.<sup>56</sup> In response, local efforts to raise the wage floor have seen a tremendous upsurge, mostly as a result of the Fight for \$15 movement, which began in New York in late November 2012 when fast-food workers walked off the job, demanding a wage of \$15 per hour and a union. However, 1 out of 2 states preempts local adoption of minimum wage laws, even in cases when local costs of living are significantly higher than the state average.<sup>57,58</sup>
- **Fair scheduling.** Nearly 1 in 5 states preempt local governments from requiring employers to provide workers with advance notice of work schedules or compensation for last-minute schedule changes, leaving many workers subject to unpredictable work schedules and income.<sup>59</sup>
- **Prevailing wage.** More than 1 in 5 states preempt local prevailing wage laws requiring municipal contracts to pay workers at least the local median wage for a given type of work.<sup>60</sup>

### Other Areas of Preemption

The misuse of preemption is not limited to laws involving traditional public health priorities but involves many other health- and equity-promoting policies. For more information on how states are misusing preemption to hinder local efforts to address environmental protections, new technologies, transportation issues, and LGBTQ rights, see the [Local Solutions Support Center's website](#).

Whether preemption supports or hinders public health and health equity depends on when and how it is used.

### Conclusion

The effects of preemption on public health and equity are complex, and understanding them requires acknowledging that preemption is neither inherently good nor inherently bad. Rather, whether preemption supports or hinders public health and health equity depends on when and how it is used. Determining the consequences of any preemptive law requires first analyzing whether the law being preempted advances or hinders health equity and then assessing how preemption factors into accomplishing that goal.

Regardless of whether preemptive state laws concern housing quality and affordability, food-related health disparities, or any other issue, the misuse of state preemption poses a substantial threat to local public health efforts. Local governments represent the first line of protection for public health, and it is critical to ensure that local governments – and the people they represent – retain the power to innovate new public health solutions.

### Resources

The following companion resources are available from ChangeLab Solutions:

- [Fundamentals of Preemption](#)
- [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

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