



**NATIONAL POLICY & LEGAL ANALYSIS NETWORK
TO PREVENT CHILDHOOD OBESITY**

Preemption

**What it is, how it works, and
why it matters for public health**

2009

Developed by the National Policy & Legal Analysis Network
to Prevent Childhood Obesity (NPLAN)

Support for this paper was provided by the
Robert Wood Johnson Foundation

www.nplanonline.org

NPLAN is a nonprofit organization that provides legal information on matters relating to public health. The legal information provided in this document does not constitute legal advice or legal representation. For legal advice, readers should consult a lawyer in their state.

Table of Contents

- 4 Preemption Affects Every Public Health Professional
- 5 What Is Preemption?
- 7 Why Is Preemption Important?
- 8 A Significant Issue for All Sides
- 9 Assess Each Case on Its Own Merit
- 10 A Short Modern History of Preemption
- 12 The Many Varieties of Preemption
 - Express v. Implied Preemption*
 - Regulatory Preemption v. Litigation Preemption*
 - Federal Preemption v. State Preemption*
- 15 Players in the Preemption Debate
- 17 Tricks of the Preemption Trade
- 18 Six Strategies for Addressing Preemption

Preemption Affects Every Public Health Professional

The legal term *preemption* may have little resonance outside of courts and legislative chambers. But what it describes—the invalidation of state law by federal law, or local law by state law—has profound significance for public health. Preemption affects everything from the quality of medical devices to the extent of tobacco advertising, from the presence of air bags in cars to the disclosure of ingredients in pesticides. In other words, preemption affects just about everything a public health professional does.

But how, and *why*, is a non-lawyer supposed to understand—much less have anything useful to say about—a concept that even most attorneys do not fully comprehend?

Essentially, the answer is straightforward. Although legal briefs and court opinions about preemption are routinely filled with elaborate and complicated analyses of the issue, outside the courtroom—and particularly inside legislative offices—preemption is mostly a question of policy and political judgment. And policy and politics are extremely relevant to the work of many public health professionals. To participate in those policy discussions and negotiations, non-lawyers need a basic working knowledge of preemption: what it is, how it works, and why its consequences are so important to keep in mind when formulating legislation.

What Is Preemption?

Preemption is the invalidation of one jurisdiction's law by the law of a higher jurisdiction. When a state law conflicts with a federal law, it is the federal law that trumps. If you've ever wondered why it seems your city or town can block all development except cell phone towers, the reason is that a federal law preempts state and local bans on those towers.¹ Any state or local law prohibiting cell phone towers is invalid and unenforceable; it is *preempted*.

That is what the Constitution means when it says federal law is the “supreme law of the land.”² If a federal statute requires that all new passenger cars have air bags, no state or local law can say, “Except here.”³ If the New Hampshire legislature passes an Auto Safety Personal Choice Act allowing automakers to leave out the airbags in cars sold in the Granite State, the state could well find itself sued and its new Act declared preempted. In the words of the U.S. Supreme Court: “State laws that conflict with federal law are without effect.”⁴ Even the most humble federal regulation will invalidate the grandest state constitutional provision, if the two conflict.

State law can trump local law in the same way. Although there are differences from state to state and from city to city, the same rule of preemption generally applies: the higher level of government trumps the lower. So if a motorcycle rider finds herself in a state with a mandatory helmet law for all riders, she would do well to keep her helmet on even when riding through the (imaginary) maverick town of Libertyville, where highway signs promise reassuringly, “Let your hair blow free. No helmets needed here.” Chances are that Libertyville's no-helmets-required law is preempted by the state statute.

It is important to recognize that the single term *preemption* may refer to very different types of measures. On the one hand, federal law can set a “floor” below which states may not go. For example, the federal Clean Water Act preempts state and local pollution standards that are *less* stringent than the federal standard, but it allows measures that are *more* protective.⁵ One regulation issued by the U.S. Environmental Protection Agency under the Clean Water Act provides simply that states “may develop water quality standards more stringent than required by this regulation.”⁶ And that is precisely what states have done.⁷ This is known commonly as *floor preemption* because the federal law sets a minimum standard but allows states and localities to adopt more restrictive rules.

On the other hand, federal law can impose a “ceiling” that state law may not exceed. In this case federal law sets aside an area in which states simply may not regulate, at least using a standard different from the federal standard. For example, the Federal Insecticide, Fungicide, and Rodenticide Act (known as FIFRA) preempts all state laws about labeling pesticides that impose requirements different from the standards in FIFRA.⁸ A state regulation requiring, for instance, the word *poison* to appear in red letters on a pesticide label would be preempted unless a federal EPA regulation imposed exactly the same requirement.⁹ This is an example of what's known as *ceiling preemption* because it sets a maximum level of regulation that states may not surpass. Of course, the provision would not permit state laws that are *less* stringent than the federal standard, either, so the term “ceiling preemption” is somewhat misleading—but that is the term that has stuck.

Generally, when courts or commentators use just the word *preemption*, they are referring to ceiling preemption.¹⁰

Most environmental (and public health) advocates and their allies tend to favor floor preemption because it not only establishes a nationwide minimum standard but also allows states to implement more protective regulation, and they tend to oppose ceiling preemption because it doesn't allow greater protection at the state level. Business groups and their allies are more likely to promote ceiling preemption because it limits potential state restrictions on their activities; floor preemption requires them to comply with a minimum standard without providing their desired "cap" on regulation.

The Laboratories of Democracy

Louis Brandeis, one of the most celebrated Justices ever to sit on the Supreme Court, likened state and local governments to laboratories where experiments in democracy could take place. He warned of preemptive federal laws that would prevent this innovation and inquiry. “To stay experimentation in things social and economic,” he wrote in his famous dissent in *New State Ice Co. v. Liebmann* in 1932, “is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”

Why Is Preemption Important?

In the United States, many different levels of government are constantly at work making new laws: Congress, state legislatures, county boards, city and town councils, and a variety of regional authorities in between. To bring some order to what might otherwise be a hodgepodge of competing laws, the U.S. Constitution (and, for state-level preemption, state constitutions) establish a basic rule for determining which law has to be followed.

Beyond that, the purpose most commonly cited by proponents of ceiling preemption is that invalidating state laws prevents a patchwork of 50 differing laws that a company doing a national—or international—business would otherwise have to contend with. A single uniform federal standard, they argue, saves a company from having to change its way of doing business to accommodate each state’s idiosyncratic law. This includes, for example, needing to adjust to the court systems of each different state in order to defend personal injury lawsuits.

Those skeptical of ceiling preemption often observe that this “patchwork” tends to be more hypothetical than real. The need for preemption is frequently asserted when there are only one or two state laws on the subject, and even in the areas of law where a wide variety of different state statutes do exist, businesses have managed to adapt to them for decades if not longer. Some also observe that companies’ ability to comply with the varied (and often more stringent) rules in other nations suggests an equal ability to continue to adapt to non-uniformity in the U.S. market. Finally, because the “common law” legal regime for injury lawsuits is quite similar from state to state, skeptics assert that *lack of regulation*—not uniform regulation—is what those promoting ceiling preemption really seek.

Whatever its merits, the “patchwork” argument has convinced numerous legislatures, agencies, and courts. The U.S. Supreme Court recently held, for example, that a federal law preempted Maine’s requirement that interstate delivery companies check the age of the addressee for cigarette sales made over the Internet. If it let the Maine law stand, the Court explained, that “could easily lead to a patchwork of state . . . laws, rules, and regulations” which would be “inconsistent with Congress’ major legislative effort to leave such decisions, where federally unregulated, to the competitive marketplace.”¹¹

Opponents of ceiling preemption also point out that the very idea of imposing a single federal standard cuts against a long tradition in the United States of first testing out possible solutions to problems at the state and local level. The notion of states and localities as “laboratories of democracy”¹²—places where new ideas for laws may be tested and refined—epitomizes, for its proponents, the proper functioning of a federal system.

A Significant Issue for All Sides

The businesses and lobbyists who tend to favor ceiling preemption, and the states and consumer advocates opposing it, do agree on one thing: These days, preemption is a very significant issue.

Consider one example of ceiling preemption: the Federal Cigarette Labeling and Advertising Act, which for decades banned any “requirement or prohibition based on smoking and health . . . imposed under state law with respect to the advertising or promotion of any cigarettes.”¹³ In practice, this rather terse provision meant that neither states nor localities could pass laws restricting cigarette advertising on billboards, or outside stores, or inside stores, or near schools, or on the packages themselves.¹⁴ The only entity with the power to regulate most tobacco advertising was the federal government—and by extensively lobbying Congress and federal agencies, tobacco firms ensured that many avenues remained open to promoting their wares.¹⁵ From the tobacco companies’ point of view, this single small piece of federal law was remarkably effective at ensuring a lack of government intrusion on their operations. From the public health community’s point of view, the provision frustrated a broad array of government efforts that might well have significantly reduced smoking.

On the preemption clause’s value, there is a sharp difference of opinion. On its importance, there is no disagreement at all.

Assess Each Case on Its Own Merit

To call all preemption “good” or “bad” makes little sense. Whether a particular preemption provision is positive or negative depends on what kind of preemption is at issue (e.g., floor or ceiling), on the context of the particular piece of legislation—and, crucially, on your point of view.

For example, if you are the chief executive of an HMO, you may find it entirely appropriate that federal law preempts most state law relating to employee benefits; you may highly value the predictability of a single federal regime and the tight limitation on patients’ remedies for wrongful denial of coverage under that regime. On the other hand, if you are a patient denied coverage for a treatment by that HMO, you may have a very different view—indeed, you may think that HMOs are able to deny coverage to so many people precisely because of patients’ inability to sue for anything beyond the treatment that was denied.¹⁶

As another example, if you are a driver covered by a personal car insurance policy, you may well be happy to know that most state law regarding insurance is not preempted—including, for example, state law allowing “bad faith” cases for triple damages to be brought against insurers that wrongfully deny coverage. On the other hand, if you are the chief financial officer of an auto insurance company, you may see things quite differently.¹⁷

Broadly speaking, industry tends to prefer ceiling preemption, while public health advocates and state and local officials prefer either floor preemption or no preemption at all. These are generalities, of course, and there are exceptions. Some public health professionals would rather, given their resources, fight one federal battle than 50 state-level contests; others believe strongly that consistency in certain areas—for example, the nutrition labels on packaged food required by the Nutrition Labeling and Education Act of 1990 (NLEA)¹⁸—is preferable even to more stringent state laws. And some businesses are comfortable with the diversity of state legal regimes because they have learned to do business that way, or because they have invested time and money adapting to that variety and see no reason to make things easier for their competitors. Nonetheless, the rough guidelines remain reasonably good predictors of where particular interests will stand on a given preemption provision.

The overall lesson remains that the type of preemption most appropriate in a piece of legislation is best decided on a case-by-case basis; each area of law, and each statute within that area, should be evaluated on its own merits.

Preemption by Federal Agencies

Almost any kind of federal law has the power, as the “supreme law of the land,” to preempt state and local law. So it’s not only the Constitution and federal statutes that can preempt—it’s also treaties with foreign governments, executive orders from the President, and regulations issued by federal agencies.²⁹ In fact, a memorandum issued early in the Obama Administration stated that the recent tendency of executive agencies to “announc[e] that their regulations preempt State law, including State common law, without explicit preemption by the Congress or an otherwise sufficient basis under applicable legal principles,” should be discontinued.³⁰ The memorandum directed federal agencies to undertake preemption “only with full consideration of the legitimate prerogatives of the States and with sufficient legal basis for preemption.”³¹

One notable story of federal agency preemption lies in the recent history of the Office of the Comptroller of the Currency (OCC). The OCC, which oversees national banks, has in the past decade declared that it has the exclusive authority to regulate these institutions, even though historically they have been subject to extensive state as well as federal oversight. In fact, the OCC issued a regulation that essentially prohibits any state regulator from investigating a national bank for any reason.

It may be that the OCC’s stance is a function of the increasing internationalization of the financial system—a bank doing business in London, Beijing, and Singapore as well as New York City may find it nettlesome to have to submit paperwork to the regulators in Albany. It may also be that the OCC is simply doing the bidding of those it regulates, a widely recognized phenomenon known as agency capture

continued on next page . . .

A Short Modern History of Preemption

Knowing the background against which preemption decisions are now being made can be useful for anyone new to the preemption wars. In recent years the trend in Congress, administrative agencies, and the courts has been strongly toward ceiling preemption, enhancing uniformity and deregulation but limiting consumer, environmental, and other regulatory protections. As economic globalization has advanced, so too has the effectiveness of industry’s efforts to secure a “level playing field” within the United States so that, companies argue, they may compete more efficiently overseas. Industry’s push for preemption has been combined with an emphasis on deregulation—that is, as little government oversight as possible—at the federal level. The combination has created in many sectors an overall level of federal regulation that is not just uniform but also highly deferential to business.

This has not always been the case. The norm used to be floor preemption, permitting states and localities to experiment with their own standards as long as those standards were at least as protective as the federal benchmark. Federal civil rights laws of the 1960s and environmental laws of the 1970s exemplify this practice. What these laws established was not uniformity—they left in place state laws that were *more* protective than the new federal standards—but rather a minimum level of protection that would from then on be afforded to all. The Civil Rights Act of 1964,¹⁹ for example, left states and localities free to supplement or increase its protections; only state laws “inconsistent with any of the purposes of this Act, or any provision thereof” were preempted.²⁰ Similarly, the federal Clean Air Act provides that states and localities “may not adopt or enforce any emission standard or limitation which is less stringent than the [federal] standard.”²¹ The Clean Water Act likewise specifies that state and local jurisdictions “may not adopt or enforce any . . . standard” less protective than that set under the Act.²²

Other federal laws of that era reflect a type of floor preemption that is somewhat less deferential to the states, requiring jurisdictions that want to deviate from the federal baseline standard to develop “state plans” or to apply for waivers from the relevant federal agency allowing them to create their own standards.²³

Overall, however, the basic approach was clear. As one congressional report recently put it, “Federal law has traditionally been a ‘floor’ in the health, safety, and environmental area, mandating minimal federal protections but allowing states to adopt more stringent requirements.”²⁴

More recent preemptive legislation, however, has been much more likely to impose a ceiling—that is, to mandate the maximum level of protection and prevent states from exceeding that level. In the past few years, for example, federal law has removed from states and localities the authority to place more stringent limits on gun advertising and sales practices,²⁵ the sharing of private financial information,²⁶ and the release of air pollution from small engines.²⁷

Ultimately, the question of preemption is one of policy. The legal arguments begin, in court, only once the basic policy determination—how much preemption? of what kind?—has been made in the legislature. And there are cogent policy claims to be made on both sides of the ceiling preemption debate. With respect to economics, it can certainly be argued that uniformity,

that results from the often too-close relationship between federal agencies and regulated entities.³²

There is widespread agreement that one factor leading to the mortgage lending meltdown was a lack of effective federal oversight. And where were the state regulators? They had been relegated to the sidelines by the federal government's aggressive campaign to preclude state authorities from regulating national banks and other national lenders. It is wholly possible that the crisis was hastened and deepened by the removal of these cops from the beat—cops who had been significantly more skeptical than their federal counterparts of mortgage-lending activities and who might have been able to do something to prevent, mitigate, or at least warn about the impending crisis.³³

for example, is a desirable thing. From the standpoint of the regulated entity, it's better to have one set of standards to follow than dozens, or the prospect of dozens. And it's also easier to have just one set of regulators to heed. States' contention that they remain the essential "laboratories of democracy" may ring hollow to a business trying to retain some profit margin on goods that are subject to three different sets of standards in three neighboring states.

On the other hand, critics of ceiling preemption assert that the recent wave of preemption has wrought substantial harm by preventing more stringent state and local consumer protection laws and, in some areas at least, bringing no countervailing economic benefit. After all, the recent financial crisis began with an industry—consumer mortgage lending—that through aggressive preemption advocated by lenders and federal banking agencies was largely relieved of its traditional supervision by state regulators. Extensive deregulation of banking at the federal level further reduced government oversight of the industry. This two-step process—preemption to reduce or eliminate state regulation, and deregulation to do the same with federal regulation—exemplifies an approach lately taken in recent years across a wide variety of industries. What this approach underscores is that ultimately preemption is not so much about constitutional interpretation or legal principle as it is about plain old politics.²⁸

The Many Varieties of Preemption

Preemption can arise in a wide array of circumstances and many different forms. Some of these differences matter a great deal: the distinction between “floor” preemption and “ceiling” preemption may determine whether states and cities will retain the ability to regulate at all in a given area. Other differences are more academic but ultimately no less crucial for preserving (or relieving industry from) regulation at the state and local level.

Express versus Implied Preemption

The different types of preemption whose descriptions fill the pages of judicial opinions can be grouped broadly under the categories of *express* and *implied* preemption.

Express preemption

Policymakers are usually most concerned with express preemption, which involves provisions that explicitly state the degree to which they preempt other laws. For example, a federal law may provide that any state or local law “inconsistent with this law is void and unenforceable to the extent of the inconsistency.” Express preemption can also sweep more broadly—for instance, providing that no state or local law may regulate “in this area of law.” The provision of the Federal Cigarette Labeling and Advertising Act banning any “requirement or prohibition based on smoking and health . . . imposed under state law with respect to the advertising or promotion of any cigarettes” is an example of such a broad express preemption provision.³⁴ This single provision has been found to preempt state and local efforts to regulate cigarette advertising on billboards, inside and outside stores, and near schools, not to mention on the packages themselves—indeed, to prevent any and all “state regulations targeting cigarette advertising.”³⁵

On the other hand, any statute may contain—often within the express preemption provision itself—a *savings clause* that specifically protects certain types of state law from preemption. For example, the federal Clean Air Act includes an apparently sweeping preemption measure providing that no state or any political subdivision thereof shall “adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles.” The next paragraph of the Act adds, however—in a well-known savings clause—that a “waiver” is available for certain state measures that are “at least as protective of public health and welfare” as applicable federal standards.³⁶

Savings clauses can be very broad, as in floor preemption provisions that preserve all state and local laws that are more protective than the federal law.³⁷ And they can be almost comically narrow, saving only state laws that affect a single industry or even a single product. The Nutrition Labeling and Education Act (NLEA), for example, contains several broad express preemption provisions with regard to product identity and product labeling of packaged foods sold in the United States, each of which contains precisely one explicit exception—for a state law “that is applicable to maple syrup.”³⁸ (Anyone wagering that members of the Vermont congressional delegation had something to do with the amendment that added this provision would be making a very safe bet.)

Implied preemption

Implied preemption, by contrast, refers to situations where federal law invalidates state law without explicitly saying so. Whether such preemption exists is a matter for the courts to decide. Implied preemption encompasses two subtypes: *conflict preemption* and *field preemption*.

Conflict preemption refers to situations where it is impossible to comply with both the federal and the state law—the feds require airbags, the state bans them—or where the state law “frustrates the purpose” of the federal law or “presents an obstacle” to accomplishing the federal law’s goal.³⁹ For example, some years ago the Massachusetts legislature decided to express its strong disapproval of the conduct of the government of Burma by forbidding state agencies from contracting with companies that did business in that country. Although the less stringent federal law on the same topic contained no express preemption provision, courts held the Massachusetts measure preempted because it conflicted with the goals and implementation of the federal law—tying the President’s hands when it came to, for example, allowing full trade with Burma as a reward for future changed behavior.⁴⁰

With state-level implied preemption, courts often apply a general rule that they must invalidate local ordinances that prohibit what state law permits or that permit what state law prohibits. Because a broad reading of this principle would bar localities from acting anywhere that the state had not acted (e.g., “prohibiting” trans fats in restaurants where the state, by doing nothing, had “permitted” them), most (but not all) courts have interpreted this conflict preemption test to invalidate only those local ordinances that prohibit something state law *expressly permits*.

Rather confusingly, state courts also frequently invoke a maxim diametrically opposite to the “prohibit/permit” principle—in this case presuming a city ordinance is valid as long as it is more, rather than less, stringent than state law. To determine which of these two standards a court is likely to use when assessing a preemption challenge requires an analysis of the relevant case law within the particular state. Even within that state, the two seemingly contradictory maxims give courts doctrinal cover for making decisions anywhere along the spectrum from minimal local autonomy to maximal municipal authority. In other words, decisions in this area are probably better explained by other factors, like the court’s political and policy views.

Field preemption occurs when the federal government has either signaled a “complete ouster” of state and local authority in a given field of law, or legislated so thoroughly in that field that it is clear (at least to the courts) there is no room left for states and cities to regulate.⁴¹ The relatively few such areas include nuclear power plant safety, immigration, and labor relations. For example, despite the fact that the National Labor Relations Act contains no express preemption provision, the Supreme Court recently struck down a California law that banned companies receiving money via state contracts from using that money to oppose union organizing.⁴² That the federal government may have “preempted the field” does not mean, of course, the federal law is as thorough, or as stringent, as state or local laws on the subject might be. It just means Congress has (in the eyes of the courts) decided to reserve the area to itself.

The Presumption Against Preemption

Implied preemption should not, in theory, be common. Courts have often noted a “presumption against preemption”—at least in areas where states and localities have traditionally regulated. That is, the default rule should be “no preemption,” and if there’s a toss-up, the ruling should be in favor of continued state authority. In recent decades, this “presumption” has been more often stated than actually observed.⁴⁵ However, the Supreme Court recently invoked the presumption in a pair of decisions that not only recited but also applied the doctrine, finding no preemption of state law claims regarding the marketing of “light” cigarettes⁴⁶ or of a state-law suit against prescription drug makers.⁴⁷ For now, at least, the presumption lives.

No-implied-preemption clauses: By employing a type of savings clause—a *no-implied-preemption* clause—those who draft legislation can protect state laws from implied preemption in much the same way a standard savings clause protects against express preemption. For example, the NLEA contains a provision stating that the Act “shall not be construed to preempt any provision of State law, unless such provision is expressly preempted ...”⁴³ As another example: the current regulations to the federal Child Nutrition Act, issued by the U.S. Department of Agriculture, provide that state agencies and school food authorities “may impose additional restrictions on the sale of and income from all foods sold at any time throughout schools participating in the [School Lunch] Program.”⁴⁴

Regulatory Preemption versus Litigation Preemption

The best-known examples of preemption involve federal legislation that invalidates state legislation in the same area of law—that is, the federal government displaces state and local government regulation. But there is another type of preemption aimed more at state courts than state legislatures.

When a federal law preempts state law, it may invalidate not just statutes and regulations but also *common law*—law created in court opinions rather than in volumes of code. Common law subjects include the law of contracts and also the law of *torts*—“civil wrongs” (as opposed to crimes) for which injured parties may seek compensation. Tort law sometimes witnesses famously large jury awards, including *punitive damages* awarded to punish the wrongdoer rather than compensate the victim. Perhaps because there is so much money at stake, this area of law has seen particularly sharp battles over preemption, both in legislatures and in the court system. Recent Supreme Court decisions on preemption have involved tort law questions about the right of individuals, despite the presence of express and/or implied preemption in the relevant federal statutes,⁴⁸ to sue makers of drug devices, “light” cigarettes, and prescription drugs.⁴⁹

Federal Preemption versus State Preemption

A final, salient variable in preemption law is the level on which the preemption is operating. Federal-level preemption occurs, of course, when a federal statute (or regulation or executive order or treaty) invalidates state or local laws. State-level preemption occurs when a state law voids local laws—for example, if a town would like to ban smoking in restaurants but cannot do so because a state law provides that localities may not restrict tobacco use in public places. This paper has focused primarily on federal-level preemption, but most of the analysis at the federal level would apply equally at the state level.

State-level preemption varies widely among the different states. First, as a structural matter, municipalities (sometimes within a single state) can have very different relationships with their state government. In a few states, cities may regulate only in subject areas where the state has explicitly delegated authority to localities. In other states, cities may legislate on issues of “local” as opposed to “statewide” concern. And in still other states, municipalities may legislate on any subject where state law does not preempt them from doing so. Second, states have adopted very different rules for determining whether local laws are preempted. It is vital in assessing a state-level preemption question to be well acquainted with the law of that particular state.⁵⁰

Players in the Preemption Debate

It is generally easy to anticipate where certain players will stand in any given debate on preemption. The first and foremost advocate for preemption—at least for ceiling preemption—is **industry**. Securing uniformity is a top priority for businesses ranging from finance to food, from tobacco to telecommunications.⁵¹ These businesses and their proponents, including trade groups and chambers of commerce, argue that uniformity and predictability are key to reducing costs and preventing inadvertent violations. They often contend that the costs of complying with multiple jurisdictions' heightened requirements—say, proposed rules requiring that cell phone companies pro-rate cancellation fees—are so high that they will have to switch their entire national operation to fit the requirements of a single state, the most stringent. (Opponents of ceiling preemption ask why that should be a problem if industry's real priority is uniformity rather than securing the lowest possible level of regulation.)

State and local regulators are also committed players in the preemption arena. These regulators—state oversight agencies, local health officials, and state attorneys general, to name a few—decry efforts to shutter the state “laboratories of democracy” and contend that the more extensive forms of preemption—such as the ouster of state regulation of national banks—have gutted enforcement because there aren't enough resources at the federal level to enforce even the less stringent federal laws.⁵² Industry advocates, on the other hand, may be inclined to downplay state and local regulators' objections as inappropriate interference with national or international business, and to opine that the real basis for these objections is simply the loss of power and prerogative.

Private attorneys who bring injury cases in state court are also dedicated opponents of ceiling preemption. A recent search of the website of the American Association for Justice, a national trial lawyers' organization, showed 325 separate articles dealing with preemption.⁵³ These lawyers—who focus on litigation preemption rather than regulatory preemption—have increasingly found themselves unable to bring cases in state court or under state law. In 2008, for example, the Supreme Court decided that U.S. Food and Drug Administration (FDA) approval of a medical device preempts any state law injury claims against the manufacturer of the device.⁵⁴ On the other hand, in 2009, the Court declined to find preemption in a similar case involving the FDA and prescription drug warnings.⁵⁵ (The Court's stated reason for the different outcomes was that the first law contained an express preemption provision but the second did not.) Proponents of ceiling preemption, meanwhile, dismiss the trial lawyers as primarily concerned not with their clients' safety but rather with their own ability to make money in injury cases. Both the trial lawyers and the industries they sue are powerful players in Washington; both work not only in the courts for favorable preemption decisions but also in Congress for legislation to overturn the judicial decisions they do not like.

Then there are the **public health professionals**, inside and outside government, whose work may be directly affected by preemption but who are often less fully involved in preemption decisions. They point out that public health has traditionally been a matter of local concern—that through their inherent “police power,” the states (and by extension the localities on which their constitutions

What about “federalism”?

The issue of federalism—the historical balance between state and federal power in the United States—is often raised as part of the debate over preemption. With the Civil Rights Era in mind, it can seem odd to hear a “progressive” who favors consumer and environmental protection arguing for states’ rights, or a “conservative” who believes strongly in deregulation advocating for exclusive federal authority. It is probably fair to say that there is little doctrinal consistency in the discussion about federalism these days. As a general rule, both progressives and conservatives are going to favor state authority when it suits their political aims and decry it when it does not. When the issue is federal authority over handguns, progressives are all for it, and conservatives are opposed.⁵⁶ When the issue is national control of marijuana use, the poles are reversed.⁵⁷

confer the same power) have the right to act to protect the health and safety of the public. The federal government, by contrast, has no inherent police power, and so wholly “federalizing” the area of health and safety through preemption runs counter to both tradition and the distribution of resources and expertise in this country.

Some other public health professionals, however—often those closest to the legislative process—note that the federal government, despite lacking a general police power, has managed to play quite an influential role in public health. More to the point, these individuals maintain, ceiling preemption is the price we must pay to ensure that residents of all jurisdictions—not just cities and states that favor progressive measures—have some level of protection and security. For those who espouse this view, it’s not that ceiling preemption is generally beneficial, but that with respect to a particular piece of legislation it may be worthwhile to have national consistency. Just as important, it may be necessary in order to get the deal done.

Finally, there are the **consumers, taxpayers, and voters** who are directly affected by preemption decisions. We all see the effect of preemption in our daily lives, even if we don’t realize it. Preemption battles have shaped much of our surroundings, from the format of our cell phone bills to the siting of cell phone towers in our neighborhoods, from the safety of our children’s car seats to the presence or absence of lead in our children’s toys. Everybody, in other words, has been touched by the outcomes of preemption debates.

Tricks of the Preemption Trade

Given the widespread and powerful effects of invalidating state and local law, it is important to recognize the strategies often used to achieve or oppose preemption.

- 1. Legislation may not always use the term *preemption* to describe the goal of restricting state and local regulation.** A bill may seek to promote “national uniformity” or to prohibit state measures that are “more restrictive or stringent” than the federal standard. It may purport to “supersede any subsequently enacted state or local law” or to “occupy the field.” All of these are just preemption by another name.
- 2. The federal government can limit state and local legislation by different means.** For example, Congress can tell states that it will provide certain types of funding only if the states meet particular criteria. When Congress threatened to withhold highway funds from states that did not raise their drinking age to 21, every state brought its drinking age up to that level.⁵⁸ (Federal aid to states for highways amounts to some \$30-40 billion annually, and no state was willing to forgo its share.⁵⁹) The spending restriction therefore had the same effect as if the law had read, “No state may enact a drinking age lower than 21.” But, strictly speaking, the drinking-age restriction was a condition on spending, not a preemption provision.
- 3. Local legislation may be used to stimulate passage of a law at a higher level.** For example, in 2002, San Mateo County, California, and several other local Bay Area governments passed ordinances limiting banks’ ability to share customers’ personal financial information. The San Mateo County Board of Supervisors, with but a handful of bank branches within its jurisdiction, may not have believed it ultimately should (or could) dictate the manner in which giant financial institutions handle customer information. But it thought the State of California should—and the following year, spurred in part by the local measures, that is precisely what the California legislature did. It is not an uncommon strategy to build momentum for statewide or national legislation by working to get laws passed at a local level. Even where those laws are not already preempted when passed, advocates may be willing to exchange preemption for broader (but somewhat weaker) state or federal legislation. Of course, some proponents of the local legislation may not appreciate that state or national players see the dearly bought ordinance, some of whose carefully crafted provisions are now preempted by the broader law, as primarily means of achieving larger goals.
- 4. It is possible (if difficult) to modify the preemptive effect of an existing statute,** especially when a court decision has interpreted the preemption provisions in a controversial way⁶⁰ or a particular interest group manages to wield strong influence over lawmakers. This is what happened, for example, with the maple syrup exception that was added to the NLEA.⁶¹ The battle over preemption, in other words, requires forethought and stamina.

The game of preemption is a complicated one. As in chess, vigilance, a long view, and an awareness of the “whole board” can be very useful.

Six Strategies for Addressing Preemption

Preemption is not simple to understand—a fact that may by now be painfully clear. Still, several guiding principles emerge from the cases and examples we’ve seen over the past few decades of legislative and judicial history.

- 1. Take the long view.** Preemption carries enormous power. Invalidating existing state and local laws—and precluding future laws—should not be done lightly. The power of preemption, and the potential extent of any given preemption clause, can easily be underestimated at the time a provision is enacted. Perhaps the best-known preemption clause of all is the extremely broad provision in the federal Employee Retirement Investment Security Act (ERISA), which preempts any state laws that “relate to any employee benefit plan.”⁶² When ERISA was passed in 1974, that clause was added at the last minute, when the bill was already in conference committee. It is safe to say—given subsequent comments by some of those involved in drafting the law—that not all those present at the negotiations in 1974 were aware of the scope of the preemptive provision in the bill they ended up supporting.⁶³
- 2. Be specific.** Base your decision about preemption on the individual merits of the particular bill and the area of law. Make sure any preemption provision is tailored to meet the specifics of the situation. A uniform national regime in areas like airline safety or foreign trade may make sense; a similar regime regarding zoning may not.
- 3. Exercise the presumption against preemption.** While it’s important to assess preemption in its specific context, in certain areas it is equally appropriate to be especially skeptical about ceiling preemption. There is a reason courts have developed the presumption against preemption in matters of health and safety, even if they have not applied it uniformly. Be very wary of barring states and local governments from subject matter areas in which they have regulated for decades or even centuries, like public health and safety.
- 4. Avoid a regulatory vacuum.** It is one thing to defer to uniformity where the federal law sets out a clear set of standards. It is quite another to adopt a preemption provision that bars state regulation in areas beyond the realm of federal law. Be especially wary of broad language like the famous phrase “relate to” in ERISA. The language in any preemption provision should be carefully tethered to the specific items covered in the federal law, so the law does not create areas where there is neither state/local nor federal regulation. If a bill is aimed, for example, at eliminating trans fats, and the preemption provision would invalidate all local laws relating to food additives, that provision is too broad. What seems like a good trade now may block even better measures later. In the 1980s having separate sections for smokers and nonsmokers in restaurants seemed a bold proposal. But if, to secure a statewide “smoking section” law, advocates had agreed then to preempt all local laws having to do with smoking in restaurants, there would have been no opportunity a decade later to enact local laws banning smoking from restaurants entirely. You cannot know what the next great public health problem may be, and you don’t want to keep the “laboratories of democracy” from working to solve it when it comes.

5. Be proactive about preemption. Objectively speaking, most state and federal laws do not need to contain a preemption provision. But as a political matter, industry is likely to raise the issue and try to insert one—and a broad one at that. Anyone involved with legislation that may affect significant commercial interests should thoroughly consider what sort of preemptive provision, if any, might be acceptable. In fact, given the now decades-old industry tactic of inserting new preemption clauses at the eleventh hour, public health advocates may be well advised to prepare their own preemption provision(s) ahead of time—just in case. These could be provisions preempting only less protective state or local laws. Or, if necessary, they could include narrow, focused ceiling preemption. Advocates often find themselves wrangling over preemption at the end of lengthy, even years-long negotiations, when they may lack both the time and the frame of mind to seek input from outside the negotiating room. Given that, there's one more thing that can be quite useful: having your own lawyer in the room.

6. Be involved in the process. Don't let others who seem to care or know more about preemption take over. Preemption is not just "their" issue. For better or worse, preemption is everybody's concern.

- ¹ See 47 U.S.C. § 253(a).
- ² U.S. Const., art. VI, sec. 1.
- ³ See National Traffic and Motor Vehicle Safety Act, 49 U.S.C. § 30301(b)(1).
- ⁴ *Altria Corp., Inc. v. Good*, 128 S.Ct. 538 (2008).
- ⁵ 33 U.S.C. § 1370.
- ⁶ 40 C.F.R. § 131.4(a) (1993).
- ⁷ See, e.g., *Public Util. Dist. No. 1 of Jefferson County v. Wash. Dept. of Ecology*, 511 U.S. 700, 705 (1994).
- ⁸ 7 U.S.C. § 136v.
- ⁹ *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 444 (2005).
- ¹⁰ Similarly, when terms like *anti-preemption* are used to refer to sentiment against the invalidation of state and local law, it is ceiling preemption to which they refer.
- ¹¹ *Rowe v. New Hampshire Motor Transport Ass'n*, 128 S.Ct. 989 (2008). The case involved the Federal Aviation Administration Authorization Act, which forbids states to “enact or enforce a law ... related to a price, route or service of any motor carrier.” In reaching its conclusion, the Court rejected Maine’s argument that there should be a “public health exception” to the general rule.
- ¹² *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).
- ¹³ 15 U.S.C. § 1334(b).
- ¹⁴ *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Greater New York Metropolitan Food Council, Inc. v. Giuliani*, 195 F.3d 100 (2d Cir. 1999).
- ¹⁵ Note that the Attorneys General of 46 states have the authority to enforce tobacco advertising restrictions set out in the 1998 Master Settlement Agreement (MSA)—which resolved lawsuits the Attorneys General brought against the major tobacco companies. The MSA is the reason why tobacco billboards are almost nonexistent. MSA § III(d), available at <http://ag.ca.gov/tobacco/msa.php>.
- ¹⁶ See Employee Retirement Income Security Act, 29 U.S.C. § 1001, 1144(a).
- ¹⁷ See McCarran-Ferguson Act, 15 U.S.C. § 1011(a) (“The business of insurance . . . shall be subject to the laws of the several States.”).
- ¹⁸ 21 U.S.C. § 343(q).
- ¹⁹ 42 U.S.C. §§ 2000e-7, 2000h-4.
- ²⁰ 42 U.S.C. § 2000h-4.
- ²¹ 42 U.S.C. § 7416.
- ²² 33 U.S.C. § 1370.
- ²³ See, e.g., Occupational Safety and Health Act, 29 U.S.C. § 651; Hazardous Materials Transportation Act, 49 U.S.C. § 5101. For a report examining the various federal-state models for regulatory interaction, see www.gao.gov/new.items/d02495.pdf.
- ²⁴ Congressional Preemption of State Laws and Regulations, US House of Representatives, Committee on Government Reform – Minority Staff, Special Investigations Division (June 2006).
- ²⁵ Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92 (2005).
- ²⁶ FACT Act, Pub. L. No. 108-159 (2003).
- ²⁷ Pub. L. No. 108-199, Div. G § 428 (2004). Note that this provision (like the Clean Air Act as a whole) does contain an exception for the standard developed in California. The California exception effectively gives states the choice of two regimes: the federal baseline or the more stringent California standard. This statute therefore illustrates a form of hybrid preemption, somewhere between “floor” and “ceiling.”
- ²⁸ Even when courts rather than legislatures take up the issue, politics is a determining factor. See David B. Spence and Paula Murray, *The Law, Economics, and Politics of Federal Preemption Jurisprudence: A Quantitative Analysis*, 87 Calif. L. Rev. 1125 (1999).
- ²⁹ See *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153–154 (1982); 12 C.F.R. 34.4(a) (Office of Comptroller of the Currency and national banks); 49 C.F.R. pts. 571, 571.3 (National Highway Traffic Safety Administration and auto safety); David C. Vladeck, *Preemption and Regulatory Failure*, 33 Pepperdine Law Review 95, 122 (2005) (noting recent Food and Drug Administration “push for preemption”).
- ³⁰ White House Memorandum on Preemption to the Heads of Executive Agencies (May 20, 2009).
- ³¹ *Id.*
- ³² William W. Buzbee, *Asymmetrical Representation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U.L. Rev. 1547, 1609 (2007) (noting that agencies often (1) derive their budgets from fees paid by the entities they regulate, (2) interact primarily with those entities, and (3) obtain their senior staff from or send their senior staff to those entities).
- ³³ See Nat’l Ass’n of Attys. Gen’l, Briefing Paper (Jan. 2009), available at: www.naag.org/assets/files/pdf/policy/Transition_Team_Briefing_Paper_20090110.pdf (“Preemption of state regulation by federal administrative agencies le[d] to irresponsible lending and contributed significantly to the on-going mortgage and credit disasters at the heart of the recent financial crisis.”)
- ³⁴ 15 U.S.C. § 1334.
- ³⁵ *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001); *Greater New York Metropolitan Food Council, Inc. v. Giuliani*, 195 F.3d 100 (2d Cir. 1999).
- ³⁶ 42 U.S.C. §§ 7521, 7543.
- ³⁷ E.g., Clean Water Act, 33 U.S.C. § 1370; 40 C.F.R. § 131.4(a) (1993).
- ³⁸ See 21 U.S.C. § 343-1.
- ³⁹ *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861 (2000); *Hines v. Davidowitz*, 312 U.S. 52 (1941).
- ⁴⁰ *Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000).
- ⁴¹ *DeCanas v. Bica*, 424 U.S. 351, 357 (1976).
- ⁴² *Chamber of Commerce v. Brown*, 128 S.Ct. 2408 (2008).
- ⁴³ Pub. L. No. 101-535, § 6(c), 104 Stat. 2535, 2364 (21 U.S.C. § 343-1 note).
- ⁴⁴ 7 C.F.R. § 210.11(b) (2006).
- ⁴⁵ See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).
- ⁴⁶ *Altria Corp., Inc. v. Good*, 128 S.Ct. 538 (2008).
- ⁴⁷ *Wyeth v. Levine*, 129 S.Ct. 1187 (2009).
- ⁴⁸ A single statute may implicate both express and implied preemption. The Employee Retirement Income Security Act (ERISA), for example, contains both an express preemption provision (section 514) that bears on regulatory preemption issues (the Act “supersedes any and all State laws” so far as those laws “relate to any employee benefit plan”), and an implied (conflict) preemption provision (section 502) that centers on litigation preemption and prevents most types of state claims – even those not preempted by section 514 – from being brought. See 29 U.S.C. §§ 1144, 1132.
- ⁴⁹ *Riegel v. Medtronic, Inc.*, 128 S.Ct. 999 (2008) (preemption for medical devices); *Altria v. Good*, 128 S.Ct. 538 (2008) (no preemption for light cigarette marketing) and *Wyeth v. Levine*, 129 S.Ct. 1187 (2009) (no preemption for prescription drug labeling).
- ⁵⁰ See Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113 (2007).
- ⁵¹ See, e.g., Amy Elizabeth Semet, *Toward National Uniformity for FDA-Regulated Products*, available at leda.law.harvard.edu/leda/data/287/Semet_Amy_00.rtf; Thomas W. Hazlett, *Is Federal Preemption Efficient in Cellular Phone Regulation?*, available at <http://mason.gmu.edu/~thazlett/pubs/Fed.Prempt.FCLJ.12.03.pdf>.
- ⁵² See, e.g., Nat’l Ass’n of Attys. Gen’l, press release, “Preemption is Attorney Generals’ Top Issue for Federal Government” (Jan. 12, 2009), available at www.naag.org/preemption-is-attorneys-general-top-issue-for-federal-government.php.
- ⁵³ See www.justice.org/cps/rde/xchg/justice/hs.xml/search.htm?search_string=preemption&site-search=all (as of June 19, 2009).
- ⁵⁴ See *Riegel v. Medtronic, Inc.*, 128 S.Ct. 999 (2008).
- ⁵⁵ See *Wyeth v. Levine*, 129 S.Ct. 1187 (2009); see also *Altria v. Good*, 128 S.Ct. 538 (2008) (no preemption with respect to liability for light cigarette marketing).
- ⁵⁶ *United States v. Lopez*, 514 U.S. 549 (1995).
- ⁵⁷ *Gonzales v. Raich*, 545 U.S. 1 (2005).
- ⁵⁸ *South Dakota v. Dole*, 483 U.S. 203 (1987).
- ⁵⁹ See www.gao.gov/new.items/d06572t.pdf.
- ⁶⁰ See, e.g., H.R. 6381 (2009), the Medical Device Safety Act of 2009, seeking to amend the Food, Drug and Cosmetic Act (FDCA) to permit state-law suits against medical device makers. The Supreme Court in *Riegel v. Medtronic*, 128 S.Ct. 999 (2008), interpreted the FDCA to prohibit such suits.
- ⁶¹ See H. David Gold, *Legal Strategies to Address the Misrepresentation of Vermont Maple Syrup*, 59 Food & Drug L.J. 93, 103 (2004).
- ⁶² 29 U.S.C. § 144.
- ⁶³ Jesselyn Alicia Brown, *ERISA and State Health Care Reform: Roadblock or Scapagoat?*, 13 Yale L. & Policy Rev. 339 (1995).