**Headline:** The Food Industry Puts Profits Over Public Health Using Big Tobacco’s Playbook

**Teaser:** In certain cases, preemption—when a higher level of government limits the authority of a lower level to enact new policies—can devastate public health.

By Gigi Kellett

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**[Article Body:]**

Public health advocates were winning. City after city was [innovating ways to reduce smoking](https://www.ncbi.nlm.nih.gov/books/NBK219563/) and protect public health between the 1960s and 1970s. As former industry lobbyist Victor Crawford [observed](https://www.ncbi.nlm.nih.gov/pubmed/7609213), you’d “put out a fire one place, another one would pop up somewhere else.”

But in the mid-1980s, this momentum stopped. [Big Tobacco](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3490543/) had discovered a way to reverse local gains. And according to a 2020 [study in the American Journal of Public Health](https://ajph.aphapublications.org/doi/10.2105/AJPH.2019.305473), the industry’s counteroffensive has led to more disturbing and enduring ramifications for public health—and our democracy—than previously understood.

The strategy is called state or “ceiling” preemption: Promoting weaker state public health laws to override stronger local laws. [Between 1986 and 1991, the tobacco industry rammed through seven state preemption laws](https://www.ncbi.nlm.nih.gov/pubmed/11891365). In the following five years, the industry gained steam, foisting 17 additional preemption policies on states. Laws restricting youth access to tobacco products would be reversed or never see the light of day. Laws establishing smoke-free environments were overridden. Tobacco tax increases were stalled. Restrictions on tobacco retail licensing were loosened.

Perhaps the [study’s](https://ajph.aphapublications.org/doi/10.2105/AJPH.2019.305473) most concerning finding is that it takes an average of 11 years to repeal these laws—if they’re repealed at all. As of 2019, no preemption laws on youth access or tobacco marketing, and [fewer than half of state preemption laws on smoke-free places, have been repealed](https://www.protectlocalcontrol.org/docs/PreemptionTimeline.pdf). The tobacco industry has a [long-documented](https://truthinitiative.org/research-resources/targeted-communities/tobacco-social-justice-issue-low-income-communities) history of targeting people in low-income communities and communities of color with the very tactics—like children-targeted marketing—preemption laws sought to protect. Consider the costs to public health and progress—especially in Black communities and other communities of color—when scarce resources are bound-up in undoing bad policies versus securing new public health protections. The [smoking-attributable mortality rate is 18 percent higher](https://smokingcessationleadership.ucsf.edu/raceethnicity#:~:text=The%20estimated%20number%20of%20smoking,(286%20deaths%20per%20100%2C000).) among Black Americans than for white, with [disproportionate childhood exposure to second-hand smoke and target marketing of products](https://www.cdc.gov/tobacco/disparities/african-americans/index.htm) such as menthol among the heightened risk factors for the Black community.

The four tactics pursued by the tobacco industry are now being modeled across industries, such as the food and beverage sector, disproportionately affecting communities of color and exacerbating diet-related disease crises.

**Preemption Harms Consumers—and Workers**

Coca-Cola, McDonald’s, and the larger food and beverage industry have already seen to the enactment of at [least a dozen laws](https://www.ajpmonline.org/article/S0749-3797(18)32160-3/abstract) preempting local public health policies like soda taxes, product labeling and restrictions on junk food marketing to kids. This has allowed the industry to continue its racist marketing campaigns, [target](https://tinyurl.com/y4loxv3t) marketing to Black youth and other [youth of color](https://www.theatlantic.com/national/archive/2013/01/brief-history-racist-soft-drinks/318929/). Understanding these tactics is key to undoing and preventing further proliferation of the industry’s preemption push.

***Lobbying***

First, to give Big Tobacco’s political agenda credibility, tobacco giants like R.J. Reynolds Tobacco Company have invested heavily in trade associations and front groups to do their bidding, from so-called “smokers’ rights groups” to restaurant, hotel and gaming associations. Unsurprisingly, a similar cast—like state affiliates of the U.S. Chamber of Commerce and National Restaurant Association (NRA)—are again the muscle behind state preemption pushes to block new soda taxes, as well as critical policies to assure food worker health and well-being, such as new paid sick leave requirements and minimum wage increases. In recent months alone, [the Texas Supreme Court has quashed (for now) city efforts to guarantee municipal paid sick leave](https://www.jdsupra.com/legalnews/silence-from-on-high-the-uncertain-20379/). The [Minnesota Supreme Court ruled *against* the Minnesota Chamber of Commerce’s](https://www.mprnews.org/story/2020/06/10/supreme-court-upholds-minneapolis-sick-time-ordinance) contention that Minneapolis’s paid sick leave requirements were preempted by state law. And [the Power Coalition for Equity and Justice is mobilizing](https://www.scalawagmagazine.org/2020/01/new-orleans-labor-rights/) to undo what a spokesperson for the group calls “yet another tool of white supremacy” and an example of the “plantation mentality’s” manifestation in state politics: state preemption of local minimum wage increases.

***Campaign Contributions***

Second, Big Tobacco lavished money on federal elections. At the outset of the 1990s, [the tobacco lobbies contributed more than $70 million](https://www.opensecrets.org/industries/indus.php?ind=A02). Predominantly, Republican candidates have received more than $50 million from the tobacco industry since 1990. In this same time period, the NRA and its biggest corporate members—like McDonald’s, Darden and Yum! Brands—combined to spend more than $60 million in disclosed federal contributions. [An analysis by Corporate Accountability](https://www.corporateaccountability.org/wp-content/uploads/2017/04/updated_scorecard_rev2_FINAL.pdf), in partnership with [Restaurant Opportunities Center United](https://rocunited.org/), [Food Chain Workers Alliance](http://foodchainworkers.org/), [Berkeley Media Studies Group](https://tinyurl.com/y33fqcvm) and [the Real Food Media Project](https://realfoodmedia.org/), found a disturbing correspondence between NRA campaign contributions and the propensity of those receiving them—like Senate Majority Leader Mitch McConnell and House Minority Leader Kevin McCarthy—to oppose progressive policies such improvements to food labeling, stronger worker protections and minimum wage increases.

***Local Preemption***

Third, the industry obscured preemption through legislative channels. As if making an end-run around local democracy wasn’t bad enough, Big Tobacco slipped preemption into a wide array of bills—from property taxes to pesticides. In 2006, the industry spent $100 million to fight tobacco control measures and funded an Ohio measure ([“Smoke Less Ohio”](https://www.fightcancer.org/releases/big-tobacco-fighting-ballot-initiatives-would-protect-public-health)) that would have rolled back local smoke-free laws and prevented their adoption in the future. Twelve years later, Big Soda [spent millions](https://www.motherjones.com/food/2018/07/how-big-soda-strong-armed-california-into-banning-soda-taxes/) on a California ballot initiative that would have made it harder not just to impose soda taxes, but to increase any taxes at all. In exchange for dropping the ballot initiative, lawmakers and the governor agreed to prohibit new taxes on any grocery items—including sugar-sweetened beverages—until January 1, 2031, as part of a larger tax overhaul. According to state Sen. Scott Wiener (D-San Francisco), the industry basically aimed “a nuclear weapon at government in California and [said], ‘If you don’t do what we want, we’re going to pull the trigger and you’re not going to be able to fund basic government services.’”

***Legal Threats***

Fourth, they issued legal threats. Despite being ineffective at overturning laws, the industry has pursued dozens of cases as a deterrent to the passage of new laws. In Michigan, Big Tobacco sponsored a Michigan Restaurant Association and Michigan Chamber of Commerce [lawsuit attempting to strike down a local smoke-free policy in 1998](https://tobaccocontrol.bmj.com/content/13/1/65). The lawsuit tied up a [22,000-person town](https://tobaccocontrol.bmj.com/content/13/1/65) in legal proceedings for about five years, despite only succeeding in repealing a small part of the law. More than a decade later, in but one example of the food industry following the same script, [McDonald’s threatened a lawsuit against San Francisco](https://books.google.com/books?id=HZ_NDwAAQBAJ&pg=PA139&lpg=PA139&dq=%22threatened+litigation%22+and+mcdonalds+and+%22san+francisco%22+and+%22happy+meals%22&source=bl&ots=7epwDAE4mm&sig=ACfU3U3uka7MGBW7imj9mdB5U_5PuEHycg&hl=en&sa=X&ved=2ahUKEwigzo67nrzqAhXLIDQIHVAdB80Q6AEwAHoECAsQAQ#v=onepage&q=%22threatened%20litigation%22%20and%20mcdonalds%20and%20%22san%20francisco%22%20and%20%22happy%20meals%22&f=false) if it enacted a prohibition on toys in kids’ meals that didn’t meet basic nutritional standards.

But after years of being on the receiving end of the industry’s tactics, the public health community has regrouped. They generated media coverage that exposed Big Tobacco’s chicanery in advancing state preemption policies and—instead of putting out fires once preemption had been introduced or adopted—advocates implemented proactive lobbying approaches. One of the earliest examples is from 1996, when the [Indiana Campaign for Tobacco-Free Communities](https://protectlocalcontrol.org/docs/LessonsFromIndiana.pdf) helped compel then-Gov. Evan Bayh to veto a law preempting “virtually non-existent” local tobacco control laws.

In the same year as the veto, a national preemption task force was formed by leading health organizations. It attracted prominent political figures like Hillary Clinton and Sen. Henry Waxman (D-California), and mobilized grassroots movements and more coherent counterstrategies. By 2000, the Centers for Disease Control and Prevention [advocated for the elimination of ceiling preemption laws](https://www.ncbi.nlm.nih.gov/pubmed/22654921).

The public health movement also helped expand legal networks. From coast to coast, [states helped fund legal resource centers](https://publichealthlawcenter.org/sites/default/files/resources/tclc-legal-update-summer-2014.pdf) that worked with departments of health and became a resource in drafting tobacco control laws that could weather industry challenges.

But history is repeating itself. For example, e-cigarette maker Juul has worked tirelessly to [ensure state increases in the minimum age to purchase tobacco products be paired with preemptions](https://app.box.com/s/kwj5vemdo6gumcs568sfmsgqmq6gr5pb) on local governments taking any further actions to regulate vaping (like flavor bans). And within just the last two months, business groups have [filed lawsuits against Los Angeles County, Palmdale, California](https://www.law360.com/articles/1280894), and [Edina, Minnesota](https://www.hometownsource.com/sun_current/community/edina-bans-sale-of-flavored-tobacco-products-is-promptly-sued/article_34ee86b8-b268-11ea-af28-c76a7bf122b0.html), seeking to nix local prohibitions on flavored e-cigs, claiming these laws are preempted by federal law. The COVID-19 pandemic that compromises the respiratory health of its victims, is seemingly not causing this destructive industry one bit of pause.

In 2020, it’s critical we assertively [preempt preemption](https://www.supportdemocracy.org/the-latest). With no end in sight for the current pandemic, we can scarce afford more industry-driven policies that denigrate public health and deepen already profound health inequities. There will be no shortage of bills and ballot initiatives up for a vote, intent on supplanting popular democracy with narrow corporate prerogatives. But we have the solutions because we’ve faced this problem before. It’s time to enact them.