Preemption and the Public’s Health
New Research, Practical Lessons

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Federal and State Preemption in Public Health and Health Policy

Overview

• What it is
• Why it matters
• Preemption and movement building
• Who wants preemption (and why)
• New research: Preemption and Movement Building in Public Health
• Preemption checklist for decision makers
• Resources: Preemptionwatch.org and the Public Health Law Center
Preemption in Health and Public Health Policy
Preemption: What It Is

• When, by legislative or regulatory action, a higher level of government (state or federal) eliminates or reduces the authority of a lower level over a given issue.

• In public health, “preemption” usually means *ceiling* preemption.
Preemption in Tobacco Control

- “NEVER AGREE TO PREEMPTION. If you are working on a law at the state or county level, the opposition may try to add a preemption provision to your language. Preemption is unacceptable and should be avoided at all costs.” ACS, AHA, ALA, APHA, ANR et al. Fundamentals of Smokefree Workplace Laws, 2009.

- “The AHA opposes federal preemption of state and local statutes and state preemption of local statutes.”

- “Based on solid research findings, state attorneys general and other experts have recommended that any effort to reduce youth access to tobacco products include the following key elements: ... No preemption of local ordinances.” CTFK
Federal Preemption

- The Supremacy Clause: Article VI, paragraph 2:

  *The Laws of the United States ... shall be the supreme Law of the Land; ... any Thing in the ... Laws of any State to the contrary notwithstanding.*

- Legislative or regulatory

- Can invalidate state *and* local laws, rules and lawsuits
State Preemption

- States have broad authority to preempt local laws.

- The ways in which municipal powers are granted or revoked may depend on whether a municipality is a home rule or statutory city/county, but the same general principles apply.

- Example: While the power to tax is one of the most important that a municipality can have, the taxing power is delegated by the state. Once granted, the state can expand that power. The state can also limit or revoke the power - and therefore preempt local taxing authority.
Express and Implied

- **Express** preemption occurs when a law contains a preemption clause or other explicit preemptive language.

- “[T]his section, as well as any other state law that regulates the disclosure of nutritional information, is a matter of **statewide concern and occupies the whole field of regulation regarding the disclosure of nutritional information by a food facility. No ordinance or regulation of a local government shall regulate the dissemination of nutritional information by a food facility. Any ordinance or regulation that violates this prohibition is void and shall have no force or effect.”

- **Implied** preemption happens when a court finds that a law is preemptive even in the absence of an express preemption clause.
Preemption: The Tricky Clause

“While we’re not married to any particular form of preemption language, we’re dead serious about achieving preemption in all 50 states.” – Philip Morris

“PREEMPT” “SUPERSEDE” “OCCUPY THE FIELD”

“SHALL BE CONSISTENT WITH STATE LAW”

“UNIFORM STATE STANDARD” “EXCLUSIVE”
“(d) RULE OF CONSTRUCTION. - Nothing in the amendments made by this section shall be construed - (1) to preempt any provision of State or local law, unless such provision establishes or continues into effect nutrient content disclosures of the type required under section 403(q)(5)(H) of the Federal Food, Drug, and Cosmetic Act (as added by subsection (b)) and is expressly preempted under subsection (a)(4) of such section”
Saved by the... Clause

- The only way to guarantee that a federal or state law will not preempt state or local laws is to include a well drafted non-preemption or “savings clause.”

- “Nothing in this law preempts more restrictive state or local regulation or requirements.”

- “This chapter shall be cumulative to and shall not prohibit the enactment of any other general or local laws, rules, and regulations of state or local governing authorities or local ordinances prohibiting smoking which are more restrictive than or in direct conflict with this chapter.” GA. CODE ANN. §§ 31-12A-1 et seq. (2005).
Preemption: Why it Matters

“All public health is local – it’s got to start and be sustained at the local level.”

- Movement Building
- Diversity
- Local Control
- Social Change
- Progress
- Innovation
Benefits of Local Control: Progress

Throughout our history, State and local governments have frequently protected health, safety, and the environment more aggressively than has the national Government.

- White House Preemption Memo, May 20, 2009

• Local control and grassroots movement building can empower the public health field to pursue fundamental policy change.
Benefits of Local Control: Social Norms

- “Local control is at the heart of our broader goal of educating the public ... and changing social norms. Debates over proposed local smokefree ordinances typically generate extensive media coverage, letters to the editor, town hall meetings, and city council hearings, all of which increase public awareness of secondhand smoke and public support for smokefree laws.”

- Allowed to grow, grassroots movements and the public dialogue they engender can spark a chain reaction of policy education and social norms change.

- Grassroots campaigns, even if they are initially unsuccessful, can increase awareness of a health issue, build community readiness for policy change, and lead to healthier social norms.
Benefits of Local Control: Innovation and Diversity

- “I think that in general public health benefits from innovation and from the opportunities afforded to localities to enact and respond to public health threats through policies that are best suited to those local needs.”
  - PMB, Key Informant Interviews 2010

“Preemption locks in the status quo, based on today’s perceived political realities. But as time passes, standards change, and measures that once seemed out of the question become politically possible.”

Benefits of Local Control: Power and Accountability

- Local officials often interact with their constituents, making them more responsive and accountable.
- The *opponents* of public health are spread thin and are usually weaker outside of DC and the state capitols.
- Grassroots power: nonpartisan and separate from changing state or national politics.

- After passage, local engagement leads to community buy-in and “self-enforcement,” as do local enforcement mechanisms.
Preemption: Who Supports It?

- “Our top priority ... can be summed up in two words: ‘accommodation’ and ‘preemption.’”

- “We need to make sure that the businesses understand that [a] statewide uniformity bill, while it may contain some level of increased restriction, will also set a fair playing field at the state level and eliminate the threat of local legislation...”
  
  - The Tobacco Industry

“[P]reemption is a tool of an industry, generally speaking. And so you [need] that analysis in order to really appreciate it, .... I mean, it was the big industry coming in and saying, “This is what we want to do.” And working their legislative people, their elected officials.”

- KI Interviews, PMBPH, 2010
Why They Want It (Badly)

- They can’t be everywhere at once, but they are in DC and your state capitol.

- Grassroots public health movements can overpower outside lobbyists, especially at the local level.

“Frankly, it’s just a lot easier to get things done at the local level. The impact of industry and other special interests is much less. The ability of a handful of citizens to make a difference is much greater.”

- PMB, Key Informant Interviews 2010
When Preemption Makes Sense

• Preemption in public health can be appropriate in the rare case of a comprehensive national or international regulatory infrastructure that by its essential nature is national or international in scope.

• Example: the Airline Smoking Ban.

  • Aircraft pass rapidly from one jurisdiction to another, so stronger laws in some states than others could subject commercial flights to rules that change several times an hour.

  • High political incentives to adopt strong and effective safety rules + no “pro-crash” lobby.

  • A strong, comprehensive system of federal rules makes sense.
Repealing Preemption

States with Any Type of Preemption of Smokefree Air Laws
American Nonsmokers' Rights Foundation
April 1, 2010

- CT, FL, NH, OK, PA, and SD have total preemption of smoking legislation.
- MI preempts local laws relating to restaurants and bars.
- NE preempts local laws relating to cigar bars.
- NC: Local laws enacted/effective before 10/15/03 remain in force, but may not be strengthened. Local laws after that date may regulate smoking in local gov’t buildings & specified public places. Local laws may regulate smoking in local gov’t vehicles.
- TN preempts entire field of regulations except for regulation in public buildings by cities and counties, airport authorities, utility districts, and special school districts.
- UT preempts local laws other than those restricting smoking in public outdoor areas.
- VA: Local laws enacted prior to 1/1/00 are not preempted. Other local laws may require nonsmoking sections in public places and may allow employers to regulate smoking in private workplaces.
- WI preempts local laws restricting smoking in outdoor areas, except those laws applying only to public property.
Preemption and Movement Building in Public Health
Key Informant Interviews 2010

• Key informants including advocates, researchers and public officials (judgment sample of eighteen):
  • Alcohol, tobacco, physical activity, menu labeling, public health systems management, student organizing, nutrition, education, farm worker health, environmental justice, outboard motors, fire prevention, gun violence prevention, health access, toxics, etc....

• Protocol:
  • Impact of federal or state preemption on public health.
  • Advantages or disadvantages of local public health policy
  • Is the impact of preemption universal across public health issues?
  • Why is preemption important to industry?
  • The pros and cons of negotiating preemption in secret.
  • The impact of state or federal preemption on grassroots movements.
  • Is “uniformity” beneficial to public health?
  • Does preemption = “equity”?
  • What resources does the public health field need to address preemption?
“It strikes me as universal.”

“It’s hugely important in almost every aspect of public health that you can name, frankly, and many that I haven’t worked on. Because if expressed preemption doesn’t exist, then implied preemption will exist. And industries are enormously creative and tireless in raising preemption arguments.”

“[Preemption is] completely antithetical to the basic tenet of public health, which is that the national policy is there to set the floor, not a ceiling and that it’s up to states and cities to exercise it’s police power to protect the public’s health.”

- PMB, Key Informant Interviews 2010
By taking away one of the major reasons grassroots movements form – to promote policy changes that improve community health – preemption can have unforeseen consequences for effective grassroots movement building.

“[I]f you take away the ability of people to make policies, to create rules at the local level, then there's far less incentive for people to organize and act because they don't have an opportunity to take action at the local level. That strategy is .... something that can take the wind out of the sails very quickly.”

“So I think that people who are genuinely looking to better the quality of life in their neighborhoods will find a way.”

- PMB, Key Informant Interviews 2010
Preliminary Findings – Secrecy vs. Transparency

• “The downside of secrecy is that if there’s two people in the room from your side, from the public health side. And there’s ten people in the room from the other side. Who are those ... two people representing? It’s not representative, it’s undemocratic. Usually there is some sort of quid pro quo happening. And then, generally in my experience, the quid or the pro is never worth what you’re signing away.”

• “There are certain parts of a bill that ... you can negotiate around ... because it doesn’t go to the heart of the matter. But something as important as preemption, which basically undercuts the ability of states or locals to go further, does go to the heart of the matter.”

- PMB, Key Informant Interviews 2010
Preemption: Checklist for Decision Makers

✓ Is federal or state preemption necessary because of the *inherent nature* of the law (like the Airline Smoking Ban)?

✓ If not, who wants preemption and why? If special interest groups oppose any legislation *without* preemption, why do they want it so badly?

✓ Consider the short- and long-term consequences:
  
  ➢ Will a one-size-fits all approach meet the need, or does the issue being addressed vary depending on the local context?
  
  ➢ Will preemption stop innovation? What is the likelihood that science and society will evolve in the future?
  
  ➢ Will preemption have a negative impact on existing grassroots movements, or on building future movements?
  
  ➢ How will preemption impact the community level dialogue that accompanies local policy campaigns?

✓ Bottom Line: Will preemption be good for the public’s health, today and in the future?
www.preemptionwatch.org
Preemption and Movement Building in Public Health

Essentials of Preemption

- Preemption occurs when, by legislative or regulatory action, a “higher” level of government (state or federal) eliminates or reduces the authority of a “lower” level over a given issue. Express preemption occurs when a law contains a preemption clause or other explicit preemptive language. Implied preemption happens when a court finds that a law is preemptive even in the absence of an express preemption clause. The only way to guarantee that a federal or state law will not preempt state or local laws is to include a non-preemption clause. For example, a federal law might state: “Nothing in this law preempts more restrictive state or local regulation or requirements.”

- The federal government has very broad authority to preempt. Under the Supremacy Clause of the U.S. Constitution, Congress and federal regulators have virtually unlimited authority – if they choose to exercise it – to preempt state and local health laws. Similarly, states almost always have broad authority to preempt local laws. The ways in which municipal powers are granted or revoked may depend on whether the municipality is a home rule or statutory city/county, but the same general principles apply. For example, while the power to tax is one of the most important that a municipality can have, the taxing power is delegated by the state. Once granted, the state can expand that power. The state can also limit or revoke the power – and therefore preempt local taxing authority.

- Local control of health and public health matters has numerous benefits that are lost when local power is preempted. As Howard Koh, Assistant Secretary for Health in the US Department of Health and Human Services, has said: “all public health is local – it’s got to start and be sustained at the local level.” Local control provides for greater accountability because local legislators interact with their constituents on a daily basis (they may even be neighbors). Local policy makers can craft laws addressing the unique needs of their communities, which fosters innovation and allows diverse communities to adopt appropriate protections for themselves rather than accept a one-size-fits-all, top-down standard.

- Local control and grassroots movement building can empower the public health field to pursue fundamental policy change. Grassroots campaigns, even if they are initially unsuccessful, are powerful public health initiatives that increase awareness of a health issue, build community readiness for policy change, and can lead to healthier social norms. As advocates for tobacco control have learned, more intensive and salient public education is likely to occur at the community level during a local campaign than
Preemption Resources and Links

**Links**

- **American Cancer Society**
  Includes information on preemption in tobacco policy and menu labeling.

- **American Heart Association**
  The AHA has taken a strong position against preemption, especially in tobacco control policy.

- **American Lung Association**
  The ALA has taken a strong position against preemption, especially in tobacco control policy.

- **Howard Koh presentation**
  Assistant Secretary of Health and Human Services Howard Koh (Video of presentation)  
  Weight of the Nation: CDC’s Inaugural Conference on Obesity Prevention and Control.  
  Secretary Koh highlights the importance of local action in obesity prevention.

- **Innovative Legal Approaches to Address Obesity**
  A comprehensive journal article on obesity prevention law and policy including a discussion of preemption.

- **Introduction: Legal Solutions in Health Reform**
  Robert Wood Johnson Foundation background paper on legal issues related to health care reform, including a discussion of federalism and preemption.

- **Obama Anti-Preemption Memo**
  May 2009 White House memo to all federal departments and agencies opposing preemption in federal rulemaking.

- **Preemption: Taking the Local Out of Tobacco Control**

- **Preemption Effect**
  University of North Carolina, Center for Community Capital.

- **The Preemption Effect**
  Edited by Robin Hobart.
The Public Health Law Center
*Improving Health Through the Power of Law*

**Changing Policies, Systems, Environments and Norms**

Tobacco Control Legal Consortium
The Public Health Law Center
*Improving Health Through the Power of Law*

Healthy Eating and Active Living

Supporting Health Departments
The Public Health Law Center

- Preemption and Movement Building in Public Health
- Legal research, analysis, and interpretation
- Policy development and legislative drafting
- Strategic consultation
- Education and training
- Litigation support
Welcome

Public Health Law Center Receives New Grant to Expand the Field of Public Health Law

The Public Health Law Center (former Tobacco Law Center) at the William Mitchell College of Law and the Robert Wood Johnson Foundation are working collaboratively to bolster the growing field of public health law. Robert Wood Johnson Foundation has awarded a grant to the Public Health Law Center, a leading legal resource on health improvement, to develop a network of experts and to provide legal technical assistance.
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