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NATIONAL POLICY & LEGAL ANALYSIS NETWORK TO PREVENT CHILDHOOD OBESITY

Public Health Law Center
AT WILLIAM MITCHELL COLLEGE OF LAW

Preemption and Public Health Advocacy

A Frequent Concern with Far-Reaching Consequences

The legal concept of preemption can have a profound effect on how public health policies develop and progress. This fact sheet is designed to help policymakers and public health advocates consider whether the benefits of a new policy creating a "one-size-fits-all" standard outweigh the benefits of state and local control.

This fact sheet is one in a series from NPLAN on how the legal concept of preemption works and why it matters for public health. For other fact sheets in this series, see www.changelabsolutions.org.

Preemption is a legal doctrine that provides that a higher level of government may limit, or even eliminate, the power of a lower level of government to regulate a certain subject area. Federal laws can preempt state and local laws, and state laws can preempt local laws.

Preemption usually occurs when Congress, or a state legislature, passes a law in a subject area (a "field") and wants that law applied uniformly to the whole jurisdiction (throughout the entire nation, or the entire state.) To ensure that the lower levels of government follow the law, Congress, or the state legislature, can limit or eliminate the authority of state or local governments to pass laws that regulate within that same field. This type of preemption is often referred to as "ceiling preemption," because local governments may not exceed the standards established in the law.

Sometimes, Congress or a state legislature passes a law that sets a uniform minimum standard, but allows local governments to decide whether to exceed those standards. That type of preemption is referred to as "floor preemption," because Congress or the state legislature is setting a base level, which local entities cannot go below, but may choose to exceed.

The most problematic use of preemption is when the higher level of government chooses not to enact regulations in a particular field and then forbids lower levels of governments from doing so, leaving a regulatory void. Some refer to this type of preemption as "null preemption."[1]

Ceiling preemption and preemption causing regulatory voids cause the most concern for consumer protection and public health advocates, and is usually what is at stake when preemption is being debated. In 2013, for example, the Mississippi Legislature enacted a law that, in part, prohibits cities and counties from passing any laws that:

- Prohibit a restaurant or food store from using incentives like giving away toys to sell unhealthy food;
- Require restaurants or other food retailers to disclose nutritional information to consumers; or
- Restrict the portion sizes of food or nonalcoholic beverages.[2]

While the law prohibits cities and counties from regulating these fields, the law sets no statewide standard.[3] As a result, no community in Mississippi – the state with the highest rate of obesity – may pass these types of laws. A similar law has been adopted by the Wisconsin legislature as an amendment to the biennial budget,[4] and in Ohio a comparable law was enacted but struck down because it violated the state's constitution.[5]

By removing local policymakers from the picture, preemption can affect the advocacy landscape for years to come.

But even in less extreme situations, preemption has consequences that extend beyond its effect on state or local regulatory authority; preemptive laws curtail state and local creativity, and often "seek uniformity when uniformity is not necessarily the most effective means for resolving issues."[6]

Despite the far-reaching impact of preemption, business and industry attempts to impose ceiling preemption on state and local governments have become almost routine in legislative and rule-making processes in recent years, particularly when health and consumer protection issues are involved.[7] Also, industry often uses preemption as a defense in product liability, consumer protection, and similar lawsuits, claiming that federal law preempts the state laws upon which these types of lawsuits are based.[8]

Preemption has also been used to undermine local public health law campaigns. For example, the tobacco industry has used preemption so often and so effectively to obstruct or weaken state and local tobacco control campaigns that it has become a documented phenomenon.[9] As one reformed tobacco lobbyist bluntly described it:

> We could never win at the local level. The reason is, all the health advocates, the ones that unfortunately I used to call "health Nazis," they're all local activists who run the little political organizations. They may live next door to the mayor, or the city councilman may be his or her brother-in-law, and they say, "Who's this big-time lobbyist coming here to tell us what to do?" When they've got their friends and neighbors out there in the audience who want this bill, we get killed. So 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.[10]

But preemption is by no means unique to tobacco control. Attempts to preempt state and local regulatory authority are a concern for all policymakers and public health advocates who want to preserve opportunities for policy innovations and control at the state and local levels.[11]

Preemption and Business Interests

Business interests typically have different priorities from groups focused on public health, and these priorities may conflict. Businesses are concerned with revenues, costs, inventories, marketing, and legal compliance, among other things. New regulations can affect all of these. Most businesses prefer less, rather than more, government regulation—and if regulations are necessary, businesses tend to prefer only one set, as opposed to several (for example, a single federal package-labeling law instead of multiple state and local laws).

For these reasons, business interests often argue that preemption makes economic sense, and that new local regulations will be costly to business. Advocates should be prepared to challenge that assertion by reviewing industry's economic analyses. Changes in practices that promote healthier outcomes may, in fact, promote sales.[12] And, assuming the regulations apply uniformly, all businesses within the community will be subject to the same regulations. As a result, no individual business should be at a competitive disadvantage. Finally, the argument ignores the greater costs to society caused by businesses whose products or practices contribute to the development of chronic diseases. The medical costs of obesity, for example, are estimated to be $147 billion per year.[13] Roughly half of these obesity-related costs are paid by Medicare and Medicaid, indicating that taxpayers foot thebill for of obesity's medical costs.[14] Obesity-related

health-care spending accounts for 8.5 percent of Medicare spending, 11.8 percent of Medicaid spending and 12.9 percent of private payer spending.[15] Even if public health regulations increase costs for individual businesses, the savings to society at large can be substantial.

Preemption and Public Health

Because preemption issues so frequently arise when new public health proposals are being debated, public health advocates should be prepared to raise arguments about preemption from a public health perspective. A key consideration for public health advocates is the extent to which local control is important for the policy at issue, and what the consequences might be if it were eliminated.

The Importance of Local Control

By restricting or eliminating local control, ceiling preemption limits the ability of local policymakers to shape public policy. But when it comes to public health, local policymakers have historically played a critical role. By removing local policymakers from the picture, preemption can affect not just the legal but also the advocacy landscape for years to come.

Ensuring that no one is left behind can keep others from pushing ahead with innovative new policies.

Advocates in a variety of public health fields have come to appreciate the importance of preemption's impact on their effectiveness, whether they work on tobacco control, alcohol policy, gun control, nutritional policy, land use, or plant and seed regulations.[16] Their observations about the importance of local authority to their work are remarkably consistent:[17]

- Local control fosters accountability. Local policymakers live in the communities in which they legislate, giving them more opportunities for face-to-face interaction with the people their regulations affect. This makes them more responsive to public sentiment, and more likely to enact new laws, strengthen existing ones, or repeal those that no longer make sense. In addition, it makes it more likely that laws that are enacted are properly and effectively enforced. That's one reason public health advocates have found that at the local level they have more influence than special interest groups.
- Local control fosters innovation. State and local governments are sometimes called the "laboratories of democracy"[18] because they can test or refine legal ideas. Willingness to be innovative is especially important where a policy area is unsettled because the science is evolving or policymakers are still learning what works. Because of this, preemptive laws that discourage innovation in these areas can be especially dangerous.
- Local control allows policies to be tailored to fit a community's needs. For example, a gun control law that makes sense in a rural community may not work as well in a densely populated urban area.
- Local control encourages progress. Local control creates an environment where community leaders can pioneer new policy development, raising the bar for others and driving policy change more broadly. The Institute of Medicine has specifically recognized the leadership role that local government officials have played in the area of childhood obesity prevention, noting that "[t]hroughout the United States, mayors, city council members, and other local officials have initiated and led city-wide campaigns . . . in addition to providing leadership through innovative policy and program changes."[19]
- Local control is important for building movements. The development of public policy at the local level creates community debate, education, and engagement in a way that policymaking at the state or federal level generally does not. This engagement creates a broader base of public understanding and usually leads to more sustainable policies. It can also build the political support necessary for ongoing progress.

When a One-Size-Fits-All Approach Can Benefit Public Health

Public health advocates often support floor preemption if it truly establishes a minimum standard of regulation without limiting the ability of states or localities to enact additional, tougher regulations. For example, the federal Clean Air Act and Clean Water Act only preempts state and local governments from adopting standards that are less protective than the standards these laws establish.[20] In this case, floor preemption preserves the ability of state and local governments to innovate, and does not strip away local control.

Ceiling preemption does just the opposite. It typically creates a one-size-fits-all standard rather than establishing a minimum level of regulation. From a public health perspective, uniformity might be desirable in situations where providing information to the public is a key goal and a lack of uniformity would undermine public understanding of the issue. For example, if airline safety rules differed in content

and presentation depending on the location of the airport, these rules would be harder for consumers to follow. Uniformity can also be beneficial in fields where having a single regulator would lead to significant cost savings. This happens in areas where regulation requires a great deal of technical expertise, intensive staffing, or large capital investment and infrastructure—like nuclear power, for instance. A uniform standard protects people who live in jurisdictions that lack the political will or resources to act. It also avoids disparities in consumer protections based solely on where people live, so that no one is left behind.

But ensuring that no one is left behind can keep others from pushing ahead with innovative new policies. If a preemptive law sets the bar too low, advocates can find themselves in the worst of all situations: with a weak law that allows business interests to claim that consumer protection and public health concerns have been addressed, and state and local governments unable to do anything more.

Conclusion

Business interests so routinely call for ceiling preemption in response to public health law proposals that advocates should be skeptical about whether preemption is truly needed or is just a political strategy. Experience from a variety of public health advocacy movements demonstrates that preemption can have profound effects not just on local regulatory authority, but also on how public health policies develop and progress. Preemptive laws, once passed, are difficult to change or repeal.[21] Therefore, dealing with this issue in advance is essential for public health policy campaigns. When preemption is on the table, local control is on the chopping block, and public health advocates should carefully consider whether the benefits of a uniform standard outweigh the benefits of local control.

Additional Resources:

The following companion fact sheets are available online at www.changelabsolutions.org: *Fundamentals of Preemption; Preemption by Any Other Name;* and *Negotiating Preemption: Strategies and Questions to Consider.*

You may also be interested in NPLAN's preemption guide, *Preemption: What It Is, How It Works, and Why It Matters for Public Health* (2009), available at: www.changelabsolutions.org.

Institute of Medicine, *Local Government Actions to Prevent Childhood Obesity*, Washington, DC: National Academies Press (2009).

Berkeley Media Studies Group, *Accelerating Policy on Nutrition: Lessons from Tobacco, Alcohol, Firearms, and Traffic Safety* (2005).

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[1] *See* generally Jonathan Remy Nash, Null Preemption, 85 Notre Dame L. Rev. 1015, 1021 (2010).

[2] 2013 Miss. Laws Ch. 370 (S.B. 2687).

[3] *Id.*

[4] Wis. Stat. §66.0418 (created by Act 20 (2013), the Wisconsin 2013-2015 State Biennial Budget.)

[5] Ohio Rev. Code Ann. § 3717.53 (2011); Cleveland v. State (Ohio App., 8th Dist., 03-28-2013), --- N.E.2d. ---, 2013, WL 1281900 (2013).

[6] Preemption Monitor – July 14, 2009, Vol. V Issue II (Nat'l Conference of State Legislatures, Denver, Colo. & Washington, D.C.), *available at:* http://www.ncsl.org/default.aspx?tabid=18108 [hereinafter, "NCSL Preemption Monitor"].

[7] Minority Staff Special Investigations Div., Comm. on Gov't Reform, 109th Cong., Cong. Preemption of State Laws and Regulations 1, 7, 8 (2006).

[8] Recent examples of lawsuits brought under state law where federal preemption claims were raised by the business defendants include *Riegel v. Medtronic,* Inc. 128 S. Ct. 999 (2008)and *Wyeth v. Levine,* 129 S. Ct. 1187 (2009).

[9] Michael Siegel et al., P*reemption in Tobacco Control, Review of an Emerging Public Health Problem,* 278 JAMA—Journal of the American Medical Ass'n 858 (1997); Robin Hobart, Am. Med. Ass'n, Preemption: Taking the Local Out of Tobacco Control (Elva Yanez ed., 2003).

[10] 274 JAMA—Journal of the American Medical Association 199 (1995) (interview with former tobacco industry lobbyist Victor Crawford, who was dying of tobacco-related cancer).

[11] *See, e.g.,* NCSL Preemption Monitor, *supra* n. 2 (noting that pressure for Congressional and White House support for "federal usurpation of state authority" "continues to mount"). *See also* Nat'l Ass'n of Attorneys Gen., Interim Briefing Paper Presented by NAAG to President-Elect Obama and the Transition Team (2009) (listing federal preemption of state laws as a top issue of concern).

[12] *See, e.g.,* Cardello, H. , Wolfson, J., Yufera-Leitch, M., Warren, L., Spitz, M. *Better-For-You Foods: An Opportunity To Improve Public Health And Increase Food Industry Profits,* Hudson Institute, (March 2013), available at: www.hudson.org/files/publications/better_for_you_combinedFINAL.pdf.

[13] Finkelstein EA, Trogdon JG, Cohen JW, et al. 2009. "Annual Medical Spending Attributable to Obesity: Payer- and Service-Specific Estimates." *Health Affairs* 5: w822–w831, http://obesity.procon.org/sourcefiles/FinkelsteinAnnualMedicalSpending.pdf.

[14] *Id.*

[15] *Id.*

[16] *See, e.g.,* Robin Hobart, Am. Med. Ass'n, Preemption: Taking the Local Out of Tobacco Control (Elva Yanez ed., 2003); James F. Mosher, Am. Med. Ass'n, Alcohol Issues: The Perils of Preemption (Pamela Glenn ed., 2001); Environmental Commons, Securing Local Control of Our Food & Environment, How to Fight Preemptive Legislation in Your State, *available at:* http://environmentalcommons.org/local-control-toolkit.pdf; State Preemption Laws, A Beyond Pesticides Factsheet (March 2005), available at: http://www.beyondpesticides.org/lawn/factsheets/Preemption%20Factsheet.pdf

[17] *See* Berkeley Media Studies Group, Accelerating Policy on Nutrition: Lessons From Tobacco, Alcohol, Firearms, and Traffic Safety 19 (2005), and the publications listed in *supra* n. 8.

[18] *New State Ice Co. v. Liebmann,* 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[19] Institute of Medicine, Local Government Actions to Prevent Childhood Obesity, Washington, DC: National Academies Press (2009) at 22 (prepublication copy).

[20] *See* 42 U.S.C. § 7416 (Clean Air Act) and 33 U.S.C. § 1370 (Clean Water Act).

[21] *See, e.g.,* Ctr. for Disease Control, U.S. Dep't of Health & Human Services, State Tobacco Activities Tracking & Evaluation, State Preemption Fact Sheet 3, *available at:* http://apps.nccd.cdc.gov/statesystem/publications/STATESystemFactSheetPreemp.pdf. Available at: http://apps.nccd.cdc.gov/statesystem/publications/STATESystemFactSheetPreemp.pdf.