

## 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.<sup>1</sup> *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.<sup>2</sup> 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.<sup>3</sup> Similarly, states almost always have broad authority to preempt local laws.<sup>4</sup> 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.*”<sup>5</sup> 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.<sup>6</sup>
- Local control and grassroots movement building can empower the public health field to pursue fundamental policy change.<sup>7</sup> 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.<sup>8</sup> 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 occurs during a state or national campaign.<sup>9</sup> By taking away the major reason grassroots movements form – to promote policy changes that improve community health –preemption can have unforeseen consequences for effective grassroots movement building. Allowed to grow, grassroots movements and the public dialogue they engender can spark a chain reaction of policy education and social norms change.<sup>10</sup>
- Preemption and local control are nearly universal issues across health and public health arenas, from alcohol policy to obesity prevention to fire prevention. Preemption, once passed, is also very difficult to repeal.<sup>11</sup> To make fully informed, strategic decisions about preemptive legislative proposals, the public health community should consider all of preemption’s short-term and long-term consequences, including its impact on grassroots movement building.
- Under limited circumstances, preemption can be appropriate, as in the case of the Airline Smoking Ban. Because commercial aircraft pass rapidly from one jurisdiction to another, airline safety and health issues are best regulated at the federal level. Stronger laws in some states than others would subject aircraft to regulations that might change several times an hour. Hence, a strong, comprehensive system of federal rules makes sense. However, in public health such examples are rare.

## References

- 1 In public health, the term “preemption” usually refers to *ceiling* preemption by which a higher level of government takes away the power of lower levels to pass *stronger* laws. Instead of preempting stronger state or local laws, Congress or the states have the option of setting minimum standards while allowing states or local communities to adopt stronger protections. This so-called “floor preemption” is rarely controversial among supporters of public health.
- 2 Also known as a “savings” clause. *See* Hobart R, Am. Med. Ass’n. Preemption: Taking the Local Out of Tobacco Control: 16-17. [www.rwjf.org/newsroom/SLSPreemption2003.pdf](http://www.rwjf.org/newsroom/SLSPreemption2003.pdf) (accessed 2010 Feb 8).
- 3 Pomeranz JL, et al. Innovative Legal Approaches to Address Obesity. *The Milbank Quarterly*. 2009; 87(1).
- 4 In rare circumstances, in jurisdictions where local government authority is based on “*imperio home rule*,” state law may not preempt certain kinds of local government laws. *See* Diller P. Intrastate Preemption. *B.U. L. Rev.* 2007; 87: 1124-25.
- 5 Koh H. Presentation at Weight of the Nation: CDC’s Inaugural Conference on Obesity Prevention and Control. Washington, DC; 2009 July 28. [www.adph.org/ALPHTN/index.asp?id=3775](http://www.adph.org/ALPHTN/index.asp?id=3775) (accessed 2010 Feb 8).
- 6 National Policy and Legal Analysis Network to Prevent Childhood Obesity (NPLAN), Public Health Law Center. Fact Sheet: Preemption and Public Health Advocacy. Forthcoming 2010; Mosher JF, Am. Med. Ass’n. Alcohol Issues: The Perils of Preemption. 2001. Policy Briefing Paper.
- 7 “A movement with a strong, mobilized grassroots and a credible and compelling message will be able to create and take advantage of political opportunities, and bridge gaps between public sentiment and political reality.” Frattaroli S. Grassroots Advocacy for Gun Violence Prevention: A Status Report on Mobilizing a Movement. *Journal of Public Health Policy*. 2003; 24(3/4).
- 8 American Cancer Society, American Heart Association, American Lung Association, et al. Fundamentals of Smokefree Workplace Laws. 2009 Nov. [www.no-smoke.org/pdf/CIA\\_Fundamentals.pdf](http://www.no-smoke.org/pdf/CIA_Fundamentals.pdf) (accessed 2010 Feb 8). Consensus Document; Public Health Law Center. Fact Sheet: Why Grassroots Movement Building Matters, Preemption and Movement Building in Public Health. 2009.
- 9 Warner K. Cigarette Smoking in the 1970s: The Impact of the Antismoking Campaign on Consumption. *Science*. 1981; 211(4483):729-731.
- 10 Americans for Nonsmoker’s Rights. The Effect of Preemption on Tobacco Control. 2004 Aug. [www.protectlocalcontrol.org/docs/effectontobaccocontrol.pdf](http://www.protectlocalcontrol.org/docs/effectontobaccocontrol.pdf) (accessed 2010 Feb 8).
- 11 *See* Americans for Nonsmokers’ Rights. History of Preemption of Smokefree Air by State. 2010 Jan. [www.protectlocalcontrol.org/docs/HistoryofPreemption.pdf](http://www.protectlocalcontrol.org/docs/HistoryofPreemption.pdf) (accessed 2010 Feb 8).

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