

State Preemption over Local Public Health Policies



Local governments have the power to pass laws that impact their community's health, happiness and prosperity. However, preemption—when a higher level of government revokes local authorityⁱ—can restrict local lawmakers' ability to pass innovative and proactive public health policies. Many important public health policies are often developed and passed at the local level, long before state legislatures act. While states should set a minimum standard for public health protections, they should not prevent local governments from going above and beyond that minimum standard. If citizens benefit from greater local control, it is often special interests that benefit from preemption. In fact, Big Tobacco has labeled preemption its “first priority.”ⁱⁱ

Floor Preemption vs. Ceiling Preemption

The type of preemption that takes away authority of lower levels of government is known as “ceiling preemption,”ⁱⁱⁱ while “floor preemption” sets a minimum standard that does not limit the authority of lower levels of government.^{iv} Floor preemption can be an effective tool in public health policy whereby everyone receives equal protection across local communities, but local communities still have the power to go above and beyond the minimum standard.

Smoke-free laws, raising the age of sale of tobacco products and sugary drink taxes serve as an examples of what role preemption can play in public health. These efforts began at the local level and eventually inspired states to consider and in many cases pass these policies. In many cases, advocates learned over time how to improve these laws at the local level to make them as effective and impactful as possible. Where states have passed preemption over public health policies, localities have been severely limited in their public policy options for achieving intended outcomes.

Passing public health policies at the local level creates community debate, education, and engagement opportunities that might not exist at the state or federal level.^v This engagement leads to a broader and deeper understanding among the public as to the goals and importance of these public health approaches and can result in more sustainable policies.^{vi, vii} Once preemption is put in place, it is nearly impossible to remove^{viii, ix} so preemption defense should be a consideration when pursuing public health campaigns.

The American Cancer Society Cancer Action Network (ACS CAN) works at the local, state and federal levels, thus it supports each level of government's ability to implement policies to protect the public's health. The right of local governments to pass public health policies must be preserved to continue future advocacy efforts to reduce suffering and death from cancer.

ⁱ National Policy & Legal Analysis Network (NPLAN) & Public Health Law Center, *The Consequences of Preemption for Public Health Advocacy* (2010), available at <http://www.publichealthlawcenter.org/sites/default/files/resources/nplan-fs-consequences-2010.pdf>

ⁱⁱ Victor L. Crawford, Former Tobacco Institute Lobbyist, *Journal of the American Medical Association*, 7/19/95

ⁱⁱⁱ Virginia Natural Resources Leadership Institute, *Dillon's Rule: Legal Framework for Decision Making*, available at http://ien.arch.virginia.edu/vnrli/docs/briefs/Dillons_Rule_09.pdf

^{iv} National Policy & Legal Analysis Network (NPLAN) & Public Health Law Center, *The Consequences of Preemption for Public Health Advocacy* (2010), available at <http://www.publichealthlawcenter.org/sites/default/files/resources/nplan-fs-consequences-2010.pdf>

^v Public Health Law Center, *Preemption and Movement Building in Public Health, Essentials of Preemption* (2011), available at <http://www.publichealthlawcenter.org/sites/default/files/resources/pw-fs-essentials-2010.pdf>

^{vi} Americans for Nonsmokers' Rights. *Preemption: Tobacco Control's #1 Enemy*. (2017) available at <http://tobaccopolicycenter.org/wp-content/uploads/2017/11/770.pdf>

^{vii} Pertschuk, M. Pomeranz, J. *Assessing the Impact of Federal and State Preemption in Public Health: A Framework for Decision Makers* (2012) *Journal Public Health Management Practice*

^{viii} Paul D Mowery et al., *The Impact of State Preemption of Local Smoking Restrictions on Public Health Protections and Changes in Social Norms*, *J ENVIRON PUBLIC HEALTH* 632629 (2012), available at <http://www.hindawi.com/journals/jeph/2012/632629>

^{ix} National Policy & Legal Analysis Network (NPLAN) & Public Health Law Center, *The Consequences of Preemption for Public Health Advocacy* (2010), available at <http://www.publichealthlawcenter.org/sites/default/files/resources/nplan-fs-consequences-2010.pdf>