Preemption or Prevention?:
Lessons From Efforts to Control Firearms, Alcohol, and Tobacco

ERIC GOROVITZ, JAMES MOSHER, and MARK PERTSCHUK

INTRODUCTION

Industries whose products create public health risks aggressively resist public health interventions targeting their products. The judicial doctrine of preemption, which removes regulatory authority from local governments and concentrates it at the state or federal level, has become an important element of the friction between public health advocates and the industries they seek to regulate (1). The preemption doctrine provides that state regulation in a given area takes precedence over, or preempts, local regulation in the same regulatory field (2). Similarly, federal law may preempt state law covering the same area (3,4).

Public health advocates have frequently used state and federal authority to establish minimum public health standards upon which additional, more stringent local regulation may be imposed. For example, the Consumer Product Safety Act (CPSA) empowers the federal Consumer Product Safety Commission to establish safety requirements for most consumer products sold in America (5), but also permits state or local regulation which creates a "higher degree of protection" (6). Although this type of regulation restricts local control to a certain degree (by imposing minimum safety standards), it nonetheless serves public health's protective goals. Preemption and public health come into conflict, however, when preemptive legislation interferes with the goals of public health by shielding harm-causing products from protective regulation.

Preemption's potential to insulate harm-causing products from
Preventive regulation results from the concentration of political power at higher levels of government. Even relatively small industries can monitor and influence policy in Congress, where a single, effective lobbyist can represent them. Larger industries, particularly when they pool their resources in trade associations or other collective bodies, can afford to protect their interests at the state level, through state or regional offices. Campaign contributions to a relatively small number of elected federal or state officials can have far-reaching impact. The tobacco industry enjoys the additional influence of a senior Congressional tobacco caucus comprising legislators from tobacco-growing states, and of numerous advocates in the state legislatures of those states, such as Virginia and North Carolina, both of which have enacted preemptive state tobacco laws. Alcohol producers exert similar influence over Congressional delegations from states with large alcoholic beverage producers.

At the local level, however, industry influence wanes considerably. Most industries cannot afford to place lobbyists in every community, contribute to numerous local campaigns, nor even keep abreast of every proposed piece of local regulation which may concern them. Local representatives also tend to be responsive to individual citizens and community organizations more directly than state or federal legislators, because local lawmakers must live and work among their constituents. Conversely, trade associations and other industry representatives are seen as outsiders rather than as bona fide constituents. These factors combine to restrict the ability of harm-causing industries to defeat public health policy efforts at the local level.

Recent advances in community-based public health policy have created a surge in the politics of preemption. Recognizing the power of local public health regulation to restrict use or possession of, or access to, their products, advocates for the tobacco, firearms and alcohol industries have put tremendous resources into state and federal campaigns to preempt local regulatory authority and erode the foundation of community-based prevention on which public health has traditionally stood. Proponents of this approach typically argue that uniform state standards are more efficient and fair than a “patchwork” of varied local regulation. But these arguments ignore the wide variation in demographic, socioeconomic and other factors which lead to variations in risk across communities. The state should appropriately establish a minimum level of safety standards applicable to all localities in the state. But local governments need additional authority to address additional risks that are relevant in their own communities.

Preemption has become a vital public health issue because of its ability to interfere with local public health efforts to protect citizens from the risks posed by harm-causing products. Proponents of injury and disease-prevention need to understand what preemption is and how it works, and must recognize how the doctrine can interfere with effective prevention efforts. This article briefly introduces the preemption doctrine, and illustrates its impact on local prevention efforts involving three leading harm-causing products: tobacco, firearms, and alcohol.

Detailed state-by-state analysis of preemption in these areas is well beyond the scope of this article. For each topic, we present a brief discussion of the range of preemption across the states, followed by specific examples from California. We focus on California because that is where our work has been most thorough. We hope, however, that the lessons we have learned in California will assist policymakers and advocates to understand and confront preemption-based challenges to local public health regulation elsewhere.

**What is Preemption?**

Preemption occurs whenever the state or federal government claims exclusive control over a particular field of regulation. “Express” preemption results when the state explicitly asserts its intent to occupy a given field of regulation. “Implied” preemption arises when the state’s regulatory scheme is so extensive that no room remains for local regulation. In each situation, the state deliberately strips lower levels of government of regulatory authority over the affected field, preventing local regulation even in the absence of any specific conflict with state law.

In either case, however, the precise boundaries of the preempted field may not be clear. Express preemption statutes often use ambiguous terms to define the occupied field, and courts must determine what the legislature meant by the terms it chose. Implied preemption is even trickier to define, because, by definition, the legislature has not made any clear statement of preemptive intent. Rather, the courts must evaluate how far beyond the specific terms of the legislation the state’s exclusive authority extends. Both situations leave considerable
room for interpretation, and disputes often arise about how much regulatory authority local governments possess over a given regulatory field. Courts resolve these disputes, so efforts to understand the preemptive scope of specific legislation must include an analysis of judicial opinions interpreting the statutes.

Because preemption analysis relies heavily on specific statutory language and the meaning given to that language by courts, the extent of preemption, and its impact on public health, varies widely from one topic to the next. The following discussion explores the public health implications of preemptive legislation sought by the tobacco, firearms, and alcohol industries.

**PREEMPTION IN TOBACCO CONTROL**

The doctrine of preemption plays a central role in tobacco control (5). The preemption story in tobacco illustrates both the protective benefit which preemption provides to industry, and the power of local action to fill the regulatory gaps left by incomplete preemption.

The Federal Cigarette Labeling and Advertising Act (FCLAA) of 1965, as amended in 1969, imposed cigarette labeling requirements and restrictions on tobacco advertising, and included a preemption clause barring states from imposing different mandates or restrictions (12). While the extent of federal preemption of tobacco advertising regulation is open to debate, the preemption clause clearly places significant limits on state and local authority in regulating tobacco labeling and advertising.

The negative impact of this federal-level preemption is immense. Without preemption, hundreds of cities and counties would have undertaken to ban or limit local tobacco advertising, especially billboards. While some cities, like Baltimore and Cincinnati, have moved forward with restrictions on billboard advertising, the vast majority of local governments have been unwilling to risk costly litigation challenging such limitations. Baltimore’s ban on tobacco advertising was upheld by a federal appeals court in 1995 (13). However, a New York City ordinance requiring tobacco companies to run one antitobacco billboard for every three cigarette advertisements was overturned on preemption grounds (14).

In addition, the Act’s labeling requirements have insulated cigarette manufacturers from liability for “failure to warn” about the wide array of diseases caused by their products (15). In so ruling, the United States Supreme Court found that forcing a tobacco company to pay damages for inadequately warning consumers about the health risks of smoking would conflict with the Act’s preemption clause by requiring a warning different from that imposed by the Act (16).

Beyond the areas of advertising and labeling, however, local governments have retained considerable authority to regulate the sale and use of cigarettes. By the mid-1980s, the nonsmokers’ rights movement had developed great skill in advocating for local regulation based on public health concerns. Nonsmokers at the community level joined together to pass local ordinances restricting smoking in workplaces, restaurants and other public places, and prohibiting cigarette vending machines. By the beginning of 1993, there were 543 local smoking ordinances in place in the United States, and an additional 182 ordinances restricting youth access to tobacco products (16). Today, there are more than 700 smoking ordinances and 400 youth access ordinances (17), the most recent of which are also among the most stringent (17).

The tobacco industry has embarked on a vigorous campaign to reverse this progress, however (18). A confidential report on a 1978 public opinion survey conducted by the Roper Organization for the Tobacco Institute (the tobacco industry’s Washington, D.C.-based trade association) identified the fledgling nonsmokers’ rights movement as “the most dangerous development to the viability of the tobacco industry that has yet occurred” (18). In response to this threat, the tobacco industry implemented a strategy of promoting preemptive state bills nationwide. While this strategy began in the mid-1980s (19), the campaign has significantly intensified since that time. So far, 25 states have adopted some form of preemptive tobacco legislation (20). These range from narrow statutory preemption clauses to broad preemption of all local smoking ordinances. Eight states preempt local regulation of clean indoor air, while six address youth access to tobacco products. Eleven preempt in both areas (15).

Activity in early 1996 illustrates the intensity of the tobacco industry’s preemption campaign. By March 25, 1996, twelve state legislatures were actively considering preemptive tobacco legislation of some type. Preemptive legislation had already been adopted in Delaware, but defeated or vetoed in five other states (21).

Perhaps the most notorious tobacco industry state preemption campaign was Philip Morris’ California tobacco initiative in 1994.
By mid-1994, there were 272 local smoking ordinances in place in California (5). Frustrated by the extraordinary success of local activists in promoting smoking ordinances, the tobacco industry had introduced preemptive “clear indoor air” bills in the California legislature. After these efforts failed, Philip Morris placed an initiative, Proposition 188, on the November, 1994 ballot. California’s initiative process allows citizens to bypass the state legislature and vote directly on specific statutory language. Called the “California Uniform Tobacco Control Act” by its industry sponsors, Prop. 188 would have preempted hundreds of strong smoking ordinances already in place in California, and would have dissipated the momentum of local regulation.

The extraordinary step of qualifying a pro-smoking ballot measure illustrates the tobacco industry’s profound displeasure with the progress of the grass roots tobacco-control movement. The press identified Philip Morris as the initiative’s main proponent, and the vast majority of California daily newspapers editorialized against the initiative (5,17,18). Although proponents spent nearly $19 million in favor of Proposition 188 (24), compared to opponents’ $1.4 million (25), the Philip Morris initiative was soundly defeated by a margin of 70.5% to 29.5%.

The failure of Proposition 188 illustrates another important benefit of local action. Because a broad array of California communities had already organized in support of local smoking regulation, an active network of informed citizens existed when Philip Morris began its preemption campaign. The nonsmokers’ rights movement also fostered widespread public mistrust of the tobacco industry, and the identification of Philip Morris with Proposition 188 contributed greatly to the campaign’s failure.

**PREEMPTION IN FIREARMS CONTROL**

Although the federal government regulates certain aspects of the sale, possession and use of firearms, federal law leaves most firearms regulation to the states. Preemption generally arises in the context of attempts by local governments to adopt regulations which differ from or add to those imposed by the state. The extent to which local governments retain regulatory authority over guns varies widely among states, and in some cases, is not at all clear. Although we have not yet performed a detailed, state-by-state analysis of preemption of local firearm regulation, a few general categories can be identified from an informal review of state gun laws (26).

Some states, like Florida (27), Rhode Island (28), and Washington (29), have expressly barred local governments from regulating firearms in any way. In other states, local governments appear to retain extremely broad authority to establish their own restrictions. In Illinois, for example, state law expressly allows municipalities to impose more stringent restrictions on gun sales and possession (30). In Virginia and Ohio, state law says nothing explicit about local regulation, but many municipalities have adopted strong gun regulations, suggesting that strict local action is permitted (21).

California fits between these two general categories. Some state preemption exists, but its scope is largely undefined. However, cities throughout California are currently testing the limits of state preemption, making the state an interesting case study of preemption as a public health issue.

A provision in the California Government Code states, in part (sec. 53071): “It is the intention of the Legislature to occupy the whole field of regulation of the licensing of or registration or licensing of commodity manufactured firearms . . .” (31). The gun lobby believes that this express preemption statute precludes any local regulation pertaining to firearms. Opponents of local regulation frequently cite this provision, and it has formed the basis of recent lawsuits filed by the National Rifle Association and others challenging local regulatory efforts (32,33,34).

Opponents of local regulation generally make a common-sense argument in support of their broad-preemption view. If the state prohibits local governments from imposing the relatively small burden of a registration or licensing requirement, the argument goes, it certainly would not permit more onerous local obstacles like sale bans, safe storage requirements, or possession restrictions.

This argument, left unchallenged, has been sufficiently powerful to persuade local governments to reject proposed firearms regulation. Throughout California, city and county attorneys heard this argument and advised their councils against approving proposed regulations. In other cases, local legislators failed to introduce ordinances because of the possibility of preemption. Faced with the possibility of potentially costly litigation, cities and counties throughout the state declined to test the boundaries of their power. In the absence of credible coun-
arguments, the intuitive plausibility of the gun lobby's interpretation of sec. 53071 posed a substantial barrier to local regulation.

Recently, however, injury prevention advocates have developed arguments against this broad interpretation, based on the context within which the legislature adopted sec. 53071 (35). The legislature enacted the provision in 1969, a few months after the California Supreme Court decided Galvan v. Superior Court (36). Galvan involved a preemption challenge to a San Francisco ordinance requiring the registration of most firearms within the city limits. In upholding the ordinance, the court made two, independent findings: The state's legislative scheme did not preempt local regulation in the broad field of "gun or weapons control," nor did it preempt local regulation in the much narrower field of firearm registration (31).

Government Code sec. 53071 was the Legislature's response to these rulings (37). When placed in this context, the meaning of the statute's reference to "registration or licensing" becomes clear. Despite the obvious opportunity to express an intent to occupy the broad field of "gun or weapons control," the legislature chose instead to preempt the much narrower field of the "registration or licensing of commercially manufactured firearms."

This history provides a credible response to claims of broad preemption. For years, injury prevention advocates were unaware of the history of the statute. The broad-preemption interpretation became widely accepted, chilling local regulation. With the recent development of a powerful counterargument, however, local governments in California have begun to take aggressive regulatory action to reduce firearm-related morbidity and mortality. For example, over 40 California cities have recently voted to ban the sale of Saturday night specials, impose stringent security requirements on gun dealers, impose steep taxes on the sale of firearms and ammunition, institute registration requirements for ammunition purchases, and bar the sale of guns at gun shows on public property. The gun lobby has challenged several of these efforts in court, with little success (32-34,38).

This case study illustrates the importance of thoroughly analyzing the preemptive effect of state legislation. Such an analysis requires examination not only of the relevant statutes, but also of their legislative histories and of the cases interpreting them. Prevention advocates may, with the help of like-minded lawyers, discover powerful arguments supporting local public health regulation.

As with the regulation of firearms, the preemptive impact of state legislation regulating alcohol sales and marketing varies widely from state to state. The states can be divided roughly equally into four categories: First, some states, including Indiana (39) and New York (40), prohibit local control of alcohol availability and marketing in virtually all circumstances. Second, many states, including California, place primary authority at the state level and limit local control to the use of local zoning ordinances, based on land use and police powers (see below for discussion). Typically, states in this category experience considerable confusion regarding the precise scope of state preemption, although the doctrine clearly limits local action to a substantial degree. A third category includes states such as Arizona (41) and Illinois (42), which provide concurrent state and local authority. In these states, alcohol retail licensees must meet both state and local standards to get a license and operate a retail premises. Finally, many states, including Hawaii (43) and Georgia (44), give primary authority to local jurisdictions, with only limited state involvement.

In most states, the extent of local regulatory authority was determined at the end of Prohibition. In recent years, however, the alcohol industry has exerted increasing pressure on states to broaden preemption and limit local authority. In 1992, for example, a lawsuit brought by the alcohol industry in Nebraska resulted in strict limits on the use of local zoning ordinances to regulate alcohol outlets in that state (45). In 1993, New York abolished local alcoholic beverage control boards which had substantial authority to regulate alcohol availability at the local level (35). This legislative change returned primary regulatory control to the state.

As in the areas of tobacco and firearm control, California provides a good case example of the historical context of state preemption of local alcohol control, the uncertainties regarding its scope, and the increasing importance of the doctrine as local communities seek new strategies to address alcohol-related problems. California falls into the second category of states, in which the state retains primary authority to regulate alcohol sales and marketing. The state preemption provision is contained in California's constitution:
This broad preemption language appears to curtail virtually all local regulatory authority. The alcohol industry, which was instrumental in enacting this provision after the repeal of Prohibition, viewed the provision as a means to developing a robust alcohol market throughout the state, free of local regulation. The temperance movement remained politically powerful in many California communities even after the repeal, and its opposition could have seriously undermined the industry’s marketing plans (47). Alcohol control in California has therefore remained primarily in state hands for over 60 years. This differs from most states, where local jurisdictions have either concurrent or primary authority to regulate alcohol sales.

California communities, however, have begun to challenge the state’s exclusive control. Beginning in the late 1960s and early 1970s, and accelerating in the last decade, cities and counties enacted zoning ordinances that regulated alcohol sales within their boundaries (48, 49). Exercising their constitutional authority over public safety and land uses, local jurisdictions placed restrictions on the number, types and locations of alcohol establishments and placed special requirements on their owners to control public nuisance activities. Typically, these cities and counties require new alcohol businesses to obtain a Conditional Use Permit (CUP), and the restrictions are implemented through the CUP approval process (50).

Although state courts have recognized these local powers, their application is limited, in most circumstances, to new businesses which seek a CUP following the enactment of a local zoning ordinance (51). This is a major problem, since most alcohol outlets predate the recent rash of local ordinances and therefore are subject only to limited local oversight (44).

Today, well over 50 California cities and counties have developed alcohol-specific CUP ordinances, which have become increasingly important in the prevention of alcohol-related problems. The California Alcoholic Beverage Control Department, the primary state regulatory agency, has suffered deep budgetary cuts and is largely ineffectual in regulating problem alcohol establishments (44). State alcohol control laws, in general, place the protection of the alcohol industry’s financial interests above public health concerns, reflecting the power of the alcohol lobby at the state capitol (42).

The industry has applied this power, through the state preemption doctrine, to further curtail the limited local control options that remain in the hands of California cities and counties. For example, in the early 1980s more than 90 cities enacted local ordinances that prohibited the concurrent sale of motor vehicle fuel and alcohol. In 1987, the industry successfully lobbied the state legislature to pass a new state law that invalidated these local laws (52). More recently, alcohol industry attorneys and lobbyists have threatened to sue local jurisdictions seeking to expand the reach of local ordinances, particularly as they apply to preexisting alcohol outlets (44). As with firearm control, such threats, backed by substantial financial support, exert a powerful chilling effect on fiscally conservative local governments. As a result, many cities have declined to test the boundaries of local control.

CONCLUSION

These three examples illustrate both the threat preemption poses to the public health, and the value of confronting the threat. The tobacco case shows the importance of local action in dealing with the health risks posed by harmful products. Local action to prevent injuries caused by dangerous products heightens public awareness of the risks associated with such products, and promotes the adoption of broader injury prevention efforts. The alcohol case in California shows how damaging broad preemption can be to effective local regulation of harm-causing products. On the other hand, the alcohol and firearm cases both illustrate that preemption may not always be as substantial an obstacle as its proponents claim, and that local governments may retain considerable authority to regulate harm-causing products despite industry assertions to the contrary.

While specific circumstances will vary from state to state, these lessons from California provide valuable guidance to prevention advocates nationwide. Preemption provides a powerful indirect method of industry control over local regulation by concentrating regulatory authority in the legislative bodies over which industry exerts the greatest control. Using their influence at higher levels of government to secure preemptive legislation, industries can effec-
 Gorovitz et al. · Preemption or Prevention?

...tively prohibit public health regulation. Disease- and injury-prevention advocates must understand the potential impact of preemption on public health efforts, and must be vigilant to protect the ability of state and local governments to deal with public health threats from harm-causing products.

Acknowledgments: This work was supported in part by a grant from the California Wellness Foundation. The authors also wish to thank Stephen Teret, Jon Vernick, and Andrew McGuire for their editorial comments.

REFERENCES

2. See, e.g., In re Hubbard, 396 P.2d 809 (Cal. 1964), overruled on other grounds, Bishop v. City of San Jose, 460 P.2d 127 (Cal. 1969).
5. The CPSA excludes from its definition of “product” any non-consumer product, tobacco, motor vehicles, pesticides, firearms, aircraft and related equipment, boats, drugs, devices and cosmetics, and food (including alcohol). 15 USC sec. 2052.
6. 15 USC secs. 2051, 2075(b).

13. Penn Advertising v. Mayor and City Council of Baltimore 63 F.3d 1318 (4th Cir. 1995), reconsidered 101 F.3d 332 (1996), cert. denied ___US____(April 28, 1997). The court found that the Federal Cigarette Labeling and Advertising Act did not preempt Baltimore’s ban on tobacco billboards. The court also held that the tobacco billboard ban, and a similar ban on alcohol billboards, do not violate the First Amendment to the US Constitution. In April, 1997, the US Supreme Court declined to review the decisions. Ibid.
40. McKinney's Consolidated Laws of N.Y. Ann Chapter 3-B.
42. 235 Illinois Compiled Statutes 5/3.
44. Georgia Code Ann. §5A-300.


ABSTRACT

The judicial doctrine of preemption allows federal or state governments to restrict the ability of state or local governments, respectively, to regulate in a given area. Industries whose products create substantial public health risks have begun to promote preemptive legislation which prevents the lower levels of government from adopting strong public health protections. This article discusses the implications of preemptive legislation concerning three of the most harmful products available in America: tobacco, firearms and alcohol. These examples illustrate the potential danger that preemptive legislation poses to efforts to prevent illness, injury and death caused by these products.