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Preemption in Tobacco Control

History, Current Issues, and Future Concerns

THE CALIFORNIA PREEMPTION EDUCATION PROJECT

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By

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EXECUTIVE SUMMARY

Preemption can be defined as state or federal law that restricts the authority of lower jurisdictions to enact or enforce their own legislation.

In tobacco control, preemption has emerged as a major strategy of the tobacco industry to undermine, overturn, and prohibit future efforts to adopt local tobacco control policies.

Local efforts to promote smokefree policies in California and other states have brought about significant gains in reducing exposure to secondhand smoke, lowering tobacco consumption, and denormalizing the practice of smoking. Current and future efforts in local tobacco control include passing clean indoor air ordinances, increasing excise taxes, limiting the access of youth to tobacco products, and restricting advertising and promotion.

The tobacco industry exercises strong influence over the U.S. Congress and state legislatures, but has far less sway at the local level. Federal laws currently preempt certain actions by states regarding cigarette advertising. The industry has sponsored bills that would preempt local action in every state in the U.S.

California, the nation's leader in tobacco control, has faced several preemption threats since passage of Proposition 99, which gave resources and expertise to local communities for the express purpose of reducing tobacco use. These threats have come in the form of state bills that include preemption, failure to repeal preemption, and a ballot initiative promoted by the tobacco industry.

Preemption also exists as a public health concern in areas other than tobacco control. Alcohol control and violence prevention efforts become more difficult when local control is relinquished to the state legislature and communities are unable to enact regulations to deal with the way guns and alcohol are sold.

National organizations, including the American Public Health Association and the Institute of Medicine of the National Academy of Sciences, have recommended against preemptive laws and in favor of home rule, or local control, for tobacco control regulations.

INTRODUCTION

Within the past decade, efforts to protect the public from the health effects of tobacco have grown into a nationwide movement in the United States. Local communities are the battleground in the war against the tobacco industry, and from large cities to the suburbs to small towns, public health victories have mounted.

But powerful opponents have discovered a way to undermine and overturn these victories—preemption of tobacco control ordinances. Preemption represents a loss of citizens' ability to protect their own health and that of their children.

Preemption can be defined as state or federal law that restricts the authority of lower jurisdictions to enact or enforce their own legislation.

As a strategy of large, powerful industries, preemption has stopped local progress in protecting the community's health in issues other than tobacco control, from local control over the location of liquor stores to directives on ways in which toxic waste can be disposed.

The concept of preemption in the United States is rooted in the Constitution, which makes federal laws the supreme law of the land. However, the Constitution provides that many areas of regulation are appropriate to local control. Although there are a number of areas in which federal and state law can provide minimum protections for public health, very few public health issues really justify preemption of local rules.

There are two different types of preemption, and it is important for policy makers and advocates to understand the difference between them:

- *Express preemption* uses specific language that limits the jurisdiction of lower levels of government to intervene. For example, Congress may limit the authority of states, counties, and cities to regulate, while a state may preempt counties or cities. Express preemption generally includes a preemption clause explicitly limiting state or local jurisdiction.

- *Implied preemption* is generally found when the legislature has adopted a scheme of regulation so comprehensive it is said to "occupy the field." Courts may also find preemption when local ordinances are inconsistent with state law (or when state law is inconsistent with federal law).

Express preemption should be avoided in all public health legislation. To prevent implied preemption, legislation should be drafted carefully to convey an anti-preemptive intent. In California, the courts have tended to favor local regulation and implied preemption is frowned upon.

Preemption is of particular concern in tobacco control, and California is the front line of that battle. Statewide preemption poses a serious and immediate risk to the future of tobacco control efforts in California.

BACKGROUND

When the 1964 Surgeon General's report linking smoking and cancer was released, the health community believed that informing smokers of the dangers of tobacco use would cause most of them to stop. Simply providing information was seen as an adequate intervention. In the following years, tobacco control attempts were made to limit advertising, add health warnings to cigarette packages, and provide more information about the hazards of smoking through counter-advertisements. The emphasis was on modifying individual behavior, finding effective means of cessation, and researching the other health effects of smoking.

By the 1980s the limited results of these approaches had become evident. More information was known about the detrimental effects of tobacco use. The surgeon general's reports issued during the 1980s documented the problems of smoking and women, brought together evidence of the addictive nature of tobacco, showed how smoking caused illnesses other than cancer and heart disease, and revealed the magnitude of the epidemic. But no easy or guaranteed ways to prevent or help people quit smoking had been found.

Perhaps the most significant discovery for tobacco control during this decade was that breathing other people's smoke could cause cancer, heart disease, and a range of smoking related illnesses in nonsmokers. Nonsmokers now had new reason to support smokefree policies.

At the same time, the federal government's attitude toward protecting its citizens changed. Under the guise of "getting government off our backs," budgets of regulatory agencies were slashed and "the marketplace" was seen as the guide for decisions between industry and consumers (Advocacy Institute, 1990). Congress and federal regulatory agencies made few efforts in tobacco control even as new dangers of smoking were revealed and the nonsmoking public — now the majority of citizens — was more concerned about breathing smoke. The pervasive influence of the tobacco industry at the federal level added to Congress's lack of inclination to find ways to limit tobacco use. One significant exception to this was the airline smoking ban; however, Congress' action on airline smoking resulted from strong grassroots efforts.

In 1989, state agencies were also lacking in tobacco control efforts. At that time, only twelve state health agencies had comprehensive tobacco control plans (Bal et al, 1990), in spite of the fact that smoking was responsible for over 400,000 deaths in the United States in that year alone.

Tobacco Industry Influence

In 1990, tobacco companies spent nearly $4 billion on advertising and promotion. But their influence did not stop at merely selling their products. Well aware that government could choose to regulate tobacco products in any of a number of ways, the industry has spared no expense in discouraging actions that could jeopardize its ability to sell its products or endanger its continued existence.

Between 1991-92, the tobacco industry contributed over $1.7 million to members of the U.S. House of Representatives and over $600,000 to the Senate. The industry contributes money to both political parties (Douglas, 1993). Tobacco contribution recipients in Congress have been less likely to vote for tobacco control measures than those who do not take money from tobacco interests (Moore, 1994; Califano 1994). Interestingly, the Congress has failed to enact any tobacco control legislation that would further restrict advertising and promotion, require disclosure of cigarette ingredients, or raise tobacco taxes (Jouzaitis, 1994).

The tobacco industry does not limit itself to influencing legislation and policy at the national level. Since passage of Proposition 99 in 1988, California, a state that neither grows tobacco nor manufactures tobacco products, has experienced a notable increase in political activity by tobacco interests (Begay, 1993). Tobacco industry spending on political contributions rose almost tenfold, from $790,000 in the 1985-86 election to over $7 million in the 1991-92 election. Indeed, tobacco companies contributed more to the California legislature than to the U.S. Congress. During the 1991-92 election, the tobacco industry also spent over $2 million in campaigns to repeal *local* nonsmoking ordinances.

A recent study shows that California legislators who take money from tobacco interests are more likely to vote against tobacco control policies regardless of their constituents' support for such measures (Glantz, 1994A). The most obvious example of this is state funding cuts in the voter-mandated tobacco education program under Proposition 99.

LOCAL ACTION ON TOBACCO

The "deregulatory vacuum" left by the federal and state governments combined with the increasing concern about secondhand smoke as a threat to public health soon led to a grassroots movement of nonsmokers working in their communities. Even before the issuance of the U.S. Surgeon General's Report of 1986, *The Health Consequences of Involuntary Smoking,* citizens were putting pressure on local governments; communities in 19 states had already enacted local ordinances limiting smoking; two years after the report, nearly 400 such ordinances were in effect (USDHHS, 1993). In 1990, the Environmental Protection Agency issued a draft of its Environmental Tobacco Smoke Risk Assessment, which categorizes secondhand smoke as a group carcinogen and associated breathing environmental tobacco smoke with lung cancer. This report prompted passage of more stringent ordinances.

Initially, local laws designated separate smoking and nonsmoking sections, sometimes requiring only very limited areas where smoking was prohibited. But as the information about secondhand smoke became more compelling, regulations became stronger and more comprehensive. As of September 1, 1994, over 700 local ordinances limiting smoking were in place in the United States.

Along with keeping the air free of smoke, public health advocates saw the need to keep cigarettes out of the hands of children. A number of cities and counties have adopted ordinances banning or restricting vending machines where children can purchase cigarettes easily and anonymously. Others have mandated licensing tobacco retailers in much the same way alcohol retailers are licensed. Banning free sampling of cigarettes and prohibiting the sales of single cigarettes are other ways local communities have limited youth access to tobacco products.

The most recent trend is toward communities restricting advertising of tobacco products, especially advertising aimed at children. RJ Reynolds' "Joe Camel" campaign raised the awareness of many citizens about how tobacco companies market to children.

Local ordinances have several advantages over state or federal regulations:

- *Less tobacco industry involvement.* Local elected officials are highly accountable to their constituents. Because they represent their neighbors and friends, they are less inclined to serve tobacco industry interests. City council, board of supervisors, or county commission candidates receive fewer contributions from the tobacco industry than state and federal legislators.

- *Community education.* Discussion and news coverage of a pending tobacco control ordinance create a substantial free education campaign about the risks of tobacco use and environmental tobacco smoke. This educational component also facilitates compliance with the law once it is passed.

- *Community involvement.* Citizens get more actively involved when a law restricting tobacco is being proposed in their own community. Such community interest and involvement are usually much less evident in decisions at the state or federal levels.

- *Effective local enforcement.* Local ordinances are enforced by agencies in the community, typically the health department or the city manager, rather than distant state or federal agencies. Also, since the community is involved in the decision-making, the compliance rate is higher when the ordinance takes effect.

National Grassroots Activities

Throughout the country, local ordinances have been enacted in response to information about the dangers of secondhand smoke. Communities have also passed regulations to prevent children from purchasing cigarettes and tobacco products. By mid-1994, over 130 local ordinances were in place that completely eliminated smoking in public places and workplaces, including restaurants (ANR, 1994), and efforts to protect nonsmokers through local action were on the increase (Cimons, 1994).

For example, Andover, Massachusetts, adopted a 100% smokefree workplace and restaurant ordinance; Pitkin County, Colorado, passed a 100% no-smoking ordinance that includes bars, restaurants, and workplaces; and Omaha, Nebraska banned free tobacco samples and sales of single cigarettes (ANR, 1994).

Clearly, local governments have responded to this challenge of protecting public health. "It has been local government action — not state or federal — which has pursued and enacted stringent control measures restricting or banning smoking in public settings and limiting the accessibility of tobacco by young people," asserts Samuel Broder, M.D., Director of the National Cancer Institute (USDHHS, 1993).

Several types of measures to protect health have been enacted at the local level, as discussed in the following sections.

Clean Indoor Air

Local ordinances mandating clean air in public places, workplaces, and restaurants were one of the first signs of citizens taking action to protect their own health. Ordinances often began by requiring smoke-free areas in restaurants and other public places. *Smoke-free* was initially defined as a section without any smokers rather than a space with no smoke. As time passed, standards for clean indoor air became more stringent, and some communities later revised their first ordinances to ban all smoking or mandate separately ventilated smoking sections where the smoky air did not mingle with clean air. Smoking sections, once as much as 80% of an area, shrank to 25% and 20% and in some cases totally disappeared. Local communities reflected the changing public health standards.

An important effect of eliminating smoking in the workplace and public places is the denormalization of smoking. The sight of people smoking and the smell of tobacco become less common, and citizens come to accept clean, smokeless air as the standard.

Advertising

Although federal law preempts certain local measures restricting tobacco advertising, some localities have found ways to protect their citizens, especially children, from tobacco advertising. The state of Utah bans all types of billboards, public transportation displays, and point-of-purchase advertising for tobacco products. This ban has not been challenged by the tobacco industry, possibly to avoid negative publicity. Many communities have banned tobacco advertising on public transportation and government-owned property, such as sports arenas.

In 1994, Baltimore, Maryland, and Cincinnati, Ohio adopted bans on tobacco billboards. Cincinnati's law banned signs within 500 feet of schools immediately and included advertisements on public transportation vehicles.

Snowmass, Colorado considered banning Joe Camel advertisements (ANR, 1994). New York City Mayor Giuliani ordered the Marlboro billboard removed from Shea Stadium, and Erie County banned tobacco ads in Rich Stadium, home of the Buffalo Bills football team (ANR, 1994).

Indeed, as local governments look for ways to prevent children from beginning to smoke, placing restrictions on advertising may become more popular.

Taxes

Tobacco taxes high enough to discourage children from starting to smoke can be an effective health measure. When local jurisdictions tax tobacco, large portions of the state's population are affected by the tax and the community directly benefits from the

revenue collected. It is often easier to convince local officials of the need for a tax than to pass a tax increase at the state level.

In 1993, 219 cities and six counties levied taxes on cigarettes, and 17 cities and four counties taxed other tobacco products (Tobacco Institute, 1994). For example, New York City can add its own taxes to the state tax. In Alabama, nearly every community collects its own tobacco tax.

But local taxation may be endangered. In 1993, the Louisiana State Supreme Court overturned New Orleans' tobacco excise tax ordinance. Illinois passed legislation in 1994 preempting local tobacco excise tax ordinances, effectively doing away with Chicago's cigarette tax (ANR, 1993, 1994).

Youth Access

Since the age of purchase of cigarettes is 18 years in most states, the sale of cigarettes to minors is illegal. Yet the tobacco industry must find new smokers to stay in business. Communities have found several ways to reduce children's access to tobacco products, including banning vending machines, prohibiting the distribution of free samples, ending the sales of single, unpackaged cigarettes, and licensing the retailers who sell tobacco products.

- Vending machines offer children an anonymous and quick way to purchase cigarettes. Currently, 274 communities ban or restrict vending machines; 119 have enacted total bans.

- Free samples of tobacco products have long been used to introduce young people to cigarettes or smokeless tobacco. In the U.S., 97 communities ban or restrict tobacco sampling.

- Single cigarettes, or "loosies," are an extremely cheap way to buy cigarettes and do away with a young smoker's need to hide the package. They carry no health warning. Sixteen local ordinances that ban or restrict sales of single cigarettes are in effect.

- Licensing retailers to sell tobacco products helps emphasize that tobacco is different from other consumer products, much like licensing alcohol retailers. Licensing may also help enforce laws regarding sales to minors. High penalties for violating such laws can be part of the licensing process. Retailers must be licensed to sell tobacco in 45 U.S. communities.

Local Activity in California

The landscape of tobacco control changed forever in California with passage of Proposition 99 in 1988. The ballot initiative raised the state's cigarette excise tax from 10 cents a pack to 35 cents, allocating part of the revenue for a state tobacco control program. The new program provides funds for local health departments to address tobacco use in their communities. Each health department is required to establish a tobacco control program, hire staff, and form coalitions representing voluntary health agencies, educational organizations, community groups, the media, and others (Bal et al, 1990). A large part of the government's responsibility for and ownership of tobacco control thus shifts from the state to the community level. The state health department remains active in administering other aspects of the program, including the media campaign and competitive grants, school, and medical care.

Motivated by the findings of the 1990 Environmental Protection Agency draft report on environmental tobacco smoke, the new community-based tobacco control groups began looking at ways to reduce exposure to secondhand smoke. For many of these newly formed groups, passing local ordinances to restrict smoking in worksites, restaurants, and other public places became a visible, cost-effective, measurable way to carry out their mandate of tobacco control.

In 1990, Lodi, a small community in northern California, passed a strong ordinance making all its restaurants completely smokefree and prohibiting smoking in business lobbies, retail stores, and almost all public places. The ordinance evoked heated discussions at city council meetings and in the newspaper (Drummond, 1990). Other communities soon followed Lodi's example (USDHHS, 1993) and the trend toward more and stronger smokefree ordinances began to accelerate by 1992.

By mid-1994, California had in place local ordinances that protected over 60% of all its citizens from secondhand smoke. At least 188 communities covering nearly 18 million Californians have passed their own regulations banning smoking completely in workplaces, restaurants, or both (ANR, 1994).

Along with ordinances to restrict exposure to secondhand smoke, communities have begun to enact regulations that would limit how children and teenagers gain access to tobacco products. In California, by September 1994:

- 298 ordinances reduce youth access to tobacco products.
- 274 communities ban or restrict vending machines.
- 97 local laws limiting free samples of cigarettes have been enacted.

Nine ordinances have been passed in California restricting or banning some form of tobacco advertising.

Effectiveness of Local Tobacco Control Efforts

An evaluation of California's local efforts in tobacco control (Pierce, 1994) shows the following:

- The number of nonsmokers exposed to environmental tobacco smoke decreased by 23% from 1990-1993.
- The proportion of 100% smokefree workplaces almost doubled between 1990 and 1993, from 35% to 65%.
- By 1993, 87% of Californians employed indoors were covered by a policy that prohibited smoking in their work area.
- Maintaining a smokefree work area was associated with a 14% reduction in smoking prevalence.
- Smokefree policies in the workplace are associated with a 20% decrease in per capita cigarette consumption.
- Tobacco consumption overall declined 27% between 1988 and 1993.
- Compliance with smokefree workplace policies is high.

Thus, local efforts are succeeding in reducing exposure to secondhand smoke and in increasing smokefree workplaces.

A recent study that examined protection of nonsmokers from environmental tobacco smoke at work in California found that strong clean indoor air ordinances play an important role in reducing nonsmoker exposure to secondhand smoke. Local ordinances increase the likelihood of nonsmoking policies in the workplace (Pierce et al, 1994). Total smoking bans were more likely to be found in areas with strong ordinances than in those with weak or no ordinances. Strong ordinances also make compliance easier because they are not open to interpretation of where smoking may be allowed.

The authors of the study note that businesses often "wait until they are legally required to restrict smoking before implementing a specific policy to protect nonsmoking

employees." Local ordinances help accelerate the process of going smokefree by mandating that employers take action.

The tobacco industry has felt the direct effects of California's smokefree workplace ordinances. One study estimates that workplace smoking policies in California cost the tobacco companies $201 million annually in lost sales since 1990 (Woodruff, 1993).

California's lead in protecting its citizens through local efforts is recognized around the country. A writer for the *Boston Globe* called the state "the premier U.S. laboratory for smoking initiatives" (Pertman, 1994).

PREEMPTION IN TOBACCO CONTROL

Overview

Aware of how local actions threaten its profits and its power, the tobacco industry has worked to prevent activity at the state and local levels. Its longest running success has been the preemption of local restrictions on advertising. The federal Cigarette Labeling and Advertising Act prohibits television and radio advertising of cigarettes. But this law also prevents state and local governments from banning tobacco advertising in other venues. After cigarette ads disappeared from television and radio, the number of print, billboard, and point of purchase ads rose dramatically, possibly even increasing the exposure of many people to cigarette advertising.

In August 1994, an appeals court overturned a New York City law requiring one public health message for every four tobacco company ads on taxicabs, bus shelters, and other spaces the city owns or licenses. The United States Court of Appeals for the Second Circuit ruled that while the city's law had a "laudable purpose," it was preempted by federal law (Federal Cigarette Labeling and Advertising Act of 1965; Public Health Cigarette Smoking Act of 1969) enacted to prevent the "chaos of multiple diverse regulations" (AP, 1994).

However, the extent of federal preemption regarding cigarette advertising is unclear. The tobacco industry has not challenged Utah's ban on tobacco advertising, nor many of the limited ordinances in other places that, for example, restrict billboards or other forms of advertising near schools. Localities may restrict advertising clearly aimed at minors, since the sale of cigarettes to minors is illegal (Bierig, 1994).

The federal law also limits product liability lawsuits against the makers of cigarettes. For many years, the health warnings required by the Federal Cigarette Labeling and Advertising Act were considered to protect cigarette manufacturers from tort claims. In 1992, the U.S. Supreme Court in *Cipollone versus Liggett Group, Inc.* ruled that the Cigarette Labeling Act preempts people in states from suing tobacco companies on grounds that the companies' advertising caused harm to smokers by glamorizing the products. But the *Cipollone* ruling does allow state suits against tobacco companies on the basis of fraud. Since *Cipollone,* the California Supreme Court has held that under California law Janet Mangini could sue RJ Reynolds for the Joe Camel advertising campaign, which she claims targets minors. She is not blocked from doing this "by the nicotine wall of congressional preemption," the Court stated in June 1994 (Bierig, 1994). The U.S. Supreme Court recently upheld this ruling.

In contrast, the Smokeless Tobacco Act, passed in 1986, like the cigarette labeling act, mandates health warnings on product packages but does not limit how states can regulate

smokeless tobacco advertising and promotion. The Committee report for this act (Bierig, 1994) states:

> *By preempting State and local laws requiring additional health warnings, the Committee does not intend to preempt a State's ability to control the promotion and advertising of smokeless tobacco products and does not intend to preempt product liability suits in State or Federal Courts based on failure to warn.*

But the largest part of the tobacco industry's efforts to preempt local restrictions has occurred at the state level. The tobacco industry was quick to realize the significance of local ordinances. In 1987, Walker Merryman, vice-president of the Washington D.C.-based Tobacco Institute, appeared in Pittsburgh, PA, to lobby city council members against an ordinance that would restrict smoking in public places, workplaces, and restaurants (Samuels, 1992). As more local ordinances were enacted in the 1980s, the tobacco industry began promoting statewide so-called clean indoor air laws that would weaken existing regulations and prevent communities from passing more and stronger ordinances (Sylvester, 1989; Lee, 1991).

Two examples of how such laws damaged tobacco control efforts can be seen in Pennsylvania and North Carolina.

Pennsylvania

Despite strong opposition from the tobacco industry, the Western Pennsylvania Restaurant Association, and organized labor, the city council of Pittsburgh passed a smoking control ordinance in 1987. Although "fairly mild" by later standards, the ordinance was quite progressive for the time (Samuels, 1992). It required that employers provide smoke-free areas for all employees, prohibited smoking in medical facilities, elevators, public restrooms, retail stores, service lines, and polling places. Most controversial was the requirement that restaurants with 50 or more seats designate at least 20% of their space to a no-smoking section. Fines were imposed for violations.

In the first year after the enactment, the dire consequences the opposition had predicted failed to occur. No restaurants left the city because of the ordinance and other adverse economic effects were not seen. The council member who had drafted the ordinance was even considering ways to strengthen it (Samuels, 1992). Other cities in Pennsylvania began proposing similar restrictions (Sylvester, 1989).

The Pittsburgh ordinance took effect in April 1988. By November of the same year, the Pennsylvania State Legislature had passed a law preempting all local ordinances except the one in Pittsburgh. The state law prevented other local governments from enacting strong controls on smoking and required that workplace smoking policies be part of collective bargaining. In Pennsylvania, the tobacco industry, in effect, took over a clean

air bill to protect nonsmokers and weakened it to preempt local efforts under the guise of a statewide law. Since passage of the law, no more ordinances regulating smoking have been proposed. In effect, the tobacco industry "muzzled the grass-roots movement for local tobacco control initiatives in Pennsylvania." This strategy proved effective in several other states.

North Carolina

One of the leading tobacco-producing states, North Carolina had 16 local smoking ordinances in place at the beginning of 1993 when the EPA issued its report on environmental tobacco smoke. During the 1993 session of the North Carolina General Assembly, a bill passed that required state-controlled buildings to reserve 20% of their space for *smoking* and made no stronger requirements for nonsmoking areas. The bill, subtitled, "An Act to Regulate Smoking in Public Places," preempted stronger local restrictions in state, local, or private buildings.

Because of pressure from leaders in the sponsor's home town, the deadline for preemption was extended three months after the bill went into effect. Within that time, 89 new local smoking rules passed in North Carolina. All but one of the new regulations were the first tobacco control measures to be passed in the jurisdiction. More than half the counties in the state had proposed ordinances regulating smoking (Malek et al, 1994).

However, an analysis by the Centers for Disease Control and Prevention shows that the new ordinances fall far short of ideal protection for nonsmokers. By the year 2000, when all the new regulations are phased in, more than half of workers in North Carolina will have no legal protection from secondhand smoke in the workplace; none will have complete protection (Conlisk, 1994) . Once the law went into effect in October 1993, no local government or board of health attempted to introduce a tobacco control measure. Four county boards of health were sued over their authority to pass smoking restrictions (Ruley, 1994).

Other States

Typically, a preemptive statewide law begins as a state "clean indoor air" bill purporting to impose uniform statewide limits on smoking and promote clean air. The bill may even be introduced by a well-intentioned sponsor who believes that a weak state law may be needed for later enactment of much stronger legislation. A legislator in Pennsylvania called that state's preemptive law, "a marshmallow, but better than nothing" (Sylvester, 1989).

Under cover of a misleading name, the bill is often weakened by the tobacco industry as a compromise and a preemption clause added to ensure that localities will not overrule it (Matthews, 1993). In 1988, a preemption clause was added to a bill in New York requiring nonsmoking areas in all public places. The preemption would have eliminated

stronger regulations that already covered over two-thirds of the state's the population (Sylvester, 1989). The following year, a statewide clean indoor air bill without preemption passed; it was the result of 13 years of legislative effort (Jacobson, 1993).

The strategy of working at the state level has been effective for the tobacco industry. "With some 95,000 local units of government, it's hard to keep track of them," says Walker Merryman. But the tobacco industry maintains a presence in all 50 state legislatures. The tobacco industry has promoted preemptive clean indoor air bills in at least 45 states, often more than once.

Preemptive statewide laws regulating smoking in public places have been enacted in the following states (Coalition, 1994):

- Connecticut
- Delaware
- Florida
- Illinois
- Iowa
- Kentucky
- Nevada
- New Jersey
- North Carolina
- North Dakota
- Oklahoma
- Pennsylvania
- Utah
- Virginia

So far, no preemptive state law has been repealed.

Preemption in California

Local activity in passing smokefree air ordinances increased in California during the early 1990s. In response, the tobacco industry began using new strategies to defeat or repeal local regulations during 1991-92 (Traynor, 1993):

- *Monitoring.* The tobacco industry used public affairs firms to track the progress of local ordinances in California.

- *Organizational and directional assistance.* Concealing itself behind front groups that claim to represent businesses or restaurants, the tobacco industry organized opposition to local ordinances and provided information on the alleged negative effects of the ordinance.

- *Referenda petition drives.* Californians for Fair Business Policy, a statewide political action committee funded by the tobacco industry, organized petition drives in Sacramento, Long Beach, Oroville, Visalia, and Sacramento County to repeal local ordinances. The campaign failed

to gather enough signatures in Sacramento, but Long Beach weakened its ordinance to avoid the expense of an election, while the other areas held elections.

- *Election campaigns.* The tobacco industry attempted to influence local elections where local ordinances were decided, using direct mail, signs, and radio ads.

The tobacco industry spent over $2.5 million on eight local campaigns to defeat or weaken local smokefree air ordinances from 1990 through 1992 (Traynor, 1993). But despite its superior resources, the tobacco interests lost elections in Sacramento, Paradise, El Dorado County, and Visalia where the smokefree air ordinances were upheld at the polls.

Brown Memo

Clearly a strategy of tracking and attempting to defeat, weaken, or repeal every single city and county ordinance in the most populous and active state in the country could exhaust even the seemingly limitless resources of the tobacco industry. The pace and movement in California called for a more efficient plan.

A tobacco industry internal memo leaked to the press in 1991 revealed that industry executives had considered a broader approach (Smokeless, 1991). In that memo, California Assembly Speaker and beneficiary of industry largesse Willie Brown outlined his ideas on how to stop tobacco control efforts in his state. His strategy, which the tobacco industry has attempted numerous times since 1991, was to promote a seemingly comprehensive state clean indoor air law that overruled stronger local ordinances and prevented future efforts. "The main goal was to seek preemption of smoking restrictions at the local level," the memo states. The tobacco industry would appear to oppose the bill while secretly dictating which provisions would be acceptable. Restrictions on coupons, discounting, free sampling, and sponsoring public events were discussed as parts of the bill "we could not live with," according to one industry representative.

Although the memo became public (Webb, 1991) and the story of Speaker Brown's close ties with tobacco companies appeared in the national media (Lee, 1991), the speaker and his allies in the industry proceeded with their strategy. The tobacco industry has attempted to preempt local smoking ordinances through a statewide law in California more than a dozen times.

SB980

In 1993, Senator Tom Hayden introduced a bill to remove the preemption on local taxation of cigarettes, tobacco products, and alcoholic beverages. His bill authorized countywide taxes on these products if a majority of a county's board of supervisors votes

for the tax or if one or more city councils representing a majority of the county's population adopts an ordinance proposing the tax. SB980 was intended to give local governments additional revenue raising ability to offset the loss of property tax revenue since Proposition 13.

The bill was opposed by alcoholic beverage and tobacco interests, including the Distilled Spirits Council of the United States, Coors Brewing Company, the Wine Institute, the Smokeless Tobacco Council, and the Tobacco Institute. The League of California Cities, Americans for Nonsmokers' Rights, and three cities and one county supported the bill. It died in committee; no vote was ever taken.

AB13

In July 1994, the California Legislature passed and the governor signed into law AB13, a statewide law that prohibits smoking in workplaces, including common areas, private offices, and cafeterias. The law preempts local laws' workplace provisions if they are weaker than AB13. It also prohibits smoking in restaurants and stipulates that free-standing bars must be smokefree by 1997, but allows smoking in 25% of the floor space of hotel lobbies, in warehouses, bingo halls, employee break rooms, hotel rooms, and tobacco shops.

AB13 took effect on January 1, 1995. In some areas, including Morro Bay, Santa Barbara County and Grover Beach, enactment of local ordinances has been suspended because the local governments believed their actions were unnecessary because of AB13 (Herscher, 1994).

The Philip Morris Initiative

By mid-1994, California had 272 local smokefree air ordinances; communities were passing regulations at the rate of about 1-2 per week. Having failed to defeat local ordinances through other means, the Philip Morris company decided to try promoting a preemptive law directly to the voters.

Proposition 188, called the California Uniform Tobacco Control Act, was a ballot initiative written and sponsored by the Philip Morris tobacco company (Tobacco International, 1994). Proposing to end the "patchwork of confusing local ordinances," the company touted the initiative as a strong statewide law that would protect nonsmokers from secondhand smoke and provide protection in areas with none.

Proposition 188 proposed regulations weaker than those that already cover over 60% of Californians (ANR, 1994) and allowed smoking where it is not presently permitted. Most damaging was that it would have prevented any future local ordinances in an attempt to stop the trend toward more protection of nonsmokers. The initiative also sought to

forestall the growing movement of local efforts to restrict tobacco product advertising and sales. It required a two-thirds vote by the Legislature to amend the law.

The preemption provisions of Proposition 188 were clearly spelled out:

- The act "repeals the California Indoor Clean Air of 1976," eliminating the explicit anti-preemption language of the earlier law.
- The initiative "repeals and preempts local smoking and tobacco regulations."
- The intent of the act is "to occupy the field to the exclusion of local action."
- The act states that no other local ordinance of any type can be adopted to "regulate the sale, distribution, advertising, sampling, promotion, or display of tobacco products, or smoking in public places, restaurants, bars, or workplaces," effectively preventing all future local ordinances.

A brochure mailed in late August by "Californians for Statewide Smoking Restrictions — Yes on Proposition 188/A Committee of California Hotels, Restaurants, and Philip Morris, Inc.," explained Proposition 188 as a "tough but reasonable alternative to prohibition." Claiming that the initiative "helps protect non-smokers by regulating smoking in public and by keeping tobacco away from minors," the brochure highlighted the provisions of the initiative that sound most like tobacco control advocacy, for example, "restricts location of cigarette vending machines" and "prohibits billboard advertising of tobacco products within 500 feet of K-12 schools." The letter was apparently aimed at nonsmokers, who represent about 80% of California voters.

The mention of prohibition with regard to tobacco restrictions reflects the tobacco industry's framing of this issue. The week of the mailing, RJ Reynolds ran a full-page ad in the *San Francisco Chronicle* and other major national newspapers with a photograph of police pointing guns at a house. The caption reads, "Come out slowly sir, with your cigarette above your head." The ad, part of a series launched in mid-1994 (Eisele, 1994), calls proposals to limit smoking "nothing less than an attempt at tobacco prohibition, something that will have serious implications for Americans" (Shapiro, 1994). In this context of near-hysterical government over-regulation and trampling on individual rights, Philip Morris presented its initiative as a more reasonable approach to concerns over smoking.

However, during early 1994, some of the tobacco industry's activities underwent national scrutiny. Tobacco became "controversial." In this atmosphere, Philip Morris's attempts to destroy health gains in California were quickly recognized. The *New York*

Times noted in a front-page news story, "Philip Morris has begun an all-out counterattack intended to slow and then roll back the nationwide drive toward more stringent tobacco control laws" (Ayres, 1994). "If smoking bans can be overturned and weakened in the nation's most populous and most virulently anti-smoking state, they can probably be overturned and weakened in just about any other state," the reporter concluded. *USA Today* ran an editorial supporting local tobacco control ordinances, warning that "Philip Morris officials call the California vote a chance to bring uniformity to California smoking laws. No one should believe them for a minute" (USA Today, 1994).

California newspapers also recognized the preemption provisions of Proposition 188 and pointed out that the initiative was sponsored by the tobacco industry in editorials and op-ed pieces. The *San Jose Mercury News* editorialized, "The main thing this act would control is the right of local governments to pass stringent smoking bans" and called the initiative "an act of desperation on the part of the tobacco industry" (San Jose Mercury News, 1994). The *San Francisco Chronicle* published an editorial against Proposition 188, telling readers, "Look at who is paying the bills" (San Francisco Chronicle, 1994). Other California papers referred to the proposed law as the Philip Morris Initiative (Endicott, 1994; Ezekiel, 1994).

If the money spent on the initiative indicates how important the sponsors considered it, Proposition 188 mattered a great deal to tobacco companies (Wildermuth, 1994). By October 29, the Secretary of State's office reported that Philip Morris had spent $12.5 on Proposition 188, the largest amount a corporation had ever spent to support an initiative in California, according to Common Cause (Young, 1994). RJ Reynolds gave $3.4 million, Brown & Williamson $1.3 million, American Tobacco Company $757,000, and Lorillard $414,000 (AP, Oct, 1994). The total spent on the campaign will be disclosed by the end of January 1995.

In the end, the No on 188 campaign was successful in letting voters know that tobacco companies backed the initiative. California voters soundly defeated Proposition 188 by a margin of 70.5 to 29.5 (Young, 1994).

Federal Legislation and Regulation

OSHA Regulations

The federal Occupational Safety and Health Administration, the agency charged with setting standards for worker health and safety, plans to take action regarding passive tobacco smoke in workplaces. The action could be in the form of a Notice of a Proposed Rulemaking or a more formal Proposed Rulemaking. Because bars, restaurants, bowling

alleys, gambling halls and other areas that often have fewer smoking restrictions are considered workplaces, the new regulations could have far reaching consequences.

It is important that any new OSHA regulation explicitly preserve the right of local communities to enact and enforce local ordinances. More than 600 local smoking ordinances already exist, and the advantages of community control over smoking regulations could be eliminated if such control is taken away.

Enforcement of a national standard is also a concern. Without meaningful enforcement provisions, the regulation will be ineffective. Enforcement provisions should include:

- A local agency with a local phone number to call with questions or complaints.
- A mechanism for rapidly responding to complaints through phone calls, letters, or site visits.
- An anti-preemption clause, which gives communities the authority to enforce their own ordinances.
- A clear and simple ban on tobacco smoke, to eliminate confusion and the impression that some exposure to environmental tobacco smoke is acceptable.

Synar Amendment

An amendment to the Alcohol, Drug Abuse and Mental Health Administration Reorganization Act written by former Representative Mike Synar (D-OK) sets the age of purchase of tobacco products at 18 years and mandates that states develop a plan to comply with this measure or lose funds. The law, passed in 1992, applies to states that receive block grant money from ADAMHA.

Under the guise of satisfying the federal mandate, tobacco industry youth access bills have been introduced which contain weak provisions while preempting local youth access ordinances. Typically, these bills penalize youth for smoking and require "supervision" of vending machines. Meaningful youth access reductions, such as vending machine bans or strong retailer licensing provisions, are invariably left out.

In 1993, three states adopted preemptive state youth access laws, Washington, New Mexico, and Montana (Coalition, 1993). Washington's preemption bill overruled King County's youth access ordinance, one of the strongest in the nation, which had implemented a strong retail licensing scheme and banned sales of cigarettes in vending machines (Weisskopf, 1993).

Americans for Nonsmokers' Rights has proposed that the regulations for implementing the Synar Amendment include language that would prohibit states from enacting preemption:

> *As of (date of enactment), states which in any way limit the power of local governments to enact and enforce tobacco control measures which are as strong or stronger than the state regulation, are not eligible to receive those federal funds.*

Whenever a state bill covering any aspect of tobacco product sales, marketing, or use is introduced, health professionals face the risk that the bill will be subverted to the tobacco industry's interests.

Synar Amendment in California

California recently passed a law to implement the Synar Amendment, called the STAKE Act (Stop Tobacco Access to Kids Enforcement Act). Introduced by Senator Tom Hayden, the act contains provisions for ensuring that tobacco products are not sold to minors. STAKE does not preempt local laws restricting sales of tobacco to youth.

HR3434

Sponsored by Congressman Henry Waxman (D-CA), this bill would have eliminated smoking in virtually all buildings open to the public, allowing smoking only in enclosed, separately ventilated rooms. HR3434 contained a key provision that prohibits preemption and protects local smoking ordinances:

> *Nothing in this title shall preempt or otherwise affect any other Federal, State, or local law which provides protection from health hazards from environmental tobacco smoke.*

Several attempts were made to gut the bill by limiting the smokefree air provisions to government-owned buildings. RJ Reynolds Tobacco Company ran full-page ads in the *Washington Post* and several major dailies around the country claiming this bill is a backdoor form of prohibition that threatens the rights of all citizens.

HR3434 did not survive the 103rd Congress, but a national smokefree air bill may be reintroduced in the next session.

POLICY IMPLICATIONS

Passage of preemptive statewide tobacco control legislation in California would halt the movement of local ordinances and have a devastating effect on tobacco control in the state. California is seen by other states as the leader in tobacco control and as a test market for various strategies. The tobacco industry is well aware of California's leadership role, a reason for its aggressive efforts in the state.

Some immediate consequences of preemption in California include:

- *Weaker public health standards.* With few exceptions, statewide proposals in California have proven weaker than local measures. In the case of Philip Morris's proposed initiative, both local smoking ordinances and youth access ordinances would be preempted. The initiative's provisions in both areas are extremely weak. If the initiative passes, more nonsmokers will be exposed to tobacco smoke and more children will gain easy access to tobacco. Furthermore, because smoking bans have reduced the social acceptability of smoking, more Californians will smoke.

- *Loss of community education.* Each local ordinance campaign involves a unique community education process. From proposal to passage and implementation, the media and the public engage in an ongoing dialog about tobacco. The result is a well-publicized, free education effort, with the tobacco industry invariably the loser. If preemption passes, this education process ends completely.

- *More difficulty with enforcement.* Local ordinances provide meaningful local enforcement mechanisms. In general, the city manager or health department is designated as the enforcement agency. Any citizen can call the local agency and file a complaint. Usually, a letter from that agency is enough incentive to gain compliance with the law. In contrast, state smoking laws have an abysmal enforcement record. If preemption passes, effective local enforcement will be replaced with poor statewide enforcement.

- *Less compliance.* As a result of local enforcement provisions and the community education that accompanies their passage, local tobacco control ordinances enjoy a high level of compliance. If local ordinances are replaced with a weak, poorly enforced state law, compliance will drop.

- *National implications.* For at least a decade, California has led the nation in tobacco control. Much of that success resulted from passage of local

tobacco control measures. If preemption passes in California, the tobacco industry will use the example of California to promote preemption in other states. There is little doubt that many states would follow.

- *Other public health issues.* If local progress is ended in tobacco control in California, other public health issues will follow. From the National Rifle Association to the alcohol industry, preemption is already a goal. If California allows tobacco preemption to pass, then preemption in other issues will appear justified.

PREEMPTION IN OTHER PUBLIC HEALTH ISSUES

As Congress and regulatory agencies awaited the guidance of the marketplace during the 1980s, health advocates found ways to protect citizens in areas of local concern. But in many health and public policy issues, preemption by state laws prevented or severely limited community action.

For example, California communities are preempted from regulating where and how alcohol can be sold by a state constitutional amendment passed after repeal of prohibition. Like the tobacco industry, the alcohol industry found it easier to influence the state legislatures than to respond to actions in the state's many local jurisdictions. By law, communities cannot ban alcohol sales or levy their own taxes on alcoholic products. A 1990 ballot initiative to raise taxes on alcohol was defeated. Recently, citizens have attempted to enact land use controls on alcohol outlets, limiting where liquor stores can be located. However, while state law allows communities to enact zoning ordinances that limit the number and types of stores, it protects existing outlets, effectively limiting the scope of local control. The state law, which places limited restraints on the number, location, or concentration of retail outlets, has resulted in large concentrations of liquor stores in inner city areas.

When Los Angeles and Oakland recently passed ordinances to limit the number of stores selling alcohol, the cities were sued by the alcohol industry on the basis of preemption. Although Los Angeles won the right to restrict liquor store locations, the case may not be applicable to other cities because the stores in question were destroyed in the 1992 riots. The law stipulates that stores must be in continuous operation to qualify for protection. Oakland's case is pending.

California law also prevents local communities from taking measures that would limit the way firearms are sold. Likewise, regulations concerning licensing and manufacture of guns are preempted by the state. Again, a major industry — firearms manufacturers and their lobbying group, the National Rifle Association — can more easily influence a single legislative body. In this way, they avoid dealings with multiple local governments. More significantly, they never have to face citizens increasingly motivated to take action against those who are seen as perpetrating gun-related violence.

The Pacific Center for Violence Prevention recommendations for reducing youth violence include opposing efforts to preempt local regulation or to lessen the state's obligation to defer to local health concerns, and specifically removing preemption language to allow cities and counties the power to regulate firearms (Pacific Center, 1994).

The importance of local control in public issues is well understood by the industries that would be affected by such regulation. Preemption of local action is high on the legislative

agenda of many industries that would lose money or the opportunity to pursue business as usual if citizens affected by these industries had a more effective means of regulating them (Teret, 1994). It is critical for health professionals to understand the effects of preemption and to develop ways to allow for more citizen input and action.

A broader issue for the public health community involves campaign financing. Powerful special interests are allowed to pour huge amounts of money into political candidates and in return expect — and too often receive — obeisance from the candidates they have financed. These industries have been especially influential at the federal and state levels, often using their vast resources to frame the debate and overwhelm their opponents. The NRA's victories in representing arms dealers are a particularly distressing example of an industry dictating the terms of the discussion by presenting gun ownership as a constitutional right and overruling the wishes of the majority who want to see gun use limited.

The result of such influence is a diminishing of the democratic process. It also contributes to a decline in the quality of life of all Americans as social problems continue because citizens in their local governments are prohibited from attempting solutions. Finding checks and balances for the undue influence of rich and powerful special interests should be a concern of the public health community. Reforming the way campaigns are financed could be a start.

COUNTERING PREEMPTION

Need for Education

The challenge for public health professionals in all areas of tobacco control is to translate the public's desire for smokefree air and the tobacco industry's lack of credibility into lasting policy changes. While tales of the industry's current and former misdeeds made headlines throughout 1994 and the tobacco industry was characterized as being under siege, no national policies were enacted to take advantage of this "news" (Jouzaitis, 1994). The Commissioner of the federal Food and Drug Administration discussed what his agency could do to regulate tobacco products but took no action. Congress proposed raising tobacco excise taxes substantially, as bills to enact this measure stalled. The Occupational Safety and Health Administration delayed issuing rulings to make all workplaces smokefree. The Federal Trade Commission even allowed Joe Camel advertisements to continue running, despite strong public sentiment against the ad campaign and studies showing that it enticed more youth to smoke.

Although surveys consistently show that the tobacco industry ranks very low with the public (Janofsky, 1994), sentiment against tobacco companies does not necessarily translate into understanding of the political implications of the industry's influence. Voters may have issues they consider more pressing than tobacco control, but they may also be feeling a deep cynicism about government in general and those who hold public office in particular. Restoring faith in government may be a task beyond the scope of most health professionals, but it is important to send the message that government does indeed have a role to play in protecting health by regulating the sales and use of a lethal product. Certainly, health professionals need to continue their efforts to discredit the allies of the tobacco industry.

Educating the public and policymakers about preemption involves pointing out the importance of community control, documenting the progress already made because of local ordinances, and explaining how gains made at the local level will be reversed and future progress halted if preemption is enacted. An understanding of preemption requires a recognition of what can be accomplished at different levels of government. It is also important to link the actions of the tobacco industry to the effects of these actions on public policy and public health.

National Recognition

Several national health organizations have recognized how preemptive laws can threaten gains made in tobacco control.

In October 1994, the American Public Health Association passed the following policy statement (APHA, 1994):

> *The American Public Health Association opposes State and Federal laws preempting local governments' ability and authority to enact their own more stringent restrictions of alcohol and tobacco availability; and supports local government home rule to use their zoning, planning, and other local police powers to control alcohol and tobacco problems including advertising and access.*

The Institute of Medicine of the National Academy of Sciences issued a report on youth smoking in 1994 (Bonnie, 1994) that includes the following recommendation to Congress:

> *Repeal the federal law that precludes states and local governments from regulating tobacco promotion and advertising within their jurisdictions.*

To reduce factors that encourage youth to smoke, the report notes that states and local governments willing to experiment with measures to restrict tobacco advertising "should be given the power to take actions such as regulating advertising at the point of sale and banning tobacco advertising on billboards and on public transportation vehicles."

In its recent report on preventing illegal sales of cigarettes to minors, the Working Group of State Attorneys General notes that "initiatives for effective control of illegal tobacco sales have come primarily from the local level and that many of these efforts have been so effective that tobacco interests have worked for passage of state laws for the sole purpose of preempting, or overriding, these local initiatives" (Working Group, 1994). In addition:

> *The Working Group believes it imperative that state laws not preempt local ordinances. State legislation should set a "floor" of minimum requirements, while allowing the continued operation of ordinances that create a higher level of protection.*

Recommendations

To avoid preemption of local laws in tobacco control:

- Understand what preemption is and why it jeopardizes gains made locally.
- Explain who is behind preemption. Emphasize that the tobacco industry sponsors preemptive laws to weaken existing local ordinances and to prevent enactment of future local regulations that may be even stronger

and may cover other aspects of tobacco control such as advertising and marketing tobacco products.

- Educate the sponsor of any statewide or national tobacco control bill on the threat of preemption. Make certain that the sponsor and the sponsor's aides understand why preemption is never acceptable.

- See that health professionals maintain a presence in the legislature throughout the entire session, especially the last few days when bills are often changed, killed, or passed very rapidly.

- Develop a group from local communities who can attest to the success of local ordinances.

- Keep the media informed of the success of local ordinances, the role of local ordinances in tobacco control, and the transgressions of the tobacco industry.

- Point out the larger issue of how preemption prohibits local action to solve local problems.

- Because preemption is an industry strategy that can be used in any proposed statewide tobacco control law, from clean indoor air to minor access, pursue a statewide tobacco control law only if the goals of such legislation cannot be achieved by local action.

REFERENCES

Adamek, T. Measure M: Lines Drawn for Battle. (Lodi, CA) *News-Sentinel,* October 10, 1990.

Advocacy Institute. *Advocate's Guide to Preemption: Preserving State and Local Preemption for Public Health and Safety.* A Report to the Advocacy Community prepared by the Advocacy Institute, Public Citizen, January 1990.

Americans for Nonsmokers' Rights. Legislative Update. *ANR Update* 12 (4), Winter 1993.

Americans for Nonsmokers' Rights. Legislative Update. *ANR Update* 13 (1), Spring 1994.

Americans for Nonsmokers' Rights. Legislative Update. *ANR Update* 13 (2), Summer 1994.

American Public Health Association. APHA Members Suggest Policy Statements to the Association. *The Nation's Health,* September 1994, p. 23.

Associated Press. Ruling Bars Anti-Smoking Ad Mandate. *New York Times,* August 27, 1994, p. 10.

Ayres, Jr., B.D. Philip Morris on Offensive in California: Effort Begun to Derail Anti-Smoking Drives. *New York Times,* May 16, 1994.

Bal, D.G., Kizer, K.W., Felten, P.G., Mozar H.N., Niemeyer, D. Reducing Tobacco Consumption in California: Development of a Statue Anti-Tobacco Use Campaign. *Journal of the American Medical Association* 264(12): 1570-1574, 1990.

Begay, M.E., Traynor, M., Glantz, S.A. The Tobacco Industry, State Politics, and Tobacco Education in California. *American Journal of Public Health* 83(9):1214-1221, 1993.

Begay, M.E., Traynor, M., Glantz, S.A. The Twilight of Proposition 99: Reauthorization of Tobacco Education Programs and Tobacco Industry Political Expenditures in 1993. Institute of Health Policy Studies, School of Medicine, University of California, San Francisco, March 1994.

Bierig, J.R., Weber, S.A., Scarborough, T. R. Legal Analysis of Approaches to State and Local Regulation of Tobacco Advertising and Sales in the US. *Tobacco Control* 3(3):257-262, Autumn 1994.

Bonnie, R.J., Lynch, B.S. Time to Up the Ante in the War on Smoking. *Issues in Science and Technology,* Fall 1994, pp. 33-37.

Borland, R., Pierce, J., Burns, D., Gilpin, E., Johnson, M., Bal, D. Protection from ETS in California: The Case for a Smoke-Free Workplace. *Journal of the American Medical Association* 268:749-752, 1992.

Califano, Jr., J.A. Revealing the Link between Campaign Financing and Deaths Caused by Tobacco. *Journal of the American Medical Association* 272:1217-1218, 1994.

Cimons, M. Smoking Bans in the Workplace Raise Concerns. *Los Angeles Times,* August 8, 1994, pp. A1, A9.

Coalition on Smoking OR Health. State Legislated Actions on Tobacco Issues. Coalition on Smoking Or Health, 1993.

Coalition on Smoking OR Health. State Legislated Actions on Tobacco Issues. Coalition on Smoking Or Health, Summer 1994.

Conlisk, E., Siegel, M., Lengerich, E., MacKenzie, W., Eriksen, M. The Status of Local Smoking Regulations in North Carolina Following a State Preemption Bill. 1994.

Douglas, C.E., Wilbur, P. The Tobacco Lobby Buys Acquiescence and Suffocates Federal Health Policy. *World Smoking & Health* 18: 17-20, 1993.

Drummond, M. Council Oks Smoking Ban. (Lodi, CA) *News-Sentinel,* June 7, 1990.

Eisele, S.M. RJ Reynolds Tobacco Co. Takes Its Show for Smokers Rights on the Road. *Charlotte Observer,* July 20, 1994, p. D1.

Endicott, W. Initiative by Philip Morris. *Sacramento Bee,* July 31, 1994.

Ezekiel, S. Tobacco Initiative Backers Battered by New Smoking Law. *West County Times,* August 1, 1994.

Glantz, S.A., Begay, M.E. Tobacco Industry Campaign Contributions Are Affecting Tobacco Control Policymaking in California. *Journal of the American Medical Association* 272:1176-1182, 1994A.

Glantz, S.A., Smith L. The Effect of Ordinances Requiring Smoke-Free Restaurants on Restaurant Sales. *American Journal of Public Health* 84(7):1081-1085, 1994B.

Herscher, E. Statewide Initiative Blamed for Delays in Local Smoking Laws. *San Francisco Chronicle,* August 1, 1994, p. A15-16.

Jacobson, P.D., Wasserman, J., Raube, K. The Politics of Antismoking Legislation. *Journal of Health Politics, Policy and Law.* 18(4):787-819, 1993.

Janofsky, M. Poll Finds Wider Aversion to Smokers, Tobacco Firms. *San Francisco Sunday Examiner and Chronicle,* May 1, 1994, p. A7.

Jouzaitis, C. Under Fire, Tobacco Lobby Still Can Counterattack; Industry Enjoys Many Allies on Capitol Hill. *Chicago Tribune*, June 16, 1994, p.1.

Lee, G. Tobacco Lobby Lights a Preemptive Strike. *Washington Post,* September 9, 1991.

Malek, S.H., et al. Preemption: North Carolina Battles for Local Authority to Protect and Preserve Health. Presentation at ASSIST Information Exchange Conference, May 16-17, 1994.

Matthews, J. War Against Smoking Hits Fierce New Phase. *San Francisco Examiner,* September 19, 1993, pp. B1, B4.

Moore, S., Wolfe, S.M., Lindes, D., Douglas, C.E. Epidemiology of Failed Tobacco Control Legislation. *Journal of the American Medical Association* 272(15):1171-1175. 1994.

Pacific Center for Violence Prevention. Preventing Youth Violence: Reducing Access to Alcohol. Pacific Center for Violence Prevention, 1994.

Pacific Center for Violence Prevention. Preventing Youth Violence: Reducing Access to Firearms. Pacific Center for Violence Prevention, 1994.

Pacific Center for Violence Prevention. Preventing Youth Violence: Reinvesting Our Resources. Pacific Center for Violence Prevention, 1994.

Pertman, A. Why U.S. Future Is Virtually Smoke-Free (Boston Globe). *San Jose Mercury News*, May 8, 1994.

Pierce, J.P., Shanks, T.G., Pertschuk, M., Gilpin, E., Shopland, D., Johnson, M., Bal, D. Do Smoking Ordinances Protect Non-smokers from Environmental Tobacco Smoke at Work? *Tobacco Control* 3:15-20, 1994.

Pierce, J.P., et al. Tobacco Use In California: An Evaluation of the Tobacco Control Program, 1989-1993. Cancer Prevention and Control Program, University of California, San Diego, March 1994.

Ruley, M. Tobacco Goes A-Courtin'. (Wake Country, NC) *Independent Weekly,* February 23, 1994, pp. 10-13.

Samuels, B.E., Begay, M.E., Hazan, A.R., Glantz, S.A. Philip Morris's Failed Experiment in Pittsburgh. *Journal of Health Politics, Policy and Law* 17(2):329-351, 1992.

San Francisco Chronicle. Qui Bono on Prop 188? (editorial), *San Francisco Chronicle,* August 22, 1994.

San Jose Mercury News. Smoke and Ire: Bill Could Break Tobacco Industry's Hold on Sacramento (editorial). *San Jose Mercury News,* May 20, 1994, p. 9B.

Schwartz, J. Institute Seeks Strong Steps to Prevent Youth Smoking. *Washington Post,* September 14, 1994, p. A3.

Shapiro, E. RJ Reynolds Fields Nonsmokers To Fight Tobacco Restrictions. *Wall Street Journal,* July 25, 1994, p. B4.

Smokeless Tobacco Council, Inc. A Proposed Comprehensive Tobacco Control Act in California. Memo from Michael J. Kerrigan to Smokeless Tobacco Council, June 28, 1991.

Sylvester, K. The Tobacco Industry Will Walk a Mile to Stop an Anti-Smoking Law. *Governing,* May 1989, pp. 34-40.

Teret, S.P., DeFrancesco, S., Bailey, L.A. Gun Deaths and Home Rule: A Case for Local Regulation of a Local Public Health Problem. *American Journal of Preventive Medicine* 9 (supplement 1):44-46, 1993.

Tobacco Institute. *The Tax Burden on Tobacco,* volume 28, 1993. Washington D.C., The Tobacco Institute, 1994.

Tobacco International. PM Launches Counter-attack on Antis in California. *Tobacco International,* June 1994, p. 14.

Tobacco International. Tobacco Industry Targets Anti-Smoking Laws. *Tobacco International,* February 1, 1994, pp. 8-9.

Traynor, M., Begay, M.E., Glantz, S. The New Tobacco Industry Strategy to Prevent Local Tobacco Control. *Journal of the American Medical Association* 270:479-486, 1993.

U.S. Department of Health and Human Services. *Major Local Tobacco Control Ordinances in the United States.* Monograph 3. U.S. Department of Health and Human Services, NIH Publication No. 93-3532, May 1993.

USA Today. States Should Butt Out of Local Anti-Tobacco Laws (editorial). *USA Today*, May 23, 1994, p. A14.

Webb, G. Speaker Disguised Smoking Bill, Memo Says. *San Jose Mercury News*, August 27, 1991, pp. 1A, 4A.

Weisskopf, M. Hill Bid to Curb Youth Tobacco Sales Falters. *Washington Post*, July 10, 1993, p. A10.

Wildermuth, J. Tobacco Firm Spent Lavishly on Initiative. *San Francisco Chronicle*, August 18, 1994, p. A6.

Woodruff, T., Rosbrook, B., Pierce, J., Glantz, S. Lower Levels of Cigarette Consumption Found in Smoke-Free Workplaces in California. *Archives of Internal Medicine* 153:1485-1493, 1993.

Working Group of State Attorneys General. No Sale: Youth, Tobacco and Responsible Retailing. Developing Responsible Retail Sales Practices and Legislation to Reduce Illegal Tobacco Sales to Minors. Working Group of State Attorneys General, 1994.

Young, D. Props 186 and 188 Rejected by Voters. *San Francisco Chronicle*, November 10, 1994, p. B4.

Examples of Preemption Language

North Carolina (HB957)

"This article shall not supersede nor prohibit the enactment or enforcement of any otherwise valid law, rule, or ordinance enacted prior to October 15, 1993, regulating the use of tobacco products. However, no local law, rule, or ordinance enacted and placed in operation prior to October 15, 1993, shall be amended to impose a more stringent standard than in effect on the date of ratification of this Article.

Any local ordinance, law, or rule that regulates smoking adopted on or after October 15, 1993, shall not contain restrictions regulating smoking which exceed those established in this article."

California (Proposition 188)

"Consistent with the finding in Section 1 of this act, the People find and declare that the need for uniform statewide regulation, as set forth in this act, is a matter of statewide concern and uniform statewide regulation of smoking in public places, bars, restaurants, and workplaces, as well as the sale, distribution, advertising, sampling, promotion or display of tobacco products, is required to maximize public awareness of and compliance with this act and is warranted because these activities do not vary from country to county or city to city. This act shall apply, without limitation, to a city, county, or charter city and county. It is the People's intent to regulate the subject matter of this act comprehensively and to occupy the field to the exclusion of local action. Notwithstanding any other provision of law, no ordinance or regulation of any city, county, city and county, including a charter city, charter county, or charter city and county, or other political subdivision of this state, or any local ordinance or regulation adopted by the use of an initiative or ballot measure, shall in any way attempt to regulate the sale, distribution, advertising, sampling, promotion, or display of tobacco products, or smoking in public places, restaurants, bars, or workplaces."

(Minors' Access — Penal Code Section 308)

"It is the Legislature's intent to regulate the subject matter of this section. As a result, no city, county, or city and county shall adopt any ordinance or regulation inconsistent with this section."

Virginia

"Local ordinances adopted after January 1, 1990, shall not contain provisions or standards which exceed those established in this chapter."

New Jersey

"The provisions of this act shall supersede any other stature, municipal ordinance, and rule or regulation adopted pursuant to law concerning smoking in health care facilities or the offices of persons licenses to practice the healing arts except where smoking is prohibited by municipal ordinance under authority of RS 40:48-2 or by any other statute or regulation adopted pursuant to law for purposes of protecting life and property from fire."

Oklahoma

"The State Legislature by adopting this act intends to preempt any other regulation promulgated to control smoking in public places and to standardize laws that governmental subdivisions may adopt to control smoking. Cities and towns may enact and enforce laws prohibiting and penalizing conduct under provisions of this act, but the provisions of such laws shall be the same as provided in this act and the enforcement provisions under such laws shall not be more stringent than those of this act."

Illinois

"A home rule or non-home rule unit of local government in this State shall not have the power and authority, after the effective date of this Act, to regulate smoking in public places. Pursuant to Article VII, Section 6, paragraph (h) of the Illinois Constitution of 1970, it is declared to be the law of this State that the regulation of smoking as provided by this Act is a power which pre-empts home rule units from exercising such power subject to the limitations provided in the Act, provided that any home rule unit that has passed an ordinance concerning the regulation of smoking prior to October 1, 1989 is exempt from pre-emption."

Hawaii (SB 256, vetoed by governor)

"It is the intent of the legislature to occupy the entire field of regulation in all matters that are the subject of this chapter.

"Notwithstanding any other law to the contrary, no country shall enact any ordinances or adopt any rules regulating the sale, use, distribution or promotion

of cigarettes or other tobacco products as defined in section 245-1. All ordinances and rules regulating the sale, use, distribution, or promotion of cigarettes or other tobacco products, adopted by a country after January 1, 1994, are hereby declared to be null and void."

Examples of Non-Preemptive Language

Vermont (1993 Clean Indoor Air Law)

"Nothing in this chapter shall be construed to supersede or in any manner affect a municipal smoking ordinance provided that the provisions of such ordinance are at least as protective of the rights of nonsmokers as the provisions of this chapter."

Washington (1994 administrative ruling on ETS in Office Work Environments)

"This section does not preempt any federal, state, municipal, or other local authority's regulation of indoor smoking that is more protective than this section."