WHY STATE PREEMPTION AND LOCAL AUTHORITY MATTER

TCN and PHLC Tobacco Preemption Virtual Series

April 30, 2019





Webinar Logistics

- This webinar is being recorded
- Full webinar materials will be made available via email and will be posted on the TCN and PHLC websites
- Submit discussion questions for today's speakers through the Q&A feature







Today's Agenda

- Background on Tobacco Preemption from the Public Health Law Center
- Local Preemption Case Study: Philadelphia
- State Preemption Case Study: Oregon
- Moderated Q&A







TCN Mission

To improve the public's health by providing education and state-based expertise for tobacco prevention and control at the state/territory and national levels.







TCN 2016-19 Strategic Map

Track 1:

Engage members

in the future of TCN

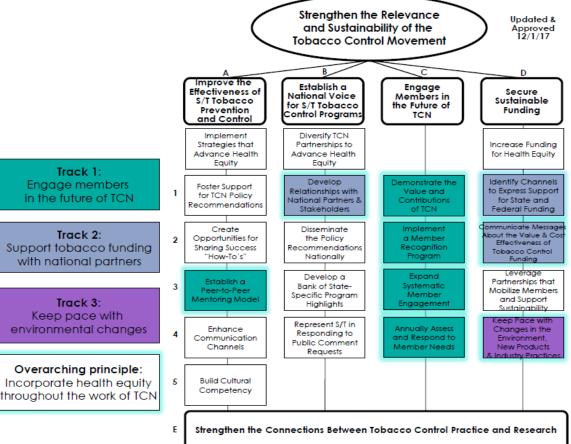
Track 2:

with national partners

Track 3:

Keep pace with

Overarching principle:







THE PUBLIC HEALTH LAW CENTER

(HEALTH THROUGH THE POWER OF LAW & POLICY)







FOCUS ON HEALTH EQUITY







LEGAL TECHNICAL ASSISTANCE



Legal Research



Policy Development, Implementation, Defense



Publications



Trainings



Direct Representation



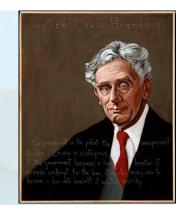
Lobby





LOCAL CONTROL & PUBLIC HEALTH

Policy experimentation and innovation



- Community inclusion in shaping health outcomes
- Civic participation and public accountability
- Tailored policies and tackling health disparities





LOCAL AUTHORITY

- No inherent local authority (creatures of state)
- Varied levels of local authority
 - Limited local authority Dillon's Rule
 - Local autonomy Home Rule
- Preemption







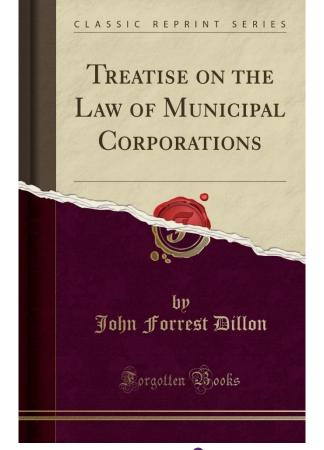


DILLON'S RULE

Dillon's Rule

- Powers expressly granted
- Powers necessarily and fairly implied from express powers
- Powers essential to the accomplishment of the declared objects and purposes of the locality

*Any doubt concerning the existence of a power is resolved against the locality







HOME RULE AUTHORITY

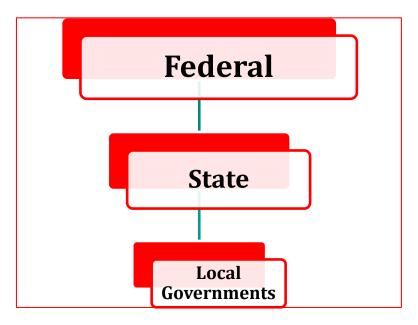
- Local autonomy broad powers to act
- Home rule localities can adopt measures without specific grant of authority
 - Imperium in imperio model (initiative + immunity)
 - National League of Cities (initiative but not immunity)
- Localities can adopt measures but states can preempt





PREEMPTION

- U.S. Const. supremacy clause
- Higher governmental level
 - Legislative or regulatory action
 - Eliminates or restricts the authority of a lower governmental level









TYPES OF PREEMPTION

Express Preemption



Implied Preemption







PREEMPTION — AN INDUSTRY TACTIC

"While we're not married to any particular form of pre-emption language, we're dead serious about achieving pre-emption in all 50 states."

~ Tina Walls, Philip Morris (1994)

"[T]he ... tobacco companies' first priority has always been to preempt the field, preferably to put it all on the federal level, but if they can't do that, at least on the state level, because the health advocates can't compete with me on a state level."

~ Victor Crawford, former TI lobbyist

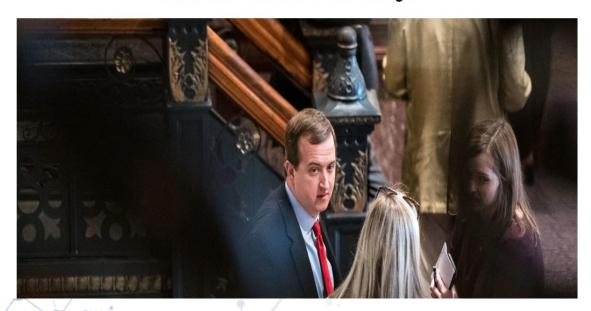




PREEMPTION — AN INDUSTRY TACTIC

The New york Times

In Washington, Juul Vows to Curb Youth Vaping. Its Lobbying in States Runs Counter to That Pledge.



The company's 80-plus lobbyists in 50 states are fighting proposals to ban flavored ecigarette pods, which are big draws for teenagers; <u>pushing</u> <u>legislation that includes</u> <u>provisions denying local</u> <u>governments the right to adopt</u> <u>strict vaping controls</u>.





THE NEW PREEMPTION: HOW IT ALL STARTED

This part expressly preempts regulation of smoking to the state and supersedes any municipal or county ordinance on the subject."

~ Fla. Stat. § 386.209



• During the 1990s:

- States with smoke-free preemption increased from 7 to 17
- States with youth access/point-of sale preemption increased from 1 to 22

~Givel MS, Glantz SA, Tobacco Lobby Political Influence on US State Legislatures in the 1990s, Tobacco Control 2001.





PREEMPTION TODAY

Haw. Rev. Stat. § 328J-11.5 (2018)

All local ordinances or regulations that regulate the sale of cigarettes, tobacco products, and electronic smoking devices are preempted, and existing local laws and regulations conflicting with this chapter are null and void.



ANNIVERSARY



Arkansas Act 580 (2019)

This subchapter and the rules and other actions of the 11 board shall preempt the enactment and enforcement of any county, municipal, 12 or other local regulation of the manufacture, sale, storage, or distribution 13 of tobacco products that is more restrictive than this subchapter[.]"



PREEMPTION TODAY

Blanket Preemption — lowa (lowa Code § 364.3(3)(C)(2018))

A city shall not adopt an ordinance, motion, resolution, or amendment that sets standards or requirements regarding the sale or marketing of consumer merchandise that are different from, or in addition to, any state law.

"Consumer merchandise" means merchandise offered for sale or lease, or provided with a sale or lease, primarily but not exclusively for personal, family, or household purposes, and includes any container used for consuming, carrying, or transporting such merchandise.

Punitive Preemption — Arizona

Ariz. Rev. Stat. Ann. § 41-194.01

"Violations of state law by counties, cities and towns; attorney general investigation; report; withholding of state shared revenues"





WHY PREEMPTION MATTERS

- Stalls momentum
- Results in weaker laws
- Trading future progress for short-term gain
- Difficult to roll back
- Tobacco-free movement had a rule--never accept preemption









Pre-Emption in Philadelphia

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Tobacco Policy and Control Program Manager

Philadelphia Department of Public Health

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Columnist Jenice Armstrong













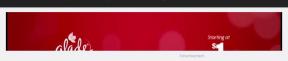
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Health - Kids & Families



Philly's No. 1 killer isn't guns or opioids - but it can be stopped | **Commentary**





Bittersweet



FY 19 Budget pre-emption language

- Section 232-A. Preemption.--(a) All powers and jurisdiction over dealers licensed under this article, and regarding or affecting the sale of tobacco products by dealers licensed under this article, shall reside in the Commonwealth unless any such power or jurisdiction is specifically granted to a political subdivision.
- (b) This section shall [not] apply to a city of the first class[.]as follows:
- (1) Except as set forth in paragraph (2), on and after the June 1, 2018, subsection (a) shall apply to a city of the first class.
- (2) Paragraph (1) does not apply to ordinances or regulations of a city of the first class in effect prior to June 1, 2018. Ordinances or regulations of the city of the first class regarding or affecting the sale of tobacco products by dealers licensed under this article shall remain in full force and effect until revoked, vacated or modified by the city of the first class.
- (c) As used in this section, the term "tobacco product" shall have the same meaning as defined in 18 Pa.C.S. § 6305(k) (relating to sale of tobacco).

- Preemption language was inserted into the FY19 PA fiscal code without public discussion
- Pre-empted Philadelphia's local autonomy to pass legislation focused on tobacco retail sales in the city
- Legislation passed before 6/1/18 will be grandfathered, including Philadelphia's tobacco retail regulations

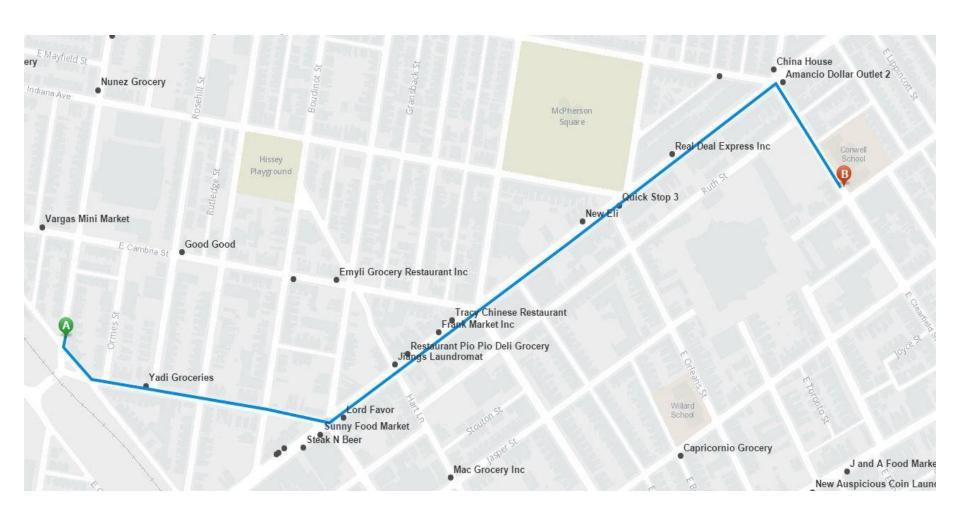
Tobacco Retail Regulations December 2016

The Board of Health regulates tobacco retailers

Philadelphia Code § 9-631(2)(C)(.7) empowers Board of Health to impose any requirement on issuance & renewal of a tobacco retailer permit, as long as requirement is "appropriate for the public health."

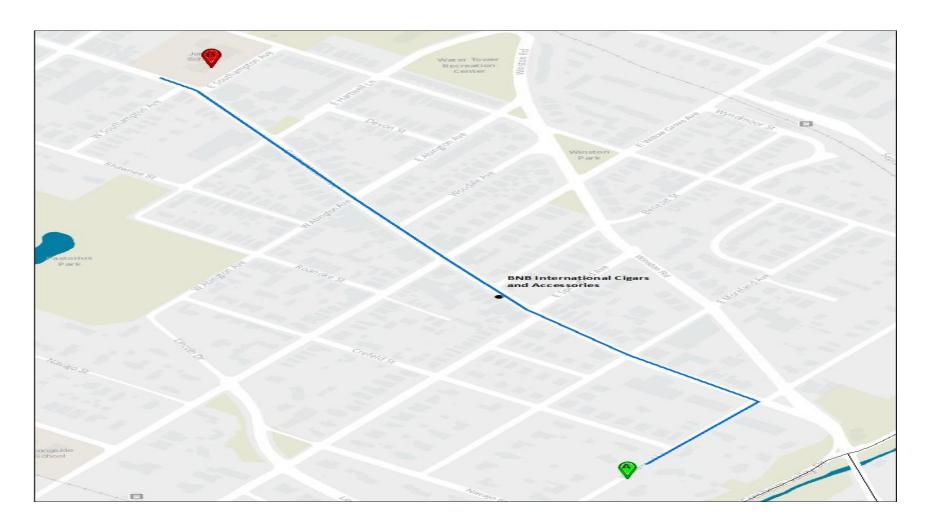
- 1. Tobacco Retailer Density Cap
- 2. Tobacco-Free School Zones
- 3. Increased permit fee to fund compliance checks
- 4. Tobacco Cease Sales Order for Repeated Youth Sales Violations

This is about parity and equality



A child walking to school in North Philadelphia passes 16 tobacco retailers

This is about parity and equality



A child walking to school in Chestnut Hill passes 1 tobacco retailer

This is about our children





The Pro-Equity Potential of Tobacco Retailer Licensing Regulations in Philadelphia

The regulations were implemented in a unanimous vote by the Philadelphia Board of Health and later endorsed through a city council resolution. Whereas the measures were opposed by the tobacco industry and some busi-

9.8% reduction in the total number of permits issued in the first year after implementation of the regulations

Bill 180522

- This bill would allow retailers who purchase a store that had a 2016 permit to obtain a permit regardless of proximity to schools or neighborhood tobacco density
- Philadelphia's tobacco retail regulations decrease the number of permits in school zones and overly dense neighborhoods via attrition; existing retailers were grandfathered
- Bill 180522 would dramatically slow that process of attrition
- Increased tobacco retailer density is associated with more youth smoking initiation and less success when attempting to quit smoking.

Next Steps

 Preserve, evaluate and publish on tobacco retail regulations regulations to ascertain public health impact

 Pursue local tobacco control policy in preemption environment

Educate legislators about pre-emption



Thank you!

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Goodbye Preemption, Hello Local Policies:

Oregon's Indoor Clean Air Act

Karen Girard April 30, 2019



Local preemption in Oregon tobacco laws

1 Taxes

2 Vending machines

But, there used to be one more...



History of Oregon's ICAA:

a series of ups and downs

1998-2001: 12 Oregon communities pass smoke-free workplace laws



2001: Statewide law passed,

including preemption

A local government may not prohibit smoking in any areas listed in ORS 433.850 (2) unless the local government prohibition was passed before July 1, 2001.



&





For six years...



History of Oregon's ICAA:

a series of ups and downs

2007*: Expansion of statewide law, preemption language removed!
*in effect January 1, 2009

2015: Inhalant delivery systems (ecigarettes) and cannabis included in the ICAA.





Since preemption was removed





Since preemption was removed



Smoke-free laws expanded in a few incorporated cities



Lessons

1 Adaptability

2 Readiness



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Questions and Answers

Submit your questions through the chat box on your screen









PHLC Preemption Resources

- Untangling the Preemption Doctrine in Tobacco Control
- Checked at the Check-Out Counter: Preemption at the Tobacco Point-of-Sale
- Preemption: The Biggest Challenge to Tobacco Control
- Why Preemption is Bad for Tobacco Control





Visit the TCN Website!

www.tobaccocontrolnetwork.org/



Tobacco Control Network

Thanks for visiting the TCN's new website! We're excited to unveil a new and improved look, simpler navigation, and new features to help you quickly access and share tobacco control information you need.

The Tobacco Control Network's (TCN) mission is to improve the public's

Coming Soon!

The website's members-only FORUM is a feature designed specifically for state or territory tobacco health department staff and Funders' Alliance staff (state-level members) to ask questions and share best practices.

New to the TCN Website

- New TCN state tobacco policy scans
- Full materials from TCN's three-part workforce development virtual series on tobacco industry tactics
- Opioids and tobacco summary presentation
- Any TCN inquiries can be directed to tcn@astho.org





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THANK YOU!





