UNTANGLING THE PREEMPTION DOCTRINE IN TOBACCO CONTROL

What is Preemption?

Preemption refers to the legal doctrine that establishes a general framework through which the laws of different levels of government interact. Due to the hierarchical structure of government, the laws of lower government units have to yield to higher government laws when there is conflict.[1] Thus, federal laws can preempt conflicting state law,[2] and likewise, state law can preempt the laws of lower state political subdivisions, such as counties, cities, and towns. When a law is preempted, it is invalid and has no effect. In a local tobacco control context, preemption removes decision-making authority from local governments and centralizes it in the federal and state governments.

Preemption may be express or implied. Express preemption refers to those instances in which a legislature has explicitly indicated its intention to preempt certain types of laws made by lower government units.[3] The Federal Cigarette Labeling and Advertising Act (FCLAA), for example, contains a provision expressly preempting state governments from regulating cigarette advertising.[4]

Implied preemption, on the other hand, arises when the legislature's intent is implicitly contained in a legislation's structure and purpose.[5] Courts have generally recognized two types of implied preemption: (i) field preemption, where a law so thoroughly occupies a legislative field that it would be reasonable to infer that the legislature left no room for the lower government to supple-

ment it;[6] and (ii) conflict preemption, which, as the name suggests, arises when lower government laws conflict with or are incompatible with the higher government's legislative objectives.[7]

Although these types of preemption are neatly classified in discrete conceptual categories, they often overlap,[8] making preemption questions difficult to answer with any certainty. To compound this uncertainty, courts have not applied preemption tests consistently.[9] Consequently, the murkiness that surrounds the nature and scope of preemption can frustrate and chill local public health efforts.

The Role of Localities in Advancing Public Health

The role that local communities play in the advancement of public health cannot be overstated. Localities, for example, have historically served as avenues for policy experimentation and have been at the forefront of adopting innovative policies that protect the public from the deleterious health effects of tobacco use.[10] The success of such innovative policies has, in turn, spurred other localities, states, and even the federal government, to adopt tried-and-tested policies to improve public health on a larger scale.[11] In 1994, for instance, the City of Baltimore adopted an ordinance prohibiting cigarette billboards located in certain parts of the city,[12] becoming the first local government to adopt such a measure.[13] Following Baltimore's lead, by 1998, numerous localities in the United States, including twenty-five of the most populous cities, had adopted similar restrictions.[14]

Also, in 2012, the City of Providence, Rhode Island, enacted an ordinance prohibiting most retailers from selling flavored tobacco products.[15] The ordinance withstood a preemption lawsuit, and Providence successfully implemented the law.[16] The successful adoption and implementation of the Providence flavor restriction ordinance continues to provide a model for other localities to adopt similar tobacco control strategies.[17] These examples illustrate how polices at the local level can engender a widespread pattern of policy innovation. If local policy experimentation is instead preempted, policies such as flavor restrictions and cigarette advertisements may never be embraced by other jurisdictions.[18]

Preemptive laws also prevent localities from adopting policies that are tailored to meet local needs. Our federal and state governments are composed of diverse constituencies, and policies adopted on a broad national or state level rarely address issues unique to those local communities in an equitable fashion. In order to address community-specific public health issues, it is therefore important that local communities retain the power to adopt public health measures tailored to their needs.[19] From a health equity standpoint, the use of local knowledge to forge community-specific solutions enables localities to employ a targeted approach to combat

health disparities and ensure equitable access to better public health.[20] Additionally, public health policies are most likely to succeed when they are adopted in a democratic process that ensures meaningful and direct engagement by the people most affected.[21] Localities are in the best position to provide this type of engagement with stakeholders in the public.

Given the negative impact of preemption on public health, all stakeholders should understand the nuances of preemption, how to spot it, and how it affects public health efforts. In the tobacco control realm preemption manifests itself in various ways, and, in some instances, it is difficult to determine whether a locality has the authority to adopt a particular public health measure. The purpose of this publication is to highlight a range of laws and court decisions dealing with preemption to show the ways in which it can hinder local tobacco control.

Local Government Power

To understand preemption and the role localities play in advancing public health, it is helpful to understand as well the authority localities typically possess and the source of local powers. It is generally accepted that local governments do not possess inherent powers — they can only exercise powers granted by the state government. States vary in the way they control their local governments. While some local governments are viewed as merely agents or administrative subdivisions of their state governments (non-home rule local governments),[22] other states permit local self-government, which gives localities extensive authority to make their own policy decisions (home-rule local governments).[23]

In most states, non-home rule local governments "may act only in areas and in ways specified by the state government."[24] This narrow interpretation of local government power is known as Dillon's Rule. According to Dillon's Rule, the total scope of local governmental powers consists of (1) powers expressly granted; (2) powers implied from expressly granted powers; and (3) indispensable powers that localities must have in order to function.[25] Thus, these localities have only enumerated powers,[26] and when the state legislature is silent on a subject localities may not regulate that subject.[27] For non-home rule locality to adopt a particular policy, it has to look first at state law to determine whether it has been granted the necessary authority. If a "fair, reasonable, substantial doubt" exists as to whether a locality has certain powers, the doubt is resolved against the locality.[28] Consequently, not only does Dillon's Rule limit local authority to address different aspects of public health, it also creates uncertainty as to the existence and scope of local power, which chills local public health efforts.[29]

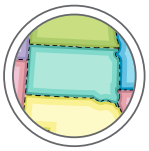
Recognizing limitations imposed upon localities by Dillon's Rule, some states have instead adopted the home rule doctrine. Although home rule arrangements vary across the United States,

the general understanding is that home rule serves both as a grant of power to localities and a limitation on state control of these localities.[30] Under the home rule doctrine, localities decide for themselves the form of local government they desire and the scope of its powers. Unlike localities under the Dillon's Rule regime, which have to look for specific enumeration of power to act, local public health efforts in home rule jurisdictions may enact regulations in areas where state law is silent. Public health efforts in home rule localities are not as bedeviled by the uncertainties of the existence and scope of authority as those under Dillon's Rule. Commenting on the significance of the home rule doctrine, one local government scholar has noted that "home rule has made a fairly substantial addition to local powers, and in many instances, local governments may not have appropriated or used the delegated power to its full extent."[31] Under home rule authority, localities are able to adopt robust, innovative public health measures without looking to state law for express authorization to do so.

Note that Dillon's Rule deals with the general existence of local authority, whereas preemption occurs where such local authority would exist but for the actions taken by a higher level of government. Dillon's Rule issues are typically evaluated prior to assessing whether or not a particular governmental action is preempted.

Express Preemption

A Lesson from South Dakota



As noted above, preemption questions are determined by analyzing the legislature's intent,[32] and, in some cases, the intent can be expressly stated in the statute's text. In cases where the concern is about express preemption, ascertaining whether a locality has the authority to regulate is often relatively straightforward. South Dakota's tobacco preemption statute, for example, explicitly preempts a broad swath of tobacco control policies. S.D. Codified Laws § 34-46-6 specifically states:

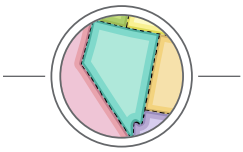
Enforcement of this chapter shall be implemented in an equitable and uniform manner throughout the state so as to ensure the eligibility for and receipt of any federal funds or grants that the state now receives or may receive relating to the provisions of this chapter. For the purposes of equitable and uniform regulation and implementation, the Legislature through this chapter is the exclusive regulator of all matters relating to the distribution, marketing, promotion, and sale of tobacco products.[33]

As the above text shows, South Dakota law explicitly withdraws from local governments the authority to adopt tobacco control measures and centralizes it in the state legislature as "exclusive regulator." By looking at the text of this statute, it is readily apparent that South Dakota

law preempts localities' authority to regulate the distribution, marketing, promotion, and sale of tobacco products. This has broad policy implications. For example, under current South Dakota law, a locality may not adopt an ordinance prohibiting the sale of tobacco to a person under 21 years of age because local regulation of tobacco sales is expressly preempted.[34]

Ambiguous Express Preemption

Lessons from South Carolina and Nevada



Even in cases where there is express preemption, a statute's preemptive scope may be difficult to determine. Although this issue may arise in different instances, it certainly occurs when the express preemption statute is ambiguously written. The South Carolina law governing youth access to tobacco provides one example of an express preemption statute with unclear scope, due to its ambiguous wording. The preemption statute, in relevant part, states:

Sections 16-17-500, 16-17-502, and 16-17-503 [—sections addressing youth access to tobacco products —] must be implemented in an equitable and uniform manner throughout the State and enforced to ensure the eligibility for and receipt of federal funds or grants the State receives or may receive relating to the sections. *Any laws, ordinances, or rules enacted pertaining to tobacco products or alternative nicotine products may not supersede state law or regulation*.[35]

At first blush, the South Carolina youth access preemption statute appears to be limited to youth access. However, by including a general reference to tobacco products or alternative nicotine products (in sentence emphasized above), it was argued that this law preempted all local regulation of tobacco products and alternative nicotine products. The scope of this ambiguous express preemption provision was litigated in two county courts, which issued two conflicting decisions.[36] It was not until the South Carolina Supreme Court stepped in that the preemption question was partially resolved—to the extent that localities can now regulate smoking.[37]

The South Carolina Supreme Court resolved questions surrounding this statute's preemptive reach in *Foothills Brewing Concern, Inc. v. City of Greenville*,[38] a case where restaurant and bar operators challenged the City of Greenville's ordinance that comprehensively regulated smoking in public places. In the *Foothills* case, the challengers argued that the statute preempted not only youth access but also the regulation of public smoking. The South Carolina Supreme Court, however, rejected this argument and concluded that the plain reading of the preemption statute showed that it only preempted local regulation of youth access, not the entire "field" of public smoking regulation.

State House, Columbia, South Carolina.

Despite this ultimate victory, the Greenville clean indoor air ordinance had been successfully challenged in the lower court and it was not until after almost a year and a half of litigation that this preemption question was finally resolved by the South Carolina Supreme Court. The *Foothills* case is a good example of how an unclear preemption statute can not only chill local tobacco control efforts but also derail local tobacco control efforts through lengthy and costly litigation. Unclear preemption statutes like this are more challenging for localities with limited budgets, which may not have the resources to sustain protracted legal battles.

Ambiguous express preemption statues are not unique to South Carolina. In fact, Nevada's preemption of more-stringent local youth access laws is similar to South Carolina's in several respects. Section 202.249(4) of the Nevada Code states:

Except as otherwise provided in subsection 5, an agency, board, commission or political subdivision of this state, including, without limitation, any agency, board, commission or governing

body of a local government, *shall not impose more stringent restrictions on the smoking, use, sale, distribution, marketing, display or promotion of tobacco or products made or derived from tobacco* than are provided by [sections] 202.2491, 202.24915, 202.2492, 202.2493, 202.24935 and 202.2494 [—the sections governing youth access].

Looking at the Nevada code sections governing youth access, it would appear that the statute's preemption reach would be limited to local laws regulating the furnishing of tobacco products to minors. However, the Nevada statute's general reference to other areas of tobacco control — i.e., smoking, use, sale, distribution, marketing, display or promotion of tobacco or products made or derived from tobacco — creates an ambiguity making its preemption reach potentially broader.

In practice, unclear preemption statutes, such as Nevada's and South Carolina's, frustrate local tobacco control efforts because they create uncertainty regarding what areas of tobacco control can be addressed on a local level. Additionally, special interest groups like the tobacco industry capitalize on the confusion created by ambiguous preemption statutes to threaten localities with lawsuits if they adopt public health measures.[39]

Uniformity and Conformity Requirements

A Lesson from Wisconsin

In other instances, even when a law does not expressly preempt a particular subject of local tobacco control, it may be implicitly preemptive if it emphasizes the need for uniformity on the state level.[40] In most cases where there is the potential for implied "field" preemption, it is hard to determine from the statutory text alone whether the legislature has intentionally withdrawn the authority of local governments to adopt certain tobacco control measures.

This type of preemption challenge was successfully used in *U.S. Oil Inc. v. City of Fond Du Lac*[41] to strike down a tobacco control ordinance in Wisconsin. The *U.S. Oil* case involved a city ordinance restricting the use of self-service displays that enabled customers to access cigarettes without the assistance of a clerk. Various business owners challenged the ordinance claiming that "because the state legislature had enacted comprehensive regulations governing the sale and use of tobacco, the city had overstepped its police power when it enacted [the] ordinance."[42] The Wisconsin Court of Appeals agreed with the challengers and concluded the ordinance was invalid because the state preempted the entire field of tobacco distribution regulation when it enacted particular statutes governing tobacco.

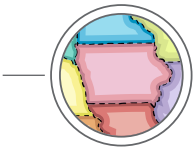
Central to the *U.S. Oil* Court decision was a provision in the state cigarette statute stating that "[cigarette tax statutes] shall be construed as an enactment of statewide concern for the purpose of providing a uniform regulation of the sale of cigarettes."[43] Although the statute only specifically required uniformity in cigarette taxation, the court nevertheless extended this cigarette taxation requirement "to all aspects of tobacco distribution."[44]

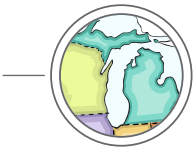
In addition to finding field preemption based on the uniformity requirement, the *U.S. Oil* Court determined that local authority to regulate selling of tobacco using self-display services was preempted because the Wisconsin youth access statute required local ordinances to strictly conform with it. Although the text of the statute explicitly limits the "strictly conform" language to youth access, the court read it so broadly as to prohibit localities from regulating even those areas of tobacco control on which state law was silent.[45] Moreover, the court's decision in *U.S. Oil* did not address any limits to the preemptive scope of the cigarette tax and tobacco distribution laws it found. Therefore, to this day it remains unclear whether a Wisconsin locality may, for example, restrict the sale of flavored tobacco products.

The *U.S. Oil* case illustrates how seemingly distinct provisions within a tobacco statutory structure can be read broadly by a court to preempt most local tobacco control law.

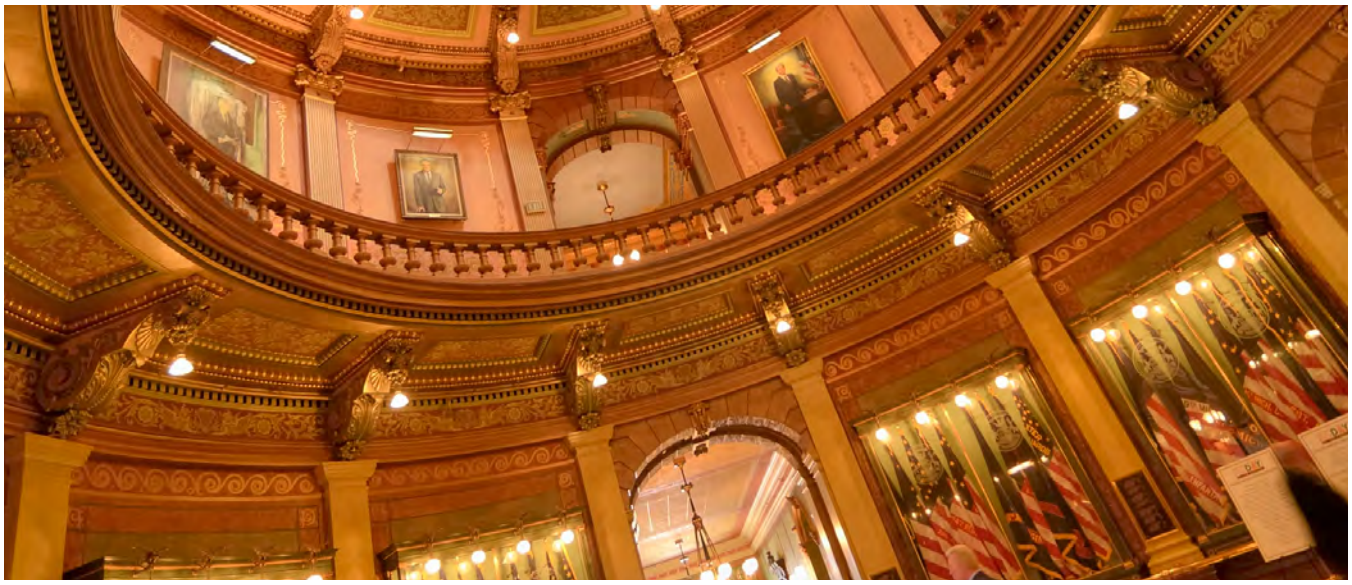
Preemption by Statutes of General Application

Lessons from Michigan and Iowa





Preemption can arguably also be found in other statutes of general application that do not specifically address tobacco. In Michigan, for example, the state Age of Majority Act[46] — a legislation of general applicability — has been used to challenge a local ordinance raising the minimum age for tobacco purchase to 21 years.[47] The preemption proponents in this case argue that raising the minimum age for tobacco purchase to 21 years conflicts with a state statute that expressly bars laws that treat people aged between 18 to 21 years differently from people over 21.[48] This interpretation of the Michigan Age of Majority Act relating to preemption of local regulation stems from Michigan's history of tobacco regulation at the state level. For many years, Michigan law (the Youth Tobacco Act) prohibited the sale of tobacco to persons under 21 years. In 1972, that law was amended to permit 18-year-olds to purchase tobacco. In the same year, the Age of Majority Act also took effect, changing the definition of an "adult" from 21 years to 18 years. The proponents therefore argue that by enacting two statutes with corresponding age provisions, the legislature intended to preempt local laws that set inconsistent age requirements.[49] The case challenging the Michigan county ordinance is currently ongoing.



Capitol Building, Lansing, Michigan.

A recently enacted Iowa statute is another example of a general law outside tobacco-specific legislation that would preempt local tobacco regulation. The Iowa local government law contains provisions that generally circumscribe local government powers. Iowa Code § 331.301(6)(c)(1), which limits a county's power to impose certain restrictions on consumer merchandise, specifically states:

A county 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 requirement established by state law.

Consumer merchandise, which would include tobacco products, is defined as "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."[50] This same broad preemptive restriction is also imposed on cities.[51]

These examples from Michigan and Iowa illustrate how difficult preemption questions can be to parse. In some cases, even a thorough review of tobacco legislation may not be enough to assess whether a locality has the authority to regulate tobacco. Thus it is very important to seek the assistance of an attorney who is familiar with the laws of a particular jurisdiction prior to undertaking any tobacco control efforts at the local level.

The Way Forward

Preemption laws are not permanent fixtures in legal structures, and, just like any other law, they can be amended or repealed. In the last thirteen years, at least seven states have successfully repealed laws preempting local authority regulating smoking.[52] In Oregon, for example, prior to 2009, state law prohibited local governments from restricting smoking in certain public places.[53] The Oregon preemption statute, however, was successfully repealed by a 2007 bill that became effective January 1, 2009.[54]

Conclusion

Preemption can be a thorny issue when it comes to assessing a local government's ability to adopt tobacco control measures. Preemption arises in different forms, and a locality's ability to address tobacco may be preempted by laws both within and outside tobacco-specific legislation. Even in cases where preemption is explicit, the breadth of such preemptive statutes may be difficult to determine. The uncertainty that preemption presents can frustrate local tobacco control efforts, as localities become wary of adopting measures that could potentially lead to protracted and costly legal battles. To guard against the uncertainty that preemption presents, it is advisable for legislatures to explicitly preserve local control in all tobacco legislation. Including a "savings clause" in a law addressing tobacco goes a long way toward preserving local control and policy innovation. For example, when the Family Smoking Prevention and Tobacco Control Act was enacted, it included a savings clause explicitly stating that it does not preempt state and local governments from enacting more stringent restrictions governing tobacco sales and distribution, youth possession, tobacco use, fire safety standards, or taxes on tobacco products.[55] Adopting similar provisions in future tobacco legislation would help to preserve local authority and guard against preemption threats from the tobacco industry.

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Endnotes

1 The preemption doctrine is derived from Art. VI of the United States Constitution, which contains the Supremacy Clause.

2 Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 108 (1992) ("But under the Supremacy Clause, from which our pre-emption doctrine is derived, 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield.'").

3 Jamelle C. Sharpe, *Toward (a) Faithful Agency in the Supreme Court's Preemption Jurisprudence*, 18 Geo. Mason L. Rev. 367, 380 (2011).

4 15 U.S.C. § 1334 (b) states: "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter."

5 Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 516 (1992).

6 *Id.*

7 Conflict preemption is further divided into two subcategories. The U.S. Supreme Court has noted that "conflict pre-emption exists where 'compliance with both state and federal law is impossible,' or where 'the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1595 (2015). By and large, analysis of the preemption doctrine on the state level is similar to that on the federal level.

8 English v. Gen. Elec. Co., 496 U.S. 72, 79 n.5 (1990) ("By referring to these three categories, we should not be taken to mean that they are rigidly distinct. Indeed, field pre-emption may be understood as a species of conflict pre-emption: A state law that falls within a pre-empted field conflicts with Congress' intent (either express or plainly implied) to exclude state regulation.")

9 *See* Paul Diller, *Intrastate Preemption*, 87 B.U. L. Rev. 1113, 1116 (2007) (discussing how state courts have applied preemption tests inconsistently, thus creating confusion that invites preemption challenges that would not have been brought if the law were clearer).

10 In *New State Ice Co. v. Liebmann*, Justice Brandeis extolled the role local and state governments played as "laboratories of democracy." 285 U.S. 262, 311 (1932).

11 Diller, *supra* note 9, at 1119.

12 Penn Advert. of Baltimore, Inc. v. Mayor & City Council of City of Baltimore, 862 F. Supp. 1402, 1404 (D. Md. 1994), *aff'd sub nom.* Penn Advert. of Baltimore, Inc. v. Mayor & City Council of Baltimore, 63 F.3d 1318 (4th Cir. 1995), *cert. granted, judgment vacated sub nom.* Penn Advert. of Baltimore, Inc. v. Schmoke, 518 U.S. 1030, 116 S. Ct. 2575, 135 L. Ed. 2d 1090 (1996), *and adopted as modified*, 101 F.3d 332 (4th Cir. 1996), *and aff'd sub nom.* Penn Advert. of Baltimore, Inc. v. Mayor & City Council of Baltimore, 101 F.3d 332 (4th Cir. 1996).

13 Paul A. Diller, *Why Do Cities Innovate in Public Health? Implications of Scale and Structure*, 91 Wash. U.L. Rev. 1219, 1226 (2014).

14 *Id.*

15 Nat'l Ass'n of Tobacco Outlets, Inc. v. City of Providence, 731 F.3d 71 (1st Cir. 2013).

16 *See also* U.S. Smokeless Tobacco Mfg. Co. LLC v. City of New York, 708 F.3d 428 (2d Cir. 2013) (holding that federal law did not preempt New York City's regulation of flavored tobacco products).

17 *See, e.g.*, Massachusetts Department of Public Health, Flavored Tobacco Product Restriction Enforcement Guide 2, http://files.hria.org/files/TC3476.pdf (noting that the Massachusetts Association of Health Boards and Massachusetts Municipal Association developed model flavor regulations to be adopted by localities based on the Providence, RI, ordinance).

18 Diller, *supra* note 9, at 1119.

19 *See* Frank J. Goodnow, City Government in the United States 39 (1908) (describing localities in the United States as "organ[s] for the satisfaction of local needs"); State v. Hutchinson, 624 P.2d 1116, 1122 (Utah 1980) ("The wide diversity of problems encountered by county and municipal governments are not all, and cannot realistically be, effectively dealt with by a state legislature which sits for sixty days every two years to deal with matters of general importance.").

20 Julie Ralston Aoki et al., *Maximizing Community Voices to Address Health Inequities: How the Law Hinders and Helps*, 45 J. Law Med. Ethics, 11 (2017).

21 *Id.*

22 *See* Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907) ("Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted [sic] to them."); Dale Krane, et. al., Home Rule in America: A Fifty-State Survey, at ix (2001) ("[L]egal theory in the United States declares local government to be the agent, creature, and delegate of state government.") (citation omitted).

23 Dale Krane, et. al., Home Rule in America: A Fifty-State Survey, at ix (2001); *see City of Lafayette, La. v. Louisiana Power & Light Co.*, 435 U.S. 389, 435 n15 (1978) ("Local self-government is broadest in 'home rule' municipalities, which can be almost entirely free from legislative control in local matters.").

24 Krane, *supra* note 23, at 1.

25 2 McQuillin Mun. Corp. § 4:11 (3d ed. 2018).

26 Osborne M. Reynolds, Local Government Law 171 (3d ed. 2009).

27 Blevins v. Hiebert, 247 Kan. 1, 5, 795 P.2d 325, 328 (1990).

28 2 McQuillin Mun. Corp. § 4:11 (3d ed. 2018).

29 *See* Richard Briffault, *Home Rule, Majority Rule, and Dillon's Rule*, 67 Chi.-Kent L. Rev. 1011, 1024 (1991). ("Dillon's Rule chills local autonomy in practice, by causing the invalidation of local measures and by inducing local[ities] to seek state political solutions to local problems out of a concern that a local ordinance might not withstand judicial scrutiny."); *see also* Sarah Miller, *Virginia Is for Business Owners Who Feel the Human Rights Commission Poses a Threat to Their Religious Liberties*, 14 Wm. & Mary J. Women & L. 659, 662 (2008) (noting that Dillon's Rule in Virginia makes local leaders reticent to enact progressive measures in fear of their exercise of power being legally challenged).

30 Osborne M. Reynolds, Local Government Law 112 (3d ed. 2009).

31 Sandra Stevenson, 1 Antieau on Local Government Law, §21.02 (2d ed. 2007).

32 *See* Altria Grp., Inc. v. Good, 555 U.S. 70, 76 (2008) ("Our inquiry into the scope of a statute's pre-emptive effect is guided by the rule that the purpose of Congress is the ultimate touchstone' in every pre-emption case.").

33 South Dakota has a companion preemption statute addressing use of tobacco products. S.D. Codified Laws § 10-50-64 states: "The Legislature is the exclusive regulator of all matters relating to the use of tobacco products. Nothing prohibits a person or a public entity from voluntarily regulating the use of tobacco products on the person's or entity's property."

34 Under S.D. Codified laws § 34-46-2, it is unlawful to knowingly sell or distribute a tobacco product to a person under the age of 18.

35 S.C. Code § 16-17-504 (emphasis added).

36 *Compare* Beachfront Entm't, Inc. v. Town of Sullivan's Island, No. 2006-CP-10-3501, 2006 WL 6102859 (S.C. Ct. Com. Pl. Charleston Cty Dec. 20, 2006) (holding that this preemption language relates to distributing of tobacco products to minors, not smoking), *with* Foothills Brewing Concern, Inc. v. City of Greenville, No. 2006-CP-23-7803, 2007 WL 3052337 (S.C. Ct. Com. Pl. Mar. 8, 2007), *rev'd* 660 S.E.2d 264 (S.C. Super. Ct. 2008) (holding that the South Carolina youth access preemption statute preempted local regulation of smoking).

37 Foothills Brewing Concern, Inc. v. City of Greenville, 660 S.E.2d 264 (S.C. Super. Ct. 2008).

38 *Id.*

39 *See e.g.*, Clark Mason, *Healdsburg Suspends Its Over-21 Requirement for Buying Tobacco*, The Press Democrat, Oct. 12, 2015, http://www.pressdemocrat.com/news/4606690-181/healdsburg-suspends-its-over-21-requirement (reporting that Healdsburg, CA, had decided to suspend its adoption of a Tobacco 21 measure due to a threat of a lawsuit by the National Association of Tobacco Outlets). *See generally* Allison M L Nixon et al., *Tobacco Industry Litigation to Deter Local Public Health Ordinances: The Industry Usually Loses in Court*, 13 Tobacco Control 65-73 (2004), http://tobaccocontrol.bmj.com/content/13/1/65.info.

40 5 McQuillin Mun. Corp. § 15:18 (3d ed. 2018); *See, e.g.*, Boston Gas Co. v. City of Somerville, 420 Mass. 702, 705–06, 652 N.E.2d 132, 134 (1995) ("[W]e conclude that the [city] cannot use its limited authority to enact an ordinance which has the practical effect of frustrating the fundamental State policy of ensuring uniform and efficient utility services to the public."); Iowa Grocery Indus. Ass'n v. City of Des Moines, 712 N.W.2d 675, 681 (Iowa 2006) (invalidating a local ordinance that imposed an additional administrative fee on application for liquor license because it "disturbed," and did not "substantially comply with, the uniformity so meticulously established by" the Iowa Alcoholic Beverages Control Act).

41 U.S. Oil, Inc. v. City of Fond Du Lac, 544 N.W.2d 589 (Wis. Ct. App. 1996).

42 *Id.* at 591.

43 Wis. Stat. § 139.43.

44 *U.S. Oil, Inc.*, 544 N.W.2d at 593. This case is also a good example of how a court's interpretation of implied preemption can create further confusion about the scope of preemption. The *U.S. Oil* Court's statement that the cigarette tax uniformity requirement extends "to all aspects of tobacco distribution" appears to suggest that all local regulation of tobacco products would be preempted.

45 *U.S. Oil, Inc.*, 544 N.W.2d at 595 ("The overall depth of legislative coverage in the field of tobacco sales informs us that the 'strict conformity' language was intended to stop local rulemaking wherever the state law was silent, not enable it.").

46 Mich. Comp. Laws § 722.52(2)(1) states:

> Except as otherwise provided in the state constitution of 1963 and subsection (2), notwithstanding any other provision of law to the contrary, a person who is at least 18 years of age on or after January 1, 1972, is an adult of legal age for all purposes whatsoever, and shall have the same duties, liabilities, responsibilities, rights, and legal capacity as persons heretofore acquired at 21 years of age.

47 RPF Oil Co. v. Genesee Cty, No. 17-109107-CZ (Mich. Cir. Ct., Genesee Cty. May 12, 2017).

48 2017 Mich. Op. Att'y Gen. No. 7294 (Feb. 2, 2017).

49 *Id.*

50 Iowa Code § 331.301(6)(c)(1)(a).

51 *See* Iowa Code § 364.3(3)(c)(1) ("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 requirement established by state law.").

52 Centers for Disease Control and Prevention, State Tobacco Activities Tracking & Evaluation, State System Preemption Fact Sheet (2017).

53 The prior preemption statute, Or. Rev. Stat. § 433.863, provided: "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."

54 *See* 2007 Oregon Senate Bill No. 571 (2007).

55 Family Smoking Prevention and Tobacco Control Act, Publ. L. No. 111-31, 123 Stat. 1776 (June 22, 2009) (codified as amended throughout 5 U.S.C., 15 U.S.C., and 21 U.S.C.), http://www.publichealthlawcenter.org/sites/default/files/resources/fda-tobacco-regulation-final-bill.pdf.