

TSET Better Health Podcast Transcript

Episode 35: Preemption: Foe of Public Health and Local Control

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Summary: Governing by the will of the people is assumed in democracy – unless preemption is involved. Such is the case with local tobacco laws in Oklahoma cities. Preemption is when a higher level of government limits or eliminates the power of a lower level of government to regulate on a particular issue. Since 1987, Oklahoma cities and towns have been prohibited from adopting tobacco restriction ordinances that go beyond state law. So local municipal leaders who want to further protect residents from harmful tobacco use in public places cannot do so. This TSET Better Health Podcast episode explores the public health and local governance issue with Doug Matheny, a policy expert at the TSET Health Promotion Research Center, Tahlequah City Councilman Stephen Highers, and Thomas Larson, TSET director of public information and outreach.

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[Theme music]

James Tyree: Hello and welcome to the TSET Better Health Podcast. This is your host James Tyree, senior health communication consultant at TSET.

Dylan Jasna: And I am Dylan Jasna, a health communication manager here at TSET. I'm very happy to join you and our listeners today for our first podcast episode of 2023. I hope everyone's new year is off to a great start. As we explore topics that explore the health and well-being of Oklahomans, today we are going to discuss a topic that some may not even know about.

J. Tyree: That is true, Dylan, and that topic is pre-emption. What the heck is pre-emption? In a nutshell, it is when a higher level of government limits or even prevents a lower level of government from regulating a particular issue. This is the case with tobacco-related laws in Oklahoma, and today we are going to hear how that affects not only local control, but also our public health and the air we breathe.

D. Jasna: In this episode we will hear from a city councilman from Tahlequah for perspective on local governance, and our own Thomas Larson, TSET director of public information and outreach, for a broader statewide look on preemption's effect on both policy and health.

J. Tyree: But first legendary expert on tobacco policy here in Oklahoma, who is very well acquainted with the history of tobacco policy, including pre-emption, the influence of the tobacco industry on our laws, and the toll that has taken on the health of Oklahomans.

D. Matheny: **(00:30)** I'm Doug Matheny. I'm a programs and initiatives manager for state and local policy at the TSET Health Promotion Research Center.

J. Tyree: Doug gives us an excellent rundown of how and why tobacco pre-emption laws came to be in Oklahoma, dating as far back as 1987. Very interesting, indeed.

D. Matheny: (2:50) The reason why that happened was because the tobacco lobbyists at the Oklahoma State Capitol had been noticing that communities across the state were starting to take interest in protecting members of their community from exposure to secondhand tobacco smoke inside public places like restaurants, for instance. So they were starting to act on that, and these lobbyists realized that they didn't have much influence at the local level. They weren't able to be as effective as they had been at the state level and keeping things like that from happening. Of course, the tobacco companies didn't want any restrictions whatsoever on smoking in public places, and nothing had happened at the state level that was very meaningful. Very few restrictions on where people could smoke and when.

(3:54) So communities were starting to act. The lobbyists were getting a little worried that the communities were going to actually adopt these ordinances at the local level, and they wouldn't be able to stop it. So they acted quickly at the state capitol and managed to get this law passed that said, "Communities could not do this. They could not pass laws on tobacco issues, specifically on smoking in public places at the time, that are any more stringent than state law."

J. Tyree: So tobacco pre-emption hampered public health efforts for three and a half decades. But it's also a reversal of how we typically do things in America.

D. Matheny: (1:27) Preemption is when a higher level of government prohibits a lower level of government from taking action on a particular issue. It's really not the norm. It's contrary to the widely supported principle that government closest to the people is generally the best for setting public policy. Generally speaking, local governments are seen as leaders in innovation, and they tend to have less political influence. They tend to be able to really fight more for the interest of the members of their community more directly without as many lobbyists at the local level, for instance. And it's actually common for state governments to learn from communities on what works best before state laws are passed on particular issues. So it's really kind of backwards when you have preemption where a state government tells the communities in their state that they're not allowed to adopt laws beyond what the state says on a particular issue.

J. Tyree: Yes, that is backward. But this is where we are right now. So how does Oklahoma compare to other states when it comes to protecting its people from tobacco use in public places

D. Matheny: (6:05-ish) Oklahoma is only one of two states that neither has a strong statewide workplace smoking smoke-free law that all workplaces are required to be a hundred percent smoke-free, including all restaurants and bars. Or they let communities take that action, and communities have taken action in those states, of course, where they're allowed to take action. So only the states of Oklahoma and Virginia, neither have a statewide smoke-free workplace law or allow communities to take action on this.

J. Tyree: Doug then mentions how, exactly, how pre-emption in Oklahoma affects the lives of us everyday Oklahomans, well, every day.

D. Matheny: (7:13) Well, of course, you have to start with the fact that smoking is the leading preventable cause of death in the state of Oklahoma and nationwide. When you have a problem that is of that scope and you take away the right of communities to act to address it, of course it has a huge impact. The only interest served by having preemption on tobacco issues in the state of Oklahoma is the interest of the tobacco industry. It is harming Oklahomans, Oklahoma families, coworkers. It affects all of our lives because again, the scope of the problem is so large.

J. Tyree: That is the public health side, which can literally come down to life or death. But there is more to realize and consider when it comes to tobacco pre-emption in Oklahoma.

D. Matheny: (8:28) Well, you could look at this just from an ethical standpoint. The tobacco companies basically take credit for having written this law back in 1987. We know that because of their internal documents. Internal documents that were never supposed to have been made public, but were made public because of legal actions against tobacco companies that were found in discovery. These documents show very clearly that they basically wrote this law in 1987. For instance, I'm looking at a document in front of me here, just one quote from a document written on May 7th, 1987, where the lobbyist for the Tobacco Institute at the time, Mandell Matheson said, "As you know, I've been working with Ken at the state level aiming at making any state law preempt local ordinances so this battle doesn't take place in all 950 cities and towns in Oklahoma." Again, basically they own this. There have been many documents since then that have been written that are now public that talk about how they wrote this law and that they fight to prevent it from ever being changed.

(9:51) So when you think about an industry writing laws about what they are in business, in this case tobacco, for and they're writing their own laws, there are just some basic ethical considerations. I'll take that one step further and point out that in the case of the tobacco industry, you're actually dealing with companies that have been found to have violated civil racketeering laws at the federal level. In 2006, 20 years roughly after the 1987 preemption bill passed, a federal court found major US tobacco companies, Philip Morris, R.J. Reynolds, others to have violated racketeering laws going back to 1953. So that 1987 time period was right kind of in the middle of that period in which the racketeering verdict looked at. So this isn't just any industry. This is an industry found guilty of racketeering, and they basically wrote a law and they have written other laws, maybe a topic for future discussions as well, according to their documents that are still on the books in the state of Oklahoma. Obviously, that's a major concern just from an ethical standpoint.

J. Tyree: Wow, that's pretty heavy. So what is happening now or in the near future relating to tobacco companies and this racketeering?

D. Matheny: (00:31, Matheny 2) This would actually be pretty good timing for revisiting this important issue, because on the issue of secondhand smoke, we know that the tobacco

companies are about to finally have to publish something called corrective statements that talk about what the actual facts are on the health effects of secondhand smoke. This is an issue of course, that the tobacco companies denied for many years. They lied about the health effects of secondhand smoke when they knew what the actual effects were. So, as a result of the Racketeering Verdict ...

(1:29, Matheny 2) The corrective statements are actually going to appear in most retail stores across the state. They're going to be on signs. And again, part of these corrective statements deal directly with the issue of secondhand smoke. So, the fact is, the tobacco companies lied about the health effects of secondhand smoke, and they not only lied to the general public, they lied to lawmakers. And that's one reason why we still have laws on the books today that are out of date, that are misinformed, that really need to be corrected.

J. Tyree How can these laws be corrected?

D. Matheny: (14:51) Well, of course, all individuals have the opportunity, and you might say responsibility to communicate with their elected officials on any issue that is of concern to them. So that's certainly the most direct way, I suppose. But they can also educate their communities to just raise the issue as something of concern to them that they would like to see action taken on by just sharing the news with others and sharing this information with others. Because a lot of people really don't have this information. It's not something that people think of every day. People assume that our laws are generally written in the best interest of Oklahomans, but this is certainly an example where that's not the case.

J. Tyree: Doug, you know about state and national tobacco policy and its history. But to bring it all home for us, as families and individuals, why are strong smokefree and tobacco-free laws so important?

D. Matheny: (12:56) Smoke-free laws are really important, not just for reducing secondhand smoke, although that's very important in and of itself, but also because it helps provide an environment that's more conducive for quitting. Most smokers are trying to quit, and most smokers wish they had never started. They typically started as kids and they're trying to quit. So when you eliminate smoking in public places, it not only reduces secondhand smoke, it also helps support smokers who are trying to quit completely.

(13:30) And it also helps actually to prevent people from starting to smoke because a lot of people, young people in particular, tend to start smoking in social settings. When you have smoking inside bars, for instance, and young people are looking up to their peers who are going to bars and smoking there, and then when they're old enough, they'll go into these bars and start to smoke to emulate people that they look up to just a little bit older than them. That's where a lot of addiction to tobacco and smoking cigarettes starts. So really, it's very important that we join the other 48 states that either have smoke-free laws for all workplaces at the state level, or we return the rights of communities as is normally done to be able to take action on this issue.

(Music)

- D. Jasna: Smokefree laws for all workplaces in the state, or returning the rights to local communities for making those decisions – that would go a long way toward protecting the health and lives of Oklahomans of all ages. That was great information from Doug Matheny on broader and historical levels, but now let's here from a city lawmaker to get one person's perspective on the local level.
- S. Highers: (0:19) So my name is Stephen Highers and I am on the Tahlequah City Council. I've been on the city council for the last eight years, and so I've seen a little bit of progression here on some of our policy.
- D. Jasna: So, how would you describe tobacco policy within the city of Tahlequah?
- S. Highers: (0:47) So in Tahlequah, we really work hand in hand with the TSET group here in Cherokee County, and we've passed some pretty strict, I think, tobacco policy. Obviously, our policy is smoking tobacco or dipping tobacco. I don't know a better way to say that. And we've also recently expanded it to vaping as well. And we don't allow that to be on city property at all. And so we also have expanded it to vehicles. And so outside of... We don't allow it to be in city vehicles and things like that. And so we just really have a robust policy around tobacco products and not allowing that to be on city property or in whatnot.
- D. Jasna: Stephen, why was it so important to you and the city council the strongest tobacco-free ordinance you could on city property?
- S. Highers: (1:59) I can't speak for the entirety of the council, but I can say it is really important to work toward policy that helps have a healthy, kind of vibrant community. And I think that's one of the main goals that I've had as I've been on the city council is to work to make sure that we're putting policy in place that is good for our community, it's good for our community's health, and is good for the future of Tahlequah. And you can't be a community that is proud of all of the things that nature has to offer, and getting people out and about, and walking, and enjoying all of our natural resources if the person next to you is smoking cigarettes or they just have some of those unhealthy habits. And so I think that's really why it's been so important and why it has been something that our community has really taken hold of and supported along the way.
- D. Jasna: The overall support for the ordinance is great, but have you encountered any pushback?
- S. Highers: (3:22) Sure. So every time that it has come before us, of course we have a few that aren't happy, but by and large, you really get great feedback. People enjoy not having to have those issues when they're enjoying time at the park or they're enjoying time with their family, not having to come into those situations, whether that be the downtown park or whether it be the ball fields and when they're watching their kids play ball, or whatnot. And so, by and large, it has really been positive and people are really appreciative.

D. Jasna: Would you like to adopt even *stronger* laws to protect Tahlequah residents and visitors from harmful tobacco smoke?

S Highers: (7:03) I mean, we can't really go more than what the state laws are. And so I think that over the course of, especially my time on the city council, over the last eight years, we've really worked hand in hand with our local TSET to make sure that we are adopting policy that is really needed. And as the environment changes or the way that products roll out and things like that, that we're making sure that we're encompassing those new changes and that we're bringing our laws up to date. And so I think that Tahlequah, we have a very strict policy. And if our TSET... We have a great TSET office here in Cherokee County, and I know that if we needed to be a little bit more strict that they would be right there and leading the charge to make that happen.

D. Jasna: Working with local TSET Healthy Living Program grantees in the counties that have them, like Cherokee County, can be very helpful. But if a city or town is already adopting tobacco-free ordinances to protect its residents, why is pre-emption still a big deal in a place like Tahlequah?

S. Highers: (8:31) It's like with anything. The city is about as local as you can get. I mean, I don't know where you can... And we understand our communities better than... You see the state legislature talking about, that the state legislature understands their state better than the federal legislature. And I would just kind of say the same thing back to them is at the local level, we understand our community and our community speaks to us. We are the ones that have to go and pass an ordinance on, or a policy, on Monday night and then take our kids to the school on Tuesday or go shop at the grocery store and really interact with our community members. And so I really think that preemption laws, at times, kind of stand in the way of letting the local community's voice be heard. And that's not always what's best for our local community.

D. Jasna: It's very easy to hear and discern that Tahlequah means a lot to Councilman Stephen Highers, just as many local leaders throughout the state love their communities and want to do what's best for them.

S. Highers: (around 9:55) Tahlequah is a good gem, and so it's easy to speak about, and I think it's a gem in the state of Oklahoma. And something that I'm passionate about is to make sure that our community remains healthy and vibrant and that we're doing the best that we can to plan for the future and to make sure that we're able to embrace all that makes us great.

(Music)

J. Tyree: You can really feel how much the councilman cares for his local community, just as we heard how deeply Doug Matheny cares about the health and wellness of Oklahomans throughout the state. TSET is also committed to that fight. So when we discuss

Thomas Larson: My name is Thomas Larson, and I'm the Director of Public Information and Outreach at TSET, the Tobacco Settlement Endowment Trust.

- J. Tyree: Before we get into pre-emption, let's start with some good news about Oklahoma and tobacco use.
- T. Larson: (1:13) All right. It is great news that Oklahoma's adult smoking rate is at its lowest level ever. It's at 16.9%, but that's still higher than the national average of 14.4%. Measures that help reduce rates of tobacco use, like repealing preemption, will help us close that gap. And it will help Oklahomans live healthier and longer lives.
- J. Tyree: Our state's smoking rates are dropping, and even with pre-emption in place here, we do have state laws that offer protection against secondhand smoke and tobacco use in many public places. So where are we falling short?
- T. Larson: (1:40) If you work in a factory or an office building or in retail, you're protected from secondhand smoke. But that's not the case if you work in a bar or a restaurant or a casino where smoking is allowed. In fact, there are 208,000 Oklahomans who work in restaurants and bars and casinos, and many of them don't have the same workplace protections from the 7,000 toxic chemicals that you find in tobacco smoke. So preemption, repealing preemption, and allowing cities and towns to pass ordinance to protect their residents, that would help close that gap and create more equality among workplaces and protect more Oklahomans from toxins while they're at work.
- J. Tyree: That really affects a lot of people. How does TSET raise awareness about this issue
- T. Larson: (2:29) TSET has a network of partners and grantees and communities across the state, so we work with them to raise public awareness about the gaps in state law and the prohibition of local governments to enact their own ordinances. We have TSET's Tobacco Stops With Me brand, which airs public education messaging to educate the broader public about this issue. Because a lot of people don't know about the issue, and they don't understand it, and we want to make sure the public is aware that cities and towns are prohibited from passing these ordinances to protect health in their communities.
- (03:10): And of course, we meet with policy-makers and state leaders all over the state. We meet with local officials, we meet with legislators. And it's something that we bring up. We want those state and community officials to know that there are policy steps that we can take as a state to improve the health of Oklahomans and help everyone to live longer and healthier lives.
- J. Tyree: Speaking of which, are there any bills relating to pre-emption in this upcoming 2023 legislative session?
- T. Larson: (3:53): I've seen two bills filed that would address tobacco control preemption, repealing it to varying degrees. Essentially, under current state law, cities and towns cannot enact any tobacco control policies that are stricter than state law. So whereas the states Clean Indoor Air Law, it allows bars to allow smoking, restaurants with smoking rooms, 25% of hotel and motel rooms can be smoking. If a city or town wants to enact an ordinance that says every indoor workplace is going to be smoke-free, those cities and towns are not allowed to do that because of preemption.

So what these tobacco control preemption repeal bills would do, it would remove that restriction, so that if someone in, say, Tahlequah or Woodward or some community across Oklahoma, if they think it is best for their residents to have clean indoor air in all bars and all restaurants and all hotels and motels, they would be able to pass that ordinance and respond to the needs of their constituents and their residents.

J. Tyree: I know that repealing pre-emption has been a primary policy focus for TSET for a number of years. Why is that?

T. Larson: That's correct. Repealing preemption is really a matter of local control and allowing those local officials to respond to the needs and desires of their constituents and make those steps that will help create a healthier community. It's very difficult for Oklahoma to make significant improvements in health and longevity, compared to other states, when we have preemption. And we also lack a comprehensive clean indoor air law. Oklahoma is one of two states that both lack that comprehensive statewide law, because our indoor air law has lots of exceptions, and we also have preemption. Only two states are so limited in the policies that they can enact to create clean indoor air.

And that speaks not just to workplace safety and workers and other customers being exposed to secondhand smoke. It also speaks to normalizing tobacco use. And when you can remove tobacco use from public spaces like that, it is less normal. You're going to have fewer kids taking up tobacco use. And it helps people to quit. As a former smoker myself, I know that when I was going through my quit and trying to give up cigarettes, I avoided smokey bars, and I avoided places where tobacco was present. And this would just help those people who are trying to quit and give up tobacco to be more successful in those attempts.

(Music)

J. Tyree: Well, there you have it – pre-emption and its negative effects on Oklahomans.

D. Jasna: As we just heard, this policy that's orchestrated by the tobacco industry really does affect the health of Oklahomans, whether they smoke or not. It can also influence kids and teens who see adults use tobacco use in public places – and it thwarts local control and independence.

J. Tyree: We want to thank our guests, Doug Matheny, Stephen Highers and Thomas Larson, for sharing their time and insights with us. And as always, we thank you, our listeners.

D. Jasna: Remember that you can always find our full podcast archive complete with transcripts at Oklahoma.gov/tset/podcast. And please follow TSET on social media, @OklahomaTSET, to stay up to date. So until next time, I'm Dylan Jasna ...

J. Tyree: And James Tyree, wishing you peace ...

D. Jasna: And better health.