



Preemption and public health: How significant is the impact?

Committee on Childhood Obesity Prevention, Institute of Medicine

Beckman Center, Monday, March 28, 2011

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**Preemption and Movement Building
in Public Health**

Preemption

Preemption: When a higher level of government eliminates or limits the authority of a lower level by legislative or regulatory action.

Federal: *Supremacy Clause.*

[T]he Laws of the United States ... shall be the supreme Law of the Land;
... any Thing in the ... Laws of any State to the contrary notwithstanding.
US Constitution Article VI.

State: Generally have the same broad preemption powers as Congress.

Federal and State Preemption

***Express* preemption:** When a law contains a preemption clause or other preemptive language.

***Implied* preemption:** When a court finds that a law is preemptive even in the absence of an express preemption clause.

Savings Clause. “Nothing in this law preempts more restrictive state or local regulation or requirements.”



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Preemption in Public Health



Key Informant Interviews 2010

- **Eighteen key informants, including:**
 - **Advocates**
 - **Researchers**
 - **Community organizers**
 - **Public officials**
- **In person, February – April 2010**
- **Recorded; transcribed; XSight**



PMBPH Key Informants 2010

- Alcohol
- Tobacco
- Gun violence prevention
- Reproductive health
- Healthcare
- Drug policy
- Education
- Farm worker health
- LGBT youth
- HIV/AIDS
- Public health Infrastructure
- Obesity prevention
- Land use
- Environmental justice
- Clean and safe ports
- School food
- Fire prevention
- CAFO's
- Indoor tanning facilities

Research Questions

- **Impact of preemption on public health**
- **Impact of preemption on movement building**
 - **What is a grassroots public health movement and how does movement building benefit public health?**
- **Are the consequences of preemption universal?**
- **Industry role in preemption**
- **Transparency in negotiating preemption**

Impact of Preemption on Public Health

All 18 key informants believed that preemption has a **negative impact** on public health:

- Limits innovation
- Takes away the ability of communities to respond to arising or diverse needs
- Takes away the incentive to organize and act at the local (or state) level
- “Hands over control” of a public health issue to industry lobbyists at the federal or state levels (where they have greater influence)
- Undermines grassroots movement building
- Bypasses the federal vision in which states function as “laboratories of experiment”



Impact of Preemption

- “[Preemption is] completely antithetical to the basic tenet of public health, which is that the national policy is there to set the floor....”
- “It’s hugely important Because if express preemption doesn’t exist, then implied preemption will exist. And industries are enormously creative and tireless in raising preemption arguments.”
- “It strikes me as universal.”

- PMB Key Informant Interviews 2010

When Preemption is Appropriate

- Preemption in public health can be appropriate in the *rare case* of a comprehensive national or international regulatory infrastructure that *by its essential nature* is national or international in scope.
- Example: the Airline Smoking Ban.
 - Aircraft pass rapidly from one jurisdiction to another, so differing laws in states could subject commercial flights to laws that change several times an hour.
 - High political incentives to adopt effective safety rules.
 - A strong, comprehensive system of federal rules makes sense.

Preemption in Tobacco Control



- **“NEVER AGREE TO PREEMPTION.** ... Preemption is unacceptable and should be avoided at all costs.”
ACS, AHA, ALA, APHA, ANR et al. *Fundamentals of Smokefree Workplace Laws*, 2009.
- **“The AHA opposes federal preemption of state and local statutes and state preemption of local statutes.”**
- **“Preemption locks in the *status quo*... But as time passes, standards change, and measures that once seemed out of the question become politically possible.”** Am Med Assn. *Preemption: Taking the Local Out of Tobacco Control*, 2003

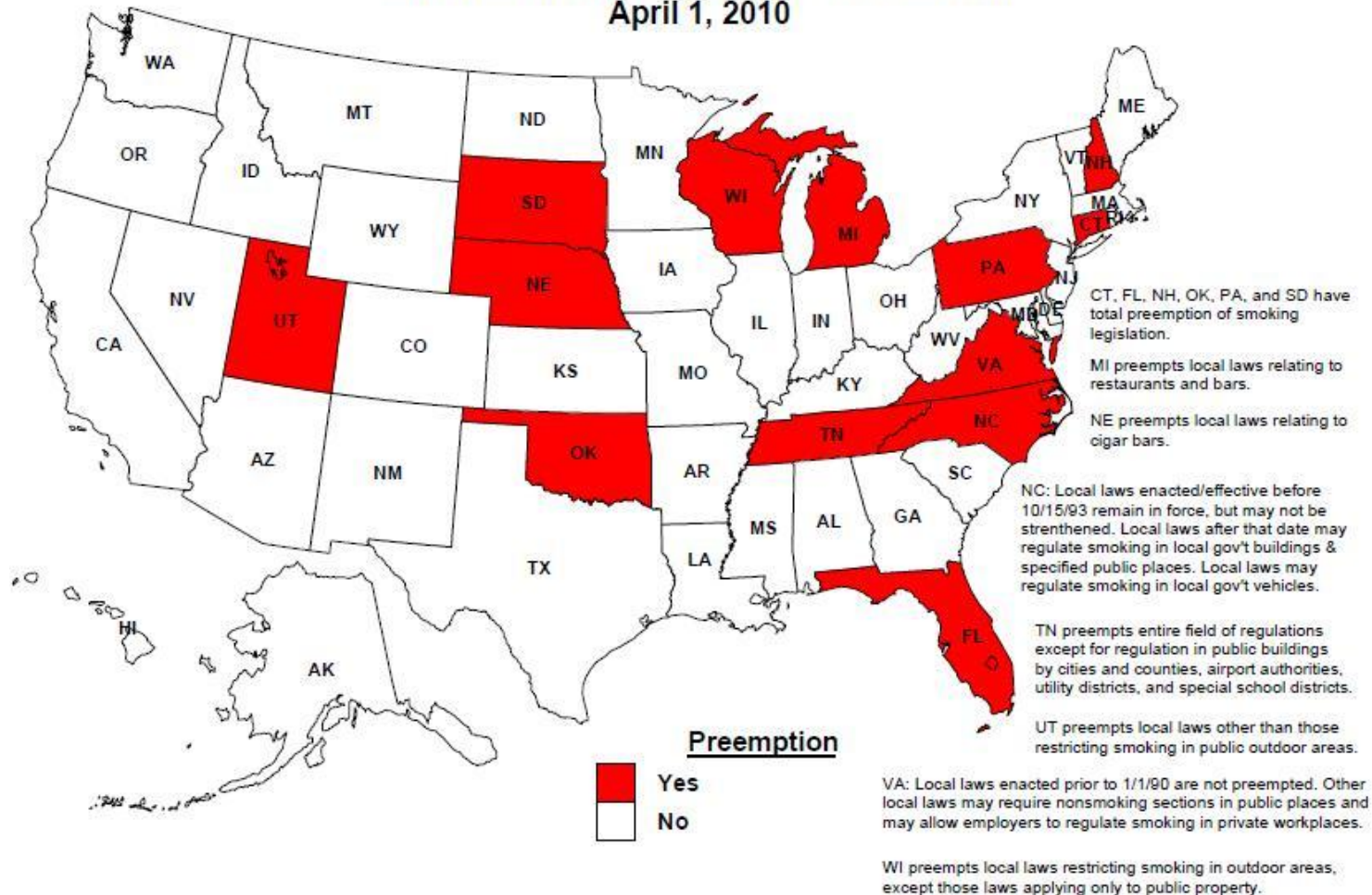


Repealing Preemption

States with Any Type of Preemption of Smokefree Air Laws

American Nonsmokers' Rights Foundation

April 1, 2010





Welcome to the Georgia Restaurant Association

Menu Labeling

What You Need To Know

June 29, 2010





Need for Federal Legislation

State and local menu labeling legislation

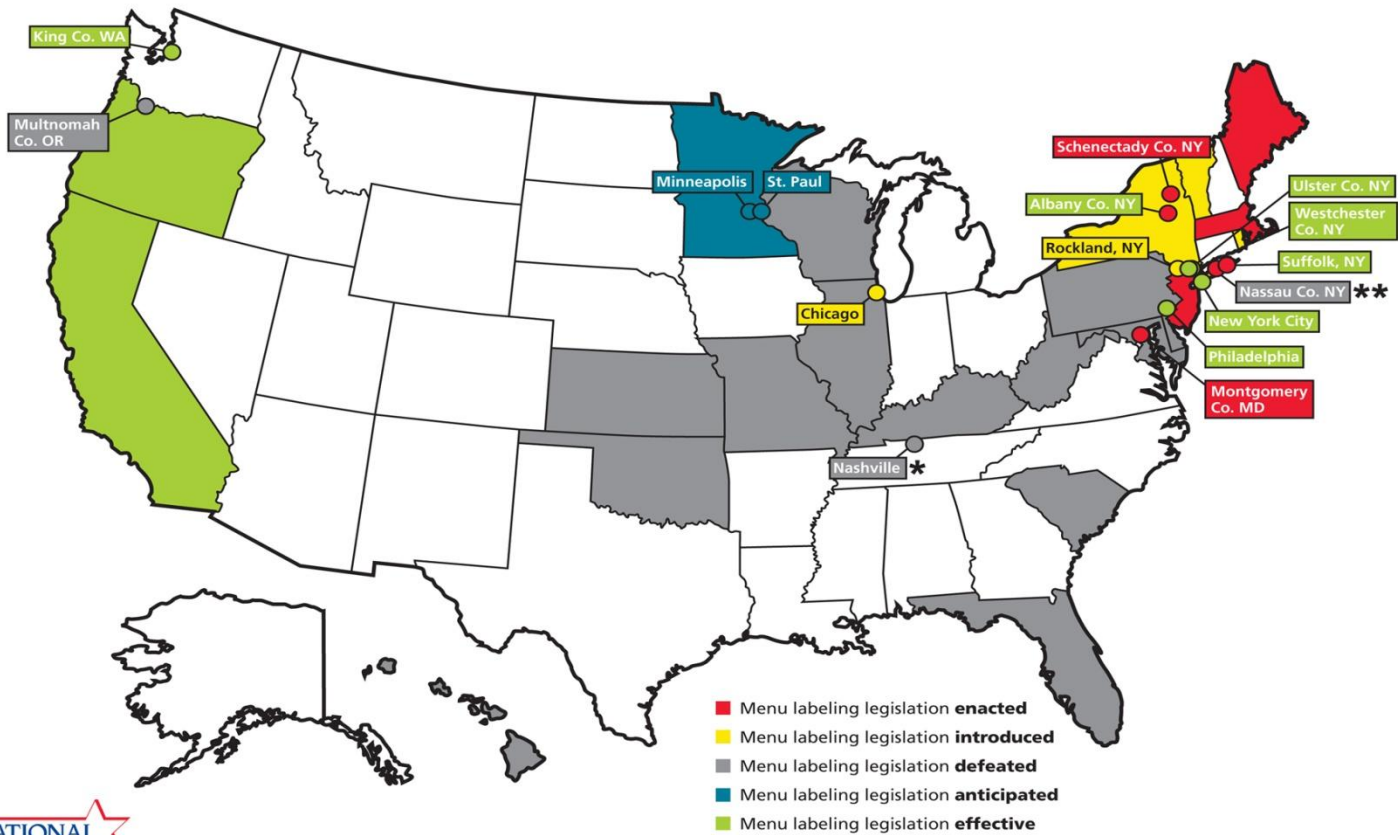
December 2006





STATE & LOCAL MENU LABELING PROPOSALS

As of May 2010



* The Nashville/Davidson County Metropolitan Board of Health menu labeling regulations have been preempted by state law and are void.
 ** Nassau Co. legislature repealed the county menu labeling ordinance (May 2010)



Nutrition Disclosure Law

	LEAN Act (Carper/Murkowski)	MEAL Act (Harkin/DeLauro)	New Law
Applies Too	20 or more (Nationally)	20 or more (Nationally)	20 or more (Nationally)
Information Required on the Menu, Menu Board and Drive Thru	Information Available Upon Request	Calories Sodium Saturated Fat Trans Fat	Calories Additional Information Available Upon Request
Federal Preemption	YES	NO	YES
Liability Protections	YES	NO	YES

Reasonable Break Time for Nursing Mothers

“The Federal law does not preempt ‘a State law that provides greater protections to employees...’” 29 U.S.C. 207(r)(4)

DEPARTMENT OF LABOR: Request for Information from the public, Dec. 2010

“Throughout our history, State and local governments have frequently protected health, safety, and the environment more aggressively than has the national Government.”

“The purpose of this memorandum is to state the general policy of my Administration that preemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States ...”

Obama Preemption Memorandum. The White House, 2009 May 20.



Grassroots Public Health Movements

- An organized effort to address threats to the health and safety of the community, led by activated citizens and organizations that devote resources to building grassroots capacity.
- Usually built around a single issue or concern that energizes individuals who join in common cause.

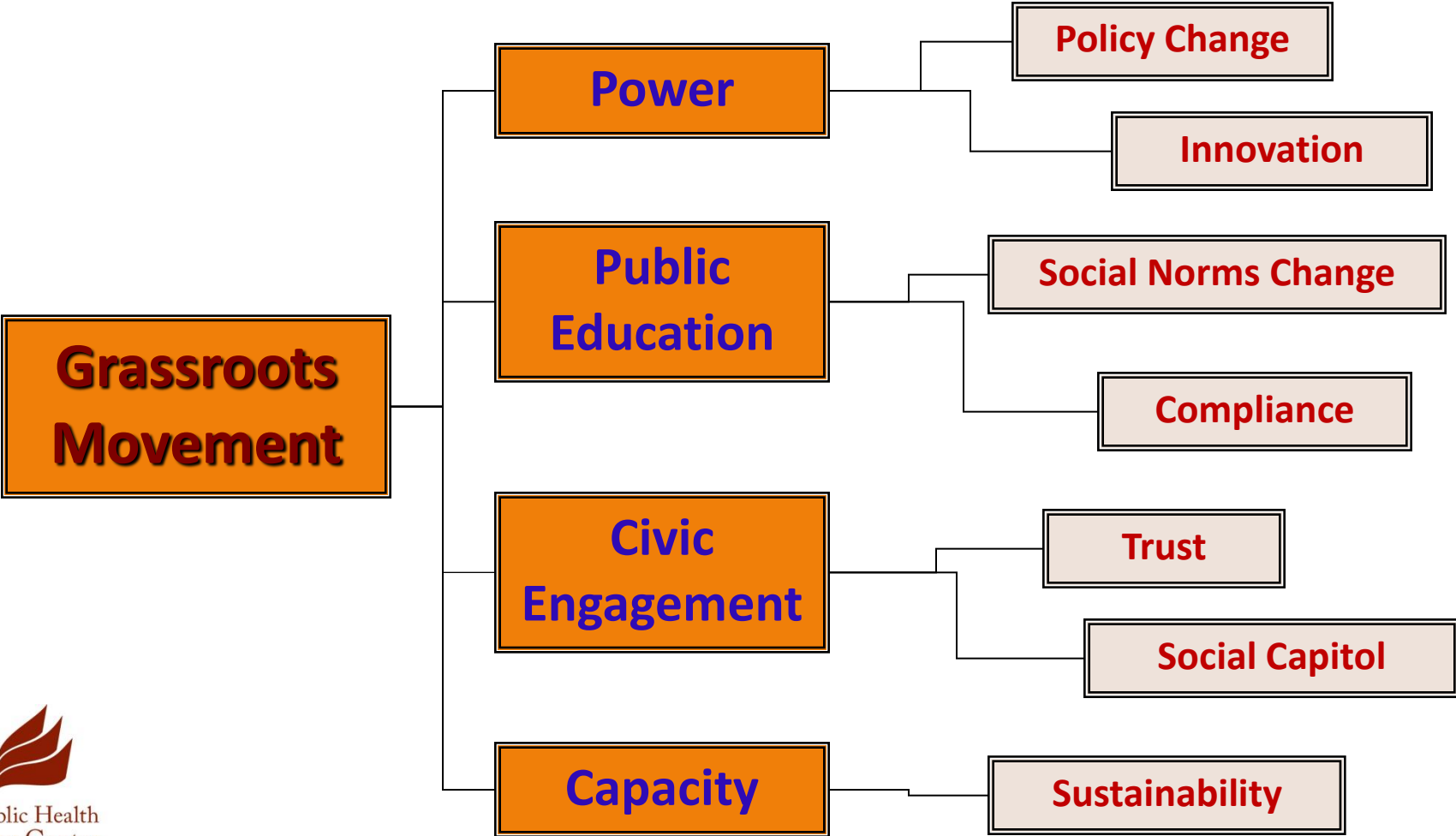


Grassroots Movement Defined

- “Residents and those who are **directly impacted** by an issue are ... making change and **taking leadership.**”
- “[I]t’s **not just one local community** struggling through that but our struggles are related, connected; and that we have a broad view about how to move a landscape in fixing the conditions that are similar....”
- “A grassroots movement [is] people organizing at the local level to bring about change on a particular issue.... And sometimes that starts at the community level and **grows to a state level movement or a national movement or even a global movement.**” (PMB Key Informant interviews 2010)

- PMB, Key Informant Interviews 2010

Benefits of Grassroots Movement Building



The Impact of Preemption on Grassroots Movement Building

- Preemption has a **negative impact** on grassroots movement building.
- “[T]here's far less **incentive** for people to organize and act because they don't have an opportunity to take action at the local level.”
- “[O]ne of the biggest detriments to building grassroots is people answering you saying, ‘**There isn't anything we can do about that.**’ [So if] the government has already said, ‘You're right, you can't do anything about this,’ then I'm much less likely to be able to move them to action.”

- PMB Key Informant Interviews 2010





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