



## The Potential for Federal Preemption of State and Local Sugar-Sweetened Beverage Taxes

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### INTRODUCTION

Federal, state, and local governments each have a role to play in protecting health. President Obama recognized that “state and local governments have frequently protected health, safety, and the environment more aggressively than has the national Government.”<sup>1</sup> Yet, the federal government can hinder state and local activity through preemption, which is “when a higher level of government restricts, or even eliminates, a lower level of government’s ability to regulate an issue.”<sup>2</sup> State governments can similarly preempt local law.

Industries subject to regulation may support preemption in order to facilitate compliance with a uniform or less stringent standard, or to create a regulatory vacuum.<sup>3</sup> From a public health perspective, preemption can be used to impede progress, innovation, local self-determination, and grassroots movements.<sup>3</sup> Conversely, preemption can be used as a tool to advance public health if it provides minimum standards or prohibits laws that would undermine health.

In the area of food and nutrition, express preemption is routinely included in certain federal laws, such as food labeling (i.e., nutrition, menu, and genetically modified organism labeling laws). In recent years, there has been an upsurge of state preemption of various local food policies.<sup>3</sup> For example, in 2016, Kansas preempted local regulations related to food-based health disparities, nutrition labeling, portion size, and restaurant incentive items, among other things.<sup>3</sup> Additionally, state legislatures are increasingly employing preemption strategically to block other progressive measures, such as increased minimum wage, paid leave, and anti-fracking.<sup>3</sup> Could preemption of a similarly politically charged measure—sugar-sweetened beverage (SSB) taxes—be next?

SSB taxes have been enacted in seven U.S. cities, and are being considered in multiple states and municipalities. But state and local laws are subject to potential preemption by the federal government. In light of the rise in SSB taxes, health consequences of consuming SSBs,<sup>4</sup> and recent change in the federal administration, it is

crucial to assess the potential basis for federal preemption of SSB taxes.

As will be discussed, Congress has the constitutional authority to preempt state and local tax laws. The aim of the present research was not to assess this constitutional authority, but to understand what might motivate federal legislators to preempt SSB taxes. As such, the authors analyzed the legislative histories of federal bills and laws that had a central and express purpose of preempting state taxes. The research uncovered Congressional preemption of state taxes related to national programs and in the context of federal regulation of interstate commerce. This article discusses the legislative histories related to these acts and considers whether the rationales upon which they are based apply to SSB taxes.

### SUGAR-SWEETENED BEVERAGE TAXES

Consistent evidence links SSB consumption with tooth decay, weight gain, obesity, type 2 diabetes, and possibly heart disease.<sup>4</sup> To reduce SSB consumption and raise revenue, excise taxes are favored over sales taxes.<sup>5</sup> Excise taxes would be levied on businesses engaged in manufacturing, wholesaling, or distributing SSBs; taxed entities generally recover the cost by increasing the price of the product.<sup>5</sup> In 2014 and 2016, seven U.S. municipalities enacted SSB excise taxes. For revenue-production purposes, seven states previously enacted low-level SSB excise taxes, and most states have sales taxes on SSBs. U.S. Representative Rosa DeLauro (CT) proposed a federal SSB tax without preemption in 2014 and 2015.

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## CONSTITUTIONAL FRAMEWORK

The U.S. government framework is characterized by separate sovereignty of the federal government and each of the 50 states. Congress has only the authority provided to it in the Constitution, which includes the powers to regulate interstate commerce and tax and spend for the public welfare. States, as the original sovereigns, retained all powers not exclusively delegated to the federal government, including the power to tax<sup>6</sup> and the “police power” to safeguard the health, safety, and welfare of the population.<sup>7</sup> Nonetheless, the Constitution elevates federal law as the “supreme law of the land,” permitting Congress to preempt state law while exercising its other powers. Although states can preempt local law as the sole purpose of the law,<sup>8</sup> Congress cannot treat the Supremacy Clause as an enumerated power, so it can only preempt state law while acting pursuant to another constitutional authority.

Although preemption is a key concern for all public health policies, federal preemption of taxes is a distinct issue because governments need revenue to function. In the 1819 case, *McCulloch v. Maryland*, the Supreme Court analyzed Maryland’s tax on a federal bank and resolved the question of whether the federal government can preempt state taxes. First, the Court explained that because the power to tax “is essential to the very existence of government,” it is to be “concurrently exercised” by the federal and state governments.<sup>6</sup> Nonetheless, the Court confirmed that the Supremacy Clause of the Constitution means that the federal government can preempt states’ ability to tax.<sup>6</sup>

The Court continues to uphold federal preemption of state taxes,<sup>9</sup> but has not issued an opinion to elucidate the boundaries of Congress’s power to do so. However, some limit on this power must exist or, at some point, states would cease generating enough revenue to function as separate sovereigns, contrary to the Constitution’s intent.<sup>10</sup>

## FEDERAL PREEMPTION OF TAXES

In the absence of clear Supreme Court boundaries, the authors examined how federal legislators have made decisions in practice about preempting state tax measures related to domestic policy. The authors assessed the legislative histories of federal bills and laws that had a central and express purpose of preempting state taxes, using LexisAdvance to research the *Congressional Record*<sup>a</sup> (1873–2016), case law (1790–2016), and targeted federal agency discussions. The research uncovered two

broad rationales for federal preemption of state taxes: (1) supporting national programs and (2) regulating interstate commerce.

### National Programs<sup>b</sup>

From the language of statutes and available historical records, Congress has preempted state taxes in national programs to ensure taxes do not reduce federal benefits or impede the accomplishment of Congress’s objectives. Specifically, Congress often provides benefits under a specific cost structure and seeks to avoid additional costs (such as state taxes) for beneficiaries. For example, Congress prohibits states from imposing premium taxes on the Federal Employees Health Benefits Program, the Employment Retirement Income Security Act, and Medicare Advantage. For each of these laws, preemption was included with relatively little discussion in the legislative history.

During congressional hearings in 1963 and 1964 to create Original Medicare, the Senate convened an independent committee whose report supported preemption of state premium taxes. The report noted preemption would effectively provide a discount to the “aged,” while states would recover lost revenue through reduced public assistance costs related to uncompensated care.<sup>11</sup> The only record of a contrary viewpoint came from an insurance industry representative who argued that states “must be able to tax to maintain their proper functions” and preemption “represents a direct interference with the states’ sovereign power.”<sup>11</sup> Interestingly, although the committee supported preemption and few opposing views were documented, Medicare was established in 1965 without preemption of state premium taxes. Nonetheless, whereas most states continued to impose premium taxes on insurers generally, most also voluntarily refrained from taxing Medicare premiums.<sup>12</sup>

In 1997, Congress created Medicare Advantage and explicitly preempted state premium taxes. There was no Congressional discussion related to this prohibition. Rather, the Joint Explanatory Statement of the Committee of Conference, which worked together to consolidate the Senate and House bills, simply noted that by conference agreement both versions of the bill included identical provisions preempting state premium taxes.<sup>13</sup>

Preemption of state taxes was added to another major national benefit program, the Supplemental Nutrition Assistance Program (SNAP). Under SNAP, the federal government allocates funds to states to provide financial benefits to low-income households to purchase food.<sup>14</sup> In

<sup>a</sup>The *Congressional Record* captures the proceedings and debates among Senators and Representatives during consideration of a bill on the floor of Congress.

<sup>b</sup>A national program is an organized set of activities directed toward a common purpose or goal, generally established by Congress and carried out by a federal agency.

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