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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.”¹ 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.”² 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.³ From a public health perspective, preemption can be used to impede progress, innovation, local self-determination, and grassroots movements.³ 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.³ 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.³ Additionally, state legislatures are increasingly employing preemption strategically to block other progressive measures, such as increased minimum wage, paid leave, and anti-fracking.³ Could preemption of a similarly politically charged measure—sugar-sweetened beverage (SSB) taxes—be next?

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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,⁴ and recent change in the federal administration, it is crucial to assess the potential basis for federal preemption of SSB taxes.

As discussed below, 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.⁴ To reduce SSB consumption and raise revenue, excise taxes are favored over sales taxes.⁵ 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.⁵ 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.

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 tax⁶ and the “police power” to safeguard the health, safety, and welfare of the population.⁷ 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,⁸ 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.⁶

Nonetheless, the Court confirmed that the Supremacy Clause of the Constitution means that the federal government can preempt states' ability to tax.⁶

The Court continues to uphold federal preemption of state taxes,⁹ 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.¹⁰

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^a (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^b

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.¹¹ 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."¹¹ 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.¹²

In 1997, Congress created Medicare Advantage and explicitly preempted state premium taxes. There was no Congressional discussion related to this prohibition. Rather, the Joint

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^aThe Congressional Record captures the proceedings and debates among Senators and Representatives during consideration of a bill on the floor of Congress.

^bA 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.

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.¹³

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.¹⁴ In 1985, Congress concluded that state sales taxes on food were impeding the purpose of the program by reducing the “food purchasing power” of program participants.¹⁴ This also violated Congress’s intent that federal funds should not be diverted to other purposes.¹⁴ Thus, in 1985, Congress amended SNAP to preempt the collection of state or local taxes on purchases of food made with benefits in order to protect the integrity of the program.¹⁴

Interstate Commerce

In contrast to national programs, Congress has engaged in extensive debate on preemption when the issue related to state taxation of interstate activities. This aligns with Congress’s exclusive and extensive power over interstate commerce.¹⁵ Congress has even preempted state taxes for activities that the Supreme Court found did not interfere with interstate commerce.¹⁶ Specifically, in response to the Court upholding a state income tax on interstate activity, Congress enacted the Interstate Income Act in 1959 to prohibit state income taxation of out-of-state companies whose sole connection to the state is soliciting orders.¹⁶ During congressional debates for this Act, Senators expressed concern that, without it, states would increasingly impose income taxes on interstate commerce, making preemption “necessary to protect” businesses.¹⁶ One Senator referred to *McCulloch*, stating that Congress has “unquestioned powers” to regulate interstate commerce and determine when states can tax corporations engaged in interstate activity.¹⁶ In opposition, a Senator called the bill a “tax favor” to companies. Others argued that states needed this revenue to carry out their necessary functions, and run their educational and penal institutions.¹⁶

In another example, Congress enacted the Internet Tax Freedom Act of 1998 to preempt states’ ability to tax Internet access. Legislators in favor of broad preemption characterized the Internet as “inherently interstate in nature”¹⁷ and expressed concern that a “patchwork” of taxes would have a “disastrous national impact” on interstate commerce and communication.^{18,19} Several Senators argued that it was Congress’s responsibility to ensure that “states do not interfere with interstate commerce,”¹⁹ but one Senator acknowledged that the power to preempt states is “rarely exercised in the context of taxation, and is a power that we take very seriously.”¹⁹ Legislators in opposition were “concerned” about preempting state and local governments from exercising their “legal powers relative to taxation.”¹⁹ One Senator argued it would “drive a major hole” in the ability of governments to finance their most basic responsibilities: police, fire, and schools.¹⁹ Another Senator called preemption “good for consumers” but “terrible for state and local government.”¹⁹

Application to Sugar-Sweetened Beverage Excise Taxes

Congress's historical rationales for preempting state taxes has been to ensure the proper functioning of its constitutional power to fund national programs for the public welfare and regulate interstate commerce. Neither of these justifications appears to support preemption of SSB excise taxes.

In the case of federal programs, excise taxes on the manufacture, wholesale, or distribution of SSBs do not interfere with any national programs including SNAP, under which Congress found that taxes on the purchase of food (i.e., at the point of sale)—not the companies responsible for the food—reduced program benefits.¹⁴ Absent a new national program that includes government benefits for SSBs or the SSB industry, Congress would be hard pressed to find SSB excise taxes interfere with a national program. Moreover, even if Congress funded a program with federal SSB tax revenue, it would be inconsistent to argue that these state taxes decrease the federal revenue stream. There is a long history of dual taxation by the federal and state governments for products such as tobacco and gasoline; the revenue from these federal taxes is earmarked for national programs.

In the case of interstate commerce, the Supreme Court has upheld state taxes that are similar to SSB taxes as not burdening interstate commerce.²⁰ It is true that a similar finding did not deter Congress from preempting state taxes under the Interstate Income Act.¹⁶ But in that case, Congress preempted income taxes on the act of interstate solicitation.¹⁶ Conversely, SSB excise taxes are administered on the production, wholesale, or distribution of products actually sold within the taxing state. Thus, although Congress's commerce power is broad,¹⁵ when preempting state taxes, Congress has historically focused on safeguarding cross-state travel,⁹ commerce,¹⁶ and communication,¹⁷ and not businesses responsible for the sale of products within the taxing state. Thus, a congressional policy preempting SSB taxes would be inconsistent with legislators' previous rationales supporting such a prohibition.

CONCLUSIONS

Congressional debates demonstrate acknowledgement among federal legislators that the power of preemption must be exercised rarely in the context of taxation so states can generate revenue to function. Although Congress has the authority to preempt state taxes, two recurring principles should continue to guide Congress's decision whether to do so: reducing interference with federally funded national programs and preserving efficient interstate activity. Neither of these principles appears to apply to the case of state or local SSB taxes. Thus, legal and historical precedents yield little valid justification to preempt SSB taxes, which align with state and local governments' powers to tax and safeguard the population's health.

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