

State Preemption: An Emerging Threat to Local Sugar-Sweetened Beverage Taxation

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 See also Falbe et al., p. 546.

We sought to examine the strategies promoting and countering state preemption of local sugar-sweetened beverage (SSB) taxes in the United States. Using Crosbie and Schmidt's tobacco preemption framework, we analyzed key tactics used by the SSB industry to achieve state preemption of local taxes identified in news sources, industry Web sites, government reports, and public documents.

Starting in 2017, 4 states rejected and 4 passed laws preempting local SSB taxes. The beverage industry attempted to secure state preemption through front groups and trade associations, lobbying key policymakers, inserting preemptive language into other legislation, and issuing legal threats and challenges. The public health community's response is in the early stages of engaging in media advocacy, educating policymakers, mobilizing national collaboration, and expanding legal networks.

State preemption of local SSB taxes is in the early stages but will likely scale up as local tax proposals increase. The public health community has a substantial role in proactively working to prevent preemption concurrent with health policy activity and using additional strategies successfully used in tobacco control to stop preemption diffusion. (*Am J Public Health*. 2021;111:677–686. <https://doi.org/10.2105/AJPH.2020.306062>)

Sugar-sweetened beverages (SSBs) include calorically sweetened sodas, energy and sports drinks, coffees, teas, and fruit drinks. SSBs are the primary source of added sugars in the US diet, increasing the risk of cardiometabolic diseases.¹ Governments can levy sales and excise taxes (e.g., 1 cent per ounce) to discourage SSB consumption² while generating revenue to fund health-related programs.³ Early evidence shows that SSB taxes (or “soda taxes”) are associated with reductions in purchases of taxed beverages.⁴ Momentum is growing for soda taxes globally: as of August 2020, at least 40 countries had introduced national soda taxes.⁵

Between 2014 and 2017, excise taxes on SSBs were enacted by the Navajo

Nation and 7 US cities (Albany, CA; Berkeley, CA; Boulder, CO; Oakland, CA; Philadelphia, PA; San Francisco CA; and Seattle, WA); Washington, District of Columbia, enacted an SSB sales tax. Since 2017, however, political momentum has stalled because of beverage industry opposition; central to this opposition is the strategy of state preemption. Preemption occurs when a higher level of government (e.g., a state) limits the authority of lower levels (e.g., municipalities) to enact laws.⁶ State preemption can sometimes limit local laws that support health inequities (e.g., exclusionary zoning laws)⁷ and, in rare cases, can be appropriate nationally (e.g., the US federal airline smoking ban).⁸ However, preemption is

increasingly being used in favor of commercial interests to inhibit local governments from responding to community-specific needs through health policy.⁹ In 2011, the Institute of Medicine concluded that federal and state governments should avoid preemption because it suppresses local innovation. Higher levels of government should primarily set minimum standards, allowing localities to enact more restrictive health policies as needed.¹⁰

The tobacco industry weaponized preemption in the 1980s,¹¹ followed by the firearm industry in the 1990s.⁶ Since 2000, state preemption has had an impact on a growing range of policy innovations: the preemption of local plastic bag and bottle laws,

LGBTQ+ rights protections, minimum wage, and sick leave standards, as well as local efforts to control the spread of COVID-19 (e.g., through business closures).^{6,8,12–19} Since at least 2008, the food and beverage industry has championed state preemption to quell local innovation in nutritional labeling laws^{14,18} as well as soda taxes.^{16–18}

Previous research has documented the process of passing preemption laws while debunking industry arguments in its favor.²⁰ Studies have shown how preemption obstructs local authority^{21–23} as well as other adverse consequences.²⁴ Researchers have developed preemption frameworks for decision-makers⁸ and health advocates²⁵ and have classified industry strategies for achieving preemption.¹¹ Researchers have also called upon public health advocates and policymakers to mount a more proactive response to the SSB industry's preemption use to slow the spread of local soda taxes.^{12,18,26}

Crosbie and Schmidt previously developed a framework for understanding successful industry tactics and health advocate responses in state tobacco preemption debates, which started in the 1980s.¹¹ We applied this framework to understand beverage industry efforts to preempt local soda tax policies in the United States. Using publicly available sources, we conducted qualitative analyses of the tactics used by SSB industry stakeholders to preempt local soda taxes. We found that the beverage industry uses the full range of preemption tactics cultivated by the tobacco industry and that soda tax advocates have been forced to take a reactive rather than proactive response to this threat.

METHODS

Case selection sought to capture all significant state-level efforts to preempt

local soda taxes in the United States. We used a combination of searches online, including resources provided by Grassroots Change Preemption Watch and the American Heart Association (AHA), and in the legal database LexisNexis to identify both successful and unsuccessful preemption attempts. The final sample was confined to all US states in which preemption was (1) successfully enacted, or (2) not enacted following an attempt that lasted for at least 6 months. We excluded unsuccessful attempts lasting less than 6 months because of difficulties with identifying all such cases. Short-term preemption attempts often occur behind the scenes and may therefore be unidentifiable.^{18,27} Using these inclusion criteria, we identified 8 eligible cases: 4 states that passed preemption and 4 that were rejected by voters or withdrawn by policymakers following a debate of at least 6 months (Table 1).

Between August 2019 and February 2020, we compiled publicly available sources on the 8 cases of state preemption using Google searches and state legislation Web sites, including

Ballotpedia. We located 81 documents, including government documents, reports, news media, and legislation (see Appendix, available as a supplement to the online version of this article at <http://www.ajph.org>, for a complete list). We applied standard snowball search methods,²⁸ beginning with keyword searches including “preemption,” “preempt,” “nutrition,” “sugar sweetened beverages,” “taxes,” “Coca-Cola,” “Pepsi,” and “American Beverage Association.” Documents were reviewed by E. C., K. E. W., and S. H. through multiple iterations, yielding analytic memos, timelines, and tables. Utilizing Crosbie and Schmidt's tobacco preemption framework, we analyzed cases with respect to the 4 types of industry tactics and 4 public health responses constituting the framework.

RESULTS

Since 2017, Arizona, California, Michigan, and Washington State have passed laws preempting local SSB tax policies (Table 1). In 3 of these states, it took an average of only 29 days from the policy's

TABLE 1— Attempts to Secure State Preemption of Local Sugar-Sweetened Beverage Taxes in the United States: 2017–2018

| State | Bill or Measure Name | Date Introduced | Date Effective | Timeframe |
|-------------------------|----------------------|-----------------|------------------|------------------|
| Arizona | HB 2484 | Jan 30, 2018 | Mar 16, 2018 | 46 d |
| California | AB 1838 | Jun 24, 2018 | Jun 28, 2018 | 5 d ^a |
| Illinois | HB 4082 | Aug 15, 2017 | Jan 8, 2019 (W) | 511 d |
| | HB 4083 | | | |
| Michigan | HB 4999 and SB 0583 | Sep 20, 2017 | Oct 26, 2017 | 37 d |
| New Mexico | HB 2045 | Feb 14, 2017 | Nov 2, 2017 (W) | 290 d |
| Oregon ^b | Measure 103 | Jun 18, 2018 | Nov 6, 2018 (R) | 141 d |
| Pennsylvania | HB 2241 | Apr 8, 2018 | Oct 25, 2018 (W) | 201 d |
| Washington ^b | Initiative 1634 | Jul 6, 2018 | Nov 6, 2018 | 124 d |

Note. AB = Assembly Bill; HB = House Bill; R = rejected by voters; SB = Senate Bill; W = withdrawn.

^aInitial ballot attempt was dropped in favor of this bill that was in the legislature for 5 d.

^bBallot measure.

introduction to its passage: Arizona (46 days), California (5 days), and Michigan (37 days). In Washington, preemption passed through a ballot measure. Preemptive laws in 2 of these states allow cities with preexisting SSB taxes to remain in place. In California, the cities of Berkeley, Albany, Oakland, and San Francisco had soda taxes grandfathered in, and in Washington, Seattle retained its soda tax. In Arizona and Michigan, preemption passed before any localities adopted a soda tax.

Since 2017, 4 states—Illinois, New Mexico, Oregon, and Pennsylvania—had policymakers withdraw preemption proposals or had them rejected by voters. Oregon voters rejected an industry-sponsored ballot initiative. In the other states, preemption bills made their way through the legislature, taking an average of 334 days from introduction to withdrawal (Table 1). Two states had localities with existing SSB taxes: Philadelphia, which retained its soda tax, and Cook County, Illinois, which repealed it for reasons unrelated to the preemptive bill. Localities in the other 2 states (Multnomah County, OR, and Santa Fe, NM) proposed SSB taxes when state preemption was being discussed.

We found specific instances in which successful and even unsuccessful state preemption attempts led local decisionmakers to abandon existing efforts to pursue soda taxes in their jurisdictions. Localities in California, including Santa Cruz, Davis, and Marin County, had proposed ballot initiatives for SSB taxes but withdrew these initiatives following statewide preemption.²⁹ Multnomah County had proposed an SSB tax ballot initiative, but momentum dwindled following the introduction of a preemption initiative on that state's ballot.³⁰

Industry Efforts to Secure Preemption

We applied Crosbie and Schmidt's tobacco preemption framework to consider if and how the beverage industry used its 4 key tactics to promote preemption.

Promoting Preemption Through Front Groups

The first tactic in the tobacco preemption framework is to use front groups and trade associations to promote preemption by framing unified messages in the media and with policymakers. Using an identical strategy to tobacco corporations, US-based SSB companies (e.g., Coca-Cola, Pepsi, Dr. Pepper–Snapple) have funded front groups and trade associations to promote state soda tax preemption laws. Acting through state chapters in all 8 states, the American Beverage Association (ABA), the beverage industry's principal trade association, served as a mouthpiece for the industry. Targets of ABA outreach were similar across states: the ABA forged alliances for preemption with grocer associations, restaurant and bar owners, trade and labor groups, and retail merchants.

Part of the beverage industry's preemption efforts included the use of front groups (e.g., “Yes to Affordable Groceries”) and slogans to obscure its role in backing preemption laws. Front groups attempted to promote preemption by reframing soda taxes as unfair “grocery taxes” that financially burdened working families. Front groups argued that preemption was necessary to protect “affordable groceries,” establish “uniform” policies to promote fairness among businesses free of government interference, and eliminate a “patchwork” of

inconsistent local laws. Trade associations and front groups produced brochures and editorials demanding uniform standards to create a “level playing field”—slogans later echoed in legal justifications for statewide preemption.

Across states, the beverage industry spent at least US \$50 million through the ABA to support front-group campaigns to secure state preemption of local SSB taxes (Table 2). Existing regulations require funding disclosures on campaign materials, but the beverage industry typically did so in small font, often hidden in a footnote beneath lengthy lists of supporters and slogans. Front groups often had misleading names, such as “Yes to Affordable Groceries,” “Citizens for a More Affordable Cook County,” and “Yes! Keep Our Groceries Tax Free!” (Figure 1). Campaign Web sites across states featured similar slogans along with testimonial videos. One video featured a woman in Chicago, Illinois, stating, “We’re being taxed out of Cook County. I’m a single mom. I can’t afford this tax!” The campaign in Oregon argued for a constitutional amendment to make soda taxes illegal because “we need to permanently protect groceries from being taxed.”

Lobbying Policymakers

The tobacco preemption framework shows that another successful industry tactic is the strategic industry lobbying of state policymakers in key positions to promote preemption. Our analyses found that beverage companies have followed suit, making campaign contributions and donations to state legislators and governors, on top of indirect contributions via front groups (Table 3). Beverage companies targeted chairs and members of state health

TABLE 2— Beverage Industry State Preemption of Local Sugar-Sweetened Beverage Taxes Funded Campaigns in the United States: 2015–2018

| State | Front Group Messages | Funded by | Amount, \$ | Supporting Groups | |
|--------------|---|--|-------------------------------|--|-----------------------------------|
| Arizona | Yes on 126! | Citizens for Fair Tax Policy | 9.16 million | Arizona Association of Realtors | |
| | | Realtors Issues Mobilization Fund | 8 million | American Institute of Architects–Arizona | |
| | | | | Arizona Retailers Association | |
| | | Arizona Small Business Association | | | |
| California | Keep Groceries Affordable Act of 2018 | American Beverage Association California PAC-Two-Thirds Vote for State and Local Revenue Increases Initiative (2018) | 7 million | Californians for Accountability | |
| | | | | Transparency in Government Spending, a Coalition of California | |
| | | | | Businesses, taxpayer groups | |
| | | | | Business property owners | |
| | | | | Beverage companies | |
| Illinois | Citizens for a More Affordable Cook County | American Beverage Association | 44 000 | NA | |
| | | | Ardagh Metal Beverage USA Inc | | 32 200 |
| | | | Monster Energy Company | | 22 200 |
| | | | Corn Refiners Association | | 22 200 |
| | | | Amtcor Rigid Plastics USA LLC | | |
| Michigan | NA | National Federation of Independent Business | NA | NA | |
| Oregon | Vote Yes on 103: Yes! Keep Our Groceries Tax Free | American Beverage Association | 3 295 346 | Parents Education Association | |
| | | | Coca-Cola | | 1.4 million |
| | | | PepsiCo | | 1.1 million |
| | | | Dr. Pepper–Snapple Group Inc | | 440 000 |
| | | | Red Bull | | 35 000 |
| | | | Kroger | | 200 000 |
| Pennsylvania | NA | NA | NA | NA | |
| Washington | Yes to Affordable Groceries | American Beverage Association | 8 484 | Teamsters Local 174 | |
| | | | Coca-Cola | 10.7 million | Joint Council of Teamsters No. 28 |
| | | | PepsiCo | 8 million | |
| | | | Dr. Pepper–Snapple Group Inc | 911 021 | |

Note. NA = not applicable or not available; PAC = political action committee.

committees to access policymakers positioned to move preemption proposals out of relevant committees in time for full floor votes. The beverage industry also donated to governors, including California's Governor Jerry Brown, to assure executive sign-off (see online Appendix).

Inserting Preemption Through Varied Avenues

The tobacco preemption framework found that tobacco companies

succeeded by deploying various legislative avenues, including bills, ballot initiatives, and riders. Beverage companies have used the same approach to preempt local soda taxes. In Arizona, Illinois, Michigan, New Mexico, and Pennsylvania, beverage companies lobbied policymakers to introduce preemption in legislative bills. In New Mexico, preemption language was added at the last minute to a 300-page substitute bill addressing a variety of unrelated tax issues; many legislators were unaware

that soda tax preemption language had been added. In California, Oregon, and Washington, beverage companies sponsored ballot initiatives, often using ambiguous language likely meant to confuse voters. In Oregon and Washington, the beverage industry promoted a “yes” vote as a vote for “affordable groceries.” This was confusing because voting “yes” actually meant “yes” to preemption and “no” to soda taxes. Adding to the confusion was the fact that local taxes were for SSBs, not all groceries.



FIGURE 1— Beverage Industry Front Group Ads to Support State Preemption of Local Sugar-Sweetened Beverage Taxes in Oregon and Washington: 2017-2018

The successful play for preemption in California took a particularly circuitous path into law. Early in the election cycle, the state's ABA chapter financed a signature-gathering campaign for a November ballot initiative that would have crippled local governments by requiring a two thirds vote on all new taxes, including library fees, public safety, and government services, as well as any soda taxes. One week before the registration deadline for ballot initiatives, ABA lobbyists coerced state representatives to support an 11th-hour bill (Assembly Bill 1838) preempting local soda taxes through the year 2030. If state legislators failed to pass the soda tax preemption bill, the ABA threatened to register its draconian tax initiative for the November ballot. Legislators voted for soda tax preemption as the lesser evil.

Issuing Legal Threats and Challenges

The tobacco preemption framework found that the industry successfully

used litigation threats that leveraged state preemption to deter municipalities from moving forward with tobacco control policies. The SSB industry similarly issued legal threats and challenges to create a chilling effect on the diffusion of soda taxes at the local level. A coalition of consumers, retailers, distributors, and trade associations, including the ABA, sued the City of Philadelphia over its soda tax, arguing that it violated and was preempted by state law. In 2018, the Pennsylvania Supreme Court ruled in favor of the city in a 4-to-2 decision, upholding its soda tax.

The tobacco preemption framework defines 4 counterstrategies cultivated by tobacco control advocates to successfully resist preemption attempts or reverse them after the fact.

Media Advocacy

Tobacco control advocates successfully fended off preemption attempts by educating the public and policymakers by framing preemption as a threat to

local control. We found that, since 2017, a nucleus of soda tax advocates have begun to adopt media advocacy, spearheaded by the AHA, often with support from state medical and dental societies, public health policy advocates, and other civil society groups such as the Praxis Project.

Media advocacy included press conferences, public service announcements, press releases, flyers and brochures, media reports, opinion-editorials, media interviews, podcasts, debates, and social media (see online Appendix). Public health framing varied across states, with many narratives emphasizing the positive aspects of “local choice” and “local authority” in contrast to “state-only control.” Health advocates in several states used earned media to educate the public and policymakers about behind-the-scenes attempts to slip preemption into legislation, expose the industry ties of front groups, and shed light on deceptive practices. In Washington, health advocates pushed back against attempts to reframe soda taxes as grocery

TABLE 3— Industry Contributions and Political Support of State Preemption of Local Sugar-Sweetened Beverage Taxes in the United States: 2015–2018

| State | Government Official | Position | Amount Received, \$ | Preemption Action |
|---|----------------------------------|---|---|---|
| Arizona | T.J. Shope | Member of Arizona House of Representatives | 1 050 “food industry” | Primary sponsor HB 2484 |
| | | | 1 500 Coca-Cola | |
| | | | 1 000 National Grocers’ Association | |
| | | | 750 Arizona Restaurant and Hospitality Association | |
| | | | 500 Kroger Co | |
| Doug Ducey | Governor | 13 500 Coca-Cola | Signed HB 2484 | |
| California | Jerry Brown | Governor | 54 400 ABA | Signed preemption legislation |
| | Chad Mayes | Vice chair of House Health Committee | 4 700 PepsiCo | Voted “yes” on AB 1838 |
| | Frank Bigelow | Member of House Health Committee | 3 000 California Grocers Association | Voted “yes” on AB 1838 |
| | | | 2 000 ABA | |
| | Rob Bonta | Member of House Health Committee | 5 000 Food and Commercial Workers Region 8 Golden State Council | Voted “yes” on AB 1838 |
| | Autumn Burke | Member of House Health Committee | 6 500 California Grocers Association | Voted “yes” on AB 1838 |
| | | | 2 500 Coca-Cola | |
| | Wendy Carrillo | Member of House Health Committee | 4 700 Coca-Cola | Voted “yes” on AB 1838 |
| | | | 4 200 PepsiCo | |
| | Kevin McCarthy | Member of House Health Committee | 4 700 Food and Commercial Workers Region 8 Golden State Council | Voted “yes” on AB 1838 |
| | | | 9 400 PepsiCo | |
| | Freddie Rodriguez | Member of House Health Committee | 4 700 California Teamsters Joint Council 42 | Voted “yes” on AB 1838 |
| | | | 4 700 Food and Commercial Workers Local 1 167 | |
| | | | 2 500 Coca-Cola North America Company | |
| | | | 2 000 United Food and Commercial Workers International Union | |
| 2 000 Food and Commercial Workers Local 770 | | | | |
| 1 500 California Restaurant Association | | | | |
| 1 500 Food and Commercial Workers Local 324 | | | | |
| Miguel Santiago | Member of House Health Committee | 3 500 United Food and Commercial Workers International Union | Voted “yes” on AB 1838 | |
| | | 3 000 PepsiCo | | |
| Marie Waldron | Member of House Health Committee | 4 700 California Restaurant Association | Voted “yes” on AB 1838 | |
| | | 2 000 PepsiCo | | |
| Illinois | John Fritchey | Representative of Illinois General Assembly | 85 000 ABA | Voted against sales and soda tax |
| | | | 54 000 Citizens for a More Affordable Cook County | |
| | | | 18 143.42 Teamsters Local Union No. 727 | |
| | Richard Boykin | Former member of Cook County Board of Commissioners (2014–2018) | 64 000 Citizens for a More Affordable Cook County | Cosponsored measure to repeal soda tax in Cook County |
| | | | 123 000 ABA | |
| | Michael McAuliffe | Member of Illinois House of Representatives (1997–2019) | 250 Illinois vendors PAC | Sponsored HB 4082 |
| 500 Illinois Food Distribution | | | | |
| 250 PepsiCo | | | | |

Continued

TABLE 3— Continued

| State | Government Official | Position | Amount Received, \$ | Preemption Action |
|--------------|----------------------|--|---|---|
| Michigan | Rob VerHeulen | Michigan House of Representatives; previous mayor of Walker, MI | 250 PepsiCo 2016 Concerned Citizens Fund | Sponsored and introduced HB 4999 |
| | | | 5000 Michigan Beer and Wine Wholesalers Association | |
| | | | 2 500 Meijer Inc | |
| | | | 2 000 Michigan Retailers Association | |
| | Pete MacGregor | State Senator | 550 Michigan Distributors and Vendors Association | Sponsored Senate version of preemption bill |
| | | | 3 200 Michigan Retailers Association | |
| | | | 3 050 Meijer Inc | |
| | | | 1 600 Michigan Restaurant Association | |
| New Mexico | Sarah Maestas Barnes | Legislator | 1 000 Admiral Beverage Corp | Introduced preemption measure |
| | | | 1 350 Michigan Distributors and Vendors Association | |
| Oregon | Bruce Hanna | Cospeaker of the Oregon House of Representatives; president of Roseburg Coca-Cola Bottling Plant | 35 000 ABA (2010) | NA |
| | | | 35 000 ABA (2012) | |
| Pennsylvania | Mark Mustio | Pennsylvania House of Representatives (Legislative Budget and Finance Committee) | 1 650 Pennsylvania Licensed Beverage Association | Sponsor of HB 2241 |

Note. AB = Assembly Bill; ABA = American Beverage Association; HB = House Bill; NA = not applicable or not available; PAC = political action committee.

taxes despite the industry having outspent their campaign by 178 to 1 (\$22 442 233.51 to \$125,943.69). Health advocates in Oregon received a private philanthropic donation of \$2.1 million that contributed to the success. However, in Arizona and Michigan, state preemption passed quickly through the legislature, leaving no time for opposition from the public health community. In California, stealth efforts to slip preemption into law over 5 legislative days left no time for media advocacy. Still, it is unclear whether this would have made a difference given policymakers' difficult choice.

Educating Policymakers

The tobacco framework shows that, by educating policymakers, advocates can counter industry lobbying efforts. While soda tax advocates in several states

have begun educating prominent government officials about preemption's impact on local control, these efforts remain nascent, with no formal national strategy. Similar to efforts to combat preemption attempts in tobacco,¹¹ the AHA has led efforts alongside local grassroots organizations to build relationships with political champions. AHA leaders have written letters to government officials, testified during public hearings, and have issued public comments. Financial support by Bloomberg Philanthropies has supported efforts to educate policymakers about preemption threats to local policymaking in Oregon and Illinois.

Mobilizing National Opposition

The creation of the National Tobacco Preemption Task Force, used to

coordinate strategy and evolve best practices across states, marked a turning point in the resistance to state preemption in tobacco control. We found evidence that health organizations have mobilized grassroots movements within states but have not fully unified nationally. Lack of unity within states has affected outcomes. In California, for example, health advocates fell prey to the ABA's divide-and-conquer strategy, which forced unions to break against public health because not doing so would have had worse consequences for labor.

The AHA led early efforts to build an interconnected network of grassroots groups and statewide health advocacy organizations, thus setting the foundation for a national network. In March 2017, Grassroots Change published a toolkit of preemption myths and facts

and advocacy training resources. The AHA and Grassroots Change partnered on a messaging toolkit that was successfully used in Oregon and Pennsylvania. In October 2018, the Local Solutions Support Center joined efforts to build a national antipreemption movement to publish handbooks defining best practices for countering preemption and model campaign materials that were used at national health conferences holding sessions on preemption. In August 2019, the AHA, in partnership with the Robert Wood Johnson Foundation, created the Voices for Healthy Kids initiative and developed a preemption fact sheet for use in advocacy campaigns.

Expanding Legal Networks

The expansion of coordinated efforts by a national network of legal experts was key to the tobacco control movement's ability to withstand preemption attacks. Our analysis found a small, loosely coupled network of attorneys providing technical assistance to soda tax advocates but no single, nationwide organization providing centralized resources. In March 2017, Grassroots Change published a model soda tax law with provisions to withstand industry preemption challenges in the courts. In October 2018, legal experts advocated for more proactive efforts to build antipreemption "savings clauses" into state law that shield local soda taxes from court challenges by expressly reserving authority for local governments.

DISCUSSION

We applied a framework based on the history of tobacco control preemption to understand beverage industry efforts to preempt local soda tax policies in the

United States. We found that the SSB industry, operating through its trade organization the ABA, has made full use of tactics cultivated by the tobacco companies to promote state preemption. The beverage industry obscured its agency in preemption attempts with front groups that present as locally grown, grassroots citizen activist groups, such as "Californians for Accountability and Transparency in Government Spending," "Joint Council of Teamsters No. 28," and "Citizens for a More Affordable Cook County." Industry stakeholders used donations and lobbying to strategically target decisionmakers positioned to quickly move preemption legislation. All told, the beverage industry spent at least \$50 million between 2016 and 2018 on preemption attempts in 8 US states. Beverage companies have tried multiple avenues for achieving soda tax preemption: legislative bills, ballot initiatives, and riders added to unrelated bills. They have also used litigation to subdue local governments seeking autonomy in nutrition policy, including a lengthy court battle in Pennsylvania that went all the way to the state's Supreme Court.

While the beverage industry has built upon the tobacco industry's preemption strategy, it has introduced some novel tactics of its own. With varied success, it has framed soda taxes as "grocery taxes" to confuse voters. It has promoted ballot measures for which the meaning of a "yes" vote was not transparent. And although beverage companies, like tobacco companies, have urged legislators to push through 11th-hour preemption bills, in 2018, the ABA used an unprecedented degree of pressure to compel California legislators opposed to preemption to nonetheless vote in favor of it.

Our findings suggest that the public health community's response to

preemption has mainly been reactive because of lack of funding and resources and the need to address misleading frameworks, which detracted from their ability to counter preemption directly. Public health groups have, at times, been caught off guard because of behind-the-scenes behavior of the industry and, thus, were unable to mount a strong countervailing force.¹² Soda tax advocates in the United States are using many tactics spearheaded by tobacco control advocates, including media advocacy and educating state policymakers. However, the movement lacks a robust formal national infrastructure supported by a legal adviser network.

Advocates can learn from the history of tobacco preemption¹¹ to bring antipreemption activities to the forefront of their policy activity, scaling up a national effort to proactively prevent industry attempts to spread state preemption laws further.³¹ An essential lesson from state preemption in tobacco control is that, once preemption laws are enacted, they create a chilling effect that severely cripples local progress, and they are challenging to repeal. The repeal of state laws preempting local smoke-free air laws—one of only a few public health policy topics ever repealed across the country—took, on average, 12 years.¹¹ State preemption for SSB taxes has already created a chilling effect by forcing localities to withdraw local SSB tax initiatives.²⁹ Efforts to repeal preemption presented particular challenges in California, where health advocates have struggled to gather consensus on whether to repeal state preemption or overturn it with a statewide tax.³² Preventing and repealing state preemption provides crucial opportunities for public education, stimulating debate, and shifting social norms.³¹ For example, in 2019, the repeal of state preemption of

local tobacco control in Colorado led to the launching of 40 local government tobacco regulation campaigns, including 9 tax proposals that passed with solid majorities in ballot initiatives.³³ State preemption does away with these opportunities.

Limitations

This study's strength is its use of an empirically validated conceptual framework for predicting tactics that are likely to be deployed by the SSB industry in pursuing state preemption. This is offset by limitations in the availability of public information to comprehensively identify preemption attempts that did not rise to the level of open public debate and the lack of research to identify the use of litigation to argue implied preemption. Additional research is needed to develop more comprehensive approaches for capturing the universe of state preemption attempts, including those that are not elevated to the public record. Another limitation is the absence of key informant interviews with policymakers and advocates; future research should include such interviews to better understand the SSB tax policy and preemption landscape.

Conclusions

Eight US states have experienced sustained debates over soda tax preemption, and the beverage industry has succeeded at suppressing local autonomy in half. State preemption has had the industry's intended effect of chilling innovation at the local level: between 2015 and 2017, 7 local governments passed soda taxes, but none have since. While the beverage industry's use of state preemption to halt diffusion in local soda taxes is limited so far, the beverage industry uses time-tested

strategies cultivated by the tobacco industry. Public health opposition to SSB tax preemption is nascent but generally uses tactics that mirror those successfully pioneered by tobacco control advocates. Findings from this research point to the need for a robust national network of advocates, supported by national panels of legal experts, that can shift from a reactive to a proactive approach that halts the spread of preemption and begins the task of overturning existing statutes. *AJPH*

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REFERENCES

1. Sánchez-Pimienta TG, Batis C, Lutter CK, et al. Sugar-sweetened beverages are the main sources of added sugar intake in the Mexican population. *J Nutr*. 2016;146(9):1888S–1896S. <https://doi.org/10.3945/jn.115.220301>
2. Andreyeva T, Long MW, Brownell KD. The impact of food prices on consumption: a systematic review of research on the price elasticity of demand for food. *Am J Public Health*. 2010;100(2):216–222. <https://doi.org/10.2105/AJPH.2008.151415>
3. City of Seattle. Sweetened beverage tax: supporting healthy food and child health and development. June 2018. Available at: https://www.seattle.gov/Documents/Departments/SweetenedBeverageTaxCommAdvisoryBoard/FactSheets/SweetenedBeverageTax_FactSheet_2019.pdf. Accessed January 10, 2020.
4. Colchero MA, Popkin BM, Rivera JA, et al. Beverage purchases from stores in Mexico under the excise tax on sugar sweetened beverages: observational study. *BMJ*. 2016;352:h6704. <https://doi.org/10.1136/bmj.h6704>
5. Healthy Food America. Map and chart the movement. December 2, 2019. Available at: <http://www.healthyfoodamerica.org/map>. Accessed January 20, 2020.
6. Gorovitz E, Mosher J, Pertschuk M. Preemption or prevention? Lessons from efforts to control firearms, alcohol, and tobacco. *J Public Health Policy*. 1998;19(1):36–50. <https://doi.org/10.2307/3343088>
7. Silverstein T. Combating state preemption without falling into the local control trap. Poverty and Race Research Action Council. December 1, 2017. Available at: <https://prrac.org/combating-state-preemption-without-falling-into-the-local-control-trap>. Accessed August 20, 2018.
8. Pertschuk M, Pomeranz JL, Aoki JR, et al. Assessing the impact of federal and state preemption in public health: a framework for decision makers. *J Public Health Manag Pract*. 2013;19(3):213–219. <https://doi.org/10.1097/PHH.0b013e3182582a57>
9. Stark MJ, Rohde K, Maher JE, et al. The impact of clean indoor air exemptions and preemption policies on the prevalence of a tobacco-specific lung carcinogen among nonsmoking bar and restaurant workers. *Am J Public Health*. 2007;97(8):1457–1463. <https://doi.org/10.2105/AJPH.2006.094086>
10. Institute of Medicine. *For the Public's Health. Revitalizing Law and Policy to Meet New Challenges*. The National Academies Press. 2011. Available at: <https://www.nap.edu/catalog/13093/for-the-publics-health-revitalizing-law-and-policy-to-meet>. Accessed September 18, 2018.
11. Crosbie E, Schmidt LA. Preemption in tobacco control: a framework for other areas of public health. *Am J Public Health*. 2020;110(3):345–350. <https://doi.org/10.2105/AJPH.2019.305473>

12. Crosbie E, Schillinger D, Schmidt LA. State preemption to prevent local taxation of sugar-sweetened beverages. *JAMA Intern Med.* 2019; 179(3):291–292. <https://doi.org/10.1001/jamainternmed.2018.7770>
13. Pomeranz JL, Pertschuk M. State preemption: a significant and quiet threat to public health in the United States. *Am J Public Health.* 2017;107(6):900–902. <https://doi.org/10.2105/AJPH.2017.303756>
14. Rutkow L, Vernick JS, Hodge JG Jr, et al. Preemption and the obesity epidemic: state and local menu labeling laws and the Nutrition Labeling and Education Act. *J Law Med Ethics.* 2008;36(4):772–789, 611. <https://doi.org/10.1111/j.1748-720X.2008.00337.x>
15. Pomeranz JL, Teret SP, Sugarman SD, et al. Innovative legal approaches to address obesity. *Milbank Q.* 2009;87(1):185–213. <https://doi.org/10.1111/j.1468-0009.2009.00552.x>
16. Pomeranz JL, Pertschuk M. Sugar-sweetened beverage taxation in the USA, state preemption of local efforts. *Public Health Nutr.* 2019;22(1):190. <https://doi.org/10.1017/S136898001800304X>
17. Pomeranz JL, Mozaffarian D, Micha R. The potential for federal preemption of state and local sugar-sweetened beverage taxes. *Am J Prev Med.* 2017; 53(5):740–743. <https://doi.org/10.1016/j.amepre.2017.06.026>
18. Pomeranz JL, Zellers L, Bare M, et al. State preemption of food and nutrition policies and litigation: undermining government's role in public health. *Am J Prev Med.* 2019;56(1):47–57. <https://doi.org/10.1016/j.amepre.2018.07.027>
19. Grassroots Change. Preemption watch: preemption map. January 2020. Available at: <https://grassrootschange.net/preemption-watch/#/newsletters>. Accessed March 20, 2020.
20. Pomeranz JL, Zellers L, Bare M, et al. State preemption: threat to democracy, essential regulation, and public health. *Am J Public Health.* 2019;109(2):251–252. <https://doi.org/10.2105/AJPH.2018.304861>
21. Pomeranz JL. Local policymakers' new role: preventing preemption. *Am J Public Health.* 2019; 109(8):1069–1070. <https://doi.org/10.2105/AJPH.2019.305223>
22. Rutkow L, McGinty MD, Wetter S, et al. Local public health policymakers' views on state preemption: results of a national survey, 2018. *Am J Public Health.* 2019;109(8):1107–1110. <https://doi.org/10.2105/AJPH.2019.305140>
23. Galea S, Vaughan R. On choosing the right starting question: a public health of consequence, August 2019. *Am J Public Health.* 2019;109(8):1075–1076. <https://doi.org/10.2105/AJPH.2019.305173>
24. Falbe J. Sugar-sweetened beverage taxation: evidence-based policy and industry preemption. *Am J Public Health.* 2019;109(2):191–192. <https://doi.org/10.2105/AJPH.2018.304888>
25. Bare M, Zellers L, Sullivan PA, et al. Combatting and preventing preemption: a strategic action model. *J Public Health Manag Pract.* 2019;25(2):101–103. <https://doi.org/10.1097/PHH.0000000000000956>
26. Crosbie E, Hatefi A, Schmidt L. Emerging threats of global preemption to nutrition labelling. *Health Policy Plan.* 2019;34(5):401–402. <https://doi.org/10.1093/heapol/czz045>
27. Pomeranz JL, Silver D. State legislative strategies to pass, enhance, and obscure preemption of local public health policy-making. *Am J Prev Med.* 2020; 59(3):333–342. <https://doi.org/10.1016/j.amepre.2020.03.023>
28. Malone RE, Balbach ED. Tobacco industry documents: treasure trove or quagmire? *Tob Control.* 2000;9(3):334–338. <https://doi.org/10.1136/tc.9.3.334>
29. Pomeranz JL. Anticipating and defeating preemption across public health. *Am J Public Health.* 2020;110(3):268–270. <https://doi.org/10.2105/AJPH.2019.305528>
30. Morales X. Evaluation of SSB taxes in the Bay Area, CA. The Praxis Project. June 30, 2019. Available at: <https://www.thepraxisproject.org/blog/2019/5/3/us-citizenship-application-fee-waiver-public-comment-aj8nr-yf4yb-hc3k2>. Accessed June 4, 2019.
31. Mowery PD, Babb S, Hobart R, et al. The impact of state preemption of local smoking restrictions on public health protections and changes in social norms. *J Environ Public Health.* 2012;2012:632629. <https://doi.org/10.1155/2012/632629>
32. Washburn D. California's soda tax ban stalled a grassroots movement, but didn't kill it. *EdSource.* July 31, 2018. Available at: <https://edsources.org/2018/californias-soda-tax-ban-stalled-a-grassroots-movement-but-didnt-kill-it/600795>. Accessed February 15, 2020.
33. American Heart Association. Local momentum spurs Colorado to repeal tobacco preemption law. May 19, 2020. Available at: <https://voicesforhealthykids.org/impact/success-stories/local-momentum-spurs-colorado-to-repeal-tobacco-preemption-law>. Accessed May 22, 2020.