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# Soda Taxes as a Legal and Social Movement

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Janice Nadler†

In the last few years, several local governments have adopted new soda taxes.<sup>1</sup> Other localities currently are considering adopting such a tax. In this Article, we consider whether soda taxes are becoming a more common local policy throughout the country—like local smoking restrictions—or whether, instead, they will remain a limited legal phenomenon.

We focus on two potential obstacles to the widespread adoption of local soda taxes: (1) policy-based objections to the taxes as regressive and unduly paternalistic, which could undermine political support for their adoption at the local level; and (2) state preemption of local taxes, often achieved at the behest of the beverage industry. As we explain later, the principal risk of preemption vis-à-vis soda taxes does not come from the state courts in the form of decisions finding implied or field preemption, but rather from state statutes that expressly, unequivocally preempt such taxes. In almost all states, such express preemption would be considered lawful by the courts and would be effective in depriving localities of the power to impose taxes on soda.

We suggest two ways in which these obstacles might be overcome. First, linking soda tax revenue to programs that provide a clear, uncontroversial benefit to low-income populations—such as universal preschool—will mute the policy objections to the adoption of soda taxes. Second, we surmise that the beverage industry will find it much easier to secure passage of state statutes expressly preempting local soda taxes *before* soda taxes have been adopted and have become the funding source for popular programs. Thus, the timing of enactment of local soda taxes may matter a great deal; the more time that elapses in a state before the adoption of a soda tax, the greater the likelihood a state preemption statute will be enacted first. In short, for those who believe that soda taxes are good policy, it is worth noting that speedy adoption of soda taxes that link tax revenue to popular programs in as many localities as possible is the surest way for soda taxes to become a nationwide legal phenomenon.

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<sup>1</sup> In this Article we use the term “soda tax” loosely to refer to taxes imposed on the manufacture, distribution, sale, or consumption of non-alcoholic beverages such as soft drinks, both carbonated and uncarbonated, and sweetened, either naturally or artificially. We follow the convention in the public health literature to use the term “sugar-sweetened beverages” to refer to all non-diet soft drinks with added sugars (e.g., sucrose, fructose, dextrose) including soda, sports drinks, juice drinks, sweetened coffees and teas, energy drinks, and so forth.

Our analysis here is descriptive and not normative; we take no position on whether soda taxes represent good policy. The public health goal of soda taxes is to reduce disease by decreasing consumption of sugary beverages. However, the health consequences of soda taxes in practice depend on a number of factors, such as: (1) the extent to which taxes affect soda prices;<sup>2</sup> (2) how those price changes affect the quantity of soda and other goods that people consume; and (3) the health consequences of these consumption changes.<sup>3</sup> The long-term health effects of soda taxes pose complicated empirical questions that would require extensive study.<sup>4</sup> Nonetheless, a number of respected public health experts endorse the soda tax approach,<sup>5</sup> so it is useful to consider both the conditions under which such taxes might be implemented and then survive legal and political scrutiny.

Part I briefly reviews the history of soda taxes to date, with attention to how they have been structured. Part II focuses on the regressivity and nanny-state objections to soda taxes and uses the Philadelphia case study to show how those objections can be muted. Part III outlines the law of preemption and explores how soda taxes could be subject to implied, field, and express preemption. Part IV develops the argument that state statutory preemption is more likely to occur the longer a local government waits to pass and implement local soda taxes. For this reason, as a political matter, public health activists

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<sup>2</sup> Taxes on soda are not necessarily fully passed down to the price faced by consumers. If the market is elastic and retailers or producers anticipate consumers switching to substitutes (e.g., water) not subject to the tax, they might lower the pre-tax price of the product to compensate. The after-tax price of soda therefore might not reflect the entire magnitude of the tax. *See, e.g.*, John Cawley, Barton Willage & David Frisvold, *Pass-Through of a Tax on Sugar-Sweetened Beverages at the Philadelphia International Airport*, JAMA (2017), <https://jamanetwork.com/journals/jama/fullarticle/2660167>; John Cawley & David E. Frisvold, *The Pass-Through of Taxes on Sugar-Sweetened Beverages to Retail Prices: The Case of Berkeley, California*, 36 J. POL'Y ANALYSIS MGMT. 303, 303–26 (2017).

<sup>3</sup> For example, consider how a soda tax might affect consumption of French fries and candy. Consumption of either good could have a negative effect on one's health. However, French fries and soda are complements; consumers prefer to consume these goods together. If the tax decreases soda consumption, consumers might purchase fewer French fries, which might increase the total health benefit of enacting a soda tax. By contrast, soda and candy, which both have high sugar content, are likely substitutes; many consumers prefer to consume one or the other, but not both in the same sitting. If consumers decrease soda consumption in response to the tax, they might increase consumption of candy, negating some of the health benefit of decreasing soda consumption.

<sup>4</sup> A few efforts have been undertaken or are underway. More work needs to be done. *See, e.g.*, Lynn D. Silver et al., *Changes in Prices, Sales, Consumer Spending, and Beverage Consumption One Year After a Tax on Sugar-Sweetened Beverages in Berkeley, California, US: A Before-And-After Study*, PLOS MED. (Apr. 18 2017), <http://journals.plos.org/plosmedicine/article?id=10.1371/journal.pmed.1002283>; M. Arantxa Colchero et al., *Beverage Purchases from Stores in Mexico Under the Excise Tax on Sugar Sweetened Beverages: Observational Study*, BMJ (Jan. 6, 2016), <http://www.bmj.com/content/352/bmj.h6704>; Jennifer Falbe et al., *Impact of the Berkeley Excise Tax on Sugar-Sweetened Beverage Consumption*, 106 AM. J. PUB. HEALTH 1865 (2016); Vasanti S. Malik, Matthias B. Schulze & Frank B. Hu, *Intake of Sugar-Sweetened Beverages and Weight Gain: A Systematic Review*, 84 AM. J. CLINICAL NUTRITION 274 (2006).; Jason M. Fletcher, David E. Frisvold & Nathan Tefft, *The Effects of Soft Drink Taxes on Child and Adolescent Consumption and Weight Outcomes*, 94 J. PUB. ECON. 967 (2010); Jason M. Fletcher, David E. Frisvold & Nathan Tefft, *Non-Linear Effects of Soda Taxes on Consumption and Weight Outcomes*, 24 HEALTH ECON. 566 (2015).

<sup>5</sup> *See, e.g.*, Rebecca J. Scharf & Mark D. DeBoer, *Sugar-Sweetened Beverages and Children's Health*, 37 ANN. REV. PUB. HEALTH 273 (2016); MARION NESTLE, *SODA POLITICS: TAKING ON BIG SODA (AND WINNING)* (2015); Kelly D. Brownell & Thomas R. Frieden, *Ounces of Prevention: The Public Policy Case for Taxes on Sugared Beverages*, 360 NEW ENG. J. MED. 1805 (2009); Kelly D. Brownell et al., *The Public Health and Economic Benefits of Taxing Sugar-Sweetened Beverages*, 361 NEW ENG. J. MED. 1599 (2009).

who seek local taxation of soda might be wise to try to ensure that as many local ordinances as possible are in place prior to the consideration by a state legislature of a state law preempting such taxes.

### I. A SHORT HISTORY OF TAXING SUGARY DRINKS

In the United States, sodas were not always sold in the portion sizes that we are accustomed to seeing today. In 1916 Coca-Cola was sold in a 6.5 ounce bottle. The company did not introduce larger sizes until the 1950s, and even then most bottled sodas contained less than 7 ounces.<sup>6</sup> Today's standard vending machine bottle size is 20 ounces, which is three times larger than the original. As a general matter, larger portion size induces people to consume more, and also to underestimate the number of calories they are consuming.<sup>7</sup> Over the past several decades, as the size of bottles and fountain drink cups for sugary drinks has increased, the average per person intake of those beverages has also increased. The industry's marketing strategies encourage people to buy and consume larger sizes; as a general matter, price per ounce decreases as package size increases. Moreover, default options have special influence when people make choices, and default sizes for sugary beverages are no exception—when the default portion is large, people will tend to consume more than when it is small.<sup>8</sup> Public health activist and scholar Marion Nestle asserts, “[o]n the basis of calories alone, larger portions are a sufficient explanation for rising rates of obesity.”<sup>9</sup> Sugar sweetened beverages represent the single largest source of added sugars for Americans.<sup>10</sup>

One way to encourage people to reduce consumption of sugary drinks is to make them relatively more expensive—i.e., by raising the tax inclusive price of soda, holding the prices of other goods fixed. Many sugary drinks are not nutritious but widely consumed, making them an attractive target for taxation, especially for cash-strapped local and state governments.<sup>11</sup> The analogy to tobacco in the soda tax debate is one that public health officials are examining. The coincident increase in the taxation of tobacco products and decline in tobacco use in the United States over the last several decades suggests that

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<sup>6</sup> NESTLE, *supra* note 5, at 344.

<sup>7</sup> See generally Brian Wansink & Pierre Chandon, *Meal Size, Not Body Size, Explains Errors in Estimating the Calorie Content of Meals*, 145 ANNALS INTERNAL MED. 326 (2006); Barbara J. Rolls, Erin L. Morris & Liane S. Roe, *Portion Size of Food Affects Energy Intake in Normal-Weight and Overweight Men and Women*, 76 AM. J. CLINICAL NUTRITION 1207 (2002).

<sup>8</sup> C. Peter Herman et al., *Mechanisms Underlying the Portion-Size Effect*, 144 PHYSIOLOGY & BEHAV. 129, 129 (2015); Ingrid HM Steenhuis & Willemijn M. Vermeer, *Portion Size: Review and Framework for Interventions*, 6 INT'L J. BEHAV. NUTRITION & PHYSICAL ACTIVITY 58, 58 (2009).

<sup>9</sup> NESTLE, *supra* note 5, at 345. Holding aside political considerations, taxing soda is an attractive proposition from a revenues perspective regardless of how consumers respond. If the price elasticity of soda is high, a tax will significantly reduce soda consumption, with attendant health benefits that may free up funding for preventative health programs. If, on the other hand, demand for soda is relatively inelastic, i.e. consumers do not reduce their soda consumption by very much in response to the tax, the city gains a steady and reliable source of revenue.

<sup>10</sup> Peter J. Huth et al., *Major Food Sources of Calories, Added Sugars, and Saturated Fat and Their Contribution to Essential Nutrient Intakes in the U.S. Diet: Data from the National Health and Nutrition Examination Survey (2003–2006)*, 12 NUTRITION J. 116, 118 (2013).

<sup>11</sup> NESTLE, *supra* note 5, at 362.

increasing the tax inclusive price reduces tobacco use.<sup>12</sup> This possibility has encouraged public health advocates to consider whether health risks associated with sugar consumption can be mitigated in the same way.

State and local taxation of sugary drinks in the U.S. began long ago, not so much as a way to discourage consumption, but simply to raise revenue. Some early measures<sup>13</sup> include South Carolina's 1925 soft drink tax,<sup>14</sup> Louisiana's 1938 wholesale tax on bottled soft drinks and syrups,<sup>15</sup> Texas' 1961 sales tax on soft drinks and candy,<sup>16</sup> Indiana's 1963 sales tax on candy, gum, and bottled drinks,<sup>17</sup> and New York State's 1965 sales tax on soft drinks and candy.<sup>18</sup> A study by Jacobson and Brownell identified a dozen state and local taxes on soft drinks that were later repealed, sometimes after lobbying or pressure by the beverage industry.<sup>19</sup> Long ago, even the federal government enacted soda taxes to raise money for World War I.<sup>20</sup>

Currently, most states (34) and some counties tax soft drinks<sup>21</sup> at rates that are low enough that the effect on sales and consumption may be negligible,<sup>22</sup> with revenues directed toward the states' general funds. Many states (about 20) collect sales tax on soft drinks at a rate higher than food.<sup>23</sup> For example, the state of Illinois collects sales taxes on food at a reduced rate of 1–2%, but taxes soft drinks at the “general merchandise” rate of 6.25%.<sup>24</sup> Chicago imposes an additional excise tax of 9% on fountain drink syrup,<sup>25</sup> as well

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<sup>12</sup> Hana Ross et al., *Do Cigarette Prices Motivate Smokers to Quit? New Evidence from the ITC Survey*, 106 ADDICTION 609, 609 (2011); Jie-Min Lee, *Effect of a Large Increase in Cigarette Tax on Cigarette Consumption: An Empirical Analysis of Cross-Sectional Survey Data*, 122 BMC PUB. HEALTH 1061, 1061 (2008).

<sup>13</sup> See Michael F. Jacobson & Kelly D. Brownell, *Small Taxes on Soft Drinks and Snack Foods to Promote Health*, 90 AM. J. PUB. HEALTH 854, 856 (2000).

<sup>14</sup> \$0.01 per twelve ounce container and \$0.95 per gallon syrup, repealed in 2001. *Id.*

<sup>15</sup> 2.5%, reduced to 1.25% in 1993, and repealed in 1997. *Id.*

<sup>16</sup> 6.25%, still in effect. *Id.* at 855.

<sup>17</sup> 5% sales tax, still in effect. *Id.* at 855.

<sup>18</sup> Up to 7.5%, still in effect. *Id.* at 856.

<sup>19</sup> See generally *id.*

<sup>20</sup> This tax was short-lived. Caitlin Dewey, *What Happened When Congress Decided to Tax All Soda*, WASH. POST: WONKBLOG (Apr. 6, 2017), <https://www.washingtonpost.com/news/wonk/wp/2017/04/06/what-happened-when-america-put-a-national-tax-on-soda/>.

<sup>21</sup> See CHRIQUI JF, EDISON SS & CHALOUKKA FJ, BRIDGING THE GAP PROGRAM, HEALTH POLICY CTR., INST. FOR HEALTH RESEARCH & POLICY, UNIV. OF ILL. AT CHI., STATE SALES TAXES ON REGULAR SODA (AS OF JANUARY 2014) (2014), [http://www.bridgingthegapresearch.org/\\_asset/s2b5pb/BTG\\_soda\\_tax\\_fact\\_sheet\\_April2014.pdf](http://www.bridgingthegapresearch.org/_asset/s2b5pb/BTG_soda_tax_fact_sheet_April2014.pdf).

<sup>22</sup> Additionally, taxes charged at checkout do not appear in the price of the item on the shelf. This makes the increased cost less salient to the consumer, possibly lowering the probability of decreasing consumption. To the extent that raising revenue is the primary goal of these taxes, the fact that they are not salient and therefore do not shape behavior is an advantage. See generally, Jacob Goldin, *Sales Tax Not Included: Designing Commodity Taxes for Inattentive Consumers*, 122 YALE L.J. 258 (2012).

<sup>23</sup> *Id.*

<sup>24</sup> *Sales & Use Taxes*, ILL. DEP'T OF REVENUE,

<http://tax.illinois.gov/Businesses/TaxInformation/Sales/rot.htm> (last visited Oct. 15, 2017) (follow “Regulation 130.310” hyperlink).

<sup>25</sup> CITY OF CHI., *Fountain Soft Drink Tax (7590)*,

[https://www.cityofchicago.org/city/en/depts/fin/supp\\_info/revenue/tax\\_list/fountain\\_soft\\_drinktax.html](https://www.cityofchicago.org/city/en/depts/fin/supp_info/revenue/tax_list/fountain_soft_drinktax.html) (last visited Oct. 15, 2017).

as a 3% sales tax on retail sales of soft drinks in cans or bottles.<sup>26</sup> These taxes appear to be primarily revenue driven, and began long before recent public health discussions regarding reducing sugar intake to combat obesity-related disease.

In the wake of increased concern among public health scholars and advocates about the link between sugar and disease, the *New England Journal of Medicine* published an article in 2009 suggesting that a 1 cent per ounce excise tax on sugar-sweetened beverages would reduce consumption as well as generate considerable revenue.<sup>27</sup> The penny per ounce tax would increase the cost of sugary drinks by about 15–20%—substantially more than current sales tax rates. Ever since the article was published, certain state and local governments have been experimenting with beverage taxes, intended to benefit health by generating more substantial revenue (to be used for health and nutrition education and the like) or to reduce consumption, or both. Attempts to impose more substantial taxes were attempted, but failed in New York State (2008 and 2010), Richmond, California (2012), El Monte, California (2012), and San Francisco, California (2014). These efforts were opposed strongly by expensive public campaigns launched by the American Beverage Association (ABA).<sup>28</sup> During some of these campaigns, the beverage industry formed alliances with grocers, unions, and even organizations representing racial and ethnic minorities.

Then, in 2014, the voters in Berkeley, CA passed a 1 cent per ounce excise tax on sugar-sweetened beverages.<sup>29</sup> The campaign received financial assistance from Bloomberg Philanthropies, among others, and enjoyed more broad-based support than did previous efforts in other localities.<sup>30</sup> The law's stated purpose is to reduce disease associated with consumption of these drinks.<sup>31</sup> Proceeds fund a variety of nutrition and health related programs.<sup>32</sup> At the time, beverage industry spokespeople dismissed the Berkeley action as *sui generis* (only Berkeley is Berkeley after all). But in 2016, Philadelphia's city council enacted a substantial 1.5 cents-per-ounce excise tax on beverages with any sweetener (including diet), which we discuss in more detail in the next section.<sup>33</sup> Later in the November 2016 general election, voters in several other municipalities across the U.S. (e.g., San Francisco, Oakland, and Albany, CA, as well as Boulder, CO) passed substantial taxes on beverages, ranging between 1–2 cents per ounce.<sup>34</sup> In addition to these ballot

<sup>26</sup> *Chicago Home Rule Municipal Soft Drink Retailers' Occupation Tax*, ILL. DEP'T OF REVENUE, <http://www.revenue.state.il.us/businesses/taxinformation/sales/softdrink.htm> (last visited Oct. 15, 2017).

<sup>27</sup> Brownell et al., *supra* note 5.

<sup>28</sup> Kate Sheppard, *Beverage Industry Group Bankrolls Soda Tax Opposition*, MOTHER JONES (July 25, 2012), <http://www.motherjones.com/environment/2012/07/meet-beverage-industry-group-bankrolls-soda-tax-opposition/#>.

<sup>29</sup> Robert Paarlberg, Dariush Mozaffarian & Renata Micha, *Viewpoint: Can U.S. Local Soda Taxes Continue to Spread?*, 71 FOOD POLICY 1, 1 (2017).

<sup>30</sup> *Id.*

<sup>31</sup> Berkeley, Cal., Ordinance Imposing a General Tax on the Distribution of Sugar-Sweetened Beverage Products (Nov. 2014), <https://www.cityofberkeley.info/uploadedFiles/Clerk/Elections/Sugar%20Sweetened%20Beverage%20Tax%20-%20Full%20Text.pdf>.

<sup>32</sup> Heather Knight, *Berkeley Kept its Word on Soda Tax Proceeds*, S.F. CHRON. (Oct. 26, 2016), <http://www.sfchronicle.com/bayarea/article/SF-soda-tax-changes-flavor-from-2014-10098368.php>.

<sup>33</sup> *See infra* Part II.

<sup>34</sup> Heather Knight, S.F., *Oakland, Albany voters pass soda tax*, S.F. CHRONICLE (Nov. 8, 2016), <http://www.sfgate.com/politics/article/Sugar-tax-measure-results-10593882.php>; Alex Burness, *Boulder passed the nation's steepest soda tax; now, to implement it*, BOULDER DAILY CAMERA (Nov. 21, 2016),

measures, the Seattle City Council passed a sugary beverage tax earmarked for food access and education.<sup>35</sup> The most significant effort in terms of total revenue projections was the 2017 sales tax proposed by the Cook County, IL Board of Commissioners on all sweetened (including diet) beverages.<sup>36</sup>

## II. POLICY OBJECTIONS TO TAXING BEVERAGES

Although small taxes have been imposed on beverages for almost a century in some states and localities, the imposition of larger taxes that might substantially reduce consumption (as well as raise substantially more revenue) is a relatively new phenomenon. The costs and benefits of these larger beverage taxes are currently the subject of a great deal of debate. In this section we briefly review this debate, with emphasis on a few of the costs and benefits that loom large in the public's consciousness.

In recent years, public health researchers and officials have focused their attention on the problem of excess consumption of unhealthful foods and beverages, which they associate with diseases that are among leading causes of death.<sup>37</sup> This problem has increased markedly in the last few decades, and sugar-sweetened beverages have been identified as possibly one of the most powerful of many factors.<sup>38</sup> Sales taxes usually are levied as a percentage of retail price, and are not ideal for discouraging consumption for a few reasons. First, they encourage consumers to purchase less expensive brands.<sup>39</sup> Second, the federal Supplemental Nutrition Assistance Program (SNAP) purchases are not subject to sales tax.<sup>40</sup> Third, these taxes are collected at the cash register and are not part of the price consumers see on the product, and so the increase in price is not salient to the purchaser at the time of selection.<sup>41</sup> By contrast, excise taxes are imposed on distributors

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[http://www.dailycamera.com/news/boulder/ci\\_30593248/boulder-passed-nations-steepest-soda-tax-now-implement](http://www.dailycamera.com/news/boulder/ci_30593248/boulder-passed-nations-steepest-soda-tax-now-implement).

<sup>35</sup> Daniel Beekman, *Seattle will tax sugary soda — but not diet*, SEATTLE TIMES (June 5, 2017), <https://www.seattletimes.com/seattle-news/politics/seattle-city-council-says-yes-to-soda-tax/>.

<sup>36</sup> The tax was extremely short-lived—it went into effect on August 2, 2017, and was repealed by lawmakers on October 11, 2017, with collections ending on December 1, 2017. The county estimated that the tax would have generated about \$200 million per year, and it was meant to help close a \$1.8 billion budget gap. Greg Trotter, *What Shoppers Need to Know About the Cook County Soda Pop Tax*, CHI. TRIB. (June 24, 2017), <http://www.chicagotribune.com/business/ct-cook-county-soda-tax-preview-0625-biz-20170622-story.html>. The tax was not collected on beverages purchased with SNAP, which are not subject to sales tax. *Id.*

<sup>37</sup> Dariush Mozaffarian, *Dietary and Policy Priorities for Cardiovascular Disease, Diabetes, and Obesity: A Comprehensive Review*, 133 CIRCULATION 187, 187 (2016); Renata Micha et al., *Association Between Dietary Factors and Mortality from Heart Disease, Stroke, and Type 2 Diabetes in the United States*, 317 JAMA 912, 912 (2017).

<sup>38</sup> Malik, Schulze, & Hu, *supra* note 4, at 274; Scharf & DeBoer, *supra* note 5, at 273; Brownell & Frieden, *supra* note 5, at 1599.

<sup>39</sup> Brownell & Frieden, *supra* note 5, at 1807.

<sup>40</sup> *Retailer Sales Tax Notice*, U.S. DEP'T AGRIC.: FOOD & NUTRITION SERV., <https://www.fns.usda.gov/snap/retailer-sales-tax-notice> (last updated Aug. 30, 2017).

<sup>41</sup> This is not to say that sales taxes have no effect on purchasing behavior, but rather that taxes included in a price are more salient than taxes that are not included in a price. Tax-exclusive pricing can lead to consumers under-valuing the tax because it is hidden. *See* Raj Chetty, Adam Looney & Kory Kroft,

and manufacturers rather than retailers, and usually are structured as a fixed cost per ounce. When these costs are passed on to consumers, they are included in the price consumers see on the price tag, rather than later at the cash register, making the increased price more salient, and possibly encouraging reduced consumption.

The major health policy argument in favor of sugar-sweetened beverage taxes is that they will discourage consumption—which will reduce caloric intake from sugar—leading to health benefits. However, to the extent that consumers continue to consume soda, the tax will generate additional revenues which the local government may use to create or expand health-enhancing programs, such as childhood obesity-prevention, health and nutrition education, and building facilities to encourage physical activity. Other beneficial uses of revenue are possible as well, and we discuss these below in the case of the Philadelphia beverage tax.<sup>42</sup>

It is still too early to tell with certainty whether imposing substantial taxes on sweetened beverages leads to lower consumption<sup>43</sup> and ultimately improves health outcomes.<sup>44</sup> Mexico, a country which has been hit hard by increasing rates of diabetes and other health problems, imposed a national excise tax of one peso per liter (about 10%) on sugar-sweetened beverages that went into effect in 2014.<sup>45</sup> One study of purchases before and after the tax went into effect suggests a reduction in purchases of taxed beverages (sugar-sweetened) and an increase in purchases of untaxed beverages (e.g., water).<sup>46</sup> Time will tell whether the results of this single study are replicated. More important than reduction in purchases is the ultimate question of whether health outcomes will improve as a result of the tax, a question that will be studied as the consequences of the tax unfold in Mexico.

The question of whether taxing sugar-sweetened beverages is an effective method for improving health outcomes is the subject of a good deal of debate. In addition to concerns about effectiveness, there are other possible disadvantages that have been debated extensively. The beverage industry apparently has invested vast resources in communication strategies focused on arguments against beverage taxes, including claims that the tax will not change consumption or health, and somewhat conversely, that beverage taxes will lead to loss of beverage industry jobs and hurt small grocers.<sup>47</sup>

One argument the beverage industry often invokes against taxing beverages is that government should not act like a “nanny” by telling citizens what and how much they

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*Salience and Taxation: Theory and Evidence*, 99 AM. ECON. REV. 1145, 1145 (2009) (showing experimentally that consumers underreact to sales tax assessed at the register).

<sup>42</sup> See *infra* Part II.

<sup>43</sup> See, e.g., Falbe et al., *supra* note 4; Silver et al., *supra* note 4; Colchero et al., *supra* note 4; Cawley and Frisvold, *supra* note 2.

<sup>44</sup> See generally Maria A. Cabrera Escobar et al., *Evidence that a Tax on Sugar Sweetened Beverages Reduces the Obesity Rate: A Meta-Analysis*, 13 BMC PUB. HEALTH 1072 (2013).

<sup>45</sup> COLCHERO ET AL., *supra* note 4.

<sup>46</sup> *Id.* at 1.

<sup>47</sup> Philly Beverage Tax is a “Job Killer” | American Beverage Association, , <http://www.ameribev.org/education-resources/blog/post/philly-beverage-tax-is-a-job-killer/> (last visited Sep 3, 2017); Tax Foundation: Philly ‘Soda Tax Experiment Failing’ | American Beverage Association, , <http://www.ameribev.org/education-resources/blog/post/tax-foundation-philly-soda-tax-experiment-failing/> (last visited Sep 3, 2017); The Truth About the Berkeley Beverage Tax | American Beverage Association, , <http://www.ameribev.org/education-resources/blog/post/the-truth-about-the-berkeley-beverage-tax/> (last visited Sep 3, 2017).



should eat and drink.<sup>48</sup> Instead, the argument reasons that adults are capable of making their own decisions without government interference or guidance. This argument appears to have had a great deal of persuasive power in several of the (ultimately failed) attempts to impose substantial beverage taxes or limits. In New York City's attempt to reduce sweetened beverage consumption (limiting the size of sugared drinks to sixteen ounce cups), the ABA's public relations campaign focused on convincing New Yorkers that the size cap amounted to a "ban" that intruded upon personal freedom of choice.<sup>49</sup> The "nanny-state" argument struck a chord with many New Yorkers across otherwise familiar divides like race, class, and education. Publications like the *New Yorker* and *The New York Times* joined late night TV hosts and others in the chorus of voices making fun of "nanny-state" politics. A now infamous, industry-funded full-page advertisement in *The New York Times* depicted Mayor Bloomberg as a giant nanny in a dress looming over the city, attempting to limit the size of pizza slices and bagel toppings.<sup>50</sup> Other industry communications strategies included distributing t-shirts with the words, "I picked out my beverage all by myself."<sup>51</sup> The portion cap rule was ultimately struck down in state court, on the grounds that the city's health department had exceeded the scope of its regulatory authority.<sup>52</sup> During the two-year period between announcement of the rule and the time it was struck down by the state's highest court, the rule remained unpopular among New Yorkers and Americans generally,<sup>53</sup> and a main flashpoint of discourse about the rule was "nanny-state" concerns.

Another key concern regarding beverage taxes is that of regressivity: taxing both rich and poor at the same fixed amount per ounce means that poor consumers will bear a higher share of the tax burden than the rich in proportion to their income.<sup>54</sup> Relatedly, the regressive nature of beverage taxes is aggravated by evidence suggesting that lower-income individuals consume sugar-sweetened beverages at a greater rate than higher-income individuals.<sup>55</sup> The image of regressive taxation that impacts poor communities of

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<sup>48</sup> NESTLE, *supra* note 5, at 352.

<sup>49</sup> Nancy Huehnergath, *The Masterminds Behind the Phony Anti-Soda Tax Coalitions*, FOOD SAFETY NEWS (July 16, 2012), [http://www.foodsafetynews.com/2012/07/the-masterminds-behind-the-phony-anti-soda-tax-coalitions/#.WiG\\_7FWnEdU](http://www.foodsafetynews.com/2012/07/the-masterminds-behind-the-phony-anti-soda-tax-coalitions/#.WiG_7FWnEdU).

<sup>50</sup> David Gianastasio, *Bloomberg Shown in Drag in Ad Protesting Ban on Supersized Drinks*, ADWEEK (June 4, 2012), <http://www.adweek.com/creativity/bloomberg-shown-drag-ad-protesting-ban-supersized-drinks-140911/#/>.

<sup>51</sup> NESTLE, *supra* note 5, at 352.

<sup>52</sup> Paul A. Diller, *The Illusion of Autonomy in "Food" Litigation*, 41 AM. J. LAW & MED. 274, 280 (2015).

<sup>53</sup> Bahar Gholipour, *Americans Would Vote Against NYC Soda Ban, Poll Says*, LIVE SCI. (June 26, 2013), <https://www.livescience.com/37780-soda-ban-poll.html>.

<sup>54</sup> *But see generally* Jacob Goldin & Tatiana Homonoff, *Smoke Gets in Your Eyes: Cigarette Tax Salience and Regressivity*, 5 AM. ECON. J. ECON. POL'Y 302 (2013) (showing that low income consumers are more responsive than other consumers to cigarette taxes not included in the price, possibly mitigating the regressivity of the tax).

<sup>55</sup> Sohyun Park, *Consumption of Sugar-Sweetened Beverages Among US Adults in 6 States: Behavioral Risk Factor Surveillance System, 2011*, 11 PREVENTING CHRONIC DISEASE (2014). Nationwide, the federal government is estimated to pay at least \$1.7 to \$2.1 billion annually for sugar-sweetened beverages purchased in grocery stores, via SNAP. Tatiana Andreyeva et al., *Grocery Store Beverage Choices by Participants in Federal Food Assistance and Nutrition Programs*, 43 AM. J. PREVENTATIVE MED. 411, 411 (2012). Relatedly, the burdens of disease associated with sugar-sweetened beverages disproportionately affect low income communities, so the benefits of the tax (assuming the tax effectively reduces disease) are progressive even if the tax itself is regressive.

color was effectively deployed by the beverage industry in its effort to defeat proposed sugar-sweetened beverage regulations. For example, in Richmond, CA, the ABA hired a political consulting firm to campaign in 2012 against that city's proposed sugared beverage tax.<sup>56</sup> The city of Richmond had a history of racial division over environmental issues, with city leaders backed by Chevron insisting that white liberal environmentalists' efforts to block Chevron's plans to expand their refinery would cost African-Americans jobs.<sup>57</sup> To defeat the proposed soda tax, the ABA's consultant hired Black and Hispanic workers to staff phone banks to spread the message that the tax would hurt poor people.<sup>58</sup> The ABA's consultant placed advertisements on billboards depicting an elderly Black man who would be hurt by the soda tax.<sup>59</sup> The tax was defeated by voters at the polls.<sup>60</sup>

Concerns about nanny-stateism and regressivity thus became part of the public discourse on soda taxes. Philadelphia Mayor Jim Kenney proposed a beverage tax shortly after taking office in 2016, and the lessons from failed initiatives in other cities were not lost on him. He campaigned on a promise of providing preschool education to every child in the city. As part of his budget, he proposed taxing sugar-sweetened beverages at 3 cents per ounce—higher than any other proposed tax in the country.<sup>61</sup> Proposals to tax sodas had failed twice before in Philadelphia.<sup>62</sup> To succeed this time, Kenney needed a way to avoid the powerful arguments of nanny-stateism and racial regressivity that the beverage industry deployed so effectively in the past. To neutralize the nanny-state concern, Kenney distanced himself from the “usual eat-your-vegetables approach of public health reformers.”<sup>63</sup> Instead, he talked about that tax purely as a way to raise revenue—at 3 cents an ounce, the \$400 million over five years would fully fund preschool and help fund popular city projects like community centers, school improvements, parks, libraries, and municipal pensions.<sup>64</sup> When asked about the health benefits of the tax, he responded, “There's really serious health benefits in pre-K.”<sup>65</sup>

The opportunity to grapple with the disproportionate impact by race concern came later, when the city council was preparing to vote on the tax. After weeks of negotiations, the city council passed a modified version of Kenney's proposal—instead of taxing sugar-sweetened beverages only, the city would tax both sugar-sweetened and artificially sweetened beverages.<sup>66</sup> And instead of 3 cents per ounce, the rate would be 1.5 cents per

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<sup>56</sup> Sheppard, *supra* note 28.

<sup>57</sup> Wendi Jonassen, *Race-Baiting in Richmond* *East Bay Express*, EAST BAY EXPRESS (Jan. 23, 2013), <https://www.eastbayexpress.com/oakland/race-baiting-in-richmond/Content?oid=3441871>.

<sup>58</sup> *Id.*

<sup>59</sup> NESTLE, *supra* note 5, at 369.

<sup>60</sup> Robert Rogers, *Voters resoundingly reject Richmond 'soda' tax*, MERCURY NEWS (Nov. 6, 2012), <http://www.mercurynews.com/2012/11/06/voters-resoundingly-reject-richmond-soda-tax/>.

<sup>61</sup> Margot Sanger-Katz, *Making a Soda Tax More Politically Palatable*, N.Y. TIMES (Apr. 3, 2016), <http://www.nytimes.com/2016/04/04/upshot/making-a-soda-tax-more-politically-palatable.html>.

<sup>62</sup> Martha C. White, *Philadelphia Tries for a More Palatable Soda-Tax Pitch*, NBC NEWS (May 23, 2016), <https://www.nbcnews.com/business/consumer/philly-tries-more-palatable-soda-tax-pitch-n578806>.

<sup>63</sup> Sanger-katz, *supra* note 61.

<sup>64</sup> *Id.*

<sup>65</sup> Sanger-katz, *supra* note 61.

<sup>66</sup> Tricia L. Nadolny, *Soda tax passes; Philadelphia is first big city in nation to enact one*, PHILA. ENQUIRER (June 16, 2016),

[http://www.philly.com/philly/news/politics/20160617\\_Philadelphia\\_City\\_Council\\_to\\_vote\\_on\\_soda\\_tax.html](http://www.philly.com/philly/news/politics/20160617_Philadelphia_City_Council_to_vote_on_soda_tax.html).

ounce.<sup>67</sup> The projected revenue from the new proposed tax was similar to the original proposal. The brunt of the tax would be borne not exclusively by consumers of sugar-sweetened beverages, but by consumers of diet soft drinks as well. The upshot was that the anti-nanny state argument carried little weight because taxing both kinds of beverages makes more sense as a revenue raising device rather than a public health nudge. In addition, the concern that poor communities of color would be singled out on the assumption that a larger share of sugar-sweetened beverages are sold in those communities was now moot. And by halving the tax, the absolute burden for all consumers was reduced. The tax is of course still regressive, because both rich and poor are taxed at the same fixed amount, which is more difficult for the poor to bear than the rich.

Besides messaging,<sup>68</sup> resources available to the city were a factor that led to passage of the tax in Philadelphia. Although the beverage industry spent about \$5 million to oppose the tax, the non-profit created to support the tax was infused with over \$2 million, much of it from former New York City Mayor Michael Bloomberg.<sup>69</sup> Philadelphia became the second city in the nation (after Berkeley), and the first large U.S. city, to pass a substantial tax on beverages, at a rate predicted to substantially discourage consumption.<sup>70</sup> Again, careful empirical study is needed to show the extent to which consumption decreases and health outcomes improve, if at all, as a result of enacting local soda taxes.

### III. FROM POLITICS TO LAW: UNDERSTANDING SODA TAXES AS AN INTRASTATE PREEMPTION ISSUE

A primary obstacle to the enactment of local soda taxes is resistance to the tax, understood either as an expression of nanny-state paternalism or as regressive, racially-insensitive politics. But local politics alone will not decide whether local soda taxes become a major phenomenon in the United States. Indeed, the biggest obstacle to local soda taxes may turn out to be state law. The future of local soda taxes may depend on whether state legislatures and state courts (ostensibly effectuating state legislative intent) allow them to stand. As we discuss below, the biggest challenge for state soda taxes is express, not implied, preemption. We argue that express preemption statutes often should be deemed invalid, but at the same time, this viewpoint is not broadly embraced by state courts.

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<sup>67</sup> *Id.*

<sup>68</sup> Paarlberg, Mozaffarian, and Micha suggest that the persuasiveness of the political message might be specific to the process of the local tax enactment, such that a message primarily promoting increased revenue is most persuasive for city council votes, whereas a public health message is most persuasive for ballot issues. *See* Paarlberg, Mozaffarian & Micha, *supra* note 30, at 5. Paarlberg, Mozaffarian, and Micha, *supra* note 29. They base this argument on the recent successful ballot measures in the following cities: Berkeley, San Francisco, Oakland, Albany, CA, and Boulder, CO. *Id.* On the other hand, the residents of those cities might be especially receptive to public health arguments, and more impervious to nanny-state arguments than residents of other cities that might consider a soda tax ballot measure.

<sup>69</sup> Nadolny, *supra* note 66.

<sup>70</sup> Nadolny, *supra* note 66; PHILADELPHIA'S SWEET DEAL TO DISCOURAGE SUGAR CONSUMPTION WASHINGTON POST, [https://www.washingtonpost.com/opinions/philadelphias-sweet-deal-to-discourage-sugar-consumption/2016/06/19/d8d7ab86-34bf-11e6-95c0-2a6873031302\\_story.html](https://www.washingtonpost.com/opinions/philadelphias-sweet-deal-to-discourage-sugar-consumption/2016/06/19/d8d7ab86-34bf-11e6-95c0-2a6873031302_story.html) (last visited Dec 1, 2017).

### A. *Implied Preemption*

Like the law of federal preemption of state and local law, intrastate preemption can be either implied or express.<sup>71</sup> With limited (albeit important) exceptions discussed below, state courts generally recognize that state law can preempt local law, such as a local soda tax. State preemption of local law can be implied, as where the court infers an intent to preempt local law from the state legislature's occupation of a field of law or regulation (sometimes called "field preemption") or from the fact that the local law would pose an obstacle to an express state legislative objective (sometimes called "obstacle" or "conflict preemption"). In such implied preemption cases, the courts are called upon to find preemption without any clear textual basis in state law, and for that reason, implied preemption is an arena of substantial judicial discretion and has been criticized on that account.<sup>72</sup> In express preemption cases, the state courts find preemption based on a clause in a statute that expressly purports to preempt local law. The legal question in express preemption cases is typically how broadly the court will read the express preemption clause when it is not entirely clear the clause applies to the local law at issue.<sup>73</sup>

There are two reasons to believe that express state preemption laws pose a greater threat to local soda taxes than judicial findings of implied preemption. First, state courts sometimes hesitate to find implied preemption, in effect applying a presumption against preemption based on the idea that the state legislature intends to defer to local authority when it does not expressly address preemption.<sup>74</sup> Second, both history and recent legislation in state legislatures suggest that industries such as the beverage industry will not rely on the mere possibility that state courts will find soda taxes to be impliedly preempted but rather will work to secure the passage of express preemption statutes in state legislatures throughout the country.<sup>75</sup> After all, the beverage industry has the resources to

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<sup>71</sup> For an overview of the different kinds of intrastate preemption, see Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113 (2007). For a discussion of preemption in the federal-state context, see David A. Dana, *Democratizing the Law of Federal Preemption Symposium: Ordering State-Federal Relations Through Federal Preemption Doctrine*, 102 NW. U. L. REV. 507 (2008).

<sup>72</sup> For examples of critical accounts of implied preemption, see generally Daniel B. Rodriguez, *Localism and Lawmaking*, 32 RUTGERS LAW J. 627–692 (2000); Diller, *supra* note 71; David J. Barron, *Reclaiming Home Rule*, 116 HARV. LAW REV. 2255–2386 (2003).

<sup>73</sup> See Diller, *supra* note 71, at 1115 n. 8 ("Determining the contours of the expressly 'preempted field' often generates significant disagreement within state courts.").

<sup>74</sup> The state courts, however, are anything but consistent in this regard. See Diller, *supra* note 71, at 1116 ("State courts have applied these tests inconsistently, sometimes upholding local authority and sometimes restricting it."). The most notable recent implied preemption case addresses fracking. In Colorado, a home rule state that has a history of the courts taking local regulatory authority seriously, the State Supreme Court nonetheless found that local bans on fracking were impliedly preempted by the state statute governing oil and gas operations. *City of Longmont et al. v. Colo. Oil & Gas Ass'n et al.*, 369 P.3d 573, 573–86 (Colo. 2016); *City of Ft. Collins v. Colo. Oil & Gas Ass'n*, 369 P.3d 586, 586–95 (Colo. 2016). In the case of oil and gas extraction, there was a plausible argument that the industry is a mainstay of the state economy and that the industry could not effectively contend with a patchwork of local operational rules, including local bans, and continue effective exploration and extraction. With regard to soda taxes, however, the economic centrality of the sale of soda beverages in any state is highly questionable, and it is much more difficult to envision an argument that different tax rates in a few localities would make it very burdensome to distribute and sell soda in a state. Still, one can imagine these arguments being put forward.

<sup>75</sup> State preemption of local nutrition regulations are part of a recent broader pattern of high-profile city-state conflicts over polarizing social issues such as immigration, guns, discrimination, and environmental protection. See Richard C. Schragger, *The Attack on American Cities*, TEX. L. REV. (forthcoming 2018).

intensively lobby state legislatures to pass express preemption statutes, just as, in the past, the tobacco and gun industries have done.

Indeed, tobacco provides a very useful analogy to soda.<sup>76</sup> Just as localities have sought to limit tobacco consumption out of interest in protecting residents' public health, localities are now seeking measures to limit soda consumption. The beverage industry, like the tobacco industry, is dominated by mega-corporations that can invest in developing and maintaining ties with state legislatures and wielding influence over state legislative debates. And the beverage industry can make free-market, anti-paternalism appeals at the state level, in the same way that the tobacco industry has done. Although the dangers of smoking are widely acknowledged, the tobacco industry has succeeded in keeping in place many state express preemption statutes that foreclose local initiatives. According to one count, twenty-two states have laws that preempt local ordinances related to youth access to tobacco products, and twelve states have laws in effect that explicitly preempt local ordinances from restricting smoking in public spaces like restaurants and bars and in work places.<sup>77</sup>

Moreover, history aside, the current political divergence between very blue (Democratic) cities in states with very red (Republican) legislatures makes express preemption at the state level an appealing strategy for the beverage industry, as well as other industries that face unwelcome local regulation.<sup>78</sup> Where both houses of a state legislature are dominated by conservative Republicans, the leadership may support express preemption statutes that, in effect, are reprimands to liberal cities to which the leadership owes no allegiance and from which it draws no support. Indeed, with the federal government controlled by one party, but still relatively inactive as a legislative matter, the principal focus for industry in the next few years might be the lobbying of state legislatures aimed at curbing local initiatives.<sup>79</sup>

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Among these are city-state conflicts over specific examples of city attempts to advance environmental protection goals, such as imposing a 5-cent excise tax on plastic bags provided by grocers to customers at the register. *See, e.g.,* Jesse McKinley, *Cuomo Blocks New York City Plastic Bag Law*, N.Y. TIMES (Feb. 14, 2017), <https://www.nytimes.com/2017/02/14/nyregion/cuomo-blocks-new-york-city-plastic-bag-law.html>. Courts have been unwilling to strike down these local efforts in the absence of state legislative action that specifically prohibits the local excise tax in question. *See* Nadav Shoked, *Cities Gaining Ground on States: The Surprisingly Permissive Treatment of Local Excise Taxation*, OHIO ST. L. J. (forthcoming 2018).

<sup>76</sup> Rob Waters, *Soda and Fast Food Lobbyists Push State Preemption Laws to Prevent Local Regulation*, FORBES (June 21, 2017), <https://www.forbes.com/sites/robwaters/2017/06/21/soda-and-fast-food-lobbyists-push-state-preemption-laws-to-prevent-local-regulation/#1a403cdf745d> (explaining that the tobacco industry pursued a “50-state strategy,” in trying to get preemption laws passed in statehouses around the country). “This effort was outlined by Philip Morris executive Tina Walls, who called statewide preemption ‘the solution’ and advocated for preemptive statewide legislation as a way to ‘shift the battle away from the community level back to the state legislature, where we are on stronger ground . . . .” *Id.* The gun industry pursued a similar strategy. *Id.*

<sup>77</sup> *See* TOBACCO CONTROL LEGAL CONSORTIUM, PREEMPTION: THE BIGGEST CHALLENGE TO TOBACCO CONTROL 3 (2014), <http://www.publichealthlawcenter.org/sites/default/files/resources/tclc-fs-preemption-tobacco-control-challenge-2014.pdf>.

<sup>78</sup> *See* Paul A. Diller, *Reorienting Home Rule: Part 2—Remedying the Urban Disadvantage through Federalism and Localism*, 77 LA. L. REV. 1045, 1083–86 (2016) (framing preemption debates in terms of the marked divergence between innovative, liberal cities and more conservative, non-urban areas in states such as North Carolina).

<sup>79</sup> *See* Sandhya Somashekhar, *In Austin, the Air Smells of Tacos and Trees—and City-state Conflict*, WASH. POST, (July 1, 2017), <https://www.washingtonpost.com/national/in-austin-the-air-smells-of-tacos-and-trees->

In fact, with the aid of the powerful, yet little-known (to the general public), American Legislative Exchange Council (ALEC), the beverage and processed food industries already have secured in some states express preemption statutes that limit the legal authority of localities to act to improve local nutrition and, hence, public health. Apparently in response to New York City's 2008 initiative to curb portion sizes for soda and local efforts to require the posting of calorie counts at restaurants,<sup>80</sup> ALEC drafted a model "Food and Nutrition" state law, which has as its express purpose, to "preempt[] towns, counties and other political subdivisions from enacting regulation in regards to food service establishments based upon or regarding food nutrition information, customer incentive items."<sup>81</sup> The Act forbids localities from "ban[ing], prohibit[ing], or otherwise restrict[ing] a food service operation based upon the existence or non-existence of food-based health disparities as recognized by the department of health, the institute of health, or the centers for disease control."<sup>82</sup>

The ALEC bill, in whole or part, has been adopted in ten states, with Kansas adopting the ALEC bill word for word.<sup>83</sup> The adopting states—Kansas, Utah, Ohio, Wisconsin,

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-and-city-state-conflict/2017/07/01/682eb420-54f7-11e7-ba90-f5875b7d1876\_story.html. *See also* NAT'L LEAGUE OF CITIES, CITY RIGHTS IN AN ERA OF PREEMPTION: A STATE-BY-STATE ANALYSIS (2017), <http://nlc.org/sites/default/files/2017-02/NLC%20Preemption%20Report%202017.pdf>.

<sup>80</sup> In the 2010 Affordable Care Act, federal law followed New York City's lead, requiring chain restaurants to label menus with nutritional information. The FDA recently extended the deadline for compliance by one year to May 2018. *Menu Labeling Requirements*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm515020.htm> (last visited Oct. 28, 2017).

<sup>81</sup> *See Food and Nutrition Act*, AM. LEGIS. EXCHANGE COUNCIL, <https://www.alec.org/model-policy/food-and-nutrition-act/> (last visited Sept. 12, 2017).

<sup>82</sup> *Id.*

<sup>83</sup> Kansas 12-16, 137 states, in part, "The state of Kansas, and any political subdivision thereof, shall not do any of the following:

- (1) Enact, adopt or continue in effect local legislation relating to the provision or nonprovision of food nutrition information or consumer incentive items at food service operations;
- (2) condition any license, permit or regulatory approval upon the provision or nonprovision of food nutrition information or consumer incentive items at food service operations;
- (3) ban, prohibit or otherwise restrict food at food service operations based upon the food's nutrition information or upon the provision or nonprovision of consumer incentive items;
- (4) condition any license, permit or regulatory approval for a food service operation upon the existence or nonexistence of food-based health disparities;
- (5) where food service operations are permitted to operate, ban, prohibit or otherwise restrict a food service operation based upon the existence or nonexistence of food-based health disparities as recognized by the department of health, the institute of health or the centers for disease control;
- (6) restrict the sale, distribution or serving of foods and nonalcoholic beverages that are approved for sale by the United States department of agriculture or other federal or state government agencies; or
- (7) restrict the growing or raising of livestock or grain, vegetables, fruits or other crops grown or raised for food and approved for sale by the United States department of agriculture or other federal or state government agencies."

The ALEC model Food and Nutrition Act states, in part 3: "(A) No political subdivision shall do any of the following:

- (1) Enact, adopt, or continue in effect local legislation relating to the provision or non-provision of food nutrition information or consumer incentive items at food service operations;
- (2) Condition any license, permit, or regulatory approval upon the provision or non-provision of food nutrition information or consumer incentive items at food service operations;

Mississippi, Alabama, Georgia, Florida, Tennessee, and North Carolina<sup>84</sup>—do include “blue” cities like Madison, Wisconsin and Cleveland, Ohio where, in theory, local politics might support passage of a soda tax. And, while these ALEC-based state statutes do not expressly address soda taxes, they conceivably could be read to preempt them, as discussed below.

The beverage industry, moreover, appears to be moving beyond the ALEC bill and is seeking to secure passage of statutes specifically preempting local soda taxes.<sup>85</sup> There is no reason to believe that the beverage industry, following the tobacco industry model, will stop pushing such legislation in state legislatures. Two relevant questions, therefore, are: (1) Are there limits on the legal validity of such statutes, assuming they secure state legislative passage?; and (2) Are there political constraints on state legislative passage and, in particular, can advocates for soda taxes (and local nutritional measures generally) strengthen those constraints?

*B. The (Limited) Legal Limits on Express State Preemption: The Cleveland and Philadelphia Cases*

Where a state passes an express preemption statute that arguably addresses soda taxes, there are two possible legal strategies for asserting that the statute does not, in fact, preempt local law. First, in some home rule jurisdictions, there is a possibility that the state constitution or home rule statutes or both limit the authority of the legislature to preempt local taxes and regulation. The strongest support for this argument is found in a recent Ohio appellate court decision.<sup>86</sup> However, while normatively appealing, this home rule argument is undercut by the fact that the courts in some home rule states have interpreted home rule so as to favor state power over local autonomy. Second, where there is ambiguity as to the reach of an express preemption statute, the state courts might refuse to read it expansively, for fear of disrupting local authority over matters where such authority is well-established, as the Pennsylvania courts arguably have done (so far) in a lawsuit involving Philadelphia’s soda tax.<sup>87</sup> Nonetheless, a well-drafted express preemption statute is likely to be upheld and enforced by almost all state courts.

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- (3) Ban, prohibit, or otherwise restrict food at food service operations based upon the food’s nutrition information or upon the provision or non-provision of consumer incentive items;
- (4) Condition any license, permit, or regulatory approval for a food service operation upon the existence or non-existence of food-based health disparities;
- (5) Where food service operations are permitted to operate, ban, prohibit, or otherwise restrict a food service operation based upon the existence or non-existence of food-based health disparities as recognized by the department of health, the institute of health, or the centers for disease control.”

<https://www.alec.org/model-policy/food-and-nutrition-act/>

<sup>84</sup> See Jennifer L. Pomeranz & Mark Pertschuk, *State Preemption: A Significant and Quiet Threat to Public Health in the United States*, 107 AM. J. PUB. HEALTH 900, 900–02 (2017) (discussing legislation). See also *Preemption Watch*, GRASSROOTS CHANGE, <https://grassrootschange.net/preemption-watch/> (last visited Oct. 28, 2017) (maintaining a website that keeps a current list of state preemption laws involving a range of issues).

<sup>85</sup> See *Soda And Fast Food Lobbyists Push State Preemption Laws To Prevent Local Regulation*, *supra* note 76.

<sup>86</sup> See *infra* notes 76–80 and accompanying text.

<sup>87</sup> See *infra* notes 87–89 and accompanying text.

In states that accord some localities home rule power, the localities have a right to legislate free from state interference, notwithstanding that localities in all states are regarded as creatures of state law. But, the range of home rule powers accorded localities is limited. In a number of states, home rule only encompasses local authority over the structure of local government and personnel matters.<sup>88</sup> Less often, the home rule includes general regulatory authority or authority over local taxation. By one count, only twelve states accord a measure of fiscal home rule to localities and even then, the extent of local authority actually recognized by the courts may be quite limited.<sup>89</sup> In California, for example, localities were blocked from imposing bag taxes until state law was altered to allow them to do so.<sup>90</sup>

### 1. Express Preemption Targeting a Specific Local Ordinance

Ohio is one of the states that accords home rule authority to localities in a meaningful way, and it is an Ohio precedent that provides the strongest basis for an argument by a locality that an express preemption statute regarding local soda taxes would be invalid. Under Ohio case law, “[a] state statute takes precedence over a local ordinance when (1) the ordinance is an exercise of the police power, rather than of local self-government, (2) the statute is a general law, and (3) the ordinance is in conflict with the statute.”<sup>91</sup> To qualify as a general law, an Ohio statute must:

- (1) be part of a statewide and comprehensive legislative enactment, (2) apply to all parts of the state alike and operate uniformly throughout the state, (3) set forth police, sanitary, or similar regulations, rather than purport only to grant or limit legislative power of a municipal corporation to set forth police, sanitary, or similar regulations, and (4) prescribe a rule of conduct upon citizens generally.<sup>92</sup>

In *Cleveland v. State*,<sup>93</sup> an intermediate appellate court applied this “general law” test to an ordinance that the City of Cleveland enacted banning trans-fat in some stores and restaurants.<sup>94</sup> According to the Cleveland ordinance, “[n]o foods containing industrially-produced trans-fat, as defined in this section, shall be stored, distributed, held for service, used in preparation of any menu item or served in any food shop . . . except food that is being served directly to patrons in a manufacturer’s original sealed package.”<sup>95</sup> The Ohio legislature responded by enacting a (close to identical) version of the ALEC bill that removed a locality’s authority to “[b]an, prohibit, or otherwise restrict food at food service

<sup>88</sup> See Diller, *supra* note 78, at 1066.

<sup>89</sup> Erin Adele Scharff, *Powerful Cities: Limits on Municipal Taxing Authority and What to do About Them*, 91 N.Y.U. L. REV. 292, 301 (2016).

<sup>90</sup> *Id.* at 297. See also *A Short History of Plastic Bag Laws in California*, PLASTICBAGLAWS.ORG, <http://plasticbaglaws.org/get-involved/plastic-bag-facts/a-short-history-of-plastic-bag-laws-in-california/> (last visited Oct. 28, 2017).

<sup>91</sup> *Cleveland v. Ohio*, 942 N.E.2d 370, 374 (Ohio 2010) (quoting *Mendenhall v. Akron*, 881 N.E.2d 255, 260 (Ohio 2008)) (internal quotations omitted).

<sup>92</sup> *Canton v. State*, 766 N.E.2d 963, 968 (Ohio 2002).

<sup>93</sup> 989 N.E.2d 1072, 1072–87 (Ohio Ct. App. 2013).

<sup>94</sup> *Id.* at 1080–87.

<sup>95</sup> *Id.* at 1075.



operations based on the food nutrition information,” where food nutrition information was broadly defined to “include[], but is not limited to, the caloric, fat, carbohydrate, cholesterol, fiber, sugar, potassium, protein, vitamin, mineral, allergen, and sodium content of food.”<sup>96</sup> “‘Food nutrition information’ also includes the designation of food as healthy or unhealthy.”<sup>97</sup>

The City of Cleveland then filed a declaratory judgment motion seeking a declaration that the state statute was not a “general law” under Ohio law and thus could not preempt Cleveland’s trans-fat ban. Both the trial and appellate court agreed the state preemption statute was not a “general” law and, therefore, could not preempt the Cleveland ordinance. According to the appellate court:

Ohio law is largely devoid of specific food content regulation such as that found in [the Cleveland Ordinance]. Indeed, the state cites only three statutes concerning any form of content regulation and those statutes are narrowly limited to the specific regulation of dairy products (R.C. 917.02; R.C. 917.05), certain beverages (R.C. 913.24) and the vitamin and mineral content of certain bakery products (R.C. 911.33; R.C. 911.32).<sup>98</sup>

Therefore, the State had no comprehensive legislative enactment of which the express preemption law could be considered a part; rather, the express preemption law was a naked, stand-alone limit on municipal power. Thus understood, the state preemption law was not a general law, and hence not effective with regard to Cleveland’s trans-fat ordinance.

The normative grounding for *Cleveland v. State* is sound, even though it is not fully explored in the appellate opinion, which instead closely hews to the formal doctrinal tests. If state law generally grants home rule powers to regulate to localities (as it does in Ohio), then the state legislature’s attempt to undo local regulation by enacting a state statute does not comport with state home rule law and should be deemed ineffective. State home rule law—especially when enshrined as state constitutional law—by definition permits localities to pass laws governing themselves as they see fit. Because of this, it is not a legitimate purpose for a state to attempt to block local regulatory action simply for the sake of blocking it. Thus, there needs to be, as the Ohio court suggests, something more—a reason why the local regulation at issue will be harmful in a way that other local regulation is not, and harmful to such a degree as to override the basic allocation of authority inherent in home rule. One such reason, although perhaps not the only conceivable one, would be that the State has in place its own relevant scheme of regulation that is in conflict with, and would be less effective because of, local regulation. In other words, if home rule as to regulatory authority is to be taken seriously, then an express preemption statute standing alone should be effective only if preemption would be justified as a matter of implied obstacle preemption.

From a political process/democratic theory perspective, there are also benefits to allowing local preemption only when it is part of a larger scheme of state regulation. When state legislatures act to preempt local regulation, they may be able to act very quickly, with

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<sup>96</sup> *Id.* at 1076–77.

<sup>97</sup> *Id.* at 1076.

<sup>98</sup> *Id.* at 1081.

little public debate, inasmuch as what they are purporting to do is simply pass a prohibition. But, where a state legislature seeks to enact a scheme of regulation that includes express preemption as only one component, the legislative process is likely to be more deliberate and to attract more attention from affected constituencies. All else being equal, therefore, the level of public engagement in such cases will be greater than when a simple express preemption law is all that is at issue.

While the formal and political-theoretical grounding for the *Cleveland v. State* approach is sound, its precedential reach is debatable. Even in Ohio, and certainly elsewhere, courts have readily found that there is enough relevant state regulation so as to characterize a state preemption provision part of a general law and not a naked attempt to block local regulation.<sup>99</sup> Thus, all a state legislature might need to do to transform a non-general law into a general one is to add some uncontroversial and not-very-meaningful state regulation to accompany a preemption provision. Moreover, outside of Ohio and certainly outside of the relatively few robust home rule states, the argument of the *Cleveland v. State* court simply has no purchase, even as persuasive authority.

## 2. Express Preemption Limiting Local Authority More Generally

Soda taxes may also be challenged on the basis of express preemption statutes due to courts perceiving them as encompassing soda taxes, even if they do not explicitly address the issue of soda taxation. For example, the ALEC-style statutes regarding food content adopted by ten states do not mention taxes, but they easily could be read to encompass such taxes. These statutes seem to cover all local food-content regulation.<sup>100</sup> Soda taxes could be conceptualized as a form of regulation in the sense that they are intended to regulate: to shape behavior rather than serve as a revenue-generating device per se. The line between a regulation and a tax can be unclear in practice.<sup>101</sup>

Alternatively, the soda tax, even when imposed in the form of an excise tax on soda distributors, could be understood as a kind of sales tax to the extent that it increases the retail sales price of soda. The line between a sales tax and an upstream distribution tax, especially if one focuses on market effects, also may be unclear, as the recent litigation regarding the Philadelphia soda tax illustrates. As noted earlier, the Philadelphia tax is imposed on, and collected from, distributors of beverages.<sup>102</sup> The tax is not paid at the cash

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<sup>99</sup> For example, the Ohio Supreme Court has upheld a state statute preempting local gun control ordinances. *Cleveland v. State*, 942 N.E.2d 370, 374 (Ohio 2010). On the other hand, a trial court in Ohio recently upheld a local ordinance favoring the hiring of local firms for public works projects, in part because the state statute preempting local firms requirements was not part of a comprehensive scheme of state regulation. See *Cuyahoga County Common Pleas Court Rules in City of Cleveland's Favor on Residency Lawsuit*, HARPST ROSS, LTD., <http://www.harpstross.com/blog/786-2/> (last visited Oct. 28, 2017).

<sup>100</sup> FLA. STAT. § 509.032(7)(a), for example, preempts local “regulation of public lodging establishments and public food service establishments, including, but not limited to, sanitation standards, inspections, training and testing of personnel, and matters related to the nutritional content and marketing of foods offered in such establishments.” A soda tax could be conceptualized as regulation relating to “nutritional content.” GA. CODE ANN. § 26-2-373 (West 2011) provides that no locality “shall enact any ordinance or issue any rules and regulations pertaining to the provision of food nutrition information at food service establishments.”

<sup>101</sup> See generally Reuven S. Avi-Yonah, *Taxation as Regulation: Carbon Tax, Health Care Tax, Bank Tax and Other Regulatory Taxes*, 1 ACCT., ECON. & L. 1 (2011).

<sup>102</sup> See Sanger-Katz, *supra* note 63.

register when people buy soda. This design for the tax may save it from legal invalidity under Pennsylvania’s Sterling Act, which was enacted in 1954 and which sought to ensure uniformity in tax burdens throughout the State.<sup>103</sup> The Act provides that “the council of any city . . . shall have the authority [to]. . . collect . . . taxes” except the council shall not have the authority to collect any tax “which is now or may hereafter become subject to a State tax or license fee.”<sup>104</sup> Thus, since the state government of Pennsylvania already imposes a sales tax on soda (as well as food generally), the Philadelphia soda tax would be barred by the Sterling Act if it is understood as a tax on the sale of soda. Pennsylvania does not have an excise tax on the distribution of soda. Therefore, Philadelphia’s soda tax is not preempted by the Sterling Act if the soda tax is understood to be a distribution tax and such a tax is understood to be different, in a legally meaningful way, from a sales tax. Although Pennsylvania is the only state to date where the issue has arisen out of a conflict between a local soda tax and state law seeking state tax uniformity, there are other states that limit the authority of localities to impose sales taxes.<sup>105</sup> The question of whether a soda tax is an impermissible sales tax could arise in other states in the future.

The Philadelphia trial and appellate courts took a formalist approach to the intersection of the Sterling Act and Philadelphia’s soda tax. The trial court simply opined that “[t]he tax is levied on distributors and dealers, and the court is constrained to ignore how these taxpayers would absorb the additional cost . . . .”<sup>106</sup> And the appellate court majority concluded that because “the PBT taxes non-retail distribution transactions and not retail sales,” it “does not violate the duplicative-tax prohibition in the Sterling Act” inasmuch as “the taxes do not share the same incidence and merely have related subjects.”<sup>107</sup> The dissent in the appellate court faulted the majority for placing form over economic substance, and argued, “A review of the PBT in its entirety reveals that it is in fact duplicative of the Sales Tax.”<sup>108</sup>

There are plausible arguments in support of and against this literalist approach. One argument against stretching the range of express preemption provisions beyond their clear meaning is that doing so creates uncertainty as to the range of permissible local authority and thus may disrupt the basic allocation of authority between the State and localities upon which a range of public and private actors have relied. The result may be costly litigation and the chilling of local governance. For example, if the Philadelphia tax is held to be equivalent to a sales tax because it has downstream effects on sales prices, would that mean city fees paid by restaurants are also preempted by the Sterling Act because such fees are largely passed along to customers when they purchase meals? The counterargument, of course, is that localities should not be encouraged to work around legislative intent by structuring taxes or other measures so they technically fall outside the wording of express preemption statutes but have the same effect as measures that squarely fall within the

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<sup>103</sup> 53 PA. STAT. AND CONS. STAT. ANN. § 15971 (West 2017).

<sup>104</sup> *Id.*

<sup>105</sup> See RUTE PINHO, OFFICE OF LEGISLATIVE RESEARCH, LOCAL OPTION TAXES (2013), <https://www.cga.ct.gov/2013/rpt/2013-R-0345.htm> (explaining that thirty-eight states authorize local sales taxes, although usually in a capped percentage of the sales price).

<sup>106</sup> Vidya Kauri, *Pa. Legislators Urge Court to Undo Philly Soda Ruling*, LAW360 (Feb. 7, 2017), <https://www.law360.com/articles/889370/pa-legislators-urge-court-to-undo-philly-soda-tax-ruling> (quoting trial court opinion).

<sup>107</sup> *Williams v. City of Phila.*, 164 A.3d 576, 588 (Pa. Commw. Ct. 2017).

<sup>108</sup> *Id.* at 597 (Covey, J., dissenting).

language of an express preemption statute.

But the broader, non-literalist reading of preemption clauses may pose a larger risk to reliance interests, as it may expose long-established local measures to preemption suits. The slippery slope scenario involving cities working to get out from under express preemption statutes assumes there are many actions cities want to take but cannot because of express preemption statutes, but there is no obvious reason to think that often will be the case. Moreover, given the ease with which highly specific express preemption statutes are currently being enacted, as reflected by their relative abundance, the absence of an express preemption statute that is literally, directly applicable to the issue at hand can be read as evidence of a lack of intent on the part of the legislature to preempt.

Broad readings of express preemption statutes also would seem contrary to a normative assumption of home rule frameworks—that local autonomy and experimentation are goods in and of themselves and generally should be encouraged. If those are home rule values (whether they are always honored in practice or not), then it would seem that state courts should employ a presumption against preemption in close cases, just as federal courts embrace such a presumption in federal preemption cases as a way to acknowledge federalism values.<sup>109</sup> Application of that presumption supports literal readings of express preemption statutes such as the Sterling Act.

These kinds of argument for and against literalist readings of express preemption statutes could have been better expressed by the Philadelphia trial and appellate courts. The two decisions are very short in the way of reasoning. But the decisions involving the Philadelphia tax, if upheld by the Pennsylvania Supreme Court, provide precedential support for courts reading express preemption provisions literally so as to allow soda taxes to stand unless such taxes very directly and obviously fall within the statutory language regarding preemption. So too, although less directly, do literalist decisions holding that express preemption of local gun regulation does not encompass local gun taxes.<sup>110</sup>

In sum, there is some room for defending a soda tax even in the face of an express preemption statute. It can be argued, as in the Philadelphia litigation, that an express preemption statute simply does not cover the tax if the statutory language does not literally do so. And, at least in Ohio and possibly other home rule states, even an express preemption provision regarding soda taxes might not constitute a general law capable of preempting local law if it is not part of larger substantive scheme of regulation. But, in general, in a jurisdiction with a well-drafted express preemption statute explicitly addressing soda taxes, local tax ordinances will be preempted. Thus, a key question is: what factors will make it more or less likely that jurisdictions will adopt such express preemption statutes? In the next section, we consider three such possible factors.

#### IV. THE POLITICS OF EXPRESS STATE PREEMPTION AND THE POSSIBLE VALUE OF ENDOWMENT EFFECTS, DATA, AND BROADER NORMATIVE ARGUMENTS

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<sup>109</sup> See generally Ernest A. Young, “*The Ordinary Diet of the Law*”: *The Presumption Against Preemption in the Roberts Court*, 2011 SUP. CT. REV. 253 (2012).

<sup>110</sup> *Watson v. City of Seattle*, 401 P.3d 1, 14 (Wash. 2017); see also Daniel Beekman, *The Washington State Supreme Court Ruled 8-1 to Uphold Seattle’s Gun Tax*, SEATTLE TIMES (Aug. 10, 2017), <http://www.seattletimes.com/seattle-news/politics/washington-state-supreme-court-to-issue-decision-on-seattles-gun-tax/>.

Whether soda taxes are subject to targeted express preemption statutes may depend on a number of factors, of which this Part explores three: (1) the timing of the local soda tax ordinances in relation to state attempts to preempt; (2) the evidence of effectiveness and benefits of soda taxes at the time state legislatures consider express preemption; and (3) the ability to reframe the state legislature preemption debate in broad terms rather than around single issues. In sum, if a number of provably effective local soda taxes ordinances can be put into effect quickly throughout the country and the debate over state preemption is re-oriented, it is less likely that such taxes will be expressly preempted. At the same time, we recognize that the possibility for re-orienting the debate over state preemption in state legislatures is more problematic in states where the legislatures are strongly aligned with and ideologically predisposed toward the interests of industry.

A. *The Race to Legislate: Are State Preemption Efforts Less Likely After Local Ordinances Are Adopted?*

State legislatures sometimes pass express preemption statutes even before there is anything to preempt: Kansas' nutrition-preemption law, for example, was enacted even though Kansas City was proposing the kind of measures it preempts. On the other hand, some state preemption statutes are clearly passed in response to local ordinances: in Ohio, for example, a statute barring local regulation of commerce in pets was a response to two Ohio localities banning commercial sales of pets;<sup>111</sup> in Tennessee, a statute prohibiting unelected local officials from enacting rules regarding food nutrition information was a response to the Nashville Metropolitan Board of Health's requirement that chain restaurants provide calorie counts on their menus.<sup>112</sup>

Where a state legislature passes preemptive legislation proactively, before there are any local ordinances to preempt, the possibility of ultimately passing local ordinances would seem to be very remote. It is a powerful argument against organizing a local political campaign to enact a soda tax—with all the costs and risks attached to it—that the whole enterprise is futile because state law already forbids such an ordinance. As Shipan and Volden have argued in the context of local anti-smoking ordinances, “the usefulness and hence the likelihood of passage” of a local ordinance are “greatly diminished” once the state has enacted a statute that could be read as preempting such an ordinance.<sup>113</sup> Thus, proponents of soda taxes face the challenge that state preemption laws will pass and thus undermine local organizing before it can even begin.

In our view, the best strategy for enacting local soda taxes is to establish them in multiple localities in a state before any state preemption law is passed.<sup>114</sup> The more

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<sup>111</sup> Jim Siegel, *Pet Store Regulations Stir Debate*, COLUMBUS DISPATCH (May 11, 2016), <http://www.dispatch.com/content/stories/local/2016/05/11/pet-store-regulations-causing-quiete-the-debate-at-the-statehouse.html>; see also Waters, *supra* note 76 (explaining that the Tennessee legislature preempted localities from adopting ordinances requiring restaurants to display calorie counts while such an ordinance was under consideration in Nashville).

<sup>112</sup> S.B. 1092, Gen. Assemb., Reg. Sess. (Tenn. 2009); see Paul A. Diller, *Why Do Cities Innovate in Public Health: Implications of Scale and Structure*, 91 WASH. U. L. REV. 1219, 1239 (2013).

<sup>113</sup> Charles R. Shipan & Craig Volden, *The Mechanics of Policy Diffusion*, 52 AM. J. POL. SCI. 840, 843 (2008).

<sup>114</sup> Shipan and Volden's study of anti-smoking ordinances also suggests that early adoption by a large city will result in more policy diffusion than early adoption by small localities, as there is a tendency for local

localities there are that have passed a soda tax, the greater the general political salience any debate over express preemption will have. If only one city has passed a soda tax, and hence the issue is salient only in one locale in the state, local officials and voters from the rest of the state will be less inclined to pay much attention, as their direct stakes in the express preemption debate will seem speculative, even if they think they would support such a tax. By contrast, the beverage industry does not need broad political salience to organize effective lobbying at the state level. The industry has the organizational benefits that Mancur Olson ascribed to concentrated interest groups,<sup>115</sup> and its perspective is national and very much oriented toward preventing a movement against soda taxes. The industry will invest resources in state preemption regardless of whether one or fifty localities in the state have adopted a soda tax. If citizens from multiple localities feel invested in their own local soda tax ordinance, it is less likely that a state preemption effort after the fact will be able to sail through the state legislature without opposition.

The passage of local soda taxes can also change the state political economy dynamics. Local soda tax ordinances can give rise to interest groups composed of citizens who directly benefit from the dedicated soda tax revenue. In Pennsylvania, there are clear and well-known recipients of soda tax revenue—Philadelphia parents of young children and pre-K/daycare providers. Those recipients will come to understand the soda tax as conferring on them a benefit—an endowment.<sup>116</sup> In general, people are more motivated to preserve an endowment, to prevent the loss of what they already have, than they are to fight for something of equal economic value they do not yet have.<sup>117</sup> By endowing citizens with a valuable resource based on the soda tax stream, the Philadelphia linkage of soda taxes with a popular public program may not only have made it easier to secure passage of the local ordinance, but also may make it less likely that the tax will be undone by a state express preemption statute. If this reasoning is correct, then soda tax advocates in and out of government should consider earmarking the tax funds for tangible benefits, and they should do what they can to make sure the beneficiaries of the tax funds understand themselves as such.

*B. Do Facts Matter: Will Evidence About Benefits and Burdens of Soda Taxes Influence State Preemption?*

Many of the arguments invoked in support of state preemption are empirical arguments. Yet these arguments are usually put forth without actual empirical evidence. Thus, for example, the Ohio legislators arguing for preemption of local commercial pet store bans argue that these pet stores are needed, because otherwise, there will be more

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officials in smaller localities to imitate the actions of large cities. *See id.* Thus, adoption of a soda tax by Philadelphia or Chicago may have a broader impact than adoption by Boulder or Berkeley.

<sup>115</sup> Mancur Olson, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965) at 132.

<sup>116</sup> According to a recent Gallup poll, six in ten Americans support the idea of free child-care and pre-K for all families. Lydia Saad, *Americans Buy Free Pre-K: Split on Tuition-Free College*, GALLUP NEWS (May 2, 2016), <http://news.gallup.com/poll/191255/americans-buy-free-pre-split-tuition-free-college.aspx>.

<sup>117</sup> *See* George Loewenstein & Daniel Adler, *A Bias in the Prediction of Tastes*, 105 *ECON. J.* 929, 929 (1995) (demonstrating that people underestimate the extent to which they will value a good in the future once they receive it); Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Anomalies: The Endowment Effect, Loss Aversion, and Status Quo Bias*, 5 *J. ECON. PERSP.* 193, 193–206 (1991) (exploring the concepts of loss aversion and endowment effect).

unlicensed breeding and uncared-for animals.<sup>118</sup> Similarly, opponents of soda taxes argue that the taxes will lead to the closing of small businesses while doing nothing to improve overall nutrition.<sup>119</sup>

To the extent some legislators and governors act based on what they believe is good, evidence-based policy, the collection of data showing that a local measure will have benefits without great costs could help in a campaign against express state preemption. Such evidence is only possible if a number of localities can implement a measure and if reliable data is collected and analyzed by groups or people who will be regarded as reasonably neutral. Data may be convincing even if it comes from places other than one where the preemption debate is occurring, if the ordinances at issue are otherwise similar. If this reasoning is correct, then one agenda item for advocates of soda taxes should be to support research on the effects of such taxes.

### C. *Reframing the Intrastate Preemption Debate*

Perhaps the most effective (if not necessarily politically feasible) way to combat express preemption of soda taxes would be to reframe the way state legislatures approach local preemption. In current practices, legislatures in both home rule and non-home rule states feel free to enact issue-specific statutes expressly preempting particular choices by local authorities. This seems to be true even where home rule is enshrined in some form in the state constitution.<sup>120</sup> There is no internal state legislative rule in any State that limits the type of issues that are subject to express state preemption. Nor are there any special internal state legislative rules for how express preemption must be considered and adopted. In this context, the debate over express preemption focuses on whether state legislators like or dislike the particular policy choices made by localities. If legislators do not like them, they can preempt them, if they can muster a legislative majority. There is no principled basis upon which local choices are or are not subject to express preemption, thus obscuring the larger questions of how much sway localism and local autonomy should have and in what arenas.

If the legislative debate were reframed as one not over “are-soda-taxes-good-or-bad” but rather over the proper range of local autonomy, legislators of different political stripes might be able to find more common ground. The conservative Republicans at the state level now pushing express preemption, after all, hail from a party and tradition that has trumpeted localism and dispersed authority.<sup>121</sup> In such a reframed debate, legislators might

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<sup>118</sup> See Siegel, *supra* note 111.

<sup>119</sup> See *Why Food & Drink Taxes Won't Work*, REJECT NEEDLESS TAXES, <http://www.fooddrinktax.eu/tax-doesnt-work/tax-is-ineffective/> (last visited Oct. 15, 2017) (collecting and highlighting evidence from studies and reports).

<sup>120</sup> Diller proposes an invigorated form of constitutional home rule as a response to the excessive preemption of local initiatives, including highly innovative ones. Diller, *supra* note 78, at 1066–73. While there is merit in that proposal, constitutional provisions for home rule by themselves have not stopped express preemption, and constitutional amendment is a very difficult process in many states. More procedurally-oriented reforms in state legislative processes might yield comparable benefits, while being easier to achieve.

<sup>121</sup> One of the questions raised by the ascendance of Republicans in Congress and the state legislatures is whether the traditional Republican/conservative rhetoric regarding federalism and localism reflected real philosophical commitments or whether it solely was employed to serve instrumental ends. See Ilya Somin, *Federalism as Insurance*, WASH. POST (Dec. 20, 2016), <https://www.washingtonpost.com/news/volokh->

be able to agree on content-neutral categories of local choices that presumptively should not be preempted, and they might be able to agree on procedural rules that could instantiate that presumption. Examples of such procedural rules include a rule requiring public hearing on any express preemption proposal or a rule requiring a supermajority for the passage of an express preemption law. In addition to the philosophical and rhetorical power of localism, these proposals might also gain political traction because they could be a benefit to a party in power in the state legislature if there were a real possibility that the next election or two would leave them out of power (just as the filibuster rule in the U.S. Senate benefits both parties by limiting the power of whichever party happens to command a majority after the last election). If special rules for express preemption ever were to become a political reality, then it most likely would not be in the states with entrenched “red” legislatures and activist “blue” cities, but rather states where the politics at state and local levels were more contingent and heterogeneous—that is, “purple” swing states.

## V. CONCLUSION

Increasingly, state and local governments are looking to the possibility of imposing or increasing taxes on soda both as a way to raise substantial revenue, and possibly as a way to improve public health. In the public discourse, the perception that the government is acting as a nanny by deciding what is or is not good or healthy to eat and drink often garners widespread attention and sympathy. In American culture, freedom of choice is highly valued.<sup>122</sup> When government is perceived as taking away choice in an area of daily living as basic and fundamental as food and drink, Americans sometimes view such efforts with skepticism, especially if the reasons for the proposed limitations are viewed as paternalistic.<sup>123</sup> When a state or local government proposes to tax soda, paternalism concerns are often compounded by suspicion that citizens who are more vulnerable will be asked to shoulder an unfair tax burden. Even in an era where the financial positions of some state and local governments are extremely weak and revenue is desperately needed, public resistance to efforts to tax soda can be difficult to overcome. Yet, as in Philadelphia, these political objections can be muted when there is a commitment to use the tax revenue for a popular initiative with readily identifiable beneficiaries.

A very different hurdle that local governments in particular face when attempting to implement soda taxes is the possibility of preemption by state law. Although preemption is a legal hurdle, the likelihood of preemption as a barrier to local taxation of soda is influenced heavily by state and national politics. Just as the tobacco and gun industries have leveraged their substantial lobbying power in statehouses to attempt to preempt local tobacco and gun ordinances, the beverage industry has similar power and is likely to make similar efforts. These efforts are especially likely in Republican controlled statehouses

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conspiracy/wp/2016/12/20/federalism-as-insurance/?utm\_term=.02b0415e7413 (raising the question whether federalism commitments are genuine on either the “left or right”).

<sup>122</sup> World Values Survey data indicates that Americans were far more likely than citizens of other large Western democracies to say that they have an extremely high amount of freedom of choice and control over the way their life turns out. Claude S. Fischer, *Paradoxes of American Individualism* 23 SOC. F. 363, 365 (2008).



where the proposals to tax soda are coming from liberal cities to which the state leaders owe no allegiance and receive little support at election time. The nation-wide reach of ALEC gives rise to the possibility of a wide variety of states enacting laws expressly preempting local nutrition ordinances. As a political matter, public health activists who seek local taxation of soda might be wise to try to ensure that as many local ordinances as possible are in place prior to the consideration by a state legislature of a state law preempting such taxes, because such proposed state legislation would visibly nullify local efforts to improve public health and would face the opposition not just of local officials, but also the beneficiaries of the tax revenue.