

State Preemption of Food and Nutrition Policies and Litigation: Undermining Government's Role in Public Health



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Introduction: In the U.S., federal, state, and local governments have various legal tools to support public health and prevent diet-related disease, including enacting policy and bringing lawsuits against businesses that produce harm-causing products. Yet, states preempt, or limit, government's authority to enact public health policies or initiate litigation.

Methods: In 2018, research was conducted to find state laws enacted through March 16, 2018, using state legislatures' websites, LexisNexis, UConn Rudd Center's Legislative Database, Centers for Disease Control and Prevention Chronic Disease State Policy Tracking System, and the Internet, that preempt local food and nutrition policies including their legislative histories; and preempt lawsuits related to food consumption and chronic disease (e.g., Commonsense Consumption Acts), including explicitly preempting government activity.

Results: Between 2008 and March 16, 2018, 12 states enacted 13 preemptive laws on nutrition labeling, content or "criteria"; consumer incentive items; "food-based health disparities"; sale, distribution, or serving of food and beverages; portion size; food safety; menus; taxes; and "marketing." Between 2003 and 2013, 26 states enacted laws preempting lawsuits claiming long-term food consumption causes obesity and diet-related disease; of these, ten states explicitly preempt such litigation by the government and five explicitly preempt laws providing litigation as a remedy.

Conclusions: State preemption may hinder public health progress by impeding local food and nutrition policies and government-initiated litigation. Local governments are in a prime position to address fundamental concerns, such as reduction of health disparities, the provision of nutrition information, access to healthy food, and the cost of unhealthy food. Government-initiated litigation could potentially support broader policy changes.

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INTRODUCTION

In the U.S., the primary public health concerns have progressed from diseases that stem from contagions and sanitation, where the problems were directly amenable to public health solutions, to harm-causing products, where the problems and solutions directly implicate business interests. The use of the law to address harmful business practices has been successful when government enacts protective policies (e.g., smoke-free laws)¹ or initiates affirmative litigation against the companies that cause harm (e.g., litigation against major tobacco companies by the state attorneys general).² As a result, business entities use their political strength to try

to defeat public health policymaking and litigation at the outset, by urging the federal and state legislatures to enact preemptive laws.

Preemption (also called "ceiling preemption") is most often discussed in the context of policy and

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occurs when a higher level of government withdraws or limits the ability of a lower level of government to act on an issue.³ Although the federal, state, and local governments all play a role in public health policy,⁴ local governments are often the first to create innovative policy solutions to public health problems,⁵ and are also in a prime position to address health disparities and inequities.⁶ Moreover, successful local policies have the potential to spread and solve problems at a national level (e.g., New York City's trans-fat ban).³ As a result, the tobacco and firearm industries historically made state preemption of local public health policies a political priority.⁷ More recently, preemption is being used to thwart a whole range of public health policies, including paid leave, civil rights, and food and nutrition.⁸

Under the Supremacy Clause, Congress may preempt state and local action while acting pursuant to its other powers (e.g., the Commerce Clause). States, on the other hand, may preempt locales without utilizing other authorities because political subdivisions are a creation of the state. States determine the extent to which local governments can exercise control over all issues and specify this authority through state constitutions or statutes.⁹ Therefore, the final determination of which powers are granted to locales “rests in the absolute discretion of the state.”¹⁰ As such, the state legislature may remove previously granted authority by amending the state constitution, repealing a statute, or enacting a new law.

In addition to supporting preemption of policies, select industries also have successfully encouraged the federal and state governments to preempt litigation against their businesses, with the firearm and food industries leading this charge. In the case of food, such laws preempt civil lawsuits claiming that long-term food consumption causes obesity and diet-related disease, with some additionally preempting lawsuits by the government. These laws are most commonly called Commonsense Consumption Acts, and will be referred to as such herein, although a few have other names (e.g., Personal Responsibility in Food Consumption Act). Litigation has the potential to provide remedies for injured people, expose industry practices through the exchange of documents, and lead to broader policy change, as was the result of the government litigation against the tobacco companies.² Although legislative efforts to constrain litigation are not new (e.g., tort reform for medical malpractice claims¹¹; the Vaccine Act, which preempts litigation but provides an alternative method for recovery¹²), legislative preemption of entire causes of action is relatively recent. Nonetheless, courts have upheld legislatures' authority to broadly preempt civil claims,^{12,13} and

the U.S. Supreme Court explicitly referred to this act as preemption.¹³

State legislatures have thus ceded to food industry requests to enact preemptive laws in two contexts: preempting local governments from passing food and nutrition policies¹⁴; and preempting litigation claiming that food consumption causes obesity and diet-related disease, including litigation initiated by the government.¹⁵ The food industry and its allies have even created model policies to encourage both types of preemption.^{16,17} Yet, there is a gap in the literature evaluating state preemption of food and nutrition policies and analyzing this as part of a broader strategy to protect the food industry from both direct regulation (through policy) and indirect regulation through litigation. To fill this gap, this paper reports the results of research on state preemption of local food and nutrition policies and state preemption of litigation against the food industry, including identifying explicit preemption of the ability of local and state governments, including the state attorneys general, to bring lawsuits in this context.

METHODS

In 2018, research was conducted to find state laws enacted through March 16, 2018, by searching state statutes and the Internet, and using LexisNexis, the UConn Rudd Center's Legislative Database (which included bills and laws from 2010 to 2018),¹⁸ and Centers for Disease Control and Prevention Chronic Disease State Policy Tracking System (which included bills and laws from 1979 to 2017).¹⁹

First, state laws that preempt local food and nutrition policies were identified. Table 1 sets forth terms used to research and analyze preemptive language. Food and nutrition policies were defined to include any topic related to food marketing (i.e., product, price, place, or promotion); portion size; consumer incentive items (e.g., toys in children's meals); nutrition labeling, content, or criteria (e.g., menu labeling); food and nutrition programs (e.g., the Supplemental Nutrition Assistance Program); and attempts to address health disparities related to food and nutrition. Historical state laws that generally prohibit local taxes were excluded, as were laws related to industrial agriculture or concentrated animal feeding operations because all states regulate farming to varying degrees and these laws have additional policy considerations, such as nuisance and environmental justice concerns.²⁰ Using LexisNexis and state legislatures' websites, the bill tracking information and final version of the state laws were collected. If the legislative history mentioned a court case related to the law, the case was reviewed. Data extracted from each law included the state, food policy topics covered, and the time from proposal to enactment.

Second, laws that preempt civil litigation based on complaints that obesity or diet-related disease resulted from food consumption were identified. The findings were cross-referenced with similar research conducted in 2012 on the same laws.¹⁵ Data extracted from each law in the current study included the state, date of

Table 1. State Legislation Preemption Language

Entity	Legislative words for preemption
City, county, municipality, political subdivision	Shall not May not Must not
City, county, municipal, political subdivision law, regulation, ordinance, or rule	Null and void No effect Not more restrictive than
No city, county, municipal, or political subdivision	Shall/may do any of the following Shall/may enact an ordinance Shall/may issue a rule or regulation
State	Has sole authority Has exclusive authority Preemption
[Topic/subject matter] is/are	of statewide concern of statewide interest of statewide regulation Reserved to the state Reserved to the [state] legislature Preempted
Law, regulation, or rule	Shall be applied uniformly Shall be applied with uniformity Shall be applied consistent with state law Shall be applied identical to state law
[Business's/residents'/state's] interest in avoiding	Patchwork laws, regulations, ordinances, or rules Piecemeal laws, regulations, ordinances, or rules

enactment, and whether the law specifically preempts government-initiated lawsuits or other government activity.

RESULTS

Between 2008 and March 16, 2018, a total of 12 states enacted 13 preemptive food and nutrition policy laws, with the majority enacted in 2011 and 2013 (Table 2). The laws preempt local regulation of the following topic areas: nutrition labeling or information (seven states); consumer incentive items (four states); “food-based health disparities” (three states); the sale, distribution, or serving of food and beverages (two states); portion size (two states); food and beverage taxes and fees (two states); food safety (one state); menus (one state); “nutritional content” (one state); “nutritional criteria” (one state); and “marketing” (one state). Many terms were not defined in these laws, including “food-based health disparities,” and “marketing,” which are broad terms that could preempt a wide range of policy topics. The earliest two laws (from 2008 and 2009) preempt nutrition labeling, while the two most recent laws (from 2017 and 2018) preempt food and beverage taxes. Tennessee is the only state to enact a law to solely preempt action by a non-elected body of a municipality, county, or metropolitan government (e.g., an agency) as opposed to local governments as a whole. Several states included multiple topics in one law. Laws in Kansas and Mississippi included the most with four of the above topics and both laws also preempt laws restricting the growing and raising of food,

which is broader than industrial agriculture.^{21,22} Kansas was the only state to additionally prohibit state action on the topics preempted.

Bill tracking resulted in finding that preemptive laws were often enacted swiftly, certain laws were drafted by the industry or based on industry-sponsored model legislation, and preemption was sometimes added to other topics late in the legislative process. Michigan was the first state to enact a law solely preempting taxes and fees on foods and beverages, and the bill advanced from proposal to passage in both houses in 10 legislative days.²³ Laws in Kansas and Mississippi were based almost entirely on model legislation created by an industry group.¹⁷ In Tennessee, the state enacted preemption in direct response to a menu labeling regulation passed by the Board of Health in Nashville/Davidson County. In another example, at the request of the fast-food industry in response to Cleveland’s successful enactment of a trans-fat ban, the Ohio legislature “tucked away” in a 3,000-page appropriations bill, a “rider taking up less than two pages” preempting local food policies.²⁴ Ohio state senators added the rider after the House had already voted on the amendments and without a hearing in either chamber.²⁴ In 2013, an Ohio appellate court found the law unconstitutionally limited municipalities’ (including Cleveland’s) home rule police powers.²⁴ However, this state law has not been repealed, which is why it is included in the results.

Table 2. State Preemption of Local Food and Nutrition Policies: Topics and Dates

State law	Topics preempted	Date bill introduced	Date bill passed both houses/enrolled	Date signed by governor to become a law
Georgia: Ga. Code Ann. § 26-2-373	Nutrition labeling	February 22, 2008	March 27, 2008	May 12, 2008
Utah: Utah Code Ann. §§ 10-8-44.5; 17-50-329	Nutrition labeling	February 11, 2009	March 12, 2009	March 24, 2009
Tennessee: Tenn. Code Ann. § 53-8-204; Tenn. Code Ann. § 68-14-704 (as amended 2013)	Food safety Nutritional information Regulate menus [Only by a nonelected body of any municipality, county, or metropolitan government (so a local health department is preempted but a local legislature is not)]	February 12, 2009	June 16, 2009	Vetoed by governor July 1, 2009; Senate overrode veto January 28, 2010; House overrode veto February 8, 2010; Public chaptered February 22, 2010
Arizona: Ariz. Rev. Stat. § 44-1380	Consumer incentive items	January 18, 2011	April 6, 2011	April 13, 2011
Florida: Fla. Stat. Ann. § 509.032	Nutritional content Marketing	March 8, 2011	May 6, 2011	June 2, 2011
Alabama: Ala. Code § 20-1-7	Nutrition labeling	March 8, 2011	June 2, 2011	June 9, 2011
Ohio: Ohio Rev. Code Ann. § 3717.53	Consumer incentive items Nutrition labeling Food-based health disparities	Appropriations bill introduced March 15, 2011 without preemption language; preemption added in the Senate after the House passed the bill. ¹⁵ The bill went to the Senate May 5, 2011	June 30, 2011	June 30, 2011
Mississippi: Miss. Code Ann. §75-29-901	Consumer incentive items Nutrition labeling Food-based health disparities Sale, distribution, serving of food/beverages Growing or raising of foods/beverages	January 21, 2013	March 7, 2013	March 18, 2013
North Carolina: N.C. Gen. Stat. §§153A-145.2; 160A-203	Portion size	April 11, 2013	July 10, 2013	July 18, 2013
Wisconsin: Wis. Stat. Ann. §66.0418	Nutritional criteria, such as the number of calories Portion size	Budget and appropriations bill introduced February 20, 2013 without preemption language; amended to include preemption by the Assembly Substitute Amendment 1 offered by the Joint Committee on Finance on June 4, 2013	June 24, 2013	June 30, 2013

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Table 2. State Preemption of Local Food and Nutrition Policies: Topics and Dates (*continued*)

State law	Topics preempted	Date bill introduced	Date bill passed both houses/enrolled	Date signed by governor to become a law
Kansas: Kan. Stat. Ann. §12.16.137	Consumer incentive items Nutrition labeling Food-based health disparities Sale, distribution, serving of food/beverages Growing or raising of crops and livestock	February 2, 2016	May 9, 2016	May 17, 2016
Michigan: Michigan Public Act No. 135	Food and beverage taxes or fees	September 20, 2017	October 12, 2017	October 26, 2017
Arizona: Ariz. Rev. Stat. § 42-6015	Non-uniform food or beverage taxes (effectively preempting specific SSB taxes)	January 30, 2018	March 14, 2018	March 16, 2018

SSB, sugar-sweetened beverage.

The specific language of these 13 preemptive laws rarely uses the terms *preempt*, *preemption*, or other variations. Instead, the laws often used the terms in Table 1, such as *no political subdivision shall do any of the following*.²²

Second, 26 states enacted Commonsense Food Consumption Acts between 2003 and 2013 (Table 3). Louisiana was the first state to enact such a law in 2003, followed by 11 states in 2004, ten states in 2005, one state in 2006, one in 2012, and two in 2013. The specific focus of all of these laws is to preempt lawsuits based on claims that a consumer's weight gain, obesity, or associated health conditions resulted from long-term consumption of food. Most laws focus on the various types of food businesses protected from such litigation, including manufacturers, sellers, trade associations, agricultural producers, wholesalers, brokers, retailer packers, distributors, carriers, holders, marketers, and advertisers.^{25,26} Most laws also identify the specific plaintiffs who are prohibited from bringing a preempted action. Ten of these laws explicitly preempt civil lawsuits filed by the government, most commonly by "any government entity," which would include state attorneys general. Only one of these ten laws (Michigan's) applies solely to local governments, which means that local governments are preempted from filing such lawsuits, but the Michigan Attorney General is not. The laws that do not specify which plaintiffs' actions are preempted may preempt lawsuits by the government, but this would be a question for that state's courts. Interestingly, although all Commonsense Consumption Acts would implicitly preempt local laws that provide causes of action preempted by the acts, five states additionally explicitly preempt either "any law of this state" or "any state statute, rule, public policy, court or administrative decision, municipal ordinance, or other action having the effect of law" on the topics preempted (Table 3).

Eleven states had both types of preemptive laws: preempting food policies and litigation (Figure 1). Only Mississippi preempts local food policies but not litigation. North Carolina was the only state to pass both preemptive clauses, for food policy and litigation, in the same bill. The rest of these laws were enacted through separate bills in different years, with the vast majority of Commonsense Consumption Acts enacted prior to state preemption of local food and nutrition policies.

DISCUSSION

This study identified 12 states that preempt political subdivisions from acting on a wide range of food policy topics, including evidence-based policies (e.g., sugar-sweetened beverage [SSB] taxes), policies that increase transparency and information to consumers (e.g.,

Table 3. State Commonsense Consumption Acts and Preemption of Government-Initiated Litigation and Related Laws

State (year enacted)	Preempts specific plaintiffs	Government action preempted
Alabama: Code of Ala. §§ 6-5-730— 6-5-736 (2012)	Natural person, any other person which includes: any individual, corporation, company, association, firm, partnership, society, joint-stock company, or any other entity, including any governmental entity or private attorney general ^a	Lawsuit by any governmental entity
Arizona: A.R.S. § 12-683 (2004)	Plaintiff in a products liability action	No
Colorado: C.R.S. 13-21-1101—C.R.S. 13-21-1106 (2005)	Natural person, any other person which includes: any individual, corporation, company, association, firm, partnership, society, joint-stock company, or any other entity, including any governmental entity or private attorney general ^a	Lawsuit by any governmental entity
Georgia: O.C.G.A. §§ 26-2-430 — 26-2-436 (2004)	Natural person, any other person which includes: any individual, corporation, company, association, firm, partnership, society, joint-stock company, or other entity, including any governmental entity or private attorney general ^b	Lawsuit by any governmental entity; Also, preempts laws that would create a cause of action by stating that liability shall not arise under “any law of this state.”
Florida: Fla. Stat. § 768.37 (2004)	“Personal injury or wrongful death” presumably means the consumer	No
Idaho: Idaho Code §§ 39-8701— 39-8706 (2004)	Natural person, any other person which includes: any individual, partnership, corporation, firm, association, governmental subdivision or agency, public or private organization or other legal entity	Lawsuit by any governmental subdivision or agency, public organization or other legal entity
Illinois: 745 ILCS §§43/1 — 43/20 (2004)	“Person” which means an individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity, including any governmental entity	Lawsuit by any governmental entity
Indiana: Burns Ind. Code Ann. §§ 34-30-23-0.1— 34-30-23-3 (2006)	Not specified	Unclear
Kansas: K.S.A. § 60-4801 (2005)	By or on behalf of a natural person, as well as any other claim lawfully asserted by or on behalf of such person	Unclear
Kentucky: KRS §§ 411.600 — 411.640 (2005)	By or on behalf of a natural person, as well as any derivative or other claim arising therefrom asserted by or on behalf of any other person	Unclear
Louisiana: La. R.S. § 9:2799.6 (2003)	“Personal injury or wrongful death” presumably means the consumer	No
Maine: 14 M.R.S. § 170 (2005)	“Personal injury or death” presumably means the consumer	No
Michigan: MCLS § 600.2974 (2004)	“Personal injury or death” presumably means the consumer. A political subdivision of this state shall not file, prosecute, or join, on its own behalf or on behalf of its citizens or another class of persons, a	Lawsuit by a “political subdivision” which is defined to include a county, city, township, or village.

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Table 3. State Commonsense Consumption Acts and Preemption of Government-Initiated Litigation and Related Laws (*continued*)

State (year enacted)	Preempts specific plaintiffs	Government action preempted
	civil action described in this section for damages or other remedy against a person. "Person" means an individual, partnership, corporation, association, or other legal entity.	
Missouri: § 537.595 R.S.Mo. (2004)	Natural person, any other person which includes: any individual, corporation, company, association, firm, partnership, society, joint-stock company, or any other entity, including any governmental entity or private attorney general ^a	Lawsuit by any governmental entity
North Carolina: N.C. Gen. Stat. §§ 99E-45— 99E-49 (2013)	Natural person, individual, corporation, company, association, firm, partnership, society, joint-stock company, or any other entity, including any governmental entity or private attorney general ^a	Lawsuit by any governmental entity
North Dakota: N.D. Cent. Code, §§ 19-23-01— 19-23-03 (2005)	Not specified, includes "any claim"	Unclear Additionally preempts state and local laws that would create such a cause of action by stating that the food businesses "may not be subject to civil liability arising under any state statute, rule, public policy, court or administrative decision, municipal ordinance, or other action having the effect of law."
Ohio: ORC Ann. 2305.36 (2005)	Not specified	Unclear
Oklahoma: 76 Okl. St. §§ 38 —40 (2013)	Natural person, any other individual, corporation, company, association, firm, partnership, society, joint-stock company, or any other entity, including any governmental entity or governmental officer, or private attorney ^a	Lawsuits by any governmental entity or governmental officer. Also, preempts laws that would create a cause of action by stating that liability shall not arise under "any law of this state."
Oregon: ORS § 30.961; ORS § 174.100 (2005)	"Person," which includes individuals, corporations, associations, firms, partnerships, limited liability companies and joint stock companies.	No
South Dakota: S.D. Codified Laws §§ 21-61-2— 21-61-4 (2004)	Not specified, includes "any case"	Unclear
Tennessee: Tenn. Code Ann. § 29-34-205 (2004)	Natural person, any other person, any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity, including any governmental entity or private attorney general ^a	Lawsuits by any governmental entity
Texas: Tex. Civ. Prac. & Rem. Code Ann. §§ 138.001—138.004 (2005)	Person other than the individual on whose weight gain, obesity, or health condition the action is based; and any individual or any representative, spouse, parent, child, or other relative of any individual. Not specified but presumably also preempts the individual whose weight gain, obesity, or health condition the action is based.	No and explicitly does not limit normal AG consumer protection actions. But does preempts laws that would create a cause of action by stating that liability shall not arise under "any law of this state."

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Table 3. State Commonsense Consumption Acts and Preemption of Government-Initiated Litigation and Related Laws (*continued*)

State (year enacted)	Preempts specific plaintiffs	Government action preempted
Utah: Utah Code Ann. §§ 78B-4-301—78B-4-306 (2004)	By or on behalf of a natural person, as well as any derivative claim arising from it, and asserted by or on behalf of any other person.	Unclear Additionally preempts state and local laws that would create such a cause of action by stating that the food businesses “may not be subject to civil liability arising under any state statute, rule, public policy, court or administrative decision, municipal ordinance, or other action having the effect of law.”
Washington: Rev. Code Wash. (ARCW) § 7.72.070 (2004)	Private party	No
Wisconsin: Wis. Stat. § 895.506 (2005)	Not specified	Unclear
Wyoming: Wyo. Stat. §§ 11-47-101—11-47-101 (2005)	“The individual” could indicate the consumer only but unclear	Unclear

^aPrivate attorney general refers to the law in some states that allows private persons to initiate a lawsuit based on a claim of harm to the population—in essence acting as a “private attorney general.” AG, attorney general.

nutrition labeling), and policies aimed at addressing health disparities (e.g., presumably policies on “food-based health disparities”). Some preemptive laws include clear definitions of which policies are preempted, whereas others are vague, making it difficult for local governments to know exactly what is preempted in those states. Moreover, these states did not simultaneously use their powers to address these issues at the state level; rather, they withdrew local control over topics typically within the purview of political subdivisions.

In some cases, states passed preemption in response to local innovation or policy proposals, whereas others preempted consideration of policies enacted nationally but not expressly being considered within the state, as in the case of Michigan’s and Arizona’s laws preempting taxes.²⁷ State preemption of local food and beverage taxes is quite new but seems to be increasing. Several bills to preempt SSB taxes are pending around the country and, after data collection for this study concluded, California state legislators, on June 25, 2018, amended a budget bill originally introduced in January 2018, to preempt local governments from adopting any new SSB tax for the next 12 years. Within 4 days, this bill passed through both houses and was signed by the governor on June 28, 2018.²⁸ The swiftness from introduction to passage in both Michigan and California left little opportunity for stakeholders to organize in opposition to preemption.

This study also provides new information on the 26 state laws that preempt litigation based on claims that long-term food consumption is associated with diet-related disease, including ten that explicitly preempt government-initiated litigation. Although litigation preemption in this domain seems to have plateaued (there were no bills on the topic after 2013), these laws highlight the two-pronged approach the food industry and its supporters have taken to preempt public health-related efforts and gain protection from the government.^{16,17,29} (Similarly, the firearms industry successfully supported passage of laws preempting legislation and litigation nationally.³⁰) Preemption of litigation can have far-reaching consequences for public health. Litigation that progresses through the discovery phase can produce documents that expose industry practices, which in turn can support increased regulation of harm-causing products.³¹ Moreover, although lawsuits brought by private individuals may produce various outcomes, litigation by state attorneys general has successfully led to industry behavior changes in the context of food, tobacco, and other products.³² Yet ten states specifically preempt claims by the government, including nine that preempt the state attorneys general from bringing such an action. State legislatures’ explicit stripping away of state attorney general authority may be one reason state attorneys

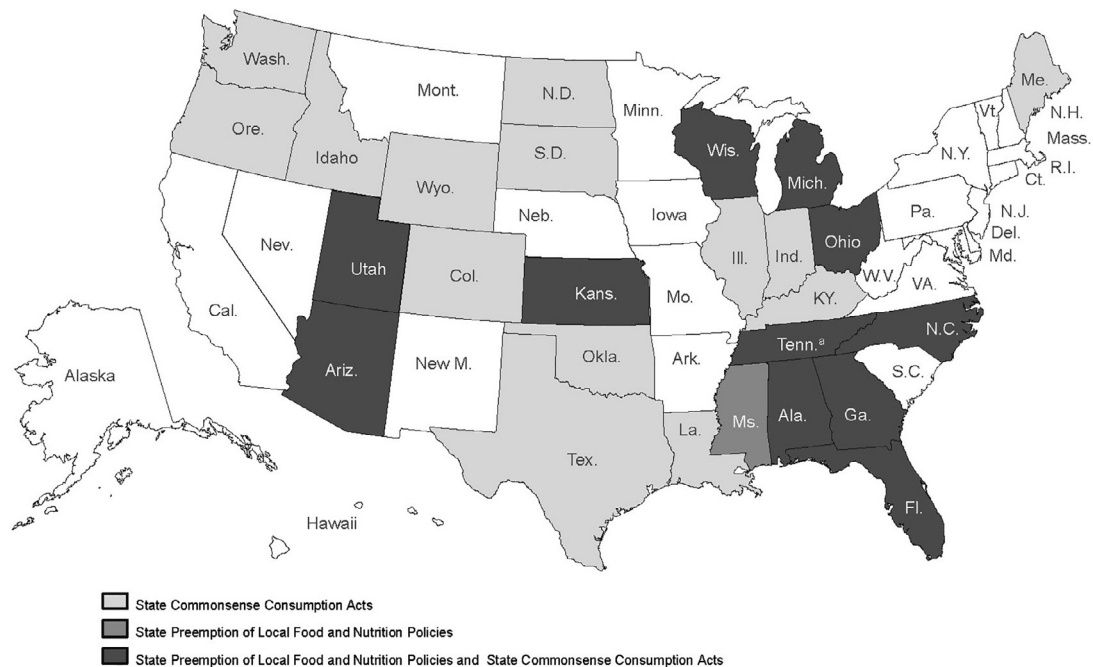


Figure 1. State preemption of local food and nutrition policies and litigation (Commonsense Consumption Acts).

^aPreempts nonelected bodies of local governments only.

general have not acted in the context of food to the extent legally feasible.³²

Once a preemptive law is passed, there is little recourse to challenge such laws in court. For this reason, food policy stakeholders need additional methods to combat and prevent preemption. Previous research found that monitoring preemption, engaging grassroots movements, unifying allies around preemption, and using media advocacy can be useful tools to combat preemption.^{33–36} Anti-preemption activity should occur concurrently with food policy advocacy, education, and promotion. Therefore, before preemption is introduced in a state, stakeholders should monitor bills throughout the legislative process and form relationships with officials in state legislatures to help identify preemptive bills and amendments early. In addition, stakeholders should continuously engage grassroots activists and traditional and nontraditional allies and partners to create a unified front against preemption across issue areas. Media advocacy can be used to educate community members about the negative aspects of preemption, such as removing the ability of local governments to protect community members' health and safety, industries' desire to avoid regulations, and exposing secrecy behind preemptive bills, including the use of front groups or preemptive language added late in the legislative process. For example, the American Heart Association issued a press release calling the June 2018 California SSB tax preemption law "a last-minute, backroom deal negotiated and

written in secret by beverage industry lobbyists and their allies."³⁷

In order to prevent preemption, stakeholders at the federal and state level can advocate for laws to be written in a way to advance public health interests by enacting minimum standards (also called "floor preemption") and including a savings clause. A savings clause is an explicit statement in the law that allows lower levels of government to enact stronger protections. Because a savings clause is explicit, it leaves no question that the legislature intended to allow lower levels of governments to enact additional protective laws, which can help guard against lawsuits challenging their authority.³⁸ One example of a savings clause at the federal level is the National School Lunch Program, which contains minimum nutrition requirements for federal reimbursement for school lunches, but includes a savings clause, allowing state and local education agencies to implement stricter nutritional requirements than the federal law.³⁹

Preemption threats are still evolving. New efforts include attempts to weaken substantive public health protections after preemption is enacted. For example, the U.S. House of Representatives passed the Common Sense Nutrition Disclosure Act in February 2018 to try to amend and weaken the federal menu labeling law, enacted in 2010 with broad preemption.⁴⁰ Another tactic is "blanket" preemption of all local control without reference to a specific issue.⁴¹ This type of preemption could appear in a law that is unrelated to food and beverage

policies. Two additional extreme methods to preempt local control include the punitive withholding of state revenues from locales deemed to have enacted a law preempted by the state⁴² and amending the state constitution to make it more difficult for local governments to levy a tax.⁴³ Both of these fiscal measures could destroy the ability of local governments to conduct routine activities, such as providing police, fire, and public health protections.⁴⁴ Moreover, although not preemption per se, some state legislators are seeking to amend the ballot initiative process to make it more difficult for citizens to place any issue on the ballot, including local ballot measures—the mechanism by which several communities passed SSB taxes.⁴⁵

Limitations

This study is the first to track state preemption of local food and nutrition policy efforts and provide a broader context for preemption efforts nationally by including litigation preemption and specifically identifying preemption of government-initiated lawsuits. Limitations of this study include that it might not have captured all laws that preempt relevant policies or litigation. Additionally, although legal recourse to challenge state preemption is available in only a small number of cases, there are circumstances in which a legal challenge can be successful,²⁴ so it is important that stakeholders consult attorneys familiar with their state's constitution and statutes.

CONCLUSIONS

State legislatures are increasingly using the legal mechanism of preemption to block local control and innovation over food policy issues. Yet, local governments are often in the best position to enact food and nutrition policies and especially those that address such fundamental concerns for public health as health disparities, healthy food access, food prices, and nutrition information. Therefore, states should avoid using preemption to hinder public health progress. Preemption of food policies is part of a broader effort to reduce government regulation of the food industry, including preemption of litigation. Preemption is thus one of the most important policy topics for public health and should be central to all food policy discussions and advocacy efforts. A concerted effort to fight preemption alongside food policy advocacy is necessary to change the culture of preemption in each state across the country.

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