Preemption & Policy

State Law and its Potential Impact on Policymaking
As required by the Alcohol Policy 18 Conference, I/we have signed a disclosure statement and note the following conflict(s) of interest:

The Pacific Institute for Research receives support from AB InBev Foundation for measuring and evaluating the results of the foundation's ongoing Global Smart Drinking Goals Initiative. I am not presently involved with this work, nor have been.
This presentation and information provided in this presentation is for informational purposes only, and does not constitute legal advice.

Ryan D. Treffers, J.D. intends to provide educational resources to community coalitions, policy analysts, municipal governments, and others assessing potential responses to public health problems in their communities. Any legal analysis provided is not offered or intended to constitute legal advice or to substitute for obtaining legal advice from a licensed attorney, and its use does not imply the creation of an attorney/client relationship. Ryan D. Treffers, JD is not engaged in the formal practice of law.
Why talk about preemption?

“All politics is local” when it comes to public health and alcohol policy.

Preemption analysis is always the first step.
Overview

- Preemption
- Alcohol Policy
- Examples
Sources of law

- Constitution (U.S. and state)
- Federal statutes
- State statutes
- Local law (ordinances)
- Administrative law (regulations)
- Case law (court decisions)
Preemption is a judicially created principal base on the proposition that a lower governmental authority cannot act contrary to a higher level of government.

More simply: Who gets to decide?
Preemption: Public Health

• Can function as an important tool or a barrier for promoting public health

• Good
  – Disease: Quarantines and vaccination

• Bad
  – Environment: Fracking

Tobacco control: Local prohibitions on vending machines and outdoor smoking being overturned by industry lobbying.
Preemption: Tenets

- Preemption not presumed
- Case-by-case analysis, based on state statute at issue
Preemption: Types

- Express
- Implied
  - Conflict
  - Field
Tenth Amendment:

“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”
Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Section 3. [states how amendment will become operative]
Alcohol Policy: Promotion

Available at:
Alcohol Policy: Tracking

Welcome to the Alcohol Policy Information System

The Alcohol Policy Information System (APIS) provides detailed information on a wide variety of Alcohol-Related Policies in the United States at both State and Federal levels, as well as policy information regarding the Recreational Use of Cannabis. The information and resources available on this site are geared towards alcohol policy researchers and others interested in alcohol policy issues.

Underage Drinking
APIS provides convenient access to policy topics that pertain to underage drinking, in order to encourage research, evaluation, and outreach efforts in this important area.

What's New
March 30, 2018 - The website was redesigned, policy information appearing on the site was updated to include legislative and regulatory changes that took effect on or before 1/1/2017, and supplemental resources were added or revised.

Alcohol Policy Topics
Detailed state-by-state information is available for the following alcohol policy topics, or you may browse all topics:

- **Alcohol Beverages Pricing**
  - Drink Specials
  - Wholesale Pricing Practices and Permissions

- **Alcohol Beverages Taxes**
  - Beer
  - Distilled Spirits
  - Wine

- **Alcohol Control Systems**
  - Retail Distribution Systems for Beer
  - Retail Distribution Systems for Spirits
  - Retail Distribution Systems for Wine
  - Wholesale Distribution Systems for Beer
  - Wholesale Distribution Systems for Spirits
  - Wholesale Distribution Systems for Wine

- **Blood Alcohol Concentration (BAC) Limits**
  - Adult Operations of Noncommercial Motor

- **Pregnancy and Alcohol**
  - Civil Commitment
  - Legal Significance for Child Abuse/Child Neglect
  - Limitations on Criminal Prohibition
  - Priority Treatment
  - Reporting Requirements
  - Warning Signs: Drinking During Pregnancy

Cannabis Policy Topics
Detailed policy information is available on the Recreational Use of Cannabis.

In addition, APIS has developed the Cannabis Policy Taxonomy (CPT), an inventory and taxonomy of cannabis policies.

Recently Adopted
Information is available on states that have recently adopted laws legalizing the recreational use of cannabis since the most recent update of this website.

Retail Sales
- Bars on Off-Premises Sunday Sales
- Beverage Service Training and Related Practices
- Key Registration

Transportation
- Open-Containers of Alcohol in Motor Vehicles
- Vehicle Insurance: Losses due to intoxication

Underage Drinking
- False Identification for Obtaining Alcohol
- Furnishing Alcohol to Minors
- Minimum Age for Off-Premises Sales

Volume I
December 2015

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES
Substance Abuse and Mental Health Services Administration
www.samhsa.gov
Alcohol Policy: Status

Alcohol-Related Harms

PSR NATIONAL SUMMARY

The Prevention Status Reports highlight—for all 50 states and the District of Columbia—the status of public health policies and practices designed to address 10 important public health problems and concerns. This report focuses on the following evidence-based policies recommended by the Community Preventive Services Task Force for preventing alcohol-related harms (1,2):

- Increasing state excise taxes on beer
- Increasing state excise taxes on distilled spirits
- Increasing state excise taxes on wine
- Having commercial host (dram shop) liability laws

Other strategies recommended by the Community Preventive Services Task Force and US Preventive Services Task Force for reducing alcohol-related harms include regulating alcohol outlet density, avoiding further privatization of retail alcohol sales, and providing adults (including pregnant women) with screening and brief intervention for excessive alcohol use (3–5).

Available at https://www.cdc.gov/psr/index.html
Examples: Taxes

Data on a Specific Date:
Beer

Use the Filter and Sort options to view the available data according to your needs and preferences. Use the Download menu to download the policy information as a CSV or formatted PDF file.

New users are encouraged to read the Instructions to understand how best to utilize the information found on this page. Select a tab to display the corresponding data.

### Data on a Specific Date:
#### Beer

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<th>Jurisdiction</th>
<th>Policies as of</th>
<th>Control</th>
<th>Specific Excise Tax Per Gallon for 5% Alcohol</th>
<th>Wholesale Tax Rate</th>
<th>Retail Tax Rate</th>
<th>Sales Tax DOES NOT Apply</th>
<th>Sales Tax Rate</th>
<th>Sales Tax Adjusted Retail Ad Valorem Rate</th>
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Available at https://alcoholpolicy.niaaa.nih.gov/apis-policy-topics/beer/30
Examples: Social Host

Available at https://alcoholpolicy.niaaa.nih.gov/apis-policy-topics/prohibitions-against-hosting-underage-drinking-parties/41/maps-and-charts#page-content
NEW SUBSECTION. [states in part]

1A. a. Except for the purposes described in subsection 2, a person who is the owner or lessee of, or who otherwise has control over, property that is not a licensed premises, shall not knowingly permit any person, knowing or having reasonable cause to believe the person to be under the age of eighteen, to consume or possess on such property any alcoholic liquor, wine, or beer.

b. A person who violates this subsection commits the following:

(1) For a first offense, a simple misdemeanor punishable as a scheduled violation under section 805.8C, subsection 7A. [note: amount is currently set at $200]

(2) For a second or subsequent offense, a simple misdemeanor punishable by a fine of five hundred dollars.

c. This subsection shall not apply to any of the following:

(1) A landlord or manager of the property.

(2) A person under legal age who consumes or possesses any alcoholic liquor, wine, or beer in connection with a religious observance, ceremony, or right. (emphasis added)
Why is state law inadequate?

- Only applies to persons **under 18**
- Requires host:
  - “knowingly permit” the gathering
  - “know[n] or should have known” age
- Location limited to owned, leased, or host controlled property
- Exempts landlords
- No cost recovery
What can be done at the local level?

- State law does not preempt local laws
- Local ordinances already in existence (including the counties of Dubuque, Delaware, Jones, and Jackson)
- Local ordinances:
  - May be more restrictive than state law
  - Cannot conflict with state law
Examples: Outlet Density

STATE AUTHORITY
- Exclusive or near exclusive State authority
  - State licensing; local zoning & police powers
  - Joint State and local licensing
  - Local licensing, minimum State standards

LOCAL AUTHORITY
- High State Preemption
  - Low State Preemption
Examples: Outlet Density (cont.)

Preemption Tool: What can my community do about alcohol outlets?

Categories
1. Exclusive or near-exclusive state preemption
2. Exclusive state licensing authority, concurrent local regulatory authority
3. Joint local/state licensing and regulatory powers
4. Exclusive local licensing with state minimum standards
5. Mixed
6. No Data Available

Note: Darker colors imply greater state preemption of local action.

Available at: http://www.camy.org/research-to-practice/place/alcohol-outlet-density/preemption-data-tool.html
1. States vary widely in extent of State preemption.

2. States assign differing levels of preemption for differing aspects of alcohol retail control.

3. Courts play a critical role in defining the extent of State preemption, and their holdings are inconsistent and unpredictable.

4. State preemption is a significant barrier to implementing effective alcohol outlet regulation.

5. The threat of preemption-based legal challenges by industry groups undermines the development of local alcohol outlet regulation.
Examples: Outlet Density
Local authority and action

Use of zoning and police powers to regulate alcohol outlet density
- California
- Maryland
- North Carolina
Contact Information

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