

Preemption in Alcohol Control

Lessons Learned the Hard Way

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Alcohol & the U.S. Constitution

- **Alcohol is unlike other consumer product**
- **Subject of 2 Constitutional Amendments**
 - **18th Amendment - Prohibition**
 - **21st Amendment – repeal, but also gave power to states**
- **Alcohol is heavily regulated at the state level**
 - **Localities must look for state level preemption**

How far does State power extend under the 21st Amendment?

Constitutional Issues

- **1st Amendment**
 - Freedom of Speech
- **Commerce Clause**
 - Authorizes Congress to regulate commerce between the states
- **Dormant Commerce Clause**
 - Flows from the Commerce Clause
 - States cannot discriminate against interstate commerce

How far does State power extend under the 21st Amendment?

Federal Regulation

- Advertising and Labeling
- Federal Taxation & Licensing
- Antitrust Laws
- Criminal Activity

Case Study

Power of 21st Amendment to overcome federal preemption – New Mexico

- State banned airline from serving alcohol when in or flying over the state
- Airline sued claiming federal aviation law preempted state action
 - Airplanes traveling over state were transporting alcohol in state
 - 21st Amendment allows state to regulate “transport” of alcohol within its territory
 - Federal law controlling airlines did not preempt alcohol regulation

Case Study

Preemption Strengthening Local Laws – Massachusetts

- Some towns restricted happy-hour promotions
- Alcohol establishments in neighboring towns began promoting their happy-hour specials
- Increased risk of drunk driving
- Competing alcohol policies undermined policy
- State level law on happy-hour promotions set minimum standards, locals could go further

Case Study

Preemption Weakening Local Laws – California

- Beer and wine can be sold at convenience stores
- Convenience stores began adding gas pumps and gas stations began adding convenience stores
- Increased concern regarding drunk driving
- 30 cities passed bans of alcohol/gasoline markets
- Industry got weak law passed to preempt local laws

Case Study

State Preemption Work Around – California

- **State sole authority over licensing of retailers**
- **City of Oakland sought to reduce nuisance problems associated with alcohol sales in its community**
- **Passed ordinance that:**
 - **Imposed requirements on the retailers to curb nuisance activities**
 - **Collected fee to fund enforcement of ordinance**
- **Ordinance upheld under local land use authority**
- **Other localities have since adopted similar ordinances**

Addressing State Preemption Issues

- **Become acquainted with state alcohol laws**
- **Use a different power – e.g., in California, land use**
- **Develop statewide proposals of minimum standards**
Always a floor, never a ceiling, preserve local control
- **Consult an attorney when drafting any local ordinance**
- **Keep an eye on industry trump card at all times**
 - **When you start getting successful at local level...may be trouble**

Caution – Issues all Intersect

- **Giving up preemption in one area (e.g. food) could undermine public policy in tobacco, alcohol**
- **Poorly drafted bills make bad court decisions**
- **Consider what is lost in grassroots movement by losing a preemption battle, or worse, giving it away**
- **Consider proactive laws to ensure local control**
- **Battle has largely been lost in alcohol taxation; don't let this happen in other areas, such as food / beverages**

Contact Info

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