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Policy briefing paper

The perils of preemption

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What is state preemption?

State (and federal) preemption, a simple doctrine in concept, constitutes a complicated legal arena that has important ramifications for alcohol policy proponents. Its operation reflects the basic structure of our federal system. The federal government defines the powers and authority of state governments, and state governments define the powers and authority of local governments. When a state decides to limit the authority of local governments in a particular policy area, it has *preempted* local control. Similarly, the federal government can preempt state powers (subject to constitutional provisions protecting state authority). Preemption is like a trump card: A state law can trump, and thus invalidate, a local regulation.

State preemption has become a critical issue for the alcohol policy field. Community activists across the country have successfully encouraged local policy makers to enact ordinances that restrict various problematic alcohol marketing practices. Local governments have restricted alcohol billboards; limited the number, location, and type of alcohol outlets; imposed fees on local retailers to fund public nuisance abatement activities; and increased local alcohol taxes, among other strategies to address alcohol problems at the community level. The alcohol industry opposes this trend vigorously, and state preemption is one of its most potent weapons. An industry-sponsored state law can wipe these local efforts off the books, sometimes invalidating dozens of hard-fought community victories. As illustrated in the box on page 3, state preemption can dramatically alter community alcohol environments.

State preemption's impact on local prevention initiatives



Nancy Gorrell

State legislation nullifies California cities' restrictions on concurrent sales of alcohol and gasoline.

During the late 1970s and early 1980s the alcohol, convenience store, and oil industries developed a new marketing scheme – adding gas pumps to convenience stores and convenience stores to gas stations. Responding to concerns from local policy coalitions that these new markets linked drinking and driving and increased sales to minors, more than 30 California cities enacted local ordinances prohibiting new alcohol/gasoline markets.¹ The industries combined their potent state lobbies and approached legislators in Sacramento. The result was state legislation in 1987 that invalidated all the local ordinances, replacing them with weak restrictions that would not interfere with the proliferation of the new markets.²

Louisiana law preempts New Orleans's mandatory, fee-based, server training program.

In 1999, a community coalition in New Orleans, working with local and state officials, developed a plan to implement a server training program that included fees to fund increased enforcement of alcoholic beverage control laws.³ Meanwhile, at the state capitol, officials were considering a statewide server training program. Coalition members approached the director of the alcoholic beverage control agency, who assured them that the bill would not preempt the New Orleans initiative. At the last minute, and without notice to the coalition, an industry representative drafted a preemption provision and convinced lawmakers to include it in the state legislation, forcing the coalition to abandon its server training plan.⁴

Nebraska courts invalidate Lincoln's efforts to restrict alcohol sales at convenience stores.

Concerned about the overconcentration of alcohol outlets and its impact on drinking problems, particularly among young people, a Lincoln coalition made several efforts to restrict alcohol licensing of convenience and grocery stores.⁵ The alcohol industry successfully challenged the city's ordinances in the Nebraska Supreme Court. The coalition sought assistance from the state legislature, which passed new legislation addressing the court's concerns and more clearly defining local powers. The court, in a series of rulings, invalidated the legislation as a violation of the state constitution's right to equal protection, and an unconstitutional delegation of legislative authority.⁶

Alcohol retail licensing and regulations: How much local control?

The place to start assessing the effect of state preemption is to determine what powers the state has given local governments to regulate alcohol outlets. Every state regulates alcohol sales and specifies the role of local government, if any, in the regulatory process. Some states own and operate their own stores and allow limited, if any, input from local governments regarding the number of stores or their location and operations. At least two states, Maryland and Minnesota, allow local governments to own and operate municipal alcohol outlets.

All states permit commercial sales of alcohol through privately-owned retail outlets. Each retailer must obtain a license through a regulatory process that determines the number and types of outlets allowed, where they can be located, who can obtain a license, and what serving and selling practices must be followed. The extent to which a state delegates licensing and regulatory authority to local governments falls into one of the following broad patterns.

- ***Exclusive or near-exclusive state control.*** Several states exclude local governments from retail licensing and regulation. States in this category will not recognize local zoning authority, even in land use matters, which is usually treated in other states as a municipal responsibility. North Carolina, for example, places exclusive power to license alcohol outlets in the state Commission on Alcoholic Beverage Control, which has “...the sole power, in its discretion, to determine the suitability and qualifications

of an applicant for a [alcohol retail] permit.”⁷ Local governments can file written objections to proposed licenses, but their objections may be ignored.

- ***Exclusive state licensing authority, local regulatory authority.*** Here, states retain exclusive licensing authority but allow local governments to influence the licensing decisions to some extent, typically through local zoning powers. States in this category vary widely in the degree to which they recognize local authority. Indiana law, for example, provides that city and town legislative bodies can influence the location of alcohol outlets through their zoning powers, but prohibits any other type of local ordinance that “... directly or indirectly regulates ... or limits the operation” of a state license holder.⁸ Pennsylvania law, by contrast, permits broad local zoning powers.⁹
- ***Joint local/state licensing and regulatory powers.*** In these states, alcohol retailers must obtain two licenses, one from the state and one from the municipality where they are located. In most cases, this gives the primary responsibility for determining alcohol availability to local governments, subject to minimum standards established by the state. In Georgia, for example, the state cannot issue a license until the applicant first receives a local license, and the state defers to local governments in most regulatory matters.¹⁰ This may vary, however. Local licensing agencies exist in Louisiana, for example, but their powers are limited by state law.¹¹

- **Exclusive local licensing, with minimum state standards.** The remaining states delegate the licensing authority entirely to local government and do not issue state licenses at all. Instead, the state imposes regulations that local governments must honor. Minnesota is one such state.¹²

These categories should not mask the variation among the states and the complexity of the state/local delegation issue. For example, many states in the second category have statutes that appear to give the state exclusive

licensing and regulatory authority. Further research reveals additional statutory provisions or decisions by state courts that permit exceptions to the general rule.¹³ Even Minnesota, with exclusive local licensing, has preempted local authority to some degree: Municipalities in that state cannot restrict 18-to 20-year-olds from working at retail alcohol outlets.¹⁴

The complexity arises in part from the ambiguity inherent in the preemption doctrine. Legal treatises and courts have defined two types of preemption, *express* and *implied*. Express preemption occurs when the state law asserts its intent to occupy a given field of regulation. Implied preemption arises when a state regulatory scheme is so extensive that no room remains for local regulation.¹⁵

This is logical in principle but confusing in application. For example, most states specify the maximum hours of alcohol retail operation. Can cities require an earlier closing time? Courts in some states have held that there is “express preemption” because the legislature has evidenced an intent to “occupy” the regulation of hours of sale; courts in other states have concluded that this is “implied preemption” because the regulation is part of a comprehensive regulatory scheme. In yet a third interpretation, courts have concluded that local ordinances imposing earlier closing times are permissible because the state legislature merely set minimum standards.¹⁶

Several state court cases offer similar examples of the ambiguity inherent in the preemption doctrine. The Texas Supreme

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**State and Local
Alcohol Availability Authority**

Near-exclusive State Authority

Nebraska *North Carolina*
Texas

**Exclusive State Licensing, Local
Regulatory Authority**

Connecticut *Delaware*
Florida *Indiana*
Iowa *Oregon*
Pennsylvania *Vermont*

Joint State and Local Licensing

Colorado *Georgia*
Louisiana *Missouri*

**Local Licensing, Minimum State
Standards**

Minnesota *Wisconsin*

Court overruled a lower court and held that a state law placing exclusive regulatory authority in the state ABC agency preempted a Dallas ordinance designed to reduce the density of alcohol outlets in an inner-city community.¹⁷ Courts in California, by contrast, held that a similar state provision did not preempt an Oakland ordinance reducing retail availability in its inner-city neighborhoods because the ordinance had only an “indirect” impact on alcohol sales.¹⁸

Only one aspect of the preemption doctrine seems relatively straightforward: Local governments cannot permit activities that state law expressly prohibits. Thus, a local government may not permit a bar to remain open during hours that the state disallows without explicit permission from the state legislature.

This points to the positive role that state preemption can play in alcohol policy and other public health and safety prevention efforts. States are responsible for establishing minimum alcohol availability regulatory standards applicable to all communities in their jurisdiction. Local governments cannot override these minimum requirements, but should have flexibility to create additional, more restrictive standards that respond to local needs and circumstances.

Sometimes, innovative local programs will lead to a state’s establishing minimum standards. For example, during the 1980s, several Massachusetts towns restricted happy-hour promotions at local bars. Drinking establishments in nearby towns without the restrictions began promoting their happy hours in towns where the restrictions applied, undermining the new local standards and

increasing the risk of drinking and driving. The state eventually stepped in and established statewide happy-hour regulations, allowing local governments to adopt stricter rules if they chose. The state’s new standard furthered public health goals by preempting local governments’ ability to permit happy hours but also allowing for further local innovation.¹⁹

Local authority to tax alcohol or impose fees on alcohol retailers

In general, legislatures are reluctant to allow local alcohol taxes, even in states where local retail availability authority is broad. But there are exceptions: Alabama permits cities to impose a by-the-drink tax on alcohol sales in restaurants and bars.²⁰ Some states provide authorization to specific cities for a similar tax. Pennsylvania allows Philadelphia to impose a 10 percent tax on alcohol sales to fund local schools; Pittsburgh is seeking similar authorization.²¹ Officials in Cleveland, Ohio, used alcohol taxes to fund a professional sports stadium.²²

State preemption can shield the industry from other kinds of taxes and fees that are not imposed on alcohol sales themselves. Pennsylvania courts, for example, have shielded beer distributors from some, but not all local business taxes, depending on the specific tax-enabling legislation involved.²³ Local authority to impose license fees also varies widely. Some states, such as Missouri, allow such fees but impose limits on their amount.²⁴

Preemption and the regulation of alcohol advertising and promotion

Preemption's impact on local regulation of alcohol advertising and promotion is even more uncertain and complex than it is in the availability and taxation arenas. First, advertising and promotions can occur in various media, including broadcast (television and radio), Internet, billboard and other outdoor venues, magazines and newspapers, point-of-sale displays, concert and sporting event sponsorships, merchandising, contests and giveaways. Each of these venues may be subject to differing local, state, and federal laws, and in some cases local regulation may be impractical or impossible. Second, federal law and the U.S. Constitution play a major role in advertising regulation. Third, all tiers of the alcohol industry (retail, wholesale, and production), as well as the advertising industry, engage in alcohol advertising, and each of these industry groups may be subject to different, potentially conflicting legal provisions. Since alcohol producers operate in a national market, state and federal action may be critical in addressing local concerns.

In general, federal law preempts most state and local regulation of broadcast media, including advertising, reflecting its national scope. Point-of-sale advertising is largely governed by the state's retail licensing and regulation provisions. If a state allows localities to license retail establishments, then it typically allows at least some authority to regulate advertising on the premises. States that preempt local control of alcohol availability may still allow local regulation of

point-of-sale advertising because those state laws may supersede the ABC preemptive provisions.

States usually (but not always) allow at least some local regulation of billboards and other forms of outdoor advertising as part of a locality's zoning and land use powers. Restrictions on event sponsorships are also treated largely as a local concern. In recent years, several cities have limited the location and number of alcohol and tobacco billboards in residential neighborhoods and other places where children gather.²⁵ These regulations have prompted the alcohol industry to assert federal preemption, citing the First Amendment's protection of commercial speech. To date, none of the industry's challenges on this basis have succeeded, but several cases are pending.²⁶

State capitols: The alcohol industry's playing field

Local and state alcohol policy coalitions and other advocates should review the potential impact of preemption when advocating for local regulatory reforms. The alcohol industry may have a legislative and/or judicial response, and both pose serious risks. Careful preparation and quick reaction to the industry's tactics may preserve or extend hard-won local victories.

The industry's first strategy for rescinding local regulation may be to seek preemptive legislation in the state capitol, where it wields considerable influence. State legislators view alcohol producers as key constituents, hear regularly from their lobbyists, and depend on their campaign contributions. The industry

has an enormous lobbying budget to build its influence in Washington and the state capitols. It is considered one of the most powerful industry lobbies in the country.

The industry's influence at the state level is compounded by the strengths and weaknesses of its opposition. In general, the influence of those seeking to restrict alcohol marketing practices comes not from cash contributions and high-priced lobbyists but from organizing "people power" and pressuring policy makers through the democratic process. These tactics work best at the local level for at least two reasons. First, the public health problems associated with alcohol marketing are experienced most immediately in neighborhoods, schools, and communities, so it is easier to organize citizen support for a local response. Second, local policy makers are more attuned to citizen concerns and less influenced by moneyed lobbyists than their state and federal counterparts. A city councilperson may view an alcohol producer's capitol lobbyist attending a local hearing as an outsider rather than as a key constituent.

These strengths are not easy to translate to the state policy arena. Local constituents are often unfamiliar with state law and less able to influence state lawmakers. State legislatures tend to discourage "people power" efforts, and rely instead on professional lobbyists. Any chance of success requires well-organized statewide coalitions and networks to exert broad-based pressure on legislators.²⁷

Vigilance is essential. The industry and its allies may try to slip a preemption bill through the process with little notice or attention. Simply shining a light on the industry's

tactic may defeat the legislation. Alternatively, preemptive legislation may be disguised as a public health bill. In some cases, public health groups supported these industry-sponsored deceptions, unaware of the negative effects of preemption. Legislators may be eager to support such legislation in order to give the appearance of public health reform while satisfying a powerful lobby.²⁸ Proposed state legislation, particularly bills sponsored by the industry, should therefore be carefully studied to determine their impact on local authority.

The state and federal judiciaries: Another alcohol industry venue

The industry may seek relief from state courts, either in addition or as an alternative to a state legislative strategy. Responding to the industry's judicial strategies is even more daunting. As demonstrated in the previous sections, local authority is often uncertain, dependent on court interpretations of ambiguous state statutes. The judicial system responsible for resolving this uncertainty also plays into the industry's strengths. Lawsuits are expensive, and the highest-priced attorneys have the best access to and wield the most influence in the system. Delays are inevitable, and courts can take years to reach a final decision. The industry has the resources to force protracted litigation; and a regulation usually will not be enforced while it is being contested.

Alcohol policy proponents are in a difficult position to respond to the industry's legal tactics. First, they must rely on local government legal staff members, who have the primary responsibility for defending the local

legislation. These officials are often predisposed to avoid lawsuits, to reduce costs and workload. They may settle a case prematurely or advise city councils and county boards to abandon the legislation. The mere threat of a lawsuit may result in the defeat of legislation even though it has strong political support and the legal threat has little or no merit. If the local government does mount a strong legal defense, protracted litigation may dissipate the momentum of the local coalition supporting the legislation and damage its organizing efforts.

To respond, a local alcohol policy coalition should include legal assistance – from local pro bono attorneys or state and national groups that provide legal expertise – as an integral part of its policy tool kit. It needs to ascertain that its policy proposals can be defended from preemption claims; develop working relationships with the local government’s legal staff; and enlist expert assistance should the industry threaten a lawsuit. Typically, one local government needs to take the lead on a particular preemption challenge. Once the matter is settled in one locale, other communities can follow that lead, and city officials will be more willing to accept the challenge. Coalitions should also develop strategies for addressing the delays inherent in the court system, by anticipating the delays and developing additional policy goals that can be pursued during the litigation process.

It can be done: Success stories

Although the barriers are formidable, community and state alcohol policy coalitions can overcome the alcohol industry’s preemption strategy. Here are three success stories.

*Baltimore coalition successfully lobbies the state legislature to enact a statute allowing the city to restrict alcohol billboards.*²⁹ In 1992, members of the City Wide Liquor Coalition for Better Laws (CWLC), a grassroots Baltimore coalition, decided to address the urban blight caused by the large number of alcohol and tobacco billboards in their inner-city neighborhoods. The city solicitor (attorney) stymied their initial effort, however, by ruling that the state had preempted local authority to regulate alcohol billboards. CWLC drafted state legislation, studied the state legislative process, lobbied legislators, and organized a grassroots presence at the capitol. Their efforts paid off: State legislation in 1993 authorized Baltimore to regulate alcohol billboards. The city passed its billboard ordinance in 1994, and successfully defended it in federal court against the industry’s charges that the ordinance violated its commercial speech rights.

*McKinley County coalition convinces the New Mexico state legislature to permit local alcohol taxes to fund local treatment and prevention programs.*³⁰ A diverse coalition of groups in McKinley County organized in the late 1980s to address the region’s serious alcohol problems. Coalition members recognized the need for more funding for treatment and prevention and wanted to close

drive-up windows (which allow drivers in their vehicles to buy alcohol). State preemption law, however, prohibited local governments from imposing alcohol taxes or regulating the drive-up windows. The coalition organized a 200-mile march from Gallup to the state capitol in Santa Fe to demand that the legislature authorize local regulation. Approximately 2,000 people participated, and the march and subsequent lobbying effort succeeded. The legislature enacted enabling legislation in 1989, and a local voter initiative passed a five-percent alcohol tax and closed the drive-up windows. The county used the tax revenue, together with new federal funding, to open the Na’ nizhoozhi Center, a crisis/treatment/prevention facility.

*Activists convince the Oakland, California, City Council to pass an ordinance regulating public nuisance problems associated with alcohol sales despite an industry state preemption claim.*³¹ Activists in Oakland formed the Coalition on Alcohol Outlet Issues (CAOI) in 1993. Their goal was to reduce violence and other public nuisance problems associated with alcohol sales in their city. CAOI proposed a local ordinance that would establish clear public nuisance standards, impose a fee on liquor stores, and use the fee to pay for monitoring and enforcement. The alcohol industry opposed the measure and, when it passed, filed a lawsuit claiming that the ordinance was preempted by state law. When the city attorney’s office failed to defend the ordinance vigorously, CAOI engaged a local pro bono attorney, who took a leading role in the case. The courts eventually agreed with the city that state law did not preempt the ordinance.

Conclusion

State preemption often poses a serious threat to the alcohol policy field, nullifying local regulatory initiatives and undermining grassroots organizing efforts. The alcohol industry uses the legal doctrine to great advantage because it plays to the industry’s primary strengths – dominance in state legislatures, and the ability to fund protracted lawsuits in state and federal courts.

The legal issues are complex and difficult for grassroots organizations to grasp, but they can still respond effectively to the industry’s preemption threat by following a four-step strategy.

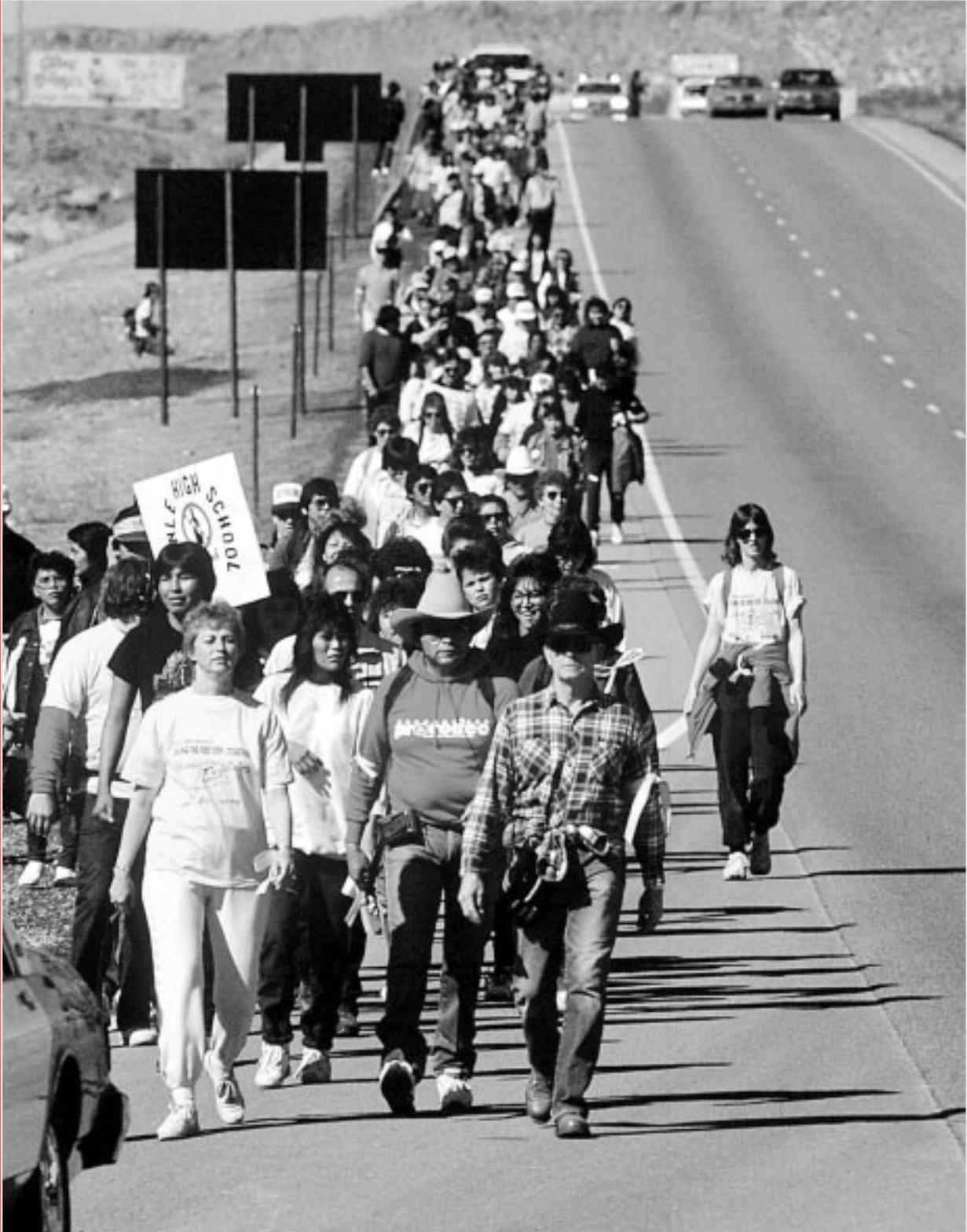
- ***Become familiar with preemption and its role in your state and find expert legal assistance for your coalition.*** Local groups ignore preemption at their peril.
- ***Craft local initiatives that anticipate the preemption threat and provide the best chance for surviving a court challenge.*** As you develop policy initiatives, analyze the preemption issues, incorporate them into your proposals, and prepare a defense against the industry’s arguments. Avoid tackling regulatory issues that have clearly been preempted or are best handled at the state or federal level, such as reforms in alcohol advertising on television. Obtain expert legal assistance, prepare background materials on the issue and meet with and brief the local government’s legal staff.

- **Monitor state legislation, develop an effective presence in the state legislature, and vigorously oppose preemptive legislation.** Working with other local coalitions and state policy groups, organize an effective advocacy presence in the state capitol. Carefully monitor all industry proposals and vigorously oppose any “poison pill” preemption provisions.
- **Develop statewide proposals that provide minimum state standards for regulating alcohol taxes, availability and marketing and allow for stricter local controls that address community circumstances.** Take the initiative, seeking state legislation that establishes minimum state standards while protecting and expanding local control.

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8. Ind. Code Ann. § 7.1-3-9-6.
9. 47 Pa. Stat. Ann. § 4-493.1.
10. Ga. Stat. Ann. § 3-3-2(a).
11. La. Stat. Ann. § 26:493.
12. Minn. Stat. Ann. § 340A.410.
13. See, e.g., Or. Rev. Stat. § 471.054, which states: “The Liquor Control Act shall fully replace and supersede any and all municipal charters and ordinances inconsistent with it. Such charters and ordinances hereby are repealed.” The Oregon courts have liberally construed this section, allowing extensive local zoning regulation. See *Sekne v. City of Portland*, 81 Or.App. 630, 726 P.2d 959 (1986).
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21. Pittsburgh city council member pushes for alcoholic beverage tax. *Alcoholic Beverage Control*, October 16, 2000, pp. 3-4.
22. Proposal to extend Ohio county’s sin tax passes easily. *Alcoholic Beverage Control*, November 13, 1995, p. 3.
23. Compare *Commonwealth v. Wilsbach Distributors, Inc.*, 513 Pa. 215, 519 A.2d 397, 1986, to *City of Philadelphia v. Clement & Muller, Inc.*, 552 Pa. 317, 715 A.2d 397, 1998.
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27. For further discussion, see Mosher, J. Alcohol policy and the young adult: Establishing priorities, building partnerships, overcoming barriers. *Addiction* 94:357-69, 1999.
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Photograph by Joe Cavaretta, courtesy of Albuquerque Tribune



McKinley County coalition's 200-mile March of Hope from Gallup, New Mexico, to Santa Fe to support legislation removing state preemption and permitting local alcohol taxes