

## THE BREWING BATTLE OVER ALCOHOL: MAKING THE CASE FOR STATE REGULATION

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Perhaps no single commodity is as uniquely intertwined with America's history as alcohol. From the earliest days of American settlement and exploration, alcohol has played a vital role in fostering trade and economic growth. The first rum distillery in the British colonies was established in 1664 on present-day Staten Island.<sup>1</sup> And for most of that history, with the exception of the country's failed experiment with federal Prohibition from 1920 to 1933, the regulation and control of alcohol was a matter for state and local governments. But recently, as e-commerce has established a stronghold as a profitable venture, some courts and commentators have sought to turn back the clock. In light of the Supreme Court's recent decision in *Granholm v. Heald*,<sup>2</sup> some have argued that state regulation of alcohol runs afoul of the negative or dormant implications of the Commerce Clause. As a result, detractors argue that federal regulation of alcohol should preempt the important control efforts of states and localities. This essay challenges that notion and argues that the states remain the proper locus for alcohol regulation.

Following a synopsis of the constitutional mandate for state regulatory authority over alcohol in Part I, Part II of this essay briefly discusses how states have traditionally served as laboratories of experimentation for controversial social issues that are ill suited for regulation by a centralized government bureaucracy. In turn, Part III reviews why the costs of the public harm caused by alcohol abuse are disproportionately borne by the state and local communities and thus, why alcohol regulation is an issue that must be addressed at the local level. Lastly, Part IV canvasses the alcohol industry's contribution to economic growth and concludes that regulation

of this industry is best left to the states because they are the political entities best equipped to balance economic growth with individual liberties and social responsibility.

## I. THE CONSTITUTIONAL MANDATE AND THE LESSONS OF PROHIBITION

The most obvious and fundamental reason why state regulation of alcohol is important is because the United States Constitution makes it so. As our nation's most cherished foundational document, the Constitution embodies the collective will of the American people—the very core of representative self-government. And the Twenty-first Amendment, which aborted our nation's failed and miserable experiment with centralized, federal control of alcohol, unquestionably establishes a state system of alcohol regulation. Proposed and ratified in 1933, the Twenty-first Amendment provides that “[t]he 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.”<sup>3</sup> Thus, the Constitution grants to the states, not to the federal government, the broad regulatory powers necessary to police the importation, transportation, and sale of alcoholic beverages. This is no small matter.

Importantly, the failure of Prohibition in America was largely attributable to the flawed assumption that America was “a single community in which a uniform policy of liquor control could be enforced.”<sup>4</sup> Nothing could be further from the truth. As one commentator has aptly noted, “[i]f any lesson can be learned from Prohibition, it is that liquor—unlike any other article of commerce, licit or illicit—cannot be subject to central planning. No system of liquor control has succeeded without the approval of the community.”<sup>5</sup> Indeed, when Congress passed the Volstead Act in 1919 to implement a federal prohibition of alcoholic beverages throughout the United States, local opponents in every state either ignored the law completely or took their

alcohol activities underground.<sup>6</sup> “From the very nature of its object,” one eyewitness observed, “prohibition is inherently difficult to enforce and when it is foisted on a community from without its ill fate is foreordained.”<sup>7</sup> Now, as then, the lack of anything approaching a national consensus on alcohol control makes a federal solution unworkable and undesirable.

The United States learned a valuable lesson from Prohibition about the limits of federal power. Andrew Mellon, Secretary of the Treasury during Prohibition, later conceded that “too much responsibility had been placed on the Federal Government.”<sup>8</sup> This miscalculation, Mellon insisted, “proved a serious hindrance to the successful enforcement of the national prohibition law.”<sup>9</sup> At bottom, Prohibition was “an interference by the Federal Government with local government which could not be other than obnoxious to every right-thinking citizen.”<sup>10</sup> The Twenty-first Amendment was intended to remedy, once and for all, the jurisdictional imbalance foisted on the nation by Prohibition.

By passing the Twenty-first Amendment, Americans returned the contentious issue of alcohol regulation to local control, where it belonged. As Brannon Denning has demonstrated, “[w]hen structuring the repeal of Prohibition, Congress heeded the demands of the states that the Amendment secure states power that would be immune from a Congress dominated by wets and dries.”<sup>11</sup> Indeed, advocates of state control “vigorously (and successfully) opposed an attempt to give Congress ‘concurrent’ authority over the ‘saloon,’ in large part for fear that congressional power would eventually eclipse the power of the states over alcohol.”<sup>12</sup> The historical and constitutional record of the Twenty-first Amendment is clear. The regulation of alcohol lies primarily, if not exclusively, in the province of states, counties, and local communities—*not* with the federal government. Those who advocate for an increased regulatory role for the federal government ignore not only the lessons of history but the Constitution itself.

## II. THE STATES AS LABORATORIES OF EXPERIMENTATION

America's failed experiment with prohibition yielded historic lessons that highlight yet another important reason favoring state regulation of alcohol. Political institutions must be capable of adapting to changing economic circumstances and social values. State governments are often more creative, flexible, and responsive than the federal government and can tailor alcohol regulations to local needs and conditions without consequence to the rest of the nation. Indeed, the primary aim of the Twenty-first Amendment was to allow each state to decide how best to regulate the transportation, importation, and use of alcohol within its own borders. Such a decentralized approach allows for greater innovation and experimentation in economic and social policy than does a centralized, "one-size-fits-all" federal regulatory bureaucracy. As such, state experimentation in the area of alcohol regulation represents an invaluable contribution to our federal system of self-government.

Perhaps the best case for encouraging the states to function as laboratories of democracy and experimentation was made by Justice Louis Brandeis in his famous dissent in *New State Ice Co. v. Liebmann*.<sup>13</sup> Riding the twentieth century's rising tide of increasing faith in scientific progress, Brandeis noted that "discoveries in physical science" and "the triumphs in invention" all "attest the value of the process of trial and error."<sup>14</sup> But innovation must also be valued in economic and social policy, Brandeis insisted, as well as in science:

To stave off experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequence to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.<sup>15</sup>

Brandeis went on to explain that, because they are closer to their constituencies, states are often able to react to economic and social problems much more swiftly and responsively than the

federal government. “There must be power in the states and the nation to remold, through experimentation, our economic practices and institutions to meet challenging social and economic needs.”<sup>16</sup>

Nowhere is robust state experimentation more evident today than in the area of alcohol regulation. States vary widely in their public policy approaches to controlling and regulating alcohol. Some prohibit collusion between retailers and producers by requiring that alcohol be distributed only by state-authorized wholesalers.<sup>17</sup> Many states, known as “control states,” have elected to erect a state-owned monopoly whereby the state government serves as the wholesaler, distributor, and retailer of alcoholic beverages.<sup>18</sup> A vast majority of states utilize the so-called “three-tier system,” which requires that alcohol first be distributed to a state authorized wholesaler, who sells to a state authorized retailer, who then sells to a consumer.<sup>19</sup> Some states grant higher levels of authority to regulate alcohol to local communities than others. In states where local regulation of liquor is limited, communities are able to place restrictions on the sale and distribution of alcoholic beverages through the use of zoning ordinances. The diversity of these myriad state approaches to the problems posed by alcohol demonstrates the great value offered by experimentation in the area of alcohol regulation.

Brandeis was right. In a nation as dynamic and diverse as the United States, the federal government should not interfere with the states’ nuanced efforts to address the unique, specific needs of their communities. Accordingly, state experimentation lies at the heart of any safe and viable system of alcohol control and regulation. For over seventy-five years, the states, consistent with the letter and spirit of the Twenty-first Amendment, have provided a workable, pragmatic solution to the problem of alcohol regulation. Such a pluralistic approach has yielded a state-by-state regulatory system that essentially functions as a patchwork quilt of local

solutions to local problems. This rich tapestry of alcohol regulations among the fifty states should not be displaced by federal preemption.

### **III. STATES DISPROPORTIONATELY FEEL THE IMPACT AND ABSORB THE SOCIAL AND ECONOMIC COSTS WROUGHT BY ALCOHOL ABUSE**

In the twenty-first century, alcohol abuse is a global epidemic. International evidence repeatedly demonstrates that the absence of government regulation leads to alcohol-related health epidemics and crushing death tolls. In 2000, the World Health Organization estimated that 4% of the global burden of disease and 9.2% of disability-adjusted life years could be attributed to alcohol abuse.<sup>20</sup> In the United States, both the individual and collective costs of alcohol abuse (and the serious public harm caused by it) are borne primarily by the individual states. Our federalist structure contemplates that, to the extent that alcohol regulation is necessary and possible, the bearer of certain public harms should have the authority to regulate the source of those harms. “The [T]wenty-first amendment places control of [alcohol] regulation where it belongs—in the communities that feel the impact of these laws.”<sup>21</sup>

Alcohol abuse has been “a crucial issue in two hundred years of American life.”<sup>22</sup> Historians have long-recorded the detrimental social impact of alcohol in America’s local communities.<sup>23</sup> Indeed, the “aura of debauchery and degradation” that Americans associated with saloons helped drive the temperance movement, and ultimately prohibition.<sup>24</sup> As one scholar has recounted, Americans’

violent reaction to drinking was based on a repulsive image of the saloon that exceeded even the tawdry truth. The accounts of drinking habits in America in the early 1800s describe practices “repulsive beyond description” and “worse than anything to be found in modern European records.” According to some accounts, drunkenness was widespread, particularly among immigrants and Native Americans, and the impact on society was enormous. One contemporary historian even attributed the destruction and demoralization of the Native

Americans to the “curse” of rum and whiskey introduced to them by whites. In Kansas—where the prohibition movement was eventually anchored—some towns were said to be “ablaze with drunkenness.” Observers in LeRoy, Kansas, in the 1850s reported (apparently with some degree of exaggeration) that “the whole town was drunk.”<sup>25</sup>

Even in the 1800s, alcohol abuse caused American fathers to “float[] away a week’s wages that could have gone to food, clothing, and education”; diverted men away from a “lifestyle of decency and responsibility by sinking him into a blurred phantasmagoria of whores, drug fiends, pimps, thieves, and gamblers; and caused “the blind idiocy of drunken violence.”<sup>26</sup> Alcohol abuse still causes these same problems in modern American society, and contributes to a plethora of new ones in the technological age. For example, alcohol is involved in up to 76% of rapes, 66% of violent episodes between partners, 50% of homicides, 50% of assaults, and 38% of suicides.<sup>27</sup> In addition, alcohol is involved in 40% of all traffic deaths, and 36% of traffic deaths among those aged 16-20.<sup>28</sup>

Both the direct and indirect consequences of alcohol abuse have always been, and are still, primarily borne by the states. Certainly, direct risks to individual health include death (by accident, suicide, or disease); disability; traffic injuries; specific diseases including cirrhosis, cancer, mental disease, and fetal alcohol syndrome; and greater risks of accidental injuries or death related to drowning, fire, falls, and work-related accidents. Further, heavy drinkers consume thousands of “empty calories,” leading to weight gain that facilitates serious health problems such as diabetes, heart disease, osteoporosis, and hypertension.<sup>29</sup> Less obvious, however, is that alcohol abuse strips local communities of resources that include, among other things, state healthcare systems, social welfare administration, and higher education.

In addition to the medical costs incurred by individuals, state healthcare systems also must absorb the costs of treating diseases and injuries such as those mentioned above. Healthcare, at least historically, has been the province of the states. So has the purchase and regulation of health insurance. State-run hospitals are funded by state tax dollars, and even privately run hospitals are authorized and regulated by the state. Undoubtedly, alcohol abuse leaves lasting (and often chronic) health implications, which often requires treatment, hospital stays, and prevention counseling. State and local healthcare systems must employ adequate numbers of physicians, nurses, and support staff to address the emergency needs of patients that sustain alcohol-related injuries (or death) stemming from motor vehicle accidents, alcohol poisoning, or other serious injuries caused by alcohol-related violence. Thus, individuals consumed by alcohol-related illnesses and injuries are the direct recipients of state-funded healthcare dollars.

Alcohol abuse also severely taxes the resources that states allocate to all tiers of the criminal justice system (and to general local government administration). Though the regulatory authority delegated to local communities varies by state, activities related to alcohol consumption are generally regulated by a city's police authority, to which states confer the power to protect the general safety and welfare of the citizens. States and local communities maintain the safety of the roadways, and bear the massive costs of maintaining a responsive police force, fire department, and emergency response teams. Moreover, the funding for judges, prosecutors, public defenders, court staff, court buildings, jail staff, jail houses, sheriffs, and the administration of public programs are all paid for primarily by state and local funds. State and local governments obtain those funds almost exclusively by taxation of the people living within

that state or district. Alcohol abuse not only overburdens a state's legal system, but diverts significant citizen resources to address alcohol-related crime.

The indirect cost impact of alcohol abuse on local communities is nearly impossible to measure. No study can quantify the societal impact of lives lost, lives marked by alcohol-related diseases (such as Fetal Alcohol Syndrome), or lives changed by underage drinking. Studies show that underage drinkers often drink heavily, which may cause them to engage in risky behavior including sexual promiscuousness and physical and sexual assaults. Underage drinking can also have devastating effects on the developing brain. And research reveals that alcohol abuse by college students has reached alarming levels.

The alcohol-related statistics among college students are staggering. In the peer group of 18-24 year olds, 1,700 students die each year from alcohol-related unintentional injuries, including car crashes; 599,000 students are injured; 696,000 students are assaulted by another student under the influence; 97,000 students are victims of sexual assault or date rape; 400,000 students had unprotected sex (and 100,000 were too intoxicated to know if they consented); and twenty-five percent fall subject to academic consequences.<sup>30</sup> Alcohol abuse by college-aged students has a wide-reaching and lasting impact on a state and its resources.

Once again, states bear the cost of college-aged alcohol abuse because the states have an ownership interest in higher education. Recently, adolescent and young adult culture has glorified “party schools”—universities or colleges with “a reputation for heavy alcohol and drug use or a general culture of licentiousness.”<sup>31</sup> *The Princeton Review* even publishes an annual list of the (alleged) best party schools in the country. In 2009, all ten of the “Top 10” party schools ranked by the *Review* were state-supported schools.<sup>32</sup> Out of all the criteria that the *Review* uses

to rank colleges and universities, ranging from teaching quality to study abroad programs to food, the party ranking garners the most publicity and “generates the most buzz” (no pun intended).<sup>33</sup>

Public universities and their educational resources are funded by state taxpayer dollars. Under many state laws, even private funds donated to public schools to support athletic and other programs, or money generated by major athletic programs, is considered public money because the state university system operates as a public body. Approximately seventy-five to eighty percent of state schools’ student bodies are composed of in-state students, meaning that state taxpayers who are already funding the state university system also pay some form of tuition. Thus, state citizens have a direct interest in alcohol regulation because of their ownership interest in the state’s university system. The university system is an unparalleled state resource, and taxpayer dollars that are allocated to educate the state’s citizens are too often squandered on alcohol-related issues. Likewise, private universities are not immune from problems stemming from alcohol abuse, and public resources must be used to combat those as well.

History has proved that combating alcohol-related social problems works only at the local level. States historically and disproportionately bear the social and economic costs of addressing alcohol-related public harms. Thus, federalism and fairness dictate that “[t]he production, marketing and consumption of alcohol are therefore quite properly and, indeed, unavoidably matters of public policy,”<sup>34</sup> and should be left to the states.

#### **IV. STATE REGULATION BEST FOSTERS ECONOMIC GROWTH IN A SOCIALLY RESPONSIBLE MANNER**

Alcohol is not merely a recreational pastime but a vital American industry. In 1979, only fifty breweries existed in the United States. Today, the American brewing industry “includes

more than 2,400 brewers and beer importers, 1,908 beer wholesalers, and 551,000 retail establishments.”<sup>35</sup> The beer industry alone employs almost 1.8 million American workers.<sup>36</sup> Alcohol producers and the states in which they exist enjoy a mutually beneficial relationship, each deriving enormous economic benefit from the other.

In 2006, the beverage alcohol industry contributed \$448 billion to the national economy, and generated \$84 billion in wages through 3.8 million jobs.<sup>37</sup> Perhaps more importantly, the alcohol industry contributed over \$18 billion directly to state treasuries.<sup>38</sup> States and local communities benefit from the jobs that the alcohol industry creates, which in turn acts as a catalyst for economic growth. The business of alcohol affects many other industries, including “transport/haulage companies, government employees involved in the regulation and oversight of the beverage alcohol industry, consulting firms, [marketing and merchandising] firms . . . , [and] agricultural fertilizer suppliers.”<sup>39</sup> The industry’s economic significance

“includes a wide variety of important ‘backward’ and ‘forward’ linkages. The backward linkages include [a] supply chain of agricultural and raw materials, capital equipment, transportation, and energy, while the forward linkages related to access to markets, transportation, distribution via retailers, wholesalers and hotels, [and] restaurants and cafes.”<sup>40</sup>

Indeed, though arguably incorrect, a popular belief is that the alcohol industry is recession-proof.<sup>41</sup>

Further, revenues from business, personal, and consumption taxes constitute a significant source of state revenue. The United States beer industry alone pays approximately \$30 billion in taxes, including \$9.2 billion in excise taxes.<sup>42</sup> Likewise, beverage corporations thrive because the states in which they operate provide them with certain economic benefits, including tax breaks and incentives. Because the states retain the primary power of alcohol regulation, healthy economic competition arises between the states to attract business.<sup>43</sup> “The battle between

difference states often centers on the inducements each could offer” to alcohol industry promoters.<sup>44</sup>

Like any profitable industry, competition is stiff for a larger share of the alcohol market. Thus, it is imperative that individual states maintain control over the beverage industry’s growth because that corporate growth must be executed in a socially responsible manner. As discussed above, the detrimental social consequences of alcohol abuse strip communities of their resources, which threaten to outweigh any economic benefit conferred by industry. Alcohol abuse has a direct cost impact on, among other things, healthcare systems, higher education, and criminal justice. And economic losses are suffered by both the community and the industry in the form of lost productivity when alcohol-related harm leads to loss of employment, absences from employment, lost future earnings, and crime.

Especially in the age of e-commerce, the only way to minimize economic and social failure attributable to alcohol-related harm is for states to breed healthy and socially responsible economic competition and corporate responsibility in the industry, through state control of alcohol-related regulation.<sup>45</sup>

“Economist and other policymakers have long argued that governments have an ethical responsibility to intervene when there is market failure, and this has been extrapolated to intervention in the case of other social failures. However, as democratic governments are voted into office in order to serve and protect a population and the rights of that population, it can be argued that governments also have an ethical responsibility to act to *prevent* market or social failure, while still preserving and protecting the rights of the individual as far as possible.”<sup>46</sup>

The role of the state has long been to impose its expectations of “acceptable behavior” on individuals living within the society while preserving personal freedoms.<sup>47</sup> The individual states, not the federal government, are the safe keepers of its citizens and communities, as well as the facilitators of economic growth. Because states bear the costs of alcohol-related harms, it is

surely the right of the *state* governments to protect the rights of its individual citizens while acting to prevent market and social failure in the alcohol industry.

When the ultimate goal of a business is profit, self-regulation of an industry is hindered because self-regulation requires each individual company to focus on the interest of the public good. Alcohol is an anomalous commodity in that it is not merely a product. Some view alcohol as a moral issue because of its social implications and potential to cause public harm. And because the ultimate goal of any business is profit, only individual states can truly change the levels of alcohol-related harm because only local communities may be willing to consider the public good ahead of revenue generated from alcohol taxation. Only the states, not the federal government, are in a position to “[have] ultimate control over ethics and behaviors of both individuals and industry because [they have] the power to define, regulate, and enforce ethical or ‘appropriate’ behaviors.”<sup>48</sup>

Like other businesses, the alcohol industry is not immune from politics. The politics of alcohol are a function of the political demands of the alcohol industry, religious groups, and other state political forces.<sup>49</sup> Because alcohol plays an important role in social activities, “policy makers may be reluctant to risk political unpopularity through aggressive alcohol control measures.”<sup>50</sup> The alcohol industry is influential, as are concerns about the contribution of alcohol to the economy and the possible political unpopularity of certain actions.<sup>51</sup> But these concerns are ultimately unpersuasive because the benefit of a federalist system is that the people of the individual states may elect representative government consistent with their value systems, including expectations pertaining to alcohol control.

As Justice O’Connor explained in *Gregory v. Ashcroft*,<sup>52</sup> state autonomy is designed to confer “numerous benefits” on the people.<sup>53</sup> Some of those benefits naturally include innovation

and competition, which in turn leads to choice. Choice in the marketplace encourages healthy economic competition. Especially pertinent to alcohol regulation is the policy that:

[L]ower levels of government are more likely to depart from established consensus simply because they are smaller and more numerous. . . . If innovation is desirable, it follows that decentralization is desirable. This statistical proposition is strengthened, moreover, by the political reality that a smaller unit of government is more likely to have a population with preferences that depart from the majority's. It is, therefore, more likely to try an approach that could not command a national majority.

Perhaps more important is that smaller units of government have an incentive, beyond the mere political process, to adopt popular policies. If a community can attract additional taxpayers, each citizen's share of the overhead costs of government is proportionately reduced. Since people are better able to move among states or communities than to emigrate from the United States, competition among governments for taxpayers will be far stronger at the state and local than at the federal level. Since most people are taxpayers, this means that there is a powerful incentive for decentralized governments to make things better for most people. In particular, the desire to attract taxpayers and jobs will promote policies of economic growth and expansion.<sup>54</sup>

In balancing the economic growth of the alcohol industry with social responsibility, states and local governments are in a unique position to try any approach that works for their citizens, even if unpopular on the national stage. In combating alcohol-related social harm, states have the ability to utilize methods such as price controls, zoning restrictions, opening hours, liability measures, restrictions on sale, and implementing programs such as "Zero Tolerance" for young drivers (which all fifty states enforce), while simultaneously rewarding the industry for its economic (and responsible) contributions. The federal government is simply too attenuated from the economic and social needs of local communities to regulate and enforce in the alcohol arena. State regulation of alcohol best fosters the needs of both the industry and the social good.

## V. CONCLUSION

America's history with alcohol and the federal government's failed experiments with centralized alcohol control are evidence that this anomalous commodity can be effectively

regulated by only the individual states because of the states' unmatched ability to undertake both the economic and social consequences of alcohol policy. Apart from the important constitutional mandate of state regulation, states foster innovation and experimentation in economic and social policy, especially in testing unpopular theories that could not garner a national majority. Further, well-documented is that it is the states that absorb the economic and social impact of alcohol-related public harm. Lastly, the states are in a unique position to offer incentives to the alcohol industry (and reap the economic benefit from it) yet also serve as the guardians of their citizenry and its safety. Because alcohol regulation should lie with those who can best balance the economic and social needs of communities with individual freedoms, the creation of alcohol-related policy and regulation of this industry clearly rests with the states.

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<sup>1</sup> Wikipedia, *Rum: Colonial America*, <http://en.wikipedia.org/wiki/Rum> (last accessed Nov. 12, 2009).

<sup>2</sup> 544 U.S. 460 (2005).

<sup>3</sup> U.S. Const. amend. XXI, § 2 (emphasis added).

<sup>4</sup> Raymond B. Fosdick & Albert L. Scott, *Toward Liquor Control* 10 (1933).

<sup>5</sup> Sidney J. Spaeth, *The Twenty-first Amendment and State Control Over Intoxicating Liquor: Accommodating the Federal Interest*, 79 CAL. L. REV. 161, 165 (1991).

<sup>6</sup> *See generally id.*

<sup>7</sup> John C. Koren, *Alcohol and Society* 95 (1916).

<sup>8</sup> 1926 Secretary of Treas. Ann. Rep. 139-40.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> Brannon P. Denning, *Smokey and the Bandit in Cyberspace: The Dormant Commerce Clause, the Twenty-first Amendment, and State Regulation of Internet Alcohol Sales*, 19 Const. Commentary 297, 309 (2002).

<sup>12</sup> *Id.*

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<sup>13</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

<sup>14</sup> *Id.* at 310.

<sup>15</sup> *Id.* at 311.

<sup>16</sup> *Id.*

<sup>17</sup> See Richard McGowan, *Government Regulation of the Alcohol Industry: The Search for Revenue & the Common Good* 101-02 (1997).

<sup>18</sup> *Id.* at 51-52, 101-02.

<sup>19</sup> *Id.* 102. For a detailed description of the three-tier system, see *North Dakota v. United States*, 495 U.S. 423, 428 (1990).

<sup>20</sup> Iain K. Crombie, et al., *How Do Public Health Policies Tackle Alcohol-Related Harm: A Review of 12 Developed Countries*, *Alcohol & Alcoholism* Vol. 42, no. 5, at 492 (2007) (available at <http://alcalc.oxfordjournals.org/cgi/Reprint/42/5/492.pdf>).

<sup>21</sup> Spaeth, *supra* n. 3, at 162.

<sup>22</sup> *Id.* at 167 (citation omitted).

<sup>23</sup> For a detailed account of America's struggle with alcoholism, see generally W.J. Rorabaugh, *The Alcoholic Republic: An American Tradition* (Oxford U. Press 1981).

<sup>24</sup> Spaeth, *supra* n. 3, at 166-67 (citation and footnote omitted).

<sup>25</sup> *Id.* at 166 (citations omitted).

<sup>26</sup> *Id.* at 167 (citations omitted).

<sup>27</sup> U. of Minnesota, *General Alcohol Facts: Statistics on Alcohol-Related Problems Related to Alcohol Consumption among the General Population*, [http://www.epi.umn.edu/alcohol/factsheets/general\\_factsheet.pdf](http://www.epi.umn.edu/alcohol/factsheets/general_factsheet.pdf) (last accessed Nov. 15, 2009).

<sup>28</sup> Nat'l Insts. of Health, *Alcohol-Related Traffic Deaths*, <http://www.nih.gov/about/researchresultsforthepublic/AlcoholRelatedTrafficDeaths.pdf> (last accessed Nov. 15, 2009).

<sup>29</sup> See, e.g., Joe Preiner, *Behind the Buzz: The Extra Calories of Alcohol*, [http://www.kansan.com/news/2008/nov/18/behind\\_buzz/](http://www.kansan.com/news/2008/nov/18/behind_buzz/) (last updated Nov. 18, 2008).

<sup>30</sup> Nat'l Inst. on Alcohol Abuse and Alcoholism, *Statistical Snapshot of College Drinking*, <http://www.niaaa.nih.gov/NR/rdonlyres/B9D09F90-3CC7-4281-8B03-81526B8EA32C/0/StatisticalSnapshotofCollegeDrinking.pdf> (last accessed Nov. 15, 2009).

<sup>31</sup> Wikipedia, *Party School*, [http://en.wikipedia.org/wiki/Party\\_school](http://en.wikipedia.org/wiki/Party_school) (last accessed Nov. 15, 2009).

<sup>32</sup> See *id.* The top ten 2009 schools (in order of ranking) include: (1) Penn State; (2) the University of Florida; (3) the University of Mississippi; (4) the University of Georgia; (5) Ohio University; (6) West Virginia; (7) the University of Texas; (8) the University of Wisconsin; (9) Florida State; and (10) the University of California-Santa Barbara.

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<sup>33</sup> Carrie Stetler, *Princeton Review Lists Top Party Schools: Kegger-proof Your Teen?* [http://www.nj.com/parenting/carrie\\_stetler/index.ssf/2009/07/princeton\\_review\\_list\\_top\\_par.html](http://www.nj.com/parenting/carrie_stetler/index.ssf/2009/07/princeton_review_list_top_par.html) (posted July 27, 2009, 2:51 p.m. EDT). See, e.g., *Penn St. Named Top Party School in Survey*, <http://www.cbsnews.com/stories/2009/07/27/national/main5191831.shtml> (last accessed Nov. 15, 2009).

<sup>34</sup> Marcus Grant & Joyce O'Connor, *Corporate Social Responsibility and Alcohol: The Need and Potential for Partnership* 92 (Routledge 2005) (citation omitted).

<sup>35</sup> Int'l Ctr. For Alcohol Policies, *The Structure of the Beverage Alcohol Industry* 10 (Mar. 2006) (available at <http://www.icap.org/LinkClick.aspx?fileticket=DZ9ittvJ%2FZs%3D&tabid=75> (hereinafter "ICAP")).

<sup>36</sup> *Id.*

<sup>37</sup> Distilled Spirits Council of the United States, *Economic Contributions of the Distilled Spirits Industry*, <http://www.discus.org/economics/> (last accessed Nov. 12, 2009).

<sup>38</sup> *Id.*

<sup>39</sup> ICAP, *supra* n. 32, at 10.

<sup>40</sup> *Id.*

<sup>41</sup> See, e.g., *Alcohol Industry Not Recession Proof*, <http://www.jointogether.org/news/headlines/inthenews/2009/alcohol-industry-is.html> (posted Feb. 2, 2009).

<sup>42</sup> ICAP, *supra* n. 32, at 10.

<sup>43</sup> See Richard Epstein, *Exit Rights under Federalism*, 55 L. & Contemp. Probs. 147, 152 (1992) (discussing the state power of incorporation).

<sup>44</sup> See *id.*

<sup>45</sup> Grant & O'Connor, *supra* n. 31, at 92.

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

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 93.

<sup>49</sup> Kenneth J. Meier & Cathy M. Johnson, *The Politics of Demon Rum*, Am. Politics Research Vol. 18, no. 4, at 404 (1990).

<sup>50</sup> Crombie et al., *supra* n. 17, at 497.

<sup>51</sup> *Id.*

<sup>52</sup> *Gregory v. Ashcroft*, 501 U.S. 452, 457-464 (1991) (deciding whether Missouri's mandatory retirement requirement for judges violated the ADEA).

<sup>53</sup> See Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue*, 42 Duke L.J. 979, 1008 (1993).

<sup>54</sup> Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484, 1498-99 (1987).