Toward the Protection of States' 21st Amendment Rights with *Toward Liquor Control*

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I. Introduction

Toward Liquor Control is valuable in the current regulatory realm not only as a guide for policy makers, but as historical and empirical evidence for courts considering current 21st Amendment issues. It is specifically applicable to the timely and hugely important question of federal preemption of state alcohol laws. As a doctrine regarding the balance between state and federal power, preemption issues are particularly important in regards to the 21st Amendment. The 21st Amendment operates to squarely delineate power between states and the federal government, with power over liquor control being almost purely reserved for the states. The Supremacy Clause operates in exactly the opposite direction, giving the federal government preemption rights over state law. These competing values must be considered in light of the history of alcohol regulation, the text and legislative history of the 21st Amendment, and the role of federalism in the US legal system. *Toward Liquor Control*, the study of alcohol regulations after the repeal of prohibition, is empirical and unbiased evidence of the understanding that the 21st Amendment was intended to give the state broad regulatory powers and that a variety of types of regulations would further state alcohol policy. Thus, when the Supreme Court faces the issue of preemption in the context of alcohol regulations, it should look to *Toward Liquor Control* for guidance.

The inspiration for this paper is a recent case in the Tenth Circuit, *U.S. Airways, Inc. v. O'Donnell*.[1] In November 2006, a passenger on a U.S. Airways flight purchased and consumed alcoholic beverages while en route to New Mexico.[2] During his drive home from the airport in New Mexico, he got into an accident that resulted in his death and the death of five others. His blood alcohol content at the time was approximately 0.329, well

over the legal limit of 0.08.[3] The state then issued U.S. Airways a citation for serving alcohol in violation of state law.[4] New Mexico state law requires that every person serving alcohol to travelers on airplanes must have a public server license, which the stewardesses did not have.[5] Additionally, all servers must have completed alcohol server training within 30 days of being hired.[6] U.S. Airways filed for a license after the accident, but its application was rejected because the airline's server training did not comply with state requirements.[7]

The airline filed for an injunction against the state from enforcing its alcohol regulations for alcohol beverages served on airplanes.[8] The airline argued that the Airline Deregulation Act of 1978 (ADA) both expressly and impliedly preempted the state's regulation of alcohol provided to passengers.[9] The state claimed that the power to regulate the sale of alcohol was within the state's 21st Amendment powers. The district court found that the 21st Amendment's protection of the state's right to regulate required a narrow interpretation of the federal law so as to avoid a constitutional conflict.[10] Accordingly, it found that the ADA only applied to the mechanical operation and safety of the plane but was not exclusive in terms of alcohol service. The court of appeals reversed, characterizing the state regulation as one over airline safety and therefore preempted by the ADA since the federal regulation impliedly preempted the entire field of aviation safety.[11] After finding preemption, the Court said that the lower court must apply a three-part test to determine if the 21st Amendment "saves" the state statute.[12] The three-part test was created by the 4th Circuit in the case *TFWS, Inc. v. Shaefer*.[13] When a federal law conflicts with the 21st Amendment, the test requires that, 1) "the court should examine the expressed state interest and the closeness of that interest to those protected

by the Twenty-first Amendment," 2) "the court should examine whether, and to what extent, the regulatory scheme serves its stated purpose," and 3) "the court should balance the state's interest… (to the extent that interest is actually furthered by the regulatory scheme) against the federal interest."[14] The court then remanded the case to the lower court for review under this standard.[15]

This test should be scrapped and completely refashioned, giving consideration to the findings of *Toward Liquor Control*. The study serves as evidence that a state's 21st Amendment rights includes a wide array of powers. Thus, the state's regulations will almost always be protected under the amendment. The study also allows provides empirical evidence as to regulations that further goals of temperance, suggesting that there should be a presumption of validity of the regulation, with the challenger carrying the burden of proof. When first faced with this issue, the Supreme Court should look to *Toward Liquor Control* to support craft a test that will properly protect state's rights.

II. History of Alcohol Laws

Understanding the status of alcohol regulations before, during, and after prohibition is fundamental to understanding the meaning and role of the 21st Amendment. This history can be examined through legislative history, newspaper reports, and *Toward Liquor Control*.

The late 19th and early 20th century saw rampant alcohol problems, mostly supported by structural aspects of the alcohol industry. Namely, "prior to Prohibition, the alcohol industry had evolved into a vertically integrated enterprise that found most outlets 'tied' to a supplier or manufacturer."[16] This led to the creation of the what was known as a "tied house," a drinking establishment that was owned by a certain brewery or brand. These

bars then gave huge discounts, free meals, and other deals in order to manipulate people into buying copious amounts of alcohol.[17] Price wars between the tide houses, along with heavy-handed supplier influence, led to low alcohol prices and wide distribution. Research shows that "when national prohibition was under consideration, 80 percent of the saloons in the United States were either owned or controlled by brewery interests."[18] Heavy drinking and social problems associated with alcohol in the mid to late 1800's led to an "aura of debauchery and degradation which for a century Americans associated with the old-time saloon."[19] Goals of social responsibility were hindered by the profit motive in this vertically assimilated system.

Prohibition was not a new idea when the 18th Amendment came around.[20] By this time, up to 33 states had prohibition laws in effect.[21] As social views of drinking and alcohol use became more conservative, certain interest groups began to call for nationwide prohibition. This movement pressured Congress to pass the 18th Amendment. The amendment prohibited the, "manufacture, sale, or transportation of intoxicating liquors" within the United States.[22] It was ratified on January 16, 1919 and went into affect one year later.[23]

Problems began to arise shortly after the passing of the amendment. Public opinion started to shift away from this tight form of federal control,[24] leading to rampant disregard for the new law.[25] Serious discussion in Congress of repealing prohibition was occurring by 1929.[26] The issue had become one of supreme political importance and was being "thoroughly discussed throughout the country."[27] Prohibition was considered by all "observant persons" to be a complete failure.[28] In 1933, Congress drafted a new

amendment that would repeal the 18th Amendment and provide for a new approach to alcohol regulation.

The 21st Amendment was specifically drafted to deal with the failures of the 18th Amendment. The senators thought that "[t]he real cause of the failure of the eighteenth amendment was that it attempted to impose a single standard of conduct upon all the people of the United States without regard to local sentiment and local habits."[29] Regulation of alcohol is "not a national question."[30] Thus, the focus of the 21st Amendment was to return control to the states.

The Amendment bestowed upon the states greater regulatory power than they possessed before prohibition.[31] The legislature sought to use the Amendment to support the enforcement of state laws, as the disregard by private entities of the particular laws of each state led to the inability of the enforcement of alcohol regulations prior to prohibition.[32] A specific purpose of the provision was to "make the intoxicating liquor subject to the laws of the State once it passed the state line."[33]

Two different provisions that would have given the federal government concurrent control over alcohol regulations were rejected by the Senate, demonstrating an intent to return full regulatory control to the states. First, Section 3 of the first debated draft of the 21st Amendment read, "Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold."[34] Much of the debate regarding the passage of the amendment was about the allocation of power between the states and federal government. Section 3 was understood to support a structure where federal alcohol law would prevail over state alcohol regulations.[35] Thus, Section 3 was seen to be contrary to Section 2 of the amendment, with Section 2 giving states greater

power for regulation and Section 3 taking it away.[36] The Amendment would give both the state and the federal government control to regulate and could lead to a "civil war" of regulations between the two.[37] In order to avoid this conflict where both sovereigns constitutionally pass laws that each claim is "supreme," many senators argued for the removal of a provision authorizing federal regulation.[38] One senator specifically highlighted the doctrine of the Supremacy Clause and the conflict it would cause for regulations as the basis for his intention to vote against the inclusion of the provision.[39] Ultimately, the Senate rejected the version of Section 3 granting the federal government concurrent powers over the regulation of alcohol.[40]

When the Senate discussed the amendment the next day, Section 1 had been revised to include a sentence giving the federal government concurrent power over regulation: ... [t]he Congress and the Several States, Territories, and possessions *shall have concurrent power* to enforce this article by appropriate legislation.[41] Many of the senators were again upset by this provision. As noted by one, "[a] good many Senators are obviously bothered by the continuance of Federal control in this matter; and while they are anxious to see the saloon outlawed, they would like to see it done by prohibition on state action rather than continuing this unsuccessful Federal effort to carry its police power into the States."[42] It was understood that "striking out the concluding sentence of the first section of the [ ] amendment will deprive the Congress of the concurrent power to conduct prohibition enforcement as it is now doing."[43] The rejection of the provision leaves it "entirely to the States to determine in what manner intoxicating liquors shall be sold or used and to what places such liquors may be transported."[44]

Following the rejection of the second "concurrent powers" provision, the 21st Amendment was passed in its following form:

> Section 1. The eighteenth article of the 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. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several states, as provided in the Constitution, within seven years of the date of the submission hereof to the States by Congress.[45]

Section 2 has been used as the basis for a state's right to regulate alcohol.

Toward Liquor Control serves as both further support for the argument that states should have exclusive and comprehensive regulatory power over alcohol and as an independent study showing the effectiveness of regulations.[46] *Toward Liquor Control* is the product of a study commissioned by John D. Rockefeller, Jr.[47] Rockefeller was a life-long teetotaler who supported Prohibition.[48] However, the "regrettable failure of the Eighteenth Amendment" led him to believe that regulations should be in support of temperance, rather than total abstinence.[49] In an attempt to support this step towards control, Rockefeller commissioned a comprehensive study of alcohol regulations both domestically and internationally.[50] "A program of action based on intimate knowledge of [other nations'] successes and failures, as well as on experience in this country, appeared to me to be a contribution to the thinking of the American people on this subject which might be welcomed."[51]

Mr. Rockefeller hired Mr. Fosdick, an attorney with experience in social problems, and Mr. Scott, and engineer with an advanced understanding of social and religious

movements, to conduct this study.[52] He sought to have them produce a "well-balanced survey and appraisal of the lessons of experience."[53] He himself took no role in the study other than to fund the research.[54] Rockefeller found the principles in the report to be "of profound importance to any present or future effort to deal with the liquor problem."[55]

Much of the beginning of the study highlights the importance of tailoring laws regulating social practices to the community in which they apply.[56] The problems of pre-prohibition and the failure of prohibition are linked to this idea. The ability of states to implement comprehensive and complete systems of alcohol regulation is imperative to the effectiveness of regulations.[57] The influence of local people and customs to the liquor laws is more influential to their effectiveness than uniformity.[58] They conclude with the charge that, "[i]f the new system is not rooted in what the people of each state sincerely desire at this moment, it makes no difference how logical and complete it may appear as a statute – it cannot succeed."[59] Thus, the inherent local nature of the state and municipal regulations make them de facto more effective than national policies.

The analysis of effective regulations begins from the premise that the 21st Amendment has "returned to the individual state the power to deal with the question" of alcohol regulation.[60] This direct continuation of the study from the sentiment of the congressional debates regarding the 21st Amendment demonstrates the reliability and importance of the study to understanding the meaning of the 21st Amendment. The regulations suggested by the study were written as a logical extension of the state's comprehensive regulatory powers.

Fosdick and Scott had a number of suggestions for regulations that were adopted by states and will be seen in subsequent cases. They recommended that liquor control be

tightly regulated, either through state monopoly or licensing of liquor distributors.[61] Effective regulations include a tight limitation on vendors (minimal issuance of licenses to sell alcohol),[62] reduction in hours of sale,[63] prohibitions against price reductions or other actions to encourage consumption,[64] rigid restrictions on advertising.[65] Fosdick and Scott found that the most important regulations were efforts to control prices and profits, as "[t]he private profit motive by which sales are artificially stimulated is the greatest single contributing cause of the evils of excess."[66] These regulations would come in the form of the establishment of minimum and maximum prices for sale, uniform systems of accounts, and limitations or capture on profits in excess of a specified percentage.[67] "The retail price level of alcohol beverages… has a direct bearing on the amount of consumption."[68] Liquor taxes also "helped to make the liquor controls more successful."[69] While Fosdick and Scott had several findings of the individual effects of regulations, it should also be kept in mind that being a part of a comprehensive system of regulation is an additional variable that supports the effectiveness of regulations.[70]

Toward Liquor Control was highly influential when it was released. Even the reversal of Rockefeller's position was enough to create headlines.[71] Rockefeller's stance on the issue carried much weight with politicians and voters.[72] When the study was released, it received wide coverage, most of which was positive.[73] The Chicago Daily News said the conclusions were "well worthy of careful study by lawmakers. They are the conclusions of enlightened and liberal minds and are based on common sense."[74] The report is still cited today by Supreme Court justices interested in considering the original intent of the 21st Amendment.[75] The conclusions in Rockefeller's report also mirrored those of a congressional committee from 30 years prior to the passage of the 21st Amendment who

had studied the problem of alcohol regulation.[76] Many states looked to the report for guidance in their liquor laws, with an estimated 15 states taking the monopoly law draft almost verbatim from the report and more following the licensing laws.[77] Thus, *Toward Liquor Control* can serve as a study for states to use in regards to proving that certain liquor regulations will have an effect of furthering state policies.

III. Federal Preemption Law

Preemption Law is a doctrine that permits federal law to supersede or preempt state law. As state alcohol policies are a right pursuant to the state's constitutional rights under the 21st Amendment, there is a particular conflict between the two. Though the Senate specifically rejected giving the federal government any right to affirmatively regulate alcohol, recent policies have sought to circumvent that restriction by claiming constitutional protection under either the Commerce Clause or the Supremacy Clause. The following legal explication and case analysis will show how this approach disrupts the balance of power in the 21st Amendment.

Preemption of state law by federal law is based on the Supremacy Clause.[78] There are three ways in which federal law may preempt state law. The first category is called express preemption, when "Congress, in enacting a federal statute, expresses a clear intent to preempt federal law."[79] Second, there are two forms of what has been called implied preemption. There can be conflict preemption when "there is outright or actual conflict between federal and state law."[80] There is also field preemption when "Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for States to supplement federal law."[81] These categories are not rigidly separate.[82]

Questions of preemption are essentially questions of Congressional intent.[83] The Court presumes that "Congress does not cavalierly preempt state [ ] law."[84] "[A]ny understanding of the scope of a preemption statute must rest primarily on a fair understanding of congressional purpose."[85] Congress' intent can be discerned from "the statue's language or implicitly contained in its structure and purpose."[86]

One of the important doctrines that the Court uses in preemption cases is a presumption against preemption. When the federal government seeks to regulate in an area traditionally regulated by the state, the Court takes a presumption against preemption.[87] This presumption applies to both the existence of preemption and to the scope of preemption.[88] The Court concludes that this "approach is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety."[89]

The study by Fosdick and Scott strongly supports the application of the presumption as part of preemption doctrine. While the study should not be necessary to trigger the use of the doctrine, courts have not applied it as a regular matter in applicable situations so additional support may be needed.[90] The study implicates the doctrine in two ways. First, it is historical evidence that Congress intended for the state's regulatory powers to be broad, thus making almost all alcohol regulations the types of regulations traditionally implemented by the state. Second, it serves as empirical support for the effectiveness of state alcohol regulations, thereby shifting the burden of proof to the challenger to prove that a regulation is completely unrelated to alcohol control (equivalent to a "presumption" against the challenger).

The importance of the study by Fosdick and Scott is further highlighted by the importance of preemption issues in 21st Amendment jurisprudence. Preemption operates in a unique way with the 21st Amendment and should be given special consideration. Preemption claims often arise when an entity is being regulated more heavily by the state than by the federal government.[91] Displacement (or field preemption) supports deregulation, as it makes it cheaper and easier for businesses to operate under a single standard, rather than a multitude of different state standards.[92] Thus, federal preemption is "a favorite theory of businesses seeking regulatory relief."[93] The very goals of the 21st Amendment and of modern alcohol regulation were to keep the alcohol industry highly regulated and controlled, goals directly frustrated by preemption. Unfettered extensions of the preemption doctrine will likely lead to deregulation,[94] and the types of problems seen prior to prohibition. Preemption doctrine is also effectively parallel or linked to questions of the dormant commerce clause,[95] the very provision the 21st Amendment was written, in whole or in party, to circumscribe.

Preemption is often seen in light of the nationalization of economics in America.[96] It reflects a movement towards harmonization and free trade principles in a national market.[97] Alcohol regulation, however, has been specifically separated from the "national market" to be a state controlled product. The very purpose of the 21st Amendment was to prevent the nationalization of alcohol as a product. Fosdick and Scott placed much emphasis on the importance of state control of regulation and the failures of national alcohol policies.[98] Looking to this study should guide courts towards an understanding of the goals of the 21st Amendment and the importance of preserving regulations at a state level.

Preemption by administrative agency acts (as seen in the *U.S. Airways* case) is questionable in normal preemption analyses and raises important concerns in the 21st Amendment context as it further frustrates the specific purposes of the Amendment. Scholars have argued that preemption of state law by agency regulation should be a particular concern as agencies are increasingly preempting state law and often have little Congressional authorization to do so.[99] Field and conflict preemption are most likely to lead towards problems, since with express preemption, there is at least some indication of Congressional intent.[100]

It is highly questionable that Congress, through a general grant of rulemaking power, would permit an agency to regulate in a way that raised constitutional questions.[101] By the nature of their existence, agencies are specialized institutions focused on a particular area of regulation and are not designed to consider state autonomy issues.[102] One study showed that, in practice, the agencies often do not take into consideration federalism issues when crafting rules.[103] Agencies are not designed to represent states' interests but, with relative ease, can establish detailed and far-reaching regulations.[104] The virtues of a federalist system are directly linked to the goals of alcohol regulation, including accountability, responsiveness, and public participation.[105] The federalism concerns noted by Congress in the debates over the amendment and by Fosdick and Scott are improperly (even illegally) imbalanced by agency regulation.

IV. Jurisprudence of Preemption and the 21st Amendment

Looking at how the Court has treated other constitutional conflicts with the 21st Amendment is particularly important in understanding how the Court approaches 21st Amendment issues generally. The Court's jurisprudence shortly after the passage of the

21st Amendment granted complete rights to the states to regulate alcohol. The Court's rulings were likely driven by the fresh understanding of the purpose of the amendment and the common knowledge of the harms the amendment was meant to prevent. However, in the 1960's, the Court begins to move away from this interpretation and permit challenges to chip away at the power of the 21st Amendment. In the past decade, the Court has succumbed to an even greater degree of attack on the 21st Amendment. If the Court can look to *Toward Liquor Control* for guidance in its approach to upcoming preemption issues, it will renew its focus on the language and historical purpose of the Amendment leading to greater protections for states' rights.

In one of the first cases that the Supreme Court heard that considered the boundaries of the newly passed 21st Amendment, the Court supported strong state powers.[106] *Young's Market* involved a state license fee on all liquor imported into the state.[107] Plaintiffs claimed that this tax violated both the Commerce Clause and the Equal Protection Clause.[108] The state defended the statute as legal under the state's powers preserved by §2 of the 21st Amendment.[109] The Court said that prior to the passage of the 21st Amendment, this law may have been impermissible as it placed a burden on interstate commerce.[110] However, the plain meaning of the text of the amendment protected such a prohibition.[111] The purpose of the amendment was to give states more leeway to regulate than would have been permitted previously under the Commerce Clause.

Plaintiffs also argued that the law was outside of the state's §2 powers because it did not protect public health, safety, and morals.[112] The Court held that it was sufficient if the law could be interpreted as serving to regulate morals.[113] Specifically, "*in light of history*,

we cannot say that the exaction of a high license fee for importation may not, like the imposition of the high license fees exacted for the privilege of selling at retail, serve as an aid in policing the liquor traffic."[114] The regulations of the state may take many different forms and still serve legitimate ends.[115]

This seminal case is immensely important as the groundwork for 21st Amendment jurisprudence. First, the Court concluded that the point of the 21st Amendment was to give states powers beyond what was previously permitted by the Commerce Clause. Thus, there must be some expansive powers held by the state that forbids preemption by the federal government's powers under the Commerce Clause. Second, the Court highlights how important it is to consider history when evaluating regulations. The fresh memory of prohibition likely supported the Court's conclusion that states possessed a wide breadth of control. Third, the Court set a very high bar for any analysis that would test the link between the regulation and policing liquor traffic. It positioned both the burden of proof and the standard against the plaintiff, so as to give the most protection to state's rights to regulate. Overall, the Court in *Young's Market* developed a doctrine whereby the state's rights in alcohol control were virtually absolute, a doctrine consistent with the findings of Fosdick and Scott.[116]

Ziffrin v. Reeves brought to the Court a case where Plaintiffs challenged a Kentucky law that prohibited the transportation of alcohol through the state without a license.[117] The plaintiffs made the standard Commerce Clause and the Equal Protection Clause claims.[118] The State argued that the expressed purpose of the statute was to "channelize the traffic, minimize the commonly attendant evils; also to facilitate the collection of revenue."[119] The Court found that the statute was permissible as it was "reasonably

appropriate" to effectuate the purpose of regulating alcohol.[120] The Court crafted a wide power on behalf of the state: "The state may protect her people against evil incident to intoxicants…. and may exercise large discretion as to the means employed."[121] Also, "[t]hese conditions are not unreasonable and are clearly appropriate for effectuating the policy of limiting traffic in order to minimize well known evils and secure payment of revenue."[122] The Court establishes a standard of mere reasonableness for the link between the statute and its intended purpose. The Court also highlighted the importance of the Constitutional grant of power; "although regulation by the state might impose some burden on interstate commerce this was permissible when 'an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the states.'"[123] This statement by the Court shows how it held its position from *Youngstown* that the 21st Amendment was meant to protect regulations that normally would be struck down as a Commerce Clause violation.

These early cases established a few important precedents. First, in these cases, the Court dealt with allegations requiring some kind of link between the regulation and a legitimate state goal. The Court took a consistent approach. Though the particular language varied, it assumed that the regulation was valid unless the challenging party could prove, to a fairly certain degree, that the regulations were no effective. The Court placed the default in favor of the state. As the regulations at issue in these cases were found by Fosdick and Scott to have a direct effect on consumption patterns, this default appears to be the correct one. The Court was properly protecting states' rights by ruling in conjunction with the legislative history of the amendment, the historical posturing of the amendment, and the specific findings of Fosdick and Scott.

However, in recent years the Court has strayed from this precedence by ignoring the text and history of the Amendment. This misapplication of the doctrine led to an improper ruling in one of its first and most influential cases on preemption and the 21st Amendment, *Midcal*.[124] In this case, the state has passed laws that required wine producers and wholesalers to set prices and prohibited the sale of wine below those prices.[125] The Court considered a challenge to state liquor laws as preempted by the Sherman Act. The Court misinterpreted the use of history in *Young's Market*, and contradicted the purpose of the amendment by shifting the burden of proof to the state.

The Court employed a balancing test between the Sherman Act and the 21st Amendment. The federal interest in enforcing anti-trust policy was declared to be both "familiar and substantial." Although "this federal interest is expressed in a statute, rather than a constitutional provision, Congress exercised all the power it possessed under the Commerce Clause when it approved the Sherman Act."[126] The Court useed this justification to give the Sherman Act equal weight against the 21st Amendment. Based on its assertion that the Sherman Act interest is "substantial" and that it holds the weight of a constitutional interest, the Court held that the state must then prove that its regulations further a legitimate policy of state alcohol regulation.[127]

The genesis for this burden shifting onto the state was not a Supreme Court opinion, legislative history, or the text of the 21st Amendment. Rather, this was a test created by the state supreme court in another case, *Rice v. Alcoholic Beverage Control Appeals Board*.[128] The Supreme Court then relies on the state court's conclusions that the state had to prove its laws were effective and that the laws did not sufficiently support state policy to withstand conflict with the Sherman Act. The state court relied on one study in

particular that, "at the very least raise[ed] a doubt regarding the justification for such laws on the ground that they promote temperance."[129] The Court then concluded that, based on the lack of correlation between the statutes and the policy goals, the "state interests are less substantial than the national policy in favor of competition."[130] The Sherman Act was held to preempt the state regulations. The regulation challenged in this case is exactly the sort that Fosdick and Scott highlighted as imperative to the success of any regulatory scheme,[131] but no mention was made of the study.

As noted above, this opinion is troubling for a number of reasons. First, the Court's dismissal of *Young's Market* as controlling based on the opinion's lack of historical analysis is a disingenuous way to avoid the controlling precedent. The Court in *Young's Market* directly references "history" when determining the requisite level of proof to show a regulation was linked to a state policy (remember, the Court found this to be a very low standard). The failures of Prohibition were fresh in the Court's memory when it found in *Young's Market* that almost any state regulation would lead to the state being able to effectuate its desired liquor policies.[132] The Court in *Young's Market* also rejected even a consideration of the claim that federal statutes limited the breadth of the Amendment, supporting an interpretation that the Sherman Act should be similarly trumped.

Second, the Court pulled a 180-degree turn from previous cases requiring the state to prove that the regulation, almost beyond a doubt, furthers the state policy. This requirement completely disregards the history of the 21st Amendment, which was passed on the assumption that almost all state regulations regarding alcohol will affect the consumption patterns of citizens. The Court was wholly unjustified in relying on a state

court standard that allows any statement to the contrary to completely destroy a finding of correlation between the state regulation and policy. Shifting the burden of proof to the state directly contradicts the purpose and language of the 21st Amendment. Additionally, the same arguments can be made against the Court's use of a beyond "doubt" standard in proving correlation. Rather than relying on one study to allow the state to show correlation, the Court allowed the results of a single study to the contrary to invalidate the statute.

Other Supreme Court cases have followed this improper shifting in the burden of proof, leading to results that do not protect states' rights under the 21st Amendment. In one case, the Court found that advertisements were not part of the state's 21st Amendment powers and could be preempted by federal agency regulations.[133] If the Court had looked to *Toward Liquor Control*, it would have seen that advertisement regulations are an integral part of the success of a state's regulatory scheme. In another case, the Court found that the 21st Amendment preempted by the Dormant Commerce Clause,[134] a ruling in direct contradiction to earlier precedent and the purpose of the 21st Amendment. This jurisprudence has left room for lower courts to further disregard the rights of states, leading to the ill-fitting test used in *U.S. Airways*.

The lack of consideration for legislative history and policy in the aforementioned jurisprudence left space for *TFWS, Inc. v. Shaefer* , which led to the creation of the poorly formed three-part test that was applied in *U.S. Airways*.[135] In this case, plaintiffs challenged state laws that they claimed violated the Sherman Act, particularly regulations that required liquor wholesalers to post and adhere to prices (post-and-hold system) and prohibitions against volume discounts.[136] These regulations were intended to promote

temperance and safety.[137] *TFWS* moved up and down the appeals system numerous times between 2001 and 2009 as the 4th Circuit tried to figure out how to deal with the particular issues. The court of appeals began its analysis by finding that these regulations are a per se violation of the Sherman Act.[138]

The court then considered the question of the 21st Amendment. Looking at the rulings of *Midcal* and *Capital Cities*, the court developed the following three-part test.

1) the court should examine the expressed state interest and the closeness of that interest to those protected by the Twenty-first Amendment
2) the court should examine whether, and to what extent, the regulatory scheme serves its stated purpose in promoting temperance. Simply put, is the scheme effective?
3) the court should balance the state's interest in temperance (to the extent that interest is actually furthered by the regulatory scheme) against the interest in promoting competition under the Sherman Act."[139]

After many appeals and remands, the court of appeals considered the case for a final time in *TFWS v. Franchot*.[140] The lower court had held that the state law was preempted because it did not further the goals of the state. The court of appeals rejected the state's challenge of the ruling of the lower court.[141] The court of appeals immediately established a presumption of invalidity, looking for the state to prove effectiveness to "salvage" the regulatory scheme.[142] The court cited *Midcal* and *324 Liquor* in holding that proof of effectiveness is essential to the survival of a state scheme.[143] Based on the highly deferential standard in the test, the court of appeals affirmed the district court's finding that the regulations did not properly further state policies.[144]

V. A New Framework Using *Toward Liquor Control*

The *TFWS* test is an incorrect interpretation of the Court's rulings and not the proper test for a 21st Amendment preemption argument. *TFWS* has gone beyond the faulty rulings of the Court and developed a test wholly inconsistent with the text and goals of

the 21st Amendment. The Court should look towards the language of the amendment, legislative history, and the particular findings in *Toward Liquor Control* as they serve as historical materials and empirical evidence of effectiveness of the regulations being found preempted in these cases.

As noted above, preemption is a particularly sensitive issue when dealing with the 21st Amendment. Accordingly, the Court should create a specific test that accounts for these issues. Simply applying a preemption test from another field of regulations will not properly protect the states in this case. Preemption questions are shaped by the particular statute in which they arise, leading to a disparate set of doctrines that may make it difficult to develop a unified preemption doctrine.[145] Thus, subject-matter specific doctrines are appropriate in certain cases.[146]

Furthermore, this doctrine should give special consideration to regulations promulgated by federal agencies. Scholars and courts have proposed setting a higher standard for agency preemption questions.[147] The Supreme Court has held that acts of preemption by an agency require, to an even greater degree than normal preemption cases, a clear statement of authority. "Where an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended the result."[148] Additionally, "[t]his concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power."[149] Thus, any test must contain additional safeguards against federal agency preemption.

In using *Toward Liquor Control* to craft a new preemption test, the Supreme Court will properly protect states' 21st Amendment rights. When first faced with a preemption

challenge against an alcohol regulation, the Court should use a reasonableness test to determine if the regulation actually applies to liquor control. This should be a very low threshold, supported by the fact that most alcohol regulations will be referenced in some way in *Toward Liquor Control*. The legislative history and historical posturing of the Amendment, in addition to *Toward Liquor Control*, support this wide interpretation of the state's powers of regulation.

Second, the Court should apply a default presumption that any state alcohol regulation affects consumption patterns and other legitimate state interests. This step would be a reversion of current Court jurisprudence to the original precedent after the passage of the 21st Amendment, including *Young's Market* and *Ziffrin*. *Toward Liquor Control* again serves a purpose, as it is evidence of effectiveness for a number of regulations. *Toward Liquor Control* was a study of the kinds of regulations that will effectively control public consumption and the negative outputs of alcohol. Many, if not most, states have designed their regulatory systems based on the results of this study. It serves as proof that state regulations will almost de facto be more effective than national or federal policies and also sets out some specific types of regulations that are effective.[150]

This step serves to protect the states from debilitating challenges to its laws. Putting the burden of proof on the state to show effectiveness both violates the spirit and history of the Amendment, and is a subtle way to almost always keep states from successfully defending preemption challenges. It would be costly, likely prohibitively so, for each state to conduct a study to provide empirical support for each regulation that could be challenged. Requiring a state to do so is tantamount to a default finding against the state.

Therefore, *Toward Liquor Control* should be used by courts as convincing proof that the state's systems are in fact furthering their policies.

Additionally, *Toward Liquor Control* can remind the Court that state-based regulations are almost always more effective than a national policy. The reason that Prohibition failed was that it was a national, rather than state policy, and the Twenty-first Amendment was drafted on the assumption that alcohol laws worked best if they were in the states' hands.[151] The debates prior to the passage of the 21st Amendment highlighted the fact that the 21st Amendment was meant to remedy the failures of prohibition caused by the nationalization of alcohol policy.[152] Local laws have been shown to be more effective than national policies.[153] There is an inherent link between a law being produced by the state and its effectiveness in furthering the state's goals that must be accepted by the Court.

Challengers should be required to show to a high degree of proof that the regulations do not further state policy. As deregulation will lead to the problems faced by the states prior to prohibition, any act of deregulation should be difficult to accomplish. Additionally, the challenger will have to overcome the legislative history indicating hat Congress specifically and actively chose not to give the federal government powers to regulate. Finally, a heightened standard should be used for any administrative law preemptions. One suggested remedy to the problem of administrative agency preemption is a sort of double presumption against preemption standard, with a presumption against preemption (a support of state law) and a presumption against agency preemption.[154]

VI. Conclusion

The Supreme Court's jurisprudence in recent cases, though misguided, is not beyond saving. The Court should take the chance of reviewing a 21st Amendment preemption case as an opportunity to reexamine the history and purpose of the Amendment. *Toward Liquor Control* can serve as a guide both to the Court's historical understandings of the issues and the particular effects of challenged regulations. As an expansion of the preemptive powers of federal law over state alcohol laws will lead to a fundamental shift in the balance of powers between the federal and state governments, *Toward Liquor Control* can serve a valuable role by not merely guiding policy makers, but protecting those policies as well.

Footnotes

[1] 627 F.3d 1318 (10th Cir. 2010).
[2] Id. at 1322.
[3] Id.
[4] Id. at 1322–23.
[5] Id. at 1322.
[6] Id. at 1323.
[7] Id.
[8] Id. at 1321.
[9] Id.
[10] Id. at 1323.
[11] Id. at 1324.
[12] Id.
[13] Id. at 1331 (citing TFWS, Inc. v. Shaefer, 242 F.3d 198, 213 (4th Cir. 2001)).
[14] Id. at 1331.
[15] Id.
[16] Jurkiewicz, Carole L. and Murphy J. Painter, *Why We Control Alcohol the Way We Do*, SOCIAL AND ECONOMIC CONTROL OF ALCOHOL: THE 21ST AMENDMENT IN THE 21ST CENTURY, 6 (2008).
[17] Id.
[18] Id.
[19] Ernest A. Grant, *Liquor Traffic before the Eighteenth Amendment*, ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE. Vol. 163, Prohibition: A National Experiment, 4 (Sept. 1932).
[20] Raymond Fosdick and Albert Scott, TOWARD LIQUOR CONTROL, 2 (1933).
[21] Id.
[22] U.S. CONST. AMEND. XVIII
[23] The National Archives, United States Government, 15 Mar. 2008 <http://www.archives.gov/exhibits/charters/constitution_amendments_11-27.html>.
[24] Henry W. Jessup, *State Rights and Prohibition*, ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, Vol. 109, 65 (Sept. 1923).
[25] Jurkiewicz, & Painter, supra note 16 at 5.
[26] 71 Cong. Rec. 2671 (1929) (Representative Pittenger, "We have reached a point where respectable citizens have not only the right but the duty to replace prohibition with some method of Government control under which law and order will prevail."). This author has not found any earlier evidence of discussions of repeal in either the Senate or the House of Representatives, but with the early and pervasive problems with the 18th Amendment, the existence of such discussions is not unlikely.
[27] Id. at 4140 (Sen. Robinson).
[28] Id. at 4218 (Sen. Glass).
[29] Id. at 4146 (Sen. Wagner).
[30] Id. at 4226 (Sen. Tydings).
[31] Id. at 4141 (Sen. Blaine).
[32] See Id. at 4216 (Sen. Robinson)
[33] Id. at 4219 (Sen. Walsh).
[34] Id. at 4138 (1933) (Vice President).
[35] Id. at 4143 (Sen. Blaine).
[36] Id. (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).
[37] Id. at 4155 (Sen. Brookhart).

[38] Id. at 4173 (Sen. Borah).
[39] Id. at 4177–78 (Sen. Black).
[40] Id. at 4179.
[41] Id. at 4212 (Sen. Glass) (emphasis added).
[42] Id. at 4220 (Sen. Reed).
[43] Id. at 4225 (Sen. Reed).
[44] Id. (Sen. Swanson).
[45] U.S. CONST. AMEND. XXI.
[46] Fosdick & Scott, supra note 16.
[47] Id. at xiii.
[48] Id.
[49] Id.
[50] Id. at xiii–xiv.
[51] Id. at xiv.
[52] Id.
[53] Id.
[54] Id.
[55] Id. at xv.
[56] Id. at 3–5.
[57] Id. at 48.
[58] Id at 8.
[59] Id. at 98.
[60] Id. at 7.
[61] Id. at 25.
[62] Id.
[63] Id.
[64] Id. at 32.
[65] Id. at 33.
[66] Id. at 58.
[67] Id. at 34.
[68] Id. at 52.
[69] Id. at 69.
[70] Id. at 27.
[71] *Backs Butler Repeal Plan: Holds 18th Amendment Must Go to Restore Respect for Law*, NEW YORK TIMES, June 7, 1932.
[72] Louis M. Hacker, *The Rise and Fall of Prohibition*, CURRENT HISTORY (New York) Vol. 36:6, 662 (Sept. 1932).
[73] Id.
[74] *The Rockefeller Study of Liquor Control: State Monopoly and Disapproval of Taxation Primarily for Revenue, Mark Report Which Aims to Serve Temperance Cause*, THE LITERARY DIGEST, Oct. 28 1933, Vol. CXVI (quoting the New York World Telegram, the Baltimore Sun and the Chicago Daily News).
[75] See 324 Liquor Corp v. Duffy, 479 U.S. 335, 357 (1987) (O'Connor dissent)
[76] Harry G. Levine, *The Birth of American Alcohol Control: Prohibition, the Power Elite and the Problem of Lawlessness*, CONTEMPORARY DRUG PROBLEMS, 17* (Spring 1985).
[77] Id. at 21*.
[78] Richard A. Epstein and Michael S. Greve, CONCLUSION: PREEMPTION DOCTRINE AND ITS LIMITS, IN FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS, Richard A. Epstein and Michael S. Greve, Eds. (2007) at 3.
[79] La. Pub. Serv. Comm'n v. Fed. Commc'n Comm'n, 476 U.S. 355, 368 (1986).

[80] Id.
[81] Id.
[82] Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (2000).
[83] Epstein & Greve, supra note 73 at 19.
[84] Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)
[85] Id. at 485–86.
[86] Id.
[87] Id. at 485.
[88] Id.
[89] Id.
[90] See e.g. Betsy Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. REV. 599, 565, 569, 611-12 (1997), and S. Candice Hoke, *Preemption Pathologies and Civic Republican Values*, 71 B.U. L. REV. 685, 760–61 (1991).
[91] Ernest Young, *Federal Preemption and State Autonomy*, in FEDERAL PREEMPTION: STATES' POWERS, NATIONAL INTERESTS, 259 (2007).
[92] Thomas W. Merrill, *Preemption and Institutional Choice*, 102 N.W. L. REV. 727, 732 (2008).
[93] Id.
[94] Young, supra note 86 at 263.
[95] Merrill, supra note 87 at 733.
[96] Id. 745–46.
[97] Id.
[98] See Fosdick & Scott, supra note 16.
[99] Nina Mendelson, *A Presumption Against Agency Review*, 102 N.W. L. REV. 695, 697–700 (2008)
[100] Id. at 700.
[101] Id. at 716.
[102] Id. at 717.
[103] Id. at 719.
[104] Scott A. Keller, *How Courts Can Protect State Autonomy From Federal Administrative Encroachment,* 82 SO. CAL. LAW REV. 45, 59 (2008).
[105] Id. at 62.
[106] State Bd. of Equalization of Cal. v. Young's Market Co.*,* 299 U.S. 59 (1936).
[107] Id.
[108] Id. at 61.
[109] Id.
[110] Id. at 62.
[111] Id. at 63–64.
[112] Id. at 63.
[113] Id.
[114] Id. (emphasis added).
[115] Id.
[116] Id., see also Indianapolis Brewing Co. v. Liquor Control Comm'n of State of Michigan, 305 U.S. 391 (1939).
[117] 308 U.S. 132, 133–34 (1939) (a case later essentially overruled by *Granholm*).
[118] Id. at 137.
[119] Id. at 134.
[120] Id. at 167.
[121] Id. at 138–39.
[122] Id. at 139.
[123] Id. at 141 (citing South Carolina Highway Dept. v. Barnwell Bros., 303 U.S. 177, 189 (1938)).

[124] Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980).
[125] Id. at 99.
[126] Id. at 111 (internal citations omitted).
[127] Id. at 112–13.
[128] Id. at 112 (citing 21 Cal. 3d 431 (1978)).
[129] Id. at 112 (citing Midcal, 21 Cal.3d at 457–58).
[130] Id. at 113.
[131] See Fosdick and Scott, supra note 16.
[132] *Young's Market,* supra note 101 at 63.
[133] *Capital Cities Cable Inc. v. Crisp*, 467 U.S. 691 (1984).
[134] *Granholm v. Heald*, 544 U.S. 460 (2005).
[135] *TFWS, Inc. v. Shaefer*, 242 F.3d 198 (4th Cir. 2001).
[136] Id. at 201–02.
[137] Id. at 203.
[138] Id. at 209.
[139] Id. at 213.
[140] 572 F.3d 186 (4th Cir. 2009).
[141] Id. at 194.
[142] Id. at 194.
[143] Id. at 194–95.
[144] Id. at 196.
[145] Young, supra note 86 at 261.
[146] Epstein & Grave, supra note 73 at 168–69.
[147] Merrill, supra note 87 at 760 (proposing that agency preemption requires a clear statement and a presumption against agency preemption).
[148] Solid Waste Agency of N. Cook Cnty v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 173 (2001); see also U.S. v. Bass, 4040 U.S. 336, 349 & n.16 (1971) ("unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.").
[149] Id.
[150] See Fosdick and Scott, supra note 16.
[151] See 76 Cong. Rec. 4226 (Sen. Tydings) and 4219 (Sen. Walsh).
[152] See supra notes 22–39 generally.
[153] See Fosdick & Scott, supra note 16 at 5.
[154] Mendelson, supra note 97 at 699.