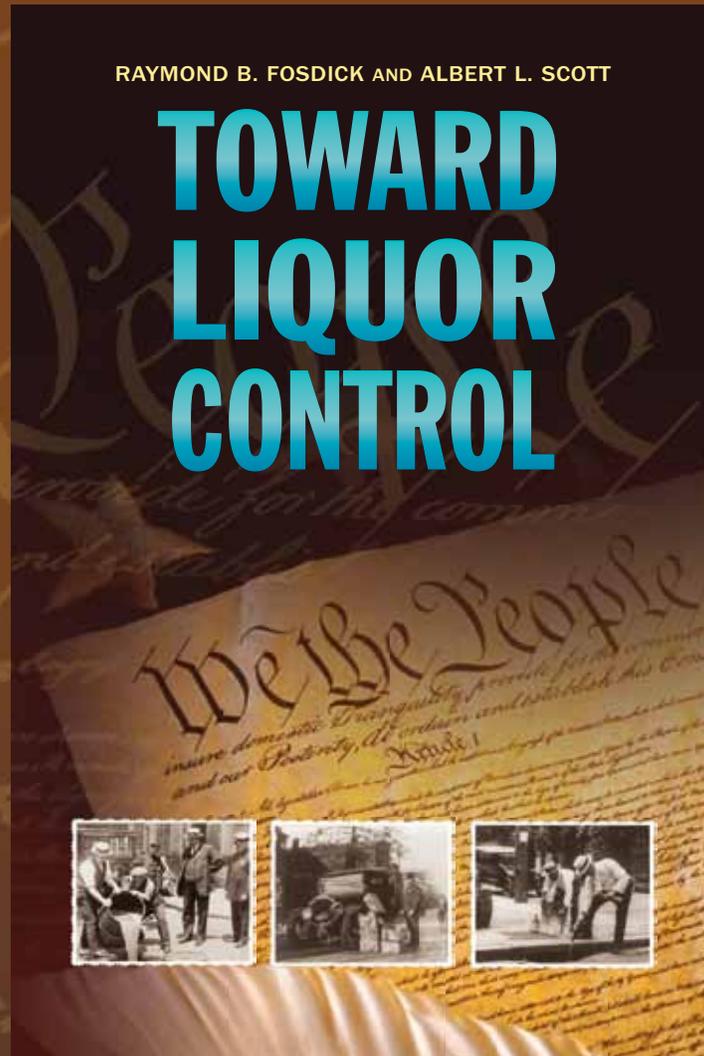


2011 National Essay Contest Winners



The Importance of **Toward Liquor Control** *to Modern Alcohol Policy*

A Message from the Center for Alcohol Policy Advisory Council

As members of the Center for Alcohol Policy Advisory Council, we are excited to share with you the winning essays from the Center's Fourth Annual Essay Contest. This national contest is intended to foster debate, analysis and examination of state alcohol regulation. The topic of the 2011 contest was "The Importance of *Toward Liquor Control* to Modern Alcohol Policy."

Toward Liquor Control is the result of a study commissioned by John D. Rockefeller, Jr. in 1933, which provided a blueprint for states to follow when determining their alcohol regulatory systems following the repeal of national Prohibition. The Center republished the previously out-of-print book in 2011 to provide those interested in effective state-based alcohol regulation with a historical perspective and an understanding of why the system remains important today. While *Toward Liquor Control* had been out of circulation for more than 50 years, it is now available for purchase as a paperback through the Center's website and as an e-book in multiple formats.

Toward Liquor Control continues to remind readers of the challenges associated with alcohol sales and consumption before Prohibition and how today's state-based regulatory system was established to encourage responsible alcohol consumption and promote competition while maintaining public health and safety. The Center's essay contest gave citizens from across our country the opportunity to study this publication and provide their insights on how many of the issues addressed in *Toward Liquor Control* still face policymakers today.

We hope you will enjoy reading the winning entries which describe the importance of *Toward Liquor Control* to modern alcohol policy. We invite you to visit www.CenterforAlcoholPolicy.org for more information on the Center's efforts to explore, research and expand education on alcohol regulation.



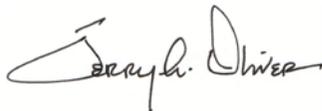
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1st Place:

Laura Napoli, attorney, New York, NY: “A Regulatory Roadmap: The Importance of *Toward Liquor Control* to Modern Alcohol Policy”

2nd Place:

Ryan Lozar, attorney, San Diego, California: “Whatever Happened to *Toward Liquor Control?* Access, Abuse, and the Problem of Direct Shipment”

3rd Place (tie):

Jeremy Carp, undergraduate student, Macalester College: “Fermented Origins: The Emergence of State-Level Alcoholic Beverage Regulation in the Post-Prohibition Era, 1933-1935”

Ashley Watkins, law student, Duke University: “Toward the Protection of States’ 21st Amendment Rights with *Toward Liquor Control*”

A Regulatory Roadmap: The Importance of *Toward Liquor Control* to Modern Alcohol
Policy

By Laura Napoli

Introduction

Although written nearly 80 years ago, *Toward Liquor Control* (hereinafter abbreviated “TLC”) helps us understand why today’s state alcohol regulatory systems developed the way they did. The authors of TLC provided a blueprint for many of the liquor regulation systems that are in place today. Yet, arguably the authors’ greatest contribution to modern alcohol policy has nothing to do with the structures they promulgated. Indeed, the authors’ words of wisdom about the importance of developing policies that are responsive to the needs of the public—and particularly individual states and communities—remain valuable advice for policymakers today. By highlighting the failures of an extreme national policy imposed unwillingly on many groups of people, the authors of TLC effectively promoted a new approach toward alcohol regulation that exists to this day.

Arguably the most important lesson TLC gives us today is to “keep it local.” In other words, the views and attitudes of people in local communities and states should be kept in mind at all times when designing and implementing regulations. We often hear about private interests taking hold in Congress, but TLC reminds us that localized, public interests are what give force to the law. TLC shows us that by allowing states and communities to play a valuable role in alcohol regulation, we can develop policies that benefit society while curbing social problems.

1. A Roadmap to Modern Alcohol Policy

The influence of the ideas presented in TLC is still visible in alcohol policies today. For example, in Chapter 5 of the book, the authors lay out their arguments in favor of the Authority Plan, their preferred method of liquor control. In this plan, a state authority manages the sale of alcoholic beverages. In this way, the authors argue, alcohol is available to the public, but all of the economic incentives for selling liquor are removed from the equation, as the state, rather than private retailers, handles all alcoholic beverage sales. Perhaps as a response to this idea, several states decided to use an approach similar to the Authority Plan. One such state, Utah, created a state liquor monopoly just two years after the release of the first edition of TLC.ⁱ Utah's justification behind its regulatory system sounds as if it could come from the very pages of TLC:

The purpose of control is to make liquor available to those adults who choose to drink responsibly—but not to promote the sale of liquor. By keeping liquor out of the private marketplace, no economic incentives are created to maximize sale, open more liquor stores or sell to underage persons. Instead, all policy incentives to promote moderation and to enforce existing liquor laws is [sic] enhanced.ⁱⁱ

The reasons behind Utah's system of alcohol regulation are exactly those set out by the TLC authors in favor of the Authority Plan: eliminate the profit motive in the retail sale of alcohol, and establish control through positive management.ⁱⁱⁱ

Utah is not the only state that has embraced the idea of state management of alcohol sales. While all states impose some form of control over alcohol distribution and consumption, nearly half of the states control the sale of alcoholic beverages, either at the wholesale or the retail level.^{iv} Retail distribution varies in each “control state,” with

some states using state-operated retail stores, others employing contract agencies, still others using private retailers, and some states using a combination of all three.

In contrast with control states, license states do not participate in the sale of alcoholic beverages at the state level; however, some license states allow municipalities to operate retail stores in certain circumstances. For example, in Minnesota, cities with a population of fewer than 10,000 may own and operate a municipal liquor store.^v And in Maryland, each county decides for itself what distribution system it will use.^{vi}

In both control and license states, alcoholic beverage licenses are considered privileges, and their issuance is always conditioned on qualifications and restrictions, much as the TLC authors advocated. Most states also provide for some form of local approval process before a license is issued or new liquor regulations are promulgated. This combination of state authority with local input is a prominent theme throughout TLC.

There are many examples of the ways that local jurisdictions can play a role in the licensing process of all states. For example, citizens and local governments are often invited to voice their concerns during a publicized license approval process.^{vii}

Additionally, many states require license applicants to announce their intention to apply for a license publicly.^{viii} This allows community members to become informed about changes that may affect them and gives them an opportunity to contact the government if they have comments or objections to the changes. Many states also require the local government to approve or recommend approval for request for a license before the state will entertain the application.^{ix} Several states also allow local jurisdictions to prohibit alcohol sales, often through a vote by local citizens.^x By incorporating methods of local

involvement and choice into state alcohol policies, states include the local population in the creation of any alcohol policy.

Although the Authority Plan in its purest form (as outlined by the TLC authors), is not a predominant measure of liquor control among the states today, the various state regulatory schemes in place today developed as a result of localized preferences. Throughout TLC, the authors consistently stressed that policymakers must be in tune with public sentiment and must be willing to change policies as public needs change over time.^{xi} A willingness to listen to the public and to adapt as needs change remains a key ingredient in the success of any alcohol policy today.

The authors of TLC, fresh from an examination of the failures of national Prohibition, were quick to point out that any law only has as much force as the public will give it.^{xii} For this reason, it is critical for policymakers to understand public attitudes and perceptions. At the time of TLC's publication, this reasoning helped the country from placing too much alcohol regulation in the hands of the federal government and opened the door to increased state regulation. Today, TLC reminds us that, even in a predominantly state-regulated system, policymakers must be attuned to public sentiment.

As one way of giving more voice to local communities, the authors of TLC suggested the idea of "local option" (in a licensing system) or adaptation to local sentiment (in an authority system).^{xiii} Today, this idea can perhaps be seen most clearly in the development of alcohol policies on college campuses. For example, college communities may choose to become "dry" campuses even if they are located in an otherwise "wet" jurisdiction. College communities establish these policies based on the students' preferences and attitudes and, given the local nature of a college campus, it is

easy to determine whether students' desires have changed over time, thus necessitating a change in policy.^{xiv}

The authors of TLC realized that national Prohibition simply could not function effectively in the America they knew.^{xv} They understood that one of the main causes of Prohibition's failure was the national government's imposition of a blanket viewpoint on a nation made up of very diverse people. The authors therefore advised that future alcohol policies be developed based on a smaller set of viewpoints—for example, taking the views of all people in a given state or community into account.^{xvi} This approach has been largely taken to heart today, as state regulations remain the predominant form of liquor control in the United States. Even within states, local communities, such as college campuses, may elect to establish their own forms of alcohol regulation.

Although many aspects of the regulatory systems described by the TLC authors exist in some form today, the authors' advice to heed localized public sentiment remains perhaps the most important piece of wisdom for modern policymakers to follow. Today's public has become very vocal in expressing their dissatisfaction with the government's treatment of what they feel to be the majority of the people. In this atmosphere, it is critical that modern alcohol policymakers make the public feel included and valued in the development of policies and regulations.

2. A Tiered Approach to Control

Further evidence of TLC's influence on modern alcohol policy can be seen in the tiered approach many states take to liquor control. The TLC authors advocated for this approach, where beverages with higher alcohol content face stricter regulations than those with lower alcohol content.^{xvii} Many states today have adopted a tiered treatment of

alcoholic beverages. For example, New Hampshire permits the sale of beer and wine in supermarkets and convenience stores, but other spirits must be sold in liquor stores owned by local alcohol beverage control boards.^{xviii} Oregon has a similar setup, allowing beer and wine to be sold in supermarkets and convenience stores but mandating that packaged distilled spirits may only be sold in liquor stores operated by state-appointed agents overseen by the Oregon Liquor Control Commission.^{xix} In Ohio, beverage containing more than 21% alcohol by volume are purchased and distributed by the Division of Liquor Control.^{xx} Ohio allows for all other alcoholic beverages to be sold by “authorized agents,” such as grocery stores.^{xxi} In Utah, all beverages over 4% alcohol by volume must be sold in state-run stores.^{xxii}

In short, while each state varies in its exact approach to the tiered system, many states follow the TLC authors’ advice to regulate stronger alcohol, such as distilled spirits, more strictly than, for example, beer and wine.

3. Guidelines for License States

The authors of TLC were perceptive enough to realize that not all states would utilize their preferred approach, the Authority Plan.^{xxiii} For this reason, they did not limit themselves to only discussing the merits of one type of plan. The authors realized that many states were leaning toward the establishment of a licensing system, and they discussed the pros and cons of this system in addition to setting forth guidelines so that the disadvantages of licensing could be minimized.^{xxiv} These guidelines have been followed by states today.

California is one licensing state that has adhered closely to many of the guidelines suggested by the TLC authors. For example, the authors argue that license states should

create a single licensing board with statewide authority and responsibility.^{xxv} California's Department of Alcoholic Beverage Control has the exclusive power to license and regulate the manufacture, importation and sale of alcoholic beverages, along with the power to suspend, revoke or deny any license for good cause.^{xxvi} California also classifies its licenses, imposing different restrictions based on whether consumption is on- or off-site and on whether the purchase concerns beer and wine or other spirits.^{xxvii} The TLC authors also suggested giving the licensing board the authority to restrict hours of sale, advertising, and sales practices that encourage consumption.^{xxviii} California's Alcoholic Beverage Control department has the power to restrict hours of sale and to place conditions on where and when beverages may be advertised.^{xxix} Finally, California's licensing laws follow the TLC authors' advice that licenses should restrict the number and type of places where liquor may be sold.^{xxx} For example, California limits the number of off-sale beer and wine licenses to one for every 2,500 people in a city or county.^{xxxi}

The structure of the licensing system in states today reflects the guidelines issued in TLC. The TLC authors' willingness to examine several different methods of liquor control has made TLC an important guidebook to be consulted before implementing any sort of state alcohol regulation.

4. The Importance of Flexibility

Throughout TLC, the authors stress that policymakers must be tuned in to public sentiment. Should attitudes toward liquor control change over time, alcohol policies and regulations must change as well. The authors emphasize that alcohol policy must be

inherently adaptable so that it remains in step with the attitudes of the population to be regulated.

This willingness to be flexible remains crucial in alcohol policy development today. As the TLC authors stated, “Law does not enforce itself. Its machinery must be set in motion and kept in motion by individual human beings.”^{xxxii} Prohibition failed because it lacked crucial public support. Similarly, any alcohol policy that seeks to override the wishes of the regulated public will fail. In outlining the structures of several approaches to alcohol regulation, the authors of TLC were attempting to design policies that would balance the public’s desire to have access to liquor, as well as its desire to control that access. The solutions the authors presented – the Authority Plan and licensing systems, both with tiered structures to recognize that different liquors must be treated differently—do a good job at preserving that balance, and states today have embraced these systems, albeit with modifications of their own. Yet it is this balance, first clearly laid out by the TLC authors, that keeps these approaches effective. For this reason, when we read TLC today, we can gain a better understanding of why the policies that we have work so well, and we can glean guidance on how to continue to develop successful regulations for the future.

5. A New Approach to Studying Alcohol Policy

Finally, TLC offered a unique comprehensive study of the effectiveness of alcohol policies on society’s problems. By examining why Prohibition failed, the authors were able to confidently articulate new policies that lacked the flaws of past efforts at alcohol regulation.

Yet, the authors of TLC did not just look to history to determine the best course for future alcohol regulation. They also looked to the international arena for guidance on how alcohol policies ought to be developed. By illustrating the pros and cons of foreign alcohol policies, the TLC authors helped ensure that America would learn from others' mistakes as well as its own.

Through their research, the TLC authors stimulated a discussion about how alcohol problems may best be prevented that continues to this day. New studies about alcohol's effects on society, as well as how those effects might best be mitigated, are constantly being funded, and the merits and drawbacks of those studies—and the policies and regulations they advocate—are being debated in classrooms, legislatures and town halls across the country.

In short, TLC encouraged further research and debate on the subject of alcohol regulation in the United States. In presenting their ideas and guidelines, the authors sparked a discussion that continues to this day and encouraged research and study of policies at home and abroad.

Conclusion

TLC continues to have a profound effect on the structure and development of modern alcohol policies. By changing the way we think about how policies should be designed and implemented, the authors opened the door to a new type of liquor regulation. In doing so, TLC may fairly be said to have given birth to modern alcohol policy.

Many of the ideas first expressed in TLC, such as a tiered approach to alcohol regulation, local option, and state control of liquor establishments, are seen repeatedly in

policies across the country. States today still work toward eradicating the heart of the liquor control problem as expressed in TLC: the desire for increased profits and increased market share.^{xxxiii} The ideas the TLC authors expressed still resonate in studies today and still revolutionize thinking about alcohol policy. If we are to succeed in removing the problems associated with alcohol in society, we must continue to follow the advice of the TLC authors and in particular, we must remain attuned to the desires of the public and craft flexible yet effective alcohol regulations for the future.

ⁱ “About DABC: Origin and Purpose,” Department of Alcoholic Beverage Control (2011), <http://abc.utah.gov/about/index.html>.

ⁱⁱ *Id.*

ⁱⁱⁱ Raymond B. Fosdick & Albert L. Scott, *Toward Liquor Control* Chapter 5 (Kindle ed., BookBaby 2011).

^{iv} “About DABC,” *supra*.

^v Minn. Stat. §340A.601 (2003).

^{vi} “Overview: Licensing of Alcohol Establishments,” [nhtsa.gov](http://www.nhtsa.gov/people/injury/enforce/abcroleweb/pages/Overview.htm), <http://www.nhtsa.gov/people/injury/enforce/abcroleweb/pages/Overview.htm>.

^{vii} *Id.*

^{viii} *Id.*

^{ix} *Id.*

^x *Id.*

^{xi} *See Toward Liquor Control, supra*, Chapter 9 (warning that control systems that do not represent the prevalent attitudes of the community will not succeed).

^{xii} *See id.* at Chapter 1.

^{xiii} *See, e.g., id.* at Chapter 1 (noting that the key to liquor legislation is to place control as close as possible to the individual and to the community); Chapter 4 (noting the usefulness of local option in a licensing system); Chapter 5 (suggesting that a state authority could establish “dry” zones within otherwise “wet” areas).

^{xiv} *See, e.g.,* “Q&A: Messiah College Alcohol Policy Discussion,” Messiah College (2009), http://www.messiah.edu/alcohol_policy/qanda.html (describing a proposed change in the school’s alcohol policy based on changing student opinions).

^{xv} *Toward Liquor Control, supra*, Chapter 1 (noting that Americans believe that there is a solution besides Prohibition to the liquor problem).

^{xvi} *Id.* (noting that state-wide prohibition will not be successful unless it has “overwhelming public support”).

^{xvii} *Id.* at Chapter 3 (arguing that laws should be tiered so that the strictest rules apply to the drinks with the most alcohol).

^{xviii} *See* N.H. Rev. Stat. Ann. Title XIII, Ch. 175 et seq.

^{xix} “About the OLCC,” Oregon.gov (July 7, 2011), http://www.oregon.gov/OLCC/about_us.shtml.

^{xx} “About the Division of Liquor Control,” Ohio.gov, <http://com.ohio.gov/liqr/about.aspx>.

^{xxi} *Id.*

^{xxii} Utah Code Ann. § 32A-1-105.

^{xxiii} See *Toward Liquor Control, supra*, Chapter 1 (noting that the key to liquor legislation is community-level control and acknowledging that many states will follow the license approach to controlling alcohol).

^{xxiv} See *id.* at Chapter 4 (setting out guidelines for licensing systems).

^{xxv} *Id.*

^{xxvi} “Licensing,” California Department of Alcoholic Beverage Control (2011),

<http://www.abc.ca.gov/permits/permits.html>.

^{xxvii} “Frequently Asked Questions,” California Department of Alcoholic Beverage Control (2011),

http://www.abc.ca.gov/questions/licenses_faq.html.

^{xxviii} *Toward Liquor Control, supra*, Chapter 4.

^{xxix} “Frequently Asked Questions,” *supra*.

^{xxx} *Toward Liquor Control, supra*, Chapter 4.

^{xxxi} “Frequently Asked Questions,” *supra*.

^{xxxii} *Toward Liquor Control, supra*, Chapter 1.

^{xxxiii} See *Toward Liquor Control, supra*, Chapter 1 (noting that retaining the private profit motive spurs the desire to stimulate sales).

Whatever Happened to *Toward Liquor Control?* Access, Abuse, and the Problem of Direct Shipment

Ryan Lozar

In nearly forty states and the District of Columbia, it is legal to have wine directly shipped to your door from an out-of-state alcohol “e-tailer.”¹ Twenty-five years ago, California, Rhode Island and Alaska were the only states to permit this practice. Most others branded it a misdemeanor.² What caused this sea change in public policy? Initially it was mom-and-pop wineries that championed direct wine shipment. They argued, sometimes successfully, that direct shipment’s elimination of wholesaler costs would give their businesses a fairer chance to thrive.³ Today, increasingly large and organized business interests pursue the cause of direct shipment, ostensibly in the name of consumer choice and free enterprise. A lobbying campaign mounted by the Wine Institute, representing over one thousand California wineries, for example, proclaims that “[c]onsumers expect to be able to purchase the wines they want... by telephone, fax and Internet.”⁴

The rise of direct shipment is a dramatic departure from the three-tier distribution system that, since the end of Prohibition and across the United States, has channeled alcohol trade through manufacturers, in-state wholesalers, and in-state brick-and-mortar retailers.

¹ Desireé C. Slaybaugh, *A Twisted Vine: The Aftermath of Granholm v. Heald*, 17 TEX. WESLEYAN L. REV. 265, 269 (Winter 2011).

² Gina M. Riekhof and Michael E. Sykuta, *Politics, Economics, and the Regulation of Direct Interstate Shipping in the Wine Industry*, CORI WORKING PAPER NO. 03-04 (May 13, 2003), available at <http://ageconsearch.umn.edu/bitstream/22136/1/sp03ri05.pdf> (last accessed Dec. 18, 2011).

³ *Granholm v. Heald*, 544 U.S. 460, 475 (2005) (“For most wineries, the expense of establishing a bricks-and-mortar distribution operation in 1 state, let alone all 50, is prohibitive...”); see also Federal Trade Commission, *Possible Anticompetitive Barriers to E-Commerce: Wine* 14 (July 2003), available at <http://www.ftc.gov/os/2003/07/winereport2.pdf> (last accessed Dec. 18, 2011).

⁴ *Issue Summary*, Free The Grapes, available at <http://www.freethegrapes.org/?q=content/research> (last accessed Dec. 18, 2011).

The three-tier model was proposed in *Toward Liquor Control* (1933), Raymond Fosdick and Albert Scott's landmark blueprint for alcohol distribution policy.⁵ Published the same year that the Twenty-First Amendment abolished Prohibition, *Toward Liquor Control* reasoned from the still-indisputable premise that there is a direct correlation between alcohol abuse and unfettered access.⁶ Relying on empirical and historical studies of international and domestic alcohol regulation, which show that excessive availability lead to a host of social problems (including accidents, unemployment, family dysfunction, crime, illness and death), Fosdick and Scott argued that the government should control alcohol access through alcohol distribution.⁷

This paper looks at the direct-shipment trend of recent years, and argues that *Toward Liquor Control* continues to provide the soundest guiding principles for regulation in this field: public health and responsible consumption.⁸ The paper contends that direct shipment does not further those aims. Fosdick and Scott's book predicted what more than a half-century of subsequent experience affirmed—namely, that a three-tier system dependent on brick-and-mortar retailers allows state authorities to monitor and restrict the amount of alcohol available in a community at any given moment.⁹ Direct shipment creates a

⁵ Raymond B. Fosdick and Albert L. Scott, *Toward Liquor Control* (1933).

⁶ Fosdick and Scott, *Toward Liquor Control* at 18-19, 44-45; U.S. Const. Amend. XXI, § 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.").

⁷ Fosdick and Scott, *Toward Liquor Control* at xiii, 89 (1933); see also *Alcohol-Attributable Deaths and Years of Potential Life Lost – United States, 2001*, MORBIDITY AND MORTALITY WEEKLY REPORT (Centers for Disease Control), Sept. 24, 2004, available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5337a2.htm> (last accessed Dec. 18, 2011); Kate Fox, *Viewpoint: Is the Alcohol Message All Wrong?*, BBC NEWS MAGAZINE, Oct. 11, 2011 (discussing that a correlation between alcohol and aggression may be an American cultural construct, as Mediterranean nations do not observe this phenomenon) available at <http://www.bbc.co.uk/news/magazine-15265317> last accessed (Dec. 18, 2011).

⁸ Fosdick and Scott, *Toward Liquor Control* at 1 (Over the course of American history, "law has remained our chief weapon in trying to curb the social consequences of excess" alcohol consumption.).

⁹ *Id.* at 16, 43.

dangerous and unprincipled exception to this system, undermining regulatory control by invisibilizing an important sector of alcohol commerce. When alcohol must pass through in-state distributors and brick-and-mortar retailers before reaching individual households, state regulators “can track it, where it came from, who it came through, where it can go,” and they can work to reduce the total amount available.¹⁰

Direct wine shipment, which most states originally made available only to in-state wineries, became something of a runaway train in 2005, when the Supreme Court held in *Granholm v. Heald* that state laws permitting only local wineries to direct-ship unconstitutionally interfered with interstate commerce.¹¹ The *Granholm* Court ruled that states would either have to permit – or prohibit – direct wine shipment from all wineries, regardless of their state of origin.¹² Though *Granholm* came under heavy fire for undermining states’ plenary power to regulate alcohol under the Twenty-First Amendment, and though the decision’s consequences have been substantial—all the states affected by it opted for across-the-board permission rather than across-the-board prohibition—this paper warns against scapegoating the Court for the political branches’ sins. Consternation over *Granholm* should not obscure the larger problem of state complicity in alcohol deregulation.

As Nida Samona of the Michigan Liquor Control Commission told the U.S. House Subcommittee on Courts and Competition Policy, “[w]e are not talking about milk here.”¹³

¹⁰ *Legal Issues Concerning State Alcohol Regulation: Hearing Before the United States House of Representatives Subcommittee on Courts and Competition of the Committee on the Judiciary*, 111th Cong. 145 (Mar. 18, 2010)(hereinafter “March 18, 2010 Hearing before the House Courts and Competition Subcommittee”)(statement of Nida Samona, then-Chairperson, Michigan Liquor Control Commission), available at http://judiciary.house.gov/hearings/printers/111th/111-125_55481.PDF (last accessed Dec. 18, 2011).

¹¹ *Granholm v. Heald*, 544 U.S. 460 (2005).

¹² *Id.* at 493 (“If a State chooses to allow direct shipment of wine, it must do so on evenhanded terms.”).

¹³ March 18, 2010 Hearing before the House Courts and Competition Subcommittee, *supra*, note 10, at 153 (statements of Nida Samona, then-Chairperson, Michigan Liquor Control Commission, and Texas Solicitor

Michele Simon of the non-profit Marin Institute (now Alcohol Justice) argued in her own Congressional testimony that states' growing laxity toward wine lubricates the slippery slope of deregulation. "[I]f you let wine be shipped all over the country, what's next?"¹⁴ No doubt some of the public's easy acquiescence in this case reflects a sense that wine is somehow special; it evokes romance and fine living and gourmet palates. But wine is something of a wolf in sheep's clothing. Its alcohol content averages about 14 percent,¹⁵ which is more than beer and close to some liquors. No doubt regulators will be reminded of this fact when breweries and distilleries seek to gain direct shipment rights for themselves.¹⁶

I. Why Alcohol is in State Control—Danger to the Community and the Need for Quick Local Reponse

The Twenty-First Amendment gave the states control over alcohol regulation for various reasons, the most cited being that there is significant local variation in attitudes towards drinking.¹⁷ "[T]his nation is not a social unit with uniform ideas and habits... in a country as large as this,... heterogeneous in most aspects of its life and comprising a

General James C. Ho)(Ho: "As a constitutional matter... there is a huge difference between... every other product... and alcohol.").

¹⁴ *The Comprehensive Alcohol Regulatory Effectiveness (CARE) Act of 2010: Hearing on H.R. 5034 Before the United States House of Representatives Committee on the Judiciary*, 111th Cong. 164 (Sept. 29, 2010)(hereinafter "September 29, 2010 Hearing before the House Judiciary Committee")(statement of Michele Simon, then-Research and Policy Director, Marin Institute), available at http://judiciary.house.gov/hearings/printers/111th/111-152_58477.PDF (last accessed Dec. 18, 2011).

¹⁵ *Id.* at 164 (statement of Michele Simon, then-Research and Policy Director, Marin Institute).

¹⁶ "How can you call me an alcoholic? I only drink red wine,' said John Schwarzlose, quoting patients at the Betty Ford Center, the drug and alcohol rehabilitation center in Rancho Mirage, Calif. But 'this hard stuff' is a myth, said Mr. Schwarzlose, who is the center's chief executive. 'Alcohol is alcohol.'" Mireya Navarro, *Is a Wine-Soaked Film too, er, Rose?*, N.Y. TIMES, Feb. 20, 2005.

¹⁷ Del I. Hawkins, Don Roupe, and Kenneth A. Coney, *The Influence of Geographic Subcultures in the United States*, ADVANCES IN CONSUMER RESEARCH, Volume 8, pp. 713-17 (1981)(discussing how consumptive behaviors are dictated by American geographic subcultures), available at <http://www.acrwebsite.org/volumes/display.asp?id=5879> (last accessed Dec. 18, 2011); see also March 18, 2010 Hearing before the House Subcommittee on Courts and Competition, *supra*, note 10, at 143 (statements of U.S. Representative Steve Cohen (D-TN), and Pamela Erickson, Chief Executive Officer, Public Action Management).

patchwork of urban and rural areas, no common rule of conduct in regard to [the] powerful human appetite [for alcohol] could possibly be enforced.”¹⁸

Another reason that alcohol control was left to the states is because symptoms revealing abuse manifest first on a community and individual scale. The state, a smaller political unit than the nation, is thus more equipped to observe and address local alcohol problems as they arise.¹⁹ The public health costs caused by alcohol are well known. It is often warned, and statistics amply show, that alcohol is “no ordinary commodity.”²⁰ A 2011 report by the Centers for Disease Control reveals that, in the United States, approximately 79,000 deaths per year are caused by excessive alcohol consumption, while more than four million people visit the emergency room for alcohol-related conditions and 1.6 million are hospitalized.²¹ Communities plagued by alcohol abuse also suffer increased crime and divorce rates, reduced workforce productivity, and other social ills.²²

State authority over alcohol regulation allows for swift and effective correction of such problems as they arise. In September 2011, for example, the Nebraska Liquor Control Commission moved decisively to combat the chronic alcoholism taking root among the citizens of a remote part of the state. It designated the region an “alcohol impact zone.” On

¹⁸ Fosdick and Scott, *Toward Liquor Control* at 10.

¹⁹ *Id.* at 11.

²⁰ Thomas Babor et al.; *Alcohol: No Ordinary Commodity* (2003); see also Letter from Robert S. Pezzolesi, Founder and President, New York Center for Alcohol Policy Solution, to the United States House of Representatives Subcommittee on Courts and Competition Policy of the Committee on the Judiciary (Mar. 18, 2010)(“Alcohol is not a typical consumer product. It is the 3rd leading root cause of death in the U.S. and is responsible for over 4,500 underage deaths per year. . . Strong regulatory policies have been shown to reduce alcohol misuse and its consequences.”).

²¹ Letter from Harry Teter, Executive Director of the American Trauma Society, to the U.S. Congress regarding the CARE Act of 2011 (Apr. 7, 2011), available at http://thecareact.org/wp-content/uploads/2011/04/ATS_CARE_Act_Letter_to_Congress.pdf (last accessed Dec. 18, 2011).

²² *Alcohol-Attributable Deaths and Years of Potential Life Lost – United States, 2001*, MORBIDITY AND MORTALITY WEEKLY REPORT (Centers for Disease Control), Sept. 24, 2004, available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5337a2.htm> (last accessed Dec. 18, 2011).

the Commission's recommendation, legislators worked to tighten alcohol controls in the area.²³ In spite of the federal government's substantial resources, it is hard to imagine that it could be as quick to extinguish such local flames before they develop into bigger fires. In recognition of these benefits, the Twenty-First Amendment placed alcohol regulation within the jurisdiction of the states.

II. Toward Liquor Control: Regulating for Public Health

Toward Liquor Control stressed that, above all, states' regulatory efforts should promote public health.²⁴ Cautioning against an opportunistic view of the alcohol industry as a mere economic driver or a way to increase tax revenue, *Toward Liquor Control* made responsible consumption the lodestar of modern alcohol policy.²⁵ It outlined two regulatory frameworks a state could adopt for this purpose.

Under the Authority Plan, a state owns and operates alcohol retail outlets staffed by salaried government employees.²⁶ Today, eighteen States employ some variation of an Authority Plan, although these state retail monopolies tend to focus on liquors with relatively high alcoholic content.²⁷ Under the License System, which most states adopted, licensed private wholesalers and retailers are subject to extensive regulatory oversight.

²³ Grant Schulte, *Nebraska Lawmakers Mull Alcohol Problems in Whiteclay*, HOUSTON CHRONICLE, Sept. 16, 2011, available at <http://www.chron.com/news/article/Neb-lawmakers-mull-alcohol-problems-in-Whiteclay-2174626.php> (last accessed Dec. 18, 2011); see also March 18, 2010 Hearing before the House Subcommittee on Courts and Competition, *supra*, note 10, at 145 (Mar. 18, 2010)(statement of U.S. Representative Bobby Rush (D-IL)("Indeed, an effective tool of local neighborhoods in Chicago has been the ability to vote, through ballot referendum, an area 'dry.'").

²⁴ Fosdick and Scott, *Toward Liquor Control* at 16, 49.

²⁵ *Id.* at 107-8 (1933)("The fundamental objective [of alcohol regulation] should be not revenue but rational and effective social control.").

²⁶ These stores are commonly called ABC Stores, for "Alcohol Beverage Control" or "Alcohol Beverage Commission."

²⁷ Marin Institute, *State Control of Alcohol: Protecting the Public's Health 1*, available at https://www.marininstitute.org/site/images/stories/pdfs/controlstates_factsheet.pdf (last accessed Dec. 18, 2011).

Toward Liquor Control proposed “a single state licensing board, with state-wide authority and responsibility” for overseeing all aspects of alcohol access.²⁸

Upon adopting an Authority Plan or a License System, a state’s next step was to closely monitor alcohol sales in order to temper the amount of alcohol in its communities.²⁹ *Toward Liquor Control* listed various regulatory devices in this respect, including: (1) limiting the location and density of retail outlets to reduce geographical facility of purchase; (2) fixing retailers’ hours and days of permissible operation to reduce temporal facility of purchase; and (3) setting a price floor on alcoholic beverages.³⁰ States were urged to adopt strict bans against the sale of alcohol to minors, who are particularly vulnerable to alcohol abuse.³¹

Perhaps most innovatively, *Toward Liquor Control* insisted on three-tier alcohol distribution systems and a strict prohibition against “tied house” sales.³² A tied house is the vertical integration that occurs when a manufacturer sells its alcohol directly to consumers through a retailer that it either owns or controls. The centrality of the three-tier system to *Toward Liquor Control*’s program for curbing excessive access cannot be overstated. Prior to Prohibition, tied-house saloons were a widely-noted social problem, criticized for abetting drunkenness, alcoholism, gambling, and public disturbances.³³ As Fosdick and Scott put it,

²⁸ Fosdick and Scott, *Toward Liquor Control* at 41.

²⁹ *Id.* at 42.

³⁰ *Id.* at 81 (“The retail price level of alcoholic beverages not only determines profits, but also has a direct bearing on the amount of consumption... [accordingly, a state] “can use its price-making power as one of its most effective instruments of control.”).

³¹ *Id.* at 49 (“Rules are also necessary forbidding sales to minors, habitual alcoholics, paupers, mental defectives and to anyone who is drunk.”).

³² *Id.* at 43.

³³ March 18, 2010 Hearing before House Subcommittee on Courts and Competition, *supra*, note 10, at 22 (“Retail outlets were often owned by out-of-town people or out-of-state people who really didn’t care too much about the community values, they only were concerned about selling alcohol.”); *see also* Fosdick and Scott, *Toward Liquor Control* at 16 (“The saloon, as it existed in pre-prohibition days, was a menace to society

“[t]he manufacturer knew nothing and cared nothing about the community. All he wanted was increased sales.”³⁴ Under the three-tier system, by contrast, there would be sharp distinctions between (1) manufacturers that produce the beer, wine, or liquor; (2) distributors that buy alcoholic beverages from a manufacturer, and which must have an in-state presence; and (3) retailers that then buy alcoholic beverages from a distributor and market the product to end-use consumers, and which also must have an in-state presence.³⁵ Most states even prohibit manufacturers from “furnishing... buildings, bars, equipment or loans of money to a retailer.” lest the retailer feel beholden to its benefactor.³⁶

The three-tier system provides practical benefits to state regulators in their efforts to control communities’ alcohol levels. In her subcommittee testimony, Michigan Liquor Control Commissioner Nida Samona explained that the physical presence of distributors and retailers within state borders allows commission staff and local law enforcement officers “to ensure that in-state retailers and wholesalers are physically inspected and checked to verify that [the] regulatory system is being followed, that only approved alcoholic beverages are being sold, that alcoholic beverages are not being sold to underage persons, and that taxes are being paid.”³⁷ This oversight assures that distributors and retailers, whose licenses depend on compliance with the letter and spirit of the law, remain accountable to the public. As Samona explains, the three-tier system gives states “the ability and that power to bring [noncompliant] licensees in, to suspend them for a few days... , take away the license, to go

and must never be allowed to return. Behind its blinds degradation and crime were fostered, and under its principle of stimulated sales poverty and drunkenness, big profits and political graft, found a secure foothold. Public opinion has not forgotten the evils symbolized by this disreputable institution and it does not intend that it shall worm its way back into our social life.”).

³⁴ Fosdick and Scott, *Toward Liquor Control* at 43.

³⁵ *Manuel v. State of Louisiana*, 982 So. 2d 316, 330 (La. Ct. App. 2008).

³⁶ *Ted Sharpenter, Inc. v. Illinois Liquor Control Comm’n*, 518 N.E.2d 128, 175 (Ill. App. Dist. 1988).

³⁷ March 18, 2010 Hearing before House Subcommittee on Courts and Competition, *supra*, note 10, at 43 (statement of Nida Samona, then-Chairperson, Michigan Liquor Control Commission).

onsite...,” either through state or local police.³⁸ The three-tier framework thus injects transparency and accountability into the alcohol trade.

III. Access and Abuse: Toward Liquor Control Today

Nearly eight decades since the publication of *Toward Liquor Control*, it has become evident that strategic restrictions on a community’s access to alcohol promotes more responsible consumption. As epidemiologist Alexander Wagenaar concludes, “[i]f you make it easier to drink, people drink more. And if people drink more, we have more alcohol-related problems. It’s as simple as that.”³⁹ Indeed, in recent years, map technology called Geographic Information Systems (GIS) confirms correlations between locations of alcohol retailers and alcohol-related traumas like car accidents and violent crimes.⁴⁰ For example, researchers from Indiana University used such methods to predict that adding one off-premise alcohol sales site per square mile would cause 2.3 more simple assaults and 0.6 more aggravated assaults per square mile.⁴¹

Studies have similarly found that limiting *when* alcohol can be sold promotes responsible consumption. A study published in the *American Journal of Preventive Medicine* found a direct relationship between the number of hours when alcohol is available

³⁸ *Id.* at 46.

³⁹ Richard Mendelson, *Wine in America* 363 (2011)(citing articles written by the Marin Institute).

⁴⁰ Paul J. Gruenewald, Lillian Remer, and Rob Lipton, *Evaluating the Alcohol Environment: Community Geography and Alcohol Problems*, National Institute on Alcohol Abuse and Alcoholism (Aug. 2002), available at <http://pubs.niaaa.nih.gov/publications/arh26-1/42-48.htm> (last accessed Dec. 18, 2011); see also Campbell CA, Hahn RA, Elder R, et al., *The Effectiveness of Limiting Alcohol Outlet Density as a Means of Reducing Excessive Alcohol*, AMERICAN JOURNAL OF PREVENTIVE MEDICINE (Dec. 2009), available at <http://www.thecommunityguide.org/alcohol/EffectivenessLimitingAlcoholOutletDensityMeansReducingExcessiveAlcoholConsumptionAlcohol-RelatedHarms.pdf> (last accessed Dec. 18, 2011).

⁴¹ Lab Spaces, *More Alcohol Sales Sites Mean More Neighborhood Violence* (Feb. 2010), available at http://www.labspaces.net/102120/More_alcohol_sales_sites_mean_more_neighborhood_violence (last accessed Dec. 18, 2011); see also Martin Snapp, *City Rolls Out Virtual Images*, CONTRA COSTA TIMES, Aug. 11, 2006 (Berkeley, California’s Planning Department has used GIS to study crime data and existing liquor stores in assessing whether to grant additional retail licenses in a particular area.).

and the rate of car crashes, violence, assault and injuries.⁴² An outback population in Australia suffering high rates of alcoholism and family neglect established a “Feed the Children First” program, shutting down liquor stores on the day paychecks were typically issued. Statistics from the ensuing two-year period showed a 19.4% decrease in consumption, fewer arrests and hospitalizations, and a dramatic decrease in domestic violence rates.⁴³

The regulation of underage drinking is a major aspect of alcohol aspect policy.⁴⁴ The dangers of alcohol use by minors include poor school attendance and grades; development issues; unplanned and unprotected sexual activity; and alcohol-related car crashes.⁴⁵ Underage drinking also sets the stage for alcohol abuse later in life. The 2004 National Survey on Drug Use and Health revealed that people who first used alcohol before age fifteen were five times more likely to develop alcohol dependence in later years.⁴⁶ Some researchers attribute this effect to alcohol’s influence on neurodevelopment during a critical moment in an adolescent’s maturation process.⁴⁷

⁴² Hahn RA, Kuzara JL, Elder R, et al., *The Effectiveness of Policies Restricting Hours of Alcohol Sales in Preventing Excessive Alcohol Consumption and Related Harms*, AMERICAN JOURNAL OF PREVENTIVE MEDICINE (Dec. 2010), available at <http://www.ncbi.nlm.nih.gov/pubmed/21084080> (last accessed Dec. 18, 2011).

⁴³ Thomas Babor, et al., *Alcohol: No Ordinary Commodity* 123 (2003).

⁴⁴ The Substance Abuse and Mental Health Services Administration, *National Survey on Drug Use and Health: State Estimates of Underage Alcohol Use and Self-Purchase of Alcohol* (April 2010), available at <http://www.samhsa.gov/data/2k10/180/180UAD.htm> (last accessed Dec. 18, 2011).

⁴⁵ National Institute on Alcohol Abuse and Alcoholism, *Why Do Adolescents Drink, What are the Risks, and How Can Underage Drinking Be Prevented?* (Jan. 2006), available at <http://pubs.niaaa.nih.gov/publications/AA67/AA67.htm> (last accessed Dec. 18, 2011); Centers for Disease Control and Prevention, *Underage Driving Fact Sheet* (July 2010), available at <http://www.cdc.gov/alcohol/fact-sheets/underage-drinking.htm> (last accessed Dec. 18, 2011).

⁴⁶ The Substance Abuse and Mental Health Services Administration, *National Survey on Drug Use and Health: Alcohol Dependence or Abuse and Age at First Use* (Oct. 22, 2004), available at <http://www.oas.samhsa.gov/2k4/ageDependence/ageDependence.htm> (last accessed Dec. 18, 2011).

⁴⁷ National Institute on Alcohol Abuse and Alcoholism, *The Effects of Alcohol on Physiological Processes and Biological Development* (2004), available at <http://pubs.niaaa.nih.gov/publications/arh283/125-132.htm> (last accessed Dec. 18, 2011).

The three-tier system, which allows states to easily regulate access by policing the in-state operations of wholesalers and retailers, remains important in modern America. *Toward Liquor Control's* complaint that manufacturers had little investment in the communities where they market rings even truer in 2012. Most of the alcohol sold in contemporary America is manufactured by foreign multinational companies.⁴⁸ This makes the requirement that various elements of alcohol distribution have an in-state presence, and in the case of retailers a physical one, more crucial than ever. As Michele Simon recently observed, “[a]s this industry becomes more and more consolidated, more and more globalized, it is critical to be able to regulate as much as we can at the local level. And not just retailers, but wholesalers,” are instrumental to this project.⁴⁹ Again, the fact that distributors and retailers can lose their licenses if they fail to comply with state law assures their accountability. Distributors also serve a powerful *de facto* police function with respect to merchants operating farther down the retail line. Distributors “understand that overconsumption [and] serving to minors” hurts the entire industry and implicates their own livelihoods, inspiring industry self-regulation.⁵⁰

In sum, *Toward Liquor Control's* regulatory suggestions remain extremely relevant in 2012. There is voluminous anecdotal and empirical evidence that states can effectively regulate alcohol consumption by continually adjusting the number, location and hours of alcohol retail outlets, imposing strict bans on alcohol sales to underage consumers, and

⁴⁸ September 29, 2010 Hearing before the House Judiciary Committee, *supra*, note 14, at 159 (statement of Michele Simon, then-Research and Policy Director, Marin Institute).

⁴⁹ *Id.* at 159 (Sept. 29, 2010)(statement of Michele Simon, then-Research and Policy Director, Marin Institute).

⁵⁰ March 18, 2010 Hearing before the House Subcommittee on Courts and Competition, *supra*, note 10, at 145 (statements of Nida Samona, then-Chairperson, Michigan Liquor Control Commission).

adopting a three-tier framework to assure that in-state businesses responsibly adhere to the regulatory scheme.

IV. Direct Wine Shipment Laws: What is Gained and What is Lost

From 1986 to 2011, the number of States permitting direct shipment of wine to end-use consumers leapt from three to thirty-eight plus the District of Columbia.⁵¹ Some of the holdout states are likely to pass direct shipment laws soon. In particular, bills in Pennsylvania and New Jersey are poised to succeed.⁵² The direct shipment distribution model – whereby wine manufacturers leapfrog over wholesalers and retailers and sell directly to consumers – represents an obvious break from the three-tier system. The rise of direct wine shipment laws owes largely to the Internet and two related arguments: (1) that “consumer rights” entitle Americans to use e-commerce to gain expanded choices and lower prices when buying wine; and (2) that “fair competition” demands that small wineries be permitted to sell beverages online where they avoid wholesaler costs.⁵³

In a much-cited 2003 report, the Federal Trade Commission concluded that direct wine shipment increases consumers’ choices insofar as “retailers simply do not have the shelf space to carry thousands of different wine brands.”⁵⁴ This physical limitation on brick-and-mortar stores, combined with Americans’ increasing tendency for buying goods on the

⁵¹ Free the Grapes!, *Maryland Wine Lovers Rejoice as Governor to Sign Bill Allowing Wine Direct Shipments: 38th State to Allow Winery Direct Shipping*, May 5, 2011, available at <http://freethegrapes.com/sites/default/files/Maryland%20to%20be%2038th%20State.pdf> (last accessed Dec. 18, 2011).

⁵² Pennsylvania and New Jersey are among the most desirable holdout States to the winery lobby, as they are populous and therefore represent great market potential. Wine industry organizations have targeted Pennsylvania and New Jersey, as the two most populous remaining States with bans, in order to reach their constituents’ market reach from approximately 85% of the U.S. population to over 90%.

⁵³ Federal Trade Commission, *Possible Anticompetitive Barriers to E-Commerce: Wine 22-24* (July 2003)(hereinafter “FTC Report”), available at <http://www.ftc.gov/os/2003/07/winereport2.pdf> (last accessed Dec. 18, 2011).

⁵⁴ *Id.* at 24.

Internet, leads Desiree Slaybaugh to argue that, while the three-tier system may have been necessary in the past, “[t]imes have changed... [and] the expectations, as well as the rights, of the American consumer are different.”⁵⁵

The Wine Institute insists that direct shipment is indispensable to fair competition. The lobbying group calls self-distribution laws vital to “the continued growth of our industry. [These] methods are what many of our members have turned to in response to the economic downturn that has faced many businesses, large and small...”⁵⁶ U.S. Representative Mike Thompson (D-CA), a known champion of wineries’ rights, likewise asserts that the traditional system “unfairly hurts producers... [and] discriminat[es] against business...” Invoking the free market ethos that has made “our great country,”⁵⁷ Thompson predicts that “[i]f any other type of business found ways to provide consumers with better choices in a more efficient manner, we’d applaud them!”⁵⁸

Such rhetoric may have popular appeal, but alcohol regulation cannot be solely “left up to the desires of thirsty drinkers and profit-maximizing [manufacturers].”⁵⁹ Indeed, when it comes to advertising, the federal Bureau of Alcohol, Tobacco and Firearms actively polices statements by alcohol producers for failure to mention “any of the possible harmful

⁵⁵ Desiree C. Slaybaugh, *A Twisted Vine: The Aftermath of Granholm v. Heald*, 17 TEX. WESLEYAN L. REV. 265, 284 (Winter 2011); see also Specialty Wine Retailers Association, *What We Stand For*, (commenting that any adult consumer “should be allowed to legally purchase and have shipped to them any wine from any retailer in America”), available at <http://www.specialtywineretailers.org/standfor.html> (last accessed Dec. 18, 2011).

⁵⁶ Joint Letter from the Wine Institute and WineAmerica, to the U.S. Congress regarding the CARE Act of 2011 at 2 (March 24, 2010), available at <http://www.wineamerica.org/issuepolicy/docs/Wine%20Institute%20Wine%20America%20Comments%20Final%20on%20Letterhead.pdf> (last accessed Dec. 18, 2011).

⁵⁷ March 18, 2010 Hearing before the House Subcommittee on Courts and Competition, *supra*, note 10, at 17 (statement of U.S. Representative Mike Thompson (D-CA)).

⁵⁸ *Id.* at 20 (statement of U.S. Representative Mike Thompson (D-CA)).

⁵⁹

societal effects arising from the consumption of wine.”⁶⁰ And while wine advocates complain of regulators “tarring” their beverage of choice “with the same brush” as beer and liquor,⁶¹ wine’s alcohol content actually hovers between the two, and studies show that it is increasingly drunk apart from meals as a cocktail.⁶²

Toward Liquor Control warned States not to abdicate their duty to promote the public good by letting economic concerns drive alcohol regulation. Low alcohol prices and vigorous sales may please wine aficionados and businesspeople, but these are not responsible policy goals for society as a whole. U.S. Representative Bobby L. Rush (D-IL) insists, “[while] regulation or deregulation [is] viewed by many through the lenses of what is in the best ‘competitive interests’ of industry... [the] objective is not to protect wholesalers or hurt producers, but rather to protect the people of [the] community.”⁶³ In the sphere of alcohol regulation, public health should be a state’s primary concern, yet direct shipment unabashedly pits the “public interest versus the private sector.”⁶⁴

⁶⁰ In 1991, to present one memorable example, the federal Bureau of Alcohol, Tobacco and Firearms rebuked Mondavi Winery among others for labeling their bottles with the following text: “Wine has been with us since the beginning of civilization. It is the temperate, civilized, sacred, romantic mealtime beverage recommended in the Bible. Wine has been praised for centuries by statesmen, philosophers, poets and scholars. Wine in moderation is an integral part of our culture, heritage and gracious way of life.” The government called the prose misleading. Dan Berger, Wording of “Mission Statement” Disapproved, L.A. Times, Feb. 7, 1991, available at http://articles.latimes.com/1991-02-07/food/fo-700_1_mission-statement (last accessed Dec. 18, 2011).

⁶¹ Richard Mendelson, *From Demon to Darling* 3 (2009).

⁶² Paul Franson, *Survey Finds Most Wine Not Drunk With Meals*, NAPA VALLEY REGISTER, Mar. 24, 2011, available at http://napavalleyregister.com/lifestyles/food-and-cooking/wine/columnists/paul-franson/article_af77e26c-5692-11e0-9722-001cc4c03286.html (last accessed Dec. 18, 2011).

⁶³ March 18, 2010 Hearing before the House Subcommittee on Courts and Competition, *supra*, note 10, at 12 (statement of U.S. Representative Bobby L. Rush (D-IL)).

⁶⁴ September 29, 2010 Hearing before the House Judiciary Committee, *supra*, note 14, at 155 (statement of Nida Samona, then-Chairperson, Michigan Liquor Commission); see also Gina M. Riekhof and Michael E. Sykuta, *Politics, Economics, and the Regulation of Direct Interstate Shipping in the Wine Industry*, CORI WORKING PAPER NO. 03-04 (May 13, 2003)(discussing the politics of regulation, noting that public interests, described as maximizing social welfare, and private interests, described as private actors’ competition to gain or protect economic rents, are the two general rationales), available at <http://ageconsearch.umn.edu/bitstream/22136/1/sp03ri05.pdf> (last accessed Dec. 18, 2011).

Direct shipment clearly undermines the regulation of alcohol access. In effect, it reduces alcohol trade to an “honor system,” leaving states unable to determine with any certainty the volume of alcohol in a given locale.⁶⁵ Classic modes of access regulation, such as limiting retailer locations and hours of operation, lose tremendous force under a direct shipment regime. The possibility of closing retailers’ brick-and-mortar doors carries much less promise if Internet windows are wide open.

The problem of mailed alcohol’s invisibility may be especially grave for underage drinkers. How can direct shippers know that their customers are over twenty-one? Online sellers’ age-verification procedures “are easy to foil by simply saying one was born in 1900 or thereabouts.”⁶⁶ The real responsibility for verifying age, then, falls to the men and women who deliver alcohol as FedEx or UPS employees. In 2010, Maryland’s Comptroller proposed the following “best practices”:

- (1) Requir[ing] a permit for a common carrier delivering wine directly shipped to a consumer;
- (2) Requir[ing] both the direct wine shipper and common carrier to affix a shipping label to the package with the following statement: “CONTAINS ALCOHOL; SIGNATURE OF PERSON AGE 21 OR OLDER REQUIRED FOR DELIVERY.”;
- and (3) Requir[ing] a common carrier to obtain an adult signature using age verification procedures.⁶⁷

David A. Kessler, former Food and Drug Administration Commissioner, has little faith that such best practices will be carried out. “It defies credibility to suggest alcohol retailed

⁶⁵ March 18, 2010 Hearing before the House Subcommittee on Courts and Competition, *supra*, note 10, at 141 (Mar. 18, 2010)(statement of Nida Samona, then-Chairperson, Michigan Liquor Control Commission).

⁶⁶ Richard Mendelson, *Wine in America* 143 (2011).

⁶⁷ Comptroller of Maryland, *Direct Wine Shipment Report, Submitted to the Maryland General Assembly* 66-69 (Dec. 31, 2010)(hereinafter “Maryland Comptroller Report”), available at http://www.comp.state.md.us/DWS_Complete.pdf (last accessed Dec. 18, 2011).

online... , beyond the reach of local regulators, and often left on doorsteps, does not significantly increase the risk of underage consumption.”⁶⁸

The FTC’s report noted that direct shipment states report no underage abuse,⁶⁹ but this finding only “begs the question: How is this known?”⁷⁰ The answer, unfortunately, is that when alcohol is trafficked under cover of mail, states *cannot* know.⁷¹ In New York, according to State Liquor Authority Chairman Dennis Rosen, “[o]ther than issuing [delivery permits to common carriers] and having the threat of revoking the permit, there is no way we’re monitoring” delivery of direct wine shipments.⁷² Michigan’s Nida Samona confirms that states simply do “not have the ability or financial resources to effectively regulate hundreds of thousands of out-of-state retailers.”⁷³

Direct shipment’s exception to the three-tier distribution system threatens to swallow the rule. Breweries and distilleries may seek to replicate the same distribution model for their products using the same arguments. Alaska, Virginia, New Hampshire, North Dakota and Washington, D.C. all already have some kind of direct beer shipment law on their books. Once consumers get used to buying wine on the Internet, they will also expect the “right” to buy other kinds of alcohol in the same way.⁷⁴ The Beer Institute has insisted that

⁶⁸ Letter from David A. Kessler, MD, former FDA Commissioner and Professor of Pediatrics, to United States Representative Jason Chaffetz (R-UT)(June 13, 2011)(on file with author).

⁶⁹ FTC Report, *supra*, note 53, at 3-4.

⁷⁰ Maryland Comptroller Report, *supra*, note 67, at 68.

⁷¹ September 29, 2010 Hearing before the House Judiciary Committee, *supra*, note 14, at 152 (statement by Michele Simon, Marin Institute: Direct shipment of alcohol “undermines the ability of states to fully account for the sale of alcohol within its borders”.)

⁷² *Economic Development Oversight: Hearing before the New York General Assembly Committee on Oversight, Analysis and Investigation*, 31 (Oct. 25, 2011)(hereinafter “October 25, 2011 Hearing before N.Y. General Assembly Oversight Committee”)(transcript on file with author).

⁷³ March 18, 2010 Hearing before the House Subcommittee on Courts and Competition, *supra*, note 10, at 145 (statement of Nida Samona, then-Chairperson, Michigan Liquor Control Commission).

⁷⁴ Desireé C. Slaybaugh, *A Twisted Vine: The Aftermath of Granholm v. Heald*, 17 TEX. WESLEYAN L. REV. 265, 284 (Winter 2011); see also Specialty Wine Retailers Association, *What We Stand For*, (commenting that any

its member breweries are not interested in direct shipment rights, but one doubts that smaller craft breweries will not make the same fair competition argument as small wineries, or that craft beer drinkers will not make the same varietal demands as wine aficionados.⁷⁵

V. *Granholm Makes Matters Worse*

Early on, many states passed direct shipment laws in order to benefit only local wineries. Michigan and New York were two such states, and eventually they were sued in federal court for violating Congress' plenary power to regulate interstate commerce.⁷⁶ The litigation eventually found its way to the U.S. Supreme Court in *Granholm v. Heald* in 2005. Though the Court acknowledged that Section 2 of the Twenty-first Amendment vests the states with broad powers to regulate alcohol within their borders, it held that this authority cannot be wielded simply "to discriminate against out-of-state goods."⁷⁷

Granholm wrought a seismic change in state alcohol regulation. Most states complied with the decision by expanding direct wine shipment permissions, punching an even bigger hole in their three-tier systems than they had originally intended. Moreover, *Granholm* also provoked one of the heaviest outbreaks of alcohol-related litigation since Prohibition, inspiring a wave of industry players to challenge other state alcohol regulations

adult consumer "should be allowed to legally purchase and have shipped to them any wine from any retailer in America."), available at <http://www.specialtywineretailers.org/standfor.html> (last accessed Dec. 18, 2011).

⁷⁵ Legal Libations, *Direct Shipment and Beer*, available at <http://www.legalibations.com/2010/03/direct-shipping-beer.html> (last accessed Dec. 18, 2011).

⁷⁶ The Commerce Clause holds that "Congress shall have Power... [t]o regulate Commerce among the several States." U.S. Cons. Art. I §, cl. 3. The Supreme Court has held that the Commerce Clause has a negative aspect, called the "dormant Commerce Clause," which effectively means that Congress' authority over interstate commerce is so plenary that even when it has not acted in some related arena, the States still may not unjustifiably burden the interstate flow of articles of commerce. *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996) ("In its negative aspect, the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.") (internal quotations omitted).

⁷⁷ *Granholm v. Heald*, 544 U.S. 460 (2005).

on similar constitutional grounds.⁷⁸ This placed a colossal burden on state resources. Costco's extended litigation against Washington, for instance, cost the state approximately \$1.5 million despite the fact that Costco lost on the majority of its claims.⁷⁹ Such expenditures have made states hesitant to defend challenged regulations.⁸⁰ Michigan became a prime example of this phenomenon when, in *Siesta Village Market, LLC v. Granholm*, a Florida wine retailer attacked a law allowing only in-state retailers the right to deliver wine to customers.⁸¹ At first blush, the law's "in-state requirement to deliver" suggests similarities to the law struck down in *Granholm*, but there is a critical difference between the cases. In *Granholm*, which involved out-of-state *producers*, the Supreme Court found that the "unquestionably legitimate" three-tier system has never required producers to have an in-state presence. *Siesta Village*, by contrast, involved out-of-state *retailers*, whose in-state presence has always been a *sine qua non* of the three-tier system. Without regard to this important distinction, the district court in *Siesta Village* held Michigan's in-state presence requirement for retailer deliveries unconstitutional.

⁷⁸ March 18, 2010 Hearing before the House Judiciary Committee, *supra*, note 10, at 160 (Mar. 18, 2010)(statement of Stephen M. Diamond, Professor of Law, University of Miami).

⁷⁹ *Id.* at appendix (open letter from Jim Petro, former Ohio Attorney General, and Tom Reilly, former Massachusetts Attorney General, entitled *The Need for Congress to Support State Alcohol Regulation with H.R. 5034*)(stating the chilling effect threat posed by a federal district court's decision that Washington State owed big-box store Costco \$1.5 million in attorney's fees after Costco was named the "prevailing party" in a litigation it initiated, and in which it had only won 2 out of 9 arguments).

⁸⁰ Letter from thirty-nine State Attorneys General to U.S. Representative Hank Johnson (D-GA), Chairman of the House Subcommittee on Courts and Competition Policy (Mar. 29, 2010)(on file with the author)(observing that "[w]ith states around the country experiencing massive budget shortfalls, [this tends to] have a chilling effect on states' ability and willingness to defend their alcohol laws").

⁸¹ *Siesta Village Market, LLC v. Granholm*, 596 F. Supp. 2d 1035 (E.D.Mich. 2008).

Siesta Village probably would not be upheld on appeal.⁸² In two later cases, U.S. Courts of Appeal upheld similar in-state retailer delivery statutes. In *Arnold's Wines, Inc. v. Boyle*, the Second Circuit held that New York's law made "no distinction between liquor produced in New York and liquor produced out of the state: both may be shipped directly to New York consumers by licensed in-state retailers."⁸³ The Fifth Circuit similarly upheld a Texas law in *Wine Country Gift Baskets.com v. Steen*, noting that "[t]he traditional three-tier system, seen as one that funnels the product, has an opening at the top available to all."⁸⁴ Despite the apparent strength of Michigan's case in *Siesta Village*, the state chose to repeal its law and save litigation costs rather than fight the decision.⁸⁵

Businesses have also raised constitutional claims against facially neutral direct wine shipment regulations like gallonage caps, with conflicting results. States have set gallonage caps in order to focus direct shipment laws' benefits on their originally intended recipients – small wineries without sufficient resources to participate in more traditional markets. Massachusetts, for example, had granted small wineries – statutorily defined as producers of under 30,000 gallons of wine each year – the right to ship more wine than large wineries. Then the First Circuit held in *Family Winemakers of California v. Jenkins* that this restriction unduly burdened interstate commerce because the gallonage cap conferred a competitive advantage on Massachusetts wineries, all of which qualified as small wineries

⁸² September 29, 2010 Hearing before the House Judiciary Committee, *supra*, note 14, at 157 (statement of Einer Elhauge, Professor of Law, Harvard University)("I have some sympathy [for Michigan], because [it] suffered from the *Siesta Village* district court case, which I think was wrongly decided.").

⁸³ *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 190 (2nd Cir. 2009)(citing *Granholm*, 544 U.S. at 493).

⁸⁴ *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 815 (5th Cir. 2010).

⁸⁵ September 29, 2010 Hearing before the House Judiciary Committee, *supra*, note 14, at 73-74 (statement of Nida Samona, then-Chairperson of Michigan Liquor Control Commission).

under the law.⁸⁶ By contrast, the Ninth Circuit upheld an Arizona gallonage cap law in *Black Star Farms LLC v. Oliver*, where the plaintiff could not prove an “actual discriminatory effect” on interstate commerce.⁸⁷ In fact, the court observed that more out-of-state wineries had acquired direct shipment licenses than in-state wineries under the challenged law.⁸⁸

Face-to-face age verification laws have also confronted legal challenges, again with mixed results. In *Baude v. Heath*, the Seventh Circuit upheld an Indiana requirement that in-state and out-of-state wineries conduct one face-to-face age verification with a customer before directly shipping wine to his or her home.⁸⁹ The Seventh Circuit conceded that Indianans could more easily visit an Indiana winery in person than a California one, but ultimately found that Indiana wineries did not accrue any meaningful benefit. For many Indianans, the Court observed, the closest winery to their home would be in Michigan, Illinois, Kentucky or Ohio.⁹⁰ When Kentucky enacted a similar law, however, the Sixth Circuit struck it down in *Cherry Hill Vineyards, LLC v. Lilly*.⁹¹ The Court found that the requirement “[made] it economically and logistically infeasible for most consumers to purchase wine from out-of-state small farm wineries.”⁹²

This array of post-*Granholm* litigation shows how nearly identical state alcohol regulations – whether they deal with in-state retailer deliveries, gallonage caps, or face-to-face age verifications – have met with very different fates. Faced with unpredictability,

⁸⁶ *Family Winemakers of California v. Jenkins*, 592 F.3d 1, 11 (1st Cir. 2010).

⁸⁷ *Black Star Farms LLC v. Oliver*, 600 F.3d 1225 (9th Cir. 2010).

⁸⁸ *Id.* at 1232.

⁸⁹ *Baude v. Heath*, 538 F.3d 608 (7th Cir. 2008).

⁹⁰ *Id.* at 613.

⁹¹ *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 424 (6th Cir. 2008).

⁹² *Id.* at 433.

states become hesitant to regulate alcohol trade and to defend those regulations they have already adopted. In ways that go beyond its specific holding, *Granholm* continues to be a major tool of alcohol deregulation.

VI. The CARE Act: Restoring State Regulatory Authority Over Alcohol

To date, approximately thirty-five challenges to state alcohol regulation have been brought under *Granholm*.⁹³ In an effort to curb this disturbing record, U.S. Representative Bill Delahunt (D-MA) introduced the Comprehensive Alcohol Regulatory Act of 2010 (the CARE Act). Reintroduced by Representative Jason Chaffetz (R-UT) in 2011, the law would allow the states to avoid the Commerce Clause's non-discrimination requirement. States would be able to allow in-state producers to do things that out-of-state producers cannot, provided:

[they] can demonstrate that the challenged law advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.⁹⁴

In other words, the CARE Act of 2011 seeks “to recognize and reaffirm that alcohol is different from other consumer products and that it should continue to be regulated by the [s]tates” in the absence of a specific federal law on an alcohol-related issue.⁹⁵ The Act has widespread support. At this writing, the current version of the bill has 116 co-sponsors in the House of Representatives.⁹⁶

⁹³ September 29, 2010 Hearing before the House Judiciary Committee, *supra*, note 14, at 63 (statement of the Hon. Mark L. Shurtleff, Utah Attorney General).

⁹⁴ H.R. 1161, 112th Cong. (2011), available at <http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.5034>: (last accessed Dec. 18, 2011); see also Susan Lorde Martin, *Wine Wars: Consumers and Mom-and-Pop Wineries vs. Big Business Wholesalers: A Citizens United Example*, 21-FAL Kan. J.L. & Pub. Pol'y 1, 20 (2011).

⁹⁵ H.R. 1161, 112th Cong. (2011), available at <http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.5034>: (last accessed Dec. 18, 2011).

⁹⁶ *Id.*

VII. Public Health's Dwindling Role in the Alcohol Regulation Debate

The CARE Act, however great its benefits, will not cure all that ails contemporary state alcohol regulation. *Granholm* certainly weakened states' regulatory armor and galvanized wine industry players to attack the alcohol laws on a rarely-seen scale. But there is another threat to meaningful alcohol regulation that has nothing to do with *Granholm*: States' complicity in deregulation. This complicity is evident in the absence of public health considerations from political debate on these laws.

Again, *Granholm* gave states a choice.⁹⁷ They could either “terminat[e] all direct-to-consumer wine shipments, whether in- or out-of-state,” or “open up the market to all out-of-state wine shipments.”⁹⁸ The vast majority of the states chose the latter path, a decisive move toward a different alcohol distribution model than traditional brick-and-mortar retail outlets.

The shift reflects the increasing centrality of consumer choice, product affordability, and small-business growth as driving arguments in alcohol regulation. Gina Riekhof and Michael Sykuta's much-cited 2003 study on legislative motivations behind direct shipment laws concluded that “private economic interests appear to play a dominant role.”⁹⁹ They found that “[n]o evidence supports general public interest motivation.”¹⁰⁰ This research was actually a boon to wineries challenging discriminatory direct shipment laws, as it stood for

⁹⁷ Maryland Comptroller Report, *supra*, note 67, at 27 (“It is important to keep in mind that *Granholm* does not require states to enact direct wine shipment laws, but it does prohibit states who have enacted direct wine shipment laws from discriminating between in-state and out-of-state wine producers unless legitimate State justifications can be demonstrated.”).

⁹⁸ Garrett Peck, *The Prohibition Hangover* 151 (2009); see also *Granholm*, 544 U.S. at 493.

⁹⁹ Gina M. Riekhof and Michael E. Sykuta, *Politics, Economics, and the Regulation of Direct Interstate Shipping in the Wine Industry*, CORI WORKING PAPER NO. 03-04 (May 13, 2003), available at <http://ageconsearch.umn.edu/bitstream/22136/1/sp03ri05.pdf> (last accessed Dec. 18, 2011).

¹⁰⁰ *Id.* at 4.

the proposition that the burden they imposed on interstate commerce could not be justified by anything other than bias against out-of-state goods.¹⁰¹

Maryland is now the most recent state to pass a direct shipment law, and serves as an example of how secondary public health has become in debate surrounding such legislation.¹⁰² Prior to the law's enactment in May 2011, the Maryland Comptroller published a 237-page report that, making perfunctory mention of the costs of alcohol-related injury and illness, does not assess the regulatory impact of mailed alcohol's invisibility.¹⁰³ Its only in-depth access discussion deals with direct shipment's age-verification problem.

New York is another case where public health was an afterthought in the direct wine shipment debate. New York convened an October 2011 hearing to examine the effects of its existing direct shipment law. State Liquor Authority Chairman Dennis Rosen acknowledged that his state conducts no sting operations to police Internet alcohol sales. Instead, law enforcement is complaint-driven, but "[t]here haven't been a lot of complaints."¹⁰⁴ Nonetheless, Rosen expressed "no doubt... that there are violations being committed" far beyond what the few complaints suggest.¹⁰⁵ The inadequacy of complaint-based enforcement is unsurprising. As Assemblyman Andrew Hevesi observed, "if you're the underage drinker... you're not going to complain," and the common carrier isn't going to

¹⁰¹ *Granholm*, 544 U.S. at 489-91.

¹⁰² Free the Grapes!, *Maryland Wine Lovers Rejoice as Governor to Sign Bill Allowing Wine Direct Shipments: 38th State to Allow Winery Direct Shipping*, May 5, 2011, available at <http://freethegrapes.com/sites/default/files/Maryland%20to%20be%2038th%20State.pdf> (last accessed Dec. 18, 2011).

¹⁰³ Richard Mendelson, *Wine in America* 386 (2011)(When weighing a change to alcohol regulation, "[t]he guiding principle should be to assess the full set of effects before adopting the measure, lest it have unintended consequences...").

¹⁰⁴ October 25, 2011 Hearing before N.Y. General Assembly Oversight Committee, *supra*, note 72, at 20.

¹⁰⁵ *Id.*

complain either.¹⁰⁶ The problem extends beyond New York. When the Federal Trade Commission studied the issue in 2003, it submitted a questionnaire to the states on age verification.¹⁰⁷ Of the ten states that responded, all confessed that they do not conduct sting operations, and have no reliable data on purchases by minors.¹⁰⁸

VIII. Conclusion

The movement to allow direct wine shipment has enjoyed success in nearly all of the United States. Most remaining states are likely to follow suit. They sit in the crosshairs of a sophisticated lobbying campaign whose mantras are consumer entitlement and free enterprise. Proponents of direct shipment play down wine's potential for abuse and capitalize on wine's deceptively rosy reputation relative to beer and liquor. The state's paramount interests in public health and responsible consumption are thus minimized in debates over direct shipment, and have been compromised by the laws themselves. With the political stage set for further efforts toward deregulation, and particularly direct shipment of beer and liquor, it is all the more important to learn from history and experience. *Toward Liquor Control* is a major repository of that wisdom. Emphasizing the relationship between access and abuse, Fosdick and Scott set the framework for decades of effective regulation. That framework should be preserved.

¹⁰⁶ *Id.* at 32.

¹⁰⁷ FTC Report, *supra*, note 53, at appendix (Colorado: "We do not have any specifics of shippers shipping directly to minors. Our enforcement posture has been to respond to complaints and not take proactive actions such as stings."); Hawaii: "No, at least not to our knowledge. No we do not conduct stings.").

¹⁰⁸ *Id.*

**Fermented Origins: The Emergence of State-Level Alcoholic Beverage Regulation
in the Post-Prohibition Era, 1933-1935**

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Historical, political, and sociological explorations of the regulation of alcohol in America have overwhelmingly focused on the experience of prohibition. The questions of how and why national prohibition was passed, as well as how and why it was repealed continue to dominate the academic discourse on alcohol control. However, the repeal of national prohibition in 1933 was, arguably, but a precursor to the most formative years of American alcohol control. In the short period between 1933 and 1935, states were forced to consider the question of how best to manage and regulate the production, sale, and distribution of alcohol, a substance which had polarized American society for the previous three decades. Every state, outside of those who retained their own prohibition laws, adopted either a monopoly or a license system of alcohol regulation. These regulatory systems, importantly, have remained in place for over seventy years and continue to shape and define American alcohol control today.

This project is the first step toward better understanding the original motivations, aims, and rationale behind the adoption of these regulatory systems by individual state legislatures. Aside from a broad view of which states created what kinds of systems, scholars have not looked carefully at how and why states chose their respective regulatory model. These systems were not adopted within a vacuum; rather, they were the product of particular social, political, and economic pressures and considerations. What factors influenced a state's decision to adopt one type of regulatory model over another? How can we explain the observed variation and similarities in state regulatory systems? In this paper, I begin to answer these questions through an analysis of the causal patterns which distinguish and characterize the groups of states employing each type of scheme.

The difference between these two systems is not inconsequential. Regulation, in addition to promoting public policy goals, helps to establish winners (and losers) in markets (Gormley 1983; Gerber and Teske 2000). In the case of alcohol regulation, the chosen form of control has serious implications for actors in every step of the production, distribution, and retail processes. Although

few states have changed their system of regulation, a framework adopted over seven decades ago is not necessarily the most rational, efficient, or economically productive option for managing the sale and distribution of alcohol today. This issue has received increasing attention at the state and national levels, with big box supermarkets like Costco aggressively lobbying for new systems. Indeed, as recently as November of 2011 Washington abolished its monopoly system and replaced it with a modified license system. Keeping in mind that the systems being debated today were established more than seventy years ago, a better understanding of the conditions and processes which produced each system, as well as the issues individual states intended them to address, can make valuable contributions to contemporary policy debates.

More importantly, detailing the causal combinations and processes which led to the adoption of each model can contribute to general theory and research about power structures. While several prominent studies examine decision making processes of the federal government (Mills 1956; Block 1977; Skocpol 1980; Gilbert and Howe 1991; Burstein 1998) and intergovernmental organizations (Polsby 1960), far less work has been done to explore regulatory decisions taken by individual states within a national context (Gerber and Teske 2000). The case of state-level alcohol regulation presents a unique opportunity to examine how and why individual state legislatures make important decisions. The work of Levine (1984) and Rumbarger (1987) provide a framework based around power elite theory within which to understand the general origins of the post-prohibition systems of alcohol regulation, but there has yet to be an analytically rigorous examination of the forces and motivations shaping individual states' choices of regulatory model. This study fills in these gaps and draws new conclusions about the workings of power in lawmaking at the state level.

To identify pathways to license and monopoly systems of alcohol regulation, I employ a comparative analysis of every state that legalized alcohol sales between 1933 and 1935 ($N=40$). More specifically, I use a fuzzy set qualitative comparative analysis (fsQCA) in order to identify

broadly applicable complex causal combinations unattainable with mid-n samples using an exclusively case-based methodology. I draw primarily from state-level demographic data reported in the 1930 U.S. Population Census and the 1936 Census of Religious Bodies, including national heritage, population distribution, and religious denomination. I also use additional state-level data reported by the Internal Revenue Service, such as the prevalence of bootlegging seizures during prohibition, the ratio of state to federal bootlegging arrests during prohibition, and the prevalence of the alcohol industry just prior to prohibition.

My study shows that while the emergence of two universally adopted models of alcohol regulation was largely the design of capitalist elites such as John Rockefeller and Pierre du Point, state-level variation in regulatory adoption was the result of a more complex process. I argue that there were multiple pathways at the state-level to each regulatory outcome and that, consistent with the traditions of pluralist and state autonomy theories, these pathways often reflected state population and government preferences. Through my analysis, I offer new insights into the relationship between national and state-level power structures, suggesting that there exists a hegemonic, unipolar relationship between elite generated priorities and agendas at the national level and pluralist based legislative processes at the state level. I conclude by outlining the limits of this study and providing potential avenues for future research.

THEORETICAL CONSIDERATIONS

Theories of power structure provide a strong framework for understanding what groups and forces helped to shape the distribution of alcohol laws in the United States. Power structure research has two goals: (1) to identify who is in power and (2) to explain how those in power perpetuate their power through their influence on the political institutions that regulate and structure economic life (Peoples 2009: 4). The power structure literature deals primarily with the debate over what role

class-based groups play in the actions and decisions of governments. From this debate three central competing theories have emerged to help explain how and why governments take specific actions: elite/class theory, pluralist theory, and state autonomy theory. In the following section I review each of these theoretical groupings and outline gaps and weaknesses in the power structure literature. I overlay these perspectives with theories of pre-prohibition regulatory variation and post-prohibition regulatory origin, drawing out variables consistent with each power structure perspective which might help to explain the observed variation in state-level systems of alcohol regulation.

Theories of Power Structure

Articulated first by Hunter (1953) and Mills (1956), elite/class theory holds that big business and its associated wealthy individuals dominate government. Hunter's (1953) study on community power structure in Atlanta demonstrated that powerful local politicians are either members of the big business class or are closely connected to it. This exclusivity, he argued, promotes one bloc of interests (big business, in particular) and precludes the average citizen from decision making processes (Hunter 1953: 233). Similarly, Mills (1956) showed that there is significant overlap between big business and the most powerful political actors in American society. Expanding the scope of Hunter's (1953) thesis to the national level, Mills (1956) argued that the highest decision making posts in American economic, political, and military institutions are controlled by a small group of interconnected actors. This group, which he labeled the 'power elite,' exerts a vastly disproportionate amount of influence over crucial policy decisions, and in so doing promotes policies which most benefit its own interests (Mills 1956: 4). In later years, others argued more explicitly that big business exerts a *direct* influence on policy and policymakers (Domhoff 1967, 1980, 1990 and Miliband 1969).

Critics of elite/class theory contend that no single set of interests dominates the government. Pluralist theory, one alternative school of thought, suggests that the government is a "neutral arena

open to societal influence” (Gilbert and Howe 1991: 205). Rooted in ideal conceptions of representative democracy (Peoples 2009), pluralist theory argues that pressure on governmental decision making is diffuse, and that no one bloc exerts greater influence than another; that is, the majority rules. From this perspective, elite/class and state autonomy theories ignore the *social* nature of state institutions and policy intellectuals (Gilbert and Howe 1991: 218). “Democratic governments often do what their citizens want, and they are especially likely to do so when an issue is important to the public and its wishes are clear,” (51) writes Burstein (1998). There are, therefore, multiple centers of power within society. This is an important contention, one which the competing power structure perspectives largely disregard.

A third and final perspective, state autonomy theory, argues that state actors are the dominant force in decision making. In a direct rebuke of the other two schools of power structure research, state autonomy theory emphasizes the independent nature of the state and contends that individuals are central to governmental decision making. That is, predominant power is located in the government, not in the general citizenry or a dominant social class. Block (1977), for instance, argued that “the ruling class does not rule” (59). While the interests of state actors often correspond with those of big business, he suggested, the autonomy of state managers leads them to decide against big business when their interests do not correspond. Skocpol (1980, 1992) hardened this line of thinking, arguing in more direct terms that government bodies and their members hold almost exclusive power over decision making processes.

State-level alcohol regulation provides an especially important case for testing these perspectives. In particular, it can provide insight into the way in which power manifests itself within the federal system of American governance. Regulatory decisions and responsibilities are often delegated to the individual states. Although the ultimate power of selection lies in the hands of state legislatures, there are a host of influences, both at the state and national level, which can affect state-

level regulatory outcomes (see Gerber and Teske 2000). In looking more closely at the post-repeal regulation of alcohol—a *nationally and locally prominent issue*—each power structure perspective can be tested at the national *and* state levels, providing insight into which actors (i.e. elites, governments, citizens) influence what dimensions of the federal system of power and, more importantly, how they interact.

Alcohol Regulation: Origins and Variation

Levine (1987) and Rumbarger (1984) argue that the national origins of post-prohibition alcohol regulation fit within a framework of power elite theory. Both scholars indicate that the repeal of federal prohibition was the result of a push from the political and economic elite to protect their interest in an ordered and sedate society. Not surprisingly, the two models of alcohol regulation popularized after repeal were designed by this same power elite and meant to manufacture the respect for legal order which had been eroded during the previous 15 years of prohibition. “State legislators faced with difficult political choices, and with little personal expertise in the subtle question of liquor regulation,” writes Levine (1984), “turned to the authoritative and virtually unchallenged plans of the Rockefeller commission and the National Municipal League,” (27) the main disseminators of the elites regulatory designs.

This hypothesis, however, in attributing the origins of alcohol regulatory systems to the power elite does not account for the variation between states, either in the form of their adopted regulatory model or in the severity of their individual regulations (e.g. where alcohol can and cannot be sold). This top-down approach is such that the differences between states’ regulatory schemes are smoothed over in favor of an emphasis on common origins. Yet, the very presence of regulatory variation inherently suggests that states perceived these systems as materially different, and that they had different reasons and rationales for adopting each framework. If the two available models of alcohol regulation were designed and propagated by a relatively homogenous power elite, then might

variation in the form and severity of these systems between states be attributable to them as well, or is this variation better understood as the result of state-level government preferences (state autonomy theory) or diffuse popular pressures (pluralist theory)?

The broader literature on alcohol regulation, focusing on both pre- and post-prohibition outcomes in more state-oriented terms, suggests that variation in regulatory forms is best explained by pluralist and state autonomy theories. Studies of *post*-prohibition regulation generally assume¹ that variation in post-repeal regulatory outcomes is attributable to the presence or absence of two specific factors.² The first is geographical proximity to Canada. It is assumed that the Canadian experience with state-run dispensaries made a strong and favorable impression on many states, especially those bordering Canada. “A large number of persons in the upper tier of states,” argue Harrison and Laine (1936), “were well acquainted with the experience of Canadian provinces in handling liquor” (109). This familiarity acted as an important influence on states that adopted monopoly systems of regulation (Barker 1955; Denny 1950; Martin 1960; Mead 1955; Rorabaugh 2009). The second factor is favorable attitudes toward prohibition. Harrison and Laine (1936) again suggest that the presence of anti-liquor voting sentiment was equally important to a state’s choice of regulatory model. The more adverse a state’s population was toward the repeal of national prohibition, they argue, the more likely it was to adopt a monopoly framework of regulation (see also Barker 1955; Bolotin 1982; Frenreis and Tatalovich 2010; Kerr and Pennock 2005; Mead 1955; Rorabaugh 2009).

Similarly, empirical studies of *pre*-prohibition regulation suggest that variations in local regulatory outcomes (i.e. “wet” or “dry” areas) prior to passage of the Eighteenth Amendment were

¹ These studies, importantly, have not *empirically proven* these hypotheses.

² License frameworks are treated as an outcome undeserving of explanation. However, understanding how states arrived at license schemes is equally important; it can provide further insight into power structures as well as more fully explain regulatory variation.

attributable to three specific factors. Although neither the monopoly nor license framework closely resembles a pre-prohibition dry regime, it is widely held (Harrison and Laine 1936; Martin 1955; Mead 1950; Frensdreis and Tatalovich 2010) that the latter scheme was perceived by states as a cautious *alternative* to prohibition. As such, variables associated with pre-prohibition dry frameworks as well as the national temperance movement can suggest explanations or pieces of explanations for post-repeal regulatory outcomes.

In his classical study of prohibition, Gusfield (1963) argues that the debate over drinking and nondrinking was ‘status’ politics. National prohibition, he writes, was “a high point of the struggle to assert the public dominance of middle-class values; it established the victory of Protestant over Catholic, rural over urban, tradition over modernity, the middle class over both the lower and upper strata” (Gusfield 1963: 7). Building on this hypothesis, several other scholars (Buenker 1973; Kleppner 1970; Lewis 2002; Sinclair 1962) have shown that the distribution of dry laws at the state and county level prior to prohibition closely mirrored the distribution of those cultural and religious groups identified by Gusfield. “Although the dries by April of 1917 could point to the impressive fact that twenty-six states had adopted prohibition, these states were primarily in the rural South and West,” (495) writes Hohner (1969). In contrast, the northeastern U.S. was the region with the highest concentrations of Catholic, foreign and urban populations, and the one region that did not enact many statewide prohibition laws (Buenker 1973). Taken together, previous scholarship has consistently shown that the presence of state-level prohibition and local dry laws was closely related to the prevalence of rural, native-born, and pietistic Protestant populations, and that the absence of such laws was closely related to the prevalence of urban, ritualistic Catholic, and foreign born populations (Odegard 1928; Lewis 2002; Pegram 1992; Timberlake 1963).

Importantly, researchers have yet to integrate the disparate literatures on alcohol regulatory *origin* and alcohol regulatory *variation* into a coherent theoretical framework. That is, scholars have

examined either commonality across states or variation between states, but never the way in which both fit together. In connecting these two bodies of literature, I hypothesize that power at the national level—wielded by capitalist elites—set a broader agenda on alcohol regulation, identified key issues of importance, established a shared vocabulary, and provided ready-made models for alcohol regulation, and that power at the state level—wielded in large part by the citizenry—was nested within this national discourse but ultimately free to choose how alcohol was going to be regulated. In so doing, state populations were given the impression of democratic choice, even though they were, in fact, selecting from a limited universe of systems and participating in a debate already shaped and defined by the national power elite. If this hypothesis is true, then we would expect distinct causal combinations of variables, roughly reflecting population characteristics or government preferences of a state, to exist for license and monopoly outcomes. We might also expect historical documents to reflect this paradoxical combination of commonalities in origin and differences in selection processes.

Explaining Alcohol Regulatory Variation

The preceding discussion highlights five areas of inquiry, consistent with pluralist theory, which may help to illuminate the social pathways leading to state-level monopoly and license frameworks. They are: (1) the prevalence of a state's liberal and conservative religious populations, (2) the prevalence of a state's rural and urban populations (3) the prevalence of a state's foreign-born population, (4) the prevalence of anti-liquor sentiment in a state, and (5) a state's proximity to Canada. The more these themes are emphasized in the analysis output, the more state-level regulatory outcomes reflected popular pressures or preferences.

In addition, two other areas of inquiry, consistent with state autonomy theory and not alluded to in the literature, may also help to explain the variation in post-prohibition regulatory outcomes. In particular, the prevalence of the alcohol industry in a state just prior to the passage of

federal prohibition and a state's commitment to the enforcement of alcohol laws during prohibition can each provide deeper insight into the diverse experiences of states in the decades leading up to repeal. For instance, the commitment of a state to enforcing laws related to prohibition could indicate that it placed a high value on legal order and strict control of alcoholic beverages. One would expect this theme to contribute to a monopoly outcome. Similarly, the prevalence of the alcohol industry in a state could indicate that industry interests were taken into greater consideration by the government when designing a regulatory framework after repeal. One would expect this variable to contribute to a license outcome. The more these themes are emphasized in the analysis output, the more regulatory outcomes reflected the preferences or priorities of states governments and politicians.³

DATA AND METHODS

My study employed a set-theoretic approach based on fuzzy-set qualitative comparative analysis (fsQCA), an analytic technique grounded in set theory that allows for a detailed analysis of how causal conditions contribute to specific outcomes (Ragin 2000, 2008). In particular, a qualitative comparative analysis was ideal for exploring the broad range of causal combinations and cases tested for each regulatory outcome. The use of an exclusively case-based approach would have made comparisons across significant numbers of cases and independent variables almost impossible. As Fiss (2009) writes, “[qualitative comparative analysis] is uniquely suited for analyzing causal processes across multiple cases because it is based on a configurational understanding of how causes combine to bring about outcomes and because it can handle significant levels of causal complexity” (25). The basic premise underlying qualitative comparative analysis is that cases are best understood

³ If, on the other hand, states did not perceive these systems as different and blindly consumed them, then we would expect there *not* to be distinct pathways to each outcome.

as configurations of attributes resembling overall types and that a comparison across cases can allow the researcher to strip away attributes that are unrelated to the outcome in question. Thus, using Boolean algebra and a set of algorithms that allow for the logical reduction of numerous, complex causal conditions, qualitative comparative analysis can transform multiple cases and variables into a reduced set of configurations that lead to an outcome.

Importantly, the use of fuzzy sets offered several advantages to the traditional crisp set qualitative comparative methodology. As Ragin (2008) explains, “fuzzy sets are especially powerful because they allow researchers to calibrate partial membership in sets using values between 0.0 (nonmembership) and 1.0 (full membership) without abandoning core set theoretic principals and operations” (29). Indeed, fuzzy sets are simultaneously qualitative and quantitative, incorporating both kinds of distinctions in the degree of set membership. Thus, concludes Ragin (2008), “fuzzy variables have many of the virtues of conventional interval- and ratio-scale variables, but at the same time they permit *qualitative* assessment” (30).

The use of a fuzzy comparative analytic approach, therefore, also did not preclude me from incorporating extensive case oriented research. In particular, I used a case based methodology to achieve three things. First, I combined in-depth examinations of individual states with the theoretical framework outlined above in order to identify and calibrate independent variables. This allowed me to draw out potential causal factors which were empirically grounded, and to establish appropriate values for the cut-off points of fuzzy set membership scores. Second, I complimented my comparative analysis with a qualitative account of the way in which state legislatures framed their choice of regulatory systems. This illustrated how states interacted with the power-elites pervasive national discourse. Finally, I incorporated into my discussion of the comparative analysis several state-specific illustrations of causal pathways. These mini-case studies provided a window into how groups of variables actually interacted.

Variables and Sources

Based on the theoretical considerations outlined in the first section, as well as the exploration of several individual cases, I compiled 7 measurements in each of the 40 states where alcohol could legally be sold in 1935.⁴ These measurements were (1) total rural population, (2) total conservative religious population, (3) total German, Austrian, and Irish heritage population, (4) total Canadian heritage population, (5) the ratio of state to federal bootlegging arrests, (6) the percentage of inhabitants who voted for repeal of national prohibition in 1933, and (7) the total number alcohol retail outlets conducting business just before national prohibition was passed in 1917. Conservative religious groups were classified as all members of Protestant denominations other than Episcopalians, German Lutherans, and Missouri Synod Lutherans (Wasserman 1990; Lewis 2002). All immigrant heritage populations were defined as first-generation immigrants and native-born individuals with at least one immigrant parent (Lewis 2002).

Information on the demographic and ethnic makeup of states was found in the 1930 United States Census and the 1936 Census of Religious Bodies. These years were selected because they were the temporally closest census to the period between 1933 and 1935, and were likely more accurate than earlier (1920) and later (1940) years. Measures of bootlegging activity and the enforcement of prohibition laws were taken from the U.S. Treasury Department's Bureau of Industrial Alcohol for the year 1932. Statistics concerning the prevalence of the alcohol industry in each state for the year 1917 and 1918 were reported by the U.S. Internal Revenue Service and found in the Anti-Saloon League Yearbook.

⁴ Alabama, Georgia, Kansas, Mississippi, North Dakota, Oklahoma, and Tennessee did not repeal state prohibition laws until after 1935. Wyoming is a special case and has also been excluded from this analysis.

Case-oriented work drew on dissertations, historical accounts, archived local newspapers, temperance and repeal group publications, and reports issued by state legislative committees tasked with studying the question of alcohol regulation. Dissertations and historical accounts provided in-depth background information on individual states' approaches to alcohol control both before and after national prohibition; archived local newspapers and temperance and repeal group publications provided insight into the public and legislative debates that took place in individual states between 1933 and 1935; and legislative reports provided the specific aims and rationales used by each state to justify its adoption of a regulatory system, as well as certain details about the process of how a state arrived at its chosen model of regulation.

Analysis

The fsQCA analysis was a three step process. First, the measurements outlined above were converted into fuzzy membership groups (i.e. independent variables) and then laid out in a 'truth table'. For each state, the membership groups were: (1) high rural population, (2) high conservative religious population, (3) concentration of Canadian heritage inhabitants, (4) concentration of German, Austrian, and Irish heritage inhabitants, (5) low repeal vote for national prohibition, (6) significant contribution to total bootlegging arrests, and (7) pervasive alcohol retail outlets in 1917. Each case was then calibrated and given a score between 1 and 0 in order to reflect degree of membership in each of these groups.⁵ The negated form of each variable was automatically included in the algorithm and is expressed in Tables 1.1 and 1.2 as the variable name in lower case letters.⁶

Next, the truth table was processed using several different computational methods, resulting in three types of solutions: complex, parsimonious, and intermediate. Although these methods all

⁵ A detailed description of the calibration process is available from the author upon request.

⁶ If a variable is negated then it indicates that the variable needed to be *absent* in order for the outcome in question to occur. Thus, if the negated form of the variable high rural population appears, then it means that achieving the outcome in question required the *absence* of a large rural population.

produce results of a slightly different form, their broad intent is the same: “to generate succinct statements about the different combinations of causal factors which are systematically associated with the outcome of interest, and the manner in which they combine” (McClellan 2011: 15). The results appear, superficially, to be strong claims about causes, but strictly speaking they are statements of *potential* causal relationships (Fiss 2009). These causal combinations are referred to as pathways and together they constitute one ‘solution’ (my analysis has two solutions, one for each outcome). The strength of each solution and causal pathway within each solution was evaluated through two descriptive measures: consistency and coverage. The latter indicates how closely a perfect subset relation is approximated, while the former gauges empirical relevance of importance (Ragin 2008: 44).

Finally, since fsQCA only produces statements of potential causal relationships, it always consists of a third step: examining causal statements in light of theory and evidence, and identifying avenues for further detailed research in order to confirm or refute their specific implications. (Ragin 2008). As mentioned above, I conducted case studies of specific states and used these accounts to elaborate on causal statements. This was a labor intensive yet integral part of my analysis, one which is constantly expanding and holds significant promise for future work.

RESEARCH FINDINGS

Consistent with the arguments put forth by Levine (1984) and Rumbarger (1989), the vast majority of states framed their choice of regulatory model in terms of the rhetoric and discourse promulgated by the American power elite. This meta-discourse emphasizing legal order and the prevention of private profit saturates the legislative debates and committee reports published throughout the period following repeal—in both monopoly *and* license states. It is clear that a vast

majority of states genuinely bought into the national atmosphere created by the capitalist elite, especially

In Wisconsin, for instance, a license state and one of the most liberal control regimes, the stated aim of its license framework was to (1) prevent the return of the saloon, (2) eradicate the bootlegger, (3) promote temperance, and (4) discourage excess profit seeking (Wisconsin Legislature; *La Cross Tribune* December, 14, 15, and 20, 1933). Similarly, in West Virginia, a monopoly state and one of the most restrictive control regimes, the stated aim of its monopoly framework was to (1) prevent the return of the old saloon, (2) drive the bootlegger out of business, (3) encourage temperate habits, and (4) remove private profit from the liquor trade (*Charleston Gazette* February 14, 15, and 17, 1935). Notably, the stated aims of alcohol control in both states were virtually identical to one another and the language used to articulate them was drawn nearly verbatim from the published liquor control plans of the elite controlled Rockefeller Commission and National Municipal League.

However, upon closer examination, considerable variation emerges in the rationales used by individual state legislatures to actually justify their choice of regulatory scheme. Again taking into consideration the examples of Wisconsin and West Virginia, it becomes clear that the theories of Levine (1984) and Rumbarger (1989) fail to account for the more subtle and perhaps more revealing differences that existed between the states and their relation to the power elite's popular discourse. Indeed, despite sharing many of the same stated aims (those derived from the power elite at the national level), states often put forth fundamentally different rationales for their chosen courses of regulatory action. To the vast majority of states it very much mattered which of the two systems of alcohol regulation they were going to adopt—this was not a blind or random choice carried out by indifferent legislative bodies.

For example, lawmakers in West Virginia argued that private profit seeking—the principle stated aim of its regulatory efforts—was to be prevented through state ownership of all liquor stores. As one West Virginian senator noted, “You’re playing with fire when you talk about returning the profits of this business to private hands” (*Charleston Gazette* February 23, 1935). In contrast, Wisconsin politicians argued that private profit seeking—also one of the principle states aims of its regulatory efforts—was to be reduced through uniform licensing fees, not careful state control of retail sales. The Legislative Interim Committee on the Regulation of the Sale of Intoxicating Liquor in Wisconsin reported that the simple act of “centralizing control of alcohol regulation—thereby allowing for the imposition of a reasonable and uniform license fee—[would] prevent the undesirable outcome of extreme profit seeking” (4).

While these differences between Wisconsin and West Virginia are by no means representative of every license or every monopoly state, they function to highlight the presence of meaningful variation in how states perceived and arrived at particular regulatory outcomes.⁷ The following comparative analysis supports this finding and demonstrates that a state’s choice of alcohol regulatory system was largely the result of pluralist pressures, and to a lesser extent government preferences. In the section below I outline the fundamentally different pathways to each regulatory system and explain how variation actually developed in the years immediately following the repeal of national prohibition.

Monopoly Pathways

The solution shown in Table 1.1 indicates that three primary combinations of causal factors led to a monopoly system of regulation. In the first causal recipe, a high Canadian concentration needed to be accompanied by the absence of a prevalent alcohol industry, the absence of high

⁷ Limitations on space do not allow for additional illustrations of the variation in rationales used by individual states. A more complete discussion can be found in the full version of the paper.

German, Austrian, and Irish heritage populations, and the absence of high conservative religious populations. The states with membership in this causal group are Vermont, Washington, New Hampshire and Michigan. In the second causal recipe, a high Canadian concentration needed to also be accompanied by the presence of a high rural population and a prevalent alcohol industry, as well as the absence of a high conservative religious population. Unlike the first recipe, this pathway required both a high rural population and a strong retail presence prior to prohibition. The states with membership in this group are Maine and Montana.

The third and final causal recipe outlines a much different path to monopoly regulation. In this third solution, a high conservative religious population, a high rural population, and a high ratio of state to federal bootlegging arrests needed to be accompanied by the absence of high German, Austrian, and Irish heritage populations, as well as the absence of a prevalent alcohol industry. This pathway illuminates a distinct and alternative causal combination leading to a monopoly outcome. The states with membership in the final group are Idaho, Virginia, and West Virginia.

This solution suggests several things. First, it confirms that Canada's experience with a state run control system played an important role in shaping many states' decisions to adopt a monopoly system of regulation. However, it challenges the assumption made popular by Harrison and Laine (1936) that geographical proximity to Canada is what produced a monopoly outcome. My analysis, notably, indicates that causation may be more closely linked (at least in part) to the presence of Canadian heritage concentrations, the only constant variable in the first two causal combinations. The cases of Minnesota, Wisconsin, and New York illustrate this point nicely. Despite their proximity to Canada, all three states adopted license systems of regulation and had below average Canadian heritage populations (2.2 percent, 3.7 percent, and 2.7 percent respectively).

It is possible that states in the first and second pathways were most strongly influenced by contact with Canadian government officials, and not popular pressure from local Canadian

populations. Indeed, legislative reports show that exchanges between state and provincial governments were not uncommon, and some states like Washington adopted laws nearly identical to those used in various Canadian provinces (Rorabaugh 2009). However, it is unlikely that government preference would have been able to manifest itself absent popular support. That is, for a monopoly system to be politically viable it needed to garner a certain level of support from the citizenry. As the case of Washington illustrates, the presence of a Canadian heritage concentration (as well as Scandinavians) likely provided this support.⁸ In Washington, argues Rorabaugh (2009), the Canadian population not only made a state-run monopoly possible, but also desirable. Moreover, like the other states in the first causal pathway, Washington lacked a large German, Austrian, and Irish heritage population, suggesting that there was little opposition to a government-run control scheme. This mix of government and populist pressures, concludes Rorabaugh (2009), worked to shape alcohol regulation in the state.

The first two combinations thus also indicate that the path to a monopoly system was not necessarily linked to the presence of evangelical or other conservative population groups. In fact, the first pathway even hints that groups like evangelical Christians and German, Austrian, and Irish immigrants needed to be *absent* in certain cases in order for the influence of a state's Canadian or other populations to be felt. From this perspective, Canadian heritage concentrations were often necessary but not sufficient for a monopoly outcome. That is, there also needed to be a lack of political will to *prevent* the adoption of a monopoly system, either from liberal immigrant groups or conservative religious populations who might have favored retaining state prohibition laws.⁹

⁸ Scandinavian countries also had experience with government-run alcohol control and future work should incorporate a variable to reflect state Scandinavian populations.

⁹ This also suggests that conservative religious groups held the most deeply rooted (negative) opinions toward alcohol as compared to other groups (e.g. urban) that supported prohibition in the 1920s.

The second combination further indicates that rural populations and conservative religious populations were often distinct political blocs. That is, the second pathway achieved a monopoly outcome through the presence of a high rural population and the absence of a high conservative religious population. It is impossible to say whether this was consistent with pre-prohibition dry law patterns since prior research has not looked closely at causal *combinations* (i.e. necessary and sufficient). However, it once again suggests that conservative religious groups could independently act as an impediment to state-level repeal and, thus, to the adoption of a monopoly system (or any system). Moreover, the prevalence of the alcohol retail outlets prior to prohibition in states with membership in this pathway also suggests that previous experience with pervasive alcohol sales could contribute to producing a cautious and controlling regulatory response.

The experience of Montana illustrates this second causal combination nicely. When national prohibition was repealed in December of 1933, Montana, like many other states, found itself in the middle of a fiscal crisis induced by the Great Depression. Desperately in need of revenue and reeling from the loss of federal relief funds in November of 1933, the state turned its attention to alcohol as a potential supplemental revenue stream (*Billings Gazette* December 3, 1933). However, the state and its rural population still held at the front of its mind the memory of a bad experience with alcohol sales in the years leading up to prohibition (Quinn 1970: 10). This meant that the state faced a choice not so much between license and monopoly systems, but rather between a monopoly system and prohibition.

The need for revenue, combined with two additional factors pushed the state toward a monopoly framework. First, after consulting officials in Alberta and British Columbia, lawmakers decided to copy the state run system used in Alberta. “No organization,” explains Quinn (1970), “made itself known to favor a more liberal policy,” (11) and there was considerable support for the system based on the familiarity of the state’s Canadian heritage population. Second, there was a lack

of ideologically rooted opposition to repealing prohibition, as the state had only a small conservative religious population (*The Helena Independent* December 18, 1933; Quinn 1970). Thus, while the states rural population still unconditionally demanded tight control of alcohol sales, there was no political impediment to repealing prohibition and enacting a revenue producing system of regulation.

None of this is to say, however, that the pathways predicted by traditional temperance literature (Buenker 1973; Kleppner 1970; Lewis 2002; Sinclair 1962) were irrelevant. The third combination actually confirms that the archetypical pre-prohibition temperance pathway still applied to a small but significant group of agrarian based states. Specifically, the three cases displaying full membership in the final combination—Idaho, Virginia, and West Virginia—were highly rural, highly conservative, and lacked large Germanic and Irish immigrant populations. The government’s attitude toward illicit alcohol sales during prohibition was also highly adverse, suggesting that government preference was also a meaningful ingredient.

Finally, several states do not fit into any of the first solutions causal pathways. While some of these cases, like Ohio and Pennsylvania, are readily explainable, additional work is needed to determine whether the other cases shared characteristics or experiences not accounted for in my analysis. For instance, the case of Pennsylvania suggests that states with highly determined or opinionated governors sometimes adopted systems at odds with popular opinion. Despite overwhelming disapproval of national prohibition and an extremely liberal culture, Pennsylvania Governor Pinchot used political maneuvering to secure the creation of a monopoly system in the state (Catherman 2009). As Pinchot explained in 1934, “I accept the decision of the American people, [but] that does not mean I have weakened or surrendered my allegiance to the dry cause” (quoted in “The Rotarian” 1934: 53). Conversely, the case of Ohio suggests that interests groups

could impact a state's regulatory outcome in unpredictable ways.¹⁰ Stegh (1975) writes that “newly formed special interest groups (and old ones, too) diligently pressured the General Assembly regarding the future of liquor control legislation” (472) playing a major role in the eventual adoption of a monopoly framework and blunting popular opinion.¹¹

License Pathways

The output shown in Table 1.2 demonstrates that the conditions leading to a license outcome were fundamentally different from those leading to a monopoly system. There were four primary causal combinations leading to a license outcome. In the first and most important causal recipe, an absence of high arrest rates needed to be accompanied by an absence in high Canadian heritage concentrations and an absence in low percentages of repeal votes. The states with membership in this group are Delaware, New Jersey, Illinois, Kentucky, Louisiana, Maryland, Minnesota, Missouri, Nevada, New York, Texas, and Wisconsin.

In the second causal recipe, high concentrations of German, Austrian, and Irish heritage populations needed to be accompanied by an absence in high Canadian heritage concentrations, an absence in the prevalence of alcohol retail outlets, and an absence in low percentages of repeal votes. The states with membership in this group are Nebraska and South Dakota. In the third causal recipe, a high rural population needed to be accompanied by an absence in high Canadian heritage concentrations, the absence of a high conservative religious population, and an absence in low percentages of repeal votes. The states with membership in this group are Arizona, New Mexico, and Nevada. In the final causal recipe, the prevalence of alcohol retail outlets and the presence of high German, Austrian, and Irish populations needed to be accompanied by the absence of high arrest

¹⁰ Interest groups were likely an inconsistent influence from state to state. Not only were they more prevalent in some states, but groups from the same industry sector could advocate different positions. For instance, the hotel lobby in Washington actively supported monopoly, whereas the hotel lobby in West Virginia and Ohio actively opposed it.

¹¹ Notably, interest groups were *especially* active in Ohio due to its symbolic importance as the birthplace of leading dry organizations (e.g. the Woman's Christian Temperance Union and the Anti-Saloon League).

rates, the absence of high conservative religious populations, the absence of high rural populations, and an absence in low percentages of repeal votes.

Several points of interest emerge from this solution. First and foremost, a high repeal vote was instrumental for achieving a license outcome. Indeed, every one of the causal combinations generated in this second solution required a high repeal vote in order to produce a license framework. This attribute strongly suggests that a state's popular attitude toward the experience of national prohibition shaped its perception and selection of a regulatory framework after repeal. Moreover, none of the causal combinations leading to a *monopoly* outcome require this same variable, indicating that its explanatory power is unambiguously linked to license pathways (unlike, for instance, the prevalence of alcohol retail outlets, which appears in both solutions in a negated and non-negated form). This point is especially interesting in light of the assumption made popular by Harrison and Laine (1936) that a low repeal vote led to a monopoly framework. If anything, my analysis suggests that a high repeal vote led to a license framework, and that a low repeal vote had only marginal importance for achieving a monopoly outcome.

A high repeal vote, however, was not itself sufficient to produce a license outcome. In the second and fourth causal combinations, a concentration of German, Austrian, and Irish heritage was also needed, and in the first and fourth causal combinations a low state level arrest rate was also needed. This suggests two things. First, immigrant populations continued to play an important role in shaping alcohol regulation. While my analysis has indicated that conservative religious populations were of decreasing importance in achieving restrictive regulatory outcomes (see above), the influence of liberal immigrant populations appears to have remained key. The states with membership in the solutions second pathway—Nebraska and South Dakota—illustrate this point nicely. Each was predominantly rural and conservative, yet the concentration of liberal immigrant populations appears to have facilitated a pathway to a license outcome.

Further, as predicted, a weak law enforcement effort during prohibition also contributed in many cases to arriving at a license framework. This suggests that, in addition to the pluralist pressures already outlined for both solutions, the attitude of a state's government toward alcohol consumption also impacted regulatory outcomes. If individuals in both the executive and legislative branches of a state's government were so adverse or passive toward controlling illegal alcohol sales *during* prohibition, then it seems highly improbable that they would have advocated for a regulatory system designed for careful state control of alcohol. It is unclear, however, whether a state government's attitudes toward alcohol were a reflection of populist influences or individual politicians who exerted disproportionate influence and imposed their own personal preferences. I suspect the latter is true, given that the first and fourth pathways contain additional variables indicating favorable views of alcohol consumption, however case-based analysis is needed to confirm this hypothesis.

The third causal combination is perhaps the most intriguing. In this pathway, a high rural population was necessary to achieve a license outcome. This once again runs counter to the path predicted by traditional temperance literature. However, upon closer examination, the three states with membership in this group shared several other important characteristics which help to explain the outcome. First, they are closely grouped together in the South West corner of the United States. The process of diffusion, though not discussed in this paper, may have contributed to producing shared outcomes. Second, all three states were strongly in favor of repeal and lacked large conservative religious populations. Hence, although their inhabitants were predominantly rural, there

was also a popular discontent toward prohibition and the absence of an ideologically rooted political impediment to repeal (i.e. evangelical Christians).¹²

Finally, the fourth causal combination shows that, once again, a small group of states still followed the archetypal pathway predicted by traditional temperance literature. Specifically, the five states with full membership in the last causal combination—New York, New Jersey, Connecticut, Rhode Island, and Massachusetts—had large concentrations of German, Austrian, and Irish heritage populations and an absence of high rural and conservative religious populations. Two of these states, however, also possessed membership in the first causal combination, detracting some of the unique explanatory power of the pathway. The presence of alcohol retail outlets was also necessary for this combination, as all of these states were located along the Eastern Seaboard and lacked state-level dry laws in the immediate years leading up to national prohibition.

CONCLUSION

Taken together, the preceding analysis suggests that there were fundamentally different pathways to license and monopoly systems of state-level alcohol regulation. These pathways largely reflected pluralist pressures in each state, and to a lesser extent government preferences. Keeping in mind that both the monopoly and license system originated from the same group of national power elites, my results support the hypothesis that there was an *appearance* of genuine choice for populations and governments at the state level. In reality, of course, this ‘choice’ constituted but a limited debate over two readily available models of alcohol regulation. The effect of this illusion was to reinforce the hegemonic power of elite-generated laws, as state populations were (1) essentially tricked into thinking that they were freely choosing their form of regulation and (2) more likely to

¹² It is also probable that this specific causal combination is missing a variable and that a closer case-based analysis of these states might reveal additional information about the shared context of their decision making processes or individual histories.

respect legal order (the primary concern of the capitalist elite) since they were living under a system which they perceived as tailored to their specific needs.

Several specific points of note also emerged from both of the fsQCA solutions. While two of the pathways resembled causal relationships characteristic of pre-1919 patterns of state- and county-level prohibition laws, others point to the importance of particular post-repeal specific variables and combinations never before empirically tested. In the case of states that adopted a monopoly framework, the concentration of a Canadian heritage population was a key ingredient, and the absence of conservative religious groups allowed cautious, rural states to repeal their own prohibition laws while still maintaining tight control over alcohol. In the case of states that adopted a license framework, the attitude of both a state's government and its inhabitants toward the experience of national prohibition was central, suggesting that disapproval of the Eighteenth Amendment strongly affected regulatory outcomes in the post-repeal era.

The purpose of this analysis was to take the first major step toward explaining variation in post-prohibition alcohol regulation and to place it within the context of the dominant regulatory blueprint created by the American power elite. While I have drawn out and emphasized prominent causal combinations in order to generate new hypotheses, further case oriented research is needed to test these hypotheses and to provide additional insight into states' decision making processes. The impact of industry, temperance group, and repeal group lobbyists deserve special attention. A closer examination of whether these systems are still appropriate to the needs and composition of individual states can also be informed by this study. Moving forward, it is important to use these potential solutions as a guide to further research and to put them into a dialogue with additional qualitative explorations of individual states.

REFERENCES

- Barker, Twiley W. 1955. "State Liquor Monopolies in the United States." PhD Dissertation, Department of Political Science, University of Michigan, Ann Arbor.
- Block, F. 1977. "The Ruling Class Does Not Rule: Notes on the Marxist Theory of the State." *Social Revolution*. 7: 6-28.
- Bolotin, Frederick. 1982. "The Impact of Government Regulatory Policy: The Case of Alcohol Beverage Control Laws." PhD Dissertation, Department of Economics SUNY, Binghamton.
- Buenker, J. D. 1973. *Urban Liberalism and Progressive Reform*. New York: Scribner.
- Burstein, P. 1998. "Bringing the Public Back In: Should Sociologists Consider the Impact of Public Opinion on Public Policy?" *Social Forces*. 77: 27-62
- Catherman, Brent. 2009. "From Gibraltar of the Liquor Traffic to Control State: A History of Alcohol Regulation and the Establishment of the State Liquor Store." PhD Dissertation, Master of Arts in Social Sciences, Edinboro University of Pennsylvania.
- Deny, Edgar. 1950. *State Liquor Control: Monopoly and License Systems*. Utah: University of Utah Institute of Government.
- Domhoff, G. W. 1967. *Who Rules America?* Englewood Cliffs, New Jersey: Prentice Hall
- Fiss, Peer C. 2009. "Building Better Causal Theories: A Fuzzy Set Approach to Typologies in Organization Research." *Academy of Management Journal*.
- Fosdick, Raymond. 1933. *Toward Liquor Control*. New York: Harper and Brothers.
- Frendreis, John, and Raymond Tatalovich. 2010. "A Hundred Miles of Dry: Religion and the Persistence of Prohibition in the U.S. States." *State Politics and Policy Quarterly*. 10 (3): 302-19.

- Geber, Brian, and Paul Teske. 2000 "Regulatory Policymaking in the American States: A Review of Theories and Evidence." *Political Research Quarterly*. 53 (4): 849-86.
- Gilbert, J., and Howe, C. 1991. "Beyond 'State v. Society': Theories of State and New Deal Agricultural Policies." *American Sociological Review*. 56: 204-20.
- Gormley, William. 1983. *The Politics of Public Utility Regulation*. Pittsburgh Pennsylvania: University of Pittsburgh Press.
- Gusfield, Joseph. 1963. *Symbolic Crusade: Status Politics and the American Temperance Movement*. Urbana, IL: University of Illinois Press.
- Harrison, Leonard, and Laine Elizabeth. 1936. *After Repeal: A Study of Liquor Control Administration*. New York: Harper and Brothers.
- Hohner, R.A. 1969. "The Prohibitionists: Who Were They?" *South Atlantic Quarterly*. 68: 491-505.
- Hunter, F. 1953. *Community Power Structure*. Chapel Hill: University of North Carolina Press
- Kleppner, P. 1970. *The Cross of Culture: A Social Analysis of Midwestern Politics, 1850-1900*. New York: Free Press.
- Levine, Harry G. 1985. "The Birth of American Alcohol Control: Prohibition, the Power Elite, and the Problem of Lawlessness." *Contemporary Drug Problems*. 63-115.
- Lewis, Michael. 2007. "Cultural Norms and Political Mobilization: Accounting for Local and State Level Liquor Laws." *Journal of Cultural Geography*. 24 (2): 31-52.
- Martin, David. 1960. "A Study of the Public Liquor Monopoly System in the United States." PhD Dissertation, Department of Political Science, University of Rhode Island.
- Mead, Lawrence. 1950. "Federal and State Liquor Control and Administration Since 1937 in Relation to the Liquor Industry." PhD Dissertation, Department of Economics Syracuse University.

- Milliband, R. 1969. *The State in Capitalist Society*. New York: Basic Books.
- Mills, C. W. 1956. *The Power Elite*. New York: Oxford University Press.
- Odegard, P. H. 1928. *Pressure Politics: The Story of the Anti-Saloon League*. New York: Columbia University Press.
- Pegram, T. R. 1992. *Partisans and Progressives: Private Interest and Public Policy in Illinois, 1870-1922*. Urbana, IL: University of Illinois Press.
- Pennock, Pamela, and Austin Kerr. 2005. "In the Shadow of Prohibition: Domestic American Alcohol Policy Since 1933." *Business History*. 47 (3): 383-400.
- Peoples, Clayton. 2009. "Reviving Power Structure Research: Present Problems, Their Solutions, and Future Directions." *Social Theory*. 20: 3-38.
- Polsby, Nelson. 1963. "How to Study Community Power: The Pluralist Alternative." *Journal of Politics*. 22: 474-84.
- Quinn, Larry D. 1970. "Politicians in Business: A History of the Montana State Liquor Control System, 1933-1968." PhD Dissertation, Department of Political Science, University of Montana.
- Ragin, Charles C. 2000. *Fuzzy-Set Social Science*. Chicago: University of Chicago Press.
- Ragin, Charles C. 2008. *Redesigning Social Inquiry: Fuzzy Sets and Beyond*. Chicago: University of Chicago Press.
- Rorabaugh, J. W. 2009. "The Origins of the Washington State Liquor Control Board, 1934." *Pacific Northwest Quarterly*. 100 (4): 159-68.
- Rumbarger, John. 1968. "The Social Origins and Function of the Political Temperance Movement in the Reconstruction of American Society, 1875-1917." PhD Dissertation, Department of Political Science, University of Pennsylvania.

- Rumbarger, John. 1989. *Profits, Power, and Prohibition: Alcohol Reform and the Industrializing of American Society, 1800-1930*. Albany: State University of New York Press.
- Sinclair, A. 1962. *Prohibition: The Era of Excess*. Boston: Little Brown.
- Skocpol, Theta. "Political Response to Capitalist Crisis: Neo-Marxist Theories of the State and the Case of the New Deal." *Politics and Society*. 10: 155-201.
- Stegh, Leslie. 1975. "Wet and Dry Battles in the Cradle State of Prohibition: Robert J. Bulkley and the Repeal of Prohibition in Ohio." PhD Dissertation, Department of History, Kent State University, Ohio.
- Pinchod, Gifford. 1934. "Liquor Control in the USA: State Store Plan." *The Rotarian*. 44 (1): 53-64.
- Timberlake, James. 1963. *Prohibition and the Progressive Movement, 1900-1920*. Cambridge, MA: Harvard University Press.
- Wisconsin Legislature. Interim Committee on the Regulation of the Sale of Intoxicating Liquors. 1933. Report. Special Session of the Legislature.

Table 1.1 Solution for Monopoly Outcome

Pathway 1:

CANADIAN CONCENTRATION*conservative religious population*retail outlets*german, austrian, irish concentration

Members: Vermont, Washington, New Hampshire, Michigan

Raw coverage: .253

Unique coverage: .204

Consistency: 1.00

Pathway 2:

CANADIAN CONCENTRATION*RETAIL OUTLETS*RURAL POPULATION*conservative religious population

Members: Maine and Montana

Raw coverage: .111

Unique coverage: .076

Consistency: .936

Pathway 3:

CONSERVATIVE RELIGIOUS POPULATION*RURAL POPULATION*retail outlets*state arrest rate*german, austrian, irish concentration

Members: Virginia, Idaho, West Virginia

Raw coverage: .232

Unique coverage: .197

Consistency: .896

Solution Coverage: .5278

Solution Consistency: .9388

Table 1.2 Solution for License Outcome

Pathway 1:

state arrest rate*canadian concentration*low repeal vote

Members: Delaware, New Jersey, Maryland, Illinois, Louisiana, Missouri, Wisconsin, New York, Nevada, Minnesota, Kentucky, Texas*Raw coverage:* .493*Unique coverage:* .275*Consistency:* .902

Pathway 2:

GERMAN, AUSTRIAN, IRISH CONCENTRATION*canadian concentration*retail outlets*low repeal vote

Members: Nebraska and South Dakota*Raw coverage:* .124*Unique coverage:* .077*Consistency:* .784

Pathway 3:

RURAL POPULATION*canadian*conservative religious population*low repeal vote

Members: New Mexico, Nevada, Arizona*Raw coverage:* .160*Unique coverage:* .064*Consistency:* .875

Pathway 4:

RETAIL OUTLETS*GERMAN, AUSTRIAN, IRISH CONCENTRATION*state arrest rate*conservative religious population*rural population*low repeal vote

Members: New York, New Jersey, Connecticut, Rhode Island, Massachusetts*Raw coverage:* .229*Unique coverage:* .081*Consistency:* .950**Solution Coverage:** .7357**Solution Consistency:** .8758

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

Submitted by
Ashley Lauren Watkins

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 statute’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

Ziffirin 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 used 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 that 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).

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- 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)).

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- 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 *Granholt 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*, 404 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.



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