When Wine Enters, Sense Leaves[1]:

A Case For Why the Three-Tier System's Regulations Stir Competition, Boost Diversity, and Protect Consumers

I. INTRODUCTION

Thomas Jefferson reportedly proclaimed that "[b]y making this wine vine known to the public, I have rendered my country as great a service as if I had enabled it to pay back the national debt."[2] Though the United States does not share the drinking culture of its European counterparts–for whom alcoholic consumption is a basic, lightly regulated, and innocuous part of daily life[3]–the American market for alcohol is certainly as considerable as Jefferson suggested. The market for American beer alone is nearly a hundred-billion-dollar industry.[4] In 2012, the craft brewers who constitute ninety-eight percent of the American brewing industry[5] saw a growth of fifteen percent in volume and seventeen percent in retail dollars.[6] With 4,000 wineries today, the U.S. wine market has grown six-fold since the 1960s[7] and is estimated to generate over forty billion dollars annually.[8]

These impressive figures would be very problematic to modern American society, if not for careful regulation. Earlier in American history, after all, periods of growth in the alcohol market brought about immense ills to society. These ills prompted the Abolition Movement and, eventually, the Eighteenth Amendment's nationwide prohibition of all alcohol production, transportation, and sale.[9] Much of the blame for these social ills falls on the rise of so-called "tied houses," which were large firms that controlled the alcohol industry's three key sectors–production, distribution, and retail.[10]

Seizing monopolies of the key industries helped tied houses stifle competition and diversity in three ways: first, by allowing pubs to sell only the controlling firm's alcoholic products; second, by encouraging retailers to promote excess consumption; and third, by incubating alcohol-related social ills, such as prostitution, gambling, and alcoholism.[11] The rise of American tied houses is hardly unique to the American alcohol market. In fact, the rise of American tied houses came hand-in-hand with the rise of tied houses in Britain, where just six tied-house breweries dominated the entire British beer industry.[12]

The Twenty-First Amendment ended the Prohibition Era in 1933, and provided states with the power to regulate the production, distribution, sale, and consumption of alcohol within their boundaries.[13] John D. Rockefeller Jr. commissioned scholars Raymond B. Fosdick and Albert L. Scott to help state legislators forge a path into the world of alcohol regulation.[14] Fosdick and Scott concluded that states should either run state monopolies over their share in the alcohol market, or license the sale and distribution of alcohol in a manner that creates wholesalers who can stand between brewers and retailers.[15] Nearly every U.S. state adopted the latter option, thus creating Fosdick and Scott's proposed "three-tier system."[16]

Subject to certain enumerated exceptions, the three-their system prohibits the production, distribution, and retail sectors of the alcohol market from commingling. Alcohol production companies include distillers, vintners, wineries, and breweries like the Boston Beer Company and the Stone Brewing Company.[17] These production companies must sell to wholesalers and distributors, such as the Southern Wine and Spirits of America and the Union Beer Distributors, who in turn sell to myriad retail centers.[18] Wholesalers and distributors sell the alcohol to retailers, which are locally licensed centers that include bars, restaurants, liquor stores, drug stores, and grocery stores.[19] In a state that adheres strictly to the three-tier model, members of the general public only interact with and purchase alcohol from retailers. Depending on the licensing agreement, retail centers sell some or all types of alcohol for consumption on the premises and/or off the premises.[20]

In *Granholm v. Heald*, the U.S. Supreme Court described the nearly century-old three-tier system as "unquestionably legitimate."[21] As such, the Twenty-First Amendment will likely continue governing the three-tier system for the foreseeable future. Nevertheless, three factors are increasingly challenging the promise and power of the three-tier system. First, European states are complaining that in comparison to the light alcohol regulation throughout Europe, the American three-tier system is anti-competitive and stifles diversity by increasing alcohol prices.[22] Second, recent years have also seen a spike in the number of state legislatures that now permit direct shipments of wine from producers to consumers,[23] or that now permit breweries to hold ownership in two of the three tiers.[24] A total of thirty-six states have enacted a self-distribution exception to the three-tier system.[25] And third, the Federal Trade Commission recently took a strong stance against the three-tier system, accusing it of limiting consumer options, increasing the price of alcoholic beverages, and impacting free trade with burdens that are insufficiently justified by the moral concerns of temperance and the regulatory concerns of tax collection.[26]

The European Union, American state legislatures, and the U.S. Federal Trade Commission are certainly powerful forces, but their attacks on the three-tier system are unfounded, and at times outright incorrect. Section Two of this Essay demonstrates how the three-tier system not only fosters competition, but fosters *fair* competition among and within the tiers in the three-tier system. In Section Three, this Essay then overviews what the three-tier system does to increase the number and diversity of new products available to consumers. And in Section Four, this Essay argues that the three-tier system works well to protect consumers and the public, particularly in comparison to the alternative model of allowing consumers to purchase alcohol directly from distributors.

II. THE THREE-TIER SYSTEM FOSTERS FAIR COMPETITION AMONG PRODUCERS, WHOLESALERS, AND RETAILERS

Where unfair competition stifles the marketplace, fair competition lies at the heart of a strong, free market.[27] Indeed, fair competition is an essential element of the market process.[28] This Section explores the three-tiered system's effect on competition among the producers, wholesalers, and retailers of alcoholic products, and its effect on keeping this competition fair.

A) The Three-Tier System's Effect on Competition Among Producers

Under the three-tier system, producers cannot take for granted that retail stores will accept their products. The three-tier system restricts producers to interacting with wholesalers, which empowers smaller beer brands and ensures that all brewers can compete on level ground.[29] With wholesalers standing between producers and retailers, producers must compete with other producers to create products that are outstanding and meet consumer demands instead of the producer's sales desires.[30] In striking contrast to the inefficient and corrupt monopolies that characterized the tied house era, the three-tier system's imposition of mandatory wholesalers into the alcohol market has created an industry that employs over 92,000 Americans[31] who work in 2,000 wholesalers.[32] Tied houses relied on the quality of their inside connections, but the size and strength of the wholesalers under our three-tier system helps ensure that producers *must* rely on the quality of their product.

The existence of independent wholesalers has further leveled the field among producers by sharpening retailer abilities. Wholesalers stockpile alcoholic supplies, thus allowing retailers to greatly reduce inventory costs for their products in general and especially for their perishable products, like beer. Producers must therefore sell their products while keeping in mind that retailers under the three-tier system are not distracted by logistical concerns about stockpiles and maintaining an ongoing relationship with the producer. Instead, the three-tier system has enabled retailers to make purchasing choices based entirely on free market demand and the quality of the product.

Though critics describe the addition of an independent distributor as inefficient and costly,[33] many scholars find that adding an independent distributor to the process actually makes the flow of goods to retailers *more* efficient.[34] This increased efficiency comes from the fact that the addition of an independent distributor forces producers to sell their goods by contracting with wholesalers, which in turn allows retailers to "pick and choose from one (or a few) wholesale vendors with diverse product portfolios."[35] Removing distributors from the picture would mean that retailers would be "approached by a multitude of different producers…Especially amongst smaller establishments, working with distributors could not only be preferable, but also easier and more efficient than dealing directly with producers."[36]

Critics of the three-tier system may also claim that regulations hamper competition, but it is difficult to deny the anti-competitive effect of the three-tier system's primary alternative, namely: self-distribution. Direct sales put small producers at a distinct disadvantage because major retailers will always prefer to buy cheaply in bulk. Large producers like Costco have the resources to offer bulk sales that undercut even the best prices from their smaller competitors. Further, producers allowed to control their wholesalers can and will "wield their financial clout to stifle competition."[37] For instance, when a Texas law exempted "marine mammal attractions" from its three-tier system, detractors were quick to point out that Antheuser-Busch InBev happened to own SeaWorld.[38] Of course, Antheuser-Busch InBev excluded all competing alcohol producers from SeaWorld.[39] But as one scholar observed with no lack of dry sarcasm, "In order for there to be competition there must be more than one competitor."[40]

B) The Three-Tier System's Effect on Competition Among Wholesalers

The three-tier system's wholesale industry also fosters competition among wholesalers.[41] With 92,000 Americans[42] working in 2,000 wholesaler companies,[43] the three-tier system single-handedly created an entire industry of wholesalers who must compete against one another to distribute the finest products in the most affordable and efficient manner. A wholesaler that fails to outperform its competing wholesalers will find itself unable to find retail customers. This free market feedback will shut down wholesalers that behave like tied houses, while helping the rest of the wholesalers and their employees to perfect their business practices.

Critics of the three-tier system often voice suspicions that the creation of a wholesaler industry has hampered competition by increasing the price of alcohol. These critics point to the European model of light regulations as a cheaper and therefore more competitive alternative.[44] This debate about regulation, self-distribution, and competitiveness received a case study in the form of Washington State's Initiative 1183, also known as the "Costco Initiative."[45] On its passage, the Costco Initiative closed and sold all state liquor stores, licensed distributors, and retailers.[46] Unsurprisingly, the state's small distributors found themselves unable to compete with the kind of bulk pricing offered by their larger counterparts.[47] And though proponents of the initiative claimed that liquor store prices would fall because of increases in competition, alcohol prices actually *increased* when the Costco Initiative relaxed liquor regulations.[48] This anti-competitive increase in prices is "partially due to the increase in licensing and regulatory fees that retailers and distributors must pay to the government."

The three-tier system presents several advantages over the alternative of European-style, laissez-faire regulation, but the three-model system is not without its flaws. Even under the three-tier system, alcohol producers and wholesaler are able to offer financial assistance to retailers, so long as the assistance is not so great as to constitute "ownership."[49] Instead of seeking to ease the anti-competitive process of self-distribution, then, state legislatures should focus on *bolstering* the three-tier system's protections. Florida's Tied House Evil Law illustrates an excellent model of a law that forbids producers and wholesalers from assisting, and retailers from accepting, financial assistance, so that producers and wholesalers do not attempt to control retailer behavior.[50]

C) The Three-Tier System's Effect on Fair Competition Among Retailers

Critics correctly note that three-tier market regulation does, in fact, stifle some competition. For example, while grocery producers "routinely pay slotting allowances to get shelf space in the chain supermarkets…, [w]ineries have been shielded from this type of legal bribery because of the three-tier protections."[51] Thus, the three-tier system restrains the ability of large retailers to exercise their massive purchasing power and unfairly stifle competition.[52] But stifling this kind of unfair competition, in turn, *increases* the level of fair competition among products because it enables smaller brands to maintain a presence in the market.

The three-tier system's multiple layers of licensing and labeling obligations helps ensure that the producers, wholesalers, and retailers of alcohol compete in a manner that serves and adjusts to consumer interests, instead of serving and adjusting to big business interests.[53] Consumer demand is, after all, "the engine that drives competition between manufacturers, distributors and retailers."[54] The transparent distribution organization that the three-tier system puts in place is fully accountable to local, state, and federal authorities, "with records of each delivery and sale, [and protections for] consumers against counterfeiting and tainted products."[55]

A loose web of self-distributors that come and go, on the other hand, will certainly be difficult to track. The self-distribution alternative also implicates significant consumer rights issues. The foremost consumer rights issue would be that by putting the seller's accountability in question, self-distribution leaves the consumer unnecessarily vulnerable to exploitation.[56] The three-tier system's accountability deters companies from trying to obtain an unfair competitive edge by deliberately tainting their product or ignoring the sanitary conditions of their product. The three-tier system also ensures that companies are able to swiftly recall products upon learning that they may be potentially contaminated. The threat of contaminated alcohol products is no academic matter. Some alcoholic products, such as hoppy India pale ales, are perishable and especially sensitive to going rancid if exposed to light and heat.[57] For instance, in 2008 the Labatt Brewing Company issued a voluntary recall of eighty-six cases of potentially contaminated beer in Michigan.[58] Because a strong regulatory system was in place to ensure accountability, the cases were pinpointed within hours of the recall and removed from store shells within days.[59]

Keeping the marketplace for alcohol well-regulated and competitive ensures that its producers, wholesalers, and retailers hone their skills while the marketplace itself continues to stay in touch with the needs and desires of consumers.[60] The multilayered levels of competition fostered by the three-tier system's regulations will improve not only the competitors and consumers themselves, but also the diversity of the alcoholic market that lies at the heart of this matter.

III. The Three-Tier System Increases the Market's Diversity of Participants, Products, and Possibilities

A) Comparing the U.S. Alcohol Market with its European Counterpart

Recent years have seen a sharp rise in the number of participants under the three-tier system–producers, wholesalers, and retailers alike. As mentioned earlier, the number of wineries has risen six-fold since the 1960s.[61] The American beer landscape began its sharp diversification in 1982, with the convergence of homebrewing, commercial craft beer, and the first Great American Beer Festival in Boulder, Colorado.[62] The festival featured twenty-eight breweries and served thirty-five beers, but now features 600 breweries and serves nearly 3,000 beers.[63] Over 2,300 craft breweries exist in the United States today, which puts the majority of Americans within ten miles of a brewery.[64] Such statistics are made all the more impressive by the fact that the 13.2 million barrels of beer sold by these brewers amounts to only six percent of the overall American beer market.[65]

The boom in growth reflects long-term, thirty-year trends, but also year-by-year trends in some states. Indiana's brewery count doubled between 2004 and 2010, for instance.[66] North Carolina's current count of eighty-two breweries also marks an increase of 200 percent from its forty-six breweries in 2009.[67] Craft breweries like the Boston Beer Company, which makes the Samuel Adams line of beers, have experienced astonishing growth since their founding in the 1980s.[68] This steady growth has led to a domino effect in which macro-breweries are now creating craft brands of their own, further diversifying the alcohol market's number of participants and products alike.[69]

By contrast, the alcohol market is struggling in many European states. Scholars have found that liberal self-distribution oversaturates a market to the point of turning away customers, and they point to Germany as a case study of oversaturation.[70] Despite Germany's exceptionally lax alcohol regulations, German breweries have consolidated, jobs have been lost, and output has reached a level just *half* of the American beer output.[71] Germany is also home to the "purity law" that seeks to maintain the high quality of German beer by restricting its ingredients.[72] This has cooled the very kind of diversity, innovation, and experimentation that is increasingly characterizing the American beer market.[73]

It is self-evident that retailers prefer to stock a selection of products that are new and diverse.[74] After all, it maximizes profits to ensure that every person who walks into a retail center can find a product worth purchasing. But arguments in favor of the three-tier system need not merely appeal to common sense and self-evidence observations. Appeals to the statistics seem to indicate that the three-tier system, especially in comparison to the performance of its laissez-faire counterpart, increases diversity in the marketplace for alcohol.

B) The Wholesaler-Retailers Interaction Increases the Diversity of Products

The three-tier system compels retailers to interact with wholesalers. Competition is built into this interaction, because each wholesaler's product portfolio carries a number of products from a number of producers.[75] By contrast, in the self-distribution model the producers directly approach retailers and therefore greatly reduce the retailers' range of options. Without extensive regulation, the market's larger producers will almost certainly exercise their massive purchasing power to buy shelves in a retailer's store, create exclusivity deals with wholesalers and retailers, and in various new and creative ways block out as much competition as they can afford. In turn, these forms of exclusivity also block out the diversity of products that exist in the alcohol market. Some scholars point to the recent "Indiana beer price war" as a case in point of how a direct relationship between producers and retailers harms the diversity of the participants and products in the alcohol market, noting:

> *Indiana briefly allowed its beer distributors to sell anywhere in the state. In response, the major chain retailers went from distributor to distributor, negotiating the best price possible on large orders. In the end, the retailers were able to force prices so low that a number of the distributors wound up out of business. As a result, craft brewers who had relied on some of those distributors lost their access to the retail market. To save the industry from further collapse, the Indiana ATC promptly instituted a territory system, so that retailers could no longer play the distributors against each other, to the death.*[76]

C) Regulation Boosts Possibilities by Encouraging Experimentation

By providing small alcohol producers with a voice that the unregulated market would drown out, the three-tier system allows and often encourages creative experimentation among producers, wholesalers, and retailers. Some alcohol manufacturers make a name for themselves by constantly testing special-batch creations and unique ingredients. The Stone Brewing Company creates month-long campaigns for Imperial India Pale Ale, for instance.[77] The Stone Brewing Company also offers unusually-flavored alcohol, such as its mint chocolate imperial stout and its coconut India pale ale.[78] The Shmaltz Brewing Company experiments with unusual flavors as well, like pomegranate.[79] The Shmaltz Brewing Company also distinguishes itself culturally by focusing on Judaism-themed marketing.[80] Other companies have begun distinguishing themselves by using edible landscaping, or recycling spent grains into dog treats, compost, animal feed, and other products.[81] Where self-distribution would reward conservative business practices and encourage the status quo, as it has done throughout Europe, the three-tier system's regulations stir the intense kind of competition that compels businesses to constantly reinvent themselves, diversify, and branch out into uncharted territory in interesting and inventive ways.

IV. The Three-Tier System's Taxation and Encouragement of Moderation Protects Consumers of Alcohol and Public Health

Though it has positive effects on competition and diversity in the marketplace for alcohol, the three-tier system's crowning achievement comes from its ability to protect consumers and the public's health. As one scholar put it, "[T]he Twenty-first Amendment left control to the states to determine a regulatory system with the idea that the state could better tackle the concerns that prompted Prohibition in the first place as well as the unfortunate by-products of that era. States were now charged with the task of reducing, if not eliminating the abuse of alcohol consumption, eradicating all forms of lawlessness associated with the sale of alcohol that dominated the Prohibition era, and regulating alcohol within the state in an appropriate, efficient, and effective manner."[82] Indeed, encouraging temperance and ensuring orderly market conditions to protect consumers formed two of the main reasons behind creating the three-tier system in the first place.[83] Lawmakers continue to defend the maintenance of the three-tier system with these two justifications.[84] Today, scholars and lawmakers often also cite the promise of increased tax revenue as a third reason to continue the three-tier system.[85] This third justification is not primarily a health-related concern, but taxation does help protect consumers and their health in many important ways.

A) The Health-Related Benefits of the Three-Tier System's Alcohol Taxes

Taxation ensures that alcohol businesses produce a detailed paper trail, one that enables the government's auditors to observe the amount of alcohol being produced and where it is being distributed. Meanwhile, the threat of an audit–in other words, the threat of being accountable–encourages those in the alcohol business to report their actions accurately and withstand the market's age-old temptations and pressures to encourage over-consumption and underage consumption.[86]

The retail end of the alcohol market is an especially important area in which to encourage compliance with the regulatory regime. After all, the retail store is the only stage in either a three-tier system or a self-distribution system where the business owners and the consumers meet face-to-face. Through a face-to-face meeting, the business owner has the opportunity to decide whether or not to sell the product to a visibly intoxicated adult, underage minor, or some other category of person who could but should not be served. Without the tax-based incentive to self-monitor, retailers may turn a blind eye to who is consuming their alcohol and bring the alcohol marketplace back to tied-house era overindulgence. Direct shipments cannot verify a person's level of intoxication or age as accurately, after all, as the direct shipment exchange is not an interpersonal exchange.

Taxation's other health benefits include the fact that wholesalers who are accountable are also able and eager to recall rancid products, more quickly and efficiently than they would have if there were no tax-based regulations in place.[87] These concerns about tainted or spoiled alcohol products are not imaginary concerns. The Czech Republic's once relatively laissez-faire attitude with regards to alcohol regulation offers a useful example, as experts attribute that lack of regulation to the 2012 disaster in which tainted alcohol products laced with cheap, industrial-grade alcohol brought severe injuries, blindness, and over twenty-five fatalities to the republic.[88] Additionally, the Czech Republic's alcohol abuse rates are higher than those of its neighbors, who regulate alcohol more stringently.[89] If the United States were to loosen regulations to reflect the loose regulations of the Czech Republic (which has strengthened alcohol regulations since the aforementioned health crisis), then the American public would be vulnerable to similar health scares and crises.[90]

C) The Three-Tier System Encourages Moderation and Temperance

Though there is mixed evidence as to whether the three-tier system's mandatory wholesalers and multiple levels of licensing actually raise alcohol prices,[91] proponents would argue that increased alcohol prices are an important tool of discouraging over-indulgence. Of course, there is a certain irony to arguing in earlier sections that the three-tier system helps the alcohol market grow by encouraging competition and diversity, then arguing here that the three-tier system *decreases* alcohol consumption. The medical problems of alcohol abuse are well known today[92] and they have been well-known for millennia, with some ancient authors summarizing the problem in a poetic, five-word observation: "When wine enters, sense leaves."[93] Given the danger of alcohol abuse, this irony is perhaps a dangerous one.

The best answer to this irony is that moderate alcohol use has its medical and social benefits as well.[94] A competitive, diverse, and growing alcohol market would therefore not impose an unreasonable danger to consumers and the public, so long as the three-tiered regulations are in place. Introducing Prohibition-like regulations that seek to decrease the amount of alcohol being produced, sold, and consumed will in all likelihood be counterproductive. The reaction to prohibitionistic policies today, much like the reaction to Prohibition itself, would counter-productively *increase* the amount of alcohol consumption in society out of spite and libertarian defiance. Instead of combating societal demands, the three-tier system's regulations channel the growth and innovation of the alcohol market into healthy alternatives, where that growth would otherwise endanger consumers and public health. The three-tier system, in that sense, balances the difficult balance between under-regulating a socially sensitive product that is prone to abuse, on the one hand, and over-regulating that product to the point of destroying a vibrant part of the economy and, more importantly, provoking the overconsumption of alcohol among the population.

The three-tier system's ability to protect consumers and public health is best evidenced by comparing its effects to the effects of its European counterpart. In the heavily regulated U.S. alcohol market, two-thirds of Americans drink alcohol,[95] alcohol abuse is "responsible for 1 in 10 deaths among working-age adults aged 20-64 years"[96], and ten to fifteen percent of Americans are at risk for abusing or depending on alcohol at some point in their lives.[97] Unlike in the U.S., which focuses its alcohol regulation on state-level licensing[98] and treats alcohol as a socially sensitive product, the European Union takes a tax-based approach to alcohol regulation and treats most types of alcohol like any other product.[99] The European Commission Health Promotion Programme only names wine as an alcohol commodity, though it describes hops and cereal grains as "significant."[100] Member states of the E.U. rely on funding from the European Commission to regulate alcohol through public health programs and studies.[101]

Where less than five percent of American males and under three percent of American females are heavy drinkers,[102] the World Health Organization found that seven percent of the European adults surveyed were alcohol-dependent, and detected "probable alcohol abuse/dependence" in ten percent of participants.[103] Germany is worth isolating, as it is known for its especially light regulations of alcohol consumption. Germans, for instance, may purchase and consume alcohol as early as age 14, and the country enforces no formal binding advertising laws.[104] Germany is also a country in which alcohol is the most commonly abused drug, where alcohol poisoning rates have increased by 100 percent from 2000 to 2009, and where a fifth of adult males and a tenth of adult females are heavy drinkers who exceed “safe use” guidelines.[105] After the country cut the alcohol tax in 2004, studies found that German alcohol-related deaths increased.[106] By contrast, studies indicate that increases in the price of alcohol in the U.S. reduced alcohol-related deaths among Americans.[107]

V. CONCLUSION

For the sake of the marketplace’s competitiveness, diversity, and safety–that would be this Essay’s response to any concerns about whether the three-tier system is still necessary in the 21st Century.[108] Talmudic scholars in the ancient world had already observed the dangers of alcohol consumption, stating that “[w]hen wine enters, sense leaves.”[109] They nevertheless did not forbid alcohol. Instead, they encouraged moderation and crafted a system of careful regulations that incentivized moderation.[110] Alcohol regulation is certainly nothing new. The early American colonies, imperial Rome, classical Greece, ancient Egypt, and even the Mesopotamian and Babylonian empires all passed regulations on the production, sale, and consumption of alcohol.[111] The Code of Hammurabi took an especially strong stance on beer service, stating that tavern keepers who underserved patrons would face the punishment of death by drowning.[112] Though the three-tier system does not impose death sentences, the long history of alcohol regulation indicates that the three-tier system’s regulations are not only nothing new, but are in fact standing on the knife’s edge of the cumulated wisdom and efforts that stretch back to the dawn of human civilization.

Unlike the self-distribution model and the European laissez-faire model, the three-tier system's regulations that characterize modern American alcohol policy spur fair competition throughout the marketplace, while also spurring fair competition among producers, wholesalers, and retailers.[113] In turn, this competition helps bring to the marketplace a tremendous diversity of participants, products, and even possibilities, all while the diversity of the European alcohol market is steadily decreasing.[114] Lastly, the three-tier system's effect on taxes and moderation protects consumers from exploitation and serves the health of the public.[115] The three-tier system is a uniquely American enterprise, and it continues to set the standard for other nations that are struggling to walk the fine line between dangerously under-regulating their alcohol market, on the one hand, and counter-productively overregulating their alcohol market on the other hand.

ENDNOTES

[1] BEN ZION BOKSER, THE WISDOM OF THE TALMUD 87 (2013).
[2] *See Making This Wine Vine Known to the Public (Quotation)*, Spurious Quotations, MONTICELLO, *available at* http:// www.monticello.org/site/jefferson/making-wine-vine-known-to-public-quotation (last visited July 7, 2015).
[3] Tammy Lam, *Brew Free or Die? A Comparative Analysis of U.S. and E.U. Craft Beer Regulations*, 23 CARDOZO J. INT'L & COMP. L. 197, 230 (2014) ("In European Union countries such as Belgium, Germany, France, and Italy, alcohol consumption is very much a part of daily life.").
[4] *See Beer Sales*, BREWERS ASS'N, http:// www.brewersassociation.org/pages/business-tools/craft-brewing-statistics/beer-sales (last visited Aug. 6, 2015).
[5] *See* CRAFT BEER BACKGROUNDER, BREWERS ASS'N, http:// www.brewersassociation.org/pages/media/Craft-Beer-Backgrounder (last visited Aug. 8, 2015).
[6] *See Beer Sales*, *supra* note 4.
[7] James A. Tanford, *E-Commerce In Wine*, 3 J.L. ECON. & POL'Y 275, 303 (2006).
[8] *See U.S. Wine Industry Info*, WHOLE WORLD WINES *available at* http://www.wholeworldwines.com/challenge/us-wine-industry-info/ (last visited July 30, 2015) (describing the U.S. wine market as the second largest in the world, and poised to become the world's largest such market).
[9] U.S. Const. amend. XVIII.
[10] *See* Benjamin Grubb, *Exorcising the Ghosts of the Past: An Exploration of Alcoholic Beverage Regulation in Oklahoma*, 37 OKLA. CITY U. L. REV. 289**,** 298 (2012) (describing the tied-house arrangements that "transformed saloon-owners' roles from independent operators to 'agents' of the liquor producers who supplied them.").
[11] *See, e.g.*, *id.* at 297-98; RAYMOND B. FOSDICK & ALBERT L. SCOTT, TOWARD LIQUOR CONTROL 43 (1933) (describing how tied houses encouraged excess consumption); Andrew Tamayo, *What's Brewing in the Old North State: An Analysis of the Beer Distribution Laws Regulating North Carolina's Craft Breweries*, 88 N.C. L. REV. 2198, 2201 (2010) (discussing the rise of tied houses from the economic perspective of monopolization).
[12] *See* Mike Reis, *Beer Issues: What's Up With the Three-Tier System?*, SERIOUS EATS, *available at http://drinks.seriouseats.com/2014/01/craft-beer-three-tier-system-pros-cons-distributor-retailer-debate.html* (last visited July 9, 2015); *see also* Jack S. Blocker, *Did Prohibition Really Work? Alcohol Prohibition as a Public Health Innovation*, 96 AM. J. PUB. HEALTH 233 (Feb. 2006), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1470475/ (discussing the rapid consolidation and closure of many of the 4,100 American breweries in the late 1800s as a factor that helped spark the rise of tied houses and Prohibition.).
[13] U.S. CONST. amend. XXI § 2.
[14] *See* Evan T. Lawson, *The Future of the Three-Tiered System as a Control of Marketing Alcoholic Beverages, in* SOCIAL AND ECONOMIC CONTROL OF ALCOHOL: THE 21ST AMENDMENT IN THE 21ST CENTURY 31, 33 (Carole L. Jurkiewicz & Murphy J. Painter eds., 2008).

[15] *Id.*

[16] *See The History of Beer and the Three-Tier System*, ASSOCIATED BEER DISTRIBUTORS OF ILLINOIS, *available at* http://www.abdi.org/public/history.htm (last visited July 13, 2015) ("The trifold tax capabilities of the three-tier system also likely proved to be a major factor that state legislators considered"); *see also* Russ Bridenbaugh, *The 3-Tier System: Is Anyone Happy?*, WINES & VINES (Apr. 2002), http://www.highbeam.com/doc/1G1-85242685.html (last visited Aug. 13, 2015) (discussing the logic of the three-tier system from the perspective of the alcohol industry's "production" and "selling" ends).

[17] *See* Southern Wine & Spirits, *The Three-Tier Distribution System*, *available at* http://www.southernwine.com/AboutSWS/SWS3Tier/tabid/98/Default.aspx (last visited on July 10, 2015).

[18] *Id.* This Essay uses the terms "wholesaler" and "distributor" interchangeably.

[19] *Id.*

[20] *Compare* IND. CODE §§ 7.1-3-4-6, -9-9, -14-4 (2012) (defining the scope of alcohol permits and allowing on-premises consumption but restricting the ability for off-premises consumption) *with id*. § 7.1-3-5-3 (noting that the permit holder "may not sell beer by the drink nor for consumption on the licensed premises nor . . . allow it to be consumed on the licensed premises."). When customers may only consume alcohol off the premises of the establishment, their consumption is referred to in industry parlance as "carryout consumption." *Id.*

[21] 544 U.S. 460, 489 (2005) (quoting North Dakota v. United States, 495 U.S. 423, 432 (1990)).

[22] *See infra* I.A-C (discussing the arguments about efficiency the price inflation); III.A-C (addressing the comparisons to the European alcohol regulations).

[23] *See infra* II.A-C (discussing the detrimental effect that direct shipments have on society and the marketplace's competitiveness).

[24] *See* Reis, *supra* note 12 (discussing the emergence of "brewpubs," which are "retail entities that make their own beer, thus representing two tiers simultaneously.").

[25] *See* Lam, *supra* note 3, at 206 ("For example, brewpubs are considered to be both producers and retailers, so some states do not require an intermediary distributor. Distributors in some states also have a retailer's license, enabling them to sell directly to consumers. Some small breweries (producing up to a certain number of barrels) are also permitted by state law to act as their own distributors.").

[26] *See infra* I.A-C (discussing the arguments about price inflation); II.A-C (discussing the argument about the diversity of options under the three-tier system); III.A-C (discussing the public welfare justifications for the three-tier system).

[27] *See* PAUL HEYNE ET. AL., THE ECONOMIC WAY OF THINKING 102-06 (13th ed., 2014).

[28] *Id.*; *see also* Investment Climate Team, Department for International Development, London, OECD Global Forum on Investment (March 2008) (*available at* www.oecd.org/investment/globalforum/40315399.pdf) (last visited July 20, 2015) ("Competition is central to the operation of markets, and fosters innovation, productivity and growth, all of which crate wealth and reduce poverty.").

[29] *See* Daniel Glynn, *Granholm's Ends Do Not Justify The Means: The Twenty-First Amendment's Temperance Goals Trump Free-Market Idealism*, 8 J.L. ECON. & POL'Y 113, 126 (2011).
[30] *See* Lam, *supra* note 3, at 208.
[31] *Id.*
[32] *Brewers Almanac 2013: Breweries and Wholesalers 1887 to 2012*, BEER INST., http://www.beerinstitute.org/br/beer-statistics/brewers-almanac (last visited July 28, 2015).
[33] Some estimate that the three-tier system's impositions cost almost 8 billion dollars per year, a price that would be passed onto consumers. *See* DJ Spiess, *How the Three-Tiered Beer Distribution System Works*, FERMENTARIUM (Feb. 22, 2009).
[34] *See* Lam, *supra* note 3, at 208.
[35] *Id*.
[36] *Id.*
[37] *See* Reis, *supra* note 12.
[38] *Id.*
[39] *Id.*
[40] David R. Scott, *Brewing Up a New Century of Beer: How North Carolina Laws Stifle Competition in the Beer Industry and How They Should Be Changed*, 3 Wake FOREST J.L. & POL'Y 417, 426 (2013) (discussing the three-tier system's competition among producers, distributors, and retailers).
[41] *See generally The Three Tier System Drives Competition*, CALIFORNIA BEER & BEVERAGE DISTRIBUTORS, http://www.cbbd.com/threetier_ drives.html (last visited Aug. 5, 2015); *Three Tier System*, ALABAMA WHOLESALE BEER ASS'N , http://beeralabama.org/three-tier-system/ (last visited Aug. 5, 2015); *Michigan's Alcohol Laws Promoting Growth, Choice and Safety*, MICHIGAN BEER & WINE WHOLESALERS ASS'N, http:// www.mbwwa.org/COREISSUES/ThreeTierSystem.aspx (last visited Aug. 5, 2015).
[42] *See generally The Three Tier System Drives Competition*, CALIFORNIA BEER & BEVERAGE DISTRIBUTORS, http://www.cbbd.com/threetier_ drives.html (last visited Aug. 5, 2015).
[43] *Brewers Almanac, supra* note 32.
[44] Scott, *supra* note 40, at 433.
[45] *See* Jason Mercier, *Citizens' Guide to Initiative 1183: To End Washington's Liquor Store Monopoly*, WASHINGTON POL'Y CENTER (Sept. 2011), *available at* http://www.washingtonpolicy.org/publications/notes/citizens-guide-initiative-1183-end-washingtons-liquor-store-monopoly (last visited July 26, 2015).
[46] *Id.*
[47] Evan Marczynski, *Mixed Reactions for Private Liquor Market's First Year*, THE BELLINGHAM BUS. J. (June 28, 2013), *available at* http://bbjtoday.com/blog/mixed-reactions-for-private-liquor-markets-first-year/23937 (last visited July 6, 2015).
[48] *Id.*
[49] *See Three-Tier System*, FLORIDA BEER WHOLESALERS ASS'N, *available at* http://fbwa.com/licensing-regulation/three-tier-system/ (last visited July 15, 2015).
[50] FL. STAT. ANN. § 561.42.

[51] *See* Sara Schorske & Alex Heckathorn, *Three Tier or Free Trade?*, COMPLIANCE SERVICE OF AMERICA (Jan./Feb. 2005) (*available at http://www.csa-compliance.com/html/CSA-Articles/three-tier-or-free-trade.html*) (last visited July 13, 2015).

[52] For comparison's sake, it is worth noting that "large" alcohol companies are truly huge, with the largest of them (Southern Wine & Spirits of America, Inc.) operating in 35 states. *See* Susan Lorde Martin, *Wine Wars - Consumers and Mom-And-Pop Wineries vs. Big Business Wholesalers: A Citizens United Example*, 21 KAN. J.L. & PUB. POL'Y 1, 10 (2011).

[53] *See generally, e.g.*, ALCOHOL AND TOBACCO TAX AND TRADE BUREAU, http://www.ttb.gov; FEDERAL ALCOHOL ADMINISTRATION ACT, 27 U.S.C. §§ 201-211 (West 2015); Andrew Tamayo, *What's Brewing in the Old North State: An Analysis of the Beer Distribution Laws Regulating North Carolina's Craft Breweries*, 88 N.C. L. REV. 2198, 2206 (2010).

[54] *See Three-Tier System*, *supra* note 49.

[55] Eric Petersen, *Liquor Sales System Has Benefits*, MILWAUKEE WISCONSIN J. SENTINEL (Mar. 12, 2008) (*available at* http://www.jsonline.com/news/opinion/29467269.html) (last visited July 15, 2015).

[56] *See* KATALIN J. CSERES, COMPETITION LAW AND CONSUMER PROTECTION 169 (2005).

[57] Daniel Fromson, *Beer's Black Market*, THE WASH. POST (Sept. 6, 2011), http://www.washingtonpost.com/lifestyle/food/beers-black-market/2011/09/01/gIQAsL0D7J_story.html (last visited Aug. 5, 2015).

[58] *See Michigan Beer Distributor Highlights Benefits of Three-Tier System and State Alcohol Regulation in Wake of Recall*, NAT'L BEER WHOLESALERS ASS'N, *available at* http://nbwa.org/beerroute/michigan-beer-distributor-highlights-benefits-of-three-tier-system-and-state-alcohol-regulation-in-wake-of-recall (last visited Aug. 4, 2015).

[59] *Id.*

[60] Scott, *supra* note 40, at 434.

[61] *See* Tanford, *supra* note 7.

[62] *See History of Craft Brewing*, BREWERS ASS'N, http://www.brewersassociation.org/brewers-association/history/history-of-craft-brewing/ (last visited Aug. 16, 2015).

[63] *Compare* Stan Hieronymus, *History of Beer: Timeline*, CRAFT BEER, http://www.craftbeer.com/the-beverage/history-of-beer/timeline (last visited Aug. 16, 2015) (discussing the first festival's diversity of beer); *with FAQ - What is the Great American Beer Festival?*, GREAT AMERICAN BEER FESTIVAL, http://www.greatamericanbeerfestival.com/about/faq/#gabf (last visited Aug. 2, 2015) (discussing the 2013 festival's diversity of beer products).

[64] *Number of Breweries,* BREWERS ASS'N, http://www.brewersassociation.org/statistics/number-of-breweries/ (last visited Aug. 12, 2015) (discussing the number of breweries); *Craft Brewer Defined*, BREWERS ASS'N, http://www.brewersassociation.org/pages/business-tools/craftbrewing-statistics/craft-brewer-defined (last visited Aug. 1, 2015) (estimating that the majority of Americans live within 10 miles of a brewery).

[65] *See 2012 Craft Beer Data Infographic,* BREWERS ASS'N, http://

www.brewersassociation.org/press-releases/2012-craft-beer-data-infographic/ (last visited Aug. 12, 2015).

[66] *Brewer's Almanac*, BEER INSTITUTE (Mar. 28, 2013), http:// www.beerinstitute.org/assets/uploads/Brewers_Almanac-_20131.xlsx.

[67] *Brewers Almanac 2013: Active Brewer Permits by State*, BEER INST., http://www.beerinstitute.org/br/beer-statistics/brewers-almanac (last visited Aug. 10, 2015).

[68] *See, e.g., History of Samuel Adams and Craft Beer*, BOSTON BEER CO, http://www.samueladams.com/history (last visited Aug. 20, 2015).

[69] William Alden, *Anheuser-Busch InBev Buys Blue Point Brewing Company*, N.Y. TIMES (Feb. 5, 2014, 11:17 AM), http:// dealbook.nytimes.com/2014/02/05/anheuser-busch-inbev-buys-blue-point-brewer/?_ php=true&_type=blogs&_r=0 (last visited Aug. 20, 2015).

[70] *See* Helay Fazel et al*, Is the End of the German Beer Industry Near?,* WHARTON BUS. SCHOOL OF THE UNIV. OF PENN., (Jan. 2, 2013), *available at* http://knowledge.wharton.upenn.edu/article.cfm?articleid=3159.

[71] *Id.*

[72] *See* Michael Filtz, *German Beer's Existential* Crisis, THE NEW YORKER (Jan. 14, 2014), http:// www.newyorker.com/currency-tag/german-beers-existential-crisis.

[73] *See* Christian DeBenedetti, *Brauereisterben: Germany's Beer Culture is in Decline*, SLATE (Mar. 2, 2011, 10:07 AM), http:// www.slate.com/articles/life/drink/2011/03/brauereisterben.html (describing the purity law as having "demonized" innovation).

[74] *See* Fermentarium, *supra* note 33.

[75] *See* Lam, *supra* note 3, at 208 ("At least according to wholesalers, there are advantages to the three-tier system…Retailers have the ability to pick and choose from one (or a few) wholesale vendors with diverse product portfolios, instead of being approached by a multitude of different producers.").

[76] *See* Sara Schorske & Alex Heckathorn, *Three Tier or Free Trade?*, COMPLIANCE SERVICE OF AMERICA (Jan./Feb. 2005) (*available at http://www.csa-compliance.com/html/CSA-Articles/three-tier-or-free-trade.html*) (last visited July 13, 2015).

[77] *See Stone Enjoy by IPA,* STONE BREWING CO., http:// www.stonebrewing.com/enjoyby/ (last visited Aug. 10, 2015).

[78] *Id.*

[79] S*ee generally* JEREMY COWAN, CRAFT BEER BAR MITZVAH 112 (2010).

[80] *Id.*

[81] *See generally* Alia Akkam & Kristen Wolfe Bieler, *Decade in Review 2000-2009: A Transformation of the Industry Recapping Ten Extraordinary Years, Beverage Media Group* (Jan. 2010), http://www.bevnetwork.com/pdf/jan10_decade.pdf.

[82] Shirley Chen, *Craft Beer Drinkers Reignite The Wine Wars*, 26 LOY. CONSUMER L. REV. 526, 528 (2014).

[83] Ethan Davis, *Uncorking a Seventy-Four-Year-Old Bottle: A Toast to the Free Flow of Liquor Across State Borders*, THE YALE LAW J. (FORUM) (26 Nov 2007) *available at*

http://www.yalelawjournal.org/forum/uncorking-a-seventy-four-year-old-bottle-a-toast-to-the-free-flow-of-liquor-across-state-borders (last visited on July 27, 2015).

[84] *See, e.g., id;* Cowan, *supra* note 79, at 112; S. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control, 731 F.3d 799, 808-09 (8th Cir. 2013) (agreeing that the three-tier system encourages public accountability and moderate consumption, and prevents underage drinking).

[85] *Id.*

[86] Carole L. Jurkiewicz & Murphy J. Painter, *Why We Control Alcohol the Way We Do, in* SOCIAL AND ECONOMIC CONTROL OF ALCOHOL: THE 21ST AMENDMENT IN THE 21ST CENTURY 1, 6-7 (Carole L. Jurkiewicz & Murphy J. Painter eds., 2008).

[87] *See* Lam, *supra* note 3, at 210.

[88] Associated Press, *The Czech Republic Has Banned Hard Alcohol*, BUS. INSIDER, http://www.businessinsider.com/czech-republic-bans-hard-alcohol-2012-9; Jan Lopatka & Jason Hovet, *Czechs Ease Alcohol Ban, Hunt for Deadly Booze Goes On,* REUTERS (Sept. 26, 2012), http:// www.reuters.com/article/2012/09/26/us-czech-bootleg-idUSBRE88P1M320120926 (last visited Aug. 14, 2015).

[89] *See Country Profile: Czech Republic*, EUROPEAN COMM'N (2009), *available at* http://ec.europa.eu/health/alcohol/policy/country_profiles/czech_republic_country_profile.pdf.

[90] *Id.*

[91] *Compare* earlier note *with* FED. TRADE COMM'N, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE 18-19 (2003) (stating that multiple layers of tax mark up the price of alcohol, and that higher prices will deter some consumers from purchasing alcohol if they are denied the option for direct shipments online) *available at* http:// www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-report-concerning-possible-anticompetitive-barriers-e-commerce-wine/winereport2.pdf.

[92] *See, e.g.*, M. Grønbæk, *The Positive and Negative Health Effects of Alcohol--and the Public Health Implications*, 265 J. INTERNAL MED. 407 (2009).

[93] Bokser, *supra* note 1.

[94] *See* Grønbæk, *supra* note 92, at 407; *see also* Jurkiewicz & Painter, *supra* note 86, at 1 (quoting a World Health Organization report, which states that "[a]lcohol gives pleasure as well as pain, and any government which fails to acknowledge that fact is unlikely to take the people with it.").

[95] *See* Frank Newport, *U.S. Drinking Rate Edges Up Slightly to 25-Year High: Beer Remains Beverage of Choice for Drinkers*, GALLUP: WELL-BEING (Jul. 30, 2010), http://www.gallup.com/poll/141656/drinking-rate-edges-slightly-year-high.aspx. Interestingly, Americans in the lowest socioeconomic brackets and Americans with the lowest degree of education were the least likely to drink alcohol. *Id.*

[96] *Alcohol Fact Sheet,* CENTERS FOR DISEASE CONTROL AND PREVENTION (Nov. 7, 2014), *available at* http://www.cdc.gov/alcohol/fact-sheets/alcohol-use.htm (last visited July 29, 2015).

[97] *Alcoholism Statistics,* ALCOHOL ADDICTION, http:// www.alcoholaddiction.info/alcoholism-statistics.htm (last visited Aug. 7, 2015).

[98] Through licensing, states are able to impose "a statewide drinking age minimum, limits on locations or hours of sale, criminal statutes, taxes, fines and fees." *See The Three-Tier Distribution System, supra* note 17.
[99] *See* Lam, *supra* note 3, at 218.
[100] *Id.* at 219.
[101] *Id.* at 219-20.
[102] *Alcohol Facts and Statistics,* NAT'L INST. ON ALCOHOL ABUSE & ALCOHOLISM (Mar. 2015), http://www.niaaa.nih.gov/alcohol-health/overview-alcohol-consumption/alcohol-facts-and-statistics (last visited July 29, 2015).
[103] *See* Lam, *supra* note 3, at 221 (citing *WHO Global Status Report on Alcohol 2004-Country Profiles: Belgium*, WHO (2004), *available at* http://www.who.int/substance_abuse/publications/en/belgium.pdf).
[104] *Id.* at 222.
[105] *Id.*
[106] *Id.* at 223.
[107] *Alcoholism Statistics, supra* note 92.
[108] *Better, But Still Flawed*, MILWAUKEE WISCONSIN J. SENTINEL (EDITORIAL) (Mar. 12, 2008) (*available at* http://www.jsonline.com/news/opinion/29467269.html) (last visited July 27, 2015).
[109] Bokser, *supra* note 1.
[110] *See The History of Beer, supra* note 109.
[111] *See* Jurkiewicz & Painter, *supra* note 66, at 2-3; *see also* Joshua J. Mark, *Beer: Definition*, ANCIENT HISTORY ENCYCLOPEDIA (Mar. 1, 2011), *available at* http://www.ancient.eu.com/Beer/ (last visited Aug. 9, 2015).
[112] *Id.*
[113] *See The History of Beer and the Three-Tier System*, ASSOCIATED BEER DISTRIBUTORS OF ILLINOIS, http://www.abdi.org/public/history.htm (last visited Aug. 2, 2015).
[114] *Id.*
[115] *Id.*