

DRINK LOCAL, THINK REGIONAL: IMPLEMENTING AN ORDERLY ALCOHOL MARKETPLACE THROUGH STATE-LEVEL LICENSING

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INTRODUCTION

Alcohol is unique. The statement surmises, if somewhat simplistically, the long and colorful history of alcohol regulation within the United States. Today, alcohol consumption accompanies many favorite American past times. People gather with a cold beer in hand, to enjoy socializing with friends, a pleasant dinner with family, an exciting sport, or merely just to unwind after a long day at work. Alcoholic beverages are a major commercial item, keeping millions employed and substantially contributing to the nation's gross domestic product. The American beer industry alone maintains over two million employees.¹ However, while alcohol consumption in the appropriate context is enjoyable, it also invites a high risk of drastic social harm. It is this tension between alcohol's respective benefits and damage that characterizes both the uniqueness of the product, and the nation's attitudes toward it. Over the century, the country has experienced varied, and somewhat turbulent, policy prescriptions designed to mitigate alcohol-related issues, until balance was found in the present-day licensing system. The modern licensing system has proven to be a durable regulatory framework, which accomplishes the goal of curbing alcohol's worst excesses while concurrently promoting safe and responsible consumption.

This paper argues in defense of the alcohol licensing system and how it is conducive to a state's core interest in furthering an orderly marketplace. Part I details the harms and evident issues inherent to alcohol use. Part II describes previous American alcohol policy frameworks, and their consequences. Part III explains the lessons learned from previous alcohol regulations,

the licensing system as it exists today, and the benefits licensing confers on the public. Finally, Part IV analyzes a pending constitutional challenge to the modern licensing system, and offers a defense and analysis of the system.

I. THE PROBLEM WITH ALCOHOL

Alcohol is unique for while it is a commercial good, its use can incur significant and substantial social costs. Alcohol consumption presents several risks, including addiction, increased crime, and even death. These facts are not in dispute, and honest policy prescriptions should be forthright in addressing them.

Addiction disorders, such as alcohol dependency, are life-long afflictions that can disrupt a victim's physical, mental, and emotional health. In 2016, the National Survey on Drug Use and Health ("NSDUH") published a report describing the current trends in alcohol consumption and abuse.² NSDUH reports that, in 2016, the number of Americans over the age of twelve who currently or recently consumed alcohol was about 136.7 million.³ Of that overall population of alcohol consumers, 65.3 million people were reported to be binge alcohol users.⁴ Of this subset of binge drinkers, the survey reports 16.3 million people engaged in Heavy Alcohol Use.⁵ This report demonstrates the clear addictive properties of alcohol, despite modern social efforts to combat it. The report also details statistics on alcohol consumption for those who are most vulnerable: adolescents and young adults.⁶ These underage consumers are *highly* susceptible to addiction, where brain chemistry has yet to fully develop.⁷ Such behavior, like underage consumption, can lead to further dependency or abuse, with addicts diagnosed with Alcohol Use Disorder.⁸ Alcohol can again be seen to exact a heavy toll when considering another group of vulnerables, the homeless. The National Coalition for the Homeless report that 38% of the

unsheltered or homeless suffer from alcohol dependency.⁹ The preceding statistics clearly demonstrate that alcohol addiction is pervasive, even in modern society.

The consumption of alcohol does not only pose significant risks of addiction, but increased criminal activity. Consumption of alcohol can lead to socially-sensitive externalities such as drunk driving and criminal violence. The National Highway Traffic Safety Administration (NHTSA) reported that in 2016, there were 10,497 fatalities from drunk driving incidents.¹⁰ Not only does the consumption of alcohol precipitate drunk driving, but statistical trends show that it is an agitating agent in a variety of violent crimes, including assault, rape, and domestic abuse. Roughly 500,000 incidents of alcohol violence occur each year.¹¹ Eighty-six percent of homicides and sixty percent of sexual assault cases are related to alcohol misuse.¹² Further, domestic abuse victims are two-thirds more likely to suffer violence by perpetrators under the influence of alcohol.¹³ If that was not enough, children who witness domestic violence are fifty percent more likely to abuse alcohol or drugs themselves.¹⁴ Therefore, alcohol can be attributed to not only the needless death and suffering of thousands, but it also helps to perpetuate generational alcohol abuse.

There are undeniable social harms associated with alcohol consumption that, if left unchecked, will lead to disastrous consequences. While the use of alcohol may confer some economic and social benefits, the clear and obvious dangers of alcohol abuse must be confronted. Policy makers have wrestled with the social benefits of alcohol, while mitigating its significant harms.

II. THE HISTORY OF ALCOHOL REGULATION

The story of the modern day alcohol licensing system begins somewhere in the early twentieth century. Due to the booming industrial revolution, Americans witnessed a drastic shift

from their once agrarian culture to that of urban life.¹⁵ It was during this economic and social upheaval that alcohol consumption became prevalent, and wreaked newfound societal harm.¹⁶ The chief concern was the social damage of the saloon, often reputed to be “a menace to society” and a threat to traditional American values.¹⁷ The institution allowed for city-workers, predominantly male, to engage in extensive drunkenness and other degrading activities, away from their homes and families.¹⁸ The rampant alcohol abuse associated with the saloon did not occur in a vacuum, but led to high levels of domestic abuse, violence, and other socially damaging externalities.¹⁹ A saloon encouraged patrons to waste away all of their wages on alcohol and gambling.²⁰ The saloon culture guaranteed a perpetual cycle of poverty and addiction for many, and soon it became clear that changes must be made.²¹

The campaign for alcohol reform was taken up by the early temperance movement, which sought to eliminate the vices accompanying saloon culture. As Temperance gained grassroots support, state legislatures began enacting laws that wholly banned the production and sale of alcohol within their borders.²² These state-level alcohol controls saw constitutional challenges from the saloon culture, including *Bowman v. Chicago & Northwestern Railway Co.* and *Leisy v. Hardin*.²³ In both of these cases, the United States Supreme Court held that a state lacked the constitutional authority to prohibit the importation of alcohol into its own borders.²⁴ These high-court rulings effectively nullified any chance of a community choosing a regional approach to alcohol control. Later, the United States Congress enacted federal legislation that overturned these decisions.²⁵ These were major victories for the temperance movement who sought to strengthen a locality’s ability to enact substantive alcohol reform. However, the best was yet to come for the temperance movement, when in 1919, the United States ratified the Eighteenth Amendment to the nation’s Constitution.²⁶ The Amendment, known as Prohibition, provided:

Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all the territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.²⁷

Pursuant to this Amendment, the national prohibition on alcohol took effect on January 16, 1920.²⁸ Notably, Section 2 of the Eighteenth Amendment deliberately distributes the authority to regulate alcohol between the state and federal government. The Amendment was concurrently implemented with the Volstead Act, legislation empowering the federal government to aid local law enforcement with enforcing Prohibition.²⁹ A uniform, nationalized alcohol regulation was to be the solution to the problems of saloon culture. However, this proved problematic.

Enforcement of Prohibition was difficult. The Volstead Act defined § 1 of the Eighteenth Amendment's "intoxicating liquors" to mean any liquid containing 0.5% alcohol.³⁰ This overzealous definition outlawed almost all alcoholic beverages, thus extinguishing the entire alcohol market despite the apparent demand.³¹ Organized crime gladly offered a black-market substitute.³² Other systematic problems eventually emerged, inherent to the general policy framework of Prohibition. First, the production and sale of alcohol was forced underground, away from the light of day, and government officials were unable to ensure the safety of the product.³³ Second, and most profoundly, the underground alcohol market spawned a new and highly sophisticated level of organized crime.³⁴ Soon, many began to wonder if the social environment of Prohibition was truly any better than that of saloon culture.³⁵ Crime was widespread, the contents of alcohol remained totally unregulated, government corruption was pervasive, and alcohol had yet to be eliminated.³⁶ Time and again, the enforcement of

Prohibition demonstrated acute vulnerabilities in the current regulatory framework. Advocates eventually called for repeal, and the debate soon began over how alcohol should be controlled in the Post-Prohibition era.

III. THE MODERN LICENSING SYSTEM

A. Lessons Learned.

On December 5, 1933, the Twenty-First Amendment to the United States Constitution was ratified, proclaiming the end of Prohibition.³⁷ The Amendment provides:

Section 1. The eighteenth article of 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 from the date of the submission hereof to the States by the Congress.³⁸

The text of the Twenty-First Amendment reflects a fundamental shift in how federal and state governments would affect an orderly marketplace for alcohol. Of great importance to the future Post-Prohibition order is Section 2 of the new Amendment. This section stands in stark contrast with Section 2 of the Eighteenth Amendment, which sought a partnered regulatory approach between the federal and state governments. There would be no nationally enacted policy like the Volstead Act. Instead, Section 2 of the Twenty-First Amendment provided for the complete delegation of alcohol control and enforcement to the states. Further, the objective of this newly ratified amendment would be to remedy three crucial defects found in the previous alcohol regulation regimes.

First, it was evident that Prohibition did not effectively further the important state interests of ensuring public health and safety. Under Prohibition, it was axiomatically impossible to propagate regulations on an illegal substance. Alcohol vendors could not openly and honestly

sell their wares, and contamination of the product became commonplace.³⁹ Quality assurance could not be consistently enforced in an absent regulatory environment. As a minimum requirement, controls on alcohol manufacturing and sale that promote public health and safety are necessary.

Second, Prohibition fully demonstrated the critical issue with improper incentive alignment. Alcohol was in high demand, yet its only merchants were criminals.⁴⁰ Bootleggers, racketeers, and the saloons before them, were driven only to maximize consumption for better profits.⁴¹ The sellers had no incentive to encourage responsible consumption, nor did they have an interest in mitigating the extensive social harms of alcohol.⁴² In the future, steps would need to be taken to embed alcohol market participants within their respective communities.

Third, there are clear problems with implementing a nation-wide alcohol policy. Regulations require community buy-in, and Prohibition illustrated the host of consequences when it is ignored. Enforcement of the Eighteenth Amendment proved difficult due to “wide areas of the public [being] unconvinced that the use of alcoholic beverages is in itself reprehensible.”⁴³ Prohibition policymakers failed to reconcile their objectives with the wishes of local communities. Going forward, each state will enact laws tailored to their respective communities that share common values, culture, and geography. For example, in the wake of Repeal, a few states chose to continue to prevent the importation and sale of alcohol within their territory.⁴⁴ Some states chose to create a government-monopoly on the industry.⁴⁵ Others chose to implement strict licensing systems.⁴⁶ The broad range of policy edicts demonstrated a clear diversity of thought amongst the American populace. The new, decentralized approach to alcohol regulation maximized the chance that policy would best reflect the attitudes of the local community and ensures public buy-in to consistent enforcement.

B. *An Orderly Marketplace.*

The Post-Prohibition order will center around a system of licenses. Alcohol would once again become a lawful article of commerce, but it would be tightly controlled through a set of comprehensive regulations. The chief aim would be to create an orderly marketplace, in stark contrast to those during the Prohibition and saloon eras. The scheme would allow for state authorities to regularly verify that industry members complied with policy objectives, and aggressively sanction bad actors.⁴⁷ The lessons learned from Prohibition would be implemented, where regulations were designed and tailored to a given locality, market participants would be incentivized to act as conscientious vendors, and the states' core objectives would be better served.

It is through a licensing system that the various state governments can limit and control the amount of alcohol market participants. The manufacture, distribution, and sale of alcohol would be, generally, illegal unless the vendor received prior authorization from the government.⁴⁸ Regulators can impose requirements for even obtaining a license, increasing the standard of quality and character for licensees.⁴⁹ Further, licenses allow the state to ensure that market participants remain compliant.⁵⁰

Licenses also allow governments to structurally limit an industry member's scope of conduct within the alcohol market. A major problem confronting community stakeholders at the end of Prohibition was somehow curbing the profit motives of the alcohol industry, such as it was during the days of the saloon.⁵¹ In a classical free market, industries have substantial economic interests in vertically integrating, thereby streamlining production and decreasing cost of consumption.⁵² However, this is not the ideal circumstance for a unique product like alcohol. An alcohol market solely driven by profit would inevitably result in proliferation of the product,

which cannot concurrently promote responsible use. Therefore, the goal would be to mitigate, or limit, the ability of market participants to maximize profits, while encouraging them to be conscientious of alcohol's social harm.

It was through this lens that the modern regulatory scheme of the 'three-tier' system was conceived. Under this framework, the entirety of the alcoholic beverage industry was divided into three parts: production, distribution, and retail.⁵³ Each tier would be rigidly segregated from its counterparts and industry members must elect to participate in only one tier. A brewer must only brew beer; a liquor retailer must only sell its wares directly to consumers; a wholesaler must only transport and sell to retailers. The state would grant licenses authorizing participation in a single tier, thereby strictly controlling the flow of alcohol.

The three-tier system fosters the core goal of an orderly marketplace. An equilibrium developed between the distinct tiers ensures that no single actor can grow dominant. Massive, nationwide alcohol brands cannot cow-tow small retailers into unfair contracts.⁵⁴ Conversely, giant big-box retailers will be unable to dictate terms to small-scale producers.⁵⁵ The total separateness guaranteed by a strict three-tier licensing scheme is absolutely paramount to preventing a return to the saloon era and pervasive alcohol abuse.

The strict segregation of alcohol market activity also substantially furthers the state's interest in public health and safety. Retailers may only receive alcohol beverages from a licensed wholesaler, which in turn received its product from a manufacturer.⁵⁶ Each alcoholic beverage must contain a serial code that allows the item to be tracked as it passes through the three-tier system.⁵⁷ Therefore, by law, unsafe or otherwise contaminated alcohol products can always be traced back to a responsible party. A system where the product must pass from producer to end-consumer ensures a chain of custody that guarantees safety.⁵⁸ Because of its responsibility to

keep detailed logs, wholesalers, as the distribution tier, may conduct precise and efficient recalls of any dangerous products. In 2012, Heineken USA Inc., discovered a possibly dangerous defect with less than one percent of its latest shipment of beer.⁵⁹ When the product was recalled, Heineken managed to recover one hundred percent of the defective product.⁶⁰ Such an effective result can only be due to the clearly delineated market responsibilities within the three-tier system.

C. *The Conscientious Alcohol Market.*

The general theme of alcohol licensing and the three-tier system is the creation of conscientious industry members. There are other incentives that help sustain an orderly marketplace, beyond the mere structure of the three-tier system. This can be done through various licensing criteria such as local board hearings and residency requirements. The design produces systematic incentives for market participants by compelling them to become accountable to their local communities.

Local board hearings for any initial or renewal license provide both alcohol vendors and community stakeholders an opportunity to engage in a substantive dialogue. License applicants can present a case for their general business plan, their vision for contributing to the community, and how they will sell liquor, beer, or wine in a responsible manner.⁶¹ More importantly however, a local board hearing allows other community members to express and address their concerns, and even remonstrate the applicant.⁶² A formal protest against an alcohol licensee is a serious matter, as some states authorize local licensing boards to deny an application in such circumstances.⁶³ This all means that neighborhoods, churches, local organizers, and any concerned citizen can have a voice in their community's alcohol policy, and build public consensus. This mechanism promises a filter against saloons, and other socially damaging

alcohol premises. It also ensures that each alcohol licensee remains receptive and accountable to the demands of their community.

Residency requirements, like local board hearings, are another structural incentive that encourages alcohol market participants to remain involved and anchored within the community.⁶⁴ Residency requirements require the licensee's physical presence within the state prior to issuance.⁶⁵ As discussed, there are undeniable, socially damaging externalities to alcohol consumption; it does not occur in a vacuum. A bar's patron can drive home over-served, or a liquor store can sell to an underage consumer who then dies from binge drinking. The consequences of irresponsible alcohol distribution must be acutely felt by the licensee. States have a substantial interest in ensuring that someone within the jurisdiction and power of the local government can be held to answer for damage caused by irresponsible alcohol use.⁶⁶ Further, enforcement and oversight of local alcohol market participants is far easier for regulators.⁶⁷ Applying not only economic and legal pressure, but also social stigma upon a market participant who fails to act conscientiously can prove effective.⁶⁸

The licensing system is an obvious, natural, and logical development in the Post-Prohibition order. It provides a robust regulatory framework, where industry members may participate and compete in a fair, lawful, and open market. The three-tier system confronts the perils inherent to unregulated environment of the historical saloon. It equally addresses our modern concerns regarding minor consumption, adult over-consumption, and addiction. The Post-Prohibition licensing system provides measures of accountability for market participants, where it must answer to both its local community and the state on a frequent basis. Finally, it should be noted that the Post-Prohibition licensing system has proven extremely durable, remaining relatively unchanged since the ratification of the Twenty-First Amendment in 1933. This is because the

system rests on sound principles, seeking community buy-in, proper incentive alignment, and locally tailored policies.

IV. THE CONSTITUTIONALITY OF ALCOHOL LICENSING

A. *Twenty-First Amendment Jurisprudence.*

It is clear by now that state-level alcohol licensing and regulation effectively promote the ideals of an orderly marketplace. However, despite its benefits, there are those who seek to undermine this proven system. Opponents to the Post-Prohibition order regularly decry claims of economic protectionism. They argue that the systems and structures implemented at the end of Prohibition should be disregarded in favor of a deregulated market. It is their position that alcohol is no different than any other marketable good. This is patently incorrect. Yet, vigorous legal challenges to the system persist, with opponents questioning the constitutionality of certain licensing criteria.

The most imminent and immediate threat to the modern licensing system is the constitutional challenge to durational residency requirements. This requirement goes beyond a state mandating a mere physical presence, and requires that a license applicant is a resident of the state for a period of time.⁶⁹ Such requirements are presently pending review before the United States Supreme Court.⁷⁰ Certain industry members seek to eliminate these restrictions through the Court's review. As it has been shown, invalidating these useful licensing standards could jeopardize the state's ability to impose an orderly marketplace. Residency requirements are a legitimate exercise of state power, and the structural incentives for anchoring alcohol market actors within their respective communities are many. Residency requirements ease the cost of government oversight, ensure public buy-in, and encourage a licensee to build a positive relationship with the local population. Much is at stake with the Court's decision, and a legal

analysis defending residency requirements is necessary to preserve this effective and durable system.

Jurisprudence on Section 2 of the Twenty-First Amendment (“Section 2”) has undergone a significant transformation since its ratification in the winter of 1933. Early court decisions interpreted Section 2 to give plenary power to a state to regulate alcohol within its borders.⁷¹ This is to say that Section 2 exempted alcohol regulation from traditional Dormant Commerce Clause jurisprudence. However, beginning in the 1960’s, the Court began to shift its perspective, observing, “[both] the Twenty-First Amendment and the Commerce Clause are parts of the same Constitution [and] each must be considered in light of the other and in context of the issues and interests at stake in any concrete case.”⁷² This meant, at times, state alcohol regulations could run afoul of the Commerce Clause, despite the language of Section 2. The newfound interpretation was coined as a ‘harmonizing’ theory between the powers delegated under Section 2 and the edicts of the Commerce Clause. Under this standard, a state’s alcohol regulation would only receive Section 2 protection when it was an exercise of a core interest provided by the Twenty-First Amendment.⁷³ The Court identified three such possible objectives as “...promoting temperance, ensuring orderly market conditions, and raising revenue...”⁷⁴ This new legal theory has certainly seen its fair share of criticism for lacking direction, yet it continues to control the limits of state power in regulating alcohol.⁷⁵ Two contemporary Supreme Court cases on the conflict between the Twenty-First Amendment and the Dormant Commerce Clause are *Bacchus Imps. v. Dias* and *Granholm v. Heald*, and offer the best instruction on the extent of state power under Section 2.⁷⁶

In *Bacchus*, the State of Hawaii enacted a wholesale excise tax on all liquor sales, with an exemption provided to in-state okolekao manufacturers.⁷⁷ The State’s explicit objective for the

tax exemption was to promote commercial growth in this native liquor. The Supreme Court found that this exemption violated the Dormant Commerce Clause, despite the law relating to the State's alcohol regulatory system. In its finding, the Court described this test: (1) whether the State's alcohol regulation discriminates against interstate commerce, and if so, (2) whether the purported state interest in the regulation "[is] so closely related to the powers reserved by the Twenty-First Amendment that the regulation may prevail..."⁷⁸ The Court determined that "economic protectionism" was not a core power enshrined within the Twenty-First Amendment.⁷⁹ Therefore, Hawaii's tax exemption was not protected by the Twenty-First Amendment, and was invalidated as a discriminatory burden on interstate commerce.

In *Granholm*, the Court was once again required to reconcile the tensions between the Twenty-First Amendment and the Dormant Commerce Clause. The Court reviewed two state laws from New York and Michigan permitting in-state wineries to directly ship to consumers.⁸⁰ The plaintiffs alleged that allowing in-state wineries to circumvent the three-tier system while prohibiting out-of-state wineries the same privilege was a violation of the Dormant Commerce Clause. The Court found that this was a discriminatory law against interstate commerce, and an obvious attempt to provide local wineries an absolute advantage over out-of-state competitors.⁸¹ In so holding, the Court made several noteworthy, albeit nebulous, findings. First, the Court found that Section 2 of the Twenty-First Amendment acted only to allow states to maintain a "...uniform system for controlling liquor by regulating its transportation, importation, and use."⁸² Second, the Court gave an extensive analysis on the three-tier system calling it "unquestionably legitimate."⁸³ Finally, the Court declared that "[s]tate policies are protected under the Twenty-First Amendment when they treat liquor produced out of state the same as its domestic equivalent."⁸⁴

Since the decision in *Granholm*, lower courts have wrestled with the Court’s holding and the proclaimed ‘harmonizing’ jurisprudence. Recently, a circuit split has formed over the exact meaning of the various findings from *Granholm*. The Second, Fourth, and Eighth Circuits have limited *Granholm*’s holding to the manufacturing/producer tier of the three-tier system, and only require that in-state and out-of-state liquor products and producers see equal treatment, as explicitly required by the Supreme Court.⁸⁵ In contrast, the Fifth and Sixth Circuits have *expanded* the holding in *Granholm*, requiring in-state and out-of-state wholesalers and retailers be treated equally.⁸⁶ The divergence within the circuits is concerning, especially if the Supreme Court affirms the Fifth and Sixth Circuits interpretation of *Granholm* this coming year in *Tenn. Wine & Spirits Retailers Ass’n v. Byrd*.

B. *Durational-Residency Requirements and the Dormant Commerce Clause.*

Tenn. Wine & Spirits Retailers Ass’n v. Byrd involved two out-of-state wholesalers seeking distribution licenses in Tennessee, despite the state’s durational-residency requirements.⁸⁷ The circuit court found that durational-residency requirements did not further any core interest of the State of Tennessee pursuant to the Twenty-First Amendment, and therefore violated the Dormant Commerce Clause.⁸⁸ In so finding, the court held that Tennessee’s residency statute wholly favored in-state residents by excluding out-of-state residents from engaging in the State’s economy. Effectively, the Sixth Circuit found the residency requirements to be “economic protectionism,” similar to the State of Hawaii’s tax exemption in *Bacchus*.⁸⁹ The court further found that the State’s durational-residency requirement was not essential to the three-tier system.

The Sixth Circuit’s holding, and the Fifth Circuit’s before it, on this issue is problematic for three reasons. First, the court does not consider both the history and the policy objectives of Section 2. Section 2 provided the several states broad powers to regulate alcohol according to the

circumstances and wishes of their respective communities.⁹⁰ As detailed in Part III, it was through Section 2 that states implemented policies that build public consensus and create structural incentives for industry members to act conscientiously. The Sixth Circuit's interpretation of *Granholm* and *Bacchus* passes over this important context, giving it no weight, and instead moves immediately to scrutinizing the apparent conflict between durational-residency requirements and the Commerce Clause.

Second, the Sixth Circuit's holding would effectively nullify the constitutional 'exceptionalism' provided under the Twenty-First Amendment, equating alcohol to any other commercial good. Despite the United States Supreme Court's shift in Section 2 jurisprudence, the Court has held that the Twenty-First Amendment "create[s] an exception to the normal operation of the Commerce Clause."⁹¹ Alcohol regulations pursuant to the state's core interests under the Twenty-First Amendment remain valid, even if there is friction with the Commerce Clause.⁹² Yet the Sixth Circuit does not address this, observing a quote from *Granholm* that "[l]aws cannot 'deprive citizens of their right to have access to the markets of other States on equal terms.'"⁹³ In context, the Court's statement in *Granholm* is discussing the reciprocal direct shipping laws amongst the several states, and was expressing deep concern that these regulations would eventually lead to "economic Balkanization," "[r]ivalries among the States..", and the "proliferation of trade zones..."⁹⁴ This cannot be the concern with durational-residency requirements. Such criteria for an alcohol license are based on the ideals of an orderly marketplace and socially conscious vendors, and directly relate to an integral aspect of the "unquestionably legitimate" three-tier system.⁹⁵ The circuit court disagreed that durational-residency requirements could ever be considered integral to the system.⁹⁶ Instead, it equates these licensing requirements with impermissible economic protectionism.⁹⁷ However, the court

does not provide an analysis to *Granholm's* decree that a state's three-tier system could validly require a licensee's physical in-state presence.⁹⁸ Both the Fourth and Eighth Circuits recognized *Granholm's* instruction, and concluded that this must mean Section 2 allows states flexibility in determining what constitutes a physical presence, including requiring licensees to reside in-state for a number of years.⁹⁹ The Sixth Circuit's holding heightens the scrutiny for three-tier system constitutionality, and narrows permissible state action under the Twenty-First Amendment.

Finally, the court found that the restriction on licenses did not fall within a core state interest pursuant to the Twenty-First Amendment, therefore, no constitutional immunity could be afforded. However, the Sixth Circuit's searching inquiry into Tennessee's submitted reasons for its durational residency requirement did not likely afford the level of deference appropriately owed to the State's legislature in structuring a three-tier system. In his dissent, Judge Sutton argues that the court's test that "[d]istinctions between in-state and out-of-state retailers and wholesalers are permissible only if they are an inherent aspect of a State's distribution system..." is flawed, and does not create a judicially manageable standard.¹⁰⁰ Instead, Judge Sutton argues that the court should have looked at the State's objectives for the durational residency requirement and whether it was reasonably related to that goal.¹⁰¹ Tennessee's proffered core interests in its durational-residency requirement were to promote responsible consumption and create an orderly liquor market.¹⁰² The people of Tennessee, through its duly elected legislature, concluded that *bona fide* residents of the State would produce a healthier, safer, and orderly alcohol market. In fact, the legislature explicitly stated as much when it enacted its residency requirements.¹⁰³ As mentioned in Part III, an alcohol vendor anchored to the community is likely to be more conscientious to the impact of dangerous alcohol consumption. Consistent with Judge Sutton's view, the Eighth Circuit found that "[resident alcohol vendors] are more likely to

respond to concern of the community, as expressed by their friends and neighbors whom they encounter day-to-day in ballparks, churches, and services clubs.”¹⁰⁴ There is no archetypal three-tier system from which a court could glean the ideal licensing requirements.¹⁰⁵ Instead, all licensing requirements and restrictions will reflect the desires of the local community. To hold otherwise would be to make a concerning return to a national alcohol regulatory philosophy. This cannot be what Section 2 of the Twenty-First Amendment represents.

It is for these reasons that the Supreme Court will hopefully overturn the decisions of the Fifth and Sixth Circuits. Durational-residency requirements are crucial to ensuring that industry members remain accountable to government agents and the broader community. These are sound principals upon which the modern alcohol policy framework is built. If the Court were to affirm the holding in *Byrd*, it would constitutionally weaken a state’s ability to form an orderly marketplace.

CONCLUSION

Alcohol is not the typical article of commerce, and must be treated as such. If left to its own devices, the alcohol marketplace’s chaotic and socially harmful inclinations are all consuming. It is for this reason that stringent restrictions must be imposed on alcohol licenses, thereby ensuring order and mutual benefit for both the industry and the wider community. These restrictions reflect the values of the resident population, as it is these individuals who will be most affected by alcohol’s harms. The local regulatory framework model embraced by the Twenty-First Amendment rests on this principle, and it is proven both durable and sustainable. Yet despite over eighty-five years of regulatory stability, where the key objectives of public health and safety are achieved, the framework has come under attack. Challengers seek to replace, or otherwise erode, the state-level licensing system in favor of a nationalized policy, and

subjecting alcohol to the traditional norms of commerce. History proves that both of these propositions are flawed. The clear benefits of the current system should not be lightly disregarded, and wise policymakers will seek to preserve it.

¹ Justin Kendall, *Study: U.S. Beer Industry Creates More Than 2 Million Jobs* (May 17, 2017), <https://www.brewbound.com/news/study-u-s-beer-industry-creates-2-million-jobs>.

² *Key Substance Use and Mental Health Indicators in the United States: Results from the 2016 National Survey on Drug Use and Health* (2016), SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION (“SAMHSA”), available at <https://www.samhsa.gov/data/sites/default/files/NSDUH-FFR1-2016/NSDUH-FFR1-2016.pdf>.

³ *Id.* at 11.

⁴ *Id.* “For men, binge alcohol use is defined as drinking five or more drinks on the same occasion on at least 1 day in the past 30 days. For women, binge drinking is defined as drinking four or more drinks on the same occasion on at least 1 day in the past 30 days” *Id.* at 1.

⁵ *Id.* at 11. “Heavy alcohol use is defined as binge drinking on 5 or more days in the past 30 days.” *Id.* at 1.

⁶ *Id.* at 11-12.

⁷ Lindsay M. Squegla, et al., *The effect of alcohol use on human adolescent brain structures and systems* (2015), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4321715/>.

⁸ SAMHSA, *supra* note 2, at 25. Alcohol use disorder is defined as meeting DSM-IV criteria for either dependence or abuse for alcohol. *Id.* at 25.

⁹ *Substance Abuse and Homelessness* (June 2017), NATIONAL COALITION FOR THE HOMELESS, available at <http://nationalhomeless.org/wp-content/uploads/2017/06/Substance-Abuse-and-Homelessness.pdf>.

¹⁰ *USDOT Releases 2016 Fatal Traffic Crash Data*, available at <https://www.nhtsa.gov/press-releases/usdot-releases-2016-fatal-traffic-crash-data>.

¹¹ *Alcohol, Drugs, and Crime*, NATIONAL COUNCIL ON ALCOHOLISM AND DRUG DEPENDENCE, INC., available at <https://www.ncadd.org/about-addiction/alcohol-drugs-and-crime>.

¹² *Alcohol and Crime: Does the Popular Drug Influence Offense Levels?*, ALCOREHAB, available at <https://alcorehab.org/the-effects-of-alcohol/alcohol-related-crimes/>.

¹³ National Council on Alcoholism and Drug Dependence, Inc., *supra* note 13.

¹⁴ *Id.*

¹⁵ Marcia Yablon, *The Prohibition Hangover: Why We are Still Feeling the Effects of Prohibition*, 13 VA. J. SOC. POL’Y & L. 552, 559-560 (2006).

¹⁶ *Id.*

¹⁷ B. Fosdick & Albert L. Scott, *Toward Liquor Control*, 10 (1933).

¹⁸ Yablon, *supra* note 15, at 559.

¹⁹ *Id.* at 562.

²⁰ *Id.* at 564.

²¹ *Id.* at 561-562.

²² *Wilson Act*, Alcohol Problems and Solutions, available at <https://www.alcoholproblemsandsolutions.org/Controversies/Wilson-Act.html>.

²³ Matthew B. Millis, *Let History Be Our Guide: Using Historical Analogies to Analyze State Response to a Post-Granholm Era*, 81 IND. L.J. 1097, 1100 (2006).

²⁴ *Id.*

²⁵ *Wilson Act*, ALCOHOL PROBLEMS AND SOLUTIONS, available at <https://www.alcoholproblemsandsolutions.org/Controversies/Wilson-Act.html>.

²⁶ Robert P. George and David A. J. Richards, *The Eighteenth Amendment*, NATIONAL CONSTITUTION CENTER available at <https://constitutioncenter.org/interactive-constitution/amendments/amendment-xviii>.

²⁷ U.S. Const. amend. XVIII.

²⁸ *Prohibition in America (U.S.): Timeline*, Alcohol Problems and Solutions, <https://www.alcoholproblemsandsolutions.org/prohibition-in-america-u-s-history-timeline/>.

²⁹ Jack S. Blocker, Jr., *Did Prohibition Really Work? Alcohol Prohibition as a Public Health Innovation*, 96 AM. J. PUB. HEALTH 233 (Feb. 2006).

³⁰ *Id.*

³¹ *Id.*

³² B. Fosdick & Albert L. Scott, *supra* note 16, 9.

³³ *Negative Effects of Prohibition: Do you know these 17?*, ALCOHOL PROBLEMS AND SOLUTIONS, available at <https://www.alcoholproblemsandsolutions.org/effects-of-prohibition/>.

³⁴ *Id.*; See also generally, B. Fosdick & Albert L. Scott, *Toward Liquor Control* (1933).

³⁵ Millis, *supra* note 22, at 1102.

³⁶ *Id.*

³⁷ Robert P. George and David A. J. Richards, *The Twenty-First Amendment*, NATIONAL CONSTITUTIONAL CENTER available at <https://constitutioncenter.org/interactive-constitution/amendments/amendment-xxi>.

³⁸ U.S. Const. amend. XXI.

³⁹ ALCOHOL PROBLEMS AND SOLUTIONS, *supra* note 31. “Prohibition led to often toxic moonshine. Many still used lead coils or lead soldering, which gave off acetate or lead, a dangerous poison.”

⁴⁰ B. Fosdick & Albert L. Scott, *supra* note 16, at 9.

⁴¹ *Id.* at 28-34.

⁴² *Id.* at 29.

⁴³ B. Fosdick & Albert L. Scott, *supra* note 16, at 9-10.

⁴⁴ *Byrd v. Tenn. Wine & Spirits Retailers Ass’n*, 883 F.3d 608, 632-633 (6th Cir. 2018) (J. Sutton, dissenting) (citing *Granholm v. Heald*, 544 U.S. 460, 489 (2005)).

⁴⁵ *Id.*; See B. Fosdick & Albert L. Scott, *supra* note 16, at 41; See also, *Control State Directory and Info*, NATIONAL ALCOHOL BEVERAGE CONTROL ASSOCIATION, available at <https://www.nabca.org/control-state-directory-and-info>.

⁴⁶ *Id.*

⁴⁷ B. Fosdick & Albert L. Scott, *supra* note 16, at 32-33.

⁴⁸ Pamela S. Erickson, *Safe and Sound: How the Three-Tier Alcohol Regulatory System Promotes Safe Products and High Revenue Collections*, HEALTHY ALCOHOL MARKET, available at <http://healthyalcoholmarket.com/pdf/SafeandSound2014.pdf>.

⁴⁹ “Each permit must be renewed annually by submitting a renewal application to the Commission...however the Local Board must consider only three factors...whether the applicant is of good moral character...” *Local Handbook*, INDIANA ALCOHOL AND TOBACCO COMMISSION,

at 6, available at https://www.in.gov/atc/files/2015_LB_Handbook.pdf; See also, “Licenses shall be issued only to persons of good moral character...” FLA STAT. § 561.15(1)

⁵⁰ *Regulatory Value*, NATIONAL BEER WHOLESALERS ASSOCIATION, available at <https://www.nbwa.org/regulatory-value>.

⁵¹ B. Fosdick & Albert L. Scott, *supra* note 16, at 29-34.

⁵² *Vertical Integration*, THE ECONOMIST (2009), available at <https://www.economist.com/news/2009/03/30/vertical-integration>.

⁵³ *Granholm v. Heald*, 544 U.S. 460, 469 (2005).

⁵⁴ B. Fosdick & Albert L. Scott, *supra* note 16, at 29.

⁵⁵ David S. Sibley & Padmanabhan Srinagesh, *Dispelling the Myths of the Three-Tier Distribution System*, WINE & SPIRITS WHOLESALERS OF AMERICA (2008), at 31.

⁵⁶ Erickson, *supra* note 45.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Understanding the Liquor Licensing Process*, CITY OF WHEATRIDGE, available at <https://www.ci.wheatridge.co.us/1147/Understanding-the-Liquor-Licensing-Proce>.

⁶² “A remonstrance is the opportunity for the general public to voice its formal objection to either a new liquor permit application or the renewal of an existing liquor permit within its town.” *Remonstrances*, CONNECTICUT STATE DEPARTMENT OF CONSUMER PROTECTION, available at <https://portal.ct.gov/DCP/Liquor-Control-Division/Remonstrances>; See also, C.G.S. § 30-39(c).

⁶³ E.g. Ind. Code § 7.1-1-3-38; See also, C.R.S.A. § 44-3-301(2)(a).

⁶⁴ “The ‘tied house’ system had all the vices of absentee ownership. The manufacturer knew nothing and cared nothing about the community. All he wanted was increased sales.” B. Fosdick & Albert L. Scott, *supra* note 16, at 29.

⁶⁵ E.g. “A ‘resident corporation’ is defined to be a corporation incorporated under the laws of this state, all officers and directors of which, and all the stockholders, who legally and beneficially own or control sixty percent or more the stock in amount and in voting rights, shall be qualified legal voters and taxpaying citizens of the county and municipality in which they reside...” Mo. Rev. Stat. 311.060.3.

⁶⁶ Legal Issues Concerning State Alcohol Regulation: Hearing Before the Subcomm. On the Courts and Competition Policy, 111 Cong. 43 (2010) (Statement of Nida Samona).

⁶⁷ *Id.*

⁶⁸ B. Fosdick & Albert L. Scott, *supra* note 16, at 29.

⁶⁹ See *S. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799, 802-803 (8th Cir. 2013).

⁷⁰ *Tenn. Wine & Spirits Retailers Ass’n v. Byrd*, 883 F.3d 608 (6th Cir. 2018), cert. granted, (U.S. Sept. 27, 2018) (No. 18-96).

⁷¹ See *State Bd. of Equalization v. Young’s Mkt. Co.*, 299 U.S. 59 (1936).

⁷² *Bacchus Imp v. Dias*, 468 U.S. 263, 275 (quoting *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964)).

⁷³ *North Dakota v. United States*, 495 U.S. 423, 432 (1990).

⁷⁴ *Id.*

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- ⁷⁵ The Eight Circuit commented “...the Court’s jurisprudence has been characterized by a case-by-case balancing of interests that defies ready predictability.” *S. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799, 809 (8th Cir. 2013).
- ⁷⁶ 468 U.S. 263 (1984); 544 U.S. 460 (2005).
- ⁷⁷ Okolekao is a sweet liquor distilled from a native Hawaiian shrub. *Bacchus Imp. v. Dias*, 468 U.S. 263, 264 (1984).
- ⁷⁸ *Id.* at 275-276.
- ⁷⁹ *Id.*
- ⁸⁰ *Granhholm v. Heald*, 544 U.S. 460, 466 (2005).
- ⁸¹ *Id.*
- ⁸² *Id.* at 484. The Court unanimously agreed that states are able to establish three-tier system. *Id.* at 520 (Thomas, J. dissenting).
- ⁸³ *Id.* at 489.
- ⁸⁴ *Id.*
- ⁸⁵ *Arnold’s Wines, Inc. v. Boyle*, 571 F.3d 185, 189 (2nd Cir. 2009); *Brooks v. Vassar*, 462 F.3d 341, 352 (4th Cir. 2006); *S. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799, 809 (8th Cir. 2013).
- ⁸⁶ *Cooper v. Tex. Alcoholic Bev. Comm’n*, 820 F.3d 730, 743 (5th Cir. 2016); *Byrd v. Tenn. Wine & Spirits Retailers Ass’n*, 883 F.3d 608, 618 (6th Cir. 2018).
- ⁸⁷ “No retail license under this section may be issued to any individual...who has not been a bona fide resident of this state during the two-year period immediately preceding the date upon the application is made to the commission...” *Tenn. Ann. Code* § 57-3-204(b).
- ⁸⁸ *Byrd v. Tenn. Wine & Spirits Retailers Ass’n*, 883 F.3d 608 at 622.
- ⁸⁹ *Id.* at 619.
- ⁹⁰ *Id.* at 630 (Sutton, J. dissenting).
- ⁹¹ *Capital Cities Cable, Inc. v. Crisp.*, 467 U.S. 691, 712 (1984).
- ⁹² *North Dakota v. United States*, 495 U.S. 423, 432 (1990).
- ⁹³ *Byrd v. Tenn. Wine & Spirits Retailers Ass’n*, 883 F.3d 608, 619 (6th Cir. 2018) (quoting *Granhholm*, 544 U.S. at 473).
- ⁹⁴ *Granhholm*, 544 U.S. at 473.
- ⁹⁵ *Id.* at 489.
- ⁹⁶ *Byrd*, 883 F.3d. at 623.
- ⁹⁷ *Id.* at 620.
- ⁹⁸ *Granhholm*, 544 U.S. at 489 (citing *North Dakota v. United States*, 495 U.S. 423, 447 (Scalia, J., concurring in judgment) “The Twenty-First Amendment...empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler.”)
- ⁹⁹ *S. Wine & Spirits of Am., Inc.*, 731 F.3d at 810; *Brooks*, 462 F.3d at 352.
- ¹⁰⁰ *Byrd*, 883 F.3d at 634 (Sutton, J. dissenting) (quoting *Cooper v. Tex. Alcoholic Beverage Comm’n*, 820 F.3d 730, 743 (5th Cir, 2016)).
- ¹⁰¹ *Id.*
- ¹⁰² *Id.*
- ¹⁰³ “For these reasons, it is in the best interest of the health, safety, and welfare of this state to require all licensees to be resident of this state as provided herein...” *Tenn. Code Ann.* § 57-3-204(b)(4).
- ¹⁰⁴ *S. Wine & Spirits of Am.*, 731 F.3d at 811.

¹⁰⁵ *Byrd*, 883 F.3d at 634 (Sutton, J. dissenting) (quoting *S. Wine & Spirits*, 731 F.3d at 810).