



Exploring Alcohol Regulation in the 21st Century

*A Collection of essays
from the
Center for Alcohol Policy's
Annual Essay Contest*

Previous 1st Place Recipients

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Celebrating a Decade of Essay Contests

The Center for Alcohol Policy was reorganized and renamed in 2008 to help interested stakeholders understand and appreciate the history of as well as the modern relevance of state-based alcohol regulation. A key initial achievement in that process was the republication of *Toward Liquor Control*, which has placed over 11,000 copies in circulation since 2011.

The Center for Alcohol Policy has also furthered this mission by a wide variety of other activities that help to put a spotlight on the history and successes of state alcohol regulation. Some of the activities it has undertaken include hosting an annual law and policy conference that has attracted over 1,300 attendees since the first one in 2008. The Center for Alcohol Policy has also conducted smaller state forums in a half dozen states and has published nearly a dozen white papers examining issues of alcohol regulation. The biennial survey of public opinion has likewise been a much demanded and viewed instrument.

The Center for Alcohol Policy's Annual Essay Contest has been another important effort to drive attention to the fascinating and often misunderstood world of state alcohol regulation. Many people have a casual opinion about alcohol regulation, but very few have actually researched and written about it. Through this contest the Center has challenged students and professionals across the country and even the globe to examine the why and how of alcohol regulation, not just stating an opinion on policy.

The Center for Alcohol Policy has been impressed by the quality of the participants. The Center has received nearly 700 submissions in these ten years, and the quality of entrants continues to improve. The Center has had entrants from Harvard Law School, Stanford Law School, Johns Hopkins School of Public Health and other top universities as well as practitioners such as alcohol practice attorneys, public health nurses and public administrators. The Center is grateful to school professors and administrators that help publicize the existence of this contest and encourage their participation.

To date, the Center has given away over \$70,000 in prize money for these winners, although the winning of the award is not the end of the story with this contest. Some of the winning essays have gone on to be republished in other publications. One essay was even cited to the United States Supreme Court in pending constitutional litigation. The 2011 winners were invited to present their papers at the annual meeting of the National Conference of State Liquor Administrators conference held in Washington, DC. The Center hopes these essays help educate those interested in alcohol policy. Identifying topics for the essay contest is always a challenge and the Center welcomes your ideas for future contests.

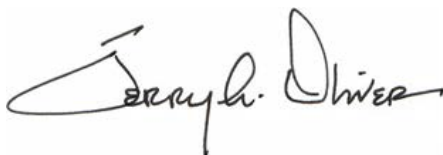
After ten years we felt it was a good time to celebrate the past successes of these essays and publish these first-place recipients in this handy book. Enjoy the trip back through the past winners of the Center for Alcohol Policy Essay Contests!



Brannon Denning



Jim Hall



Jerry Oliver



Patrick Lynch

2008

1st Annual Essay Contest

2008 marks the 75th anniversary of the ratification of the 21st Amendment. Using a wide range of issues such as economic, political, legal and/or public health, highlight the strengths of the 21st Amendment.

FIRST PLACE

Andy Herrold

"Although its virtues will likely be long debated, its uniqueness never can be."

SECOND PLACE

Stephen Bertman

Don't Let the Tap Run Dry on Section Two of the 21st Amendment: The Importance of the 21st Amendment and the Need for Continued State Regulation of Alcohol

Andy Herrold

I. Introduction

On April 7, 2008, America marked the 75th anniversary of the end of Prohibition.¹ It was on that date, 75 years ago, that cargo shipments once again began carrying grain to breweries and bottles began clinking down the assembly line.² Although Americans would have to wait a little longer for official repeal of the 18th Amendment by ratification of the 21st Amendment, Franklin Roosevelt's signature on the Volstead Act allowed the shipment and sale of low alcohol beer in anticipation of a full repeal of Prohibition, effectively ending a fourteen year ban on the sale and purchase of alcohol.³ Today, few Americans would likely note the link between alcohol and our national and constitutional history. Nor would one expect many Americans to be cognizant of the prevalence of judicial activity related to alcoholic beverages. In fact though, the regulation of alcohol is the only subject to have *two* constitutional amendments devoted to it.⁴ Additionally, taverns occupied a prominent place in early American civic life, and alcohol was at the center of meetings and discussions that led up to the drafting of the Constitution.

This paper will consider how topics surrounding the trade and use of alcohol have received attention throughout this country's history and engendered significant attention by Congress and the courts. It will begin by examining the historical significance of alcohol to civic and political life in revolutionary times. Next, it will review the social atmosphere that gave way to the 18th Amendment to the Constitution, which prohibited the "manufacture, sale, or transportation of intoxicating liquors."⁵ It will also look at the ultimate repeal of Prohibition by the 21st Amendment, following a tumultuous fourteen year run. Jumping forward, the paper will

consider recent attempts to clarify the meaning of the 21st Amendment, beyond its operative clause. The paper will describe modern day regulatory attempts as well as review a recent United States Supreme Court decision dealing with such regulation. It will consider the aftermath of that decision by examining a Ninth Circuit Court of Appeals case. I will also offer some thoughts for the future about alcohol regulation in the United States.

II. Alcohol in Colonial America – A Brief Contextual History

Although perhaps stretching alcohol's role to its logical end, some might argue that without alcohol, this nation would not have been born. The Founding Fathers met frequently at local taverns, where talk often turned to the revolution, and later, to the Constitution. As Eric Burns points out in his account of alcohol's place in America,

alcoholic beverages would come to be more than just a staple of diet for the New World colonists; they would serve as an almost indispensable accompaniment to liberty: sparking the urge to separate from the Motherland, igniting patriotism, stoking the passion for growth and prosperity and a government that was the perfect reflection of its citizens' desires.⁶

Some of the most famous Founding Fathers themselves brewed or distilled their own drink of choice. George Washington had a successful whiskey and fruit brandy distillery; Thomas Jefferson had a brewery and an extensive wine cellar at his beloved Monticello; and Samuel Adams managed a brewery in Boston.⁷ Although the Supreme Court attempted to limit its justices from drinking except in "wet weather and then only for the sake of health,"⁸ John Marshall pointed out, with the Supreme Court's nationwide jurisdiction in mind, it must surely be raining somewhere in America.⁹

Cognizant of the new nation's affinity for drink, the government saw an opportunity to replenish funds that were being used to fight Native Americans.¹⁰ Alexander Hamilton, the first

Secretary of the Treasury, led an effort to place a tax on whiskey.¹¹ There were also hints that Hamilton hoped such a tax would have at least some effect in curbing alcohol consumption among colonialists.¹² Hamilton, however, perhaps overlooked the lingering suspicion of taxes among citizens. After all, many of those citizens had just fought a war to free themselves from things such as the stamp tax.

Resistance to the whiskey tax was especially strong among rural farmers, particularly in Pennsylvania. Initial efforts to oppose the tax consisted of harassment of tax collectors. Farmers were quick to tar and feather anyone attempting to find and tax their whiskey caches.¹³ However, before long, the opposition became more intense. Pennsylvania farmers marched on and took Pittsburgh, requiring George Washington to order 15,000 militiamen to the city to quell the insurgency.¹⁴ The Whiskey Rebellion (as it has come to be known) provided an initial glimpse into the passions that alcohol policy can incite; it would not be the last.

III. Pre-Prohibition Era and Passage of the Eighteenth Amendment

America has always had vocal critics of alcohol and the potential for its abuse. However, during the time between the Whiskey Rebellion and the Civil War, critics struggled to organize or play any meaningful role in policy-making. Temperance efforts were set back further during the Civil War. Many temperance supporters seemingly began to rethink their priorities; others were killed when fighting began.¹⁵

But after the Civil War, the temperance movement began to enjoy renewed interest. Citizens became concerned with the fact that very few laws existed to regulate alcohol.¹⁶ They were often confronted with the potential evils of alcohol, sometimes in the form of returned soldiers drowning the nightmares of war.¹⁷ Whereas before the Civil War temperance

organizations had difficulty mobilizing, after the Civil War these groups gained strength and momentum. Chief among those efforts was the Woman's Christian Temperance Union,¹⁸ which was concerned with conditions in the home, and its possible degradation from alcohol abuse.¹⁹ As Eric Burns points out, "The Woman's Christian Temperance Union ... was a carefully orchestrated conflagration."²⁰ The Woman's Christian Temperance Movement (WCTU) focused its crusade on young people and led a charge to teach temperance in schools. In fact, the efforts of WCTU were instrumental in the establishment of mandatory school attendance policies,²¹ and their efforts regarding alcohol have been compared to the modern day efforts of DARE.²² Ultimately, their actions served as the seeds of the growing push toward prohibition of alcohol from society.²³

The WCTU was not the only organization aimed at eliminating alcohol from society. In 1893, an Ohio minister formed the Anti-Saloon League of Ohio. Within a few years, other states had similar organizations which merged to found the Anti-Saloon League of America.²⁴ The group effectively demonized saloons and the activities that took place within them. The Anti-Saloon League produced mass propaganda campaigns detailing the ills that accompanied drinking and the indecent atmosphere of saloons. The League noted that "[f]emales of negotiable virtue and questionable hygiene sat at the bar."²⁵ Perhaps most importantly to the temperance movement, the Anti-Saloon League was adept at raising money.²⁶ This allowed the League to not only publish its anti-alcohol literature, but it enabled them to focus efforts on electing politicians sympathetic to their cause.

Relatively quickly, groups such as the WCTU and the Anti-Saloon league began to see support for their efforts. Athletes and doctors began to weigh in on the subject, and often spoke out against alcohol.²⁷ The groups also began to realize political successes. The Anti-Saloon

League led an effort in Ohio and elsewhere to turn counties “dry.” The group relied on the argument that local municipalities should be free to determine whether alcohol was right for their town.²⁸ Additionally, Nebraska attempted to pass a “prohibitory law early in the twentieth century.”²⁹ Although the bill was ultimately defeated, it demonstrated the growing trend among lawmakers to support such laws. Inroads were also made in Congress. In 1913, Congress passed the Webb-Kenyon Act,³⁰ which prohibited the transportation of alcohol into states in a fashion that would violate the laws of that state.³¹

By 1916, the Anti-Saloon League had gained so much political ground, that the time appeared to be right for a constitutional amendment. The League had recently made great strides in the 1916 elections.³² As Burns points out, “[t]he result was that Americans voted into office more antidrink legislators than ever before, men whose debt to the league was no less binding to them than their oath of office.” Perhaps not surprisingly, in 1917 Congress proposed a constitutional amendment to the states. Interestingly, the language prohibited only the manufacture, sale, or importation of intoxicating liquor. It did not prohibit consumption.³³

Based on the enormous success of groups such as the WTCU and the Anti-Saloon League, the stage was set for the states to ratify the amendment. “Mississippi was the first state to ratify the Eighteenth Amendment, on January 18, 1918.”³⁴ Within a year, the requisite three-fourths majority of the states had ratified the Eighteenth Amendment.³⁵ The Eighteenth Amendment became the law of the land on January 20, 1920, at 12:01 AM.³⁶ Although some Americans held parties in which they slowly placed their empty alcohol bottles in coffins at midnight,³⁷ most Americans accepted the new law with little fanfare.³⁸ America embarked on its “noble experiment.”³⁹

IV. Prohibition and Its Aftermath: The Passage of the Twenty-First Amendment

The National Prohibition Act, or as it was more commonly referred to, the Volstead Act, was the enforcement mechanism of the Eighteenth Amendment.⁴⁰ As noted above, it did not prohibit the *consumption* of alcohol, but rather, its sale, manufacture or importation. Ironically, as has been well documented, alcohol continued to be manufactured and sold. However, there *is* evidence that the Eighteenth Amendment had at least some moderating effect on *consumption* of alcohol. Historians have tended to refute the popular image that drinking actually increased during Prohibition,⁴¹ pointing out that illegal alcohol was generally too expensive for ordinary citizens to afford.⁴² Colleges and universities, sometimes depicted as out of hand in popular culture, were actually quite similar to society as a whole, and drinking occurred only among the minority of students.⁴³

Despite the net decrease in drinking, alcohol consumption was never eradicated completely, and a dangerous disregard for the law emerged. Many families continued to manufacture their own alcohol. In fact, it is estimated that “[d]uring Prohibition, Americans produced as much as 700 million gallons of beer in their homes each year, defying the Volstead Act and enraging the Anti-Saloon League.”⁴⁴ Beer wasn’t the only homemade elixir. Many otherwise law-abiding citizens created more potent liquors, sometimes yielding “pure alcohol.”⁴⁵ These homemade liquors became popularly known as bathtub gin, referencing a key piece of equipment of many of these household operations.⁴⁶

The era of Prohibition was not only marked by illegal manufacture of beer and alcohol in the homes of citizens. Larger scale operations also began to establish themselves. For citizens who did not wish to drink alone in their house, establishments known as speakeasies⁴⁷ began to permeate American towns, especially larger cities.⁴⁸ Illustratively, Eric Burns points out, “[i]n

the entire city (Manhattan), according to an estimate by Police Commissioner Grover Whalen in 1929, there were 32,000 speakeasies, which was more than twice as many as the number of legal drinking establishments before Prohibition.”⁴⁹ These establishments were generally frequented by the more wealthy citizens, and often included notable politicians as patrons.⁵⁰

Despite the relative popularity of speakeasies, the illegal alcohol that many people consumed during Prohibition was not always safe. Because of the steep demand for illegal alcohol and the lack of regulation, many varieties of illegal booze had disastrous health consequences.⁵¹ Bootleggers would often turn to substances that were never intended as a beverage, such as industrial alcohol and antifreeze, to make their liquor.⁵² These potent substances developed distinguishing tags such as “Yack Yack Bourbon,” “Goat Whiskey,” and “Jackass Brandy.”⁵³ Despite their questionable quality, people were drawn to the liquors because of their low price. As Burns acknowledges, “[a]t ten cents a slug, most folks could obliterate themselves and still get change for a quarter.”⁵⁴

Many of these unregulated alcohols caused serious ailments in those who “enjoyed” them. Jamaica Gin, a 180 proof liquor, was known to cause a permanent limp among those who drank it.⁵⁵ More tragically, many of these unregulated liquors killed those who consumed them. In fact, one estimate claims that nearly 12,000 people were killed from toxic booze during Prohibition.⁵⁶

Another sinister aspect of the illegal alcohol operations, and a hallmark of the Prohibition Era, was an increase in crime. During Prohibition, “hijackings and thefts of illegal shipments of booze” were common.⁵⁷ Prohibition also brought about the increase of organized crime. Perhaps most notoriously, Al Capone orchestrated a major illegal liquor trade (as well as prostitution and racketeering) in Chicago.⁵⁸ Although small time organized crime rings existed

before passage of the Eighteenth Amendment, Prohibition provided a ripe opportunity for these organizations to grow into the powerful and feared organizations that they did.⁵⁹

Stated generally, the proliferation of home brew concoctions, speakeasies frequented by politicians, and organized crime, all led to an overall disrespect for laws and those who made them.⁶⁰ Additionally, the government began to realize that Prohibition was not only costing lives from poisoned alcohol and crime, but it was also costing many millions of dollars due to enforcement costs and lost alcohol tax revenue. It is estimated that in 1925, the government failed to collect “\$1,874,000,000 in levies on beer alone.”⁶¹ Also, taxes that were once collected from workers in the alcohol trade were no longer contributing to the government’s revenue, although many continued to profit illegally in the trade of alcohol.⁶² Finally, the cost of enforcement efforts and court costs to try those accused of Prohibition violations placed a significant financial burden on the government.⁶³

By the end of the 1920’s, the difficulties and tragedies described began to wear on the American people. Citizens became more open about their disobedience of the law, and “seemed no longer to think of their actions as illegal”⁶⁴ but rather, “the *law* was illegal, or should have been.”⁶⁵ During this time period, anti-Prohibition groups began to become stronger and more visible. Although in existence since 1920, the Association Against the Prohibition Amendment (AAPA) only gained prominence during the second half of the 1920’s,⁶⁶ as Prohibition’s challenges became more clear.⁶⁷

If the AAPA might be thought of as a counter to the Anti-Saloon League, the Women’s Organization for National Prohibition Reform (WONPR) would likely be the “wet” counterpart to the Woman’s Christian Temperance Union. Founded by Pauline Sabin, the WONPR questioned the sense behind the often futile, but sometimes violent enforcement efforts of

Prohibition.⁶⁸ Although originally supportive of Prohibition,⁶⁹ Sabin came to believe that the lawlessness that had followed had in fact bred contempt for the law, and turned ordinary citizens into criminals.⁷⁰

One of the most persuasive groups to join the anti-Prohibition movement was the American Bar Association, whose membership overwhelmingly supported repeal of the Eighteenth Amendment.⁷¹ Other influential and respected groups such as the American Legion and Veterans of Foreign Wars followed closely behind the ABA.⁷²

Despite the efforts of these groups, lawmakers refused to give in without a fight. In fact, in an attempt to add teeth to Prohibition, Congress passed what is commonly known as the Jones Law. The law significantly raised the penalties for violating the Volstead Act. First-time offenders were now subject to the possibility of up to ten years in prison.⁷³ However, perhaps not surprisingly, the possibility of this stiff penalty being applied to the many people who disregarded Prohibition only seemed to strengthen the anti-Prohibition sentiment.⁷⁴ Newspapers began to join the groups mentioned above in criticizing Prohibition, as did one of its former strongest proponents, John D. Rockefeller Jr.⁷⁵

The outcry of public opposition, as well as the dire economic conditions that gripped the nation at the end of the 1920's and early 1930's, proved to be too much for the Eighteenth Amendment. In early 1933, Congress passed a measure to send the repeal of the Eighteenth Amendment to the states.⁷⁶ Even before the states could act, newly inaugurated President Roosevelt sent a bill to Congress to allow the manufacture of "near beer" and light wine "even as the Eighteenth Amendment remained in effect, awaiting the verdict of the states."⁷⁷ The measure passed, and not long thereafter, on December 5, 1933 Utah became the 36th and decisive

state to ratify the Twenty-first amendment.⁷⁸ The “noble experiment” of Prohibition was a thing of the past.

V. Post-Prohibition: Alcohol Regulation and the Birth of the Three Tier System

If the complete lack of regulation of the pre-Prohibition era, coupled with the failures of Prohibition’s absolute ban on alcohol demonstrated one thing, it was the need for *effective* regulation of alcohol. The end of Prohibition was more a recognition of an unworkable system than it was a longing to return to a society of intemperance and abuse of alcohol. In an effort to achieve a more viable system, the Twenty-first Amendment designated a state based system of alcohol regulation, stating “[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited”.⁷⁹ This state-based system allowed individual states to decide whether they would retain a prohibition against alcohol, or if they allowed alcohol, how they would regulate it.⁸⁰ The regulatory system allowed states to regulate both the consumption aspect of alcohol as well as its sale, manufacture, and distribution.⁸¹

A. The Three-Tier System

Under the 21st Amendment, most states have chosen to regulate their alcohol industry through either state operated liquor stores, or a private enterprise system known as the three-tier system.⁸² The three-tier system “permits manufacturers (tier one) to sell only to licensed wholesalers (tier two), who in turn can only sell to licensed retailers (tier three).”⁸³ Supporters of the state-based, three-tier regulatory system note that the insulatory layers help maintain local control and ensure proper tax collection of alcohol. Further, the system works as a sort of self-regulating mechanism, which helps promote some of the temperance concerns that led to

Prohibition in the first place.⁸⁴ Before Prohibition, many retail businesses were tied to a manufacturer of alcohol. This led to a promotion of over consumption, driven by the manufacturers' desire to obtain maximum profits. Also, most three-tier systems require a minimum markup on the price of alcohol, which further reduces the temptations for over consumption. Finally, the three-tier system provides an enforcement mechanism by which to address alcohol violations. By ensuring a transparent process of manufacture, transportation, and sale, it becomes much easier for alcohol regulators to investigate the source of a violation, such as underage sales, and to hold those responsible accountable.

VI. The Courts' Handling of the Three-Tiered System: How We Reached *Granholm* and Where it Left Us

Early interpretation of the Twenty-first Amendment tended to regard state regulatory powers broadly.⁸⁵ Many of the early cases that were decided regarding alcohol regulation upheld the right to discriminate in a fashion that would otherwise be in violation of the dormant Commerce Clause of the Constitution. In *State Bd. of Equalization of Cal. V. Young's Market Co.*, in which a \$500 importation fee of alcohol into California was challenged, the Supreme Court upheld a state's broad power to regulate, even in a discriminatory fashion, based on the Court's reading of the Twenty-first Amendment.⁸⁶ In *Granholm*, the majority cited several other early cases that "reaffirmed the States' broad powers under § 2" of the Twenty-first Amendment.⁸⁷ In addition to the Twenty-first Amendment, many of these cases noted the Webb-Kenyon Act, which provided in its text a right of the states to discriminate. Many claimed, and continue to claim, the Webb-Kenyon exempts alcohol regulation from Commerce

Clause restrictions.⁸⁸ Supporters of such a reading have noted Congress' reenactment of the measure after such a holding by the Court.⁸⁹

More recently, court decisions have tended to recognize the legitimacy of a state-based regulatory system, albeit in a more limited fashion than earlier precedents. *Hostetter v. Idlewild Bon Voyage Liquor Corp.* marked the beginning of this shift.⁹⁰ In invalidating an attempt by the New York State Liquor Authority to restrict a “duty-free” shop’s ability to sell alcohol in John F. Kennedy Airport, the Supreme Court held, “[t]o draw a conclusion from this line of decisions that the Twenty-first Amendment has somehow operated to ‘repeal’ the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification.”⁹¹ Rather, the Court held that the “Twenty-first Amendment and the Commerce Clause are parts of the same Constitution” and “each must be considered in the light of the other.”⁹² *Hostetter* was followed by a series of cases which maintained a similar standard.⁹³ Importantly, in *Bacchus Imports, Ltd. v. Dias*, the Court invalidated a tax on alcohol that was only applicable to alcohol produced out-of-state. In other words, the regulation favored in-state producers.⁹⁴ The court held that the purpose of the Twenty-first Amendment was not to provide states with a mechanism to favor local businesses.⁹⁵ However, it should be noted that the Court focused its holding on “[s]tate laws that constitute mere economic protectionism.”⁹⁶ It noted that such laws are not to be given the same deference as laws aimed at addressing the “the perceived evils of an unrestricted traffic in liquor.”⁹⁷

A. *Granholm v. Heald*

The Supreme Court’s most recent holding surrounding the powers of the Twenty-first Amendment and its relation to the three-tier system came in *Granholm v. Heald*. Like *Bacchus*, *Granholm* involved a challenge to a regulatory system, which out-of-state residents and wine

producers claimed was violative of the dormant Commerce Clause of the Constitution.⁹⁸ The Supreme Court maintained its more recent understanding of the power of the Twenty-first Amendment and held the challenged regulatory scheme unconstitutional.⁹⁹

Granholm came before the Court as a consolidated case, involving two similar regulatory schemes, both of which were part of a state's three-tier system. The first case involved Michigan's regulatory system, which required wine producers to distribute their product through wholesalers, similar to the system described above. However, the State's regulatory scheme provided an exception for in-state wineries. Under the Michigan law, these producers were "eligible for 'wine maker' licenses that would allow direct shipment to in-state consumers."¹⁰⁰ Although there was a nominal fee associated with the "wine maker" license, out-of-state wineries were completely restricted from shipping their product directly to Michigan consumers. In-state consumers and out-of-state wineries sued Michigan officials, claiming the regulatory scheme "discriminated against interstate commerce in violation of the Commerce Clause."¹⁰¹ The District Court for the Eastern District of Michigan upheld the regulation. The Sixth Circuit Court of Appeals reversed, relying heavily on *Bacchus*.¹⁰²

The other case that was combined involved a New York regulatory scheme that also provided special treatment for in-state wineries. According to the regulation, if a winery produced its wine solely from grapes grown in New York, the winery "can apply for a license that allows direct shipment to in-state consumers."¹⁰³

These licensees are authorized to deliver the wines of other wineries as well, but only if the wine is made from grapes 'at least seventy-five percent the volume of which were grown in New York state,'. An out-of-state winery may ship directly to New York consumers only if it becomes a licensed New York winery, which requires the establishment of a 'branch factory, office or storeroom within the state of New York,'¹⁰⁴

An out-of-state winery and its customers sued agents of the New York State in the Southern District of New York, claiming the regulatory scheme was in violation of the Commerce Clause. Determining that the regulation discriminated against out-of-state wineries, the District Court granted summary judgment to the plaintiffs.¹⁰⁵ Taking the broader view of the powers of the Twenty-first Amendment described above, the Court of Appeals of the Second Circuit reversed, holding that New York was free to establish such regulations to maintain accountability within the alcohol distribution system.¹⁰⁶

1. Majority

Not surprisingly, the Court began by reiterating the well known rule of the Commerce Clause, that state laws which provide for disparate treatment of in-state and out-of-state businesses violate the Constitution¹⁰⁷ and face “a virtually *per se* rule of invalidity.”¹⁰⁸ The Court noted that such a discriminatory law will only be found to be constitutional if it “advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.”¹⁰⁹

However, despite these well known legal truisms, and despite the Court’s finding that “New York, like Michigan, discriminates against interstate commerce through its direct-shipping laws,”¹¹⁰ the Court’s inquiry in this case depended on the extent to which such Commerce Clause principles apply to alcohol regulation. As noted above, early cases granted broad powers based on the Twenty-first Amendment coupled with the Webb-Kenyon Act.¹¹¹ However, the Court in this case continued its more recent tendency of holding that the Commerce Clause does in fact apply to alcohol regulation, thus making the New York and Michigan regulatory schemes unconstitutional.¹¹²

The Court began its analysis by pointing out that the Court was skeptical of state laws, passed before the ratification of the Eighteenth Amendment, aimed at importers of alcohol,¹¹³ a position reiterated through passage of the Wilson Act, which subjected alcohol shipped in interstate commerce to the laws of the receiving state.¹¹⁴ After describing the history of alcohol regulation under the Wilson Act, the Court noted that Congress passed the Webb-Kenyon Act (enacted before Prohibition¹¹⁵), which was entitled, “An Act Divesting intoxicating liquors of their interstate character in certain cases.”¹¹⁶ Despite its title, the Court was unconvinced that the Webb-Kenyon Act’s purpose was to allow a full panoply of discriminatory powers. The majority noted that the meaning of the Act should be limited to the text of *Clark Distilling Co. v. Western Maryland R. Co.*, which held that “The Act’s purpose ‘was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught.’”¹¹⁷ Because the majority found that the Webb-Kenyon Act did not specifically grant states the right to pass discriminatory alcohol regulations, the Court had to determine if the wording of the Twenty-first Amendment saved the New York and Michigan regulatory schemes from unconstitutionality. As noted above, the Court maintained its most recent rulings, which held that the Twenty-first Amendment does not grant states an exception to the Commerce Clause. Although acknowledging the earlier cases described above, the Court found that these cases were contrary to the history of the Twenty-first Amendment.¹¹⁸

Rather, the majority relied on several relatively recent holdings of the Court. First, the majority cited *44 Liquormart, Inc. v. Rhode Island*, which stood for the proposition that the Twenty-first Amendment does not grant a right to violate other aspects of the Constitution.¹¹⁹ Narrowing their focus, the majority then relied on precedent that has held that § 2 of the Twenty-

first Amendment “does not abrogate Congress’ Commerce Clause powers with regard to liquor.”¹²⁰ Finally, and perhaps most importantly, the Court relied heavily on *Bacchus*, and held that states are not free to discriminate in pursuit of alcohol regulation. The Court also noted the decisions of *Brown-Forman Distillers Corp. v. New York State Liquor Authority* and *Healy v. Beer Institute*, both decided after *Bacchus* and standing for similar propositions,¹²¹ but the majority seemed especially taken by *Bacchus*’ keen example of a discriminatory regulation, which provided an excise tax exemption for alcohol that was produced in-state.¹²² The Court noted that “[d]espite attempts to distinguish it in the instant cases, *Bacchus* forecloses any contention that § 2 of the Twenty-first Amendment immunizes discriminatory direct-shipment laws from Commerce Clause scrutiny.”¹²³ Aside from stating generally that the history of the Twenty-first Amendment does not support the reading encouraged by the States, the Court gave few reasons for favoring the more recent decisions surrounding the Twenty-first Amendment than those more temporal to its passage.¹²⁴

Finally, the Court was not persuaded by arguments claiming the regulations served a legitimate state interest in a narrowly tailored fashion. The Court found the claim that the regulations helped New York and Michigan prevent minors from obtaining alcohol unconvincing.¹²⁵ Nor did the Court find the States’ argument that the regulations promoted tax-collection sufficient to permit the discriminatory practice.¹²⁶ Ultimately, the Court found the arguments to be “sweeping assertion[s] that they cannot police direct shipments by out-of-state-wineries”¹²⁷ with “little concrete evidence”¹²⁸ to support them.

Although the States were ultimately denied in their efforts to uphold their alcohol regulations, supporters of the three-tier, state-based system did find a consolation hidden within the decision. Justice Kennedy, writing for the majority, noted toward the end of the opinion that

“the three-tier system itself is ‘unquestionably legitimate.’”¹²⁹ Additionally, in recognition of a state’s authority to regulate, he also specifically noted the validity of state-operated liquor stores.¹³⁰

2. Dissent:

Justice Stevens wrote a short dissent relying on the strength of the powers granted under the Twenty-first Amendment. Stevens noted “the text of the Twenty-first Amendment is a far more reliable guide to its meaning than the unwritten rules that the majority enforces today.”¹³¹ Stevens, joined by O’Connor, noted the uniqueness of the product in question and pointed out that policy makers today have little if any contextual understanding of the time when the Twenty-first Amendment became part of the Constitution, and as such, the views of policy makers who proposed and passed the Amendment and judges who lived through that time period “are entitled to special deference.”¹³²

Justice Thomas wrote a much longer dissent (30 pages¹³³) in which he was joined by Justice Stevens, Justice O’Connor, and the Chief Justice. Justice Thomas devoted a great deal of attention to the Webb-Kenyon Act, which was often cited in support of their position by the States and amici.¹³⁴ Thomas began by stating that the Webb-Kenyon Act immunizes such regulations from the negative Commerce Clause and he cited many of the cases noted above (*Clark Distilling et al*), which although pointed to by the majority for minor propositions, did not have their ultimate holding upheld.¹³⁵ Thomas relied on the early interpretation of the act,¹³⁶ as well as the fact that the act was reenacted without change after it had been given such interpretation by the courts.¹³⁷ Thomas even took issue with the majority’s somewhat less conclusive statement that “at the very least” the Act disfavored discrimination, claiming that the Act “explicitly abrogates negative Commerce Clause review of state laws that fall within its

terms.”¹³⁸ Perhaps not surprisingly, Thomas advocated that the Act be given the meaning of its plain text, and urged that the Act allows for Commerce Clause discrimination when a state is regulating alcohol.¹³⁹

In addition to disagreeing with the majority on the proper powers under the Webb-Kenyon Act, Thomas also disagreed with the majority by claiming that the regulations in question are saved by the text of § 2 of the Twenty-first Amendment. Once again, Thomas suggested a literal reading of the text in question.¹⁴⁰ He suggested that the Amendment in fact broadens powers already granted under the Webb-Kenyon Act and naturally encompasses the right to discriminate against out-of-state imports, quite to the contrary of the holding in *Bacchus*.¹⁴¹ Additionally, like Stevens, Thomas noted that the case law decided shortly after the passage of the Twenty-first amendment upheld the broad state regulatory authorities he described.¹⁴² He claimed that the majority failed to account for these earlier precedents and, in effect, simply dismissed them without proper consideration,¹⁴³ relying instead on the more recent Twenty-first Amendment cases, and without proper explanation.¹⁴⁴

Despite Thomas’ persuasive dissent, the State regulations would not ultimately hold the day. The Court maintained its more recent tendency of limiting states’ ability to enact discriminatory alcohol regulations. It was perhaps not a question of if, but when, supporters of direct shipment of alcohol would attempt to expand the application of *Granholm* beyond specialty wines, and apply it to large shipments of beer and wine. The answer came when Costco (by no means a small winery) attempted to challenge Washington State’s regulatory scheme. Interestingly, despite the apparent sympathy that Costco found in the *Granholm* decision, the company’s argument would at least indirectly question the majority’s assertion that the three-tier system is “unquestionably legitimate.”

VII. Post Granholm

A. *Costco v. Hoen*

Likely emboldened by the Court's refusal to find that the Twenty-first Amendment saved the challenged regulations in *Granholm*, supporters of a less restrictive Washington State regulatory scheme brought a suit seeking to invalidate many of the State's requirements of alcohol distribution and sales. Washington "can best be described as a 'mixed' form of regulation in which the State retained exclusive control over the sale of packaged spirits through state and contract stores, but regulated the sale of beer and wine through a three-tier system that separates manufacturers from retailers."¹⁴⁵

The case was brought by Costco Corporation against members of the Washington State Liquor Control Board in their official capacity.¹⁴⁶ Costco is a major discount warehouse retailer headquartered in Washington State.¹⁴⁷ Costco claimed that many of Washington's regulations permitted and encouraged a system of agreements between alcohol manufacturers, distributors, and retailers which resulted in a restraint of competition,¹⁴⁸ and thus violated the Sherman Antitrust Act. The company claimed that the regulations disallowed many of the competitive practices that have made them successful.¹⁴⁹

Costco specifically challenged nine regulations which placed limitations on the sale and distribution of alcohol.¹⁵⁰ First, Costco challenged Washington's "uniform pricing" rule. This rule mandated that alcohol manufacturers sell their product at a uniform price to every distributor/wholesaler within the state. Accordingly, wholesalers must maintain uniform pricing of their product to retailers.¹⁵¹ Costco also challenged Washington's "price posting" requirement. This regulation mandates that "every beer or wine distributor shall file with the board at its office in Olympia a price posting showing the wholesale prices at which any and all

brands of beer and wine sold by such beer and/or wine distributor shall be sold to retailers within the state.”¹⁵² The third challenged regulation was Washington’s “post and hold” requirement. The regulation requires that both manufacturers and distributors must post prices, and are not free to change their prices for at least 30 days.¹⁵³ Next Costco challenged a “minimum mark-up” provision which disallowed sale by distributors and retailers at less than a ten percent mark-up.¹⁵⁴ The fifth challenged regulation prohibited price discounts based on volume purchasing.¹⁵⁵ Sixth, Costco challenged a prohibition on credit sales of alcohol.¹⁵⁶ Seventh, Costco challenged what is known as a “delivered price” requirement. According to the requirement, distributors are not free to offer discounts to retailers who might choose to pick up the alcohol as opposed to having it delivered. The eighth challenged regulation “is known as the central warehousing ban.”¹⁵⁷ Under the ban, retailers are prohibited from having a central warehouse. Rather, storage of alcohol in warehouses is restricted to licensed distributors or wholesalers.¹⁵⁸ Finally, Costco challenged a regulation which prohibited sales between retailers. This requirement mandates that retailers of alcohol purchase their product only from licensed distributors or wholesalers.¹⁵⁹

Although this case did not implicate discriminatory practices under the Commerce Clause, the challenged restrictions are typical within state-regulated three-tier systems, a system that *Granholm* described as “unquestionably legitimate.” Additionally, this case would once again provide a court with the opportunity to determine just how much power the Twenty-first Amendment provides to states to regulate alcohol.

The Ninth-Circuit began its inquiry by noting the standard by which a state statute will be analyzed under the Sherman Act. Citing *Rice v. Norman Williams, Co.*, the court stated that “A party may successfully enjoin the enforcement of a state statute only if the statute on its face

irreconcilably conflicts with federal antitrust policy.”¹⁶⁰ The court went on to acknowledge that for a statute to be invalidated, there must be a level of active supervision by the government.¹⁶¹ Additionally, the court acknowledged the immunity from antitrust liability that attaches to restraints on competition that are wholly and unilaterally imposed by a state in its sovereign capacity, as opposed to a “hybrid” restraint which involves producers in carrying out the restraint.¹⁶² Quoting the First Circuit, the court noted that “what is centrally forbidden is state licensing of arrangements between private parties that suppress competition-not state directives that by themselves limit or reduce competition.”¹⁶³

The Ninth Circuit ran through a methodological review of each of the challenged restraints, applying the standards noted above to them. Specifically, the court focuses on whether a restraint is unilaterally imposed by the State of Washington, and thus afforded immunity under the Sherman Act, or whether a challenged restraint is “hybrid”, facing a per se invalidity.¹⁶⁴ Ultimately, the court concluded that the retailer-to-retailer sales ban, “the central warehousing ban, the volume discount ban, the delivered pricing requirement, the credit ban, the uniform pricing requirement and the minimum mark –up”¹⁶⁵ were unilateral restraints imposed by Washington as a sovereign and not subject to Sherman Act preemption.¹⁶⁶ The only regulation found to be a hybrid restraint, and thus subject to preemption, was the post-and-hold scheme. The court cited *Catalano, Inc. v. Target Sales, Inc.*, noting “[t]he Supreme Court has held that an agreement to adhere to posted prices is a per se violation without regard to its reasonableness.”¹⁶⁷ Although the court acknowledged the wholesalers were acting in accordance with a regulation, the court determined that the requirement essentially created a privately determined price setting scheme through government enforcement of the regulation. The court noted that the regulation requires wholesaler as well as government involvement, thus making it

a hybrid restraint. *Costco v. Hoen*, 514 F.3d 915, 934 (9th Circuit, 2008). The court described the anti-competitive nature of the agreements as “likely to facilitate horizontal collusion among market participants.”¹⁶⁸

Because the court found at least one of the regulations to be preempted under the Sherman Act, the court next had to determine the same issue that was resolved by the Supreme Court in *Granholm*, specifically, whether the Twenty-first Amendment saved the regulation from preemption. But, unlike the *Granholm* Court, the Ninth Circuit would not be called on to determine if the Twenty-first Amendment abrogates other sections of the *Constitution*, but rather, whether it abrogates the Sherman Antitrust *statute*, albeit a statute which bases its authority on the Commerce Clause.

The court began its inquiry by noting a standard of review that was developed during the more recent Supreme Court decisions, which have limited state authority to regulate in violation of the Commerce Clause. The court cited *Capital Cities Cable*, which posed the question as “whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies.”¹⁶⁹ The Ninth Circuit also relied on other federal courts’ prior opinions in reviewing the issue. The court noted a “three-fold analysis” by which to review Twenty-first Amendment cases.¹⁷⁰ Relying on a Fourth Circuit decision, the court stated that the first inquiry should be “the expressed state interest and the closeness of that interest to those protected by the Twenty-first Amendment.”¹⁷¹ Second, the court should inquire as to whether the regulatory scheme promotes temperance,¹⁷² relying in large part on the specific facts.¹⁷³ The final piece of the analysis should consist of a balancing of the State’s interest against the federal interest under the Sherman Act.¹⁷⁴

The court found that the preemption of the post-and-hold restraint was not saved by a state's power under the Twenty-first Amendment. It reviewed the district court's decision, which held similarly, based on whether a mistake had clearly been committed. The court was not convinced that it had been.¹⁷⁵ The court noted that Washington's per-capita alcohol consumption was quite moderate, but was unconvinced of the statistic's relation to the questioned regulation.¹⁷⁶ The court also found that the State's interest in promoting consumption in moderation did not outweigh the federal interest in competition protected under the Sherman Act, an interesting claim given the 21st Amendment's aim at ensuring effective alcohol regulation.

Ultimately, despite the finding that the post-and-hold requirement was not saved by the Twenty-first Amendment, supporters of the state-based three-tier regulatory system were relatively pleased with the Ninth Circuit's decision, which legitimized several common regulations of a three-tier system.¹⁷⁷ But was the Ninth-Circuit's Sherman Act analysis entirely necessary, and did the analysis conflict with *Granholm*'s support for the three-tier system? As noted above, *Granholm* held that the three-tier system is "unquestionably legitimate." Although not described in detail in *Granholm*, the provisions challenged under *Costco* are fairly typical of a three-tier alcohol regulation system. The court in *Costco* could arguably have avoided the Sherman analysis by relying on the "unquestionably legitimate" language, by recognizing the Washington regulations as part of a three-tier system. Moving forward, courts will likely be forced to confront the applicability of the "unquestionable" legitimacy of the three-tier system and what exactly is meant by it.

VIII. Conclusion – The Need for Continued State-Based Regulation

Alcohol has played an extraordinary role in this nation's history. From its place at the tables of the Founding Fathers, to its toll on soldiers returning from the Civil War, to Prohibition and beyond, alcohol has maintained its place within society. Although its virtues will likely long be debated, its uniqueness never can be. This uniqueness is demonstrated through its relevance to *two* constitutional amendments, the only product with such a distinction. This uniqueness calls for a unique regulatory system to accompany it. Courts must recognize this need!.

For 75 years, the 21st Amendment has provided a workable system for alcohol regulation. The court cases detailed above indicate that alcohol remains a socially sensitive subject, in need of oversight and control. The 75 years since prohibition ended have effectively made the case for the continuation of state-based regulation. The system in place today has done away with many of the ills of the pre-prohibition era. Tied-house laws have eliminated the temptation of alcohol manufacturers to promote over-consumption in the name of increased profits. The state-based system of alcohol regulation has also ensured that proper excise taxes are collected at each step along the distribution line, as well as promoting safe consumption, only among adults of legal drinking age. The three-tier state regulatory system provides a transparent process of alcohol distribution, thus preventing an unsafe product from reaching the market; and if an unsafe product does reach the market, a fast and accurate way to pull the unsafe product from retail shelves. Perhaps most importantly, the 21st Amendment has retained for local governments the ability to decide what type of alcohol regulation is right for them. As Jim Petro, former Attorney General of the State of Ohio, said best, "The 21st Amendment is the essence of Federalism."¹⁷⁸

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- 2008).¹ *The Day Beer Began Flowing, Legally*, All Things Considered, (National Public Radio broadcast Apr. 7, 2008).
- ² *Id.*
- ³ Press Release, National Beer Wholesalers Association (Hereinafter NBWA), America's Brewers, Importers, and Beer Distributors Celebrate '75 Years of Beer' April 7, 2008 (Apr. 7, 2008), *available at*, http://www.nbwa.org/Nbwa/NewsRoom/Press_Releases/pr_3_10_08.htm.
- ⁴ *See generally* U.S. CONST. ; *see also* U.S. CONST. amend. XVIII (repealed 1933), amend XXI (1933).
- ⁵ U.S. CONST. amend. XVIII (repealed 1933).
- 2004).⁶ ERIC BURNS, *THE SPIRITS OF AMERICA: A SOCIAL HISTORY OF ALCOHOL* 5 (Temple University Press 2004).
- ⁷ *Id.* at 25.
- ⁸ *Id.* at 28.
- ⁹ *Id.*
- ¹⁰ *Id.* at 43.
- ¹¹ MARK LENDER AND JAMES MARTIN, *DRINKING IN AMERICA: A HISTORY* 51 (The Free Press 1982).
- ¹² *See Id.*; *See Also*, BURNS *supra* note 6.
- ¹³ BURNS, *supra* note 6, at 44.
- ¹⁴ *Id.* at 45.
- ¹⁵ *Id.* at 91.
- author).¹⁶ NBWA, *American Beer Distribution: More Relevant Today than Ever*, Video Recording (on file with the author).
- ¹⁷ BURNS, *supra* note 6, at 95.
- ¹⁸ *Id.* at 111.
- ¹⁹ NBWA, *supra* note 16.
- ²⁰ BURNS, *supra* note 6, at 111.
- ²¹ *Id.* at 115.
- ²² *Id.*
- ²³ *See id.* at 121.
- ²⁴ *Id.* at 151.
- ²⁵ *Id.*
- ²⁶ LENDER AND MARTIN, *supra* note 11 at 127.
- ²⁷ *See* BURNS, *supra* note 6 at 171.
- ²⁸ *See* LENDER AND MARTIN, *supra* note 11, at 127.
- ²⁹ BURNS, *supra* note 6, at 171.
- ³⁰ 27 U.S.C. § 122.
- ³¹ *See* 27 U.S.C. § 122; *see also* *Granholm v. Heald*, 544 U.S. 460, 498 (2005) (Thomas dissenting).
- ³² BURNS, *supra* note 6, at 180.
- ³³ U.S. CONST. amend. XVIII (repealed 1933).
- ³⁴ BURNS, *supra* note 6, at 183
- ³⁵ *Id.*
- ³⁶ *See* LENDER AND MARTIN, *supra* note 11, at 131.
- ³⁷ BURNS, *supra* note 6, at 189.
- ³⁸ *See id.* ; *see also* LENDER AND MARTIN, *supra* note 11, at 131.
- ³⁹ BURNS, *supra* note 6, at 185.
- ⁴⁰ *Id.* at 183-184.
- ⁴¹ *See* LENDER AND MARTIN, *supra* note 11, at 136-138.
- ⁴² *Id.*
- ⁴³ *Id.* at 145.
- ⁴⁴ BURNS, *supra* note 6, at 190.
- ⁴⁵ *Id.*
- ⁴⁶ *Id.* at 193.
- ⁴⁷ *Id.* at 197.
- ⁴⁸ *See* LENDER AND MARTIN, *supra* note 11, at 141.
- ⁴⁹ BURNS, *supra* note 6, at 197.
- ⁵⁰ *See id.* at 198.

⁵¹ See *id.* at 217-225.

⁵² *Id.* at 218.

⁵³ *Id.* at 220-221.

⁵⁴ *Id.* at 220.

⁵⁵ *Id.* at 222.

⁵⁶ *Id.* (citing Ethan Mordden).

⁵⁷ *Id.* at 271.

⁵⁸ LENDER AND MARTIN, *supra* note 11, at 141.

⁵⁹ BURNS, *supra* note 6, at 273.

⁶⁰ *Id.* at 273.

⁶¹ *Id.* at 275.

⁶² See *id.* at 275.

⁶³ See *id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 265.

⁶⁷ *Id.*

⁶⁸ *Id.* at 263.

⁶⁹ LENDER AND MARTIN, *supra* note 11, at 141.

⁷⁰ BURNS, *supra* note 6, at 261.

⁷¹ *Id.* at 267.

⁷² *Id.*

⁷³ *Id.* at 269.

⁷⁴ See *id.*

⁷⁵ *Id.* at 270-271.

⁷⁶ *Id.* at 283.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ See U.S. CONST. amend XXI Section 2 (1933); see also Ethan Davis, *Uncorking a Seventy-Four-Year-Old Bottle: A Toast to the Free Flow of Liquor Across State Borders*, 117 YALE L.J. POCKET PART 133, 137 (2007), <http://yalelawjournal.org/2007/11/26/davis.html>; NBWA, *supra* note 16.

⁸⁰ See Ethan Davis, *Uncorking a Seventy-Four-Year-Old Bottle: A Toast to the Free Flow of Liquor Across State Borders*, 117 YALE L.J. POCKET PART 133, 137 (2007), <http://yalelawjournal.org/2007/11/26/davis.html>.

⁸¹ NBWA, *supra* note 16.

⁸² American Medical Association, *Alcohol Industry 101*, available at www.alcoholpolicy.md.com/pdf/AMA_Final_web_1.pdf

⁸³ Gregory Durkin, Note, *What Does Granholm v. Heald Mean for the Future of the Twenty-First Amendment, The Three-Tier System, and Efficient Alcohol Distribution?*, 63 WASHINGTON AND LEE L. REV. 1095, 1098 (2006).

⁸⁴ NBWA, *supra* note 16.

⁸⁵ See Jason Prince, Note, *New Wine in Old Wineskins: Analyzing State Direct-Shipments Laws in the Context of Federalism, the Dormant Commerce Clause, and the Twenty-First Amendment*, 79 NOTRE DAME L. REV. 1563 1581 (2004).

⁸⁶ See *State Bd. of Equalization of Cal. v. Young's Market Co.*, 299 U.S. 59, 62 (1936).

⁸⁷ *Granholm*, 544 U.S. at 485 (citing *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938); *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391 (1939); *Ziffrin, Inc. v. Reeves*, 308 U.S. 132 (1939); *Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395 (1939)).

⁸⁸ See *id.* at 497-498 (Thomas dissenting) (citing *McCormic & Co. v. Brown*, 286 U.S. 131 (1932), et al).

⁸⁹ See *id.* (Thomas dissenting).

⁹⁰ See generally *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964).

⁹¹ *Hostetter*, 377 U.S. at 331-332.

⁹² *Id.* at 332.

⁹³ See Durkin, *supra* note 83.

⁹⁴ See generally *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984).

⁹⁵ *Id.* at 276.

⁹⁶ *Id.*
⁹⁷ *Id.*
⁹⁸ See generally *Granholm*, 544 U.S. 460.
⁹⁹ *Id.*
¹⁰⁰ *Id.* at 469.
¹⁰¹ *Id.*
¹⁰² *Id.*
¹⁰³ *Id.* at 470.
¹⁰⁴ *Id.*
¹⁰⁵ *Id.* at 471 (quoting lower court's decision).
¹⁰⁶ See *id.* (citing lower court's decision).
¹⁰⁷ See *id.* at 472 (citing *Oregon Waste Systems, Inc. v. Department of Environmental Quality of Ore.*, 511 U.S. 93, 99 (1994), and *New Energy Co. of Ind. V. Limbach*, 486 U.S. 269, 274 (1988)).
¹⁰⁸ *Id.* at 476 (quoting *Philadelphia v. New Jersey*, 437 U.S. 617 (1978)).
¹⁰⁹ *Id.* at 489 (quoting *New Energy Co. of Ind v. Limbach.*, 486 U.S. 269 (1988)).
¹¹⁰ *Id.* at 476.
¹¹¹ See sources cited *supra* note 93.
¹¹² See generally *id.*
¹¹³ See *Granholm*, 544 U.S. at 476-477. It should be noted, as the Court rightfully does, that the cases cited in support of this fact were decided before the Webb-Kenyon Act.
¹¹⁴ *Id.* at 478 (citing and quoting the Wilson Act which stated alcohol shall be subject to regulations "to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory") (27 U.S.C. §121).
¹¹⁵ *Id.* at 481. The Webb-Kenyon Act was passed in 1913. (27 U.S.C. §122).
¹¹⁶ *Id.* (quoting Webb-Kenyon Act).
¹¹⁷ *Id.* at 482 (quoting *Clark Distilling*, 242 U.S. 311 (1917)).
¹¹⁸ *Id.* at 485.
¹¹⁹ *Id.* at 486 (citing *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), et al.)).
¹²⁰ *Id.* at 487 (citing *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984)).
¹²¹ *Id.*
¹²² *Id.* (citing *Bacchus*, , 468 U.S. 263).
¹²³ *Id.* at 488.
¹²⁴ See *id.* at 485-489.
¹²⁵ *Id.* at 490.
¹²⁶ *Id.* at 491.
¹²⁷ *Id.* at 492.
¹²⁸ *Id.*
¹²⁹ *Id.* at 489.
¹³⁰ *Id.*
¹³¹ *Id.* at 498 (Stevens dissenting).
¹³² *Id.* at 496.
¹³³ Justice Thomas' dissent begins on page 497 and continues through page 527.
¹³⁴ See generally Brief of the National Beer Wholesalers Association, *Granholm v. Heald*, 544 U.S. 460, (2005).
¹³⁵ *Granholm*, 544 U.S. at 498 (Thomas dissenting).
¹³⁶ *Id.* at 499.
¹³⁷ *Id.*
¹³⁸ *Id.* at 501.
¹³⁹ *Id.* at 503.
¹⁴⁰ See generally *id.* (Thomas Dissent).
¹⁴¹ See *id.* at 515.
¹⁴² *Id.* at 515.
¹⁴³ *Id.* at 517.
¹⁴⁴ *Id.* at 522.
¹⁴⁵ *Costco v. Hoen*, 514 F.3d 915, 923 (9th Cir. 2008).

¹⁴⁶ *Id.* at 924.
¹⁴⁷ See www.costco.com.
¹⁴⁸ *Costco*, 514 F.3d at 924.
¹⁴⁹ *Id.*
¹⁵⁰ Based on Washington’s state operation of liquor sales, throughout this section, the term alcohol refers only to beer and wine.
¹⁵¹ *Costco*, 514 F.3d at 924.
¹⁵² *Id.* (quoting RCW 66.28.180(2)(a)).
¹⁵³ *Id.* at 925 (citing WAC 314-20-100(2),(5)).
¹⁵⁴ *Id.* (citing RCW 66.28.180(2)(d)).
¹⁵⁵ *Id.* (citing RCW 66.28.180(2)(d)).
¹⁵⁶ *Id.* (citing RCW 66.28.010(1)(a)).
¹⁵⁷ *Id.*
¹⁵⁸ *Id.* (citing RCW 66.24.185(4)).
¹⁵⁹ *Id.* (citing RCW 66.28070(1)).
¹⁶⁰ *Id.* at 927 (citing *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982)).
¹⁶¹ *Id.* at 928 (citing *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105-106 (1980)).
¹⁶² *Id.* (citing *Sanders v. Brown* 504 F.3d 903 (9th Cir. 2007)). The latter restraint is generally known as a “hybrid restraint”.
¹⁶³ *Id.* at 931 (quoting *Mass. Food Ass’n v. Mass. Alcoholic Beverages Control Comm’n*, 197 F.3d 560, 566 (1st Cir. 1999)).
¹⁶⁴ See generally *id.* The per se invalidity of a hybrid restraint is discussed by the court in its analysis of *Midcal*, citing *Parker v. Brown*, 317 U.S. 341 (1943).
¹⁶⁵ *Id.* at 943.
¹⁶⁶ *Id.*
¹⁶⁷ *Id.* at 937 (citing *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 649-50 (1980)).
¹⁶⁸ *Id.* at 938.
¹⁶⁹ *Id.* at 944 (quoting *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984)).
¹⁷⁰ *Id.*
¹⁷¹ *Id.* (quoting *TFWS, Inc. v. Shaefer*, 242 F.3d 198, 213 (4th Cir. 2001)).
¹⁷² *Id.* (citing *TFWS*, 242 F.3d at 213).
¹⁷³ *Id.* (citing *Miller v. Hedlund*, 813 F.2d 1344, 1352 (9th Cir., 1987)).
¹⁷⁴ *Id.* (citing *TFWA*, 242 F.3d at 213).
¹⁷⁵ *Id.* at 945.
¹⁷⁶ See *id.*
¹⁷⁷ Press Release, National Beer Wholesalers Association, America’s Beer Distributors Applaud Decision to Uphold State-Based Alcohol Regulation (Jan. 29, 2008), available at http://www.nbwa.org/Nbwa/NewsRoom/Press_Releases/pr_01_29_08.htm.
¹⁷⁸ Jim Petro, former Ohio Attorney Gen., Address at the Center for Alcohol Policy Legal Symposium (Oct. 21, 2008).

2009

2nd Annual Essay Contest

State regulation
of alcohol is
important
because...

FIRST PLACE

Josephine Thomas

"For over seventy-five years, the states, consistent with the letter and spirit of the Twenty-first Amendment, have provided a workable, pragmatic solution to the problem of alcohol regulation. Such a pluralistic approach has yielded a state-by-state regulatory system that essentially functions as a patchwork quilt of local solutions to local problems. This rich tapestry of alcohol regulations among the fifty states should not be displaced by federal preemption."

SECOND PLACE

Martha Lantz

THIRD PLACE

Jason Koransky

Majid Rizvi

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

By Josephine W. Thomas

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

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

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

I. THE CONSTITUTIONAL MANDATE AND THE LESSONS OF PROHIBITION

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

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

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

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

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

II. THE STATES AS LABORATORIES OF EXPERIMENTATION

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

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

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

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

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

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

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

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

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

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

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

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

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

Even in the 1800s, alcohol abuse caused American fathers to “float[] away a week’s wages that could have gone to food, clothing, and education”; diverted men away from a “lifestyle of decency and responsibility by sinking him into a blurred phantasmagoria of whores, drug fiends, pimps, thieves, and gamblers; and caused “the blind idiocy of drunken violence.”²⁶ Alcohol abuse still causes these same problems in modern American society, and contributes to a plethora of new ones in the technological age. For example, alcohol is involved in up to 76% of rapes, 66% of violent episodes between partners, 50% of homicides, 50% of assaults, and 38% of suicides.²⁷ In addition, alcohol is involved in 40% of all traffic deaths, and 36% of traffic deaths among those aged 16-20.²⁸

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. CONCLUSION

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

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

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

² 544 U.S. 460 (2005).

³ U.S. Const. amend. XXI, § 2 (emphasis added).

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

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

⁶ See generally *id.*

⁷ John C. Koren, *Alcohol and Society* 95 (1916).

⁸ 1926 Secretary of Treas. Ann. Rep. 139-40.

⁹ *Id.*

¹⁰ *Id.*

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

¹² *Id.*

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

¹⁴ *Id.* at 310.

¹⁵ *Id.* at 311.

¹⁶ *Id.*

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

¹⁸ *Id.* at 51-52, 101-02.

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

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

²¹ Spaeth, *supra* n. 3, at 162.

²² *Id.* at 167 (citation omitted).

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

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

²⁵ *Id.* at 166 (citations omitted).

²⁶ *Id.* at 167 (citations omitted).

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

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

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

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

³¹ Wikipedia, *Party School*, http://en.wikipedia.org/wiki/Party_school (last accessed Nov. 15, 2009).

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

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

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

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

³⁶ *Id.*

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

³⁸ *Id.*

³⁹ ICAP, *supra* n. 32, at 10.

⁴⁰ *Id.*

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

⁴² ICAP, *supra* n. 32, at 10.

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

⁴⁴ See *id.*

⁴⁵ Grant & O'Connor, *supra* n. 31, at 92.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 93.

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

⁵⁰ Crombie et al., *supra* n. 17, at 497.

⁵¹ *Id.*

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

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

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

2010

3rd Annual Essay Contest

Describe how
state-based
regulation of
alcoholic
beverages
promotes public
health and safety.

FIRST PLACE

Neil Jamerson

"Considering the totality of the circumstances, state regulation is a better tool for preventing and ameliorating public health harms associated with college student alcohol abuse than tort. Universities should seek state regulation to augment their internal efforts to control student alcohol abuse, and states are well-advised to consider additional regulation in order to ensure public welfare."

SECOND PLACE

Marshall Thompson

THIRD PLACE

Adam Gershowitz

Higher Education and Public Health:
Proper External Measures for Confronting Student Alcohol Abuse

Neil Jamerson

Public Health Law

November 29, 2010

I. Introduction

Walk through a college residence hall, bar, or tailgate and you will likely come across a game of Circle of Death, a 2-for-1 special, or a half-melted ice luge. While the terms may be unfamiliar, the goal of each relates to a widely recognized public health issue facing college campuses across the country: the rapid consumption of alcohol by students. Student alcohol abuse has spurred not only the growth of university alcohol policies but the growth of lawsuits and state regulation as well.¹ University policies are appropriate internal measures for confronting student alcohol abuse. However, whether tort or state regulation is a more appropriate external measure to prevent and ameliorate the harms of student alcohol abuse remains an unanswered question. Consequently, this paper examines student drinking in the context of public health. It then summarizes applicable case law, criticisms of those cases, and considers the practical implications of tort liability for student drinking. Finding tort lacking as an external control measure for student alcohol abuse, it examines research findings on the effect of state regulation of alcohol and proposes new regulation aimed at reducing dangers associated with student alcohol abuse. It concludes with a recommendation that state regulation is a more appropriate vehicle for helping universities to confront student alcohol abuse.

II. Student Alcohol Abuse as a Public Health Issue

The average person probably thinks of health in terms of doctor or hospital visits. Public health, on the other hand, has a macro perspective. It examines the overall health of a community in order to provide an aggregate benefit.² Accordingly, the central purpose of public health is to

¹ See Ralph Hingson, et. al., *Magnitude of alcohol-related mortality and morbidity among U.S. college students ages 18-24: Changes from 1998 to 2001*, ANNUAL REVIEW PUB. HEALTH 263 (2005), which defines alcohol abuse as drinking 5 or more drinks in a single occurrence at least once a month.

² LAWRENCE O. GOSTIN, PUBLIC HEALTH LAW: POWER, DUTY, RESTRAINT, 16 (2008).

“monitor and evaluate health status, as well as to devise strategies and interventions designed to ease the burden of injury, disease, and disability and, more generally, to promote the public’s health and safety.”³ Given this purpose, public health often emphasizes prevention over amelioration, though the two may be used conjointly to reduce potential dangers.⁴ Effectuating prevention and amelioration requires an entity with the “power and responsibility to assure community well-being.”⁵

Alcohol abuse by college students clearly qualifies as a public health issue at the participant, campus, and local community levels.⁶ College students are an especially relevant population because students between the ages of 18-24 abuse alcohol at a greater rate than their non-college peers.⁷ Approximately 44% of college students reported abusing alcohol at least once a year; 23% abused alcohol three or more times in a two-week span.⁸ In the participant community, drinking has a profound effect on health and safety. From 1998 to 2001 the number of alcohol-related unintentional injury deaths increased from 1600 college students to 1700.⁹ During the same period, alcohol-related unintentional injuries rose from 500,000 students to 600,000. Additionally, of the college students surveyed in both years approximately 500,000 reported engaging in unprotected sex after abusing alcohol.¹⁰ College student alcohol abuse also affects the campus community. Negative secondary effects on students who are non- to moderate-drinkers include being hit or assaulted, having their property damaged, or experiencing

³ *Id.* at 16.

⁴ *Id.* at 19-20.

⁵ *Id.* at 16.

⁶ “Participant” is used to refer to students abusing alcohol. “Campus” encompasses those students as well as students who do not abuse alcohol. “Community” refers to non-students.

⁷ See Hingson, *supra* note 1, at 263.

⁸ *Id.* at 260.

⁹ *Id.* at 259.

¹⁰ *Id.* at 267.

unwanted sexual advances at the hands of students abusing alcohol.¹¹ In 2001, nearly 700,000 non- to moderate-drinkers reported being hit or assaulted; sexual assault and date rape accounted for nearly 100,000 of the total assaults.¹² The odds of a negative secondary effect affecting the campus community at a high drinking level schools was nearly 4-to-1 compared to low drinking level schools.¹³ Finally, the health and safety concerns of alcohol abuse reaches beyond the college campus to the local community. From 1998 to 2001, the number of college students who reported they drank and drove rose from 2.3 million college students to 2.8 million.¹⁴ Furthermore, research shows most episodes of college student alcohol consumption take place off-campus.¹⁵

Given that college student alcohol abuse is a public health issue, the question turns to what entity has the power and responsibility to assure community well-being. Internally, colleges and universities can introduce control measures to prevent and ameliorate the harms of student alcohol abuse. However, institutions do not bear the sole responsibility for creating an environment of alcohol abuse. Research shows “that persons who drink to excess even before they enter college are more likely to experience alcohol-related problems . . . in college.”¹⁶ Consequently, external control measures aimed at college student alcohol abuse can augment the internal efforts of institutions to assure the well-being of participant, campus, and local communities.

¹¹ See Henry Wechsler, et. al. The Adverse Impact of Heavy Episodic Drinkers on Other Colleges Students, 56 J. OF STUDIES ON ALCOHOL (1995).

¹² Hingson, *supra* note 1, at 267.

¹³ See Wechsler, *supra* note 11.

¹⁴ Hingson, *supra* note 1, at 259.

¹⁵ Toben F. Nelson, et. al., *The state sets the rate: The relationship among state-specific college binge drinking, state binge drinking rates, and selected state alcohol control policies*, 95 AM. J. OF PUB. HEALTH 444 (March 2005).

¹⁶ Hingson, *supra* note 1, at 274.

Public health law creates, limits, and vests the power and responsibility necessary to ensure community well-being. To this end, several legal tools aimed at preventing and ameliorating harm have developed. First, a government's ability to tax and spend can provide "inducements to engage in beneficial behavior and disincentives to engage in risk activities."¹⁷ Second, governments and private groups can alter the informational environment through the provision or requirement of information that encourages people to make healthier choices.¹⁸ Third, governments can alter the built environment through local zoning and building codes to reduce injury, disease, and associated harms.¹⁹ Fourth, governments can directly regulate persons, professionals, and businesses with clear, enforceable rules that alter behavior.²⁰ Fifth, governments and private citizens can indirectly regulate by bringing tort claims for public harms; tort liability, in theory, forces the abatement of public health risks too expensive to continue.²¹ The propriety of these five tools in relation to the prevention and amelioration of college student alcohol abuse must be weighed.

III. The Failure of Tort as an Indirect External Control Measure

The two most cited cases for university tort liability related to student injury involve alcohol.²² The first case, Bradshaw v. Rawlings,²³ was decided by the Third Circuit in 1979. The case followed closely on the heels of the G.I. Bill after World War II and the Student Rights movement of the 1960s. These two phenomena reshaped the student-university relationship. The relationship receded from viewing the role of universities as *in loco parentis* and toward

¹⁷ Gostin, *supra* note 2, at 31.

¹⁸ *Id.* at 32.

¹⁹ *Id.* at 34.

²⁰ *Id.* at 36.

²¹ *Id.* at 37.

²² WILLIAM A. KAPLIN AND BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION*, 92 (2007).

²³ Bradshaw v. Rawlings, 612 F.2d 135 (3d Cir. 1979).

universities and courts treating students as adults.²⁴ Consequently, Rawlings found institutions had no duty to protect adult students from injury. The second case, Beach v. University of Utah,²⁵ reaffirmed the Third Circuit's reasoning in Rawlings. In Beach, the Supreme Court of Utah held an institution did not owe a duty of protection to its students because they were adults.

In Rawlings, college sophomores Donald Bradshaw and Bruce Rawlings attended a class picnic off campus. The picnic was organized by sophomore class officers with a professor serving as advisor; however, no professors attended the class picnic. The advisor signed a check for class funds that allowed an underage class officer to purchase six to seven kegs of beer for the seventy-five attendees. Bradshaw and Rawlings left the picnic with Rawlings driving despite witnesses testifying he was visibly intoxicated. Their vehicle struck a parked car; the accident left Bradshaw paralyzed from the neck down.

The court found the “modern American college is not an insurer of the safety of its students.”²⁶ It based its finding on the recognition that universities no longer assumed a role of *in loco parentis*. Students had fought for the ability to define and regulate their own lives through the Students Rights movement, and universities, as well as society, acquiesced to their demands.²⁷ Because tort liability requires a showing that the defendant has a duty of care, the court examined whether universities had a duty to protect adult students.

First, the court rejected that a university regulation prohibiting students from drinking at college sponsored events created a custodial relationship because the regulation merely

²⁴ Robert Bickel and Peter Lake, *Reconceptualizing the university's duty to provide a safe learning environment: A criticism of the doctrine of in loco parentis and the Restatement (Second) of Torts*, 20 J. C. & U.L. 261, 270 (Winter 1994).

²⁵ Beach v. Univ. of Utah, 726 P.2d 413 (Utah 1986).

²⁶ Rawlings, 612 F.2d at 138.

²⁷ *Id* at 139.

reinforced state law barring underage consumption.²⁸ Further, the court predicted “the Pennsylvania courts would not hold that by promulgating this regulation the college had voluntarily taken custody of Bradshaw so as to deprive him of his normal power of self-protection or to subject him to association with persons likely to cause him harm.”²⁹ Next, it rejected that the university’s knowledge that alcohol would be served at the picnic created a special relationship between it and Bradshaw. The court based its rejection on the fact that the Pennsylvania Supreme Court had refused to find a special relationship would require a host to protect a third party from the negligence of guests who become intoxicated. The Third Circuit felt it even less likely the Pennsylvania Supreme Court would find a special relationship required universities to protect third parties from students.³⁰ Finally, it rejected that “beer-drinking by underage college students, in itself, creates the special relationship on which to predicate liability and, furthermore, that the college has both the opportunity and means of exercising control over beer drinking students at an off campus gathering.”³¹ The court reasoned the prevalence of beer drinking—in society generally and by underage college students in particular despite state prohibitions—would make the imposition of a university duty to protect against injuries related to beer drinking an impossible burden.³²

In Beach, Danna Beach enrolled in a freshmen-level field biology class taught by tenured professor Orlando Cuellar.³³ At the time, Beach was a twenty-year-old student living on her own. During a required class trip to Lake Powell, Beach consumed wine and fell asleep in a group of

²⁸ *Id.* at 141.

²⁹ *Id.* at 141.

³⁰ *Id.*

³¹ *Id.* at 142.

³² *Id.*

³³ *Beach*, 726 P.2d at 414.

bushes after wandering away from the group; she later told Cuellar “the incident was unusual.”³⁴ During the final required trip, the class visited Deep Creek Mountains; they hiked, rappelled, and attended a cookout hosted by a local rancher. While at the cookout, Beach again consumed alcohol. Cuellar also admitted to drinking and testified he assumed the students drank as well. After returning to the group’s campsite, Beach fell down a cliff face; her injuries left her in a disabled state.

Subsequently, Beach brought suit against the University of Utah, the president of the University, other university officials, and Cuellar. On appeal from summary judgment, Beach asserted “a special relationship existed between the parties which gave rise to an affirmative duty on Cuellar’s part to supervise and protect her.”³⁵ Beach conceded that student-teacher did not give rise to a special relationship, nor did Cuellar need to walk each student to their tent. Rather, Beach based her claim upon the Lake Powell incident. She argued Cuellar “knew or should have known of her propensity to become disoriented after drinking.”³⁶

The court acknowledged no duty normally exists toward a person who becomes voluntarily intoxicated; consequently, it stated it would only impose an affirmative duty to act if a special relationship existed. The court cited *the Restatement (Second) of Torts §314(A)* and stated “these relationships generally arise when one assumes responsibility for another’s safety or deprives another of his or her normal opportunities for self-protection.”³⁷ In its analysis, the court first found Beach did not become disoriented at Lake Powell until after she left the group. Second, it found Beach told Cuellar the incident was abnormal. Third, it found no other incidents occurred on any other field trip Beach attended. Instead, she demonstrated “the judgment and

³⁴ *Id.*

³⁵ *Id.* at 415.

³⁶ *Id.* at 416.

³⁷ *Id.* at 415.

skills of any normal twenty-year-old college student.”³⁸ Fourth, on the Deep Creek trip, the court found Beach testified that she did not “act inebriated or in any way impaired, but appeared to be well-oriented and alert.”³⁹ Further, the court found she stated she exited the van and headed toward her tent without incident. Fifth, the court found Cuellar testified that he did not know that Beach specifically had consumed alcohol and that she did not act intoxicated or disoriented. Based upon these five findings, the court held “as a matter of law that Beach’s situation was not distinguishable from that of the other students on the trip; therefore, no special relationship arose between the University and Beach.”⁴⁰

After dismissing Beach’s other arguments, the court dealt with Cuellar’s failure to enforce university and state laws regarding underage drinking at university functions. The court acknowledged Cuellar’s failure raised “a more difficult issue.”⁴¹ Specifically, the court questioned whether a state law or university regulation regarding underage alcohol consumption created a special relationship that required Cuellar and the University to protect a student from “voluntary intoxication during a field trip sponsored by the University.”⁴² The court characterized this as a policy argument that would recognize a custodial relationship between an adult student and a large, modern university.

It rejected such a relationship on two grounds. First, the court was persuaded by the reasoning in Rawlings. Second, the court pointed to the demise of *in loco parentis* during the Student Rights movement of the 1960s as evidence universities treated students as adults, unlike high schools and elementary schools. The court found treating university students as adults

³⁸ *Id.* at 416.

³⁹ *Id.* at 415.

⁴⁰ *Id.* at 416.

⁴¹ *Id.* at 417.

⁴² *Id.*

allowed them to mature, which kept with a central purpose of higher education and satisfied an important public interest. Furthermore, the court found recognizing a custodial relationship between universities and students would require institutions to babysit students at an exorbitant expense.⁴³ Accordingly, the court stated, “if the duty is realistically incapable of performance or if it is fundamentally at odds with the nature of the parties relationship, we should be loath to term that relationship ‘special’ and to impose a resulting ‘duty’”⁴⁴

Based on the oft-cited Rawlings and Beach decisions, tort litigation attempts to impose a duty of protection on universities that would prevent and ameliorate student alcohol abuse. In theory, risk adverse universities would do more to stop alcohol abuse. However, courts have been unwilling to recognize that universities should be held responsible for the injuries of adults who become voluntarily intoxicated. It is fair to say that these two decisions demonstrate that tort is an ineffective legal tool for addressing the public health issue of college student alcohol abuse. The analysis cannot stop there, however, as both Rawlings and Beach have been subjected to a variety of criticism.

In response to Rawlings and Beach, legal theorists argued for the adoption of new tort rules that would impose greater university liability for student injury.⁴⁵ Theorist often point to alcohol abuse as a justification for new rules. They also cite risk management and loss-spreading as justifications for greater liability. Two of the earliest and most prolific writers on the subject, Robert Bickel and Peter Lake, argue universities can do more to control alcohol use and would

⁴³ *Id.* at 419.

⁴⁴ *Id.* at 418.

⁴⁵ See Bickel and Lake, *supra* note 24. Accord Robert Bickel and Peter Lake, *The emergence of new paradigms in student-university relations: From “in loco parentis” to bystander to facilitator*, 23 J. C. & U. L. 755 (1997); Jane Dall, *Determining duty in collegiate tort litigation: Shifting paradigms of the college-student relationship*, 29 J. C. & U. L. 485 (2003); Kristen Peters, *Protecting the Millennial College Student*, 16 SO. CAL. REV. L. & SOC. JUST 431 (2007).

impose a university duty to “exercise reasonable care when it has actual or constructive knowledge of acts or behavior including the acts or behavior of students or student groups, or of historical events or occurrences, which present a known or foreseeable, and unreasonable, risk to a foreseeable student or class of students.”⁴⁶ The hopes of legal theorists have been buoyed by a small number of court decisions that imposed university liability for student injuries—though not always in context of alcohol abuse.⁴⁷ These courts often based university duty on landlord-invitee relationships.⁴⁸ Additionally, proposals for greater university liability gained traction with the *Restatement (Third) of Torts*, which added school-student to its list of special relationships.⁴⁹

Despite the criticism and possible shift to greater university liability, tort still fails as an external legal tool to prevent and ameliorate harms associated with college student alcohol abuse. The goal of indirect tort regulation is to reduce public health harms by making behaviors too expensive to sustain or allow. Similarly, critics of Rawlings and Beach reason greater liability will cause universities to reduce alcohol use in order to avoid liability.⁵⁰ This stance is naïve in the context of higher education.

Due to the unique nature of higher education, traditional management theories and accountability techniques applied in business do not translate to universities.⁵¹ Unlike corporations producing widgets, universities do not have decision makers that wield the power

⁴⁶ Bickel and Lake *supra* note 24, at 290.

⁴⁷ See *Furek v. Univ. of Del.*, 594 A.2d 506, (Del. 1991) where the Supreme Court of Delaware disagreed with the decision in Bradshaw v. Rawlings and held a university could be held liable for a breach of duty to protect a fraternity pledge burned by a lye-based liquid poured on him during pledging.

⁴⁸ Robert Bickel and Peter Lake, *The emergence of new paradigms in student-university relations: From “in loco parentis” to bystander to facilitator*, 23 J. C. & U. L. 755, 761 (1997).

⁴⁹ RESTATEMENT (THIRD) OF TORTS § 41 proposed final draft 1 (2005).

⁵⁰ Jane Dall, *Determining duty in collegiate tort litigation: Shifting paradigms of the college-student relationship*, 29 J. C. & U. L. 485, 522-523 (2003).

⁵¹ ROBERT BIRNBAUM, *HOW COLLEGES WORK: THE CYBERNETICS OF ACADEMIC ORGANIZATIONS AND LEADERSHIP* 28-29 (1991).

necessary to directly influence risk management. Power is diffused throughout the organization. State and federal governments, board of trusts, administrators, faculty, alumni, and students all play a role in institutional decision making.⁵² These decision makers have independent goals that may or may not align.

The independent goals allowed by power diffusion lead organizational theorists to characterize universities as open systems, in which “system parts are themselves systems; they constantly change as they interact with themselves and with the environment.”⁵³ These interactions are described as “loosely-coupled,” which is to say “connections between organizational subsystems that may be infrequent, circumscribed, weak in their mutual effects, unimportant, or slow to respond.”⁵⁴ These connections lead to probabilistic cause-and-effect within the organization, as opposed to a deterministic system of choices-and-outcomes.⁵⁵ A decision maker can say what outcomes are possible by undertaking risk management efforts, but cannot predict the consequences with certainty.⁵⁶

For example, the president of a university might ask a tenured faculty member to change a course activity in order to avoid scenarios such as those in Rawlings and Beach. However, the professor may ignore the request for a multitude of reasons and properly assert academic freedom as a bar against the president’s interference. While legal theorists wrestle with the level of control a university has over its students, the greater question is who constitutes the university and what controls, if any, do they possess. As this example illustrates, risk management fails as

⁵² See generally, *Id.*

⁵³ *Id.* at 35.

⁵⁴ *Id.* at 38.

⁵⁵ *Id.*

⁵⁶ *Id.*

a method for controlling public health harms associated with college student alcohol abuse and as a justification for the expansion of university liability.

The failure of risk management means any attempt to control college student alcohol abuse through tort will inevitably lead to the associated costs being spread through tuition, which raises a host of other issues. From 1982 to 2006 college tuition and fees grew by 439%, whereas healthcare costs increased by only 251% over the same period.⁵⁷ Flat or declining growth in family income over the past three decades exacerbated the impact of tuition increases.⁵⁸ The burden of paying for college has been felt by all families; however, it has become particularly acute for “low- and middle-income families, even when scholarships and grants are taken into account.”⁵⁹ Students who choose to still attend college must take on more debt than ever before; student borrowing nearly doubled from 1997 to 2007.⁶⁰ These concerns mirror the acknowledged drawbacks to indirect tort regulation of public health. Gostin states litigation, “increases the cost of doing business, thus driving up the price of consumed products. It is important to note that tort actions can deter not only socially harmful activities (e.g., unsafe automobile designs) but also socially beneficial ones (e.g. innovation in vaccine development).”⁶¹

IV. The Argument for State Regulation as a Direct External Control Measure

Tort fails as an indirect legal tool to prevent or ameliorate alcohol abuse by college students. Universities are not good risk managers due to decentralized power structures; consequently, the use of tort to force universities to reduce risky drinking behaviors resulting in liability is frustrated. Rather, the costs arising from tort liability pass to students through tuition.

⁵⁷ NAT’L CTR. FOR PUB. POLICY & HIGHER EDUC., MEASURING UP 8 (2008).

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Gostin, *supra* note 2, at 37.

Tuition loss-spreading disproportionately impacts low- to middle-class students who must choose to either forgo a college degree or assume an ever-increasing debt load. Consequently, other external legal tools are needed to augment university efforts aimed at preventing and ameliorating public health harms stemming from student alcohol abuse.

The Department of Health and Human Services found scientific evidence increasingly demonstrated alcohol policy affects drinking behaviors and alcohol-related problems for college students.⁶² State laws and policies, in particular, have been shown to be “important predictors of alcohol consumption and alcohol-related problems among adults and underage youth.”⁶³ In turn, binge drinking by adults and high school students are significant predictors of alcohol abuse by college students.⁶⁴ Building off this information, researchers studied the relationship between alcohol abuse by college students and state alcohol control policies.⁶⁵ The study examined 40 states with nearly 21,000 respondents.⁶⁶ The results showed that in states with less than four alcohol control laws 48.3% of college students engaged in binge drinking; whereas, only 33.1% of students in states with four or more alcohol control laws abused alcohol.⁶⁷ Enforcement of laws also played a key role. The study used ratings of state law enforcement and found: 34.2% of college students abused alcohol in states with a B+ or better rating, 44.7% abused alcohol in states with a C+ to B rating, 49.4% abused alcohol in states with a D+ to C rating, and 45.7% abused alcohol in states with a F to D rating.⁶⁸

⁶² Nelson, *supra* note 15, at 444.

⁶³ *Id.* at 441.

⁶⁴ *Id.* at 444-445.

⁶⁵ *Id.* at 441.

⁶⁶ *Id.* at 444.

⁶⁷ *Id.* See also *Id.* at 442 defining binge drinking/alcohol abuse as 5 or more drinks in a row for men and 4 or more drinks in a row for women, at least once in the past two weeks.

⁶⁸ *Id.* at 444.

Because state of residence has a profound effect on the percentage of students abusing alcohol, it seems reasonable that state regulation of alcohol will work as an external legal tool to prevent and ameliorate public health harms caused by college student alcohol abuse. In eight of the forty states studied, the presence of stronger alcohol control policies conclusively acted as a protective measure against binge drinking among college students.⁶⁹ In addition to augmenting internal university measures to curb student alcohol abuse, state regulation will extend prevention and amelioration measures to areas outside the control of universities. Extension is warranted based on research showing that “[m]ost alcohol purchase and consumption among college students occurs off-campus.”⁷⁰

State regulation will also work better than tort as an external legal tool. First, unlike tort, state regulation of alcohol abuse will not make community welfare dependent upon higher education’s diffuse power structures that poorly manage risk. The state clearly has greater authority and means to enact and enforce alcohol regulation than a university president or dean of students. The federal government tying highway funding to a minimum drinking age of 21 serves as just one example of authority and means. Second, unintended costs of state regulation can be spread more efficiently than costs associated with tort. Fundamental to loss-spreading as a justification for tort liability is “the real burden of a loss is smaller the more people share it.”⁷¹ Based on this basic principle, state regulation is preferable to tort as a public health legal tool. The state can choose to spread costs amongst all taxpayers. Tort, on the other hand, would only spread costs amongst people paying tuition at the institution being sued. Consequently, tort loss-spreading represents a larger burden compared to state regulation loss-spreading. Alternatively,

⁶⁹ *Id.* at 444.

⁷⁰ *Id.*

⁷¹ Guido Calabresi, *Some thoughts on risk distribution and the law of torts*, 70 YALE L. J. 499, 517 (1961).

the state can choose to spread costs more narrowly through an alcohol tax. Though narrow loss-spreading might result in a larger burden on users of alcohol compared to the burden tort would spread to individuals paying college tuition, deterring alcohol use through price increases is preferable to deterring college attendance through tuition increases.

The central drawback to any state regulation of public health is the concern that it will infringe on civil liberties such as autonomy, privacy, and liberty.⁷² Here, civil liberties will be infringed when the state makes it harder for an individual to drink alcohol. However, society has already accepted some infringement of that right as evidenced by a minimum drinking age of 21, illegalization of drunk driving, and adoption of blue laws. As with these examples, states can point to their power to protect the safety and morality of citizens as authorizing further infringement of a person's right to drink alcohol. Nevertheless, states should still be cognizant of the civil liberty concern when adopting regulation to control college alcohol abuse.

A secondary concern arising from state regulation is the fear it will negatively impact private enterprise by deterring entrepreneurs from entering the market.⁷³ However, survey data shows gross sales from liquor, beer, and wine stores in 2008 was \$40,085,000,000, which outpaced the gross sales of shoes stores, jewelry stores, men's clothing stores, women's clothing stores, home furniture stores, and many other retailers. From 1998 to 2008, the gross sales of liquor, beer, and wine stores increased by \$14,552,000,000, which represented 64% growth. The growth over that period dwarfed most other retail areas. For example, in a decade where laptops, smart phones, mp3 players, and flat screen televisions became must have items, the gross sales of

⁷² Gostin, *supra* note 2, at 36.

⁷³ *Id.*

electronic and appliance stores grew 68%.⁷⁴ The gross sales of liquor, beer, and wine stores compared to other forms of retail coupled with the explosive growth of sales from 1998 to 2008 makes it unlikely that state regulation will deter entrepreneurs from entering the marketplace.

State regulation of college student alcohol abuse can prevent and ameliorate public health harms better than tort without significant negative effects to civil liberty or private enterprise. Universities and public health advocates should approach state legislatures and city or county officials with rule proposals aimed at the participant, campus, and local communities. Dan Stier, director of the Public Health Law Network, suggested state and local lawmakers respond better to ‘menus’ of possible statutes (personal communication, October 18, 2010). Menus provide flexibility and allow lawmakers to select rules that fit specific governmental needs, political climates, and personal views.

When drafting and presenting a menu of possible statutes, universities and public health advocates should match their proposals to their political clout. For example, a state flagship university, such as the University of Tennessee, that has built relationships with lawmakers during appropriation hearings may have more leverage at the state legislature level than a private institution. These relationships may help state universities to better overcome local resistance as well. Anecdotally, the University of North Carolina, one of the state’s two flagship institutions, overturned building code regulation in the town of Chapel Hill by appealing to the General Assembly, North Carolina’s state legislature.

Universities and public officials should also consider the location of higher education institutions when drafting menus. For instance, a proposed rule targeting college student alcohol

⁷⁴ U.S. CENSUS BUREAU, ESTIMATED ANNUAL SALES OF U.S. RETAIL AND FOOD SERV. FIRMS BY KIND OF BUS.: 1992 THROUGH 2008, *available at* <http://www2.census.gov/retail/releases/current/arts/sales.pdf> (retrieved October 27, 2010).

abuse at bars may have a better chance of passage if a state's universities are all located in college town. Alternatively, a proposed rule intended to prevent or ameliorate college student alcohol abuse at bars would likely miss targeted populations and run into greater opposition when a campus is located in a large metropolis where tourists and locals—as well as college students—patronize bars. A menu allows universities and public officials to present a rule designed for urban campuses and a rule designed for non-urban campuses.

To help universities and public health officials begin their advocacy, a small sample menu of rules aimed at preventing and ameliorating public health harms associated with college student alcohol abuse is provided. Brackets highlight information that should be adapted to particular circumstances. A discussion of the rule's purpose, implementation, and impact to civil liberty or private enterprise follows the sample statutory language.

Sample Menu of Statutes

- *Rule 1: This act imposes a [state/local] sales tax on all alcohol of [3]%.*
- Reasoning: Tax increases are not always popular given certain political stances or environments, which demonstrates the handiness of the menu approach. However, tax increases can prevent and ameliorate college student alcohol abuse. Research shows increases in state and local alcohol tax effectively prevent alcohol abuse.⁷⁵ . Increasing the price of alcohol affects younger drinkers more than older drinkers.⁷⁶ Further, higher alcohol prices “have also been found to reduce alcohol-related problems such as motor vehicle fatalities (13, 39, 62), robberies, rapes, liver cirrhosis deaths (11, 13, 61), sexually transmitted diseases (9), and child abuse (46,47).”⁷⁷

⁷⁵ Nelson, *supra* note 15, at 445.

⁷⁶ Hingson, *supra* note 1, at 271. *Accord* Nelson, *supra* note 15, at 444.

⁷⁷ Hingson, *supra* note 1, at 271.

The income from taxes can be used to prevent or ameliorate alcohol abuse as well. Universities and public health advocates may want to suggest an addendum requiring a portion of tax revenue be earmarked for local police DUI checkpoints or training,⁷⁸ for bureau of alcohol efforts to ensure retailers check age identification before selling alcohol,⁷⁹ or for university alcohol education efforts.

Though increased taxation imposes on a person's liberty to purchase alcohol, the imposition is not a complete bar to alcohol use. Furthermore, the imposition focuses narrowly on taxing alcohol users. Finally, those who bear the brunt of civil liberty infringement are alcohol users who drink the most and, therefore, are the likely target of public health concerns. Next, there is some threat increased taxation will reduce alcohol sales and deter private enterprise, so special attention should be paid to rate chosen. The amount of the proposed tax rate should consider alcohol taxation already in place.

- *Rule 2: All alcohol sales to the public shall be for [cash] only and payment by [checks, credit cards, charge cards or any form of deferred payment] is prohibited. For the purposes of this rule "cash" means coins or notes. Nothing in this rule shall be construed as prohibiting or restricting the sale of alcohol by distributors to retailers through any form of payment.*
- Reasoning: This rule uses language adapted from the Tennessee statute on lottery ticket sales.⁸⁰ That statute demonstrates the state's interest in deterring individuals from funding their gambling through check fraud or credit card debt. Similarly, this rule can be used to

⁷⁸ *Id.* at 270 stating, "Young drivers may be more likely to drink at locations where DWI enforcement resources are less likely to be deployed. Young drivers with high BACs also are more likely to be missed by police at sobriety checkpoints (82)."

⁷⁹ *Id.* at 271 stating, "Stepped-up enforcement of alcohol purchase laws aimed at sellers and buyers can be effective if resources are made available for this purpose."

⁸⁰ TENN. CODE ANN. § 4-51-108 (2003).

deter individuals from funding their drinking through fraud or debt. The rule narrowly tailors itself to the prevention and amelioration of college student alcohol abuse because one can reasonably assume college students have less access to cash than individuals working full-time.

The rule poses little risk to civil liberty because nothing guarantees people the right to items they cannot pay for. The real drawback to this rule is the loss of sales for private enterprise. However, retailers may support the rule as cash-only would allow them to refuse credit cards and the associated fees retailers must pay to credit card companies. Lawmakers could adapt the rule to allow debit card purchases so as not to frustrate the purchase of alcohol by people who do not carry cash.

- *Rule 3: (A) Any structure in which a [liquor, beer, or wine] store is the principal or accessory use shall be separated by a distance of at least [one thousand five hundred (1,500) feet] from a university or college. A [liquor, beer, or wine] store lawfully operating as a conforming use is not rendered a nonconforming use by the subsequent location of a university or college within [one thousand five hundred (1,500) feet]. (B) Any structure in which a [liquor, beer, or wine] store is the principal or accessory use shall be separated by a distance of at least [one thousand (1,000) feet] from any other [liquor, beer, or wine] store.*
- Reasoning: This rule is adapted from a Charlotte, North Carolina city ordinance dealing with pornography stores locations.⁸¹ The dual distance requirements makes alcohol less

⁸¹ CHARLOTTE, N.C., CODE, APP. A §12.518 (2008).

accessible to college students. Research shows limiting alcohol outlet density effectively prevents alcohol abuse.⁸²

The rule raises a civil liberties concern based on a person's ability to buy alcohol, but the rule only inconveniences a person's ability to buy alcohol and targets communities whose welfare is at issue. Private enterprise advocates may resist the rule to a greater degree. The rule acts as a barrier to entry for new entrepreneurs seeking to sell alcohol, because it effectively gives a monopoly to first-comers. It will also shut down businesses within the restricted distance unless those establishments are grandfathered in. Consequently, universities and public health advocates may find this rule difficult to pass.

If passage seems unlikely, the rule could be changed from a restriction on stores to a restriction on alcohol containers. The rule could state kegs, half-gallon bottles of liquor, and other large alcohol containers cannot be sold within 1500 feet of a university or college. Like alcohol outlet density, research shows that "availability of large volumes of alcohol (24- and 30-can cases of beer, kegs, party balls) . . . were also associated with higher binge drinking rates [on college campuses]."⁸³

- *Rule 4: Institutions of higher education shall notify a parent or legal guardian of a student under twenty-one (21) years of age if the student has committed a disciplinary violation with respect to the use or possession of alcohol or a controlled substance that is in violation of any federal, state, or local law, or of any rule or policy of the institution. Institutions of higher education will not be required to provide notifications that are prohibited by the Family Educational Rights and Privacy Act (FERPA).*

⁸² Nelson, *supra* note 15, at 445. Accord Hingson, *supra* note 1, at 271.

⁸³ Hingson, *supra* note 1, at 272.

- Reasoning: This language comes directly from a Tennessee statute requiring public universities to notify parents of underage students of alcohol violations; the statute also states public welfare necessitated its passage.⁸⁴ Inherent in public health regulation of societal welfare is paternalism; it is assumed the government can make better health decisions than the individual. This rule puts paternalism in the hands of parents, allowing them to address their adult child's drinking habits. The intervention hopefully prevents or ameliorates future abuse of alcohol. Involving parents is an inexpensive measure that can be administered by university personnel. FERPA provides very little protection to students in the way of discussing violations of university codes of conduct or state law;⁸⁵ therefore, the rule can be administered effectively.

Individuals concerned with civil liberty may resist sharing private information pertaining to an adult with a parent. However, adult college students are often counted as a parent's dependent for tax purposes, remain on a parent's health insurance, and receive financial assistance from parents for their education. All of which makes the civil liberties concern less persuasive. This rule would not affect private enterprise

- *Rule 5: It is unlawful for any person to drive or to be in physical control of any automobile or other motor driven vehicle on any of the public roads and highways of the state, or on any streets or alleys, or while on the premises of any shopping center, trailer park or any apartment house complex, or any other premises that is generally frequented by the public at large, while: (1) the alcohol concentration in the person's blood or breath is [eight-hundredths of one percent (.08%)] or more for individuals 21 years of*

⁸⁴ TENN. CODE ANN. § 49-7-146 (2008).

⁸⁵ See 34 C.F.R. § 99.31 (2010); 34 C.F.R. § 99.36 (2010).

age or older; or (2) the alcohol concentration in the person's blood or breath is [one-hundredths of one percent (.01%)] or more for individuals under the age of 21.

- Reasoning: The rule uses language from Tennessee's drunk-driving statute with the addition of a zero-tolerance policy for individuals under 21.⁸⁶ Illegalizing driving for individuals under 21 after any amount of drinking has "contributed to declines in alcohol-related traffic deaths among people younger than 21."⁸⁷ The prevention of deaths related to drunk-driving falls squarely within the purview of public health and justifies a zero-tolerance policy for underage drunk-drivers. Research demonstrates that students who abuse alcohol are more likely to drive. Though students who abuse alcohol may surpass .08% BAC, research has found "[y]oung drivers with high BACs also are more likely to be missed by police at sobriety checkpoints."⁸⁸ The effectiveness of drunk-driving statutes depends upon vigorous enforcement.⁸⁹ A zero-tolerance policy for individuals under 21 gives officers probable cause to check sobriety based upon the smell of alcohol alone; they need not depend on other evidence such as swerving or slurred speech.

Society has approved of infringing on a person's liberty to drive after drinking and for limiting alcohol use by persons under the age of 21. Therefore, a zero-tolerance rule should not raise a civil liberties issue. Private enterprise also fails to raise a red flag with a zero-tolerance policy, because places that would sell alcohol to a driver cannot serve individuals under the age of 21.

V. Conclusion

⁸⁶ TENN. CODE ANN. § 55-10-401 (2002).

⁸⁷ Hingson, *supra* note 1, at 270.

⁸⁸ *Id.*

⁸⁹ *Id.*

College student alcohol abuse is a public health problem affecting the students that abuse alcohol, their peers who do not, and the wider community in which they live. For the participant community, college student alcohol abuse contributes to a great number of deaths, injuries, and incidents of unsafe sex. For the campus community, the abuse results in large number of assaults and unwanted sexual advances. For the local community, college student alcohol abuse makes roads unsafe as students drink off-campus a majority of the time and drive intoxicated at a higher rate than peers not in college.

Public health issues led to the development of numerous legal tools to address community welfare. These tools require an enforcement entity charged with prevention and amelioration of public health harms. For college student alcohol abuse, three entities primarily enforce prevention and amelioration efforts. Internally, universities create policies aimed at prevention and amelioration. Externally, courts and governments have attempted to prevent and ameliorate college student alcohol abuse to varying degrees of success.

Courts, through tort suits, have predominantly found universities do not owe adult students a duty of care or protection. Therefore, the public health goal of tort, which is to make risky activities too expensive to continue, is frustrated. Though some courts and a number of legal theorists have challenged the predominant view, tort would still fail as a public health legal tool in the context of higher education even with the adoption of new tort rules. If more universities were held liable in tort, it would not necessarily reduce student alcohol abuse. Universities operate as loosely-coupled systems with power diffused throughout an institution. Loosely-coupled systems make universities poor risk managers because system inputs do not dictate system outputs. Consequently, tort liability for college student alcohol abuse would not

result in prevention or amelioration; rather, tort liability would result in tuition increases that disproportionately impact low- to middle-income students.

State regulation, through statutes and alcohol policies, effectuate public health changes in college student alcohol abuse better than courts. Research shows greater enactment and enforcement of state regulation corresponds to lower levels of college student alcohol abuse. States can choose to spread regulation costs either broadly, through general taxation, or narrowly, through alcohol taxation. Either form of state loss-spreading is more fair than loss-spreading through tort. General taxation reduces the individual burden more than tuition increases, while alcohol taxation targets at-risk populations better. Unlike tort, state regulation does create civil liberty and private enterprise concerns. However, society already accepts some infringement of civil liberties related to alcohol as evidenced by the number of laws already regulating its purchase and use. Further, alcohol is a booming business that will attract private enterprise despite further regulation. Universities and public health officials can help state lawmakers prevent and ameliorate the public health harms of college student alcohol abuse and limit regulation's effects on civil liberties and private enterprise by presenting menus containing a variety of possible regulation from which lawmakers can select. The flexibility of menus makes them an extremely useful advocacy tool. Considering the totality of the circumstances, state regulation is a better tool for preventing and ameliorating public health harms associated with college student alcohol abuse than tort. Universities should seek state regulation to augment their internal efforts to control student alcohol abuse, and states are well-advised to consider additional regulation in order to ensure public welfare.

2011

4th Annual Essay Contest

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

FIRST PLACE

Laura Napoli

"The authors of Toward Liquor Control realized that national Prohibition simply could not function effectively in the America they knew. They understood that one of the main causes of Prohibition's failure was the national government's imposition of a blanket viewpoint on a nation made up of very diverse people. The authors therefore advised that future alcohol policies be developed based on a smaller set of viewpoints – for example, taking the views of all people in a given state or community into account."

SECOND PLACE

Ryan Lozar

THIRD PLACE

Jeremy Carp

Ashley Watkins

Toward Liquor Control is the result of a study commissioned by John D. Rockefeller, Jr. in 1933, which provided a blueprint for states to follow when determining their alcohol regulatory systems following Prohibition. The Center republished the out-of-print book in 2011 to provide those interested in effective state-based alcohol regulation with a historical perspective and an understanding of why the system remains important today.

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

Introduction

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

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

1. A Roadmap to Modern Alcohol Policy

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. A Tiered Approach to Control

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

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

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

3. Guidelines for License States

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

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

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

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

4. The Importance of Flexibility

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

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

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

5. A New Approach to Studying Alcohol Policy

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

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

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

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

Conclusion

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

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

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

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

ⁱⁱ *Id.*

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

^{iv} “About DABC,” *supra*.

^v Minn. Stat. §340A.601 (2003).

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

^{vii} *Id.*

^{viii} *Id.*

^{ix} *Id.*

^x *Id.*

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

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

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

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

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

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

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

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

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

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

^{xxi} *Id.*

^{xxii} Utah Code Ann. § 32A-1-105.

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

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

^{xxv} *Id.*

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

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

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

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

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

^{xxix} "Frequently Asked Questions," *supra*.

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

^{xxxi} "Frequently Asked Questions," *supra*.

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

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

2012

5th Annual Essay Contest

If National Prohibition was just coming to an end in 2012, how would you structure the regulation of alcohol and why?

FIRST PLACE

Joseph H. L. Perez-Montes

"Realistically, any framework governing the production, sale, and consumption of alcohol must be multi-faceted. No single regulatory approach could adequately address all of the positive or ill effects of alcohol consumption. Sustained research on alcohol policy indicates that effective regulation should target numerous areas, including drunk driving policies, alcohol availability measures (such as licensing and minimum drinking age laws), alcohol marketing regulations, community-based prevention strategies, pricing and taxation regulations, and monitoring or surveillance activities."

SECOND PLACE

Joseph Ojih

TWIST THE CORK, POP THE TOP, AND BOTTOMS UP: SELECTED RECOMMENDATIONS ON
ALCOHOL REGULATION FROM SCRATCH

BY: JOSEPH H.L. PEREZ-MONTES

I. Introduction

Good cocktails usually have recipes. A few ounces of this, a shot of that, and a twist of the other, and a cocktail is born from unrelated ingredients. Cocktails are often generations old. Most were presumably created by trial and error. Some work better in certain situations than others. But all share a common characteristic: they follow a formula, a methodology of combining things that, when taken together, taste good. At least to some people.

This essay maintains that good regulatory schemes – like good cocktails – can be born of good recipes. Some of the ingredients may be changed. Experimentation can occur, and can work. But there is a basic formula with a set of fundamental ingredients. And those ingredients work well together; they taste good. This essay endeavors to identify some of those ingredients, and to explain why it is that they mix well.

II. Policy Implications to Consider

Alcohol regulation shares a close and often rocky bond with the public policy underlying it. Alcohol regulation concerns important questions of public policy. It arouses strong feelings in the people it impacts. And its effects often reach farther than anticipated. As a result, in the area of alcohol regulation, Chief Justice Earl Warren’s famous wisdom is particularly applicable: “It is the spirit and not the form of law that keeps justice alive.”¹ As such, the following important policy implications, among others, should be kept in mind when implementing a new regulatory framework.

A. The Prevalence of Alcohol Use

Both in the United States and abroad, alcohol is a widely used product. There are approximately two (2) billion “drinkers” worldwide.² While attitudes vary, in most countries, alcohol is a product consumed on a consistent and significant basis. This essay concerns the implementation of a regulatory framework from scratch in a hypothetical country. In all likelihood, wherever the hypothetical country may be, at least a noteworthy percentage of the adult citizens of that country will be regular consumers of alcohol.

Of course, social and cultural factors affect the level of alcohol consumption in a given country. Historically, different cultures have displayed different attitudes or degrees of acceptance toward alcohol consumption.³ In fact, based upon these differences, some researchers have divided cultures into two (2) categories: “wet” and “dry” cultures.⁴ In “wet” cultures, “alcohol is integrated into daily life and activities . . . and is widely available and accessible.”⁵ “European countries bordering the Mediterranean have traditionally exemplified wet cultures.”⁶ In “dry” cultures, by contrast, “alcohol consumption is not as common during everyday activities . . . and access to alcohol is more restricted.”⁷ “[T]he Scandinavian countries, the United States, and Canada” all exemplify traditionally “dry” cultures.⁸

Statistics seem to validate these categories. While not at all insignificant, alcohol consumption rates in the United States are relatively modest by comparison to western Europe. According to the 2010 National Health Interview Survey conducted by the Centers for Disease Control and Prevention, in the United States, 51% of adults aged 18 or older identified themselves as “current regular drinkers.”⁹ In sharp contrast, only 21% of surveyed adults were

“lifetime abstainers,” and 14% were “infrequent drinkers.”¹⁰ By any measure, those percentages show that at least a significant portion of the American population consumes alcohol on a regular basis.

True to the form described above, studies of European drinking patterns show a much higher propensity for alcohol consumption. One (1) study conducted in 2000 considered the drinking patterns of 15-year-olds in 29 European countries.¹¹ Again, by any measure, the results showed significant rates of alcohol consumption. In all but one (1) of the surveyed countries (the Republic of Macedonia), more than 70 percent of 15-year-olds were identified as “drinkers.”¹² In six (6) of the surveyed countries – including Greece, Lithuania, and the United Kingdom – more than 90 percent of 15-year-olds were considered “drinkers.”¹³

The World Health Organization (“WHO”) has developed, and maintains, more current “profiles” of the drinking patterns in various countries. Some data contained in the 2011 profiles of several countries is instructive. The data characterizes individuals who had not consumed an alcoholic beverage in the previous 12 months as “abstainers.” In the United States, 34.6% of surveyed individuals were “abstainers.”¹⁴ The figure in Canada was 22.4%¹⁵, and the figure in the Russian Federation was 41%¹⁶. Again, unsurprisingly, the figures in Western European countries showed a much lower percentage of “abstainers.” Only 4.3% of German citizens were abstainers.¹⁷ Citizens in France and Norway followed a similar pattern, with “abstainers” registering at 8%¹⁸ and 10%¹⁹ respectively.

In sum, cultural variations create different patterns of alcohol consumption. Nonetheless, it is reasonable to suppose that alcohol will be consumed by at least a significant percentage of the citizens of any country. Accordingly, the sheer volume and breadth of alcohol

consumption – and all of the positive and ill effects that may come from it – must be taken into account when considering a new regulatory framework.

B. Health

The negative health implications of alcohol consumption are well-documented, and need not be belabored.²⁰ Alcohol abuse has identifiable links to various medical ailments, including hypertension, stroke, liver cirrhosis, cardiomyopathy and other heart conditions, cancers, and psychological disorders.²¹ “In 2006, there were 22,073 alcohol-induced deaths in the United States, excluding deaths attributed to accidents, injuries, and/or Fetal Alcohol Syndrome.”²²

Global statistics are even more telling. The WHO has reported that alcohol use “causes an estimated 2.5 million deaths every year” worldwide.²³ In addition, “[a]lcohol use is the third leading risk factor for poor health globally,” and “is one of the four most common modifiable and preventable risk factors for major noncommunicable diseases.”²⁴ Moreover, “[t]here is also emerging evidence that the harmful use of alcohol contributes to the health burden caused by communicable diseases such as, for example, tuberculosis and HIV/AIDS.”²⁵ These substantial health implications must be considered when enacting a new regulatory framework.

C. Safety

Alcohol consumption has a startling impact upon public safety as well, and one which needs little emphasis to be understood. In 2006, in the United States alone, “there were 13,491 alcohol-impaired driving fatalities.”²⁶ Traffic fatality statistics are staggering enough. But there are various links between alcohol consumption and a host of other safety risks. “Globally, alcohol consumption causes 3.2% of deaths (1.8 million) and 4.0% of the Disability-Adjusted Life Years lost (58.3 million). Overall, there are causal relationships between alcohol

consumption and more than 60 types of disease and injury.”²⁷ Accordingly, safety concerns related to alcohol consumption cannot be ignored.

III. The Suggested Regulatory Framework

Realistically, any framework governing the production, sale, and consumption of alcohol must be multi-faceted. No single regulatory approach could adequately address all of the positive or ill effects of alcohol consumption. Rather, any effective framework should address alcohol consumption from a variety of angles. Sustained research on alcohol policy indicates that effective regulation should target numerous areas, including drunk driving policies, alcohol availability measures (such as licensing and minimum drinking age laws), alcohol marketing regulations, community-based prevention strategies, pricing and taxation regulations, and monitoring or surveillance activities.²⁸

This essay will not – and could not adequately – address each of these areas. Instead, this essay will focus upon several of the most consequential, and controversial, aspects of alcohol regulation: minimum drinking age (“MDA”) laws (“MDALs”), civil liability (in the form of “dram shop” statutes), and criminal liability (in the form of driving under the influence (“DUI”) laws). These areas will be emphasized for a number of reasons. Given their divisiveness, these areas demand at least some analytical depth. Further, these areas clearly require “regulatory” choices, made primarily through legislative action. And finally, these areas are simply important, and should undoubtedly be discussed in any consideration of a new regulatory framework.

A. A Minimum Drinking Age Law

1. The Fairness, Advisability, and Viability of Any MDAL

Enacting an MDAL seems a logical, even inevitable first step in creating a regulatory framework. However, all MDALs are controversial to one extent or another. This is, in part, because MDALs – while intended to curb underage drinking and its negative short-term and long-term effects – may create problems of their own. One commentator identified two (2) potential problems associated with prohibiting alcohol use by young adults: (1) “the impossibility of enforcing the law will engender a lack of respect for the law in general among young adults,” and; (2) “for those who choose to violate the law, the necessity of sneaking around to drink may lead to more dangerous drinking patterns and may preclude access to avenues that might imbue healthier drinking habits.”²⁹ Other commentators maintain that MDALs set adolescents apart “for disparate treatment in a way that ultimately creates disrespect for the legal system”; “deter[] underage drinkers from seeking help to deal with problem drinking early on,” and; “force[] drinking behind closed doors and encourage[] binge drinking.”³⁰

Nonetheless, for several reasons, some MDAL is a necessary component of any regulatory framework. First, MDALs serve the admittedly paternalistic, but likely essential purpose, of protecting children and young adults from their own cognitive limitations. In the United States, the first laws prohibiting underage drinking were enacted in the 1880s.³¹ These early statutes were arguably “one aspect of the state’s intervention into the parent-child relationship,” and reflected the newly-formed association between adolescence and “incompetency.”³² The more modern – and arguably, more accurate and less offensive – conception of MDALs is that they represent merely another child protective policy, comparable to policies prohibiting minors from making certain medical decisions, choosing not to attend school, or using tobacco products.³³

The fundamental legal theory is that, for their own protection and benefit, minors are deprived of certain rights of self-determination, including the right to consume alcohol.³⁴ In this instance, the practicalities seem to support the theory. Youth drinking patterns have been shown to significantly influence both short-term and long-term health implications associated with alcohol consumption.³⁵ More particularly, teenage drinkers are more likely to suffer “alcohol-related unintentional injuries (such as motor vehicle injuries, falls, burns, and drownings)” than older drinkers.³⁶ Likewise, “early onset of regular alcohol consumption has been found to be a significant predictor of lifetime alcohol-related problems.”³⁷ Given these facts, this author agrees with the basic theory of limiting minors’ self-determination rights to avoid certain susceptibilities, and therefore, with the “child protection” justification underlying MDALs.

Second, MDALs save lives. While the number of lives saved is very arguable, the fact remains that MDALs prevent at least some alcohol-related deaths.³⁸ The American experience is illustrative of this point. Some research indicates that raising the MDA in the United States from 18 to 21 resulted in a significant reduction in the mortal consequences of underage drinking:

The enactment by Congress of a federal minimum-drinking-age law resulted in many saved lives. In the six months after the state of New York raised its minimum-drinking age, the number of fatal car accidents involving people under twenty-one years of age declined by 41%. Nationally, the higher drinking age was credited with decreasing drunk-driving accidents by persons under age twenty-one by 10-20%. Further, in the twenty years following the increase in the drinking age, researchers estimated that over 20,000 lives were saved by the measure.³⁹

Other research has shown that a legal prohibition upon drinking between the ages of 18 and 20 can be linked to a 20-33 percent difference in alcohol consumption, and a 10 percent

difference in fatal accidents for adult males.⁴⁰ Of course, a massive body of research exists in this area, and disputes abound. But it seems clear that there is at least some statistical correlation between MDALs and reduced loss of life. That broad conclusion, in and of itself, must count as support for the enactment of an MDAL.

Third, and finally, the vast majority of the world's governments have concluded that at least some MDAL should be enacted. While MDAs vary, the consensus that some MDA is appropriate is relatively settled. As to the sale of beer "on-premise," only 14.8% of the world's countries have no age limit.⁴¹ "Off-premise" figures increase only slightly – 21.4% of countries have no age limit for the "off-premise" sale of beer.⁴² The selection of an appropriate MDA is a complex and delicate process, as described below. But worldwide, an MDAL of some kind is the rule, not the exception.

2. How the United States Arrived at a MDA of 21

For decades now, the MDA in the United States has been 21. That, however, was not always the case. The MDA of 21 has always been controversial. The policies and research underlying the selection of 21 as the American MDA have likewise been disputed. And overall, the tactics by which the United States Congress "prompted" states to adopt the MDA of 21 have long been the subject of academic quibbling, political maneuvering, and legal battling.

As noted above, regulation of the sale of alcohol to American minors began in earnest during the 1880s.⁴³ These early enactments came as part of a wave of government intervention in the family relationship and the development of children.⁴⁴ However, these enactments targeted the sale or provision of alcohol to minors.⁴⁵ The consumption of alcohol by minors was not made illegal, as minors were viewed as "innocent victims," rather than "persons at

fault.”⁴⁶

Moreover, these laws were intertwined with the continuation of the “temperance movement.” The American temperance movement originated in the early 19th century.⁴⁷ Initially, the temperance movement focused upon avoiding “distilled spirits,” but ultimately, advocated total abstinence from all forms of alcohol.⁴⁸ The philosophies of the temperance movement, combined with the growing concern of Progressive Era reformers with the problems associated with alcohol consumption in general, brought the issue of youth exposure to alcohol to the forefront of the debate.⁴⁹

In 1919, with the ratification of the 18th Amendment to the United States Constitution, the Prohibition era began.⁵⁰ Prohibition made the “manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States” unlawful.⁵¹ This broad preclusion, of course, impacted the possession of alcohol by minors, as well as adults. But some commentators have observed that Prohibition was not immediately intended to affect underage drinking:

Prohibition was aimed at eliminating the culture of drinking, particularly male drinking, and was not aimed specifically at youth drinking. Although Prohibition lasted only a few years, it did indeed change American drinking habits. Obviously, the clandestine drinking that occurred while Prohibition was in force could not occur in saloons, as was previously common. However, the secretive drinking that did take place had another new element: men and women imbibed together. Previously, it was considered indecent for men to drink in the presence of women. But, drinking at dances, with women, and to excess had become, by the latter twenties, a new code of permissible behavior among college students because it was sanctioned by peer opinion. When Prohibition finally ended, and individual states resumed regulation of alcohol consumption, this new pattern continued ⁵²

Prohibition ended in 1933 with the ratification of the 21st Amendment to the United States Constitution, which expressly repealed the 18th Amendment.⁵³ Section 2 of the 21st

Amendment provides that “[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.”⁵⁴ This provision effectively returned control of alcohol regulation to the individual states.⁵⁵

The states, in turn, began their own process of regulating the consumption of alcohol by minors. Following the repeal of Prohibition, nearly every state adopted an MDA of 21.⁵⁶ New York was the lone exception, with an MDA of 18.⁵⁷ In the 1970s, states began to reduce their MDAs (as well as their ages of majority) below 21.⁵⁸ A number of factors may have contributed to this change. To begin, in 1971, the passage of the 26th Amendment to the United States Constitution reduced the voting age from 21 to 18.⁵⁹ “As a result, the benchmark for achieving adulthood, as measured by participation in public life, was eighteen years old.”⁶⁰ Eighteen also represented the minimum age for draft eligibility.⁶¹ Thus, MDAs of 21 created the oft-noted irony that 18-year-old men could be conscripted into the armed forces, sent to battle, and killed, but could not drink alcohol.⁶² A final factor may also have come into play: “In the late 1960's and early 1970's, American attitudes toward adolescence became less paternalistic and moved toward increased autonomy.”⁶³ In all, during the early 1970s, 29 states reduced their MDAs, mostly from 21 to 18.⁶⁴

During the early 1980s, in response to drunk driving statistics, the Reagan administration created the Presidential Commission on Drunk Driving.⁶⁵ The Commission ultimately recommended that the administration promote the adoption of a national MDA of 21.⁶⁶ The administration ultimately agreed.⁶⁷ This decision – which contravened the Reagan

administration's traditional deference to states' rights – was influenced in no small measure by an intense lobbying campaign conducted by Mothers Against Drunk Driving (“MADD”):

MADD, led by founder Candy Lightner, lobbied intensely for federal drunk driving legislation. Its approach was to emphasize the deaths of innocent young people at the hands of drunk drivers. Even staunch states' rights proponents found it difficult to say no to this approach. MADD received further support from Congress members from “blood border” states--states that bordered other states with less restrictive drinking ages. Due to the drinking age differences, people traveled across state lines to drink, which led to an increase in alcohol related accidents when drivers were returning to their home state. One such state was New Jersey. It was caught between the more restrictive Pennsylvania and the less restrictive New York.⁶⁸

In the end, MADD and other proponents of federal MDA legislation acquired the Reagan administration's support for the National Minimum Drinking Age Act of 1984 (“NMDAA”).⁶⁹ The NMDAA was passed as part of the Surface Transportation Assistance Act, because its enforcement mechanism became the withholding of federal highway funds for a state's non-compliance.⁷⁰ In particular, the statute phrases this “incentive” to adopt an MDA of 21 as follows:

The Secretary shall withhold 10 per centum of the amount required to be apportioned to any State . . . on the first day of each fiscal year after the second fiscal year beginning after September 30, 1985, in which the purchase or public possession in such State of any alcoholic beverage by a person who is less than

twenty-one years of age is lawful.⁷¹

Unable to tolerate the consequence of losing 10 percent of federal highway funding, all 50 states ultimately passed laws adopting MDAs of 21.⁷²

Shortly after the passage of the NMDAA, South Dakota filed suit seeking a declaration that the statute was unconstitutional. In the landmark decision of *South Dakota v. Dole*, the United States Supreme Court upheld the NMDAA, reasoning as follows:

Here Congress has offered relatively mild encouragement to the States to enact higher minimum drinking ages than they would otherwise choose. But the enactment of such laws remains the prerogative of the States not merely in theory but in fact. Even if Congress might lack the power to impose a national minimum drinking age directly, we conclude that encouragement to state action found in § 158 is a valid use of the spending power.⁷³

This decision marked the end of a “widely unsuccessful” litigation campaign against the NMDAA.⁷⁴ The NMDAA has remained the law in America for more than two (2) decades now. With its adoption, the United States entered an unprecedented and lengthy era of stability in the area of MDA law. And although some commentators maintain that “the debate has resurfaced,” the MDA in all American states remains 21.⁷⁵

3. How United States MDALs Compare to Others Around the World

Instinctively, 21 seems to be a high number for an MDA. In fact, 21 is the highest MDA in the world – no country imposes a higher MDA under any circumstances.⁷⁶ Of course, some countries have no MDA at all.⁷⁷ As to the purchase of beer, the vast majority of countries – 64.3% for “on- premise” purchases, and 58.0% for “off-premise” purchases – impose an MDA of 17 or 18 years.⁷⁸ Some countries – 13.0% for “on-premise” purchases, and 11.6% for “off-premise” purchases – impose a lower MDA of 15 or 16 years.⁷⁹

The United States, however, falls into the smallest category of all: countries with an MDA of 19 or older. In particular, only 7.8% of countries impose an MDA of 19 or older for “on-premise” purchases, and 8.9% of countries impose an MDA of 19 or older for “off-premise” purchases.⁸⁰ The following countries fall into this category: “Canada (19), Nicaragua (19), Republic of Korea (19), Iceland (20), Sweden (20 for strong beer off-premise, 18 otherwise), Japan (20), Indonesia (21), the Federated States of Micronesia (21), Palau (21) and the United States (21).”⁸¹

4. The MDAL Choice in the New Regulatory Framework

This author would recommend that a country adopting a new regulatory framework enact an MDA of 21 as its centerpiece. Of course, this recommendation could not be made lightly. As touched upon in the preceding sections, various factors – scientific, cultural, and philosophical – should no doubt be taken into account.⁸² A country’s MDA arguably sets the metaphorical “tone” for the rest of its regulatory framework. And, an MDA has implications which literally impact the other elements of a regulatory policy, including bases of civil and criminal liability related to alcohol sale and consumption. As such, an MDA is the linchpin of any regulatory framework, and should be carefully considered.

Furthermore, an MDA of 21 has well-known limitations. In all likelihood, other indicia of adulthood in our hypothetical country – such as the right to vote – will have arrived well before the age of 21, as they do in the United States.⁸³ Even more controversially, the MDA may be incongruent with certain civic responsibilities, such as the duty to participate in a military draft.⁸⁴ And as a matter of fact, selecting an MDA of 21 would place our hypothetical country in the minority camp among the world’s countries.⁸⁵ These are no minor impediments.

Nonetheless, this author would recommend an MDA of 21 for one simple reason: again, it saves lives. For all its unsightly twists, the American MDA experience teaches us a great deal to this end. The broad results of the increased MDA in terms of the preservation of life have been, in large measure, analyzed, counted, and positive:

Research continued to be conducted after implementation of the NMDA, and these studies confirmed the earlier findings. A comprehensive evaluation of the evidence base requested by Congress and reported in 1987 by the General Accounting Office (GAO) raised the profile of the evidence and dispelled any lingering doubts about the effectiveness of raising the drinking age. The GAO's thorough, 111-page review concluded that "the evidence is persuasive" that raising the MLDA has significant effects on alcohol-related crashes among eighteen-to twenty-year-olds, and that the observed effects were consistent across studies in different states and with different designs and methods.⁸⁶

Some studies indicate drastic reductions in alcohol-related fatalities: "[T]he percentage of teenage drivers killed in traffic crashes with a blood alcohol content (BAC) above the legal limit (0.08) has dropped from 56 percent in 1982 to 23 percent in 2005," according to estimates by the National Highway and Transportation Safety Authority.⁸⁷ And the NHTSA has estimated that the MDA of 21 saves approximately 1,000 lives each year.⁸⁸

Statistical quibbling is no doubt possible. But the MDA of 21 has saved at least some lives which would have otherwise been lost. Accordingly, this author, admittedly as a value judgment, would elevate the preservation of life above all of the other policy considerations discussed herein. An MDA of 21 would best support this policy goal.⁸⁹ For that reason, this author would recommend the adoption of an MDA of 21.

B. "Dram Shop" Liability

Dram shop liability statutes raise interesting legal and philosophical questions. For some, logic defies imposing liability upon the distributor of a product for damages directly

caused by the consumer of that product. The intervening act of drinking the alcohol breaks the metaphorical “chain” of responsibility. For others, providing the alcohol begins the process ultimately causing the injury, and in any event, the goal of compensating innocent victims is preeminent. Fortunately, this is an area in which the “mean between extremes” can be reached, at least in large part, by statute.

1. A Brief History of Dram Shop Liability in America

Absent statutory authority, common law courts were rarely imposed liability upon alcohol vendors.⁹⁰ “The underlying theory was that the consumption of alcohol, rather than the actual furnishing of it, was the proximate cause of the injury.”⁹¹ In less articulate, but equally meaningful terms, courts commonly held that it was not a tort “to sell liquor to ‘a strong and able-bodied man.’”⁹²

In the mid-19th century, state legislatures began passing dram shop statutes.⁹³ These statutes provided limited forms of dram shop liability, often creating “causes of action for spouses and children injured in person, property, or means of support.”⁹⁴ Importantly, the emergence of these statutes also coincided with the rise of the temperance movement.⁹⁵

Following the repeal of Prohibition in 1933, state legislature, in turn, began to repeal dram shop acts and return to the common law rule.⁹⁶ Much like the MDA, as shocking drunk driving statistics began to mount in the 1980s, so did interest in resurrecting some form of dram shop liability.⁹⁷ At the same time, the tort reform movement prompted some state legislatures to limit – and even cap damages for – dram shop liability.⁹⁸ Nonetheless, the era had definitely returned. Some states still refuse to impose any form of dram shop liability, but these states are

the minority.⁹⁹

2. A Comparative Analysis of Dram Shop Liability Statutes

Because of the intersection between modern dram shop liability and the tort reform movement, a few broad principles concerning American dram shop liability may be observed:

First, a dramshop may be liable for selling or otherwise furnishing alcohol to either a visibly intoxicated patron or a person who is not of legal drinking age. Second, the primary goal of dramshop liability is to compensate innocent third parties for injuries they suffer at the hands of intoxicated tortfeasors. Thus, in the absence of special circumstances, a dramshop's customers may not recover for injuries caused by their own intoxication. Finally, and in keeping with the general trend of apportioning financial responsibility among multiple tortfeasors whenever applicable, a dramshop will not be solely liable for the plaintiff's injuries, but will instead pay a sum of damages based on its share of comparative responsibility.¹⁰⁰

Dram shop statutes may also be classified “according to their permissive or prohibitive orientation,” with the former classification broadly permitting causes of action against alcohol vendors, and the latter classification prohibiting or restricting such causes of action.¹⁰¹

The distinction between “permissive” and “prohibitive” statutes is particularly obvious, and helpful. South Dakota is a prime example of a state with a “prohibitive” law. South Dakota’s statutes plainly preclude dram shop and social host liability, pronouncing that “the consumption of alcoholic beverages, rather than the serving of alcoholic beverages, is the proximate cause of any injury inflicted upon another by an intoxicated person.”¹⁰² By contrast,

the Illinois dram shop statute provides that

[e]very person who is injured within this State, in person or property, by any intoxicated person has a right of action in his or her own name, severally or jointly, against any person, licensed under the laws of this State or of any other state to sell alcoholic liquor, who, by selling or giving alcoholic liquor, within or without the territorial limits of this State, causes the intoxication of such person.¹⁰³

No express additional conditions are placed upon the sale of the alcohol to maintain a cause of action in Illinois.¹⁰⁴ This type of statute approaches a form of “strict liability” against dram shops.¹⁰⁵

Furthermore, while there is arguably “general agreement as to the broad contours of American dramshop liability,” dram shop statutes contain “unique quirks” and “oddities.”¹⁰⁶ These variations include “requirements that suits be based on claims of drunk driving, heightened burdens of proof, and even making the plaintiff’s ability to sue dependent upon the dram shop’s first having been criminally convicted of the illegal sale.”¹⁰⁷ Nevertheless, commentators have identified four (4) forms of sales which may give rise to dram shop liability: (1) all illegal sales; (2) sales to intoxicated persons; (3) sales to minors, and; (4) various other unlawful sales, such as sales to known alcoholics or “incompetents.”¹⁰⁸ In addition, states take different approaches regarding whether the following types of plaintiffs may be barred from recovering: (1) intoxicated plaintiffs; (2) the families of intoxicated plaintiffs, and; (3) “coadventurers” of intoxicated plaintiffs.¹⁰⁹ Finally, states are divided on the issues of apportionment of liability, contribution, and damage caps.¹¹⁰

3. The Recommended Dram Shop Liability Framework

This author would recommend the adoption of a “permissive” dram shop liability statute. Undoubtedly, the historical reasoning for non-liability – that “[v]oluntary consumption of alcohol, rather than the mere furnishing of alcohol, is the proximate cause of any subsequent injury as a matter of law” – is persuasive.¹¹¹ However, the policy goal of compensating injured victims is perfectly reasonable.¹¹² And legally, imposing liability upon dram shop vendors “for foreseeable harm caused by their negligence” is rooted in well-settled tort law.¹¹³ The remaining question, then, becomes the most effective form of dram shop statute.

In this author’s view, abstract requirements for stating a cause of action are simply not justified in most circumstances. While some limitations are arguable, “it is important to remember that it is the victim who must absorb the cost of these limitations.”¹¹⁴ For instance, “sold and served” requirements – which basically exempt convenience stores and other vendors who do not sell alcohol for on-premises consumption – eviscerate licensing requirements for dram shop liability.¹¹⁵ “Sold and served” requirements also potentially allow vendors (such as convenience store clerks) to escape liability for injuries caused by intoxicated or underage customers, despite knowing that the sale may otherwise create exposure for their businesses.¹¹⁶

As to the types of sales which may give rise to dram shop liability, a statute combining two (2) commonly accepted categories would be most appropriate: sales to intoxicated persons and to minors. The statute should require proof that the dram shop had actual or constructive knowledge of the offending condition, i.e. that the vendor “knew or should have known” that the purchaser was intoxicated or underage. For instance, Iowa’s dram shop statute requires proof that the vendor “knew or should have known the person was intoxicated, or ... sold to and served

the person to a point where the licensee or permittee knew or should have known the person would become intoxicated.”¹¹⁷ This moderate approach tempers the “strict liability” approach advocated in some states.¹¹⁸ At the same time, it simplifies the categories of illegal sales, excludes anomalies, and avoids the challenges of determining whether a sale was otherwise “illegal.”¹¹⁹

Furthermore, this author would recommend adopting a dram shop statute which precluded recovery for intoxicated plaintiffs, their family members, and their “coadventurers,” regardless of the age of any such plaintiffs. Specifically, our hypothetical country should adopt an express prohibition extended to all three (3) of these categories of plaintiffs, similar to Georgia’s dram shop statute: “Nothing contained in this Code section shall authorize the consumer of any alcoholic beverage to recover from the provider of such alcoholic beverage for injuries or damages suffered by the consumer.”¹²⁰ Intoxicated persons – unlike their innocent victims – have assumed the risks associated with becoming intoxicated.¹²¹ An intoxicated person’s family members would derive a right to recover from the intoxicated person’s assumption of such risks – a legal right, therefore, would result from an arguable wrong.¹²² And “coadventurers” assume the risks of associating with or encouraging intoxicated persons.¹²³

Finally, our hypothetical country should adopt a statute which allows both apportionment of liability through joint and several liability, and contribution among dram shops and intoxicated tortfeasors. North Carolina’s governing statute is prototypical: “The liability of the negligent driver or owner of the vehicle that caused the injury and the permittee or ABC board which sold or furnished the alcoholic beverage shall be joint and several, with right of contribution but not indemnification.”¹²⁴ This approach embraces both the theoretical notion of shared

responsibility, and the practical reality that dram shops will be more capable of paying judgments than intoxicated defendants.¹²⁵

With this type of moderate, simplified, and permissive statute in place, our hypothetical country will likely reap the bulk of the rewards, and avoid the bulk of the inequities, created by dram shop statutes.

C. Criminal Liability

The final aspect of alcohol regulation discussed in this essay is both critical and especially complex: DUI laws. No discussion of DUI laws should begin, however, without considering the tremendous human costs addressed by them. DUI laws should seek to prevent, deter, and punish alcohol-related traffic injuries. And that issue remains overwhelmingly serious. Data compiled by the NHTSA for the year 2010 in the United States alone illustrates the point. In 2010, 10,228 people were killed in “drunk-driving” crashes – crashes in which a driver had a blood alcohol concentration (“BAC”) of 0.08% or more.¹²⁶

That number represents 31% of all traffic fatalities in the United States that year.¹²⁷ “An average of one alcohol-impaired-driving fatality occurred every 51 minutes in 2010.”¹²⁸ And while the number of traffic fatalities in 2010 decreased by 4.9% from the previous year, it is beyond dispute that the human costs of drunk driving remain unacceptably high.¹²⁹

DUI laws should endeavor to curb the loss of life caused by drunk-driving above all else. With that goal in mind, a few of the most critical aspects of effective DUI laws should be considered.

1. Simplicity and Consistency

Laws deter crimes by causing fear in potential offenders: “[D]eterrence presumably stems

from the perceived threat or fear of the inherent elements of punishment itself, not through some indirect process.”¹³⁰ Clearly, the deterrent effect of a law suffers if potential offenders do not understand it. And many would argue that average people do not adequately understand DUI laws. In fact, some researchers have estimated that “only 27% of driving-age people know their state’s BAC limit.”¹³¹ Drivers are often not alone. Judges, prosecutors, and law enforcement officials often struggle with complexities and inconsistencies in their state laws as well.¹³² As such, unnecessary complications are not just frustrating; they reduce the efficacy of DUI laws. Simplicity and understandability should be the primary goals of our hypothetical country’s DUI laws.

For similar reasons, consistency is important. The following passage summarizes the problem as manifested in our country:

Currently in the United States, no two states possess the same sentencing provision for the crime of vehicular homicide while under the influence of alcohol. Recent case law shows states are lacking uniformity in their sentencing measures for drunk drivers. This lack of uniformity in facing a national problem leads to variation in the types of convictions and punishments that drunk drivers face.¹³³

State legislation punishing drunk drivers for causing fatal crashes can be roughly divided into three (3) distinctive, and sometimes conflicting categories: (1) “easy states,” like Delaware, which impose maximum prison sentences of five (5) years; (2) “harsh states,” like Rhode Island, which have statutes specifically geared toward punishing DUI-induced homicides, and which impose more severe incarceration penalties, and; (3) “states lacking a clear message,” which have

no specific statutes addressing DUI-induced homicides, and which may take differing approaches to charging and sentencing drunk drivers that cause fatalities.¹³⁴

To reconcile these differences, some commentators have suggested uniform sentencing guidelines for drunk drivers who have committed vehicular homicide.¹³⁵ Such legislation could arguably be enforced in the same way as the National Minimum Drinking Age Act: by conditioning the receipt of federal highway funds upon adoption of the uniform legislation.¹³⁶ To the extent that governmental subdivisions may exist within our hypothetical country, uniform legislation which addresses DUI-related offenses as specifically as possible should be adopted.

To that end, the National Committee on Uniform Traffic Laws and Ordinances has developed the “2007 DUI Model Law.”¹³⁷ The Model Law is basically a compilation of various common elements of DUI laws, synthesized into a single, comprehensive statute. The Model law includes “provisions relating to repeat and high blood alcohol concentration (BAC) offenders and use of ignition interlocks.”¹³⁸ Moreover, the Model Law contains provisions related to chemical testing, “zero tolerance” for drivers under the age of 21, and an “open container” provision.¹³⁹ Accordingly, the Model Law would be a terrific starting (and perhaps ending) point in enacting a DUI regulatory scheme.

2. The Issue of Legal BAC Limits

Perhaps the most basic question in DUI law is: How drunk is legally drunk? State legislatures have answered that question by enacting and enforcing “per se drunk driving statutes.” These statutes “make driving at a given BAC a crime in itself, thus requiring no proof that an individual was actually impaired while driving.”¹⁴⁰ In other words, American states (like most countries around the world), set a certain level of BAC as the threshold for criminalizing

the operation of a motor vehicle. Call it what you may: “impaired,” “drunk,” or “over the limit.” By any name, the legal BAC limit is the measurable point at which you are, in the eyes of the law, “too drunk to drive.”

Unsurprisingly, BAC was not a component of most early DUI laws:

The earliest drunk driving statutes included no legal limit on BAC, only a prohibition on driving while impaired. As our understanding of alcohol's interaction with blood and the body developed, states began to incorporate the BAC into statutes. Indiana was the first to do so in 1939. This first wave of legislation did not create per se statutes, but rather allowed for the use of BAC as evidence of intoxication; subsequent laws created a presumption of intoxication at a given BAC.¹⁴¹

By 1966, however, per se laws were being adopted in the United States.¹⁴² Although the legal BAC limit was often much higher than it is today – in some cases 0.15% – the limit set the legal ceiling.¹⁴³ State adoption of 0.08% as the legal BAC limit – again, like the MDA of 21 – ultimately became a condition for receipt of federal highway funding.¹⁴⁴ And as of 2004, the strategy was again effective; all American states had adopted 0.08% as the legal BAC limit.¹⁴⁵

The journey to reduce the legal BAC limit in the United States was a difficult one. Proponents of a legal BAC limit of 0.10% or higher went to great lengths to discredit studies showing the potential benefits of the reduction.¹⁴⁶ Other commentators have suggested even more interesting sticking points with the legal BAC limit of 0.08%: “Per se statutes may have many positive effects, but in light of the scientific evidence indicating that women are generally more impaired than men at the same BAC, they also create the potential for discrimination against men.”¹⁴⁷ Nonetheless, the legal BAC limit of 0.08% is significantly higher (meaning more forgiving) than the legal BAC limit in most other countries:

According to the International Center for Alcohol Policies, only 15 other countries

(including Canada and New Zealand) have the same threshold as the United States. Most European nations carry a standard of .05 or lower and a few countries, such as the Czech Republic, have zero tolerance policies.¹⁴⁸

Viewed in that light, the American BAC restriction does not seem so, well, restrictive.

Moreover, research strongly suggests that lower legal BAC levels correlate with lower incidences of alcohol-related traffic fatalities. Indeed, studies have shown that “reducing blood alcohol limits from 0.10% to 0.08% in the United States led to a 6% decrease in the proportion of drivers in fatal crashes with blood alcohol levels at 0.10% or higher and a 5% greater decrease in the proportion of fatal crashes that were alcohol related at 0.10% or higher.”¹⁴⁹ Similarly, “[a] time series study of traffic deaths in the United States between 1980 and 1997 indicated about a 14% lower rate of alcohol-related motor vehicle mortality and a 13% lower rate of motorcycle mortality when laws specifying a legal BAC of 0.08% were in effect.”¹⁵⁰ Results in other countries were similar:

In Sweden, which changed its BAC threshold from .05 to .02 in 1990, the results have been dramatic. According to the World Health Organization and European Commission, of road fatalities in Sweden, roughly 16% were alcohol related. In the U.S., 31.7% of traffic fatalities were alcohol related in 2007. Other countries around the world have continued to modify their standards for “drink-driving.” In Switzerland, where the limit was reduced from .08 to .05 in 2005, drunk driving deaths instantly declined. France saw similar results when it lowered its limit to .05 in 1995. Changes appear to be on the horizon in other countries as well. For example, in the past few years Denmark has discussed reducing the BAC threshold to .02.¹⁵¹

In light of this research, our hypothetical country should adopt a legal BAC limit of 0.08% or lower. Furthermore, the “zero tolerance” policy for drivers under age 21, as reflected in the Model Law, should also be adopted: “Notwithstanding any other provision of law, it is

unlawful for a person under the age of 21 years who has a blood alcohol concentration of 0.02 or more, as measured by a preliminary alcohol test or a test authorized by section 103, to drive a vehicle.”¹⁵² In this crucial area – and given the potential life-saving implications of lower legal BAC limits – it is best to err on the side of caution.

3. Strengthening BAC Test Refusal Penalties

Obtaining evidence of a driver’s BAC is of paramount importance. Indeed, a BAC test result “is one of the most valuable and persuasive pieces of evidence in an OUI case and is directly linked to the deterrence function of implied consent laws. BAC evidence may exonerate an individual who is wrongfully charged and may help to convict an individual who is impaired.”¹⁵³ The problem is that, all too often, intoxicated drivers refuse to submit to BAC chemical testing. In those circumstances, not only is a crucial piece of evidence in a DUI prosecution often lost forever, but the deterrent effect of DUI laws is adversely impacted.¹⁵⁴ Moreover, “[m]issing BAC data is also a concern in terms of accurately determining the extent of impaired driving crashes.”¹⁵⁵

Notably, BAC test refusals are relatively common. Data collected by the NHTSA indicates alarming refusal rates on a broad scale:

Data was received from 37 States, the District of Columbia, and Puerto Rico, and reflects arrests from 2005. State refusal rates varied from 2.4 percent in Delaware to 81 percent in New Hampshire. The average refusal rate was 22.4 percent, and the median refusal rate was 17.4 percent. The weighted mean of the refusal rates based on State populations in 2005 was 20.9 percent.¹⁵⁶

To compound the problem, different American states have enacted sometimes wildly different

penalty provisions for BAC test refusal.¹⁵⁷

To adequately address the problems generated by BAC test refusal, our hypothetical country should take a number of steps. First, BAC test refusal should be criminalized and stringently punished. Some research indicates an inverse correlation between the harshness of penalties for refusing to take BAC tests, and the rate at which drivers refuse:

For example, in Minnesota, where the penalties for test refusal can include up to 90 days in jail (and up to one year in jail for repeat offenders), the rate is 14%. In Illinois, the prescribed penalty is a 6-month license suspension but offenders may receive a restricted license immediately; the test refusal rate is 38%.¹⁵⁸

The Model Law specifically provides that refusal to submit to a BAC test is a criminal offense, and provides for moderate periods of incarceration, in addition to the administrative penalties of loss of license and monetary fines.¹⁵⁹ Although the extent of these penalties may be debatable, all should be available as sanctions for a first offense of criminal refusal.

Moreover, our hypothetical country should also enact other, more logistical measures to address the problem of criminal refusal. For instance, the DUI statute should specifically provide that evidence of a defendant's refusal to submit to BAC testing is admissible in the defendant's criminal trial. Pennsylvania's statute could serve as a template:

In any summary proceeding or criminal proceeding in which the defendant is charged with a violation of section 3802 or any other violation of this title arising out of the same action, the fact that the defendant refused to submit to chemical testing as required by subsection (a) may be introduced in evidence along with other testimony concerning the circumstances of the refusal. No presumptions shall arise from this evidence but it may be considered along with other factors

concerning the charge.¹⁶⁰

Moreover, upon a driver's refusal to submit to a BAC test, officers should be allowed to seek warrants to obtain blood samples.¹⁶¹ This remedy should be used in conjunction with sanctions for criminal refusal.¹⁶² These steps would likely limit instances of criminal refusal, and thus, help to curb one of the most challenging problems associated with DUI laws.

IV. Conclusion

There are many recipes to make the same good cocktail, and many more variations on each recipe. But the basics should rarely change. The same goes for an effective regulatory framework for alcohol policy. Admittedly, an extra twist of this and shot of that might make it just right. But someone probably tried a few other variations of the fundamental ingredients, and found out the hard way that it just did not taste good. We should take lesson.

Endnotes

1. David M. Crane, *Foreword*, 62 SYRACUSE L. REV. 167, 167 (2012) (citing Earl Warren, *The Law and the Future*, in THE PUBLIC PAPERS OF CHIEF JUSTICE EARL WARREN 221, 229 (Henry M. Christman ed., 1959)).
2. WORLD HEALTH ORGANIZATION, GLOBAL STATUS REPORT: ALCOHOL POLICY 1 (2004) [hereinafter GLOBAL STATUS REPORT].
3. Kim Bloomfield *et al.*, *International Comparisons of Alcohol Consumption*, 27 J. OF NAT'L HEALTH INST. ON ALCOHOL ABUSE AND ALCOHOLISM 95, 96 (2003).
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. CENTER FOR DISEASE CONTROL AND PREVENTION, SUMMARY HEALTH STATISTICS FOR U.S. ADULTS: NATIONAL HEALTH INTERVIEW SURVEY, 2010, VITAL AND HEALTH STATISTICS 10, Series 10, No. 252 (2012).
10. *Id.*
11. Bloomfield *et al.*, *supra* note 3, at 104.
12. *Id.*
13. *Id.*
14. World Health Organization, *Country Profiles by WHO Region, United States*, http://www.who.int/substance_abuse/publications/global_alcohol_report/profiles/usa.pdf (last visited Dec. 9, 2012).
15. World Health Organization, *Country Profiles by WHO Region, Canada*, http://www.who.int/substance_abuse/publications/global_alcohol_report/profiles/can.pdf (last visited Dec. 9, 2012).
16. World Health Organization, *Country Profiles by WHO Region, Russian Federation*, http://www.who.int/substance_abuse/publications/global_alcohol_report/profiles/rus.pdf (last visited Dec. 9, 2012).
17. World Health Organization, *Country Profiles by WHO Region, Germany*, http://www.who.int/substance_abuse/publications/global_alcohol_report/profiles/deu.pdf (last visited Dec. 9, 2012).
18. World Health Organization, *Country Profiles by WHO Region, France*, http://www.who.int/substance_abuse/publications/global_alcohol_report/profiles/fra.pdf (last visited Dec. 9, 2012).
19. World Health Organization, *Country Profiles by WHO Region, Norway*, http://www.who.int/substance_abuse/publications/global_alcohol_report/profiles/nor.pdf (last visited Dec. 9, 2012).
20. This is not to say that moderate alcohol consumption cannot have positive health implications. Persuasive research indicates that “[h]ealth benefits from moderate drinking, including a reduced risk of heart disease and heart attack, reduced risk of stroke, lowered risk of gallstones, and possibly reduced risk of diabetes have been documented by recent research.” Mary Pat Treuthart, *Lowering the Bar: Rethinking Underage Drinking*, 9 N.Y.U. J. LEGIS. & PUB. POL’Y 303, 358-59 (2006).
21. DONNA E. SHALALA, SPECIAL REPORT TO THE U.S. CONGRESS ON ALCOHOL AND HEALTH, 7-12, 240-44 (2000).
22. Jared Wachtler, *Are New York's Social Host Liability Laws Too Strict, Too Lenient, or Just Right?*, 27 Touro L. REV. 309 (2011) (citing Melonie Heron *et al.*, Nat’l Ctr. for Health Statistics, Deaths: Final Data for 2006 11 (2009)).
23. WHO Library Cataloguing-in-Publication Data, *World Health Organization, Global Strategy to Reduce the Harmful Use of Alcohol*, p. 3 (2010) [hereinafter *Global Strategy*].
24. *Id.*
25. *Id.*
26. Wachtler, *supra* note 22, at 309 (citing NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., 2007 TRAFFIC SAFETY ANNUAL ASSESSMENT: ALCOHOL-IMPAIRED DRIVING FATALITIES 2 (2008)).
27. GLOBAL STATUS REPORT, *supra* note 2, at 1.
28. *Global Strategy*, *supra* note 23, at pp. 13-19.
29. Judith G. McMullen, *Underage Drinking: Does Current Policy Make Sense?*, 10 LEWIS & CLARK L. REV. 333, 361 (2006).
30. Mary Pat Treuthart, *Lowering the Bar: Rethinking Underage Drinking*, 9 N.Y.U. J. LEGIS. & PUB. POL’Y 303, 306 (2006).

31. Michael Philip Rosenthal, *The Minimum Drinking Age for Young People: An Observation*, 92 DICK. L. REV. 649, 652 (1988) (citing Mosher, *The History of Youthful Drinking Laws: Implications for Current Policy*, in H. WECHSLER, MINIMUM DRINKING AGE LAWS, ch. 2 (1980)).
32. *Id.*
33. McMullen, *supra* note 29, at 335.
34. *Id.*
35. GLOBAL STATUS REPORT, *supra* note 2, at 29-30.
36. *Id.* at 30.
37. *Id.*
38. Rosenthal, *supra* note 31, at 658.
39. Samuel Randall, *Loco Parents: A Case for the Overhaul of Social-Host Liability in Florida*, 62 U. MIAMI L. REV. 939, 944 (2008).
40. Robert Kaestner & Benjamin Yarnoff, *Long-Term Effects of Minimum Legal Drinking Age Laws on Adult Alcohol Use and Driving Fatalities*, 54 J.L. & ECON. 365, 365 (2011).
41. GLOBAL STATUS REPORT, *supra* note 2, at 31.
42. *Id.*
43. Rosenthal, *supra* note 31, at 652.
44. *Id.*
45. *See id.*
46. *Id.*
47. McMullen, *supra* note 29, at 336-37 (citing THOMAS R. PEGRAM, *BATTLING DEMON RUM: THE STRUGGLE FOR A DRY AMERICA, 1800-1933* 7-10 (1998)).
48. *Id.*
49. *Id.*
50. U.S. CONST. AMEND. XVIII.
51. *Id.*
52. McMullen, *supra* note 29, at 337 (internal citations and quotations omitted).
53. U.S. CONST. AMEND. XXI.
54. *Id.*
55. Treuhart, *supra* note 30, at 307-08.
56. Rosenthal, *supra* note 31, at 652.
57. *Id.*
58. *Id.* at 652-53.
59. U.S. CONST. AMEND. XXVI.
60. Treuhart, *supra* note 30, at 308.
61. *See* 10 U.S.C. § 505, formerly 50 U.S.C. § 453 (“[N]o person under eighteen years of age may be originally enlisted without the written consent of his parent or guardian . . .”).
62. Rosenthal, *supra* note 31, at 653.
63. *Id.*
64. *Id.*
65. Christopher Calvert Johnson, *The Minimum Age to Possess Alcohol in South Carolina: Are State Statutes Prohibiting Individuals Eighteen to Twenty Years Old from Possessing Alcohol Unconstitutional?*, 4 CHARLESTON L. REV. 813, 815 (2010).
66. *Id.*
67. *See id.*
68. *See id.* at 815-16.
69. *Id.* (citing 23 U.S.C. § 158).
70. *Id.*
71. 23 U.S.C. § 158 (a)(1).
72. Johnson, *supra* note 65, at 817.
73. *S. Dakota v. Dole*, 483 U.S. 203, 211-12 (1987). The MDAL provides an excellent example. Ohio’s legislature made clear that, “[i]f the United States congress repeals the mandate established by the Surface Transportation Assistance Act of 1982” relating to a national uniform drinking age of twenty-one or if a court of competent

jurisdiction declares the mandate to be unconstitutional or otherwise invalid, the minimum drinking age for beer will be reduced to 19, while the minimum drinking age for intoxicating liquor will remain 21. Ohio Rev. Code Ann. § 4301.691.

74. Treuthart, *supra* note 30, at 312.

75. McMullen, *supra* note 29, at 337.

76. Treuthart, *supra* note 30, at 364.

77. *Id.*

78. GLOBAL STATUS REPORT, *supra* note 2, at 31.

79. *Id.*

80. *Id.*

81. *Id.* at 32.

82. Some commentators have suggested specific factors to be considered in this determination, including “ages of initiation,” statistical analyses, health implications, the level of compliance with existing laws, and comparisons to the laws of other countries. Treuthart, *supra* note 30, at 347-355. No doubt, these (and others) are all valid points of emphasis. At some point, however, decisions between conflicting policy implications must be made.

83. See Treuthart, *supra* note 30, at 308.

84. Rosenthal, *supra* note 31, at 653.

85. Treuthart, *supra* note 30, at 364.

86. Michelle M. Mello & Kathryn Zeiler, *Empirical Health Law Scholarship: The State of the Field*, 96 GEO. L.J. 649, 673-74 (2008).

87. Alexis M. Farris, *Lol? Texting While Driving Is No Laughing Matter: Proposing A Coordinated Response to Curb This Dangerous Activity*, 36 WASH. U. J.L. & POL’Y 233, 259 n.104 (2011).

88. Kathryn Stewart, *Overview and Summary*, in TRANSPORTATION RESEARCH CIRCULAR E-C123, TRAFFIC SAFETY AND ALCOHOL REGULATION: A SYMPOSIUM 6 (Nov. 2007).

89. As discussed above, other research indicates a correlation between some of the negative effects of alcohol consumption and MDALs:

Only two studies examine longer term effects. Cook and Moore (2001) examine the association between whether a person's state of residence at age 14 has an MLDA of 18 (versus higher) and alcohol consumption at approximately age 24 (sample ages were 17-31). They find that the drinking environment at age 14 is significantly associated with binge drinking at later ages; a legal drinking age of 18 is associated with a 7 percent greater probability of binge drinking at least four times in the last month at later ages. The other study is by Norberg, Beirut, and Grucza (2009), who examine whether living in a state with an MLDA of less than 21 (versus 21) is associated with alcohol use disorders for persons ages 21-53. They report that an MLDA of less than 21 is associated with a 32 percent increase in the prevalence of alcohol use disorders.

Kaestner & Yarnoff, *supra* note 40, at 366. Findings such as these – which relate not just to mortality rates, but also to what may be termed the “quality of life” implications of alcohol consumption – would lend further support to this author’s value judgment.

90. Richard Smith, *A Comparative Analysis of Dramshop Liability and A Proposal for Uniform Legislation*, 25 J. CORP. L. 553, 555 (2000).

91. Nina J. Emerson and Sarah B. Stroebel, *Another Look at Dram Shop Liability*, 73-AUG WIS. LAW. 14, 16 (2000).

92. Julia A. Harden, *Dramshop Liability: Should the Intoxicated Person Recover for His Own Injuries?*, 48 OHIO ST. L.J. 227, 228 (1987) (quoting *Cruse v. Aden*, 127 Ill. 231, 234, 20 N.E. 73, 74 (1889)).

93. Smith, *supra* note 90, at 555.

94. *Id.* at 555-56.

95. *Id.*

96. *Id.* (citing Daniel E. Johnson, *Drunken Driving--The Civil Responsibility of the Purveyor of Intoxicating Liquor*, 37 IND. L.J. 317, 321 (1961-62)).

97. *Id.*

98. *Id.* at 557.

99. *Id.*
100. Smith, *supra* note 90, at 557.
101. Daphne D. Sipes, *The Emergence of Civil Liability for Dispensing Alcohol: A Comparative Study*, 8 REV. LITIG. 1, 5 (1988).
102. S.D. Codified Laws § 35-11-1.
103. IL ST CH 235 § 5/6-21.
104. *See id.*
105. Smith, *supra* note 90, at 557.
106. *Id.* at 574.
107. *Id.*
108. *See id.* at 558-62.
109. *See id.* at 563-66.
110. *See id.* at 567-73.
111. Sipes, *supra* note 101, at 3.
112. Emerson and Stroebel, *supra* note 91, at 16.
113. *Id.*
114. Emerson and Stroebel, *supra* note 91, at 67.
115. Bradley M. Strouse, *Inconsistent Legislation, Interpretation, and Application: Iowa's Dramshop Act and Its Failed Purposes*, 56 DRAKE L. REV. 1117, 1138 (2008).
116. *Id.* at 1138-39. Other requirements create similar anomalies. In Missouri, for instance, vendors may not be held liable for injuries caused by intoxicated *adults*. Emerson and Stroebel, *supra* note 91, at 16. Louisiana's dram shop statute contains similar limitations. *See* La. R.S. 9:2800.1. For obvious reasons, these provisions create a substantial risk of under-compensation for innocent victims who happen to be injured by intoxicated adults.
117. Iowa Code Ann. § 123.92(1)(a).
118. Smith, *supra* note 90, at 575.
119. *Id.*
120. Ga. Code Ann. § 51-1-40 (b).
121. Smith, *supra* note 90, at 564. This author would not support limiting the category of intoxicated plaintiffs to "adult" persons over the age of 18. Although arguable, the balance of logic and equity do not seem to support allowing minors to recover for injuries caused by their own voluntary intoxication simply because they are minors. *Contra id.* at 576. The protective blanket of "cognitive limitation" for minors mentioned herein and elsewhere must, in this author's opinion, have limits.
122. *Id.* at 565.
123. *Id.* at 566.
124. N.C. Gen. Stat. Ann. § 18B-124.
125. *See* Smith, *supra* note 90, at 567.
126. NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, TRAFFIC SAFETY FACTS 2010: ALCOHOL IMPAIRED DRIVING 1 (Apr. 2012). Sixty-five percent (65%) of those individuals were the intoxicated drivers themselves. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. Kirk R. Williams & Richard Hawkins, *Perceptual Research on General Deterrence: A Critical Review*, 20 LAW & SOC'Y REV. 545, 547 (1986).
131. JAMES H. HEDLUND & ANNE T. MCCARTT, DRUNK DRIVING: SEEKING ADDITIONAL SOLUTIONS 53 (2002).
132. *Id.*
133. Amanda Staples, *Another Small Step in America's Battle Against Drunk Driving: How the Spending Clause Can Provide More Uniform Sentences for Drunk-Driving Fatalities*, 46 NEW ENG. L. REV. 353, 365 (2012).
134. *Id.*
135. *Id.* at 376.
136. *Id.*
137. NATIONAL COMMITTEE ON UNIFORM TRAFFIC LAWS AND ORDINANCES, 2007 DUI MODEL LAW, available at <http://www.ncutlo.org/2007dui.htm>.
138. *Id.*

139. *Id.*
140. Andrew Gore, *Know Your Limit: How Legislatures Have Gone Overboard with Per Se Drunk Driving Laws and How Men Pay the Price*, 16 WM. & MARY J. WOMEN & L. 423, 424 (2010).
141. *Id.* at 427.
142. *Id.* at 428.
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.* at 425.
148. Andrew Clark, *Drunk Driving: Is the Blood Alcohol Limit Too Liberal?*, Time (Oct. 16, 2010), available at <http://www.time.com/time/nation/article/0,8599,2025301,00.html>.
149. Joel W. Grube, *Alcohol Regulation and Traffic Safety: An Overview*, in TRANSPORTATION RESEARCH CIRCULAR E-C123, TRAFFIC SAFETY AND ALCOHOL REGULATION: A SYMPOSIUM 19 (Nov. 2007).
150. *Id.*
151. Andrew Clark, *Drunk Driving: Is the Blood Alcohol Limit Too Liberal?*, Time (Oct. 16, 2010), available at <http://www.time.com/time/nation/article/0,8599,2025301,00.html>.
152. NATIONAL COMMITTEE ON UNIFORM TRAFFIC LAWS AND ORDINANCES, *supra* note 137.
153. Tina Wescott Cafaro, *Fixing the Fatal Flaws in Oui Implied Consent Laws*, 34 J. LEGIS. 99, 101 (2008).
154. *Id.* at 99.
155. NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, REFUSAL OF INTOXICATION TESTING: A REPORT TO CONGRESS 19 (2008).
156. *Id.* at 5.
157. Cafaro, *supra* note 153, at 101.
158. HEDLUND & MCCARTT, *supra* note 131, at 53.
159. NATIONAL COMMITTEE ON UNIFORM TRAFFIC LAWS AND ORDINANCES, *supra* note 137.
160. 75 Pa. Cons. Stat. Ann. § 1547(e).
161. NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION, *supra* note 155.
162. *Id.*

2013

6th Annual Essay Contest

This year marks
the 80th
anniversary of
the 21st
Amendment. Has
it achieved its
intended
purpose?

FIRST PLACE

Warren Adegunle

"[The 21st Amendment] repealed a good-spirited, but misguided law and gave the states the power to regulate a mostly local issue... It recalibrated the constitutional balance in an important area of commerce, and it had the positive derivative effect of reducing alcohol related crimes. This makes the 21st Amendment more than just the law that brought back alcohol; it makes it a law worthy of veneration."

SECOND PLACE

Joseph Ojih

THIRD PLACE

Craig Childs

Achieving Success

The 18th Amendment was the perfect poison of good intentions, bad incentives, and unintended consequences. It birthed one of the single most destructive forces in American criminal history: the Mafia.¹ It created a new saloon culture, one that was no less profligate than the last.² It eliminated the temperance movement from political consciousness³ and it did all of this within fifteen years after its passage. But the 21st Amendment was supposed to be the corrective. It was supposed to return the law to the time before Prohibition. But was this truly the purpose of the 21st Amendment? How do we even divine purpose? This essay attempts to reconstruct the purposes of the 21st Amendment, at the time of passage, by analyzing the social, political, and legislative events of the era. After identifying some broad purposes, this essay then measures these purposes against the actual effects of the 21st Amendment. Ultimately concluding, that the 21st Amendment achieved its broad purposes but at some considerable cost.

Social and Political Environment Surrounding the Passage of the 18th Amendment

The Temperance Movement originated in the late 18th and 19th centuries.⁴ It was an organized effort to promote moderation and abstinence in alcohol consumption.⁵ It was a movement largely driven by women who had borne or witness the effects of alcohol consumption on their families and friends.⁶ To the Temperance Movement, alcohol consumption was one of the

¹ MARC MAPPEN, PROHIBITION GANGSTERS (2013)

² *Id.*

³ DAVID KYVIG, REPEALING NATIONAL PROHIBITION (2D ED. 2000)

⁴ The Temperance Movement, <http://libraryguides.nesl.edu/content.php?pid=358326&sid=2934955#periodicals> (last visited Nov. 30th, 2013); Roots of Prohibition, <http://www.pbs.org/kenburns/prohibition/roots-of-prohibition/> (last visited Nov. 30th, 2013)

⁵ *Id.*

⁶ *Id.*

chief causes of the violence, domestic abuse, infidelity, vagrancy, and general moral laxity that had increased dramatically after the Victorian Era.⁷ But since the problem of over consumption of alcohol was global, from its earliest origins the movement took on an international character.⁸ The earliest organizations originated in Ireland in the 1820s, then swept through Scotland, Britain, Norway, and Sweden.⁹ In the United States, the movement would reach its apex through the passage of the 18th Amendment.¹⁰ So what then can be gleaned from the integral role that the Temperance Movement played in the passage of the 18th Amendment? Arguably, the role the Temperance Movement played in the passage of the 18th Amendment suggests that one of the purposes behind the law was to curb alcohol consumption, or at the very least, dramatically change the degree to which it was regulated. By default then, one of the purposes of the 21st Amendment, which repealed the 18th was to allow for the freer consumption of alcohol and/or to change the regulatory structure that the 18th Amendment had put in place. This is all the more evident when we look at one of the biggest supporters of the repeal of Prohibition: the Association Against Prohibition Amendment (AAPA).

The Association Against Prohibition Amendment was a nonpartisan, single-issue organization founded in 1918 by William H. Stayton.¹¹ The group initially took a moderate approach to Prohibition.¹² For a significant amount of time, the organization letterhead bore the slogan, “Beer and Wine NOW: But no Saloons Ever.”¹³ The leaders of the AAPA emphasized that they favored temperance and were “unalterably opposed to the saloon.”¹⁴ AAPA recognized that

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ Mappen, *supra* note 1

¹² *Id.*

¹³ DAVID KYVIG, REPEALING NATIONAL PROHIBITION, 58 (2D ED. 2000)

¹⁴ *Id.* at 58

in the early twenties that any call for a repeal of Prohibition had to be coupled with assurances that the association had no desire for the return of the saloon and unrestrained drinking. One of the earliest pushes that the AAPA made for a reform was for modification under the Volstead Act.

By 1922, the AAPA began publicly endorsing modification, which would allow beverages to have 2.75% as opposed to .05% of alcohol in them. The AAPA called on both major political parties to endorse modification in their 1924 platforms, but neither party did.¹⁵ But the failure to get either one of the major parties to support Volstead Modification did have a positive unintended consequence for the AAPA.¹⁶ It drew various antiprohibition groups together like the American Federation of Labor, the Moderation League of New York, and the Constitutional Liberty League of Massachusetts to seek modification.¹⁷ Furthermore, as a united front they were able to get Congress to have a hearing on modification.¹⁸

In 1924, the first congressional hearings for the modification of the Volstead Act were heard. Yet, even with a sympathetic chairperson, George S. Graham, on the House Committee the antiprohibitionist, including the AAPA failed to get the House to act.¹⁹ This was despite the fact that the AAPA concealed their general distaste for Prohibition and only voiced a desire to increase the permissible amount of alcohol in beverages from .05% to 2.75%. A modest change but one that did not succeed in the House and did not succeed in the Senate two years later.²⁰ However, by 1932 the Democratic Party, which was much more amenable to the idea of repealing Prohibition and who were viewed as less involved and entangled with it, came to power.²¹ Their landslide

¹⁵ *Id.*

¹⁶ *Id.* at 59

¹⁷ *Id.* at 59

¹⁸ *Id.*

¹⁹ *Id.* at 59-60

²⁰ *Id.* at 59-64

²¹ *Id.* at 160

victory, in the mind of the AAPA and other antiprohibitionists groups signaled to them that they had a mandate for change.²² And so, by 1932 the AAPA and other antiprohibitionist groups were taking a much harder stance against Prohibition.²³

The AAPA in 1932 issued its major campaign document, *32 Reasons for Repeal*.²⁴ The forty-page pamphlet insisted first that the federal government's power "should be confined to interstate and international" matters and that the 18th Amendment's conferral of broad police power's to the federal government harmed the delicate balance between state and federal authorities.²⁵ Second, the AAPA argued that Prohibition led to: "extensive corruption, widespread crime, enormous enforcement expenses, and the loss of one billion dollars in annual government revenue."²⁶ While the AAPA distributed its *32 Reasons*, a temperance group that opposed the 18th Amendment the Crusaders were distributing a book called *The New Crusade*. In it, they argued that temperance should be the policy goal of society, but that Prohibition had created a host of problems as great as the evil of mass over consumption of alcohol.²⁷ But the most interesting fact of organizations like the AAPA, The Crusaders, and the Women's Organization for National Prohibition Reform was that by 1932 they were seemingly more concerned about ending federal regulation of alcohol consumption than anything else. They would accept no half-measures.²⁸ The federal government had to exit the field of alcohol regulation. One AAPA director wrote of the 1932 Senate Resolution which proposed a new constitutional amendment ending national prohibition but granting Congress concurrent power with the states to regulate or prohibit saloons,

²² *Id.*

²³ *Id.*

²⁴ *Id.* at 167

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

that "... we have only scotched the snake, and not killed it. Let us never sleep until we have smashed its head and laid it dead on the national highway."²⁹ AAPA President Shouse said himself that "unless and until there is offered a clear cut resolution providing for outright repeal and 18th Amendment and returning unrestricted control over the liquor problem to the different states without an attempt to continued exercise of jurisdiction by the federal government...it were infinitely better that the Eighteenth Amendment Stand." This belief was furthered echoed by Raymon Picartin, secretary of the United Repeal Council who called the Senate resolution "a fraud." So ultimately, when we look at the events leading up to the 21st Amendment there seems to be two purposes, one social, the other political.

As to the social purposes, Prohibition led to corruption and crime. Al Capone, Lucky Luciano and Arnold Rothstein were member of the Prohibition generation.³⁰ So many notorious and murderous gangsters were born during this time that there is even a Wikipedia page with a list of infamous Prohibition gangsters.³¹ It includes over 50 names.³² In fact, during Prohibition the crime rate soared. In Chicago, for example, there was extensive violence between 1923-1926.³³ An estimated 215 criminals died at the hands of rival gangs during this time period, while police killed another 160 gangsters.³⁴ Although, violence did decrease in Chicago towards the latter years of the decade, "by conventional business standards the violence level in bootlegging remained high."³⁵ And New York, despite the efforts of Arnold Rothstein, Lucky Luciano, and

²⁹ *Id.* at 170

³⁰ Mappen *supra* note 1

³¹ Category: Prohibition Gangsters, http://en.wikipedia.org/wiki/Category:Prohibition-era_gangsters (last visited Nov, 30th 2013)

³² *Id.*

³³ DAVID KYVIG, *REPEALING NATIONAL PROHIBITION*, 27 (2D ED. 2000)

³⁴ *Id.*

³⁵ *Id.*

Frank Costello did not obtain the same level of criminal stability as other major cities.³⁶ Not one criminal was able to amass absolute control over the city and as a result, during Prohibition over 1000 gangland murders occurred in New York City.³⁷ But the effects of Prohibition on crime were more global in scope: every major city was affected and it fundamentally change the federal government's relationship with crime³⁸.

Before Prohibition the nation as a whole had "...4,000 federal convicts, fewer than 3,000 of whom were housed in federal prisons."³⁹ By 1932 the number of federal convicts had increased 561 percent, to 26,589, and the federal prison population had increased 366 percent."⁴⁰ In short, the federal government's penal system went from small and innocuous to pervasive and conspicuous. And the homicide rate in large cities increased dramatically from 5.6. per 100,000 to 10 per 100,000 by the 1920's.⁴¹ With bootlegging and murder came secondary criminal effects. The rate of burglaries, robberies and prostitution all increased over this same period of time.⁴² Unfortunately, not only did Prohibition fail to stem the tide of crime, it was expensive. Government expenditures on crime and alcohol enforcement increased tremendously during Prohibition. Total federal expenditures on criminal institutions increased more than 1,000 percent between 1915 and 1932.⁴³ The annual budget of the Bureau of Prohibition went from 4.4 million to 13.4 million during the 1920's, while the Coast Guard's spending on Prohibition average over \$13 million per

³⁶ Mappen *supra* note 1

³⁷ *Id.*

³⁸ *Id.*

³⁹ Mark Thompson, Cato Institute Policy Analysis No. 157: Alcohol Prohibition Was a Failure, CATO INSTITUTE, Nov. 30th 2013 <http://object.cato.org/sites/cato.org/files/pubs/pdf/pa157.pdf>

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

year.⁴⁴ But Prohibition's secondary effects were not limited to the criminal sphere, they also, unfortunately, had a deleterious effects on American politics and society.

In regards to political and social decay, at the federal level the Bureau of Prohibition, the agency tasked with enforcing the laws prohibiting the consumption of alcohol had to be reorganized to reduce the impact of corruption on its enforcement efforts⁴⁵ while bribery of police officers and the flouting of legal loopholes continued unabated at the local precincts.⁴⁶ During Prohibition, "police officers and Prohibition agents alike were frequently tempted by bribes or the lucrative opportunity to go into bootlegging themselves."⁴⁷ Although, many "stayed honest enough succumbed to the temptation that the stereotype of the corrupt Prohibition agent or local cop undermined public trust in law enforcement for the duration of the era."⁴⁸ But it was not only law enforcement agent's that succumbed to temptation, even the common man became wrapped up in commercial ruses. One of those ruses, was the pharmacy business. One of the biggest loopholes of the Volstead Act, the law that enforced the 18th Amendment's mandate to prohibit "the manufacture, sale and transportation of intoxicating beverages" was that it permitted pharmacists to dispense "whiskey by prescription for any number of ailments, ranging from anxiety to influenza." So in New York alone the number of registered pharmacists tripled.⁴⁹ Pharmacies became dispensaries for the many who wanted alcohol. But another equally notorious provision of the Volstead Act was the exception for religious institutions. Because religious institutions were permitted to consume wine for religious purposes, attendance rose at "churches

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ United Consequences, <http://www.pbs.org/kenburns/prohibition/unintended-consequences/> (last visited Nov. 30th, 2013)

⁴⁸ *Id.*

⁴⁹ *Id.*

and synagogues, and cities saw a large increase in the number of self-professed rabbis who could obtain wine for their congregations.”⁵⁰ So even the church was not safe from legal subterfuge.⁵¹ Ironically then, “the law that was meant to stop Americans from drinking” turned many of them into alcohol procurement specialist.⁵²

So from the brief history of the social and political events leading up to the passage of the 18th Amendment and its repeal by the 21st Amendment, what purposes can be gleaned? Well first, it must be prefaced that attempting to divine purpose is a very difficult endeavor. It is unclear whose purpose should control. Should only the view of notable legislators control or should the views of all legislators present at the time control? Should public opinion control? The problem is intractable and much has been written on whether accurately divining purpose from history is even possible. But with that said, it is probably fair to say that the 21st Amendment had at least two general purposes: as stated earlier the first, was to wrest from the federal government and to give back to the states the power to regulate alcohol and the second, was to alleviate some of the negative social consequences that Prohibition had wrought on America. The rest of this paper is devoted to determining how well the 21st Amendment succeeded in achieving these purposes. To this end, this paper will survey and analyze the Supreme Court’s 21st Amendment jurisprudence and scholarly articles on the immediate social effects of the 21st Amendment.

The 21st Amendment is the only amendment to be ratified by state conventions. The amendment was not ratified by $\frac{3}{4}$ of the state legislatures, which is the usual course, but instead it was ratified by $\frac{3}{4}$ of specially summoned state conventions. This was done for two reasons. The

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

first, was to insulate state legislators from political backlash and the second, was to ensure that the amendment was actually passed.⁵³ But given the fact that the 21st Amendment was a remedial amendment. In that, it was meant to repeal the 18th one would think its language would plainly permit the consumption and transportation of alcohol. However, this is not the case. For a variety of reasons, including the continued sway of the Temperance Movement, the 21st Amendment reads quite differently than what a lay observer may assume it would read. The text of the 21st Amendment states:

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.⁵⁴

⁵³ Kyving *supra* note 2, 165-174

⁵⁴ *U.S. Const. amend. XXI*

Most would assume that Section 2 would explicitly state that the transportation and consumption of alcohol is *permitted*. Instead, it reads that the transportation and importation of alcohol is *prohibited* by state law. Initially it seems then, that the 21st Amendment is not a direct appeal of the 18th. However, one of the purposes of the 21st Amendment as identified by this paper and the historical record, was to wrest the control of alcohol consumption from the federal government to the states. The purpose of the 21st Amendment was not to end alcohol regulation for no mainstream antiprohibitionist groups were publicly arguing that position. On the contrary, they were arguing that alcohol could be regulated and that it should be regulated, but only by the proper sovereigns: the states. Yet Section 2 of the 21st Amendment is nonetheless, ambiguous, and it has been the point of contention for every single case that has been decided by the Supreme Court. The Supreme Court has issued four notable decisions on Section 2 of the 21st Amendment. The Supreme Court ruled on section 2 of the 21st Amendment in *State board of Equalization v. Young's Market Co*⁵⁵, *Craig v. Boren*,⁵⁶ *South Dakota v. Dole*,⁵⁷ and *Granholm v Heald*.⁵⁸ Collectively, these cases make up the heart of the Supreme Court's jurisprudence on the 21st Amendment.

The first time the Supreme Court ruled on the 21st Amendment it interpreted Section 2 of the amendment very expansively. In *State Board of Equalization v. Young's Market Co.*, the plaintiffs were beer wholesalers, whose companies were based in California, but imported beer from Wisconsin and Missouri.⁵⁹ Their wholesaler's licenses permitted them to sell beer in California whether it was domestic or imported. The wholesalers, however, did not have an

⁵⁵ *State Bd. of Equalization v. Young's Market Co.*, 299 U.S. 59 (U.S. 1936)

⁵⁶ *Craig v. Boren*, 429 U.S. 190 (1976)

⁵⁷ *South Dakota v. Dole*, 483 U.S. 203 (1987)

⁵⁸ *Granholm v. Heald*, 544 U.S. 460 (2005)

⁵⁹ *State Board of Equalization*, 299 U.S. 59

importer license which would have exacted on them a fee of \$500 per year for importing beer and \$750 per year for manufacturing beer.⁶⁰ The plaintiffs argued that the additional importer licensure requirement discriminated against wholesalers who importer beer and thus, violated both the Commerce Clause and the Equal Protection Clause.⁶¹ The court ruled that the discrimination claim had no merit because all companies, both in-state and out-of-state, had to have the additional license in order to import beer. So the state argued that domestic businesses were treated no better than foreign businesses.⁶² If a foreign business had a wholesale operation in California, it would have to obtain a license. Likewise a domestic wholesaler whose principal place of business was in California would have to do the same to comply with the law. The burden was equally applicable to all. However, the court did find that the fee associated with the additional license was unduly onerous and burdened interstate commerce which is something, in the view of the Court that the states formerly could not do. The Court stated that a “fee would be a direct burden on interstate commerce; and the commerce clause confers the right to import merchandise free into any state, except as Congress may otherwise provide.”⁶³ Thus, California did not have the right to burden, what the Constitution meant to facilitate: free trade among the states. However, the Supreme Court found that the 21st Amendment changed the relationship between the states and the federal government as it related to alcohol regulation.⁶⁴ The Supreme Court stated that: “the exaction of a fee for the privilege of importation would not, before the 21st Amendment⁶⁵” be permissible but after the 21st Amendment it was such.⁶⁶ In the words of the Court section 2 “confer[s] upon the

⁶⁰ *Id.* at 60-61

⁶¹ *Id.* at 60-61

⁶² *Id.* at 60-63

⁶³ *Id.* at 62

⁶⁴ *Id.* at 60-63

⁶⁵ *Id.* at 62

⁶⁶ *Id.* at 62

State the power to forbid all importations which do not comply with the conditions which it prescribes.”⁶⁷ But the Court’s language in the latter part of the opinion suggest a power broader than merely the ability to forbid importation of beer that does not comply with state regulatory standards⁶⁸ Instead, its language suggests that the states have a near absolute right to regulate alcohol, in any manner within their borders. The courts asked rhetorically, “⁶⁹

Can it be doubted that a State might establish a state monopoly of the manufacture and sale of beer, and either prohibit all competing importations, or discourage importation by laying a heavy impost, or channelize desired importations by confining them to a single consignee?....⁷⁰

These questions presume that the 21st Amendment gave the states an unqualified power over alcohol policy. For this reason, the Supreme Court in its later decisions would retreat from the broad language of this decision. It would not hold fast to the idea that a state could create a discriminatory liquor monopoly or exact heavy punitive fees merely to favor in-state businesses over out-of-state businesses. Nonetheless, the legacy of *State Board of Equalization* rest with its broad holding which gave the state powers that they could not properly bear. The Supreme Court would begin to recognize this in its next decision *Craig v. Boren*.

The next significant ruling on the 21st Amendment by the Supreme Court came in *Craig v. Boren*⁷¹ where the Court found that statutes prohibiting the sale of ‘nonintoxicating’ 3.2% beer to males under the age of 21 and to females under the age of 18 constitutes a denial to males 18-20

⁶⁷ *Id.* at 62

⁶⁸ *Id.* at 60-63

⁶⁹ *Id.* at 60-63

⁷⁰ *Id.* at 63

⁷¹ *Craig*, 429 U.S. 190

years of age equal protection of the laws.⁷² However, what is most significant about this case is not the ruling, but instead, how it defines the relationship between the 21st Amendment, the Commerce Clause, and the Equal Protection clause. The majority opinion stated that the 21st Amendment did not affect the normal judicial analysis under the Equal Protection Clause or Fourteenth Amendment.⁷³ A state, even with powers that the 21st Amendment has granted it, cannot discriminate against protected classes in its regulation of alcohol, nor could it deny any person by virtue of its law due process.⁷⁴ The court stated that

.... the Amendment primarily created an exception to the normal operation of the Commerce Clause. (Internal citations omitted). Even here, however, the Twenty-first Amendment does not *pro tanto* repeal the Commerce Clause, but merely requires that each provision be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.⁷⁵ (Internal citations omitted)

In other words, the 21st Amendment did create an exception to the Commerce Clause, but it did not completely supersede it.⁷⁶ A court must consider the general import, purpose, and precedent of the Commerce Clause when deciding a case that implicates both the Commerce Clause and the 21st Amendment.⁷⁷ This differs from the *State Bd. of Equalization v. Young's Market Co.* in that the court does not assume that the 21st Amendment gives the states absolute power to decide alcohol policy within its borders. The 21st Amendment instead has to be read in light of the other constitutional provisions. In fact, the court held in *Craig v. Boren* that the “the

⁷² *Id.* at 205

⁷³ *Id.* at 206-208

⁷⁴ *Id.* at 206-208

⁷⁵ *Id.* at 206

⁷⁶ *Id.* at 206

⁷⁷ *Id.* at 206.

relevance of the Twenty-first Amendment to other constitutional provisions becomes increasingly doubtful.” This more measured analysis of the 21st Amendment is exemplified in the Supreme Court’s two most recent decision on the 21st Amendment *South Dakota v. Dole* and *Granholm v. Heald*.

In the former case, South Dakota law permitted persons who were 19 years or older to purchase alcohol.⁷⁸ However, Congress had passed a statute 23 U.S.C.S. § 158⁷⁹ allowing for the reduction of federal highway funds otherwise allocable to a state if the state had a minimum drinking age below 21.⁸⁰ The State of South Dakota desired a declaratory judgment stating that § 158 violated Congress’s spending power and violated the 21st Amendment of the United States Constitution.⁸¹ The court ruled that the offer of conditional funding from the federal government is not coercive and does not infringe on a state’s sovereignty.⁸² Furthermore, the court held that the 21st Amendment cannot act as an independent bar to the spending powers granted to the federal government by Article I, section 8, clause 1 of the Constitution.⁸³ This greater narrowing of the scope of the 21st Amendment would continue in the Court’s most recent Supreme Court decision.

In *Granholm v. Heald*, the court held that the 21st Amendment does not overrule the Dormant Commerce Clause with respect to alcohol sales.⁸⁴ The court deemed it constitutionally impermissible for states to treat in-state wineries differently than out-of-state wineries. Instead, consistent with the Dormant Commerce Clause, states cannot impermissibly burden or

⁷⁸ *Dole*, 483 at 205

⁷⁹ 23 U.S.C.S. § 158

⁸⁰ *Dole*, 483 at 205-206

⁸¹ *Id.* at 205-206

⁸² *Id.* at 206-208

⁸³ *Id.* at 206-208

⁸⁴ *Granholm*, 544 U.S. at 472-474

discriminate between in-state and out-state liquor businesses.⁸⁵ In order to treat, in-state and out-of-state liquor businesses differently there must be “legitimate concerns” and not merely “state protectionism” motivating the discriminatory regulation or law.⁸⁶ In short, with *Granholm*, the Court put to rest the idea that the 21st Amendment permitted discrimination in alcohol sales. *Granholm*, completely broke from the Supreme Court’s earlier decisions that gave states sole power to regulate alcohol. It reaffirmed the fact that the 21st Amendment has to be read in light of the other relevant constitutional provisions. The question then arises, where does these series of cases leave the 21st Amendment as it relates to the goal of wresting the power to regulate alcohol from the federal government? This paper contends that it places it at an appropriate position of balance.

No constitutional amendment is without limits. The right to bear arms does not give a man the right to bring an antitank rocket launcher (bazooka) to a sporting event, nor does it allow a movie theatre patron to falsely yell “fire” where there is none. On the contrary, with rights there often are duties, and at the very least, there are always regulations. With its earlier decisions the Supreme Court failed to recognize this fact. They construed the 21st Amendment as a broad remedial right without restriction. In *State Board of Equalization* for example, the Court asks rhetorically “may [a state]... not subject the foreign article [alcohol] to a heavy importation fee?” As if it were a foregone conclusion that a state could do such a thing despite the commands of the Commerce Clause. But with time, the Supreme Court began to strike a more appropriate balance between the powers conferred to the states by the 21st Amendment and the other constitutional amendments that predated it. The Supreme Court later decisions recognize that the 21st

⁸⁵ *Id.*

⁸⁶ *Id.*

Amendment was passed largely to give the state's power, almost exclusive power to regulate the sale of alcohol, but that this power still had to be understood in light of all the other relevant constitutional provisions. There is no internal constitutional supremacy clause. No constitutional provision is supposed to trump another unless it was passed with the express purpose of repealing another provision. And true, the 21st Amendment did supersede the amendment it repealed, the 18th, but it did not supersede the Commerce Clause, the Equal Protection Clause and the Due Process Clause. Initially, the Supreme Court seemed to suggest that this was the case. The Court failed to give the other constitutional amendments their proper deference. However, this changed. The Supreme Court still recognized the 21st Amendment for what it was, a broad remedial grant to the states to regulate alcohol, but it did not do so at the expense of free and fair interstate commerce. In this way, the Supreme Court has allowed the 21st Amendment to achieve one of its intended purposes: free commerce with decentralized regulation.

As to the second purpose of the 21st Amendment, alleviating the negative society wide consequences of the over consumption of alcohol, this is a far harder question to answer. But in determining the success of the 21st Amendment in achieving this goal, it is probably best to look to crime and health statistics. As to the former, however, it is very difficult to make any well-founded causative or correlative connection between crime and alcohol regulation. Crime is such a varied social phenomenon that the effect alcohol regulation has had on the crime rate cannot be easily bracketed off. For that reason, the following analysis is not going to focus on crime statistics other than to reiterate that alcohol related crime rose sharply during Prohibition and then leveled off a bit towards the latter years of the era. But crime was still remarkably high for the times. Furthermore, health and consumption statistics are by themselves a good proxy for determining whether the repeal of prohibition had positive social effects.

First, “by 1830, the average American over 15 years old consumed nearly seven gallons of pure alcohol a year – three times as much as we drink today”⁸⁷ but during the initial implementation of Prohibition a dramatic decrease in alcohol consumption occurred.⁸⁸ Alcohol consumption at the beginning of Prohibition fell 30% from its pre-Prohibition days.⁸⁹ However, during the next several years alcohol consumption would reach 60-70% of the pre-Prohibition era. Once Prohibition was repealed, alcohol consumption would remain at the same levels as it was towards the end of Prohibition, but in the decades that followed alcohol consumption would reach its pre-Prohibition levels.⁹⁰ When we look at the amount of alcohol consumed per person per gallon this is confirmed. Between the years 1916-1918 the average person of drinking age consumed 21.63 gallons per year of alcoholic beverages.⁹¹ In 1934, the year after Prohibition was repealed the number was 13.58, which is a significant decrease. But within a decade that number had increase to 25.22 and by 1983 that number had reached as high as 30.47.⁹² It should be noted, however, that it took 40 years for the number to reach that level.⁹³ But in all, as far as the goal of decreasing alcohol consumption, Prohibition only partially succeeded but that does not mean that it did not more fully succeed in alleviating some of the other negative health consequences of alcohol consumption.

In fact, Prohibition seems to have had a very positive effect on the health of the American community. For example, “Cirrhosis (liver disease) death rates for men were 29.5 per 100,000 in 1911 but only 10.7 in 1929 and admissions to state mental hospitals for alcoholic psychosis

⁸⁷ Roots of Prohibition, <http://www.pbs.org/kenburns/prohibition/roots-of-prohibition/>

⁸⁸ Jeffrey A. Miron & Jeffrey Zwiebel, Alcohol Consumption During Prohibition, NATIONAL BUREAU OF ECONOMIC RESEARCH (Apr. 1991) *available at* http://www.nber.org/papers/w3675.pdf?new_window=1

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Apparent Consumption of Alcohol, <http://prohibition.osu.edu/brewing/consumption> (last visited Dec. 1, 2013)

⁹² *Id.*

⁹³ *Id.*

declined from 10.1 per 100,000 in 1919 to 4.7 in 1928”⁹⁴ And as for as, “arrests for public drunkenness and disorderly conduct”⁹⁵ “they declined 50 percent between 1916 and 1922.”⁹⁶ However, as of 2005, 13.5 per 100,000 males have liver cirrhosis and 5.48% of males have alcohol related disorders.⁹⁷ So Prohibition did have some immediate positive public health effects⁹⁸ but some of those positive effects have been mitigated by the general increase in alcohol consumption. Thus to some extent, Prohibition can be seen as a public health success. It may not have lived up to the aspirations of some prohibitionist who believed it was a cure all for all of society’s ills but it did improve the general public health of the community. This alone, does not make the 21st Amendment a failure because it repealed Prohibition. For in the long run Prohibition was untenable and positive health effects could not and did not last. Moreover, they came at the high cost of increase crime and diminished respect for the law.

Conclusion

The first part of this paper combed the historical record to identify broad purposes animating the 21st Amendment. Two purposes were identified. The first, the decentralization of alcohol regulation, was deemed an eventual success. The second, alleviating the social effects of intemperance, was not a clear success because public health was probably in a better state during Prohibition. The question then is whether the 21st Amendment as a whole is a success. Did it achieve its intended purposes to a further enough extent to be labeled a success? The short answer

⁹⁴ Mark H. Moore Editorial, Actually, Prohibition Was a Success, N.Y. Times, October 16, 1989 *available at* <http://www.nytimes.com/1989/10/16/opinion/actually-prohibition-was-a-success.html>

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ World Health Organization, http://www.who.int/substance_abuse/publications/global_alcohol_report/profiles/usa.pdf (last visited Dec. 1, 2013)

⁹⁸ *Id.*

is yes. The first goal was achieved, while the second was so aspirational and broad that a failure to meet it is not damning. In fact, having such a salutary goal (that of alleviating the negative social effects of Prohibition while allowing for the freer consumption of alcohol) is a small achievement in itself. As such, the 21st Amendment is a success. It repealed a good-spirited, but misguided law and gave the states the power to regulate a mostly local issue. Ultimately, before the passage of the 21st Amendment the federal government was not within its proper limits. The federal government was regulating a mostly local issue with police powers completely unenvisioned by the Founders. However, the 21st Amendment changed this, it recalibrated the constitutional balance in an important area of commerce, and it had the positive derivative effect of reducing alcohol related crimes. This makes the 21st Amendment more than just the law that brought back alcohol; it makes it a law worthy of veneration.

2014

7th Annual Essay Contest

As states contemplate the legalization of prohibited products, like marijuana, what are some lessons policymakers and regulators can learn from the movement to end alcohol Prohibition in the 1930s?

FIRST PLACE

Timothy Cuffman

"While national alcohol Prohibition in the United States was a function of a constitutional amendment (with the corresponding Volstead Act that governed enforcement), the national prohibition of cannabis is simply a function of federal law (while many states have parallel state regulations). Consequently, the method of repeal is different in each case."

SECOND PLACE

Roni Elias

THIRD PLACE

Daniel Bruggebrew

Corinne Snow

**The Twenty-first Amendment in the Twenty-first Century:
Lessons for Cannabis Reform**

Timothy Cuffman

More than eighty years after the ratification of the Twenty-first Amendment, which effectively ended the nationwide prohibition of alcohol production, sale, and transport in the United States, critics and would-be-reformers of federal drug policy regularly make comparisons between the infamous “War on Drugs” to the “noble experiment” of Prohibition. Among the most salient similarities between the two cases are the encroachment on the home rule of states (whether justified or otherwise), the imposition on individual liberty, and the fostering of illegal underground economies and black markets rife with organized and unorganized crime. Similarly, many of the arguments that were formerly made against Prohibition are repeated today with regard to cannabis and other criminalized drugs—overcrowding of prisons, the increase in organized crime, the high cost of enforcement, and so forth.

Yet, these comparisons often belie the stark *differences* between Prohibition and the present prohibition of cannabis (commonly called “marijuana”), which will be the focus of this analysis, such that any policy implications of Prohibition’s repeal must take account of these differences. After recounting brief histories of alcohol and cannabis prohibition in the United States, I will outline the differences between the two prohibitions which allow us to conclude with three lessons that present-day policymakers and reformers can and should derive from the movement to end Prohibition.

A Brief History of Alcohol Prohibition and Repeal in the United States

Aimed at alleviating a variety of social ills, including declining public health, domestic violence, and poverty, the Temperance Movement arose in the nineteenth

century to oppose the substance that was considered to be the root of the problem: alcohol. Tied to such issues as abolition of slavery and women's suffrage,¹ the movement led to regional prohibitions in the last decades of the nineteenth century. Founded in the 1890s, the Anti-Saloon League became the country's most influential proponent of prohibition of alcohol.² As the League gained nationwide support and political influence, a constitutional amendment was proposed in 1917 that would prohibit the manufacture, transport, and sale of intoxicating beverages. This proposal would become the Eighteenth Amendment, which was ratified in January 1919 and went into effect in January 1920.³

In preparation for national Prohibition, Congress passed the National Prohibition (Volstead) Act in October, 1919, for the enforcement of constitutional criminalization of alcohol.⁴ Originally formed by the Volstead Act in 1920 as a unit of the IRS, the Bureau of Prohibition was created as an independent entity in 1927 and placed in the Treasury Department with the duty of "enforcement of all laws prohibiting or authorizing the manufacture, sale, and use of intoxicating liquors and narcotic drugs."⁵

By some accounts, Prohibition was a modest success in accomplishing certain of its aims, including lowering the consumption of alcohol. However, some of its unintended consequences—including loss of federal tax revenue and the prevalence of organized crime, coupled with the extreme difficulty of law enforcement—led to nationwide opposition to the Amendment and increasing political pressures to repeal it.⁶

¹ Okrent 42

² Ibid. 34

³ Ibid. 104—107

⁴ Okrent 108—109

⁵ Schmeckebier 1

⁶ See, e.g., Moore 1989 and Blocker 2006

Among the prominent proponents of repeal was John D. Rockefeller, Jr., whose father had previously contributed hundreds of thousands of dollars to the prohibitionist Anti-Saloon League.⁷ The highly influential Women's Organization for National Prohibition Reform, likewise, contained many former prohibitionists.⁸ The DuPont brothers helped organize the Association Against the Prohibition Amendment, which began a publicity campaign in 1928 to gain support for their anti-Prohibition cause.⁹ The anti-Prohibition movement exercised a variety of different strategies, including attempting to change the definition of "intoxicating liquors," electing "wet" politicians to all levels of government, and canvassing and lobbying to end Prohibition outright. They also expressed different rationales for favoring the repeal of the Eighteenth Amendment, including the Amendment's fostering of organized crime, its failure to promote moderation, and the need to restore freedom of conscience and states' rights.¹⁰

The repeal of Prohibition became a component of the Democratic Party's platform, and Franklin Delano Roosevelt conducted his 1932 presidential campaign on an anti-Prohibition platform, calling Prohibition a "damnable affliction."¹¹ After Roosevelt was elected, Congress passed the Cullen-Harrison Act of 1933, which permitted the sale of 3.2% alcohol. By that time, the Twenty-first Constitutional Amendment, which would repeal the 18th Amendment, had already been proposed and sent to the states for ratification.¹² The ratification of the Twenty-first Amendment, effectively ending

⁷ Okrent 300

⁸ Ibid. 340—341

⁹ Ibid. 299

¹⁰ Ibid. See 299, 340—41

¹¹ Olsen 8

¹² Okrent 352

nationwide Prohibition, was completed on December 5th, 1933, as the only amendment to be passed by state conventions rather than legislatures.¹³

A Brief History of Cannabis Prohibition in the United States

English colonists in the United States have grown and exported hemp, a variant of the cannabis plant, since the early seventeenth century, particularly for use in textiles.¹⁴ After tetrahydrocannabinol (THC), the active ingredient in this plant, was found to have desired effects on the mind and body, cannabis was used in the nineteenth and early twentieth centuries as a pharmaceutical, with some states requiring a prescription to purchase it, thus imposing an initial regulation on its use.¹⁵ Congress passed the Pure Food and Drug Act in 1906, which required that certain drugs, including cannabis, be accurately labeled with contents.¹⁶

During the early part of the twentieth century, the plant was linked, perhaps unreasonably, to various instances of violence and tension along the Texas-Mexico border with Mexican immigrants, who smoked cannabis recreationally and called it “marijuana.”¹⁷ As a consequence of the plant’s perceived ill-effects, various states and municipalities began regulating and prohibiting cannabis in the first few decades of the twentieth century.¹⁸ Louisiana, for example, banned it in the 1920s.¹⁹ As a component of an international movement to restrict recreational drugs, Indian hemp (which had a

¹³ Ibid. 354

¹⁴ Booth 9—41

¹⁵ Ibid. 109—119

¹⁶ Ibid. 161

¹⁷ Ibid. 158—161

¹⁸ Ibid. 163

¹⁹ Ibid. 165

relatively high THC content, compared with European hemp) became regulated under the International Opium Convention.²⁰

By the mid-1930s, virtually all states had some manner of cannabis regulation, and federal regulation was enforced through the creation of the Federal Bureau of Narcotics in 1930.²¹ Possession and transfer of cannabis became regulated in the United States under the Marihuana Tax Act of 1937, through the imposition of a tax on all sales of cannabis. These taxes on cannabis eventually transformed into *de facto* criminal law, as described by the Commission on Law Enforcement and Administration of Justice in 1967.²² While this act was repealed in 1969 after it was ruled unconstitutional, it was replaced with the Controlled Substances Act (CSA) in 1970,²³ which was a component of the Comprehensive Drug Abuse Prevention and Control Act of 1970.²⁴ The Drug Enforcement Administration (DEA) was created in 1973 as a branch of the Department of Justice, charged with investigating and prosecuting cases under the CSA.²⁵

In the decades since the DEA was created to enforce the CSA, state governments and local municipalities have begun a gradual process of de-criminalization and legalization of cannabis. Oregon de-criminalized cannabis in 1973, while Colorado, Alaska, Colorado, and California did the same in 1975. Presently, in 2014, the sale, possession, and use of marijuana (subject to certain regulations) is legal in three states: Washington, Oregon, and Colorado. While recreational marijuana is only legally

²⁰ Ibid. 142

²¹ Ibid. 176

²² Gerber 11

²³ Ibid. 135

²⁴ Ibid. 297

²⁵ Booth 292

available in these three states, 23 states and Washington, D.C., permit production, possession, and use of medical marijuana.²⁶

Analyzing the Differences between Alcohol and Cannabis Prohibitions

It is tempting to draw a direct parallel between alcohol de-prohibition and cannabis de-prohibition, such that one could reliably predict, for example, that organized violence related to cannabis will decrease on the basis that organized violence related to alcohol decreased after the Twenty-first Amendment went into effect in 1933. It *might* be the case that organized violence will decrease if cannabis is de-criminalized at a national level, though this cannot be *directly* inferred from the circumstances surrounding alcohol de-prohibition. Rather, the first step to drawing lessons from the movement to repeal Prohibition in 1933 in our present context is to understand the ways in which we can reasonably draw lessons, and those in which we cannot.

Accordingly, I lay out the manners in which the cases of alcohol de-prohibition in 1933 and marijuana de-prohibition in the present are asymmetrical—the legal, the social, and the geo-political conditions—in order to lay the groundwork for policymakers to draw appropriate lessons from the repeal of the Eighteenth Amendment.

Legal Differences

The first asymmetry between alcohol Prohibition and cannabis prohibition is the divergence in legal condition between the two cases, which has two facets: the legal status of the prohibition and the extent of proscription.

While national alcohol Prohibition in the United States was a function of a constitutional amendment (with the corresponding Volstead Act that governed enforcement), the national prohibition of cannabis is simply a function of federal law

²⁶ McVeigh 62

(while many states have parallel state regulations). Consequently, the method of repeal is different in each case. The repeal or modification of the CSA does not require a two-thirds majority of states bodies (either legislatures or conventions) to repeal the bill, as was required in the case of the repeal of the Eighteenth Amendment—it just requires a simple majority of state *representatives*. In a sense, this method of repeal is procedurally simpler, and likely easier to accomplish, all other things being equal.

There is also a divergence in the extent of proscription. The Eighteenth Amendment, and the corresponding legislation, did not prohibit simple possession and private use of alcohol—rather, it prohibited production, transport, and sale. In contrast to this limited extent of alcohol prohibition, cannabis is currently subject to comprehensive prohibition at a federal level, including the production, transport, sale, and possession of any amount of the substance. Since possession is illegal, some of the creative work-arounds of the Prohibition-era are effectively eliminated, such as bars offering a free beer with the purchase of food, or relying on one’s personal liquor supplies. In this sense, repeal of the nationwide cannabis prohibition would likely be more complicated and difficult because the status quo proscription is more comprehensive and wide-reaching than alcohol Prohibition.

In any case, we can conclude from these legal features that “Prohibition” is not a univocal concept—cannabis is not prohibited in precisely the same sense in which alcohol was prohibited in the 1920s, and repeal would not require precisely the same type of political action.

Social Differences

In addition to the legal differences, there is an asymmetry between alcohol and cannabis prohibitions in their relative social situations. The criminalization of alcohol began at a popular level through the Temperance Movement, but reached the level of federal prohibition in a relatively abrupt manner—through a single constitutional amendment that criminalized the production, transport, and sale of alcohol in the United States. Alcohol, which still had a relative hold on American society, was driven underground. Both before and during Prohibition, the prevalent consumption of alcohol as a social custom, especially among immigrants, did not necessitate intemperance (that is, immoderation).

The criminalization of cannabis, however, was a gradual process that began with individual state regulation, and culminated in federal prohibitions, and is presently undergoing a gradual process of de-criminalization at the state level. Because alcohol was more widely consumed, its prohibition was instantly more controversial than the criminalization of marijuana, which was less commonly used, at least among the most dominant and politically-influential segments of American society. Whereas alcohol went from legal to illegal and back to legal within a generation, there are relatively few who would remember a time before cannabis was nationally-prohibited. In any case, the status of cannabis as *malum prohibitum* for approximately 80 years, coupled with the totality of the prohibition, resulted in an American society that is still relatively less accepting of the substance than the United States was of alcohol in 1933.

According to a Gallup poll conducted in October 2014, 51% of Americans support the legalization of cannabis, while 47% oppose it.²⁷ This is in sharp contrast to 12% in favor of legalization (and 84% opposed) in 1969,²⁸ and 36% in favor (and 60% opposed) as recently as 2005.²⁹ However, these figures still pale compared to the public opinion of alcohol leading up to the ratification of the Twenty-first Amendment—approximately 74% of the American people favored repeal of the Eighteenth Amendment, while 26% opposed it.³⁰

The use of cannabis has been on the rise for decades, especially among youth. The National Center on Addiction and Substance Abuse at Columbia University reported in 2005 that 33.3% of college students reported using marijuana during the previous year. Still, according to a 2013 Gallup survey, only 38% of Americans admit to having *ever* used marijuana, while only 7% claim to, in the present, smoke marijuana.³¹ The relative popularity of cannabis among youth and within various subcultures has not translated into widespread social use among American society as a whole. Recreational marijuana is still, to some extent, an “outsider” drug, as opposed to caffeine or alcohol. While public opinion is changing relatively rapidly regarding its legal status, the recreational use of marijuana has not reached the level of social acceptability that alcohol held prior to Prohibition. Accordingly, predictions regarding the effects of cannabis legalization on use, and any regulations that are instituted as a result, must take into consideration the current relative lack of acceptance in comparison to alcohol during Prohibition.

Geopolitical Differences

²⁷ Gallup, 2014.

²⁸ Gallup, 1969.

²⁹ Gallup, 2005.

³⁰ Childs 260-261.

³¹ Gallup, 2013.

The final difference that is relevant for drawing an incisive relationship between alcohol de-prohibition and prospective cannabis reform is that of the global context. The geopolitical context in which alcohol prohibition was repealed in 1933 is in stark contrast to the present geopolitical criminalization of cannabis.

At the time the Twenty-first Amendment was ratified in 1933, the United States was one of the only countries in the world to prohibit alcohol. Many countries had prohibited alcohol in the first decades of the twentieth century, but the vast majority repealed their laws during the 1920s. Among them, Norway repealed its prohibition in 1923 for beer and fortified wine and 1927 for liquor; the Soviet Union repealed its prohibition laws in 1925; all Canadian provinces but Prince Edward Island repealed by 1929; Finland repealed in 1932.³² A notable exception to this trend was Iceland, which prohibited all alcohol from 1915 to 1935, after which only “strong” beer (2.25% or more alcohol by volume) was prohibited until 1989.³³

In contrast, most countries have imposed nationwide prohibitions on cannabis, stemming from the early twentieth century international movement to ban recreational drugs. If the United States permitted cannabis at a federal level, it would be among the relative few countries that have, to some extent, legalized (or de-criminalized) the sale, cultivation, and/or transportation of cannabis (which include Cambodia, Czech Republic, Jamaica, the Netherlands, Peru, Portugal, Russia, Slovenia, and Ukraine).³⁴

³² Several countries have prohibited alcohol since 1933, in some cases only for Muslim citizens, including Pakistan, Brunei, particular Indian states, Iran, Libya, Mauritania, Saudi Arabia, Sudan, Kuwait, and Afghanistan.

³³ Associated Press, 1988

³⁴ Possession or private use of cannabis is legalized or de-criminalized in many other countries. See New Health Guide, 2014.

Consequently, if it were to consider nationwide repeal of cannabis prohibition, the United States would be at the cutting-edge of national social policy, which is an asymmetrical position to that which it occupied with regard to alcohol. In 1933, the United States had no dearth of countries with which to seek alternative models of restriction. The anti-Prohibitionist pamphlet *32 Reasons for Repeal*, for example, was able to make an appeal to the regulatory systems in Canada, England, Sweden, Norway, and Denmark as viable alternatives to nationwide Prohibition.³⁵ However, in the present world, relatively few cannabis regulatory systems exist, so repeal at a federal level would be relatively risky in terms of predicted effect and effectiveness. Thus, the prescriptive power of the repeal of Prohibition in 1933 must be tempered with the relative isolation of the United States on the geopolitical stage and the unknowns regarding cannabis prohibition repeal.

Lessons from the Repeal of Alcohol for Cannabis Reformers:

Taking into account these asymmetries between the Twenty-first Amendment's de-prohibition of alcohol in 1933 and the prospective reform of federal drug policy, we can arrive at three lessons that can be drawn from the movement to repeal Prohibition in the 1930s: the necessities of reform at the national level, the differential distribution of legal regulation between the federal and state levels, and cannabis regulation that balances freedoms with public interests.

(1) If there is to be lasting and stable cannabis reform, it is necessary to repeal or reform cannabis policy at the national level rather than simply the state level.

By the time Congress issued a partial repeal of nationwide prohibition through the Cullen-Harrison Act in 1933, the Twenty-first Amendment, which would completely

³⁵ Association Against the Prohibition Amendment 15–21, 32

repeal the Eighteenth Amendment, had already been sent to the states for ratification. Upon ratification, alcohol production and sales could begin without federal intervention, apart from peripheral violations. Effectively, the repeal at the national level (through federal legislation and, finally, constitutional reform) was a condition for the possibility of states and localities deciding whether or not to permit alcohol, and for private establishments to actually begin to serve alcohol.

Under the doctrine of nullification, states are not required to enforce federal law, and can even hold laws in contradiction with federal law, but states cannot prevent the federal government from enforcing federal laws within state boundaries. However, nullification through the existence of state laws in contrast to federal law is not directly available in the case of a Constitutional amendment, such as the Eighteenth Amendment, for example. Accordingly, states were not technically required to *enforce* Prohibition, but they were not permitted to pass laws in contradiction to national Prohibition, for any such law would have been unconstitutional.

While the legalization of cannabis at the state level, in contrast, is not prohibited *per se*, reform at the federal level is no less practically-necessary if we are to foster stability in cannabis law and enforcement. Cannabis is still classified as a Schedule I drug at the federal level, which implies that it has "no currently accepted medical use in treatment in the United States,"³⁶ and the DEA enforces the law accordingly, often in tension with state laws. The DEA continues to enforce the CSA, even in the states of Washington, Oregon, and Colorado, where the sale, possession, and use of cannabis is legal. While recreational marijuana is only legally available in these three states, 23 states and Washington, D.C., permit production, possession, and use of *medical* marijuana.

³⁶ Drug Enforcement Administration 1

With the trend of states de-criminalizing cannabis, this tension and legal dissonance between the federal government and state governments can only be effectively resolved through *de jure* federal reform. In May 2014, following several high-profile raids on California medical marijuana shops, Congress restricted the DEA's use of federal funds to target medical marijuana operations that are legal under state laws. Raids of this sort that violated federal law while being permitted under state law were previously ruled to violate the 10th Amendment by a federal district court in *County of Santa Cruz v. Mukasey*. These changes, however, amount to *de facto* reform where comprehensive *de jure* reform is required, demonstrated by the continuance of DEA raids on state-sanctioned clinics.

National reform can come through gradual change, such as the present trajectory of federal cannabis policy, or through relative upheaval, such as the de-prohibition of alcohol. The present trajectory of cannabis reform at the state level, however, requires the latter, as state nullification in this case does not permit consistent or predictable enforcement, and the tensions between state and federal law will have a chilling effect on free action.

(2) It is necessary to balance regional restriction with federal de-prohibition and restriction.

In 1932, the Association Against the Prohibition Amendment published a pamphlet titled *32 Reasons for Repeal*. Its first stated reason for repeal was the conflict of federal and state power, as the Amendment was said to violate the Home Rule of the states.³⁷ Similarly, the second reason was a critique of the Amendment's centralization of

³⁷ Association Against the Prohibition Amendment 4

power in Washington.³⁸ It is clear from the remaining 30 reasons that Prohibition at *any* level of government is not, though their argument was primarily based on the power of states to govern themselves and regulate alcohol, in accordance with the 10th Amendment.

The repeal of the Eighteenth Amendment neither created a vacuum of alcohol regulation nor established a constitutionally-protected right to produce, sell, and consume alcohol. Rather, following the repeal of the Eighteenth Amendment in Section 1 of the Twenty-first Amendment, Section 2 leaves the regulation of alcohol firmly within the purview of the states, while also leaving open the possibility of federal regulation. Section 2 reads as follows:

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.

The Federal Alcohol Administration Act of 1935 set the precedent that certain matters of production, wholesaling, containers, importing, advertising, and transporting between states would be regulated by the federal government. Meanwhile, state laws were left to govern issues relating to retail (except containers) and consumption of alcohol—who can buy alcohol, when alcohol can be sold, where individuals can consume alcohol, and so forth. Indeed, states could even determine *if* alcohol would be permitted to be produced, transported, or sold at all.

Nine states chose not to ratify the Twenty-first Amendment, most implicitly, while two states actively opposed it. Even in states that ratified the Amendment and did not prohibit alcohol at a state level, most states adopted a local option, allowing counties

³⁸ Ibid. 5

and local municipalities to decide whether or not to allow alcohol, and in what manner they would do so. As a consequence, after the repeal of national Prohibition, 38% of Americans still lived in areas where alcohol was prohibited.³⁹ Mississippi remained “dry” until 1966 and Kansas prohibited public bars even until 1987. In a similar way, reform of federal cannabis regulation will not necessarily have any particular effect on the policies and regulations of individual states—some states or municipalities may elect to prohibit cannabis indefinitely, based on community standards and other considerations.

After the repeal of the Eighteenth Amendment, the federal government came to regulate the elements of the alcohol industry that pertained directly to interstate and international commerce, as well as issues of standardization and transparency that related directly to public health (e.g. proper labeling, reuse of bottles, etc.). Whether or not this federal involvement in alcohol regulation is reasonable or not, and whether it infringes upon the home rule of states, can be debated. In any case, it is clear that in the years following the ratification of the Twenty-first Amendment, and leading to the present, federal regulations of alcohol have been balanced, to some degree, with state regulations.

The federal Department of Justice currently houses the DEA along with the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF), which began as the Bureau of Prohibition until the Twenty-first Amendment required a bureaucratic transformation. Now primarily tasked with investigating and prosecuting the use of explosives and arms trafficking, and so forth, the ATF formerly collected federal alcohol taxes, while still investigating illegal alcohol imports, and labelling issues, among other things. In conjunction with the Alcohol and Tobacco Tax and Trade Bureau (which regulates alcohol containers, producers, and wholesalers), these two agencies govern all

³⁹ Mendelson and Mello 94

federal regulations on alcohol. Virtually all other facets of alcohol regulation rest with states and local law enforcement.

In stark contrast to the theoretically-complimentary relation of federal and state alcohol regulation, the DEA retains virtually all powers related to investigation and enforcement of drug offenses, while state and local governments have concurrent powers. Thus, with regard to the balance that has been achieved in terms of alcohol regulation, and foreseeing changes in cannabis policy, it is imperative to retain the capacity of local communities to make local decisions based on community standards, while also protecting the federal government's powers to regulate interstate and international commerce and conflict.

(3) Through substance regulation, it is necessary to balance individual freedoms with public interests.

In the interest of fostering public health and public safety, while also maintaining individual freedoms, it is imperative to engage in vigilant study and consideration with regard to present and potential future substance regulations. There are at least three facets of banned-substance-related public policy that must be considered: the scope of the regulation, the type of regulation, and the extent and manner of enforcement.

Potential models of cannabis regulation that aim at this balance can be found in the models of alcohol regulation that have been adopted by various states to decrease instances of drunken driving, public intoxication and disruption, domestic violence, liver disease, alcohol poisoning, and so forth, while also preserving the freedom of adults to buy, sell, and consume alcohol. In accordance with these aims, states have adopted drinking age laws, liquor license laws, regulations on time and place of sale, place of

consumption, and other regulations. These state-specific regulations are coupled with federal taxes and federal regulations of importers, producers, and wholesalers. Under this alcohol model, restrictions on supply are insufficient to foster a black market, thereby eliminating the most pernicious effects of strict prohibition.⁴⁰

It is vitally important to maintain the capacity of local communities to institute substance policies based on shared values and aims, but the United States does have examples of local decisions that strain the delicate balance between public goods and private freedoms. One such example is the restriction of alcohol sales on the Christian Sabbath.

While the existence and enforcement of so-called “Blue Laws,” which restrict commerce on Sundays, such as the sale of alcohol, lie firmly in the purview of states and local municipalities, the question still remains whether or not such laws are reasonable and advance a legitimate public purpose. Many critics maintain that such Blue Laws represent an unreasonable rights restriction, while not contributing in any substantial way (if any positive way at all) to public health and safety. Indeed, Blue Laws have been shown not to lower the rate of alcohol-related traffic accidents or fatalities.⁴¹ Furthermore, while there is a slight increase in drinking on Sundays after the repeal of Blue Laws, there is a correlating decrease in alcohol consumption on Saturdays, which even may be a public health benefit, because it levels out the consumption of alcohol so that there is a more even amount of consumption throughout the week.⁴²

Whatever character state regulations of cannabis take in the future, some of these interests are described in the Department of Justice's stated priorities with regard to states

⁴⁰ Miron and Zwiebel 189

⁴¹ Maloney and Rudbeck (2009)

⁴² Carpenter and Eisenberg (2009)

that have legalized cannabis, such as Colorado, Oregon, and Washington, which include the following:

- Preventing the distribution of marijuana to minors;
- Preventing revenue from the sale of marijuana from going to criminal enterprises, gangs and cartels;
- Preventing state-authorized marijuana activity from being used as a cover or pretext for the trafficking of other illegal drugs or other illegal activity;
- Preventing violence and the use of firearms in the cultivation and distribution of marijuana;
- Preventing drugged driving and the exacerbation of other adverse public health consequences associated with marijuana use.⁴³

Unfortunately, these federal regulations—seemingly in the public interest—are still complicated by the tensions between federal and state enforcement, underscoring the fact that regulation requires *both* a reasonable balance between public interests and private freedoms *and* a suitable legal and political structuring.

Conclusions

Now the better part of a century removed from Prohibition, it seems as though American policymakers have yet to adequately account for the lessons of the Twenty-first Amendment and the circumstances surrounding Prohibition’s repeal. Even critics of the federal government’s prohibition of cannabis seem to have failed to fully account for the differences between the two contexts, such that we could draw reasoned and incisive conclusions.

We face the necessity of policy reform at the national level, though we do not have a great many countries on which to model the reform. We require the differential distribution of legal regulation between the federal and state levels, though the legal situation in which we must enact reforms is far more complex than one might otherwise

⁴³ Cole 1–2

think. It is also imperative to enact cannabis regulation that balances freedoms with public interests, though this reform will fall in a social climate that may not yet be as receptive as 1933 America was to Prohibition repeal. Whatever the future of American cannabis law, without taking these truths into account, public cannabis policy will be mired, as if the lessons of the Twenty-first Amendment were long since forgotten.

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2015

8th Annual Essay Contest

Explore how the “unquestionably legitimate” three-tier system has fostered competition, increased new products available to consumers and worked to protect consumers and the public.

FIRST PLACE

Roni Elias

“[A]s Americans have long recognized, alcohol cannot be sold in the same way as any other commodity... changing the operation of the three-tier system should not, therefore, be taken lightly... Although the Supreme Court’s decision in Granholm might have seemed to offer a chance for a dramatic expansion of direct shipment and a transformation of the regulatory scheme for selling alcohol, a careful reading of that decision, along with subsequent judicial rulings have made it clear that the three-tier system is still consistent with the constitutional order.”

SECOND PLACE

Gurney Pearsall

Three Cheers for Three Tiers: Why the Three-Tier System Maintains Its Legal Validity and Social Benefits After *Granholm*

Introduction

Alcohol consumption has the potential to be either a great benefit or a great detriment to the United States economy. The direct retail sales of beer, wine and spirits at licensed establishments creates over 1.7 million jobs throughout the United States; and these direct retail sales create an more than 750,000 additional jobs in ancillary enterprises, such as suppliers.¹ In 2014, all of these enterprises together were responsible for as much as \$245 billion in total economic activity throughout the nation.² The business entities involved in the sale of alcohol, along with their employees, pay over \$19.3 billion in federal taxes, and \$16.9 billion in state and local taxes.³

At the same time, the excessive consumption of alcohol is both a public health problem and a source of grave economic loss. Alcohol abuse can lead to declining productivity in the workplace, increased illness and associated health care expenses, criminal justice expenses, and property damages, especially damages to motor vehicles involved in alcohol related accidents.⁴ The Center for Disease Control and Prevention estimates that, in 2010, such problems caused economic losses totaling \$249 billion across the entire U.S. economy.⁵

Since the ratification of the Twenty-First Amendment in 1933, which ended Prohibition, the United States has employed a system for the distribution and retail sale of alcohol that has helped maximize the social benefits of alcohol use and minimize its dangers social costs. In this “three-tier” system, the producers of alcoholic beverages sell their products only to state-licensed distributors, who are the exclusive source for state-licensed retail outlets, including both liquor

stores and bars and restaurants.⁶ State-laws generally prohibit or greatly restrict the direct sale of alcohol from producers to consumers.⁷

The three-tier system promotes the effective regulation of consumption because the regulations are made at the state level and therefore can be responsive to local concerns and unique local circumstances.⁸ The system also promotes economic efficiency by helping producers receive accurate information about consumer demand. Given their unique – and exclusive – position between consumers and producers, distributors have the informational and economic ability to make sure that products are directed to retail outlets with the greatest demand at a low cost.⁹

Since its inception in the wake of Prohibition, the three-tier system, including its ban on direct sales to consumers, was understood to be an exercise of state power conferred by the Twenty-First Amendment.¹⁰ In 2005, in *Granholm v. Heald*, the United States Supreme Court invoked the dormant Commerce Clause to rule that states could not use the ban on direct sales to consumers as an instrument for discriminating against products from other states.¹¹ Thus, the Court imposed a limitation on states' ability to use the structure of the three-tier system to regulate sales; but *Granholm* also re-affirmed the general validity of the three-tier system,¹² and left some uncertainty about when and how states could continue to use a ban on direct sales as an element of that system.

Since *Granholm*, federal courts have upheld state-law restrictions on direct shipment, and the three-tier system has survived and even thrived. Its ability to promote economic efficiency and to serve as a framework for effective regulation have benefitted consumers, producers and society as a whole. While the Court's ruling in *Granholm* prohibited the use of regulations under the three-tier system as a means of discrimination against producers or products based on their

location, that ruling and numerous judicial opinions following it have affirmed that the three-tier system is a legitimate instrument by which state governments may regulate alcohol sales.

This paper argues that the three-tier system is not only a legitimate means of regulating alcohol sales but also a beneficial one that should be maintained. It begins this argument in Part I by describing the basic characteristics of the three-tier system. In Part II, it reviews how the three-tier system was developed after over a century of largely failed attempts to effectively regulate alcohol sales, and it explains how that system provides significant regulatory and economic advantages. Part III discusses how the expansion of direct shipment from suppliers to consumers and retailers threatens many of the benefits conferred by the three-tier system. Finally, Part IV reviews the *Granholm* decision and subsequent judicial rulings to see whether and to what extent the three-tier system can be maintained in a manner consistent with constitutional law.

I. The Nature of the Three-Tier System

Many industries are built around a three-part structure that includes producers, wholesalers, and retailers. The business of selling alcoholic beverages is no exception. The wine and spirits industry has three main elements: (1) product manufacturers, (2) wholesale-distributors and (3) product retailers.¹³ In most parts of the U.S., wine and spirits are distributed through these three segments, and this method of distribution is collectively referred to as the three-tier system.¹⁴

One of the chief objectives of the system is to rationalize and streamline the distribution of the incredibly wide variety of products available to consumers. In the first tier of the system, the producers of alcoholic beverages bottle a wide range of products, many of which are targeted at narrow market niches. For example, there are literally hundreds of thousands of different

types of wine available to consumers; *Wine Spectator* magazine offers reviews of 332,000 different wines.¹⁵ Similarly, one website that lists popular brands of tequila identifies 89 different tequila products, ranging in price from under \$20 to over \$90.¹⁶ In fact, the number of distilleries that produce all kinds of spirits are increasing dramatically. According to the American Craft Spirits Association, the number of local, craft distilleries in the United States increased from about 50 in 2005 to 769 in 2015.¹⁷ And, of course, the recent growth of craft breweries is well-known; the volume of production from craft breweries, many of which serve only local or regional markets, almost doubled between 2006 and 2012.¹⁸

Producers sell this plethora of brands and products to wine and spirits wholesale distributors, who, in turn, resell those products retailers.¹⁹ Wholesalers are not merely brokers or agents who work on a commission basis. Rather, wine and spirits wholesalers are merchant wholesalers who purchase goods on their own account for resale. Merchant wholesalers earn profits on commercially successful products and incur losses on failed products.²⁰ Wholesale distributors are licensed by state governments, and there are distributors of all sizes. According to one study completed in 2008, there were approximately 16,000 wholesaler licensees in the United States in 2008.²¹

Because so many of these products have specialized appeal, the wholesale distributors that make up the middle tier of the system do much more than serve as a passive conduit for products; they play an important role in identifying the local retail markets where unique products will have the most success. Because wholesalers serve a wide variety of retailers, they have an unparalleled opportunity to identify any common trends or differences among the retailers they serve and represent.²² Thus, wholesalers collect and distribute important information that helps both

to convey their

retailers and producers respond more efficiently to changing consumer preferences.²³

Consequently, wholesale distributors play an important role in marketing. With respect to individual liquor products, the producer creates a consumer image, and the wholesaler communicates that image to the retailers with whom it contracts; and retailers then communicate that image to consumers.²⁴ This is a marketing function that could not be easily or completely replicated by third-party marketers who were not in the wholesale business. Such third-party marketers lack the depth or breadth of relationships with local retailers that wholesale distributors enjoy.²⁵

Retail establishments form the third tier of the system. Such establishments include full service restaurants (those serving alcohol), bars, and retail stores that sell beer, wine, and liquor. According to recent Census data, there are nearly a quarter-million full service restaurants,²⁶ nearly 50,000 bars,²⁷ and about 33,000 liquor stores²⁸ in the United States. For many customers, retail outlets are not just a convenient source for wine and spirits, they are also a principal source of information about, and a place to sample, new products.²⁹

The range of selections at retail outlets varies substantially. A typical bar or full-service restaurant offers consumers a few dozen wines and spirits.³⁰ Larger traditional retailers such as Knightsbridge Wines in Illinois and the Wine Club in California stock about 8,000 distinct items.³¹ By contrast, a typical Costco Wholesale Corp. outlet sells 120 wine labels and 30 to 35 spirits labels at any one time, and approximately half of the labels change every year.³²

Given the wide range of products in the market and the variation of products available at different retailers, consumers often rely on retail stores for product information. Knowledgeable staff, product demonstrations, such as tastings, and promotional displays are all available in the retail store, and they all help consumers decide products suit their tastes.³³ Much of this

information comes from wholesale distributors who educate the staff of retail stores, pay for the promotional displays, and furnish products for tastings.³⁴ The costs to wholesalers for providing marketing support to retailers are extensive, sometimes running in excess of \$10 million annually for large, regional distributors.³⁵

II. The Origins and Policy Reasons for the Three-Tier System

A. *Origins*

In historical terms, the three-tier system is a product of attempts at reforming the regulation of alcohol sales around the time of the Twenty-First Amendment, which ended Prohibition. When it became apparent that Prohibition was not going to succeed in solving the social and public health problems associated with abusive alcohol consumption, government officials and policy activists sought another way, that their efforts resulted in the three-tier system. Consequently, the three-tier system is, to a great extent, a response to failed efforts at alcohol regulation that preceded it, and understanding its effects, particularly in the regulatory context, requires some understanding of its background and origins.

From the colonial period through the end of the nineteenth century, Americans were concerned with controlling excessive and abusive alcohol consumption, but the patchwork of conflicting state laws directed towards this end was not especially effective. States experimented with various statutes that limited opportunities to purchase alcohol, and many states entirely prohibited the purchase and sale (but not necessarily the production) of alcohol.³⁶ Nevertheless, the problems associated with alcohol abuse continued to proliferate into the early twentieth century, as alcohol consumption increased by as much as 33 percent in the first decade of the twentieth century and the death rate from cirrhosis of the liver and chronic alcoholism reached high levels.³⁷

Concern with this worsening problem led to federal legislation. In an effort to protect states that had chosen to completely ban alcohol, Congress enacted the Webb–Kenyon Act in 1913.³⁸ It prohibited the interstate transportation of any form of alcohol into a state where that form of alcohol was illegal.³⁹ The Supreme Court affirmed the constitutionality of the Webb–Kenyon Act in *James Clark Distilling Co. v. Western Maryland Railroad Co.*, reasoning that the only purpose for the legislation “was to give effect to state prohibition” laws.⁴⁰ The Court made it clear that Webb–Kenyon did not give states the power to authorize the sale of liquor generally and to treat out-of-state liquor on unequal, discriminatory terms.⁴¹ Thus, the Court held that, under the constitutional framework in place before Prohibition, states could regulate alcohol any way they chose, but the Commerce Clause prevented states from enacting any regulation that discriminated on the basis of where alcohol was produced.⁴²

The political momentum that helped to support the Webb–Kenyon Act soon resulted in the Eighteenth Amendment, which prohibited “the manufacture, sale, or transportation of intoxicating liquors” within the United States, and the import or export of intoxicating liquors to or from the United States.⁴³ But the total prohibition on all commerce in alcoholic beverages seemed to generate more problems than it solved. Although alcohol consumption declined and abstinence increased during Prohibition,⁴⁴ compliance with the ban on alcohol sales was anything but uniform, especially because there were many Americans who consumed alcohol moderately and responsibly and thought that a total ban on alcohol sales was an unwarranted means to curb abusive consumption. In addition, most Americans thought that Prohibition helped to increase lawlessness and the growth of organized crime.⁴⁵ Consequently, public support for Prohibition waned quickly, and many Americans began to try to formulate a way to

regulate alcohol use that was short of an outright ban but that would also be effective in avoiding the problems of abuse that had helped prompt Prohibition.⁴⁶

There were varying proposals for reforming the regulation of alcohol sales. Some, led by John D. Rockefeller, called for a government monopoly on the production and consumption of all alcoholic beverages.⁴⁷ Although this particular policy prescription was not uniformly adopted, eighteen states eventually followed a version of it by creating a government monopoly on distribution and, in some cases, permitting retail sales of packaged liquor only in government-owned outlets.⁴⁸ Today, seventeen states employ some variation of this regulatory system, although these state retail monopolies tend to focus on liquors with relatively high alcoholic content.⁴⁹

The most widely adopted proposal for regulating alcohol sales and use was what is now known as the three-tier system. In general, this system was designed to discourage drinking in bars and saloons and encourage it in restaurants and above all, at home.⁵⁰ The right to sell alcohol was subject to licenses issued by a commission that operated as an agency of state government.⁵¹ Retail sales were permitted only in restaurants, bars, and stores that were licensed by the state commission, and there were different categories of licenses for beer and wine, on the one hand, and distilled spirits, on the other.⁵² When it came to issuing licenses authorizing on-premises consumption, state commissions tended to favor establishments where food was served.⁵³ The scheme also limited whom retailers could purchase from. In general, direct purchasing from producers was outlawed, and retailers could purchase only from wholesalers who were also licensed by the state commission.⁵⁴

Once it was possible to imagine an effective regulatory regime, such as the three-tier system, the repeal of Prohibition seemed more feasible. Consequently, on December 5, 1933,

the Twenty-first Amendment was ratified.⁵⁵ Section 1 of the amendment repealed the Eighteenth Amendment.⁵⁶ Section 2 provided that “[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.”⁵⁷ Since its ratification, the meaning of Section 2 has been a matter of uncertainty and conflict within the federal judiciary.⁵⁸ According to one view, Section 2 created new authority for state governments to regulate alcohol, unfettered by the Commerce Clause.⁵⁹ According to an opposing view, Section 2 only gave states plenary authority to regulate alcohol within their borders, and it did not give states any authority to enact laws that would have a restrictive or discriminatory effect in interstate commerce.⁶⁰

This uncertainty about the legal significance of Section 2 of the Twenty-First Amendment has created questions about the extent to which states can use the three-tier system to prohibit the direct shipment of alcohol from producers to consumers. This uncertainty in turn creates a question about the preservation of the entire system because the system can continue to function only if there are essentially exclusive relationships between producers and wholesale distributors and between wholesalers and retailers. And the three-tier system provides an essential framework for the business of selling alcoholic beverages. As its history shows, it was created for a purely regulatory purpose, and, over eighty years of practical experience, it is clear that the system serves that purpose well. In addition, recent economic analyses have shown that the system provides important economic benefits that enhance the salutary economic effect of alcoholic beverages.

B. *Regulatory Advantages*

Given the dangers associated with alcohol abuse, the effective regulation of alcohol sales is of paramount importance. As one commentator has noted, alcohol is “no ordinary

commodity,”⁶¹ and, therefore, extra care must be taken in regulating it. According to the Centers for Disease Control and Prevention (“CDC”), excessive alcohol use can lead to a variety of serious, chronic diseases including: high blood pressure; heart disease; stroke; liver disease; digestive problems; several types of cancer; learning and memory problems; mental health problems, such as depression and anxiety; social problems, such as lost productivity, family problems, and unemployment; and, of course, alcohol dependence, or alcoholism.⁶² These problems are certainly keenly felt across all segments of American society. As the CDC points out:

Excessive alcohol use led to approximately 88,000 deaths and 2.5 million years of potential life lost (YPLL) each year in the United States from 2006 – 2010, shortening the lives of those who died by an average of 30 years. Further, excessive drinking was responsible for 1 in 10 deaths among working-age adults aged 20-64 years. The economic costs of excessive alcohol consumption in 2010 were estimated at \$249 billion, or \$2.05 a drink.⁶³

When the locus of regulation is at the state level, the regulatory authority can tailor its rules to local conditions. For example, a state government could establish a procedure by which local communities could set their own rules for alcohol sales, even to the point that they would prohibit alcohol sales altogether within their area.⁶⁴ As one Congressman has noted, “an effective tool of local neighborhoods in Chicago has been the ability to vote, through ballot referendum, an area ‘dry.’” Thus, the three-tier system provides an unmatched ability to empower local communities. If the regulatory authority is centralized at a federal level, or if direct sales via the internet effectively deprive state and local authorities of their ability to regulate sales, these kinds of locally-oriented regulations would disappear.

One aspect of the local tailoring of regulations is the capacity to make a quick response to new developments and problems. For example, in 2011, the Nebraska Liquor Control Commission learned of “rampant alcohol abuse and bootlegging” in a town of about two dozen

residents on the Pine Ridge Indian Reservation in a remote area of the state's panhandle.⁶⁵ Commission officials acted to restrict the hours during which alcohol sales can be made in the town and surrounding area and to take other remedial measures designed to specifically respond to unique local conditions.⁶⁶ Similarly, in Washington state, the liquor control board has taken information about alcohol products that are abused in particular local areas, and it has taken special measures to restrict their availability in those localities.⁶⁷

Another significant regulatory advantages of the three-tier system is that it permits effective enforcement. As noted by Nida Samona, the Chairperson of the Michigan Liquor Control Commission, the physical proximity of commission staff and local law enforcement to retailers and wholesalers ensures "that in-state retailers and wholesalers are physically inspected and checked to verify that [the] regulatory system is being followed, that only approved alcoholic beverages are being sold, that alcoholic beverages are not being sold to underage persons, and that taxes are being paid."⁶⁸ This oversight gives states "the ability and that power to bring [noncompliant] licensees in, to suspend them for a few days. . . ., take away the license, to go onsite. . . .," either through state officials or local police.⁶⁹

Ultimately, the decentralized regulatory regime enabled by the three-tier system makes producers, wholesalers, and retailers alike accountable to local communities. As a policy expert recently observed, "[a]s this industry becomes more and more consolidated, more and more globalized, it is critical to be able to regulate as much as we can at the local level. And not just retailers, but wholesalers," are instrumental to this project.⁷⁰ Indeed, private actors at each of the three tiers have significant incentives to assure that their business partners in the other tiers adhere to regulations.⁷¹ For example, a wholesaler has an interest in encouraging the retailers with whom they do business to comply with applicable regulations, and the wholesaler also has

the day-to-day contact with retailers that would enable them to identify and address any compliance problems.

All of these aspects of the regulatory regime associated with the three-tier system show that it remains well-suited to addressing the policy considerations that inspired its adoption in so many states after the repeal of Prohibition in 1933. The three-tier system provides a flexible regulatory structure that can be readily tailored to local conditions, which assures that its rules will be more likely to find public acceptance as well as to effectively promote the safer consumption and sale of alcohol. Moreover, even though these regulatory considerations are of paramount importance, they are not the only reasons why the three-tier system is an especially effective means of organizing the sale of alcoholic beverages.

C. *Economic Advantages*

Although it was originally designed with a purely regulatory purpose, the three-tier system has proven to serve important economic objectives as well. Given the enormous – if not overwhelming – variety of alcoholic beverage products, and given the variation in consumer demand across different geographic areas, the marketing of those products to consumers is a difficult and complicated process. For one thing, it is virtually impossible for an individual consumer to be educated about the thousands of different products that he or she might purchase. The three-tier system provides an invaluable instrument for conveying information and reducing transaction costs within the alcoholic beverage industry.

Until recently, there have been few analyses of the economic impact of three-tier system. But in a 2008 study, David S. Sibley and Padmanabhan Srinagesh provide a sophisticated analysis of the economics of the three-tier system, drawing on economic data from firms in the system, other econometric data, and interviews with major players in wholesale distribution and

retail sales.⁷² This study and other related scholarship and data provide insight into how the three-tier system improves the economic efficiency of the alcoholic beverage industry as a whole.

One of the principal ways that the three-tier system produces economic efficiency is to reduce transaction costs across all segments of the industry. Given the extraordinary variety of products that suppliers deliver to one end of the market, and given the equally broad variety of demand across all consumers at the other end of the market, it is possible, in theory, for significant inefficiencies caused by a large number of transactions. For example, consider a consumer who likes to drink Budweiser beer, a brand of tequila produced by a boutique distillery, and a few specific varieties of wine. Such a consumer might visit his local liquor store on a weekly basis, usually buying beer, and purchasing his favored wine products somewhat less frequently, and his favorite tequila only a few times a year. If that local liquor store wants to assure that it is his first choice for all of his purchases, it will have to keep all of those products in stock, but managing the cost of maintaining inventory for this kind of complex purchasing behavior can be very high, especially when the store has dozens or even hundreds of customers who each have their own unique preferences and purchasing patterns. Juggling the purchase of so many different products from many different suppliers in varying amounts can be difficult for any retailer.

The three-tier system streamlines this process and reduces the transaction costs because wholesale distributors can serve a crucial intermediary function. Wholesalers can match the different needs of suppliers and retailers “by maintaining inventories in their warehouses and operating transportation fleets to deliver wine and spirits to retail outlets in a timely manner.”⁷³ This is so because wholesalers have the capacity to routinely deliver individual bottles or split

cases (cases customized with various individual bottles) to stores, bars and restaurants, usually in a turn-around period of a day or two.⁷⁴ The presence of wholesalers as intermediaries means that suppliers can sell large volumes of products in a relatively small number of transactions and that retailers can customize their ordering to meet the diverse demands of their customers without incurring the cost of maintaining a large inventory.⁷⁵ The service that wholesalers provide in the business of selling alcoholic beverages makes it possible to funnel the wide variety of available products to different market niches with efficiency that would not be available in a marketplace without wholesalers.⁷⁶

These efficiencies become more important as computer-based technology plays an ever-increasing role in inventory management. Because the sale of alcoholic beverages is so heavily regulated, because those regulations vary so widely between jurisdictions and among particular categories of beverages, and because there are so many different products, it is increasingly important for wholesalers to employ computer-based information management systems.⁷⁷ “These information systems help ensure that complex shipments, payments and taxes are accurately tracked and that state and federal regulations are met.”⁷⁸ It would not make much sense for suppliers to maintain such systems because their nationwide market would require a prohibitively large and complex system that would be unwieldy to use. By the same token, individual suppliers lack the sales and inventory volume that would make such systems efficient for them. Thus, wholesalers who operate on a regional level are best positioned to employ such system with the most favorable ratio of benefits to cost.⁷⁹

In addition, wholesalers have a unique capacity to reduce the cost of maintaining such computer systems. These systems often have to synchronize data with multiple sources. Consequently, such systems must be able to accommodate the wide variety hardware and

software that is already installed at these multiple sources.⁸⁰ By reducing the number of parties that need to transact directly with one another, the business structure of the three-tier system “reduces the number of different computer systems that need to communicate directly with one another, permitting greater interoperability of information systems used in the wine and spirits industry and further reducing the costs of distribution while increasing the range of services provided.”⁸¹

In short, the three-tier system provides opportunities for creating economies of scale that simply would not exist in a world where suppliers shipped directly to retailers or even to consumers. Sibley and Srinagesh estimate that “wholesaler activities reduce retailers’ costs by almost \$52.00 for every \$1,000.00 in retailer sales, for a national savings in retailer operating costs of \$7.2 billion per year.”⁸² These wholesaler-created economies of scale make it possible for consumers to purchase at lower prices, which means that they have more disposable income to spend on a wider variety of products of all kinds.

Given their position between retailers and suppliers, wholesalers have a unique opportunity to acquire and disseminate the flow of information necessary for effective marketing. “Because wine and spirits are experience goods and highly influenced by marketing activities, distributors’ knowledge of consumers’ purchasing habits can be critical to the whole industry.”⁸³ Wholesalers have comprehensive information about both the range of products available from suppliers and the particular market characteristics within their regions, they have an unparalleled ability to identify the best ways to promote products and the best areas or market niches in which to promote them.⁸⁴ This information comes, at least in part, from their maintenance of the kinds of computer systems described above, which give them the capacity to aggregate sales data and identify market trends in a way that suppliers and retailers cannot.⁸⁵

The economics of selling alcoholic beverages make this kind of marketing expertise especially important. When a supplier introduces a new product, it will generate little profit at first because its promotional costs will be high and it can be difficult to convince retailers to provide shelf space for it.⁸⁶ Indeed, the inventory holding costs associated with new brand introduction can exceed \$1 million.⁸⁷ Wholesalers can reduce the promotional and inventory costs for new products by making sure that promotions are targeted accurately and by maintaining inventory that retailers might not be ready to maintain themselves.⁸⁸

The economic structure of the three-tier system also promotes efficient outcomes by facilitating a certain degree of vertical integration and the maintenance of minimum prices. At first blush, such things might seem to be anti-competitive. But some recent economic studies suggest that, under the right circumstances, they can have pro-competitive effects.⁸⁹ And the United States Supreme Court has recognized that a degree of vertical integration and price floors are not necessarily violations of anti-trust law.⁹⁰

Economists have recognized that, under certain conditions, restricting competition through the use of exclusive territories can solve fundamental business problems.⁹¹ For example, when marketing requires a distributor to undertake certain activities that are difficult to specify, monitor and measure, it may be difficult or impossible to regulate the distributor's compliance by contract. "By giving the distributor an exclusive territory and some protection from intrabrand competition, however, the supplier creates a financial incentive for the distributor to undertake the required marketing investments necessary to compete against brands represented by other wholesalers (interbrand competition)."⁹²

In its decision in *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, the United States Supreme Court has also recognized that the creation of exclusive territories and minimum retail

prices can actually promote competition rather than hinder it.⁹³ When a supplier has an exclusive agreement with a distributor, and when that agreement includes prescriptions about a minimum price for a product, such arrangements can reduce intrabrand competition and stimulate the distributor's marketing efforts.⁹⁴ This is because, in a territory where a distributor has exclusive rights in a particular brand, that distributor does not compete with any other provider of that brand ~~in its territory, but it does have an incentive to compete~~ vigorously against distributors of competing brands.⁹⁵ Establishing a minimum price helps control the free-riding incentive, and each distributor competes with other distributors by adding value to its product.⁹⁶ As the *Leegin* Court explained:

The justifications for vertical price restraints are similar to those for other vertical restraints. . . . Minimum resale price maintenance can stimulate interbrand competition--the competition among manufacturers selling different brands of the same type of product--by reducing intrabrand competition--the competition among retailers selling the same brand. . . . The promotion of interbrand competition is important because the primary purpose of the antitrust laws is to protect [this type of] competition. . . . A single manufacturer's use of vertical price restraints tends to eliminate intrabrand price competition; this in turn encourages retailers to invest in tangible or intangible services or promotional efforts that aid the manufacturer's position as against rival manufacturers. Resale price maintenance also has the potential to give consumers more options so that they can choose among low-price, low-service brands; high-price, high-service brands; and brands that fall in between.⁹⁷

The sale of alcoholic beverages within the structure of the three-tier system provides exactly the right kind of opportunity to promote the pro-competitive effects described in *Leegin*. One study of beer sales in Indiana confirms this conclusion. It found that the prohibition of exclusive territories for beer sales actually caused a decrease in beer sales.⁹⁸

III. The Threat to The Three-Tier System Posed by Direct Shipment

One of the biggest challenges to the preservation of the three-tier system has been the recent proliferation of small-scale producers of beer, wine, and spirits, who seek to use the internet as a means to sell directly to retailers and consumers. Some, including the Federal Trade Commission, have suggested that these developments warranted a significant reconsideration of how the market for alcoholic beverages should be structured.⁹⁹ These suggestions often overlook the unique nature of this market and have generally overstated the economic benefits that would come from expanding the scope of direct shipment.

The recent expansion of small-scale production of alcoholic beverages has been dramatic. For example, the proportion of American wine produced by small, family farm wineries has increased dramatically in the last thirty years.¹⁰⁰ According to some estimates, there are now nearly 3000 such wineries, in the United States, double the number that existed in the late 1970s.¹⁰¹ There have been similar increases in the number of small-scale craft breweries and distilleries.¹⁰²

Given their small size, these boutique suppliers cannot furnish enough products to meet the volume requirements of distributors in the three-tier system.¹⁰³ The only economically viable way for these smaller suppliers to reach consumers is to sell directly, either on their own premises or over the internet.¹⁰⁴ This fact has inspired the conclusion that consumers will enjoy greater choice in products and lower prices if direct shipment is widely permitted.

In 2003, the FTC issued a staff report that attracted significant attention for expressing just such a conclusion. The report compared the prices of certain highly regarded wines at retail stores in McLean, Virginia and at on-line retailers who shipped directly to the consumer.¹⁰⁵ The

report concluded that direct shipment could result in cost savings – provided the consumers ordered at least six bottles at a time and chose the right kind of shipping method.¹⁰⁶

But the virtues of direct shipment are easily overstated.¹⁰⁷ To a great extent, the economic benefits of direct shipment, which were described in the FTC report, are available because of the role that wholesalers play in informing consumers about which brands to seek out from suppliers. With the expansion of direct shipment to both consumers and high-volume retailers, wholesalers will lose the economic advantages that permit them to engage in valuable marketing activities, and the entire market for wine – not to mention other alcoholic beverages – will look much different. As Sibley and Srinagesh explain:

When regulations permit large retailers to bypass the three-tier system, wholesalers will no longer have exclusive territories because suppliers will also be able to sell direct to big-box retailers, whose business models do not emphasize marketing investments in the specific brands they carry. Unwilling to shoulder the marketing alone, wholesale competitors are likely to refrain from brand-specific marketing activities, waiting instead for another wholesaler to invest in marketing and to undertake the efforts necessary to create or maintain customer demand for the product. Once another wholesaler performs these activities, the competitors who did not make comparable investments (including any big-box retailers) will benefit from the increased brand awareness and demand stimulated by others' marketing efforts, despite not having performed the activities themselves. Competitors who did not engage in marketing activities for the product can undersell the investors, essentially "free-riding" on the investment of their rivals.¹⁰⁸

Needless to say, a market characterized by skewed incentives and rampant free-riding will not produce efficient outcomes.

Increasing direct shipment is also likely to result in more economic power for large retail outlets at the expense of locally-owned retailers and even wholesalers. If the three-tier system is modified to permit more direct shipment, big-box stores will be positioned to purchase at discounted prices from large suppliers, while wholesalers and smaller sized retailers lose sales and profits.¹⁰⁹ Consumers who shop for certain products at big-box retailers will benefit from

lower prices on those products, but the market as whole will have less variety, poorer information exchanges between consumers and suppliers, and less popular brands will likely increase in price and be sold in fewer outlets.¹¹⁰

Of course, more direct shipment to consumers and retailers will have deleterious effects on regulation, as well. With respect to direct shipments from suppliers to consumer, any regulations about who can buy or about how much can be bought will be reduced to a kind of “honor system.” There will be no-one in position to assure that sales are being conducted in accordance with law.¹¹¹ In addition, direct shipment eliminates the opportunity to restrict sales by limiting the location and hours of operation for retail outlets, which have proven to be effective regulatory responses to increased rates of alcohol abuse or alcohol-related problems.¹¹² Even more generally, direct shipment undermines the regulatory regime in numerous problematic ways. As one state regulator pointed out in testimony to Congress, the direct shipment of alcohol “undermines the ability of states to fully account for the sale of alcohol within their borders.”¹¹³

IV. Granholm and Its Effect on Three-Tier System

Despite the problems associated with direct shipment, not to mention the uncertainty of its economic benefits, the momentum towards removing legal obstacles to direct shipment has continued in the last decade. The most important event in this connection was the Supreme Court’s decision in *Granholm v. Heald*.¹¹⁴ There, the Court ruled that the Commerce Clause prohibited states from regulating direct shipment in a manner that resulted in discrimination in favor of intrastate direct shipments and against interstate direct shipments.

The dispute in *Granholm* arose from attempts by Michigan and New York to regulate the direct shipment of wine from out-of-state suppliers to in-state consumers. Both New York and

Michigan have three-tier regulatory systems for the sale of alcoholic beverages, and both states attempted to modify those systems by licensing in-state wineries to sell their products directly to consumers while not offering licenses to out-of-state wineries on the same terms.¹¹⁵ In Michigan, out-of-state wineries could sell only to wholesalers licensed by the state.¹¹⁶ In New York, out-of-state wineries could sell directly to New York consumers only if they opened a branch, factory, office, or storeroom inside the state.¹¹⁷

A majority of the Supreme Court held that New York and Michigan violated the Commerce Clause through their methods of regulating direct shipment. By focusing on the Commerce Clause as the core of its analysis, the majority opinion made it clear that the problem with the states' laws was their discriminatory character, not their prohibition of direct shipment.

The rule prohibiting state discrimination against interstate commerce follows also from the principle that States should not be compelled to negotiate with each other regarding favored or disfavored status for their own citizens. States do not need, and may not attempt, to negotiate with other States regarding their mutual economic interests. Cf. U.S. Const., Art. I, § 10, cl. 3. Rivalries among the States are thus kept to a minimum, and a proliferation of trade zones is prevented. . . .

Laws of the type at issue in the instant cases contradict these principles. They deprive citizens of their right to have access to the markets of other States on equal terms. The perceived necessity for reciprocal sale privileges risks generating the trade rivalries and animosities, the alliances and exclusivity, that the Constitution and, in particular, the Commerce Clause were designed to avoid.¹¹⁸

In reaching the conclusion that the Commerce Clause controlled the states' ability to regulate alcohol sales, the *Granholm* majority rejected the idea that the ratification of the Twenty-First Amendment had enlarged the states' regulatory power. It held that:

The aim of the Twenty-first Amendment was to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use. The Amendment did not give States the authority to pass nonuniform laws in order to discriminate against out-of-state

goods, a privilege they had not enjoyed at any earlier time.¹¹⁹

Apparently ignoring the Court's focus on the discriminatory effect of the regulations, some commentators concluded that removing barriers to direct shipment could – or should – open the door to a nationwide market in the direct shipment of all kinds of alcoholic beverage products to consumers and retailers.¹²⁰ But the majority opinion in *Granholm* asserted unequivocally that the three-tier system was “unquestionably legitimate.”¹²¹ In addition, subsequent case law in the lower courts made it clear that the problem with the New York and Michigan laws in *Granholm* was the fact that they discriminated against interstate commerce, not that they imposed restrictions on direct shipment.

In one of the earliest post-*Granholm* decisions, *Brooks v. Vassar*, the Fourth Circuit considered a challenge by Virginia consumers and out-of-state wineries to the volume limits on personal importation, which were a part of Virginia's alcoholic beverage control law.¹²² The Fourth Circuit's ruling focused on the plaintiffs' argument that Virginia discriminated against interstate commerce by limited direct sales from out-of-state wineries to consumers to a total of one gallon or four liters of wine.¹²³ In rejecting this argument, the appeals court pointed out that, after some recent amendments, Virginia's law required all in-state wineries to sell to Virginia customers only through the three-tier system, either through their own retail outlets, which had to be licensed within the system, or through wholesalers, who also were licensed within the system.¹²⁴ The Fourth Circuit found no “economic protectionism” in Virginia's regulatory scheme, and therefore concluded that it did not contradict the Commerce Clause principles that were at the core of *Granholm*.¹²⁵

The Second Circuit also relied heavily on the concept of “economic protectionism” in its analysis of a similar challenge to New York regulations in *Arnold's Wines, Inc. v. Boyle*.¹²⁶

There, the regulations at issue permitted an in-state alcoholic beverage retailer to deliver directly to consumers' residences in New York, using the retailer's own vehicles or by using vehicles of a transportation company licensed by the State's liquor authority; but out-of-state retailers did not have the same permission.¹²⁷ The Second Circuit concluded that the New York law did not violate Commerce Clause prohibitions against discriminatory legislation because, under *Granholm*, the Commerce Clause only prohibits discrimination against out-of-state products and producers.¹²⁸ In this connection, the Second Circuit noted that, in any state, there are aspects of the three-tier system that are inherently discriminatory against out-of-state entities. For example, in many states, wholesalers and retailers must be physically present in the state in order to get a license. And there is no question that this kind of discrimination is part of the system that the *Granholm* Court identified as unquestionably legitimate.¹²⁹ Thus, the Second Circuit ruled that the New York regulations were not unconstitutional because they did not discriminate against out-of-state products or producers.¹³⁰

In *Siesta Village Market, LLC v. Steen*, the Fifth Circuit confirmed that *Granholm* did not undermine the integrity of the three-tier system generally and that it only prohibited regulations within that system which created discrimination against interstate commerce.¹³¹ This case arose from a challenge to several different Texas regulations by parties outside of Texas who wanted to make retail sales directly to Texas consumers. In particular, the case focused on rules that permitted an in-state retailer to deliver wine to consumers within the county in which the retailer was located but that prohibited out-of-state retailers from delivering wine to consumers in Texas.¹³² The Fifth Circuit held that such rules passed constitutional muster because they did not discriminate against out-of-state products or producers and because a set of rules governing local

distribution of any products within the state was a “benign incident of an acceptable three-tier system.”¹³³

Conclusion

Given the dramatic effects that e-commerce and internet marketing have had on the economy, it should not be surprising that there would be political ferment for changes in the regulation of alcohol sales, so that selling beer, wine, and spirits could be changed in the way that the sale of other commodities has been. But, as Americans have long recognized, alcohol cannot be sold in the same way as any other commodity. Its use can lead to risks of significant problems for the public health and social welfare, and the sale of alcohol must be regulated in a manner that reduces the chances of abusive consumption.

After over a century of trying to develop an effective method for such regulation, the United States finally succeeded in the wake of Prohibition, when it developed the three-tier system that has worked so well for over eighty years. The regulatory structure of this system maximizes the opportunities to tailor regulations to local conditions and to assure that regulators remain informed about developing problems. In addition, the three-tier system provides substantial economic benefits by improving the flow of information about consumer demand, spreading marketing costs efficiently, and by minimizing some of the transaction costs that can come from try to find the right retail outlets for the thousands of different alcoholic beverage products that are produced at any one time. Overall, the three-tier system has succeeded at maximizing the economic benefits of alcohol sales while minimizing the social risk.

Changing the operation of the three-tier system should not, therefore, be taken lightly, even if direct shipment from producers to retailers and consumers seems to offer a way to expand markets and foster the development of new suppliers and brands. When properly limited and

regulated, direct shipment can be a useful addition to the alcoholic beverage industry. But such direct shipment must be maintained within the framework of the three-tier system.

Although the Supreme Court's decision in *Granholm* might have seemed to offer a chance for a dramatic expansion of direct shipment and a transformation of the regulatory scheme for selling alcohol, a careful reading of that decision, along with subsequent judicial rulings have made it clear that the three-tier system is still consistent with the Constitutional order. While states may not use the three-tier system as an instrument for discriminating against certain products on the basis of where they are made, the system can and should impose other kinds of limits on direct shipment to assure that the regulatory and economic benefits of that system remain unimpaired.

¹ ECONOMIC STUDY REFLECTS POSITIVE IMPACT OF BEVERAGE LICENSEES (Nov. 14, 2014), available at <http://ablusa.org/2014/11/abl-releases-new-economic-impact-study-reflects-positive-impact-of-beverage-licensees/> (last visited November 27, 2015).

² *Id.*

³ *Id.*

⁴ CENTER FOR DISEASE CONTROL & PREVENTION, EXCESSIVE DRINKING COSTS U.S. \$223.5 BILLION available at <http://www.cdc.gov/features/alcoholconsumption/> (last visited December 3, 2015).

⁵ CENTERS FOR DISEASE CONTROL AND PREVENTION, ALCOHOL USE & YOUR HEALTH, available at <http://www.cdc.gov/alcohol/fact-sheets/alcohol-use.htm> (last visited November 29, 2015).

⁶ See *Granholm v. Heald*, 544 U.S. 460, 489 (2005) (discussing the “three-tier” system of regulating the sale of alcoholic beverages at the state level).

⁷ See, generally, Kevin C. Quigley, *Uncorking Granholm: Extending the Nondiscrimination Principle to All Interstate Commerce in Wine*, 52 B.C. L. REV. 1871, 1877-78 (2011) (discussing the current limits on the direct shipment of wine from producers to consumers).

⁸ See *infra* § II.A.

⁹ See *infra* § II.B

¹⁰ See *State Bd. of Equalization of Cal. v. Young's Market, Co.*, 299 U.S. 59, 64 (1936) (discussing the scope of state power to regulate alcohol sales under the Twenty-First Amendment).

¹¹ *Granholm*, 544 U.S. at 473.

¹² *Id.* at 489.

¹³ DAVID S. SIBLEY & PADMANABHAN SRINAGESH, DISPELLING THE MYTHS OF THE THREE-TIER DISTRIBUTION SYSTEM 6 (2008) available at <http://www.five-star-wine-and->

spirits.com/includes/archivos/about_five_start/pdf/three_tier_01.pdf (last visited November 27, 2015).

¹⁴ *Id.*

¹⁵ See WINE SPECTATOR, WINE RATINGS, available at <http://www.winespectator.com/wineratings> (last visited November 28, 2015).

¹⁶ Colleen Graham, *A Guide to Popular Tequila Brands*, ABOUT FOOD, available at http://cocktails.about.com/od/spirits/tp/tequila_brands.htm (last visited November 28, 2015).

¹⁷ Chris Morris, *Craft Distilleries: The Next Local Liquor Boom?* FORTUNE (Aug. 1, 2015) available at <http://fortune.com/2015/08/01/distilleries-craft-beer-liquor/> (last visited November 28, 2015).

¹⁸ 2012 SMALL & INDEPENDENT CRAFT BREWERS' GROWTH IN THE BEER CATEGORY, available at <http://www.craftbeer.com/wp-content/uploads/BrewStat.png> (last visited November 28, 2015) (showing that production at craft breweries increased from 7.1 million barrels in 2006 to 13.2 million in 2012).

¹⁹ SIBLEY & SRINAGESH, *supra* note 13, at 14.

²⁰ *Id.* at 14, n. 25.

²¹ *Id.* at 14.

²² *Id.* at 12.

²³ *Id.*

²⁴ *Id.* at 16.

²⁵ *Id.*

²⁶ UNITED STATES CENSUS BUREAU, AMERICAN FACT FINDER, available at <http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> (last visited November 28, 2015).

²⁷ *Id.*

²⁸ *Id.*

²⁹ SIBLEY & SRINAGESH, *supra* note 13, at 12.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 20.

³⁶ See RUSSELL BLAINE NYE, *SOCIETY & CULTURE IN AMERICA, 1830-1860*, 51 (1974); RONALD G. WALTERS, *AMERICAN REFORMERS 1815-1860* 135-37 (1978).

³⁷ Jack S. Blocker, Jr., *Did Prohibition Really Work? Alcohol Prohibition as a Public Health Innovation*, 96 AM. J. PUB. HEALTH 233, 236 (2006).

³⁸ See 27 U.S.C. § 122, available at <http://www.law.cornell.edu/uscode/text/27/122> (November 29, 2015).

³⁹ *Id.*

⁴⁰ *James Clark Distilling Co. v. Western Maryland Railroad Co.*, 242 U.S. 311, 332 (1917).

⁴¹ *Id.* at 324.

⁴² See *id.*; see also Quigley, *supra* note 7 at 1877.

⁴³ U.S. Const., Amend. XVIII. It is worth noting that the Eighteenth Amendment did not outlaw the consumption of alcoholic beverages.

⁴⁴ Jeffrey A. Miron & Jeffrey Zwiebel, *Alcohol Consumption During Prohibition*, 81 AM. ECON. REV. 242–247 (1991); Jack S. Blocker, Jr., *Did Prohibition Really Work? Alcohol Prohibition as a Public Health Innovation*, 96 AM J. PUB. HEALTH 233, 237 (2006)

⁴⁵ Blocker, *supra* note 37 at 237; *see also* Andrew Sinclair, PROHIBITION: THE ERA OF EXCESS 211–212, 220–230 (1962)

⁴⁶ Harry G. Levine & Craig Reinerman, *Alcohol Prohibition & Drug Prohibition: Lessons from Alcohol Policy for Drug Policy* in DRUGS & SOCIETY: U.S. PUBLIC POLICY 59 (Jefferson M. Fish, ed.) (2006).

⁴⁷ *Id.* at 59.

⁴⁸ ALCOHOL JUSTICE, PROTECTING THE PUBLIC’S HEALTH, available at <https://alcoholjustice.org/images/factsheets/StateControlPublicHealth2014.pdf> (last visited November 29, 2015).

⁴⁹ *Id.*

⁵⁰ Blocker, *supra* note 37, at 239

⁵¹ Levine & Reinerman, *supra* note 46 at 56–57.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ U.S. CONST., amend. XXI.

⁵⁶ *Id.* at § 1.

⁵⁷ *Id.* at § 2.

⁵⁸ *Compare Ziffirin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939) (“The Twenty-first Amendment sanctions the right of a state to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause.”) with *United States v. Frankfort Distilleries*, 324 U.S. 293, 299 (1945) (holding that granting states full authority to regulate alcohol within their borders does not give them “plenary and exclusive power to regulate the conduct of persons doing an interstate liquor business outside their boundaries”).

⁵⁹ *See Ziffirin*, 308 U.S. at 138; *see also State Bd. of Equalization of Cal. v. Young’s Market, Co.*, 299 U.S. 59, 64 (1936).

⁶⁰ *See Frankfort Distilleries*, 324 U.S. at 299; *see also Granholm*, 544 U.S. at 473.

⁶¹ THOMAS BABOR ET AL.; ALCOHOL: NO ORDINARY COMMODITY (2003).

⁶² ALCOHOL USE & YOUR HEALTH, *supra* note 5.

⁶³ *Id.* (footnotes omitted).

⁶⁴ *Legal Issues Concerning State Alcohol Regulation: Hearing Before the H. Subcommittee on Courts and Competition Policy of the Committee on the Judiciary*, 111th Cong. 145 (2010) (statement of U.S. Representative Bobby Rush (D-IL)).

⁶⁵ Grant Schulte, *Nebraska Lawmakers Mull Alcohol Problems in Whiteclay*, News from Indian Country (October 2011) available at <http://www.indiancountrynews.com/index.php/news/9-news-from-through-out-indian-country/12063-nebraska-lawmakers-mull-alcohol-problems-in-whiteclay> (last visited November 29, 2015).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Legal Issues Concerning State Alcohol Regulation supra*, note 64, at 43 (Mar. 18, 2010) (statement of Nida Samona, Chairperson, Michigan Liquor Control Commission).

⁶⁹ *Id.* at 46.

⁷⁰ *Hearing on H.R. 5034: The Comprehensive Alcohol Regulatory Effectiveness (CARE) Act of 2010 of the Committee on the Judiciary*, 111th Cong. 159 (September 29, 2010) Hearing before the House Judiciary Committee, *supra*, note 14, at 159 (statement of Michele Simon, Research and Policy Director, Marin Institute) available at http://judiciary.house.gov/_files/hearings/pdf/Simon100929.pdf (last visited November 29, 2015).

⁷¹ *Legal Issues Concerning State Alcohol Regulation supra*, note 64, at 45 (statement of Nida Samona, then-Chairperson, Michigan Liquor Control Commission).

⁷² *See* SIBLEY & SRINAGESH, *supra* note 13.

⁷³ *Id.* at 14.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *See id.*

⁷⁷ *Id.* at 15.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 26.

⁸¹ *Id.*

⁸² *Id.* at 14 (citing JOHN DUNHAM, *THE ECONOMIC VALUE OF WINE AND SPIRITS WHOLESALERS* (2008)).

⁸³ *Id.* at 16.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 20.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* at 32-35.

⁹⁰ *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

⁹¹ *See* DENNIS W. CARLTON & JEFFREY M. PERLOFF, *MODERN INDUSTRIAL ORGANIZATION* 418-424 (4th ed. 2005).

⁹² SIBLEY & SRINAGESH, *supra* note 13, at 32.

⁹³ *Leegin*, 551 U.S. at

⁹⁴ SIBLEY & SRINAGESH, *supra* note 13, at 33 (discussing *Leegin*).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Leegin*, 551 U.S. at 890 (internal quotations and citations omitted).

⁹⁸ *See* Tim R. Sass & David S. Saurman, *Efficiency Effects of Exclusive Territories: Evidence from the Indiana Beer Market*, in 34 *ECON. INQUIRY* 597, 614 (1996).

⁹⁹ FEDERAL TRADE COMMISSION, *POSSIBLE ANTI-COMPETITIVE BARRIERS TO E-COMMERCE: WINE* (2003) available at https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-report-concerning-possible-anticompetitive-barriers-e-commerce-wine/winereport2.pdf (last visited Dec. 2, 2015).

¹⁰⁰ Matthew B. Mills, *Let History Be Our Guide: Using Historical Analogies to Analyze State Response to a Post-Granholm Era*, 81 *Ind. L. J.* 1097, 1110-11 (2006).

¹⁰¹ Mills, *supra* note 100, at 1111.

¹⁰² Morris, *supra* note 17; 2012 SMALL & INDEPENDENT CRAFT BREWERS' GROWTH IN THE BEER CATEGORY, *supra* note 18.

¹⁰³ Mills, *supra* note 100, at 1111.

¹⁰⁴ FEDERAL TRADE COMMISSION, POSSIBLE ANTI-COMPETITIVE BARRIERS TO E-COMMERCE: WINE (2003) available at https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-report-concerning-possible-anticompetitive-barriers-e-commerce-wine/winereport2.pdf (last visited Dec. 2, 2015).

¹⁰⁵ *Id.*, Appendix A.

¹⁰⁶ *Id.*

¹⁰⁷ SIBLEY & SRINAGESH, *supra* note 13, at 28.

¹⁰⁸ *Id.* at 34.

¹⁰⁹ *Id.* at 38.

¹¹⁰ *See id.*

¹¹¹ *Legal Issues Concerning State Alcohol Regulation supra*, note 64, at 41 (Mar. 18, 2010) (statement of Nida Samona, Chairperson, Michigan Liquor Control Commission).

¹¹² R.A. Hahn, *et al.*, *The Effectiveness of Policies Restricting Hours of Alcohol Sales in Preventing Excessive Alcohol Consumption and Related Harms*, 39 AM. J. PREVENTIVE MED. 590 (2010); *see also* Schulte, *supra* note 65 (describing how state liquor control officials used restricted hours for sales to address a localized increase in the rate of alcohol abuse and alcohol-related crime).

¹¹³ *Hearing on H.R. 5034, supra* note 70 at 152 (statement by Michele Simon, Marin Institute).

¹¹⁴ *Granholt v. Heald*, 544 U.S. 460 (2005).

¹¹⁵ *See id.* at 469-70.

¹¹⁶ *Id.* at 469.

¹¹⁷ *Id.* at 470.

¹¹⁸ *Id.* at 473.

¹¹⁹ *Id.* at 484-85.

¹²⁰ *See, e.g.*, Quigley, *supra* note 7; Kristin Woeste, Comment, *Reds, Whites, and Roses: The Dormant Commerce Clause, the Twenty-First Amendment, and the Direct Shipment of Wine*, 72 U. Cin. L. Rev. 1821 (2004)

¹²¹ *Granholt*, 544 U.S. at 489 (quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1986)).

¹²² *Brooks v. Vassar*, 462 F.3d 341 (4th Cir. 2006).

¹²³ *Id.* at 352.

¹²⁴ *Id.*

¹²⁵ *Id.* at 352-54.

¹²⁶ *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185 (2d Cir. 2009)

¹²⁷ *Id.* at 188.

¹²⁸ *Id.* at 190.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *Siesta Village Market, LLC v. Steen*, 595 F.3d 249 (5th Cir. 2010).

¹³² *Id.* at 260-61.

¹³³ *Id.* at 260.

2016

9th Annual Essay Contest

The 21st Amendment repealed Prohibition and put control over alcohol regulation directly in the hands of the states. Though each state's alcohol control policies are unique, they all include distinct regulations for different types of alcohol. Why are various types of alcohol regulated in different ways? Should they be?

FIRST PLACE

Anna B. Brawley

"It remains true that distilled spirits, per ounce, are the most potent choice, and limiting access to these products relative to other, less-potent options is sound policy. It is equally true, however, that the goals of reducing overconsumption, preventing youth access, and reducing the harmful consequences of consumption can only be met through thoughtful regulation of all alcoholic beverages."

SECOND PLACE

Rebecca Strazds

THIRD PLACE

David King

Deconstructing the Drink Menu: A History of Alcoholic Beverages and Proposed Policy Framework

Anna B. Brawley
December 2, 2016

All alcohol is the same, yet not the same. What we commonly refer to as “alcohol” is actually a vast array of products, known at once for their great diversity and their essential similarity: the presence of ethanol (C_2H_5OH), in varying concentrations, which produces the intoxicating effects that have earned alcohol’s complicated reputation. There are other chemical compounds called alcohols, but for purposes of federal and state regulation, alcohol is defined as a beverage containing some amount of ethanol (at least 0.5 percent alcohol by volume, or ABV) and intended for human consumption. It is the latter characteristic—intentional use by people as a psychoactive substance—that serves as the underlying reason for treating alcohol differently than household chemicals, and differently from other food and drinks. The current American legal framework for alcohol regulation was developed in the twentieth century following the repeal of Prohibition, but our system follows a long tradition of recognizing alcohol’s unique status in society and an ongoing need to manage its negative impacts: confining its use to religious rites, celebratory occasions or medical treatment; developing social norms about acceptable use; and, through state intervention into the market, controlling its production, distribution and access by the public.

Beyond the basic rationale for regulating all alcoholic beverages, there are several assumptions within the American system about different *types* of alcohol that have resulted in a

regulatory scheme that treats different products differently. The three primary categories are as follows, defined by both the raw materials and the production method employed:

1. Beer: naturally fermented from grain, yeast and sugar;
2. Wine: naturally fermented from yeast and grape or other fruit juices; and
3. Distilled spirits (liquor): a concentrated product from either of the other two categories, having higher alcohol content than can be obtained through natural fermentation.¹

These categories are used at the federal level for differing rates of taxation, marketing and labeling requirements, as well as in individual states' liquor control laws relating to taxation, licensing, distribution, and even individuals' consumption. Our complex system for regulating types of alcohol emerged through the interplay of chemistry, economics, culture and politics. This essay will first explore the American history of alcohol and the distinct developments of beer, wine and spirits; second, identify the legitimate public health and economic reasons for treating these products distinctly; and third, propose the following policy framework: that differing regulations for these product types must be *rational*, *equitable* and *practical*.

1: A Brief History of Alcohol(s)

Making and consuming alcohol is an old human activity: most cultures around the world and throughout recorded history have produced some form of fermented drink, traditionally relying on common agricultural or wild-harvested materials at hand and yeasts naturally present in the environment.² Each culture or region's grains or fruits of choice reflect the climate and biodiversity of where they developed: grapes flourished in the Mediterranean region, producing

¹ Not all products fit neatly within these categories; cider, made from apples, is classified as wine but is popularly thought of and marketed like beer; sake, made from fermented rice, is a brewed beverage but typically has alcohol content closer to that of fruit based wine.

² Kinney 2.

wine; hardy grains such as wheat and barley favored in Northern Europe were made into beer; rice, a staple food in East Asia, became sake, rice wine and others; and corn, fundamental to multiple civilizations and tribes in the Americas, yielded chicha. In many societies alcohol was integrated into everyday life, but also regarded as having special properties. Homebrewed, relatively low-alcohol drinks were part of a household's daily diet, especially where potable water was scarce or of marginal quality.³ Recognizing but not fully understanding alcohol's impacts on the mind and body, many cultures from ancient Egypt to Catholic Europe employed alcohol in religious rites, celebrations, and for treatment of mental and physical ailments.⁴

The growth and maturation of alcohol production yielded some of the earliest contributions to the field of chemistry, and began to shape taste people's preferences. Natural fermentation has an upper limit for alcohol content, typically 15 percent, above which the yeast will begin to die.⁵ Dilute fermented products spoiled quickly without access to cold storage, limiting their economic potential, while higher-potency products such as wine became recognized for their stronger physiological effects, good quality, and value as a trading commodity that could withstand long-distance transport.⁶ Wine, in addition to its Biblical significance in the Judeo-Christian world, enjoyed elevated status across a widespread trading network on multiple continents, a locally-produced or exotic luxury enjoyed by elites.⁷ As individual regions cultivated distinct varieties and "brands" for their products, wine became an expression of social and cultural status, and shaped a sophisticated understanding of alcoholic

³ Gerritsen 25.

⁴ Kinney 2-3.

⁵ Kinney 3.

⁶ Gerritsen 26-27.

⁷ Gerritsen 30.

beverages not simply as a diet staple, but as an economic unit that can be evaluated on its taste, rarity, potency, and reflects on its owner as a person of style and distinction.

The next advancement in the chemistry of alcohol occurred around the tenth century, with the creation of concentrated alcohol products through the process of distillation.⁸ Natural fermentation had always limited the potency of alcoholic beverages, but distillation exploits ethanol's lower boiling point and allows it to be separated from the water and other materials present in beer and wine, if the vapor is captured and collected until it cools into a liquid. Repeating the process can increase its purity beyond 90 percent ABV.⁹ Scholars interested in the secrets of alchemy found that distilling alcoholic beverages extracted their essence into a liquid with noticeably enhanced effects, and began incorporating distilled spirits into medical treatment and other specialized uses.¹⁰ Spirits were not widely consumed recreationally in Europe until the sixteenth century, but their invention fostered a major shift in perception about alcohol: that distilled spirits were, unlike naturally fermented beverages, a fundamentally artificial product that had a distinct chemical composition from beer and wine, which had existed for thousands of years. This perception, laden with assumptions that the physical, social and moral effects of distilled spirits are different than those of beer and wine, persists even today.

By the early modern period, cultures had developed their own distinct tastes for and skills in producing alcoholic beverages: brewing beer, for example, continued at home but emerged as a professional niche in local economies of northern Europe: monasteries and local breweries made a living from supplying higher-quality products to nearby communities, similar to a baker, miller or butcher.¹¹ As Europe's dominant powers sought to expand their political and economic

⁸ Kinney 3.

⁹ Kinney 3; Gerritsen 27.

¹⁰ Huckelbridge 7-8.

¹¹ Gerritsen 30-31.

empires to other continents, each brought their beverages of choice and the means to produce more in new lands. Thus it may be said that America is not only a land of immigrants, but a land of imports: grapes cultivated by Spanish missionaries in California for wine; gin made by Dutch settlers in what would become New York; and rum produced from Jamaican molasses and slave labor in the Caribbean.¹² In the lands far east of California, people struggled to produce a suitable local version of European wines, finding that American varieties of grapes were readily available but did not produce good wine, while European varieties were highly susceptible to blight and did not survive long enough to produce multiple harvests. Wine therefore remained for several decades a prized commodity from overseas, and solidified its reputation as a luxury suited to the tastes of well-educated, well-heeled citizen.¹³

As settlers spread further west and established communities among rich agricultural lands, two beverages of local origin gained prominence: cider and whiskey made from apples and grains, respectively.¹⁴ Rye, and later corn, were the most popular grains from which to produce whiskey, faring better in the local climate than imported grains and yielding a potent spirit when distilled. These products became most popular in more rural areas, as they were easy to produce and more readily available in places far from the robust trade in imported British rum and or locally-produced rum from British molasses.¹⁵ Overall, distilled spirits, were cheap and available in the American colonies and territories beyond; wine remained a high-end product; and beer's short shelf life kept it from being commercially viable for another century.¹⁶ Whiskey and rum had distinct economic advantages in this period: as had happened in other regions of the

¹² Pegram 5.

¹³ Lukacs 13.

¹⁴ Heath 310.

¹⁵ Huckelbridge 29.

¹⁶ Pegram 9.

world, spirits were a boon to farmers as a desirable value-added product from agricultural surplus, easier to transport and more valuable than the grain crop alone. Distilled spirits were far superior for storage, portability and protection against spoilage, and in frontier areas served as a reliable currency for barter.¹⁷ In the cities and towns further east, a steady supply of molasses and imported rum to the eastern colonies ensured that economically and politically, rum remained their drink of choice.

Prior to the American Revolution rum dominated the colonial market, its dominance protected by British trade policies. When the new nation severed relations with Britain and import duties were imposed on foreign products, however, corn whiskey rose to prominence as a local substitute when molasses ceased to flow from the south.¹⁸ The prolonged war and costs of independence had created a fiscal problem, however, and caused lawmakers to resurrect discussions which had caused considerable turmoil in England a century earlier and more recently the subject of riot and rebellion in America: excise taxes.¹⁹ Excise taxes, levied on products imported or produced locally and before they reach the consumer, were viewed as relatively easier to administer but favored economic interests in urban areas and represented stronger intrusion into citizens' lives by the state than many desired.²⁰ While these taxes can be levied on any product, they are often applied products perceived as luxuries, providing a basis for state revenue that most impacts those with disposable income.²¹ Protection of public health is also often articulated as one purpose of "sin" taxes on products such as alcohol and tobacco, an

¹⁷ Gerritsen 36.

¹⁸ Slaughter 71.

¹⁹ Slaughter 15-24.

²⁰ Excise taxes had even been used in Britain to promote the interests of larger distillers who could better absorb the cost of their taxes through higher volume of production. These distillers actively participated in the creation of legislation and were designated to collect the tax, giving them significant economic and political leverage to drive smaller producers out of business. Slaughter 13-14.

²¹ Gerritsen 87.

argument which also originated in this period and continued as an undercurrent of many subsequent taxation discussions.²²

It is notable that the first excise tax in the United States was not only an alcohol tax, but specifically a tax on distilled spirits produced within its borders, a provision which, unlike a concurrent tax on imported spirits, was vehemently opposed by frontier regions of the new nation. The tax, enacted in 1791, had been the subject of multiple debates in Congress but gained new political momentum as Secretary of the Treasury Alexander Hamilton examined the nation's finances, mix of revenue sources, and pressing need to reduce its war debt. Hamilton argued that more sources of taxation were necessary to support the government.²³ Relations between the more densely-settled northeast and the primarily rural areas of Ohio, Kentucky and North Carolina had been contentious throughout the creation of the new government, with ideological and political conflicts over the role of the state, individual liberty, and fair representation for all the states in Congress. This new excise tax was seen as a direct affront to the rural economy and to farmers dependent on whiskey production and trade: many areas were effectively isolated from larger markets in the east and could not easily ship goods, as well as having a small labor pool and relatively little circulating currency. Whiskey served a vital economic function in these areas but had become victim to national politics, not just among differing states but among small and large distillers. Large distillers generally supported the tax because it aligned with their own interest in maintaining competitive advantage against smaller producers.²⁴ The unrest culminated in an uprising in western Pennsylvania, commonly known as the Whiskey Rebellion in 1794, and became an early test for the United States to demonstrate its willingness to enforce its laws, even

²² Babor et al. 33; Slaughter 100.

²³ Slaughter 96.

²⁴ Slaughter 71.

in the face of armed opposition. Ultimately the rebellion was subdued by military intervention and opposition changed to submission. A new political administration repealed the tax in 1802, with no new taxes levied on alcohol until the Civil War.²⁵ The first domestic alcohol excise tax did, however, establish precedent for distinguishing between types of alcohol for purposes of taxation, a common feature of today's alcohol taxes as well.

Concurrent with the economic and political developments in America's alcohol industry was increasing concern about the effects of alcohol on private and public life in the nation, and greater desire to promote or legislate moderation. The proliferation of distilled spirits at the turn of the nineteenth century caused some to question whether the country's drinking habits were healthy. In 1784 Dr. Benjamin Rush published *An Inquiry into the Effects of Spiritous Liquors upon the Human Body, and Their Influence upon the Happiness of Society*, detailing the supposed negative health and moral impacts of liquor as a threat to an orderly democratic society, extolling the virtues of "natural" fermented beverages, and positing that they were completely different substances.²⁶ Thomas Jefferson, the nation's premier gentleman farmer, claimed that "No nation is drunken where wine is cheap; and none sober where the dearness of wine substitutes ardent spirits as the common beverage."²⁷ Popular perception of beer, cider, wine and distilled spirits in the early nineteenth century were certainly influenced by the longer histories of these products, their differing roles in social life, and limited understanding of the underlying chemistry of alcohol. Indeed, the belief that distilled spirits had differing effects on the body and different composition persisted, even after scientific demonstrations of their underlying similarity by showing the presence of ethanol in each.²⁸

²⁵ Slaughter 226; Pegram 9.

²⁶ Pegram 14.

²⁷ Lukacs 15.

²⁸ Kinney 10.

Urbanization, industrialization and immigration in nineteenth century America transformed its social and economic structures, resulting in the concurrent growth of saloon culture and the temperance movement. Alcohol continued to be consumed at home by men and women alike, but increasingly men spent their free time and wages in saloons. Saloons were establishments perceived as important spaces for political discourse and social bonding by their male patrons, but abhorred by others as sources of vice, crime and violence against women and children when the men returned home.²⁹ Temperance, originally described as voluntary abstention from liquor—not naturally fermented products—became an important movement in which women found their political voice and promoted the virtue of temperance for a healthy family and democratic society.³⁰ Temperance became a widespread, though not universal, cultural value, with overall alcohol consumption declining between 1800 and 1850.³¹

The temperance movement shifted ideology in the 1830s, from simply avoiding distilled spirits to “teetotaling,” abstaining from all alcoholic beverages and even promoting local bans on sales of alcohol.³² Criticizing others’ drinking while consuming wine or brandy was perceived as middle-class hypocrisy, and the public discourse began to engage with all alcohol types as potential causes for rising social ills in large cities and small towns. At the same time, large-scale immigration to the U.S. brought greater ethnic diversity, and with it more forms of alcohol: German immigrants in particular had a profound and lasting impact on American alcohol preferences, bringing the knowledge and skills needed to scale up beer brewing to a commercial scale in the North and Midwest. German, Irish, Italian and other groups had different attitudes toward alcohol use and perceived teetotalism as against their values and as an excessive intrusion

²⁹ Pegram 4, 10-11, 53.

³⁰ Pegram 77.

³¹ Pegram 43.

³² Pegram 33.

into private life, while middle-class Protestant teetotalers viewed immigrants as undermining American values.³³ Alcohol of all types became a target for social reformers interested in the profound social problems rampant in American cities: poverty, poor housing, crime, abuse of women and children. Where previously alcoholic beverages had been described as having medicinal benefits in moderation, they were now described as having significant social and economic costs, with many calling for legislative action.³⁴

By the end of the nineteenth century saloon culture had shifted from whiskey to beer, but saloons remained important social spaces for working men and continued to attract greater criticism as the number of outlets increased.³⁵ The advent of commercial refrigeration gave the beer industry the needed technology to scale up production to match and exceed that of distilled liquor, as well as better bottling technology to make it easier for customers to purchase for consumption at home.³⁶ Brewing companies continued to consolidate, creating a few companies with a great deal of market share; the market was further dominated by importing the “tied house” system from Britain, in which a manufacturer purchases or secures an exclusive relationship with a saloon to sell their products. A steady supply of beer from a manufacturer, and additional benefits such as lines of credit and equipment purchases, insulated saloon owners from financial risk, and ensured access to the market for producers. Combined, these industry shifts created a fiercely competitive environment for beer producers and retailers, incentivizing producers to open more retail outlets and vie with neighboring businesses for customers. Some relied on dubious tactics such as touting the health benefits of beer and downplaying its alcohol

³³ Pegram 77, 94-95.

³⁴ Pegram 89.

³⁵ This shift in taste did not significantly impact the South, where whiskey and bourbon remained the primary drink of choice. Pegram 56.

³⁶ Pegram 93.

content, selling outside business hours, attracting younger customers or turning a blind eye for service to minors, and engaging in price wars which promoted cheap drinks and overconsumption.³⁷

The political landscape of alcohol regulation was marked by division and mutual distrust among its stakeholders. The Anti-Saloon League, Women's Christian Temperance Union and other anti-alcohol groups pointed to all alcohol, but saloons and beer in particular, as a problem needing legal solutions; rural America perceived saloons as an urban issue and their own consumption of cider and wine not part of that problem; immigrant communities and ethnic groups with more favorable perceptions of alcohol believed controlling alcohol use was best left to the family, not the state.³⁸ Consolidation within the alcohol industry resulted in horizontal and vertical market integration, concentrating economic and political power that was viewed with concern in an era characterized by strong anti-trust sentiment. Even the federal and state governments were perceived by the prohibitionists as having pro-alcohol bias: the proceeds of the alcohol tax, enacted following the Civil War, became a significant revenue source, up to 27% of total federal government revenue prior to 1920.³⁹ Reliance on this tax made governments seem too willing to collaborate with the liquor industry to maintain this funding source; while it did encourage greater enforcement on producers who evaded the tax, the targets were primarily small-scale rural distillers, with a higher tax rate on distilled spirits and more incentive to actively collect taxes on these products.⁴⁰

The politics of alcohol policy were further complicated by rivalries and uneasy alliances among the alcohol industry, often perceived from the outside as a unified interest, but in reality

³⁷ Pegram 96-97.

³⁸ Kvvig 15; Pegram 77.

³⁹ Gerritsen 110.

⁴⁰ Pegram 130.

pitted against each other to capture market share or differentiate themselves from “problem” alcohol.⁴¹ Distillers attempted to distance themselves from public criticism of saloon culture, but were regularly mired in their own scandals involving price manipulation, speculative purchases and adulteration of products with low-quality filler substances.⁴² Brewers and vintners highlighted their products as traditional pairings with food and as healthy alternatives to “demon” liquor, while saloons proliferated and American wine became synonymous with Skid Row.⁴³ The shifting landscape of “dry” laws and tax rates presented various opportunities for industry cooperation against the common enemy, prohibition, but also strategic lobbying to ensure that one producer type was exempted from restrictions on the others. One may assume that the federal taxes levied on beer and distilled spirits, but not wine, prior to 1916 were decisions made in isolation by policymakers, nor the reduction in the beer tax between 1901 and 1914.⁴⁴ The looming prospect of national prohibition in the early 1900s forced industry groups to re-evaluate their own interests and determine whether or not they would join together in opposition, spurred by shifting public opinion that all alcohol is the same, a view not previously held by the public and certainly not by the separate industries now being painted with the same brush.⁴⁵ This internal division and persistent belief that not all alcohol products are created equal set the stage for one of the most flawed of American domestic policies, the Eighteenth Amendment and the Volstead Act.

Cataloguing the flaws of Prohibition is a much larger task than what can be laid out here, but not the least of its flaws was its unequal treatment of beer, wine and spirits. Grain alcohol

⁴¹ Pegram 99-100.

⁴² Huckelbridge 130-131.

⁴³ Lukacs 94.

⁴⁴ Alcohol and Tobacco Tax and Trade Bureau.

⁴⁵ Lukacs 95.

had already been at a disadvantage during the First World War with food rationing that included a ban on producing grain-based alcohol, and a mandatory low alcohol content (2.75% ABV) for beer.⁴⁶ The Eighteenth Amendment outlawed the “manufacture, sale, or transportation of intoxicating liquors” as well as importation into the United States, which many Americans had assumed to be distilled spirits as a majority of states debated and ultimately ratified the law through 1919.⁴⁷ The passage of the Volstead Act the same year, however, created laws to implement the newly-ratified amendment, and stated unequivocally that the new law applied to all alcoholic beverages with at least 0.5 percent alcohol by volume. This restriction effectively dismantled most of legal alcohol industry nationwide—except for the provision stating that “non-intoxicating cider and fruit juices” for home consumption.⁴⁸ This exemption not only illustrates the problematic design of the law, but deeply-held beliefs that fruit-based drinks were simply not the same as other alcohols. As a result, California grape growers thrived on “wine brick” shipments of grape juice, with coy warnings not to leave the container in a warm place, lest it become alcoholic.⁴⁹ Other producers revived characterization of alcohol as having medicinal benefits, because another loophole in the law allowed savvy producers to secure the few permits available to produce alcoholic products that could be procured with a prescription. The most famous Prohibition-era alcohol enterprise, bootlegging liquor, did not require a legal loophole to thrive. In the absence of a legal market, criminal networks formed to meet the demand of a thirsty public, focusing on the most potent forms of alcohol, which yielded the most profit.⁵⁰

⁴⁶ Pegram 147.

⁴⁷ Moore and Gerstein 61.

⁴⁸ Kyvig 15-16.

⁴⁹ Lukacs 99-100.

⁵⁰ Huckelbridge 203.

The affordable and available raw materials for home winemaking and DIY distilling reinforced that some alcohol consumption was still acceptable, while otherwise law-abiding citizens could take comfort in the idea that the law protected the nation against an irresponsible liquor industry.⁵¹ While ostensibly applied to all types of alcoholic beverages, the new law highlighted existing cultural differences in alcohol use and engendered new ones: many families continued to drink discreetly at home, but many abstained; large urban centers became famous for images of speakeasy culture in which young men and women, black and white, caroused together in defiance of the law. Alcohol consumption is estimated to have decreased between 1920 and 1933, a combination of good-faith compliance with the law, higher prices on the black market that made alcohol less affordable, and a shift in attitudes toward alcohol as a single controlled substance, with consumption driven less by individual tastes and more by potency and ease of access.⁵²

The slow cultural shift toward “alcohol” as a single category had first been codified in the Volstead Act, but could not erase the complex histories of beer, wine, cider, and distilled spirits and the assumptions about each. Prohibition was repealed in 1933 with ratification of the Twenty-first Amendment, but eight states retained a ban on liquor throughout the decade, even after re-legalizing beer and wine.⁵³ Each state was empowered to enact their own alcoholic beverage control laws, but the legacy of the Volstead Act and federal tax policies provided a framework, defining alcoholic beverages as anything containing 0.5 percent alcohol by volume and assigning different tax rates on different types of alcoholic beverages.

⁵¹ Pegram 152.

⁵² Kyvig 18.

⁵³ Pegram 186-187.

Equally influential on states' law was a report commissioned in 1933 by the Rockefeller Foundation called *Toward Liquor Control*, which outlined a framework for state-level alcohol regulation intended to protect against the excesses before Prohibition and the failed experiment that followed. The authors, Raymond Fosdick and Albert Scott, posited that different types of alcohol should be treated differently and articulated this long-held belief in their rationale: "The experience of every country supports the idea that light wines and beers do not constitute a serious social problem."⁵⁴ This rationale was applied to the taxation of alcohol, described not simply as a revenue source but as a means of encouraging temperance by making higher-alcohol products more expensive.⁵⁵ While the report noted that taxation based on alcohol content may be best for discouraging overconsumption, as a practical measure, tax rates by product type would serve as a proxy.⁵⁶ The report also proposed limiting the availability of distilled spirits to fewer points of access than beer and wine by limiting which products can be served under what permit or license, and went so far as to say that low-alcohol beer "should be obtainable by the bottle, for off-premises consumption, practically without limitation. Its sale should be allowed by grocery stores, drug stores, delicatessen and general stores, and indeed by any merchant who so desires. [. . .] The sale of such beer by the glass, with or without meals, should be permitted in restaurants, hotels, beer gardens, clubs and, indeed, in any reputable establishment."⁵⁷ By regulating the market more tightly for some products, they argued, consumers would make the rational economic choice to substitute liquor for beer or wine, and in social settings that hearken back to the traditions of naturally-fermented alcohol on each family's table.

⁵⁴ Fosdick and Scott 33.

⁵⁵ The tax rate should not be so high, however, to encourage production and sales on the black market as a means of avoiding the tax: taxation is presented as a balance between regulating demand and avoiding incentives for bootlegging. Conlon 734; Fosdick and Scott 35, 110-111.

⁵⁶ Fosdick and Scott 128; Conlon 731.

⁵⁷ Fosdick and Scott 47.

By the twentieth century it was well understood that different types of alcoholic beverages had different potency based on their chemically-possible ranges of ethanol concentration, but this fact alone does not explain the enduring distinctions made in federal and state policies among beer, wine and spirits. The cultural and political histories of each product's development in the United States, and even earlier in their respective regions of origin, continued to influence popular perceptions and policy decisions from *Toward Liquor Control* to taxation to the state alcohol control systems still in place today. The rise of California's wine industry to global prominence has certainly motivated the development of monthly "wine clubs," tasting rooms and direct shipping permits allowing consumers to order their products online, all activities unheard of under the strict three-tier systems originally enacted in each state. The social and economic importance of beer, America's most popular alcoholic beverage, and the explosion of the craft brewing industry have influenced the preferential federal and state tax rates for craft beers in relation to mass-produced brands. And a system that justifies regulating separately two otherwise-identical dining establishments, one with a full alcohol license and the other with a license for beer and wine only, perpetuates our age-old relationship with beer, wine and food as a natural combination.

2: Protecting the Public Health and Promoting a Fair Market

The brief historical narrative in Part 1 illustrates the many forces—technological, economic, cultural, political—that contributed to the current American system of alcohol regulation, at both the federal level and replicated in some form within each state. Historical accident is not in itself a basis for policymaking, however, and the question remains whether beer, wine and spirits should continue to be regulated separately, and if so, on what basis. *Toward Alcohol Control* offered one compelling and enduring rationale, that some types of

alcohol have greater impacts than others and should be controlled accordingly. A possible answer for the twenty-first century emerges from two of the overall policy goals for alcohol control: protecting the public health and maintaining an orderly, well-regulated market for all alcoholic beverages. It is important first to regulate all alcoholic beverages on a common basis, then to make further distinctions among product types.

From a public health perspective, all alcohol is essentially the same: beer, wine and spirits contain ethanol, and therefore all have the potential for abuse, misuse or the harmful impacts of consumption by specific populations, notably pregnant women and youth. Public health policy researchers, medical professionals and addiction specialists tend to speak about “alcohol” as a general category, not distinguishing between individual types for purposes of policymaking, and track annual per capita consumption by gallons of ethanol, often accompanied by estimates by product type based on standardized drink sizes (12 oz. beer, 4 oz. wine, 1 oz. distilled spirit).⁵⁸ Ethanol has a specific and predictable effect on the body: upon introduction through the mouth and throat, a small amount of alcohol is absorbed immediately, with another 20 percent absorbed in the stomach and the remainder through the small intestine. The presence of food in the digestive system and other factors influence the timing and intensity of the effects, but the liver processes ethanol at a steady rate.⁵⁹ While distilled spirits are commonly believed to have worse health outcomes because it is possible to consume a larger volume of ethanol relative to the volume of the beverage, intoxication can occur with any alcoholic beverage in sufficient quantity, and over time it is ethanol that causes addiction, cirrhosis and withdrawal symptoms.⁶⁰ Public health professionals acknowledge an increased risk of overdose from consumption of

⁵⁸ Moore and Gerstein 28.

⁵⁹ Kinney 10-11.

⁶⁰ Gerritsen 18.

distilled liquors, but maintain that all alcohol contributes to negative social and health outcomes: vehicle-related injuries and fatalities, intimate partner and family violence, poor health and lost productivity, avoidable medical costs, early death and cycles of substance-use related trauma.

If all alcohol has costs to the public and to the individual, then regulation of alcohol must encompass all products, not just those with highest alcohol content. This has become increasingly true in an industry with continual innovation in alcohol-based products, from low-calorie “diet” beers, to fortified beer and wine, to previously unimagined products such as powdered alcohol and alcoholic whipped toppings.⁶¹ It remains true that distilled spirits, per ounce, are the most potent choice, and limiting access to these products relative to other, less-potent options is sound policy. It is equally true, however, that the goals of reducing overconsumption, preventing youth access, and reducing the harmful consequences of consumption can only be met through thoughtful regulation of all alcoholic beverages. Individual consumers do not display uniform consumption habits: approximately 20 percent of adults in the U.S. consume 90 percent of the total alcohol sold annually.⁶² Because ethanol is the relevant intoxicant to regulate, ensuring that policy addresses all ethanol-containing beverages is an important first step, and differentiating between high-alcohol and low-alcohol products in taxation, access points and other controls should follow.

Alcohol control is predicated not only on protecting public health and safety, but on the regulation of a market for a product with significant externalized costs and considerable profit potential that, if unchecked, would be against the public interest.⁶³ Indeed, many states’

⁶¹ Powdered alcohol, most recently marketed under the name Palcohol, has been met with skepticism and concern by state and federal regulators even following approval of a few products by the Tax and Trade Bureau in 2015. Powdered alcohol is explicitly illegal in a majority of states, and poses significantly regulatory challenges within the current system which focuses on alcohol-containing liquids. Center for Alcohol Marketing and Youth.

⁶² Babor et al. 41.

⁶³ Moore and Gerstein 13; Gerritsen 4.

regulators have redefined their understanding of the work since repeal of Prohibition to the present day, with increased focus on industry regulation.⁶⁴ Many hallmarks of state alcohol control systems are primarily intended to prevent criminal enterprise and ensure a fair business climate, from criminal penalties for selling alcohol without a license, to restrictions on certain trade practices that undermine the functioning of three independent tiers (manufacturer, wholesaler, retailer). As the history of alcohol control in America illustrates, disparate levels of regulation and taxation on different product types, and the outsized influence of one specific industry sector, can create distorted incentives in the market or favor the proliferation of one product over another. The market for alcoholic beverages is complex, with different types of products continually gaining or losing ground in consumer preferences and with only a loose affiliation between price and potency—one bottle of limited-production specialty beer may be more expensive than a “shooter” of low-grade whiskey.⁶⁵ Economists describe elasticity of demand, the degree to which demand is sensitive to a slight increase or decrease in price; Americans’ preference for beer has been relatively price inelastic, and may substitute this product when higher-alcohol alternatives are more expensive.⁶⁶

In this market of steady demand for alcohol and many options that can satisfy that demand, creating unreasonable restrictions on one sector while favoring another can shift both operators and consumers toward the cheapest, most freely-available choice and create perverse business incentives. A policy limiting the number of liquor stores but allowing service of beer at any establishment, for example, could have the simultaneous effects of ensuring dominance of beer producers and distributors in a local market, and encouraging policies that protect existing

⁶⁴ Moore and Gerstein 63.

⁶⁵ Babor et al. 104.

⁶⁶ Babor et al. 108.

liquor stores' business interests and create barriers to entry for would-be retailers. While the three-tier system and regulation of trade practices were designed to prevent consolidation and monopoly within the liquor industry, these alone do not eliminate the need to examine alcohol control policies across all types of products containing alcohol, and prevent unnecessary burden or insufficient regulation on each.

3: Good Alcohol Control Policy: Rational, Equitable and Practical

Using the goals established in Part 2—protecting the public health and promoting a fair market—and the recognition that all alcoholic beverages contain ethanol, but some much more than others, a framework for regulation of different types of alcoholic beverages may be established. One may reasonably conclude that if ethanol is the problem, then designing policy around specific ethanol concentration should be the solution. This paper comes to a different conclusion, however, and instead upholds the basic framework of our current regulatory system: regulating and taxing products based on categories of like products. In addition to the market characteristics articulated in the previous section and weak correlation between potency and price, the fact remains that alcohol policy is not only carried out at the federal and state level, but in thousands of bars, restaurants, package stores, outdoor festivals, catered events, airplanes, and other settings nationwide and through myriad individual interactions every day. Legislation and policies with such broad reach and cumulative significance for the general public, business interests in the alcohol industry, local governments and enforcement professionals, and other impacted groups must be designed with minimal burden and therefore maximum chance of compliance. A policy framework differentiating between different types of alcohol should therefore meet the following criteria: to be *rational*, *equitable* and *practical*.

The first test, rationality, requires that alcohol control policies for different types of alcohol be evidence based and address the costs that alcohol control is attempting to prevent or mitigate. Though not precise, regulating different categories of alcoholic beverages according to their typical alcohol content range provides a means of associating the scale or risk of negative impacts to the amount of ethanol per unit of drink. For example, a regulation allowing a liquor store to provide free samples of their products to customers might specify different volume limits per product type, based on a reasonable ratio of relative alcohol content. A limitation on a restaurant license to serve only beer and wine should not be based only on the enduring belief that those beverages are integral to the experience of a meal, but also on the desire to establish healthy social norms for youth that consuming lower-alcohol beverages with a meal is responsible and encourages moderation. Rationality also supposes that there can be arbitrary and inappropriate distinctions between regulations on product types, favoring one over another and obscuring the fact that all still contain some amount of ethanol. While the proposal in *Toward Liquor Control* that limited outlets for distilled spirits seems rational, the recommendation to allow sales of beer in as many places as are economically sustainable is not. A rational policy recognizes the need for overall control to reduce the potential costs of all forms of alcohol, then places some additional controls on products with higher alcohol content, which can deliver the most immediate and intense impact per ounce.

A good alcohol control policy must also be equitable across product types, not necessarily affording them the same privileges, but ensuring that the rationale on which differences are based does not unduly favor one sector of the industry over another. The history of alcohol regulation provides many examples of ostensibly public-minded policies that, intentionally or accidentally, provide a boon to one type of business—the preferential tax rate for

craft beer producers has been a significant economic development tool for that sector, but cannot be said to be equitable across all brewers, let alone all manufacturers. Similarly, many wine producers enjoy the ability to serve the public directly without participating in the other two tiers, including shipment of alcohol to a consumer in another state, a privilege conveyed in several states to wineries alone.⁶⁷ Equitable regulations are not only important to the businesses operating within that system, but also to the overall functioning of a well-regulated market in which balanced incentives prevent exploitation of loopholes, do not drive demand disproportionately to the cheapest or most potent products, and are not influenced by any one industry sector's political motivation to secure more market share from the others or protect their own interests through placing additional restrictions on others.

Finally, an alcohol control policy must pass the most important test, practicality, or it cannot be effectively and consistently implemented. While typically a government's peace officers are tasked with enforcing the law, to a large degree alcohol control laws are predicated on voluntary compliance first, with the enforcement language necessary to sanction an individual or organization that does not comply. It is this third test that any regulatory scheme based purely on ethanol content inevitably fails: within the inventory of an individual manufacturer there may be products ranging from low-alcohol beer to potent barley wine, to say nothing of a package store or bar that offers a wide selection of all product types. While it is feasible (and required) to measure alcohol content for purposes of labeling and compliance with federal law, designing a policy such as daily sampling limits or differentiated tax rates becomes impossible to administer both at the state level and at each point of sale: a busy bartender could not be expected to track each customer's cumulative alcohol intake from multiple products, and calculating excise taxes

⁶⁷ Wine Institute.

owed for a ten-brand product line would become a rather complicated algebra problem. Using product types as a proxy for alcohol content is not without flaws: beer, wine and distilled spirits all vary considerably in their potency, and some products such as cider and sake do not neatly fit in their defined categories with average alcohol content, though they share production methods with wine and beer, respectively. All policies must be subjected to the question, “Does this work?” Alcohol policies in particular must be scrutinized further, or they cannot be broadly complied with and enforced: “Does this work in a variety of retail settings? Does it take a great deal of time for an employee to carry out? Does it require too much discretion, or not enough? Does it provide a business sufficient flexibility to incorporate this into their business model?” Categorization of alcohol products, though imperfect, provides a practical, easy-to-understand framework on which regulation and taxation of different product types can be based.

No policy is perfect, but there are better and worse ways to promote an orderly and functional alcohol market while protecting the public health, safety and welfare. Much of our current system of alcohol regulation, including each state’s alcohol control framework, encompasses all beverage products containing alcohol. At the same time, these systems treat different types of alcohol differently, with complex historical, political and cultural reasons that have persisted to the present day. There remain valid reasons for differentiation among beer, wine and distilled spirits: the concentration of ethanol predictably varies between product types, and higher-alcohol products are easier to consume quickly and have historically represented a greater profit potential. Present day regulation should not, however, favor one product over another or assume that there is any inherently “safe” form of alcohol. Effective regulation of alcohol should encompass all alcoholic beverages, and where types are treated differently, policies should be rational, equitable and practical.

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2017

10th Annual Essay Contest

The Supreme Court has recognized “temperance” as a permissible goal of state alcohol regulation. Define temperance as it would apply in today’s alcohol marketplace. Is it still relevant today? Should temperance still be recognized as a permissible goal of alcohol regulation?

FIRST PLACE

Joseph Uhlman

“By shedding the outdated connotations that link temperance to its early goals of promoting Protestant values, a definition of temperance appears that is in-line with what Americans already support: increasing the safety of their communities and improving the health of those around them.”

SECOND PLACE

Timothy Gervais

THIRD PLACE

Henrik Born

THE SYNTAX OF THE SIN TAX:

WHY REDEFINING TEMPERANCE WILL PROMOTE DEFENSIBLE ALCOHOL LEGISLATION IN TODAY'S MARKETPLACE

Joseph Uhlman

“It is not possible to make a bad law. If it is bad, it is not a law.”

—Carrie Nation¹

I. INTRODUCTION

Temperance is not dead. Recent social commenters have asserted that the Twenty-First Amendment signaled the death of Prohibition – and thus the temperance movement – as “the great failed social experiment.”² Even noted documentarian Ken Burns stated in an interview about Prohibition that “[t]here’s nothing noble about unintended consequence.”³ But this widespread belief in the demise of temperance is misplaced. The Twenty-First Amendment contains a regulatory provision that allows states to restrict the flow of alcohol within its borders,⁴ and the Supreme Court has held that temperance is a permissible goal for state alcohol regulation.⁵ Because of this, temperance is still alive in American courts.

But the current state of temperance is unwell. Courts have given no precise definition of temperance, and the most recent Supreme Court case on the Twenty-First Amendment has cut against its authority.⁶ To revive temperance’s standing in both the public eye and in the courts, a reliable legal definition is needed that addresses both modern social concerns about alcohol while comporting to changes in technology and commerce that impact its use and distribution.

To that end, this essay synthesizes the history and goals of the temperance movement, Supreme Court jurisprudence, and dictionary definitions to recommend the modern legal definition of temperance be: policies and laws that promote moderation in the use of intoxicating

drink for the purpose of promoting health and safety. Temperance must be the sole goal of any law claiming it, and it must have observable results towards meeting that goal.

Section II of this essay will discuss the history of the temperance movement, the Twenty-First Amendment, and the legal evolution of temperance as a valid state goal. Section III will discuss the proposed definition of temperance, how it would apply to today's alcohol marketplace, and why it is superior to the current definition of temperance. Finally, this essay will consider how this definition would be defended if legally challenged.

II. BACKGROUND

A. *A Brief History of the Temperance Movement*

The temperance movement first gained nationwide traction in the United States following the Civil War.⁷ The movement gained steam as a response to the sudden changes in American life way from an agrarian society towards a much more industrialized nation, causing working-class men to seek alcohol as an escape from the harsh realities of early industrial life.⁸ Even Abraham Lincoln reportedly recognized this upcoming social conflict by saying that “after Reconstruction, the country's next question would be the suppression of legalized liquor.”⁹

During this period, alcohol was perceived as a threat to society largely because it separated the man from his family.¹⁰ Women were either discouraged or forbidden from entering drinking establishments, so “[t]he saloon thereby served to effectively divorce husbands from wives.”¹¹ Critics of this behavior further warned that “alcohol could disintegrate social and family loyalties and that this disintegration would be followed by poverty and crime and a frightful depth of conjugal squalor.”¹²

These critic's concerns were well founded. The death rate due to alcohol was between 4.9–5.8 people per 100,000 in the decade leading up to Prohibition,¹³ much higher than the 1.0–2.6 in the years immediately following the passage of the Eighteenth Amendment.¹⁴ And advocates of the time noted higher incidents of domestic violence, too:¹⁵ “They were “fighting against the rape and battering of victims of all ages.”¹⁶ Due to these concerns, temperance societies were formed across the country, largely organized by women and religious leaders.¹⁷

These societies spread quickly, and the temperance movement rapidly gained steam. So much so that between the end of the Civil War and the dawn of the Nineteenth Century, temperance had become a central issue in the American political discourse.¹⁸

B. *The Twenty-First Amendment*

On January 16, 1919, the New York Times reported that “the American nation was voted dry today by Constitutional Amendment when the Legislature of Nebraska, the home of William Jennings Bryan, one of the foremost champions of prohibition, ratified the proposal.”¹⁹ In January 1919, Congress ratified the Eighteen Amendment, and Prohibition was set to begin on January 16, 1920.²⁰

But Prohibition did not have the desired impact of temperance on America. Soon after Prohibition began, so too did criminal activity. Organized crime developed, and the movement of contraband – with all of the criminal behavior that accompanied it – expanded and flourished throughout the country.²¹ The impact of this criminal activity had the opposite effect: the 1920s are commonly known as the “Roaring Twenties,” not the “Temperate Twenties.”²²

Disillusionment towards the unintended consequences of Prohibition grew, and the national conversation about alcohol temperance continued.²³ Finally, the nation decided the

consequences were greater than the benefits, and the Eighteenth Amendment was repealed by the Twenty-First Amendment in 1933.²⁴ But at the time, the Twenty-First Amendment was not seen as the end of the temperance movement, but only as the end of National Prohibition.²⁵

The Twenty-First Amendment's text shows that the national discussion about temperance was very much alive. Section 2 of this Amendment allows states to regulate the shipment of out-of-state alcohol within its borders. Specifically, this section of the Amendment reads: "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."²⁶ The debate over the interpretation of this section continues today.

C. *Recent History of The Twenty-First Amendment in the Courts*

Judicial interpretation of Section 2 of the Twenty-First Amendment is ongoing. Due to changes in technology, society, and the judicial interpretation of the dormant commerce clause, the forty-eight words of this clause continue to be part of the debate on constitutional interpretation and congressional authority. Three cases are essential for understanding how temperance became a permissible state goal for regulating alcohol, and how that part of Section 2 has evolved: *Idlewild*, *Bacchus*, and *Granholm*.²⁷

Early Supreme Court cases on the Twenty-First Amendment typically gave great deference to a state's ability to disallow out-of-state alcohol.²⁸ However, in 1964, *Hostetter v. Idlewild Bon Voyage Liquor Corp.* began to change how the Court read Section 2 of the Twenty-First Amendment.²⁹ In *Idlewild*, the Court invalidated a New York regulating the sale of alcohol at a duty-free area of the John F. Kennedy Airport.³⁰ For the first time, the Court read limitations to state regulation into Section 2.³¹ Specifically, the Court rejected the notion that the Dormant

Commerce Clause did not apply to Section 2.³² Placing Section 2 under the ambit of the Dormant Commerce Clause was a novel interpretation, and set the table for further interpretation.

Twenty years later, the Court further restricted a state's authority to regulate alcohol in *Bacchus Imports Ltd. v. Dias*.³³ Hawaii had an excise tax law applied only to out-of-state alcohol.³⁴ In response to the law's legal challenge, the state asserted that the law was valid despite its discrimination against out-of-state commerce because Section 2 of the Twenty-First Amendment prioritized state interests when dealing with alcohol.³⁵

The Court disagreed.³⁶ It found the Hawaiian law to be pure economic protectionism, and to allow it to continue would potentially cause market Balkanization.³⁷ Instead, the Court noted that discriminatory laws could only be used to further the core purpose of the Twenty-First Amendment, such as temperance.³⁸

Finally, the most recent Supreme Court case to deal with temperance and the Twenty-First Amendment is *Granholm v. Heald*.³⁹ In *Granholm*, the Court consolidated two cases dealing with direct-shipment wine sale laws in Michigan and New York.⁴⁰ Both states prohibited out-of-state wineries from shipping directly to consumers, unless the out-of-state winery set up a physical location in the state.⁴¹

The Court invalidated both states' direct-shipment laws.⁴² In doing so, stated that all alcohol laws must follow the commerce clause, but a law dealing with alcohol violated the commerce clause could still be saved by the Twenty-First Amendment if the core values of that law aligned with the core values of the Amendment.⁴³ While both states argued their laws were written to protect minors from underage drinking, the Court held that assertion unsupported, as neither state provided objective evidence to substantiate this claim.⁴⁴

The synthesis these cases present two requirements that must be met to promote temperance as a legitimate interest under Section 2 of the Twenty-First Amendment.⁴⁵ First, temperance must be the law's only purpose; and second, the temperance effort must be real and observable.⁴⁶ Additionally, these cases show a plain pattern of the Court moving alcohol sales into the ambit of the commerce clause, and away from the exceptions the Twenty-First Amendment affords.

III. ANALYSIS

Temperance is an outdated word. It has become so deeply associated with alcohol that its use in that context now primarily defines the term.⁴⁷ Temperance as a concept is intertwined with Prohibition, which as noted above, is viewed somewhat less than ideally in public consciousness.⁴⁸ Worse yet, it is notoriously undefined when used by the courts, particularly the Supreme Court.⁴⁹ One scholar found that the best synthesis of the Court's usage of the term was a "means of controlling the 'evils' of alcohol."⁵⁰

But this outdated, poorly-defined concept of temperance need not be the case. Temperance, as a concept, is alive and well in the United States – but it isn't associated with the word.⁵¹ It needs to be redefined to better reflect the modern efforts towards alcohol moderation. Thus, it should be defined as: policies and laws that promote moderation in the use of intoxicating drink for the purpose of promoting health and safety. This definition, an additional framework for legislative preparation, would allow temperance to be applicable in today's marketplace as a useable jurisprudential definition that accurately reflects society's near-unanimous accord for the modern core concepts term.

A. *Temperance, Hidden in America Today*

Temperance still exists. Despite its negative public connotations, most Americans still wholeheartedly support the non-moralistic principles of temperance. The goals of the early American temperance movement were “to promote health, safety, and Protestant morality” in the context of alcohol consumption.⁵² Subtract Protestant morality from those goals, and temperance is everywhere.

1. *Mothers Against Drunk Driving*

Take Mothers Against Drunk Driving (MADD). Founded in 1980, MADD was founded by Candace Lightner after her daughter was struck and killed by a drunk driver.⁵³ Its goal is to reduce the number of deaths and injuries from drunk driving to zero.⁵⁴ Today, MADD is everywhere: there is at least one office in every state, along with international posts.⁵⁵ It also boasts over three million members, and countless more supporters.⁵⁶

And MADD isn't a controversial organization. Apart from some very isolated protest groups⁵⁷ – none of which were well received by the public⁵⁸ – MADD exists as one of the few unchallenged advocacy. No serious group is advocating for drunk driving, or eliminating drunk driving laws.⁵⁹ In fact, MADD is so successful that it has consistently met its goals early, including a goal in 2000 to reduce the number of alcohol-related fatalities by 20%.⁶⁰

This is because the underlying goals of temperance are uncontroversial. One would be hard-pressed to find an honest social activist who thinks drunk driving is a right reserved for all motorists. And of course that's true: as a society, we implicitly understand that one's ability to freely act ends at the point where it impacts another.⁶¹ John Stuart Mill said it best in his famous aphorism: “my right to swing my fist ends where your nose begins.”⁶²

MADD exists to protect the health and safety of all motorists. It exists uncontroversially, and has so much support in America that it regularly achieves its goals. In fact, absent the early American's temperance movement's aim of 'promoting Protestantism',⁶³ MADD is very much a temperance organization. So because America supports MADD, they support the tangible goals of temperance.

2. *Alcoholics Anonymous*

Alcoholics Anonymous (AA) is also a temperance organization. Founded in 1935 by Bob Smith and Bill Wilson, its initial goal was to "fix drunks."⁶⁴ The organization's famous '12-step program' to treat alcoholism has been used successfully in over 160 countries.⁶⁵ AA boasts successful treatment of over two million alcoholics, and has an American membership of 1.6 million.⁶⁶

AA is also largely uncontroversial. While its methods have been called into question, these challenges deal exclusively with the science behind the '12-step' program.⁶⁷ No respected organization has asserted that alcoholism should not be treated, nor has any organization advocated for alcoholism. In fact, even the idea of such an organization advocating such a position outside of satire is absurd.

And of course advocating for alcoholism would be absurd. Combating alcoholism is a universally accepted and acceptable goal, and it's acceptable entirely because America still believes the non-religious goals of the early temperance movement. AA promotes the health of its members in addressing their alcoholism, and because promoting health was one of the core goals of the early temperance movement was addressing the health concerns of alcohol use, AA is a temperance organization.

3. *Non-Moralistic Temperance is Thriving*

If the assertion that AA and MADD are temperance-based organizations seems basic, it should. Put forth in terms divorced from the moralism of the early movement, no reasonable person disagrees with temperance's goals of promoting health and safety towards alcohol consumption. The issue is that there has been little recognized effort to distance temperance from its moralistic early roots – and this is a problem. Temperance is still a goal recognized by the Supreme Court as a valid end in alcohol regulation, but because the term is so charged with the moralistic history of the early temperance movement and Prohibition, courts are hesitant to apply the term.

A modern approach, coupled with a modern definition, address this problem. The modern approach should be to strip temperance from any moralizing – and thus from its moralistic history – and instead be focused on tangible efforts to promote health and safety. “Policies and laws that promote moderation in the use of intoxicating drink for the purpose of promoting the health and safety” is an uncontroversial goal if framed as an umbrella definition for other successful and accepted organizations like MADD and AA, and allow temperance as a term to re-enter the courts as an observable, permissible goal of state alcohol definition.

B. *Redefining Temperance, Losing Abstinence*

The only direct definition of temperance found at the Supreme Court occurred in a footnote, it only recorded another state's definition, and that definition was only a citation to the dictionary definition.⁶⁸ That definition of temperance was: “moderation in or abstinence from the use of intoxicating drink.”⁶⁹ However, the proposed definition has dropped the term ‘abstinence’ from the definition. This was done intentionally.

Abstinence is another word that is loaded with implicit connotations. Merriam Webster's Dictionary, whose Third Edition gave the above Supreme Court's dicta definition of temperance,⁷⁰ currently defines abstinence as "habitual abstaining from intoxicating beverages, [or] abstention from sexual intercourse."⁷¹ In fact, if one Googles "abstinence," the first five pages⁷² are devoted entirely to sexual abstinence. Only on the last link of the sixth page does one find a link to abstinence as a concept outside of sex, which leads to a food addiction page it refers to abstinence as "avoiding foods that contain sugar, flour or wheat."⁷³

This is far from ideal. If the goal is to create a definition of temperance that is divorced from moralism, using a word that singularly defines a moralistic movement is ill-advised. But even outside of that, the concept of advocating for an alcohol-free position has plenty of negative associations in the temperance movement.

"Teetotalers" was a term used by critics of the early temperance movement as shorthand for "Capital-T Temperance," applied to temperance advocates who demanded total abstinence from alcohol.⁷⁴ Since these early teetotaling advocates were viewed as a part of a religious movement,⁷⁵ then advocating total alcohol abstinence may still have a moralistic attachment to it. If redefining temperance as a term with a measurable goal is to have any chance of success, it must shed all of its prior moralism.

Nothing is sacrificed by dropping abstinence from the proposed definition and leaving only moderation. Having moderation encompass the idea of withholding from alcohol is a permissible use of the word: to again use the Merriam-Webster's dictionary, one definition of "moderation" is "observing reasonable limits;" and in the context of "in moderation" as an idiom, "in a way that is reasonable and not excessive."⁷⁶ In other words, it is entirely permissible

to ‘moderate’ your alcohol intake to zero, as such a moderation would be both reasonable and not excessive.

And this interpretation would likely hold in a court. It is a canon of statutory or linguistic construction that “words are presumed, unless the contrary appears, to be used in their ordinary sense, with the meaning commonly attributed to them.”⁷⁷ This canon bears the use of ‘moderation’ as permissible stand-in for ‘withhold’, as common dictionary definitions bear ‘to withhold’ covered under the ambit of ‘moderation’; and thus, a permissible construction.

This may seem like picking nits, but it is not. Any new definition of temperance needs to include observable goals; but more importantly, it needs to be new. If it is still associated with past use of the term, then it still retains its moralistic underpinning – and unlikely to be utilized by any courts seeking to apply temperance as a permissible state goal for alcohol regulation.

C. *The New Definition of Temperance, Applied*

Temperance can be used as a modern goal for state alcohol regulation. However, previous attempts have failed largely for two reasons: lack of measurable results, and overburdening interstate commerce. The proposed definition of temperance in this essay combats the first reason; it justifies itself with the second.

1. *Providing Measurable Goals*

For the proposed definition to be successful for a state justifying its alcohol restrictions, courts have made it clear that temperance efforts need a plain and observable real-world impact. This is why stripping moralism from the definition of temperance is important: it takes away the discomfort courts appear to have in dealing with intangible moral concepts applied to tangible

effects like interstate commerce. But reviewing what laws haven't worked as temperance justifications instructs what may work in the future.

The concept of temperance as a justification for interstate commerce is found in cases that interpret the text of the Twenty-First Amendment.⁷⁸ To review, the Supreme Court's decisions in *Idlewild*, *Bacchus*, and *Granholm* can be synthesized into two requirements about temperance under the Amendment for be acceptable: first, temperance must be the law's only purpose; and second, the temperance effort must be real and observable.⁷⁹

Lower courts have shown great reluctance to allow a state alcohol law to pass this two-part test. In *Pete's Brewing Co. v. Whitehead*, the court rejected the Missouri's claim that labeling requirements promoted temperance.⁸⁰ The court called Missouri's attempts to rely on temperance "half-hearted," noting "there is absolutely no evidence before the Court regarding how [the Missouri law] promotes moderation, much less abstinence, in alcohol consumption."⁸¹

So too did the court reject claims of temperance in *Loretto Winery v. Gazzara*.⁸² In *Gazzara*, New York argued that a law allowing grocery-store sales of wine, but only for wine made with New York grapes, permissible because it promoted the goal of temperance due to the lower alcohol content of the New York wine.⁸³ The court rejected this assertion, because even if true, it did not justify allowing wine with domestically-grown grapes over out-of-state grapes, if both alcohol quantities were the same.⁸⁴

*Dickerson v. Bailey*⁸⁵ also highlights the failure that comes with asserting temperance without an observable goal. In *Dickerson*, the court struck down a Texas law that restricted the sale of out-of-state wine manufacturers straight to the consumer.⁸⁶ The court rejected the assertion that temperance was the goal of the law because, "Texas residents can become as drunk on local wines or on wines of large out-of-state suppliers."⁸⁷

This is a sampling of the cases where courts have failed to find temperance as a valid state goal.⁸⁸ Admittedly, partially the claims of tolerance by the states asserting them failed because of what appears to be kitchen-sink arguments; however, the far more significant reason for failure was because the states didn't show an observable, measurable impact that these laws could have on tolerance. Consider: all fifty states have DUI laws, and all of those states set the impairment level at .08% Blood Alcohol Content (BAC).⁸⁹ But in some states, those with a commercial driver's license have tougher BAC laws imposed on them, as low as .04% BAC.⁹⁰ These are the drivers transporting alcohol across state lines; thus, these laws burden interstate commerce – yet none of these laws have been successfully challenged. The reason is simple: they pass the two-part test above. These laws solely promote temperance – and on what are usually larger vehicles –and they have observable effects.

So, the framework this essay's proposed definition creates is simple, and can be readily applied. The proposed definition of temperance deals solely with health and safety through alcohol moderation, and those goals can be observed in legislation if the law in question tackles temperance head-on, and explains what sort of observable impacts the legislation should show. This is a straightforward definition, with what should be a straightforward justification. Any law claiming temperance should have this justification written into it when the law is being enacted to improve the chances of it being upheld in the event of a legal challenge.

2. *The Evolving Twenty-First Amendment Jurisprudence Aids an Evolving Temperance Definition*

The decisions in *Granholm* and *Bacchus* support changing the definition of temperance. These decisions move the goalposts on alcohol as inside the scope of the dormant commerce

clause and not outside of it, almost certainly an interpretation of the Amendment that the drafters did not intend.⁹¹ But apart from concerns about constitutional interpretation,⁹² the recognition of a changing society helps the argument towards redefining temperance.

In *Granholm*, the court noted that changes in technology influence how interstate shipment of wine should be assessed.⁹³ Critically, the court stated:

“It is therefore understandable that the framers of the Twenty-first Amendment and the Webb-Kenyon Act would have wanted to free States to discriminate between in-state and out-of-state wholesalers and retailers, especially in the absence of the modern technological improvements and federal enforcement mechanisms that the Court argues now make regulating liquor easier.”⁹⁴

In other words, today’s technology would have changed how the drafters structured the Twenty-First Amendment.

This is great news. If modern technology can impact how the Supreme Court reads the Constitution, then modern society can impact how we define words. And if we accept that temperance as a modern concept is alive and well,⁹⁵ then we can redefine it to reflect its current place in society. Here, that means temperance as the promotion of health and safety towards alcohol use, stripped of its moralistic overtones. Any challenges towards this modern definition can be justified by the modern judicial interpretation of the constitutional amendment it derives its authority from.

IV. CONCLUSION

Temperance is not dead, it is simply outdated. Society still promotes the core goals of temperance, but has shied away from the term because of its historical and moralistic

connotations. The Supreme Court also recognizes temperance as a permissible goal, but lower courts have also avoided the word due to a lack of clarity in defining it in the modern world.

Both of these issues are addressed with an updated definition that applies to today's alcohol marketplace. By shedding the outdated connotations that link temperance to its early goals of promoting Protestant values, a definition of temperance appears that is in-line with what Americans already support: increasing the safety of their communities, and improving the health of those around them.

And by adding a framework under this definition that encourages legislators to craft laws that address these concerns in direct and measurable ways, courts will be more willing to apply temperance as a permissible goal in state regulation when those laws are challenged. This would be a major win for temperance advocates, because it takes a currently ambiguous term of art that the Supreme Court has recognized as Constitutionally important and redefines it on solid ground. And since the Court has shown a willingness to recast the meaning of the Twenty-First Amendment in a modern light, this is not an unreasonable goal.

To keep temperance relevant in today's world, and to protect the modern goals of temperance in the courts, it should be redefined as: policies and laws that promote moderation in the use of intoxicating drink for the purpose of promoting health and safety.

¹ CARRY AMELIA NATION, THE USE AND NEED OF THE LIFE OF CARRY A. NATION 254 (1909).

² Jay Maeder, *Blows Against the Empire Repeal*, DAILY NEWS, May 29, 2000, at 23; *see also*

Kevin A. Sabet, *Prohibition's real lessons for drug policy*, L.A. TIMES (Oct. 5, 2011)

(“Prohibition — America's notoriously ‘failed social experiment’”), available at

<http://articles.latimes.com/2011/oct/05/opinion/la-oe-sabet-prohibition-20111005>; Wayne Hall,

What are the policy lessons of National Alcohol Prohibition in the United States, 1920-1933?

SOC’Y FOR THE STUDY OF ADDICTION, 105, 1164 (“‘Everyone knows’ that national alcohol

prohibition (NP) in the United States between 1920 and 1933 was a quix-otic [sic] and failed

social experiment.”).

³ *Q&A With Ken Burns About His Prohibition Documentary*, IMBIBE MAG. (Sept. 27, 2011),

available at <http://imbibemagazine.com/qa-with-ken-burns/>.

⁴ *See* U.S. Const. amend. XXI, § 2.

⁵ *See infra* notes 27–46 and accompanying text.

⁶ *See infra* notes 39–46 and accompanying text.

⁷ Sidney J. Spaeth, *The Twenty-First Amendment and State Control Over Intoxicating Liquor:*

Accommodating the Federal Interest, 79 CAL. L. REV. 161, 169 (1991).

⁸ *Id.*

⁹ *Id.*, *citing* NORMAN H. CLARK, DELIVER US FROM EVIL: AN INTERPRETATION OF AMERICAN

PROHIBITION 50 (1976).

¹⁰ Marcia Yablon, *The Prohibition Hangover: Why We Are Still Feeling The Effects Of*

Prohibition, 13 VA. J. SOC. POL’Y & L. 552, 559 (2006).

¹¹ Kevin Wendell Swain, *Note: Liquor By the Book In Kansas: The Ghost of Temperance Past*, 35 WASHBURN L.J. 322, 324 (1996).

¹² Yablon, *supra* note 10, at 553, *quoting* NORMAN H. CLARK, *DELIVER US FROM EVIL: AN INTERPRETATION OF AMERICAN PROHIBITION* 42 (1976).

¹³ UNITED STATES DEPARTMENT OF COMMERCE, *SURVEY OF CURRENT BUSINESS*, NO. 35 (July, 1924), available at <https://bea.gov/scb/pdf/1924/0724cont.pdf>.

¹⁴ *Id.*

¹⁵ *See generally* Erin M. Masson, *The Woman's Christian Temperance Union, 1874-1898: Combatting Domestic Violence*, 3 WM. & MARY J. OF WOMEN & L. 163 (noting various prominent temperance advocates, and their focus on the overlap between domestic violence and alcohol consumption).

¹⁶ MARY DALY, *PURE LUST* 286 (1983).

¹⁷ Spaeth, *supra* note 7, at 168; W. J. Rorabaugh, *Reexamining the Prohibition Amendment*, 8 YALE J.L. & HUMAN. 285, 288 (1996).

¹⁸ Daniel Glynn, *Comment: 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, 118 (2011).

¹⁹ Henry S. Cohn & Ethan Davis, *Article: Stopping the Wind that Blows and the Rivers that Run: Connecticut and Rhode Island Reject the Prohibition Amendment*, 27 QUINNIPIAC L. REV. 327, 327 (2009)(*quoting Nation Voted Dry; 38 States Adopt the Amendment*, N.Y. TIMES (Jan. 17, 1919) at 1.).

²⁰ AMENDMENT TO THE CONSTITUTION OF 1919, 40 Stat. 1941–42.

²¹ Emily Greene Owens, *Are Underground Markets Really More Violent? Evidence from Early 20th Century America*, AM LAW ECON REV 13:1 (2011).

²² *Id.*

²³ See *Id.* (noting that Prohibition was even a major issue in the presidential campaign of 1928.)

²⁴ *Id.*

²⁵ Yablon, *supra* note 10, at 553.

²⁶ U.S. Const. amend. XXI, § 2.

²⁷ *Granholm v. Heald*, 544 U.S. 460 (2005); *Bacchus Imports Ltd. v. Dias*, 468 U.S. 263 (1984); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964).

²⁸ See also *Joseph Finch & Co. v. McKittrick*, 305 U.S. 395, 398 (1939); *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401, 404 (1938); *State Bd. of Equalization v. Young's Market Co.*, 299 U.S. 59, 62-64 (1936); *State Bd. of Equalization v. Young's Mkt. Co.*, 299 U.S. 59, 62 (1936).

²⁹ *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964).

³⁰ *Id.* at 333–334.

³¹ *Id.*

³² *Id.*

³³ *Bacchus Imps. v. Dias*, 468 U.S. 263 (1984).

³⁴ *Id.* at 265.

³⁵ *Id.* at 275–276.

³⁶ *Id.* at 276.

³⁷ *Id.*

³⁸ *Id.*; see also John Foust, *Note: State Power to Regulate Alcohol under the Twenty-First Amendment: The Constitutional Implications of the Twenty-First Amendment Enforcement Act*,

41 B.C. L. REV. 659, 684 (“Although nowhere in Bacchus does the Court explicitly state what the central purpose or core power of the Amendment is, the language implies that the only legitimate purpose would be “temperance” or other means of controlling the “evils” of alcohol.”).

³⁹ Granholm v. Heald, 544 U.S. 460, 460 (2005).

⁴⁰ *Id.* at 471.

⁴¹ *Id.* at 470.

⁴² *Id.* at 476.

⁴³ *Id.* at 484–486.

⁴⁴ *Id.* at 489–490.

⁴⁵ Foust, *supra* note 38, at 686–687.

⁴⁶ *Id.*

⁴⁷ Compare the 1828 Webster’s Dictionary definition of the term, which does not mention alcohol: “Patience; calmness; sedateness; moderation of passion[.]” *Temperance, Webster’s Dictionary* (1828), with modern versions, which all mention its use in terms of alcohol consumption. See also *Temperance, Merriam-Webster Online Dictionary* (November 28, 2017) (“moderation in or abstinence from the use of alcoholic beverages”); *Temperance, Oxford Dictionary* (11th ed. 2008) (“Abstinence from alcoholic drink”).

⁴⁸ See *supra* note 2 and accompanying text.

⁴⁹ In the fifteen cases the Supreme Court has heard that deal with the concept of temperance as a valid state goal, only one has referenced a definition of temperance – and only in a footnote, and only to note a state’s definition of the term, which was only a restatement of a dictionary definition. See 44 *Liquormart v. Rhode Island*, 517 U.S. 484, 490 n.4 (1996) (“Webster’s Third

New International Dictionary (1961) defines 'temperance' as 'moderation in or abstinence from the use of intoxicating drink.'")

⁵⁰ Foust, *supra* note 38, at 684.

⁵¹ See *infra* notes 54–59 and accompanying text.

⁵² Owens, *supra* note 21, at (2): 433

⁵³ *Saving Lives, Serving People*, MOTHERS AGAINST DRUNK DRIVING (last accessed Nov. 29, 2017), available at <https://www.madd.org/history/>.

⁵⁴ *Our Story*, MOTHERS AGAINST DRUNK DRIVING (last accessed Nov. 29, 2017), available at <https://www.madd.org/about-us/our-story/>.

⁵⁵ *Local Offices*, MOTHERS AGAINST DRUNK DRIVING (last accessed Nov. 29, 2017), available at <https://www.madd.org/local-offices/>.

⁵⁶ Wendy J. Hamilton, *Mothers Against Drunk Driving—MADD in the USA*, INJURY PREVENTION 90–91 (2000), available at <http://injuryprevention.bmj.com/content/injuryprev/6/2/90.full.pdf>.

⁵⁷ Tom McCaffery, *Controversial New Group: Drunk Drivers Against Mothers*, HUFFINGTON PO. (June 6, 2009), available at https://www.huffingtonpost.com/tom-mccaffrey/controversial-new-group-d_b_205894.html; *see also* *GetMADD*, GETMADD (last accessed Nov. 28, 2017), available at <http://www.getmadd.com/>.

⁵⁸ *Id.*

⁵⁹ *But see* Radley Balko, *Abolish Drunk Driving Laws*, REASON.COM (Oct. 11, 2010), available at <http://reason.com/archives/2010/10/11/abolish-drunk-driving-laws> (asserting that drunk driving laws cause more drinking fatalities)

⁶⁰ *Mothers Against Drunk Driving*, ACTIVIST FACTS (last accessed Nov. 29, 2017), available at <https://www.activistfacts.com/organizations/17-mothers-against-drunk-driving/>.

⁶¹ See generally Marci A. Hamilton, *Foundations Of Church Autonomy: Article: Religious Institutions, the No-Harm Doctrine, and the Public Good*, 2004 B.Y.U. L. REV. 1099, 1104–1110 (2004) (discussing the no harm doctrine).

⁶² See JOHN STUART MILL, *ON LIBERTY* (1859).

⁶³ Owens, *supra* note 21, at (2): 433.

⁶⁴ ALCOHOLICS ANONYMOUS WORLD SERVICES, *ALCOHOLICS ANONYMOUS: THE STORY OF HOW MANY THOUSANDS OF MEN AND WOMEN HAVE RECOVERED FROM ALCOHOLISM*, 4TH ED (New York, NY: Alcoholics Anonymous World Services, Inc., 2001).

⁶⁵ Michael Gross, *Alcoholics Anonymous: Still Sober After 75 Years*, AM. J. PUB. HEALTH, (Dec. 2010), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2978172/>.

⁶⁶ *Id.*

⁶⁷ Gabrielle Glaser, *The Irrationality of Alcoholics Anonymous*, THE ATLANTIC (Apr. 2016), available at <https://www.theatlantic.com/magazine/archive/2015/04/the-irrationality-of-alcoholics-anonymous/386255/>; Lee Ann Kaskutas, *Alcoholics Anonymous Effectiveness: Faith Meets Science*, J. ADDICT DIS. (Sept. 18, 2009), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2746426/>.

⁶⁸ See *supra* note 49 and accompanying text.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Abstinence*, *Mirriam-Webster Online Dictionary* (November 28, 2017).

⁷² Not counting the links to the dictionary definitions, which all contain references to sexual abstinence.

⁷³ *Abstinence*, FOOD ADDICTS ANON. (last accessed Nov. 30, 2017), available at <http://www.foodaddictsanonymous.org/abstinence>.

⁷⁴ RAYMOND CALKINS, *SUBSTITUTES FOR THE SALOON*, 305 (2d rev. ed., 1919).

⁷⁵ Erin M. Masson, *Essay: The Woman's Christian Temperance Union, 1874-1898: Combatting Domestic Violence*, 3 WM. & MARY J. OF WOMEN & L. 163, 164 (noting the public perception of “temperance supporters as tee- totaling moral zealots”).

⁷⁶ *Temperance*, *Miriam-Webster Online Dictionary* (November 28, 2017).

⁷⁷ *Caminetti v. United States*, 242 U.S. 470, 482 (1917).

⁷⁸ See *supra* notes 27–46 and accompanying text.

⁷⁹ Foust, *supra* note 38, at 686-687.

⁸⁰ *Pete's Brewing Co. v. Whitehead*, 19 F. Supp. 2d 1004, 1017–1020 (W.D. Mo. 1998).

⁸¹ *Id.* at 1018.

⁸² *Loretto Winery Ltd. v. Gazzara*, 601 F. Supp. 850, 861 (S.D.N.Y. 1985)

⁸³ *Id.* at 863

⁸⁴ *Id.*

⁸⁵ *Dickerson v. Bailey*, 87 F. Supp. 2d 691, 710 (S.D. Tex. 2000)

⁸⁶ *Id.* at 693–694.

⁸⁷ *Id.* at 710 (S.D. Tex. 2000).

⁸⁸ See also *Bridenbaugh v. O'Bannon*, 78 F. Supp. 2d 828, 837 (N.D. Ind. 1999) (invalidating an Indiana direct-to-consumer shipment law that failed to promote temperance); *Quality Brands v. Barry*, 715 F. Supp. 1138, 1138, 1143 (D.D.C. 1989) (invalidating a District of Columbia law

requiring alcoholic beverage sellers to store beverages within its jurisdiction because it did not promote temperance).

⁸⁹ *DUI & DWI*, DMV.ORG (last accessed Nov. 30, 2017), available at <https://www.dmv.org/automotive-law/dui.php>.

⁹⁰ *Id.*

⁹¹ Harris Danow, *Recent Development: History Turned "Sideways": Granholm V. Heald And The Twenty-First Amendment*, 23 CARDOZO ARTS & ENT LJ 761, 772 (2006) (Noting that Justice Black, who participated in the passage of the Twenty-First Amendment as a senator, wrote in his dissenting opinion of *Idlewild* that the holding made "inroads upon the powers given the States by the Twenty-first Amendment. Ironically, it was against just this kind of judicial encroachment that Senators were complaining when they . . . paved the way for the Amendment's adoption.").

⁹² For an excellent critique of the Supreme Court's interpretation of the Twenty-First Amendment, see Clayton Silvernail, *Smoke, Mirrors and Myopia: How the States Are Able to Pass Unconstitutional Laws Against the Direct Shipping of Wine in Interstate Commerce*, 44 S. TEX. L. REV. 499, 545–548 (2003).

⁹³ *Granholm v. Heald*, 544 U.S. 460, 524 (2005).

⁹⁴ *Id.*

⁹⁵ See *supra* notes 53–67 and accompanying text.

2018

11th Annual Essay Contest

The licensing of individuals and businesses that are involved in the commerce of alcoholic beverages is an important feature of state-based alcohol regulation. Why is licensing necessary for an orderly marketplace, what impact does it have on public health and safety and what are the benefits provided by licensing systems?

FIRST PLACE

Nathaniel Moyer

"The local regulatory framework model embraced by the 21st Amendment... has proven both durable and sustainable... The clear benefits of the current system should not be lightly disregarded, and wise policymakers will seek to preserve it."

SECOND PLACE

Timothy Gervais

THIRD PLACE

Shannon Auvil

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

Nathaniel E. Moyer

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. Squeglia, 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.*

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 *Granholm 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 *Granholm*, 544 U.S. at 473).

⁹⁴ *Granholm*, 544 U.S. at 473.

⁹⁵ *Id.* at 489.

⁹⁶ *Byrd*, 883 F.3d. at 623.

⁹⁷ *Id.* at 620.

⁹⁸ *Granholm*, 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).



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