
Erosion or Explosion? **the** **FUTURE** **of Alcohol Policy in the United States**

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One of the earliest issues in our country's conception years was inhibited trade between colonies.¹ Upon adoption of our Constitution, the Congress was empowered to fully regulate interstate commerce.² The Supreme Court has long protected the Congress's power as exclusive and weighed in against states who would seek to protect their industries from competition of other states.

However, the era of distributing alcohol culminating in Prohibition sparked an entirely new level of commercial problems. Thus, the Constitution underwent two major amendments, starting by banning alcohol altogether, and secondly loosening that initial restraint to set up a new framework of regulation that would be entirely state-based.

Over the ensuing decades, societal attitude toward alcohol has adjusted, and the courts have increasingly tweaked the balance of interstate commerce law with state regulatory frameworks for alcohol control. The Supreme Court seemed to take a hard turn away from

¹ Hamilton, Alexander. Federalist No. 7 "The Same Subject Continued: Concerning Dangers from Dissention Between the States." *The Federalist*. Ed. Jacob E. Cooke (Middletown, Conn.: Wesleyan University Press, 1961).

² U.S. Const. art. I, § 8, cl. 3.

generally unfettered state alcohol control during 2005 in the opinion of *Granholm v. Heald*.³

Lower courts scrambled to realize what such a holding could mean, and circuits subsequently divided over the implications of a clear change of course as it relates to state alcohol regulation.⁴

In 2019, *Tennessee Wine & Spirits v. Thomas* confirmed the direction of the Highest Court insisting that federal interstate commerce law be given an equal seat at the table in alcohol regulation, notwithstanding the Twenty-First Amendment's historically blanket industry protections.⁵ Having cut into the heart of so many states' three-tier or other regulatory systems, the question now remains, what else will change for alcohol regulation at both the state and federal levels?

Considering recent history and context, four areas have potential to see change, whether slowly or swiftly. First, the Three-Tier system may evaporate, causing states to redesign their entire systems. Second, litigation based on the interstate commerce cause is sure to escalate the scope, speed, or both such possibilities of regulatory changes. Third, national policies may come back into fashion in the wake of states' individual regulations weakening at the same as global logistics are increasing. And finally, states may maintain their regulatory identity but work

³ *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2482-2483 (2019) (GORSUCH, J., dissenting) ("The truth is, things have begun to shift only in very recent years. Bending to the same impulses that moved it at the beginning of the 20th century, this Court has lately begun flexing its dormant Commerce Clause muscles once more to strike down state laws even in core areas of state authority under § 2.... *Granholm* extended *Bacchus* and its reasoning to strike down on dormant Commerce Clause grounds a state law for disfavoring out-of-state wine producers, holding that "Section 2 does not allow States to regulate the direct shipment of wine on terms that discriminate in favor of in-state producers.")

⁴ *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 190 (2nd Cir. 2009); *Brooks v. Vassar*, 462 F.3d 341, 352 (4th Cir. 2006); *Cooper v. Tex. Alcoholic Beverage Comm'n*, 820 F.3d 730, 743 (5th Cir. 2016); *Byrd v. Tennessee Wine and Spirits Retailers Assn.*, 883 F.3d 608, 633 (6th Cir. 2018); *S. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799, 809, 810 (8th Cir. 2013).

⁵ Brief for Illinois et al. as Amici Curiae, 23-24, *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449 (2019). Retrieved from supremecourt.gov/DocketPDF/18/18-96/72811/20181120153341467_Tennessee%20Wine%20and%20Spirits%20v.%20Blair%20IL%20Multi%20state%20Amicus%20FINAL.pdf

smarter with limited resources by operating by cooperative agreements with other states for enforcement or informational sharing support. Lobbyists will continue their quest for more accessible markets, aided by the democratic process and any legal challenge available. These changes may become sudden or they may drift, but alcohol policy is certainly heading into a new era.

BACKGROUND

The cultural context prior to National Prohibition essentially drew the map for modern state regulations once the Prohibition was lifted in 1933 through the ratification of the Twenty-First Amendment to the U.S. Constitution.

The “tied-house” model previously drove the alcohol market, wherein out-of-state owner-manufacturers pushed local operators to push volume with no concern for the effects on local communities.⁶ States who had become “dry” in response were bombarded with interstate commerce claims of those residents who were clearly of the minority opinion and sought to secure alcohol in spite of state laws to the contrary.⁷ A flood of Supreme Court cases alternating with Acts of Congress attempted to clarify the role of states in setting laws that would moderate this interstate commerce, but came short notwithstanding.⁸ The country was then frustrated to the point of a Constitutional Amendment for nationwide prohibition of all alcohol in any form anywhere. “The saloon, as it existed in pre-prohibition days, was a menace to society and...must never be allowed to return.”⁹ However, as became clear in the next fourteen years, the national

⁶ Fosdick, Raymond B. & Scott, Albert L. *Toward Liquor Control* (Center for Alcohol Policy 2011), 1933; 29.

⁷ Brief for Illinois et al. as Amici Curiae, *TN Wine v. Thomas*, 9.

⁸ *Granholm v. Heald*, 544 U.S. 460, 498-509 (2005) (THOMAS, J., dissenting).

⁹ Fosdick & Scott, 10.

policy failed to account for disparate local values.¹⁰ Therefore, the next step was to identify how to assign the commerce of alcohol to states in order to avoid national mandates that could so easily backfire. The adoption of the Twenty-First Amendment repealed nationwide Prohibition, and included the following language assigning regulation to the States:

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.¹¹

Section 3 of the draft included additional language that was amended out of the final version passed:

Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold.¹²

Opponents to Section 3 believed that a narrow allowance of federal control could turn into a Trojan horse to undermine the exclusive control given to states over traffic in Section 2, and thus it was removed by Senate vote prior to passage.¹³

After adoption of the Twenty-First Amendment, promoted plans to alleviate States' repeated frustration over alcohol control included a litany of regulatory procedures to specifically avoid each of the previously experienced issues.¹⁴ The three-tier system became popular, wherein manufacturers could not directly sell to customers, or distribute directly to retailers. Ownership between tiers of producer, distributor, and retailer would be quarantined, with licensing likewise separated by tier. Regulatory policy suggestions were opposite of a free market in order to constrict availability, accessibility, and buying power of alcohol, which was

¹⁰ Brief for Center for Alcohol Policy as Amicus Curiae, 2, *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449 (2019). Retrieved from supremecourt.gov/DocketPDF/18/18-96/72718/20181120165053450_Amicus%20Brief%20of%20Center%20for%20Alcohol%20Policy.pdf

¹¹ U.S. Const. amend XXI, § 2.

¹² *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 337 (1964).

¹³ *Id.*, 338.

¹⁴ Fosdick & Scott, 5-8.

critical to reduce quantities in circulation.¹⁵ Additionally, in order to tame the excess experienced from transportation circumventing state regulations, new policy frameworks suggested in-state physical presence of wholesalers and retailers who would be directly subject to state regulations and inspections.¹⁶ In this vein, a majority of states adopted some version of a residency requirement for participants in their system of alcohol sales control.¹⁷

Time hardly passed before multiple cases regarding States' liquor laws rose to the Supreme Court, which repeatedly confirmed over the next several decades the intent of the Twenty-First Amendment to provide "exception to the normal operation of the Commerce Clause"¹⁸ in the alcohol industry.

In 2005, the Supreme Court then announced an about-face position, that the Commerce Clause applied equally alongside the Twenty-First Amendment. This amounted to a direct contradiction of early interpretations, even by the Court's own admission.¹⁹ The early predecessors of this new position had slowly crept forward, becoming detectable in the 1980's,²⁰ but grasped firm hold in the now landmark case *Granholm v. Heald*. Still, double-sided statements by the Court led to unclear and clashing findings by lower courts thereafter.²¹

¹⁵ *Id.*, 15-19.

¹⁶ Brief for Illinois et al. as Amici Curiae, *TN Wine v. Thomas*, 18-25.

¹⁷ *Id.*

¹⁸ *Craig v. Boren*, 429 U.S. 190, 206 (1976).

¹⁹ *Granholm v. Heald*, 497 (THOMAS, J., dissenting); *TN Wine v. Thomas*, 2468.

²⁰ *Granholm v. Heald*, 522-525 (THOMAS, J., dissenting).

²¹ *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 192 (2nd Cir. 2009) (CALABRESI, Circuit Judge, concurring) ("There is good evidence that when the Twenty-First Amendment was first adopted, section two of that amendment was intended to give states near-total control over alcohol regulation. That complete control was a stark exception to the otherwise limited scope of state commerce regulation. In the ensuing decades however, as attitudes toward alcohol have changed and its commerce has become more nationalized, the Supreme Court has increasingly read the Twenty-First Amendment more narrowly, and excluded from its protection any number of state regulatory schemes that, to be sure, discriminated against interstate commerce. This 'updating' of the Twenty-First Amendment raises important theoretical questions about the role of courts in interpreting constitutional provisions that may well have become anachronistic. But apart from these "legal process" issues, the jurisprudence that the Supreme Court has

In 2019, *Tennessee v. Thomas* became the solidification of the Supreme Court on Commerce Clause balance with the Twenty-First Amendment. Long-held state laws regarding residency requirements in Tennessee's three-tiered system were struck down, above the cry of 35 other states with similar laws.

THE FUTURE OF ALCOHOL POLICY

Although the Supreme Court confirmed its allegiance to the three-tier system in *Granholm* (2005) and again in *Tennessee v. Thomas* (2019), its simultaneous surgery on parts of the historical bedrock of such a system presents doubt as to the future of that system. A direct example proceeds.

In 1936, the Supreme Court rejected the notion that activity under the Twenty-First Amendment was subject to interstate commerce protection.

They request us to construe the Amendment as saying, in effect: The State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the Amendment, but a rewriting of it.²²

By 2019, the Supreme Court had fully turned about to state,

Although our later cases have recognized that § 2 cannot be given an interpretation that overrides all previously adopted constitutional provisions, the Court's earliest cases interpreting § 2 seemed to feint in that direction. In 1936, the Court found that § 2's text was "clear" and saw no need to consider whether history supported a more modest interpretation....With subsequent cases, however, the Court saw that § 2 cannot be read that way, and it therefore scrutinized state alcohol laws for compliance with many constitutional provisions....The Court also held that § 2 does not entirely supersede Congress's

created through this updating presents other problems. Regrettably, it often leaves lower courts at a loss in seeking to figure out what the Twenty-First Amendment means and what if any governing principles may be derived from the High Court's Twenty-First Amendment decisions.”)

²² *State Bd. of Equalization of Cal. v. Young's Market Co.*, 299 U.S. 59, 62 (1936).

power to regulate commerce. Instead, after evaluating competing federal and state interests, the Court has ruled against state alcohol laws that conflicted with federal regulation.²³

That the Supreme Court has made 180-degree turns at times is far from novel. In 2015, marriage between two consenting adults of the same sex was deemed by the Supreme Court a constitutional right,²⁴ although rewinding to the 1970's reveals Courts determining the exact same circumstance "a nullity."²⁵ Likewise, the Supreme Court heard a case in 2009 where police had been executing unconstitutional searches as a matter of regular practice for 28 years.²⁶ The dissent to overturning such practice stated that changing police training would be an undue burden.²⁷ In response, the majority opinion declared,

The doctrine of *stare decisis* is of course essential to the respect accorded to the judgments of the Court and to the stability of the law, but it does not compel us to follow a past decision when its rationale no longer withstands careful analysis. We have never relied on *stare decisis* to justify the continuance of an unconstitutional police practice. (internal citations omitted)²⁸

Because even Constitutional rights can be moving targets, the future is likewise.

I. Evaporation of the Three-Tier System through Developing New Policy

In recent years, the Supreme Court noted it has "previously recognized that the three-tier system itself is unquestionably legitimate."²⁹ However, if history is any teacher, such statements evade security for the future. Could the three-tier system disintegrate? Multiple bypasses already

²³ *TN Wine v. Thomas*, 2468-2469.

²⁴ *Obergefell v. Hodges*, 135 S.Ct. 2583, 2598 (2015). ("The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.")

²⁵ *Jones v. Hallahan*, 501 S.W.2d 588, 589 (Ky.Ct.App.1973); *Anonymous v. Anonymous*, 67 Misc.2d 982, 984 325 N.Y.S.2d 499 (1971).

²⁶ *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 1722 (2009).

²⁷ *Id.*, 1727-1728.

²⁸ *Id.*, 1722.

²⁹ *North Dakota v. United States*, 495 U.S. 423, 432 (1990); *Granholm v. Heald*, 489.

exist, some of which are subject to interstate commerce scrutiny with the advent of internet ordering and swift trans-border logistics.³⁰

Residency has been viewed by states as part of physical presence requirements,³¹ which have their origins in historical response to the tied-house fiasco.³² Current state regulations now missing one or more foundational pieces such as the requirement of in-state residency could give up under pressure concerning physical presence next. Courts have already noted “suspicion” around such requirements.³³ Many states employ staff inspectors or agents to fulfill the enforcement of that state’s regulatory scheme. While every state’s bandwidth is different, some avoid out-of-state travel nearly entirely while others include field trips by airplane in their regular routines. A system that is unenforceable is no system at all, and if federal compliance obligates states to accommodate the interests of interstate commerce in the name of nondiscrimination, the system will surely evaporate.

Monopolies or state-owned stores are certainly an impediment to interstate commerce,³⁴ yet they are still sanctioned under the same original schemes creating the three-tier system.³⁵

Washington operated as a monopoly state until 2011, when Costco used litigation to unlock the

³⁰ Schneider, Grace. “There’s a big push in Kentucky to uncork wine shipments to your door.” *Louisville Courier Journal* (18 Feb 2019). Retrieved from courier-journal.com/story/money/2019/02/18/kentucky-lawmakers-may-allow-wine-shipments-your-home/2870855002; Wine Institute (1 Aug 2018). Oklahoma Direct-To-Consumer Permit Application Available. Retrieved from wineinstitute.com/pliancerules.org/state_alerts/oklahoma-direct-to-consumer-permit-application-available

³¹ Brief for Illinois et al. as Amici Curiae, *TN Wine v. Thomas*, 18-25.

³² Fosdick & Scott, 5-8.

³³ *Granholm v. Heald*, 475. (“In addition to its restrictive in-state presence requirement, New York discriminates against out-of-state wineries in other ways.”); *Arnold's Wines v. Boyle*, 197. (“This burden included a physical presence requirement, something about which dormant Commerce Clause cases had long expressed suspicion.”)

³⁴ Fitzpatrick, Alex. “A Judge Ordered Microsoft to Split. Here’s Why It’s Still a Single Company.” *Time* (5 Nov 2014). Retrieved from time.com/3553242/microsoft-monopoly.

³⁵ *Granholm v. Heald*, 495 (STEVENS, J., dissenting) (“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? *State Bd. of Equalization of Cal. v. Young's Market Co.*, 299 U. S. 59, 62-63 (1936).”)

door to its business model of wholesale-retail combination stores.³⁶ If, in fact, the power of a state to operate in the alcohol industry in monopoly fashion is protected by the same provision as the discrimination against competition of imports, then any breakdown of monopoly regulations may open the door to further commercial discrimination.

Another example is Kentucky, which is dry throughout approximately half the state.³⁷ Current law precludes shipping alcohol to locations it would not be legal to sell.³⁸ Certainly this is an impediment to interstate commerce, and yet this is the very commerce that led to excessive violation and eventual national Prohibition. In fact, this is the very regulation the Twenty-First Amendment most directly states to protect.

II. Escalation of Litigation under the Commerce Clause

Over the past few decades, case after case has claimed harm to those who wish to purchase items disallowed by their state's regulatory system. The National Association of Wine Retailers (NAWR) is already lobbying to effectively erase state lines.³⁹ They went so far as to write an amicus brief in a California case where state licensing laws in the optometry field precluded a national chain store's business model from operating without alteration.⁴⁰ The Ninth Circuit Court of Appeals accurately identified Plaintiff's case as a mere request for convenience

³⁶ Erikson, Pamela S. (2014). *Alcohol Deregulation by Ballot Measure in Washington State: A Status Report on the Implementation of Measure 1183*. Retrieved from healthalcoholmarket.com/pdf/Alcohol_Deregulation_by_Ballot_Measure_in_Washington_State.pdf

³⁷ Kentucky Department of Alcoholic Beverage Control, (Jan 2019). Wet-Dry Map. Retrieved from abc.ky.gov/Forms-and-Resources/Agency%20ResourcesForms/Wet-Dry%20Map%201-19.pdf

³⁸ Ky. Rev. Stat. 243.200 (2) ("Deliveries or shipments of alcoholic beverages shall only be made into areas of the state in which alcoholic beverages may be lawfully sold.")

³⁹ National Association of Wine Retailers (NAWR) (n.d.). Direct Shipping. Retrieved from nawr.org/issues/direct-shipping

⁴⁰ Brief for Specialty Wine Retailers Association as Amicus Curiae, 2, *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 133 S.Ct. 1241 (2013). Retrieved from nawr.org/wp-content/uploads/2013/02/NAWR-Amicus-Lenscrafters.pdf

cloaking itself in assertions of interstate commerce violations,⁴¹ and the Supreme Court refused certiorari.⁴² However, the NAWR claimed that wine retailers were subject to similar discrimination, and that upholding a state licensing law would be an inconvenience to out-of-state companies who may wish to open up locations in California.⁴³ Interestingly, NAWR spends a whole web page elaborating on interstate commerce law in relation to its wine sales without once mentioning the Twenty-First Amendment.⁴⁴ Free trade seems to be the only theme in this new era of alcohol industry.

If a national organization seeks to advantage their membership by twisting laws into red carpet rollouts in order to avoid the uphill climb of changing laws through the democratic process, then increasing court battles may be the stage for new alcohol policy. Weaponizing those court opinions proffered against state regulations could pull more of the Three-Tier system down piece by piece,⁴⁵ or it may not always proceed with a gradual documented process.⁴⁶

Most critical to these hypothetical scenarios are the effects beyond direct results. In Michigan, a state swollen with litigation surrounding interstate commerce violations in alcohol policy, the Court recently declared,

Michigan retains its Twenty-first Amendment powers to maintain a closed three tier system, just as it remained free after *Granholm* to prohibit wineries from shipping directly to consumers. But when it starts carving exceptions out of that system, it must do so without resorting to economic protectionism....A law favoring local businesses that strays too far from the protection of the Twenty-

⁴¹ *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 682 F. 3d 1144, 1146 (9th Cir. 2012).

⁴² *Nat'l Ass'n of Optometrists & Opticians v. Harris*, 133 S.Ct. 1241 (2013).

⁴³ Brief for Specialty Wine Retailers Association as Amicus Curiae, 2, *Nat'l Ass'n of Optometrists v. Harris*.

⁴⁴ NAWR (*Id.* note 37).

⁴⁵ See *Hostetter v. Idlewild* (1964); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984); *Granholm v. Heald* (2005); *TN Wine v. Thomas* (2019).

⁴⁶ See *Obergefell v. Hodges* and *Arizona v. Gant*.

first Amendment must withstand a Commerce Clause challenge on its own merits.”⁴⁷

The Ninth Circuit artfully declares, “Justice Scalia has candidly observed that once one gets beyond facial discrimination our negative-Commerce-Clause jurisprudence becomes (and long has been) a quagmire.”⁴⁸

What is obvious in today’s internet age, amid same- and next-day delivery advertisements for commercial goods of all sorts, is that the Three-Tier system is already carved into by many jurisdictions.⁴⁹ If this Michigan Court is correct that any carving releases the seal and subjects the state’s entire regulatory framework to the standards required of any other industry, the resources handed to states in the Twenty-First Amendment could be effectively void.

It is hard to see any difference between the NAWR position on free trade and the current climate in states handling the question of Cannabis legalization. According to the National Conference of State Legislatures, “some States recognize medical benefits of marijuana while others do not. In acting in these areas, states and local governments must strike difficult balances, all while respecting (and not discriminating against) other States’ approaches to the same issues.”⁵⁰ What is now impeding states from transporting Cannabis across state lines where it is not currently allowed? Certainly this is a restriction on desired interstate commerce similar to the

⁴⁷ *Lebamoff Enterprises v. Snyder*, 347 F. Supp. 3d 301, 308 (E.D. Mich. 2018).

⁴⁸ *Nat’l Ass’n of Optometrists v. Harris*, 682 F. 3d 1144, 1149 (9th Cir. 2012).

⁴⁹ Prince, Jason E. (2004). *New Wine in Old Wineskins: Analyzing State Direct-Shipment Laws in the Context of Federalism, the Dormant Commerce Clause, and the Twenty-First Amendment*, 79 Notre Dame L. Rev. 1563, 1591-1593. Retrieved from scholarship.law.nd.edu/ndlr/vol79/iss4/10; Madigan, Michael D. (2018). *Control Versus Competition: The Courts’ Enigmatic Journey in the Obscure Borderland Between the Twenty-First Amendment and Commerce Clause*, Mitchell Hamline L. Rev. Vol 44-S, fn. 17. Retrieved from mitchellhamline.edu/law-review/wp-content/uploads/sites/37/2018/04/Madigan_ChecklistCompleted.pdf

⁵⁰ Brief for National Conference of State Legislatures et al. as Amici Curiae, 19, *Tennessee Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449 (2019). Retrieved from supremecourt.gov/DocketPDF/18/18-96/72780/20181120150659635_18-96%20Amicus%20Brief.pdf

Ninth Circuit case about Optometrists above. Absent federal prohibition, free trade may be closer to alcohol's future than originally apparent.

However, if states can restructure their Tiers or systems to provide modern strength to otherwise patchwork regulations, regulatory frameworks may continue to look approximately as they currently do. After all, centuries of experience has taught us to strike correct balance on these issues, and no democratic process will quickly and substantially roll off long-traveled tracks.

The Ninth Circuit Court of Appeals clarified that, “although dormant Commerce Clause jurisprudence protects against burdens on interstate commerce, it also respects federalism by protecting local autonomy.”⁵¹ Therefore, “not every exercise of local power is invalid merely because it affects in some way the flow of commerce between the States.”⁵² Furthermore, “the Court made it clear that the Commerce Clause does not protect the particular structure or methods of operation in a retail market.”⁵³ Statements such as these should be the goalposts for states attempting to convert their regulatory ball into a scoring kick. If a new framework of regulation can be entirely redeveloped to focus on structure and methods of retail operation, there may be more daylight for state autonomy under Twenty-First Amendment authority even in the face of burgeoning litigation under the Commerce Clause.

III. Weakening State Regulations will Resurrect National Policy

Leveraging federal dollars to entice states into adopting modeled laws nationally is nothing new. “Perhaps the most well-known regulation is the establishment of the minimum

⁵¹ *Nat'l Ass'n of Optometrists v. Harris*, 682 F.3d 1144, 1148 (9th Cir. 2012).

⁵² *Id.*, quoting *Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 371 (1976).

⁵³ *Id.*, 1151.

legal drinking age of 21. All states adopted such laws by 1984, when the federal government conditioned the receipt of transportation funding on raising the legal drinking age.”⁵⁴ A creative option that could pass Twenty-First Amendment challenge is a model regulatory structure that stops short of federal control, but massages states into adopting models attached to grant money or even expected federal funds as in the example above. Lobbying groups and special interests in the Big Alcohol arena may relish the chance to target their efforts in a single direction. After all, preemption is often desirable by lobbying interests to reduce the burdens on the industry and seek shelter for achieved progress.⁵⁵

One need not be an expert on Constitutional law to observe the issues with this scenario. While some states’ licensed professional authorities have adopted nationally-standardized tests,⁵⁶ multi-state compacts,⁵⁷ or reciprocity for specific states,⁵⁸ one can hardly imagine a state in which a licensee could successfully complain of their credentials being unrecognized in another state as a matter of Equal Protection or Interstate Commerce. It is this state-by-state quilt of licensure that tips states’ regulatory authority over alcohol away from commercial interest standards and toward very individualistic and potentially restrictive licensing frameworks. Therefore, model alcohol policies ripe for adoption may be simultaneously generated by

⁵⁴ Brief for U.S. Alcohol Policy Alliance et al. as Amici Curiae, 12, *Tennessee Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449 (2019). Retrieved from supremecourt.gov/DocketPDF/18/18-96/76131/20181213161030926_18-96%20Amici%20Brief%20US%20Alcohol%20Policy%20Alliance%20Revised.pdf

⁵⁵ Gorovitz, E., Mosher, J. & Pertschuk, M. (1998). Preemption or Prevention?: Lessons from Efforts to Control Firearms, Alcohol, and Tobacco. *J Public Health Pol* 19: 36, 37. doi.org/10.2307/3343088

⁵⁶ Conference of State Bank Supervisors (8 Aug 2018). “State Regulators Nationwide Adopt Single Exam for Mortgage Licensing.” Retrieved from csbs.org/state-regulators-nationwide-adopt-single-exam-mortgage-licensing

⁵⁷ American Nurses Association (n.d.). Interstate Nurse Licensure Compact. Retrieved from nursingworld.org/practice-policy/advocacy/state/interstate-nurse-compact2

⁵⁸ National Association of Complementary and Alternative Medicines (n.d.). State Requirements for Cosmetology. Retrieved from nacams.org/cosmetology-states

convenience and expansion of tax revenue concerns rather than solely from pressure of federal funding opportunities.

IV. State Regulation will Survive with Smart Solutions

Reflecting on the last time this country operated without prohibition or stringent tiered-system regulation, it must be understood:

Deregulation would return us to the days of the tied-house where suppliers owned the retail outlets. History teaches us that this would ultimately lead to a multiplicity of retail outlets because each supplier would require a sales outlet in each community. There is an undisputed correlation between the density of retail outlets and excessive alcohol consumption.⁵⁹

And President Franklin D. Roosevelt included in his proclamation upon repeal of Prohibition,

I ask especially that no State shall by law or otherwise authorize the return of the saloon either in its old form or in some modern guise.⁶⁰

Concerns as grave as these were what set up the original plan to deeply limit and regulate the production and sale of alcohol, in order to “discourage consumption, or to make it easier to police the liquor traffic, or to accomplish some other objective the State thought worthwhile to protect against the evils which can flow from the traffic.”⁶¹

As logistics and technology have evolved, and loopholes have emerged,⁶² state-based alcohol regulators have become burdened with sorting out interstate shipping, distance ordering,

⁵⁹ Madigan, 50.

⁶⁰ Roosevelt, Franklin D. (5 Dec 1933). *Proclamation 2065—Repeal of the Eighteenth Amendment*. The American Presidency Project. Retrieved from presidency.ucsb.edu/node/207879

⁶¹ *Hostetter v. Idlewild*, 339.

⁶² VinoShipper is one such new company, whose “strategy takes title to wines at the moment of shipping, under their network of licenses and relationships. . . . This transfer effectively allows VinoShipper’s licenses to be utilized in most states, obviating the need for individual wineries to obtain and maintain their own direct ship licenses, thus allowing wineries of all sizes to compliantly sell to many more states, with no investment from the wineries. . . . A few important States remain where it seems a license must still be obtained, but one by one, he has worked out methodologies for most of the country.” Smith, Clark (9 Sep 2015). Re: The Coming Repeal of the Three-Tier System for Wine, Beer, and Spirits. [Blog

and large multi-state mergers among companies. With shrinking budgets and expanded programming requiring fiscal attention, states must turn their attention to efficiency in their various tasks. To properly maneuver through litigation and legislation that intrudes into historic Twenty-First Amendment rights, reevaluating causes and priorities of alcohol regulation is imperative. Working with likeminded states could pave a path forward, even when neighboring states maintain disparate persuasion.

In a world where goods move nationwide just under the speed of sound, and companies are consolidating into large chains, states may consider interstate compacts or reciprocity-based enforcement measures to alleviate the burden of inspections and other regulatory interests. Similar to the Driver's License Compact,⁶³ which has 45 member states in addition to the District of Columbia,⁶⁴ sharing of information for enforcement purposes could help states keep up with the times as their borders start to mingle.

While neighboring states in any given region may widely differ in alcohol policy viewpoints, perhaps multiple compacts nationwide could bring likeminded collections of states together into philosophical subsets to assist each other in maintaining their goals for alcohol control while pooling resources in the wake of more global regulatory requirements.

comment]. Retrieved from fermentationwineblog.com/2014/03/coming-repeal-three-tier-system-wine-beer-spirits/#comment-801567

⁶³ U.S. Department of Transportation, National Highway Safety Administration (April 1994). The Driver License Compact (Guidelines for Motor Vehicle Administrators): Administrative Procedures Manual 1994. Retrieved from aamva.org/uploadedFiles/MainSite/Content/DriverLicensingIdentification/DL_ID_Compacts/DLC%20Administrative%20Procedures%20Manual.pdf

⁶⁴ American Association of Motor Vehicle Administrators (n.d.). Driver License Compact Member Joinder Dates. Retrieved from aamva.org/uploadedFiles/MainSite/Content/DriverLicensingIdentification/DL_ID_Compacts/2019%20Nov%20DLC-NRVC%20Join%20dates%20wlrthead.pdf

CONCLUSION

The future of alcohol policy in the United States rests on a precipice. Court cases could return our society toward a modern pre-prohibition situation with Big Alcohol lobbying or litigating states out of their historically-recognized rights.⁶⁵ Ethics laws will need to maintain healthy pace with the consolidation of alcohol interests in the advent of a new era. For States to best prepare, they must develop innovation and agility. If successful, they will continue to protect their society and citizens in the face of any possibilities of the future.

⁶⁵ O’Leary, Sean (9 Aug 2018). They won’t be coming to the dance together: Alex Tanford and The Wine and Spirits Wholesalers of America give their strong and opposing views on the three-tier system. Retrieved from irishliquorlawyer.com/they-wont-be-coming-to-the-dance-together-alex-tanford-and-the-wine-and-spirits-wholesalers-of-america-give-their-strong-and-opposing-views-on-the-three-tier-system