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The Intemperate Regulation of Alcohol

Bradley R. Greenman

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THE INTEMPERATE REGULATION OF ALCOHOL

Bradley R. Greenman*

I.	Introduction	173
II.	History And Background	177
A.	<i>A Complicated History, Alcohol Regulation Prior to the Twenty-First Amendment</i>	177
B.	<i>The Twenty-First Amendment and Beyond: How Temperance Values Live on</i>	185
III.	The Every Day Impact Of Modern Alcohol Regulation	193
A.	<i>Increased Prices for Consumer and Producers Across the States</i>	194
B.	<i>Laws Limiting Alcohol Generally</i>	199
IV.	CONCLUSION: WHY ISN'T THE MARKET OPEN FOR BUSINESS?	200

I. INTRODUCTION

From the Pilgrims on the Mayflower to the bootleggers of prohibition, America has a complicated relationship with alcohol.¹ From a moral and legislative perspective, alcohol has a long and contentious history in the United States; and regardless of if it was legal, people have

* Editor-in-Chief, Pepperdine Caruso School of Law Journal of Business, Entrepreneurship, and the Law. Thank you to the staff and editorial team for helping put the journal together. Note to Jason, Bryce, Evan, and Jeremiah: keep opening businesses that create spaces for people to flourish. My journey to law school and becoming an attorney is not possible without the time I spent learning and growing with you all. Do Good. Be Better. Have Fun.

¹ See Sidney J. Spaeth, *The Twenty-First Amendment and State Control over Intoxicating Liquor: Accommodating the Federal Interest*, 79 CAL. L. REV. 161, 164 (1991) (discussing the tension between America's historical consumption and embracing of alcohol despite its "Puritan roots"). *But cf.* text accompanying note 25 (explaining that the Puritan spirit may be more accepting of alcohol than popularly portrayed).

found ways to produce and consume it.² The long-fermented Temperance Movement exemplifies the contentious position of alcohol in American life, which culminated in the complete federal prohibition of alcohol under the Eighteenth Amendment. This was quickly followed by the controlled repeal of the Eighteenth Amendment through the Twenty-First Amendment, which returned the regulation of alcohol to the state level (where certain values of the Temperance Movement still live on).³ Underlying this legal give-and-take, are the public policy concerns that first supported the Prohibition Movement and later supported the Twenty-First Amendment's reach into regulating the alcohol marketplace.⁴

² See *id.* at 164–76 (highlighting the labored and protracted battle against alcohol consumption by temperance advocates in America over the course of the Nineteenth Century); Daniel Glynn, *Granholm's Ends Do Not Justify the Means: The Twenty-First Amendment's Temperance Goals Trump Free-Market Idealism*, 8 J.L. ECON. & POL'Y 113, 115 (2011) (“[while] drinking was popular [around the time of the Founding]...America was not a freewheeling bacchanalian society”); Hannah Jeppsen, *Let My Brewers Go! A Look at Home Brewing in the U.S.*, 10 J. FOOD L. & POL'Y 137 (2014) (discussing the impact of the Twenty-First Amendment on the craft beer industry and noting that home brewing after the repeal of prohibition was *still* not legal in the United States until the Carter Administration). This was despite the popularity of home brewing and was due to a clerical error in drafting post-prohibition legislation. *Id.* Further, despite being illegal, Jeppsen notes homebrewing boomed during prohibition: homebrewers produced over 700 million gallons of beer per year from 1922–1933 to accommodate the 25% growth in consumption of beer during that period. *Id.* at 140.

³ See *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2463–67 (2019) (writing for the majority, Justice Alito outlines the proliferation of drinking beginning at the first half of the Nineteenth Century and subsequent attempts at regulation to address social harms caused by ample drinking all the way up through the passage of the Eighteenth Amendment in 1919).

⁴ See Marcia Yablon, *The Prohibition Hangover: Why We Are Still Feeling the Effects of Prohibition*, 13 VA. J. SOC. POL'Y & L. 552 (2006). Yablon notes, to understand the Twenty-First Amendment fully, you must understand the public policy concerns of the Temperance Movement from which it came. *Id.* at 553–54. These concerns, among others included: the threat to the family because alcohol consumption occurred away from the family in the Nineteenth Century; the sexual impropriety which attended saloons; nativist concerns about immigrants from drinking cultures; and the real effects that intemperance had on women and children in American households. *Id.* at 558–73.

Having little to do with the temperance values which undergirded the Prohibition Movement (and which carried over into the Twenty-First Amendment),⁵ the current state of alcohol regulation hurts businesses, business owners, and consumers.⁶ Further, the current state-law systems controlling alcohol are more concerned with protecting centralized and well-funded corporate interests than promoting the original temperance values the Twenty-First Amendment was buttressed by.⁷ This comment will not argue the legitimacy of the policy aims of the Twenty-First Amendment, rather, it will argue the current regulatory and legal apparatuses which govern the alcohol industry are no longer moored to the original moral and philosophical values the Temperance Movement, or those morals and values which carried over into the Twenty-First Amendment.⁸

To aid in understanding the current state of alcohol regulation, Section II will outline the history of liquor regulation in the United States from the Founding to the present.⁹ Second, Section II will examine the history of legislation and regulation of alcohol that led to the ratification of the Eighteenth Amendment and its subsequent repeal.¹⁰ This will help provide context to the underlying values which led to the Twenty-First Amendment in its final form.¹¹ Section II will then examine the case law upon which modern Twenty-First Amendment jurisprudence is built, and where modern jurisprudence and legislation currently sits.¹² This historical foundation is required to analyze the current state of the Twenty-First Amendment's effectiveness in incorporating temperance values.¹³ In

⁵ See discussion *infra* Section II.

⁶ See discussion *infra* Section III.

⁷ See discussion *infra* Section III.B.

⁸ *Supra* text accompanying note 4. See also discussion *infra* Section III (noting what interests are actually being promoted).

⁹ See discussion *infra* Section II.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ See Vijay Shanker, *Alcohol Direct Shipment Laws, the Commerce Clause, and the Twenty-First Amendment*, 85 VA. L. REV. 353, 375–77 (1999) (identifying temperance as the core purpose behind the Twenty-First Amendment); Lisa Lucas, *A New Approach to the Wine Wars: Reconciling the Twenty-First Amendment with the Commerce Clause*, 52 UCLA L. REV. 899, 924–25 (2005) (identifying temperance and orderly market conditions as the core concerns of the Twenty-First Amendment).

concluding, there will be an examination of laws over a spectrum of states which regulate different forms of alcohol.¹⁴ This will help highlight the lack of logical connection between current liquor regulation systems and the Twenty-First Amendment's temperance roots.¹⁵

Today, states do not exercise their constitutional power over alcohol primarily in the name of temperance. Instead, states exercise their potent regulatory power to further the centralized interests of a well-funded lobbying effort on behalf of large wholesale companies.¹⁶ As a result, current alcohol regulation across the United States imposes heavy burdens on small business owners,¹⁷ increases costs to consumers,¹⁸ centralizes legislative influence into the hands a few large corporate

¹⁴ See discussion *infra* Section III.

¹⁵ *Id.*

¹⁶ Baylen Linneken, *Bad State Laws and Big Money Beer Wholesalers Are Still Hurting Craft Brewers*, REASON, (Mar. 16, 2019, 8:30 AM), <https://reason.com/2019/03/16/bad-state-laws-and-big-money-beer-wholes/> Linneken notes efforts to change alcohol regulation laws “face powerful opposition from wholesalers.” *Id.*

¹⁷ See David R. Scott, *Brewing Up A New Century of Beer: How North Carolina Laws Stifle Competition in the Beer Industry and How They Should Be Changed*, 3 WAKE FOREST J.L. & POL'Y 417 (2013) (noting the number of ways small retailers and small brewers in North Carolina were harmed by its three-tier distribution system—prior to its legislative adjustments in 2020); see also Linneken, *supra* note 16 (noting laws across a variety of states which impose financial and regulatory burdens on breweries). Linneken notes laws in Texas which make it illegal for a brewery to sell any of its beer “to go” (the consequence being breweries must pay wholesalers to sell it for them); laws in Montana which force breweries to close tap rooms by 8PM; and brick-and-mortar sales requirements in Denver, Colorado for local alcohol delivery services. *Id.*

¹⁸ David White, *Wholesale Robbery in Liquor Sales*, N.Y. TIMES, (Apr. 3, 2011), <https://www.nytimes.com/2011/04/04/opinion/04white.html> (noting the current regulatory system, at the behest of wholesalers, imposes an 18–25% cost increase on consumers); C. Jarrett Dieterle, *Welcome to Virginia*, THE AM. SPECTATOR, (Aug. 15, 2016, 12:00 AM), <https://spectator.org/welcome-to-virginia-where-the-whiskeys-strong-and-the-governments-stronger/> (noting Virginia's state regulatory system for alcohol imposes a 69% markup on liquor prices, along with substantial taxes on liquor products).

interests,¹⁹ and is not logically connected to the public health and safety ends of the Twenty-First Amendment.²⁰

II. HISTORY AND BACKGROUND

A. *A Complicated History, Alcohol Regulation Prior to the Twenty-First Amendment*

To fully understand modern alcohol regulation, it is necessary to understand the role alcohol has played in American society.²¹ Dating back to America's Founding, through to present day, the United States has had a complicated relationship with alcohol. A large motivation of the Temperance Movement was a reaction against the widespread drinking found across American society during the Nineteenth Century, and a reaction against the destructive images and characterizations which came with it.²² Proponents of temperance cited the social, health, and financial burdens that widespread and frequent alcohol consumption had on American family life and culture.²³ In addition to general societal

¹⁹ See White *supra* note 18. White states, "The National Beer Wholesalers Association maintains the nation's third-largest political action committee, and since 2000, it has donated \$15.4 million to candidates for federal office." *Id.* Further, a "chunk" of the cash donated comes from the two largest wholesale companies in the market. *Id.* See also *infra* text accompanying note 152.

²⁰ See discussion *infra* Section III.

²¹ See Glynn, *supra* note 2 at 114 (noting the importance of historical context to understanding the full impact of the Twenty-First Amendment); Lucas, *supra* note 13, at 914 ("Identifying and understanding the core concerns underlying the Twenty-First Amendment requires an awareness of the historical events and social developments that led first to the enactment of the nationwide prohibition of alcoholic beverages in 1919.").

²² See Spaeth, *supra* note 1, at 166–68. Spaeth notes, the widespread image of the "debaucherous" saloon helped motivate the Temperance Movement even though the stereotype probably went further than the truth. *Id.* Nonetheless, it served as a motivating factor in the movement's success because the image was "riddled with terror." *Id.*

²³ See Yablon, *supra* note 4, at 558–65. Yablon notes that women were proactive in the Temperance Movement because of the negative effects alcohol could have on family life—of which they were the primary stewards during that time. *Id.* at 559. Yablon notes women feared that alcohol would destroy family bonds and lead to poverty. *Id.* at 560.

concerns, temperance advocates were motivated by religious beliefs as well.²⁴

Interestingly, whether considering the Puritan religious influence, to the charge led by primarily by women to define and the social spaces in which alcohol was acceptable, the initial political and legislative achievements of the Temperance Movement arose primarily at the local level.²⁵ The Temperance Movement would not exercise control over politics and law at the national level until the late Nineteenth and early Twentieth Centuries.²⁶

As the nationwide Temperance Movement gained steam, Congress passed influential legislation which led to the development of the Eighteenth and Twenty-First Amendments, the Wilson Act (1890),²⁷ and the Webb-Kenyon Act (1913).²⁸ The Wilson Act enabled states to regulate alcohol manufactured out-of-state, so long as they regulated alcohol manufactured within their borders in the same way.²⁹ Practically, this meant a state could ban the sale of alcohol from out-of-state producers by invoking its police powers and regulating alcohol sales within its own borders in the same manner (this type of regulation would contradict the

²⁴ See Spaeth, *supra* note 1, at 164–65; Kevin Wendell Swain, Note, *Liquor by the Book in Kansas: The Ghost of Temperance Past*, 35 WASHBURN L.J. 322, 323–24 (1996). Swain notes the Puritan influence on Temperance Movements in Western states as the country expanded west during the Nineteenth Century. *Id.* But cf. David J. Hanson, ALCOHOL: SCIENCE, POLICY, AND PUBLIC HEALTH 7 (Peter Boyle et al. eds., 1st ed. 2013) (noting the Puritan and Catholic traditions in the colonies both viewed alcohol consumption favorably when consumed in moderation). Further informing the religious context of early American views of alcohol, Puritan minister, Increase Mather, claimed “alcohol [is] the ‘good creature of God.’” Roger I. Abrams, *Alcohol, Drugs and the National Pastime*, 8 U. PA. J. LAB. & EMP. L. 861, 865 (2006) (alteration added). Further supporting the idea that the Puritans enjoyed drinking, Abrams cites a diary entry from the Pilgrims on the *Mayflower* which suggests they drank all the beer they brought for the trip—before arriving at Plymouth rock. *Id.* The journal entry states their arrival was concurrent with “[their] victuals being much spent, especially our beer” (alteration in original). *Id.*

²⁵ See Spaeth, *supra* note 1, at 165 (noting prior to the Eighteenth Amendment, and the federal legislation which led to it, temperance was accomplished through local level laws with some success).

²⁶ See *id.* at 165–80.

²⁷ 27 U.S.C. § 121.

²⁸ 27 U.S.C. § 122.

²⁹ *Scott v. Donald*, 165 U.S. 58, 100–01 (1897).

Commerce Clause jurisprudence which would develop over the Twentieth Century).³⁰ In the subsequent case law, which developed from challenges to The Wilson Act, the Supreme Court clarified that the legislation did not give states the power to outright ban alcohol from other states, it only allowed them to regulate the sale of alcohol as they best saw fit once the alcohol was imported.³¹

Congress gave more power to the states, however, by passing the Webb-Kenyon Act in 1910³² over a veto by President Taft.³³ The Webb-Kenyon Act allowed states who banned alcohol altogether (manufacturing and sales), to unilaterally exclude the importation of alcohol from other states.³⁴ Effectively, this law allowed states to discriminate against other states in commerce, so long as they did so in the name of full-on temperance.³⁵ Both of these laws set the stage for state experimentation with local alcohol legislation aimed at producing local prohibition cultures. As the Temperance Movement came into full force in the early Twentieth Century, the federal government attempted prohibition at a national scale through the Eighteenth Amendment.³⁶ The Eighteenth Amendment stated:

[Section 1] The manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into,

³⁰ *Id.*

³¹ See Spaeth, *supra* note 1, at 172–73.

³² *Id.*

³³ Perkins, *infra* note 66, at 404. President Taft, acting at the advice of his Attorney General, George Wickersham, vetoed the legislation over concerns about its constitutionality. Todd Zywicki & Asheesh Agarwal note, “[t]he doubts about the constitutionality of Webb-Kenyon arose from its peculiar language divesting alcohol of its interstate commerce character in certain cases covered by state law, which arguably improperly ceded Congress’s exclusive Commerce Clause authority to the states.” *Wine, Commerce, and the Constitution*, 1 NYU J.L. & Liberty 609, 621 n.62 (2005). Congress, however, eventually overrode this veto in response to loud cries and building political pressure towards prohibition.

³⁴ Perkins, *infra* note 66, at 405.

³⁵ See 27 U.S.C. § 121. The Supreme Court upheld the constitutionality of the law in *James Clark Distilling Co. v. W. Maryland R.R. Co.*, 242 U.S. 311 (1917). *But cf. infra* Section II (noting there were grave concerns among Prohibition supporters that the law may be repealed by Congress or the courts in light of changing attitudes during the time in which the Eighteenth Amendment was in place).

³⁶ U.S. CONST. amend. XVIII (repealed 1933).

or the exportation thereof from the United States and all 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.³⁷

Prior to the Eighteenth Amendment, states had been able to adequately enforce alcohol regulation laws with some success at the local level.³⁸ Now, under the Eighteenth Amendment, even though both the federal and state governments had concurrent jurisdiction to enforce prohibition³⁹ for the most part, the federal government took on the responsibility.⁴⁰ This increased level of federal government involvement, coupled with the misguided belief that America as a nation embraced Prohibition on the whole, was why Prohibition on a national scale ultimately failed.⁴¹ One of the key mistakes of federal prohibition, which ultimately led to its failure and repeal, was that regulating alcohol on a uniform national scale did not effectively allow the enforcement of the Eighteenth Amendment to happen within the context of localized cultural awareness.⁴² Scholars note, prior to Prohibition, in places where the majority of the local community approved of regulating or prohibiting alcohol, the regulation was usually quite effective in achieving its aims.⁴³ Prohibition failed in part because the general consensus, which existed

³⁷ *Id.* §§ 1–2 (repealed 1933).

³⁸ Spaeth, *supra* note 1, at 165–66.

³⁹ U.S. CONST. amend. XVIII § 2 (repealed 1933).

⁴⁰ Spaeth, *supra* note 1, at 176.

⁴¹ *Id.* at 165. Spaeth notes, “[t]he failure of the [E]ighteenth [A]mendment largely was due to the mistaken belief that the United States was ‘a single community in which a uniform policy of liquor control could be enforced’” *Id.* (alteration added). When federal laws were passed to stop the liquor traffic, opponents either went underground or ignored the laws completely. *See also* Clayton L. 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, 512–13 (noting the failure of the federal government to enforce national prohibition).

⁴² *See* Spaeth, *supra* note 1, at 165. Spaeth notes, “[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.” *Id.*

⁴³ *See id.* at 165–66 (noting state laws varied in success and strictness of regulation, but that where localities were allowed to determine the extent to which alcohol was regulated, the regulation was met with more success).

within those particular communities as to the danger alcohol posed to society and families, did not exist when applied to the United States as a whole.⁴⁴

Against this backdrop, for more than a decade, the federal government attempted to enforce Prohibition.⁴⁵ While there were some successes within the goals of the Temperance Movement,⁴⁶ the lasting legacy and historical narrative surrounding Prohibition looks back at the Eighteenth Amendment as an overall failure to legislate morality on a national scale.⁴⁷ At the same time that federal enforcement of Prohibition was faltering, organized crime took over the market for producing and distributing alcohol—albeit illegally—nationwide.⁴⁸ Simultaneously, the entire world also entered into an economic collapse: the Great

⁴⁴ *Id.*

⁴⁵ *See id.* at 176–80.

⁴⁶ Timothy Hsiao, *Almost Everything You Need to Know About Alcohol Prohibition is Wrong*, THE FEDERALIST (Apr. 23, 2019), <https://thefederalist.com/2019/04/23/almost-everything-know-alcohol-prohibition-wrong/>. Specifically, Hsiao notes there is substantial evidence that prohibition decreased alcohol consumption. *Id.* Hsiao notes:

Deaths from cirrhosis of the liver and alcoholism (which are proxies for alcohol consumption) fell dramatically. Life insurance companies reported declines in alcohol-related deaths. . . . Consumption fell by around 30[–]50 percent. Moore also notes that hospitalizations for alcohol psychosis and arrests for drunk and disorderly conduct also declined. *Id.* (alteration added).

⁴⁷ Spaeth, *supra* note 1; *see also supra* notes 39–44 and accompanying text; Silvernail, *supra* note 41 and accompanying text. Where Prohibition was not supported at the local level, “the federal government’s efforts to enforce it spawned violence, bloodshed, and corruption. For precisely this reason, police power issues involving moral issues were traditionally local matters. Because of diverging local views, it was thought that state and local governments were uniquely well-suited to exercise police power authority.” Zywicki & Agarwal, *supra* note 33, at 621.

⁴⁸ *See generally* Nora V. Demleitner, *Organized Crime and Prohibition: What Difference Does Legalization Make?*, 15 WHITTIER L. REV. 613 (1994) (discussing the role of organized crime in the black market alcohol industry in America during the time of prohibition).

Depression.⁴⁹ Organized crime and the violence it entailed, coupled with the need for tax revenues which evaporated during the economic downturn, turned the volume up on the call for repeal of the Eighteenth Amendment.⁵⁰

Advocates of repealing the Eighteenth Amendment argued the best way to get rid of the black-market for alcohol was to legalize it through constitutional amendment, allowing the states to control all levels of the alcohol market.⁵¹ Further, proponents argued the tax revenues of a newly legalized alcohol market would help cushion the economic blow of the Great Depression through increased tax revenues and job creation.⁵² While these repeal arguments won out, it is important to note that *this was not the death-knell* for the values of the Temperance Movement.⁵³ It was much more a shift back to the model of alcohol regulation which existed before Prohibition—one where the states took on the enforcement

⁴⁹ See Sherry Truong, *A Topsy Balance: Dormant Commerce Clause Limits on A State's Prerogatives Under the Twenty-First Amendment*, 44 HASTINGS CONST. L.Q. 203, 208–09 (2017).

⁵⁰ Elizabeth Norton, *The Twenty-First Amendment in the Twenty-First Century: Reconsidering State Liquor Controls in Light of Granholm v. Heald*, 67 OHIO ST. L.J. 1465, 1470 (2006). Additionally, Truong notes the effect of the Great Depression was that it “undermined two crucial prohibitionist principles: (1) Prohibition would bring about American prosperity, and (2) Prohibition would bring order to the growing lawlessness in society.” Truong, *supra* note 49, at 208.

⁵¹ See *infra* text accompanying note 108. The other effect of handing liquor regulation over to the states would be that states and localities could pursue temperance at the local level.

⁵² See Zywicki, *supra* note 33, at 623.

⁵³ See Yablon, *supra* note 4, at 553. Yablon notes:

Although National Prohibition ended with the ratification of the Twenty-First Amendment, state and local Prohibition was expected to, and did, continue long after its passage. Similarly, liquor regulation did not conclude with the repeal of the Eighteenth Amendment. Instead, after repeal the country returned to a system of liquor regulation very similar to the system in place immediately before Prohibition. *Id.*

It is also worth noting at the time, although widespread support for Prohibition was faltering, there was still political support for both temperance generally and for federal prohibition. See Truong, *supra* note 49, at 208–209 (noting a commission put in place by President Herbert Hoover opposed repealing Prohibition).

prerogative and responsibility given their more intimate knowledge of the community.⁵⁴

While national-scale prohibition was off the table following repeal of the Eighteenth Amendment, some of the values and aims of temperance advocates were upheld and codified through the Twenty-First Amendment, including the ability for states to prohibit production, sale, possession, and consumption of alcohol.⁵⁵ The Twenty-First Amendment reads: 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.⁵⁶ Scholars note that Section 2 of the Twenty-First amendment is a near word-for-word incorporation of the Webb-Kenyon Act.⁵⁷

Although, prohibition was repealed at the national level, both the Wilson Act and the Webb-Kenyon Act—and their temperance roots—remain in full force today under Section 2 of the Twenty-First Amendment, and in the still codified Acts themselves: 27 U.S.C. §§ 121–122.⁵⁸ Specifically, The Wilson Act states:

All . . . intoxicating liquors . . . transported into any State or Territory . . . shall . . . be subject to the operation and effect of the laws of such State . . . to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory.⁵⁹

As discussed above, this gives states the right to subject liquor produced out of state to the same rules as liquor produced within the

⁵⁴ See Yablon, *supra* note 4; Zywicki, *supra* text accompanying note 33.

⁵⁵ See Yablon, *supra* note 4, at 552 (arguing the influence of the Temperance Movement and Prohibition live on through the ways the Twenty-First amendment continues to shape alcohol commerce and regulation); Norton, *supra* note 50, at 1468–72.

⁵⁶ U.S. Const. amend. XXI, §§ 1–2.

⁵⁷ See Norton, *supra* text accompanying note 50.

⁵⁸ *Id.* at 1468–72 (discussing the codification of the Webb-Kenyon Act in section 2 of the Twenty-First Amendment).

⁵⁹ 27 U.S.C. § 121.

state.⁶⁰ This principle lives on through the jurisprudence of the Court in its analysis of liquor laws under the Commerce Clause.⁶¹

Prior to Prohibition, the Wilson Act left states could not outright prevent importation of alcohol because such laws were discriminatory to interstate commerce.⁶² This changed under the Webb-Kenyon Act, however, where “[t]he *shipment or transportation*, in any manner or by any means whatsoever . . . liquor of any kind, from one State . . . thereof, into any other State . . . *in violation of any law of such State . . .* [was] prohibited.”⁶³ This allowed states to ban alcohol importation altogether, so long as all alcohol was banned within the state.⁶⁴ The language of the Twenty-First Amendment tracks this in almost an identical way: “The *transportation or importation* into any State . . . of intoxicating liquors, in violation of the *laws thereof*, is hereby prohibited.”⁶⁵

It is worth keeping this history in mind through the rest of this comment, because, while the Twenty-First Amendment repealed Prohibition, it did not gut the values of temperance from the Constitution.⁶⁶ It retained them, at the same time returning alcohol regulation to a very similar situation it was in prior to the ratification of the Eighteenth Amendment.⁶⁷ Under the Twenty-First Amendment, the states, once again, were given the constitutional power to enforce liquor laws towards temperance ends.⁶⁸ As the discussion in Section III will show, however, the constitutional authority given to states to regulate alcohol for public health and moral reasons often serves as a guise to perpetuate large corporate and state tax interests with questionable temperance motivations at best.⁶⁹

⁶⁰ *See id.*

⁶¹ *See* discussion *infra* Section II.B.

⁶² 27 U.S.C. § 121; *see* Spaeth, *supra* note 1, at 172–173.

⁶³ 27 U.S.C. § 122 (emphasis added).

⁶⁴ *See id.*

⁶⁵ U.S. Const. amend. XXI, §§ 1–2 (emphasis added).

⁶⁶ *See supra* text accompanying note 53. Rachel M. Perkins, *Wine Wars: How We Have Painted Ourselves into A Regulatory Corner*, 12 Vand. J. Ent. & Tech. L. 397, 401–09 (2010).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *See* discussion *infra* Section III.B.

B. *The Twenty-First Amendment and Beyond: How Temperance*

Values Live on

To fully understand the historical context of modern-day liquor regulation, it is necessary to discuss the evolution of case law following the ratification of the Twenty-First Amendment. While prohibition on a national scale is no longer in place, the Twenty-First Amendment constitutionally delegated to individual states the authority to decide how to regulate alcohol on their own terms.⁷⁰ Following the repeal of Prohibition, the early Twenty-First Amendment jurisprudence of the Supreme Court allowed states the greatest leeway in terms of how they regulated alcohol.⁷¹ As mentioned above, the Twenty-First Amendment was a constitutional codification of the principles of the Webb-Kenyon and Wilson Acts, both of which were in force prior to the Eighteenth Amendment.⁷² Both in fact, are still in force today.⁷³ The effect of adopting Section 2 of the Twenty-First Amendment, was that the principles of the Wilson and Webb- Kenyon Acts were effectively lifted out of the legislative reach of Congress, save for amending the Constitution.⁷⁴

⁷⁰ See Norton, *supra* note 50, at 1470 (“The Twenty-First Amendment not only ended Prohibition, but also created a critical constitutional power for the states: the ability to regulate alcoholic beverages entering their borders.”)

⁷¹ David S. Versfelt, *The Effect of the Twenty-First Amendment on State Authority to Control Intoxicating Liquors*, 75 COLUM. L. REV. 1578, 1581–82 (1975). Versfelt, speaking of the first case law in the aftermath of the Twenty-First Amendment, noted, “[t]he first Supreme Court cases addressing the Twenty-First amendment recognized nearly absolute state authority to regulate liquor.” *Id.* Further, noting the effects following the *Young’s* decision, he says, “the Court found that section two granted the states absolute discretion in using their power to forbid imports. The Court thus believed that section two granted states broad regulatory and taxing control over intoxicants within their borders, even in the face of putative violations of the fourteenth amendment.” *Id.*

⁷² See *supra*, text accompanying note 54–55; discussion *supra* Section II.A.

⁷³ See 27 U.S.C. § 121 (The Wilson Act); 27 U.S.C. § 122 (The Webb-Kenyon Act).

⁷⁴ See Norton, *supra* note 50, at 1771 (“Prior to the passage of the Twenty-First Amendment, the states’ abilities to regulate liquor in interstate commerce arose from a grant of Congress, via the Webb-Kenyon Act; after the Amendment’s passage, the Constitution itself granted states this authority”). The legislative history of the passage of the Twenty-First Amendment also tells the

Consequently, the pro-temperance values embodied in the Acts were perpetuated through the enforcement and interpretation of Section 2 of the Twenty-First Amendment.⁷⁵

Much of the case law history since the Twenty-First Amendment's adoption in 1933 has centered on defining the constitutional limits of state regulation of alcohol in its interactions with the Commerce Clause and Dormant Commerce Clause of the U.S. Constitution.⁷⁶ Over time, the Supreme Court has evolved in its thinking about what interpretive framework should be used in reading and applying the Twenty-First Amendment to challenges of state importation laws.⁷⁷ Historically, in the first few decades following the adoption of the Twenty-First Amendment, the courts followed an "absolutist"⁷⁸ approach to determine the meaning of the Twenty-First Amendment as it applied to state laws.⁷⁹ Under the absolutist approach, the court held the Twenty-First Amendment gave states *absolute* authority to regulate and legislate alcohol however they saw fit.⁸⁰ Given the Twenty-First Amendment's strict language and history, both of which provide the states with nearly unilateral authority when it comes to alcohol, the court held there was no room for the federal

story of the concern Prohibition supporters had that either the courts would invalidate, or Congress would repeal the Wilson and Webb-Kenyon Acts. *See* Zywicki & Agarwal, *supra* note 33 at 622–24. *Cf.* Aaron Nielson, *No More "Cherry-Picking": The Real History of the 21st Amendment's S 2*, 28 HARV. J.L. & PUB. POL'Y 281, 286–89 (2004) (discussing the Senate and House debates over ratification).

⁷⁵ *See supra* text accompanying notes 54–56.

⁷⁶ *See* Silvernail, *supra* note 41, at 514–41 (outlining the legal history of the Twenty-First Amendment in the courts) (note: the article was written prior to *Granholm v. Heald*, 544 U.S. 460 (2005)); Glynn, *supra* note 2, at 120–23 (outlining the history and evolution of the courts Twenty-First Amendment interpretive framework leading into *Granholm*). In *Granholm*, the Court overturned Michigan and New York direct shipment laws which allowed wineries based in Michigan and New York to ship directly to state citizens, while making it illegal for out-of-state wine producers to do the same. 544 U.S. at 465–66.

⁷⁷ *See* discussion *infra* notes 77116 (outlining the evolution of the Supreme Court jurisprudence).

⁷⁸ Glynn, *supra* note 2, at 120.

⁷⁹ Silvernail, *supra* note 41, at 515. "For the first twenty years after ratification of the Twenty-first Amendment, the Supreme Court would follow the absolutist approach." *Id.*

⁸⁰ *Id.* at 514–15.

government to oversee or exercise authority over alcohol regulation.⁸¹ The absolutist approach was initially upheld under *State Board of Equalization of California v. Young's Market. Co.*, 299 U.S. 59 (1936) (abrogated by *Granholm*). In *Young's*, a California state law required retailers to purchase a license to sell imported beer, even though they were already licensed to sell beer in the state.⁸² The *Young's* court held the law passed constitutional muster because the language of the Twenty-First Amendment clearly gave the states the right to unilaterally regulate liquor free from the normal constraints of the Commerce Clause.⁸³ Under *Young's*, states were free to impose and define the complete parameters that alcohol producers, wholesalers, retailers, and consumers were to abide by, even if their regulations were facially discriminatory to interstate commerce.⁸⁴

⁸¹ See *Granholm*, 544 U.S. at 497–98 (Thomas, J., dissenting) (Articulating the absolutist position, Justice Thomas wrote:

A century ago, this Court repeatedly invalidated, as inconsistent with the negative Commerce Clause, state liquor legislation that prevented out-of-state businesses from shipping liquor directly to a State's residents. The Webb–Kenyon Act and the Twenty-first Amendment cut off this intrusive review, as their text and history make clear and as this Court's early cases on the Twenty-first Amendment recognized.

⁸² *State Bd. of Equalization of Cal. v. Young's Mkt. Co.*, 299 U.S. 59, 59–62 (1936) (abrogated by *Granholm*).

⁸³ *Id.* at 62. The court explained that prior to the adoption of the Twenty-First Amendment, the California law at issue most certainly would have violated the commerce clause. *Id.* But, the effect of ratifying the Twenty-first Amendment was that it abrogated the right of retailers and wholesalers to import for free. *Id.* The majority wrote:

The amendment which 'prohibited' the 'transportation or importation' of intoxicating liquors into any state 'in violation of the laws thereof,' abrogated the right to import free, so far as concerns intoxicating liquors. The words used are apt to confer upon the state the power to forbid all importations which do not comply with the conditions which it prescribes. *Id.*

⁸⁴ See Perkins, *supra* note 66 at 405 n.56 (noting the “expansive interpretation” of the Supreme Court in *Young's* gave “broad, unconfined power [to the states] to regulate intoxicating liquors pursuant to the Twenty-First Amendment”); Zywicki & Agarwal, *supra* note 33 at 640 (“[T]he Court actually did uphold facially discriminatory state liquor laws.”).

Rubbing against the absolutist approach is the “federalist”⁸⁵ approach, which has become the Court’s modern interpretive model.⁸⁶ Under the federalist approach, the Court reads the Twenty-First Amendment as only prohibiting federal oversight of state liquor laws in those states that outright ban alcohol.⁸⁷ The practical consequence of this nuance is that, where a state does not altogether promote temperance by banning the production and sale of alcohol within its borders, then any laws or regulations it enforces are subject to judicial review and Commerce Clause (and Dormant Commerce Clause) jurisprudence.⁸⁸ The

⁸⁵ See Versfelt, *supra* note 71, at 1580. Versfelt notes that, under the federalist approach, the purpose of the Twenty-First Amendment is:

[T]o allow states wishing to do so to remain ‘dry.’ State protection of its citizens from the harmful effects of intoxicants was to be achieved by preventing federal regulations under the commerce clause from unduly interfering with state regulation of imported liquor. Throughout, however, the amendment was designed to allow federal oversight of alcohol in interstate commerce.” *Id.*;

see also Spaeth, *supra* note 1, at 181 (“The ‘federalist’ view was that section two merely protected dry states: that is, states that allowed the importation, manufacture, or sale of intoxicating liquor gained no new powers vis-à-vis the federal government under the amendment”). Spaeth also notes the federalist view sees section 2 of the U.S. Constitution, Amendment XXI, as mere codification of the Webb-Kenyon act. *Id.* Note, the term federalist is being used in a nuanced way compared to its traditional definition in constitutional law. *Federalism*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“The legal relationship and distribution of power between the national and regional governments within a federal system of government, and in the United States particularly, between the federal government and the state governments.”). It is used in Twenty-First Amendment jurisprudence to describe the judicial approach which gives the courts increased power to review state laws treating alcohol produced in other states on different terms than alcohol produced within its own borders. *Id.*

⁸⁶ *Granolm*, 544 U.S. at 489. See Braden H. Boucek, *That’s Why I Hang My Hat in Tennessee: Alcohol and the Commerce Clause*, CATO SUP. CT. REV., 2018–2019, 119, 136 (discussing the implications of the *Granolm* decision on Twenty-First Amendment jurisprudence).

⁸⁷ See *supra* text accompanying note 71.

⁸⁸ See Glynn, *supra* note 2, at 121. *But see Granholm*, 544 U.S. at 497–98 (Thomas, J., dissenting) (arguing the Court’s decision did not take into account the Webb–Kenyon Act’s incorporation into the Twenty-First Amendment). Justice Thomas noted the implication of this incorporation was that the, “Act’s

federalist approach brings state laws that do not outright promote temperance under the purview of the federal courts, where those laws will be more readily subject to negation by provisions of the U.S. Constitution (such as the Commerce Clause).⁸⁹ Further, state laws will also be more readily submitted to review under the Dormant Commerce Clause because state regulations cannot discriminate against other states in the stream of interstate commerce and thus infringe on the positive authority given to Congress to regulate interstate commerce.⁹⁰

Historically, the federalist approach evolved as the courts incrementally placed more limitations on the Twenty-First Amendment through their decisions.⁹¹ First, through the Court's explicit adoption in *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), and further clarified in *Granholm v. Heald*, 544 U.S. 460 (2005), albeit, subject to protest from the dissent (and scholarly opposition).⁹² The federalist approach is

language displaces any negative Commerce Clause barrier to state regulation of liquor sales to in-state consumers." *Id.* (Thomas, J., dissenting).

⁸⁹ See *infra* text accompanying note 85.

⁹⁰ U.S. Const. art. I, § 8, cl. 3; see also *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 268 (1984). Justice White writing for the majority stated the Commerce Clause (and Dormant Commerce Clause) principle as: "[the] cardinal rule of Commerce Clause jurisprudence is that '[n]o State, consistent with the Commerce Clause, may 'impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.'" *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 329 (1977)" (quoting *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959)). *But see* *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000) (holding a state law which was equally discriminatory on in-state and out-of-state producers was accepted because the purpose of the law was to maintain "orderly market conditions.").

⁹¹ See *Silvernail*, *supra* note 41, at 519. *Silvernail* notes over time, the Court introduced "chips into the foundation upon which the absolutist interpretation of the Twenty-first Amendment is constructed." *Id.*

⁹² See *Granholm v. Heald*, 544 U.S. 460, 493–527 (2005), (Stevens & Thomas, JJ., dissenting); Glynn, *supra* note 2, at 121–23. Glynn notes Justice Stevens dissented citing "(1) the plain text of the Twenty-First Amendment; (2) the views of Justices who were present at the time of the Amendment's passage . . . ; and (3) early Supreme Court cases on the Amendment . . . weigh[ing] dispositively in favor of *strong state regulatory power* over the industry." *Id.* (emphasis added). Glynn also notes Justice Thomas dissented citing the text and statutory history of federal alcohol regulation. *Id.* Academic critics of the ruling in *Granholm* note that the federalist approach is more of an accommodation to

important because it allows for judicial review of state alcohol laws and regulations, subjecting them to the Commerce Clause (and Dormant Commerce Clause), thus limiting the power of states to regulate alcohol importation in a discriminatory manner compared to the early absolutist days of the Court.⁹³ In turn, the opening up of state alcohol markets to out-of-state alcohol producers who were previously barred entrance, or faced entrance at a discriminatory cost because of laws that favored in-state producers, theoretically creates more economic activity for out-of-state producers by giving them access to the market.⁹⁴ Further, more participants in the market has the potential to lead to lower prices and more choices for consumers.⁹⁵

The Court reversing course of its original absolutist ways led directly to the overturning of state liquor laws which otherwise would have been protected under the Twenty-First Amendment directly following the repeal of prohibition.⁹⁶ Further, while *Granholm* and *Bacchus* made clear that Commerce Clause jurisprudence applied to the importation of alcohol by producers and wholesalers, the question of whether the Commerce Clause applied similarly to state laws and regulations on retailers remained.⁹⁷ This brings us to the most recent Supreme Court case in this realm, *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449 (2019).

modern economic views on free markets rather than an originalist reading of the Twenty-First Amendment in its historical context. *See id.* at 124–27 (discussing free market economic theory and its effect on the Court's Twenty-first Amendment jurisprudence).

⁹³ *See Granholm*, 544 U.S. 460 (overturing direct shipment laws in New York and Michigan); *Bacchus*, 468 U.S. 263 (overturing tax law imposed on out-of-state producers, which was not imposed on in-state producers); *Tennessee Wine*, 139 S. Ct. 2449 (2019) (overturing residency requirement placed on retail licenses for liquor in Tennessee).

⁹⁴ *See infra* text accompanying note 145.

⁹⁵ *Id.*

⁹⁶ *See supra* text accompanying note 91–93. Both dissents in *Granholm* note the laws at issue would have survived under *Young's* absolutist model of applying the Twenty-First Amendment. *Id.* The respective laws at issue from New York and Michigan in *Granholm*, gave economic preference to in-state producers by allowing them to ship directly to consumers while disallowing out-of-state producers to do the same. *Granholm*, 544 U.S. at 465–66.

⁹⁷ *See Boucek, supra* note 86, at 121–22.

In *Tennessee Wine*, plaintiffs challenged a licensing requirement imposed by the state of Tennessee that required first-time retailers to have maintained residence in the state for two years prior to receiving a license to sell alcohol in the state.⁹⁸ The Court held the requirement “plainly favors Tennesseans over nonresidents,” and because of that, it was offensive to the Dormant Commerce Clause.⁹⁹ In reality, the retail level of the alcohol market is where the state arguably has the biggest interest in regulating without federal oversight because this is where alcohol is distributed to the local population— whose health and safety the state is most directly responsible for.¹⁰⁰ But, the Court held that the retail level was subject to the same Commerce Clause and Dormant Commerce Clause analysis as the manufacturing and producer levels of the alcohol markets because the Commerce Clause protects “all ‘out-of-state economic *interests*.’”¹⁰¹ *Tennessee Wine* illustrates that the Courts, relying on the federalist approach to the Twenty-First Amendment, will apply the Commerce Clause (and Dormant Commerce Clause) to state laws and regulations at each level of the alcohol market.¹⁰²

At this point, a discussion of three-tier distribution systems highlights the depth at which state governments can regulate and control the alcohol market under the Twenty-First Amendment. Much of the case law animating the Twenty-First Amendment arose out of challenges to such systems.”¹⁰³ Immediately following Prohibition, all states took complete control over these levels through state-run monopolies.¹⁰⁴ Today, states maintain monopolistic control over each tier, but the way they

⁹⁸ *Tennessee Wine*, 139 S. Ct. at 2457.

⁹⁹ *Id.* at 2462.

¹⁰⁰ See Boucek, *supra* note 86, at 121 (quoting *Craig v. Boren*, 429 U.S. 190, 215 (1976) (Stewart, J., concurring)). This is precisely the type of police power concern where states have also enjoyed great lawmaking authority. *Id.*

¹⁰¹ *Tennessee Wine*, 139 S. Ct. at 2471. The plaintiff’s argument was that *Granholm* only applied to manufacturers and producers of alcohol because the language of the majority’s decision only spoke to producers of alcohol. *Id.* The court rejected this argument, citing the reason the *Granholm* court only spoke in terms of producers was that the issue of law in that case was specific to producers of alcohol. *Id.*

¹⁰² *Id.* at 2457.

¹⁰³ See discussion *infra* Section II.C.

¹⁰⁴ See discussion *infra* Section II.C.

regulate and write laws bears a scant connection to the original temperance justifications for the monopoly.¹⁰⁵

The name “three-tier” stems from the three-pronged structure of alcohol markets operating under the three-tier system.¹⁰⁶ Tier-one includes producers and manufacturers, tier-two includes wholesalers, and tier-three includes retailers.¹⁰⁷ Originally, following the repeal of Prohibition, state-controlled three-tiered systems were implemented to root out the organized crime which had taken hold of the alcohol markets during Prohibition, to take in tax revenues (in the face of the Great Depression), and to ensure alcohol did not make its way into the hands of minors.¹⁰⁸ The courts held this system was constitutional because it fell in line with the underlying purposes of the Twenty-First Amendment.¹⁰⁹ It also furthered the legitimate police power concerns the states had in regulating the alcohol market in the name of public health and safety.¹¹⁰ By enforcing a three-tier distribution system, a state can utterly control the flow of alcohol within its borders through defining the terms by which it must be imported, produced, sold, and purchased by retailers and consumers alike.¹¹¹

¹⁰⁵ See discussion *infra* Section III.

¹⁰⁶ See Roni A. Elias, *Three Cheers for Three Tiers: Why the Three-Tier System Maintains Its Legal Validity and Social Benefits After Granholm*, 14 DEPAUL BUS. & COM. L.J. 209, 211–14 (2015) (discussing the nature and characteristics of the three-tier distribution system).

¹⁰⁷ *Id.*

¹⁰⁸ *Lucas*, *supra* note 13, at 906–07. Lucas notes the aims underlying the three-tier system: “[It] was designed with several aims: to collect taxes, to reduce the hold organized crime had gained on the liquor trade during Prohibition, and to prevent sales of alcohol to minors.” *Id.* See generally Elias, *supra* note 106, at 214–25 (discussing the policy justifications for the initial use of the three-tier system and its economic and regulatory advantages). These three values, which the state-level monopolies sought to perpetuate, coupled with the pro-temperance moral values laden in the politics of the prohibition and repeal movements, were the main justifications in giving expansive power to the states to control liquor. *Id.*

¹⁰⁹ Elias, *supra* note 106, at 214–25.

¹¹⁰ *Granholm v. Heald*, 544 U.S. 460, 489 (2005). Justice Kennedy noted the constitutionality of the three-tier system, “States may also assume direct control of liquor distribution through state-run outlets or funnel sales through the three-tier system. We have previously recognized that the three-tier system itself is ‘unquestionably legitimate.’” *Id.* (quoting *North Dakota v. United States*, 495 U.S. 432 (1986)).

¹¹¹ Elias, *supra* note 106 at 211–14; Perkins, *supra* note 66, at 413–14.

Further, when considering the effect of direct shipment laws, like those at issue in *Granholtm* and *Bridenbaugh*, in the context of three-tier distribution, the three-tier systems achieve the end of maximizing state control of alcohol. By banning direct shipment to consumers from out-of-state producers (like the Indiana laws at issue in *Bridenbaugh* did),¹¹² the out-of-state alcohol is forced to work its way through the state-designated wholesale and retail channels.¹¹³ By following the prescribed path, the alcohol is now subject to the state-specific tax regimen, as well as the specific health and safety standards required by the state's regulations regarding wholesaling and retail sales.¹¹⁴ To these ends, the control exercised by a state through the three-tier system furthers the temperance-oriented aims of public health and safety by regulating sales; it ensures higher tax revenue by making all alcohol pass through the scheme; and it mitigates organized crime's role in alcohol commerce through states' exercising plenary control of each level of the market.¹¹⁵ Because the three-tier system gives states an enormous amount of control over the industry, there are notable economic and competitive impacts on participants in the industry.¹¹⁶

III. THE EVERY DAY IMPACT OF MODERN ALCOHOL REGULATION

Up to this point, we have outlined the historical, legal, and philosophical context which has shaped the interpretation and application of the Twenty-First Amendment in American law at a large scale level.¹¹⁷ But what about its practical consequences? What does it mean for businesses and consumers to abide by a state's monopolistic participation in alcohol markets in an every-day sense? What happens when the rules and regulations are decreased? Does the current state of the law actually reflect the temperance values the Twenty-First Amendment was ratified

¹¹² *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 849 (7th Cir. 2000).

¹¹³ See *id.* at 853–54. Judge Easterbrook in the majority opinion noted the effect of the Indiana law “has one real economic effect on out-of-state sellers who neither have nor seek Indiana permits: it channels their sales through Indiana permit-holders, enabling Indiana to collect its excise tax equally from in-state and out-of-state sellers.” *Id.*

¹¹⁴ *Id.*

¹¹⁵ See Elias, *supra* note 106, at 214–25 (discussing the regulatory and economic advantages of the three-tier system in light of its original aims).

¹¹⁶ See discussion *infra* Section III.

¹¹⁷ See discussion *supra* Sections I, II.

under? This section will attempt to answer these questions by reviewing a sampling of current laws and their impacts on states, businesses, and consumers.

A. *Increased Prices for Consumer and Producers Across the States*

Monopolistic conditions like those created under the three-tier system carry substantial economic consequences for businesses operating in the tiers, which eventually are passed on to consumers.¹¹⁸ It is important to note that state legislation rarely stops at the mere channeling of alcohol products through the proper tax, health, and safety channels under the three-tier system. Rather, it goes on to define the market conditions and relationships by which producers participate with wholesalers and retailers.¹¹⁹

i. *Laws limiting craft beer brewers*

For example, the North Carolina three-tier distribution system, which is perpetuated under the authority of the Twenty-First Amendment, limits the freedom of contract that brewers have with wholesalers in addition to establishing a three-tier distribution system.¹²⁰ While, the North Carolina law's stated purpose is to promote a competitive market place, Scott notes, the law pragmatically works against this purpose of "maintain[ing]... healthy competition" by effectively shutting down producers' freedom to choose those with whom they work in the wholesale

¹¹⁸ See Scott, *supra* note 17, at 422–33. In his discussion of North Carolina's three-tier system, Scott notes that the licensing requirements come with certain restrictions. *Id.* For example, brewers in North Carolina are heavily regulated in the types of contracts they can form with wholesalers. *Id.* at 42324. A brewer can only contract to sell a brand in a legally designated area (and not outside that area); brewers can only break or fail to renew a contract with a wholesaler for good cause; and, before selling any product to a wholesaler, the Alcohol Beverage Control Commission in North Carolina must be given notice of the contract. *Id.* All these restrictions are layered on top of the licensing system "requiring separate licenses for brewers, wholesalers, and retailers," with specific constraints on the relationships between each level. *Id.* at 422. See also Perkins, *supra* note 66, at 427 (discussing how the regulatory systems currently in place "directly harm consumers by over-inflating prices and reducing availability").

¹¹⁹ See *supra* text accompanying note 118. The laws dictates the certain necessary terms of contract that producers can have with wholesalers and limits their options in terms of retail strategy. *Id.*

¹²⁰ N.C. GEN. STAT. ANN. § 18B-1300–1309.

and distribution sectors.¹²¹ The law places a heavy burden on small producers by limiting who they can work with and how they can terminate their business relationships, while simultaneously providing a market that ensures business to wholesalers regardless of how they carry out the services for which they are contracted for.¹²²

The North Carolina law, in its initial iteration, also kept producers from working directly with retailers to promote their products if they produced over 25,000 barrels of beer per year;¹²³ leaving it to wholesalers who control the brands to sell the beer to retailers.¹²⁴ This requirement forced producers to give control of the distribution of their product over to wholesalers once they reached 25,000 barrels,¹²⁵ even though they may not have the brand awareness necessary to incentivize the wholesalers to prioritize their product over the other brand lines they carry.¹²⁶ While the

¹²¹ Scott, *supra* note 17, at 426. Scott notes that the statutes preventing brewers from using more than one wholesaler in a given territory, coupled with the statutes limiting the ways brewers can break contract or find a new wholesaler upon the termination of a contract, act to directly limit competition and give wholesalers a virtual monopoly on beer distribution. *Id.* He also notes the difficulty smaller breweries have in getting new products to market under the current regulatory system. *Id.* at 428. See also Michael Sorini, *Beer Franchise Law Summary*, BREWERS ASSOCIATION, <https://www.brewersassociation.org/wp-content/uploads/2015/06/Beer-Franchise-Law-Summary.pdf> (last visited Sept. 30, 2021) (noting that the applicable franchise laws in Alabama, Arkansas, and Arizona—among many other states—require good cause to terminate a wholesaler relationship).

¹²² See Scott, *supra* note 17, at 426–429 (discussing the various ways the law works against creating competition). Scott notes, the effect of limiting freedom of contract and only allowing producers to work with one wholesaler in a given market, is that the wholesaler gains a monopolistic position in the market. *Id.* at 426–27. See also Sorini, *supra* note 121 (noting similar laws in states all across the country).

¹²³ Scott, *supra* note 17, at 427. Under the North Carolina system, producers could obtain a wholesaling permit to sell their own beer to retailers so long as their production was under 25,000 barrels per year. *Id.* at 422 (these barrel limits were increased as of 2019, see *infra*, text accompanying note 131).

¹²⁴ *Id.* at 426–27. In addition to limiting the power of the producer, the retailer is also subject to the given wholesaler’s brand preference. *Id.* This brand preference is most often motivated by what is best for the wholesaler and not the producer. *Id.*

¹²⁵ *Id.* Now a 50,000-barrel limit, see *infra* note 130.

¹²⁶ See Scott, *supra* note 17, at 426–27.

North Carolina system allows small producers to promote their own beer to retailers, their efforts are ultimately limited because they do not have the power or influence of larger producers to ensure their product is promoted effectively alongside other brands.¹²⁷ Further, retailers may find it inefficient to work with numerous small wholesalers only selling one product.¹²⁸ Considering these regulations overall, the result of the North Carolina laws forces small and new breweries to face unnecessarily large market barriers for their products.¹²⁹

In response to the effects of the law's original construction, in 2019, North Carolina changed the law by replacing the 25,000-barrel cap and with a 50,000-barrel cap.¹³⁰ Brewers and beer fans celebrated the move as an economic success and one which would lead to greater freedom autonomy for independent craft brewers and ultimately more options for consumers.¹³¹ The limitations on freedom of contract and monopolistic conditions promoted by North Carolina's three-tier system, however, remain in place.¹³² Brewers in North Carolina were somewhat fortunate to have their barrel limitations changed before the onset of the COVID-19 pandemic because they gained more control over how they sell their product in the midst of uncertain futures, some brewers were not so lucky.¹³³

¹²⁷ See *Id.* See also Stuart Banner, *Granholm v. Heald: A Case of Wine and A Prohibition Hangover*, CATO SUP. CT. REV. 263, 265 (2005) (noting the disadvantages faced by small producers: "Wholesalers and retailers are prevented by cost and space constraints from offering every variety of every beverage produced. They focus on the well-known brands of the largest producers, at the expense of the smaller producers and lesser known products.").

¹²⁸ Banner, *supra* note 127.

¹²⁹ Scott, *supra* note 17, at 427–28. Noting "retailers do not wish to be burdened with dealing with multiple self-distributing breweries. The inconvenience placed on retailers by self-distribution in a world dominated by mandated wholesalers necessitates the use of wholesalers for many small breweries who do not have the power to require wholesalers to carry their products." *Id.*

¹³⁰ See N.C. GEN. STAT. ANN. § 18B-1104.

¹³¹ Edward Martin, *Craft brewer's growth path eased with new bill*, BUSINESSNC (Aug. 1, 2019), <https://businessnc.com/craft-brewers-growth-path-eased-with-new-bill/>.

¹³² See N.C. GEN. STAT. ANN. § 18B-1300–1309.

¹³³ See Martin, *supra* note 131.

In contrast to easy of some restrictions under the North Carolina statutory scheme, Minnesota has laws in place that prevent breweries from selling their beer in cans from their own tap rooms, thus forcing any products packaged in cans to be sold through wholesale and retail distribution only.¹³⁴ During the pandemic, Minnesota breweries were only permitted to sell their beer “to go” in growlers, which are much larger than traditional cans, less appealing to some customers, and more expensive to supply.¹³⁵ Further, this law was qualified by a 20,000-barrel limitation which prohibited any brewery that produced over 20,000 barrels of beer per year from selling its beer in growlers.¹³⁶ Minnesota is the only state that allows on-site “to go” beer sales to have such a limitation.¹³⁷ Under normal circumstances, these issues may be less impactful, but, with the onset of COVID-19—and the emergency restrictions on indoor dining and congregating in alcohol establishments—these laws greatly restricted the ability of small breweries to keep their heads above water.¹³⁸ Not being able to sell smaller amounts of beer in twelve- or sixteen-ounce cans to consumers on-site hurts profits because the process for growler and growler production is less efficient and imposes a higher labor cost than producing smaller aluminum cans.¹³⁹ While restrictive laws like these are placed on beer across the United States,¹⁴⁰ such restrictions are not unique to beer alone.

ii. Laws limiting craft liquor

¹³⁴ Kenny Gould, *Restrictive Craft Beer Laws May Put Small Breweries Out Of Business*, FORBES (May 8, 2020, 12:58 PM), <https://www.forbes.com/sites/kennygould/2020/05/08/restrictive-craft-beer-laws-may-put-small-breweries-out-of-business/#59badcd0187d>; Peter Callaghan, *Updating Minnesota’s Prohibition-era liquor laws likely has a lot of support. Here’s why that doesn’t matter.*, MINNPOST (Feb. 17, 2021), <https://www.minnpost.com/state-government/2021/02/updated-minnesotas-prohibition-era-liquor-laws-likely-has-a-lot-of-support-heres-why-that-doesnt-matter/>.

¹³⁵ Gould, *supra* note 134.

¹³⁶ Callaghan, *supra* note 134. Five breweries are currently affected by the limit at the time of the writing of this article. *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Gould, *supra* note 134.

¹⁴⁰ See Linneken, *supra* note 17 (discussing state laws across the country which hurt small businesses to the advantage of large wholesalers).

Another example of the increased burdens producers and consumers face from state regulation under the guise of promoting temperance happens within the three-tier system in Virginia. Under Virginia law, all hard-liquor is sold through the state's three-tier system, which imposes a 69% markup to consumers on top of excise and sales taxes; resulting in the third-highest effective tax rate on distilled spirits in the nation.¹⁴¹ These price impositions on customers have the two-sided effect of discouraging consumers from purchasing hard liquor—a desired outcome for temperance advocates—and potentially nudging smaller craft distilleries that face higher production costs out of the market in Virginia.¹⁴² Wine and beer producers in Virginia, who are not subject to such strict regulations, are some of the biggest supporters of the current system along with the Virginia restaurant lobby.¹⁴³ That craft distillers' competition, namely beer and wine producers, support for the current system is not surprising given the preferential tax treatment and looser sales regulations they experience results in a distinct state-sponsored advantage in the marketplace.¹⁴⁴ What may be surprising, is the irony of the strange bedfellows the current Virginia law creates. The laws in Virginia are such, that temperance advocates and beer and wine producers are on the same side against the craft liquor industry. Temperance advocates who do not want alcohol sold or produced at all, arguably tend to get what they want in regards to liquor because the laws make liquor products significantly more expensive to produce and buy, making

¹⁴¹ Dieterle, *supra* note 18; *see also*, Janelle Cammenga, *How High Are Spirit Taxes in Your State?*, TAX FOUNDATION (June 19, 2019), <https://taxfoundation.org/state-distilled-spirits-taxes-2019/#:~:text=In%20this%20category%2C%20Washington%20State,in%20Wyoming%20and%20New%20Hampshire> (noting as of June 2019: Virginia had the third highest tax rate for distilled spirits; the eight highest tax rate for wine; and the twenty-sixth highest tax rate for beer).

¹⁴² Dieterle, *supra* note 18.

¹⁴³ *Id.* The beer and wine lobby in Virginia contributed \$1.7 million in political donations between 2014 and 2015. *Id.* The state of Virginia itself is also a huge proponent, as the regulations on distillers contribute millions of dollars of tax revenue to its general fund. *See* Jenna Portnoy, *Va.'s growing craft distillery industry pushes against regulatory roadblocks*, WASHINGTON POST (Feb. 14, 2016), https://www.washingtonpost.com/local/virginia-politics/vas-growing-craft-distillery-industry-pushes-against-regulatory-roadblocks/2016/02/14/ef233eae-d0ed-11e5-abc9-ea152f0b9561_story.html (noting in 2015–2016 Virginia gleaned over \$152 million in tax revenues from its three-tier system).

¹⁴⁴ Dieterle, *supra* note 18.

consumers less likely to purchase them. Similarly, the major producers of beer and wine in the state also glean a benefit because they can produce and sell in the state at lower costs and better margins.

B. *Laws Limiting Alcohol Generally*

Further, looking at things from a broader perspective, leading up to *Granholm*, both scholars and regulators noted how direct shipment bans created imposing burdens on consumers and producers by closing off the expanding market created by the Internet.¹⁴⁵ Yet, even after *Granholm* made state importation laws unconstitutional under the Dormant Commerce Clause, some states adjusted their laws to the decision by rewriting them to facially comply with the decision while practically still perpetuating economic discrimination.¹⁴⁶ While such “gallone cap

¹⁴⁵ *Possible Anticompetitive Barriers to E-Commerce: Wine*, FED. TRADE COMM’N (July 2003), https://www.ftc.gov/sites/default/files/documents/reports/possible-anticompetitive-barriers-e-commerce-wine/winereport2_0.pdf (note the report was written prior to the *Granholm* decision which affected direct shipment laws favoring in state producers and shippers). The Federal Trade Commission (FTC) concluded that “[s]tate bans on interstate direct shipping represent the single largest regulatory barrier to expanded e-commerce in wine.” *Id.* at 14. The report also noted “states could significantly enhance consumer welfare by allowing the direct shipment of wine to consumers.” *Id.* at 3. The Commission acknowledged state concerns regarding “tax collection and prevention of sales to minors” but observed that “many states have adopted measures that are less restrictive than an outright ban on interstate direct shipping, and these states generally report few or no problems.” *Id.* See Banner, *supra* note 127, at 264–65 (noting the two primary effects of three-tier distribution “first is to raise the price of alcohol to the consumer by placing two intermediaries between the consumer and the producer.... The second effect of the three-tier requirement is to reduce the consumer’s range of choice.”); Perkins, *supra* note 66, at 420 (noting the market barriers for small wine producers the three-tier system creates). Perkins also notes “[m]ost state regulation of alcohol intends neither to promote state interests nor to protect consumers, but rather to protect established businesses.” *Id.* at 424.

¹⁴⁶ Perkins, *supra* note 66, at 415–18. The laws at issue set a limit on how many barrels of wine a producer can make before they are prohibited from direct shipment. *Id.* at 415. As long as they fall under the production number specified they can ship directly to consumers. *Id.* The issue is that this number is set just above the production of the largest wine producer in the state. *Id.* Meaning, all in-state wine producers comply with the law, thus allowing them to ship directly to customers—at the exclusion of out of state producers. *Id.*

exceptions” failed in some states, they were upheld in others as non-discriminatory under the Commerce Clause, highlighting the inconsistency across the circuits in terms of how the *Granholm* decision is applied.¹⁴⁷ Once again, much like with the beer laws in North Carolina and the three-tier distribution system in Virginia, there are substantial advantages to be gained by interested parties from the imposition of these types of state laws.¹⁴⁸

Not content to let states enjoy all the restrictive lawmaking, the federal government has also maintained laws which have hurt producers and consumers alike. Until late 2018, a law implemented under Andrew Jackson, which was based on offensive and misguided stereotypes, made it illegal for Native Americans to distill spirits on tribal lands.¹⁴⁹ The law was put in place shortly after President Jackson signed the Indian Removal Act and barred Native Americans from distilling “ardent spirits” on tribal land.¹⁵⁰ It effectively kept an entire class of American citizens from enjoying the ability to engage in a segment of the U.S. economy which created over 14,000 manufacturing jobs from January 2018 to January 2019.¹⁵¹

¹⁴⁷ *Id.* at 414–15. Perkins notes a similar face-to-face requirement law for direct shipments was upheld in the Seventh Circuit but struck down in the Sixth Circuit. *Id.* Massachusetts attempted to pass a capping law, but it was struck down when challenged at the district court level. *Id.* at 415–16. An Arizona “small winery exception” law was upheld in a Commerce Clause challenge in, *Black Star Farms, LLC v. Oliver*, 600 F.3d 1225 (9th Cir. 2010). It is still on the books. *See* Ariz. Rev. Stat. Ann. § 4-205.04 (2019).

¹⁴⁸ *See* Perkins, *supra* note 66, at 420–21. Perkins notes the oversized influence wholesalers and trade associations have in the legislative process given their lobbying efforts and financial contributions. *Id.*

¹⁴⁹ C. Jarrett Dieterle, *Distilling on Tribal Lands Is Now Legal in the U.S.*, SEVENTYFIFTYDAILY (Jan. 16, 2019), <https://daily.seventy.com/distilling-on-tribal-lands-is-now-legal-in-the-u-s/#:~:text=Rep.&text=But%20until%20just%20a%20few,craft%20alcohol%20renaissance%3A%20Native%20Americans>.

¹⁵⁰ Dieterle, *supra* note 149. *See also* Christopher Helman, *The Inside Story of the First (Legal) Native American Distillery*, FORBES (Aug. 17, 2020, 06:30am EDT), <https://www.forbes.com/sites/christopherhelman/2020/08/17/the-inside-story-of-the-first-legal-native-american-distillery/?sh=3c4e64e23412>.

¹⁵¹ Dieterle, *supra* note 149.

IV. CONCLUSION: WHY ISN'T THE MARKET OPEN FOR BUSINESS?

Current alcohol regulation works against smaller businesses, in part, because of the centralized and oversized control wholesalers exercise at the political level.¹⁵² Wholesalers run an organized, targeted, and well-funded lobbying effort at the state and federal levels.¹⁵³ In contrast, most segments of the producer level of the three-tier system are decentralized and have not effectively organized themselves into influential political machines.¹⁵⁴ This results in a disparity in the ability to affect the regulatory law-making process, leading to laws which are conducive to large wholesaler interests over and against those of the individual and smaller scale producers.¹⁵⁵ This is seen over and over again in the survey of laws regulating the production, sale, and distribution of alcohol.¹⁵⁶

How does limiting the freedom of contract of beer brewers in North Carolina so extensively fulfill the self-proclaimed purpose of the law to create competition?¹⁵⁷ States were given heavy handed ability to regulate alcohol in part, because Congress intended for the values of temperance movement to be perpetuated at the state level if the states so chose.¹⁵⁸ How do the contract limitations placed on producers nationwide work to actually further any temperance goals? What public health or temperance goals are met by forcing successful Minnesota breweries to

¹⁵² See Lucas, *supra* note 13, at 907 (discussing the consolidation of the wholesale tier by 90% from 1950 to 2002 coinciding with an increase in lobbying efforts by wholesale interests).

¹⁵³ See Liz Essley Whyte, *Alcohol Distributors Ply Statehouses to Keep Profits Flowing*, TIME (Aug. 6, 2015, 05:00 AM EDT), <https://time.com/3986536/alcohol-distributors-lobbying/>.

¹⁵⁴ See Banner, *supra* note 127, at 265.

¹⁵⁵ See Silvernail, *supra* note 41, at 553. Silvernail notes this in the context of direct shipping laws, “wholesalers--the true proponents behind the direct shipping laws--see direct shipping as a threat to their monopoly. In response to this perceived threat, the wholesalers expend great effort in lobbying state legislatures and the Congress, and many states responded with laws banning direct shipping.” *Id.*

¹⁵⁶ Jim Saksa, *Rum Deal: Counting up all the ways America's booze laws are terrible*, SLATE (June 12, 2014, 1:23 PM), <https://slate.com/business/2014/06/americas-booze-laws-worse-than-you-thought.html>.

¹⁵⁷ See *supra* text accompanying notes 118–19.

¹⁵⁸ See discussion *supra* Section II (noting the values of Temperance survived the repeal of Prohibition).

only sell their canned beer through wholesalers and retailers instead of out of their own breweries?¹⁵⁹ The answer to these questions is that the goals of temperance underlying the Twenty-First Amendment are not the real objects being achieved by many of the laws regulating alcohol today.¹⁶⁰ Rather, current laws reflect the priorities of the parties who have the most financial and political influence over state and federal lawmakers.¹⁶¹ Whether that is producers of alcohol seeking to ensure their own market positions at the expense of other producers,¹⁶² wholesalers seeking to entrench and establish their monopolistic position,¹⁶³ or distributors seeking laws which result in maximum profits,¹⁶⁴ current state laws go far beyond mitigating organized crime, ensuring tax income, and promoting the public health and safety which originally justified the extensive authority granted by the Twenty-First Amendment.¹⁶⁵

Three-tier distribution systems are embedded as constitutional under the Twenty-First Amendment, and given the public health concerns and organized crime which justified their existence when the federal government repealed prohibition, they are likely to remain in place.¹⁶⁶ But the extent to which state governments have layered regulations within the three-tier system are favorable to those with the most access in the political process, resulting in state governments and elected officials making laws at the expense of the average producer and consumer.¹⁶⁷

¹⁵⁹ See discussion *supra* text accompanying notes 134–40.

¹⁶⁰ See Elias, *supra* note 106.

¹⁶¹ See Silvernail, *supra* note 41, at 532–41 (discussing current legal trends and challengers in Twenty-First Amendment jurisprudence). See also Saksa, *supra* note 156 (noting that “booze barons” are motivated to defend regulations through lobbyists and political donations).

¹⁶² See discussion *supra* notes 142–44.

¹⁶³ See discussion *supra* notes 120–32 (discussing the favorable impact of North Carolina’s laws written with wholesalers in mind).

¹⁶⁴ See *id.*

¹⁶⁵ See discussion *supra* notes Section III (discussing different state alcohol laws).

¹⁶⁶ See *Granolm v. Heald*, 544 U.S. 460, 489 (2005).

¹⁶⁷ See Saksa, *supra* note 156. This is called “regulatory capture.” *Id.* As defined in administrative law, regulatory capture is “[t]he process by which a regulatory agency created to protect public interests becomes dominated by the industry it was created to regulate and comes to favor the industry rather than serving as a watchdog for the public interest.” *Regulatory Capture*, BLACK’S LAW DICTIONARY (11th ed. 2019).

Just because a state *can* regulate something extensively in the, does not mean it *should* do so. Further, just because states can regulate in the name of temperance, does not mean their laws in fact achieve temperance when they claim to, nor does it mean their regulations are actually written with temperance in mind.¹⁶⁸ Smaller craft producers and consumers of craft alcohol alike should continue to organize and lobby for their own benefit.¹⁶⁹ While the Twenty-First Amendment and the three-tier distribution systems it gives rise to are not going anywhere, state legislators should be held accountable to passing laws within those frameworks that are actually related to temperance, taxes, and orderly markets.¹⁷⁰ By getting rid of burdensome laws, business owners, consumers, and even wholesalers (who may see more variety and better products come to market), can reap the benefits of more choices and cheaper drinks.¹⁷¹ Cheers!

¹⁶⁸ See Perkins, *supra* note 66, at 419–28.

¹⁶⁹ See generally Tara Nurin, *One Craft Distillery Opens Every Day. One Decision Can End The Boom*. FORBES (July 31, 2017, 8:07 AM), <https://www.forbes.com/sites/taranurin/2017/07/31/one-craft-distillery-opens-every-day-one-decision-can-end-the-boom/?sh=1a1701d07134> (discussing tax reform lobbying achieved by craft and large interests alike through associations).

¹⁷⁰ See generally discussion *supra* Section II.C.

¹⁷¹ See discussion *supra* Section III.A.i (outlining how change in North Carolina state law benefitted small-scale producers and consumers).

