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What's Brewing in the Old North State: An Analysis of the Beer Distribution Laws Regulating North Carolina's Craft Breweries

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INTRODUCTION

The craft brew revolution is said by some to have begun in 1977, when Jack McAuliffe founded the New Albion brewery in Sonoma, California. The New Albion brewery, although a commercial failure, is significant as the nation’s first microbrewery and as the blueprint for the craft brew industry. Shortly after New Albion, notable craft brewers such as Ken Grossman of Sierra Nevada and Jim Koch of Boston Beer appeared on the landscape and craft brewing gained traction. Eight years after New Albion failed, North Carolina saw its first craft brewery with the opening of Uli Bennewitz’s Weeping Radish brewpub in 1985. Today, there are forty-four breweries and/or brewpubs in North Carolina; of these, forty are locally owned, with some on the verge of becoming regional breweries. Not only has the state’s craft brew industry undergone significant growth, but it has

2. See id. Craft brewers are defined as small (annual production of less than 2,000,000 barrels), independent (less than 25% of the craft brewery is owned “by an alcoholic beverage industry member who is not themselves a craft brewer”), and traditional (brewers who have an “all-malt flagship” or at least 50% of its volume in all-malt beers or “beers which use adjuncts to enhance, rather than lighten flavor”). Brewers Association, American Craft Brewer Definition, http://www.brewersassociation.org/pages/business-tools/craft-brewing-statistics/craft-brewer-defined (last visited Aug. 23, 2010). Within craft brewers, there are four subcategories: microbrewers (annual production of 15,000 barrels or less, with 75% of beer sold off-site); brewpubs (a brewery that sells 25% or more of its beer on-site); contract brewers (businesses which hire other breweries to produce their beer); and regional breweries (annual production of 15,000 to 2,000,000 barrels annually). Brewers Association, Market Segments, http://www.brewersassociation.org/pages/business-tools/craft-brewing-statistics/market-segments (last Aug. 23, 2010).
4. See Elizabeth Leland, Something’s Brewing in Manteo: N.C. Gets a Taste of Germany, CHARLOTTE OBSERVER, Aug. 4, 1988, at 1B.
also gained a favorable reputation nationwide, with Asheville voted America’s top beer city among a poll of craft beer enthusiasts and state craft breweries taking home medals at the Great American Beer Festival.

This has not gone unnoticed by North Carolina’s General Assembly, which has explicitly professed an interest in promoting the growth of the craft brew industry. In October 2009, with the enactment of the malt beverage tasting and special event permit, the General Assembly recognized that “craft brewers... are a growing industry in North Carolina,” that “craft brewers... could serve as an economic engine throughout North Carolina and create jobs and serve as a tourist draw,” and that “North Carolina is now being recognized as a highly respected state for specialty malt beverages.”

Despite the expressed legislative intent to help the craft brewing industry grow, there is some contention among craft brewers in North Carolina about whether the alcohol control laws really promote growth. Specifically, there is controversy over the three-tier system regulating the distribution of alcohol, a system that was adopted by a majority of states shortly after the repeal of Prohibition (“Repeal”). At its core, the three-tier system requires brewers to sell to

6. See Jeri Rowe, North Carolina Brews Reputation for Good Beer, GREENSBORO NEWS & REC., Aug. 6, 2009 (noting that Asheville was voted the number one beer destination in the country in Beer Advocate magazine).


9. Id. at 50. The special event permit allows a brewer to give free tastings at trade shows, convention centers, malls, and other venues. See id. The malt beverage tasting permit allows a brewer to offer tastings at locations that hold a retail permit to sell beer. See id.

10. See E-mail from Mark Doble, Owner, Aviator Brewing, to author (Dec. 31, 2009, 14:34 EST) (on file with the North Carolina Law Review).


12. See Beskind v. Easley, 325 F.3d 506, 509–10 (4th Cir. 2003) (“As in many states that implemented the Twenty-first Amendment, the structure in North Carolina is a familiar three-tiered one in which out-of-state sellers of alcoholic beverages may sell their
wholesalers, who in turn can only sell to other wholesalers or retailers. The impact of the law in its purest form is to keep the brewer completely separate from the retailer. Over time, the three-tier system was modified to allow brewers under a certain size to self-distribute directly to the retailer. Additionally, almost every state has a franchise law which regulates the relationships that suppliers can have with wholesalers.

Nevertheless, the craft brew industry that is regulated by these laws today is very different from the brewing industry that existed at the time of Repeal and is different from the mass-production beer industry that controls a significant portion of market share today. Many question whether the three-tier system, enacted in the mid-1930s following Repeal to prevent the recurrence of “tied-house” alcoholic beverages only to licensed wholesalers, who in turn may sell only to other wholesalers and licensed retailers.

13. The function of the wholesaler is to buy beer from the brewer, warehouse it, and then sell and deliver the beer to retailers. The North Carolina Beer and Wine Wholesalers Association, What is a Beer/Wine Distributor?, http://ncbwaa.org (place cursor over “About Us” hyperlink; then follow “What is a Beer/Wine Distributor?”) (last visited Aug. 23, 2010). This involves not only transporting beer from the brewery to the retailer, but also marketing and promoting the beer to retailers.

14. In addition to the term “wholesaler,” the term “distributor” will be used as an equivalent in this Comment. “Wholesaler and “distributor” are used interchangeably in this Comment because the terms are used interchangeably in the beer industry.

15. See Lawson, supra note 11, at 33–34.


17. See DOUGLAS GLEN WHITMAN, STRANGE BREW: ALCOHOL AND GOVERNMENT MONOPOLY 3 (2003). The franchise laws govern agreements between brewers and distributors where the brewer grants a wholesaler the right to offer and sell the brewer’s products. See N.C. GEN. STAT. § 18B-1301 to -1302 (2009). The franchise laws prohibit a brewer from terminating the agreement unless there is good cause and notice. See N.C. GEN. STAT. § 18B-1304 (2009).

18. See Susan C. Cagann, Contents Under Pressure: Regulating the Sales and Marketing of Alcoholic Beverages, in SOCIAL AND ECONOMIC CONTROL OF ALCOHOL, supra note 11, at 57, 69 (comparing the impact of franchise laws on large national suppliers as opposed to small suppliers); Lawson, supra note 11, at 33. In 2008, domestic beers had roughly 85% of the market share. BREWERS ALMANAC, supra note 3 (follow “Brewers Almanac 2009” hyperlink; then follow “Industry Summary”) (last visited Aug. 23, 2010). Craft beers had 4.0% of the market share by volume in 2008, a 5.8% increase from the year before. Brewers Assoc. Reports Craft Up 5.8% in '08, MOD. BREWERY AGE, Feb. 25, 2009.

19. “Tied-house” outlets refer to retail outlets where alcohol suppliers held a direct financial interest in (and were hence “tied” to) the owners of the retail outlets. See Carole L. Jurkiewicz & Murphy J. Painter, Why We Control Alcohol the Way We Do, in SOCIAL AND ECONOMIC CONTROL OF ALCOHOL, supra note 11, at 1, 7.
retail outlets, should really be applicable to craft brewers today.\textsuperscript{20} Also contentious are the beer franchise laws, enacted beginning in the early 1970s in the face of increasing concentration of market dominance among the top brewers and the corresponding bargaining power they possessed relative to wholesalers.\textsuperscript{21}

Since the time these laws were enacted, the beer industry has undergone a significant change in the number of brewers and the diversity of beers available.\textsuperscript{22} Repeal brought a rush of new breweries, which for a variety of reasons, such as mergers and consolidations, ebbed to a low of forty-four breweries in 1979.\textsuperscript{23} With the growth of a craft brew market segment, the number of breweries went from the low of forty-four to over 1,600 different breweries and brewpubs today.\textsuperscript{24} In the world of distribution, significant changes have also occurred; as major breweries consolidated, so too have many distributors.\textsuperscript{25} In addition to industry changes, there has also been a continuous social shift since Repeal on how alcohol is perceived.\textsuperscript{26} In North Carolina, in particular, there appears to have been significant social change in recent years as the state is “shedding [its] blue-law attitudes toward alcohol.”\textsuperscript{27}

Despite these changes in industry and social attitudes, wholesalers have resisted modifications to these laws, citing promotion of temperance as their reason for opposing changes. Many question, though, whether this resistance is truly based on a


\textsuperscript{23} BREWERS ALMANAC, supra note 3 (follow “Brewers Almanac 2009” hyperlink; then follow “Breweries and Wholesalers in Operation”) (last visited Aug. 23, 2010).

\textsuperscript{24} Id.

\textsuperscript{25} See WHITMAN, supra note 17, at 19–20; Curtin, supra note 21, at 29 (“Breweries are finding their choices of distribution harder and harder because of consolidation.”). There were 6,573 wholesalers in 1967 as opposed to 2,092 wholesalers in 2006. BREWERS ALMANAC, supra note 3 (follow “Brewers Almanac 2009” hyperlink; then follow “Breweries and Wholesalers in Operation”) (last visited Aug. 23, 2010).

\textsuperscript{26} See generally GARRET PECK, THE PROHIBITION HANGOVER (2009) (discussing the developments in the alcohol industry and the different social movements that have occurred since the time of Repeal).

\textsuperscript{27} Jennifer Klahre, Beer May Join the Cornucopia of Grocery Samples, NEWS & OBSERVER (Raleigh, NC), July 18, 2009, at A1 (discussing the significance of the new law allowing beer companies to obtain permits for beer tasting).
desire to "promote temperance" or whether such defensiveness is merely an expression of the wholesalers' economic interests.\(^{28}\) Under the three-tier system, the wholesale tier is guaranteed a part in the beer business since brewers over a certain size are required to use them to get to market.\(^{29}\) Thus, independent of any nobler intent the wholesalers might have, there is some economic motive on the part of the wholesalers to protect against brewers circumventing the wholesale tier.\(^{30}\) In addition to wholesalers' rational economic interests, their growth and clout is another factor mixed into the complicated brew of industry and morality that serves as the foundation for the laws of alcohol control.

This Comment seeks to evaluate whether the North Carolina state laws regarding alcohol distribution truly further the goal of promoting a craft brew industry. Evaluating these laws involves not only analyzing whether they promote the growth of craft breweries in North Carolina, but also whether any modifications to the three-tier system would negatively impact the state's concerns implicated by the Twenty-first Amendment.

Part I of this Comment discusses the three-tier laws of North Carolina in greater depth. Since the three-tier laws were enacted shortly after Repeal, understanding these laws requires an understanding of the brewing industry before Prohibition as well an understanding of societal views and concerns about alcohol. Thus, Part II gives an overview of the development of the brewing industry and the shifting views of society regarding alcohol, and shows how this combination led to the laws that are in place today. With the context for the laws explained, Part III discusses whether the laws regulating beer distribution in North Carolina are well-suited to achieve the legislative goal of promoting a craft brew industry. Part III argues that while the laws do allow for some growth, more can be done to encourage growth of the craft brew industry. Specifically, this Comment proposes two changes to North Carolina's alcohol laws: (1) removing the limits on self-distribution, and (2) creating a small-brewer exception to the beer franchise laws. These changes could

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\(^{29}\) See N.C. GEN. STAT. § 18B-1104 (2009) (allowing only breweries that brew under 25,000 barrels to self-distribute).

\(^{30}\) See WHITMAN, supra note 17, at 4-5 ("The three-tier system] inflate[s] the profits of the wholesale sector, whose market position depends in large part on state protection. In this environment, the lobbying efforts of wholesalers aim to entrench the three-tier system—and to shield the wholesalers from market competition.").
have a significant impact on the craft brew industry in North Carolina and would show that the General Assembly is truly interested in promoting this industry.

I. THE LAWS REGULATING ALCOHOL DISTRIBUTION

A. State Law

North Carolina, like every other state, regulates the distribution of beer by requiring it to pass through the three-tier system. The three-tier system is a licensing regime that requires suppliers (first tier) to sell only to wholesalers (second tier), who then sell only to retailers (third tier), who then sell only to customers. North Carolina does this statutorily by requiring breweries to obtain a brewery permit, wholesalers to obtain a malt beverage wholesaler permit, and retailers to obtain a retail permit. Holders of brewery permits can only sell to holders of wholesaler permits (with some exceptions), and holders of wholesaler permits can only sell to other licensed wholesalers or retailers.

In North Carolina, the three-tier system also requires that each tier consist of distinct persons and prohibits any of the three tiers from having a financial interest in any other tier. The three-tier laws

32. Note that for the purposes of regulating distribution, there are two types of states: license states and control states. Lawson, supra note 11, at 33-34. Control states put the management of distribution and retail under state control. See id. at 33. License states retain private control of the distribution and retail of alcohol, but require the different tiers to obtain a license from the state to operate. See id. North Carolina is one of the eighteen states that are control states. See North Carolina ABC Commission, Brief History, http://www.ncabc.com/aboutus/BriefHistory.aspx (last visited Aug. 23, 2010). However, virtually no control states hold a monopoly on the sale of beer. See Alcohol Policy Information Systems, supra note 31. Since North Carolina does not sell beer through its state-run ABC stores, see North Carolina ABC Commission supra, the control alternative to distribution will not be discussed in this Comment.
33. See WHITMAN, supra note 17, at 3-5.
34. N.C. GEN. STAT. § 18B-1104 (2009).
35. Id. § 18B-1109.
36. See id. § 18B-1001.
37. § 18B-1104.
38. § 18B-1109.
39. See id. §§ 18B-1116, -1119; see also Beskind v. Easley, 325 F.3d 506, 509-10 (4th Cir. 2003) ("As in many states that implemented the Twenty-first Amendment, the structure in North Carolina is a familiar three-tiered one in which out-of-state sellers of
also prohibit exclusive outlets—neither brewers nor wholesalers can require a retailer to purchase any alcoholic beverage to the exclusion of others; have any direct or indirect financial interest in a retailer’s business; or lend or give money, equipment, furnishings, or anything else of value to a retailer.40

While the three-tier system is fundamentally the same among states,41 over time it has been modified to allow brewers to self-distribute.42 Self-distribution, an option in thirty-four states, allows a brewer to act as a wholesaler and sell only their own beer to retail licensees.43 North Carolina is among the thirty-four states allowing self-distribution, and permits brewers to also act as wholesalers if they manufacture fewer than 25,000 barrels per year.44

In addition to self-distribution, almost all states have enacted “franchise laws” that regulate the agreements between brewers and wholesalers.45 In North Carolina, the franchise law makes it illegal for brewers to terminate franchise agreements with a wholesaler except for good cause and with notice.46

B. The Twenty-First Amendment

The source of the three-tier system is Section 2 of the Twenty-first Amendment, which states that “[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.” Courts have interpreted this section to grant states broad authority to regulate alcohol within their borders.48 Although there has been a long-running debate regarding the extent to which the Twenty-first Amendment allows alcoholic beverages may sell their alcoholic beverages only to licensed wholesalers, who in turn may sell only to other wholesalers and licensed retailers.”)

40. § 18B-1116.
41. See WHITMAN, supra note 17, at 3.
42. See, e.g., § 18B-1104 (authorizing breweries with a capacity of less than 25,000 barrels to obtain wholesaler permits, and thus distribute without having to go through a separate and independent entity).
43. See Brewers Association, Self-Distribution Laws, supra note 16.
44. § 18B-1104.
45. WHITMAN, supra note 17, at 8.
46. N.C. GEN. STAT. § 18B-1304 (2009). North Carolina’s beer franchise law also defines “good cause” and “notice.” See id. § 18B-1305.
47. U.S. CONST. amend. XXI, § 2.
states to create distribution systems that affect interstate commerce,\textsuperscript{49} the Supreme Court has held that the Twenty-first Amendment grants states virtually complete control over how to structure a liquor distribution system within the state.\textsuperscript{50} The Supreme Court has held that the three-tier system is "unquestionably legitimate."\textsuperscript{51}

C. Federal Laws

While the Twenty-first Amendment grants states considerable power in deciding how they design an alcohol distribution system, federal law does not require states to adopt a three-tier system.\textsuperscript{52} Nonetheless, the Federal Alcohol Administration Act creates a legal backstop by prohibiting retailers from purchasing alcohol exclusively from one source.\textsuperscript{53} This is done by preventing retailers from entering into tied-house agreements with suppliers and wholesalers, and by prohibiting bribery and consignment sales.\textsuperscript{54} Federal law does not mandate that there be a wholesaler tier—it just prohibits certain conduct between brewers and retailers.\textsuperscript{55}

Nevertheless, every state's three-tier system is more stringent than that prescribed by the Federal Alcohol Administration Act.\textsuperscript{56} The reason for such strict regulation of distribution by the states is better understood in the context of Prohibition and Repeal, as many of these laws were enacted shortly after Repeal.\textsuperscript{57}

II. FOUNDATIONS OF THE THREE-TIER SYSTEM: THE DEVELOPMENT OF THE BEER INDUSTRY AND SHIFTING SOCIAL VIEWS ON ALCOHOL

This Part will explain the development of the beer industry and put these laws in their historical context. This Part will also emphasize some of the recent social shifts, particularly in North Carolina.

\textsuperscript{49} See generally Elizabeth D. Lauzon, Annotation, Interplay Between Twenty-First Amendment and Commerce Clause Concerning State Regulation of Intoxicating Liquors, 116 A.L.R. 5th 149 (2004) (summarizing the history of litigation resulting from conflicts between state alcohol laws and the Commerce Clause).

\textsuperscript{50} Granholm, 544 U.S. at 488.

\textsuperscript{51} Id. at 489 (quoting North Dakota v. United States, 495 U.S. 423, 432 (1990)).

\textsuperscript{52} See Federal Alcohol Administration Act, 27 U.S.C. §§ 201–211 (2006) (stating federal law for regulation of the alcohol industry and omitting any requirement of a mandated wholesaler tier). However, every state to date has adopted the three-tier system for beer. See WHITMAN, supra note 17, at 4.

\textsuperscript{53} 27 U.S.C. § 205.

\textsuperscript{54} See id. "Tied-house" agreements are discussed supra note 19.

\textsuperscript{55} See § 205.

\textsuperscript{56} See Alcohol Policy Information Systems, supra note 31.

\textsuperscript{57} See Jurkiewicz & Painter, supra note 19, at 7–15.
A. Beer: Pre-Prohibition

The three-tier laws were formed out of a desire to prevent the pre-Prohibition practices of brewers, namely the tied-house system. Starting in the 1840s, beer became popular due to an influx of German immigrants who brought their brewing traditions and their lager beer. Although only a few breweries initially appeared (for the purpose of serving the German population), there was a significant increase in the number of breweries as the number of German immigrants grew and as beer became more popular among Americans. Correspondingly, there was a substantial increase in per capita consumption, which tripled between 1840 and 1860.

The proliferation of breweries made competition fierce, and brewers began looking for secure and guaranteed retail outlets for their beer. Larger brewers, who had invested substantial capital in technology to allow them to reach distant markets, especially needed security due to their massive capital expenditures. The brewers found this security in saloons, the forerunner of modern day bars.

These saloons would become the downfall of the brewers, for concurrent with the growth of the beer industry was the revival of temperance movements within the United States, which vigorously opposed the saloons. Temperance movements, which were triggered by a societal perception of rampant public drunkenness and its attendant ills, sought to bring about abstention from alcohol in
Initially, temperance advocates sought to use "moral suasion" (education) to achieve their ends; but once that failed, they turned to the law. One of the legislative tactics that temperance advocates used to promote temperance was raising the price of the licenses that were required to legally sell alcohol.

These high license fee laws were responsible in part for the creation of the tied-house saloon. A disparity in bargaining power between brewers and saloonkeepers, combined with the high license fees, allowed brewers to gain a financial interest in saloons. Breweries would lease real estate, furnish the bar, pay the license fee, and then sell the right to run the saloon to saloonkeepers, who on their own usually did not have the means to pay for the license fee and establish the saloon. Because of a virtual absence of wholesalers, brewers were also able to exert considerable influence over independent saloonkeepers.

Saloons quickly became the focus of temperance groups, who viewed them as bastions of immorality. The temperance advocates believed that saloons were turning good men into drunkards, causing them to waste away their weekly wage on an intoxicating mix of illegal gambling, prostitution, and, of course, beer. While the brewers, concerned with reputation, wanted their tied-houses to be clean, they also were not ignorant of the fact that the keepers of their saloons were trying to increase their own profitability by turning to illicit lines of business.

67. OGLE, supra note 1, at 24-25. These early temperance movements appeared to have been successful, bringing consumption from seven gallons per capita in 1830 to two gallons in 1844. See id. at 25. Temperance movements had seen an ebb and flow since the early nineteenth century; prior to the more well-known national Prohibition in 1919, states had experimented with statewide prohibition in 1850. MITTELMAN, supra note 61, at 17. The temperance movement gained momentum after the Civil War with broad support from the middle class, who felt alcohol was an overt evil, as well as from industrialists who believed that alcohol undermined the morale of their workers. See id. at 139; PECK, supra note 26, at 11.

68. See PECK, supra note 26, at 9.

69. See MITTELMAN, supra note 61, at 48.

70. See id. at 49.

71. See id.

72. See id.

73. See Lawson, supra note 11, at 32.

74. See OGLE, supra note 1, at 149.

75. See id. at 96, 149.

76. See id. at 96-99 (discussing the brewers' knowledge that their saloons were also engaged in gambling, prostitution, and pickpocket rings, and discussing their desire to have their beer "associated with tonier settings").
It was these profit pressures, along with other unsavory aspects of the saloon, that the temperance advocates effectively utilized to claim that brewers and saloonkeepers were trying to pump an unsuspecting public with alcohol, plunging others into misery for monetary gain.\textsuperscript{77} While later scholarly research has shown that these claims were exaggerated,\textsuperscript{78} these sordid images resonated strongly enough with the public to win societal support for Prohibition.\textsuperscript{79} The Eighteenth Amendment was enacted in 1920\textsuperscript{80} and the noble experiment of Prohibition began, only to end in failure thirteen years later.\textsuperscript{81}

B. **Repeal and the Origins of Modern State Regulation: Toward Liquor Control**

Prohibition ended in part because many high profile temperance advocates who had advocated the Eighteenth Amendment realized it was a disaster. Prohibition brought an increase in organized crime and a wide and flagrant disregard for the law, which had the more subtle and pernicious effect of undermining public confidence and respect for police authority. As these problems became more apparent, high-profile temperance advocates instead started to advocate for Repeal.

Once Repeal seemed imminent, one of these former temperance advocates, John D. Rockefeller, Jr., commissioned a report called *Toward Liquor Control* to provide guidance to the states that were soon to have the responsibility once again of regulating alcohol.\textsuperscript{82} The report, written by Raymond Fosdick, an attorney, and Albert Scott, an engineer, was based on interviews with a wide array of experts and data gathered from various countries, and ultimately recommended policies for the states.\textsuperscript{83} The report was very influential, and many

\textsuperscript{77} See MITTELMAN, supra note 61, at 67.
\textsuperscript{78} See id.
\textsuperscript{79} See id. In Deliver Us From Evil, Norman Clark emphasizes the point that the problems associated with saloons should not be dismissed too easily by describing Jack London's stance on Prohibition. See NORMAN CLARK, DELIVER US FROM EVIL 1-3 (1976). Clark points out that Jack London, himself a frequenter of saloons and heavy drinker, voted in favor of Prohibition. Id. Clark suggests London's vote for Prohibition despite his habits reflected some degree of truth about the imagery that anti-saloon advocates effectively utilized to win the vote of the population. Id.
\textsuperscript{80} See U.S. CONST. amend. XVIII, repealed by U.S. CONST. amend. XXI; JEFF HILL, DEFINING MOMENTS: PROHIBITION 30 (2004).
\textsuperscript{81} See Hill, supra note 80, at 93–94.
\textsuperscript{82} Mark R. Daniels, Toward Liquor Control: A Retrospective, in SOCIAL AND ECONOMIC CONTROL OF ALCOHOL, supra note 11, at 217, 218.
\textsuperscript{83} Id.
states relied on it to create their alcohol control laws, including the three-tier system.\textsuperscript{84}

In the report, Fosdick and Scott tried to gauge what the community wanted out of its alcohol control laws.\textsuperscript{85} On the basis of interviews, they outlined six desires, the most pertinent being that the community considered the saloon a menace to society, did not want it to ever return, and would not stand for aggressive behavior on the part of brewers and distillers.\textsuperscript{86}

Mindful of these community desires, the authors recommended regulating alcohol by license as a possible solution.\textsuperscript{87} The authors first critiqued previous licensing regimes, finding them flawed because of the haphazard nature with which licenses were distributed.\textsuperscript{88} To remedy these flaws, the authors made ten recommendations for modeling a license system;\textsuperscript{89} of these, the most pertinent was that the tied-house system should be prevented by all available means.\textsuperscript{90}

Fosdick and Scott believed that the tied-house was particularly responsible for the bad reputation of saloons due to the problem of absentee ownership.\textsuperscript{91} They argued that because the brewer was not present in the saloon’s community, he was insulated from its negative effects while his profit motive—maximized by increasing volume sold—remained.\textsuperscript{92} Thus, Fosdick and Scott concluded that “[a] license law should endeavor to prohibit all [financial] relations between the manufacturer and the retailer, difficult though this may be.”\textsuperscript{93}

\begin{itemize}
\item \textsuperscript{84} See Lawson, \textit{supra} note 11, at 33.
\item \textsuperscript{85} See \textsc{Raymond B. Fosdick \& Albert L. Scott}, \textit{Toward Liquor Control} 5–9 (1933).
\item \textsuperscript{86} \textit{Id.} at 15–18. In addition to these desires, Fosdick and Scott also determined that the community: wanted to wipe out the “whole wretched nexus of crime” that had developed during prohibition, even if it meant a temporary increase in consumption; generally did not believe alcohol use was per se reprehensible; was gratified by the return of beer, but feared the return of heavier liquors; and believed that there was a better solution for the liquor problem than Prohibition. \textit{Id.}
\item \textsuperscript{87} See \textit{id.} at 35–62.
\item \textsuperscript{88} \textit{Id.} at 39–41.
\item \textsuperscript{89} See \textit{id.} at 41–52. Other recommendations included: advice on the creation and administration of a state licensing board; character qualities that administrators of state licensing boards should possess; restrictions on the number and character of places where liquor could be sold; treating beer, wine, and liquor differently for the purposes of licensing; regulating hours of sale of liquor, especially in regards to on-premises consumption; requiring the individual retail owner and her establishment to each hold a separate license; prohibiting sales practices encouraging consumption; restricting or forbidding advertising; and taking efforts to control profits and prices. \textit{Id.}
\item \textsuperscript{90} \textit{Id.} at 43–44.
\item \textsuperscript{91} \textit{Id.} at 43.
\item \textsuperscript{92} \textit{Id.}
\item \textsuperscript{93} \textit{Id.} at 44.
\end{itemize}
states took this recommendation to another level by interposing a wholesaler between the supplier and retailer, creating what is known today as the three-tier system.\textsuperscript{94}

Given that these recommendations were made in the 1930s with the evils of the saloon fresh on the minds of the community, one could reasonably question whether the foundation of the report is a worthy basis for rigidly defending the three-tier system today. While it is conceivable that modern society is not concerned with saloons because the post-Repeal laws were so effective in preventing them, the desires of the community today are likely to be different from the desires of the community outlined by Fosdick and Scott.\textsuperscript{95} Wholesalers, however, seem to assume uniformity in social norms and the alcohol industry between the 1930s and today.\textsuperscript{96} For example, in arguing against modifications to the system, wholesalers have stated that “[a]s demonstrated by over seventy years of history, the present system has proven a reasonable and effective one for alcohol beverage regulation.”\textsuperscript{97} That such a regulatory scheme was found to be worthwhile seventy years ago, however, speaks little about whether such a system is necessary today.\textsuperscript{98}

\textsuperscript{94} \textit{See} Lawson, \textit{supra} note 11, at 33.

\textsuperscript{95} The desires of society today appear to be more focused on preventing drunk driving, reducing underage drinking, and discouraging binge drinking. \textit{See infra} Part II.C.3. Thus, while discouraging excess consumption is a common interest between the community of the 1930s and public health advocates today, the focus today appears to be not on how alcohol gets to shelves, but rather on how it is used from the point-of-sale onwards. \textit{See infra} Part II.C.3.

\textsuperscript{96} \textit{See} Panelists at NBWA/Brewers Legislative Conference Discuss Three-tier Threats, MOD. BREWERY AGE, Apr. 25, 2005, at 4 (summarizing statements made by panelists for retaining the three-tier system in the face of lawsuits and legislation they felt might weaken the system).

\textsuperscript{97} \textit{Id.}

\textsuperscript{98} Howard Wolf, an Austin lawyer and citizen member of the Texas Sunset Advisory Commission—which “identifies and eliminate[s] waste, duplication, and inefficiency in [Texan] government agencies”—wrote a strongly worded letter condemning the state’s resistance to changing its three-tier system. \textit{See} Texas Sunset Advisory Commission, http://www.sunset.state.tx.us (last visited Aug. 23, 2010); Letter from Howard Wolf, Citizen Member, Tex. Sunset Comm’n, to Tex. Sunset Comm’n, \textit{supra} note 20; \textit{see also} Mark Lisheron, \textit{Alcohol Regulation Hammered}, AUSTIN AM.-STATESMAN, Feb. 9, 2007, at A1 (summarizing the contents of the letter and describing Wolf’s position within the Sunset Commission and in the Austin legal community). Among Wolf’s criticisms was a strongly worded skepticism of the wholesaler’s position:

One legislative member of the Sunset Commission argues for the continuation of the three tier system without examining ways to remove corruption and refocus regulation on public health, safety and welfare. The sophistc reason given for this position is that the industry has done such a good job through the years of handling a controversial product. This argument is as ludicrous as saying that the
Toward Liquor Control thus seems anachronistic in two respects. First, the alcohol retailing industry itself has seen some major changes since the time of Prohibition. For example, although bars have replaced saloons, much more alcohol is sold off-premises today than was sold off-premises during the pre-Prohibition era.99 This is one of many changes that have occurred in the brewing industry since the time of Repeal.100 Second, the social view of alcohol has also undergone major shifts, as alcohol has become much more normalized in society today.101

C. Post-Repeal Industry and the Craft Brew Revolution

1. Consolidation in the Beer Industry and Franchise Laws

The beer industry itself has changed significantly since Repeal. Immediately after Repeal, an onrush of new entrants sought to capitalize on the post-Prohibition beer market.102 Due to brewery mergers and closings, however, the number of breweries gradually declined until bottoming out at forty-four in 1979.103 Concurrent with the decline in the number of breweries was a dramatic increase in market share among the top five brewers.104 In 1947, the five largest brewers held only 19% of the market.105 By 2001, the market share of the top five largest brewers had increased to 87.2%.106

Sherman Anti-Trust Act should not have been passed to break up the Oil Trusts, because the participants in the monopoly were doing such a good job of selling petroleum products to consumers.

Letter from Howard Wolf, Citizen Member, Tex. Sunset Comm'n, to Tex. Sunset Comm'n, supra note 20.

99. See MITTELMAN, supra note 61, at 105-07 (detailing the shift toward off-premise consumption after Repeal). Pre-Prohibition, 90% of beer was served on tap; two years after Prohibition, in 1935, 33% of beer was served packaged. OGLE, supra note 1, at 208. In 1940, 50% was packaged and by 1960, 80% of beer was packaged. See id.

100. See Lawson, supra note 11, at 34-38.

101. See Peck, supra note 26, at 24 (noting the public's acceptance of occasional alcohol consumption and citing a "famous picture of a smiling Ronald Reagan holding up a glass of white wine); Id.

102. See OGE, supra note 1, at 203.

103. BREWERS ALMANAC, supra note 3 (follow "Brewers Almanac 2009" hyperlink; then follow "Breweries and Wholesalers in Operation"). This drop in the number of breweries was due to several mergers and consolidations, which many brewers undertook due to profit motives. See Elzinga, supra note 59, at 78-79; VICTOR J. TREMBLAY & CAROL HORTON TREMBLAY, THE U.S. BREWING INDUSTRY: DATA AND ECONOMIC ANALYSIS 201 (2005).

104. See Elzinga, supra note 59, at 76.

105. Id.

106. Id. Today, there have been even further consolidations that reflect overall trends in globalization. For example, Miller, which had been under the umbrella of South African
In the context of this consolidating beer industry, where market power was becoming heavily concentrated, states began enacting what were called “Beer Franchise laws” starting in the early 1970s. These laws were intended to protect what were then small, family-owned distributors against breweries that held significant market share and thus wielded significant bargaining power. This protection of distributors was seen as necessary to further “the goal of fragmented, weak players that [are] unable to wield political and marketing power” and, in turn, to maintain the vitality of the three-tier system.

From an economic perspective, franchise laws were considered necessary to prevent opportunism by brewers. Since part of the function of a wholesaler is to sell the beer to retailers, they must exert effort to promote and build up their brand. Without protection, brewers can prematurely terminate a wholesale agreement and appropriate the brand value the wholesaler has created—through its promotional efforts—by going to another wholesaler and asking for more reasonable rates, or by threatening their existing wholesaler with termination and obtaining more reasonable rates in that

Breweries (“SAB”), merged with Coors to create MillerCoors. See Lauren Shepherd, *Miller, Coors Unite—Brewers Take Direct Aim at Anheuser-Busch*, CAP. TIMES (Madison, WI.), Oct. 9, 2007, at D8. Anheuser-Busch (“A-B”) was acquired by InBev, a Belgian brewery, in 2008. See *Peck*, supra note 26, at 47. Somewhat surprisingly, this leaves Koch’s Boston Beer (maker of Sam Adams) as both the largest craft brewer in the country and the largest American brewer. Id. at 48. Despite being the largest U.S. brewer, Boston Beer has less than 1% of the U.S. market. Id.


108. *See Ask Mark Rodman*, MOD. BREWERY AGE, Jan. 29, 2001 (“It is also vital . . . to recognize the beer franchise statutes are a by-product of the abuses by some brewers back in the 1960s and 1970s. Then the big players consistently told their distributors and dealers: ‘Do as we say, because we and only we own the brand, we can move or do with it as we wish. Cross us, and then you’ll get nada when we terminate.’ ”); see also, e.g., MD. CODE ANN., HEALTH OCC. § 17-101 (LexisNexis 2005) (stating that beer distributors require special protection in comparison to other types of alcohol beverage distributors since they mainly handle only a few brands of beer in their distributorships).

109. Lawson, supra note 11, at 35; see, e.g., 815 ILL. COMP. STAT. ANN. 720/2 (West 2008) (stating that an objective of the beer franchise law was to assure that a beer wholesaler could freely and independently manage its business enterprise); see also Marc E. Sorini, *The Case for a Small Supplier Exception to the Beer Franchise Laws*, MOD. BREWERY AGE, Jan. 18, 1999 (“Thus, beer franchise laws serve the three-tier system’s primary goals of avoiding domination of beverage alcohol distribution by one tier and fostering vigorous competition in the market.”).


111. Id. at 10–11.
fashion. Although wholesalers could theoretically obtain this protection via contract, it appears that they were able to convince legislatures that their bargaining power relative to brewers was too weak to do so. Today bargaining power is shifting, yet franchise laws remain in place without a change in explanation.

2. Craft Brewing, Brewpubs, and Self-Distribution

The rationale for franchise protection laws was based on the premise that wholesalers were small and suppliers were large; however, the introduction of craft brewing in the late 1970s shook up the industry and has thrown the foundation for the franchise laws into question.

112. Id. Similar justifications are used to mandate exclusive territory agreements between brewers and wholesalers, whereby a brewer designates only one distributor of a brand per area. See id. at 23–28. If a brewer had multiple wholesalers in one area, one wholesaler could free ride on the marketing and brand-building efforts of the other. See id. at 24. North Carolina mandates exclusive territories. See N.C. GEN. STAT. § 18B-1303 (2009) ("No supplier may provide by a distribution agreement for the distribution of a brand to more than one wholesaler for the same territory.").

113. See Cagann, supra note 18, at 68 ("Wholesalers have sought and received statutory protection at the state and even local level. Many states and one county have passed some form of legislation known as ‘franchise regulations’ governing formation and conclusion of the relations between suppliers and wholesalers."). Even today, there are examples of how large brewers use their bargaining power to demand coercive contract provisions. For example, certain provisions in the MillerCoors wholesaler contract, such as provisions allowing MillerCoors to retain control over a distributor’s business plan, retain control over the hiring and firing of a distributor’s management employees, and have the right to approve of changes in ownership, have been under attack and have been considered unenforceable by the California Attorney General. See Calif. AG Warns MillerCoors on Wholesaler Agreement, MOD. BREWERY AGE, June 11, 2009.

114. Breweries are distinct from brewpubs in that breweries sell most of their beer off-site while brewpubs sell most of their beer on-site, oftentimes in a restaurant where food is served. See supra note 2. This distinction is important for the purposes of the three-tier system because breweries and brewpubs have different approaches to distribution. Notably, brewpubs can be run without the owners having to worry about distribution, allowing them to retain all profit markups of retail sales. See, e.g., OGLE, supra note 1, at 296–97; E-mail from Scott Maitland, Owner, Top of the Hill Restaurant and Brewery, to author (Sept. 2, 2009) (on file with the North Carolina Law Review);

115. See Cagann, supra note 18, at 69 ("Suppliers sometimes question the validity of the rationale for leveling the playing field through franchise regulations when the party protected may have more clout than the supplier."). To this day, craft beers still represent a very small share of the market based on volume; in 2008, craft beers captured 4.04% of the U.S. beer market; in 1999, they only had 2.43% share by volume. Press Release, Brewers Association, Brewers Association Announces 2008 Craft Brewer Sales Numbers (Feb. 23, 2009), available at http://www.beertown.org/ba/media_2009/growthrelease2009.htm. Nonetheless, they are the only segment of the beer market currently growing while both domestic sales and import sales have declined. See Brewers Association, Facts, http://www.brewerssasso citation.org/pages/business-tools/craft-brewing-statistics/facts (last visited Aug. 23, 2010).
Craft brewing arose out of a developing niche of beer drinkers in the 1960s who wanted more beer variety and fuller flavor in comparison to the largely uniform offerings from the major domestic brewers. 116 Although these beer drinkers initially turned to imports, 117 they soon had an option with domestic craft brews. 118 One of the first craft brewers, Fritz Maytag of Anchor Steam, realized that his new brewery would not be able to compete with Anheuser-Busch (“A-B”) and other major domestic producers on price and volume, so he focused instead on targeting the same discriminating beer drinkers who were consuming imports. 119 Maytag’s discovery of a viable higher-end market for American beer, 120 combined with the blueprint for the microbrewery created by the failed New Albion Brewery, 121 laid the foundation for the craft brew industry that has since developed.

In North Carolina, the first craft brewery entered the market in 1986, when Uli Bennewitz, after lobbying the state law makers to make brewpubs legal, opened the Weeping Radish Brewpub in eastern North Carolina. 122 Shortly thereafter, three more craft breweries opened, although all three were eventually forced to close their doors. 123 In 1991, Bill Sherrill opened the Red Oak brewpub,

116. See MITTELMAN, supra note 61, at 190–91; OGLE, supra note 1, at 268–70 (discussing how cultural shifts in the early 1970s, including a focus on local foods, spurred American interest in more premium beverages).

117. See OGLE, supra note 1, at 275–76 (describing how imports started becoming more popular in the 1970s).

118. See id. at 258–65 (giving an account of Maytag’s founding of the Anchor Steam brewery and highlighting Anchor Steam as the first craft brewery).

119. See id. at 264–65.

120. See id. at 299. The appearance of the higher-end American beer market is crucial to small brewers—since these small brewers cannot hope to achieve the economies of scale that the major domestic brewers have attained, they also cannot hope to compete on price. See Elzinga, supra note 59, at 80–82. In his book on starting the Dogfish Head brewery, Sam Calagione emphasizes the need he felt to create a business model that was the opposite of big brewers: low volume and high price, justified by the unique ingredients used to make equally unique and higher quality beer. SAM CALAGIONE, BREWING UP A BUSINESS 52–69 (2005).

121. For an account of the brief rise and fall of the New Albion Brewery, see OGLE, supra note 1, at 291–99.

122. See Leland, supra note 4; see also N.C. GEN. STAT. §§ 18B-1001, -1104 (2009) (authorizing breweries that sell under 25,000 barrels per year to obtain a retail permit to sell alcohol to the public on the premises).

123. See 9-to-5 People, GREENSBORO NEWS & REC., Mar. 18, 1990, (People & Places), at 18 (discussing the opening of Loggerhead brewing company); Steve Fountain, There’s Something Brewing at Greenshields Pub, FAYETTEVILLE OBSERVER, Apr. 1, 1994, (At Ease), at 11 (discussing the opening of Greenshields Pub five years prior to the writing); Polly Paddock, There’s Something Brewing in an Old Dilworth Cafe, CHARLOTTE OBSERVER, Nov. 14, 1988, at 1C. The North Carolina ABC Commission Web site no
and, like Uli Bennewitz, he was successful enough to subsequently open his own stand-alone brewery in central North Carolina.  

Since the opening of the Red Oak brewery, there has been expansive growth in the craft brew industry in North Carolina as many new breweries and brewpubs have opened in the state. Today, there are thirty-nine locally owned breweries in North Carolina, some of which received their brewery permits as recently as January 7, 2010, and there are more breweries planned on the horizon.

Many of these early craft breweries were initially unable to tap into the distribution networks owned by larger brewers, and these breweries, like Weeping Radish and Red Oak, chose to start as brewpubs where they could both sell their beer on the premises and reap the markups that would otherwise go to retailers and distributors. Other craft brewers turned to self-distribution when they were unable to convince distributors to pick up their brands.
Although self-distribution would be illegal under the three-tier system, many states have since made it legal.130

Today, relationships between craft brewers and distributors have changed, as distributors are now much more eager to take on craft brews.131 For many years, starting shortly after Repeal, the biggest brewers had significant power over wholesalers through the threat of termination, and they used this power to pressure smaller wholesalers into dropping competing brands.132 This trend continued well into the late twentieth-century, with large brewers offering financial incentives to get the loyalty and exclusivity of their distributors;133 however, as craft beers increasingly gain market share and grow while the rest of the beer market stays stagnant or declines, many distributors have stopped exclusively carrying major domestic beers and are now carrying craft beers.134 In addition to the trend of distributor non-exclusivity, there are now also smaller, independent distributors that focus on distributing craft beers.135

Despite all these new choices for distribution, there are still some traps for unwary craft brewers. The primary concern for a craft brewer seeking distribution is the franchise laws, which in many states have not been updated since they were enacted prior to the

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130. See Brewers Association, Self Distribution Laws, supra note 16 (listing each state and its law regarding self-distribution). However, not all states have made it legal, and the self-distribution laws vary from state to state, with some allowing all brewers to self-distribute while others limit self-distribution to brewers under a certain capacity. Id. North Carolina allows self-distribution if the brewery brews under 25,000 barrels. N.C. GEN. STAT. § 18B-1104 (2009).

131. See Curtin, supra note 21, at 29-32.

132. See OGLE, supra note 1, at 218.

133. See David Kesmodel, Beer Distributors Across U.S. Look Beyond Anheuser Busch, TUCSON CITIZEN, Feb. 7, 2008, http://www.tucsoncitizen.com/ss/taste/76319.php (explaining the “100% share of mind program” where A-B offered financial incentives for wholesalers who stayed exclusive to A-B). At the time Elzinga wrote his chapter on beer in The Structure of American Industry (11th ed. 2005), 62% of A-B volume went through exclusive distributors. Elzinga, supra note 59, at 88. According to Harry Schumacher, publisher of BeerNet, an industry daily, 100% share of mind has “gone out the window” as distributors are recognizing they can realize higher profits by carrying craft beer, despite the financial incentives offered by A-B. Telephone Interview with Harry Schumacher, Publisher, Beer Business Daily (Jan. 5, 2010). For a discussion of A-B’s 1996 efforts to convince its distributors to jettison side brands and focus on distributing A-B products, see PHILIP VAN MUNCHING, BEER BLAST 256-60 (1997).

134. See Curtin, supra note 21, at 29-32; Kesmodel, supra note 133; Telephone Interview with Harry Schumacher, supra note 133.

Because the domestic beer landscape has changed considerably since the early 1970s, however, these laws were passed based on industry conditions that are no longer true today. For example, the consolidation of large breweries has driven distributors to consolidate. As distributors have moved from small family-owned operations to much larger corporations, many small brewers question the rationale for the laws when the distributors have more bargaining power than they do.

In light of this changing landscape, policymakers should consider whether the three-tier laws they adopted shortly after Repeal are still valid and applicable to the beer industry as it exists today. The three-tier system was enacted in response to the perceived dangers of breweries vertically integrating retail outlets, and the franchise laws were passed in response to perceived disparities in bargaining power between brewers and distributors. Given that craft breweries, by and large, are dissimilar from the large breweries that the laws had in mind when they were enacted in the 1970s, and given that craft brewers bear very different relationships to distributors than the large breweries did in the 1970s, legislators should give themselves some latitude in adjusting the laws to track the changing conditions in the alcohol beverage industry. Modifying the laws must be based on more than simple economics and industry practice, though; legislatures should also give consideration to the societal norms on alcohol.

3. The Neo-temperance Movement: Social Concerns About Alcohol Today

Society's view on alcohol should be taken into account when formulating policy, a difficult task since public sentiment changes

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137. See Curtin, supra note 21, at 29–32; Elzinga, supra note 59, at 88; Lawson, supra note 11, at 36–37.

138. See Cagann, supra note 18, at 69.

139. See Lawson, supra note 11, at 34 (“The 21st century presents a far different economic environment from that in which the states crafted their methods of alcohol control based on the Fosdick and Scott method.”).

140. See supra Part II.B.

141. See supra notes 104–10 and accompanying text.

142. See supra notes 104–10 and accompanying text.

143. See supra notes 131–34 and accompanying text (describing the power large breweries exerted over distributors); Cagann, supra note 18, at 69.
often. This is particularly important in the case of the three-tier system, since the defenses that wholesalers and others raise are based in large part on social norms from the 1930s, a time when temperance advocates dominated the discussion of alcohol policy. Shortly after Repeal, however, society seemed to relax its view on alcohol, and drinking lost much of its social stigma. In the years following Repeal, per capita alcohol consumption steadily increased, going from 0.97 gallons in 1934 to a peak of 2.76 gallons in 1980.

After 1980, per capita alcohol consumption began to decline once again, a trend that many attribute to "the new temperance movement." This new movement has several roots, including but not limited to increased alcohol fatalities that arose when the minimum legal drinking age was lowered to eighteen, the recognition of alcoholism as a disease, and concerns about beer advertisements. But, unlike the temperance movement that spurred the passage of the Eighteenth Amendment, the new temperance movement is based on public health advocacy rather than morality, and it seeks to identify and reduce the economic costs associated with alcohol consumption. The new temperance movement looks beyond regulating distribution to policies such as excise taxes and price controls, lower blood alcohol content limits, warning labels on

144. Jeffrey W. Linkenbach, Perceptions, Policies, and Social Norms: Transforming Alcohol Cultures over the Next 100 Years, in SOCIAL AND ECONOMIC CONTROL OF ALCOHOL, supra note 11, at 139, 141.
145. See supra Part II.B.
146. See, e.g., PECK, supra note 26, at 19–21 (discussing trends after the repeal of Prohibition, such as an increase in consumption among World War II veterans, that indicated that the temperance movement had lost its force).
147. Daniels, supra note 82, at 217, 224–25.
148. Id. at 225; see Elzinga, supra note 59, at 74; MITTELMAN, supra note 61, at 174; OGLE, supra note 1, at 324–25; PECK, supra note 26, at 198–99.
149. See MITTELMAN, supra note 61, at 173.
150. See OGLE, supra note 1, at 322 ("From [the recognition of alcoholism] came a view of immoderate drinking as a medical rather than a moral issue.").
151. See id. at 325 (detailing some of the excesses of major brewing advertisements, including magazines distributed on college campuses prior to spring break by Miller which told male readers how to "turn spring break into your own personal trout farm"); VAN MUNCHING, supra note 133, at 105–08 (discussing A-B's "Spuds MacKenzie" the "party animal" advertisements which featured a dog that was wildly popular with children and caused an increase in sales of Bud Light).
152. MITTELMAN, supra note 61, at 177.
153. Id.; see Elzinga, supra note 59, at 91 (framing social costs as negative externalities as part of a broader economic analysis of the beer industry); TREMBLAY & TREMBLAY, supra note 103, at 224–27.
beers, and bans on advertising. In addition to these preventive forms of alcohol control, recent studies suggest that other softer (non-legal) approaches, such as shaping the social norms regarding alcohol consumption, may be effective in combating alcohol abuse.

These shifting social norms are reflected not only in the approach of the new temperance movement, but also in recent jurisprudence on the Twenty-first Amendment. In Granholm v. Heald, a 2005 Supreme Court case, the Court ruled 5–4 that state alcohol laws favoring in-state wine producers violated the Commerce Clause and were not saved by the Twenty-first Amendment. Although Justice Thomas wrote a lengthy dissenting opinion arguing that the Twenty-first Amendment was intended to trump the Commerce Clause, Justice Stevens wrote a different dissent highlighting his belief on why the Court was split:

Today many Americans, particularly those members of the younger generations who make policy decisions, regard alcohol as an ordinary article of commerce, subject to substantially the same market and legal controls as other consumer products.

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154. See Jonathan P. West & Colleen M. West, Sociological/Cultural Influences of Drinking, in SOCIAL AND ECONOMIC CONTROL OF ALCOHOL, supra note 11, at 117, 127–30; see also Peck, supra note 26, at 200 (outlining the views of Professor Thomas Barbor, who believes that alcohol should be more heavily regulated, and who recommends ten ways of doing so, including sobriety checkpoints and restrictions on outlet locations and hours of sale). This is not to say that the new temperance movement is without resistance. For example, Radley Balko with the Cato Institute sees the work of “neo-prohibitionists” as a “back door” to Prohibition and believes that increased attempts to control the environment where alcohol is consumed only punishes moderate drinkers while doing little to deter serious alcoholics. See id. at 199.

155. See generally Linkenbach, supra note 144, at 139–57 (stating that a major cause of alcohol abuse is people’s incorrect perceptions about others’ alcohol consumption, and suggesting educational efforts aimed at correcting these perceptions as a solution to alcohol abuse).


157. See id. at 493. The laws in this case allowed in-state wine producers to ship directly to customers, while out-of-state wine producers were required to use an independent distributor. See id. at 468–69. On the basis of statutory interpretation, legislative history, and prior case law resolving conflicts between the Twenty-first Amendment and the Commerce Clause, the Court held that the laws were facially discriminatory and were not justified by the state’s core concerns of facilitating tax collection and keeping alcohol out of the hands of minors (although the concerns themselves were valid). See id. at 476–93. Nevertheless, the Court made clear that it was not ruling on the validity of the three-tier system generally, calling it “ ‘unquestionably legitimate.’ ” Id. at 489 (quoting North Dakota v. United States, 495 U.S. 423, 432 (1990)). A year before Granholm, the Fourth Circuit arrived at a similar conclusion regarding North Carolina’s wine distribution laws, which allowed in-state wineries to distribute while denying that same right to out-of-state wineries. See Beskind v. Easley, 325 F.3d 506, 519–20 (4th Cir. 2003).

158. See Granholm, 544 U.S. at 497–527 (Thomas, J., dissenting).
That was definitely not the view of the generations that made policy in 1919 when the Eighteenth Amendment was ratified or in 1933 when it was repealed by the Twenty-first Amendment. On the contrary, the moral condemnation of the use of alcohol as a beverage represented not merely the convictions of our religious leaders, but the views of a sufficiently large majority of the population to warrant the rare exercise of the power to amend the Constitution on two occasions.\textsuperscript{159}

Despite Justice Steven's dissent, the majority's "ordinary article of commerce" view toward alcohol seems to be more in line with modern social norms.\textsuperscript{160} In Granholm, and other Twenty-first Amendment jurisprudence, courts show increasing skepticism of the state justifications for defending alcohol laws.\textsuperscript{161} The judiciary's critical view of the three-tier system bolsters the General Assembly's need to consider whether their laws truly promote temperance and reduce social costs—rather than regulating the alcohol industry on the basis of outdated social mores that viewed alcohol as an inherent evil.\textsuperscript{162}

D. North Carolina "Pops the Cap": Shifting Views on Alcohol

While it appears that the nation as a whole is shifting away from the stigma on alcohol that existed at the time of Repeal,\textsuperscript{163} there also appear to be notable shifts within North Carolina.\textsuperscript{164} A recent noteworthy shift that was particularly relevant for the craft brew industry was the "Pop the Cap" campaign, a movement begun in 2003

\textsuperscript{159} Id. at 494–95 (Stevens, J., dissenting) (footnote omitted).
\textsuperscript{160} Id. at 494 (Stevens, J., dissenting); Lawson, supra note 11, at 50.
\textsuperscript{161} See, e.g., Costco Wholesale Corp. v. Maleng, 522 F.3d 874, 901–04 (9th Cir. 2008) (finding that a "post-and-hold" pricing requirement administered by the Washington State Liquor Control Board violated the antitrust laws and was not saved by the state's Twenty-first Amendment interests); Beskind, 325 F.3d at 516–17 (finding that a discriminatory wine distribution law violated the Commerce Clause and was not saved by North Carolina's core Twenty-first Amendment concerns).
\textsuperscript{162} See PECK, supra note 26, at 24 ("We have seen how far American society has shifted since Repeal in 1933. . . . We now look back upon the era of abstinence as some kind of dark age, a not-so-noble experiment that deserved to fail. A socially pure America is no longer on our agenda."); Lawson, supra note 11, at 50 ("The majority view in Granholm v. Heald seems more in tune with the current popular attitude toward beverage alcohol.").
\textsuperscript{163} See PECK, supra note 26, at 24 ("[O]ver the years the stigma against alcohol melted away, and Americans embraced drinking again.").
\textsuperscript{164} See Klahre, supra note 27 ("[The law permitting beer tasting] is the latest indication that North Carolina is gradually shedding blue-law attitudes toward alcohol.").
to raise the limit on alcohol by volume ("ABV") for beer.\textsuperscript{165} At the time the campaign started, North Carolina was one of six states that limited the ABV to 6\%.\textsuperscript{166} Even though wine with higher alcohol content was already available at private retail, there was significant opposition to the bill.\textsuperscript{167}

Proponents of the bill, including craft breweries, articulated several reasons for raising the limit on ABV for beer. Aside from the obvious reason of allowing a greater diversity of beers into the state, proponents argued that it would allow the state’s craft breweries to produce a wider selection of products, thus allowing North Carolina craft breweries to be more competitive.\textsuperscript{168} Proponents also argued that raising the limit would create three hundred additional jobs.\textsuperscript{169}

Opponents to raising the limit believed that it would encourage binge drinking due to a wider array of high-alcohol choices and that it would cause increases in underage drinking and drunk driving.\textsuperscript{170} Many of these opponents based their opposition to the law in moral and religious convictions,\textsuperscript{171} which one North Carolina journalist pointed out "harken[ed] back to the period immediately following the repeal of Prohibition, when lawmakers still sought to limit alcohol

\begin{footnotes}
\footnotetext[165]{See Pop the Cap: Celebrating North Carolina and Independent Beer, Pop the Cap: A Brief History (on file with the North Carolina Law Review).}
\footnotetext[166]{Jim Pettit, Popping the Beer Cap is a Matter of Taste, FAYETTEVILLE OBSERVER, July 8, 2005, at 1B.}
\footnotetext[167]{David Ingram, Alcohol-Content Cap is Popped by Legislators—Bill to Increase Limit for Beer Goes to Easley, WINSTON-SALEM J., Aug. 4, 2005, at B1 (noting that the bill passed by a state senate vote of 27-21). In the House, the bill passed with a vote of 68-46. Michael Wagner, Senators: Alter Beer Tax, FAYETTEVILLE OBSERVER, July 10, 2005, at B1.}
\footnotetext[168]{Jim Yeager, Letter, Raising Alcohol Content in Beer Good for N.C., DAILY REFLECTOR (Greenville, NC), Aug. 3, 2005. One of the bill’s main sponsors said his goal was for North Carolina to export beer. Ginger Livingston, State Senator Stalls Alcohol Content Legislation, DAILY REFLECTOR (Greenville, NC), July 8, 2005.}
\footnotetext[169]{Editorial, Smooth Finish, DAILY REFLECTOR (Greenville, NC), July 13, 2005.}
\footnotetext[167]{See id.; Ingram, supra note 167. Senator Jim Jacumin argued that “[t]here will be more families without mommies and daddies, and there’ll be more mommies and daddies without kids . . . [a]nd we did it all for a taste." Id. In later debates, the same senator stated: “You’re going to have a loosening of sexual inhibitions, more pregnancies and more abortions. . . . Let’s not do this to our black brothers and sisters.” Barry Saunders, Beer Issue is Not One of Race, NEWS & OBSERVER (Raleigh, NC), July 12, 2005, at B1.}
\footnotetext[171]{See Ginger Livingston, Kerr Pulls Beer Bill for Taxation, Binge-Drinking Issues, DAILY REFLECTOR (Greenville, NC), July 11, 2005 ("I’m not for prohibition, because the first miracle was turning water into wine," Kerr said. However, he said, representatives of several religious organizations asked if he could ‘slow this thing down.’ "). The bill was also vigorously opposed by the Christian Action League of North Carolina. See Donald W. Patterson, Beer Bill’s Backers Downplay Changes, GREENSBORO NEWS & REC., Aug. 5, 2005, at B1.}
\end{footnotes}
consumption in some fashion." Proponents responded to these concerns by pointing out that it was unlikely that people would use the higher alcohol beers to become intoxicated, because of their higher price and less "drinkable" nature. Proponents also pointed to the enactment of similar legislation in other states, where little had changed as a result of raising the limits.

The bill was finally passed on August 3, 2005, and went into effect ten days later. While the law ultimately had the effect of stimulating the craft beer and export market in North Carolina, it was also significant in signaling cultural shifts. A staff writer for the *Charlotte Observer*, shortly after the enactment of the law, wrote, "The relaxation of the liquor laws reflects the growing clout of the transplants and well-traveled Carolinians who no longer yield to the social conservatives who have had the South on cultural lockdown for decades." This writer took note of the muted response of religious conservatives to the change in the law.

The trend toward relaxation of the liquor laws appears to continue today. Within four years of raising the ABV limit for beer, the General Assembly passed a law allowing for malt beverage special event and tasting permits. The very same legislature that had fought over the "Pop the Cap" legislation four years before embraced the craft beer industry in North Carolina and stated their desire to promote the craft brew industry in text preceding the bill.

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172. Smooth Finish, supra note 169.
173. See Livingston, supra note 168 ("The people drinking this product, it's not made for quick consumption, they are too full-bodied, too hoppy, there's too much flavor.").
174. See Ingram, supra note 167.
177. Tonya Jameson, Pop the Cork for Loosened Alcohol Rules: Changes Show Conservatism Losing Its Hold In Carolinas, CHARLOTTE OBSERVER, Sept. 4, 2005, at 1H.
178. Id. In the article, the author details her correspondence with a sociology professor at UNC Charlotte, who states that "[w]e are seeing a pattern of change in which traditional Bible conservatism is slowly waning as secular and socially moderate interests gain ground." Id.
180. See id. at 717 ("North Carolina is now being recognized as a highly respected state for specialty malt beverages ... and ... the creation of a malt beverage special event permit and a malt beverage tasting permit will help grow this industry in a similar fashion...\)
This reversal was noted by one journalist, who wrote that "[t]he bill is the latest indication that North Carolina is gradually shedding blue-law attitudes toward alcohol."\textsuperscript{181}

III. ANALYZING THE NORTH CAROLINA LAWS ON DISTRIBUTION OF BEER

Although societal norms and preferences have substantially changed since Prohibition, many of the laws enacted in the years immediately following Repeal still remain. As the legislature considers modifications to the three-tier law, it should take into consideration the shifting attitudes toward alcohol and more seriously question whether laws that limit growth are actually reducing the cost to society from alcohol consumption. The growth of the North Carolina beer industry and the reputation that it has earned is a valuable asset, and one that the General Assembly has already explicitly recognized as worth promoting and protecting.\textsuperscript{182} This Part of the Comment will analyze two proposed ideas for modifying the three-tier system to better achieve this goal: (1) eliminating the 25,000 barrelage limit at which a brewery can no longer self-distribute, and (2) changing the beer franchise laws to allow for a small brewer exception, such that brewers that constitute less than a specified percentage of a wholesaler's business are not subject to the mandatory contract terms specified by North Carolina's beer franchise law.\textsuperscript{183}

It must be noted, though, that the General Assembly faces no legal pressure to change the laws; as the Court stated in \textit{Granholm}, the three-tier system is "unquestionably legitimate."\textsuperscript{184} Regardless of its reasons, the legislature can choose to keep a three-tier system in place, without modification, under its Twenty-first Amendment power.\textsuperscript{185} This Twenty-first Amendment power, however, means that

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\textsuperscript{181} See Klahre, \textit{supra} note 27.

\textsuperscript{182} See \textit{supra} notes 8--9 and accompanying text.

\textsuperscript{183} See Brewers Association, BA Position Statements, \textit{supra} note 136.


\textsuperscript{185} See Jurkiewicz & Painter, \textit{supra} note 19, at 7.
the General Assembly is also free to modify the law and should consider the consequences and necessity for the current system.

First, the General Assembly should consider that the social norms and attitudes prevalent at the time the three-tier system was enacted are very different from the social norms of today, and, similarly, that the modern craft brew industry is different from the beer industry that existed for most of the twentieth century after Repeal. Toward Liquor Control, a strong influence in the creation of the three-tier system, was aimed at preventing the return of pre-Prohibition excesses—most notably, the tied-house saloons. The General Assembly should consider whether the proposed changes to the law—higher self-distribution limits and a small brewer exception to the franchise laws—will really have the undesirable effect of promoting excess consumption of alcohol.

In this vein, the temperance movement during the 1930s was comfortable regulating alcohol for morality’s sake, unlike the new temperance movement today. Although some state legislators have not dropped this moral stigma, it seems clear that a majority of society has, especially in North Carolina. The cultural shift among North Carolinians, and their desire for less “moral” regulation of alcohol, should be taken into account by the General Assembly.

Second, state legislators should question whether modifications to the laws would help or hinder the goals of the new temperance movement, namely reducing social costs. The General Assembly should question what impact the proposed modifications will have on drunk driving, underage drinking, and excess consumption, among other concerns.

Third, in relation to the distribution laws, the General Assembly should question whether the craft brew industry poses the same threat to wholesalers as the beer industry did in the 1970s when many of the beer franchise laws were enacted. The legislative purpose behind many of these laws clearly indicates that they were intended

186. See supra Part II.C.3.
187. See supra Part II.C.1–2.
188. See supra Part II.B.
189. See supra note 74 and accompanying text.
190. See supra Part II.C.3.
191. See supra note 170 and accompanying text.
192. See supra note 178 and accompanying text.
193. See supra Part II.C.3.
194. See id.
195. See supra Part II.C.1.
to protect small wholesalers from large suppliers.\footnote{196} Although it is true that a vast majority of market share is controlled by a few brewers, there has been considerable distributor consolidation and a proliferation of small craft breweries—both factors that were nonexistent at the time the franchise laws were enacted.\footnote{197}

A. Reasons to Keep the Three-Tier System

Given that so much has changed since Toward Liquor Control, one could ask why the three-tier system is even needed anymore. While at least one scholar argues that the three-tier system has deep flaws and should be jettisoned for its anti-competitive effects,\footnote{198} the three-tier system is deeply embedded and appears to be accepted at all levels of the industry. Although it is not clear that the three-tier system accomplishes the objectives that underlie the Fosdick and Scott recommendations,\footnote{199} there does not appear to be any real opposition to the three-tier system except for some outside commentators\footnote{200} and smaller brewers.\footnote{201} A-B embraces it,\footnote{202}

\begin{enumerate}
\item \footnote{196}{See supra note 108 and accompanying text.}
\item \footnote{197}{See supra notes 125-32 and accompanying text.}
\item \footnote{198}{See generally WHITMAN, supra note 17 (discussing the anti-competitive effects of the three-tier system and evaluating whether the policy behind the system really justifies its continued existence).}
\item \footnote{199}{See Lawson, supra note 11, at 34-35, 50-51 ("The combination of social, economic, and technologic changes typified by deregulation, economic consolidation, and mass communication . . . coupled with] an inexorable trend toward consolidation at every level of the industry . . . mocks the [three-tiered system's] goal of fragmented, weak players . . . unable to wield political and marketing power. . . . [T]he three-tiered system conceived by Fosdick and Scott and implemented by the state legislatures in 1934 does not fit well with contemporary notions of a modern, dynamic, innovative free enterprise system. Indeed, the three-tiered system may already have been rendered ineffective for its intended purpose. The suppliers today are mostly huge multinational corporations whose must-have brands are essential for wholesalers and retailers. The wholesale tier is tending toward large national or regional firms. . . . The concept of promoting temperance by limiting local sale of alcoholic beverages to local businesses that are sensitive to the needs of their community and impervious to pressure to increase sales because of the separation of the tiers, if it was ever viable, no longer applies.").}
\item \footnote{200}{See Letter from Howard Wolf, Citizen Member, Tex. Sunset Comm'n, to Tex. Sunset Comm'n, supra note 20. See generally WHITMAN, supra note 17 (discussing how granting a monopoly to the wholesale tier allows for that tier to obtain an unnaturally high profit at the expense of higher prices to the consumer, and discrediting the "paternalistic" notion that states should desire these increased prices as a means of lowering social costs related to alcohol consumption).}
\item \footnote{201}{See BeerNet, We Can Agree to Disagree, It's Okay . . . Really It's Okay, BEER BUS. DAILY, July 18, 2009, http://www.beernet.com/publications_beerlog.php?date=2009-07 ("I've often observed that the smaller the operator, the more they distrust the three-tier system. Typically as you move up the size scale, alcohol makers start to . . . appreciate the system itself . . . ").}
\end{enumerate}


distributors clearly are in favor, and while craft brewers are divided on the issue, many are for the three-tier system as they believe the independence of a middle tier allows for craft brewers to enter distribution channels.

The three-tier system's hypothesized role in promoting the growth of the craft brew industry is corroborated by observations of the beer industry in Europe, where tied-houses and domination of distribution channels by major brewers make new entry into the market difficult. For example, in the United Kingdom, where much of the distribution is vertically integrated into large breweries, microbreweries only had a 1.5% share of the market in 2000, significantly less than the market share held by American craft brewers at that time. Although the smaller market share held by microbreweries in the United Kingdom may be due to factors other than the dominance of distribution networks by large suppliers, beer industry insiders in the United States believe that the three-tier

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202. See Brewers and Distribs Sing Praises of Three-tier at NBWA, MOD. BREWERY AGE, Sept. 20, 2004 (“August Busch pleased the crowd when he stated, ‘no one is more committed to the three-tier [sic] system than Anheuser Busch.... We believe that it is the most effective, efficient way to serve the marketplace.’”).

203. See E-mail from Oscar Wong, Owner, Highland Brewing Co., to author (Jan. 4, 2010) (on file with the North Carolina Law Review) (stating that while the three-tier system had probably outlived its premise rooted in Prohibition, it seems to work, and probably has had the effect of preventing total dominance of the market by major brewers). At the opposite end of the spectrum, Uli Bennewitz of the Weeping Radish Farm Brewery is strongly opposed. E-mail from Uli Bennewitz, Owner, Weeping Radish Farm Brewery, to author (Jan. 5, 2010) (on file with the North Carolina Law Review).

204. Telephone Interview with Harry Schumacher, supra note 133; E-mail from Oscar Wong, supra note 203; see also BeerNet, Jim Koch’s Opus: Let My People Go, BEER BUS. DAILY, Sept. 24, 2009, http://www.beernet.com/publications_daily.php?id=1879 (detailing Jim Koch's statements at a wholesaler convention about the success of American craft brewers as opposed to countries that have no three-tier system); BeerNet, supra note 201 (“I describe how the reason we have so many choices on the shelf is because indy distributors—who are not owned by the big brewers-vintner-distillers—can choose of their own free will to carry those brands.”).

205. See Jurkiewicz & Painter, supra note 19, at 14 (“The United States operates within a state-regulated three-tier system while most of the world’s industrial nations operate within completely vertical two-tier systems. The U.S. system has allowed tremendous variety and value for American consumers, yet allowed regulators to keep a check on an unregulated alcohol market.”).

206. Kevin Lawler & Kin-Pui Lee, Brewing in INDUSTRIES IN EUROPE 111, 118 (Peter Johnson ed., 2003); Press Release, Brewers Association, supra note 115 (stating that craft brewers had a 2.34% market share in 1999 in the United States). This 1.5% market share in the United Kingdom has been consistent since 1989. Lawler & Lee, supra, at 118.
system is in part responsible for the difference in the market share of craft beers between the United States and other countries.  

While craft brewers may be divided on the merits of the three-tier system generally, many craft brewers in North Carolina agree that the law could be improved. For some, this improvement comes in the form of increased latitude to self-distribute. For others, improvement would entail modifying the franchise laws. Before discussing whether these modifications have merit, this Comment will establish the framework under which these modifications will be evaluated.

B. Establishing Policy Goals for Legal Analysis

This Comment argues that the goal legislators should consider in modifying the three-tier system is the promotion of a craft brew industry. The General Assembly has expressly recognized this as a policy objective in its bill enacting the malt beverage special events permit and malt beverage tasting permit. Aside from this legislative recognition, a local craft brew industry arguably offers a number of other benefits, including the creation of jobs, the shift of beer dollars from major domestics to local breweries (and in turn, an increase in state taxes from that income), and a reduced environmental impact due to shorter transportation distances. In counterbalance to the

207. See BeerNet, supra note 204. This article summarized statements made by Jim Koch, founder of Boston Beer, to members of the National Beer Wholesalers Association. See id. Koch pointed out that in Alberta, a province with a three-tier system, craft brewers had 10% of the market, whereas in Ontario, which had no three-tier system, they only had 2% of the market. Id. He also pointed out that in Mexico there are virtually no craft beers because the wholesalers are owned by big brewers. Id. Harry Schumacher, publisher of Beer Business Daily, made similar statements saying:

I described how tied house in Europe and Latin America has stifled competition, I describe how the reason we have so many choices on the shelf is because indy distributors—who are not owned by the big brewers-vinter-distillers—can choose of their own free will to carry those brands.

BeerNet, supra note 201.

208. See, e.g., E-mail from Uli Bennewitz, supra note 203; E-mail from Mark Doble, supra note 10; E-mail from Oscar Wong, supra note 203.

209. See E-mail from Uli Bennewitz, supra note 203; Interview with Bill Sherrill, Owner, Red Oak Brewery, in Whitsett, N.C. (Jan. 8, 2010).

210. See, e.g., E-mail from Mark Doble, supra note 10; E-mail from Oscar Wong, supra note 203.


212. E-mail from Uli Bennewitz, supra note 203; Interview with Bill Sherrill, supra note 209; E-mail from Oscar Wong, supra note 203; Telephone Interview with Joe Zonin, Co-Owner, Carolina Brewing Co. (Jan. 7, 2010); see also Industry's Brewing in North
goal of promoting the craft brew industry are the concerns implicated
by the Twenty-first Amendment and by public policy advocates
today. In the litigation setting, North Carolina has stated that its
concerns include “regulating the consumption of alcoholic beverages,
channeling the distribution of alcoholic beverages, enforcing a
minimum age for the purchase and consumption of such beverages,
limiting the location from where they are sold, controlling the
contents of such beverages, and collecting taxes in connection with
their sale and distribution.” Public policy advocates today tend to
focus on reducing the cost to society resulting from alcohol
consumption and argue that the impact of the law on drunk driving,
underage drinking, and binge drinking should also be considered.

In addition to these concerns, the law should take into account
the interests of the other two players in the brewing industry: major
domestic brewers and distributors. Major domestic brewers are of
lesser concern—first, because there is some evidence that the entry of
craft breweries may be expanding the beer market rather than
cannibalizing sales of domestic brewers; and, second, because large
domestic brewers hold such a strong advantage in their bargaining
power over distributors that it seems unlikely they need to be
protected from small suppliers who have far less power in
comparison. Distributors are of greater concern, and it is because of

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213. See supra notes 149–51 and accompanying text (outlining the modern day
concerns of drunk driving, underage drinking, and binge drinking). More fundamentally,
Vijay Shanker argues that “federal courts have increasingly required state laws regulating
alcohol to be passed with the intent of furthering the core [Twenty-first] Amendment


215. See supra notes 149–51 and accompanying text.

216. See Sorini, supra note 109, at 31–32 (discussing how the growth of the high-priced
specialty beer market has likely benefitted the entire industry by the creation of new
markets and new situations where beer is consumed). Although Sorini’s article was written
in 1999, more recent estimates indicate that the craft beer market is still growing while
other sectors of the beer industry remain stagnant or are in decline. See Greg Kitsock,
Tiers Three, Leave Them Be: Why the Beer Industry Needs a Firewall, AM. BREWER,
Summer 2009, at 23, 25. Some in the craft brewing industry believe that larger brewers
have key ed into and benefitted from this market by introducing their own craft beers—for
example, A-B’s Shock Top or Coors’ Blue Moon. Bump Williams, Market Matters: Nice
Guys Finish First, AM. BREWER, Summer 2009, at 9, 10.

217. See supra notes 131–34 and accompanying text (discussing distributors exclusively
carrying the brands of large brewers). Although craft brewers are finding it easier to sign
on with distributors than they used to, major suppliers still provide most of a distributor’s
revenue and can still (and often attempt to) exert considerable control over a distributor.
the issues discussed in Part II.C.2 that they were given the protection of franchise laws. Since distributors have been subject to exploitation in the past, any modification in the laws should reflect these concerns.218

Nevertheless, there is another side to the interests of wholesalers. Many craft breweries, particularly those trying to effect changes in the laws, believe that successful wholesaler opposition to deregulation of the three-tier system is a result of a well-organized and well-capitalized lobby that seeks to protect the economic benefits it derives from the three-tier system.219 While the wholesalers justify their position by mentioning the need for a clear chain of custody, facilitation of taxation on alcohol, and the promotion of temperance,220 the craft brewers' stance has support in academic

See Calif. AG Warns MillerCoors on Wholesaler Agreement, supra note 113, at 1; Jack Curtin, "Better Beers Are Here to Stay": Embattled Distributors Strive to Survive in a Craftier World, AM. BREWER, Summer 2009, at 17, 18 ("[A]n anonymous beer distributor recently was quoted thusly: 'My major suppliers pay for my mortgage, keep the lights on, but crafts and imports send my kids to college and put steak on the table now and then as opposed to hamburger helper.' ").

218. See supra Part II.C (explaining the origins and necessity of the franchise laws). Prior to the franchise laws, large breweries, which possessed considerable bargaining power over what were then small distributors, could use the threat of terminating a distributorship to seek concessions from distributors. See id. But see WHITMAN, supra note 17, at 7–21 (questioning the benefits of franchise laws generally).

219. See, e.g., E-mail from Uli Bennewitz, supra note 203; Interview with Bill Sherrill, supra note 209; see also Mark Binker, Battle's Brewing over Law, GREENSBORO NEWS & REC., Mar. 15, 2009, at B1 (stating that the North Carolina Beer and Wine Wholesalers Association spends thousands of dollars in state campaign donations and has at least three lobbyists working at the General Assembly). Howard Wolf, in his letter to Texas’s Sunset Commission, described in fanciful terms his frustration with the Commission’s attempts to reform the alcohol regulatory industry in Texas:

While sanctimoniously professing the value delivered to the public by the system they control, the lions of the lobby for the alcoholic beverage industry do everything possible to prevent a critical review of this system. Despite growing pressure from competing economic interests to open the market in ways that would make the system more efficient and effective, the lions feed on the fruits of the uncompetitive markets and the restraints on trade in the industry. All the while, they continue to hypocritically profess that public interests are being served through their efforts.

Letter from Howard Wolf, Citizen Member, Tex. Sunset Comm’n, to Tex. Sunset Comm’n, supra note 20, at 7.

220. See Binker, supra note 219; The North Carolina Beer and Wine Wholesalers Association, supra note 13. In Beskind v. Easley, North Carolina stated its Twenty-first Amendment interests to be: "regulating the consumption of alcoholic beverages, channeling the distribution of alcoholic beverages, enforcing a minimum age for the purchase and consumption of such beverages, limiting the location from where they are sold, controlling the contents of such beverages, and collecting taxes in connection with their sale and distribution." Beskind v. Easley, 325 F.3d 506, 516 (4th Cir. 2003).
literature and in the opinion of industry insiders. Accordingly, however noble the intentions of the wholesalers in opposing deregulation, there is an economic incentive for them to do so as well. The extent to which wholesaler opposition is based on economic motives should thus be taken into consideration in crafting policy.

C. Self-Distribution

The economic benefits wholesalers see in a three-tier system often come at the economic detriment of those who must unwillingly participate in the antiquated system. Self-distribution avoids this situation by allowing small brewers the opportunity to create and sell their own brand. Currently, North Carolina allows self-distribution if

221. See WHITMAN, supra note 17, at 4-5; Shanker, supra note 28, at 361–63, 368.

[Wholesalers] currently enjoy a monopoly over alcohol sales in most states. Consumers cannot purchase alcohol from any other source. As a result, wholesalers enjoy increased revenues from inflated monopoly prices. Because suppliers are forced to sell through these exclusive distributorships, the distributors can extract monopoly rents. It is therefore no surprise that, with such organizational advantages and so much at stake, wholesalers are actively involved in the lobbying effort.

Id. at 361–63.

222. Telephone Interview with Harry Schumacher, supra note 133.

223. See WHITMAN, supra note 17, at 5 (“In [the three-tier] environment, the lobbying efforts of wholesalers aim to entrench the three-tier system—and to shield the wholesalers from market competition.”). Nevertheless, in some instances the economic interests of wholesalers are aligned with the economic interests of brewers. See Kitsock, supra note 216, at 25 (“Distributors themselves are realizing that by cutting brewers some slack when they’re small and struggling, their brands might become valuable assets someday.”). For example, in some states, distributors support self-distribution laws, as they allow craft breweries, whose products may have more lucrative profit margins, to create value for their brand. See Telephone Interview with Harry Schumacher, supra note 133.

224. Just recently, a house representative proposed a congressional bill, H.R. 5034, also known as the Comprehensive Alcohol Regulatory Effectiveness (CARE) Act of 2010, with the stated purpose of “reaffirm[ing] and protect[ing] the primary authority of States to regulate alcoholic beverages.” See H.R. 5034, 111th Cong. (2010). This bill would, by amending parts of Chapter 27 of the U.S. Code, give a strong presumption of validity to state alcohol laws and put the burden on plaintiffs seeking to challenge state laws to show that such laws have no effect on the promotion of temperance, regardless of the degree to which they interfere with interstate commerce. See id. The general view among online commentators is that this bill was lobbied for by the National Beer and Wine Wholesalers Association in an effort to combat the perceived erosion of their distribution rights under Granholm. See DrVino, H.R. 5034: A Threat to Wine Shipping (Apr. 20, 2010), http://www.drvino.com/2010/04/20/hr-5034-wine-direct-shipping/; Robert Taylor, An End to Wine Direct Shipping, WineSpectator.com, Apr. 16, 2010, http://www.winespectator.com/webfeature/show/id/42526.
a brewer sells less than 25,000 barrels annually.\textsuperscript{225} There is variation among the states on the self-distribution laws—some states prohibit all self-distribution,\textsuperscript{226} others, like North Carolina, have a 25,000 barrel limit,\textsuperscript{227} yet others have a 60,000 barrel limit,\textsuperscript{228} yet others still have no restrictions on barrelage for self-distribution.\textsuperscript{229} In 2009, Red Oak lobbied to have the limit on self-distribution in North Carolina raised to 60,000 barrels.\textsuperscript{230}

One of the primary reasons for enacting self-distribution laws is that small and unknown brewers often find it difficult to access distribution networks.\textsuperscript{231} Similar concerns have been used to justify self-distribution in the wine industry, as wine distributors are

\begin{itemize}
  \item \textsuperscript{225} See N.C. GEN. STAT. § 18B-1104 (2009).
  \item \textsuperscript{226} See, e.g., MISS. CODE ANN. § 67-3-46 (West 1999).
  \item \textsuperscript{227} See, e.g., MINN. STAT. § 340A.301 (2004 & Supp. 2009–2010).
  \item \textsuperscript{228} See, e.g., MONT. CODE ANN. § 16-3-214 (2009). The 60,000 barrel limit is significant because it represents the federal small brewer threshold, which subjects the brewery to a lower excise tax than barrels over the limit. See 26 U.S.C. § 5051 (2006).
  \item \textsuperscript{229} See, e.g., CAL. BUS. & PROF. CODE § 23357 (West 1997).
  \item \textsuperscript{230} See Binker, supra note 219; Christian Action League, \textit{Bill to Increase Small Brewery Limits Fails to Resonate with ABC Committee} (May 8, 2009), http://christianactionleague.org/news/bill-to-increase-small-brewery-limits-fails-to-resonate-with-abc-committee/; see also H.B. 1017, 2009 Gen. Assem., Reg. Sess. (N.C. 2009) (increasing the small brewery brewing limit from 25,000 to 60,000 gallons). In 2003, Red Oak had pushed to raise the limit to 100,000 barrels, but was rebuffed by lobbying from wholesalers and large brewers such as Miller. See Binker, supra note 219. Miller (the large brewer, not the local owner of Triangle Brewing Company) argued that the bill would give small brewers an "unfair competitive advantage" and would allow microbreweries other than Red Oak to expand, possibly threatening Miller's market share. Scott Michels, \textit{Proposed Beer Bill Causes Stir}, GREENSBORO NEWS & REC., July 19, 2003, at B3. It is not clear why allowing small brewers to self-distribute would be unfair. First, because breweries can only self-distribute their own beer, they are at an inherent disadvantage to distributors who possess economies of scale that are not available to the brewer. See Jane Seccombe, \textit{A Head for Business}, WINSTON-SALEM J., Oct. 2, 2000, at B1 (discussing the need to achieve further economies of scale "by spreading costs over a wide sales base" as a reason for distributor consolidation). Local breweries, in calculating whether they should self-distribute or not, have found that the cost of self-distributing is nearly the same as the profit markup ceded to distributors. Interview with Andy Miller, Co-Owner, Triangle Brewing Co., in Durham, N.C. (Jan. 9, 2010) (stating further that because the cost was the same, the owners preferred to focus their efforts just on brewing, and not on distributing). Second, Miller, owing to its size, possesses an enormous competitive advantage over Red Oak in regards to bargaining power it holds with distributors. See supra notes 131–34 and accompanying text (discussing the bargaining power brewers had over distributors, and the ways they used that bargaining power to maintain distributor exclusivity).
  \item \textsuperscript{231} See Brewers Association, BA Position Statements, supra note 136. The Brewers Association in justifying its position states that "[t]he success or failure of a beer should depend on consumer demand, rather than artificial barriers to distribution. The absence of a willing and/or viable wholesaler should not prevent a small brewer's products from reaching a retailer who is willing to sell them." \textit{Id.} According to the Brewers Association Web site, thirty-four states currently have self-distribution laws. See Brewers Association, Self Distribution Laws, supra note 16.
\end{itemize}
rationally disinclined to take on a smaller winery's brand due to their low production volume and small consumer base. As shown in Granholm, though, small wineries do develop relationships with customers across state lines and depend on the ability to retail directly to these customers to survive.

Many craft brewers face similar dilemmas in seeking distribution, although their problems are a bit different. As in the wine industry, brewers find it hard to sign on with a distributor unless the brand has some value. This value is built by developing relationships with retailers and developing the brand among the consuming public. With self-distribution, brewers can build up this value on their own, convince distributors that their brand will be profitable, and often obtain a signing bonus as well. While some chafe at allowing distributors to receive some of the benefits of that value, others find the benefits of using a distributor—a lack of cost difference and, more importantly, the ability to focus on brewing free from distraction—to be worthwhile enough to enter into a distributorship agreement.

Add to [the distributor's] gripes small brewers who have pie-in-the-sky expectations of what a wholesaler is supposed to do for their brands. “So often a craft brewer comes in and doesn’t know anything about us or the laws in this state,” complained Jim Schembre, manager of World Class Beverage in Indianapolis. “They want to be in all the grocery stores, and grocery stores don’t sell beer!”

Id.

232. See Granholm v. Heald, 544 U.S. 460, 467 (2005); Peck, supra note 26, at 142; Shanker, supra note 28, at 362.
233. See Granholm, 544 U.S. at 467–68; Peck, supra note 26, at 138–42.
234. Telephone Interview with Harry Schumacher, supra note 133 (stating that brewers almost never engage in direct shipping to customers).
235. See Goldman-Armstrong, supra note 129, at 7. Distributors also find it difficult sometimes to control the expectations of new brewers who approach them. See Kitsock, supra note 216, at 24.

236. See Goldman-Armstrong, supra note 129, at 6–7.
237. Bill Sherrill of Red Oak brewery, who currently self-distributes, expressed frustration at being forced to cede the value that he had developed in his brands simply because his brewery expanded beyond a certain capacity. Interview with Bill Sherrill, supra note 209. However, one article suggests that not all the value has to be ceded. See Goldman-Armstrong, supra note 129, at 7 (“[S]elf-distributing initially can help a brewery to develop accounts, which can then be sold to a distributor for a signing bonus.”).
238. Andy Miller, along with his co-owner of Triangle Brewing Company, found very little difference in cost between signing on with a wholesaler and self-distributing. Interview with Andy Miller, supra note 230. To them, it was worth going with a distributor so they could focus on brewing. Id. Joe Zonin, a co-owner of Carolina Brewing Company, expressed a similar sentiment when explaining why his brewery chose to self-distribute. Telephone Interview with Joe Zonin, supra note 212.
Many craft brewers in the state therefore agree that the best way for a brewer to develop a brand is for the brewer to start by distributing and making sales itself. When asked about some possible drawbacks of distributors, a local brewer explained that, while distributors are very good at distributing, they are not optimal salesmen. This concern was based on the fact that when distributors’ sales teams visit retailers, they are often offering several different brands from different breweries—and, therefore, have less incentive to sell a craft brewer’s brand than the craft brewer itself.

Craft brewers also cite concerns about their brand competing with other brands in a distributor’s portfolio. For example, in 2007, A-B released “Shock Top,” a Belgian white beer. A local craft brewer stated its concern that were it in a distribution agreement with an A-B distributor, the distributor would be inherently conflicted in taking away sales from A-B’s brand, from which they derive most of their revenue, to promote an independent craft brewer’s beer. Some brewers worry that this will necessarily cause a distributor to neglect the brewer’s brand, a term that they have called “parking”—where their beer sits “parked” in a distributor’s warehouse collecting dust because distributors are focusing instead on a major brewer’s brand. In response to this concern, some distributors express

239. See Curtin, supra note 21, at 32 (“[The California Small Brewers Association] view[s] [self-distribution] as a very important and healthy way for brands to gain traction . . . .”); Goldman-Armstrong, supra note 129, at 6 (“‘No one can tell the story of your beer as well as you can,’ an Oregon-based distributor says of the advantages of self-distribution.”). Some brewers have actually had distributors tell them to self-distribute before the distributors would agree to carry the brewer’s beer. Id. at 7 (“When [the new brewers] contacted [the distributors], they got a surprising answer. The [distributors] told them to self-distribute for a year. That year of self-distribution allowed [the new brewers] to build up relationships with pubs, and put a face to the beer.”).

240. Interview with Local Craft Brewer (on file with the North Carolina Law Review).

241. Id. Larry Bell, of Bell’s Brewing in Michigan, found this concern to be so great that he engaged in litigation with his distributor to stop the sale of distribution rights of his brand, alleging that the buyer of the rights had loyalties to A-B that would not allow it “to fairly promote and sell Bell’s brands . . . .” Curtin, supra note 21, at 32.


243. Interview with Local Craft Brewer, supra note 240.

244. See Curtin, supra note 21, at 32 (discussing a Michigan craft brewer’s litigation efforts to stop the sale of his brand from one distributor to another, alleging that the buyer-distributor was an A-B house that would not be able to put aside its loyalty to A-B).

245. Interview with Local Craft Brewer, supra note 240; see also Kitsock, supra note 216, at 25 (“We’ve all heard horror stories about distributors cherry-picking one or two top-sellers and ignoring the rest of a brewer’s portfolio; selling brands, without the brewer’s permission, like grade-schoolers swapping trading cards; or sitting on brands, without trying to grow them, simply to keep them out of the hands of a competitor.”). While Kitsock acknowledged this anecdotal evidence of problems with distributors, he
frustration at the "pie-in-the-sky" expectations of some craft brewers, stating that they often enter into distribution agreements with unrealistic expectations regarding market penetration.\textsuperscript{246}

1. Does the Law Promote the Growth of the Craft Brew Industry?

Applying the framework established in Part III.B, the first question is to ask whether the self-distribution laws promote the growth of the craft brew industry. All the anecdotal evidence strongly suggests that self-distribution helps to promote growth by allowing unknown entrants to establish themselves. With self-distribution, brewers have the ability to develop relationships with local retailers and to create demand for their product.\textsuperscript{247} Since a self-distributing brewer is the person most invested in getting his beer to retail, he is also the best salesman for his product.\textsuperscript{248} It is for this reason that some distributors even prefer that a new brewer self-distribute prior to signing on with them.\textsuperscript{249}

Although it is impossible to say whether self-distribution has accounted for the growth of so many smaller breweries in the state, the fact that the more recent breweries are only using self-distribution suggests that without it, North Carolina would not have the variety of breweries that it currently does.\textsuperscript{250} Some major breweries certainly attribute their success to self-distribution—Brooklyn Brewery, for example, attributes its survival and growth to self-distribution.\textsuperscript{251} Thus, the question is not so much whether self-distribution itself promotes growth, but whether the 25,000 barrelage limit is sufficient.

Brewers are divided on this point. Oscar Wong, owner of Highland Brewery in Asheville, believes that above a certain limit, which he estimates to be 10,000 barrels, self-distribution is no longer

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\textsuperscript{246} See Kitsock, supra note 216, at 24.

\textsuperscript{247} See supra notes 235–36, 239–41 and accompanying text; Goldman-Armstrong, supra note 129, at 6–7.

\textsuperscript{248} See Goldman-Armstrong, supra note 129, at 6–7 ("No one can tell the story of your beer as well as you can," an Oregon-based distributor says of the advantages of self-distribution.").

\textsuperscript{249} See supra notes 235–36 and accompanying text.

\textsuperscript{250} Mark Doble, owner of Aviator Brewing Company, currently uses only self-distribution, as does Dave Quinn of Pisgah Brewing Company. E-mail from Mark Doble, supra note 10; E-mail from Dave Quinn, Owner, Pisgah Brewing Co., to author (Jan. 6, 2010) (on file with the North Carolina Law Review).

\textsuperscript{251} See Goldman-Armstrong, supra note 129, at 6–7.
economically efficient. Others believe that a higher barrelage limit is necessary for expansion. At the forefront of the battle to raise the limit, Bill Sherrill, owner of Red Oak brewery, has been arguing for a higher threshold in order to stay competitive. Although Red Oak brewery currently operates at an annual production below 25,000 barrels per year, Sherrill states that they hope to expand and add capacity. He believes that, with the addition of a bottling line that allows him to distribute to more retail locations, he will be able to exceed the current 25,000 barrel limit. His motive for spending money lobbying to pursue a higher barrelage limit when he is currently well under 25,000 barrels is to ensure he will continue to be able to pursue self-distribution before he invests too much capital in expanding.

Given Oscar Wong's belief that self-distribution is not feasible in North Carolina beyond 10,000 barrels, why would Bill Sherrill continue to pursue it—especially when he is at a natural disadvantage in regards to economies of scale? The reason given by Sherrill is that self-distributing beyond the 25,000 barrel limit gives him greater control over his product, and thus over his reputation. As beer history has shown, far larger breweries have fallen as a result of consumer perception of poor quality.

The quality control concern is exacerbated by Sherrill's belief that Red Oak beer requires special handling because of the brewing methods he uses. Red Oak claims to brew beer in accordance with the German Purity Law of 1516 and does not filter or pasteurize its

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252. E-mail from Oscar Wong, supra note 203. However, Wong qualifies this by saying that his 10,000 estimate only applies to states like North Carolina; in densely populated areas, he says this would be much larger. Id. Other brewers have shared similar sentiments. See E-mail from Mark Doble, supra note 10.
253. See Binker, supra note 219.
254. See id.
255. Interview with Bill Sherrill, supra note 209.
256. See Binker, supra note 219.
257. Id.
258. See WHITMAN, supra note 17, at 20 (discussing how distributors achieve greater economies of scale by consolidating and internalizing spillover effects from their brand-building efforts); E-mail from Oscar Wong, supra note 203.
259. Interview with Bill Sherrill, supra note 209.
260. See VAN MUNCHING, supra note 133, at 44 ("[T]he folks at Schlitz remained incapable of pulling themselves out of the slide started by their disastrous brewing decisions. Though by 1977 they'd finally admitted their folly, [and] returned to quality brewing methods . . . consumers were not prepared to forgive them."). For an account of how Schlitz ruined their beer, see id. at 41–44.
261. See Interview with Bill Sherrill, supra note 209.
beer.\textsuperscript{262} This is a selling point for Red Oak, since major domestic beers are both filtered and pasteurized, a process which Sherrill says removes flavor and nutritional value from the beer.\textsuperscript{263} Like many other craft brewers, Red Oak uses more expensive brewing processes to differentiate their brand and offer something they believe is unique to the market, and something that they believe consumers would be willing to pay more for due to its higher quality.\textsuperscript{264}

Sherrill also claims that his brewing methods are a bit self-limiting in regards to ease of storage and shelf-life.\textsuperscript{265} Since unpasteurized and unfiltered beer requires refrigeration to a greater extent than pasteurized American lager, he claims to be limited by the distances he can feasibly ship his beer.\textsuperscript{266} He thus desires to retain control over the storage and transportation of his beer, which he aims to distribute to a limited area—and because he worries that distributors are unable to give his brand the attention it needs, he feels he should not be prohibited from controlling all aspects of the distribution process himself.\textsuperscript{267} “Beer is the face of the company,” says Andy Miller, a brewer with Triangle Brewing Company in Durham.\textsuperscript{268} If customers have one bad experience with a brewer’s beer, the brewer has much to lose.\textsuperscript{269} For this reason, Red Oak assumes the higher costs of self-distributing so that it can have greater control over the quality of its product.\textsuperscript{270}

\textsuperscript{262} See Red Oak Brewery, Freshness, http://www.redoakbrewery.com/freshness.php (last visited Aug. 23, 2010). Although unpasteurized and unfiltered beer is a selling point for Bill Sherrill, many craft brewers, including some who distribute nationally and must thus necessarily use distributors, also do not pasteurize or filter their beer. See Greg Hottinger, Organic Beer: Tapping a New Market, http://www.bestnaturalfoods.com/newsletter/organic_bean.html (last visited Aug. 23, 2010).

\textsuperscript{263} Interview with Bill Sherrill, supra note 209. Bill Sherrill’s claim finds support among other brewmasters, although they harbor reservations about the extent that pasteurization removes flavor from beer. See, e.g., Dave Miller, Ask the Troubleshooter: Dave Miller on..., BREWING TECHNIQUES Mar.–Apr. 1995; http://brewingtechniques.com/library/backissues/issue3.2/miller.html (“Sterile filtration strips body, flavor, and even color from beer.... [P]asteurization always does some damage, though it is not always immediately noticeable.”).

\textsuperscript{264} See Interview with Bill Sherrill, supra note 209. This echoes the business plan of the craft brewer as explained by Sam Calagione of Dogfish Head Brewery. See CALAGIONE, supra note 120, at 52–69.

\textsuperscript{265} Interview with Bill Sherrill, supra note 209.

\textsuperscript{266} Id.

\textsuperscript{267} Id.

\textsuperscript{268} Interview with Andy Miller, supra note 230.

\textsuperscript{269} See Binker, supra note 219 (“‘Our concern is that someone who has a Red Oak could have a poor Red Oak experience’ ”); supra note 260 (discussing Schlitz’ downfall).

\textsuperscript{270} Interview with Bill Sherrill, VAN MUNCHING, supra note 133, at 41–44; cf. Binker, supra note 219 (“Jamie Bartholomew, an owner and brew master at Foothills Brewing...”)
Nevertheless, Red Oak seems to be the exception rather than the norm, as most brewers do not find it economical to ship into distant markets and intend to enter into distributorship agreements when they grow large enough. While allowing for self-distribution generally promotes the growth of craft breweries in North Carolina, it is not clear that raising the barrelage limit in a state with few metropolitan areas would promote more than marginal growth. Despite this weak potential for growth, at least one brewery, Red Oak, claims that it would be able to capitalize on higher limits. Although Red Oak would have to more than double its current sales volume to exceed the legal cap, there remains a valid question of whether there is any justification for not changing the law. In other words, even if the potential of expanded self-distribution rights to promote growth is weak, what about expanding these rights is pernicious enough to continue to place limits on self-distribution?

2. Does a Higher Barrelage Limit for Self-Distribution Trigger the Core Concerns of the Twenty-First Amendment?

The question therefore is whether raising the barrelage limit interferes with North Carolina's core Twenty-first Amendment concern of promoting temperance. There appears to be little evidence that raising the barrelage limits would create problems. As mentioned in Part III.C.1, very few breweries currently find it economically worthwhile to self-distribute above a certain barrelage. Distributors already have economies of scale since they can centralize multiple brands in one location and ship multiple brands in one truck. As Co. in Winston-Salem agrees philosophically with Red Oak that breweries should be able to distribute as much of their own product as they want. 'We would rather go to a distributor on our own terms when we feel we're ready rather than being forced to go with one'..

271. E-mail from Mark Doble, supra note 10; Interview with Bill Sherrill, supra note 209; E-mail from Oscar Wong, supra note 203; see Curtin, supra note 21, at 32 (" 'While [self-distribution] is a great way to get started, though, it is limiting because it doesn't make sense geographically to distribute too far away from the brewery.' ").

272. Aviator Brewing Company, Pisgah Brewing Company, and Red Oak all use only self-distribution. See E-mail from Mark Doble, supra note 10; E-mail from Dave Quinn, supra note 250; Interview with Bill Sherrill, supra note 209.

273. See E-mail from Oscar Wong, supra note 203.

274. Interview with Bill Sherrill, supra note 209; see Binker, supra note 219.

275. See supra note 271 and accompanying text.

276. See WHITMAN, supra note 17, at 20. Even Bill Sherrill acknowledged that signing on with a distributor would allow him to reach the outer limits of the state, citing his failed experiment with self-distributing out to Boone, North Carolina. Interview with Bill Sherrill, supra note 209.
craft brewers find it easier to sign on with distributors, it is very unlikely that many craft breweries above 25,000 barrels will use self-distribution.

Looking to the Fosdick and Scott rationale—assuming this rationale is even still viable today—it seems highly unlikely that allowing craft brewers greater flexibility to self-distribute will promote excess consumption. Unlike the pre-Prohibition brewers, craft brewers are barred by federal and state law from having any financial interest in or coercing retailers—in other words, there is no way that they can unite their profit motive with that of the retailer, as pre-Prohibition brewers were able to do. It is also unlikely that a higher barrelage limit violates any of the precepts of the new temperance movement. From a consumer point of view, who delivers Red Oak beer to the retailer is likely irrelevant to the consumer’s decision on how much to drink.

Looking at state per capita consumption, it is also not clear that there is any correlation between per capita consumption and a state’s self-distribution laws. For example, California, which has no barrelage limit, had a per capita consumption of 19.9 gallons of beer in 2008. In contrast, Louisiana, which does not allow self-distribution, had a per capita consumption of 27.1 gallons of beer in 2008. Similarly, North Carolina had a per capita consumption of 20.8 gallons in 2008, while South Carolina, which does not allow self-distribution, had a per capita consumption of 25.8 gallons in 2008. While this comparison does not take into account several other factors that could control per capita consumption, it also provides

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277. See Curtin, supra note 21, at 29–32.
278. See Lawson, supra note 11, at 50.
280. See supra Part II.C.3.
281. See Brewers Association, Self-Distribution Laws, supra note 16 (“[In California, a] holder of a beer manufacturers license can sell to a licensed retailer. No restrictions on production size or on-premise.”).
282. See BREWERS ALMANAC, supra note 3 (follow “Brewers Almanac 2009” hyperlink; then follow “Per Capita Beer Consumption by State”) (last visited Aug. 23, 2010); Brewers Association, Self Distribution Laws, supra note 16 (listing each state and its law regarding self-distribution).
283. See BREWERS ALMANAC, supra note 3 (follow “Brewers Almanac 2009” hyperlink; then follow “Per Capita Beer Consumption by State”) (last visited Aug. 23, 2010); Brewers Association, Self Distribution Laws, supra note 16 (listing each state and its law regarding self-distribution).
284. See BREWERS ALMANAC, supra note 3 (follow “Brewers Almanac 2009” hyperlink; then follow “Per Capita Beer Consumption by State”) (last visited Aug. 23, 2010); Brewers Association, Self Distribution Laws, supra note 16 (listing each state and its law regarding self-distribution).
very little support for the apocalyptic claims that raising the barrelage limit will promote excess consumption. In sum, there appears to be no evidence that raising the barrelage limits will yield results contrary to the state’s Twenty-first Amendment concerns.

3. Is the Increased Barrelage Limit Inherently Unfair to Distributors?

Since distributors were opposed to the proposed law, the last question in this policy analysis is to ask whether increased barrelage limits are unfair to distributors or whether such opposition is grounded in the distributors’ economic self-interest. On the distributor side, Mark Craig, president of local distributor R.H. Barringer, asks “[w]hen you have one [brewer] who does everything [including distribution], how are we assured that taxes are collected correctly, how are we assured that the product is handled correctly not only from a quality standpoint . . . but for a whole host of regulatory issues?” These rationales are also stated by the North Carolina Beer and Wine Wholesalers Association on its Web site, which discusses the need for accountability and a chain of custody, for efficient collection of taxes, and for promotion of temperance.

If it is true that distributors are really needed for taxes to be collected on sales of alcohol—a rationale that some craft brewers take offense to—that it is not clear why distributors, and not the state’s Department of Revenue, need to champion the cause by spending thousands in campaign donations and employing no less than three lobbyists working in the General Assembly. While distributors continue to “couch their argument in terms of protecting the public,” the underlying economic reality appears instead to reflect a battle to prevent lost profits to which the distributors are, at the moment, statutorily entitled to have.

286. See Binker, supra note 219.
287. Id.
289. See E-mail from Dave Quinn, supra note 250.
290. See Binker, supra note 219.
291. See WHITMAN, supra note 17, at 6. Howard Wolf, in his letter to Texas’s Sunset Commission, stated many of the criticisms shared by the craft brewers—most fundamentally that

[a] statute that was designed to promote public health, safety and welfare has, over time, been subverted by the economic interests of the entities it was intended to regulate. Now, the legalized system operates primarily to prevent competition, protect anti-competitive conduct and otherwise thwart the functioning of a free
Nor is this reality refuted by opponents of the bill in the General Assembly who justified their opposition on the grounds that raising the barrelage limit would be "to the detriment" of wholesalers. Although the legislature has not precisely stated what this "detriment" is, the only foreseeable detriment is that wholesalers would be denied the profit markup they would otherwise have if craft brewers were forced to utilize them for distribution. This statement therefore appears to reflect a perception that the wholesale tier is entitled to some portion of the profits of all the beer that is sold in the state, regardless of the impact the policy has on promotion of temperance; however, promotion of temperance, and not profit entitlement, was the purpose underlying the three-tier system immediately after Repeal.

Accordingly, there does not appear to be any compelling reason to deny brewers of any size the right to self-distribute. In fact, all the compelling evidence points in the opposite direction. The General Assembly has acknowledged that the growth of the craft brew industry is important, and anecdotal evidence shows that self-distribution only helps to promote growth by allowing brewers to establish themselves, build relationships with local retailers, and build the value of their brand. Brewers can then utilize this value to market themselves to distributors who are rationally disinclined to take on a brand that has not yet proven itself.

Although brewers dispute the necessity for self-distribution above a certain barrelage limit, at least one brewer claims that he will be able to utilize self-distribution above 25,000 barrels. In this way, amending the law to remove any limits for brewers seeking to self-distribute has the potential to allow for even greater growth in North
Carolina's craft brew industry. Such an amendment would also allow brewers over a certain size to retain greater control over their beer—a rational desire, and one that should be denied only if unlimited rights on self-distribution would aggravate the concerns the state seeks to protect through its Twenty-first Amendment rights.

On this point, there is no evidence that removing the limits on self-distribution would have any pernicious effects within the state. Brewers, whether they self-distribute or not, are barred by state and federal law from having any financial interest in retailers or otherwise exerting influence over them, thus resolving many of the concerns indicated in the Fosdick and Scott report. There is also no evidence that states without limits on self-distribution have higher per capita consumption—a result that is to be expected given that it is likely irrelevant to consumers who delivers kegs to the bar or beer bottles to store shelves.

There is thus very little evidence that removing limits on self-distribution would be unfair to distributors. Although in very limited circumstances distributors may not have profits they would otherwise have, there is nothing to suggest that this result is somehow objectively unfair to distributors.

In the absence of any compelling rationale that raising the barrelage limits will help promote temperance, there appears to be no reason for limiting the threshold at which a brewer can self-distribute.

D. State Franchise Laws

Although most craft brewers in the state do not have a strong opinion on Red Oak's push to increase the barrelage limits for self-distribution, virtually all craft brewers agree that there needs to be a change in North Carolina's franchise distribution laws.

300. See supra notes 259–64 and accompanying text.
302. See supra notes 278–85 and accompanying text.
303. See supra Part III.C.3.
304. E-mail from Uli Bennewitz, supra note 203; E-mail from Mark Doble, supra note 10; Interview with Andy Miller, supra note 230; E-mail from Dave Quinn, supra note 250; Interview with Bill Sherrill, supra note 209; E-mail from Oscar Wong, supra note 203; Telephone Interview with Joe Zonin, supra note 212.
1. Do the Franchise Laws Promote the Growth of the Craft Brew Industry?\textsuperscript{305}

Evaluating whether franchise laws are beneficial to the growth of the craft brew industry depends on who the franchise laws are being used against. All brewers that were interviewed for this Comment feel that franchise laws inhibit growth for craft brewers in the state because the North Carolina franchise laws prohibit brewers from terminating a contract without good cause.\textsuperscript{306} Furthermore, the statutes prohibit termination of the contracts unless notice is given to the distributor at least ninety days prior to the date of termination, so that the wholesaler is given the opportunity to fix the issue.\textsuperscript{307} The resulting combination makes it "harder to switch distributors than it is to get divorced."\textsuperscript{308}

Nevertheless, some argue that there is a positive side to the franchise laws. Harry Schumacher of BeerNet, an industry publication, claims that franchise laws can work to the benefit of small brewers.\textsuperscript{309} Harry argues that franchise laws help to maintain the wholesalers' independence by giving them leverage against large suppliers; this independence allows wholesalers to resist pressure from large domestic brewers for exclusivity and allows them greater flexibility in carrying other brewers' brands.\textsuperscript{310}

While the laws may be beneficial in allowing wholesalers independence to enter into distribution agreements with craft brewers, the laws are nonetheless problematic since they work inverse to legislative intent. Franchise laws were passed to protect small distributors against large suppliers, and given the large consolidations of MillerCoors and A-B, even large distributors still need protection.\textsuperscript{311} In the context of craft breweries, however, they operate to give large distributors extra clout over small suppliers, which

\textsuperscript{305} For a discussion on the rationale behind the state franchise laws, see supra Part II.C.1.

\textsuperscript{306} See N.C. GEN. STAT. § 18B-1304 (2009) ("It is unlawful for a supplier . . . to . . . alter in a material way, terminate, fail to renew, or cause a wholesaler to resign from, a franchise agreement with a wholesaler except for good cause and with the notice required by G.S. 18B-1305.").

\textsuperscript{307} Id. § 18B-1305 (2009).

\textsuperscript{308} Interview with Andy Miller, supra note 230.

\textsuperscript{309} Telephone Interview with Harry Schumacher, supra note 133.

\textsuperscript{310} Id. Jack Curtin argues that there is another benefit to franchise protections—by preventing brewers from switching distributors on a whim, it encourages distributors to build up the brand. See Curtin, supra note 217, at 19.

\textsuperscript{311} See Calif. AG Warns MillerCoors on Wholesaler Agreement, supra note 113; Curtin, supra note 217 at 18.
creates the potential for craft brewers to be “stuck, and sometimes virtually abandoned, in a wholesale house that had little interest in, or knowledge of, how to handle, specialty brands.”312 These laws are especially detrimental to craft brewers, since their lack of relative bargaining power makes it difficult for them to demand contract provisions that create benchmarks for wholesaler performance.313 This puts the craft brewers, unhappy with their distributors, on a treadmill of woe; unable to put in favorable contract provisions, it is difficult for them to establish good cause and terminate a wholesaler relationship.314 Unable to exit a distributor relationship, craft brewers are thus unable to capitalize on the value or growth of their brand—a value that would give them the bargaining power to work a more favorable deal with their own distributor, or another, distributor.315 Furthermore, even if a craft brewer had facts sufficient to establish good cause, the costs of litigation may be a barrier to its ability to do so.316

One commentator argues that the franchise laws have three other short-comings: first, that these restrictions prevent suppliers and wholesalers from finding the best “marriage”; second, that franchise laws act as a deterrent to specialty brewers by making it impossible for them to enter the market experimentally lest they be tied to a less-than-ideal wholesaler indefinitely;317 and, third, “applying the

312. Curtin, supra note 217, at 17. A prominent example of a craft brewer who has had these difficulties with distributors is Larry Bell, who was forced to exit the Chicago market as a result of disagreements with his wholesalers. See Nicholas Day, Bye-Bye Bell’s, CHICAGO READER, Dec. 14, 2006, http://www.chicagoreader.com/chicago/bye-bye-bells/Content?oid=923858.

313. See Sorini, supra note 109, at 34 (“Franchise laws should recognize that where the central assumption concerning the parties' relative power is absent, the protection of those laws is unnecessary and their effect is counterproductive.”); see also Telephone Interview with Joe Zonin, supra note 212 (explaining that a brewer needs to be large to have any bargaining power).

314. See Cagann, supra note 18, at 69 (“In franchise states, it may be easier to divorce a spouse than end a distribution relationship.”). Andy Miller echoed this sentiment on the North Carolina law, saying that although he has been content with his distributor, he knows others who have found it impossible to get out of a bad business relationship. Interview with Andy Miller, supra note 230. The difficulty of establishing good cause is compounded by the fact that the notice requirement allows distributors to reset the termination process by correcting any deficiencies. See Sorini, supra note 109, at 33; Telephone Interview with Joe Zonin, supra note 212.

315. Telephone Interview with Joe Zonin, supra note 212.

316. See Sorini, supra note 109, at 34.

317. For this reason, some craft brewers, most notably Bill Sherrill, have shied away from signing on with distributors. Interview with Bill Sherrill, supra note 209; see also E-mail from Dave Quinn, supra note 250 (“We self distribute all of our products, and do not see using a distributor for a long time, if ever.”).
franchise laws to [craft brewers] gives a few unscrupulous wholesalers the ability to unfairly 'hold-up' [craft brewers]."318 These factors all combine to inhibit the growth of the craft brew industry. To promote the goal of growth, craft brewers should have freedom in contracting with their wholesalers.319

A compromise that some have suggested is to create a small supplier exception to the franchise laws.320 In his article advocating the small supplier exception, Marc Sorini, an attorney specializing in alcohol regulation and distribution, suggests that an exception for suppliers who constitute up to 20% of a wholesaler's business is "high enough to restore the small supplier's freedom of contract, yet low enough to protect wholesalers from any supplier big enough to dictate terms."321

This small supplier exception is the official position embraced by the Brewer's Association, which believes that the exception can better equalize the playing field between small craft brewers and large distributors.322 The small supplier exception has also been enacted in some form in a limited number of states.323 Within North Carolina, at least one brewer, when questioned about the exception, thought that it would be feasible and a welcome change to the law.324

318. Sorini, supra note 109, at 34.
319. See id. ("What is now needed is a legal environment more compatible with those brands' continued growth.").
321. Sorini, supra note 109, at 34. Despite the attractiveness of this solution, it has been difficult to implement; for example, states that have tried to include an exemption for only in-state suppliers have had the exemptions challenged and invalidated on constitutional grounds. See Cagann, supra note 18, at 69. Harry Schumacher stated that even though many distributors are supportive of small supplier exemptions, they are hesitant to support craft brewers in pursuing them due to the possibility of large brewer intervention in the legislative process—and the resulting unpredictability of the law such intervention produces. Telephone Interview with Harry Schumacher, supra note 133.
322. See Brewers Association, BA Position Statements, supra note 136 ("Without the leverage inherent in being a large part of a wholesaler's business, a small brewer and wholesaler can negotiate a fair contract at arm's length.").
323. See supra note 320.
324. See Telephone Interview with Joe Zonin, supra note 212.
2. Is This Modification Inherently Unfair to Distributors?

The elegance of the small supplier exception is that it still allows the distributor to insert franchise-law protections. By ensuring that the brewer is exempt only if it constitutes a small percentage of a distributor's business, this law would ensure that distributors would not be coerced into unfair contracts that would allow a larger brewer to act opportunistically. At the same time, they would allow for greater flexibility for smaller brewers; these brewers could decide to forego a distributor's brand-building efforts in exchange for the right to terminate at will. This would allow for smaller brewers to experiment with different distributors and test the market without being bound for an indefinite span of time.

Ultimately, such an exception could work to the benefit of distributors as well as suppliers. By allowing brewers to enter and test the market before committing to a distributor, the laws would have less deterrent effect and would allow for a greater diversity of brewers and greater opportunity for those brewers to create value for their brands. If successful, these brewers could then provide distributors with more sought-after and profitable brands, or what one commentator has termed "golden cases." For these reasons, Harry Schumacher has stated that many distributors are on board with the idea of small supplier exceptions.

Therefore, the North Carolina General Assembly should seriously consider joining other states that have adopted the small supplier exception to franchise laws if it is truly serious about promoting its craft brew industry.

CONCLUSION

Like the growth of North Carolina's wine industry, North Carolina's craft brew industry has garnered national recognition.
and is recognized by the General Assembly as a positive development in the state—despite the General Assembly’s resistance to liberalizing the laws on beer less than five years ago. An expanded craft brew industry can provide several benefits to the state, and the General Assembly should make an effort to ensure that its stated objective of promoting the growth of the craft brew industry is more than mere lip service.

While the General Assembly has made some efforts to promote growth by allowing brewpubs, self-distribution, and, most recently, beer tasting permits, the General Assembly can and should do more to promote growth by following the lead of other states and removing all barrelage limits for self-distribution. In regards to the franchise laws, the General Assembly should be a leader among the states and create a small supplier exemption to the laws to remove the amplified disparity in bargaining power that currently exists between small craft brewers and large distributors.

Although many in the General Assembly seem hesitant to change these laws, a realistic view of the craft brew industry in the context of modern society shows that the recommended changes are unlikely to have pernicious effects. When the history of the three-tier system is understood, it becomes apparent that the foundations of the three-tier system are based on antiquated principles, and that shifting social norms and changes in the beer industry have made many of the original reasons for enacting the three-tier system irrelevant.

Despite these different social norms and developments in the beer industry, there appears to be some evidence that the three-tier system, at its core, has been beneficial for the growth of the craft brew industry. But just because the three-tier system has some benefits does not mean that there is no room for improvement. Interviews with craft brewers in the state indicate that at least one brewer feels that they are currently limited by the limitations on self-distribution, and almost all brewers agree that the franchise laws, by locking a

334. See supra notes 6–7 and accompanying text.
336. See supra notes 170–72 and accompanying text.
337. See supra note 212 and accompanying text.
brewer into a distribution agreement with little opportunity to exit or renegotiate, are a significant limitation on growth.

When brewers attempt to change these laws, however, they encounter significant distributor opposition to removing limitations on self-distribution; and as of yet, no brewer has taken up the legislative battle to insert a small supplier exception into the franchise laws. Although the distributors couch their opposition in terms of the public interest, the disproportionate amount of resources spent to lobby for the preservation of three-tier laws—combined with the lack of evidence that preserving the laws will promote temperance—indicates that opposition is primarily out of economic self-interest. There is thus no principled reason for the legislature to continue favoring distributors at the expense of craft brewers, particularly when the courts and society are increasingly diverging from the views held in the post-Repeal era.

Finally, by raising limits on self-distribution and the franchise laws, both craft brewers and distributors stand to benefit. These changes will make it easier for craft brewers to gain traction and grow—and once they grow large enough, they will be able to deliver the “golden cases” that will benefit distributors as well.\textsuperscript{340} The ultimate beneficiary of improved laws, however, are the beer-drinkers of North Carolina, who will have access to a wider and deeper array of the “specialty malt beverage” the General Assembly seeks to encourage.

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\footnotesize\textsuperscript{340} See supra note 331 and accompanying text.

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