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PUBLIC HEALTH, STATE ALCOHOL PRICING POLICIES, AND THE DISMANTLING OF THE 21ST AMENDMENT: A LEGAL ANALYSIS

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I. ABSTRACT

After the 21st Amendment to the United States Constitution repealed Prohibition, many States chose to regulate alcohol through the establishment of a three-tier system of alcohol producers, wholesalers, and retailers (often referred to as "tied house" laws), strictly separating the production and retail tiers of the industry. Tied house provisions often include specific wholesaler pricing restrictions, such as bans on volume discounts, minimum markup / maximum discount provisions, and post-and-hold requirements.

Public health advocates have in the past considered tied house provisions to be instruments of the marketplace with little or no connection to public health concerns. This perception is being reassessed.

This article provides an analysis of the legal landscape regarding the validity of alcohol wholesaler pricing restrictions. It reveals that the courts have largely abandoned the original intent of the 21st Amendment (which repealed Prohibition in 1933) – to grant States the primary responsibility in regulating the alcohol trade as a means to protect public health and safety. Recent cases have subordinated this purpose in favor of protecting commercial interests pursuant to the Interstate Commerce Clause of the Constitution. The States, the courts and the public health community each have a role to play to restore the powers granted by the 21st Amendment and to enhance the public health benefits of wholesaler pricing policies while also protecting them from future legal challenges.

II. INTRODUCTION

After the 21st Amendment[3] to the U.S. Constitution repealed Prohibition, many States chose to regulate alcohol through the establishment of a three-tier system of alcohol producers, wholesalers, and retailers, thus strictly separating the production and retail tiers of the industry. These regulations, often referred to as "tied house" laws, addressed a perceived pre-Prohibition problem – that local retailers were run by out-of-state producers, which resulted in aggressive marketing practices that were beyond the control of local communities.[4] Tied house provisions often include specific wholesaler pricing restrictions, such as bans on volume discounts, minimum markup and maximum discount provisions, and post-and-hold requirements.[5] There are several purposes behind these provisions: insuring an orderly market, avoiding

3. U.S. CONST. amend. XXI.

4. Carole L. Jurkiewicz & Murphy J. Painter, *Why We Control Alcohol the Way We Do, in* SOCIAL AND ECONOMIC CONTROL OF ALCOHOL: THE 21ST AMENDMENT IN THE 21ST CENTURY 1 (Carole L. Jurkiewicz & Murphy J. Painter eds., 2008); Susan C. Cagann, *Contents Under Pressure: Regulating the Sales and Marketing of Alcoholic Beverages*, *in* SOCIAL AND ECONOMIC CONTROL OF ALCOHOL: THE 21ST AMENDMENT IN THE 21ST CENTURY 57 (Carole L. Jurkiewicz & Murphy J. Painter eds., 2008).

5. *Id.*

price competition among both wholesalers and retailers (thereby promoting temperance), and protecting small retailers.[6]

Public health advocates have in the past considered tied house provisions to be instruments of the marketplace with little or no connection to public health concerns. This perception is being reassessed. Research is demonstrating that underage consumption, binge drinking, and other adverse effects of alcohol are strongly influenced by alcohol prices.[7] Research also suggests that wholesaler-pricing restrictions increase the price of alcohol to consumers so that maintaining the pricing restrictions may have important public health benefits.[8]

Public health interest in wholesaler pricing restrictions comes at a critical time. Although the Supreme Court has previously recognized that the three-tier systems are "unquestionably legitimate,"[9] the restrictions have been under legal attack as being in violation of the Interstate Commerce Clause ("Commerce Clause") in the Constitution and the Sherman Act.

This article analyzes the complex legal landscape regarding the validity of alcohol wholesaler pricing restrictions from a public health perspective. It begins with a brief history of the tension between the Commerce Clause and State alcohol laws before discussing the specific laws in question. Next, it provides an analysis of the case law, highlighting trends and the role of and implications for public health concerns in the outcomes. It concludes with recommendations for enhancing the public health benefits of price restriction policies and protecting them from legal challenges.

III. BRIEF HISTORY: INTERSTATE COMMERCE CLAUSE V. STATE ALCOHOL LAWS

The tension between the Federal Commerce Clause[10] and State alcohol laws predates both the 21st and the 18th Amendments.

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6. *Id.*

7. Frank J. Chaloupka, Legal Challenges to State Alcohol Control Policy: An Economist's Perspective, Presentation at the Alcohol Policy 14 Conference (San Diego, Cal., Jan. 28, 2008); NATIONAL RESEARCH COUNCIL & INSTITUTE OF MEDICINE, REDUCING UNDERAGE DRINKING: A COLLECTIVE RESPONSIBILITY (Richard J. Bonnie & Mary Ellen O'Connell eds., The National Academies Press 2004).

8. *Id.*

9. Granholm v. Heald, 544 U.S. 460, 489 (2005) (citing North Dakota v. United States, 495 U.S. 423, 432 (1986)).

10. U.S. CONST. art. I, § 8, cl. 3. (granting the United States Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes.").

A. Pre-Prohibition: Allowing States to Regulate Alcohol Within Their Borders

Early Supreme Court cases (prior to the enactment of the 18th Amendment instituting Prohibition) relied on the Tenth Amendment[11] to reject Commerce Clause-based challenges to State authority to regulate the alcohol trade.[12] The Tenth Amendment declares "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[13] The Court found that this Amendment gave the states "a broad authority . . . to regulate the trade of alcoholic beverages within their borders free from implied restrictions from the *Commerce Clause*."[14]

When later Supreme Court opinions infringed on the States' alcohol trade authority, Congress passed the Wilson Act[15] in 1890 and the Webb-Kenyon Act[16] in 1913.[17] The Wilson Act stated that "[a]ll . . . intoxicating liquors or liquids transported into any State or Territory . . . shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory."[18] The Webb-Kenyon Act prohibited "[t]he shipment or transportation . . . of any . . . intoxicating liquor of any kind, from one State, Territory, or District . . . into any other State, Territory or District . . . [for the purpose of being] received, possessed, sold, or in any manner used . . . in violation of any law of such State, Territory or District."[19]

The tension between the Commerce Clause and the States' police power temporarily subsided with the passage of the 18th Amendment[20] and the beginning of Prohibition in 1919. The 18th Amendment declared that "the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited."[21]

11. U.S. CONST. amend. X.
12. *See, e.g.,* In the License Cases, 5 How. 504, 579 (1847).
13. U.S. CONST. amend. X.
14. Craig v. Boren, 429 U.S. 190, 205 (1976) (relying on *License Cases,* 5 How. at 579).
15. 27 U.S.C. § 121 (1890).
16. 27 U.S.C. § 122 (1913).
17. Craig v. Boren, 429 U.S. 190, 205 (1976).
18. 27 U.S.C. § 121.
19. 27 U.S.C. § 122.
20. U.S. CONST. amend. XVIII.
21. *Id.* § 1.

B. Post-Prohibition: The 21st Amendment and the Sherman Act Conflict

The 21st Amendment[22] – using language which paralleled that found in the Wilson and Webb-Kenyon Acts – repealed Prohibition in 1933. The Amendment originally had three sections.[23] The first repeals prohibition and the second 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." [24] The third section gave Congress the "concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold."[25] However, opponents succeeded in having this section removed prior to passage, arguing that "any grant of power to the Federal Government, even a seemingly narrow one, could be used to whittle away the exclusive control over liquor traffic given the States under Section 2."[26] The removal of this section suggests a Congressional intent that the 21st Amendment be read to grant States exclusive, or at least primary, authority over the regulation of alcoholic beverages within their boundaries.

The enactment of the 21st Amendment began a long-standing debate among Supreme Court Justices over the relation between the 21st Amendment and the Commerce Clause. The Commerce Clause grants Congress the power "[t]o regulate Commerce . . . among the several States."[27] Therefore, the Court has accepted challenges to the 21st Amendment based on the Sherman Act because it derives its authority from the Commerce Clause.[28] The Sherman Act has two relevant sections: section 1 makes unlawful "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States"[29]; and section 2 makes it unlawful to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States."[30] Over time, the Court has made a dramatic shift in its approach to resolving the tension between the 21st Amendment, which has as its apparent

22. U.S. CONST. amend. XXI.

23. *Id.*

24. *Id.* § 2.

25. Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 337 (1964) (Black, J., dissenting).

26. *Id.*

27. U.S. CONST. art. I, § 8, cl. 3.

28. United States v. Frankfort Distilleries, Inc., 324 U.S. 293, 301 (1945) (Frankfurter, J., concurring). The Court reiterated the sentiment in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, explaining that "[a]lthough this federal interest is expressed through a statute rather than a constitutional provision, Congress '[exercised] all the power it possessed' under the *Commerce Clause* when it approved the Sherman Act." 445 U.S. 97, 111 (1980) (emphasis added) (citation omitted).

29. 15 U.S.C. § 1 (2011).

30. 15 U.S.C. § 2 (2011).

intent granting States primary control of the alcohol trade, and the Sherman Act, which establishes a Federal ban against State-imposed restraints on trade.

IV. SUPREME COURT ANALYSIS

A. The Early Years: Granting States Unrestricted Power to Regulate Alcohol

The Supreme Court broadly interpreted the 21st Amendment for the first three decades following its enactment, providing the States extensive powers to regulate the trade in alcoholic beverages even when the provisions appeared to violate the Commerce Clause. In *State Board of Equalization of California v. Young's Market Co.*,[31] decided in1936, the Court upheld a statute imposing a license-fee for the privilege of importing beer, stating that it did not present a case of discrimination prohibited by the Commerce Clause.[32] Moreover, the Court explained that States could now do things which would have been unconstitutional under the Commerce Clause prior to the 21st Amendment:

> Prior to the *Twenty-first Amendment* it would obviously have been unconstitutional to have imposed any fee for [the privilege of importing beer]. The imposition would have been void, not because it resulted in discrimination, but because the fee would be a direct burden on interstate commerce; and the *Commerce Clause* confers the right to import merchandise free into any state, except as Congress may otherwise provide.[33]

Although the Commerce Clause still applied generally, the Court clarified that the 21st Amendment "abrogated the right to import free, so far as concerns intoxicating liquors."[34] The Court found that the 21st Amendment also protected laws which contained "a lesser degree of regulation than total prohibition."[35] In addition, the Court did not agree with the argument that the States could only regulate if doing so for the "purpose of protecting the public health, safety or morals."[36]

The series of cases that followed *Young's Market* continued to use the 21st Amendment to uphold State laws. In *Joseph S. Finch & Co. v. McKittrick*,[37] the Supreme Court upheld a Michigan law prohibiting the transportation, importation, purchase, sale, receipt or possession of any alcohol manufactured

31. 299 U.S. 59 (1936).
32. *Id.* at 62.
33. *Id.* (emphasis added).
34. *Id.*
35. *Id.* at 63.
36. *Id.*
37. Joseph S. Finch & Co. v. McKittrick, 305 U.S. 395 (1939).

in a "state in which discrimination exists."[38] The Court ignored the issues pertaining to the Commerce Clause, finding that since the 21st Amendment "the right of a State to prohibit or regulate the importation of intoxicating liquor is not limited by the Commerce Clause."[39] In *Ziffrin, Inc. v. Reeves*,[40] the Court upheld a Kentucky law requiring an "interstate contract carrier" (as authorized under the Federal Motor Carrier Act) to acquire a Transporter's License before selling alcohol within the state.[41] The Court found that "[t]he *Twenty-first Amendment* sanctions the right of a State to legislate concerning intoxicating liquors brought from without, unfettered by the *Commerce Clause*."[42] Similar to *Young's Market*, the Court also held that although States could enact laws to "absolutely prohibit" the manufacture, transportation, sale or possession of alcohol, they could also enact laws which were less than prohibition and still have them be considered constitutional.[43]

In each of these early cases, the Court first looked at whether the 21st Amendment applied and often ignored the issue of whether the law in question violated the Commerce Clause. The Court explained that "[c]onsideration of any state law regulating intoxicating beverages must begin with the Twenty-first Amendment."[44]

B. The Middle Years: The Process of Narrowing the Application of the 21st Amendment Begins

After nearly thirty years of using the 21st Amendment to uphold any alcohol-related state law, the Supreme Court issued a series of opinions narrowing its reach and giving greater weight to the Commerce Clause. The Court explained that although the 21st Amendment still granted States the authority to regulate alcohol within their own borders, the Commerce Clause prevented States from regulating alcohol that was not consumed in-state, or enacting laws which affected the sale, importation, transportation or consumption of alcohol in or to other states.[45] Prior to this wave of cases the Court seemed to use the 21st Amendment to trump the Commerce Clause; by the end of this wave, the two provisions were treated equally.

The first signs that the Court would narrow the broad interpretation of the 21st Amendment appeared in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*,

38. *Id.* at 396. *Indianapolis Brewing Co. v. Liquor Control Commission* was decided on the same day and also upheld the aforementioned Michigan law even though it specifically listed Indiana as "a state in which discrimination exists." 305 U.S. 391 (1939).

39. *McKittrick*, 305 U.S. at 398.

40. 308 U.S. 132 (1939).

41. *Id.* at 140.

42. *Id.* at 138. (emphasis added).

43. *Id.*

44. Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 41 (1966).

45. *See id.*; *See also infra* notes 46-65 and accompanying text.

decided in 1964.[46] In *Hostetter*, a company sold bottled wines and liquors at a New York airport to international airline passengers prior to the departure of their flights.[47] The company transferred the purchased alcohol directly onto the plane and the customer did not receive it until he or she arrived at their foreign destination.[48] The State informed the company that its business was illegal under provisions of the New York Alcoholic Beverage Control Law because the business was "unlicensed and unlicensable under that law."[49] The Court found the State's actions were constitutionally impermissible under the Commerce Clause, and "that shipment through a state is not transportation into the state within the meaning of the Amendment."[50] Although the Court acknowledged that a "State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders"[51] it also cautioned that "[t]o draw a conclusion . . . that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd simplification."[52] The Court explained that both provisions are parts of the same Constitution and "each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case."[53]

It must be noted that the Court had almost completely new membership since it had decided *Young's Market*. At this time, the only two justices remaining from that original Court were Justices Black and Douglas. Justice Black authored the dissent.[54] He argued that "the Twenty-first Amendment confers exclusive jurisdiction upon the State of New York to regulate all alcoholic business carried on in New York"[55] and that the current decision "makes in-

46. 377 U.S. 324 (1964). One indicator of this change in the relation between the 21st Amendment and the Commerce Clause is the way that the Court frames the question in this case. *Id.* at 329. The Court asks: "whether the Twenty-first Amendment so far obliterates the Commerce Clause as to empower New York to prohibit absolutely the passage of liquor through its territory, under the supervision of the United States Bureau of Customs acting under federal law, for delivery to consumers in foreign countries." *Id.*

47. *Id.* at 325.

48. *Id.*

49. *Id.* at 326. Under the New York Alcoholic Beverage Act "[n]o person shall manufacture for sale or sell at wholesale or retail any alcoholic beverage within the state without obtaining the appropriate license." N.Y. ALCO. BEV. CONT. LAW § 100. Only those premises which "shall be located in a store, the principal entrance to which shall be from the street level and located on a public thoroughfare in premises which may be occupied, operated or conducted for business, trade or industry or on an arcade or sub-surface thoroughfare leading to a railroad terminal" may receive licenses to sell liquors and/or wines for off premises consumption. N.Y. ALCO. BEV. CONT. LAW § 105.

50. *Hostetter*, 377 U.S. at 333 (citing Carter v. Virginia, 321 U.S. 131, 137 (1944)).

51. *Id.* at 330.

52. *Id.* at 331-32.

53. *Id.* at 332.

54. *Id.* at 334-40 (Black, J., dissenting).

55. *Id.* at 335.

roads upon [those] powers." [56] Justice Black concluded that "instead of protecting the States' power to control liquor traffic, today's interpretation of the Twenty-first Amendment leaves New York powerless to regulate Idlewild's business and others like it." [57]

A series of cases had similar holdings to *Hostetter* and applied to alcohol being transported to federal lands, such as national parks and military bases.[58] The Supreme Court concluded that the 21st Amendment does not give States the authority to regulate the transport of alcohol when it is not to be consumed within the State.[59]

A second set of cases that further eroded the reach of the 21st Amendment involved the constitutionality of State alcohol laws that depend upon or affect the prices of alcohol in other states (termed "price affirmation" laws). These provisions required an alcohol supplier to affirm to the State that the same alcohol was not being sold for a lower price in any other State and might also require the supplier to lower the prices in-state if the prices out-of-state dropped.[60] The Court first addressed the constitutionality of price affirmation laws in *Joseph E. Seagram & Sons, Inc. v. Hostetter*, decided in 1966, where it found that the statute in question did not place an illegal burden upon interstate commerce and thus did not violate the Commerce Clause.[61] As described in a later case, "the Court ruled that the mere fact that the New York Statute was geared to appellants' pricing policies in other States did not violate the *Commerce Clause*, because . . . the *Twenty-first Amendment* [provided a] broad grant of liquor regulatory authority to the States . . . ."[62] Interestingly, the Court held that these laws are protected under the Twenty-first Amendment even though they are not related to temperance, a primary rationale for the Amendment's passage.[63] Rather, the laws encourage lower prices, which in turn, promote, rather than deter alcohol consumption.

Seagram was decided in 1966. By 1989, its logic was completely rejected, signaling a shift in the Court's approach to Twenty-first Amendment cases. In *Healy v. United States Brewers Ass'n*, decided in 1983, the Court held that the

56. *Hostetter*, 377 U.S. at 340.

57. *Id.*

58. Collins v. Yosemite Park & Curry Co., 304 U.S. 518 (1938) (finding that the 21st Amendment did not give California the power to prevent alcohol destined for distribution and contribution in a national park from being shipped through the state); United States v. State Tax Comm'n, 412 U.S. 363 (1973) (finding that Mississippi could not regulate a transaction between an out-of-state liquor supplier and a federal military base); United States v. State Tax Comm'n, 421 U.S. 599 (1975) (finding that Mississippi could not impose a sales tax on military installations purchase of out-of-state alcohol).

59. *Id.*

60. Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 580 (1986).

61. *Seagram,* 384 U.S. at 38.

62. Healy v. Beer Inst., 491 U.S. 324, 331 (1989) (discussing *Seagram*, 384 U.S. at 38) (emphasis added).

63. *Id.* at 337-43.

price affirmation statute in question unconstitutionally restricted the ability of out-of-state shippers to offer volume discounts in bordering States.[64] In *Brown-Forman Distillers Corp. v. New York State Liquor Authority*,[65] the Court held that the prospective affirmation statute was unconstitutional because it had the "'practical effect' of . . . control[ling] liquor prices in other States," and thus was invalid under the Commerce Clause.[66] Finally, in 1989, the Court overturned *Seagram* completely in *Healy v. Beer Institute*, stating that it was "no longer good law" because "[r]etrospective affirmation statutes, like other affirmation statutes, have the inherent practical extraterritorial effect of regulating liquor prices in other States."[67]

In summary, this period saw significant shifts in the Court's analysis as it explored the relation between the 21st Amendment and the Commerce Clause. From *Hofstetter* in 1939 to *Healy* in 1989, the Court went from ruling that the 21st Amendment had primary authority vis-a-vis the Commerce Clause, to building exceptions to that authority, and gradually expanding the reach of the Commerce Clause and its impact on the 21st Amendment. However, the Court still maintained that the States had the authority to regulate alcohol within their borders as long as the laws did not affect other States.

C. The Third Wave of Cases: A Confusing Shift in the Court's Analysis, Resulting in Conflicting Decisions by the Lower Courts

The third and final wave of cases involves a set of confusing and apparently conflicting decisions. In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*[68] and *324 Liquor Corp. v. Duffy*,[69] the Court changed its analysis of the 21st Amendment to suggest that the Commerce Clause could trump the 21st Amendment, whether or not the law in question affected other States. However, almost twenty years after *Midcal* and *Duffy*, the Supreme Court decided *Granholm v. Heald*,[70] holding that the 21st Amendment protected state policies as long as they did not discriminate between in-state and out-state producers or wholesalers.[71] These mixed signals from the Supreme Court have led to conflicting decisions among the U.S. Courts of Appeal.

64. Healy v. U.S. Brewers Ass'n, 464 U.S. 909, 909 (1983) (summarily aff'g 692 F.2d 275 (CA2 1982)).

65. *Brown-Forman*, 476 U.S. at 573.

66. *Id.* at 583.

67. *Healy*, 491 U.S. at 343.

68. 445 U.S. 97 (1980).

69. 479 U.S. 335 (1987).

70. 544 U.S. 460 (2005).

71. *Id.* at 486-89.

1. Supreme Court Decisions

In *Midcal*, the Supreme Court asked whether California's resale price maintenance and price posting statutes for the wholesale wine trade were shielded from the Sherman Act by section 2 of the 21st Amendment.[72] California's law at that time required wine producers to set alcohol prices through a fair trade contract, which established the terms for all wholesale transactions involving that brand.[73] If the producer did not enter into a fair trade contract, then a wine wholesaler had to post prices for that producer's brands through a resale price schedule, which would then bind all the wholesalers in that area.[74] The Court started its analysis by noting that the 21st Amendment only explicitly granted the States the control over the "transportation or importation" of liquor into their territories although it then acknowledged that "[o]f course, such control logically entails considerable regulatory power not strictly limited to importing and transporting alcohol."[75] After a review of case precedent, beginning from *Young's Market* to the present, the Court concluded that:

> [T]here is no bright line between federal and state powers over liquor. The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations.[76]

At first glance, this does not appear to stray too far from the analysis found in previous cases. However, the Court then stated that 21st Amendment cases should involve a "pragmatic effort to harmonize state and federal powers," "careful scrutiny," and reconciliation of "competing state and federal interests."[77] To determine the state interest, the Court relied on the lower court's determination that the resale price maintenance law had two purposes – to "promote temperance and orderly market conditions."[78] The Court then examined whether the laws actually achieved these purposes.[79] The Court found little evidence that the pricing system helped promote temperance or sustain retail establishments and thus concluded that "the asserted state interests are less substantial than the national policy in favor of competition."[80] This constituted a significant shift by the Court in its analysis of the 21st Amendment. It is the first time that it held that the 21st Amendment only

72. *Midcal*, 445 U.S. at 99.
73. *Id.*
74. *Id.*
75. *Id.* at 107.
76. *Id.* at 110.
77. *Id.* at 109-10.
78. *Midcal*, 445 U.S. at 112.
79. *Id.*
80. *Id.* at 112-13.

protects State laws if those laws effectively achieve the purposes behind their creation.

The Court revisited this issue seven years later in *324 Liquor Corp. v. Duffy*.[81] A liquor retailer challenged a New York law, which required retailers to charge at least 112 percent of the "posted" wholesale price for liquor, but permitted wholesalers to sell to retailers at less than the "posted" price.[82] As a result, the wholesalers could manipulate prices so that retailers had to sell for more than 112 percent of the actual wholesale cost.[83] The Court concluded that this permitted the "wholesalers to maintain retail prices at artificially high levels."[84] The Court explained that "[t]he question in each [Twenty-first Amendment] case is 'whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail notwithstanding that its requirements directly conflict with express federal policies.'"[85] The Court decided that the purpose behind the 12-percent minimum markup was to protect small retailers.[86] However, the Court found no legislative or other findings that the law had been "effective" in preserving small retailers and thus concluded that "the State's unsubstantiated interest in protecting small retailers 'simply [is] not of the same stature as the goals of the Sherman Act.'"[87] The Court also noted that since the lower court had determined that promoting temperance was not a purpose of the law, the Court could not "reach the question whether New York's liquor-pricing system could be upheld as an exercise of the State's power to promote temperance."[88]

Justice O'Connor wrote a strongly-worded dissent.[89] She quoted Justice Stevens dissent from a previous case unrelated to the Commerce Clause. He had recently observed that "the Court has, over the years, so 'completely distorted the Twenty-first Amendment' that '[i]t now has a barely discernible effect in Commerce Clause cases.'"[90] Justice O'Connor explained that:

> The history and purpose of the Twenty-first Amendment are a compelling indication of an intent to confer on States the power to regulate trade in liquor. Despite this clear intent, the Court in recent years has used a balancing test to resolve conflicts between federal statutes and state laws enacted pursuant to § 2. In [*Midcal*], and once again today, the Court ventured still further from the intent of the Twenty-

81. 479 U.S. 335 (1987).
82. *Id.* at 337.
83. *Id.* at 339-40.
84. *Id.* at 340.
85. *Id.* at 347 (citing Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 714 (1984)).
86. *Id.* at 349.
87. *Duffy*, 479 U.S. at 350 (citing *Midcal*, 445 U.S. at 114) (alteration in original).
88. *Id.* at 351-52.
89. *Id.* at 352-60 (O'Connor, J., dissenting).
90. *Id.* at 352-53 (citing Newport v. Iacobucci, 479 U.S. 92, 98 (1986) (Stevens, J., dissenting)).

> first Amendment by adopting an unprecedented test that focuses on the wisdom of the State's exercise of its § 2 powers.[91]

She further criticized the Court for adopting an "effectiveness test" and argued that "[t]he sole 'question is whether the provision in this case is an exercise of a power expressly conferred upon the States by the Constitution.'"[92]

The Court followed these two cases that appear to severely limit protections afforded by the 21st Amendment in 2005 with *Granholm v. Heald*.[93] In *Granholm*, the Court examined laws from New York and Michigan, which permitted in-state wineries but not out-of-state wineries to sell directly to consumers.[94] The Court held that "discrimination is neither authorized nor permitted by the Twenty-first Amendment" and, therefore, invalidated the Michigan provisions.[95] In dicta, the Court then cited the decision in *Midcal*, which stated that "[t]he Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system"[96] and concluded that "[s]tate policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent."[97] This seems similar to the cases decided in the second wave that allowed States to regulate alcohol within their borders as long as their laws did not affect other States.

2. Lower Court Decisions

These recent Supreme Court decisions have led to conflicting case law among lower courts regarding the constitutionality of wholesaler pricing policies. To date, there have been at least three other lower court cases addressing this issue: *TFWS, Inc. v. Schaefer*,[98] *Costco Wholesale Corp. v. Maleng*,[99] and *Manuel v. Louisiana*[100]. The U.S. Courts of Appeal heard the first two; the Court of Appeals of Louisiana heard the third case.

In *TFWS, Inc. v. Schaefer*, a large retail liquor store challenged Maryland's regulatory provisions requiring liquor wholesalers to post prices and adhere to them (i.e. a "post-and-hold" law) and prohibiting volume discounts as unconstitutional because they violated the Commerce Clause and Section 1 of the

91. *Id.* at 359.
92. *Id.* at 360 (citing Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 287 (1984) (Stevens, J., dissenting)).
93. 544 U.S. 460 (2005).
94. *Id.* at 465-66.
95. *Id.* at 466.
96. *Id.* at 488 (citing *Midcal*, 445 U.S. at 110).
97. *Id.* at 489.
98. 242 F.3d 198 (4th Cir. 2001).
99. 522 F.3d 874 (9th Cir. 2008).
100. 982 So. 2d 316 (La. Ct. App. 2008).

Sherman Act.[101] According to *TFWS*, the State's pricing scheme restrained competition by allowing wholesalers to match each other's prices at artificially high levels and maintain those prices.[102] The appellate court instructed the district court to follow a specific three-part test when analyzing 21st Amendment questions.[103] First, examine the expressed state interest and the closeness of that interest to those protected by the Twenty-first Amendment – in this case, temperance.[104] Second, ask whether the regulatory scheme is effective in promoting that interest.[105] Third, balance the state interest in temperance against the federal interest in promoting competition under the Sherman Act.[106]

This test, while based loosely on earlier Supreme Court cases, represents a new approach to 21st Amendment cases. In *Midcal* and *Duffy*, the Court discussed balancing the 21st Amendment against the Commerce Clause and assessing the effectiveness of the challenged law in meeting its 21st Amendment purpose, but the Court did not articulate a test for such an analysis. In addition, the cases did not apply this analysis to laws whose purpose was temperance. The test also has similarities to the analysis in *Granholm*. The *Granholm* Court, however, did not use it to determine whether the 21st Amendment protects a law, but rather to determine whether the law in question could still advance its purpose in a nondiscriminatory way.[107]

Having devised this new test, the *TFWS* appellate court upheld the district court's conclusion that "the State has proven that the challenged regulations have at best only a minimal impact in furthering the State's interest in temperance, which is outweighed by the federal interest in promoting competition under the Sherman Act" and struck down both regulations as unconstitutional.[108] Even though the Supreme Court has not officially endorsed this new test, courts in other circuits have already begun relying on it.[109]

In *Costco Wholesale Corp. v. Maleng*, the retail store Costco challenged nine of Washington State's regulations which placed limitations on the sale and

101. 242 F.3d. at 201-02.
102. *Id.* at 203.
103. *Id.* at 213.
104. *Id.*
105. *Id.*
106. *Id.*
107. 544 U.S. at 492-93.
108. TFWS, Inc. v. Schaefer, No. WDQ-99-2008, 2007 U.S. Dist. LEXIS 76362, at *27 (D. Md. Sept. 27, 2007).
109. U.S. Airways, Inc. v. O'Donnell, 627 F.3d 1318, 1330-31 (10th Cir. 2010) (addressed whether New Mexico, pursuant to the New Mexico Liquor Control Act (NMLCA), could regulate the alcoholic beverage services that airlines provided to passengers on flights. The lower court granted summary judgment for New Mexico, holding that federal law did not preempt the NMLCA. The appellate court reversed the decision and remanded it back to the lower court, instructing it to balance the state and federal interests at issue in the case. Although this case did not deal with wholesaler pricing policies, the court suggested that the lower court use the test laid out in *TFWS v. Schaefer* for guidance when conducting its analysis).

distribution of wine and beer.[110] These regulations included: a uniform pricing rule; price post-and-hold requirements; a minimum mark-up provision; bans on volume discounts, selling beer or wine on credit, and central warehousing; a delivered price requirement; and a prohibition on retailers selling beer or wine to other retailers.[111]

The district court followed the three-part test that was laid out in *TFWS*.[112] It examined the effectiveness of the three interests put forth by the State: "(1) promoting temperance; (2) ensuring orderly market conditions; and (3) raising revenue."[113] The State provided expert testimony showing that these laws raise alcohol prices and that higher prices reduce consumption, but the court was "not persuaded that the challenged restraints are effective in promoting temperance"[114] and were "either ineffective or only of minimal effectiveness in . . . ensuring orderly markets, or raising revenue."[115] However, the court did provide some advice to guide future state actions: "If the State desires to promote temperance by artificially increasing beer and wine prices, the State could readily achieve that goal in a manner that does not run afoul of the Sherman Act. Most obviously, the State could adopt higher excise taxes on beer and wine." [116]

On appeal, the federal appellate court overruled the district court regarding all of the challenged provisions except the post-and-hold requirements.[117] The court reached this decision based on its conclusion that the provisions were exempt from a Sherman Act challenge under an immunity exemption articulated in *Parker v. Brown*[118] – an analysis which is explained in more detail in the next section.[119] To determine if the Twenty-first Amendment protected the post-and-hold provision, the court then applied the three-part test laid out in *TFWS*.[120] First, the court found that temperance "was a valid and important interest of the State under the Twenty-first Amendment."[121] Second, it relied on the district court's finding that that there was "little empirical evidence" documenting the relation between the Washington pricing regulation and the State's interest in temperance, even though the State has one of the

110. 522 F.3d at 883.
111. *Id.* at 883-84.
112. Costco Wholesale Corp. v. Hoen, No. C04-360P, 2006 U.S. Dist. LEXIS 27141, at *5-*6 (W.D. Wash. Apr. 21, 2006).
113. *Id.* at *6.
114. *Id.* at *16.
115. *Id.* at *29.
116. *Id.* at *19.
117. *Maleng*, 522 F.3d at 895. *See infra* Part II.D. for a more detailed explanation of why the court concluded this.
118. 317 U.S. 341 (1943).
119. *Maleng*, 522 F.3d at 895. *See infra* Part II.D.
120. *Id.* at 902.
121. *Id.*

lowest per capita alcohol consumption rates in the country.[122] The court found that the post-and-hold provisions had no connection to these low rates.[123] Third, the court concluded that "[g]iven that the State has failed to demonstrate that the post-and-hold requirement is effective in promoting temperance . . . the state's interests do not outweigh the federal interest in promoting competition under the Sherman Act."[124]

The court did not agree, however, "that the existence of an alternative form of regulation" – such as increased excise taxes – would necessarily lead the State's interest to yield to the federal interest.[125] It explained that "[t]he district court's suggestion that the State should serve its interest in some other way disparages the policy choices that Section 2 of the Twenty-first Amendment commits to the states." [126] It also stated that there are probably a variety of reasons why the State did not choose an excise tax, and the court is "not authorized to look behind the regulation to decide whether such policy reasons are sufficiently compelling." [127]

After the Court of Appeals issued its decision, the case returned to the lower court to determine attorneys' fees.[128] Even though the State won on seven of the nine challenges, the lower court awarded attorneys' fees to Costco.[129] The court held that Costco was eligible for the fees because it had "'substantially prevailed' on its antitrust action claims."[130] It defined the "prevailing party" as needing to only "succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit."[131] Therefore, Costco prevailed because it had "successfully challenged Washington's 'post' and 'hold' regulations, ultimately bringing about a change in state law." [132] The State decided not to appeal, which effectively gave Costco a significant victory. This had implications for other States -- the high costs of a trial and the prospects of losing any portion of the case leading to having to pay attorneys fees may deter States from defending these provisions in future cases.

In *Manuel v. Louisiana*,[133] a restaurant and grocery store challenged eight of Louisiana's bans on certain practices relating to the wholesale and retail of

122. *Id.* at 903 (The court found that the evidence did not clearly show that these requirements were the cause for the low levels of consumption).

123. *Id.*

124. *Id.*

125. *Maleng*, 522 F.3d at 903 n.25.

126. *Id.*

127. *Id.*

128. Corrected Order on Plaintiff's Motion for Attorneys' Fees, *Hoen*, No. C04-360 MJP (W.D. Wash. June 23, 2009).

129. *Id.* at 9.

130. *Id.* at 4.

131. *Id.* (quoting Hensley v. Eckerhart, 461 U.S. 424, 433 (1983)).

132. *Id.*

133. 982 So. 2d 316 (La. Ct. App. 2008).

alcoholic beverages as being unconstitutional under the Sherman Act and the Commerce Clause.[134] The regulations included a "delivered-price requirement" and bans on certain credit sales, volume discounts, central warehousing, the provision of distribution services by retailers, direct shipping and the sale or deliveries by wholesalers to retailers located outside of the wholesaler's territory.[135] Unlike *Costco*, Manuel brought this case in State court rather than federal court.[136]

The Louisiana Court of Appeals for the Third Circuit examined whether "Louisiana's 21st Amendment interests are amply substantiated in this case as within the core concerns of the State's 21st Amendment authority."[137] It explained that a "justification common to [all of the regulatory bans challenged under the Sherman Act] . . . is that they promote the separation, independence, and stability of the three tiers and are, in fact, integral components of Louisiana's three-tier system for the regulation of alcoholic beverages within the State."[138] The court then pointed to *Granholm*, where the Supreme Court had "recognized that the three-tier system . . . is unquestionably legitimate."[139] Next, the Court used two of the regulations – the bans on volume discounts and central warehousing – to demonstrate that if those regulations were removed retailers would "functionally replace the wholesaler . . . in effect, functionally collapsing the two tiers."[140] The court concluded that "to the extent there is a conflict between the challenged State measures in regulation of alcoholic beverages, deriving their authority vis-à-vis the Federal Government from the 21st Amendment, and the Sherman Act, deriving its authority from the Commerce Clause, the latter must yield."[141]

D. A Replacement for the 21st Amendment: The State Immunity Exemption Under the Sherman Act

As the Supreme Court has limited the scope of the 21st Amendment, the States have had more difficulty using it to defend the constitutionality of their laws. In response, they have resorted to an exemption created by the Supreme Court's decision *Parker v. Brown*, decided in 1943, which found that the

134. *Id.* at 319-20.
135. *Id.* at 320-21.
136. *Id.* at 316.
137. *Id.* at 334.
138. *Id.* at 321. Unlike the *TFWS* and *Maleng* Courts, the court relied on a test which differentiated between first-tier and second-tier Commerce Clause claims. *Id.* at 329. Second-tier commerce claims do not involve questions of discrimination against out-of-state interests. *Id* at 328-29. The test for these types of claims is "whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." *Id.*
139. *Manuel*, 982 So. 2d at 322 (citing *Granholm*, 544 U.S. at 488–89).
140. *Id.* at 321.
141. *Id.* at 340.

Sherman Act only applied to individual and not state actions.[142] To date, the Court has offered two different standards to determine if a State qualifies for immunity from the Sherman Act. In *Midcal*, the Court explained that the law must be "'clearly articulated and affirmatively expressed as state policy' and must be 'actively supervised' by the State itself."[143] Although the Court found that the State had satisfied the first requirement, it found it did not meet the second because "[t]he State neither establishes prices nor reviews the reasonableness of the price schedules . . . ." [144] The Court also applied this first standard in *Duffy,* where it held that the law did not qualify for immunity under the Sherman Act because the liquor-pricing system was "not actively supervised" by the State.[145] Rather the State "simply authorizes price setting and enforces the prices established by private parties."[146]

Six years later, in a case unrelated to alcohol control and the 21st Amendment, the Court seems to have articulated a different test of State involvement that is needed to trigger immunity from the Sherman Act. In *Fisher v. City of Berkeley*,[147] the Court addressed the constitutionality of a rent control ordinance.[148] The Court held that immunity only applied if the State had imposed the law unilaterally rather than creating a hybrid law to be imposed jointly by the State and private parties.[149] It would appear that the standard created in *Fisher* is stricter than the one in *Midcal* and thus, makes it harder for the State to prevail. The State could actively supervise a hybrid law which would satisfy the *Midcal* requirements for immunity, but not the *Fisher* requirements. This difference might be explained by the fact that *Midcal* involves an alcohol regulation and therefore should be interpreted in light of the 21st Amendment.

Once again, the differing Supreme Court standards have led to differing opinions by the lower courts. In *TFWS, Inc. v. Schaeffer*, the district court held the Maryland pricing scheme was an "an illegal 'hybrid restraint,' . . . [b]ecause Maryland neither establishes the posted prices nor reviews them for reasonableness . . . ."[150] Moreover, these hybrid restraints mandated activity that was "essentially a form of horizontal price fixing."[151] The court relied entirely on

142. 317 U.S. at 351. Although *Parker* was decided in 1943, the States did not use this argument until the 1980's after the Court had started limiting the scope of the 21st Amendment.

143. *Midcal*, 445 U.S. at 105 (quoting City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410 (1978) (Brennan, J., majority opinion)).

144. *Id.* at 105-06.

145. *Duffy*, 479 U.S. at 344.

146. *Id.*

147. Fisher v. City of Berkeley, 475 U.S. 260 (1986).

148. *Id.* at 261.

149. *Id.* at 266.

150. *TFWS*, 242 F.3d at 203.

151. *Id.* at 209.

the *Fisher* standard for its analysis.[152] The only reference to the *Midcal* case in this part of the analysis occurred when the *TFWS* Court pointed out that the Supreme Court in *Fisher* characterized the *Midcal* case "as involving hybrid restraints."[153]

In *Costco Wholesale Corp. v. Maleng*, by contrast, the court recognized that "the Supreme Court has not provided clear guidance in defining the relationship between the 'hybrid' restraint inquiry from and the *Midcal* 'active supervision' inquiry."[154] Therefore, the court first determined if the regulations were hybrid or unilateral and only then applied the two *Midcal* requirements to the regulations found to be hybrid in nature.[155] In the end, the court concluded that only the post-and-hold requirements were hybrid regulations and thus preempted by the Sherman Act.[156] For example, the court held that although the Washington's ban on retailer sales to other retailers may have an anti-competitive effect, it "is complete upon enactment and does not delegate any authority to private parties." [157] Similarly, the State's central warehousing ban had "no degree of discretion delegated to private parties by the ban . . . [thus] any anticompetitive effect is complete once the ban is imposed by the State."[158] On the other hand, the post-and-hold requirements "facilitate the exchange of price information and require adherence to the publicly posted prices" among and by wholesalers.[159] The State erred by allowing the court to pull out the post-and-hold regulation and analyze it separately. When determining whether the post-and-hold provision was hybrid, the Court did not link it to the other pricing provisions which are central to understanding it. The purpose of the post-and-hold provision is to facilitate State oversight of the other regulations. Therefore, to understand how the post-and-hold provision promotes temperance, the proper analysis looks at it in relation to the other pricing provisions.

Unlike the other two cases, the court in *Manuel v. Louisiana*, only examined whether the regulations were hybrid or unilateral after first finding that the purposes of the challenged State's requirements fell "within the core concerns of the State's 21st Amendment authority" and thus were "supported by a strong presumption of validity."[160] Similar to *TFWS*, the court only relied on *Fisher* when conducting its analysis. It found that "[t]o the extent the hybrid action doctrine should apply here, Plaintiffs have shown neither that the governmentally imposed requirements actually lead in fact to concerted action

152. *Id.* at 207-08.
153. *Id.* at 208.
154. 522 F.3d at 887.
155. *Id.*
156. *Id.* at 896.
157. *Id.* at 890.
158. *Id.* at 891.
159. *Id.* at 893.
160. 982 So. 2d at 334.

between two or more private parties nor that each of the challenged bans does in fact grant a degree of private regulatory power to private actors."[161]

V. THE PUBLIC HEALTH EVIDENCE PRESENTED TO THE LOWER COURTS

In *TFWS* and *Costco*, both Maryland and Washington States provided public health evidence supporting two premises to demonstrate that their States' wholesaler pricing regulations promoted the goal of temperance.[162] First, wholesaler pricing restrictions raise the price of alcohol. Second, increased alcohol prices lead to decreased alcohol consumption.

The first premise, connecting these regulations to increased alcohol prices, was largely uncontested in *Costco*. In fact, both sides agreed to it beforehand.[163] The plaintiff did not contest that the regulations raised the price of alcohol.[164] To the contrary, Costco argued that they kept prices artificially high.[165] Even though both parties had conceded this point, the court still questioned it.[166] In *Costco*, the judge quoted the state's expert as saying, "more research is needed to fully understand the impact of the complex and varied policies that affect . . . the retail prices of these beverages."[167] In *TFWS*, however, the plaintiff did not concede this point, instead arguing that the regulations had no effect on alcohol prices.[168] The *TFWS* Court found the state's retail price data problematic because it was not entirely representative of each state and did not consistently survey the same retailers.[169] Therefore, the court relied heavily on TFWS's exhibits when comparing Maryland wholesale case prices to Delaware – a state that had repealed comparable regulations over a decade before.[170] The *TFWS* Court held that the evidence generally showed that Maryland prices were lower (or at least the same as) Delaware, which the court argued indicated that the challenged regulations did not raise prices in Maryland.[171]

The second premise, linking increased prices with decreased consumption, has been well-established. For example, both the Center for Disease Control[172] and the World Health Organization[173] have published comprehen-

161. *Id.* at 341.

162. *TFWS*, 242 F.3d at 212-13; *Hoen*, 2006 U.S. Dist. LEXIS 27141, at *12-*19; *compare Manuel*, 982 So. 2d 316 (Louisiana Court of Appeals determined that public health evidence was not needed).

163. *Hoen*, 2006 U.S. Dist. LEXIS, at * 13.

164. *Id.*

165. *Id.* at *13-*14.

166. *Id.* at *14.

167. *Id.* at *17 (internal citation omitted).

168. 242 F.3d at 203.

169. *Id.* at 211.

170. TFWS, Inc. v. Schaefer, 315 F. Supp. 2d 775, 778-82 (D. Md. 2004).

171. *Id.* at 781-82.

172. *See* R.W. Elder, B. Lawrence, A. Ferguson, T.S. Naimi, R.D. Brewer, S.K. Chattopadhyay, T.L. Toomey & J.E. Fielding (Task Force on Community Preventative Services), *The Effec-*

sive reviews of the evidence on the issue, concluding that increased alcohol prices result in decreased alcohol consumption. Both Maryland and Washington State provided expert testimony to establish this basic finding in the public health research literature.

The *TFWS* and *Costco* Courts, however, were not persuaded. For example, in *Costco*, the State's expert started his testimony by providing data on the prevalence and consequences of underage drinking in Washington.[174] He then testified that higher prices reduce overall alcohol consumption, the likelihood of binge drinking, and the frequency of drinking, with the greatest impact occurring among young people.[175] According to the expert, higher prices that result from the challenged regulations reduce the number of young people who drink and drive, die from alcohol-related traffic or injury fatalities, contract sexually transmitted diseases and engage in alcohol-related violence.[176] They also reduce the number of high school dropouts, increase the probability that young people will go to and graduate from college, and improve the study habits and grade point averages of those in college.[177] The elimination of comparable policies in two other states – Nebraska and Delaware – led to increased overall alcohol consumption relative to what it would have been in those states had the policies been maintained.[178]

The expert stated that he expected that the removal of the controls in Washington would lead to an increase in overall alcohol consumption, and as a result, to an increase in the consequences from alcohol use.[179] He explained that "Washington is doing relatively well when it comes to promoting moderate consumption and curbing excessive consumption, binge drinking, as well

tiveness of Tax Policy Interventions for Reducing Excessive Alcohol Consumption and Related Harms, 38(2) AM. J. PREV. MED. 217 (2010); *See also* Task Force on Community Preventative Services, *Increasing Alcohol Beverage Taxes is Recommended to Reduce Excessive Alcohol Consumption and Related Harms*, 38(2) AM. J. PREV. MED. 230 (2010).

173. *See* THOMAS BABOR ET AL., ALCOHOL: NO ORDINARY COMMODITY (2d. ed. 2010).

174. Testimony of Frank Chaloupka at 22-32; Costco Wholesale Corp. v. Hoen, 407 F. Supp. 2d 1234 (D. Wash. 2006), *subsequent determination by Hoen*, 2006 U.S. Dist. LEXIS 27141.

175. Testimony of Frank Chaloupka, *supra* note 174, at 44-45. Research shows that kids are more responsive to price than adults. *Id.* at 45. Kids have relatively limited incomes typically and therefore "[a] change in the price of the products that they consume is going to have more of an impact on their budget." *Id.*

176. Testimony of Frank Chaloupka, *supra* note 174, at 47-50.

177. *Id.* at 50.

178. *Id.* at 54, 61-62. The rates of alcohol consumption in Nebraska increased so that it was now comparable to those in the Midwest and the US although it had previously been lower than those two other rates. *Id.* at 56. However, at the same time that the State's polices were being eliminated – which would otherwise drive up consumption – there was also an increase in taxes which drives down consumption. *Id.* Dr. Chaloupka was observing the net effect. *Id.* In Delaware, the rates of alcohol consumption had followed the rates in the South and the United States and had been falling over time. *Id.* at 62. After the policies changed, the South and the United States continued that downward trend, whereas the consumption in Delaware started to rise. *Id.*

179. *Id.* at 63-64.

as some of the consequences of consumption," but "that relatively good position would be eroded if the controls were eliminated and Washington would perform more poorly relative to the states than it does now." [180] He concluded that the control policies at issue in the case effectively promoted temperance.[181] The district court judge was not convinced. She concluded that "[t]here has been little if any research or careful study on whether the type of restraints challenged in this litigation are effective in promoting temperance." [182]

The same expert provided substantially the same evidence in the Maryland case, with the same result.[183] In both cases, the courts were highly skeptical of the States' evidence. They questioned the persuasiveness of the States' evidence as being based on ad hoc assessments and skeptical views of data in general. In *Costco*, it appeared that the judge had a fundamental misunderstanding of the evidence presented. For example, the judge disagreed with the State's expert's analysis of consumption in Nebraska after the policies in that state were eliminated.[184] The expert testified that wine consumption in Nebraska, the Midwest, and the United States had been on a downward trend for the past few years.[185] When the restraints were lifted in Nebraska, wine consumption continued to decrease, but did so at a slower rate than before[186] and thus the rates of wine consumption were higher than they would have been had the policies not been eliminated.[187] However, the judge dismissed the expert's analysis after pointing out that "wine consumption in Nebraska actually decreased significantly after the restraints in that state were eliminated," ignoring the explanation provided. [188]

The courts' dismissal of the State's expert testimony brings into question what standard of proof was actually being employed in making the decision. Clearly, no deference was given to the State's evidence, suggesting that the balancing test employed in at least these two cases was weighted against the State. This balancing test appears to have more affinity with tests employed when addressing fundamental individual rights than with economic due process concerns.

VI. DISCUSSION

In this review, the courts appear to have largely abandoned what was the apparent initial intent of the 21st Amendment. Rather than continuing to

180. *Id.* at 64.
181. *Id.* at 64-65.
182. *Hoen*, 2006 U.S. Dist. LEXIS 27141, at *16-*17.
183. TFWS, Inc. v. Schaefer, 315 F. Supp. 2d at 782 n. 9.
184. *Hoen*, 2006 U.S. Dist. LEXIS 27141, at *17-*18.
185. Testimony of Frank Chaloupka, *supra* note 174, at 56, 60.
186. *Id.* at 56.
187. *Id.* at 60.
188. *Hoen*, 2006 U.S. Dist. LEXIS 27141, at *18.

endorse a broad interpretation and application of the 21st Amendment, the courts have shifted to curtailing the scope of the 21st Amendment in favor of protecting interstate commerce interests. As a result, economic interests in the alcohol trade are being given greater protection at the expense of the States' interest in protecting its citizens from the potential harms of alcohol.

The courts' undermining of the States' primary authority of the alcohol trade under the 21st Amendment is attributable, at least in part, to the States' failure to clearly articulate this purpose and to have it reflected in the laws that have been enacted. Without the temperance rationale clearly articulated, it appears that the states are indeed simply trying to protect in-state economic interests, often to the detriment of out-of-state interests. Such laws are hard to defend in light of the federal government's strong interest in promoting interstate commerce. For example, in *Duffy*, the State failed to raise the temperance defense altogether, undermining the case.[189] *Granholm* made it hard to defend the States' actions when it appears that the purpose behind the laws was to favor in-state alcohol producers over out-of-state producers.[190] Price affirmation laws such as those considered in *Seagram* actually served to undermine temperance by promoting lower prices while at the same time affecting the alcohol trade in other states.[191]

Even in cases where the States have taken action to stabilize and maintain higher prices through wholesaler pricing restrictions, the mechanisms used have been flawed and undermined the states' temperance rationale. For example, as discussed above, the States argued that "hybrid" laws served to promote temperance, yet the laws were structured to allow alcohol wholesalers to make important pricing decisions that undermined competition with little or no state oversight. The lack of oversight resulted in the appearance that the States' primary purpose was to protect the interests of the wholesalers and not the public interest in promoting temperance. Further undercutting the States' defense is the fact that the temperance rationale was not raised when the laws were enacted. These underlying weaknesses in the States' rationale for enacting the laws set the states up for defeat, giving credence to the adage that bad facts can lead to bad interpretations of the law.

Unfortunately, the failure of the states to articulate the temperance purpose and to have it reflected in the statutes has undermined public health interests. State regulation is a backbone of alcohol control policies. The federal government has largely ceded alcohol availability controls, particularly related to retailing and distribution, to the states. Therefore, to the extent that the 21st Amendment is undermined by these Commerce Clause cases, it undermines the structure of alcohol control that is needed to protect public health.

State public health agencies and alcohol researchers have been largely missing in action on this issue, further undermining the States' legal position.

189. *Duffy*, 479 U.S. at 351-52.
190. *Granholm*, 544 U.S. 460.
191. *Seagram*, 384 U.S. 35.

State wholesaler pricing regulations have not been viewed by public health professionals and agencies as serving a public health purpose. As a result, public health is not engaged in the political process regarding the enactment and implementation of the laws being challenged. Nor has public health made researching the effects of the laws on public health outcomes a priority. This has made it easier for courts to dismiss what little research there is that does suggest a connection between wholesaler pricing restrictions and public health concerns.

Although the States have failed to use their 21st Amendment authority effectively, the courts' analysis also remains seriously flawed. The Supreme Court has issued a series of cases with contradictory and confusing holdings and dicta which, not surprisingly, has led to confusion and conflicting results among the lower courts. For example, the Supreme Court is requiring that the States' 21st Amendment interests be balanced against the federal Interstate Commerce Clause interests, but has provided no clear test for how this balancing should be accomplished. What public health evidence is sufficient for establishing the states' interest in promoting temperance? As a result, some lower courts appear to be applying a very high burden of proof on the states to justify their alcohol regulations despite the apparent power given to them by the 21st Amendment.

The Court's failure to articulate clear guidelines in deciding these cases has an impact that reaches beyond the specific rulings found in the case law. The alcohol industry is using lawsuits and even the threat of lawsuits to seek changes at the state legislative level. Given the high costs of defending against such lawsuits and the uncertainty of their outcome, many states have opted instead to amend or repeal the laws in question. For example, in *Costco*, Washington won 8 of 9 provisions and yet ended up repealing many of the provisions and having to pay Costco's legal fees.[192] Other states have taken note of this outcome.

VII. CONCLUSION

The courts' narrowing of the interpretation and application of the 21st Amendment over the last few decades is causing a chilling effect on the States' resolve to effectively regulate the alcohol market. This analysis of Supreme Court and lower court cases provides support for action by the States, courts, and the public health community to promote the public's health and protect the States' authority under the 21st Amendment. State wholesaler pricing restrictions, in particular, need to be examined and protected, given their potential for maintaining higher alcohol prices and thereby reducing alcohol consumption and alcohol problems. State legislatures need to reexamine their wholesaler pricing laws to ensure that their temperance purpose is clearly ar-

192. Corrected Order on Plaintiff's Motion for Attorneys' Fees, *Hoen*, No. C04-360 MJP (W.D. Wash. June 23, 2009).

ticulated and they are structured so that wholesalers' practices are adequately supervised.

State Alcohol Beverage Control (ABC) agencies can assist in the process. They have the authority to clarify the purpose and function of laws they administer. Formal interpretations of the purpose of wholesaler pricing restrictions could be issued to emphasize the importance of these laws to the promotion of temperance in the state. These interpretations, in turn, could be used by the courts when determining the purpose behind these laws. In addition, the ABC agencies in many cases can engage in a more active review of the prices set by the wholesalers and monitor that they are reasonable without the need for legislative action. This additional supervision will help bolster the States' immunity defenses against the Sherman Act.

Court action is also needed. The Supreme Court should reaffirm the original intent of the 21st Amendment, which is to allow states to regulate within their own boundaries with the caveat that they are not allowed to discriminate against or affect prices in other states. In addition, the Court needs to establish a reasonable standard of proof for the lower courts to apply when evaluating States' evidence showing that the regulations promote temperance in 21st Amendment cases. Although courts should view with skepticism state laws that discriminate between in-state and out-of-state economic interests, they should give greater deference to State laws seeking to stabilize and maintain higher alcohol prices. The rational basis test, which requires that the government action be rationally related to a legitimate government interest, would appear to be an appropriate vehicle for determining the constitutionality of wholesaler pricing policies under the 21st Amendment.

Finally, there is an urgent need for the public health community to become engaged in this legal and political issue. State public health agencies should become active in the political process and seek to work with State ABC agencies to ensure effective implementation of existing wholesaler pricing policies. State and Federal public health agencies should make funding for research a priority and should use existing networks to promote dissemination of findings to key constituencies and policy makers. Public health advocacy groups should become familiar with the issues and seek more effective state policies. Without a concerted effort, state wholesaler pricing policies may be lost along with the states' authority under the 21st Amendment. Such an outcome would undermine our nation's effort to reduce the toll of alcohol problems.