

EXORCISING THE GHOSTS OF THE PAST: AN EXPLORATION OF ALCOHOLIC BEVERAGE REGULATION IN OKLAHOMA

Benjamin Grubb*

I. INTRODUCTION

Thoughts of the State of Oklahoma invoke many images, including a proud Native American heritage, as well as nostalgia for the Old West and for a bygone era. When standing on the Oklahoma plains, it is easy to imagine the land as it was over a century ago. The dusty streets of the Oklahoma Territory served as the backdrop for life on the frontier. Horses galloped through the streets, wind carried the smell of bright new paint on hastily constructed wooden buildings, and lively piano music emanated from a nearby saloon. Outside, however, the president of the local Anti-Saloon League stood forebodingly, leering at the establishment as she contemplated its demise. More than one hundred years later, the scenery has changed considerably. Automobiles have largely replaced the horses—at least in town. The ramshackle buildings have been replaced by skyscrapers, and the dusty streets have given way to highways, connecting modern cities with the rural Oklahoma Heartland. The ghosts of the Anti-Saloon League, however, still haunt Oklahoma.

It is an exciting time to live in Oklahoma. State residents enjoy low housing costs and a comfortable standard of living, and the region has been largely immune to national financial woes. Oklahoma businesses are growing, and Oklahoma City recently became home to a professional basketball team. Oklahoma's alcoholic beverage regulations, however, are stuck in the past. In the past decade, the United States Supreme

* J.D. Candidate, Oklahoma City University School of Law, 2013; the author extends special thanks to Professor Andrew Spiropoulos for his support and guidance, Senator Clark Jolley Audif Winters, Barbara Klepper, and most of all, his wife, Lauren.

Court's ruling in *Granholm v. Heald*¹ caused Oklahoma to re-examine some of its alcohol regulations, but the larger regulatory scheme remains lost in time. A push for modernization is gaining momentum, however, as Oklahomans consider whether to amend current alcoholic beverage regulations to allow beer and wine to be sold in grocery and convenience stores within the state. This Note explores that question in detail.

In Part II, this Note examines the early history of alcoholic beverages and the history of alcohol regulation in the United States. The Temperance Movement and National Prohibition are consequential to the regulatory schemes promulgated by states after the end of Prohibition. These schemes are examined along with the forces that shaped Oklahoma's early alcohol policies around the time it was admitted to the Union as the forty-sixth state.

Part III explores the current state of Oklahoma's alcohol laws and highlights the regulatory idiosyncrasies that exist in Oklahoma as compared to other states. The focus of the section is regulation applicable to sales for off-premise consumption. The practical effects of these provisions on the average Oklahoma consumer are also considered.

Part IV acknowledges that Oklahoma's alcohol laws are antiquated and confusing to citizens, depriving them of conveniences enjoyed by citizens of other states. The regulatory environment in Oklahoma serves as a hindrance to competition, which could be eliminated or mitigated by allowing beer and wine to be sold in grocery stores. Next, the Note examines health and welfare considerations associated with the proposed regulatory changes and compares the effects of deregulation in other states and abroad. Finally, the Note explores competing interests that must be balanced after a regulatory change is initiated and proposes alternatives for implementation.

II. HISTORY AND BACKGROUND

A. Early History of the Regulation of Alcoholic Beverages

History is fraught with references not only to the manufacture and consumption of alcoholic beverages but also the residual effects of alcohol consumption on society. While it is impossible to pinpoint the inception of alcoholic beverages, there is evidence that fermented beverages existed as early as 10,000 BCE, and Egyptian pictographs

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

depicted wine as early as 4,000 BCE.² Ancient Egyptians produced several varieties of beer and wine and generally used alcoholic beverages for a variety of social as well as medicinal purposes.³ Ancient Egyptians also emphasized the importance of moderation, embracing it as a secular and religious virtue while generally rebuking taverns⁴ and inebriation.⁵

Organized religion was the means by which early regulation of alcohol consumption was achieved. The Christian Bible relates that Jesus consumed wine⁶ and approved of its consumption in moderation,⁷ but castigated those who abused alcohol⁸ to the point of drunkenness.⁹ The Jewish Talmud contains rules pertaining to the consumption of wine that establish, among other things, standards for assuming responsibility for intoxicated behavior.¹⁰ Islam takes a decidedly harder line on alcohol consumption, as the practice is forbidden by the Muslim Qur'an.¹¹ Sharia Law generally punishes consumption of alcohol with flogging.¹²

2. DAVID J. HANSON, PREVENTING ALCOHOL ABUSE: ALCOHOL, CULTURE, AND CONTROL I (1995).

3. *Id.* at 2.

4. Though they warned against drunkenness, there is evidence that in disfavoring taverns, Egyptians were primarily concerned with the fact that they were often venues for prostitution. *Id.*

5. *Id.*

6. See *Matthew* 15:11; *Luke* 7:33–35.

7. See *Matthew* 15:11.

8. *Luke* 21:34; *Luke* 12:42–46; *Matthew* 24:45–51.

9. HANSON, *supra* note 2, at 5.

10. See generally TALMUD BAVLI, Er. 65a.

11. The Qur'an provides, in pertinent part:

O you who have believed, indeed, intoxicants, gambling, [sacrificing on] stone altars [to other than Allah], and divining arrows are but defilement from the work of Satan, so avoid it that you may be successful.

Satan only wants to cause between you animosity and hatred through intoxicants and gambling and to avert you from the remembrance of Allah and from prayer. So will you not desist?

QUR'AN 5:90–91 (Sahih International).

12. Toni Johnson & Lauren Vriens, *Islam: Governing Under Sharia (aka shariah, shari'a)*, COUNCIL ON FOREIGN RELATIONS (Oct. 24, 2011), <http://www.cfr.org/religion/islam-governing-under-sharia/p8034>. Under Sharia Law, there are generally three categories of offenses: “*hadd* punishments,” which are specific punishments found in the Qur'an; punishments that “fall under a judge’s discretion”; and retributive punishment (e.g., fiscal compensation paid to the family of a murder victim). *Id.* Wine (or alcohol) drinking is one of five “*hadd* crimes,” the others being “unlawful sexual intercourse . . . , false accusation of unlawful sexual intercourse, . . . theft, and highway robbery.” *Id.* “*Hadd* punishments” may include “flogging, stoning, amputation, exile, or execution.” *Id.*

B. Alcohol Regulation in the United States

Throughout the course of American history, colonists and citizens of the United States have looked to the law to govern the consumption of alcohol and the social consequences that result.¹³ During the Colonial Period, consumption of alcoholic beverages was an integral part of everyday life.¹⁴ The Puritans believed that moderate consumption of alcohol was beneficial to health.¹⁵ This idea was codified in 1623 by the first Virginia legislature, which required every man to “plant a quarter acre garden with vines.”¹⁶ Colonial social activity revolved around two establishments: churches and taverns.¹⁷ Sometimes referred to as “the ordinary,” the tavern was the hub for various types of recreation.¹⁸ To the same extent that moderate consumption was celebrated, drinking to excess was frowned upon in the colonies.¹⁹ Some colonies proscribed drunkenness by statute,²⁰ and offenders were penalized with fines.²¹ For offenders of limited means, punishments were physical and included whipping, time in the stocks, or time in prison.²²

During the next two hundred years, alcohol consumption increased steadily in American society. In the wake of the Revolution, Americans consumed alcohol voraciously, drinking at a rate unparalleled during any other era in the country’s history.²³ Liquor was consumed in the workplace, where laborers enjoyed “daily rations of spirits,”²⁴ and U.S.

13. RICHARD MENDELSON, FROM DEMON TO DARLING: A LEGAL HISTORY OF WINE IN AMERICA 6 (2009).

14. *Id.* at 8.

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. Paul Aaron & David Musto, *Temperance and Prohibition in America: A Historical Overview*, in ALCOHOL AND PUBLIC POLICY: BEYOND THE SHADOW OF PROHIBITION 127, 132 (Mark H. Moore & Dean R. Gerstein eds., 1981).

20. *Id.* Laws limited, for example: the amount of time taverns could remain open and amount of alcohol served; prohibited service to slaves, indentured servants, and habitual drunkards; and proscribed certain other activities while consuming alcohol (e.g., gambling, loud music). *Id.*

21. MENDELSON, *supra* note 13, at 9–10. A fine was a common penalty for a first offense of drunkenness, and double or even treble fines were assessed for subsequent offenses. *Id.*

22. *Id.* at 10.

23. THOMAS R. PEGRAM, BATTLING DEMON RUM: THE STRUGGLE FOR A DRY AMERICA, 1800–1933 6–7 (1999).

24. MENDELSON, *supra* note 13, at 11.

Supreme Court Justices privately imported fortified Madeira, which they enjoyed after dinner while they “consulted over the cases before them.”²⁵ Others, however, were less tolerant of strong spirits. Dr. Benjamin Rush, signer of the Declaration of Independence and Surgeon General of the Revolutionary Army, published works in the late eighteenth century²⁶ which extolled the virtues of temperance and disparaged spirits.²⁷ Thomas Jefferson advocated the use of wine for medicinal purposes and enjoyed the beverage socially, but disfavored spirits and fortified wines.²⁸ Additionally, in *Federalist No. 12*, Alexander Hamilton promoted the taxation of “ardent spirits” to both raise revenue and curtail consumption.²⁹

Despite the distaste for strong spirits harbored by the luminaries of the Post-Revolutionary Era, the sentiment of the American public was the opposite.³⁰ In the first-ever Internal Revenue Action, Treasury Secretary Alexander Hamilton imposed an excise tax on distilled spirits in order to defray Revolutionary debts.³¹ The Internal Revenue Service (IRS) was established in order to collect the new tax from distillers.³² Opposition to the new tax eventually culminated in armed conflict, and some thirteen thousand militiamen were deployed to western Pennsylvania to pacify an incident of violence now known as the Whiskey Rebellion.³³ After the cessation of hostilities and the inauguration of Thomas Jefferson, all federalist excise taxes (including the tax on spirits) were repealed.³⁴ A new tax on liquor during peacetime would not reappear for more than sixty years.³⁵

25. James M. Marsh, *Mr. Dooley Discovers a Unanimous Dissent*, 1979 SUP. CT. HIST. SOC'Y Y.B. 70, 72 (1978). The Justices only indulged themselves, of course, “when the cloth had been removed.” *Id.*

26. MENDELSON, *supra* note 13, at 13–14. Rush’s “Moral and Physical Thermometer” from *An Inquiry into the Effects of Spirituous Liquors* ranked various spirits along with other benign substances (e.g., milk, water) on a spectrum of temperance. *Id.* at 14, 15 fig.3.

27. *Id.* at 14.

28. *Id.* at 13.

29. THE FEDERALIST NO. 12 at 90 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

30. MENDELSON, *supra* note 13, at 16.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

1. The Temperance Movement

Subsequent to experiments with federal taxation of spirits, a grassroots temperance movement gained favor throughout the country.³⁶ By 1831, nearly 1.5 million Americans were members of a wide variety of temperance organizations.³⁷ Temperance organizations usually administered a personal pledge to abstain from spirits.³⁸ Although fervor for temperance was bolstered by renewed Christian activism during the 1820s and 1830s,³⁹ support for local temperance movements began to wane due to demographic changes caused by the arrival of a sizeable immigrant population and their permissive views of alcoholic beverages.⁴⁰ Perhaps because their hymns sung in front of barrooms and taverns were becoming nullities, temperance leaders shifted their focus toward the legal and political realms.⁴¹

The advent of licensure enhanced the ability of temperance advocates to exert political control over alcohol regulation at a local level.⁴² However, while local officials endeavored to control alcoholic beverages by tightly restricting the issuance of licenses, those charged with enforcing the laws took a relaxed approach to their duties.⁴³ Undaunted, temperance advocates simply turned to state legislatures who were implored to implement “local option” laws.⁴⁴ In essence, local-option legislation allowed voters to determine whether to prohibit the sale of alcoholic beverages at the municipal or county level.⁴⁵ The scope of local-option laws was not uniform.⁴⁶ While some local options proscribed the sale of liquor entirely, others allowed (severely restricted) sales of “liquor by the drink.”⁴⁷ The range of beverages addressed was also variable. Most legislation focused on abating access only to “spirituous liquors,” but some legislatures took a more comprehensive

36. *Id.*

37. *Id.*

38. *Id.* Interestingly, pledges of abstinence usually did not include beer and wine, which were considered to be “healthful and morally acceptable” beverages. *Id.*

39. *Id.* at 17.

40. *Id.* at 18.

41. *Id.* at 18–19.

42. *Id.* at 19.

43. *Id.*

44. *Id.* at 20.

45. *Id.*

46. *Id.*

47. *Id.*

view and prohibited fermented beverages as well.⁴⁸

Eventually, legislation established liquor regulation at the state level. State regulations were enabled at the federal level by the passage of the Wilson Act in 1890.⁴⁹ The Act made all intoxicating liquor or liquid subject, upon arrival, to the laws of any state or territory into which it was transported, regardless of where it was actually produced.⁵⁰ Ever resourceful, state residents quickly discovered a loophole which allowed them to continue to enjoy imported spirits on an individual basis.⁵¹ Since the direct shipment of alcoholic beverages to consumers was not addressed in the Wilson Act, individuals were free to import alcoholic beverages from outside areas for personal consumption.⁵² The passage of the Webb-Kenyon Act in 1913 operated to close this loophole by explicitly prohibiting the importation of “spirituous, vinous, malted, fermented, or other intoxicating liquor” if doing so would violate state law.⁵³ Seemingly having achieved its objectives at the state level, the Temperance Movement would be thrust onto the national stage with the introduction of the Eighteenth Amendment in 1917.

2. Prohibition

As drafted, the Eighteenth Amendment to the United States Constitution sought to prohibit “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.”⁵⁴ By 1919, three-fourths of the states ratified the Amendment,⁵⁵ and Prohibition roared in alongside the 1920s on January 16 of the following year.⁵⁶ Prior to the ratification of the Eighteenth Amendment,⁵⁷ Congress passed both the National

48. *Id.* (internal quotation marks omitted).

49. Wilson Act, ch. 728, 26 Stat. 313 (1890) (codified at 27 U.S.C. § 121 (2006)).

50. *Id.*

51. Elizabeth Norton, Note, *The Twenty-First Amendment in the Twenty-First Century: Reconsidering State Liquor Controls in Light of Granholm v. Heald*, 67 OHIO ST. L.J. 1465, 1469 (2006).

52. *Id.*

53. Webb-Kenyon Act, ch. 90, 37 Stat. 699 (1913) (codified as amended at 27 U.S.C. § 122 (2006)).

54. U.S. CONST. amend. XVIII, § 1, *repealed by* U.S. CONST. amend. XXI.

55. MENDELSON, *supra* note 13, at 57.

56. *See* U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI; *see also* MENDELSON, *supra* note 13, at 57.

57. The Eighteenth Amendment granted concurrent power to federal and state

Prohibition Act⁵⁸ and the Supplement to National Prohibition Act.⁵⁹ Taken together, the acts enabled the federal government to enforce Prohibition, which was attempted with fervor for more than a decade.⁶⁰

The social and economic consequences associated with National Prohibition were nothing short of disastrous. The illegal liquor trade flourished as illegal manufacturing and smuggling operations sprang up nationwide.⁶¹ Organized criminal smuggling became prominent, and crime syndicates such as Al Capone's⁶² Chicago Outfit became profitable by way of illegally manufacturing and smuggling alcoholic beverages.⁶³ Meanwhile, the rise of these black markets and lost tax revenues from the legitimate liquor trade contributed to a depressed national economy.⁶⁴

C. State Regulation: The Twenty-First Amendment and Three-Tier Distribution

Fueled by a dismal economy and popular belief that the virtues of abstinence were outweighed by the resulting social and economic evils, a

governments to enforce the Amendment by passing legislation. U.S. CONST. amend. XVIII, § 2, *repealed by* U.S. CONST. amend. XXI.

58. National Prohibition Act, ch. 85, 41 Stat. 305 (1919), *repealed by* U.S. CONST. amend. XXI. The National Prohibition Act is also well known by its common name: The Volstead Act. MENDELSON, *supra* note 13, at 59–60.

59. Supplement to National Prohibition Act, ch. 134, 42 Stat. 222 (1921), *repealed by* U.S. CONST. amend. XXI. The Supplement to National Prohibition Act is also known as the Willis-Campbell bill. *See* MENDELSON, *supra* note 13, at 67.

60. *See* MENDELSON, *supra* note 13, at 50. The National Prohibition Act codified into statute the prohibitions found in § 1 of the Eighteenth Amendment, while the Supplement to National Prohibition Act carved out a carefully crafted medicinal exception allowing for the prescription of limited quantities of “spirituous and vinous liquor.” Supplement to National Prohibition Act § 2; Norton, *supra* note 51, at 1469 n.21.

61. MENDELSON, *supra* note 13, at 80–81.

62. Capone, arguably one of the most notorious crime figures of the twentieth century, famously quipped: “Everyone calls me a racketeer; I call myself a businessman.” KENNETH ALLSOP, *THE BOOTLEGGERS: THE STORY OF PROHIBITION* 26 (1961).

63. MENDELSON, *supra* note 13, at 81. The National Commission on Law Observance and Enforcement described the illicit liquor trade as a “well organized, exceedingly profitable business admitting of lavish expenditure for protection and in corruption, and of employing the best talent in design, construction, and operation of apparatus and equipment.” *Id.* (quoting NAT'L COMM'N ON LAW OBSERVANCE & ENFORCEMENT, *REPORT ON THE ENFORCEMENT OF THE PROHIBITION LAWS OF THE UNITED STATES* 25 (1931)).

64. *See generally* Donald J. Boudreaux & A. C. Pritchard, *The Price of Prohibition*, 36 ARIZ. L. REV. 1 (1994).

movement to repeal Prohibition gained support in the late 1920s.⁶⁵ Repeal was a central issue during the 1932 Presidential Election.⁶⁶ While Prohibition was supported by incumbent President Herbert Hoover,⁶⁷ his democratic challenger, Governor Franklin D. Roosevelt of New York, favored repeal.⁶⁸ After Roosevelt won the election handily, Congress called for the submission of the Twenty-first Amendment to the states.⁶⁹ In addition to repealing Prohibition, the Twenty-first Amendment purported to shift regulatory power to the states, reviving the still-effective Webb-Kenyon law.⁷⁰ “[T]he Amendment was forwarded to the states” on February 21, 1933.⁷¹

While state ratification was pending, Congress passed the Cullen-Harrison Act in March 1933.⁷² The Act was something of an insurance policy, redefining beer and wine with an alcohol content lower than 3.2% by weight (4% by volume) as non-intoxicating under the National Prohibition Act, authorizing its manufacture, sale, and taxation.⁷³ Nine months later, the “noble experiment” of Prohibition came to a formal end after thirteen long years with the ratification of the Twenty-first Amendment.⁷⁴ With the stroke of a pen, President Franklin D. Roosevelt re-legitimized alcoholic beverages in the United States when he affixed his signature to Presidential Proclamation No. 2065 on December 5, 1933.⁷⁵

The Twenty-first Amendment virtually afforded states *carte blanche* to regulate alcoholic beverages in any such manner as their legislatures saw fit.⁷⁶ Wielding this formidable power, many state legislatures endeavored to prevent the resurgence of what was widely perceived to be the cause of alcohol-related social evil: the “tied-house system,” a

65. MENDELSON, *supra* note 13, at 85–87.

66. *See id.* at 89; DAVID E. KYVIG, REPEALING NATIONAL PROHIBITION 154–55 (1979).

67. KYVIG, *supra* note 66.

68. MENDELSON, *supra* note 13, at 89.

69. *Id.* at 89–90.

70. *Id.* at 90. Section 2 of the Twenty-first Amendment provides: “The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.” U.S. CONST. amend. XXI, § 2.

71. MENDELSON, *supra* note 13, at 91.

72. Act of Mar. 22, 1933, ch. 4, 48 Stat. 16 (1933).

73. *Id.*

74. MENDELSON, *supra* note 13, at 93.

75. *Id.*

76. *See* U.S. CONST. amend. XXI, § 2.

reciprocal relationship between saloon owners and manufacturers of alcoholic beverages that existed before Prohibition.⁷⁷ Under tied-house agreements, manufacturers⁷⁸ provided incentives to saloon owners in exchange for payment or a pledge by the owner to sell the manufacturer's products.⁷⁹ A typical tied-house arrangement transformed saloon-owners' roles from independent operators to "agents" of the liquor producers who supplied them.⁸⁰ In exchange for a promise to sell the manufacturer's product exclusively, saloon keepers received all of the tools needed to run their businesses.⁸¹ Benefits ranged from the provision of tangible fixtures inside the saloon to large-scale subsidies, including payment of licensure fees or even the construction of the saloon itself.⁸²

After tied-house arrangements gained a foothold,⁸³ they quickly spiraled out of control,⁸⁴ incubating several social ills associated with alcohol consumption, including prostitution, gambling, and general moral corruption.⁸⁵ To effectively market the products of their principals, saloons offered free lunches and goods (such as glassware), stayed open for all hours of the day and night, and engaged in price wars with competitors.⁸⁶ These practices made alcoholic beverages ubiquitous, and the role of the saloon within the community became more sinister.⁸⁷ Some saloons became havens for prostitutes, featuring curtained "wine rooms"⁸⁸ and upstairs bedrooms, while others became "deeply involved in the corrupt flow of money and favors that lubricated the system between elections."⁸⁹

77. MENDELSON, *supra* note 13, at 31–32.

78. The majority of manufacturers involved in tied-house arrangements were beer brewers. *Id.* at 31.

79. PEGRAM, *supra* note 23, at 94.

80. MENDELSON, *supra* note 13, at 31.

81. PEGRAM, *supra* note 23, at 94.

82. *Id.*

83. Early efforts to encourage temperance using high licensure fees made saloonkeepers even more dependent on manufacturer subsidies and further fostered tied-house arrangements. *Id.* at 95–96.

84. MENDELSON, *supra* note 13, at 32. Seemingly benign activities, such as billiards, quickly deteriorated into gambling and prostitution. Over time, saloons became associated with illegal activities, corruption, and general ill repute. *Id.*

85. *See id.*

86. PEGRAM, *supra* note 23, at 94.

87. *Id.* at 96.

88. MENDELSON, *supra* note 13, at 32.

89. PEGRAM, *supra* note 23, at 102.

Armed with the lessons of history, legislatures in several states devised regulatory schemes aimed at preventing two causes of social evils associated with alcoholic beverages: the potential for large manufacturers “to dominate local markets through vertical and horizontal integration” and “excessive sales” and consumption of alcoholic beverages resulting from “aggressive marketing techniques.”⁹⁰ In most states, these regulations—“tied-house laws”—prevented suppliers or those with any financial interest in suppliers from “hold[ing] directly or indirectly, a financial interest in a liquor retailer’s business, its property, or its license, or giv[ing] ‘a thing of value’ to a retailer.”⁹¹

State legislatures attempted to eradicate tied houses primarily with licensing and by establishing systems of three-tier distribution.⁹² Three-tier distribution prevents vertical integration among market participants at various levels of the liquor trade.⁹³ Under a three-tier system, producers are required to sell alcoholic beverages to wholesale distributors who in turn may sell to retail stores.⁹⁴ Participants at each level must secure a state license.⁹⁵ The objective of the three-tier system is to keep manufacturing, wholesale, and retail interests segregated, preventing tied-house practices and the environment that bred social discord in the pre-Prohibition era.⁹⁶

1. Early Regulation in Oklahoma

Prior to statehood, Oklahoma was territorially organized and known as the “Indian Territory.”⁹⁷ After the opening of the unassigned lands to non-Indians and the ensuing Land Run of 1889, the western part of the territory became known as the “Oklahoma Territory.”⁹⁸ Liquor policies were vastly different in the Indian and Oklahoma Territories. The Oklahoma Territory generally permitted the sale of liquor and other

90. *Cal. Beer Wholesalers Ass’n, Inc. v. Alcoholic Beverage Control Appeals Bd.*, 487 P.2d 745, 748 (Cal. 1971) (internal citations omitted).

91. MENDELSON, *supra* note 13, at 117.

92. *Cal. Beer*, 487 P.2d at 748.

93. *See id.* at 749.

94. *See id.* at 748–49.

95. *See id.* at 749–50.

96. *See, e.g., Affiliated Distillers Brands Corp. v. Sills*, 265 A.2d 809, 813 (N.J. 1970); *Downer v. Liquor Control Comm’n*, 59 A.2d 290, 292 (Conn. 1948).

97. JAMES E. KLEIN, *GRAPPLING WITH DEMON RUM: THE CULTURAL STRUGGLE OVER LIQUOR IN EARLY OKLAHOMA* 16–17 (2008).

98. *Id.* at 18.

intoxicants, while the Indian Territory prohibited the sale of intoxicants pursuant to federal law.⁹⁹ In the Oklahoma Territory, laws allowing for consumption of alcoholic beverages were vigorously opposed by interest groups such as the Anti-Saloon League (ASL) and the Women's Christian Temperance Union (WCTU).¹⁰⁰ These organizations sought to end legalized liquor sales in the Oklahoma Territory and called for stricter enforcement measures in the Indian Territory.¹⁰¹ By the time a constitutional convention was called in 1906, the interest groups, backed by Protestant churches, were responsible for the selection of delegates amenable to drafting anti-liquor policy into the new constitution.¹⁰²

The framing of Oklahoma's Constitution, and specifically its restrictive provisions governing alcohol, are perhaps best understood by an examination in historical context. As the forty-sixth state admitted to the Union, Oklahoma was among the last states to draft and ratify a state constitution.¹⁰³ Saluted by William Jennings Bryan as "the best constitution today of any state in the Union,"¹⁰⁴ the framers of the Oklahoma Constitution produced a document that was, at the time of ratification, the United States' longest and most comprehensive state constitution.¹⁰⁵

Ratified on September 17, 1907, the Oklahoma Constitution obliterated the state's liquor trade entirely. However, liquor remained abundant in Oklahoma in spite of its "dry" entry to the Union.¹⁰⁶ Since the state ban initially "had no jurisdiction over interstate commerce," liquor obtained out-of-state remained unregulated and flowed relatively freely into Oklahoma.¹⁰⁷ Additionally, a widely held belief that alcohol could cure many ailments helped to carve out an exception,¹⁰⁸ allowing

99. *Id.* at 17–18.

100. *Id.* at 19–20.

101. *Id.*

102. *Id.* at 45.

103. See generally IRVIN HURST, THE 46TH STAR: A HISTORY OF OKLAHOMA'S CONSTITUTIONAL CONVENTION AND EARLY STATEHOOD (1957).

104. *Id.* at 26.

105. LUTHER JEWETT ABBOTT, HISTORY AND CIVICS OF OKLAHOMA 36 (1910).

106. KLEIN, *supra* note 97, at 54.

107. *Id.* at 54–55.

108. *Id.* at 59. The "Billups Bill," 1907–1908 Okla. Sess. Laws 594, sponsored by State Senator Richard A. Billups, purported to prescribe penalties for violations of the liquor ban and delineate exceptions for medicinal and sacramental purposes. KLEIN, *supra* note 97, at 59–60. Once codified, the law was quite unclear, however, and led to many uncertainties. *Id.* at 61.

2012]

Ghosts of the Past

301

the use of alcohol for medicinal purposes.¹⁰⁹ Early enforcement of the state prohibition was left to local authorities, who were generally ill-equipped to handle the task.¹¹⁰ Officials who enforced the ban soon began to lose elections, as the financial burden associated with enforcement motivated voters to displace them.¹¹¹ Together, all of these elements fostered a flourishing illegal liquor trade,¹¹² and Oklahoma authorities were all too eager to defer their duties to federal officials at the outset of Prohibition.¹¹³

In 1933, during the death throes of Prohibition, the Oklahoma legislature approved a beer referendum, which was supported by nearly two-thirds of Oklahoma voters.¹¹⁴ In 1957, a local-option amendment designed to limit the distribution and sale of beer was initiated and ultimately put to a vote, which Oklahomans defeated with gusto.¹¹⁵ Rapid urbanization and new state leadership led to another initiative in 1959 that sought to legitimize off-premise sales of liquor.¹¹⁶ On April 7, 1959, prohibition of liquor was finally repealed in Oklahoma.¹¹⁷ The 1959 Oklahoma Alcoholic Beverage Control Act established an enforcement agency known as the Alcohol Control Board.¹¹⁸ In 1984, the board was renamed¹¹⁹ and is now known as the Alcoholic Beverage Laws Enforcement (ABLE) Commission.¹²⁰ On-premise consumption,

109. *Id.* at 59.

110. *Id.* at 54.

111. *Id.*

112. *Id.*

113. *Id.*

114. Gene Curtis, *Only in Oklahoma: Legal Beer Made a Splash in State in 1933*, TULSA WORLD, July 4, 2007, at A4.

115. *See In re Initiative Petition No. 259*, 1957 OK 167, 316 P.2d 139.

116. *See* ARRELL M. GIBSON, OKLAHOMA: A HISTORY OF FIVE CENTURIES 247 (2d. ed. 1995).

117. *Id.*

118. 1959 Okla. Sess. Laws 141.

119. 1984 Okla. Sess. Laws 1248.

120. OKLA. CONST. art. XXVIII, § 1. The creation and composition of the ABLE Commission is prescribed by Article XXVIII of the Oklahoma Constitution, which sets Commission membership at seven members. *Id.* Each member is “appointed by the Governor with the advice and consent of the State Senate.” *Id.* Five of the members, known as at-large members, represent the citizens, while the remaining two members have “law enforcement experience in the State.” *Id.* Members of the Commission serve a term of five years. *Id.* A single Director is appointed by the Commission to lead it. *Id.* Politically, no more than four members of the Commission can be from the same party, and no more than two members may be “appointed from the same federal congressional district.” *Id.* Commission members are prohibited from holding any liquor license “or hav[ing] any interest in any capacity, in the manufacture, sale, distribution or

however, curiously remained prohibited, and “bottle club” laws restricted the sale of liquor for on-premise consumption to licensed private clubs.¹²¹ Oklahomans found innovative means of circumventing the law. Some clubs issued “memberships” freely, while other establishments disregarded the formalities altogether.¹²² In 1985, Oklahoma finally legalized liquor by-the-drink;¹²³ it was the last state in the Union to do so.¹²⁴

III. THE CURRENT REGIME

A. Modern Oklahoma Laws

The vestiges of the Temperance Movement and Prohibition are alive and well in Oklahoma in the twenty-first century. Modern Oklahoma liquor laws remain among the most restrictive in the United States. ABLE Commission General Counsel John Maisch perhaps best summarized Oklahoma’s unyielding policies: “Oklahoma does not believe that its liquor policies should be dictated by national trends. Simply because a majority of states permit[] a certain activity, or fail to prohibit a certain activity, doesn’t necessarily mean those states’ laws reflect the best public policy.”¹²⁵ Oklahoma’s “modern” liquor laws are a mosaic of constitutional and statutory provisions which are examined on occasion by state courts.

Article 28 of the Oklahoma Constitution governs alcoholic beverage laws and enforcement in Oklahoma.¹²⁶ The article contains ten subsections, each of which addresses a specific facet of liquor regulation.¹²⁷ For the purposes of this Note, only the sections pertaining to retail sales for off-premise consumption will be discussed. The balance of article 28’s subsections serve to authorize “an occupation

transportation of alcoholic beverages.” *Id.*

121. See Sara Plummer, *1984 Liquor Law Led to Better Control of Alcohol*, TULSA WORLD, Sept. 13, 2009, at A17.

122. See *id.*

123. 1984 Okla. Sess. Laws 1249. On-premise sales still remain prohibited in some Oklahoma counties, however, as each county was required to authorize the sale of on-premise liquor. *Id.*

124. *Id.*

125. John Estus, *Strong Beer, Wine Sales Considered: Liquor Law Idea Concerns Agency*, THE OKLAHOMAN, Dec. 28, 2010, at 1A.

126. OKLA. CONST. art. XXVIII.

127. *Id.*

tax . . . for the manufacture, distribution, or sale of alcoholic beverages,¹²⁸ restrict the issuance of licenses,¹²⁹ prescribe the distribution of licensure and tax proceeds,¹³⁰ and prohibit state and local subdivisions from participating in the trade.¹³¹

The regulatory framework for three-tier regulation in Oklahoma initially appeared in the Oklahoma Constitution. After directing the Oklahoma Legislature to “enact laws providing for the strict regulation, control, licensing, and taxation of the manufacture, sale, distribution, possession, and transportation of alcoholic beverages consistent with the provisions of th[e] Amendment,” article 28, section 3 requires producers to sell their product indiscriminately and at the same price to every Oklahoma distributor who wishes to purchase it.¹³² Statutory regulation of alcoholic beverages is provided in title 37 of the Oklahoma Statutes.¹³³ Generally, there are two separate and distinct categories of alcoholic beverages in Oklahoma.¹³⁴ Classification depends entirely on alcohol content.¹³⁵ Alcoholic beverages stronger than 3.2% are regulated by the Oklahoma Alcoholic Beverage Control Act,¹³⁶ while alcoholic beverages containing between .05% and 3.2% are deemed to be “low-point beer” and are governed by a separate chapter of Oklahoma’s Intoxicating

128. *Id.* § 9.

129. *Id.* § 10.

130. *Id.* § 7.

131. *Id.* § 8.

132. *Id.* § 3. In article 28 of the Oklahoma Constitution, section 3 provides the following:

The Legislature shall enact laws providing for the strict regulation, control, licensing, and taxation of the manufacture, sale, distribution, possession, and transportation of alcoholic beverages, consistent with the provisions of this Amendment. Provided, that any manufacturer, or subsidiary of any manufacturer who markets his product solely through a subsidiary or subsidiaries, a distiller, rectifier, bottler, winemaker, brewer, or importer of alcoholic beverages, bottled or made in a foreign country, either within or without this state, *shall be required to sell such brands or kinds of alcoholic beverages to every licensed wholesale distributor who desires to purchase the same, on the same price basis and without discrimination, and shall further be required to sell such beverages only to those distributors licensed as wholesale distributors.*

Id. (emphasis added).

133. OKLA. STAT. tit. 37, §§ 1–601 (OSCN through 2011 Leg. Sess.).

134. *See id.* §§ 1–151.

135. *See id.*

136. *See id.* § 501.

Liquor Title.¹³⁷

1. Alcoholic Beverages

Retail sales of alcoholic beverages are restricted by article 28, section 4 of the Oklahoma Constitution, which provides that such beverages may only be sold in “the original sealed package, by privately owned and operated¹³⁸ package stores.”¹³⁹ Package stores may only exist “in cities or towns having a population in excess of two hundred . . . persons.”¹⁴⁰ Retail package stores are prohibited from selling “any goods, wares, or merchandise . . . on the same premises on which retail package alcoholic beverages are sold.”¹⁴¹ Package stores cannot operate on Sundays¹⁴² and must remain closed on “Memorial Day, Independence Day, Labor Day, Thanksgiving Day, and Christmas Day.”¹⁴³

The sale of alcoholic beverages to minors under the age of twenty-one, intoxicated persons, or persons who have been “adjudged insane or mentally deficient” is strictly prohibited.¹⁴⁴ Severe penalties are prescribed for those who are convicted of violations. Providing alcohol to a minor under the age of twenty-one in any manner is a felony mandating revocation of an offender’s license if convicted.¹⁴⁵ Likewise, the sale of alcoholic beverages to an insane or incompetent individual is a felony.¹⁴⁶ Sale to any person who misrepresents his or her age in order to purchase alcoholic beverages is a misdemeanor.¹⁴⁷

There are several restrictions on retail package stores. First, package stores must be free-standing buildings built with “nontransparent walls which may be broken by a passageway to which the public is not admitted.”¹⁴⁸ Retail package stores may only sell alcoholic beverages

137. *See id.* §§ 151–247.

138. The Oklahoma Constitution requires that package stores be privately owned and operated, and limits each person or general or limited partnership to one retail package license. OKLA. CONST. art. XXVIII, § 4.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* § 6; *see* OKLA. STAT. tit. 37, § 537.

143. OKLA. CONST. art. XXVIII, § 6.

144. *Id.* § 5.

145. OKLA. STAT. tit. 37, § 538(F).

146. *Id.* § 538(G).

147. OKLA. CONST. art. XXVIII, § 5.

148. OKLA. STAT. tit. 37, § 534(A).

2012]

Ghosts of the Past

305

“between the hours of 10:00 a.m. and 9:00 p.m.”¹⁴⁹ Additionally, ABLE Commission administrative regulations require that “alcoholic beverages at retail shall be located on the street level or on the ground floor” and that customers must enter and exit the store from a door “in full view of a public street or highway.”¹⁵⁰ Retail package stores may sell only alcoholic beverages in containers filled and stamped or sealed by the manufacturer and “in the original package for consumption off the premises.”¹⁵¹ Refrigeration of alcoholic beverages sold in retail package stores is prohibited; all such beverages must be “sold at ordinary room temperature.”¹⁵²

2. Low-Point Beer

The rules are very different for beverages with alcohol content below the 3.2% threshold. These beverages are referred to as “low-point beer” for regulatory purposes, regardless of their form.¹⁵³ Thus, low-point beer can categorically include beer, cereal malt beverages, or similar products.¹⁵⁴ Deemed “nonintoxicating” by statute,¹⁵⁵ low-point beer is regulated by the Oklahoma Tax Commission.¹⁵⁶ The ABLE Commission may not exercise any authority over low-point beer and is under no duty to enforce violations involving low-point beer committed in its presence.¹⁵⁷ The only restriction placed upon low-point beer sold in Oklahoma for off-premise consumption is that it may not be purchased between the hours of 2:00 a.m. and 6:00 a.m.¹⁵⁸

3. Wine

Interesting exceptions to the general regulatory scheme exist for winemakers. Winemakers, like all other producers, are “required to sell

149. *Id.* § 537(C)(3).

150. OKLA. ADMIN. CODE § 45:20-3-1 (2011).

151. OKLA. STAT. tit. 37, § 534(C).

152. *Id.*

153. *Id.* § 163.1.

154. *Id.* § 163.2.1.

155. *Id.* § 163.1.

156. *See id.* § 163.3. Low-point beer is regulated by the Oklahoma Tax Commission, which levies a tax on such beverages at the rate of eleven dollars and twenty-five cents for every barrel containing thirty-one gallons or less or a fractional share thereof. *Id.*

157. *M & W Rests., Inc. v. Okla. Alcoholic Beverage Laws Enforcement Comm’n*, 2003 OK CIV APP 12, ¶ 13, 63 P.3d 559, 563.

158. OKLA. STAT. tit. 37, § 219.1.

wine they produce to every licensed wholesale distributor who desires to purchase the wine.”¹⁵⁹ However, “winemakers . . . may sell wine produced at the winery to adult consumers who . . . are physically present on the premises of the winery or at a festival or trade show.”¹⁶⁰ Despite Oklahoma’s strict adherence to a closely regulated distribution scheme, the Oklahoma Constitution allows winemakers in Oklahoma and elsewhere to sell their products directly to retailers, provided that the winemaker annually produces no more than ten thousand gallons of wine and distributes wine to retailers using only vehicles owned or leased by the winemaker.¹⁶¹

The exception for winemakers, as currently written, is the result of several years of court battles inside and outside of Oklahoma. A constitutional amendment in 2000 provided that only *Oklahoma* winemakers could “sell and ship the wine they produce at wineries in this state directly to retail package stores and restaurants in this state.”¹⁶² This circumvention was also provided for in the statutes of title 37.¹⁶³ By 2004, similar regulations in other states brought the issue before the U.S. Supreme Court in *Granholm v. Heald*,¹⁶⁴ where the Supreme Court held that the laws favoring local winemakers were unconstitutional.¹⁶⁵

159. OKLA. CONST. art. XXVIII, § 3.

160. *Id.*

161. *Id.*

162. *Action Wholesale Liquors v. Okla. Alcoholic Beverages Laws Enforcement Comm’n*, 463 F. Supp. 2d 1294, 1296 (W.D. Okla. 2006).

163. *Id.*

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

165. *Id.* at 466, 493. In *Granholm*, Michigan and New York laws nearly identical to Oklahoma’s were challenged as unconstitutional under the dormant commerce clause. *See id.* at 465–66. Historically, the U.S. Supreme Court has utilized the dormant commerce clause to invalidate state regulation deemed to be “protectionist” of state interests at the expense of interstate commerce. *See* KATHLEEN M. SULLIVAN & GERALD GUNTHER, *CONSTITUTIONAL LAW* 176 (Robert C. Clark et al. eds., 17th ed. 2010). Article I, Section 8 of the Federal Constitution does not expressly prohibit states from regulating interstate commerce, yet the Court has enforced restrictions on state action even when Congress has not acted. *Id.*

A dormant commerce clause challenge requires the Court to categorize the challenged law as facially discriminatory or facially neutral. *Id.* at 185. A law is facially discriminatory if, by its express language, it discriminates against interstate commerce. *See id.* Conversely, facially neutral laws are indiscriminate as between in-state and out-of-state interests. *See id.* Laws which are facially neutral, however, can be further interpreted as discriminatory if the laws have an impermissibly protectionist purpose or effect, or if the law is found to have a disproportionate adverse effect on interstate commerce. *See* *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951); *United Haulers Ass’n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330 (2007); *Pike v. Bruce Church*,

After *Granholm*, the winemaker exceptions found in the Oklahoma Constitution were challenged at the state level in *Action Wholesale Liquors v. Oklahoma Alcoholic Beverage Laws Enforcement Commission*.¹⁶⁶ Interpreting state law, the U.S. District Court for the Western District of Oklahoma invalidated the Oklahoma constitutional provisions under the dormant commerce clause.¹⁶⁷ Analogizing the facts of *Granholm*,¹⁶⁸ the court found that the Oklahoma laws discriminated against interstate commerce and further found that no legitimate local purpose, which could not be effectuated otherwise, was offered as a justification for the discrimination.¹⁶⁹ The federal court stopped short of prescribing a remedy, however, stating that “the most appropriate remedy for the unconstitutionality identified in this order is a determination best left to the Oklahoma Legislature and to the people of Oklahoma.”¹⁷⁰ The Oklahoma Legislature responded by amending the constitution and statutes into their current form,¹⁷¹ allowing wineries both inside and outside of the state to ship their products directly to retailers provided the winemaker complies with the provisions of article 28,

Inc., 397 U.S. 137 (1970).

In *Granholm*, the Michigan laws at issue allowed Michigan wineries to circumvent the state three-tier distribution system and ship their product directly to consumers while providing that out-of-state wineries may only sell to distributors. *Granholm*, 544 U.S. at 468–69. New York laws allowed wineries to directly ship wine to consumers if the wine was produced exclusively from grapes grown in New York. *Id.* at 470. New York wineries were also permitted to directly ship wines made by other winemakers, provided that the wines were produced from grapes “at least seventy-five percent the volume of which were grown in New York.” *Id.* (internal quotation marks omitted). Out-of-state wineries, however, were prohibited from directly shipping their products to New York residents unless they established a physical presence and obtained a license in New York. *Id.*

In a landmark ruling, the Court found that the laws in Michigan and New York were unconstitutional under the Commerce Clause, as their differential treatment of domestic and out-of-state wineries was both impermissibly protective of domestic interests and imposed impermissible burdens on interests outside the state. *Id.* at 472. After finding that neither state’s laws sought to further a legitimate local purpose that could not be effectuated by non-discriminatory alternatives, the Court found that the Michigan and New York laws were unconstitutional, holding that “[i]f a State chooses to allow direct shipment of wine, it must do so on evenhanded terms.” *Id.* at 493.

166. *Action Wholesale Liquors*, 463 F. Supp. 2d at 1296.

167. *Id.* at 1305.

168. Judge Friot stated that “it should be obvious that *Granholm* could hardly be closer to being an ‘all fours’ case—favoring plaintiffs’ contention that the challenged laws are unconstitutional.” *Id.* at 1301.

169. *Id.* at 1305.

170. *Id.* at 1306.

171. See OKLA. CONST. art. V, § 3.

section 3 of the Oklahoma Constitution.¹⁷²

4. A Citizen's Perspective

The practical effects of Oklahoma's alcoholic beverage laws are nothing short of bizarre and are perhaps best illustrated by way of example. Suppose hypothetically that John Q. Oklahoman was hosting friends for dinner and wanted to furnish a bottle of wine and a six-pack of beer for his guests. First, John would have to trek to a retail package store to buy wine between the hours of 10:00 a.m. and 9:00 p.m.¹⁷³ If the dinner party happened to be on a Sunday or a certain holiday, wine is "off the menu," as package stores are closed.¹⁷⁴ If John were purchasing white wine and wished to have it chilled, extra planning would be required, as any wine purchased at a retail package store must be sold at room temperature.¹⁷⁵ If John needed a corkscrew to open the wine bottle, he would have to buy one elsewhere, as package stores cannot sell general merchandise.¹⁷⁶

With regard to beer, John has a few options. If John's guests prefer microbrews or "premium" brands, John can purchase the beer at the package store. Again, planning is a factor, as any beer purchased in a package store will be sold at room temperature and requires time to cool to a palatable level.¹⁷⁷ Incidentally, the package store cannot sell John any limes or other "garnishes" for the beer.¹⁷⁸ If John's guests prefer a major brand such as Coors, Miller, or Anheuser-Busch selections, or if cold product is desired, John must then make another trip to a grocery or convenience store (where he may also get his corkscrew and garnishes). There, John may purchase low-point beer and may also purchase it refrigerated—as long as he gets there before 2:00 a.m.¹⁷⁹

172. *Id.* art. XXVIII, § 3. It is questionable whether the section, as amended, remains unconstitutional. *See* Family Winemakers of Cal. v. Jenkins, 592 F.3d 1 (1st Cir. 2010) (invalidating an outputs-based statute similar to Oklahoma's constitutional provision on the basis that the statute had a discriminatory effect on interstate commerce, and the provision was enacted in spite of non-discriminatory alternatives).

173. *See supra* Part III.A.1.

174. *See supra* Part III.A.1.

175. *See supra* Part III.A.1.

176. *See supra* Part III.A.1.

177. *See supra* Part III.A.1.

178. *See supra* Part III.A.1. It has been the author's first-hand experience that some package stores will circumvent this prohibition by offering free limes to customers.

179. *See supra* Part III.A.2.

2012]

Ghosts of the Past

309

B. The Case for Change

The lessons of history have proven that the gears of Oklahoma's alcohol policies grind slowly, and that change has often been met with stiff resistance. Thus, sales of beer and wine in grocery and convenience stores have recently become a staple of annual legislative sessions.¹⁸⁰ To date, the most successful measure allowed for the creation of a twenty-one-member panel to study the feasibility and potential consequences of the sales of beer and wine in grocery and convenience stores.¹⁸¹ The panel met twice, on September 19 and October 20, 2011.¹⁸² At the close of the second meeting, a motion was made, properly seconded, and unanimously adopted to discontinue all further task force meetings.¹⁸³ The task force did not make any recommendations regarding any constitutional or statutory changes.¹⁸⁴

Legislative hurdles notwithstanding, another mechanism exists for changing the law: the initiative petition. Any legislative change to Oklahoma's current regulatory scheme must pass through both houses of the state legislature and must be placed on the ballot at a general election.¹⁸⁵ The Oklahoma Constitution also reserves power to the people of the state, by popular vote, to propose legislation or constitutional amendments and to approve or reject any legislative action.¹⁸⁶ The general procedure for referendum is outlined in title 34 of the Oklahoma Statutes. The first step in the process is filing a petition with the Oklahoma Secretary of State, who must then publish a notice that the petition has been filed and that it is sufficient or insufficient.¹⁸⁷ The notice must be published "in at least one newspaper of general circulation in the state" and include the text of the ballot and provide notice that any citizen of the state may file a protest as to the

180. The most recent attempt to effect this change was Senate Joint Resolution 62, sponsored by Senator Andrew Rice. *See* S.J. Res. 62, 52d Leg., 2d Reg. Sess. (Okla. 2010). The measure was defeated in committee in February 2010. *See id.*

181. *See* S.B. 658, 52d Leg., 2d Reg. Sess. (Okla. 2011). The Committee was chaired by Senator Clark Jolley and Representative Ron Peters. *See id.*

182. *See* Michael McNutt, *Panel Ends Liquor Sales Study*, THE OKLAHOMAN, Oct. 21, 2011, at 1B.

183. *See id.*

184. *Id.*

185. OKLA. CONST. art. XXIV, § 1. Provided, the Legislature may order a special election for the purpose of amending the Constitution by two-thirds vote in each house. *Id.*

186. *Id.* art. V, § 1.

187. OKLA. STAT. tit. 34, § 8(A)–(B) (OSCN through 2011 Leg. Sess.).

constitutionality of the petition within ten days of publication.¹⁸⁸ Opponents must file a copy of the protest with the Secretary of State.¹⁸⁹

After the initial filing of an initiative petition or survival of a constitutional challenge, proponents have ninety days to circulate the petition.¹⁹⁰ The number of signatures required to place an initiative on a ballot varies depending on whether the petition is for a legislative or constitutional amendment.¹⁹¹ After circulation, signed copies of a petition are then filed with the Secretary of State, who must “certify to the Supreme Court of the state . . . [t]he total number of signatures counted . . . and . . . [t]he total number of votes cast for the state office receiving the highest number of votes cast at the last general election.”¹⁹² The Oklahoma Supreme Court determines whether the quantity of signatures obtained is sufficient.¹⁹³

In Oklahoma, initiatives, like other legislation, must “embrace but one subject, which shall be clearly expressed in its title.”¹⁹⁴ This requirement, known as the single-subject rule, has two purposes: to adequately notify the legislators or voters of Oklahoma as to the potential effects of the legislation, and to prevent “logrolling,” or “forc[ing] assent to an unfavorable provision to secure passage of a favorable one, or . . . forc[ing] to vote against a favorable provision to ensure that an unfavorable provision is not enacted.”¹⁹⁵ The Oklahoma Supreme Court interprets the single-subject rule using a “germaneness” test.¹⁹⁶ Under the test, any proposed amendments or legislation must be “germane, relative, and cognate to a readily apparent common theme and purpose.”¹⁹⁷ A single subject is present when all facets of an initiative petition, “no matter how numerous, are so interrelated as to all form parts of an integrated whole.”¹⁹⁸ There are two inquiries which underlie the

188. *Id.* § 8(B).

189. *Id.*

190. *Id.* § 8(E).

191. *See* OKLA. CONST. art. V, § 2. Legislative enactments require a number of signatures equal to 8% of votes cast for the state office receiving the highest total number of votes at the last general election preceding the filing of the petition, while constitutional amendments require 15% of the same. *Id.*

192. OKLA. STAT. tit. 34, § 8(G).

193. *Id.*

194. OKLA. CONST. art. V, § 57.

195. *In re* Initiative Petition No. 382, 2006 OK 45, ¶ 8, 142 P.3d 400, 405 (citations omitted); *see also* Edmondson v. Pearce, 2004 OK 23, ¶ 44, 91 P.3d 605, 628.

196. *Initiative Petition No. 382*, 2006 OK 45, ¶¶ 8–9.

197. *Id.* ¶ 9.

198. *In re* Initiative Petition No. 363, 1996 OK 122, 927 P.2d 558, 566.

2012]

Ghosts of the Past

311

germaneness analysis: first, whether a voter (or legislator) is able to make a clear “choice without being misled,” and second, whether a voter (or legislator) is “forced to choose between two unrelated provisions contained” in the same initiative.¹⁹⁹ Application of the rule has produced disparate results in the courts. Single-subject inquiries are generally fact specific. Since courts have broad discretion in determining whether an initiative petition violates the single-subject rule, challenges to initiative petitions have yielded diverse results.²⁰⁰

IV. ANALYSIS

Currently, thirty-five²⁰¹ states allow the sale of beer and wine in grocery stores. Oklahoma is among the minority of states that prohibit such sales, and the issue of whether or not to alter Oklahoma’s regulatory scheme is a thorny one. Supporters of change generally view Oklahoma’s laws as antiquated, indicating that consumers suffer inconveniences as a result, while opponents laud an unbroken regulatory system, cite social as well as public health and welfare concerns, and a fear of shuttering local businesses as support for their reluctance to meddle with Oklahoma’s current laws.

A. *Competition*

An unintended consequence of Oklahoma’s regimented approach to alcohol regulation is the retail package stores’ virtually uncontested dominance over the retail liquor market. Although the regulatory environment in Oklahoma restricts the activities of retail package stores to a significant extent, no external competition exists for retail package stores, beyond other retail package stores. The three-tier system itself

199. *Initiative Petition No. 382*, 2006 OK 45, ¶ 9.

200. *Compare Edmondson*, 2004 OK 23, ¶ 46 (holding that although the Act in question was detailed, “all of its provisions are germane to its central purpose [of] prohibiting cockfighting and related conduct”), *with Initiative Petition No. 382*, 2006 OK 45, ¶ 7 (holding that an initiative petition limiting public power to “take private property by eminent domain” and requiring a public entity to “pay landowners compensation when property values are adversely affected by zoning laws” violated the single-subject rule).

201. Washington became the thirty-fifth state to allow beer and wine to be sold in grocery stores with the passage of Initiative 1183 in 2011. The law is set to take effect in June 2012. See Melissa Allison, *Voters Kick State out of Liquor Business*, SEATTLE TIMES (Nov. 8, 2011, 9:16 PM), http://seattletimes.nwsources.com/html/localnews/2016720231_elexliquor09m.html.

perpetuates a highly localized system of marketing, which “ultimately amounts to a system of fiefdoms.”²⁰² After *Granholm*’s pronouncement that the Twenty-first Amendment did not immunize state regulations from constitutional challenge,²⁰³ the opportunity arose to lay siege to three-tier fiefdoms.²⁰⁴

The State of Washington served as the venue for a quasi-successful challenge to the three-tier system. In Washington, regulations similar to those found in Oklahoma prevented large Washington-based retailer Costco from “effectively implementing its wholesale model, which involves purchasing large volumes of product at discounted prices” direct from producers.²⁰⁵ As a result, Costco brought suit, alleging violations of the Commerce Clause and federal antitrust laws.²⁰⁶ Citing a longstanding reliance on “a healthy competitive market to distribute goods efficiently and economically” and “minimal effectiveness of the challenged restraints in advancing the state’s interests under the Twenty-first Amendment,” the trial court overturned nine state regulations²⁰⁷ found to hinder competition.²⁰⁸

The Ninth Circuit Court of Appeals reversed as to all regulations but upheld the trial court’s invalidation of Washington’s “post-and-hold” provisions, which required wholesalers to “post” product prices with the State Liquor Control Board prior to offering the products for sale and freeze the prices at posted levels for thirty days.²⁰⁹ The Ninth Circuit found Washington’s post-and-hold arrangements to be a per se violation of the Sherman Antitrust Act, declaring that the provisions were “highly likely to facilitate horizontal collusion among market participants.”²¹⁰

Subsequent to the ruling of the Ninth Circuit Court of Appeals, Costco decided to forego an appeal to the Washington Supreme Court

202. Angela Logomasini, *A CARE-less Rush To Regulate Alcohol: Wholesalers Attempt to Secure Regulatory Fiefdoms*, COMPETITIVE ENTERPRISE INST., July 2011, at 6.

203. *Granholm v. Heald*, 544 U.S. 460, 486 (2005).

204. Logomasini, *supra* note 202, at 6.

205. *Id.* at 18.

206. *Costco Wholesale Corp. v. Hoen*, No. C04-360P, 2006 WL 1075218 (W.D. Wash. Apr. 21, 2006).

207. Challenged regulations included post provisions, hold provisions, uniform pricing regulations, minimum markups, bans on volume discounts, bans on credit sales, cost-of-delivery provisions, and prohibitions on warehousing and retailer-to-retailer sales. Logomasini, *supra* note 202, at 18–19.

208. *Hoen*, 2006 WL 1075218 at *13.

209. Logomasini, *supra* note 202, at 18–19; see *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874 (9th Cir. 2008).

210. *Maleng*, 522 F.3d at 896.

2012]

Ghosts of the Past

313

and pursued an initiative petition seeking to privatize the state liquor industry and eliminate anti-competitive practices.²¹¹ The measure competed with a similar initiative on the same ballot, and both were defeated in November 2010.²¹² The following year, however, Washington voters approved Initiative 1183, effectively privatizing the liquor industry in Washington and dismantling three-tier distribution.²¹³ Millions of dollars were spent by proponents and opponents of both initiatives.²¹⁴ A declaration of victory by Costco in Washington may be premature, however, as a challenge is pending in the court which alleges violation of Washington's legislative single-subject rule.²¹⁵

Oklahoma law requires manufacturers of alcoholic beverages to sell their products only to licensed wholesalers.²¹⁶ Additionally, manufacturers must sell their products to any licensed wholesaler who desires to purchase them "on the same price basis and without discrimination or inducements."²¹⁷ Oklahoma's current regulations include post-and-hold provisions similar to the ones struck down in *Costco*.²¹⁸ The regulations require nonresident manufacturers to register all items the manufacturer wishes to sell to licensed wholesalers with the ABLE Commission.²¹⁹ The registration must reflect the brand, price, size and alcoholic content of the manufacturer's products.²²⁰ Once prices become effective, they remain frozen for one month.²²¹

Presently, no challenges have been initiated to the post-and-hold provisions in Oklahoma.²²² As a result, there is no barrier to "horizontal collusion" at the wholesale and retail levels. Wholesalers and retailers enjoy the benefit of knowing the cost-basis of their competitors' products and therefore are dissuaded by the regulatory environment itself from

211. See Rachel La Corte, *Costco-Backed Liquor Initiative Fails in Washington*, SEATTLE TIMES (Nov. 3, 2010, 6:46 PM), http://seattletimes.nwsourc.com/html/business/technology/2013340084_apusprivatizingliquor.html.

212. See *id.*

213. Allison, *supra* note 201.

214. *Id.*

215. Melissa Allison, *Unions Sue To Block Liquor Initiative From Taking Effect*, SEATTLE TIMES (Dec. 6, 2011, 10:56 AM), http://seattletimes.nwsourc.com/html/localnews/2016947384_liquorsuit07.html.

216. OKLA. STAT. tit. 37, § 533 (OSCN through 2011 Leg. Sess.).

217. *Id.*

218. See OKLA. ADMIN. CODE § 45:30-3-3 (2011).

219. *Id.*

220. *Id.*

221. *Id.*

222. Although persuasive, Ninth Circuit precedent is not binding on Oklahoma Courts.

offering significant price incentives to their respective customers. Revising the current regulatory scheme will eliminate the possibility of horizontal collusion without facilitating a return to the tied-house environment the laws sought to prohibit. On the contrary, allowing sales of beer and wine in retail outlets other than retail package stores would foster competition at the retail level in two ways. First, high-volume retailers such as grocery stores would encourage competitive pricing in retail package stores. Since retail package stores would no longer be competing only with other retail package stores, horizontal collusion would be rendered ineffective. Expanding the scope of permitted retailers would encourage economic competition among wholesalers and retailers. Second, package stores would be required to offer unique, non-monetary incentives to stay competitive, including offering a diverse range of products and specialized services, such as knowledgeable sales staff not found in higher volume stores.

Opponents of regulatory change argue that allowing grocery stores to sell beer and wine would significantly diminish package store market shares, causing prices to rise and shuttering some package stores.²²³ These conclusions, however, may be premature. The decision to allow the sales of beer and wine in grocery stores necessarily implies a massive regulatory overhaul of Oklahoma statutes and the administrative code. Among these changes, some could prove to be favorable to retail package stores. For example, diminished market share could be offset by allowing retail package stores to sell products besides alcoholic beverages. Additional products such as ice, soft drinks, cups, or even wine literature would afford package stores opportunities to sell products with healthier profit margins while allowing consumers to enjoy a higher level of convenience. Additionally, new business interests would be attracted to the state. While the regulatory environment may not invite Costco,²²⁴ other retailers, such as Trader Joe's,²²⁵ could be drawn to the

223. Wayne Greene, *Changing Liquor Laws Complex*, TULSA WORLD, Sept. 19, 2011, at A4. According to J.P. Richard, owner of Cache Road Liquor and Wine in Lawton, Oklahoma, sales of wine and beer in grocery and convenience stores would erode a quarter of package stores' market shares, causing many locally owned stores to go out of business. *Id.*

224. Oklahoma's three-tier distribution scheme would presumably prohibit Costco's wholesaling practices in much the same way as Washington's distribution system did prior to litigation in that state.

225. Trader Joe's is a California-based premium grocer that owes a significant amount of business to the sales of beer and wine. See *About Trader Joe's*, TRADER JOE'S, <http://www.traderjoes.com/about/index.asp> (last visited Apr. 11, 2012). Trader Joe's

area, potentially increasing sales tax revenues and creating thousands of new employment opportunities for Oklahomans.

B. Public Health and Welfare Considerations

Opponents of change repeatedly cite public health and welfare concerns as reasons for maintaining the regulatory status quo. Increased accessibility, it is argued, will lead to diminished control. During a legal conference session in 2010, the ABLE Commission cited studies detailing how alcohol deregulation abroad has adversely affected public health and safety.²²⁶ Specifically, alcohol deregulation in the United Kingdom has been blamed for an increase in hospital admissions and youth and childhood drinking.²²⁷ Waving warnings that deregulation of alcohol may lead to similar social consequences in the United States, the ABLE Commission is resistant to any change in the way alcoholic beverages are currently sold.²²⁸

The United Kingdom's cautionary tale has little persuasive value in the United States. It is unlikely that allowing grocery stores to carry beer and wine would produce similar consequences in Oklahoma. While vertically integrated supermarkets in the United Kingdom may purchase alcoholic beverages directly from producers and use their buying power to elicit price concessions at the wholesale level, these practices are widely prohibited in the United States.²²⁹ Furthermore, the current distribution system in Oklahoma would continue to serve their purpose of separating wholesaler and retailer interests, avoiding a revival of the tied-house scheme in supermarkets.

For a more illustrative comparison, Oklahoma need not look far beyond her own borders. Missouri borders Oklahoma to the northeast. Although the land area of the two states is roughly the same, Missouri is significantly more densely populated.²³⁰ In stark contrast to Oklahoma's

recently expanded into Texas, where beer and wine can be sold in grocery stores. *See Find a Trader Joe's*, TRADER JOE'S, <http://www.traderjoes.com/stores/index.asp> (last visited Apr. 11, 2012) (enter "Texas" then click on "Search").

226. Estus, *supra* note 125.

227. Pamela S. Erickson, *The Dangers of Alcohol Deregulation: The United Kingdom Experience*, PAM ACTION, 6 (2010), http://www.pamaction.com/pdf/UK_Alcohol_Deregulation.pdf.

228. Estus, *supra* note 125.

229. Erickson, *supra* note 227, at 12–13.

230. *Compare State and County QuickFacts, Oklahoma*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/40000.html> (last visited Apr. 16, 2011) (according

restrictive laws, Missouri's alcoholic beverage laws are among the most lenient in the country. Laws governing alcoholic beverage control in Missouri are comprehensive and make no distinctions based upon alcohol content.²³¹ Therefore, Missouri permits the sale of *any variety* of intoxicating liquor in retail outlets, including grocery stores, general merchandise stores, and drug stores.²³² Missouri state law forbids counties from exercising a local option,²³³ but does restrict the sale of alcoholic beverages in retail outlets that are located within one hundred feet of a school or place of worship.²³⁴ Alcoholic beverages may be sold in Missouri between the hours of 6:00 a.m. and 1:30 a.m. the following day, Monday through Saturday.²³⁵ Additionally, retailers may purchase an additional license to sell alcoholic beverages between the hours of 9:00 a.m. and midnight on Sundays.²³⁶ Due to the marked differences in state regulations, one would expect that Missouri's social alcohol woes dwarf Oklahoma's. Empirical data on the subject, however, presents a surprisingly similar comparison.

Data compiled between 2005 and 2008 by Substance Abuse and Mental Health Service Administration (SAMHSA) of the Department of Health and Human Services (DHHS) indicates that alcohol use by minors is only slightly more prevalent in Missouri among respondents between the ages of twelve and twenty.²³⁷ In Missouri, 28.7% of young people between the ages of twelve and twenty reported alcohol use in the past month, as opposed to Oklahoma, where 24.6% reported alcohol use in

to the 2010 U.S. Census, Oklahoma has a population of 3,751,351 people, a total land area of 68,594.92 square miles, and a population density of 54.7 persons per square mile), *with State and County QuickFacts, Missouri*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/29000.html> (last visited Apr. 16, 2011) (Missouri has a population of 5,988,927 people, an area of 68,741.52 square miles, and a population density of 87.1 persons per square mile).

231. See MO. REV. STAT. § 311.200 (MOGA through Aug. 2011).

232. See *id.* "Intoxicating liquor" in Missouri means "alcohol for beverage purposes, alcoholic, spirituous, vinous, fermented, malt, or other liquors, or combination of liquors, a part of which is spirituous, vinous, or fermented, and all preparations or mixtures for beverage purposes, containing in excess of one-half of one percent by volume." *Id.* § 311.020.

233. *Id.* § 311.170.

234. *Id.* § 311.080.

235. *Id.* § 311.290.

236. *Id.* § 311.293.

237. See SUBSTANCE ABUSE AND MENTAL HEALTH SERVICES ADMINISTRATION, SERIES: PREVENTION AND REDUCTION OF UNDERAGE DRINKING: STATE SUMMARIES 267, 317 (2011).

2012]

Ghosts of the Past

317

the last month.²³⁸ Heavy alcohol use statistics were similar. As to “binge drinking,” (i.e., drinking more than five drinks in a single occurrence) 20.2% of Missourians between age twelve and age twenty reported binge alcohol use as compared to 17.8% of Oklahomans in the same age group.²³⁹ Traffic fatalities involving minors with a blood alcohol content of more than .01% were found to be slightly more prevalent in Oklahoma at 29% as compared to Missouri at 26%.²⁴⁰

A similar comparison exists with respect to statistics involving alcohol-related fatalities. According to the National Highway Traffic Safety Administration (NHTSA), in 2010, 819 fatal traffic accidents were documented in Missouri,²⁴¹ and 668 traffic fatalities were recorded in Oklahoma.²⁴² Thirty-two percent of fatal crashes in Missouri involved operators with a blood alcohol content higher than the legal limit of .08%.²⁴³ In Oklahoma, 33% of fatal crashes involved an operator with a blood alcohol content above .08%.²⁴⁴ Both states’ statistics were marginally higher than the national average of 31%.²⁴⁵ Arrest data for adults driving under the influence (DUI) in Oklahoma and Missouri is also congruent. According to the FBI’s Uniform Crime Reports for 2010, DUI arrests accounted for 10.2% of all arrests made in Missouri in 2010.²⁴⁶ In Oklahoma, 11.3% of arrests were for DUI.²⁴⁷ Minors arrested for DUI accounted for 1% or less of all arrests of minors in both states.²⁴⁸

On the whole, the empirical data suggests that Oklahoma and Missouri’s social problems with alcohol are strikingly similar per capita despite their vastly different laws. Simply put, the United States is not

238. *Id.*

239. *Id.*

240. *Id.* at 268, 318.

241. NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEPT. OF TRANSP., TRAFFIC SAFETY FACTS: MISSOURI 2006-2010 6 (2010) [hereinafter MISSOURI], available at http://www-nrd.nhtsa.dot.gov/departments/nrd-30/ncsa/STSI/29_MO/2010/29_MO_2010.PDF.

242. NAT’L HIGHWAY TRAFFIC SAFETY ADMIN., U.S. DEPT. OF TRANSP., TRAFFIC SAFETY FACTS: OKLAHOMA 2006-2010 6 (2010) [hereinafter OKLAHOMA], available at http://www-nrd.nhtsa.dot.gov/departments/nrd-30/ncsa/STSI/40_OK/2010/40_OK_2010.PDF.

243. MISSOURI, *supra* note 241, at 6.

244. OKLAHOMA, *supra* note 242, at 6.

245. *Id.*; MISSOURI, *supra* note 241, at 6.

246. Fed. Bureau of Investigation, *Crime in the United States, 2010: Table 69 Arrests by State, 2010*, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10tbl69.xls> (last visited Aug. 22, 2012).

247. *Id.*

248. *Id.*

the United Kingdom. Even if price reduction due to mass marketing and increased access to alcoholic beverages has contributed to the problem in the United Kingdom,²⁴⁹ Oklahoma only needs to look just beyond its eastern border to weigh the social effects of the deregulation of alcoholic beverages on Midwestern Americans. Given the geographic proximity and demographic similarities between the two locales, it is very doubtful that allowing wine and strong beer to be sold in grocery stores would foster any problems similar to those experienced in the United Kingdom.

C. Effecting Regulatory Change in Oklahoma

If the regulatory environment in Oklahoma is to change, how will it happen? Provided the challenges associated with enacting change legislatively, it is unsurprising that plans to file an initiative petition were reported in the Tulsa World Newspaper in January 2012.²⁵⁰ After first considering filing a petition that would allow the sale of strong beer and wine in grocery and convenience stores,²⁵¹ local interest group Oklahomans for Modern Laws filed its initiative petition on April 3, 2012.²⁵² Subsequent to filing, many obstacles exist before a measure is ultimately considered by voters. The first obstacle is presented by the petition process itself. The single-subject rule should be seriously considered upon filing a petition, as the initiative petition process can potentially cost millions of dollars.²⁵³ Since Oklahoma's alcohol regulations are codified in separate constitutional provisions, it is first necessary to decide if a single-initiative measure will be constitutionally sufficient under the single-subject rule. While a single initiative may well satisfy the single-subject rule under the "germaneness" analysis promulgated by the Oklahoma Supreme Court, the fact that several

249. See Erickson, *supra* note 227, at 19.

250. Wayne Greene, *Wine and Beer Battle Brewing*, TULSA WORLD, Jan. 14, 2012, at A1.

251. Michael McNutt, *Group Seeks Vote on Wine*, THE OKLAHOMAN, Apr. 4, 2012, at 1B.

252. *Id.* The measure would allow counties with populations greater than 50,000 to vote to allow for the sale of wine in grocery stores and supermarkets. Sales of wine would not be allowed in convenience stores. *In re Initiative Petition No. 396*, 2012 OK 67, ¶ 2 (Colbert, V.C.J., dissenting). The measure also would create a grocery store wine license, which could be held by individuals as well as corporations and businesses inside and outside of Oklahoma. *Id.* All licensees would be limited to six locations. *Id.*

253. Costco spent over \$20 million on supporting its successful initiative in Washington in 2011. Allison, *supra* note 201.

sections of the Oklahoma Constitution would be amended invited a challenge to the initiative.²⁵⁴ Although the Oklahoma Supreme Court ultimately upheld the petition, the measure was voluntarily withdrawn on August 3, 2012.²⁵⁵ With respect to any initiative petition, considerations of cost, time, and judicial economy suggest that separate initiatives are the best course of action. However, multiple initiatives can also be confusing to voters,²⁵⁶ which could result in the failure of some or all related initiatives at the polls. After approval of an initiative petition, a whole new challenge arises regarding implementation of new regulations.

For guidance as to how to facilitate the sales of beer and wine in grocery stores, Oklahomans could look southward to neighboring Texas. In Texas, as in Oklahoma, a three-tier-distribution system exists.²⁵⁷ Unlike Oklahoma, however, Texas residents may purchase beer and wine in grocery and convenience stores.²⁵⁸ Texas has two broad types of permits for off-premise consumption: package store permits and wine and beer retailers off-premise permits. Package store permits allow for the sales of liquor, wine, and beer.²⁵⁹ Package stores must be freestanding in Texas, but package stores may sell other general merchandise in addition to alcoholic beverages.²⁶⁰ Package stores may not be owned by corporations,²⁶¹ nor may they employ minors under the age of twenty-one.²⁶² A beer and wine retailer's off-premise permit only allows the sale of "wine, beer, and malt liquors containing alcohol in excess of one-half of one percent by volume but not more than seventeen percent by

254. *Initiative Petition No. 396*, 2012 OK 67. Opponents alleged that the initiative petition violated the single-subject rule and the equal protection clause to the Fourteenth Amendment to the U.S. Constitution. *Id.* The Oklahoma Supreme Court upheld the petition, finding that the measure did not violate the single-subject rule, and that "all portions of the proposed amendment [were] germane to the subject of Initiative Petition No. 396, State Question No. 763." *Id.* ¶ 2. The court also found no equal protection violation, stating that "[n]either an invidious classification nor any deprivation of a fundamental interest [was] shown, and there [was] a rational basis for the provisions within Initiative Petition No. 396, State Question No. 763." *Id.* ¶ 3.

255. Barbara Hoberock, *State Question on Wine Sales Postponed*, TULSA WORLD, Aug. 4, 2012, at A17.

256. Logomasini, *supra* note 202, at 19.

257. TEX. ALCO. BEV. CODE ANN. § 6.03(i) (TCAS through July 2011).

258. *Id.* § 26.01.

259. *Id.* § 22.01.

260. *Id.* § 22.14.

261. *Id.* § 22.16(a).

262. *Id.* § 22.13(a).

volume.”²⁶³ There is no statutory requirement that these products remain unrefrigerated.²⁶⁴

Emulating Texas’ broad licensing scheme in Oklahoma is a straightforward approach to the implementation of an initiative to allow for the sale of wine and beer in grocery stores. For example, Oklahoma, like Texas, could have two simple categories of off-premise licenses: a package store license and a beer and wine retailer’s license. Beer and wine retailers would be permitted to sell wine, beer, or malt liquors containing not more than 17% alcohol by volume and would not be subject to restrictions on corporate ownership, refrigeration, or requirements that locations be freestanding or only accessible from the street. Package store requirements would be permitted to stay substantially the same. Allowing beer distributors to deliver products containing 17% alcohol or less would be prudent, as current distribution networks place them in an excellent position to effectively circulate these products under the current three-tier system.

Even assuming both the success of an initiative measure and adoption of a licensing system enabling sales in grocery and convenience stores, several tough implementation questions remain. Several practical issues arise with respect to the sale of beer and wine in grocery and convenience stores. Grocery and convenience stores are often open longer hours than package stores. If regulations for beer and wine retailers with regard to hours and days of operation mirror those of package stores, stores will potentially be open during hours when beer and wine cannot be sold. This issue can be addressed in two concurrent ways. First, a store could elect to segregate the wine and beer section inside the store. Segregation would allow the area to be cordoned off or for cases to be locked during times when sales are prohibited. In addition to restricting access, secondary measures could also be employed to ensure compliance. These measures include electronically preventing merchandise from being sold at the point of sale and implementation of severe penalties for violations, including fines or loss of license. Enforcement presents another potential problem at wine and beer retail locations. Although current regulations do not require the ABLE Commission to enforce regulations with respect to low-point beer in these locations, allowing the sale of beer and wine in grocery and convenience stores would require that the ABLE Commission be

263. *Id.* § 26.01(a).

264. *See id.*

2012]

Ghosts of the Past

321

afforded adequate resources to provide enforcement at new locations.

Retail package stores should also be afforded some of the benefits of regulatory change. Generally, the best interests of package stores would be served by allowing the sale of general merchandise and allowing the sale of refrigerated products. Regulatory change does not have to place package stores at a disadvantage, nor do changes need to be devoid of concessions to package store interests. Allowing package stores to sell general merchandise will afford them new potential for profits, and allowing refrigeration of beverages containing less than 17% alcohol will eliminate a competitive advantage for wine and beer retailers with respect to refrigeration. These allowances, along with a uniform restriction on hours of operation for similar products, will serve to place package store interests “on the level” with those of grocery and convenience stores.

Regulatory change in Oklahoma involves balancing a range of compelling and nuanced interests. Legislation enacted a century ago with the purpose of prohibiting tied-house arrangements has left Oklahoma in the past, and Oklahomans thirst for change. Even if special interests prevent change from occurring legislatively, the will of the people cannot be overborne. Oklahoma has a variety of tools at its disposal as it considers whether to change its current regulatory environment and the steps required to facilitate any change. Once a decision is made to alter Oklahoma’s regulatory environment, the challenge of striking a balance between important competing interests becomes the key to success.

V. CONCLUSION

Oklahoma’s history of alcohol regulation is long and unique. However, unwillingness to change has given Oklahoma the distinction of having some of the most antiquated alcohol laws in the country. Oklahoma’s current regulations can be directly traced to a period of history that most states have long since forgotten. These antiquated laws are confusing to citizens and deprive them of conveniences enjoyed by citizens of other states. Oklahoma’s liquor laws have insulated package store owners from the free market.²⁶⁵ Current regulations leave Oklahoma consumers susceptible to horizontal collusion while creating disincentives to a competitive retail environment. Allowing beer and

265. The same is arguably true for distributors. *See Costco Wholesale Corp. v. Maleng*, 522 F.3d 874 (9th Cir. 2008).

wine to be sold in grocery stores would discourage horizontal collusion and encourage package store owners to remain competitive by offering diverse selections and superior service. Allowing the sale of beer and wine in convenience stores will reward Oklahoma consumers with choice, convenience, and competitive prices.

Arguments that public health and welfare would suffer as a result of these regulatory changes are largely unfounded. Although studies from the United Kingdom warn of the perils of alcohol deregulation, Oklahoma is better informed by observing neighboring states with far fewer regulations on alcoholic beverages. When Oklahoma is compared with Missouri, a heavily deregulated state, empirical data suggests that health and social problems associated with alcohol consumption are strikingly similar despite vast regulatory differences.²⁶⁶

Special interests cannot stop the will of the people of Oklahoma. Once the decision to effect change is made by the people or by the legislature, many complex issues surrounding implementation will arise. In order to ensure that any change to Oklahoma's existing alcohol regulations is positive, it is necessary to balance several legitimate competing interests effectively. Although the ghosts of Oklahoma's past still haunt the regulation of alcoholic beverages in the twenty-first century, the winds of change are blowing on the plains.

266. *See supra* Part IV.B.