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Retying the House: How the Evolution of Prohibition Era Alcohol Beverage Laws Has Facilitated a Generation of Independent Craft Brewers

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RETYING THE HOUSE: HOW THE EVOLUTION OF PROHIBITION ERA ALCOHOL BEVERAGE LAWS HAS FACILITATED A GENERATION OF INDEPENDENT CRAFT BREWERS

MICHAEL B. NEWMAN¹ AND JASON H. BARKER²

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On January 1, 2014, Colorado’s Constitutional Amendment 64 became effective, legalizing recreational marijuana within that state.³ In addition to Colorado, seven other states that have legalized the commercialization of marijuana for recreational purposes.⁴ The repeal of the nationwide prohibition against recreational marijuana is only beginning and it is too early to tell whether or not these ambitious state enactments will become the majority rule among the several states or if recreational marijuana will become legal under federal law.⁵ Nonetheless, if there is a lesson to be gleaned from the history of alcohol beverage regulation, it is that with the passage of time and evolution of industry, the exceptions can swallow the rule.

This article examines the regulatory framework that governs vertical integration in the beer industry and its evolution since the end of Prohibition. It further discusses the rise of craft beer localism and concludes with several examples of brewery-friendly state laws that continue to spurn the growth of craft breweries nationwide.⁶

³ See COLO. CONST. art. XVIII, § 16(9).

⁴ See ALASKA STAT. § 17.38.010 (Supp. 2015); CAL. BUS. & PROF. CODE §§ 26000-26202 (West 2017); ME. STAT. tit. 7, §§ 2441-2455 (2017); MASS. GEN. LAWS ch. 94G §§ 1-21 (2018); NEV. REV. STAT. §§ 453D.010-453D.600 (2017); OR. REV. STAT. § 475 (B) (2015); WASH. REV. CODE § 69.50.301 (2014). The District of Columbia and Vermont have also legalized the possession and limited cultivation of marijuana for personal recreational use; however, these jurisdictions have not yet implemented or immediately authorized a regulatory framework for the commercial cultivation, distribution or sale of recreational marijuana. D.C. CODE § 48-904.01(a)(1)(A) (Suppl. 2016); VT. STAT. ANN. tit. 18 § 4230 (2017).

⁵ Under the Controlled Substances Act, marijuana and related compounds are included in Schedule I, making them illegal under federal law. See 21 U.S.C. § 812(c)I(c) (2012).

⁶ According to the Brewer’s Association (as of end of 2015), there were 4,144 breweries operating within the U.S., the highest in U.S. history. The previous high, 4,131, occurred in 1873. *The Year in Beer: U.S. Brewery Count Reaches All-Time*

I. REGULATORY BACKGROUND

By the turn of the Twentieth Century, the alcoholic beverage industry was thriving in saloons, a majority of which were under the dominion of suppliers of alcohol beverages to those very same establishments.⁷ Suppliers either directly owned or maintained exclusive relationships with retail outlets; as a result, cost savings were passed on to consumers and a culture of overconsumption prospered.⁸ The resultant intemperance led to considerable social protest and call for reform; ultimately the Eighteenth Amendment to the U.S. Constitution was ratified in 1919.⁹ With the start of the Roaring Twenties, Prohibition ensued.

For various reasons, Prohibition failed to indoctrinate a culture of temperance in the United States and its failure came at considerable expense to the country. The literal expense was the loss of excise tax revenue to the government on the manufacture and sale of alcoholic beverages, and the figurative expense was the incubation of an organized criminal element with associated and irrepressible evils that far surpassed those of the local saloon.¹⁰ This proliferation of crime coupled with the economic woes of the time led to an about-face in national sentiment regarding the viability of Prohibition and, within 13

High of 4,144, BREWERS ASSOCIATION (Dec. 2, 2015), <https://www.brewersassociation.org/press-releases/the-year-in-beer-u-s-brewery-count-reaches-all-time-high-of-4144/>.

⁷ See generally Joe De Ganahl, *Trade Practice and Price Control in the Alcoholic Beverage Industry*, 7 LAW & CONTEMP. PROBS. 665 (1940); see also Shirley Chen, *Craft Beer Drinkers Reignite the Wine Wars*, 26 LOY. CONSUMER L. REV. 526, 529 (2014).

⁸ See H.R. Rep. No. 8870, at 57-58 (1935), reprinted in CONG., LEGISLATIVE HISTORY OF THE FEDERAL ALCOHOL ADMINISTRATION ACT (1935); see also Chen, *supra*, at 529.

⁹ See David Fogarty, *From Saloon to Supermarket: Packaged Beer and the Reshaping of the U.S. Brewing Industry*, 12 CONTEMP. DRUG PROBS. 541, 552-53 (1985); see Andrew Tamayo, *What's Brewing in the Old North State: An Analysis of the Beer Distribution Laws Regulating North Carolina's Craft Breweries*, 88 N.C. L. REV. 2198, 2221 (2010).

¹⁰ See Irwin R. Powers, *Legal Aspects of the Federal Alcohol Administration Act and Practices Thereunder*, 7 J. MARSHALL L. Q. 78, 79 (1941-2).

years of its passage, Prohibition ended.

The Twenty-First Amendment to the U.S. Constitution not only repealed the Eighteenth Amendment but it also broadly empowered the states to enact their own laws.¹¹ Section two to the 21st Amendment reads: “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.”¹²

Accordingly, with the table set for state regulation, the several states endeavored to enact laws to address the evils of the alcoholic beverage industry that persisted immediately prior to the implementation of Prohibition.¹³ One such evil, which was heavily associated with the saloon culture, is referred to as “tied house,” and is generally understood to exist where ownership or a financial relationship between a supplier and a retail establishment result in the latter’s favorable dealing (often exclusively) in the products of the former.¹⁴ The seminal regulatory treatise, *Toward Liquor Control*, associated the following negatives with tied house relationships prior to Prohibition:

‘Tied houses,’ that is establishments under contract to sell exclusively the product of one manufacturer, were, in many cases, responsible for the bad name of the saloon. The ‘tied house’ system had all the vices of absentee ownership. The manufacturer knew nothing and cared nothing about the community. All he wanted was increased sales.¹⁵

With these issues in mind, federal and state laws were enacted to broadly prohibit overlapping ownership and financial interests

¹¹ U.S. CONST. amend. XXI.

¹² *Id.* § 2.

¹³ *See* Powers, *supra* note 9.

¹⁴ *See* Fogarty, *supra* note 8, at 564-65.

¹⁵ Raymond Fosdick & Albert Scott, *TOWARD LIQUOR CONTROL* 29 (1933).

between suppliers and retailers.¹⁶ Structurally, this objective was pursued by the states through implementation of the so-called “three-tier system.”¹⁷ In the three-tier system, the opportunity to vertically integrate a beer business is foreclosed by requiring legal and financial separation between three different aspects of the alcohol beverage product cycle: the manufacture and production of the product – the supplier tier; the wholesale purchase and distribution of the product – the wholesaler tier; and the retail sale of the product to consumers – the retailer tier.¹⁸ Statutorily, this is accomplished by requiring a separate permit and license to operate on each tier; and, it is through the state’s application and vetting process that an applicant’s pre-existing ownership interest in the various tiers is disclosed.¹⁹ Beyond overlapping ownership restrictions, the tied house laws also seek to prohibit the provision of any money or other thing of value (by either the supplier tier or the wholesaler tier to the retailer tier) as a means to induce a favorable if not exclusionary relationship between the retailer and the industry tier member offering such inducement.²⁰

It should be noted that while a strict separation requirement between the supplier tier or wholesaler tier, on the one hand, and the retailer tier, on the other, is virtually unanimous among the states, the states do not uniformly prohibit overlapping interests between the

¹⁶ For example, under Texas law, “‘tied house’ means any overlapping ownership or other prohibited relationship between those engaged in the alcoholic beverage industry at different levels, that is, between a manufacturer and a wholesaler or retailer, or between a wholesaler and a retailer, as the words ‘wholesaler,’ ‘retailer,’ and ‘manufacturer’ are ordinarily used and understood[.]” TEX. ALCO. BEV. CODE. ANN. § 102.01(a) (Vernon 2015).

¹⁷ Texas describes the purpose of its three-tier system as follows: “the public policy of this state and ...purpose of this section [is] to maintain and enforce the three-tier system (strict separation between the manufacturing, wholesaling, and retailing levels of the industry) and thereby to prevent the creation or maintenance of a ‘tied house’ as described and prohibited in Section 102.01 of this code.” *Id.* at § 6.03(i).

¹⁸ Barry Kurtz and Bryan H. Clements, *Beer Distribution Law as Compared to Traditional Franchise Law*, 333 FRANCHISE L. J. 397, 400 (2014).

¹⁹ See e.g., OR. REV. STAT. § 471.757 (2015).

²⁰ See De Ganahl, *supra* note 6, at 666-68. Prior to Prohibition, it was common practice for breweries to influence independent saloonkeepers towards their products through the provision of fixtures and equipment. See Fogarty, *supra* note 8, at 549.

supplier tier and the wholesaler tier.²¹ This explains why a beer company like Anheuser-Busch, Inc. is able to operate simultaneously as one of the largest beer suppliers *and* wholesalers in the U.S.²² But, this is not to suggest the inter-tier relationships between suppliers and wholesalers are not regulated. In fact, in the context of beer distribution, a vast majority of the states have enacted franchise laws to protect beer wholesalers from overreaching by breweries.²³ These beer franchise laws came of age in the 1970s in response to the rapidly consolidating beer industry and perceived inequalities in bargaining power between small, family-owned wholesalers and increasingly powerful breweries with expansive market share.²⁴ Unlike tied house laws, with their Prohibition-Era temperance rationale, beer franchise laws are fashioned after commercial franchise protections for more generic commodities. These laws are embedded with notions of balanced bargaining power and protection of the wholesaler's expenditures and efforts – as a putative franchisee – in making a market in a brewery's products. Beer franchise laws impose requirements of good faith and fair dealing by the brewery, and generally afford the wholesaler some combination of protections relating to territory, termination, change of control, and dispute resolution.²⁵

II. BURGEONING LOCALISM

With the passage of time and the evolution of consumer

²¹ See Justin M. Welch, *The Inevitability of the Brewpub: Legal Avenues for Expanding Distribution Capabilities*, 16 REV. LITIG. 173, 185-86 (1997).

²² *Ensuring Competition Remains on Tap: The AB InBev/SABMiller merger and the State of Competition in the Beer Industry*, U.S. SENATE COMM. ON THE JUDICIARY, (Dec. 8, 2015), <http://www.judiciary.senate.gov/meetings/ensuring-competition-remains-on-tap-the-ab-inbev/sabmiller-merger-and-the-state-of-competition-in-the-beer-industry> (written testimony of Bob Pease, Chief Executive Officer of the Brewer's Association).

²³ See Kurtz and Clements, *supra* note 17, at 401.

²⁴ See Tamayo, *supra* note 8, at 2213. In addition to consolidation activities – i.e. the merger of Miller Brewing Co. and cigarette giant Phillip Morris, Inc. – the 1970s were a period of seismic change in beer marketing, as larger breweries directed considerable resources towards advertising, branding, and overall mass commoditization of beer. See Fogarty, *supra* note 8, at 545.

²⁵ See Kurtz and Clements, *supra* note 17, at 402.

preferences, tied house laws created tension between business design and economic development, and the increasingly anachronistic rationale for prohibiting overlapping supplier and retailer interests.²⁶ Arguably, the tied house laws entrenched large faceless brewing companies and their national distributors by eliminating avenues for competition from more localized industry.²⁷ Accordingly, certain exceptions to tied house laws were made to incubate local brewing activities.²⁸ In the 1980s, California and the Northwestern states enacted laws allowing so-called microbreweries to both manufacture beer, and to sell it for consumption on their premises in direct contravention to the historical tied house laws.²⁹ In the intervening years, and often under the rubric of developing instate brewing activities, the vast majority of the states enacted exceptions to their traditional tied house prohibitions to allow certain breweries (many of which fit within the modern concept of craft brewer or microbrewer) to own and operate their own retail establishments.³⁰ The definition of

²⁶ See Welch, *supra* note 20, at 175-77; cf. T.A.C. Hargrove II, *Stone Didn't Come, But We Got the Bill: An Analysis of South Carolina Laws Affecting Craft Brewers*, 9 CHARLESTON L. REV. 335, 339 (2015) (noting that "local brewers are still bound by antiquated state laws related to the distribution of their beer."); Charlie Papazian, *Imagine a Country Without Brewpubs*, NEW BREWER, 7 (May/June 2015) ("Out-of-date regulations prohibit craft brewers from changing distributors, prohibit them from selling in certain size containers, prohibit tap rooms or brewery sales, prohibit self-distribution, and even limit the size of a small brewery.")

²⁷ See Fogarty, *supra* note 8, at 575.

²⁸ See Thomas H. Walters, *Michigan's New Brewpub License: Regulation of Zymurgy for the Twenty-First Century*, 71 U. DET. MERCY L. REV. 621, 623 (1994).

²⁹ See *id.* at 659.

³⁰ See 161 CONG. REC. S775-6 (daily ed. Feb. 4, 2015). In considering on-premises consumption privileges for micro and/or craft brewers, it is important to distinguish a brewery's retail operation (beer garden, tap room, full-fledged restaurant) from a "brewpub" licensee. Many states classify a brewpub as an on-premises retail licensee, i.e., retail establishment, that serves food and beverages (including alcoholic) for on-premises consumption (i.e., a restaurant/tavern with brewing facilities located within the establishment). Under Texas law, for example, the holder of a brewpub license is a "retailer" for the purpose of Texas tied house laws. See TEX. ALCO. BEV. CODE. ANN. § 74.01(d) (Vernon 2015). The New York State Liquor Authority has concluded, "Notwithstanding the ability to produce a limited amount of beer, a brewpub, as defined in [New York], is generally considered to be a retail business." See *Advisory #2015-16*, STATE OF N.Y. LIQUOR AUTH., 4, (Oct. 15, 2015), <https://www.sla.ny.gov/bulletins-divisional-orders-and-advisories>. As a retailer, the brewpub will likely be prohibited from holding an ownership or

microbrewery varies among the states; but, generally speaking, the production privileges available to the holder of a microbrewery license are capped at a certain gallonage or beer barrel amount per year.³¹ The coupling of limitations to the microbrewer's privileges represents a legislative compromise to the tied house loyalists, including the powerful beer wholesaler lobby.³² As discussed more fully below,

financial interest in a brewery. *See, e.g.*, OR. REV. STAT. § 471.200(3) (2013) (prohibiting brewery-public house licensee from owning any interest in manufacturer or wholesaler).

³¹ For example, to hold a microbrewery license in Washington State, a brewery must produce less than 60,000 gallons per year. WASH. REV. CODE. § 66.24.244(1) (2014); *see also* Hargrove II, *supra* note 25, at 355-56. The use of the terms microbrewer and craft brewer can be confusing. These terms are often used interchangeably although the former tends to derive from or be associated with legal definitions under state law and the latter more typically relates to a style of beer production popularized in the 1980s. *See* Chen, *supra* note 6, at 539. The Brewers Association defines "craft brewer" to be "small, independent and traditional." *Craft Brewer Defined*, BREWERS ASSOCIATION, <https://www.brewersassociation.org/statistics/craft-brewer-defined/> (last visited Apr. 9, 2016). However, by defining the term "small" to be a brewer with annual production of less than six million barrels per year, the Brewers Association's definition subsumes the majority of the breweries in the U.S., which, in turn, is not particularly useful as an analytical device. Nevertheless, for the purposes of this article, the Brewers Association will suffice provided that, in reality, the bulk of the breweries that benefit from progressive microbrewery laws are substantially smaller than the Brewers Association definition allows. The terms "independent" and "traditional" (in terms of brewing processes and ingredients) do typify the modern craft brewer. *See id.*

³² *See* Welch, *supra* note 20, at 187. The following excerpt from a California Assembly Committee Hearing regarding the rationale for amending California law to allow for breweries producing more than 60,000 barrels annually to continue to hold their interests in existing on-sale retail stores, is illustrative of the ongoing turf war between craft brewers and beer wholesalers: "The bill also incorporates a change in the Act due to a compromise between the California Craft Brewer Association (CCBA) and California Beer and Beverage Distributors (CBBB), the purpose of which is to maintain on-sale retail privileges for beer manufacturers, as they grow larger to avoid the forced divestiture of an existing licensed business. Currently, if a Type 23 licensed beer manufacturer grows their production beyond a 60,000-barrel threshold, and thus becomes a Type 01 licensed beer manufacturer, they concurrently lose their existing privilege to hold six (6) on-sale retail licenses under B&P Code Section 25503.28. In this instance, the beer manufacturer is forced to divest themselves of their existing on-sale retail stores. This loss of privilege creates unnecessary hardships on businesses as they are forced to make a determination of whether to either grow their volume production past the 60,000 threshold or maintain their on-sale retail privileges afforded to them as a Type 23 under B&P Code Section 25503.28." CAL. S. RULES COMM., OFFICE OF SENATE FLOOR ANALYSES FOR SB-

these limitations typically include a production cap, together with other limitations such as the number of retail outlets permitted and, in the case of a brew pub, the right to distribute and the right to sell beer off of the premises.

III. EXAMPLES OF CRAFT-FRIENDLY LAWS

In order to highlight some of the privileges now available to craft breweries throughout the United States, the following is a non-exhaustive summary of a number of tied house exceptions. These exceptions permit a brewer to operate some version of a retail establishment or self-distribute in the states of California, Colorado, Florida, Illinois, Oregon, South Carolina, Texas and Washington. To fully grasp the shift of the tied house laws in relation to the growth of the craft beer industry, it is important to note that some of the states have completely removed production cap limitations as a qualification for a brewer to have additional privileges that were formerly prohibited by tied house laws. California is one such state.

A. California

The holder of a Beer Manufacturer's license (type 01), which allows for unlimited production, may sell beer for on- or off-premises consumption at up to six branch office locations (two of which may be bona fide public eating places where beer and wine may be sold).³³ In addition, California law was recently amended to allow the holder of a Beer Manufacturer's license (type 01) to hold an interest in up to six on-sale licenses (not including the retail sales privileges on the manufacturer's licensed premises or on premises owned by the manufacturer that are contiguous to the licensed premises).³⁴ Prior to this amendment, this privilege relating to brewer ownership of on-sale

796 (Cal. 2015), <http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?billid=201520160SB796#> (last visited Apr. 11, 2016).

³³ CAL. BUS. & PROF. CODE § 23389(c)(1) (West 2016).

³⁴ *Id.* at § 25503.28(a).

licenses was limited to Small Beer Manufacturers (type 23).³⁵ “These six retail locations include any combination of both retail licenses and duplicate licenses for branch offices of beer manufacturers issued under Section 23389(c).”³⁶

The holder of a Beer Manufacturer’s license (type 01) may distribute beer of its own production.³⁷

B. Colorado

On-sale consumption privileges are not generally available to licensed Colorado breweries except for those operating pursuant to a brew pub license and manufacturing no more than 1,860,000 barrels of beer annually.³⁸

The holder of a manufacturer’s license in Colorado may distribute beer of its own production, provided that it applies for and obtains a wholesaler’s license and inventories its products for tax purposes at the premises of a licensed wholesaler.³⁹

C. Florida

A licensed manufacturer of malt beverages may be issued a vendor’s license “for the sale of alcoholic beverages on property consisting of a single complex, which property shall include a brewery.”⁴⁰ In total, a licensed manufacturer may hold up to eight vendor’s licenses.⁴¹ Vendor privileges range from beer only, to beer, wine, and liquor. However, vendor licenses involving liquor may require the purchase of a quota license, or the operation of a restaurant

³⁵ A summary of the rationale for this amendment is discussed above, *supra* note 31.

³⁶ *Industry Advisory AB796: Ownership of Licensed Beer Manufacture by Holder of On-Sale Licenses*, CAL. DEPT. OF ALCOHOLIC BEVERAGE CONTROL, https://www.abc.ca.gov/trade/INDUSTRY%20ADVISORY_AB796.pdf.

³⁷ CAL. BUS. & PROF. CODE § 23357(a)(1) (1953).

³⁸ COLO. REV. STAT. §§ 12-47-103(4), 12-47-415(1)(a) (2016).

³⁹ *Id.* § 12-47-402(1)(b).

⁴⁰ FLA. STAT. ANN. § 561.221(2)(a) (West 2016).

⁴¹ *Id.* at § 561.221(2)(c).

of a certain size and service requirements.⁴²

A licensed manufacturer of malt beverages may not distribute beer of its own production, and – except for a limited partnership relationship of not more than eight years in duration – a manufacturer may not have any interest in any licensed beer distributor in Florida.⁴³

D. Illinois

The holder of a class 2 brewer license, whose license authorizes the production of up to 120,000 barrels of beer per calendar year by the holder and any affiliate of the holder, may simultaneously hold up to three brew pub licenses in Illinois, provided that the total amount of beer produced at all licensed locations does not exceed 120,000 barrels of beer per year.⁴⁴ The holder of a class 3 brewer license, which authorizes beer production without a volume cap, may not hold a brew pub license. However, the holder of a class 3 brewer license is permitted to make limited retail sales from the licensed brewery premises for on or –off-premises consumption.⁴⁵

In Illinois, only the holder of a class 1 brewer license, which caps the holder’s production at 30,000 barrels per year, may acquire – by application to the Liquor Control Commission – self-distribution privileges for self-distribution to retailers of up to 7,500 barrels per year.⁴⁶

E. New York

The holder of a brewer’s license may “operate a restaurant, hotel, catering establishment, or other food and drinking establishment, in or adjacent to the licensed premises and sell at such place, at retail for consumption on the premises, beer manufactured by the licensee, and

⁴² *Id.* at § 561.20.

⁴³ *Id.* at § 563.022(14)(b).

⁴⁴ 235 ILL. COMP. STAT. ANN. 5/5-1(a), (n) (West 2017).

⁴⁵ *Id.* at 5/6-4(e).

⁴⁶ *Id.* at 5/5-1(a), /3-12(a)(18).

any New York state labeled beer.”⁴⁷ In addition to beer sales, the holder of a brewery license may acquire an on-premises retail license to sell wine or liquor.

The holder of a brewer’s license may sell products of its own production at wholesale to retailers, provided the holder also acquires a wholesaler’s license.⁴⁸

F. Oregon

The holder of a brewery license may sell beer brewed on the premises for consumption on or off the licensed premises.⁴⁹ The holder of a brewery license is also eligible to acquire and hold a full on-premises sales license.⁵⁰

In Oregon, the holder of a brewery license may also acquire a wholesale malt beverage and wine license, and that license allows the holder to distribute malt beverages at retail.⁵¹

G. South Carolina

In South Carolina, both the brewery license and brewpub license allow for the retail sale of beer, produced on the premises, for on- and off-premises consumption.⁵² In addition, despite fairly explicit tied house restrictions to the contrary, South Carolina expressly allows the holder of a brewery license to apply for, and obtain, a retail on-premises consumption license. This license permits the sale of beer and wine that has been purchased from a wholesaler through the three-tier

⁴⁷ N.Y. ALCO. BEV. CONT. L. § 51(4) (Consol. 2017).

⁴⁸ *Id.* at § 51(2).

⁴⁹ OR. REV. STAT. §471.221(c)) (2017) A brewery licensee may also sell malt beverages, wine and cider – regardless of whether produced on premises – for consumption on premises and may sell up to two gallons of such products per consumer for consumption off premises. *Id.*

⁵⁰ *Id.* at § 471.221(f).

⁵¹ *Id.* at § 471.235. Oregon House Bill 4053, which expanded the privileges of brewery licensees, explicitly states that a brewery licensee may hold a wholesale malt beverage and wine license. H.B. 4053, 78th Leg., Reg. Sess. (Or. 2016).

⁵² S.C. CODE ANN. §§ 61-4-1515, -1740.

distribution chain.⁵³

South Carolina tied house laws prohibit a brewer from either wholesaling its beer directly to retail or having an ownership or financial interest in a wholesaler.⁵⁴

H. Texas

Both the holder of a Brewer's Permit (B) and the holder of a Brewpub License (BP) may sell beer produced by the holder on the premises.⁵⁵ Notably, the holder of a Brewpub License must also obtain either a wine and beer retailer's permit or a mixed beverage permit for limited (beer and wine) or full on-premises consumption privileges, respectively.⁵⁶ However, the holder of a Brewer's Permit will not have on-sale privileges if its on-premises production exceeds 225,000 barrels. In addition, "[t]he total combined sales of ale to ultimate consumers under this section, together with the sales of beer to ultimate consumers by the holder of a manufacturer's license [...] at the same premises, may not exceed 5,000 barrels annually."⁵⁷

The holder of a Brewer's Permit (B) may apply for and receive a Brewer's Self-Distribution License (DB).⁵⁸ Provided that the holder of the Brewer's Permit does not exceed 125,000 barrels in annual production, such holder may self-distribute up to 40,000 barrels of its

⁵³ *Id.* at § 61-4-1515(B). If a brewery licensee elects to sell its beer on premises (and otherwise obtain an on-premises consumption license), its premises must comply with the rules and regulations of the Department of Health and Environmental Control, which govern eating and drinking establishments (the "DHEC Rules"). *Id.* If the premises do not comply with the DHEC Rules then the brewery licensee's on-premises sales and tastings privileges are subject to certain volume per person (48 ounces) and brewery tour requirements. *Id.* at §61-4-1515(A). No matter how the on-premises consumption privileges are structured, a brewery licensee's off-premises sales are capped at 288 ounces per person (a 24 pack) of its own beer and must only be sold in connection with a brewery tour. *Id.* at §61-4-1515(E).

⁵⁴ *Id.* at § 61-4-940(A), (D).

⁵⁵ TEX. ALCO. BEV. CODE. ANN. §§ 12.052(a), 74.01(a)(2) (Vernon 2016).

⁵⁶ *Id.* at § 74.01(c). The holder of a Brewpub License may not be affiliated with a member of the industry tier and is considered a retailer under Texas law. *Id.* at § 74.01(d).

⁵⁷ *Id.* at § 12.052.

⁵⁸ *Id.* at §12A.01.

own beer per year.⁵⁹

I. Washington

A domestic brewer licensee in Washington is expressly authorized to act as retailer of beer of its own production and “may hold up to two retail licenses to operate an on- or off-premise [off-premises] tavern, beer and/or wine restaurant, or spirits, beer, and wine restaurant. This retail license is separate from the brewery license.”⁶⁰ In addition,

[a]ny domestic brewery licensed under this section may also sell beer produced by another domestic brewery or microbrewery for on and off-premises consumption from its premises, as long as the other breweries’ brands do not exceed twenty-five percent of the domestic brewery’s on-tap offering of its own brands.⁶¹

The holder of a domestic brewer’s license may operate as a wholesaler of beer of its own production.⁶²

The success of craft beer is inextricably tied to evolving tied house laws, while its popularity among consumers has paralleled a broader trend towards locally sourced products and an emerging demand and appreciation for higher quality beer.⁶³ Moreover, as

⁵⁹ *Id.* at §12A.02.

⁶⁰ WASH. REV. CODE § 66.24.240(2), (4) (2014). Washington also has a microbrewery license for breweries whose production is less than 60,000 barrels per year. *Id.* at § 66.24.244.

⁶¹ *Id.* at § 66.24.240(3).

⁶² *Id.* at § 66.24.240(2).

⁶³ The ‘locavore’ movement – the practice of consuming locally sourced products – is very much at the core, and a widely-appealing feature, of the craft beer movement. Tom Actitelli, *THE AUDACITY OF HOPS: THE HISTORY OF AMERICA’S CRAFT BEER REVOLUTION* 103 (2013); *see also* Chen, *supra* note 6, at 540. And, with the growth of beer localism, has come the foreign divestment of America’s most iconic and largest beer brands. *See* Brad Tuttle, *How to Support America and Drink Beer in the Same Gulp*, TIME MAG. (Aug. 2, 2012), <http://business.time.com/2012/08/02/how-to-support-america-and-drink-beer-in-the-same-gulp/>. The Brewers Association recounts the following regarding the

business and political leaders continue to realize the economic benefit to more permissive brewery legislation, the future is bright for continued growth in the craft beer segment. The integrity of traditional tied house laws is less certain but these laws do continue to survive.⁶⁴

evolving tasting preferences in beer: “The 1980s marked the decade of the microbrewing pioneers. In a time when industry experts flat out refused to recognize their existence as anything serious, the pioneering companies emerged with their passion and a vision, serving their local communities a taste of full-flavored beer and old world European traditions; all with what was to become a uniquely American character.” *History of Craft Brewing*, BREWER’S ASS’N, <https://www.brewersassociation.org/brewers-association/history/history-of-craft-brewing/> (last visited Apr. 19, 2018).

⁶⁴ The recreational marijuana laws enacted thus far are largely patterned upon alcohol beverage laws but have not uniformly embraced separation of tiers. *Compare* WASH. REV. CODE § 69.50.328 (2014) (prohibiting overlapping interest between producer, processor and retailer tiers) *with* OR. REV. STAT. § 475B.068 (2015) (“The same person may hold one or more production licenses, one or more processor licenses, one or more wholesale licenses, and one or more retail licenses.”) In addition, in a recent decision of the Ninth Circuit Court of Appeals, certain aspects of California’s tied house laws were highly scrutinized. In *Retail Digital Network v. Prieto*, 861 F.3d 839 (9th Cir. 2017)(en banc), the Ninth Circuit considered a First Amendment challenge to California’s long-standing tied-house prohibition against industry tier members providing inducements to retailers in exchange for retailer advertising of their products – and, more specifically, a restriction against indirect or direct payments by suppliers to retailers for placement of supplier advertisements within retail establishments. Although the Ninth Circuit concluded that the law failed to directly and materially advance the State’s interest in promoting temperance the court ultimately upheld the constitutionality of the law on the rationale that it “serves the important and narrowly tailored function of preventing manufacturers and wholesalers from exerting undue and undetectable influence over retailers.” *Id.* at 850.

