

Getting a Handle on Growler Laws

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INTRODUCTION

The growler has served its humble purpose as a vessel for consumers to transport draft beer to their homes since the 1800s. Growlers are both economical and environmentally friendly. Growlers provide benefits not only for consumers, but also for breweries, especially for smaller craft breweries. Despite the utility of growlers, the current law in the United States regarding growler use remains a jumble of conflicting and often confusing regulations varying widely by state. This Note will argue that both breweries and consumers would be better served by more consistent and even-handed legislation that encourages growler distribution.

In recent years, growler law has been subject to intense lobbying efforts. This regulatory battle has effectively split the market into two camps. On one side are consumers, retailers, and smaller craft breweries that favor a liberation of growler regulation. Opposite them are the two major brewing conglomerates, Anheuser-Busch InBev and MillerCoors, along with large regional beer distributors who stand to benefit most under a restrictive regulatory environment for growlers. Everything from the legality of growler use, to the parties that can distribute growlers, to the size of growlers is currently subject to debate.

The present growler conflict can also properly be viewed in light of two broader historical movements: (1) the three-tier alcohol regulatory system, which developed shortly after the ratification of the Twenty-first Amendment to the United States Constitution; and (2) the present explosive growth of small craft breweries over the last fifteen years. Over time, the three-tier regulatory structure has led to a broad proliferation of laws that hindered consumer access to smaller craft brewers' beer in favor of protecting the market share of larger breweries and distributors. However, given the growing popularity of craft beer with consumers and the efforts of many determined small brewers, the pendulum has started to swing the other way.

This Note will begin with a brief general history of growlers in the United States and the benefits they provide to consumers, retailers, and small craft brewers. Part II will provide an overview of national alcohol distribution regulation and how the present growler law exists within this larger framework. To complete the necessary background information, Part III will provide context to the competitive landscape by way of an examination of the craft beer industry's explosive growth.

The substantive portion of the Note will follow in Part IV, beginning with an outline of the various key types of growler restrictions such as the size of the vessel, the type of license that is required, and the regulatory practice of "locking" growlers to specific establishments. After this discussion, there will be an analysis and comparison of recently

passed and pending key legislation in major beer producing states. Part V will review the regulatory environment for growlers within Washington State. In this section, I will argue that states should adopt laws similar to those in Washington, which by virtue of having some of the least restrictive regulations on growler use, has built a model that is beneficial to the consumer while also encouraging business growth within the state. Part VI will then focus on more controversial legislation such as Florida's S.B. 1714 and the impact of grassroots organization within the craft beer community to counter such measures. Tied to this discussion will be a brief examination of whether the efforts of larger brewers and distributors in sponsoring bills like S.B. 1714, when viewed under the Sherman Antitrust Act, provide for the possibility of finding collusive, coordinated action.

Finally, the Note concludes with proposed recommendations for the future of growler law by reiterating changes that align closer to Washington State's regulatory model.

I. GROWLER DEFINITION, HISTORY, AND BENEFITS

A growler is a container, typically sixty-four ounces in capacity that is usually made of glass.¹ It is generally used by the consumer to transport beer from the draft line of a brewery or retail store to an off-premises location for later consumption.² Growlers gained popularity in the late 1800s when most beer was consumed on draft.³ During those times, “[f]amilies would routinely send someone, usually a woman or child, to the local saloon to bring home beer for the evening meal.”⁴ The original growlers were usually a galvanized steel pail with a lid.⁵ The growler's unique name is believed to have come from the rumbling sound of the carbonation escaping as it rattled the lid.⁶

Following Prohibition, growler use declined due to the closing of both saloons and many smaller breweries.⁷ By the 1960s, with consumers' increased preferences for canned and bottled beer, coupled with a

1. Metal growlers are gaining in popularity due to their resistance to breakage and insulation properties. See, e.g., Nathan Berrong, *Berrong on Beer - Building a Better Drinking Vessel*, EATOCRACY (Apr. 17, 2013, 11:30 AM), <http://eatocracy.cnn.com/2013/04/17/berrong-on-beer-building-a-better-drinking-vessel/>.

2. Robert Simonson, *The New Old Way to Tote Your Beer*, N.Y. TIMES, Jan. 26, 2010, http://www.nytimes.com/2010/01/27/dining/27growl.html?_r=0.

3. Garret Oliver, *Growler*, in THE OXFORD COMPANION TO BEER 409, 409 (Garret Oliver ed., 2011).

4. *Id.*

5. Simonson, *supra* note 2.

6. *Id.*

7. *Id.*

sharp decline in the number of small breweries, growlers disappeared almost entirely.⁸

Given the recent increase in the craft beer movement's popularity, growlers have made a comeback within the last decade.⁹ Growlers are now "big business for many small breweries, and some beer shops do a brisk trade in them."¹⁰ This popularity can be attributed to the variety of benefits growlers offer to consumers, producers, and retailers of craft beer.¹¹

For consumers, growlers provide the freedom to consume beer, which might not be available anywhere else other than the brewery, in the comfort of their own homes.¹² Just as one might have brought wine to a dinner party in the past, it has become more common for guests to bring a growler as a gift to the host to be shared during the evening.¹³ Also, growlers provide the chance for customers to acquire, for later consumption, unique small batch or limited run beers.¹⁴ Finally, as growlers are by design reusable containers, they are more environmentally friendly than either cans or bottles.¹⁵

Growler benefits for breweries are twofold. The first advantage is that growler use naturally expands the revenue base because customers who might not otherwise have the time to spend consuming beer at a brewery or bar can enjoy the beer at their convenience at home.¹⁶ In addition, growler distribution lowers the market entry cost for smaller breweries because the associated cost of setting up bottling or canning lines is prohibitively expensive.¹⁷ The initial investment to open a bottling or canning line is between \$200,000 and \$500,000.¹⁸ This cost estimate also does not take into account the additional labor required to operate those lines once they are up and running.¹⁹ Even more, if the

8. *History of the Growler*, GOOSE CREEK GROWLERS CO., <http://goosecreekgrowlers.com/pages/history-of-the-growler> (last visited Mar. 22, 2016).

9. Simonson, *supra* note 2.

10. Oliver, *supra* note 3, at 410.

11. *See id.*

12. Simonson, *supra* note 2.

13. Ryan Randazzo, *Craft Brewers Cheer Proposed Changes to Growler Laws*, ARIZ. REPUBLIC (Mar. 18, 2014, 5:06 PM), <http://www.azcentral.com/story/money/business/2014/03/18/craft-brewers-cheer-proposed-changes-to-growler-laws/6583525/>.

14. Oliver, *supra* note 3, at 410.

15. *Eco-Friendly*, GLENWOOD CANYON BREWPUB, <http://glenwoodcanyonbrewpub.com/eco-friendly/> (last visited Mar. 22, 2016).

16. Simonson, *supra* note 2.

17. Mary Catherine O'Connor, *Cannery Tow? A Mobile Canning System for Craft Beer*, SMART PLANET (Jan. 17, 2013, 7:00 PM), <http://www.smartplanet.com/blog/the-report/cannery-tow-a-mobile-canning-system-for-craft-beer/>.

18. *Id.*

19. *Id.*

brewery wants to place its bottles or cans on a retail shelf, further effort is required in setting up a relationship and sharing profits with a distributor.²⁰ Furthermore, any label placed on the bottles or cans needs to meet the strict requirements of the Alcohol and Tobacco Tax and Trade Bureau.²¹ Meeting these requirements is yet another cost for a fledgling brewery to bear. Thus, the interim revenue that growler sales provide to a young, expanding brewery can often serve as a critical financing bridge until it reaches a more stable capital position.

Finally, the additional outlet for selling smaller batches of beer encourages creative experimentation at breweries.²² A new recipe concept that would be a risky investment if bottling was required is more readily undertaken when a brewery can sell for off-site consumption using growlers.

II. OVERVIEW OF THE THREE-TIER ALCOHOL DISTRIBUTION SYSTEM

A. History and Recent Case Law

Since growlers are used to transport beer, an alcoholic product, growler law is inexorably tied to the three-tier distribution system that dominates alcohol regulation within the United States. Under this system, there are “three vertical layers of distribution (manufacturer, distributor, and vendor) and [the regulatory scheme] mandates that no layer in the vertical hierarchy act in the capacity of another.”²³ The manufacturer (brewer) sells beer to the distributor, who in turn sells the beer to the vendor (retailer), who ultimately provides the product to the consumer.²⁴

The three-tier system dates back to the ratification of the Twenty-first Amendment to the United States Constitution.²⁵ The Amendment repealed the Eighteenth Amendment, effectively ending Prohibition,²⁶ while at the same time granting states the right to regulate their own al-

20. The laws vary slightly by state, but are governed by the three-tier alcohol distribution system. See *infra* Part IV for a discussion of this arrangement.

21. See *Labeling*, ALCOHOL & TOBACCO TAX TRADE BUREAU, <http://www.ttb.gov/beer/beer-labeling.shtml> (last visited Mar. 28, 2016).

22. Alison Saclolo, *Draft Beer to Go: Growlers Are a Growing Trend in Southern Nevada*, VEGAS INC. (July 18, 2013, 2:00 AM), <http://www.vegasinc.com/business/2013/jul/18/draft-beer-go-growlers-are-growing-trend-southern-/>.

23. *Bainbridge v. Turner*, 311 F.3d 1104, 1106 (11th Cir. 2002).

24. *Id.*

25. U.S. CONST. amend. XXI.

26. *Id.* § 1.

cohol distribution systems.²⁷ Seeking to break up the power held by so-called tied houses, states adopted the three-tier model.²⁸

The Supreme Court has since been unequivocal in upholding the states' ability to implement and maintain the three-tier system.²⁹ States' power to control alcoholic product distribution within their borders is effectively absolute.³⁰ For example, in *North Dakota v. United States*, the Court held valid North Dakota's "power [to control distribution] under the Twenty-first Amendment. In the interest of promoting temperance, ensuring orderly market conditions, and raising revenue, the State has established a comprehensive system for the distribution of liquor within its borders. That system is unquestionably legitimate."³¹ Further, the Court has gone so far as to state that "[t]he Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system."³²

The three-tier system is nearly universal in the United States. The only partial exception is the state of Washington.³³ Following a voter initiative in 2012, Washington created the opportunity for manufacturers to sell directly to vendors; however, the law still allowed for distributors' continued existence.³⁴ Since the general adoption of the three-tier regulatory scheme, there have been numerous challenges from both producers and consumers, with the most recent challenge coming in the Supreme Court case of *Granholm v. Heald*.³⁵

27. *Id.* § 2.

28. Tied houses were essentially saloons that were owned by a single brewery and where the beer was bought from a single brewery. For more information about tied houses, see Andrew Tamayo, Note, *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, 2210–11 (2010) ("[T]he tied-house was particularly responsible for the bad reputation of saloons due to the problem of absentee ownership. They argued that because the brewer was not present in the saloon's community, he was insulated from its negative effects while his profit motive—maximized by increasing volume sold—remained. Thus, [the report] concluded that '[a] license law should endeavor to prohibit all [financial] relations between the manufacturer and the retailer, difficult though this may be.' The states took this recommendation to another level by interposing a wholesaler between the supplier and retailer, creating what is known today as the three-tier system.").

29. See, e.g., *North Dakota v. United States*, 495 U.S. 423 (1990); *Carter v. Virginia*, 321 U.S. 131 (1944).

30. See, e.g., *North Dakota*, 495 U.S. 423.

31. *Id.* at 432.

32. *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). "Liquor" for the purposes of this case included all alcoholic products such as beer and wine. *Id.* at 99.

33. See *I-1183 Transition*, WASH. ST. LIQUOR & CANNABIS BOARD, <http://liq.wa.gov/transition/overview> (last visited Mar. 22, 2016).

34. *Id.*

35. *Granholm v. Heald*, 544 U.S. 460, 523–24 (2005).

Although *Granholm* involved the interstate shipment of wines directly from wineries to consumers, the Court yet again left the overall structure of the three-tier system largely intact.³⁶ The case involved two statutes, one in New York and one in Michigan, which allowed wineries to effectively bypass the three-tier system by serving as both manufacturers and vendors.³⁷ The issue was that only in-state wineries could make direct mail sales to customers in the state.³⁸ Out-of-state wineries were restricted from making direct mail shipments.³⁹ Due to this disparate treatment favoring the in-state producers, the Court held that “[b]oth States’ laws discriminate[d] against interstate commerce in violation of the Commerce Clause.”⁴⁰ At the same time, the Court was careful to note that “[t]he decision to invalidate the instant direct-shipment laws also does not call into question their three-tier systems’ constitutionality.”⁴¹ The decision further cited the “unquestioned acceptance of the three-tier system of liquor regulation . . . and the contemporaneous practice of the States following the ratification of the Twenty-first Amendment confirm that the Amendment freed the States from negative Commerce Clause restraints on discriminatory regulation.”⁴²

B. Small Brewery Critiques of the System

While craft breweries and their patrons have many complaints with the three-tier system, the role of distributors is arguably near the top of the list. Much of the problem stems from the fact that distributors, by serving as a wedge between producers and retailers (and thereby ultimately consumers), are given an outsized amount of control. This outcome was partly by design when the three-tier systems were instituted. The distributor’s function was to prevent any single entity, on either the production or retail side, from controlling the supply chain.⁴³ Ironically, since the 1970s, the distributor’s power within the supply chain has increased enormously due to franchise laws that govern distributor operations in each state.⁴⁴ These laws essentially lock the brewer and the distributor into a contract that is very difficult to break.⁴⁵

36. *Id.*

37. *Id.*

38. *Id.*

39. *See id.*

40. *Id.* at 461.

41. *Id.* at 463.

42. *Id.* at 517 (Thomas, J., dissenting).

43. Danielle M. Teagarden, *Brewing Tension: The Constitutionality of Indiana’s Sunday Beer-Carryout Laws*, 47 IND. L. REV. 335, 346 (2014).

44. Steve Hindy, Op-Ed., *Free Craft Beer!*, N.Y. TIMES (Mar. 29, 2014), http://www.nytimes.com/2014/03/30/opinion/sunday/free-craft-beer.html?_r=0.

45. *Id.*

In a 2014 *New York Times* editorial, Steve Hindy, president of the successful Brooklyn Brewery, explained that franchise laws “not only prevent other companies from distributing a company’s beers, but also give the distributor virtual carte blanche to decide how the beer is sold and placed in stores and bars.”⁴⁶ Thus, craft breweries, particularly the smaller upstarts, are often operating at the whim of the distributor.⁴⁷

As a way to mitigate the distributor’s power, a majority of states in recent years have passed statutes that carve out exceptions within the three-tier system by allowing smaller breweries to self-distribute.⁴⁸ Under this system, breweries less than a certain size, measured in terms of beer production output in barrels,⁴⁹ are allowed to package and sell their products directly to retailers, thereby eliminating the distributor in the transaction.⁵⁰ For example, the relevant statute in Washington State provides that a “microbrewery licensed under this section may also act as a distributor and/or retailer for beer . . . of its own production.”⁵¹ Washington separately defines a microbrewer as one with an annual production of “less than sixty thousand barrels.”⁵²

While self-distribution is certainly a step in the right direction, it does not completely correct market access issues that small brewers face. First, the adoption of self-distribution laws has been far from universal.⁵³ Brewers in many states, particularly in the South, still lack the statutory ability to self-distribute.⁵⁴ Furthermore, even where self-distribution laws exist, the production caps vary widely by state.⁵⁵ This disparity creates even more confusion and opportunity for larger brewers to game the system.⁵⁶ Second, self-distribution laws do nothing to impact the cost faced by smaller brewers when bottling and packaging goods for standard retail

46. *Id.*

47. Darren Fischell, *Startup Craft Brew Distributor Touts Unprecedented Model in Taking on Big Beer*, BANGOR DAILY NEWS (Aug. 22, 2014, 8:39 AM), <http://bangordailynews.com/2014/08/22/business/startup-craft-brew-distributor-touts-unprecedented-model-in-taking-on-big-beer/>.

48. See *Self-Distribution Laws*, BREWERS ASS’N, <https://www.brewersassociation.org/government-affairs/laws/self-distribution-laws/> (last visited Mar. 22, 2016) [hereinafter *Distribution*, BREWERS ASS’N].

49. A barrel of beer equals thirty-one gallons or the equivalent of two standard kegs. See Garrett Oliver, *Keg*, in *THE OXFORD COMPANION TO BEER*, *supra* note 3, at 512.

50. Fischell, *supra* note 47.

51. WASH. REV. CODE § 66.24.244(2)(a) (2015).

52. WASH. REV. CODE § 66.24.244(1) (2015).

53. *Distribution*, BREWERS ASS’N, *supra* note 48.

54. *Id.*

55. See *Barrel Cap Laws*, BREWERS ASS’N, <https://www.brewersassociation.org/government-affairs/laws/barrel-cap-laws/> (last visited Mar. 22, 2016).

56. *Id.*

sale.⁵⁷ Third, even if a brewery is able to come up with the capital to package their beer and self-distribute, because of the outsized power wielded by large distributors in controlling retail shelf (and tap handle) space, getting visibility in a crowded marketplace remains an issue.⁵⁸ Finally, self-distribution laws effectively create de facto production ceilings, which have, not surprisingly, slowed the growth of smaller breweries.⁵⁹ In a story that likely holds true for brewers in many states, it was reported that several small breweries in Maine are stalling production just below the statutory 50,000 gallon (approximately 1,600 barrels) limit⁶⁰ in order to maintain their eligibility to self-distribute.⁶¹ Distributors often lobby against any attempts to raise the production caps, characterizing any increase as a threat to “erode the three-tier distribution system.”⁶²

It is also important to mention one other exception within the three-tier system: the concept of a brewpub. Brewpubs are breweries that have a license to produce beer and serve customers on-site at the brewery.⁶³ Brewpubs have existed in the United States since the late 1970s.⁶⁴ Some of the country’s most popular breweries, including Russian River—arguably the most awarded brewery⁶⁵—operate or began as brewpubs. Brewpub laws function similarly to the laws governing self-distribution. The laws require production caps, but a key difference is that brewpubs are typically only allowed to distribute beer on-site at the brewery, as opposed to self-distribution that allows products to be put on the shelves of local retailers.⁶⁶ Many states today have enacted laws, similar to those in Michigan, that allow for “a brewer that produces in total less than 60,000 barrels of beer per year . . . [to] sell the beer produced to consumers at the licensed brewery premises for consumption on or off the licensed brewery premises and to retailers.”⁶⁷

57. See *supra* Part I.

58. Tim Heffernan, *Last Call*, WASH. MONTHLY, Nov.–Dec. 2012, at 12, 17, available at http://www.washingtonmonthly.com/magazine/november_december_2012/features/last_call041131.php?page=all.

59. Fischell, *supra* note 47.

60. ME. REV. STAT. tit. 28-A, § 1355-A(3)(B) (2015).

61. Fischell, *supra* note 47.

62. Amy Haneline, *More Beer? Sun King, 3 Floyds Want State to Up Production Limit*, INDIANAPOLIS STAR (Jan. 26, 2015, 3:41 PM), <http://www.indystar.com/story/life/2015/01/26/beer-sun-king-floyds-want-state-production-limit/22362767/>.

63. Dick Cantwell, *Brewpub*, in THE OXFORD COMPANION TO BEER, *supra* note 3, at 171, 171.

64. *Id.* at 172–73.

65. Jill Redding, *Zymurgy’s Best Beer in America*, ZYMURGY, July–Aug. 2014, at 27.

66. See *Craft Beer Market Segments*, BREWERS ASS’N, <http://www.brewersassociation.org/statistics/market-segments/> (last visited Mar. 22, 2016) [hereinafter *Market*, BREWERS ASS’N]; *Distribution*, BREWERS ASS’N, *supra* note 48.

67. MICH. COMP. LAWS § 436.1109(3) (2014).

Growler law, therefore, often follows a combination of self-distribution law and brewpub law. Growlers, because they are usually sold on-site at the brewery and require little startup cost, typically become one of the primary methods by which breweries are able to directly get their products in the customer's hands. Even in less obvious cases under self-distribution, the availability of growlers at a third-party retail shop provides another access point for small breweries to maintain control over their products. Thus, the growler remains an important tool in the arsenal of upstart brewers operating within the three-tier system that weighs heavily in favor of distributors and large producers.

III. FALL AND RISE OF THE SMALL BREWER

Prohibition remains a profound influence on the brewing industry nearly eighty years following its repeal.⁶⁸ The decimation of small breweries during Prohibition is a direct cause of the present unsettled nature of growler law.⁶⁹ Prior to the passage of the Eighteenth Amendment in 1920 there were over 1,300 breweries in the United States.⁷⁰ The brewing industry that emerged following Prohibition's repeal was far different.⁷¹ Only 164 breweries remained in operation,⁷² and the number eventually reached its nadir in 1978 when only eighty-nine breweries were still in business.⁷³

There were two key developments that started the recovery of the brewing industry in the late 1970s. The first was the rise of brewpubs and the lobbying efforts by their owners.⁷⁴ The initial uptick in the number of smaller brewers started due to legislation Congress passed in 1976.⁷⁵ In an attempt to stem the rapid decline of smaller breweries and to help save the industry, a change was made to lower the excise tax on a barrel of beer from \$9 per barrel to \$7⁷⁶ for all brewers with under 60,000 barrels of annual production.⁷⁷ The law was successful in bringing about its in-

68. Pete Brown, *Prohibition*, in THE OXFORD COMPANION TO BEER, *supra* note 3, at 666.

69. *Id.*

70. *Id.* at 671.

71. *Id.*

72. *Id.*

73. *Number of Breweries*, BREWERS ASS'N, <http://www.brewersassociation.org/statistics/number-of-breweries/> (last visited Mar. 22, 2016) [hereinafter *Number*, BREWERS ASS'N]. As an interesting note, the breweries that did manage to survive during prohibition did so in a number of creative ways, including selling products like "root beer and malt extracts, non-alcoholic drinks, and tonics while some continued to brew beer under the protection of mobsters." Ben McFarland, *California*, in THE OXFORD COMPANION TO BEER, *supra* note 3, at 204, 206.

74. Cantwell, *supra* note 63, at 173–74.

75. STEVE HINDY, THE CRAFT BEER REVOLUTION: HOW A BAND OF MICROBREWERS IS TRANSFORMING THE WORLD'S FAVORITE DRINK 27–28 (2014).

76. See 26 U.S.C. § 5052 (amended 2008).

77. HINDY, *supra* note 75.

tended result, and in 1976, the New Albion Brewery was started in Sonoma, California by Jack McAuliffe.⁷⁸ The New Albion Brewery is widely considered to be the first modern craft brewery, and Mr. McAuliffe's venture served as the model for several other entrepreneurial brewers.⁷⁹ During the next five years, notable craft breweries like Anchor Steam and Sierra Nevada were founded.⁸⁰

As these new breweries and brewpubs gained traction, many of their owners set out to change the legal landscape that was hindering further expansion.⁸¹ Mike and Ken McMenemy, brothers who started a chain of brewpubs in Oregon, lobbied for changes in their state legislature.⁸² Among their key accomplishments was a change in Oregon law to allow for the manufacture and distribution of alcohol on the same premises, essentially legalizing the brewpub concept.⁸³

The second important change was the legalization of home brewing in 1979.⁸⁴ The passage of H.R. 1337 (a transportation bill that included a home brewing amendment) in 1978 and its subsequent signing by President Jimmy Carter in 1979 allowed for the production of up to 200 gallons of beer for personal use annually.⁸⁵ This shift in the law served as inspiration to a second generation of craft brewers. In 1984, Jim Koch, the founder of the Boston Beer Company, brewed his first batch of Boston Lager in his kitchen.⁸⁶ This beer now serves as the flagship of a brewery with annual sales of over \$900 million.⁸⁷

As a result, starting in the mid-1980s, the number of breweries within the country steadily increased,⁸⁸ starting from just over 100 breweries in 1985 and growing to an excess of 1,500 breweries in operation by the year 2000.⁸⁹ This fifteen-year period was not simply important in terms of the quantity of breweries that opened, but also the growth and

78. Garrett Oliver, *Microbrewery*, in THE OXFORD COMPANION TO BEER, *supra* note 3, at 585, 586.

79. *See id.*

80. *See generally* ANCHOR BREWING, <http://www.anchorbrewing.com/> (last visited Mar. 22, 2016); SIERRA NEVADA, <http://www.sierranevada.com/> (last visited Mar. 22, 2016).

81. Cantwell, *supra* note 63, at 173–74.

82. Bob Woodward & Laurel Bennet, *Oregon Beer History*, 1859: OREGON'S MAGAZINE, Jan. 2010, at 94, 101, available at <https://www.1859oregonmagazine.com/oregon-beer-history>.

83. *Id.*

84. Gary Glass, Ray Daniels & Keith Thomas, *Homebrewing*, in THE OXFORD COMPANION TO BEER, *supra* note 3, at 444, 448.

85. 26 U.S.C. § 5053(e) (2012).

86. *Longshot American Homebrew Competition*, SAMUEL ADAMS, <https://www.samueladams.com/longshot> (last visited Mar. 22, 2016).

87. *Fundamentals-Snapshot*, BOSTON BEER CO., <http://www.bostonbeer.com/phoenix.zhtml?c=69432&p=irol-fundSnapshot> (last visited Mar. 22, 2016).

88. *Number*, BREWERS ASS'N, *supra* note 73.

89. *Id.*

establishment of wildly successful breweries like Sierra Nevada and the Boston Beer Company.⁹⁰ The generation of brewers that emerged from the earlier brewpub era began to gain popularity, and the best-positioned breweries began to distribute on a national scale. In 1990, Sierra Nevada exceeded 25,000 barrels in annual production capacity and was the first of these formerly classified microbreweries to break through the then-existing industry production cap definition.⁹¹

Craft breweries have continued to expand rapidly over the past decade.⁹² The total amount of craft breweries in the United States has increased by over 56 percent, from 1,485 in 2003 to 3,464 in 2014.⁹³ Smaller craft breweries, or microbreweries, have grown the fastest during this period, increasing nearly 400 percent in the same timeframe from 362 to 1,871.⁹⁴ A microbrewery is, by industry definition, a smaller brewery that produces less than 15,000 barrels of beer per year.⁹⁵ For comparison, the largest brewer in the world, Anheuser-Busch InBev, produces over 100 million barrels annually.⁹⁶

The unprecedented growth of craft breweries over the past decade, while undoubtedly impressive, further indicates how common a fixture they have become within local communities nationwide.⁹⁷ According to the Brewers Association, approximately 75 percent of legal-drinking-aged adults in the United States now live within ten miles of a craft brewery.⁹⁸ Although craft breweries have increased in familiarity and visibility, the laws that govern their licensing remain an unclear and inconsistent mix of statutory concepts.

IV. GROWLER LAWS BY LICENSE TYPE

Generally, growlers may be legally distributed through one or more of three main channels: (1) direct from a brewery, classified as a manufacturer; (2) direct from a brewery classified as a brewpub; or (3) from a third-party retailer.⁹⁹ Although growlers are available in all fifty states in

90. *History of American Beer*, BEER ADVOCATE, http://www.beeradvocate.com/beer/101/history_american_beer/ (last visited Mar. 22, 2016).

91. *Id.*

92. *Number*, BREWERS ASS'N, *supra* note 73.

93. *Id.*

94. *Id.*

95. *Market*, BREWERS ASS'N, *supra* note 66.

96. William Bostwick, *Craft Breweries Scale Up But Keep It Real*, WALL ST. J. (July 25, 2014, 11:14 AM), <http://online.wsj.com/articles/craft-breweries-scale-up-but-keep-it-real-1406301243>.

97. Tristan Chan, *2014 GABF Recap*, PORCH DRINKING (Oct. 8, 2014), <http://www.porchdrinking.com/2014-gabf-recap/>.

98. *Id.*

99. *Growler Laws*, BREWERS ASS'N, <http://www.brewersassociation.org/government-affairs/laws/growler-laws/> (last visited Mar. 22, 2016) [hereinafter *Growler Laws*, BREWERS ASS'N].

at least one of these formats, there is little consistency between states in the application of growler distribution law.¹⁰⁰ Within these classifications there are further restrictions relating to growler labeling, growler size, and the annual production of the brewery attempting to sell the growler.¹⁰¹ This inconsistency has created a confusing regulatory environment. Further, while these three license types may seem as though they have no overlap with one another, the availability of one type can often have significant ramifications for the revenue opportunity of the other two types.

A. Growler Distribution Under Manufacturer Licenses

Small breweries are classified as manufacturers or microbreweries when their annual production is less than 15,000 barrels per year and seventy-five percent or more of their beer is produced for off-site consumption.¹⁰² While the craft beer industry defines microbreweries under this 15,000-barrel cap, it should be noted that one of the advantages of the manufacturer license, compared to the brewpub license, is that it allows for higher production. Most states will allow for manufacturer license holders under a certain production limit to self-distribute.¹⁰³ For example, in New York, a manufacturer license allows for self-distribution up to a 60,000-barrel annual production limit.¹⁰⁴ By comparison, however, New York brewpub license holders can only produce up to 5,000 barrels annually at a single location or 20,000 barrels in total at multiple locations.¹⁰⁵

Currently, forty-four states allow for breweries within this segment to distribute their beer via growler sales.¹⁰⁶ In terms of craft beer production by volume, the following are the six states that do not allow direct growler sales, in order of manufacturer rank: Texas (7th), Georgia (18th), Alabama (39th), Oklahoma (43rd), and Mississippi (44th).¹⁰⁷ Among these six states, both Texas and Georgia have, within the past eighteen

100. *Id.*

101. See, e.g., Smith Mathews & Carly Wiggins, *Beer Buzz: Georgia Craft Breweries Need Continued Support*, DO SAVANNAH (Feb. 26, 2014), <http://www.dosavannah.com/article/wed-02262014-2143/beer-buzz-georgia-craft-breweries-need-continued-support>.

102. *Market*, BREWERS ASS'N, *supra* note 66.

103. Chris Crowell, *Craft Beer Self-Distribution Refresher: Does Your State Make the List?*, CRAFT BREWING BUS. (Sept. 10, 2013), <http://www.craftbrewingbusiness.com/packaging-distribution/craft-beer-self-distribution-refresher-state-make-list/>.

104. *Id.*

105. *Definition of License Classes*, N.Y. ST. LIQUOR AUTH. DIV. OF ALCOHOLIC BEVERAGE CONTROL, <https://www.sla.ny.gov/definition-of-license-classes> (last visited Mar. 22, 2016).

106. *Growler Laws*, BREWERS ASS'N, *supra* note 99.

107. *State Craft Beer Sales & Production Statistics, 2014*, BREWERS ASS'N, <http://www.brewersassociation.org/statistics/by-state/> (last visited Mar. 22, 2016) [hereinafter *Production*, BREWERS ASS'N].

months, attempted to address on-site sales for this classification of breweries.¹⁰⁸ Unfortunately, neither the Georgia nor Texas legislative measures have been successful.

In early 2014, the Georgia State Legislature proposed H.B. 314¹⁰⁹ (and companion bill, S.B. 174¹¹⁰), which would have allowed a brewer holding a license to manufacture malt beverages “the right to sell, for personal use and not for resale, a maximum of 288 ounces per person per day of malt beverages manufactured on its premises for off-premises consumption.”¹¹¹ The proposed change would have allowed breweries to sell not only packaged products but to distribute beer via growlers as well.¹¹² The two bills, however, ultimately stalled in both houses.¹¹³ Texas remains even further behind in allowing this segment of brewers to sell off-premise.¹¹⁴ In 2013, the Texas State Legislature passed a series of bills, including S.B. 518, which allowed for a brewery holding a manufacturer license to “sell ale produced on the brewer’s premises . . . to ultimate consumers on the brewer’s premises for responsible consumption on the brewer’s premises.”¹¹⁵

Thus, manufacturer license holders gained the ability to sell beer on-site, but not off-site, which included the sale of growlers.¹¹⁶ Furthermore, although S.B. 515 (a companion bill) addressed the rights of brewpub license holders—who could already sell growlers—by increasing the annual production limit from 5,000 to 12,500 barrels, it was of little help to brewers holding manufacturer licenses.¹¹⁷

Further, the two bills had an interesting effect on brewers’ behavior, which was evidenced when one of the more well-known craft breweries in Texas, Jester King, applied to change its license from a manufacturer to a brewpub.¹¹⁸ In Jester King’s case, because its production was only

108. See *Authority of Certain Brewers and Manufacturers to Sell Beer and Ale to Ultimate Consumers*, 2013 Tex. Sess. Law Serv. ch. 535 (S.B. 518) (West) (amending TEX. ALCO. BEV. CODE ANN. § 12.052 (West 2015)); Savannah Morning News, *Georgia Craft Brewers Prepare for 2015 Legislative Push*, SAVANNAH NOW (Nov. 8, 2014, 8:42 AM), <http://savannahnow.com/exchange/2014-11-07/georgia-craft-brewers-prepare-2015-legislative-push>.

109. H.B. 314, 2013–2014 Gen. Assemb., Reg. Sess. (Ga. 2014).

110. S.B. 174, 2013–2014 Gen. Assemb., Reg. Sess. (Ga. 2013).

111. Ga. H.B. 314, *supra* note 109.

112. *Id.*

113. Savannah Morning News, *supra* note 108.

114. See 2013 Tex. Sess. Law Serv. ch. 535 (S.B. 518) (West).

115. *Id.*

116. *Id.*

117. *Sale and Production of Malt Liquor, Ale, and Beer by the Holder of a Brewpub License*, 2013 Tex. Sess. Law Serv. ch. 750 (S.B. 515) (West).

118. Adam Nason, *Jester King Craft Brewery Files for Brewpub License, Will Qualify It for Direct Sales*, BEERPULSE (May 24, 2013, 9:36 AM) <http://beerpulse.com/2013/05/jester-king-craft-brewery-files-for-brewpub-license-will-qualify-it-for-direct-sales-429/>.

around 1,500 barrels annually, the shift made sense from a business standpoint.¹¹⁹ Jester King stated it made the change for the benefit of its customers:

We want them to be able to tour our brewery, drink small pours or full glasses of our beer while at the brewery, and should they so desire, purchase bottles of our beer to take home with them. By changing our license to a brewpub, we are now able to offer this full experience.¹²⁰

This change, however, ultimately will have the effect of disincentivizing growth because if Jester King surpasses the 12,500-barrel annual production threshold, it will again lose the right to distribute to customers for off-premises consumption.¹²¹

It appears that S.B. 515 will remain the controlling law in Texas for the foreseeable future;¹²² although, one brewery, Deep Ellum Brewing Co., went so far as to file a federal lawsuit arguing that the system was “arbitrary and discriminatory.”¹²³ Others are determined to wait out a change in the law and redouble their lobbying efforts in preparation for the next time the Texas Legislature meets in 2017.¹²⁴

B. Growler Distribution Under Brewpub Licenses

The industry definition classifies a brewpub as an establishment that derives twenty-five percent or more of its beer sales from on-site consumption.¹²⁵ As noted above, brewpub licenses are capped at lower annual production limits than manufacturer licenses.¹²⁶ While brewpubs traditionally operate a restaurant or offer limited food service on-site,¹²⁷ many states actually *require* brewpub license holders to serve food on-site. For example, in New York, the holder of a brewpub license “must have a bona fide restaurant.”¹²⁸ Similarly, in Michigan, a brewpub “must provide evidence . . . that not less than 25% of the gross sales of the restaurant . . . are derived from the sale of food and nonalcoholic beverage-

119. *Id.*

120. *Jester King Brewpub*, JESTER KING BREWERY, <http://jesterkingbrewery.com/we-re-now-officially-a-brewpub> (last visited Mar. 22, 2016).

121. Tex. S.B. 515, *supra* note 117.

122. Michael Marks, *Texas' Unfair Liquor Laws Limit Local Craft Brewers*, SAN ANTONIO CURRENT (Oct. 14, 2015), <http://www.sacurrent.com/sanantonio/texas-unfair-liquor-laws-limit-local-craft-brewers/Content?oid=2477782>.

123. *Id.*

124. *Id.*

125. *Market*, BREWERS ASS'N, *supra* note 66.

126. Crowell, *supra* note 103.

127. *Id.*

128. *See Definition of License Classes*, *supra* note 105.

es.”¹²⁹ Conversely, in other states like Oregon, this requirement informs potential licensees that “[f]ood service is not a requirement of this license.”¹³⁰ In terms of growler and off-site consumption sales, presently forty-six states allow for brewpub license holders to distribute in this fashion.¹³¹ The four states that completely ban growler sales rank as follows in terms of craft beer production by volume: Florida (5th), Georgia (18th), New Mexico (37th), and Alabama (39th).¹³²

Following the earlier discussion of manufacturer licenses, Georgia and Alabama are the only two states that do not allow for growler sales under either a manufacturer or brewpub license.¹³³ In Georgia, the failed attempt to pass H.B. 314 (S.B. 174) remains the closest the Georgia State Legislature has come to changing either manufacturer licensing or brewpub licensing.¹³⁴ Following the attempts with those earlier bills, the Georgia Senate formed a committee to examine alternate solutions to the issue.¹³⁵ The “recommendation given by the committee would limit the consumers to only one 64-ounce growler purchased at a brewpub . . . [and] [t]his growler must be partially consumed on site. The remainder can then be taken home [by the consumer] if it is wrapped and sealed in a plastic bag.”¹³⁶ The legislature has yet to act on these recommendations.¹³⁷ Even if the legislature adopts the revised rules, the limitation on volume would be among the lowest of any state and the unique partial consumption requirement would be unnecessarily burdensome to the consumer.¹³⁸

Finally, after recognizing the magnitude of resistance faced in Georgia, breweries attempted to secure a small victory in the passage of S.B. 63.¹³⁹ The law essentially created a workaround to on-site sales, by stating that breweries could offer “tours” to consumers that included the

129. MICH. COMP. LAWS § 436.1407(1)(b) (1998).

130. *Brewery-Public House*, OR. LIQUOR CONTROL COMM’N, http://www.oregon.gov/olcc/LIC/pages/brewery_public_house_license.aspx (last visited Mar. 22, 2016).

131. *Growler Laws*, BREWERS ASS’N, *supra* note 99.

132. *Production*, BREWERS ASS’N, *supra* note 107.

133. *Id.*

134. Carly Wiggins, *Georgia Legislators Hear Our Cry!*, SOUTHBOUND BREWING CO. (Feb. 27, 2014, 1:08 PM), <http://southboundbrewingco.com/southbound/georgia-legislators-hear-our-cry#>.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. Tom Sabulis, Op-Ed., *On the Record: Beer Wholesaling*, ATLANTA JOURNAL-CONSTITUTION (Dec. 3, 2015, 2:00 PM), <http://www.myajc.com/news/news/opinion/on-the-record-beer-wholesaling/npbKF/>.

right to take up to seventy-two ounces of beer off-premises.¹⁴⁰ However, due to the Georgia Department of Revenue's interpretation of the law limiting breweries' ability to charge different prices for the tours based on the type of beer, even this limited attempt at a carve-out was stymied.¹⁴¹

Alabama provides another case study as its brewpub statute is among the most restrictive in the country.¹⁴² Accordingly, the relevant language in the current statute only allows for the sale of "unpackaged form at retail for on-premises consumption at the licensed premises only."¹⁴³ While the 10,000-barrel annual production cap in Alabama is among the more generous, like the New York and Michigan laws mentioned above, the brewpub "must contain and operate a restaurant or otherwise provide food for consumption on the premises."¹⁴⁴ There is also a unique requirement that the "brewpub premises must be located in an historic building or site . . . or in a registered historic district, or in any economically distressed area designated as suitable by the municipal or county governing body, in a wet county or wet municipality."¹⁴⁵

Because of these restrictions, and the fact that Alabama was the last state to legalize home brewing in 2013,¹⁴⁶ the Alabama Legislature has done little to modify laws to allow brewpubs to sell growlers. The closest the legislature came to any action was in early 2014.¹⁴⁷ H.B. 581 (and its Senate equivalent S.B. 439) states:

[A] manufacturer licensee that manufactures in excess of 25,000 barrels . . . on . . . the manufacturer's licensed premises, may: (i) operate a restaurant . . . and . . . be issued an additional license . . . for the purpose of selling and dispensing alcoholic beverages at retail for consumption at its restaurant . . . (ii) sell alcoholic

140. Austin L. Ray, *Georgia Department of Revenue Tightens SB 63 Regulations*, OMNIVORE (Sept. 29, 2015, 10:53 AM), <http://clatl.com/omnivore/archives/2015/09/29/georgia-department-of-revenue-tightens-sb-63-regulations>.

141. Aaron Gould Sheinin, *Ralston Calls on State to Reverse Craft Brewery Tour Rule Change*, ATLANTA JOURNAL-CONSTITUTION (Dec. 9, 2015, 11:21 AM), <http://www.ajc.com/news/news/state-regional-govt-politics/ralston-calls-on-state-to-reverse-craft-brewery-to/npfxy>.

142. ALA. CODE § 28-4A-3 (2011).

143. *Id.* § 28-4A-3(a).

144. *Id.* § 28-4A-3(a)(4).

145. *Id.* § 28-4A-3(a)(1).

146. Kim Chandler, *Gov. Robert Bentley Signs Home Brew Bill*, AL.COM (May 10, 2014, 6:33 AM), http://blog.al.com/wire/2013/05/gov_robert_bentley_signs_home.html.

147. Alex Walsh, *Stone Brewing to Alabama? Legislators Make Play That Could Attract Craft Beer Leader*, AL.COM, (Mar. 6, 2014, 3:12 PM), http://blog.al.com/wire/2014/03/stone_brewing_to_alabama_legis.html [hereinafter Walsh, *Leader*].

beverages manufactured by the licensee at retail for consumption at its restaurant¹⁴⁸

Thus, H.B. 581 was unique in that it was an attempt to create a hybrid class of license by grafting brewpub-like restaurant language onto a manufacturer license.¹⁴⁹ The proposed bill also differed from typical brewpub regulations in that it set a production floor, 25,000 barrels, rather than a production cap.¹⁵⁰

The authors of the bill wanted a production floor to attract a very large Stone Brewing production, packaging, and distribution facility with projected revenues of over \$100 million.¹⁵¹ Stone Brewing is one of the highest producing and most nationally well-known craft brewers with an annual output of over 325,000 barrels.¹⁵² As part of the proposed construction, Stone had wanted to build out a second “Stone World Bistro & Gardens, which would support tourism commerce and merchandising sales.”¹⁵³ Thus, potential tourism dollars, not a newly found sympathy for craft breweries, drove the Alabama Legislature’s attempt to change its laws.¹⁵⁴ The bill ultimately failed to pass the legislature, raising the ire of the Alabama Craft Brewer’s Guild and Stone itself.¹⁵⁵ The Alabama Brewer’s Guild argued that the bill “would effectively cut out all existing Alabama breweries in an effort to entice larger businesses into Alabama.”¹⁵⁶ Stone agreed, adding that it would prefer “legislation that benefit[ed] all craft brewers.”¹⁵⁷ Although the Alabama legislature indicated it would take up self-distribution issues again during its 2016 legislative session, based on the previous outcomes, breweries in the state should be skeptical of any significant change to the law in the near term.¹⁵⁸

148. H.B. 581, 2014 Leg., Reg. Sess. (Ala. 2014).

149. *Id.*

150. *Id.*

151. Walsh, *Leader*, *supra* note 147.

152. *Facts and Figures*, STONE BREWING, <http://www.stonebrewing.com/about/facts> (last visited Mar. 22, 2016).

153. Walsh, *Leader*, *supra* note 147.

154. *Id.*

155. Alex Walsh, *Stone Brewing Sides with Alabama’s Craft Brewers, Makes Legislators’ Job More Difficult*, AL.COM (Mar. 13, 2014, 9:03 AM), http://blog.al.com/wire/2014/03/stone_brewing_sides_with_alaba.html [hereinafter Walsh, *Difficult*].

156. *Our Thoughts on HB581*, ALABAMA BREWERS GUILD (Mar. 6, 2014), <http://albeer.org/blog/archives/1537>.

157. Walsh, *Difficult*, *supra* note 155.

158. Mary Sell, *Lawmakers to Talk Breweries, Off-site Drinking in January*, TIMES DAILY (Dec. 17, 2015, 12:15 AM), http://www.timesdaily.com/news/state-capital/lawmakers-to-talk-breweries-off-site-drinking-in-january/article_1730e1ec-9bd3-5313-9ab0-f8410f765d4e.html.

C. Growler Distribution Under Retailer Licenses

Finally, to conclude this section, this Note examines growler distribution under retailer licenses. While the manufacturer and brewpub licenses apply directly to brewers, the retailer license applies to third parties such as liquor stores or even supermarkets like Whole Foods.¹⁵⁹ Growler distribution through retailers provides small brewers another outlet for their product without the requirement of adding bottling or canning lines.¹⁶⁰ Furthermore, because growler fills can occur at a supermarket or even a gas station, it is an opportunity for craft brewers to reach customers who otherwise would not take the time to visit the brewery.¹⁶¹ Currently, thirty-five states allow for retailers to distribute beer via growler sales.¹⁶² Among the states that ban growler sales by retailers, many are unexpectedly among the top in craft beer production by volume. Some of the states and rankings include: Pennsylvania (1st), California (2nd), Colorado (3rd), Minnesota (11th), and Illinois (22nd).¹⁶³

It can be argued that because all these states allow breweries to distribute via growler under both manufacturer and brewpub licenses, there is less urgency among their brewers to press for action on the retail licenses.¹⁶⁴ California makes a particularly interesting exception in that retailers can sell growlers that are prefilled and shipped by the brewery, but they cannot fill growlers themselves from their own draft lines.¹⁶⁵ It should also be noted that until 2013, California had another unique and controversial law that only allowed a brewery to fill a growler container if the brewery also sold the container.¹⁶⁶ Thus, a customer was left in an undesirable situation whereby she would need to purchase and store a different container for each brewery.¹⁶⁷

The Minnesota Legislature also recently addressed a similar question by passing S.F. 2346, which clarified that “[a] brewer may, but is not required to, refill any growler with malt liquor for off-sale at the request of a customer. A brewer refilling a growler must do so at its li-

159. *Growler Laws*, BREWERS ASS’N, *supra* note 99.

160. Todd Gill, *Retail Growler Fills Begin in Arkansas*, FAYETTEVILLE FLYER (July 8, 2014), <http://www.fayettevilleflyer.com/2014/07/08/retail-growler-fills-begin-in-arkansas/>.

161. *Sunoco Expands Growler Program*, ASS’N FOR CONVENIENCE & FUEL RETAILING (July 17, 2013), <http://www.nacsonline.com/News/Daily/Pages/ND0717135.aspx>.

162. *Growler Laws*, BREWERS ASS’N, *supra* note 99.

163. *Production*, BREWERS ASS’N, *supra* note 107.

164. *Growler Laws*, BREWERS ASS’N, *supra* note 99.

165. *Growlers – Q&A*, CAL. CRAFT BREWERS ASS’N (July 9, 2014), <http://www.californiacraftbeer.com/growlers-qa/>.

166. Lessley Anderson, *California Eases Up on Buying Beer to Go*, SFGATE (Oct. 11, 2013, 3:23 PM), <http://www.sfgate.com/wine/brew/article/California-eases-up-on-buying-beer-to-go-4888968.php>.

167. *Id.*

censed premises and the growler must be filled at the tap at the time of sale.”¹⁶⁸

Arkansas recently started to allow retailers to sell growlers in July 2014.¹⁶⁹ The Arkansas legislature created a Growler Endorsement, which could be attached to the existing retailer license.¹⁷⁰ The endorsement allowed for “[r]etail Beer Permit holders who also hold a Retail Liquor Permit [to] sell malt products . . . in growlers for off-premises consumption.”¹⁷¹ In terms of quantifying how much a law like the one in Arkansas helps small brewers, it is critical to consider the interplay between the retailer license and the self-distribution laws within the state, particularly manufacturer licenses.¹⁷² Those who qualify as an “Arkansas Native Brewer,” a manufacturer license holder producing less than 30,000 barrels per year, “may sell to wholesalers, to retail license holders and other small brewery license holders, or to the consumer at the brewery facility.”¹⁷³ Therefore, the small brewer in this scenario could add an additional revenue channel by placing their products directly on sale at a retailer’s growler filling station while bypassing the need for a distributor. Under Arkansas law, the holder of a brewpub license—defined as a microbrewery–restaurant operator who operates under the Arkansas native brewer permit—may manufacture beer and malt beverages in an aggregate quantity not to exceed 5,000 barrels per year.¹⁷⁴ The microbrewery–restaurant may sell to wholesalers, to other retail dealers, or to the consumer at the microbrewery–restaurant for consumption either on or off the premises.¹⁷⁵

Thus, in what is a common situation, the brewpub license holder would not be able to take advantage of this opportunity without going through a distributor.¹⁷⁶ Fortunately, the clumsiness of the three-tier system demonstrated by these representative examples has thus far merely inhibited, not stopped, the proliferation of small breweries.

168. S.F. 2346, 88th Leg. Sess., 2nd Reg. Sess. (Minn. 2014).

169. Gill, *supra* note 160.

170. *Growler Endorsement*, ARK. ALCOHOLIC BEVERAGE CONTROL, <http://www.dfa.arkansas.gov/offices/abc/Documents/growlers.pdf> (last visited Mar. 22, 2016).

171. *Id.*

172. *Title 2, Subtitle B, Definitions*, ARK. DEP’T OF FIN. & ADMIN., <http://www.dfa.arkansas.gov/offices/abc/rules/Pages/title2SubtitleB.aspx> (last visited Feb. 27, 2016).

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

V. BENEFITS OF WASHINGTON STATE'S MODEL

While not perfect, Washington State arguably provides the best example of what can happen in a regulatory environment that encourages small brewers.¹⁷⁷ Washington currently has the second highest amount of breweries of any state and among the highest number of breweries per capita.¹⁷⁸ Perhaps most importantly, while the breweries may be small, the amount of revenue they generate is not. The craft beer industry in Washington State has an estimated annual economic impact of over \$1 billion.¹⁷⁹ An examination of Washington's model under the three license types—manufacturer, brewpub, and retailer—will demonstrate the practical effects of well-crafted legislation.

Washington's manufacturer's license, or "Microbrewery License" as it is known within the state, is the main driver helping to foster this wellspring of small breweries.¹⁸⁰ To begin, the statute governing this license offers a relatively generous 60,000-barrel production cap.¹⁸¹ License holders are granted three key rights: (1) self-distribution,¹⁸² (2) on-site retail sales,¹⁸³ and (3) growler sales for off-site production.¹⁸⁴ Washington grants small breweries a variety of avenues in which to grow their businesses. Breweries can avoid costly and complex relationships with distributors, draw customers in to taste and consume beer at their facilities, and send those same customers home with a growler. Furthermore, the statute even allows for collaboration among local breweries by granting them the right to sell each other's beer on-site for consumption.¹⁸⁵ While this may seem counterintuitive, many smaller breweries focus on particular styles of beer. For example, one may specialize in traditional stouts and IPAs, while another's specialty is wild fermented

177. Associated Press, *State at Center of Microbrewery Growth*, HERALD BUS. J. (Feb. 18, 2014, 12:01 AM), <http://www.theheraldbusinessjournal.com/article/20140218/SCBJ02/302199997>.

178. *Id.*

179. Sara Nelson, Op-Ed., *Craft Beer Brewers Need Tax Relief*, SEATTLE TIMES (Apr. 11, 2015, 10:19 AM), <http://www.seattletimes.com/opinion/craft-beer-brewers-need-tax-relief/>.

180. WASH. REV. CODE § 66.24.244(1) (2015).

181. *Id.*

182. *Id.* § 66.24.244(2) ("Any microbrewery licensed under this section may also act as a distributor and/or retailer for beer . . . of its own production.").

183. *Id.*

184. *Id.* ("A microbrewery holding a spirits, beer, and wine restaurant license may sell beer of its own production for off-premises consumption from its restaurant premises . . . in a sanitary container brought to the premises by the purchaser or furnished by the licensee and filled at the tap by the licensee at the time of sale.").

185. *Id.* § 66.24.244(3) ("Any microbrewery licensed under this section may also sell from its premises for on-premises and off-premises consumption beer produced by another microbrewery or a domestic brewery as long as the other breweries' brands do not exceed twenty-five percent of the microbrewery's on-tap offerings [of its own brands].").

ales. Thus, the breweries are complementing each other's selection rather than cannibalizing business.¹⁸⁶

On the other hand, Washington's brewpub or "Public House" license is one that could use some improvement. On the positive side, the license places a relatively low 2,400-barrel production cap for this license type.¹⁸⁷ However, sales are limited to on-premises consumption only, and thus, a brewpub license holder is not allowed to sell growlers.¹⁸⁸ Accordingly, Washington would benefit from adopting Oregon's brewpub law, which explicitly allows for growler sales by brewpub license holders.¹⁸⁹ Regardless, a work-around does exist for those wishing to both sell beer and operate a restaurant in Washington. Microbrewery license holders can apply for a separate restaurant license and receive the full privileges of that license.¹⁹⁰ Thus, the restaurant license allows food sales, and the microbrewery license allows growler sales.¹⁹¹ Obviously, this is more cumbersome than having just a single brewpub license, but the concept is viable in the interim.

Perhaps the area where Washington has been the most progressive and has provided the most benefit to small breweries is in granting retailer licenses that allow for growler sales. The benefit is evident in Washington's beer-focused bottle shops.¹⁹² Under a retailer license, a bottle shop that derives at least fifty percent of its sales from beer and/or wine sales is eligible to fill and sell growlers.¹⁹³ The advantage here is understood best in terms of competition. As previously mentioned in Part I of this Note, adding a canning or bottling line for a new brewery can be prohibitively expensive.¹⁹⁴ Because the state allows for growler sales at

186. Collaboration among small breweries both in- and out-of-state is a very common phenomenon. For just a few examples among many, see Chris Mah, *6 Collaboration Beers to Share with a Friend*, FOOD & WINE (Jan. 13, 2015), <http://www.foodandwine.com/fwx/drink/6-collaboration-beers-share-friend>.

187. WASH. REV. CODE § 66.24.580(1)(a) (2015).

188. *Id.* § 66.24.580(1)(b) ("To sell product, that is produced on the licensed premises, at retail on the licensed premises for consumption on the licensed premises . . .").

189. OR. REV. STAT. § 471.200(1)(d) (2015) ("To sell on the licensed premises at retail malt beverages manufactured on or off the licensed premises in unpasteurized or pasteurized form directly to the consumer for consumption off the premises, delivery of which may be made in a securely covered container supplied by the consumer . . .").

190. WASH. REV. CODE § 66.24.244(5) (2015) ("A microbrewery that holds a tavern license, spirits, beer, and wine restaurant license, or a beer and/or wine restaurant license holds the same privileges and endorsements.").

191. *Id.*; *id.* § 66.24.244(3).

192. WASH. REV. CODE § 66.24.371(3) (2015) ("[T]he beer and/or wine specialty shop licensee . . . may also receive an endorsement to permit the sale of beer to a purchaser in a sanitary container brought to the premises by the purchaser, or provided by the licensee or manufacturer, and fill at the tap by the licensee at the time of sale.").

193. *Id.*

194. See O'Connor, *supra* note 17.

these retailers, small breweries can benefit from the additional sales and exposure without investing heavily early in the growth cycle.

Similarly, Washington allows any establishment with over \$15,000 in beer or wine sales to obtain the same retailer license.¹⁹⁵ The retailer license opens up opportunities for grocery stores and even in one notable success case, a drug store, to sell and fill growlers.¹⁹⁶ Once again, small breweries gain more revenue channels and exposure under this type of scheme.

Finally, Washington opens up a third major channel for growler sales—restaurants—offering yet another avenue for smaller breweries to find new customers. A customer, who might not otherwise take the time to go to a brewery or specialty bottle shop, can pick up a growler during his normal shopping or dining outing and become a fan of the brewery.¹⁹⁷ Quite simply, Washington has allowed for growler-filling to occur in places that many states do not, thereby fostering the growth of small breweries and increasing consumer choice.

Thus, considering the way that Washington treats growler sales under its three license types, there are four main areas that other states should focus on when crafting regulation. First, states should keep the production caps associated with self-distribution rights at least as high as Washington's 60,000-barrel ceiling. Utilizing a distributor greatly hinders a brewery's ability to distribute growlers to customers.

Second, to encourage a variety of business models, states should allow holders of a brewpub license to sell growlers for off-premises consumption. The brewpub has been an important business concept for craft brewers since the late 1970s,¹⁹⁸ and states should allow craft brewers the same opportunities as other brewers.

Third, states should allow for bottle shop retailers to distribute via growlers. Bottle shops have limited shelf-space, and allowing for growler sales allows small breweries to get their products in front of consumers at an earlier growth stage.

Fourth, states should increase consumer convenience by allowing other non-beer focused retailers, like grocery stores, to sell growlers. An

195. WASH. REV. CODE § 66.24.371(3) (2015) (“[T]he board may waive the fifty percent beer and/or wine sale criteria if the beer and/or wine specialty shop maintains alcohol inventory that exceeds fifteen thousand dollars.”).

196. Allecia Vermillion, *Bartell Drugs Is Planning Another Growler Fill Station*, SEATTLE MET (Sept. 30, 2013, 9:30 AM), <http://www.seattlemet.com/eat-and-drink/nosh-pit/articles/bartells-is-planning-another-growler-fill-station-september-2013>.

197. WASH. REV. CODE § 66.24.354(2) (2015) (“Beer may be sold to a purchaser in a sanitary container brought to the premises by the purchaser and filled at the tap by the retailer at the time of sale.”).

198. See Cantwell, *supra* note 63.

expanded retailer license can benefit small breweries by exposing a whole new class of customers to small brewery products. If more states adopt these measures, it will strengthen small breweries, ensure a robust competitive environment, and offer consumers more variety and easier access to craft beer.

VI. CONTESTED GROUND: OTHER ATTEMPTS BY SMALL BREWERS TO LEVEL THE PLAYING FIELD

The threat small breweries face is not limited to issues created by a confusing regulatory environment as outlined in Part IV but they also face a direct threat from the beer industry's established kingpins: Anheuser-Busch InBev and MillerCoors. These massive corporations are acutely aware that small or craft brewery growth over the past two decades has come directly at their expense.¹⁹⁹ Since 1998, craft brewers in the United States have risen from a 2.6 percent market share²⁰⁰ to an 18 percent market share.²⁰¹ Additionally, craft brewery sales increased by over 20 percent in 2014, whereas overall beer consumption only grew by 1 percent.²⁰² This further compounds the threat to larger producers.

It appears that larger brewers have adapted a three-pronged strategy: attempt to appeal to customers by developing new craft-like products such as Blue Moon,²⁰³ purchase successful craft breweries such as Goose Island and 10 Barrel,²⁰⁴ and, in the case most relevant to this Note, attempt to stymie the growth of craft breweries through legislation.²⁰⁵ Large distributors are closely aligned with the interests of the large brewers. These large distributors—as a result of the three-tier system—enjoy near monopoly status in individual states.²⁰⁶ Distributors see any

199. Rani Molla, *Craft Beer Takes a Bigger Swig of the Shrinking Beer Market*, WALL ST. J. (July 2, 2014, 11:47 AM), <http://blogs.wsj.com/numbers/craft-beer-takes-a-bigger-swig-of-the-shrinking-beer-market-1502/>.

200. *Id.*

201. Alison Griswold, *More Americans Are Learning to Love Beer That Actually Tastes Like Something*, SLATE (Mar. 17, 2015, 4:28 PM), http://www.slate.com/blogs/moneybox/2015/03/17/craft_beer_sales_jump_in_2014_americans_are_learning_to_love_beer_with_taste.html.

202. Philip H. Howard, *Big Breweries Are Trying to Fend Off Craft Beer by Getting Bigger*, WASH. POST (Sept. 30, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/09/30/big-breweries-are-trying-to-fend-off-craft-beer-by-getting-bigger/>.

203. Duane Stanford, *Blue Moon vs. Craft Beer Rivals: MillerCoors Strikes Back*, BLOOMBERG BUSINESSWEEK (Aug. 8, 2013, 2:56 PM), <http://www.businessweek.com/articles/2013-08-08/blue-moon-vs-dot-craft-beer-rivals-millercoors-strikes-back>.

204. Aaron Smith, *Anheuser-Busch Swallows Up Another Craft Brewer*, CNN (Nov. 6, 2013, 9:09 AM), <http://money.cnn.com/2014/11/06/news/companies/anheuser-busch-beer-10-barrel/>.

205. S.B. 1714, 2014 Leg., 116th Reg. Sess. (Fla. 2014).

206. Scott Maxwell, *Wacky Beer Laws Reflect Power of Special Interests*, ORLANDO SENTINEL (Feb. 1, 2014), http://articles.orlandosentinel.com/2014-02-01/news/os-beer-wine-laws-in-florida-scott-maxwell-20140201_1_beer-special-interests-public-safety.

change, whether an increase in self-distribution or a fracturing of the market, as disruptive to their steady businesses.²⁰⁷ Arrangements between Anheuser-Busch InBev and distributors have recently caught the attention of the U.S. Department of Justice (DOJ).²⁰⁸ In October 2015, the DOJ began investigating the anticompetitive potential raised by Anheuser-Busch InBev's purchase of several large distributors and the pressure the company places on independent distributors to carry only Anheuser-Busch InBev products.²⁰⁹ This is not to mention the threat caused by the proposed merger between Anheuser-Busch InBev and MillerCoors, which would create a company worth \$275 billion.²¹⁰

Growlers are at the forefront of these controversies due to their unique ability to help foster the growth of small brewers, as well as the fact that they can be used to circumvent traditional distribution methods.²¹¹ As the craft brewing industry consists of a coalition of several thousand small brewers,²¹² its actions to counter these attacks often take the form of grassroots movements by necessity.

This section continues by exploring S.B. 1714—a recently proposed controversial piece of legislation in Florida. An examination of how grassroots action helped to turn the political tide in Minnesota's "Save the Growler" campaign will follow. The section concludes with an examination of whether large brewers' and distributors' responses to counter those efforts—in places like Florida and Minnesota—can amount to collusive action when viewed through the lens of the Sherman Antitrust Act.

A. Florida's S.B. 1714

In April 2014, Florida's proposed S.B. 1714 started with a noble purpose: to correct the situation where growler sales were restricted to either thirty-two ounces (too small) or 128 ounces (much too large) without allowing for the sale of the most common and convenient sixty-four ounces.²¹³ The Bill proposed to update the definition of a growler to "a refillable container that is made of glass, ceramic, metal, or similar leak-proof material and is designed to contain a carbonated malt beverage."

207. *Id.*

208. Diane Bartz, *Exclusive: U.S. Probes Allegations AB InBev Seeking to Curb Craft Beer Distribution*, FISCAL TIMES (Oct. 12, 2015), <http://www.thefiscaltimes.com/latestnews/2015/10/12/Exclusive-US-probes-allegations-AB-InBev-seeking-curb-craft-beer-distribution>.

209. *Id.*

210. Howard, *supra* note 202.

211. See *supra* Part V for a more detailed discussion of these laws.

212. Molla, *supra* note 199.

213. S.B. 1714, 2014 Leg., 116th Reg. Sess. (Fla. 2014).

age in a capacity of 32 ounces, 64 ounces, or 128 ounces.”²¹⁴ However, attached to the bill was an additional rider stating:

- a. On-premises consumption, provided that, notwithstanding s. 563.022(14)(d), all malt beverages received from the manufacturer’s other breweries above an amount equal to the lesser of the receiving manufacturer’s total malt beverages brewed on the licensed premises or 2,000 kegs must be obtained through a distributor;
- b. Off-premises consumption in growlers pursuant to s. 563.061;
- c. Off-premises consumption in sealed containers, as authorized under s. 563.06, in an amount not to exceed one keg per consumer per day, provided that the total amount of malt beverages brewed by the manufacturer and sold for consumption off the licensed premises in sealed containers does not exceed 2,000 kegs per year.²¹⁵

What this amendment attempted to do was to create a situation whereby brewers had to pay distributors a fee for the sale of their own beer, on-site at their own premises.²¹⁶ The bill passed the Florida Senate 30–10 and was sent to the Florida House for ratification.²¹⁷ Immediately following the senate vote, however, the backlash from small brewers was ferocious and made national news.²¹⁸ The editorial pages of many of Florida’s newspapers contained pleas from craft brewers in the state to kill the bill.²¹⁹ Joey Redner, the owner of Cigar City, one of Florida’s best known craft breweries, explained that the bill would cost his brewery over \$300,000 per year and that he would consider leaving the state if S.B. 1714 passed the Florida House.²²⁰ Adding fuel to the fire was the public realization that the bill’s primary sponsor, Senator Kelli Stargel, had received \$5,500 in donations from a number of large beer distributors in the year leading up to the bill’s vote.²²¹

214. *Id.*

215. S.B. 1714e2, 2014 Leg., 116th Reg. Sess. (Fla. 2014).

216. *Id.*

217. Chuck Ross, *Florida Senator Says She’s Being ‘A Parent’ To Craft Beer Breweries*, DAILY CALLER (Apr. 30, 2014, 12:45 PM), <http://dailycaller.com/2014/04/30/florida-senator-says-shes-being-a-parent-to-craft-beer-breweries/>.

218. Danielle Teagarden, *Growler Fills in Florida: Them’s Fightin’ Words!*, BREWERY LAW BLOG (Mar. 24, 2014), <http://brewerylaw.com/2014/03/growler-fills-in-florida-thems-fightin-words/>.

219. See Jennifer Gratz, Op-Ed., *Big Beer Backed SB 1714 Would Ruin Small Breweries*, NEWS-PRESS (Apr. 27, 2014, 12:16 AM), <http://www.news-press.com/story/opinion/contributors/2014/04/27/big-beer-backed-sb-ruin-small-breweries/8228399/>; Susan Thurston, *Cigar City Founder Joey Redner Considers Leaving Florida if Bill Passes*, TAMPA BAY TIMES (Apr. 24, 2014, 7:08 PM), <http://www.tampabay.com/news/business/cigar-city-founder-joey-redner-considers-leaving-florida-if-bill-passes/2176759>.

220. Thurston, *supra* note 219.

221. Ross, *supra* note 217.

Ultimately, the bill never reached the Florida House due to the immense public pressure.²²² Further, the movement had the effect of gaining an unlikely ally—the Beer Industry of Florida.²²³ This coalition of distributors released a video in October 2014, which voiced its support for eliminating the ban on sixty-four ounce growlers, stating, “We’re mobilizing an industrywide coalition to make this new container size legal, no strings attached”²²⁴ It appears likely that the distributors sensed the public backlash and reversed course.²²⁵ Ultimately, the sixty-four ounce growler became reality one year later with the passage of S.B. 186.²²⁶ Although the bill lacks the harshest restrictions of its earlier progeny, S.B. 186 still contains several distributor-friendly provisions, such as preventing brewers from delivering beer directly to retailers.²²⁷ Brewers largely viewed the change as positive, however, and to celebrate victory in the battle, many breweries released special beers on July 1, 2015—the first day the law went into effect.²²⁸

B. Minnesota’s “Save the Growler” Campaign

Another example of how change in growler law can be driven from the bottom up was demonstrated when a collection of small Minnesota breweries and their supporters worked to raise production caps related to growler sales.²²⁹

The “Save the Growler” lobbying campaign was spearheaded by the craft breweries that make up the Minnesota Brewers Association.²³⁰ The group reached out to their supporters to help raise support through a variety of methods including creating a website,²³¹ a Twitter feed,²³² a

222. James L. Roscia, *Craft Beer Regulation Dead in House, Rep. Young Says*, TAMPA TRIB. (Apr. 29, 2014, 7:54 PM), <http://tbo.com/news/politics/craft-beer-bill-passed-by-florida-senate-20140429/>. In the article, Roscia also notes that, ironically, the very exception to the on-site consumption that existed since the 1960s was created to allow for “Tampa’s Busch Gardens, then owned by Anheuser-Busch, to serve beer at the theme park’s hospitality centers.” *Id.*

223. Patrick Clark, *A Beer Growler Battle Is Brewing in Florida*, BLOOMBERG BUSINESSWEEK (Oct. 10, 2014, 12:41 PM), <http://www.bloomberg.com/news/articles/2014-10-10/a-beer-growler-battle-is-brewing-in-florida>.

224. *Id.*

225. *Id.*

226. S.B. 186, 2015 Leg., 117th Reg. Sess. (Fla. 2015).

227. *Id.*

228. Carlos Frías, *64-Ounce Growlers Are Legal in Florida Today, Craft Beer Lovers Rejoice*, PALMBEACHPOST (July 1, 2015), <http://feastpb.blog.palmbeachpost.com/2015/07/01/craft-beer-lovers-rejoice-64-ounce-growlers-are-legal-in-florida-today/>.

229. Matt Schwandt, *Minnesota Growlers Saved For Some, For Now*, MINN. BEER ACTIVISTS (June 18, 2013), <http://mnbeeractivists.com/newsfeed/minnesota-growlers-saved-for-some-for-now>.

230. Keane Amdahl, *Save the Growler Group of MN Breweries Want to Make More Beer and Still Sell Growlers*, CITY PAGES (Feb. 21, 2013, 8:47 AM), <http://www.citypages.com/restaurants/save-the-growler-group-of-mn-breweries-want-to-make-more-beer-and-still-sell-growlers-6597674>.

231. *Id.*

Facebook page,²³³ and a series of brewery events.²³⁴ The campaign's stated mission was to "increase the 'cap' on the production ceiling for growlers sales to 250,000 barrels," from the then limit of 3,500 barrels.²³⁵ Approximately six months later, the law was changed and the production ceiling was raised to 20,000 barrels.²³⁶ Although the increase to the production cap was short of the stated goal, the nearly six-fold improvement was nonetheless a victory for breweries within the state.²³⁷

Given that the limit is still ostensibly too low, there are already calls from the group to continue to raise the ceiling.²³⁸ For instance, Surly, one of the leading craft breweries in Minnesota, is already above the current ceiling with others quickly approaching the limit.²³⁹ These types of brewer-driven actions appear to be particularly common in Minnesota; for example, in 2011, Surly led an initiative to allow for on-site consumption sales for breweries holding a manufacturer license.²⁴⁰

The Minnesota Brewers Association is also fighting on another front—campaigning for Sunday growler sales by breweries.²⁴¹ While legislation advocating this position did not make it out of committee in the Minnesota Senate in mid-2014, brewers scored a partial victory as related legislation allowed brewery taprooms to remain open on Sundays.²⁴² Interestingly, lobbying efforts by the Teamsters proved decisive in the bill's defeat.²⁴³ The Teamsters in turn cited threats by an unnamed beer distributor that the law's passage would give the distributor the power to "reopen their labor contracts."²⁴⁴ Ultimately, Sunday growler

232. MNBA, <https://twitter.com/savethegrowler> (last visited Mar. 22, 2016).

233. MINN. BREWER'S ASS'N, <https://www.facebook.com/savethegrowlermn> (last visited Mar. 22, 2016).

234. Amdahl, *supra* note 230.

235. Ben Johnson, *Breweries Backing Bill to Reduce Limits on Growler Sales*, THE JOURNAL (Mar. 22, 2013), <http://www.journalimpls.com/?s=Breweries+backing+bill+to+reduce+limits+on+growler+sales>.

236. S.F. 541, 88th Leg., 1st Reg. Sess. (Minn. 2013).

237. *Id.*

238. Schwandt, *supra* note 229.

239. *Id.*

240. Jake Anderson, *New Laws Impact MN Brewers, Distilleries, and Wineries*, TWINCITIES BUS. (May 20, 2014), <http://tcbmag.com/News/Recent-News/2014/May/New-Laws-Impact-MN-Brewers-Distilleries-And-Wine>.

241. *Id.*

242. *Id.*

243. Jeff O'Brien, *Prohibition's Progeny: Understanding Minnesota's Three-Tiered Alcohol Distribution System*, N. WRIGHT COUNTY TODAY (May 22, 2014), <http://northwrightcounty.today/2014/05/prohibitions-progeny-understanding-minnesotas-three-tiered-alcohol-distribution-system/>.

244. Tom Scheck, *Teamsters Lobby Against Proposed Sunday Growler Sales*, MPRNEWS (Apr. 11, 2014), <http://www.mprnews.org/story/2014/04/11/teamsters-lobby-against-proposed-sunday-growlers-sales>.

sales became a reality in Minnesota with the passage of the state omnibus liquor bill in May 2015.²⁴⁵

C. The Sherman Antitrust Act

Another interesting issue to consider is whether the types of above actions by the large brewers and distributors reach the level of collusion under the Sherman Antitrust Act.²⁴⁶ The Sherman Antitrust Act governs anticompetitive practices.²⁴⁷ Given the concerted efforts by these large brewers and distributors to stem the growth of smaller breweries, especially their efforts against growler sales, a case can be made.

The legality of the three-tier distribution system itself certainly seems to be unquestionably ensconced as evidenced by the Supreme Court's consistent holdings, most recently in *Granholm*.²⁴⁸ However, just because there is no constitutional issue with the three-tier system, it should not give large brewers and distributors carte blanche to use any means necessary to entrench their historical market share and profit margins at the expense of consumer choice and growth of smaller breweries.

Utilizing the framework of analyzing cases under the Sherman Antitrust Act, craft brewers would need to show that the "challenged anticompetitive conduct stem[s] from independent decision or from an agreement, tacit or express" by the large distributors and breweries.²⁴⁹ These mere allegations, however, would need to be further substantiated by showing an actual agreement:

The inadequacy of showing parallel conduct or interdependence, without more, mirrors the ambiguity of the behavior: consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market.²⁵⁰

The large brewers and distributors could further counter that their actions are more akin to "conscious parallelism," a common reaction of 'firms in a concentrated market [that] recogniz[e] their shared economic interests and their interdependence with respect to price and output decisions' [that] is 'not in itself unlawful.'"²⁵¹ Although the large brewers are not

245. Peter Callaghan, *Gov. Dayton Just Signed the Bill Allowing Sunday Growler Sales. Now What?*, MINNPOST (May 5, 2015), <https://www.minnpost.com/politics-policy/2015/05/gov-dayton-just-signed-bill-allowing-sunday-growler-sales-now-what>.

246. Sherman Antitrust Act, 15 U.S.C. §§ 1–7 (2006 & Supp. V 2011).

247. *Id.*

248. *Granholm v. Heald*, 544 U.S. 460, 523–24 (2005).

249. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007).

250. *Id.* at 554.

251. *Id.* at 553–54 (quoting *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993)).

attempting to control their own output, they clearly affect the output of their mutual competition when they lobby for legislation that effectively caps the production of smaller brewers.

CONCLUSION AND RECOMMENDATION FOR FUTURE GROWLER REGULATION

Based on the tangle of legislation that currently exists regarding growler regulations within the greater craft beer industry, it is apparent that coordinated reform is needed. Recalling the recommendations in Part V, states can solve many problems by adopting a more open licensing environment like that in Washington State. The guiding principle should be to make growlers available as freely as possible. Based on the financial benefits they provide to growing small breweries and increases in consumer choice, there is very little argument against encouraging their use.

It is also clear that growlers are often tied up in license disputes, which are in turn a proxy in production ceiling battles. Congress passed the most influential production ceiling legislation, which fostered the initial growth of craft breweries, in part to reduce excise taxes.²⁵² Brewers should be taxed on their ultimate production output, and if this nation wants to encourage smaller brewers, a tax break is an appropriate incentive. However, when state legislatures attempt to use similar limits in order to tie up the right to self-distribute and, especially, to distribute via growlers on-site, it is a perversion of this principle.

Furthermore, a brewery's own growler sales, while providing a critical revenue stream to craft brewers, are still small enough that they are not a threat to large breweries or to the fairness of the general taxation system. Growlers are useful marketing and acquisition tools for a growing small brewery; therefore, production ceilings serve as a disincentive to invest once the (often arbitrary) cap is reached. By decoupling the ability to distribute via growler from any production ceiling, many future squabbles in state legislatures will be avoided. I would go further and propose that both manufacturer and brewpub licenses include the automatic right to distribute via growler, absent any production cap restriction.

Additionally, removing restrictions on growler size and allowing any brewery or any retailer to fill any growler is equally beneficial to consumers as it is to brewers. This would solve the issue seen in Georgia, where by crippling growler size, the legislature is imposing a de facto ban on the vessel. Finally, by allowing both breweries as well as third-

252. 26 U.S.C. § 5052 (amended 2008).

party retailers to sell growlers, states would create more choice in the market for consumers and greater exposure for small breweries.

The growler has enjoyed a comeback that has mirrored that of the craft beer industry in the past twenty years. Not since the days in which the growler was a modest “growling” metal pail has the vessel been as popular as it is today. By ensuring that the regulations in place are both intelligent and fair, growlers and the entire craft beer industry should be able to continue reaping the benefits of years of toil and innovation that has rebuilt the industry from near destruction at its nadir. Growlers are economical, environmentally friendly, and an ingrained part of craft beer culture. The business that growlers support is by definition almost entirely local—the product they hold is meant to be consumed fresh, usually by somebody within the immediate area of the brewery itself. Whether at the brewery, the bottle shop, a restaurant, or even the local drug store, the ubiquity of growler availability has a real positive effect on small breweries and their customers. We should therefore continue to take the necessary steps in fostering growler use and, of course, keeping in mind the ultimate purpose of the vessel, take time out at the end of the day to gather with friends and family in order to savor the fine products that growlers conveniently help deliver to us.