AN ANALYSIS OF AMENDED H.R. 5034, THE COMPREHENSIVE ALCOHOL REGULATORY EFFECTIVENESS ACT OF 2010

Einer Elhauge

Petrie Professor Of Law

Harvard Law School*

Date Submitted: September 26, 2010

Submitted for House Judiciary Committee Hearing on H.R. 5034

11 a.m., September 29, 2010

* I have been retained to state my opinions in this statement by the Beer Institute. The views expressed here are my own and should not be taken to reflect the views of Harvard University, which does not take institutional positions with respect to specific legislation, litigation, or regulatory proceedings. I am grateful for the invaluable research assistance of Michael Darby and Mitchell Reich.

I. INTRODUCTION

This white paper analyzes H.R. 5034, the Comprehensive Alcohol Regulatory Effectiveness Act of 2010, on the assumption that the substitute amendment offered by Congressman Bill Delahunt is adopted.[1] Proponents have argued that this proposed Act is necessary to resolve conflicts in caselaw, avoid the threat of deregulation, and end excessive litigation.[2] But a review of the recent cases indicates that the alleged conflicts in caselaw generally reflect results that properly varied with different facts, that the common law process has largely resolved the alleged conflicts, and that none of the cases has resulted in deregulation. Probably because the common process has already clarified the main issues, the initial stream of cases has dwindled to a trickle, thus mooting any concern about excessive litigation.

Moreover, even if fears of uncertainty, deregulation, and excessive litigation were serious, the proposed Act would be a poor remedy for them. Worse, the Act would allow many types of protectionist state laws and could allow state regulations that conflict with federal antitrust statutes or other important Congressional Acts.

The proposed Act has two main provisions. First, § 3(a) declares that: "It is the policy of Congress that each State or territory shall continue to have the primary authority to regulate alcoholic beverages." Most courts would likely interpret § 3(a) to have no actual legal effect because it merely states a "policy" that is meant to "continue" (rather than change) the existing congressional policy that leaves states as primary alcohol regulators. However, some courts

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[1] Amendment in the Nature of a Substitute to H.R. 5034, 111th Cong. (2010), offered in Letter of Representative Bill Delahunt to Chairman John Conyers, Jr. (Sept. 13, 2010). Although I had initially analyzed the original version of the H.R. 5034, my understanding is that the forthcoming committee hearing is likely to focus on the substitute amendment, and thus I limit this white paper accordingly.

[2] *See* National Beer Wholesalers Association, *Section by Section Analysis of the CARE Act*, *available at* http://www.alcohollawreview.com/wp-content/uploads/2010/09/Section-by-Section-Analysis-of-the-CARE-Act.pdf [hereinafter NBWA, *Section by Section*]; National Beer Wholesalers Association, *Fact vs. Fiction: H.R. 5034 – The Comprehensive Alcohol Regulatory Effectiveness (CARE) Act of 2010*, *available at* http://www.nbwa.org/sites/default/files/Fact_vs._Fiction_H.R.5034.pdf [hereinafter NBWA, *Fact v Fiction*].

might conclude (given the canon against superfluous language) that § 3(a) must have been intended to accomplish something, and thus might interpret § 3(a) to inversely preempt some -- or maybe even all -- federal statutes that conflict with state alcohol regulation. In short, there are at least two ways to interpret § 3(a). Under the first interpretation, § 3(a) changes nothing, and thus cannot address any of the concerns animating the act. But if any courts adopt some version of the alternative interpretation, then § 3(a) will create legal conflict, and the possibility that courts might adopt such an alternative interpretation will likely induce a spate of litigation to resolve the meaning of § 3(a). Thus, § 3(a) would affirmatively worsen two of the proponent's concerns because § 3(a) will likely foment a new round of litigation and case conflicts about how to interpret § 3(a). Under the alternative interpretations, § 3(a) could also generate inverse preemption decisions that immunize state alcohol regulation that is anticompetitive, contrary to the congressional policy of the antitrust statues, or that immunize state alcohol regulations that conflict with other congressional statutes and policies.

Second, § 3(b) eliminates commerce clause scrutiny unless a state alcohol regulation "intentionally or facially" discriminates against out-of-state "producers." This provision would have three unfortunate effects. (1) It would eliminate dormant commerce clause scrutiny of state alcohol laws that have discriminatory *effects* on out-of-state interests unless a discriminatory intent can be proven. This could allow protectionist state alcohol laws where intent is hard to prove or where a state has no discriminatory intent but the state's lack of political accountability to out-of-state interests makes the state indifferent to those discriminatory effects. Further, § 3(b) can be expected to create new court conflicts about whether and when courts can properly infer a discriminatory intent from the discriminatory effects, which will undermine the proponent's concerns about legal uncertainty and excessive litigation. (2) Because the § 3(b)

exception is limited to discrimination against out-of-state "producers," § 3(b) would eliminate dormant commerce clause scrutiny of state alcohol laws that *intentionally or facially* discriminate against out-of-state interests other than producers, such as out-of-state *consumers*. (3) Because the § 3(b) exception is limited to discrimination, § 3(b) would eliminate current dormant commerce clause scrutiny of nondiscriminatory state alcohol laws that *directly* regulate interstate commerce. Because the "direct regulation" branch of dormant commerce clause doctrine protects states from interfering with the ability of *other* states to regulate, eliminating such scrutiny would ironically allow some states to directly regulate interstate commerce in ways that hamper the ability of *other* states to exercise their own Twenty-First Amendment rights.[3]

In short, the proposed Act would actually worsen the concerns about legal uncertainty and excessive litigation and can be expected to produce a spate of new legal conflict and litigation. Nor does the proposed Act further an interest in avoiding deregulation of alcohol markets. Nothing in the proposed Act would prevent a state from deregulating its alcohol markets. Nor is the proposed Act at all necessary for states to avoid deregulation of alcohol markets. The Twenty-First Amendment already provides the states with ample power to regulate their alcohol markets, and the Supreme Court has interpreted such powers broadly. So long as the state law does not violate other constitutional provisions, including the dormant commerce clause, states have unquestioned power to ban the sale and consumption of alcohol, assume direct control of it, and adopt regulations funneling sales through the three-tier system. In addition, states may adjust their alcohol tax to achieve their legitimate interests. Thus, states already have all the regulatory authority they need to advance legitimate interests like encouraging temperance or curbing underage drinking.

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[3] Proposed Act § 4 seems largely mooted by § 3(b), but if the proposed Act were further amended to cut § 3(b), then § 4 would raise serious problems because it could be interpreted to allow discrimination against out-of-state alcohol even if such discrimination would have been illegal under § 3(b). *See infra* Section III.C.

II. THE CONCERNS MOTIVATING THE PROPOSED ACT ARE UNFOUNDED OR MOOT

A. The Concerns About Conflicting Caselaw and Excessive Litigation

Since the Supreme Court decided *Granholm v. Heald*,[4] litigants have brought numerous actions against state alcohol regulations. Plaintiffs have brought these challenges mainly under two theories. First, they have argued that the state laws violate the Sherman Act because they restrain trade in a way that does not qualify for antitrust state action immunity. Second, litigants have alleged that the state laws violate the dormant commerce clause. Despite claims that these cases have resulted in conflicting conclusions, the following analysis shows that the caselaw has been consistent, and that the differences in legal outcomes instead properly reflect differences in the facts of each case.

1. Recent Antitrust Cases. In three recent cases, plaintiffs have claimed that state laws restrain trade in ways that violate the Sherman Act. Their results are all perfectly consistent. First, the Louisiana state court of appeals found that antitrust state action immunity protected various state laws designed to preserve the state's three-tier distribution system.[5] Second, the Fourth Circuit federal court of appeals denied antitrust state action immunity to Maryland's post-and-hold laws, which required wholesalers to post prices and adhere to them, and found that those laws violated the Sherman Act.[6] Finally, the Ninth Circuit federal court of appeals upheld Washington state laws that protected the three-tier distribution system but invalidated its post-and-hold laws.[7] Thus, the antitrust cases are consistent with each other because they invalidated

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[4] 544 U.S. 460 (2005).
[5] Manuel v. Louisiana, 982 So. 2d 316 (La. Ct. App. 2008).
[6] *See* TFWS, Inc. v. Franchot, 572 F.3d 186 (4th Cir. 2009); TFWS v. Schaefer, 242 F.3d 198 (4th Cir. 2001).
[7] *See* Costco Wholesale Corp. v. Maleng, 522 F.3d 874 (9th Cir. 2008).

post-and-hold schemes that helped financially interested firms anticompetitively fix prices, while sustaining laws that protected the three-tier system.[8]

Bill proponents have argued that these cases are in conflict with each other because a volume discount was prohibited in the Maryland case but not in the Washington state case.[9] However, there is no actual conflict. The court in the Maryland case found that the volume discount was inseparable from the invalid post-and-hold provisions and indeed was designed to reinforce those provisions by making it easier for rivals to observe deviations from posted prices.[10] In contrast, the court in the Washington state case found that the volume discount was separable from the invalid post-and-hold provisions because it was designed to instead enforce a valid uniform pricing requirement.[11] This is not a conflict, but is rather an application of severability principles that reached different results because the facts differed.

2. Recent Dormant Commerce Clause Cases. More frequently, plaintiffs prompted by the Supreme Court's decision in *Granholm* have alleged that state alcohol regulations violate the commerce clause by discriminating against out-of-state alcohol firms to protect in-state businesses. Plaintiffs principally have relied on *Granholm* to mount challenges. Many of these cases concerned state regulations that treated out-of-state producers differently from in-state producers. For example, many cases involved state laws which provided that only in-state producers could ship directly to in-state consumers. Courts, relying on *Granholm*, easily disposed of these cases, often on a motion for summary judgment or a judgment on the

[8] Recent empirical work has confirmed the anticompetitive effects of post-and-hold laws and further has found that they do not measurably reduce drunk driving or underage drinking. *See* James C. Cooper & Joshua D. Wright, State Regulation of Alcohol Distribution: The Effects of Post & Hold Laws on Consumption and Social Harms, FTC Working Paper No. 304 (August 2010).
[9] NBWA, *Fact v Fiction, supra* note 3.
[10] 572 F.3d at 193; 242 F.3d at 209.
[11] 522 F.3d at 900.

pleadings, by holding that they violated the dormant commerce clause.[12] In other instances, state legislatures took the initiative to make their statutes even-handed, such as by either prohibiting direct shipment to state residents altogether or allowing both in-state and out-of-state entities to ship to state residents.[13] Such evenhanded state laws have been sustained or unchallenged.[14]

Challenges have also been brought against state laws that make direct sales to consumers illegal for out-of-state retailers but legal for in-state retailers. However, even though these state laws are facially discriminatory, they have actually been upheld by all three appellate federal circuits to consider the question, on the ground that favoring in-state retailers is inherent to the states' Twenty-first Amendment authority to define who constitutes a retailer within the three-tier system—a system whose legal validity has been unquestioned in the courts.[15] True, one district court reached the opposite conclusion based on the law's facial discrimination, but that district court did not consider the connection between the state law and the three-tier system and the appeal was mooted when the legislature amended the statute.[16] There thus does not appear to be any final judgment that prohibits such statutes and little risk they would be invalidated, and in any event any nominal conflict in caselaw appears to have been decisively resolved in favor of the three circuits that sustained such laws.

State alcohol regulations that were facially nondiscriminatory have been invalidated in only three instances, each of which involved state laws that were found to be discriminatory in effect. First, an Indiana statute provided that any winery could ship directly to Indiana

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[12] *See, e.g.*, Action Wholesale Liquors v. Oklahoma Alcoholic Beverage Laws Enforcement Comm'n, 463 F. Supp. 2d 1294 (W.D. Okla. 2006).

[13] *See, e.g.*, MICH. COMP. LAWS § 436.1203 (2010); MO. REV. STAT. § 311.185 (2010).

[14] *See, e.g.,* Jelovsek v. Bredesen, 545 F.3d 431 (6th Cir.2008) (upholding Tennessee ban on direct shipment to consumers by any winery), *cert. denied,* 130 S. Ct. 199 (2009); Hurley v. Minner, Civ. No. 05-826, 2006 WL 2789164, at *6 (D. Del. Sept. 26, 2006) (upholding Delaware ban on direct shipment to consumers by any winery).

[15] Wine Country Gift Baskets.com v. Steen, 612 F.3d 809, 815-821 (5th Cir. 2010); Arnolds Wines, Inc. v. Boyle, 571 F.3d 185, 188 (2d Cir. 2009); Brooks v. Vassar, 462 F.3d 341, 352 (4th Cir. 2006).

[16] Siesta Village Market v. Granholm, 596 F. Supp. 2d 1035, 1039–45 (E.D. Mich. 2008); *Wine Country*, 612 F.3d at 817 n.5 (noting that the appeal was mooted by a change in statute).

consumers, so long as the winery did not act as its own wholesaler in any other state.[17] Because California, Oregon, and Washington, which accounted for 93% of the country's wine production, allowed their wineries to sell directly to retailers, producers in these states were prohibited from selling directly to Indiana consumers.[18] The Seventh Circuit struck down this provision because it protected Indiana wholesalers at the expense of Indiana consumers and out-of-state wineries.[19]

Second, a Massachusetts law provided that "small" wineries could sell wine through any or all of three methods – to wholesalers, retailers, or directly to consumers – whereas large wineries had to choose between one of two methods – selling to wholesalers or directly to consumers.[20] Although the Massachusetts law defined small and large wineries by their wine volume, and thus was facially nondiscriminatory, the First Circuit held the law was discriminatory in effect because the plaintiffs proved that all Massachusetts wineries qualified as "small" wineries and that all "large" wineries were out of state, and that the law increased the market share of in-state wineries.[21] The court also inferred that the state law had a discriminatory intent from its discriminatory effects, from the fact that the statutory provision were not closely tailored to achieve the asserted legitimate purposes, from its context because it was enacted along with other provisions favoring local industry, and from the statements of various state legislators.[22]

Bill proponents have argued that this First Circuit decision is inconsistent with a Ninth Circuit decision upholding an Arizona law that allowed small but not large wineries to ship directly to consumers.[23] But there is no inconsistency. The case results differed because the

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[17] *See* Baude v. Heath, 538 F.3d 608, 611 (7th Cir. 2008).
[18] *See id.* at 611–12.
[19] *See id.*
[20] *See* Family Winemakers of California v. Jenkins, 592 F.3d 1, 4 (1st Cir. 2010).
[21] *See id.* at 4–5, 8–13.
[22] *See id.* at 7, 13–17.
[23] NBWA, *Fact v Fiction*, *supra* note 3.

evidence differed. The Ninth Circuit upheld the Arizona law because no evidence was presented that the Arizona law was discriminatory in effect or purpose.[24] The evidence did not prove that the Arizona law altered the share of wine sales by in-state wineries, and to the contrary the evidence indicated that the vast bulk of benefitted small wineries who used the law to sell directly to Arizona consumers were located out of state.[25] Nor was any evidence offered that the Arizona legislature's intent was protectionist.[26]

Third, the Sixth Circuit invalidated a Kentucky law requiring in-person transactions because the evidence showed that the law was discriminatory in effect, favoring in-state wineries and wholesalers over out-of-state wineries.[27] In contrast, the First, Seventh, and Ninth Circuits have all reached the contrary conclusion, sustaining state laws requiring in-person transactions because the evidence in those cases did not prove a discriminatory effect that altered the market share of in-state wineries.[28] The opinions leave it unclear whether this difference in result simply reflects a difference in the evidence presented (in which case there is no real legal conflict) or rather a different conclusion about how the discriminatory effect test applied to similar facts. But even if the latter is the case, the weight of authority is clearly with the latter three circuits, so the common law process seems to be resolving any conflict in favor of sustaining in-person sale requirements.

3. There Remains Little Legal Conflict or Litigation. The upshot is that state legislatures have generally reacted responsibly to comply with *Granholm* and the courts have almost always reached consistent results, and in the two possible exceptions the common law

[24] *See* Black Star Farms LLC v. Oliver, 600 F.3d 1225 , 1232-33 (9th Cir. 2010).
[25] *Id.* at 1231-32.
[26] *Id.* at 1230-31.
[27] Cherry Hill Vineyards, LLC v. Lilly, 553 F.3d 423, 432–34 (6th Cir. 2008).
[28] *See Black Star Farms*, 600 F.3d at 1231–32; *Baude*, 538 F.3d at 613–15; Cherry Hill Vineyard LLC v. Baldacci, 505 F.3d 28, 36–38 (1st Cir. 2007); *see also* Kleinsmith v. Shurtleff, 571 F.3d 1033, 1042 (10th Cir. 2009) (distinguishing *Lilly* on the ground that the plaintiffs in *Lilly* had presented sufficient evidence to establish a discriminatory effect).

process appears to already be resolving any inconsistency. Courts have properly struck down state laws that were facially discriminatory, except that the appellate courts have all upheld state laws that involved the sort of facial discrimination that is inherent in defining the three-tier system whose legitimacy the cases have never questioned. When state laws are facially neutral, the courts have upheld them when the evidence did not prove a discriminatory effect, but have invalidated them when courts found that the evidence did prove such an effect. Generally, this difference in result does not indicate a conflict in law, but a difference in the facts presented, and the one possible exception appears to be disappearing as the common law process resolves the issue in favor of sustaining state in-person sale requirements.

In the wake of this common law clarification, the number of cases has dropped sharply. I can find only three cases that have been filed in this arena in the last 12-18 months, two of which have already reached substantive resolution in the trial court.[29] Further, there are only five other active cases, two of which have been resolved on appeal, and three of which have been resolved in the trial court and have appeals pending.[30] The concern about excessive litigation thus now appears moot and is no longer a strong reason to adopt a federal statute.

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[29] *See* Lebamoff Enterp., Inc. d/b/a Cap N' Cork v. Snow, 09-00744, United States District Court for the Southern District of Indiana (filed in state court on May 19, 2009) (challenging state law that permitted wineries, but not wine retailers, to ship directly to consumers via common carrier); S.L. Thomas Family Winery, Inc. v. Walding, No. 3:10-cv-4, United States District Court for the Southern District of Iowa (filed Jan. 12, 2010) (dismissed May 3, 2010) (challenging state's prohibition against direct shipment by out-of-state wineries from non-reciprocal states); Anheuser-Busch, Inc. v. Schnorf, Case No: 10-cv-1601 (filed March 10, 2010) (partial summary judgment to plaintiff granted Sept. 3, 2010, based on facial discrimination).

[30] *See* Family Winemakers of California v. Jenkins, 592 F.3d 1 (1st Cir. 2010) (awaiting a decision on attorney's fees); Wine Country Gift Baskets.com v. Steen, 612 F.3d 809, 815-821 (5th Cir. 2010) (awaiting a possible petition for certiorari); Freeman v. Fischer, 563 F. Supp. 2d 493 (D.N.J. 2008) (striking down facially discriminatory laws that charged out-of-state wineries double the license fee charged to in-state wineries and limited out-of-state wineries to one salesroom when in-state wineries were allowed six salesrooms); US Airways, Inc. v. O'Donnell, --- F. Supp. 2d ----, 2009 WL 6340104 (D.N.M. 2009) (holding that state alcohol laws at issue were not preempted by federal air transportation laws); Browning v. Oregon Liquor Control Commission, No. 0805-0685, Circuit Court of Oregon, County of Clackamas (rejecting challenge to state's prohibition against central warehousing by retailers).

B. The Alleged Threat of Deregulation

In an effort to gather support for the proposed Act, several proponents have alleged that the litigation summarized above threatens to "deregulate" the alcohol industry.[31] Some proponents have suggested that such deregulation by lawsuit could cause the sort of problems that one report found resulted from deregulating alcohol markets in the United Kingdom.[32]

This fear is misplaced because none of the cases hampers the ability of states to effectively regulate their alcohol markets. As the Supreme Court stressed in *Granholm*, states have unquestioned power to ban the sale and consumption of alcohol, assume direct control of it, or adopt regulations funneling sales through the three-tier system.[33] Rather, what the cases legitimately strike down are laws that violate the dormant commerce clause (because the laws discriminate against out-of-state interests) or violate antitrust law (because the laws give financially interested firms the power to impose anticompetitive restraints).

Even if deregulation were a serious concern, the proposed Act does not alleviate it. Nothing in the proposed Act prevents states from deregulating their alcohol markets. Under the proposed Act, states could even adopt precisely the deregulatory approach as the U.K. approach decried by proponents of the proposed Act. All the proposed Act does is allow states to adopt new laws regulating or deregulating alcohol markets in ways that have discriminatory effects against out-of-state producers, that discriminate intentionally or facially or in effect against

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[31] *See, e.g.*, NBWA, *Section by Section*, *supra* note 3; Letter from Nat'l Assoc. of Att'ys Gen., to Rep. Hank Johnson (Mar. 29, 2010), *available at* http://www.naag.org/assets/files/pdf/signon.Final%20Alcohol%20Letter%20Submit%20Committee.pdf.; *Hearing on Legal Issues Concerning State Alcohol Regulation Before the Subcomm. on Courts and Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. (2010) (statement of Rep. Steve I. Cohen), *available at* http://judiciary.house.gov/hearings/pdf/Cohen100318.pdf.; (statement of Representative Bobby L. Rush), *available at* http://judiciary.house.gov/hearings/pdf/Rush100318.pdf.

[32] *See Hearing on Legal Issues Concerning State Alcohol Regulation Before the Subcomm. on Courts and Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. (2010) (statement of Pamela S. Erickson, Chief Executive Officer, Public Action Management, Scottsdale, Ariz.), *available at* http://judiciary.house.gov/hearings/pdf/Erickson100318.pdf.

[33] *See Granholm*, 544 U.S. at 489.

consumers or other nonproducers out-of-state, or that directly regulate interstate commerce in ways that interfere with the ability of other states to exercise their Twenty-First Amendment powers. Further, if § 3(a) were interpreted by courts to inversely preempt the application of federal antitrust law, the proposed Act could also allow states to regulate or deregulate in ways that empower financially interested firms to restrain alcohol markets.

III. THE PROPOSED ACT WOULD NOT REMEDY ITS MOTIVATING CONCERNS, BUT WOULD HAVE MANY UNDESIRABLE EFFECTS

A. The Possible Effects or Non-effects of § 3(a)

1. Why § 3(a) Would Increase Uncertainty and Litigation. § 3(a) of the proposed Act provides: "It is the policy of Congress that each State or territory shall continue to have the primary authority to regulate alcoholic beverages." The effects of this provision are quite unclear. Most courts would likely interpret § 3(a) to have no actual legal effect. The main reason is that § 3(a) provides that it will only "continue" the current congressional policy of allowing states to have primary authority over alcohol regulation. The word "continue" suggests that the § 3(a) was not meant to change the current state of law, which means that Congress deems the state powers allowed under current law to already give states "primary authority" over alcohol regulation. Under this interpretation, although *certain* types of state alcohol regulation would continue to be preempted because they conflict with federal statutes like the antitrust laws, such isolated preemptions would be deemed consistent with the *overall* "primary authority" that states have over alcohol regulation because those isolated preemptions do not bar states from all the other types of alcohol regulation that can achieve legitimate state interests.

Reinforcing this first interpretation would be the fact that § 3(a) states only a general "policy", which some courts would likely conclude means that § 3(a) was not intended to have operative effect, but rather was only intended to state a general purpose that should be used to interpret the operative provisions of the proposed Act. These courts could cite a line of cases that have treated other statutory statements of "policy" like a statement of legislative purpose that has no operative effect itself but instead provides only a guide to help interpret any ambiguity that exists in the statute's actual operative provisions.[34]

If this first interpretation were adopted by all the courts, then § 3(a) changes nothing and has no real point. Lacking any effect, § 3(a) could not serve any of the purposes animating the proposed Act. To the contrary, under this first interpretation, the proposed Act would have exactly the same meaning as the Act would have without § 3(a).

However, an alternative interpretation is also possible. Some courts might conclude that the first interpretation cannot be right precisely because it would mean that § 3(a) has no real point. These courts could reason that Congress cannot have meant to enact a meaningless provision. They could cite the canon of statutory construction that statutes should not be interpreted in ways that make some words superfluous.[35] This canon seems particularly apt here because § 2(a) already states that Congress' purpose is to "reaffirm and protect the primary authority of States to regulate alcoholic beverages," so that § 3(a) would be superfluous even as a statement of purpose if the first interpretation were adopted.

[34] See, e.g., Rapanos v. U.S., 547 U.S. 715, 737 (2006); U.S. v. New Mexico, 438 U.S. 696, 713 (1978).
[35] Moskal v. United States, 498 U.S. 103, 109-110 (1990) ("a court should 'give effect, if possible, to every clause and word of a statute.'")(citing United States v. Menasche, 348 U.S. 528, 538-539 (1955)); Gustafson v. Alloyd Company, Inc, 513 U.S. 561, 574 (1995) ("the Court will avoid a reading which renders some words altogether redundant"); Circuit City Stores, Inc. V. Adams, 532 U.S. 105, 113 (2001) (rejecting an interpretation because it would make a "provision superfluous", noting that "Our cases express a deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment") (quoting Pennsylvania Dept. of Public Welfare v. Davenport, 495 U.S. 552, 562 (1990)).

Given the canon against superfluous words, these courts might reason that the fact that Congress wanted to "continue" its existing policy does not necessarily mean that Congress believed that its existing policy was being correctly followed by the courts. Instead, these courts might conclude, the only way to give § 3(a) any meaning would be to assume that Congress believed that its existing Congressional policy was being violated by the courts and that § 3(a) was necessary to reverse some or all of those decisions in order to give states the intended "primary authority."

Courts adopting this second interpretation could also rely on another line of cases that have sometimes interpreted statements of congressional "policy" to have operative effect.[36] There is thus likely to be a conflict about how to interpret both the word "policy" and the word "continue" in § 3(a).

Moreover, there is also an ambiguity in how to interpret the words "primary authority" that is likely to lead to at least two possible versions of the alternative interpretation, which I will call the second and third interpretations to distinguish them from the first interpretation. Under the second possible interpretation, the issue of whether a state retains "primary authority" would be judged *overall*. That is, the court would ask about all the ways in which states can regulate alcohol, and all the ways in which federal statutes restrict particular types of alcohol regulation, and determine whether the latter was so large that the states no longer had primary authority overall. The second interpretation would thus interpret Congress to be displeased with the overall balance of authority struck by current court decisions, requiring that some (but not all) of the decisions preempting state alcohol regulation should be reversed.

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[36] Byers v. Inuit, 600 F.3d 286, 294-95 (3d Cir. 2010) (interpreting a statute that stated it was congressional "policy" that the IRS "should cooperate with and encourage the private sector" to provide statutory authority to enter into certain contracts that granted antitrust immunity); Schutz v. Thorne, 415 F.3d 1128, 1137-38 (10th Cir. 2005) (interpreting a statement of congressional "policy" to grant dormant commerce clause immunity, although in that case there was also an operative provision to the same effect).

Under the third possible interpretation, courts would interpret "primary authority" to mean that states must have primacy over federal law in *each instance* when states regulate alcohol, even though that state regulation conflicts with federal statutes. Courts may reach this construction because several federalism decisions, including the seminal case *United States v. Lopez*,[37] have used the term "primary authority" to refer to states' power over subject matters outside the proper reach of Congress.[38] Under this possibility, § 3(a) would mean that any state alcohol regulation would inversely preempt the application of any federal statute that conflicts with that state regulation.

If all the courts uniformly adopted the first interpretation, then § 3(a) has no effect and cannot advance any of the purposes of the proposed Act. But if at least some Courts adopt the second or third interpretations, then that will create a conflict among the courts and vastly increase legal uncertainty. Indeed, the second interpretation would generate considerable uncertainty even within itself, because courts would likely vary in their interpretation of just how many (and what types) of federal statutes have to be inversely preempted in order to restore overall "primary" authority to states. Under the second interpretation, it would be unclear, for example, whether all, some, or no applications of federal antitrust law would be inversely preempted.

Second 3(a) would thus likely create great legal uncertainty if, as seems likely, some courts adopt the second or third interpretations. Further, the prospect that the set of claims that win under § 3(a) could differ from the set of claims that have won under preexisting law will

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[37] 514 U.S. 549 (1995).

[38] *E.g.* id. at 561 n.3 (quoting Brecht v. Abrahamson, 507 U.S. 619, 635 (1993)); Engle v. Isaac, 456 U.S. 107, 128 (1982); *see* Nextel Partners Inc. v. Kingston Tp., 286 F.3d 687, 691 (3d. Cir. 2002) (construing Telecommunications Act to grant states "primary authority for land use regulation"). Courts have rarely construed the term "primary authority" when it has been used in statutory text. *See, e.g.*, 42 U.S.C. § 290bb-25b(b)(7); 18 U.S.C.A. § 1030; 22 U.S.C.A. § 2707; *but see* Manuel v. State, 982 So.2d 316, 326 n.7 (La. App. 2008) (interpreting term "primary authority" in 42 U.S.C. § 290bb-25b(b)(7) to mean that Congress has continued to "show respect for the States' authority in this area").

induce a new round of litigation to test the limits of § 3(a) and clarify its meaning. Thus, far from serving the statutory purposes of reducing legal uncertainty and ending excessive litigation, § 3(a) is likely to thwart those purposes by increasing legal uncertainty and increasing litigation. If § 3(a) does not have those adverse effects, it will likely be because the courts have uniformly read it to have no effect at all, in which case it might as well be eliminated.

2. The Possible Adverse Substantive Effects If § 3(a) Were Interpreted to Give It Meaning. To the extent that courts did interpret § 3(a) to sometimes or always inversely preempt the application of federal statutes that conflict with state alcohol regulation, the substantive effects are likely to be undesirable because such inverse preemption will thwart the congressional policy behind that federal statute. To illustrate, suppose a court either (a) adopted the third interpretation or (b) adopted the second interpretation and concluded that inverse preemption of federal antitrust laws was necessary to restore overall primary authority to states. Then § 3(a) would leave states free to adopt anticompetitive laws that favor financially interested firms in ways that are unnecessary to promote legitimate state interests protected by the Twenty-First Amendment.

A state legislature could, for example, adopt a statute that authorizes price-fixing cartels in any alcohol market.[39] Such a state might believe that allowing alcohol cartels would serve a legitimate public interest because it results in higher alcohol prices that the state might think would promote worthy goals like temperance or curbing underage drinking.[40] But even if a state

[39] Under current antitrust state action doctrine, a court would strike down the state statute because, although the state legislature has clearly authorized the cartel, the cartel prices are not being actively supervised by any state official. Einer Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667, 673–74 (1991) (summarizing caselaw). Thus, the terms of the restraint – the level of cartel prices – are being set by financially interested firms who cannot be trusted to act in the public interest and whose actions must instead be reviewed under antitrust laws that are designed to regulate interested market conduct.

[40] However, recent empirical work indicates that, although allowing anticompetitive pricing reduces output slightly, it does not measurably reduce drunk driving or underage drinking. *See* James C. Cooper & Joshua D. Wright, State Regulation of Alcohol Distribution: The Effects of Post & Hold Laws on Consumption and Social Harms, FTC

legislature truly believes that higher alcohol prices would achieve those public interest objectives, it can already achieve that objective with antitrust immunity under current law by simply authorizing the setting of alcohol prices by a state official who is financially disinterested and politically accountable.[41] Such a statute would satisfy the clear authorization and active supervision elements of current antitrust state action immunity, and such a disinterested political process would assure that the prices being set are optimally designed to further those public interest goals.

In contrast, the problem with a state allowing a private cartel to set alcohol prices is that it violates the fundamental premise of federal antitrust law that financially interested firms cannot be trusted to restrain trade in ways that further the public interest.[42] A private cartel has incentives to set prices to maximize its profits, rather than limit itself to the prices that best achieve public interest objectives. The cartel might set prices higher than optimal to achieve public interest objectives because doing so creates more cartel profits. Or the cartel might set prices too low because the cartel has a long run interest in maintaining a sales volume that is inconsistent with state alcohol policy. Thus, allowing legislatures to authorize alcohol cartels would enable financially-interested firms to reap cartel profits at the expense of consumers in ways that are unnecessary to advance any legitimate state interests and may well undermine them. The same is more generally true for other state laws that allow private actors to impose

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Working Paper No. 304 (August 2010). The most likely reason is that the price increases have little effect on the consumption of alcohol by persons prone to engage in drunk driving or underage drinking (their demand is inelastic), in which case anticompetitive price increases selectively reduce sales to the more temperate part of the market (adults who drink in moderation, the demand of whom is, not surprisingly, more elastic). Laws that directly target problem driving by lowering the permissible blood alcohol level to .08 for everyone or to zero for underage drinkers do, in contrast, significantly reduce drunk driving and teen drinking. *Id.*

[41] Elhauge, *supra* note , at 696 (concluding that the Supreme Court caselaw can all be explained by the principle that "an anticompetitive restraint is immune from antitrust liability whenever a financially disinterested and politically accountable actor controls and makes a substantive decision in favor of the terms of the restraint."); *see also id.* at 682–96 (explaining why this simple principle is consistent with all the Supreme Court precedent)..

[42] *Id.* at 696-717.

anticompetitive restraints without having the terms of those restraints substantively approved and controlled by a disinterested public official.

3. Legislative History and Savings Clauses. In his letter proposing the current version of the proposed Act, Representative Delahunt stated: "I have removed from the text language that some claim would have allowed the states to engage in anti competitive behavior."[43] One might mistakenly believe that such an explicit statement by the sponsor of a bill would make it implausible that any court would ever interpret § 3(a) to inversely preempt federal antitrust law. However, many modern judges are textualists who are against considering legislative history (certainly when the text is clear and some judges even when the text is unclear), and even when judges consider legislative history, many regard it with skepticism because it states the views of only some legislators and is not (like the statutory text) adopted by the legislature as a whole. This is true even when the legislative history consists of official committee reports.[44] Judges give statements by bill sponsors or floor managers even less weight than committee reports,

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[43] *See* Letter of Representative Bill Delahunt to Chairman John Conyers, Jr. at 1 (Sept. 13, 2010).

[44] For example, Exxon Mobil Corporation v. Allapattah Services, Inc., 545 U.S. 546 (2005), held that courts should definitely not examine legislative history when the text is clear, expressed great skepticism about legislative history and committee reports in general, suggested (without deciding) that these problems might mean that courts should not examine legislative history even when the text is unclear, and concluded that the committee reports in the case at hand should not guide interpretation even if the text were unclear. The Court stated:

> Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms. Not all extrinsic materials are reliable sources of insight into legislative understandings, however, and legislative history in particular is vulnerable to two serious criticisms. First, legislative history is itself often murky, ambiguous, and contradictory. Judicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in "'looking over a crowd and picking out your friends.'" Second, judicial reliance on legislative materials like committee reports, which are not themselves subject to the requirements of Article I, may give unrepresentative committee members—or, worse yet, unelected staffers and lobbyists—both the power and the incentive to attempt strategic manipulations of legislative history to secure results they were unable to achieve through the statutory text. We need not comment here on whether these problems are sufficiently prevalent to render legislative history inherently unreliable in all circumstances, a point on which Members of this Court have disagreed. It is clear, however, that in this instance both criticisms are right on the mark.

Id. at 568-69. *See also* Wisconsin Public Intervenor v. Mortier, 501 U.S. 597, 601 (1992) (Scalia, J., concurring in the judgment) (refusing to join opinion that relied on committee reports). Blanchard V. Bergeron, 489 U.S. 87, 97-99 (1989) (JUSTICE SCALIA, concurring in part and concurring in the judgment) (refusing to join portion of opinion that relied on committee report).

though more weight than statements made by other individual legislators.[45] Further, statements made during the committee hearing process are generally treated with the most judicial skepticism of all.[46] There is thus no guarantee that all or even most federal judges will view Representative Delahunt's statement as decisive. Indeed, the question about what weight to give this statement is likely to generate even more legal conflicts and litigation.

One might reasonably conclude that the solution to this problem would be to amend the bill to add an explicit antitrust savings clause into the statutory text. But while this would solve the antitrust problem, it would increase the likelihood that courts would interpret § 3(a) to inversely preempt the application of other federal statutes. The reason is that many courts would reason that such an antitrust savings clause would have no point unless Congress thought that, absent such a clause, the language of § 3(a) did inversely preempt the application of federal statutes that conflicted with state alcohol regulations.[47] The canon against superfluous words could again be applied, here to conclude that the antitrust savings clause would have no meaning unless § 3(a) were interpreted to have such an inversely preemptive effect. Further, courts would likely also rely on the *expressio unius* canon (short for *expressio unius est exclusio alterius*), which means "the expression of one thing excludes others."[48] This canon would suggest that expressing an antitrust savings clause implies that Congress *did* want § 3(a) to inversely preempt

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[45] Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 118 (1980); Zuber v. Allen, 396 U.S. 168, 186 (1969); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395-396 (1951) (Jackson, J., concurring).
[46] *See* Kelly v. Robins, 479 U.S. 36, 51 n.13 (1986); S & E Contractors, Inc. v. United States, 406 U.S. 1, 13 n.9 (1972).
[47] *See* North Haven Board Of Education v. Bell, 456 U.S. 512, 521 (1982) (concluding that the fact that two exceptions covered employment in religious and military schools suggested the main provision was meant to cover school employment).
[48] *See* EINER ELHAUGE, STATUTORY DEFAULT RULES 189 (Harvard University Press 2008). The *expressio unius* canon is not always applied, and indeed sometimes courts apply the opposite canon that expressing certain things may indicate a statutory purpose that should be extended by analogy to include unexpressed things that advance the same purpose. ELHAUGE, *supra*, at 189-90. But the possibility of such a conflict in canons would only increase the likelihood of increased legal uncertainty and litigation.

the application to state alcohol regulations of all *non*-antitrust federal statutes, such as labor or civil rights laws.[49]

The only way to avoid that problem would seem to be to provide a savings clause for all federal statutes. But if such a global savings clause were adopted, § 3(a) would again seem to have no effect and thus might as well be eliminated.

B. The Adverse Effects of § 3(b) on Dormant Commerce Clause Scrutiny

1. How § 3(b) Changes Current Dormant Commerce Clause Doctrine. Current dormant commerce clause doctrine provides the following. "When a state statute *directly* regulates *or discriminates* against interstate commerce, *or* when its *effect* is to favor in-state economic interests over out-of-state interests, [the courts] have generally struck down the statute without further inquiry."[50] A state law that discriminates facially *or* in effect against out-of-state interests will be upheld "only if it advances a legitimate local purpose that cannot be adequately served by reasonable non-discriminatory alternatives."[51] A state law is deemed to "directly" regulate interstate commerce in violation of the dormant commerce clause if the state law effectively (1) regulates out-of-state transactions or (2) subjects interstate conduct to the risk of inconsistent regulations, where one state prohibits the same conduct that the other state mandates.[52] "When, however, a statute has only indirect effects on interstate commerce and regulates evenhandedly, [the courts] have examined whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits."[53]

[49] *See* North Haven Board Of Education v. Bell, 456 U.S. 512, 521-22 (1982) (concluding that the listing of certain exceptions to a statute implied that Congress did not intend any other exceptions).
[50] *See* Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579 (1986) (emphasis added).
[51] *See* Dep't of Revenue v. Davis, 553 U.S. 328, 338 (2008); Hunt v. Washington State Apple Advertising Commission, 432 U.S. 333, 350–53 (1977); Dean Milk Co. v. City of Madison, Wisconsin, 340 U.S. 349 (1951).
[52] *See Brown-Forman,* 476 U.S. at 582–584.
[53] *See id.* at 579; Pike v. Bruce Church, 397 U.S. 137, 142 (1970).

Proposed Act § 3(b) would eliminate any dormant clause scrutiny of state alcohol regulations, with the only exception being that the state "may not intentionally or facially discriminate against out-of-state producers of alcoholic beverages in favor of in-state producers unless the State or territory can demonstrate that the challenged law advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." Proposed Act § 3(b) thus changes current dormant commerce clause doctrine by allowing state alcohol regulations that: (1) are discriminatory in effect but cannot be proven to have a discriminatory intent, (2) discriminate against nonproducers out-of-state (such as out-of-state consumers), or (3) directly regulate interstate commerce in ways that interfere with the ability of other states to regulate their own alcohol markets.

2. The Uncertain and Undesirable Effects of Eliminating the Discriminatory Effects Test. Proposed Act § 3(b) would eliminate dormant commerce clause scrutiny of state alcohol laws that have discriminatory effects on out-of-state interests unless a discriminatory intent can be proven. This is likely to create problems because proving a discriminatory intent can be very difficult, in part because courts are naturally loathe to haul legislators before the courts to testify about their state of mind. Some courts are willing to infer a discriminatory intent from the discriminatory effects themselves.[54] To the extent they do so, § 3(b)'s elimination of the discriminatory effects test has little meaning. But not all courts infer a discriminatory intent from discriminatory effects. Further, the fact that § 3(b) eliminated the discriminatory effects test but not the discriminatory intent test is likely to lead some (but probably not all) courts to conclude that Congress must have viewed them as distinct tests and would not want courts to infer a discriminatory intent from discriminatory effects for state alcohol regulations anymore.

[54] See, e.g., Family Winemakers of California v. Jenkins, 592 F.3d 1, 13-17 (1st Cir. 2010).

Thus, § 3(b) is likely to generate new legal uncertainty and about the extent to which courts can infer a discriminatory intent from discriminatory effects. This will affirmatively worsen the proponent's concerns about legal uncertainty and excessive litigation.

Further, in courts that do not allow a discriminatory intent to be inferred from discriminatory effects, litigants will often be unable to prove a discriminatory intent, even if it exists, because the evidence of such an intent will be largely in the control of state regulators who (by hypothesis) were intentionally being discriminatory and thus have incentives to hide that fact. The difficulty of proving a discriminatory intent thus may encourage intentionally protectionist state laws when the state regulators think their discriminatory intent is unlikely to be provable.

Moreover, a state regulator might adopt a protectionist state regulation not because it affirmatively has a discriminatory intent, but rather because the state regulator's lack of political accountability to out-of-state interests makes the state *indifferent* to those discriminatory effects. A state regulator might, for example, adopt some state law that does have some minor effect in furthering some nondiscriminatory state purpose, even though that state law causes discriminatory effects against out-of-state producers that could be avoided with another law that would equally advance the state's nondiscriminatory purpose. The state regulator might do so not because it affirmatively intends the discriminatory effects, but rather because the state regulator simply does not *care* about those discriminatory effects because they are suffered by out-of-staters to whom the regulator is not politically accountable. Such a state regulation would be immune under § 3(b), which is undesirable because an important goal of dormant commerce clause doctrine is not only to stop states from deliberately harming out-of-staters, but also to

force such issues to be decided at a federal level that can affirmatively protect all the effected interests.

3. The Undesirable Effects of Allowing Facial and Intentional Discrimination Against Out-of-Staters Who Are Not Producers. Suppose a state legislature adopts a protectionist state alcohol law that facially and intentionally discriminates without any justification whatsoever against out-of-state consumers, say by requiring firms to sell at a higher price to consumers from other states. Under current doctrine, such a facially discriminatory state law would violate the dormant commerce clause, which invalidates discrimination against out-of-state consumers just as much as discrimination against out-of-state producers.[55] But under proposed Act § 3(b), the state law would enjoy complete commerce clause immunity because the facial discrimination is not against out-of-state "producers." It seems clearly undesirable to immunize all protectionist state alcohol regulations, no matter how blatant and justified, just because the harmed out-of-state interests are not producers.

Facially nondiscriminatory state laws might also discriminate in effect against out-of-state consumers. For example, suppose California, which makes 62.4% of the wine sold in the United States and consumes 10.9% of the wine bought in the United States,[56] decided to adopt a state law allowing wine producers to set cartel prices whether those producers were in-state or out-of-state, with those prices subject to substantive review by California state officials. This state law not only creates no facial discrimination, but also has no discriminatory effect on out-of-state producers because it would benefit all producers (whether in or out of the state) by

[55] *See Brown-Forman,* 476 U.S. at 580.

[56] *See* The Wine Institute, *2009 California Wine Sales*, *available at* http://www.wineinstitute.org/resources/statistics/article122. (last visited June 28, 2010); http://www.discus.org/pdf/May2009Preliminary.pdf (last visited June 30, 2010).

increasing their profits. Thus, such a state law would not discriminate against out-of-state *producers* even if proposed Act § 3(b) were amended to cover discriminatory effects.

However, if one considered the interests of *consumers*, the statute would have a clear discriminatory effect because 89.1% of the burden of those cartel prices would be borne out of state, while 62.4% of the gain from those cartel prices would be reaped in state. Antitrust state action immunity would likely apply given the clear authorization by the state and the active supervision through substantive review by the state official.[57] But the state itself would have a financial interest in such a law because its residents would gain 62.4% of the resulting cartel profits, but only pay 10.9% of the cartel overcharge. Thus, the state officials would be politically accountable to state residents who have a financial interest in excessive pricing, undermining our confidence that the state officials would have incentives to approve only price levels that further the public interest of the nation as a whole. Today, a court would strike down this statute under the dormant commerce clause because the statute has a discriminatory effect that does not serve any legitimate purpose that cannot be furthered in a non-discriminatory fashion. But the state law could not be challenged under proposed Act § 3(b) because it does not discriminate against out-of-state *producers*. Further, even if § 3(b) were amended to cover intentional or facial discrimination against all out-of-state interests, such a state law would not discriminate on its face, and a discriminatory intent may be hard to prove.

4. The Undesirable Effects of Eliminating Dormant Commerce Clause Scrutiny of State Laws that Directly Regulate Interstate Commerce. Suppose a state legislature adopts a nondiscriminatory law that directly regulates alcohol transactions in other states. Under current doctrine, the fact that the state law directly regulates interstate commerce would violate the

[57] *See* Einer Elhauge, The Scope of Antitrust Process, 104 HARV. L. REV. 667, 673–74 (1991); Parker v. Brown, 317 U.S. 341 (1943).

dormant commerce clause even though the state law is nondiscriminatory. But under proposed Act § 3(b), the state law would enjoy commerce clause immunity because the state law does not violate the standards of that section, which allow any nondiscriminatory state alcohol regulations even if they directly regulate interstate commerce. This would be unfortunate because such direct regulation of out-of-state transactions can affirmatively *hamper* the ability of other states to exercise their own Twenty-First Amendment powers.

To illustrate how the proposed Act could immunize state laws that affirmatively hamper the ability of other states to exercise their own Twenty-First Amendment powers, consider the application of the Act to price affirmation laws. Under current dormant commerce clause doctrine, a state can require that a distiller set in-state prices that are no higher than the lowest price at which the distiller sold in other states in the *previous* month, but a state cannot require that a distiller set in-state prices for the following month that are no higher than the lowest price at which the distiller *will* sell in other states in following month.[58] The former is valid because the state is simply using past data from other states to set the state's own in-state price regulations, without interfering with the ability of other states to regulate pricing in their states as they please. The latter, in contrast, directly regulates out-of-state pricing by prohibiting future price cuts in other states below the prices posted in the first state and may create inconsistent obligations if other states regulate pricing in other ways. In striking down the latter sort of statute, the Court has rejected a Twenty-First Amendment defense, observing that such state statutes could actually impair the ability of other states to exercise their Twenty-First Amendment authority.[59]

[58] *See Brown-Forman,* 476 U.S. at 581–583.
[59] *See id.* at 584–85.

The proposed Act would force courts to uphold a state law that required distillers to affirm that they would not cut future prices in other states below the level in the first state, even though the Supreme Court has explicitly held that such a scheme violates the dormant commerce clause. The state would enjoy commerce clause immunity under § 3(b) because such a law is nondiscriminatory, preventing both in-state and out-of-state distillers from cutting prices both in-state and out-of-state. Thus, the proposed Act would immunize this state statute even though it constitutes direct regulation of interstate commerce that interferes with the ability of other states to regulate liquor prices in ways that the other states feel optimally advance their own Twenty-First Amendment interests.

C. The Possible Adverse Effects of Proposed Act § 4.

If the proposed Act remains as written, then proposed Act § 4 would largely be mooted by § 3(b). Section 4 removes the Wilson Act's nondiscrimination requirement that alcohol imported into one state "be subject to . . . the laws of such State . . . to the same extent and in the same manner as though such liquids or liquors had been produced in such State." Even though § 4 would remove this affirmative nondiscrimination requirement, proposed Act § 3(b) would still protect out-of-state alcohol producers from state laws that were facially or intentionally discriminatory.

However, if the proposed Act were amended to eliminate § 3(b) in order to avoid the problems outlined above, then § 4 might have a very large negative effect because § 4 could be interpreted to allow discrimination without even meeting the standards of § 3(b). That is, a court might reason that, by eliminating the Wilson Act's nondiscrimination requirement, § 4 means to allow discrimination against out-of-state producers even if that discrimination is facial or

intentional and even if the state alcohol regulation fails to advance any legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives. Thus, if the proposed Act were amended to eliminate § 3(b), then it should also be amended to eliminate § 4. Alternatively, § 4 should at least be amended to make clear that § 4 does not alter existing dormant commerce clause standards.

D. The Proposed Act and the Twenty-First Amendment

Because some proponents of the proposed Act suggest it is necessary to protect the Twenty-First Amendment powers of states, it is worth emphasizing that the proposed Act would go beyond the scope of the Twenty-First Amendment and that without the proposed Act the states would still have more than ample powers to advance legitimate state interests through state alcohol regulations. The Supreme Court has explained that the goal of the Twenty-First Amendment was to permit states to "maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use."[60] The Court, however, held that the Twenty-First Amendment does not provide states with the ability to discriminate against out-of-state goods.[61]

In *Granholm*, the Supreme Court explained three basic principles derived from decades of Twenty-First Amendment precedent. First, the Twenty-First Amendment does not save state laws that violate other constitutional provisions.[62] Second, § 2 of the Amendment does not

[60] *See Granholm*, 544 U.S. at 484.
[61] *See id.* at 484–85.
[62] *See id.* at 486–87.

abrogate Congress' commerce clause powers with respect to liquor.[63] Third, the Twenty-First Amendment does not allow states to violate the dormant commerce clause doctrine.[64]

The Court, however, carefully noted that the Amendment still provides extraordinary power to states to regulate alcohol beverages and, thus, contrary to the views of many proponents of the proposed Act, states can still take into account the unique norms and standards of their communities.[65] First, a state can prohibit the importation of alcohol if the state bans the sale and consumption of alcohol completely.[66] Second, a state can assume total and direct control of the alcohol market through state-administered liquor outlets.[67] Third, if a state believes that price controls support state alcohol policy goals, it is far more effective for the state to adjust its alcohol tax, rather than leaving the price levels up to financially interested parties who might overweigh their interest in cartel profits. Finally, with respect to other state interests in orderly markets or distribution, states can funnel transactions into the three-tier system if they find that desirable. The proposed Act is not necessary to protect the validity of the three-tier system because the Supreme Court has stated that it is "unquestionably legitimate."[68] These are all undoubtedly valid mechanisms for the states to employ in an effort to achieve their legitimate interests in regulating alcohol.

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[63] *See id.* at 487.
[64] *See id.*
[65] *See Hearing on Legal Issues Concerning State Alcohol Regulation Before the Subcomm. on Courts and Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. (2010) (statement of Nida Samona, Chairperson of the Michigan Liquor Control Commission), *available at* http://judiciary.house.gov/hearings/pdf/Samona100318.pdf.
[66] *See id.* at 488–89.
[67] *See id.* at 489.
[68] *See Granholm*, 544 U.S. at 489.

IV. CONCLUSION

Proponents of the H.R. 5034 argue that it is necessary to redress legal uncertainty, a deregulatory threat, and excessive litigation. But claims that recent cases are in conflict are overblown, and to the contrary the common law process has largely resolved any remaining legal uncertainty in a way that makes clear the cases pose no deregulatory threat and that has greatly reduced the volume of litigation. Moreover, even if those problems did exist, the proposed Act would be a poor remedy because it would actually greatly increase legal uncertainty in a way that would likely foment more litigation and it does nothing to prevent states from deregulating if they wish.

Further, the proposed Act would create many new problems. It would allow protectionist state laws that discriminate against out-of-state nonproducers, such as out-of-state consumers, even if the discrimination were facial and intentional. It would also allow protectionist state laws that discriminate against out-of-state producers whenever a discriminatory intent could not be proven. It would allow states to directly regulate interstate commerce in ways that interfere with the ability of other states to exercise their own Twenty-First Amendment rights. Finally, it could inversely preempt the application of some federal statutes to state alcohol regulations, including federal antitrust law, and might even inversely preempt the application of all federal statutes.

The effects are not only undesirable, but unnecessary because the current regulatory power of the states under the Twenty-First Amendment is adequate to achieve their goals. If this proposed statute were to be approved by this Committee, such action would also set a dangerous precedent that would attract other special interests in seeking their own immunity from generic constitutional protections and legal safeguards that were designed to be uniformly applied to all.