

MICRO-BREW, MACRO-FEES: TEXAS LAW FAVORS BEER
DISTRIBUTORS WHILE CURBING GROWTH AND INVESTMENT IN THE
NATION'S THIRD LARGEST CRAFT BEER MARKET

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I. INTRODUCTION

In 2013, the taps opened on Texas' craft beer industry.¹ New beer producers, new investors, and new consumers poured into the widening market hoping to capitalize on craft beer's new popularity. Around the Country, engineers, lawyers, and other professionals quit their careers to rush into the new craft beer market, going from brewing beer by the liter in their garages to opening massive operations producing thousands of barrels of beer per year.² Since 2013, Texas became the 8th largest producer of craft beer in the Country, and the economic impact for the State generated by the craft beer industry totals more than \$4.5 billion, the 3rd highest in the Nation.³

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¹Derek Thompson, *Craft Beer is the Strangest Happiest Economic Story in America*, THE ATLANTIC (Jan. 19, 2018), <https://www.theatlantic.com/business/archive/2018/01/craft-beer-industry/550850/>; *Texas Craft Beer Sales Statistics 2017*, BREWERS ASSOCIATION (2017), <https://www.brewersassociation.org/statistics/by-state/?state=TX>.

²Jonny Auping, *Brewing a Career*, TEXAS MONTHLY (Oct. 20, 2016), <https://www.texasmonthly.com/food/brewing-a-career/>; Chris Morris, *This is How to Make Money Off Your Homebrewed Craft Beer*, FORTUNE, (June 27, 2015), <http://fortune.com/2015/06/27/craft-beer-businesses/>; *College Beer Buddies Quit Day Jobs to Open a Brewery*, CNBC (2016), <https://www.cnn.com/video/2016/05/19/college-beer-buddies-quit-day-jobs-to-open-a-brewery.html> (last visited Jul. 19, 2018); David Siegel, *Circle Brewing Co.—Texas Craft Brewery Profile*, CRAFT BEER AUSTIN (May 4, 2017), <https://www.craftbeeraustin.com/circle-brewing-co-texas-craft-beer-profile/>; Robert C. Deming, *Farm-to-Table: An All-Texas Beer is in the Works & It's Worth the Wait*, TEXAS HILL COUNTRY (Mar. 5, 2018), <http://texashillcountry.com/farm-table-beer-texas-worth-wait/>.

³*Texas Craft Beer Sales Statistics 2017*, *supra* note 1.

In Texas, the manufacture, distribution, and sale of alcohol are regulated by the Texas Alcoholic Beverage Commission (“TABC”) through its enforcement of the Texas Alcoholic Beverage Code. TABC’s main charge is to ensure all alcohol manufacturers, distributors, and retailers remain independent of one another.⁴ The organization of this system came about after the repeal of Prohibition and is not unique to Texas. Indeed, nearly every state has adopted this structure, known as the “three-tier system.” Under the three-tier system, Tier I is made up of alcohol manufacturers—like beer breweries, whisky distilleries, and wine vineyards—while Tier II is comprised of the wholesalers, like beer distributors and wine brokers or wine suppliers.⁵ Tier III consists of the retailers who sell the final product to the ultimate consumers.⁶ Tier III would include bars, pubs, liquor stores, and restaurants.⁷ Manufacturers must sell their product to distributors, who in turn sell the product within designated territories to retailers, and retailers then sell the product to the ultimate consumer. The distributor acts as middle-person to prevent a “tied house” wherein the manufacturer also owns the retailer, which historically led to the monopolization of the alcoholic beverage industry. The three-tier system is designed to correct a problem that has existed for centuries.⁸

The Twenty-first Amendment gave states significant authority to regulate the business activities between the tiers, regulating their contracts, store hours, product quality, and even prohibiting the production, distribution, and sale of alcohol on the county or state-wide level.⁹ With this authority, the Texas Legislature can directly govern the relationship between Tier I, the beer manufacturers, and Tier II, the beer distributors.¹⁰ While the three-tier system protects the public from the historical issues associated with alcoholic beverage sales, the law governing business transactions between distributors

⁴TEXAS ALCOHOLIC BEVERAGE COMMISSION, TABC GUIDE FOR MANUFACTURERS, WHOLESALERS, DISTRIBUTORS & RETAILERS 1 (Dec. 1, 2017).

⁵*Id.*; TEXAS ALCOHOLIC BEVERAGE COMMISSION, TEXAS PEACE OFFICER’S GUIDE TO THE ALCOHOLIC BEVERAGE CODE 1-2 (August 2017).

⁶TEXAS ALCOHOLIC BEVERAGE COMMISSION, *supra* note 4, at 1.

⁷*Id.* at 51.

⁸*See generally* The National Archives, *World of Domesday, Food and Drink* (2014), <http://www.nationalarchives.gov.uk/domesday/world-of-domesday/food.htm>.

⁹State Bd. of Equalization v. Young’s Market Co., 299 U.S. 59, 62–63 (1936); Granholm v. Heald, 544 U.S. 460, 526–27 (2005) (Thomas, J., dissenting).

¹⁰TEX. ALCO. BEV. CODE ANN. § 5.31(a); TEXAS ALCOHOLIC BEVERAGE COMMISSION, *supra* note 4, at 21.

and beer manufacturers heavily favors distributors, placing craft beer manufacturers at a serious disadvantage. These regulations go too far to benefit distributors, encourage inefficiency, and reduce competition among the tiers, and if left unchanged, the regulations could cap the growth of the craft beer industry and walk-back the progress made in the previous five years.

This comment will explore the current legal environment that manufacturers must navigate and what ramifications this environment may have on the new craft beer industry. Section I will discuss the history of the three-tier system, Texas regulations, and the current state of the Texas craft beer industry. Section II will discuss the current laws and regulations governing the relationship between beer manufacturers and beer distributors in Texas. Section III will also explore the impact recent legislative efforts have had on the craft beer industry, as well as recent legal challenges to Texas' beer and how those challenges should be addressed by the courts in the future.

II. THE THREE TIER SYSTEM

A. *England's Tied Houses and Pre-Prohibition America*

Upon their arrival in 54 BCE, the Romans noted that the tendency for the weather in Britain to be cold and damp made the cultivation of grape vines a particularly uninviting challenge.¹¹ Unlike their Roman invaders, the British could not harvest grapes on a significant scale, meaning that the culture of Britain could not revolve around the consumption of wine. While historic changes in the climate have allowed for some favorable grape crops, the wine produced from these harvests has never been well-received by the British.¹² As the joke goes, you need four people to drink a glass of English wine—one is the victim, two to hold the victim down, and another to pour the glass down his throat.¹³

Instead, the English adopted beer as their cultural alcoholic beverage. Beginning with the Celts and carrying on into modern times, England has a rich history with the production of beer.¹⁴ Brewing in England is thought to

¹¹The National Archives, *supra* note 8; Frank Langfitt, *U.K. Steps Up Its Wine Game*, NPR (Feb. 18, 2018), <https://www.npr.org/2018/02/18/586888466/u-k-steps-up-its-wine-game>.

¹²Frank Langfitt, *supra* note 11.

¹³*Id.*

¹⁴Richard W. Unger, *BEER IN THE MIDDLE AGES AND THE RENAISSANCE* 21–22 (2004).

have been well-established by the Celts before the arrival of the Romans. As the popularity of beer rose, so did the prevalence of pubs and the regulation of beer by the Crown.¹⁵ The first brewers formed groups, known as guilds, as early as 1292.¹⁶ The first company of brewers to receive a royal charter were “The Wardens and Commonalty of the Mystery or Art of Brewers in the City of London” in 1438 by Henry VI.¹⁷ The brewing company is still in operation today, retitled as “The Worshipful Company of Brewers” under the 1639 royal charter of Charles I.¹⁸

As the influence of brewers grew, so did the competition among them. Starting in the 17th century, large brewers began consolidating beer retailers, requiring these retailers to sell their beer exclusively, creating what was known as a “tied house.”¹⁹ This new “tied house” system was rife with corruption, prompting hundreds of years of struggle by Parliament to regulate the market.²⁰ By the 1890’s, 90% of the beer sold in England was through a tied house.²¹ The system persisted until the 1960’s, when an unprecedented number of small breweries were purchased or merged, leaving 6 of the largest brewers, known as “The Big 6,” with 75% of England’s beer market share.²² Until reforms were enacted in 2003, small brewers had little ability to compete against this “complex monopoly which worked against the public interest.”²³

¹⁵ Proclamation of King Charles 1 to Oxford, A Proclamation Concerning the Brewing of Beere and Ale within the Quarters of the Kings Army (June 12, 1643), *reprinted in* Stuart Royal Proclamations Vol. 2, 423 (James Francis Larkin ed., 1983).

¹⁶ IAN SPENCER HORNSEY, A HISTORY OF BEER AND BREWING, 296 (2003).

¹⁷ Brewers Hall, *Welcome to Brewers Hall*, 2018, <https://www.brewershall.co.uk/>.

¹⁸ Brewers Hall, *History and Treasures*, 2018, <http://www.brewershall.co.uk/company-history/>; HORNSEY, *supra* note 16, at 318.

¹⁹ Act of Charles I, c. 4 § 2 (1627) (This is legislation enacted in the early 17th century with the purpose to address the monopoly that was developing in the market and production of alcohol).

²⁰ Edward Porritt, *Five Centuries of Liquor Legislation in England*, 10 POLITICAL SCIENCE QUARTERLY, NO. 4, at 615–16 (Dec. 1895).

²¹ Ian Hornsey, *The tied house system*, CRAFT BEER & BREWING MAGAZINE, <https://beerandbrewing.com/dictionary/x9Kdc4PlhJ/the-tied-house-system/> (last visited Nov. 27, 2018).

²² *Id.*; Roger Blitz & Jenny Wiggins, *Few Crying into Beers at Decline of Big Six Breweries*, FINANCIAL TIMES (Jan. 25, 2008), <https://www.ft.com/content/da2e02b0-cb81-11dc-97ff-000077b07658>; Ray Anderson, *The Decline and Fall of the Big Six U.K. Brewers*, 146 THE BREWERY HISTORY SOCIETY 3–7 (2012).

²³ Anderson, *supra* note 22, at 4–5.

The United States faced its own struggles with tied houses, except they were known as “saloons.”²⁴ In the early 1880’s, overproduction in the brewing industry forced brewers to hastily acquire retail outlets for their product. Often buying a local saloon outright, breweries began consolidating saloons, requiring them to sell their product exclusively.²⁵ Increased competition among the saloons induced breweries to purchase extremely valuable corner locations and welcome gambling and prostitution to entice customers.²⁶ These efforts succeeded, and beer consumption peaked at 21 gallons per capita annually during this time.²⁷ Typically open 24 hours a day, many men would spend a significant portion of their time within their local saloons.²⁸ Some customers even developed calluses on their elbows from prolonged and heavy leaning on the bar.²⁹ While smaller brewers did find it difficult to compete with the larger breweries and their tied house saloons, their complaints likely fell on deaf ears as the Temperance Movement gained momentum.

The Temperance Movement in the United States rose in popularity, advocating for the ultimate prohibition of the production and sale of alcohol. The Movement deemed saloons places of ill repute, where society’s seediest subjects plied their trades on innocent passersby and blamed them for rampant domestic issues, workplace inefficiency, and overall lawlessness.³⁰ Public sentiment eventually would turn against the once-beloved saloon, as the Temperance Movement began pushing for the election of pro-temperance candidates. In 1913, the Movement was able to sway Congress to override President Taft’s veto of the Webb-Kenyon Act, which prohibited the importation of alcoholic beverages into states that had previously elected to

²⁴“Probably when we use the word ‘saloon’ most of the public understands it as a place where there can be unlimited excessive drinking in a place called a ‘tied-house.’ Unlimited excessive drinking because as a result of the high cost of his wares the saloon keeper would use every trick and device to encourage sales, such as treating, prostitution and so forth.” David Fogarty, *From Saloon to Supermarket: Packaged Beer and the Reshaping of the U.S. Brewing Industry*, 12 CONTEMP. DRUG PROBS. 541, 564–65 (1985).

²⁵PERRY R. DUIS, SALOONS, ENCYCLOPEDIA OF CHICAGO, CHICAGO HISTORICAL SOCIETY (2005), <http://www.encyclopedia.chicagohistory.org/pages/1110.html>.

²⁶*Id.*

²⁷Fogarty, *supra* note 24, at 548.

²⁸*Id.* at 561.

²⁹Kathy Weiser, *Saloons of the American West*, LEGENDS OF AMERICA (2017), <https://www.legendsofamerica.com/we-saloons/2/>.

³⁰Cadena Comercial USA Corp. v. Tex. Alcoholic Bev. Comm’n, 518 S.W.3d 318, 341 (Tex. 2017) (Willet, J., dissenting); Weiser, *supra* note 29.

prohibit the sale of alcohol.³¹ But the crown jewel sought by the Temperance Movement and their lobbyist within the Anti-Saloon League was effectuating prohibition nationally through a constitutional amendment.³² After multiple unsuccessful attempts, Texas Senator Morris Sheppard led Congress to approve what would, on January 16, 1919, become the Eighteenth Amendment to the United States Constitution.³³ With the passage of the Volstead Act of 1919, Congress was able to enforce a nation-wide ban on the manufacture, transportation, and sale of what it defined to be alcoholic beverages.³⁴

B. The Twenty-First Amendment and a Return to State Control

Sunday evening, after only one week in office, President Franklin D. Roosevelt spoke to the Nation, providing them with the first bit of good news they had heard in some time.³⁵ Thanks to immediate action by FDR's administration, the banks were scheduled to reopen in the morning and the Federal Reserve reported that deposits finally exceeded withdrawals two to one.³⁶ As the Country sat in the midst of the Great Depression, FDR sat next to his fireplace and told them the banking crisis was now over. Concluding his speech, FDR remarked to his guests, "I think this would be a good time for a beer."³⁷ Four days later, Congress passed the Cullen-Harrison Act, amending the Volstead Act of 1919, which provided the federal definition of what was and was not prohibited by the Eighteenth Amendment.³⁸ The sale and manufacture of beer with 3.2% alcohol by weight became legal again

³¹Daniel Okrent, *Wayne B. Wheeler: The Man Who Turned Off the Taps*, SMITHSONIAN MAGAZINE (May 2010), <https://www.smithsonianmag.com/history/wayne-b-wheeler-the-man-who-turned-off-the-taps-14783512/>.

³²*Id.*

³³*Prohibition Wins in Senate, 47 to 8*, THE NEW YORK TIMES, (Dec. 19, 1917), available at <https://www.nytimes.com/1917/12/19/archives/prohibition-wins-in-senate-47-to-8-concurs-in-house-resolution.html>; *Texas to Act at Once*, THE NEW YORK TIMES (Dec. 18, 1917); United States Senate, *Morris Sheppard: A Featured Biography*, 2018, https://www.senate.gov/artandhistory/history/common/generic/Featured_Bio_Sheppard.htm.

³⁴National Prohibition Act, Pub. L. No. 66-66, 41 Stat. 305, 323 (1919).

³⁵Martha H. Swain, *PAT HARRISON: THE NEW DEAL YEARS 40* (1978); Jean Edward Smith, *FDR 320* (2008).

³⁶Smith, *supra* note 35, at 315.

³⁷*Id.* at 315–16.

³⁸*Id.* at 316.

under federal law, seven months before the ratification of the Twenty-first Amendment.³⁹

On December 5, 1933, the Utah State Convention approved the proposed Twenty-first Amendment, giving it the necessary number of ratifying states to become the Twenty-first Amendment to the United States Constitution.⁴⁰ The Amendment's swift passage was partly because the goal of the Eighteenth Amendment—to eradicate saloons and eliminate the public's desire for alcohol—had gone largely unrealized.⁴¹ During Prohibition, the laws regulating alcohol were widely disregarded and the black market for alcohol caused an explosion in organized crime.⁴² While Prohibition may have decreased the overall consumption of alcohol and temporarily curbed Americans' cultural drinking habits, its negative cost was thought too great.⁴³ The extent of the blatant lawlessness brought those like John D. Rockefeller, Jr., a teetotaler and major figure of the temperance movement, to say:

In the attempt to bring about total abstinence through prohibition, an evil even greater than intemperance resulted—namely, a nation-wide disrespect for the law, with all the attendant abuses that followed in its train. That this intolerable situation should be done away with has seemed to me even more important for the moment that the promotion of temperance.⁴⁴

Section 1 is likely the most well-known aspect of the Twenty-first Amendment, as it expressly ended Prohibition by repealing the Eighteenth Amendment, but this was not the full extent of the Amendment's effects.⁴⁵ Section 2 provides each state the ability to regulate the transportation and importation of alcoholic beverages within that state's borders, effectively

³⁹ *Id.*

⁴⁰ Daniel Okrent, *LAST CALL: THE RISE AND FALL OF PROHIBITION* 35467 (2011) (explaining the history of the passage of the 21st Amendment, particularly detailing the first and only usage of State Conventions to amend the Constitution in American history).

⁴¹ *Id.* at 352.

⁴² *Id.*

⁴³ *Id.* at 354.

⁴⁴ John D. Rockefeller, Jr., Foreword to *RAYMOND B. FOSDICK AND ALBERT L. SCOTT, TOWARD LIQUOR CONTROL* at vii–viii (1933).

⁴⁵ *Id.*

creating 50 unique alcoholic beverage markets across the United States.⁴⁶ While different in many ways, the laws of most states apply what is known as the “three-tier system,” wherein manufacturers (Tier I), distributors (Tier II), and retailers (Tier III) remain independent of one another. Members of each tier are prohibited from engaging in the business practices of the other tiers, forcing each tier to rely on the other tiers to conduct business.⁴⁷

The Twenty-first Amendment repealed the Federal ban on liquor sale and consumption but did not prevent states from enacting their own restrictions on the sale and consumption of liquor.⁴⁸ Shortly before the enactment of the Twenty-first Amendment, the Federal Government encouraged states to construct their own methods for regulating the sale of alcohol to prevent many pre-prohibition concerns, including the saloon’s vertical monopoly on alcohol retailers by manufacturers.⁴⁹ States applied their versions of the three-tier system and enacted their own unique laws tailored to accommodate temperance concerns of specific communities within each of their states.

The current system of beer distribution around the United States was created after the passage of the Twenty-first Amendment, with the intent of allowing states to regulate liquor to encourage an efficient and fair marketplace.⁵⁰ The three-tier system is designed to counteract the monopolistic tendencies of the brewer-retailer relationship, which protects consumers and other producers.⁵¹ States can control the alcoholic beverage market more easily using the three-tier system.⁵² While there have been many challenges to the constitutionality of the three-tier system, courts have recognized the three-tier system as an unquestionable exercise of the state’s authority under the Twenty-first Amendment.⁵³

⁴⁶ See *Granholm v. Heald* 544 U.S. 460, 484 (2005); *North Dakota v. United States*, 495 U.S. 423, 431 (1990).

⁴⁷ See *Maxwell’s Pic-Pac, Inc. v. Dehner*, 739 F.3d 936, 939 (6th Cir. 2014) (noting most states chose the recommended three-tier system in regulating the alcoholic-beverage industry).

⁴⁸ *Id.*

⁴⁹ Proclamation No. 2065, (Dec. 5, 1933); Kathy Weiser, *Saloons of the American West*, LEGENDS OF AMERICA (2017), <https://www.legendsofamerica.com/we-saloons/2/>.

⁵⁰ *Granholm*, 544 U.S. at 484.

⁵¹ *Neel v. Tex. Liquor Control Bd.*, 259 S.W.2d 312, 316 (Tex. Civ. App—Austin 1953, writ ref’d n.r.e).

⁵² *Id.* at 317.

⁵³ *Granholm*, 544 U.S. at 466.

C. *Post-Prohibition Texas*

The Temperance Movement was popular in Texas. As early as 1854, the Legislature introduced a ballot measure to allow counties to vote on the prohibition of saloons and any other entity selling liquor, which overwhelmingly passed.⁵⁴ A majority of Texas counties voted to prohibit the issuance of licenses to sell liquor, but the measure was soon struck down as unconstitutional, never going into effect.⁵⁵ Unshaken by their defeat in the Supreme Court, the Temperance Movement—at the time calling themselves “Drys” because of their goal of turning Texas into a dry state—lobbied to include a provision in the Constitution of 1876 that would provide counties with the ability to vote on the prohibition of liquor.⁵⁶ And, in 1918, Texas adopted the Eighteenth Amendment.⁵⁷

Shortly after Prohibition ended in 1933, Texas adopted the Texas Liquor Control Act, and the voters adopted an amendment to the Texas Constitution legalizing the sale of beer.⁵⁸ Nevertheless, 199 of 254 Texas counties voted to prohibit the sale of alcohol, and all but 10 counties placed some form of regulation on the sale of alcohol.⁵⁹ In 1935, the Texas Liquor Control Board (now known as the Texas Alcoholic Beverage Commission or TABC) was created to enforce the Texas Liquor Control Act (now superseded by the Texas Alcoholic Beverage Code).⁶⁰ The Act created Texas’ three-tier system to “ensure fair competition within the alcoholic beverage industry [and] ensure consistent, predictable, and timely enforcement of [the] code.”⁶¹ The three-tier system applies to all alcoholic beverages in Texas, but TABC has

⁵⁴Jacques Bagur, ANTEBELLUM JEFFERSON, TEXAS: EVERYDAY LIFE IN AN EAST TEXAS TOWN 558 (2012).

⁵⁵*Handbook of Texas Online*, K. Austin Kerr, PROHIBITION (June 2010), available at <http://www.tshaonline.org/handbook/online/articles/vap01>.

⁵⁶Ex Parte Bell, 6 S.W. 197, 198 (Tex. Ct. App. 1887); Texas Constitution of 1876 XVI, Sec. 20; Kerr, *supra* note 55.

⁵⁷Kerr, *supra* note 55.

⁵⁸Tex. H.J. Res. No. 3, 44th Leg. R.S., 1935 Tex. Const. (Amendment to the Texas Constitution authorizing the manufacture and sale of spiritous, vinos, or malt liquors). Tex. H.J. Res. No. 43, 43rd Leg., R.S., 1933 Tex. Const. (Amendment to the Texas Constitution authorizing the sale of alcoholic beverages under 3.2% abv).

⁵⁹Texas Alcoholic Beverage Commission, THE HISTORY OF THE TEXAS ALCOHOLIC BEVERAGE COMMISSION 1 (2005), available at https://www.tabc.state.tx.us/about_us/history/70HistoryBook.pdf.

⁶⁰*Id.*

⁶¹TEX. ALCO. BEV. CODE ANN. § 5.31(b)(3)–(4); See *Tex. Liquor Control Bd. v. Floyd*, 117 S.W.2d 530, 534 (Tex. Civ. App.—Fort Worth 1938, no writ).

its own specific regulation for the manufacture, transportation, and sale of beer. The stated purpose of the regulations dealing specifically with beer is to “promote the public interest in the fair, efficient, and competitive distribution of beer, to increase competition in such areas, and to assure product quality control and accountability.”⁶²

Fearing a return to the old practices of the saloon, Texas public policy today is to maintain and enforce the three-tier system and, therefore, prevent the creation of a tied house.⁶³ The courts understood that in the years before Prohibition, tied houses played a substantial role in the “over-intoxicating society.”⁶⁴ Thus, when interpreting the Texas Alcoholic Beverage Code and the actions of the TABC, Texas courts provide significant deference to efforts to maintain the three-tier system and its historical context.⁶⁵

III. THE COMPLICATED RELATIONSHIP BETWEEN TIER I AND TIER II

The idea behind the three-tier system is to prevent vertical integration, meaning no single company can gain full control over the supply chain.⁶⁶ Thus, the three-tier system creates a market populated by smaller localized businesses, which are more responsive and can regulate themselves to temper illegal practices and irresponsible alcohol consumption.⁶⁷ The three-tier system has unquestionably served its intended purpose and prevented the resurgence of the tied houses in Texas. But as the alcoholic beverage industry grew following prohibition, new issues surfaced in Texas, and beer distributors crept into a favorable position under the law.⁶⁸ Before 2011, the

⁶²ALCO. BEV. § 102.51(c).

⁶³Tex. Alcoholic Beverage Comm’n. v. Live Oak Brewing Co., LLC, 537 S.W.3d 647, 649 (Tex. App.—Austin 2017, pet. filed); ALCO. BEV. §§ 1.03, 6.03(i).

⁶⁴Cadena Comercial USA Corp. v. Tex. Alcoholic Beverage Comm’n, 518 S.W.3d 318, 321–22 (Tex. 2017)

⁶⁵*Live Oak Brewing*, 537 S.W.3d at 659; *Neel v. Tex. Liquor Control Bd.*, 259 S.W.2d 312, 317 (Tex. Civ. App.—Austin 1953, writ ref’d n.r.e).

⁶⁶*Neel*, 259 S.W.2d at 317.

⁶⁷*Id.* at 316; S.A. Disc. Liquor, Inc. v. Tex. Alcoholic Beverage Comm’n, 709 F.2d 291, 293 (5th Cir. 1983); Texas Public Policy Foundation, POLICYMAKER’S GUIDE TO CORPORATE WELFARE 68 (2016)(edited by Kathleen Hunker, Carine Martinez-Gouhier, and Bill Peacock), available at <https://www.texaspolicy.com/library/doclib/TPPF-Corp-Welfare-Guide.pdf>; Texas Alcoholic Beverage Commission, *Mission and Vision* (Sept. 19, 2014), available at https://www.tabc.state.tx.us/home/mission_and_vision.asp.

⁶⁸Texas Public Policy Foundation, *supra* note 67, at 69.

beer market was not populated with small-time craft brewing operations.⁶⁹ Instead, it was largely controlled by multi-national beer manufacturers.⁷⁰ Fearing that these companies would disrupt the three-tier system by using their tremendous resources and influence to control Texas distributors, the Texas Legislature launched its effort to protect Tier II.

To protect distributors from the influence of manufacturers, the Legislature created a business environment that would seem unusual when juxtaposed against what is ordinarily expected from the state regulation of Texas businesses.⁷¹ For instance, the Legislature and TABC keep the manufacturers and distributors strictly separate by enforcing the “One Share Rule,” which prevents a member of one tier from holding any “interest,” even a single share of stock, in two companies engaged in different tiers.⁷² The Legislature also protects distributors from cancellation and competition by requiring manufacturers to enter exclusive distribution contracts and mandating that territorial rights owned by manufacturers be transferred to distributors for free.⁷³

The laws governing the relationship between beer distributors and beer manufacturers were created to favor distributors because the beer industry had historically been dominated by large and influential companies that could use their size and wealth to circumvent the three-tier system.⁷⁴ But now, the market has changed. Now, small breweries cannot exercise the significant influence that the law protects distributors from. Small breweries are, however, still subject to the exact same limitations as the large multinational breweries.⁷⁵ In its effort to limit the influence of major beer manufacturers, the Legislature has allowed small craft beer operations to be caught in the regulatory thicket.⁷⁶ The law must change to treat craft breweries differently

⁶⁹ Jan Ross Piedad, *Tapping Into the History of Beer in Texas*, TEXAS PUBLIC RADIO (Oct. 17, 2017), <http://tpr.org/post/tapping-history-beer-texas>.

⁷⁰ *Id.*

⁷¹ Texas Public Policy Foundation, *supra* note 67, at 69.

⁷² *Cadena Comercial USA Corp. v. Tex. Alcoholic Bev. Comm’n*, 518 S.W.3d 318, 334–35 (Tex. 2017).

⁷³ *See id.* at 364; *Tex. Alcoholic Beverage Comm’n. v. Live Oak Brewing Co., LLC*, 537 S.W.3d 647, 650 (Tex. App.—Austin 2017, pet. filed).

⁷⁴ The Beer Alliance of Texas, *The Beer Alliance of Texas Supports Our State’s Long-Standing Three-Tier System* (2016), <http://www.beeralliance.com/legislation.php>.

⁷⁵ Brewbound, *The Beer Alliance Continues Support of Three-Tier Regulatory System* (2018), <https://www.brewbound.com/news/beer-alliance-texas-continues-support-texas-three-tier-regulatory-system>.

⁷⁶ *Id.*

than their huge international competitors. Otherwise, these small businesses are likely to wilt away.

A. The “Fair” Dealing Law

Layered on top of the general provisions applying to the overall alcoholic beverage industry are the specific provisions governing each tier of the beer industry.⁷⁷ A major part of these specific provisions governs the business conducted between manufacturers and distributors, dealing with necessary licenses, contract rights, and responsibilities for both groups.⁷⁸ One significant element of these provisions is the Texas Fair Dealing Law. The stated purpose of the Fair Dealing Law is “to promote the public’s interest in the fair, efficient, and competitive distribution of beer within this state. . . .”⁷⁹ The Fair Dealing Law is like other laws governing alcoholic beverages in other states, typically known as “franchise laws.”⁸⁰ Among its various provisions, the Texas Fair Dealing Law prohibits the use of coercive acts in which a brewer requires a distributor to act illegally, forces acceptance of unordered beer to impose terms on the distributor.⁸¹ In addition to the temperance concerns, the purpose of these laws is to correct the perceived imbalance between the often large, wealthy beer manufacturers and the typically small, often family owned and operated distributors.⁸²

The Fair Dealing Law, codified within the Alcoholic Beverage Code, also places requirements on the terms of an agreement between a manufacturer and distributor that cannot be modified within the agreement. An agreement between a beer manufacturer and a beer distributor sets out the terms and period by which a distributor has the right to purchase, resell, and distribute

⁷⁷TEX. ALCO. BEV. CODE ANN. § 102.72.

⁷⁸*Id.* §§ 102.71–81; *see* *Gambrinus Co. v. Galveston Bev., Ltd.*, 264 S.W.3d 283, 286 (Tex. App.—San Antonio 2008, pet. denied) (discussing the negotiations and contracts between a manufacturer and a distributor for the Galveston County region); *Live Oak Brewing*, 537 S.W.3d at 650.

⁷⁹*Live Oak Brewing*, 537 S.W.3d at 650.

⁸⁰Kevin A. Adams, *Contract Considerations for the Craft Beer Distribution Relationship*, MULCAHY LLP (May 19, 2016); ALCO. BEV. §§ 102.73–74, 102.77.

⁸¹ALCO. BEV. § 102.75.

⁸²*Live Oak Brewing*, 537 S.W.3d at 651; *see* Brock Wagner & Scott Metzger, *Big Beer Trying to Swallow Craft Beer Industry*, SAN ANTONIO EXPRESS-NEWS (Dec. 18, 2017), available at <https://www.mysanantonio.com/opinion/commentary/article/Big-Beer-trying-to-swallow-craft-beer-industry-12434665.php>.

any brand or brands of beer offered by a manufacturer.⁸³ Under the Alcoholic Beverage Code, all distribution agreements must be made in writing.⁸⁴ Additionally, no provision of an agreement can interfere with a beer distributor's right to independently manage its enterprise, including the right to set its own selling prices for the beer manufacturer's product.⁸⁵ The Alcoholic Beverage Code also requires that a manufacturer cannot cancel, fail to renew, or otherwise terminate an agreement with a distributor, unless the manufacturer can establish good cause for canceling, failing to renew, or otherwise effectively terminating the agreement.⁸⁶ If a manufacturer establishes good cause, the manufacturer must provide the distributor with prior notice as to the cancellation of the agreement and must provide the distributor with a 90-day period to cure.⁸⁷ A manufacturer may terminate an agreement without providing a distributor with notice: (1) if the distributor is insolvent; (2) bankrupt; (3) dissolves; (4) is liquidated; (5) fails to pay owed amount due under the agreement; (6) if the distributor's license is revoked; or (7) the distributor is convicted of a crime materially affecting the party's business.⁸⁸

Distributors may also assign, sell, or transfer all or part of their business to another party that meets reasonable standards of a distributor.⁸⁹ Distributors may also assign, sell, or transfer their obligations under the terms of a distribution agreement with a specific manufacturer or group of manufacturers, if the transfer is made to a distributor who meets reasonable industry standards.⁹⁰ If the owner of a beer distributor dies, the Code provides the surviving spouse, child, or other partners of the distributor the right to become the successor-in-interest to the agreement between the manufacturer.⁹¹ Manufacturers are prohibited from withholding or delaying the approval of an assignment, transfer, or sale of a distributor or its assets.⁹²

⁸³ ALCO. BEV. § 102.71(2).

⁸⁴ *Id.* § 102.51(b); *see Ace Sales Co. v. Cerveceria Modelo, S.A. de C.V.*, 739 S.W.2d 442, 445 (Tex. App.—Corpus Christi 1987, no writ) (discussing the legislature's intent in requiring a written contract prior to permitting the prosecution of a claim).

⁸⁵ ALCO. BEV. § 102.72(a)(1).

⁸⁶ *Id.* § 102.74; *see Live Oak Brewing*, 537 S.W.3d at 650–51.

⁸⁷ ALCO. BEV. § 102.74.

⁸⁸ *Id.* § 102.73(c).

⁸⁹ ALCO. BEV. § 102.76(a); *see Ace Sales*, 739 S.W.2d at 445.

⁹⁰ ALCO. BEV. § 102.76(a).

⁹¹ *Id.* § 102.76(b).

⁹² *Id.* § 102.76(a).

Manufacturers are also prohibited from withholding or denying the approval of the assignment, transfer, or sale of a distributor's rights under an agreement or the appointment of a successor-in-interest to the agreement.⁹³

The ability to assign, sell, or transfer rights under distribution agreements belongs solely to the distributors — manufacturers have none of these abilities under the Alcoholic Beverage Code.⁹⁴ While the Code requires distributors and manufacturers to have good cause to cancel an existing distribution agreement, the Code only allows the distributors to recover for unlawful cancellations.⁹⁵ Under the Alcoholic Beverage Code, if a manufacturer cancels, terminates, or fails to renew any agreement without good cause, or unlawfully denies approval of any assignment, transfer, or sale of a distributor's business assets, the beer manufacturer must pay the distributor the fair market value—including good will and going concern value—of the distributor's business for the beer manufacturer's affected brands.⁹⁶ The payment to the distributor is also referred to as “reasonable compensation” under the Code.⁹⁷ If the manufacturer and distributor cannot agree whether good cause existed for the cancellation, either party may submit the issue to three arbitrators—one selected by each party with the chosen arbitrators selecting the third.⁹⁸ If a distributor and manufacturer cannot agree on the value of reasonable compensation and neither party agrees to arbitration, then a manufacturer or distributor may maintain a civil action in court.⁹⁹

Under the Alcoholic Beverage Code, a manufacturer is placed at a significant disadvantage when contracting with a distributor. When the parties come to an agreement, there are several unpredictable actions a distributor may make that could cause significant harm to the business dealings of the manufacturer. By entering a distribution agreement, the manufacturer is required to renew until good cause is present, meaning that even if the manufacturer is dissatisfied with the distributor's services, the manufacturer is obligated to continue its business relationship with the

⁹³ *Id.*; see *Adolph Coors Co. v. Rodriguez*, 780 S.W.2d 477, 480 (Tex. App.—Corpus Christi 1989, pet. denied).

⁹⁴ ALCO. BEV. § 102.76(a).

⁹⁵ ALCO. BEV. §§ 102.74, 102.77; *Nauslar v. Coors Brewing Co.*, 170 S.W.3d 242, 257 (Tex. App.—Dallas 2005, no pet.).

⁹⁶ ALCO. BEV. § 102.77.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ ALCO. BEV. § 102.79(a).

distributor.¹⁰⁰ Even if the manufacturer approved of the original distributor, the distributor may still transfer all its rights and obligations to a different distributor entirely.¹⁰¹ At this point, the manufacturer is still obligated to renew the initial agreement and continue the business relationship with this new distributor.¹⁰² Even if the manufacturer had good cause, the distributor could compel arbitration, forcing the manufacturer to pay for half of the arbitration costs.¹⁰³ And, if the arbiters find that no good cause was present, the manufacturer is liable to the distributor for the fair market value of the business relations for the affected brands.¹⁰⁴ This level of unpredictability decreases the likelihood that a small brewery can compete in the emerging market. It also discourages investment into the growing craft beer industry, as the early decisions of the craft breweries will heavily affect the future performance of the brand. Thus, the unpredictability will only act to drive away investors, robbing small breweries of the capital they need to expand.

B. Territorial Rights

In addition to the Texas Alcoholic Beverage Code's provisions dealing with distribution agreements, the Code also provides several obligations pertaining to the territorial rights of a distributor. In Texas, distribution agreements must provide for the specific geographic area that any of the beer manufacturer's product brands may be sold.¹⁰⁵ These "territories" can be as small as a block, as big as a whole city, or even as big as the entire State.¹⁰⁶ When a territory assignment has been made, the distributor may only sell the beer manufacturer's product within that prescribed territory.¹⁰⁷ Once

¹⁰⁰*Id.* §§ 102.73(a), 102.74; *see Ace Sales Co. v. Cerveceria Modelo, S.A. de C.V.*, 739 S.W.2d 442, 444 (Tex. App.—Corpus Christi 1987, no writ).

¹⁰¹ALCO. BEV. § 102.76(a); *see Tex. Alcoholic Beverage Comm'n. v. Live Oak Brewing Co., LLC*, 537 S.W.3d 647, 650 (Tex. App.—Austin 2017, pet. filed).

¹⁰²*See Live Oak Brewing*, 537 S.W.3d at 650.

¹⁰³ALCO. BEV. § 102.77(b); *see Cerveceria Cuauhtémoc Moctezuma S.A. de C.V. v. Mont. Bev. Co.*, 330 F.3d 284, 287 (5th Cir. 2003) (holding that arbitration may be compelled when the existence of good cause for contract cancellation is disputed); *Glazer's, Inc. v. Mark Anthony Brands, Inc.*, Civil Action No. SA-11-CV-977-XR, 2012 WL 2376899, at *6 (W.D. Tex. 2012) (holding that the plaintiff's claims did not fall within the Code's arbitration provision because they did not involve the value of the terminated distributor agreement or if good cause was present).

¹⁰⁴ALCO. BEV. § 102.77(a).

¹⁰⁵*Id.* § 102.71(5); *see Live Oak Brewing*, 537 S.W.3d at 650.

¹⁰⁶*See ALCO. BEV.* § 102.71(5).

¹⁰⁷*Id.* § 102.51(b).

territorial rights are assigned and the distributor is given the exclusive ability to distribute the manufacturer's brands in that territory, the Code prohibits manufacturers from assigning a sales territory to more than one distributor.¹⁰⁸ While the beer manufacturer cannot hire two distributors to service the same territory, the distributor may transfer its obligations under the agreement or transfer the product to another distributor in the same territory.¹⁰⁹ Of course, the manufacturer is prohibited from withholding approval for this type of arrangement among distributors, because otherwise, the manufacturer would be liable for reasonable compensation.¹¹⁰

The presence of territorial rights adds tension between manufacturers and distributors by adding a layer of pressure at the outset of their business relationship. If a manufacturer initially assigns their territorial rights to an unsatisfactory distributor, the manufacturer could not salvage that territorial region by finding another distributor.¹¹¹ Without good cause, the manufacturer would have to renew the agreement with the distributor for that territorial region.¹¹² While a beer manufacturer has virtually no quality options in this scenario, the distributor may at any time assign its obligations under the agreement to another distributor, including another unsatisfactory distributor.¹¹³ The possibility of this outcome places a significant constraint on the beer manufacturer's ability to plan for the future growth of its brewery, because even if the correct choices are made at the outset of the relationship, they remain variable throughout the relationship.¹¹⁴

The distributor's exclusive territorial rights extend to the initial product and any "brand extensions" of the original product.¹¹⁵ Thus, territorial rights to a product considered a brand extension must be sold by the manufacturer's initial distributor.¹¹⁶ Craft breweries typically provide consumers with

¹⁰⁸ *Id.*

¹⁰⁹ ALCO. BEV. § 102.56(b).

¹¹⁰ *Id.* § 102.77(a).

¹¹¹ *Id.* § 102.51(b).

¹¹² *Id.* § 102.77(a).

¹¹³ *Id.*

¹¹⁴ *Tex. Alcoholic Beverage Comm'n. v. Live Oak Brewing Co., LLC*, 537 S.W.3d 647, 656–57 (Tex. App.—Austin 2017, pet. filed); *see Adams, supra* note 80.

¹¹⁵ ALCO. BEV. § 102.55(c).

¹¹⁶ Entirely new products are not considered brand extensions, only products marketed as derivative of an existing brand fall under this definition. For example, Shiner Blonde and Shiner Black are not considered brand extensions of Shiner Bock. However, Budweiser's product Bud Light Lime would be considered a brand extension of Bud Light. ALCO. BEV. § 102.55(b).

several beer options, with many offering different types of beer, such as Porters, Pale Ales, IPAs, Ambers, etc.¹¹⁷ All these variations usually fall under the brewery's brand.¹¹⁸ Under the Alcoholic Beverage Code, a brand is simply any word, symbol, group of letters, or trademark that is used by a manufacturer on a label or package to identify a specific beer.¹¹⁹ Any new product that a manufacturer wishes to begin selling, that bears the manufacturer's brand, must be offered first to the same distributor.¹²⁰ The Code requires beer manufacturers to offer the new product to their original distributors, but then it is up entirely to the original distributor whether they want to carry the product.¹²¹ Only after the distributor has elected not to sell the product can a manufacturer find another distributor.¹²² This makes the quality of the distributor at the outset even more crucial to the future success of a brewery. If a brewer contracts with an unsatisfactory distributor, or if a distributor assigns the rights under the original agreement to an unsatisfactory distributor, the future products of the manufacturer are at risk. This increases the unpredictability and danger of investing in craft breweries, because an unsatisfactory distributor can undermine any future attempts at product growth, while still leaving the beer manufacturers with virtually no satisfactory recourse.¹²³

Being the exclusive distributor of a popular new craft beer in a major city provides the distributors with a significant opportunity for profit. When Live Oak Brewing sought to offer its product in the Houston area, the brewery began accepting bids for its territorial rights.¹²⁴ Distributors began negotiating and eventually agreed to pay Live Oak Brewing \$250,000 for the territorial rights to sell Live Oak's craft beer in the Houston area.¹²⁵ Live Oak used the proceeds from the sale of these territorial rights to purchase

Regardless, agreements between distributors and manufacturers now frequently provide distributors with the option to acquire new products even if the product is not considered a brand extension. See Kevin A. Adams, *How to Find the Right Distributor For Your Craft Beer*, MULCAHY LLP (July 14, 2017), available at <http://www.mulcahyllp.com/blog/howtofindtherightdistributorforyourcraftbeer.html>; see Adams, *supra* note 80.

¹¹⁷ Metzger, *supra* note 82.

¹¹⁸ ALCO. BEV. § 102.55(a)(2).

¹¹⁹ *Id.* § 102.55; see *Live Oak Brewing*, 537 S.W.3d at 650.

¹²⁰ ALCO. BEV. § 102.55(c).

¹²¹ *Id.*; see *Live Oak Brewing*, 537 S.W.3d at 651.

¹²² ALCO. BEV. § 102.55(c).

¹²³ *Id.* § 102.74.

¹²⁴ *Live Oak Brewing*, 537 S.W.3d at 653.

¹²⁵ *Id.*

equipment and expand operations to meet the demand for its product in Houston.¹²⁶ Peticolas Brewing also began negotiating with distributors for the territorial rights to its product in Houston.¹²⁷ The distributors made an offer of \$300,000 for Peticolas Brewing's territorial rights.¹²⁸ Before Peticolas Brewing received any payment, however, the Texas Legislature amended section 102.75(a)(7) of the Alcoholic Beverage Code.¹²⁹ The change made it unlawful for a beer manufacturer to receive payment in exchange for an agreement setting forth their territorial rights.¹³⁰ While it is evident that these territorial rights are valuable assets for craft beer manufacturers, the Code now requires that these rights be transferred to distributors for free.¹³¹

Because the relationship between distributors and producers is designed to favor distributors, the market cannot generate a fair outcome for businesses in this industry. The competition between craft breweries in Texas is significant because consumers have a sizable number of brands to select from, forcing breweries to market their products effectively to get the attention of the consumer. Overall, this competition results in better quality products and better pricing for consumers. In contrast, the most significant competition faced by beer distributors is the competition at the outset of the business relationship. Once an agreement is reached, a distributor no longer needs to compete to retain the beer manufacturer's business. Once an agreement is reached, distributors also no longer need to compete for the rights to sell new products from their manufacturers because the distributors own a guaranteed offer of future business. Further, distributors face no competition within their region because manufacturers are forbidden from contracting with more than one distributor in the same territory.¹³² The Code requires only that the distributor operate in a manner that does not provide the manufacturer with good cause to terminate their agreement.¹³³ With competition among manufacturers driving the creation of new breweries and new products, the potential for the rise of the industry to continue is great.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*; Acts of 2013, 83rd Leg., R.S. ch. 555, 2013 TEX. ALCO. BEV. CODE ANN. § 102.75(a)(7)(amended 2017)(current version at TEX. ALCO. BEV. CODE ANN. § 102.75(a)(7)).

¹³⁰ ALCO. BEV. § 102.75(a)(7).

¹³¹ *Id.*

¹³² *See Live Oak Brewing*, 537 S.W.3d at 650.

¹³³ *Id.*; ALCO. BEV. § 102.74.

But until the law changes to accommodate both small breweries and beer distributors, growth may not continue.

C. The Beer Bill's Negative Impact on the Future of the Industry

Beyond the constraints of the laws governing territorial agreements, application of what has come to be known as the “Bump Dock Tax” limits the ability of craft beer producers to market their products to consumers.¹³⁴ In a highly competitive and saturated market like the one for beer, laws restricting producers from reaching new customers stifle attempts to drive up brand recognition and pose a serious concern for the future growth and investment into the craft beer industry.¹³⁵

In 2013, the Texas Legislature rolled back several regulations, allowing for some small-scale beer producers to sell their product at their breweries to customers.¹³⁶ The facilities, known as “taprooms,” appealed to the growing craft beer consumer base by allowing craft beer fans the opportunity to tour the brewing facilities of their favorite breweries and drink a new or classic recipe, while surrounded by the people and equipment that created the beverage.¹³⁷ Craft beer fanatics or the casual beer drinker could all see these facilities in person, meet the people that operated them, and try a new product at the facility that likely would not be available at a local bar or store.¹³⁸ These taprooms stimulated interest in individual breweries but also served to cultivate the growing craft beer market, as many of these locations became highly trafficked tourist sites.¹³⁹

While the practice of selling craft beer from a taproom does violate the rigid terms of the three-tier system, the law provided several necessary restrictions to prevent the resurgence of the tied-houses under the new system.¹⁴⁰ The law aimed to allow small craft breweries to sell from these taprooms while preventing the multinational companies from doing the

¹³⁴Jay Root & Chris Essig, *Small Beer Makers Say Bill Creates “Extortion Fee” as they Seek Abbot’s Veto*, THE TEXAS TRIBUNE (June 8, 2017), <https://www.texastribune.org/2017/06/08/small-beer-makers-facing-extortion-fee-see-veto-abbott/>.

¹³⁵See Root & Essig, *supra* note 134.

¹³⁶*Id.*; Acts of 2013, 83rd Leg., R.S., ch. 535, 2013 ALCO. BEV. § 12.052 (amended 2017)(current version at ALCO. BEV. § 12.052).

¹³⁷See Root & Essig, *supra* note 134.

¹³⁸*Id.*

¹³⁹Wagner & Metzger, *supra* note 82.

¹⁴⁰The Beer Alliance of Texas, *supra* note 74.

same.¹⁴¹ Under the law, taprooms could only be operated at individual brewing facilities that produced fewer than 225,000 barrels of beer per year, and these individual breweries could only sell up to 5,000 barrels of beer from their taproom.¹⁴² All the product served from the taproom had to be consumed at the brewery—no brewery could sell its product to customers for off-site consumption. Texas is still the only state where all beer sales for offsite consumption are prohibited.¹⁴³

In 2017, with the passage of the Beer Bill, the legislature altered the barrel limit in a way that made operating taprooms much more difficult for small craft breweries, and in doing so, may have made these craft breweries a less attractive source of future investment.¹⁴⁴ Instead of measuring individual production facilities for the 225,000-barrel cap, the Beer Bill aggregated the number of barrels produced by each facility operated by the same brewing company.¹⁴⁵ For example, if a brewing company operated a taproom with two facilities that each produced 150,000 barrels of beer per year, the Beer Bill would now require TABC to aggregate the barrel production of both facilities.¹⁴⁶ Thus, the brewing company would be producing 300,000 barrels per year and violate the cap by 75,000 barrels.¹⁴⁷ Not only did the Beer Bill allow TABC to aggregate the barrel count of individual facilities, but if a brewery is “indirectly or directly owned” by another brewery in Texas or outside of Texas, the barrels produced by that brewery is also counted toward the 225,000-barrel cap.¹⁴⁸

Once a brewery meets the 225,000-barrel cap, the Beer Bill applies penalties on the breweries that operate the taprooms.¹⁴⁹ Once a brewery meets the aggregate 225,000-barrel cap, the brewery is required to sell its beer to the distributor first and then buy it back from the distributor for sale in its

¹⁴¹Root & Essig, *supra* note 134.

¹⁴²The Beer Alliance of Texas, *supra* note 74.

¹⁴³Acts of 2013, 83rd Leg, R.S., ch. 535, 2013 TEX. ALCO. BEV. CODE ANN. § 12.052 (amended 2017); Michael Taylor, *Hopping Mad About Texas Beer Regulations*, SAN ANTONIO EXPRESS NEWS, (March 5, 2018), https://www.expressnews.com/business/business_columnists/michael_taylor/article/Hopping-mad-about-Texas-beer-regulations-12716961.php.

¹⁴⁴See Root & Essig, *supra* note 134.

¹⁴⁵Compare Acts of 2013, 83rd Leg, R.S., ch. 535, 2013 TEX. ALCO. BEV. CODE ANN. § 12.052 (amended 2017) with TEX. ALCO. BEV. CODE ANN. § 12.052(a).

¹⁴⁶ALCO. BEV. § 12.052(a).

¹⁴⁷*Id.*

¹⁴⁸*Id.*

¹⁴⁹ALCO. BEV. §§ 11.61, 11.64.

taprooms.¹⁵⁰ This mandated repurchase of a brewery's own product is what is known as the "bump dock tax."¹⁵¹ This system is designed by the Legislature to maintain the separation of the tiers by requiring manufacturers to allow distributors to "deliver" the beer to the on-site taprooms.¹⁵² In effect, manufacturers are paying to move their product from on-site storage to their on-site taprooms, while the distributor never sees or comes into contact with the product.

All these restrictions put future investors and growing breweries in a precarious position. While taprooms provide breweries with a highly effective way of reaching prospective customers, taprooms now present a possible roadblock to continued growth and profitability. Growing breweries that produce near the 225,000-barrel cap must choose to expand production and pay the bump dock tax, or maintain current production and sacrifice profits, jobs, and future investment opportunities.

D. The Strength of a Good Lobby

Any analysis of Texas' laws for beer manufacturers and distributors would be incomplete without addressing the lobbying efforts of both groups. There is very little doubt that the position beer distributors enjoy under Texas law came about through decades of legislative lobbying, and if the distributors' contributions continue to dwarf contributions by manufacturers, the legal environment is unlikely to shift.¹⁵³ Unless these laws are reexamined absent the influence wielded by the distributor lobbies, the law may never provide craft brewers with a fair chance to compete and grow in Texas' new craft beer industry.

During the 2017 legislative session, Texas' largest beer distributors spent more than \$1.1 million on campaign contributions and lobbying efforts on the Beer Bill.¹⁵⁴ In contrast, the Texas Craft Brewers Guild—through CraftPAC, the Texas craft beer brewer's political action committee—spent

¹⁵⁰Root & Essig, *supra* note 134.

¹⁵¹*Id.*

¹⁵²*Id.*

¹⁵³Matthew Kelly, *Opinion: Were Lawmakers Drunk When They Wrote Texas Alcohol Laws?*, THE DALLAS MORNING NEWS, (April 13, 2018), available at <https://www.dallasnews.com/opinion/commentary/2018/04/13/lawmakers-drunk-wrote-texas-alcohol-laws>.

¹⁵⁴Andrew McLemore, *Pint-Sized Brewers Outmatched by Lege Lobbyists*, THE TEXAS MONITOR (Nov. 13, 2017), <https://texasmonitor.org/lobby-beer-craft-brewers-distributors-legislature/>.

\$125,000 to lobby against the passage of the Beer Bill.¹⁵⁵ Even though distributors vastly outspent craft brewers on lobbying efforts, 2017 was the first year the distributors had any serious resistance to their lobbying efforts.¹⁵⁶ Over the last 10 years, Texas lawmakers have accepted over \$8.5 million in campaign contributions from distributors, outspending beer manufacturers by over \$8.2 million.¹⁵⁷ A significant percentage of these contributions went to nine of the members of the House Licensing and Administrative Procedures Committee — the committee that oversees legislation relating to the beer industry.¹⁵⁸ These nine members received a total of \$588,000 in campaign contributions.¹⁵⁹

To counteract the past 10 years of spending, craft brewers have created their own group, The Craft Brewers Guild, to advocate for their interests in Austin.¹⁶⁰ The Craft Brewers Guild supports breweries that remain Texas-owned and that have a moderate production capacity.¹⁶¹ The Guild specifically excludes breweries where a majority or significant amount of its ownership are large multinational beer producers.¹⁶² The Craft Brewers Guild is among several new lobbying efforts being made to counteract years of work by beer distributors in the other direction.¹⁶³ But the path is long for these groups, and with very few friends and the contributions pushing in the other direction, the path is a difficult one as well.¹⁶⁴

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*; Justin Kendall, Texas Craft Brewers Guild Forms Political Action Committee, BREWBOUND, (Jan. 23, 2018) <https://www.brewbound.com/news/texas-craft-brewers-guild-forms-political-action-committee>.

¹⁵⁷ McLemore, *supra* note 154.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ Kendall, *supra* note 156.

¹⁶¹ Texas Craft Brewers Guild, *Texas Craft Brewing Has a \$4.5 Billion Impact on Texas Economy*, <https://texascraftbrewersguild.org/item/texas-craft-brewing-industry-has-45-billion-impact-on-texas-economy> (last visited at Nov. 28, 2018).

¹⁶² *See id.*

¹⁶³ Kendall, *supra* note 156; *see* McLemore, *supra* note 154.

¹⁶⁴ McLemore, *supra* note 154; Liz Essley Whyte, *Alcohol Distributors Ply Statehouses to Keep Profits Flowing*, TIME MAGAZINE (Aug. 6, 2015), <http://time.com/3986536/alcohol-distributors-lobbying/>.

IV. CONCLUSION

There is a sense in Texas that if a person has the motivation to create a product and enter a market, then that person should have a fair environment to compete in and should not be entitled to an unfair advantage. This sense in no way permeates the Texas beer market. The laws are skewed to benefit one small segment of the market—the beer distributors—and to undermine beer manufacturers that are too small to overcome the legal barriers by sheer size. Unless the laws that unequally favor beer distributors are reformed to provide craft brewers with a reasonable opportunity to compete with the multinational producers, this new booming industry may not continue. Either we merely provide these small businesses with the ability to fairly compete and grow their craft, or visitors arriving at Texas' borders will one day find it much like the Romans found Britain. Only now, it will be regulation, and not the climate, that prevents the cultivation of our cultural alcoholic beverage.