

The Pennsylvania Liquor Code
By P. Michael Jones

“It has been said that alcohol is a good servant and a bad master. Nice try. The plain fact is that it makes other people, and indeed life itself, a good deal less boring.”¹

The Pennsylvania Liquor Code has been an anomaly to all drinkers in the Keystone State. Fractured and inconvenient, to prepare a simple dinner with a pairing that includes wine and beer and an after-dinner nightcap, the libating consumer must leave the grocery and navigate to a Wine and Spirits, where the monopoly has inflated the prices, and then head to a mom and pop beer distributor, where they are compelled to purchase an entire case.

In a past life I managed a beer distributor, and I was always greeted with the same exhausted question of “Why?” Over time I learned of the driving forces, but never did I have time to learn anything but the straight line to the answer, which was ultimately “Prohibition.” While this left the thirst for answers of many of the miffed patrons somewhat quenched, I had an insatiable desire to really understand the underlying process for how Pennsylvania ended up as one of only two states in the nation where the government is the wholesaler of wine and spirits. I’ve completed a tome in the process, a clear indication that my terse, if not pithy response was not the whole story.

The events leading up to Prohibition, the era of Prohibition, and the remarkable journey out of its depths are not stories that one can consume in one sitting. The Temperance Movement surged in the late 19th century; the nation became frenzied by the movement fueled by puritans and the women’s suffrage movement. The bastard 18th

¹ Christopher Hitchens, Introduction: The Muse of Booze “Everyday Drinking: The

Amendment was passed with the hopes of creating an idyllic society, rather it turned law-abiding citizens into a criminal class. The United States and individual states have spent the 83 years since repeal navigating the uncharted waters.

Since the repeal of Prohibition, Pennsylvania's Liquor Code has its roots in the story of a teetotaler Governor with a scholarly admiration for European regulations. His disdain for alcohol translated into a restrictive and socialist monopoly system for Pennsylvanians to purchase alcohol. Until recently, efforts to remove and relax the statutory binds were thwarted, primarily due to the revenue the monopoly generates and the number of union jobs supported by the state liquor store system. Now, rarely does a month go by that a new piece of legislation is passed modernizing the archaic system.

At times, the Code is dry, both literally and metaphorically. However, the stories and intricacies born from it bring the statutes to life. The reticulate body of law creates a number of bureaus, including the Pennsylvania Liquor Control Board, which runs the state stores and grants licenses to private sellers of alcohol. Licensees have very particular procedures and regulations that must be followed, or they will suffer penalty from the Bureau of Enforcement.

All of this has been to keep alcohol out of the hands of Pennsylvanians. Left to our own devices, the government expected us to revert to the era of the saloon. Fortunately, trust has been proven over time and we are gradually erasing the lasting watermarks of Prohibition.

Pennsylvania: A Prohibition Nightmare

“I am not only a Dry, but I am dry.”² So wrote the Governor of Pennsylvania upon repeal of Prohibition. Governor Pinchot ran for Governor of Pennsylvania on the Dry platform. He fought for the removal of saloons “when it was politically dangerous to do so.”³ Governor Pinchot was an unwavering Dry for the majority of his life; Pinchot did admit that during his teenage years he imbibed the “occasional drink.”⁴ Pinchot developed his repulsion to alcohol by witnessing “the sight and antics of those who drank deeply” during his time studying at Yale and while studying forestry in Europe.⁵ After graduating from Yale, Pinchot wrote from Europe in a letter to his father that it seemed drunkards across the world acted as if “a man’s chief duty to society lies in the willingness to drink all he can get.”⁶

Pinchot was an avid outdoorsman. In fact, as the first Chief of the United States Department of Agriculture Forest Service he was an architect of the conservationist and environmentalist movements. Natural resources, like the forest, were considered “inexhaustible” during the industrial revolution.⁷ “To waste timber was a virtue and not a crime,” Pinchot lamented of his contemporaries in his autobiography.⁸ Pinchot’s policy was modeled after European forestry, as the job of “professional forester” did not exist

² Gifford Pinchot, “Liquor Control in the U.S.A.” *The Rotarian*, January, 1934, p. 59

³ Char Miller, “Gifford Pinchot and the Making of Modern Environmentalism,” 252, Island Press, 2001

⁴ *Id.* at 251

⁵ *Id.*

⁶ *Id.*

⁷ Gifford Pinchot, Al Sample, “Breaking New Ground,” 27 Washington, D.C.: Island Press, 1998

⁸ *Id.*

until Pinchot was in charge of the Forest Service.⁹ The idea was to preserve the United States forests, because “there was not... a single acre of forest under [government protection] anywhere in the United States” at the inception of the U.S. Forest Service.¹⁰

Pinchot believed fixing only one side of the equation could not solve the problem. If our natural resources must be preserved, then we must not lose focus on “human resources,” and preserve those being lost “in [the] strong drink.”¹¹ Prohibitionist rhetoric won Pinchot the 1923 election for Governor of Pennsylvania, a state where the denizens were convinced the Eighteenth Amendment and the Volstead Act were flagrantly unenforced. In his inaugural address, three years after Prohibition took effect, Governor Pinchot pledged, first and foremost, to “drive all saloons out of Pennsylvania” and to “prevent and punish bootlegging.”¹²

Bootleggers controlled the Commonwealth, not the other way around. For example, Philadelphia Mayor W. Freeland Kendrick appointed Smedley D. Butler, Marine Brigadier General and recipient of two Congressional Medals of Honor, Director of Public Safety in 1924, and Smedley took it upon himself that his chief duty was to remove the corruption of police by bootleggers.¹³ Prior to Butler’s appointment, Philadelphia police officer precincts corresponded to political ward boundaries. Politicians could pick their local captain, and control their ward.¹⁴ Butler, a native to the Philadelphia area, began his tenure by reorganizing the boundaries, reducing the number

⁹ Id.

¹⁰ Id. at 29

¹¹ Supra, Miller at 252

¹² Governor Gifford Pinchot, Inaugural Address, 1923, <http://explorepahistory.com/odocument.php?docId=1-4-2B4>

¹³ Mark H. Haller “Philadelphia Bootlegging and The Report of the Special August Grand Jury,” 215, Temple University 1985

¹⁴ Id.

of officers by dismissing the corrupt ones, and instituting raids on local speakeasies and distilleries.¹⁵ In his attempt administer blind justice, Butler attacked the poor and the wealthy; this policy was viewed as abrasive by politicians and local bootleggers. When Butler tried to lock the Bellevue-Stratford Hotel, a prestigious hotel where many of the businessmen, high-ranking police, and politicians raised their glasses, the Director of Public Safety was fired by the Mayor, and Butler returned to the Marine Corps claiming “Sherman was right about the war, but he was never head of police in Philadelphia.”¹⁶

Pinchot believed he was on the winning side of the moral crusade, until the 1933 referendum for repeal came to Pennsylvania. On November 7, the returns showed 1,537,158 in favor of repeal, and only 491,393 wanted to keep Prohibition.¹⁷

The Creation of the Pennsylvania Liquor Code

Despite a mandate to repeal Prohibition, Pinchot did not dare let the saloon return under his watch, and instead chose to create the Pennsylvania Liquor Code we know¹⁸ today. “Prohibition at its worst has been infinitely better than booze at its best,” Pinchot begrudgingly wrote in in response to repeal.¹⁹

On November 13, 1933, Pennsylvania Governor Gifford Pinchot was in his second of non-sequential terms, and he had called a special assembly of the state legislature to quickly and quietly create the Pennsylvania Liquor Code and Pennsylvania

¹⁵ Id.

¹⁶ Id. at 216

¹⁷ Paul B. Beers, “Pennsylvania Politics Today and Yesterday: The Tolerable Accommodation,” 76, The Pennsylvania State University Press, 1980.

¹⁸ And many revile

¹⁹ Frank Whelan, “An Answer To The End Of Prohibition: State Liquor Stores Are Legacy of Former Pa. Gov. Gifford Pinchot,” The Morning Call, February 23, 1997, http://articles.mcall.com/1997-02-23/news/3131589_1_gifford-pinchot-state-stores-liquor

Liquor Control Board. Repeal was imminent, and Pinchot wanted to pass strict legislation that would curb liquor consumption by giving the government a monopoly over the sales.²⁰ The legislature had less than a month to create a new body of laws, and the resulting code included imperfections that continue to be corrected almost a century later.

In the January 1934 publication of *The Rotarian*, Rotary International's monthly magazine, Governor Pinchot elucidated his "five cardinal points" for the shaping of Pennsylvania's post-Prohibition liquor code.²¹ His five points were "The saloon must not be allowed to come back; Liquor must be kept entirely out of politics; Judges must not be forced into liquor-politics; Liquor must not be sold without restraint; and Bootlegging must be made unprofitable."²² Pinchot desired to use the money earned from state sales on "social needs," like unemployment benefits, social security, and education.²³ He demonized "selfish wets" who wanted to profit off the end of Prohibition, and somehow collude with the alcohol industry to coerce the public into drinking.²⁴ The Pennsylvania Liquor Code, he claimed, was a "dam of efficient control" for the "flood of trouble which would fall upon our people if liquor were permitted once more to become a tool..."²⁵ ²⁶

Governor Pinchot, a fond believer in European policy, studied two systems of alcohol regulation to develop the Pennsylvania Liquor Code, the Province of Ontario in Canada and Sweden's Bratt System. Generally recognized as good systems,

²⁰ Bomboy, Scott, Pennsylvania to fight one of Prohibition's last battles, *Constitution Daily*- U.S. Constitution Center, January 30, 2013, <http://blog.constitutioncenter.org/2013/01/pennsylvania-to-fight-one-of-prohibitions-last-battles/>

²¹ Gifford Pinchot, "Liquor Control in the U.S.A." *The Rotarian*, January, 1934, 12

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ Pinchot must have been aware of the hypocrisy of this statement.

Pennsylvania's proximity to Ontario made it "comparatively easy" to study, while the Bratt System of control in Sweden was considered a "worthy study [for] possible emulation."²⁷

In addition, notorious teetotaler and avid Prohibitionist John D. Rockefeller asked a number of people to "study the methods that might be best employed for handling the sale of alcoholic beverage."²⁸ The Rockefeller Committee recommendation was used by many states during this pivotal time.

The liquor code of Pennsylvania is influenced by these three studies. All three systems, studied and recommended, are monopoly systems where the state holds a monopoly over the "liquor traffic other than the manufacturing of liquor," and Governor Pinchot and the Republican leadership at the time were determined to have a monopoly system in Pennsylvania.²⁹

Pennsylvania most closely reflects Ontario with regard to liquor control. The Ontario system left manufacturing of liquor in the hands of private industry, while the government department had "control through the issuances of federal licenses... and... the power of taxation."³⁰ The Liquor Control Board of Ontario licensed breweries and wineries.³¹ The commissioners of the Board were appointed to an indefinite term by the Lieutenant-Governor, where they had unbridled authority upon a number of provisions regarding how liquor would be distributed and consumed.³²

²⁷ Harold Edward Fassberg, "The Development of Liquor Control In Pennsylvania," 17, Unpublished M.A. Thesis, University of Pittsburgh, 1942

²⁸ Id.

²⁹ Id. at 18

³⁰ Id. at 19

³¹ Id.

³² Id. at 21

The Liquor Control Board of Ontario (LCBO) used to be the sole importer of beer and wine for the province, while it “maintain[ed] its own stores” selling spirits at retail locations in packages to the individual consumer.³³ Sale by the glass was prohibited at the time, as the unique liquor code established no taprooms or saloons, effectively prohibiting all drinking in public.³⁴ Beer and wine could be sold to consumers for off-premise consumption either by the licensed premises, or at a store run by the LCBO.³⁵ For individual consumers to purchase any alcoholic beverages, they must receive a permit book from the LCBO, which ensured the store clerk that the consumer was an upright and prudent citizen and did not have a habitual drinking problem.³⁶ The permit book limited the amount of alcohol that could be purchased every day.³⁷

Generally speaking, lighter alcoholic beverages, like beer, levied lower taxes, while wine and spirits had a higher tax. Retail sales from breweries were taxed at 5%, and wine was taxed at .10¢ a gallon.³⁸ Interestingly, domestic beer was not subject to the provincial tax.³⁹ Aside from the exception of “a private right to purchase from provincial brewers and vintners,” Ontario was a “true monopoly liquor administration.”⁴⁰

The Bratt System of Sweden is like and unlike the Ontario monopoly in many ways. Dr. Ivan Bratt, a practicing physician in Stockholm, developed Sweden’s system in

³³ Id. at 20

³⁴ Id.

³⁵ Id.

³⁶ Id.

³⁷ Id.

³⁸ Id. at 22

³⁹ Id.

⁴⁰ Id.

1917—the same year the 18th Amendment was proposed by Congress.⁴¹ Bratt was a pragmatic temperance support, who, like America’s Dr. Benjamin Rush, argued that alcohol was less a moral issue and more a social health issue, citing overuse as a detriment.⁴² Bratt was against complete prohibition, because it would be “impossible to enforce” against people who simply want to have a drink once in a while, and that it would be “ineffective because of the ease of home brewing and distilling.”⁴³ His strongest reason against prohibition was that it would create bootleggers and profiteering from the underground trade of alcohol.⁴⁴ Instead, Bratt and his Temperance Committee instituted regulations on the individual level.⁴⁵

The distinguishing features of the Bratt System were individual control of consumption and “entrusting the municipal sale of alcohol to a central company, whose primary goals were to divorce the private profit initiative from the liquor trade, reduce alcohol consumption, and use the liquor revenues to fund civic welfare and philanthropic endeavors.”⁴⁶ Private businesses manufactured and sold alcohol, but the government had complete control of how it was run and would receive a vast amount of the profits earned.⁴⁷

Sweden’s king would appoint members of the Royal Board of Liquor Control.

The central and private company in charge, “Vin and Spritcentralen” (V&S), controlled

⁴¹ Mark Lawrence Schrad, “The Political Power of Bad Ideas: Networks, Institutions, and the Global Prohibition Wave,” Oxford University Press, 2010

⁴² Ketil Braun, “New Perspectives on the Origin of the Bratt System,” *Alkoholpolitik Tidskrift för nordisk alkoholforskning* Vol. 1:13-23, 1984

⁴³ *Supra*, Schrad at 98

⁴⁴ *Id.*

⁴⁵ *Supra*, Braun

⁴⁶ *Supra*, Schrad at 101

⁴⁷ Ake Elmer Lund, “The Change of Temperance Policy in Sweden,” 54 *The British Journal of Addiction* 55,

the “importation, manufacture, and wholesale trade in alcoholic beverages except beer.”⁴⁸

The government chose the directors of V&S. Only 122 private producers of spirits were licensed within the districts. These private producers were only able to sell their products to V&S. Each producer had directors appointed by the local government, the Royal Board, and the private company itself.⁴⁹

The number of licenses were determined by the local option, thus the 122 private producers reflected the 122 wet districts.⁵⁰ Each wet district had its own private retail store to sell wine, spirits, and beer. These private retail stores had to purchase their wine and spirits from V&S, the primary purchaser of alcohol. Because beer was not considered an unstoppable threat, retail stores could purchase their beer from private manufacturers.⁵¹

Similar to the Ontario plan, the retail stores could sell for off-premise consumption only, and one must be in possession of the “motboks” permit book, given to men and unmarried women over 25 to manage excessive drinking on an individual level.⁵² The local private retail companies distribute these permits to people who prove their “moderate drinking habits.”⁵³ Each individual had varied purchasing power depending upon their age, sex, financial standing, record of sobriety, and whether they were the head of the household, but the total volume of spirits that can be purchased within a month could not exceed 1.1 gallons.⁵⁴ These permits could only be used at the

⁴⁸ Supra. Fassberg at 23

⁴⁹ Id. at 24

⁵⁰ Id.

⁵¹ Id.

⁵² Id.

⁵³ Id.

⁵⁴ Id.

store that presented them to the citizen, and no other.⁵⁵ While retail stores would track the quantity of light beer and wine purchased by the individual in their motbok, there were no restrictions upon the amount that could be purchased of those two alcoholic beverages.⁵⁶

Unlike the Ontario system which prohibited the sale of liquor by the drink, on-premise consumption was permitted at hotels and restaurants, which were licensed by the Board. Though the motbok was not utilized for on-premise consumption, the amount of spirits that could be purchased by the glass was “determined by the time of day and the price of the meal.”⁵⁷

The private companies from each wet district were levied on the excess profits over their fixed dividends, 6% for V&S and 5% for the other private retail stores.⁵⁸ Taxes were levied on manufacturers and brewers as well, with spirits being taxed heavier than lighter alcohol—a policy intended to drive citizens to drink fewer and less alcoholic beverages.⁵⁹

Though the government had a monopoly system in place for alcohol sales in Sweden, there was a vast amount of private control, effectively decentralizing the Royal Board of Liquor Control. “Sweden has steered her policy of liquor control between the Scylla of complete highly centralized regulation and the Charybdis of a licensing system with its attendant malpractices.”⁶⁰

The third source from which the Pennsylvania Liquor Code is derived is a study done by John D. Rockefeller. Rockefeller, an avid dry like Pinchot, feared bootleggers’

⁵⁵ Id.

⁵⁶ Id.

⁵⁷ Id. at 25

⁵⁸ Id.

⁵⁹ Id.

⁶⁰ Id.

ability to pervert the laws, calling them a “vast army of lawbreakers.”⁶¹ Rockefeller consequently formed a committee which recommended that states implement “a system which the state would take over, as a public monopoly, the retail sale through its own stores of the heavier alcoholic beverages for off-premise consumption, and an Authority organized as an independent body under the state would have control over the wholesale and retail sale of liquor.”⁶² The system was one of law-and-order as “the legitimacy of the law must be the primary concern in liquor regulation.”⁶³ The idea was to limit profits generated from alcohol sales, which would encourage private businesses to sell more alcohol. Rockefeller wrote in the forward of the proposal that “only as the profit motive is eliminated is there any hope of controlling the liquor traffic in the interests of a decent society.”⁶⁴ The Rockefeller Committee recommendation cited the Bratt and the Ontario monopolies as influences.

The proposal was based on the Rockefellers idea that social evils arise where liquor regulations are inadequate, and where retail sales are easy to acquire alcohol.⁶⁵ The American public trusted Rockefeller because he was “a well-regarded social, religious, and philanthropic figure.”⁶⁶ Within the committees recommendation for a strict monopoly was advice to have the local option.⁶⁷ However, in order to keep out the “ubiquitous bootleggers” from rising again, the Rockefeller committee suggested that

⁶¹ Emma Snyder, “Comment: Privatization in Pennsylvania: How Reforming the Pennsylvania Liquor Code Would Benefit the Commonwealth and its Citizens” 284, 119 Penn State Law Review Vol. 279, 2014

⁶² Supra, Fassberg note 21 at 26

⁶³ Jefferson M. Fish, “Drugs and Society: U.S. Public Policy,” 55, Rowman & Littlefield Publishers, Inc., 2006

⁶⁴ Id.

⁶⁵ Supra. Fassberg note 21 at 28

⁶⁶ Supra, Snyder note 48 at 284

⁶⁷ Id. at 29

citizens within municipalities that voted to become dry towns still maintain the ability to purchase alcohol through the liquor authority.⁶⁸

The Great Depression also played a role in the shaping of Pennsylvania liquor control. Pinchot realized state revenue would be bolstered by the deleterious beverage he distained so greatly.⁶⁹ Proponents of Prohibition argued that the removal of alcohol from the nation would “ensure prosperity[,] increase law and order,” and stimulate the economy.⁷⁰ Those in support of repeal made the exact same arguments in 1933—that bringing alcohol back into the United States would “provide jobs... increase tax revenue, and reduce ‘lawlessness’ stimulated by and characteristic of the illegal liquor industry.”⁷¹

With full knowledge of the tax revenue that would be generated, Governor Pinchot carefully studied each of the systems and the recommendation. During the special session set up by Pinchot where he lamented about the “liquor problem” on the horizon, the Governor announced his plan to implement a monopoly system in Pennsylvania based on his studies.⁷²

In anticipation of repeal, the Commonwealth began to stock pile whiskey and grain alcohol.⁷³ Once the state began to covet liquor, the legislature passed the “Spirituous and Vinous Liquor Floor Tax” which imposed a dollar tax on every gallon of whiskey or wine “lodged or stored in the Commonwealth between November 22, 1933

⁶⁸ Id.

⁶⁹ Harry G. Levine and Craig Reinerman, “Alcohol Prohibition and Drug Prohibition- Lessons From Alcohol Policy for Drug Policy,” CEDRO-UVA, 2004, <http://www.cedro-uva.org/lib/levine.alcohol.html>

⁷⁰ Id.

⁷¹ Id.

⁷² Supra, Fassberg note 21 at 45

⁷³ Id.

and December 15, 1933,” until the ratification of the 21st Amendment.⁷⁴ The tax was the only statute enacted prior to the liquor store system for distilled spirits; it was “an expedient method of raising sorely needed funds for social needs” that still provided “a modicum of control” for the government in the event the legislature could not come to a deal for the liquor code.⁷⁵

On November 26, 1933 the Pennsylvania House passed the Liquor Control Act by a vote of 144-61, and three days later the State Senate approved the measure by a vote of 33-14.⁷⁶ The state store system and the Pennsylvania Liquor Control Board put in place remains a contentious and reticulate network 83 years later.

The Pennsylvania Liquor Code

The Pennsylvania Liquor Code (the Code) creates a state monopoly, where the Commonwealth has complete control over the sales and distribution of alcoholic beverages. The stated purpose of the Code is to “prohibit the manufacture of and transactions in liquor, alcohol and malt or brewed beverages which take place in this Commonwealth, except by and under the control of the board.”⁷⁷ The Code creates an independent administrative board known as the Pennsylvania Liquor Control Board (“the Board,” “the PLCB”), which has the authority to create Pennsylvania liquor stores,

⁷⁴ Commonwealth v. Miller, 118 Pa. Super. 58, 60 (1935) (Holding an unlicensed manufacturer of moonshine whiskey is still considered a manufacturer and must pay the tax)

⁷⁵ Supra, Fassberg note 21 at 49

⁷⁶ 69 News, “Pinchot’s Legacy: Pennsylvania’s Liquor Control System,” WFMZ.com, July 2, 2016, <http://www.wfmz.com/features/history-headlines/pinchots-legacy-pennsylvanias-liquor-control-system/99758915>

⁷⁷ 47 P.S. § 1-104(c). Interpretation of act

provide licenses and regulations for the manufacturer, distribution and sale of liquor, alcohol, and malt or brewed beverages, and to enforce the regulations they proliferate.⁷⁸

The Code is set up in 9 articles; the most pertinent of which establishes the PLCB, the Pennsylvania Liquor Store system; the procedures, rules, and regulations for licensure of liquor, alcohol, and malt beverages; and, the licenses and regulations for distilleries and wineries, and the disposition of monies accrued under the Code. Additionally, the Code regulates bailees and transports for hire, dealings with a distilled bonded warehouse certificate, and miscellaneous provisions. These latter articles will not be discussed in this piece.

The Pennsylvania Liquor Control Board & Other Bureaus

Under the Code, the PLCB was established.⁷⁹ The “independent administrative body,” akin to the Ontario Liquor Control Board, has broad powers to buy, import or have in its possession for sale and sell liquor, alcohol, corkscrews, wine and liquor accessories, trade publications...” and ultimately “control the manufacture, possession, sale, consumption, importation, use storage, transportation and delivery of liquor, alcohol and malt or brewed beverages...”⁸⁰ Until 1979, the PLCB was not an independent agency, and was, instead, “integral to the Commonwealth, and... afforded the full sovereign immunity status of the Commonwealth.”⁸¹

The Board consists of three members, one of which designated as Commissioner, each appointed by the governor and must be approved by a two-thirds majority of the

⁷⁸ 47 P.S. § 2-207(a). General powers of the board.

⁷⁹ 47 P.S. § 2-201. Appointment of members; terms; salaries.

⁸⁰ 47 P.S. § 2-207(a), (b)(1). General powers of the board.

⁸¹ Garretston v. Commonwealth, 46 Pa. Commw. 136, 139 (1979)

Pennsylvania Senate.⁸² The three members hold staggered tenures of three, four or five years each.⁸³ The only qualifications to be a member of the Board are to be a United States citizen, resident of Pennsylvania, and to have been a qualified elector over the age of twenty-one.⁸⁴ ⁸⁵ Board members and their immediate family, and employees of the board are not permitted to “be directly or indirectly interested or engaged in any other business or undertaking within the Commonwealth dealing in liquor, alcohol, or malt or brewed beverages, whether as owner, part owner, partner, member of syndicate, holder of stock exceeding five percent (5%) of the equity at fair market value of the business, independent contractor or manager of a licensed establishment.”⁸⁶

Enumerated powers granted to the Board include licensure of resident and non-resident manufacturers of beer, wine, and spirits, pricing the wine and spirits, licensure of alcoholic purveyors at various stages, determining and publishing prices for wine and spirits, determining municipalities where alcohol can be sold, operating and furnishing state liquor stores appropriately, and issuing and granting alcohol education and prevention services.⁸⁷ Most recently the Board has been granted the authority to sell Pennsylvania lottery tickets in state liquor stores.⁸⁸

In the states’ police power to create the Code, establish the Board, and regulate licensure, the state also created the Bureau of Liquor Enforcement within the

⁸² 47 P.S. §§ 2-201, 2-203

⁸³ Id.

⁸⁴ 48 P.S. § 2-202. Qualifications of the members.

⁸⁵ Note that there are no further qualifications to be in charge of the purchasing and selling of liquor for the entire Commonwealth aside from being an of age resident. What is the likelihood that liquor will stay out of politics, as Pinchot desired?

⁸⁶ 47 P.S. § 2-210(a). Restrictions on members of the board and certain employees of the Commonwealth.

⁸⁷ 47 P.S. § 2-207. General powers of the board.

⁸⁸ Id.

Pennsylvania State Police.⁸⁹ The Bureau of Liquor Enforcement is “responsible for enforcing [the] Act.”⁹⁰ Similar to Eliot Ness’s Bureau of Prohibition, which would break confiscated bottles in the street and empty barrels for the world to witness, the Bureau of Liquor Enforcement investigates and arrests people for breaking the law of the Code, and confiscates any “equipment or appurtenance used in the commission the of unlawful acts.”⁹¹ Enforceable crimes include the unlawful or unlicensed manufacture, importation, or sale of alcohol, or any crime which occurs against the officer when in their official capacity, like assault or harassment.⁹²

The dense⁹³ Code provides for a number of avenues for customers and licensees to interpret and respond to the measures promulgated and enforced by the Commonwealth. For example, licensees may ask for clarity of certain practices and “the Board may issue legal opinions regarding any subject within the code.”⁹⁴ The adjudication process following a citation begins with administrative law judges appointed by the governor who “preside at all citations and other enforcement hearings required or permitted under this Act.”⁹⁵ Administrative law judges maintain chambers in Philadelphia, Harrisburg, and Pittsburgh.⁹⁶

⁸⁹ 47 P.S. § 2-211. Enforcement.

⁹⁰ Id.

⁹¹ 47 P.S. § 2-211(b). Enforcement.

⁹² Id.

⁹³ And poorly organized

⁹⁴ 47 P.S. § 2-211.1. Legal Opinions.

⁹⁵ 47 P.S. § 2-212(c). Office of administrative law judge

⁹⁶ “Office of Administrative Law Judges,” Pennsylvania Liquor Control Board, PA.gov, <http://www.lcb.pa.gov/Legal/Office-of-ALJ/Pages/default.aspx>

The Bureau of Consumer Relations is responsible for handling complaints and suggestions made by customers.⁹⁷ The Board also maintains an investigative unit that handles complaints and suggestions made directly to Consumer Relations, and is “responsible for implementing and monitoring compliance with the provisions and regulations made under [the] Act.”⁹⁸

While an independent administrative body, the PLCB is still a creature of the state and must submit biennial reports to the legislature about trends in underage drinking, programs implemented to curtail underage drinking and drunk driving, and any science which could help prevent “high-risk college alcohol drinking.”⁹⁹

Pennsylvania Liquor Stores

Pinchot created the Pennsylvania Liquor Code with the hopes of keeping saloons out of the Commonwealth and to prevent bootlegging. Pinchot was an avid proponent of state monopoly over the sale of alcohol and wine as indicated by his studying the monopoly systems from Sweden and Ontario. Historically, Pennsylvania had classified beer alongside wine.¹⁰⁰ However the studied systems and the Rockefeller committee recommendation each placed wine in a different classification because of the strength of the alcoholic beverage.¹⁰¹ Beer, the Rockefeller committee argued, was not likely to be abused like higher alcoholic beverages such as spirits and wine.¹⁰² The Code followed the

⁹⁷ 47 P.S. § 2-213. Bureau of consumer relations.

⁹⁸ 47 P.S. § 2-216(a). Investigative Unit.

⁹⁹ 47 P.S. § 2-217(c). Biennial reports.

¹⁰⁰ Mihir A. Munshi, Share The Wine – Liquor Control in Pennsylvania: A Time for Reform, 58 U. Pitt. L. Rev. 507, 517 (1997)

¹⁰¹ Id. at 518

¹⁰² Id.

recommendation and the Board relinquished its direct power to sell beer, giving licensure to beer distributors and other establishments, and maintained the power to exclusively sell wine and spirits.

To purchase wine and spirits in Pennsylvania, one must go to a state liquor store—one of the most notable features of the Code. Upon inception of the PLCB, Pennsylvania was the world’s largest purchaser of liquor, ordering roughly \$1,000 of liquor from suppliers each week—a number that does not sound as astounding as it truly was given the rank in which it placed Pennsylvania.¹⁰³ As wholesalers across the country grew and were able to purchase and sell across many state lines, many wholesalers overtook Pennsylvania’s place. As of 2013, Pennsylvania held the place of 8th largest wholesaler of alcohol in the nation—with only one-ninth of the purchasing power of the largest wholesaler in the United States.¹⁰⁴ The PLCB purchased 1.3 billion dollars worth of wine and spirits in fiscal year 2015-2016.¹⁰⁵

The Liquor Control Board issues liquor importers’ licenses for the importation of liquor from “other states, foreign countries, or insular possession of the United States, and purchase from manufacturers located within this Commonwealth, to be sold outside of this Commonwealth or to Pennsylvania Liquor Stores...”¹⁰⁶ Each importer must maintain a licensed premise and one licensed warehouse where the liquor supply is kept

¹⁰³ *Supra*, Fassberg note 23 at 61

¹⁰⁴ Nathan Benefield, “Myth: PLCB vs. Largest Wholesalers,” Commonwealth Foundation, May 28, 2013, <http://www.commonwealthfoundation.org/policyblog/detail/myth-plcb-vs-largest-wholesalers>

¹⁰⁵ “Fiscal Year 2015-16 Annual Report” Pennsylvania Liquor Control Board, http://www.lcb.pa.gov/About-Us/News-and-Reports/Documents/AnnualReport_2016.pdf

¹⁰⁶ 47 P.S. § 4-410(e). Liquor importers’ licenses; fees; privileges; restrictions.

and stored.¹⁰⁷ Importers may skip delivering to the PLCB, and deliver directly to a licensee where the liquor can be stored at the importer's warehouse when the licensee has placed the order with the Board and is paid in full prior to delivery.¹⁰⁸ Importers may charge a delivery fee.¹⁰⁹

Upon purchasing the liquor, the PLCB prices the alcohol "proportional with the prices paid by the board to its suppliers and may include a handling fee."¹¹⁰ Included in this price is a hidden 18% tax known as the Johnstown Flood Tax, which will not appear on your receipt after purchasing from a state liquor store.¹¹¹ This surreptitious tax and "constant irritant" was imposed in 1936 in order to rebuild and maintain Johnstown after a series of catastrophic floods.¹¹² A temporary 10% levy on each bottle of alcohol was put in place to pay for the \$17 million in damages, but after the necessary profits accrued within six years, the legislature decided not to repeal it due to its success.¹¹³

The legislature saw the opportunity and twice decided to raise the tax, once to 15% in 1963 and again in 1968 to 18%, where it has remained since.¹¹⁴ Since the tax has been in place, in spite of the vehement calls to remove it, it has levied \$300 million

¹⁰⁷ 47 P.S. § 4-410(b). Liquor importers' licenses; fees; privileges; restrictions.

¹⁰⁸ 47 P.S. § 4-410(g)(1)(2). Liquor importers' licenses; fees; privileges; restrictions.

¹⁰⁹ *Id.*

¹¹⁰ 47 P.S. § 2-207(b)(2).

¹¹¹ Bruce of Brews, "Johnstown Flood Tax: Why Are We Still Paying A Flood Tax From 1936 On Our Booze?" Drink Philly, October 18, 2010, <http://philly.thedrinknation.com/articles/read/174-Johnstown-Flood-Tax-Why-Are-We-Still-Paying-A-Flood-Tax-From-1936-On-Our-Booze-#>

¹¹² Mark M. Wilcox, "Squeezing wine consumers; Pennsylvania's shipping laws should be revised so that the state—and, more important, wine drinkers—can benefit," Philadelphia Inquirer, February 14, 2014, http://articles.philly.com/2011-07-27/news/29820953_1_johnstown-flood-tax-lcb-turzai.

¹¹³ Adam Teeter, "The High Price of Alcohol In Pennsylvania Can All Be Blamed On a Flood," Vine Pair, March 5, 2015, <http://vinepair.com/wine-blog/high-price-alcohol-pennsylvania-can-blamed-flood/>

¹¹⁴ *Supra*, Bruce of Brews

annually and anywhere between \$5 billion and \$15 billion in total, which is deposited into the State Treasury.^{115 116}

The Board, in its power, decides where state liquor stores are to be located and established in the municipalities that have not exercised their local option, and prohibited the existence of liquor stores within their jurisdiction.^{117 118 119 120} When a location for a liquor store has been found, the PLCB gives notice through “public advertisement in two newspapers of general circulation,” and if, within fifteen days, fifteen or more taxpayers living within a quarter mile of the proposed store protest, a hearing will be held within the court of common pleas to determine whether the store should be established.¹²¹

Originally, the Code provided for one liquor store for every community with a population over 10,000. In January of 1934, 234 state liquor stores were in operation.¹²² Today, the PLCB operates 601 retail facilities across the Commonwealth, employing roughly 5,000 Pennsylvanian’s across the Commonwealth.¹²³ With a population of 12.8

¹¹⁵ Supra, Teeter

¹¹⁶ 1936 Pa. P.L. 4.

¹¹⁷ 47 P.S. § 4-472. Local Option.

¹¹⁸ The ballot questions are always asked in the positive. For example, the local option ballot questions asks “When the question is in respect to the establishment, operation and maintenance of Pennsylvania liquor stores it shall be in the following form: ‘Do you favor the establishment, operation and maintenance of Pennsylvania liquor stores in the _____ of _____? Yes/ No.’” Id.

¹¹⁹ Between 1933 and 1942 5.5% of Pennsylvanians voted against on-premise sales of malt and distilled beverages, 1.4% denied sale of spirits, and .7% prohibited malt beverage. Supra, Fassberg note 23 at 65

¹²⁰ According the Pennsylvania Liquor Control Board, 684 municipalities are at least partially dry, as of July 2015. “Wet Versus Dry Municipalities,” Licenses, Pennsylvania Liquor Control Board, <http://www.lcb.beta.state.pa.us/PLCB/Licensees/wetversusdry/index.htm>

¹²¹ 47 P.S. § 3-301(a). Board to establish state liquor stores.

¹²² Supra, Fassberg note 23 at 66

¹²³ Supra, “Fiscal Year 2015-16 Annual Report” at 17.

million, Pennsylvania now has roughly one retail liquor store for every 21,302 residents.¹²⁴

Pennsylvania liquor stores are open “on the hours and days the Board deems appropriate.”¹²⁵ “Appropriate” in the eyes of Governor Pinchot was as little as possible. Pinchot was stubborn, as proven, and if he had it his way Pennsylvania would have remained dry seven days a week. Instead, Pinchot received one-seventh of his wish, where he could rest assured that not one drop of liquor would be sold on Sunday. The Governor was relentless; he “stubbornly upheld the sanctity of the Sabbath and closed the Pennsylvania Building at the 1926 Sesquicentennial Exposition in Philadelphia. Then he went further and sought legal action to padlock the entire exposition on Sundays. He battled against allowing Sunday professional baseball in Pennsylvania.”¹²⁶

The decision to limit liquor sales on Sunday was appropriate for the time. “A lot of people think that Sundays are a day for families and a day for God” said PLCB Chairman Jonathan Newman in 2003.¹²⁷ As time progressed and the weekend became the busiest time for retail sales, the Board recommended loosening their restrictions, and the legislature agreed—in 2003 63 stores, or roughly 10% of Pennsylvania liquor stores, opened for limited business hours on Sunday.¹²⁸

¹²⁴ United States Census, “Quick Facts: Pennsylvania” July 1, 2015, <http://www.census.gov/quickfacts/table/PST045215/42>

¹²⁵ 47 P.S. § 3-304. When sales may be made at Pennsylvania liquor stores.

¹²⁶ Paul B. Beers, “Pennsylvania Politics Today and Yesterday: The Tolerable Accommodation,” 74, The Pennsylvania State University Press (1980).

¹²⁷ Associate Press, “Pennsylvania Gets Taste of Sunday Liquor Sales,” The Los Angeles Times, February 10, 2003, <http://articles.latimes.com/2003/feb/10/nation/na-booze10>

¹²⁸ Id.

The bill was not easy to pass amid fears that the social costs would outweigh any pecuniary gain.¹²⁹ “Somebody’s grandmother who’s going to church should not have to be standing next to a guy who’s begging for quarters so he can get a drink,” State Senator Anthony Williams predicted, while many of his cohorts believed an increase in the hours of alcohol sales would increase drunk driving accidents.¹³⁰ House Liquor Control Committee Chairman Representative Reinard logically argued that Pennsylvanian’s could purchase alcohol at sporting events, restaurants, and clubs and drive home.¹³¹ It would be safer and better public policy to allow them to purchase alcohol and drink it at home.

Pennsylvania Senate Bill 1365 passed and became 2002 Act 212 which permitted certain Pennsylvania liquor stores to “be open for Sunday retail sales between the hours of noon and five postmeridian.”¹³² The amendment included a sunset clause whereby at the end of two years from enactment the Board would review whether Sunday sales affected Saturday sales, and consequently whether the experiment would grow or wither.¹³³ Ending the program never crossed a legislators mind once the numbers came in the following year. Sunday sales had boosted revenue generated from state liquor stores by \$23.7 million, a 7.7% boost the total revenue generated by alcohol sales.¹³⁴

Financial gain is not the only advantage Pennsylvania received. Whether related or unrelated, drunk driving fatalities in Pennsylvania have been on the decline since

¹²⁹ Charles Thompson, “Allowing Sunday Sales of Alcohol?: How’d That Work Out,” PennLive.com, http://www.pennlive.com/news/2016/03/post_17.html#1

¹³⁰ Id.

¹³¹ Id.

¹³² 2002 Act 212, 47 P.S. § 3-304(b)

¹³³ Id.

¹³⁴ John L. Micek, “Revenue pours in from state’s Sunday sales of liquor,” The Morning Call, February 8, 2004, http://articles.mcall.com/2004-02-08/news/3524495_1_liquor-store-state-store-wine-and°-spirits

Sunday sales have been implemented.¹³⁵ In 2002, the year the Sunday sales legislation was signed into law, there were 523 alcohol impaired driving fatalities; and in 2015 Pennsylvania were only 364 alcohol impaired driving fatalities.¹³⁶

Gradually stores have been permitted to open on the Sabbath. Today, 300 Pennsylvania liquor stores are open on Sundays, many of which have expanded hours from 11am-7pm.¹³⁷

The Bureau of Licensing

While the off-premise retail sale of wine and spirits has historically been left for the Liquor Control Board to manage, the LCB has the authority to grant retail licenses to hotels, restaurants and clubs selling alcohol for on-premise consumption; manufacturing licenses to in-state distilleries, wineries, and breweries; distributor and importing distributor licenses to malt beverage wholesalers and distributors for off-premise consumption; and, most recently, direct shipment licenses to wineries. The Code, organized by the type of beverages the license permits to be handled, is separated into “Liquor and Alcohol (Not Including Manufacturers),” “Malt and Brewed Beverages (Including Manufacturers),” “General Provisions Applying to Both Liquor and Malt and Brewed Beverages,” “Shipment of Wine,” and “Distilleries, Wineries, Bonded Warehouses, Bailees for Hire, and Transporters for Hire.”

¹³⁵ Department of Transportation, National Highway Traffic Safety Administration, “Traffic Safety Performance (Core Outcome) Measures for Pennsylvania,” <https://cdan.nhtsa.gov/SASStoredProcess/guest>

¹³⁶ *Id.*

¹³⁷ Governor Tom Wolf, “Check out the 94 PA Liquor Stores That Will Now Be Open on Sunday,” Pennsylvania.gov Newsroom, August 12, 2016, <https://www.governor.pa.gov/check-out-the-94-pa-liquor-stores-that-will-now-be-open-on-sunday/>

Under “Liquor and Alcohol (Not Including Manufacturers),” the Board is given the authority to “issue a retail liquor license for any premises kept or operated by a hotel, restaurant or club...”¹³⁸ Upon Board approval, the retail liquor licensees may purchase wine and spirits from Pennsylvania liquor stores and beer from licensed distributors and importing distributors, store the alcohol on-premises, and sell to customers for on-premise consumption.¹³⁹ ¹⁴⁰ Major retail liquor licenses include restaurants (R), hotels (H), airport restaurants (AR), municipal golf course restaurants (GR), privately owned public golf course restaurants (PGR), off-track wagering restaurants (OWR), and economic development restaurant liquor licenses (EDR).¹⁴¹ A class of “Retail Dispensers” licenses exists and permits the “purchase, possession and sale of malt or brewed beverages only, in the same manner and under the same conditions as set forth for retail liquor licenses.”¹⁴²

Procedurally, the applications for the various retail liquor licenses are the same, however each license has are subtle regulatory differences. Applicants must submit a written application with description of the proposed premises.¹⁴³ These licenses are subject to the license quota, which limits the number of licenses that are granted to one for every 3,000 inhabitants of a county.¹⁴⁴ ¹⁴⁵ ¹⁴⁶ Many licenses existed before the 1939

¹³⁸ 47 P.S. § 4-401(a). Authority to issue liquor licenses to hotels, restaurants and clubs.

¹³⁹ Id.

¹⁴⁰ 47 P.S. § 4-407. Sale of malt or brewed beverages by liquor licensees.

¹⁴¹ “Information Booklet For Retail Licenses,” 6, Pennsylvania Liquor Control Board, Commonwealth of Pennsylvania, https://www.lcbapps.lcb.state.pa.us/webapp/education/item_images/4419.pdf

¹⁴² Id. at 10

¹⁴³ 47 P.S. § 4-403(a). Applications for hotel, restaurant and club liquor licenses.

¹⁴⁴ Id.

¹⁴⁵ 47 P.S. § 4-402. License districts; license period; hearings.

quota provision, which provided one license for every 1,000 municipal inhabitants, and because of this many counties have exceeded their number of licenses per inhabitant, but while the LCB will not issue new licenses within those counties, “it doesn’t refuse to renew licenses simply to meet the quota.”¹⁴⁷

Similar to the procedure for opening Pennsylvania liquor stores, after a hotel, restaurant or club applies for a new license or a transfer or extension of their previous license a notice will be posted for thirty days.¹⁴⁸ Residents that live within five hundred feet of the premises who oppose the licensure due to the proximity of the proposed license to a church, school, or residence will testify at a hearing, where the Board will make a determination. License fees for retail liquor licenses are gradually priced according to the population of the municipality.¹⁴⁹

Once the license has been granted to the retail liquor licensee may serve “liquor and malt or brewed beverages by the glass, open bottle or other container, and in any mixtures, for consumption only in that part of the hotel or restaurant habitually used for serving of food to guests or patrons...”¹⁵⁰ Sales under these licenses may occur between 7 AM of any day until 2 AM the following day, except Sunday, when sales may begin at 9 AM.¹⁵¹ In the same bill opening Pennsylvania liquor stores on Sunday, blue laws were

¹⁴⁶ “The Retail Liquor License Quota,” Pennsylvania Liquor Control Board, <http://www.lcb.pa.gov/Licensing/Topics-of-Interest/Documents/003324.pdf>

¹⁴⁷ *Id.*

¹⁴⁸ *Supra*, “Information Bookler For Retail Licenses” at 26

¹⁴⁹ 47 P.S. § 4-405. License fees.

¹⁵⁰ 47 P.S. § 4-406(a)(1). Sales by liquor licensees; restrictions.

¹⁵¹ 47 P.S. § 4-406(a)(2), (d). Sales by liquor licensees; restrictions.

stripped from the Code and licensees of all kinds were given the ability to operate on Sunday, provided they purchase a Sunday sales permit.^{152 153}

Airports and Casinos each have been given opportunities no other licensee has yet received regarding operational hours. Airport restaurants need only take three hours off a day of selling alcohol, as their licenses permit them to sell from 5 AM of any day until 2 AM the follow day.¹⁵⁴ Casinos, on the other hand, the hot-bed for controversy and addiction, have recently been given the opportunity to purchase a license which would extend hours from the regular 7 AM to 2 AM to a full 24 hours a day seven days a week.¹⁵⁵

Act 16, a liberalization of the Liquor Code recently passed by the Pennsylvania legislature and signed by Governor Tom Wolf, hoped to increase revenue given the recent \$31.5 billion state budget.¹⁵⁶ One part of the bill included a provision for casinos to purchase the extended liquor license for one million dollars and to pay that price for four years, after which the renewal would then become \$250,000 a year.¹⁵⁷ Despite casinos having lobbied for extra hours to remain competitive with neighboring states, since being enacted on August 8, 2016, not one of the twelve casinos in Pennsylvania has applied for the five extra hours a day, or 1,825 hours a year.^{158 159} While Act 16 has its

¹⁵² 47 P.S. § 4-406(a)(1). Sales by liquor licensees; restrictions.

¹⁵³ 2002 PA Act 212

¹⁵⁴ 47 P.S. § 4-406(a)(2.1). Sales by liquor licensees; restrictions.

¹⁵⁵ 47 P.S. § 4-416(e). Casino liquor license.

¹⁵⁶ Matt Assad, “Pennsylvania’s plan for 24-hour casino liquor sales a flop,” The Morning Call, July 24, 2016, <http://www.mcall.com/news/local/mc-pa-casino-liquor-20160723-story.html>

¹⁵⁷ 47 P.S. § 4-416(c)(2). Casino liquor license.

¹⁵⁸ Each extra hour then costs \$547.95, a calculation I’m sure each casino has found to be determinative.

shortcomings, where casinos have left a \$12 million hole in the budget, one of the most lauded sections of the law has given restaurant and hotel licensees the ability to purchase a wine expanded permit, which allows, for the first time since before Prohibition, an entity other than the Pennsylvania liquor stores to sell wine for off-premise consumption.¹⁶⁰

Differences between the groups of licenses range in nuances that are created by the Board, not statutorily. For example, though food is a requirement to qualify for any retail license, Restaurant Liquor licenses (R) must have “serving areas within the building not less than 400 square feet and must be equipped with tables and chairs to accommodate at least 30 persons at one time.”¹⁶¹ Eating Place Retail Dispensers (E), which sell beer only, need only have a 300 square foot minimum for serving area.¹⁶²

Hotels (H), which may serve alcohol under the licensed restaurant and within guest rooms, must have “a public dining room or rooms operated by the same management accommodating at least 30 persons at one time, with a kitchen, apart from the dining room or rooms... [and] the number of permanent bedrooms required for the issuance of a new hotel license... varies according to population of the municipality.”¹⁶³ Where a population is less than 3,000 a hotel must have twelve rooms; a municipal population between 3,000 to 9,999, hotels must have at least sixteen rooms; and any municipality exceeding 100,000 in population hotels must have fifty rooms in order to

¹⁵⁹ Jason Cato, “Pa. casinos don’t bite on extra hours to sell alcohol,” TribLive.com, August 30, 2016, <http://triblive.com/news/allegheeny/10934192-74/casinos-alcohol-state>

¹⁶⁰ 47 P.S. § 4-415. Wine Expanded Permits.

¹⁶¹ Supra, “Information Bookler For Retail Licenses” at 11.

¹⁶² Id.

¹⁶³ Id. at 11-12

have a license issued.¹⁶⁴ Bedrooms are required to be no less than 80 square feet and have an outside window.¹⁶⁵ ¹⁶⁶

An interesting aspect of Pennsylvania liquor law is that there “is nothing in the [Code] or the Board’s regulations which prohibits patrons from bringing their own alcohol (“BYOB”), whether or not the establishment possesses a license issued by the Board, so long as the alcohol is legally procured.”¹⁶⁷ These “house rules” pertain to all establishments, whether or not they fall within the restrictions of the Code. The only concern is whether a municipality has exercised its local option, only then can the consumption of wine, spirits, and beer on a restaurants premises may be prohibited. It is insisted that the wait staff in BYOBs ask for the customers’ identification and receipt of the alcohol to prove it was legally purchased from a Pennsylvania licensee.¹⁶⁸

“Malt and Brewed Beverages (Including Manufacturers)” are regulated under Article IV(B) of the Liquor Code. There are three distinct malt or brewed beverage licenses: manufacturers’, distributors’, and importing distributors’. Manufacturer licensees brew, transport, and sell malted beverages from their location.¹⁶⁹ The beverages are sold importing distributors (ID) and distributors (D), which sell the beer for off-

¹⁶⁴ Id.

¹⁶⁵ Id.

¹⁶⁶ Only one-third of the rooms must be equipped with “hot and cold water, a lavatory, a commode, bathtub or shower and a clothes closet.” This is a surprisingly low number of rooms required to meet modern day zoning requirements.

¹⁶⁷ Faith S. Diehl, “RE: BYOB,” Pennsylvania Liquor Control Board Advisory Opinion No. 07-193, May 30, 2007, <https://collab.pa.gov/lcb/Extranet/Advisory%20Opinions/07-193.pdf>

¹⁶⁸ Id.

¹⁶⁹ 47 P.S. § 4-431(a). Malt and brewed beverages manufacturers’, distributors’ and importing distributors’ licenses.

premise consumption.¹⁷⁰ Importing distributors, in addition to the general authority to sell beer to consumers held by both IDs and Ds, are authorized to receive and sell out-of-state manufacturers products in designated geographic regions.¹⁷¹

Like other licenses, malt and brewed beverage licenses are granted to “any resident of this Commonwealth of good repute.”¹⁷² Licensed Pennsylvania manufacturers are permitted to “produce and manufacture malt of brewed beverages, and to transport, sell and deliver [the products] from the place of manufacture only in original containers, in quantities not less than a case or original containers containing one hundred twenty-eight ounces or more which may be sold separately anywhere within the Commonwealth.”¹⁷³ Manufacturers are required to keep a number of daily permanent records within the principal place of business including the quantities of raw material received and used and the quantities of product produced, the sales of the beverages, the quantities of beverages transported, and the names and addresses of the purchasers.¹⁷⁴ Manufacturers are subject to an inspection by the Bureau of Enforcement at “any and all times of the day or night, as they may deem necessary, for the detection of violations.”¹⁷⁵ Manufacturers may acquire up to two storage facilities separate from the principle manufacturing facility.¹⁷⁶

¹⁷⁰ 47 P.S. § 4-431(b). Malt and brewed beverages manufacturers’, distributors’ and importing distributors’ licenses.

¹⁷¹ *Id.*

¹⁷² 47 P.S. § 4-431(a). Malt and brewed beverages manufacturers’, distributors’ and importing distributors’ licenses.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ 47 P.S. § 4-431(a.2). Malt and brewed beverages manufacturers’, distributors’ and importing distributors’ licenses.

Out-of-state manufacturers are authorized to rent, lease or acquire space to store their wares at no more than two facilities owned by an importing distributor.¹⁷⁷ The out-of-state manufacturer may compensate the importing distributor for their storage and services, however the LCB must be notified of the compensation rate.¹⁷⁸

Distributors and importing distributors, as previously noted, are authorized to sell malt or brewed beverages to consumers for off-premise consumption. A distributor license permits the holder thereof to purchase beer from manufacturers and importing distributors within the Commonwealth.¹⁷⁹ Importing distributors may purchase the beer from manufacturers and “persons outside this Commonwealth engaged in the legal sale of malt of brewed beverages or from manufacturers or importing distributors licensed under this article.”¹⁸⁰

Until recently, manufacturers, distributors and importing distributors have been bound by the laws to sell in quantities “not less than a case or original container.”¹⁸¹ A “case” as defined by the Code is “a package prepared by the manufacturer for sale or distribution of twelve or more original containers totaling two hundred sixty-four ounces of malt or brewed beverages excepting those packages containing twenty-four or more original containers each holding seven fluid ounces or more.”¹⁸² Original containers have

¹⁷⁷ 47 P.S. § 4-431(a.1). Malt and brewed beverages manufacturers’, distributors’ and importing distributors’ licenses.

¹⁷⁸ Id.

¹⁷⁹ 47 P.S. § 4-431(b). Malt and brewed beverages manufacturers’, distributors’ and importing distributors’ licenses.

¹⁸⁰ Id.

¹⁸¹ Id.

¹⁸² 47 P.S. §1-102. Definitions.

been defined as “all bottles, casks, kegs, or other suitable containers that have been securely capped, sealed or corked by the manufacturer.”¹⁸³

In a March 2015 advisory opinion, the PLCB elucidated an “interpretation” of the existing law enabling malt beverage licensees to sell twelve-packs if the “original container” contains one hundred and twenty-eight ounces or more.¹⁸⁴ The LCB relied on a decision rendered in Red Sky v. Pennsylvania State Police, where an importing distributor sold “mixed” cases of beer containing products from different manufacturers not in their original package.¹⁸⁵ The court found “original containers” to mean bottles “securely sealed... physically holding the liquid...’ in the original containers as prepared for the market by the manufacturer at the place of manufacture.”¹⁸⁶ This broadens the definition of “original container” from one case that consists of two twelve-packs to each twelve pack as its own original container.

Governor Tom Wolf, an advocate of modernizing the Pennsylvania Liquor Code, took further steps to “Free the Six-Pack” by signing HB 1196 into law in late October 2016. The bill, now Act No. 166, has further liberalized the amounts distributor licensees may sell malt or brewed beverages to non-licensed consumers from “original containers” to “any amount... for off-premise consumption. The sales shall not be required to be in the package configuration designated by the manufacturer and may be sold in refillable

¹⁸³ Id.

¹⁸⁴ Faith S. Diehl, “RE: 12-Packs as Single Original Containers,” Pennsylvania Liquor Control Board Advisory Opinion No. 15-077, March 6, 2015, <https://collab.pa.gov/lcb/Extranet/Advisory%20Opinions/15-077.pdf>

¹⁸⁵ Red Sky v. Pennsylvania State Police, 654 A.2d 143 (Pa. Commw. Ct. 1995).

¹⁸⁶ Id. at 146-47

growlers.”¹⁸⁷ In essence, beer distributors may now sell six-packs, single bottles, and growlers for off-premise consumption.

The freeing of the six-pack for distributors has been a long time coming and an uphill battle. Prior to 2010, beer could only be purchased by the case at distributors and importing distributors, or by the six-pack from retail liquor licenses and eating place retail establishments. In 2007, Wegmans Food Markets, Inc. (“Wegmans”) applied for the transfer of five restaurant liquor licenses from unrelated licensed facilities to their Market Café restaurants located in their deluxe grocery stores.¹⁸⁸ The PLCB issued the restaurant licenses to the premises as operating restaurants, and the Malt Beverage Distributors Association (MBDA), the lobbying group for beer distributors in Pennsylvania, filed a motion to intervene in the licensure proceedings, contending that the licenses violated the rule that licensees are not permitted to operate another business on the licensed premises, nor are the licensed premises permitted to have an inside passage or communication with businesses unless authorized by the Board.¹⁸⁹ The PLCB contended that Wegmans “satisfied the requirements [including the segregation of storage and preparation of food items from the unlicensed grocery store and demarcation of proposed restaurant with walls, and restriction of beer storage and sales to the licensed area] to operate ‘another business’ on the licensed premises” pursuant to the regulation.¹⁹⁰ The Pennsylvania Supreme Court held that Wegmans fulfilled and satisfied all requirements to meet the standards for a restaurant as directed by the PLCB, the

¹⁸⁷ 2015 PA HB 1196, Pa. Act No. 166, 47 P.S. § 4-431(b). Malt and brewed beverages manufacturer’, distributors’ and importing distributors’ licenses.

¹⁸⁸ Malt Beverage Distributors Association of Pennsylvania v. Pennsylvania Liquor Control Board, 607 Pa. 560, 564 (2010).

¹⁸⁹ 40 Pa. Code § 3.52. Connection with other business.

¹⁹⁰ Malt Bevs. Distribs. Ass’n v. Pa. Liquor Control Bd., 607 Pa. 560, 568.

Liquor Code, and the administrative code.¹⁹¹ It opened the doors for a number of grocery stores to sell beer for on- and off-premise consumption.

The inability to purchase beer from a grocery store is not the only source of controversy for beer sales in Pennsylvania; gas stations have been frequent targets of ire from in and out-of-state consumers looking to purchase beer and petrol in the same location. A number of provisions in the Code prohibit the licensure of “the area where fuels or oil is sold. No sales of liquor fuels or oil may be made from a licensee’s premises.”¹⁹²

A Sheetz gas station in Shippensburg, PA with a restaurant attached sought to have a license transferred to the premises for the sale of beer. The MBDA filed a motion to intervene, and argued the transfer of liquor licenses to these premises is in direct contravention of the Code which prohibits the transfer of licenses to “any place or property upon which is located as a business the sale of liquid fuels and oils.”¹⁹³

The issue in the case was distinguishing between “location” and “place or property.” Sections 404, 431, and 432 of the Code identically refuse licensure to any “location” where liquid fuel is sold.¹⁹⁴ Section 468, on the other hand, prohibits the transfer of a liquor license to “any place or property” where liquid fuel is sold.¹⁹⁵ The MBDA argued in support of the “more encompassing” definition of “place and property,” which would construct the licensed area to be the entire land used by the business,

¹⁹¹ Id. at 577.

¹⁹² 47 P.S. § 4-431(b). Malt and brewed beverages manufacturers’, distributors’ and importing distributors’ licenses.

¹⁹³ 47 P.S. §§ 4-468(a)(3), Malt Beverage Distributors Association v. Pennsylvania Liquor Control Board, 121 A.3d 1153, 1158 (Pa. Commw. Ct. 2015).

¹⁹⁴ 47 P.S. §§ 4-404, 4-431(b), 4-432(d)

¹⁹⁵ 47 P.S. § 4-468(a)(3).

whereas the Board argued that “place and property” should be construed similarly to “location,” which would restrain the area of the licensed premise, segregating it from another area on the same land used for gasoline sales.¹⁹⁶ The Court held that if the standard defined in Wegmans that the “defined parameters between the proposed licensed and licensed premises” were met, then the Board did not err in granting the licenses to gas stations because “absurd results would follow if ‘place,’ ‘property,’ and ‘location’ are interpreted differently.”¹⁹⁷

After the decision, at the behest of Governor Wolf, a continued champion of removing Pinchot’s woeful laws, the Pennsylvania Liquor Control Board granted a number of licenses to gas stations for the sale of beer. The MBDA tried to challenge further licensing of gas stations, but the Supreme Court of Pennsylvania dismissed the case.¹⁹⁸ It appears that gas stations will now have the ability to get a license to sell beer.

Now, many gas stations are beginning to construct their places, properties, and locations to properly sell beer. Similar to grocery stores, gas stations are building 400 square foot restaurants that can seat thirty people and apply for a Restaurant (R) or Eatery (E) license. From there, they can sell six-packs of beer for off-premise consumption and determine how they choose to control drinking on-premise.¹⁹⁹

¹⁹⁶ Malt Beverage Distributors Association v. Pennsylvania Liquor Control Board, 121 A.3d 1153, 1156

¹⁹⁷ Id. at 1163

¹⁹⁸ Kari Andren, “Pennsylvania justices toss case brought by beer distributors, free gas stations to sell suds,” The TribLive, July 19, 2016, <http://triblive.com/state/pennsylvania/10816695-74/beer-court-distributors>

¹⁹⁹ Jocelyn Brumbaugh, “Cambria County Sheetz Location to Sell Beer,” The Tribune-Democrat, December 3, 2016, http://www.tribdem.com/news/cambria-county-sheetz-location-to-sell-beer/article_ebbe684c-b918-11e6-8c61-cb36810b84a9.html

Under Section 4-443, holders of retail, distributor, and manufacturer licenses are prohibited from having ownership or financial interest, directly or indirectly, in another license, known in the Code as interlocking businesses and generally known as tied house restrictions.²⁰⁰ The Code defines a financial interest as ownership through securities or other interest of 5% or more in a legal entity owning a restaurant.²⁰¹ Tied house restrictions have recently come under close scrutiny across the nation, as large companies are gathering up smaller companies and the interest they hold across the three-tiers gives rise for concern.²⁰² The purpose of tied house provisions is to prevent vertical integration of ownership of the manufacturing, distributing, and retail sale of alcoholic beverages.

However, despite Pennsylvania prohibiting cross ownership of these tiers, when a brewery decides to use an importing distributor or distributor for the sale of their in a particular geographic region the brewery must sign a lifelong contract where the distributor holds significant power to decide how to market the brand.²⁰³ This comes awfully close to the prohibited interlocking business without actual vertical integration.

Under the law, a manufacturer of brewed or malted beverages may name a licensed distributor or importing distributor as their “primary or original supplier” of their product for a distinct geographical region.²⁰⁴ These agreements are, ostensibly, lifetime contracts because they cannot be “modified, cancelled, terminated, or rescinded by the manufacturer without good cause.”²⁰⁵ “Good cause” means the failure of any party to

²⁰⁰ 47 P.S. § 4-443. Interlocking business prohibited.

²⁰¹ *Id.*

²⁰² SEE Cadena Commer. USA Corp. v. Tex. Alcoholic Bev. Comm'n, No. 14-0819, 2016 Tex. LEXIS 672 (Aug. 5, 2016)

²⁰³ 47 P.S. § 4-431(b)

²⁰⁴ 47 P.S. § 4-431(b)

²⁰⁵ 47 P.S. § 4-431(d)(1)

complete the “essential, reasonable, and commercially accepted” terms of the agreement without reasonable excuse of justification.²⁰⁶ Interestingly, if a manufacturer does not claim, or explicitly state the importing distributor or distributor is not the “primary or original supplier,” the provisions set forth between the two parties for modification, cancellation, termination, or rescission are not subject to the “good cause” requirement.²⁰⁷

Within these agreements, a clause must be included which provides that “The manufacturer recognizes that the importing distributor and distributor are free to manage their business in the manner the importing distributor and distributor deem best...”²⁰⁸

While the importing distributor and distributor have a management interest in the manufacturer, it would be illegal for an importing distributor and distributor to have pecuniary interest in a manufacturer, as the Pennsylvania Liquor Code prohibits interlocking businesses, commonly known as tied house restrictions. The distributors unbridled freedom to manage the business of the brewery, however, smacks of the interlocking business these restrictions hope to eliminate.

The most significant change to the Code, and under licensing, is that in- and out-of-state wineries can now apply for direct shipment permits to send wine through the mail directly to customers houses.²⁰⁹ For a registration fee of \$250, and simple bookkeeping of sales and shipment records for the Board to review annually, a winery may ship “up to thirty-six cases of up to nine liters per case in a calendar year of any wine on the order of

²⁰⁶ Id.

²⁰⁷ Matt Lamb & Sons, Inc. v. Christian Schmidt Brewing Co., 336 Pa. Super. 341 (1984).

²⁰⁸ Id.

²⁰⁹ 47 P.S. § 4-488. Shipment of wine into Commonwealth.

any resident of this Commonwealth who is at least twenty-one (21) years of age for such resident's personal use and not for resale."²¹⁰

Over the past decade direct shipment of wine has been a hot-button issue, where in-state wineries across the nation were permitted to ship to residents, but out-of-state wineries were prohibited. The interstate commerce discrimination was ruled unconstitutional, and many states, including Pennsylvania, have moved towards a more fair approach allowing for wineries from across the nation to apply for a permit to ship the wine, and making the taxes Pennsylvania would otherwise see on the sale from within liquor stores included into the statute as annual sales and excise taxes.^{211 212}

Wineries have been in operation in Pennsylvania since the 1968 Limited Winery Act. Which allowed grape growers to sell wine produced on their premises to promote tourism and generate revenue.²¹³ Limited distilleries went into effect in 2012, and in response, Pennsylvania has become a haven for spirit manufacturers, as there are more than 50 operating in the Commonwealth.²¹⁴

Article V of the Code deals with Distilleries and Wineries. As with malt or brewed beverage manufacturers, the Code makes mandatory licensure of those who "manufacture, produce, distill, develop or use in the process of manufacture, denature, redistill, recover, rectify, blend, reuse...any alcohol or liquor."²¹⁵ Upon receipt of a license, the Board grants the licensee the ability to engage in the operation of a winery or

²¹⁰ 47 P.S. § 4-488(b). Shipment of wine into Commonwealth.

²¹¹ *Cutner v. Newman*, 398 F.Supp. 2d 389 (E.D. Pa. 2005)

²¹² 47 P.S. § 4-488(d)(7). Shipment of wine into Commonwealth.

²¹³ 1994 Pa. ALS 94, 1994 Pa. Laws 94, 1993 Pa. HB 2630, 1994 Pa. ALS 94, 1994 Pa. Laws 94, 1993 Pa. HB 2630

²¹⁴ Chris Hoffman, "Limited distillery licenses on the rise in PA," MyFox43, July 21, 2016, <http://fox43.com/2016/07/21/limited-distillery-licenses-on-the-rise-in-pa/>

²¹⁵ 47 P.S. § 5-501. Licenses required.

limited winery or the manufacturing of liquor, among other powers.²¹⁶ Applications require prior approval including site plans.²¹⁷ If an application is refused the Board will hold a hearing to report the reason for refusal, where an examiner will make a determination of whether the license should be issued.²¹⁸

A limited winery can be an in state or out-of-state winery that produces no more than 200,000 gallons of alcoholic ciders, wines, or wine coolers in a year.²¹⁹ Limited wineries may hold up to five Board-approved locations, including a recent farmers market permit which grants the winery the power to sell their wine at specified farmers markets throughout the year.²²⁰ Limited wineries may sell food, store alcoholic beverages, and even apply for a hotel or restaurant retail license.²²¹

Distilleries, the manufacturers of liquor and spirits, may obtain a limited distillery license granting the ability to produce no more than 100,000 gallons of distilled liquor a year.²²² Similar to limited wineries, distilleries may have up to five Board-approved locations to sell their product, including the farmers market permit. The Board has a special “distillery of historical significance” license for distilleries that were in operation prior to January 1, 1875, but they mustn’t have been in continuous operation since opening.²²³ These locations may produce no more than 20,000 gallons of alcohol a year.

Both licensees may sell their alcohol for off-premise consumption, but while distilleries may not sell at prices lower than they are sold to the Board, limited wineries

²¹⁶ 47 P.S. § 5-505. Licenses issued.

²¹⁷ 47 P.S. § 5-504. Applications; filing fees.

²¹⁸ 47 P.S. § 5-507. Hearings on licenses and refusals.

²¹⁹ 47 P.S. § 5-505.2(b). Limited wineries.

²²⁰ 47 P.S. § 5-505.2(a)(4.1). Limited wineries.

²²¹ 47 P.S. § 5-505.2. Limited wineries.

²²² 47 P.S. § 5-505.4. Distilleries.

²²³ 47 P.S. § 5-505.4(a). Distilleries.

may sell their wine a price lower than they charge the Board.^{224 225} All products ready for sale must include a label with the “manufacturer, kind and quantity of alcohol or liquor contained therein, and the date of its manufacture, together with the number of the license authorizing the manufacture thereof...”²²⁶

The Pennsylvania Liquor Code is in a state of modernization. Some of the changes are heralded, while certain changes may be missteps. For example, the Code created beer distributors, a specific industry which had no other licensees directly competing with the sale of beer for off-premise consumption. These businesses are facing modernization head on and are likely the largest losers, as proved by the MBDA’s recent litigious behavior. Gas stations and grocery stores can now sell beer, leaving corporate giants to eat away at local mom and pop beer distributors sales. There will always be a need for distributors, however their presence will diminish unless the industry is preserved.

Pennsylvania has become a magnet for breweries, wineries, and distilleries due, in part, to our rich agricultural history. Water, malt, and hops—three quarters of the beer’s main ingredients—can be found in plenty within our great Commonwealth. Progress won’t come overnight, and change for change sake does not correct mistakes, but Pennsylvania is hoping to create an environment for our alcohol industry that can survive and thrive in the modern world.

²²⁴ 47 P.S. § 5-505.4(c)(1). Distilleries.

²²⁵ 47 P.S. § 5-505.2(a)(2). Limited wineries.

²²⁶ 47 P.S. § 5-510. Containers to be labeled.