

BATTLING BIG BEER: BEER INDUSTRY MONOPOLIZATION LEAVES SMALL BREWERIES LITTLE ROOM TO COMPETE

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ABSTRACT

In a globalized society filled with nationwide chains, decreasing local businesses, and mergers and acquisitions, small businesses often struggle to compete against larger corporations. This is no different for craft breweries where the taste palates and wallets of consumers often favor brand-name beer. Nevertheless, following the recent craft beer boom that has brought more craft breweries across the United States in response to increasing consumer demand, policies and laws remain unfavorable for craft breweries. These policies and laws need to be critically examined to ensure large beer corporations do not completely dominate the beer market. This will give craft brewers a fair chance to thrive in the market, develop more specialty brews, and stimulate local and state economies across the United States.

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I. INTRODUCTION

America's love of beer is well integrated into American culture, with brewing traditions rooted in centuries of innovation, production, and consumption.¹ Beer has molded the Constitution, agricultural industry, and most recently, beer has been a source of heated debate concerning economics, agriculture, and antitrust laws.² The booming beer industry in the United States is unique because the steady growth of international "Big Beer"³ companies has also been accompanied by the rise of local specialty breweries—an amazing trend that does not often occur in today's globalized and industrialized society.⁴ From crackin' a cold one after a long workday to exploring local craft breweries, Americans have proven the successful beer industry is not likely to disappear anytime soon. With this in mind, it is critical that United States laws and policies honor capitalistic and laissez-faire economics while still delicately balancing regulation of the industry to avoid complete monopolization, primarily for the benefit of the consumer.

The current United States alcohol industry—as is the case in most industrialized nations—has become increasingly monopolized by Big Beer giants based internationally.⁵ Specifically, as measured by revenue Anheuser-Busch InBev SA/NV (ABI) and Molson Coors Beverage Company (Molson Coors), both headquartered internationally, control 65% of the United States beer market.⁶ This monopoly has been the result of aggressive mergers and acquisitions.⁷ Thus, this blatant domination has expectantly raised the eyebrows of lawmakers due to the

1. See AMY MITTELMAN, *BREWING BATTLES: A HISTORY OF AMERICAN BEER* 5 (2008).

2. See, e.g., U.S. CONST. amend. XXI, § 2; Michael Kiser, *Critical Drinking—On Breaking Up "Ma Beer" and the Three Tier*, GOOD BEER HUNTING: CRITICAL DRINKING (Aug. 31, 2017), <http://goodbeerhunting.com/blog/2017/8/30/critical-drinking-breaking-up-ma-beer-and-the-three-tier> [<https://perma.cc/83SP-CFDM>].

3. Big Beer, as the term is used throughout this Note, is a colloquial term that is used to describe beer companies that have grown immensely to acquire smaller companies and hold a significant share of the beer market, both in the United States and on a global level.

4. See generally Alan Kornhauser, *Forward* to THE GEOGRAPHY OF BEER: REGIONS, ENVIRONMENT, AND SOCIETIES, at v, v (Mark Patterson & Nancy Hoalst-Pullen eds., 2014).

5. *Big Beer Exposed: U.S. President Biden Puts Big Beer Under Scrutiny*, MOVENDI INT'L (Aug. 19, 2021) [hereinafter *Big Beer Exposed*], <https://movendi.ngo/news/2021/08/19/big-beer-exposed-u-s-president-biden-puts-big-beer-under-scrutiny/> [<https://perma.cc/MX94-R5WZ>].

6. Christopher Condon, *U.S. Treasury Calls Out Beer Industry Over Anti-Competitive Practices*, BLOOMBERG (Feb. 9, 2022), <https://www.bloomberg.com/news/articles/2022-02-09/treasury-calls-out-beer-industry-over-anti-competitive-practices>.

7. See *id.*

inherent inability of smaller companies, including craft breweries, to have a legitimate stake in the overall beer market.⁸ The chokehold that these two giants have on the industry has collectively been referred to as the duopoly of the American beer industry.⁹

Distilled to its essence, the alcohol industry in the United States can be described as a three-tier system consisting of producers, distributors, and retailers.¹⁰ First, producers may only sell their products to wholesale distributors.¹¹ Second, the wholesale distributors then sell the product to retailers.¹² And third, the retailers sell the alcohol directly to consumers.¹³ This system has largely been critiqued because the monopolization at the producer tier in turn trickles down to the next two tiers.¹⁴ A vast majority of the approximately 3,000 wholesale distributors around the nation are forced to interact with ABI and Molson Coors to stay afloat, whether they want to or not.¹⁵ Thus, the Biden Administration has voiced its concern that this is leading to unfair competition and monopolization in the American beer industry.¹⁶ The beer industry was further called out in President Biden's 2021 executive order.¹⁷

Monopolies, in any industry, can have severe effects and consequences on the economy and, ultimately, the consumer.¹⁸ A monopoly is:

a business that is characterized by a lack of competition within a market and unavailable substitutes for its product. Monopolies can dictate price changes

8. *Id.*

9. U.S. DEP'T OF THE TREASURY, COMPETITION IN THE MARKETS FOR BEER, WINE, AND SPIRITS 26 (2022), <https://home.treasury.gov/system/files/136/Competition-Report.pdf> [<https://perma.cc/LKN2-8J6K>].

10. *Big Beer Exposed*, *supra* note 5.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. Lauren Cahn, *Why the U.S. Government Thinks the Beer Industry Is Run by a Monopoly*, MASHED (Jan. 27, 2023, 11:24 AM), <https://www.mashed.com/768634/why-the-u-s-government-thinks-the-beer-industry-is-run-by-a-monopoly/> [<https://perma.cc/M5UZ-NR7G>].

16. *Id.*; *see also* U.S. DEP'T OF THE TREASURY, *supra* note 9.

17. Promoting Competition in the American Economy, 86 Fed. Reg. 36987, 36994 (July 14, 2021); *see also Big Beer Exposed*, *supra* note 5.

18. Nicole Manuel, *How Does a Monopoly Affect Business and Consumers?*, CHRON. (Jan. 25, 2019), <https://smallbusiness.chron.com/monopoly-affect-business-consumers-70033.html> [<https://perma.cc/8VAV-J6VG>].

and create barriers for competitors to enter the marketplace. Companies become monopolies by controlling the entire supply chain, from production to sales through vertical integration, or buying competing companies in the market through horizontal integration, becoming the sole producer.¹⁹

To combat monopolization in the American alcohol industry in general, the Federal Alcohol Administration Act of 1935 was enacted following the end of Prohibition.²⁰ Further, other antitrust safeguards were put in place to protect consumers from the potential dangers of monopolies—the Sherman Antitrust Act and the Clayton Antitrust Act are standard examples of this.²¹ These laws allow for governmental interference when deemed necessary to protect the sanctity of the open and free market.²²

This Note encourages adjustments in laws and procedures in the regulation of the beer industry to push back against Big Beer's unfair monopolization. These changes would significantly help craft beer flourish well into the future and increase a fair spread of profits to local entrepreneurs instead of international behemoth corporations.

II. CRAFT BEER'S SIGNIFICANCE

The highly regulated alcohol industry is booming and worthy of protection when considering how quickly consolidation has overtaken the industry.²³ While some argue that there have been inconsistencies in merging enforcement laws, extensive research demonstrates atypical price increases following the 2008 merger of SABMiller and Molson Coors—then respectively the second and third largest producers of beer in the United States.²⁴ The competitive concerns over Big Beer scooping up multiple smaller brands via billions of dollars in mergers and acquisitions is hard to ignore.²⁵ When a producer has a larger market share, there are more opportunities to increase prices with reduced competition, and its large

19. Adam Hayes, *What Is a Monopoly? Types, Regulations, and Impact on Markets*, INVESTOPEDIA (Aug. 2, 2022), <https://www.investopedia.com/terms/m/monopoly.asp> [<https://perma.cc/T2ER-EU4C>].

20. U.S. DEP'T OF THE TREASURY, *supra* note 9, at 2; Federal Alcohol Administration Act, H.R. 8870, 74th Cong. (1935).

21. Sherman Antitrust Act of 1890, 15 U.S.C. § 2; Clayton Antitrust Act of 1914 § 2, 15 U.S.C. § 13(a); Hayes, *supra* note 19.

22. Hayes, *supra* note 19.

23. See U.S. DEP'T OF THE TREASURY, *supra* note 9, at 28.

24. See generally Nathan H. Miller & Matthew C. Weinberg, *Understanding the Price Effects of the MillerCoors Joint Venture*, 85 *ECONOMETRICA* 1763, 1772–73 (2017).

25. U.S. DEP'T OF THE TREASURY, *supra* note 9, at 29.

market share typically involves a dedicated consumer base that enjoys the alcohol product.²⁶ Similarly, a producer may be able to create barriers for their rivals and smaller brewers to succeed in the marketplace by their oversized influence on distributors in the three-tier system who frequently prefer consistent contracts with large producers.²⁷

Not even a global pandemic can slow down a beer drinker's desire for a cold pint. The number of craft breweries has risen drastically in recent years despite a heavily consolidated market and the safety and financial struggles resulting from the COVID-19 pandemic.²⁸ This is partially due to the craft beer boom starting in 2010 where an increasing amount of consumer demand shifted towards quality and unique brews that support local businesses.²⁹

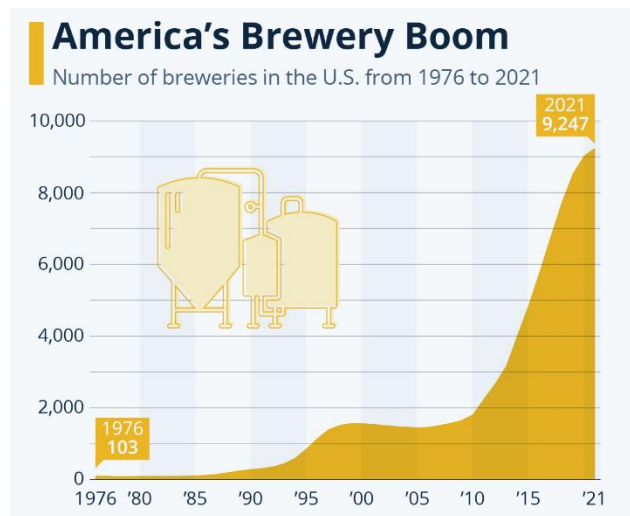


Figure 1 – Source: Statista³⁰

26. *Id.* at 28.

27. *Id.* at 29.

28. Hudson Lindenberger, *The Craft Beer Industry Has Reason to Celebrate According to the Latest Data*, FORBES (May 25, 2022, 10:38 AM), <https://www.forbes.com/sites/hudsonlindenberger/2022/05/25/the-craft-beer-industry-has-reason-to-celebrate-according-to-the-latest-data/?sh=72ff28428372> [<https://perma.cc/9MAH-N4N3>].

29. Derek Thompson, *Craft Beer Is the Strangest, Happiest Economic Story in America*, THE ATLANTIC (Jan. 29, 2018), <https://www.theatlantic.com/business/archive/2018/01/craft-beer-industry/550850/>.

30. *America's Brewery Boom* (illustration), in Martin Armstrong, *Brewery Boom*, STATISTA (Aug. 2, 2022), <https://www.statista.com/chart/10280/americas-brewery-boom/> [<https://perma.cc/5K78-WD23>].

For purposes of this Note, the word “craft” implies that the producer is smaller, local, and oftentimes independently owned³¹ where “[t]he majority of Americans live within 10 miles of a craft brewer.”³² The immense expansion of breweries contributed to increased craft beer sales, which grew approximately 8% in 2021, while the entire beer industry only grew 1% in total sales that same year.³³ Even so, at the same time craft breweries still only accounted for 13.1% of the overall American beer market.³⁴

Further, American beer drinkers have enjoyed the variety that has resulted from the recent influx of craft breweries.³⁵ While a simple lager remains largely popular among beer drinkers,³⁶ craft brewers have turned the simple lager into unique brews with their own twist.³⁷ The ability to choose from a plethora of unique beer options keeps consumers’ taste buds wanting more, which benefits both consumers and craft brewers.

III. HISTORY AND TRADITIONS OF BREWING

Brewing is deeply rooted in American history, beginning with the English and Dutch settlers during the seventeenth century.³⁸ A recent discovery from residues in 13,000-year-old stone has suggested the Natufian people³⁹ brewed beer

31. Cahn, *supra* note 15.

32. *Craft Brewer Definition*, BREWERS ASS’N FOR SMALL & INDEP. CRAFT BREWERS (Oct. 6, 2023, 11:50 AM), <https://www.brewersassociation.org/statistics-and-data/craft-brewer-definition/> [<https://perma.cc/BR4D-F7BX>].

33. Armstrong, *supra* note 30; Lindenberger, *supra* note 28.

34. Press Release, U.S. Census Bureau, No. CB23-SFS.46, National Beer Day: April 7, 2023 (Apr. 7, 2023), <https://www.census.gov/newsroom/stories/beer-day.html> [<https://perma.cc/F9U4-D9C3>].

35. Felix Richter, *U.S. Beer Lovers Have the Luxury of Choice*, STATISTA (Aug. 4, 2023), <https://www.statista.com/chart/28572/popularity-of-beer-styles-in-the-us/> [<https://perma.cc/X2AD-KYCE>].

36. 43% of beer drinkers in 2022 preferred lagers as their beer style of choice, but “at least 1 out of 5 beer drinkers [consumed a] pale ale, pilsner, wheat beer, brown ale or stout in the past year.” *Id.*

37. *Id.*

38. Martin H. Stack, *A Concise History of America’s Brewing Industry*, ECON. HIST. ASS’N (Oct 6, 2023, 11:52 AM), <https://eh.net/encyclopedia/a-concise-history-of-americas-brewing-industry/> [<https://perma.cc/6C7H-S2AQ>].

39. The Natufian people were located near modern day Israel and were a semi-sedentary, foraging people. See Li Liu et al., *Fermented Beverage and Food Storage in 13,000 y-old Stone Mortars at Raqefet Cave, Israel: Investigation Natufian Ritual Feasting*, 21 J. OF

for rituals as a result of agricultural surplus production.⁴⁰ Unsurprisingly, beer brewing, fueled by an enjoyment of the beverage, has evolved with centuries of time to perfect the brewing process. Beer connoisseurs from across the globe have been able to concoct unique recipes with the help of technology and widespread knowledge of the brewing process in general.

United States beer production statistics are unavailable before 1810, but immigrants in the eighteenth and nineteenth centuries from notoriously hefty beer drinking countries, such as Germany, Ireland, and Great Britain, helped mold American beer culture.⁴¹ While working in an increasingly industrialized country with decent wages, workers had extra money to spend on beer.⁴² The 1840s was a time of beer experimentation in America—technological advancements in the brewing and refrigeration processes, along with a cultural melting pot of immigrants, yielded a variety of different kinds of beer.⁴³ With the temperance⁴⁴ movement increasingly gaining traction, beer was an excellent alternative with a lower alcohol level as compared to traditional liquors.⁴⁵ From 1865 to the early 1910s, national beer production rose from 3.7 million barrels to 59.6 million barrels.⁴⁶ Per capita consumption also increased from slightly under four gallons to 20 gallons per year.⁴⁷ Moreover, although the number of American breweries in this time period was nearly halved, the average brewery produced about 27 times more barrels in 1915 than in 1865.⁴⁸ This is directly attributed to the creation of American Big Beer giants whose market and influence extended further than a

ARCHAEOLOGICAL SCI.: REPS. 783, 783 (2018). Approximately 13,000 years ago, “the Natufians exploited at least seven plant taxa, including wheat or barley, oat, legumes and bast fibers.” *Id.*

40. Ancient methods of beer brewing “may have been, at least in part, an underlying motivation to cultivate cereals.” *Id.* at 792.

41. Stack, *supra* note 38.

42. *Id.*

43. *See id.*

44. *Temperance*, MERRIAM-WEBSTER DICTIONARY (Nov. 1, 2023, 8:22 AM), <https://www.merriam-webster.com/dictionary/temperance> [<https://perma.cc/7TL6-DERW>] (“[M]oderation in or abstinence from the use of alcoholic beverages”).

45. Stack, *supra* note 38.

46. *Id.*

47. *Id.*

48. *Id.*

local brewery⁴⁹ in the 1870s, such as Pabst Brewing and Anheuser-Busch, that had the resources to efficiently ship their beer via railways across the nation.⁵⁰

Temperance movement efforts by the United States government culminated into the most radical attempts to regulate the alcohol industry in the history of the United States—the Prohibition Era.⁵¹ Much to the disapproval of many Americans, the ratification of the Eighteenth Amendment in 1920 marked the start of Prohibition.⁵² This made the “manufacture, sale, or transportation of intoxicating liquors” illegal.⁵³ But fortunately for today’s beer-loving Americans, considering the immense administrative difficulties of enforcement, social pressures related to the Great Depression, and the general ineffectiveness of the ban, Prohibition was repealed when the Twenty-First Amendment was ratified in 1933.⁵⁴ Industrialist John D. Rockefeller, Jr. notoriously criticized Prohibition claiming that “drinking has generally increased; . . . many of our best citizens have openly ignored Prohibition; respect for the law has been greatly lessened; and crime has increased to a level never seen before.”⁵⁵

The hangover of Prohibition greatly influenced federal laws for decades to come.⁵⁶ Eager to correct the mistakes made during Prohibition, the Twenty-First Amendment grants states “the authority to regulate the production, importation, distribution, sale, and consumption of alcoholic beverages but were given no overall guidance on the implementation of alcohol industry regulation.”⁵⁷ Breweries, especially small and local brewers, were hit hard during Prohibition; the small minority of breweries that stayed open were able to ship products and

49. Ryan R. Lee, *Prohibition’s Hangover: How Antiquated Illinois Beer-Law Is Abused by Big Beer to the Substantial Detriment of Craft Breweries*, 37 N. ILL. U.L. REV. 144, 148 (2016).

50. Stack, *supra* note 38.

51. See U.S. CONST. amend. XVIII, § 1.

52. *Id.*

53. *Id.*

54. See U.S. CONST. amend. XXI, § 1; *The Oxford Companion to Beer Definition of Prohibition*, CRAFT BEER & BREWING (Oct 6, 2023, 11:53 AM), <https://beerandbrewing.com/dictionary/VaoQ2AtMO7/> [https://perma.cc/5JE5-VSL6].

55. *The Oxford Companion to Beer Definition of Prohibition*, *supra* note 54.

56. *Federal Alcohol Administration Act of 1935: Historical Background*, ALCOHOL & TOBACCO TAX & TRADE BUREAU (Aug. 7, 2013), <https://www.ttb.gov/trade-practices/federal-alcohol-administration-act-historical-background> [https://perma.cc/XT6R-VA2W].

57. Michaela A. Hendricks, *Wisconsin’s Craft Beer Industry: Crafting Better Law for a More Competitive Market*, 104 MARQ. L. REV. 913, 920–21 (2020); see also U.S. CONST. amend. XXI, §§ 2–3.

produced “near beer,”⁵⁸ soft drinks, and medicinal malt syrups to stay afloat.⁵⁹ Immediately after the lift of Prohibition in 1933, there were less than 800 breweries nationwide.⁶⁰ An unintended consequence of Prohibition was that these breweries gained experience in individualized canning and bottling because pre-Prohibition beer was primarily shipped out in kegs.⁶¹ This competitive edge in individualized production and shipping resources gave breweries that operated during Prohibition a favorable starting point that made it difficult for their pre-Prohibition rivals to compete.⁶² The difficult market, growth of Big Beer, and increasing production capabilities ultimately culminated in only about 100 American breweries remaining in existence in the 1970s—an unprecedented low number during a critical time period that would make it possible for the Big Beer giants to turn into behemoths, but also would open the door for craft breweries.⁶³

IV. CURRENT MAJORITY THREE-TIER SYSTEM

Today, where the beer industry is dominated by foreign corporations, most states have adopted a three-tier system of producers/manufacturers (tier one) who sell to distributors (tier two) who in turn sell to retailers (tier three), such as restaurants, bars, and liquor stores, to reach the end consumer.⁶⁴ This system was intended to address the centuries-old problem of corruption in the alcohol industry where “[t]he 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.”⁶⁵ Other policy considerations

58. Near beer was “a malt beverage with under one-half of one percent alcohol.” Stack, *supra* note 38. Even though it was not very successful, it allowed breweries to stay afloat and maintain their beer-making abilities. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*; Lee, *supra* note 49, at 148.

64. NAT’L ALCOHOL BEVERAGE CONTROL ASS’N, THE THREE-TIER SYSTEM: A MODERN VIEW 1 (2015), https://www.nabca.org/sites/default/files/assets/files/ThreeTierSystem_Mar2015.pdf [<https://perma.cc/TLW7-URY8>].

65. Daniel P. Pellegrin, Jr., *Mircodo-Brew, Macro-Fees: Texas Law Favors Beer Distributors While Curbing Growth and Investment in the Nation’s Third Largest Craft Beer Market*, 71 BAYLOR L. REV. 190, 191 (2019).

for such a system regulated by each state involve promoting an orderly market and ensuring state tax revenues from alcohol sales.⁶⁶

Under most state systems, there are separate regulations at each tier that accompany narrow exceptions for craft breweries.⁶⁷ With such discretion left to the states, there are inherently varying statutes and regulations among the 50 states, where some state governments even control one or more of the tiers for certain alcoholic beverages.⁶⁸ Nevertheless, the United States Supreme Court has consistently determined these varying state-controlled systems to be “unquestionably legitimate” under the Twenty-First Amendment.⁶⁹

A. Producers/Manufacturers

Perhaps the most powerful tier in the system is the producers/manufacturers of beer. As one of the two duopolists in the American beer market, ABI—a European superpower—is the most elite and powerful producer of beer in the United States. This conglomerate company is the result of many mergers and acquisitions—including the \$107 billion merger of SABMiller (owner of Miller Lite, Peroni, and Fosters) and Anheuser-Busch InBev (owner of Budweiser, Corona, and Stella Artois).⁷⁰ But this merger did not go without notice and oversight; before approving the ABI–SABMiller merger, the United States

66. Justin Lemaire, *Unmixing a Jurisprudential Cocktail: Reconciling the Twenty-First Amendment, the Dormant Commerce Clause, and Federal Appellate Jurisprudence to Judge the Constitutionality of State Laws Restricting Direct Shipment of Alcohol*, 79 NOTRE DAME L. REV. 1613, 1622 (2004).

67. Marc Sorini, *Understanding the Three-Tier System: Its Impacts on U.S. Craft Beer and You*, CRAFTBEER.COM (March 6, 2017), <https://www.craftbeer.com/craft-beer-muses/three-tier-system-impacts-craft-beer> [<https://perma.cc/M8M3-Y9G8>].

68. *E.g.*, *Control State Directory and Info*, NAT’L ALCOHOL BEVERAGE CONTROL ASS’N (Nov. 1, 2023, 8:29 AM), <https://www.nabca.org/control-state-directory-and-info> [<https://perma.cc/H7VW-J7S7>] (The 18 “[c]ontrol jurisdictions [in the United States] reflect the public commitment to moderation and serve as a vehicle for balance between alcohol profits and public wellbeing through dedicated enforcement, resources, promotion of alcohol education and awareness programs to support that commitment.”).

69. *North Dakota v. United States*, 495 U.S. 423, 432 (1990); *see also State Bd. of Equalization v. Young’s Market Co.*, 299 U.S. 59, 62 (1936).

70. Fatima Hussein & The Associated Press, *Big Beer Companies Control 65% of the Market. The Treasury Department Wants to Change That*, FORTUNE (Feb. 18, 2022, 1:15 PM), <https://fortune.com/2022/02/18/treasury-department-beer-market-competition/> [<https://perma.cc/XCX6-KVAN>]; Antoine Gara, *Anheuser Busch Inbev Strikes Biggest-Ever Beer Deal with \$107B Takeover of SABMiller*, FORBES (Nov. 11, 2015, 7:23 AM), <https://www.forbes.com/sites/antoinegara/2015/11/11/anheuser-busch-inbev-strikes-biggest-ever-beer-deal-with-107b-sabmiller-takeover/?sh=6509cfdb5348>.

Department of Justice required a settlement with ABI that regulated aspects of the merger.⁷¹

Even though there were some restrictions on ABI's merger with SABMiller in 2016, critics are quick to point out that the federal government nevertheless allowed the acquisition of SABMiller.⁷² This created a complete megacompany, and the restrictions of the settlement are not very effective in practice.⁷³ The settlement required ABI to divest all of SABMiller's prospects in the United States beer market, including ownership interests in MillerCoors and even the right to sell certain beers.⁷⁴ Moreover, "[t]he settlement also prohibits ABI from instituting or continuing practices and programs that limit the ability and incentives of independent beer distributors to sell and promote the beers of ABI's rivals, including high-end craft and import beers."⁷⁵ That said, this settlement still provides an example of the United States government exercising its ability to counter monopolization within the market while still acknowledging mid- and small-size brewers and the deeply rooted free market economic model.

Despite the three-tier system being created to eliminate vertical integration and limit the influence of the producers, there are flaws. The system inherently creates exclusionary practices and barriers depending on the size, influence, and resources of a producer—a concept known as “pay-to-play,” which is a “common yet whispered business practice.”⁷⁶ This practice essentially slots fees that give certain beers more preferable placement on store shelves.⁷⁷ Exclusionary practices such as this are prohibited by the Federal Alcohol Administration Act of 1935, but still occur because enforcement has been lax due to the deep pockets of beer and

71. Press Release, Off. of Pub. Affs., U.S. Dep't of Just., Justice Department Requires Anheuser-Busch InBev to Divest Stake in MillerCoors and Alter Beer Distributor Practices as Part of SABMiller Acquisition (July 20, 2016), <https://www.justice.gov/opa/pr/justice-department-requires-anheuser-busch-inbev-divest-stake-millercoors-and-alter-beer> [<https://perma.cc/2B4Q-T47Q>].

72. *Id.*; Gina Chon & Scheherazade Daneshkhu, *AB InBev-SABMiller Merger Critics in U.S. Seek Concessions*, FINANCIAL TIMES (Dec. 8, 2015), <https://www.ft.com/content/cd2fd094-9dcd-11e5-8ce1-f6219b685d74>.

73. Press Release, Off. of Pub. Affs., U.S. Dep't of Just., *supra* note 71.

74. *Id.*

75. *Id.*

76. Tara Nurin, *The Pay-to-Play Scandal in the Beer Biz: How Far It Goes Nobody Knows*, FORBES (Mar. 31, 2016, 9:00 PM), <https://www.forbes.com/sites/taranurin/2016/03/31/the-pay-to-play-scandal-in-the-beer-biz-how-far-it-goes-nobody-knows/?sh=50cdce9db0d5>.

77. U.S. DEP'T OF THE TREASURY, *supra* note 9, at 38.

alcohol companies.⁷⁸ With meager fines for violations, Big Beer giants can afford to continue this practice and take the monetary hit as merely a small cost for the price of doing business.⁷⁹ Further perpetuating the issue, “the size of the big players gives them an outsized voice in national and state policy-making bodies: as of 2017, alcohol companies reported 303 lobbyists in Washington D.C. and spend nearly \$12 million on state-level lobbying.”⁸⁰ In contrast, medium- and small-sized breweries simply do not have the legal resources to combat this problem without the help of state and local lawmakers.⁸¹

The large exception to the three-tier system falls within the area of craft brewing.⁸² According to the Brewers Association, a craft brewer is:

Small[:] Annual production of 6 million barrels of beer or less (approximately 3 percent of U.S. annual sales). Beer production is attributed to a brewer according to rules of alternating proprietorships.

Independent[:] Less than 25[%] of the craft brewery is owned or controlled (or equivalent economic interest) by a beverage alcohol industry member that is not itself a craft brewer.

Brewer[:] Has a TTB Brewer’s Notice and makes beer.⁸³

Despite this definition by the Brewers Association, individual states may have varying legal definitions, standards, and classifications as to what specifically constitutes a craft brewer in their jurisdiction.⁸⁴

Regardless of how breweries are classified, it can be extremely difficult for smaller entities to compete with Big Beer giants given the economic complexities that are associated with moving their product through a distributor.⁸⁵ Therefore, as a matter of policy reasoning, states have created laws with legal loopholes that permit craft breweries to bypass the need to go through a separate distributor.⁸⁶

78. 27 U.S.C. § 205(c); *see also* U.S. DEP’T OF THE TREASURY, *supra* note 9, at 60.

79. Julie Rhodes, *Competition in the Beer, Wine & Spirits Industry*, PORCH DRINKING (Mar. 4, 2022), <https://www.porchdrinking.com/articles/2022/03/04/treasury-report-competition-in-beer-wine-spirits-industry/> [<https://perma.cc/LRD6-AHWQ>].

80. U.S. DEP’T OF THE TREASURY, *supra* note 9, at 60.

81. *Id.*

82. Sorini, *supra* note 67.

83. *Craft Brewer Definition*, *supra* note 32.

84. Sorini, *supra* note 67.

85. Jon P. Nelson, *Beer Advertising and Marketing Update: Structure, Conduct, and Social Costs*, 26 REV. OF INDUS. ORG. 269, 299 (2005).

86. Lee, *supra* note 49, at 152.

Depending upon the laws of each state regarding the classifications of craft brewers, breweries may face challenges regarding potential growth. Classification laws can be restricting because a craft brewery that becomes too large may no longer be allowed to self-distribute—thus, putting them on level playing fields with much larger players in the game when the brewery barely exceeds the requirements.⁸⁷ This is troublesome because successful craft breweries must often join Big Beer to expand.⁸⁸ Somewhere in the middle of the duopoly and craft brewers falls the medium-sized breweries. They are not big enough to hold as much of the market share as ABI or Molson Coors, but their power and product extend far beyond local limits. Oftentimes, these medium-sized breweries become targets in Big Beer’s quest for market domination.⁸⁹

B. Distributors

Distributors, also known as wholesalers, are licensed through state governments and contract with producers to act as the middle party to purchase and deliver packaged beer from producers.⁹⁰ Distributing companies vary in size from locally owned “mom and pop” businesses to large multi-state operations with an entire fleet of delivery trucks.⁹¹ Acting as an independent middleman, distributors’ specialization in moving large amounts of product nearly eliminates the producers’ involvement in the retail level.⁹² To the extent brewers are not selling their beer at their own facility, independent distributors are particularly useful because breweries would find it difficult to afford the trucks, equipment, and warehouses to widely distribute products on their own.⁹³ Without independent distributors, brewers would not be able to efficiently distribute and would be

87. *Id.*

88. Kate Taylor, *People Are Furious That This Craft Brewer ‘Sold Out’ to Anheuser Busch—Here’s Why the Founders Say They’re Wrong*, BUS. INSIDER (May 3, 2017, 4:03 PM), <http://www.businessinsider.com/wicked-weed-founders-take-on-sell-out-criticism-2017-5> [<https://perma.cc/A6VE-7VWR>].

89. Medium-sized breweries like Goose Island, Blue Point, Golden Road, and Seattle’s Elysian have all been bought out. Aaron Goldfarb, *Brew Wars: How Big Beer Is Able to Bully Craft Beer: A Look into Why These Two Entities Are at Odds, and What It Means for the Future of the Suds Industry*, FIRST WE FEAST (Nov. 3, 2015), <https://firstwefeast.com/drink/2015/11/brew-wars-how-big-beer-is-able-to-bully-craft-beer> [<https://perma.cc/HN3P-XK7P>].

90. Sorini, *supra* note 67; Roni A. Elias, *Three Cheers for Three Tiers: Why the Three-Tier System Maintains Its Legal Validity and Social Benefits After Granholm*, 14 DEPAUL BUS. & COM. L.J. 209, 212 (2016).

91. Sorini, *supra* note 67.

92. *See id.*

93. *Id.*

limited to a specific geographic area.⁹⁴ Although state laws greatly vary, some heavily populated states allow brewers to become distributors, thus eliminating the need to contract with a third party.⁹⁵

Distributors are more than just a conduit for products—their interaction with the other two tiers in the system allows them to communicate trends in supply, demand, and marketing.⁹⁶ Especially with unique products, the unparalleled opportunity to spot trends in consumer preferences through the retailers that distributors serve enables the producers to respond to trends in the market.⁹⁷ Therefore, both producers and retailers benefit from distributors' unique role in the three-tier system.⁹⁸

Beer franchise laws within the three-tier system are “regulations about what you can and cannot contract with distributors about.”⁹⁹ They provide guidelines regarding the contractual relationship between the production and distribution tiers.¹⁰⁰ These beer franchise statutes originated in the 1970s to combat the unequal bargaining power between producers and distributors when beer producers were much larger and had more resources than small distributing operations.¹⁰¹ Such statutory protections dictate uniform distribution agreements that “may not be drafted around by parties to the contract.”¹⁰² To alleviate any power imbalances in the bargaining process, common clauses include territorial, termination, procedural, and transfer protections that largely favor the distributor.¹⁰³

94. *Id.*

95. *Id.*

96. Elias, *supra* note 90, at 212.

97. *Id.* at 212.

98. *Id.* at 213.

99. CANDACE L. MOON & STACY ALLURA HOSTETTER, *BREW LAW 101: A LEGAL GUIDE TO OPENING A BREWERY—CALIFORNIA EDITION* 166 (2015).

100. Aric Codog, *The Antitrust Roadblock: Preventing Consolidation of the Craft Beer Market*, 50 U. PAC. L. REV. 403, 411 (2019).

101. *Id.*; Brian D. Anhalt, *Crafting a Model State Law for Today's Beer Industry*, 21 ROGER WILLIAMS U. L. REV. 162, 174 (2016).

102. Codog, *supra* note 100, at 411.

103. *Id.* at 411–12; see also Barry Kurtz & Bryan H. Clements, *Beer Distribution Law as Compared to Traditional Franchise Law*, 33 FRANCHISE L.J. 397, 402 (2014) (detailing the protections and various state laws).

Moreover, with the recent craft beer boom in the United States,¹⁰⁴ these regulations more so inhibit the growth of modern craft breweries rather than help them.¹⁰⁵ The original purpose for these beer franchising laws—protecting distributors—is no longer as relevant because producers, especially craft brewers, are more vulnerable under the current laws that favor distributors.¹⁰⁶ As mentioned, small emerging breweries may initially self-distribute their beer to develop a market for the products, but as their business grows, most breweries lack sufficient funds to distribute their products beyond the local level or an in-brewery bar/tasting room.¹⁰⁷ If a brewery grows enough to graduate from self-distribution to third-party distribution, brewers are placed in a legal straightjacket that subjects them to the unwaivable terms and conditions mandated by distributor-friendly beer franchising laws.¹⁰⁸ Multiple states have laws that dictate once a distributor contracts with a beer producer, they may hold the contract indefinitely.¹⁰⁹ The only way for a producer to exit a contract is to either prove negligence or illegal activity, or to purchase back their rights at an inflated and unfair cost.¹¹⁰

These laws were initially enacted to protect wholesalers from investing in brands that could potentially move to their competitors.¹¹¹ In application, the consequences for smaller producers are detrimental and prohibit freedom of contract within the marketplace by locking them in.¹¹²

[A]ll too often for small producers, [these laws serve as] a way for wholesalers to round up small breweries, bury them in a book with too many SKUs¹¹³

104. While craft breweries are not increasing in number at pre-pandemic rates, craft beer brewing itself is still growing. Louis Biscotti, *Craft Beer Boom Slows, But Still Grows*, FORBES (Jan. 19, 2023, 10:15 AM), <https://www.forbes.com/sites/louisbiscotti/2023/01/19/craft-beer-boom-slows-but-still-grows/?sh=5c32cd605e3e> (according to the Brewers Association, in 2021, “[i]ndependent brewers’ share of the U.S. beer market by volume rose to 13.1%, up from 12.2%” in 2020).

105. Codog, *supra* note 100, at 412–13.

106. *Id.* at 413.

107. *Id.*; Sorini, *supra* note 67; *see supra* text accompanying notes 93–94.

108. Sorini, *supra* note 67.

109. Kiser, *supra* note 2.

110. *Id.*

111. *Id.*

112. *Id.*

113. For the purposes of record keeping, a stock keeping unit (SKU) is “a uniquely identifiable and numbered type of a [p]roduct.” *Stock Keeping Unit Definition*, LAW INSIDER (Oct. 6, 2023, 12:21 PM), <https://www.lawinsider.com/dictionary/stock-keeping-unit> [<https://perma.cc/8QL9-5ZAH>].

(sometimes even unwittingly), and then hold them ransom. As we've seen with some breweries, the only choice is to pull out of [the] market for up to five years to reset the contracts or . . . mak[e] the hard decision to kill their brand outright.¹¹⁴

Unfortunately, most state regulatory laws have not changed to more accurately reflect the changes within the beer market and the unintended consequences of these pro-distributor laws.¹¹⁵ When most beer franchise laws were passed in the 1970s and 1980s, nationwide breweries were emerging while beer distributors were not yet heavily consolidated.¹¹⁶ The roles have since reversed—an increase of craft breweries is accompanied by enormous consolidation within beer distribution where “distributors today [dwarf] the vast majority and, in some cases, even the very largest craft brewers.”¹¹⁷ Less rigid mandatory contractual clauses would allow craft brewers more bargaining power while still balancing the legitimate interests of distributors, both large and small.¹¹⁸

C. Retailers

As the third tier of the system, retail establishments—including bars, restaurants, and stores that sell alcohol—serve as a way for consumers to directly purchase and sample beer.¹¹⁹ With tens of thousands of retail locations from which to purchase beer at around the nation, most consumers have easy access to a variety of retail locations and a large variety of products.¹²⁰ Commonly categorized into two subdivisions, “off premises” retailers entails the alcohol not being consumed at the retail location while “on premises” retailers consist of bars and restaurants where consumption occurs at the retail location.¹²¹ Regardless of the geographic location or categorization of the retailer, product placement in retail locations is of the utmost importance because consumers do not purchase their weekend six-pack online.¹²²

114. Kiser, *supra* note 2.

115. Codog, *supra* note 100, at 413.

116. Sorini, *supra* note 67.

117. *Id.*

118. *See infra* Part V.

119. Elias, *supra* note 90, at 213.

120. *Id.*

121. Sorini, *supra* note 67.

122. Goldfarb, *supra* note 89.

1. Pay-to-Play

Premium shelf space and exposure in retail locations equates to more sales and profit. Inherently, companies want their products on the eye level shelf in stores—and some are willing to pay hefty sums of money to ensure they have the best spot in the store.¹²³ Likewise, similar behavior occurs in restaurants and bars, where producers or distributors may bribe retail owners by secretly buying beer draft lines or providing kickbacks, such as gifts, rewards, special payment arrangements, and slotting fees,¹²⁴ to ensure a consistent presence at that retail location.¹²⁵ This difficult-to-regulate, exclusionary process is colloquially known as pay-to-play, a practice all too common in the industry yet hard to measure.¹²⁶ This rampant, but illegal,¹²⁷ bribery is inconsistently enforced throughout states, and the monetary consequences are rarely effective deterrence.¹²⁸ Even further, the line can be blurry between a legal, benevolent discount to a retailer versus an illegal bribe.¹²⁹ Therefore, distributors and producers may not even be aware they are participating in illegal business dealings.¹³⁰

Pay-to-play from producers and distributors to retailers severely alienates and disadvantages smaller players in the game.¹³¹ Big Beer companies possess the “advantage of their large pockets and tolerance for risk” where craft brewers and small distributors likely do not.¹³² Craft beer is less likely to be sold in chain retail locations across the nation than Big Beer when uniformity among retail locations is a priority.¹³³ Craft brewers are also disproportionately affected by recent

123. See Marty Lariviere, *Paying for Grocery Store Shelf Space* (Nov. 29, 2016), <https://operationsroom.wordpress.com/2016/11/29/paying-for-grocery-store-shelf-space/> [<https://perma.cc/HT32-EJCU>].

124. Rhodes, *supra* note 79.

125. Goldfarb, *supra* note 89.

126. Nurin, *supra* note 76.

127. Following Prohibition, and in an effort to prevent a corrupt alcohol market, six categories of unlawful and unfair exclusionary practices are defined and enforced in the FAA Act of 1935 § 105. See 27 U.S.C. § 205(c).

128. Kiser, *supra* note 2.

129. See *id.*

130. *Id.*

131. See generally Rhodes, *supra* note 79.

132. Kiser, *supra* note 2.

133. Chief economist for the Brewers Association, Bart Watson, said in July 2022 that “there is clearly very little momentum behind craft beer at chain retail at the moment.” Kate Bernot, *Wait Your Turn—Craft Beer Looks to Inflation and Competition for Permission to*

inflation rates, as craft beer is typically more expensive, and raising prices during turbulent times can be an especially risky business decision.¹³⁴ Considering Bud Light is nearly one out of every five beers consumed in the United States, the mainstream American palate clearly demonstrates a preference for Big Beer's products.¹³⁵ Additionally, not only do craft brewers compete with Big Beer, but craft brewers—without participating in illegal pay-to-play bribery to retailers—must compete in a diverse alcohol market with hard seltzers, ready-to-drink cocktails, liquor, wine, and more.¹³⁶

V. AGRICULTURAL IMPACT

With centuries of brewing history around the world, more than 160 recognized styles of beer in the United States,¹³⁷ and over 500 plants used in beer brewing,¹³⁸ beer is a complex beverage.¹³⁹ Beer consists of four basic ingredients—water, grain, hops, and yeast—and is the third most consumed beverage behind water and tea.¹⁴⁰ Before transportation infrastructure grew, transporting ingredients was nearly impossible, so beer was largely the product of trial-and-error brewing and regional agriculture.¹⁴¹ Beer is the product of not only local ingredients found around the world, but the traditions associated with brewing the beer that spread once cultures migrated to different locations.¹⁴² With so many potential ingredients, recent brewing technology, distribution networks, and endless recipe combinations, modern craft brewing in the United States is essentially a brew

Raise Prices, GOOD BEER HUNTING: SIGHTLINES (July 14, 2022), <https://www.goodbeerhunting.com/sightlines/2022/7/14/craft-beer-looks-to-inflation-and-competition-for-permission-to-raise-prices> [<https://perma.cc/2YEN-264F>].

134. *Id.*

135. Kiser, *supra* note 2.

136. Bernot, *supra* note 133.

137. See BREWERS ASS'N, 2023 BREWERS ASSOCIATION BEER STYLE GUIDELINES, at v–ix (2023), https://cdn.brewersassociation.org/wp-content/uploads/2023/07/10124402/2023_BA_Beer_Style_Guidelines-updated.pdf [<https://perma.cc/CYT8-3EBW>]; see also Mark W. Patterson & Nancy Hoalst-Pullen, *Geographies of Beer*, in THE GEOGRAPHY OF BEER: REGIONS, ENVIRONMENT, AND SOCIETIES, *supra* note 4, at 1, 1.

138. See generally GUISEPPE CARUSO ET AL., THE BOTANY OF BEER: AN ILLUSTRATED GUIDE TO MORE THAN 500 PLANTS USED IN BREWING 11 (2022).

139. Patterson & Hoalst-Pullen, *supra* note 137, at 1.

140. *Id.*

141. *Id.* at 5.

142. *Id.* at 4–5.

master's playground to perpetuate the facets of craft beer: diversity, flavor, and community.¹⁴³

Agricultural success and experimental techniques are crucial to the history of beer.¹⁴⁴ Beer making in various regions was previously limited to the plants available for early brewers.¹⁴⁵ That limited availability rapidly changed with globalization and trade, which is why beer drinkers today can enjoy the various styles of beer they have grown to love.¹⁴⁶ For example, in Mexico, one of the world's leading countries in beer exportation, there are records of licenses to produce and sell beer dating back to 1540.¹⁴⁷ Efforts to establish local malt did not succeed until the 1920s where, up until that point, malt was imported from the United States.¹⁴⁸ Likewise, even today, Mexico's climate and topography make it nearly impossible for farmers to grow sufficient hops for beer.¹⁴⁹

Just as the weather in an area is unchangeable, so too are the seasons, local crops, and harvest cycle. Farmers' markets and community supported agriculture have bolstered the idea of shopping locally for seasonal produce within the United States.¹⁵⁰ Oftentimes, craft brewers have rotating seasonal beers to correspond to local changes in the harvest.¹⁵¹ Breweries also frequently have logos that depict rural or local imagery.¹⁵² This is a prime example of how agricultural innovation coupled with globalization has helped give rise to beer's popularity, while still not completely compromising the character and locality of craft beer—Wynkoop

143. Codog, *supra* note 100, at 416.

144. Andrew Shears, *Local to National and Back Again: Beer, Wisconsin & Scale*, in THE GEOGRAPHY OF BEER: REGIONS, ENVIRONMENT, AND SOCIETIES, *supra* note 4, at 45, 49.

145. See generally Patterson & Hoalst-Pullen, *supra* note 137, at 3.

146. Philip H. Howard, *Too Big to Ale? Globalization and Consolidation in the Beer Industry*, in THE GEOGRAPHY OF BEER: REGIONS, ENVIRONMENT, AND SOCIETIES, *supra* note 4, at 155, 155.

147. Susan M. Gauss & Edward Beatty, *The World's Beer: The Historical Geography of Brewing in Mexico*, in THE GEOGRAPHY OF BEER: REGIONS, ENVIRONMENT, AND SOCIETIES, *supra* note 4, at 57, 58.

148. *Id.* at 59.

149. *Id.*

150. Steven M. Schnell & Joseph F. Reese, *Microbreweries, Place, and Identity in the United States*, in THE GEOGRAPHY OF BEER: REGIONS, ENVIRONMENT, AND SOCIETIES, *supra* note 4, at 167, 179.

151. *Id.*

152. *Id.*

Brewing Company in Denver, Colorado notoriously brews their Rocky Mountain Oyster Stout, brewed with actual bull testicles.¹⁵³

Hops, a key crop in modern beer recipes, is closely related to cannabis in the Cannabaceae family and adds bitterness and aroma to beer while simultaneously acting as a preservative.¹⁵⁴ In the ninth century, European civilizations began using this plant and quickly spread knowledge of its cultivation to more temperate regions around the globe.¹⁵⁵

The history reflects how plants, people, and ideas engaged in global exchanges over centuries as a means to achieve agricultural and brewing success. In the twenty-first century, commercial hop growing occurs in many temperate regions of the world. But that was not always the case, and understanding how this specialty crop developed helps us better understand the contents of our beer glasses.¹⁵⁶

For example, the twentieth century saw an unprecedented amount of hop growth and expansion, not only in geographic location, but also hops farm size as consumers demanded hoppier beers.¹⁵⁷ As an indirect result, the supply of hops often struggles to keep up with increasing demand.¹⁵⁸ Big Beer producers have the ability to purchase hops in massive quantities because they push out more product than craft breweries.¹⁵⁹

VI. CONCLUSION

The beer laws in the United States have largely favored Big Beer monopolies, which continue to buyout and dominate the beer market. Craft brewers are severely disadvantaged by these laws and the current downfalls of the three-tier system.¹⁶⁰ Federal antitrust legislation and states restructuring their three-tier systems will ensure a more level playing field without any laws in place that border vertical integration of the producer and distributor tier.¹⁶¹

153. *Id.* at 180.

154. Peter A. Kopp, *The Global Hop: An Agricultural Overview of the Brewer's Gold*, in *THE GEOGRAPHY OF BEER: REGIONS, ENVIRONMENT, AND SOCIETIES*, *supra* note 4, at 77, 77.

155. *Id.*

156. *Id.*

157. *Id.*

158. Goldfarb, *supra* note 89.

159. *Id.*

160. *See supra* Part IV.

161. Codog, *supra* note 100, at 423.

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Without stricter regulations or reform in the beer-market laws, monopolistic behaviors will continue to flourish in the current regulatory system that allows pay-to-play bribes, huge mergers and acquisitions, and beer franchise laws that favor the largely consolidated distributor tier over small craft breweries. Although state legislatures dictate the beer laws in each state, increased federal regulation will provide uniform protection among craft brewers across the nation, which will ensure a more level playing field in the market and that craft beers can be enjoyed for years to come.