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## Connecticut's Post-and-Hold Out: Total Wine's Challenge to The Liquor Control Act & Antitrust Implications

Emily Gait

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## Note

### Connecticut's Post-and-Hold Out: Total Wine's Challenge to The Liquor Control Act & Antitrust Implications

EMILY GAIT

*At first blush, Connecticut's liquor laws serve the noble purpose of protecting the state's small businesses. The policy argument for the regulations could go something like—maybe we don't want lower alcohol prices in the state, maybe we want to advocate for temperance and protect local shops from big box chains. What the argument does not consider is the reality of who bears the cost and who profits from the laws as written. Prices in the alcoholic-beverage industry are controlled by wholesalers, without oversight by the state. Consumers pay higher prices and wholesalers mop up the profits. Under the laws, there is virtually no incentive for competition. Prices are stable, consistent, uniform, and high.*

*Antitrust principles could not be more at odds with Connecticut's regulatory scheme. But what about Connecticut's authority to regulate the alcoholic-beverage industry without interference from the federal government? The doctrine of state-action immunity recognizes state's authority and limits federal government interference when the state is actively involved in the oversight of private market participants and prices. State laws only violate antitrust principles when private participants assume control over prices. Connecticut's liquor laws do just that. The laws actually mandate price sharing. They leave price control of the alcoholic-beverage industry in the hands of the wholesalers, and consumers pay the price.*

*This Note argues that Connecticut's liquor laws are per se illegal because they always, or almost always, restrict competition. But that argument need not be interpreted as the last drop in the bucket for the local package store. There are other ways to protect small merchants. Connecticut has enacted, and can continue to enact laws that support local businesses and limit big box takeover. Connecticut should follow other states around the nation which have done away with similar laws and opened up the alcoholic-beverage market to healthy competition.*

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# Connecticut's Post-and-Hold Out: Total Wine's Challenge to The Liquor Control Act & Antitrust Implications

EMILY ADAMS GAIT \*

## INTRODUCTION

Antitrust laws are intended to promote competition and enable consumers to benefit from the forces of a competitive market—spurring innovation, efficiency, and applying constant downward pressure on prices. There are times, however, when antitrust principles come into conflict with other interests. Liquor laws are a prime example. States are concerned with the sale, regulation, distribution, and consumption of alcohol. The Twenty-First Amendment to the United States Constitution recognizes states' ability to regulate alcohol within their borders; across the nation, states maintain regulatory schemes governing alcohol producers' and retailers' sales of alcohol to consumers. When challenged, courts examine these regulatory schemes to determine whether the alcoholic-beverage industry is appropriately shielded from the competitive market forces that antitrust laws seek to promote.

What happens when a state's alcoholic-beverage regulatory scheme leads to anticompetitive outcomes thereby conflicting with antitrust laws? This Note considers this conflict within the context of a lawsuit brought by the national liquor retailer, Total Wine. Total Wine is challenging Connecticut's Liquor Control Act of 1933 (the "Liquor Act"), claiming that it violates antitrust laws, unreasonably restrains competition, and harms consumers. The essential questions are: Does the Liquor Act merely entail vertical resale price maintenance that is immune to antitrust laws? Or does it fall into a different category more closely resembling an industry-wide regulatory scheme still considered a *per se* violation of antitrust laws? This Note explores recent case law and the arguments on both sides of the Total Wine case. Ultimately, this Note concludes that the Liquor Act places irresistible pressure on liquor market participants to violate antitrust laws because it authorizes and mandates collusive conduct while simultaneously prohibiting price competition.

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\* University of Connecticut School of Law, J.D. Candidate 2019. Many thanks to Professor Hillary Greene for an education in antitrust, the push to find my voice, and for serving as a brilliant mentor long after this Note. Eduardo, mom, and dad – thank you simply isn't sufficient to show my gratitude for giving me the chance to enjoy law school. A special thanks to Steven Carlyle Cronig for the intense summer session editing course. Also, thank you to the *Connecticut Law Review* members for the tedious and often thankless work that goes into editing.

## I. TOTAL WINE'S COMPLAINT

In August 2016, Total Wine filed a complaint challenging Connecticut's post-and-hold requirement, minimum pricing standard, and volume discount prohibition as violations of federal and state antitrust laws.<sup>1</sup> Total Wine's complaint is simple: antitrust law interests override Connecticut's interests.

Total Wine alleges that the Liquor Act prevented it from offering the "best prices" by creating an anticompetitive state regulatory regime that intentionally promotes horizontal and vertical price-fixing by Connecticut wholesalers of alcoholic beverages.<sup>2</sup> The complaint argues that the challenged provisions of the Liquor Act "facilitate and impel vertical and horizontal price-fixing among manufacturers and wholesalers."<sup>3</sup> Total Wine states that manufacturers and wholesalers "fix and maintain prices at levels substantially above what fair and ordinary market forces would dictate" by setting bottle and case prices, sharing price information, and coordinating to match competitors' pricing, "resulting in horizontal price-fixing at the wholesale level."<sup>4</sup>

In October 2016, Connecticut filed a motion to dismiss Total Wine's complaint stating that Total Wine failed to state a claim upon which relief can be granted.<sup>5</sup> Connecticut argues that the Liquor Act is a valid state regulation seeking to prevent price discrimination among alcoholic-beverage retailers.<sup>6</sup> Connecticut asserts that Total Wine failed to allege sufficient facts to support the argument that an actual agreement among wholesalers exists, and that facts showing an agreement are required for the court to determine that the Liquor Act violates antitrust laws.<sup>7</sup> Connecticut concedes that the Fourth and Ninth Circuits found similar state alcohol regulations in violation of antitrust laws, but argues that under fact-pleading standards, Total Wine's complaint should be dismissed for lack of sufficient factual detail.<sup>8</sup>

Shortly after Connecticut filed its motion to dismiss, five intervening defendants filed a brief in support of the state.<sup>9</sup> The intervenors first claim that there is no actual "irreconcilable conflict" between Connecticut's

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<sup>1</sup> 15 U.S.C. § 1 (2012); Conn. Gen. Stat. § 35-26 et seq.; Complaint at 3–4, *Connecticut Fine Wine & Spirits v. Harris*, 255 F. Supp. 3d 355 (D. Conn. 2017) (No. 3:16-cv-1434).

<sup>2</sup> Complaint, *supra* note 1, at 3.

<sup>3</sup> *Id.* at 4.

<sup>4</sup> *Id.*

<sup>5</sup> Memorandum of Law in Support of Motion to Dismiss at 1, *Connecticut Fine Wine & Spirits v. Harris*, 255 F. Supp. 3d 355 (D. Conn. 2017) (No. 3:16-cv-1434).

<sup>6</sup> *Id.* at 4.

<sup>7</sup> *Id.* at 12, 16.

<sup>8</sup> *Id.* at 13.

<sup>9</sup> Intervenors' Joint Reply in Support of Their Motions to Dismiss at 1, *Connecticut Fine Wine & Spirits v. Harris*, 255 F. Supp. 3d 355 (D. Conn. 2017) (No. 3:16-cv-1434) [hereinafter Intervenors' Brief].

regulatory scheme and antitrust laws.<sup>10</sup> They argue that Total Wine has not established an irreconcilable conflict, and therefore antitrust law interests cannot override the state's interests.<sup>11</sup> The motion goes on to argue that the challenged provisions are not per se violations, are not horizontal restraints, and do not leave pricing power in the hands of market participants.<sup>12</sup> Finally, they argue that the specific allegations made by Total Wine should not be considered, as they are beyond the scope of a facial challenge.<sup>13</sup>

## II. THE SHERMAN ACT

The Sherman Act states that “[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal.”<sup>14</sup> The Supreme Court has never “taken a literal approach to this language,”<sup>15</sup> but rather has said that the Act “outlaw[s] only unreasonable restraints.”<sup>16</sup> As the Ninth Circuit stated in *Costco Wholesale Corp. v. Maleng*, the federal government only has the authority to strike down a state statute as an antitrust violation if the “statute on its face irreconcilably conflicts with federal antitrust policy.”<sup>17</sup> The “threshold question” is, then, whether Connecticut’s liquor laws irreconcilably conflict with the Sherman Act.<sup>18</sup> *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.* established the two-step balancing test to determine whether a state liquor regulation violates the Sherman Act.<sup>19</sup> The first step analyzes whether the state regulation actually violates the Sherman Act, and the second step evaluates whether the state has immunity based on a finding that the regulation is clearly articulated and actively supervised by the state.<sup>20</sup>

### A. *Per Se Violation*

Antitrust analysis is industry-specific, and courts are hesitant to condemn behavior that has not been thoroughly analyzed to determine whether there are any procompetitive effects that warrant further economic

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<sup>10</sup> *Id.* at 5–7.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 6–7 (citing *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 898 (2007)).

<sup>13</sup> *Id.* at 9.

<sup>14</sup> 15 U.S.C. § 1 (2012).

<sup>15</sup> *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006).

<sup>16</sup> *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997).

<sup>17</sup> *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 885–86 (9th Cir. 2008) (citing *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982)).

<sup>18</sup> *Id.* at 885.

<sup>19</sup> See *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 111 (1980) (invalidating a California statute that required all producers, wholesalers, and rectifiers of wine to file contracts or price schedules with the state).

<sup>20</sup> *Id.* at 105.

analysis.<sup>21</sup> The per se rule treats certain behavior as a violation of antitrust laws and eliminates the need to study the reasonableness of each activity where the courts understand the market forces within the industry.<sup>22</sup> Per se violations always or almost always restrict competition.<sup>23</sup> Restraints that are per se unlawful include horizontal agreements among competitors to fix prices.<sup>24</sup> Restraints that require a case-by-case analysis of pro- and anticompetitive effects are evaluated under what is called the rule of reason.<sup>25</sup> While the distinction facially appears sharp, “it has recently been suggested that the Court has effectively abandoned a dichotomous approach to analyzing reasonableness. The fundamental inquiry is ‘whether or not the challenged restraint enhances competition,’ not which label to attach to the conduct under review.”<sup>26</sup>

### B. *Horizontal or Vertical Price Fixing*

At the most basic level, horizontal relationships are between competitors at the same level. For example, two wholesalers in the same geographic area would be considered horizontal. Vertical relationships are between parties either down- or upstream in the supply chain. For example, a wholesaler and a retailer such as Total Wine. “Restraints that are *per se* unlawful include horizontal agreements among competitors to fix prices.”<sup>27</sup> There has, however, been a recent shift to recognize that vertical agreements to fix prices (minimum resale price maintenance) may have procompetitive effects and are no longer considered per se illegal.<sup>28</sup> In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, the Court explored the question of whether vertical resale price maintenance should be considered per se illegal under the Sherman Act.<sup>29</sup> Until *Leegin* in 2007, the established rule was that a “vertical agreement between a manufacturer and its distributor to set minimum resale prices” was per se illegal.<sup>30</sup>

In that case, the leather belt manufacturer, Leegin, set a suggested retail price for the Brighton belt brand and refused to supply to the retailer Kay’s Kloset because Kay’s Kloset sold the belts to consumers below the

<sup>21</sup> *State Oil Co.*, 522 U.S. at 10.

<sup>22</sup> *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (citing *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988)).

<sup>23</sup> *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988).

<sup>24</sup> *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006).

<sup>25</sup> See ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW AND ECONOMICS OF PRODUCT DISTRIBUTION 25 (2006) (citing 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶¶ 1500–11 (2d ed. 2003)) (discussing per se and rule-of-reason standards).

<sup>26</sup> *Id.* (quoting *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 779–80 (1999)).

<sup>27</sup> *Leegin Creative Leather Prods.*, 551 U.S. at 886 (citing *Dagher*, 547 U.S. at 5).

<sup>28</sup> See ABA, *supra* note 25, at 77 (“Since 1911, it has been per se unlawful for a manufacturer to agree with its distributor or dealer on minimum resale pricing.”).

<sup>29</sup> *Leegin Creative Leather Prods.*, 551 U.S. at 885.

<sup>30</sup> *Id.* at 887.

suggested retail price.<sup>31</sup> Leegin argued that it wanted to maintain an image of high quality by selling at specialty stores focused on customer service rather than discount retailers.<sup>32</sup> It established a vertical minimum resale price by prohibiting any retailer from selling Brighton belts to consumers below a certain price. Leegin asserted that since there was no concerted action, the policy did not violate antitrust laws.<sup>33</sup>

The Court in *Leegin* formally recognized potential procompetitive effects of vertical restraints and the “differences in economic effect between vertical and horizontal agreements.”<sup>34</sup> In making this shift, the court quoted the American Bar Association Section of Antitrust Law’s *Antitrust Law and Economics of Product Distribution*, stating “the bulk of the economic literature on [resale price maintenance] suggests that [it] is more likely to be used to enhance efficiency than for anticompetitive purposes.”<sup>35</sup> The Court also cited *The Antitrust Enterprise: Principle and Execution*, which states that vertical minimum resale price maintenance “is competitively benign in the great majority of situations when it is not being used to facilitate collusion.”<sup>36</sup> In *The Antitrust Paradox, A Policy at War with Itself*, Robert H. Bork describes vertical restraints as a positive means of creating economic efficiencies, but he excludes from the procompetitive analysis “restraints, vertical in form only, that are actually imposed by horizontal cartels at any level of the industry, e.g. resale price maintenance that is compelled not by the manufacturer but by the pressure of organized retailers.”<sup>37</sup>

The *Leegin* Court also discussed the potential anticompetitive effects of vertical price fixing.<sup>38</sup> If retailers collude and fix prices, the manufacturer is likely not acting in the interest of efficiency, but enabling inefficient retailers to take advantage of the system and make higher profits.<sup>39</sup> “Resale price maintenance, furthermore, can be abused by a powerful manufacturer or retailer,” which could lead to less innovation in distribution-cost reduction.<sup>40</sup> The Court said that “[a] horizontal cartel among competing manufacturers or competing retailers that decreases output or reduces competition in order to increase price is, and ought to be, *per se* unlawful.”<sup>41</sup> The Court acknowledged both pro- and anticompetitive effects as possible results of

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<sup>31</sup> *Id.* at 883.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 884.

<sup>34</sup> *Id.* at 888.

<sup>35</sup> *Id.* at 889 (quoting ABA, *supra* note 25, at 77).

<sup>36</sup> *Id.* (emphasis added) (citing HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 186 (2005)).

<sup>37</sup> ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 288 (1978).

<sup>38</sup> *Leegin*, 551 U.S. at 892.

<sup>39</sup> *Id.* at 893.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* (citations omitted).

vertical restraints and held that the vertical restraints did not meet the per se criteria of always, or almost always, producing anticompetitive results.<sup>42</sup>

### C. *Leading Cases*

Four cases have addressed state alcohol regulations, similar to the Liquor Act.<sup>43</sup>

#### 1. Second Circuit, 1984: *Battipaglia v. New York State Liquor Authority*

The court in *Battipaglia*, in an opinion written by Judge Friendly, evaluated New York's liquor laws that mandated a minimum price increase and required wholesalers to post prices with the state.<sup>44</sup> The court distinguished New York's laws from California's laws struck down in *Midcal* by stating that New York's law "merely requires wholesalers to post and adhere to their own unilaterally determined prices and nothing more," whereas *Midcal* struck down a law that mandated a resale price.<sup>45</sup> The court found that the requirement to exchange information is distinct from acting in

agreement—combining or colluding—and the former is not a per se violation that is preempted by the Sherman Act.<sup>46</sup> The law "does not mandate or authorize conduct that necessarily constitutes a violation of the antitrust laws in all cases."<sup>47</sup>

#### 2. United States Supreme Court, 1987: *324 Liquor Corp. v. Duffy*

New York's liquor laws again came under scrutiny in *324 Liquor Corp.*,<sup>48</sup> although the Supreme Court did not discuss *Battipaglia*. At issue were New York's minimum pricing and post-and-hold requirements.<sup>49</sup> The court relied on the *Midcal* analysis and *Parker v. Brown* state-action immunity evaluation to determine whether the regulations were clearly stated and actively supervised by the state.<sup>50</sup> The Court noted that "industry-

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<sup>42</sup> *Id.* at 894 (quoting *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988)).

<sup>43</sup> I selected two circuit cases decided after *Leegin* in order to address how courts are evaluating state liquor regulatory schemes following the *Leegin* decision, which held minimum resale price maintenance to no longer be a per se violation of antitrust law. I selected *Battipaglia* because the judge relied on the holding to dismiss the Total Wine case. I selected *324 Liquor Corp.* because it is the relevant United States Supreme Court precedent.

<sup>44</sup> *Battipaglia v. New York State Liquor Auth.*, 745 F.2d 166, 168 (2d Cir. 1984).

<sup>45</sup> *Id.* at 172.

<sup>46</sup> *Id.* at 175.

<sup>47</sup> *Id.* (internal citations omitted).

<sup>48</sup> 479 U.S. 335 (1987).

<sup>49</sup> *Id.* at 337.

<sup>50</sup> *Id.* at 341–44; see also *Parker v. Brown*, 317 U.S. 341, 351 (1943) (establishing the two-part test for state-action immunity as requiring a restraint to be (1) clearly articulated and affirmatively expressed and (2) actively supervised by the state itself).

wide resale price maintenance also may facilitate cartelization” and “prevents manufacturers and wholesalers from allowing or requiring retail price competition.”<sup>51</sup> Wholesalers were able to set prices and retailers were forbidden from reducing those minimum prices.<sup>52</sup> The Supreme Court held that New York’s liquor laws were inconsistent with the Sherman Act because the statute applied “to *all* wholesalers and retailers of liquor.”<sup>53</sup> The Court held resale price maintenance a per se violation of antitrust laws since it is “virtually certain to reduce interbrand competition as well as intrabrand competition, because it prevents manufacturers and wholesalers from allowing or requiring retail price competition.”<sup>54</sup>

### 3. Ninth Circuit, 2008: *Costco Wholesale Corp. v. Maleng*

Washington’s liquor laws consisted of nine different challenged provisions including a post-and-hold requirement, minimum-mark-up provision, and volume-discount prohibition.<sup>55</sup> The Ninth Circuit noted that under the post-and-hold requirement, wholesalers were not *required* to price match, as the law only required that they maintain their own price for the month.<sup>56</sup> However, the court concluded that the logical result of post-and-hold is “a less uncertain market, a market more conducive to collusive and stabilized pricing, and hence a less competitive market.”<sup>57</sup> “[A]greements to adhere to posted prices are anticompetitive because they are highly likely to facilitate horizontal collusion among market participants.”<sup>58</sup> The court had “little trouble concluding that the post-and-hold scheme would constitute a per se violation of the Sherman Act.”<sup>59</sup>

The Ninth Circuit’s approach was unique because it did not treat all the regulations as a bundle. Instead, the court severed the minimum-mark-up and volume-discount provisions from the post-and-hold requirement, holding only the post-and-hold requirement a per se violation of antitrust laws.<sup>60</sup> The court determined that without the invalid post-and-hold at the center of the regulatory scheme, the additional provisions did not constitute per se violations of the Sherman Act.<sup>61</sup> According to the court, “[t]he discretion to set a price, in the absence of any obligation to post it or maintain it for any period of time, is not a grant of discretion that facilitates horizontal

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<sup>51</sup> 324 *Liquor Corp.*, 479 U.S. at 342.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 883 (9th Cir. 2008).

<sup>56</sup> *Id.* at 894.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 896.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 901.

<sup>61</sup> *Id.* at 897–98, 901.

price collusion.”<sup>62</sup> It seems, in Washington at least, the setting of prices alone was not anticompetitive, but the setting, posting, and maintaining violated antitrust law.<sup>63</sup>

#### 4. Fourth Circuit, 2009: *TFWS, Inc. v. Schaefer*

Maryland’s liquor laws consisted of a post-and-hold requirement and a volume-discount prohibition.<sup>64</sup> The Fourth Circuit viewed Maryland’s liquor laws as horizontal price fixing.<sup>65</sup> The court stated, “there is ‘a plain distinction between the lawful right to publish prices . . . on the one hand, and an agreement among competitors limiting action with respect to the published prices, on the other.’”<sup>66</sup> The court held that “Maryland’s horizontal price fixing was a per se violation of the Sherman Act.”<sup>67</sup> The court specifically rejected Maryland’s argument that the restraints concerned vertical-resale price maintenance, which are no longer per se illegal under *Leegin*.<sup>68</sup> “In fact, *Leegin*, far from undermining our conclusion that horizontal price fixing is per se illegal under the Sherman Act, actually reiterates that rule.”<sup>69</sup> The Court in *Leegin* stated, “per se unlawfulness applies to horizontal market division and horizontal price fixing because both have similar economic effect.”<sup>70</sup> Essentially, the Fourth Circuit upheld its previous decision that the regulatory scheme “mandated activity that was ‘essentially a form of horizontal price fixing’”<sup>71</sup> and “a per se violation of the Sherman Act.”<sup>72</sup>

### III. THE LIQUOR ACT

The Twenty-First Amendment to the United States Constitution recognizes states’ power to regulate alcohol within their borders.<sup>73</sup> Most states, including Connecticut, follow a three-tier distribution system preventing consumers from purchasing alcohol directly from a producer.<sup>74</sup> Instead, the producer makes the alcohol, sells to a retailer (often utilizing a

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<sup>62</sup> *Id.* at 900.

<sup>63</sup> *Id.* at 900–01.

<sup>64</sup> *TFWS, Inc. v. Franchot*, 572 F.3d 186, 188 (4th Cir. 2009).

<sup>65</sup> *Id.* at 192.

<sup>66</sup> *Id.* (quoting *Catalano v. United States*, 446 U.S. 643, 649–50 (1980)).

<sup>67</sup> *Id.*

<sup>68</sup> See *id.* (noting the distinction that *Leegin* held vertical resale price maintenance subject to the rule of reason, whereas Maryland’s liquor laws were horizontal restraints and per se illegal).

<sup>69</sup> *Id.*

<sup>70</sup> *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 904 (2007).

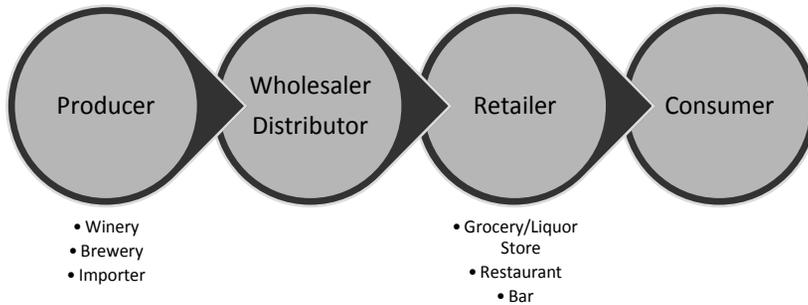
<sup>71</sup> *TFWS, Inc.*, 572 F.3d at 190.

<sup>72</sup> *Id.* at 192; *TFWS, Inc. v. Schaefer*, 242 F.3d 198, 209 (4th Cir. 2001).

<sup>73</sup> U.S. CONST. amend. XXI, § 2.

<sup>74</sup> STATE OF CONN., COMPETITIVE ALCOHOLIC LIQUOR PRICING TASK FORCE 2012-R-0502 7 (2012), <https://www.cga.ct.gov/2012/rpt/pdf/2012-R-0502.pdf> [<https://perma.cc/5N24-P994>].

wholesale distributor, but not always), and finally, the consumer purchases from the retailer.<sup>75</sup>



### A. *The Post-and-Hold Requirement*

The Liquor Act establishes the state’s regulatory structure for alcohol sales within the state.<sup>76</sup> Under the Liquor Act, wine and spirits manufacturers and wholesalers must post their prices on a monthly basis with the Department of Consumer Protection (“DCP”), which distributes posted prices to the manufacturers and wholesalers, and maintains the set price for the following month.<sup>77</sup> A limited window (four days from posting) exists for manufacturers to amend their price even after posting.<sup>78</sup> Prices may be lowered to match a competitor, but not raised.<sup>79</sup>

Total Wine argues that the post-and-hold requirement eliminates “almost any incentive for wholesalers to compete on price.”<sup>80</sup> If a wholesaler decides to lower its price, the price is posted and holds for the following month.<sup>81</sup> Competitors are immediately aware of the price reduction and can match prices.<sup>82</sup> “The post-and-hold regime thus provides a perfect veil to enshroud an active horizontal agreement among wholesalers to fix prices.”<sup>83</sup> Connecticut responds that post-and-hold requirements “effectuate[] a legitimate state interest in protecting small retailers from price discrimination by wholesalers,”<sup>84</sup> are not per se unlawful, and argues the

<sup>75</sup> *Id.*

<sup>76</sup> CONN. GEN. STAT. § 30–63 (2017).

<sup>77</sup> *Id.* at § 30–63(c).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> Plaintiff’s Consolidated Opposition to Defendants’ and Intervenors’ Motions to Dismiss at 10, *Connecticut Fine Wine & Spirits v. Harris*, 255 F. Supp. 3d 355 (D. Conn. 2017) (No. 3:16-cv-1434) [hereinafter Plaintiff’s Consolidated Opposition Brief].

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 11.

<sup>84</sup> State Defendants’ Reply Memorandum in Support of Motion to Dismiss at 6, *Connecticut Fine Wine & Spirits v. Harris*, 255 F. Supp. 3d 355 (D. Conn. 2017) (No. 3:16-cv-1434).

Ninth Circuit incorrectly struck down Washington’s post-and-hold law.<sup>85</sup> Connecticut and the intervenors rely on the *Battipaglia* decision upholding New York’s post-and-hold laws and argue that the Supreme Court’s decision in *324 Liquor Corp.* did not overrule *Battipaglia*.<sup>86</sup> The intervenors argue the Fourth and Ninth Circuit “cases were incorrectly decided and thus have no persuasive value” regarding the Connecticut post-and-hold regulation.<sup>87</sup>

### B. *The Minimum-Pricing Standard*

The minimum-pricing standard prohibits retailers from selling alcohol below “cost.”<sup>88</sup> “Cost” for alcohol is defined as the posted bottle price from the wholesaler plus shipping or delivery charges to the retailer’s business.<sup>89</sup>

Wholesalers also operate what are termed “off-post” months during which the case price is lowered but the bottle price remains high.<sup>90</sup> According to Total Wine, “[w]holesalers know that retailers buy almost exclusively by the case and that they will buy larger quantities during ‘off-post’ months.”<sup>91</sup> However, because of the minimum-pricing standard, retailers are still required to sell the product at a high price because cost is calculated based on the artificially high bottle price.<sup>92</sup> Total Wine argues that since retailers have no ability to sell below cost, essentially, wholesalers are setting the prices that consumers pay, making the restraint both vertical and horizontal.<sup>93</sup> “These provisions authorize horizontal price fixing among inefficient retailers . . . to conceal a horizontal agreement not to sell below a ‘floor’ price—and thereby inflate retail prices—in order to preserve artificially high profit margins. Such horizontal agreements to set minimum prices constitute quintessential illegal price fixing.”<sup>94</sup>

Connecticut responds that the minimum-pricing standard “effectuates a legitimate state interest in precluding ‘artificial inducements to purchase liquor [that] will result in increased consumption.’”<sup>95</sup> Connecticut and the intervenors argue that the regulations should not be considered as a bundle, but evaluated independently of each other as in the *Costco* case.<sup>96</sup> They further argue that the minimum-pricing standard, evaluated on its own apart

<sup>85</sup> *Id.* at 4, 6.

<sup>86</sup> *Id.* at 4; Intervenors’ Brief, *supra* note 9, at 10.

<sup>87</sup> Intervenors’ Brief, *supra* note 9, at 10.

<sup>88</sup> CONN. GEN. STAT. § 30-68m(b) (2016).

<sup>89</sup> CONN. GEN. STAT. § 30-68m(a)(1) (2016).

<sup>90</sup> *Connecticut Fine Wine & Spirits v. Harris*, 255 F. Supp. 3d 355, 362 (D. Conn. 2017).

<sup>91</sup> Complaint, *supra* note 1, at 5.

<sup>92</sup> *Id.*

<sup>93</sup> Plaintiff’s Consolidated Opposition Brief, *supra* note 80, at 10.

<sup>94</sup> *Id.* at 12.

<sup>95</sup> State Defendants’ Reply Memorandum in Support of Motion to Dismiss at 6, *Connecticut Fine Wine & Spirits v. Harris*, 255 F. Supp. 3d 355 (D. Conn. 2017) (No. 3:16-cv-1434) (alteration in original) (citations omitted) [hereinafter State’s Reply Brief].

<sup>96</sup> *Id.* at 4; Intervenors’ Brief, *supra* note 9, at 12.

from the post-and-hold regulation, is a vertical restraint and, under *Leegin*, does not violate antitrust law.<sup>97</sup>

### C. *The Volume-Discount Prohibition*

The volume-discount prohibition bans price reductions, which otherwise could be used to incentivize retailers to purchase larger quantities of merchandise.<sup>98</sup> Wholesalers must sell every bottle and case of alcohol to every retailer at the same price, regardless of the amount the retailer charges.<sup>99</sup> Total Wine argues that the volume-discount prohibition “authorizes both horizontal and vertical price fixing” by “reinforcing the mandatory price-posting laws.”<sup>100</sup> The intervenors again respond that the restraint should be evaluated individually, is a vertical restraint, and therefore, is not preempted by the antitrust law.<sup>101</sup> Connecticut further states that the regulations simply permit wholesalers to “price match pursuant to a precisely delineated and closely monitored process.”<sup>102</sup> To the contrary, they “do not mandate or authorize wholesalers or retailers to contract, combine, or conspire in restraint of trade, nor do they place irresistible pressure on any private party to violate the antitrust laws in order to comply with the state.”<sup>103</sup>

### D. *Application to Connecticut’s Liquor Laws*

Following *Leegin*, the critical question is whether a particular statute is a horizontal or vertical restraint. Connecticut and the intervenors argue that the Liquor Act regulations are vertical restraints, and therefore are not per se illegal, and are not preempted by the antitrust law. Conversely, Total Wine argues that the Liquor Act regulations result in horizontal, as well as vertical, price fixing and that the vertical price fixing is inextricably tied to the horizontal price fixing, creating “irresistible pressure on retailers to collude ‘vertically’ with wholesalers.”<sup>104</sup>

The Liquor Act, in a purely directional sense, has elements that are vertical in nature. The minimum-price standard is set by the wholesaler, paid by the retailer, and then paid by the consumer.<sup>105</sup> The volume-discount prohibition prevents retailers from buying vertically from the wholesaler at

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<sup>97</sup> Intervenors’ Brief, *supra* note 9, at 13–14.

<sup>98</sup> CONN. GEN. STAT. § 30-68k (2017).

<sup>99</sup> *Id.*

<sup>100</sup> Plaintiff’s Consolidated Opposition Brief, *supra* note 80, at 14.

<sup>101</sup> Intervenors’ Brief, *supra* note 9, at 9–10.

<sup>102</sup> State’s Reply Brief, *supra* note 95, at 6.

<sup>103</sup> *Id.*

<sup>104</sup> Plaintiff’s Consolidated Opposition Brief, *supra* note 80, at 42.

<sup>105</sup> See *supra* Part III.B.

a discounted rate.<sup>106</sup> However, what distinguishes the Liquor Act from a simple directional question of vertical versus horizontal is the post-and-hold provision that lurks in the background.<sup>107</sup>

Under the post-and-hold regulation, the fixed price that is horizontally shared and set by wholesalers carries downstream all the way to the consumer.<sup>108</sup> Whatever price wholesalers arrive at for a particular product for the month is not only the price to retailers, but also the minimum price to consumers.<sup>109</sup> Resale price posting is not simply allowed; it is *mandated* by the regulation.<sup>110</sup> Furthermore, resale price is not fixed by a single supplier, but by all suppliers once pricing information among suppliers is shared and matched.<sup>111</sup> The Supreme Court in *324 Liquor Corp.* stated that “[m]andatory industrywide resale price fixing is virtually certain to reduce interbrand competition as well as intrabrand competition, because it prevents manufacturers and wholesalers from allowing or requiring retail price competition.”<sup>112</sup> *Leegin* still controls when there is one supplier, saying that vertical price fixing should be judged under the rule of reason. This, however, is a very different case, where the entire state alcoholic-beverage market is controlled by vertical price fixing.

#### IV. STATE-ACTION IMMUNITY

Once a regulation is deemed an antitrust violation, the court must then determine whether the regulations are immune to antitrust laws under the state-action immunity doctrine. *Parker v. Brown* established state-action immunity when it held that the Sherman Act was not “intended to restrain state action or official action directed by a state.”<sup>113</sup> “[W]here the state, acting as a sovereign, imposes restraints on competition, the state is immune from antitrust liability . . . .”<sup>114</sup> In order to determine whether a regulatory scheme is immune, the court must first determine whether the regulation is unilateral or hybrid.<sup>115</sup> A unilateral restraint is when a state imposes, and private actors abide by, a regulation.<sup>116</sup> A hybrid restraint, on the other hand, grants private actors the ability to control market forces through a

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<sup>106</sup> See *supra* Part III.C.

<sup>107</sup> See *supra* Part III.A.

<sup>108</sup> *Id.*

<sup>109</sup> See *supra* Part III.B.

<sup>110</sup> See *supra* Part III.A.

<sup>111</sup> *Id.*

<sup>112</sup> *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 341–42 (1987).

<sup>113</sup> *Parker v. Brown*, 317 U.S. 341, 351 (1943).

<sup>114</sup> *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 887 (9th Cir. 2008) (internal quotation marks omitted).

<sup>115</sup> *Id.*

<sup>116</sup> *Fisher v. City of Berkeley*, 475 U.S. 260, 265 (1986).

regulation.<sup>117</sup> In the hybrid scenario, the private actors have the ability to manipulate the market and represent their own interests, rather than simply following a directive from the state.<sup>118</sup> A unilateral restraint is immune from antitrust law.<sup>119</sup> A hybrid restraint, however, is not immune, and must be further evaluated to determine whether the restraint is clearly articulated and actively supervised by the state.<sup>120</sup>

Total Wine claims that the restrictions are hybrid in nature, enabling private actors to manipulate the market, unsupervised, and set their own prices.<sup>121</sup> The Fourth Circuit in *TFWS* said “the post-and-hold system is a classic hybrid restraint: the State requires wholesalers to set prices and stick to them, but it does not review those privately set prices for reasonableness . . . .”<sup>122</sup> Ultimately, wholesalers are granted private regulatory power.<sup>123</sup> The Ninth Circuit also found Washington’s post-and-hold laws to be hybrid, rather than unilateral restraints.<sup>124</sup>

In its motion to dismiss, Connecticut argues that the Liquor Act restrictions are unilateral and therefore immune.<sup>125</sup> Connecticut argues that the 1984 Second Circuit decision in *Battipaglia v. New York State Liquor Authority* controls.<sup>126</sup> At issue in *Battipaglia* were the New York post-and-hold laws.<sup>127</sup> In Judge Friendly’s analysis, the New York regulations warranted a rule of reason analysis, rather than per se condemnation, requiring certain “plus” factors where the collusion among competitors could be explained by parties acting in parallel without some sort of explicit agreement.<sup>128</sup> Judge Friendly questioned whether post-and-hold laws constituted an actual agreement and ruled conservatively that a more thorough analysis was required rather than per se condemnation.<sup>129</sup> This rationale has not been persuasive elsewhere. The Ninth Circuit in *Costco* considered the *Battipaglia* decision, but declined to follow it.<sup>130</sup> The *Costco* court instead relied on the conclusion that the Supreme Court came to in *324 Liquor Corp.* where it “made it clear that an actual ‘contract, combination,

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<sup>117</sup> *Id.* at 267–68.

<sup>118</sup> *Costco Wholesale Corp.*, 522 F.3d at 887 (internal citations omitted).

<sup>119</sup> *Id.*

<sup>120</sup> See *id.* (outlining the two-part inquiry); *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (rearticulating and applying the two-part inquiry).

<sup>121</sup> Plaintiff’s Consolidated Opposition Brief, *supra* note 80, at 20–21.

<sup>122</sup> *TFWS, Inc. v. Franchot*, 572 F.3d 186, 189 (4th Cir. 2009).

<sup>123</sup> *Id.*

<sup>124</sup> *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 895 (9th Cir. 2008).

<sup>125</sup> Memorandum of Law in Support of Motion to Dismiss, *supra* note 5, at 4.

<sup>126</sup> *Id.* at 10; *Battipaglia v. New York State Liquor Authority*, 745 F.2d 166 (2d Cir. 1984).

<sup>127</sup> *Battipaglia*, 745 F.2d at 168.

<sup>128</sup> *Id.* at 175.

<sup>129</sup> *Id.* at 174.

<sup>130</sup> *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 894 (9th Cir. 2008) (quoting *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 345–46 n.8 (1987)).

or conspiracy<sup>7</sup> need not be shown for a state statute to be preempted by the Sherman Act.”<sup>131</sup>

In *TFWS*, the Fourth Circuit addressed the concern that the hybrid nature of post-and-hold regulations would “allow private business to set prices, mandate price-filing and price-holding, and allow industry players to facilitate detection of would-be price cutters.”<sup>132</sup> By granting private actors “the tools to engage in coordinated pricing,” the regulations are the definition of hybrid, rather than unilateral restraints.<sup>133</sup>

If a regulation is determined to be a hybrid, the state must meet two criteria to qualify for state-action immunity: (1) the state must clearly articulate and affirmatively express state policy, and (2) the state must actively supervise the regulation.<sup>134</sup> Total Wine claims that the regulations do not meet the active supervision element.<sup>135</sup> The complaint states that “[n]o agency or instrumentality of the state of Connecticut actively supervises the posting, matching, and coordination of bottle and case prices among manufacturers and wholesalers of alcoholic beverages.”<sup>136</sup> Connecticut argues in response that the regulations enable the state to enforce their stated goal of preventing price discrimination among retailers and detecting violations.<sup>137</sup> By forcing wholesalers to publicly post their prices, the state can monitor and ensure that large and small retailers receive the same pricing and that the DCP is able to detect violations.<sup>138</sup>

Although the Liquor Act procedurally allows the state to ensure that industry participants set and maintain prices, the prices themselves are determined by industry participants, not the state. The state is not ensuring that the prices are competitive or that there is competition among participants. The intervenors argue that out-of-circuit decisions are not controlling and should not be followed.<sup>139</sup> This would dismiss the decisions in *Costco* and *TFWS*, which held post-and-hold statutes to be hybrid restraints.<sup>140</sup> They argue that the proper precedent to follow is *Battipaglia*.<sup>141</sup> *Battipaglia* was decided almost thirty years ago and stands as a lone island in the face of the contrary circuit court cases, as well as *324 Liquor Corp.*

In granting the motion to dismiss, Judge Janet C. Hall determined that the three regulations at issue should be severed and analyzed individually,

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<sup>131</sup> *Id.*

<sup>132</sup> *TFWS, Inc. v. Franchot*, 572 F.3d 186, 193 n.16 (4th Cir. 2009).

<sup>133</sup> *Id.*

<sup>134</sup> *See, e.g., 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 343 (1987) (outlining the standards a state regulation must meet to be deemed immune from antitrust laws).

<sup>135</sup> Complaint, *supra* note 1, at 6.

<sup>136</sup> *Id.*

<sup>137</sup> Memorandum of Law in Support of Motion to Dismiss, *supra* note 5, at 6.

<sup>138</sup> *Id.*

<sup>139</sup> Intervenors’ Brief, *supra* note 9, at 10.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

rather than as a whole regulatory scheme.<sup>142</sup> In support of this decision, Judge Hall looked to federalist principles.<sup>143</sup> She stated that by separating the provisions, the court would “give ‘due regard’ for the policy judgment of the people of the state of Connecticut,” and strike down no more than is required.<sup>144</sup> Additionally, Judge Hall cited Sections one through three of the Connecticut General Statutes, which states: “If any provision of any act . . . is held invalid, such invalidity shall not affect other provisions or applications of such act.”<sup>145</sup> “[T]he invalidity of certain portions of state statutes should, as a general matter, not infect other portions of that statute.”<sup>146</sup> Based on these two supporting arguments, Judge Hall proceeded to evaluate each regulation separately.<sup>147</sup>

The Ninth Circuit addressed the severability issue in *Costco* when it faced the same question regarding nine challenged provisions to Washington’s regulatory scheme.<sup>148</sup> The Ninth Circuit also severed the regulations.<sup>149</sup> Total Wine’s case is arguably distinct in that there are only three regulations, and the three work together to achieve the state’s purposes. In analyzing severability, Judge Hall stated that “there can be little doubt that the three challenged sets of provisions function, at least to some extent, together to effectuate the legislature’s policy goals.”<sup>150</sup> The harm to competition comes from the wholesalers using the three regulations together in order to set a floor price below which no alcohol can be sold, and then holding that price to prevent any competition between wholesalers and retailers.

The second determination that Judge Hall made was to follow the 1984 holding in *Battipaglia*.<sup>151</sup> According to Judge Hall, *Battipaglia* stands for the proposition that post-and-hold provisions are horizontal restraints subject to rule of reason analysis rather than per se condemnation, stating “[w]hether or not this court would reach a different conclusion if it were writing on a blank slate is immaterial: *Battipaglia* constitutes binding precedent.”<sup>152</sup> The courts in *324 Liquor Corp.*, *Costco*, and *TFWS* reached different conclusions. In all three of these cases, which are more recent than

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<sup>142</sup> *Connecticut Fine Wine & Spirits v. Harris*, 255 F. Supp. 3d 355, 367 (D. Conn. 2017).

<sup>143</sup> *Id.* at 366.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 367; CONN. GEN. STAT. § 1–3 (West 2017).

<sup>146</sup> *Harris*, 255 F. Supp. 3d at 367.

<sup>147</sup> *Id.* at 367–80.

<sup>148</sup> *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 886 (9th Cir. 2008).

<sup>149</sup> *See id.* at 891–92, 896, 898–99, 900 (analyzing each provision separately to determine whether it should be considered unilateral or hybrid, and ultimately concluding that by severing the post-and-hold provision, the other provisions are unilateral restraints that are not in violation of the Sherman Act).

<sup>150</sup> *Harris*, 255 F. Supp. 3d at 366 (citing Intervenors’ Motion to Dismiss, *supra* note 9, at 8).

<sup>151</sup> *See id.* at 370–72 (citing *Battipaglia v. New York State Liquor Authority*, 745 F.2d 166, 168 (2d Cir. 1984) as good law to be followed).

<sup>152</sup> *Id.* at 372.

*Battipaglia*, post-and-hold provisions were deemed horizontal restraints in violation of the Sherman Act and not immune under state action immunity.<sup>153</sup> Judge Hall, finding the post-and-hold restraint to be hybrid, stated that “[t]he post and hold provisions at issue here are remarkably similar to the statutes that the Supreme Court concluded constituted a hybrid restraint in *324 Liquor*.”<sup>154</sup> However, when evaluating whether the post-and-hold provisions are per se violations, Judge Hall stated that “Connecticut’s post-and-hold provisions are in all material respects identical to those upheld by the Second Circuit in *Battipaglia*. They are therefore not preempted by the Sherman Act.”<sup>155</sup>

## V. STATE-INTEREST JUSTIFICATION

The final step in evaluating a state’s alcoholic-beverage-regulatory scheme is determining whether the state’s justification for the regulations supersedes the antitrust interest.<sup>156</sup> This step is a balancing test that weighs the federal interest in competitive markets against a state’s interest in regulating the sale and distribution of alcohol within its borders.<sup>157</sup> It is a “pragmatic effort to harmonize state and federal powers.”<sup>158</sup> The state interest must be closely related to the powers recognized by the Twenty-First Amendment, and the challenged liquor regulations must directly serve the specific state interest under the Amendment.<sup>159</sup>

In *324 Liquor Corp.*, the Court concluded that New York’s interests were insufficient to provide immunity from the Sherman Act.<sup>160</sup> New York argued that the restrictions protected small liquor retailers.<sup>161</sup> When New York made this argument, the record showed that the number of retail liquor shops in New York had declined.<sup>162</sup> The Court also looked to the holding in *Midcal*, which stated that “the State’s unsubstantiated interest in protecting small retailers ‘simply [is] not of the same stature as the goals of the Sherman Act.’”<sup>163</sup> New York argued that the regulations promoted the state interest of temperance.<sup>164</sup> The irony of a state interest in more small retail shops in

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<sup>153</sup> See *infra* Parts III.C.2–4.

<sup>154</sup> *Harris*, 255 F. Supp. 3d at 368.

<sup>155</sup> *Id.* at 371.

<sup>156</sup> *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 346–47 (1987).

<sup>157</sup> See *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 902 (9th Cir. 2008) (balancing Washington’s interests against the federal interest in promoting competition under the Sherman Act).

<sup>158</sup> *Id.* (internal quotations omitted).

<sup>159</sup> *Id.* (citations omitted).

<sup>160</sup> *324 Liquor Corp.*, 479 U.S. at 350–51.

<sup>161</sup> See *id.* at 348 (citation omitted) (explaining the previous holding from the New York Court of Appeals).

<sup>162</sup> *Id.* at 350.

<sup>163</sup> *Id.* (quoting *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 114 (1980)).

<sup>164</sup> *Id.* at 351.

order to promote temperance did not slip by the Court.<sup>165</sup> Although the Court left the determination of consumption to the power of the state, it ultimately concluded that the Twenty-First Amendment did not shield the state's regulations from an antitrust violation.<sup>166</sup>

In *Costco*, the Ninth Circuit affirmed the District Court's finding that the state's interest in temperance "[did] not outweigh the federal interest in promoting competition under the Sherman Act."<sup>167</sup> The court concluded that the Twenty-First Amendment did not shield Washington from antitrust laws.<sup>168</sup> The Fourth Circuit in *TFWS* similarly held that the antitrust interest outweighed the state interest in temperance.<sup>169</sup> In the Total Wine case, "neither the defendants nor the intervenors have suggested at this time that any of the challenged provisions might be saved by the Twenty-[F]irst Amendment."<sup>170</sup>

### CONCLUSION

The initial question that this Note sought to answer was: which interest wins when a state's alcoholic beverage regulatory scheme conflicts with antitrust laws—state interests or antitrust-law interests? The answer is, of course: it depends. The Sherman Act is broad and grants significant power to the federal government to defend antitrust principles and promote competition. So long as the competition as a whole is not harmed, businesses are free to set their own prices, innovate, and develop efficiencies as they see fit. With those same principles in mind, states have the authority to make laws and regulations as they deem appropriate. What a state cannot do is set up a regulatory scheme where private businesses act under the guise of the state and manipulate the market for their own private interests without any state supervision.

The Liquor Act accomplishes the latter effect. The post-and-hold law mandates the sharing of pricing which enables wholesalers to price compare and match their competitors' prices. Wholesalers can essentially eliminate any need whatsoever to compete on price. The post-and-hold law then requires wholesalers to maintain prices for an entire month. While vertical minimum resale price maintenance has come to be seen as having both pro- and anticompetitive effects, and is no longer considered a per se violation, there is something clearly anticompetitive about the post-and-hold regulatory scheme that has attracted much scrutiny and condemnation in the courts. Post-and-hold sets up a framework for collusion leading to market

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<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 352.

<sup>167</sup> *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 903 (9th Cir. 2008).

<sup>168</sup> *Id.*

<sup>169</sup> *TFWS, Inc. v. Franchot*, 572 F.3d 186, 197 (4th Cir. 2009).

<sup>170</sup> *Connecticut Fine Wine & Spirits v. Harris*, 255 F. Supp. 3d 355, 364 (D. Conn. 2017).

conditions which antitrust law seeks to condemn: higher prices and reduced incentive for competition, efficiencies, and innovation. It is virtually impossible to imagine a scenario where wholesalers would not take advantage of this framework in which collusion is not only legal—it is required. This price sharing and matching, if done outside of the Liquor Act framework, would constitute the most basic antitrust law violation of coordination and combination. Instead, Connecticut mandates collusion under the Liquor Act and claims that these laws stabilize the alcohol industry and protect small merchants. That may be true, but it is at the cost of competition. It is time for Connecticut to stop shielding the alcoholic-beverage industry from the antitrust principles that the federal government, the state of Connecticut, and consumers value: innovation, efficiency, and price competition.