Undermining the Law: How Uninformed Legislating Helps Big Beer Erode California's Tied-House Laws

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"All very big business, even though honestly conducted, is fraught with such potentiality of menace that there should be thoroughgoing governmental control over it, so that its efficiency in promoting prosperity at home and increasing the power of the nation in international commerce may be maintained, and at the same time fair play insured to the wage-workers, the small business competitors, the investors, and the general public."

-Theodore Roosevelt, August 6, 1912

I. INTRODUCTION

In the 2017–2018 legislative session, the California Legislature approved AB 2573, sending the bill to Governor Jerry Brown for his signature.[1] The bill proposed an exception to California's tied-house laws that would allow beer manufacturers to give retail licensees up to five free cases of glassware per brand each year.[2] On September 6, 2018, Governor Brown vetoed the bill and cited market fairness as the basis for his rejection.[3] He explained the bill would create "an economic disadvantage for small beer manufactures [sic] who might not be able to provide free glassware in the same manner as the larger manufacturers."[4] Governor Brown's explanation spoke to the bill's embattled history and echoed the legislative intent behind California's post-Prohibition beer laws.[5]

AB 2573 was a contentious bill that pitted large brewers, and their traditional market dominance, against craft brewers who are still carving out a place in the industry.[6] Anheuser-Busch InBev ("ABI") sponsored the bill, and MillerCoors Brewing Company ("MillerCoors") expressed conditional support so long as the bill only applied to glassware.[7] ABI and MillerCoors have ownership interests in at least sixty of the seventy-one "large breweries" in the United States and

1. Complete Bill History of AB 2573, https://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201720180AB2573 (last visited Oct. 24, 2018) (on file with *The University of the Pacific Law Review*).

2. AB 2573, 2018 Leg., 2017–2018 Sess. (Cal. 2018) (as passed on Aug. 21, 2018, but not enacted); Daniel Croxall, *Let's Make Sure We Are Talking About the Same Things: Tied-House Laws and the Three-Tier System*, CRAFT BEER LAW PROF (Feb. 6, 2017), https://www.craftbeerprofessor.com/2017/02/lets-make-sure-talking-things-tied-house-laws-three-tier-system (on file with *The University of the Pacific Law Review*) (defining a tied house as "any retail outlet that is beholden to a particular alcohol manufacturer for any reason").

3. Letter from Jerry Brown, Governor, Cal. State to Cal. State Assembly (Sept. 6, 2018) [hereinafter Brown Letter] (on file with *The University of the Pacific Law Review*).

4. *Id.*

5. *Compare id.* (discussing how the bill would give larger manufacturers a market advantage because it permitted a cost-prohibitive activity), *with* MARKETING LAWS SURVEY, STATE LIQUOR LEGISLATION 20 (1941) (explaining that legislators were concerned with the control that large manufacturers had over the industry before Prohibition), *and* CAL. BUS. & PROF. CODE § 25500(a)(2) (West 2018) (prohibiting manufacturers from giving "any money or other thing of value" to a retail licensee).

6. ASSEMBLY COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF AB 2573, at 4–5 (Apr. 18, 2018).

7. *Id.*

collectively produced almost sixty-six percent of all domestic beer in 2017.[8] Alcohol Justice, an industry watchdog,[9] and the California Craft Brewers Association ("CCBA"), a non-profit trade association, officially opposed the bill.[10]

Governor Brown's veto message stated three policy objectives with respect to the brewing industry.[11] First, he reaffirmed California's longstanding inducement ban by acknowledging the adverse impacts that gifts have on the market.[12] Second, he highlighted the market tension between large and craft brewers.[13] Finally, Governor Brown spoke to the original purpose and core theme of California's beer laws—market fairness.[14] Governor Brown's veto demonstrated the value that history can contribute to the legislative process.[15]

Large beer manufacturers' efforts to create market advantages over craft brewers are not unique to AB 2573.[16] Rather, AB 2573 is the most recent

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8. *United States Breweries*, BREWERS ASS'N, https://www.brewersassociation.org/directories/breweries/?type=large&term=United%20States&searchby=country (last visited Oct. 21, 2018) (on file with *The University of the Pacific Law Review*); *National Beer Sales & Production Data*, BREWERS ASS'N, https://www.brewersassociation.org/statistics/national-beer-sales-production-data/ (last visited Oct. 21, 2018) (on file with *The University of the Pacific Law Review*); *Number of Breweries and Brewpubs in U.S.*, BREWERS ASS'N, https://www.brewersassociation.org/statistics/number-of-breweries/ (last visited Mar. 20, 2019) (on file with *The University of the Pacific Law Review*); s*ee also Craft Beer Industry Market Segments*, BREWERS ASS'N, https://www.brewersassociation.org/statistics/national-beer-sales-production-data/ (last visited Jan. 2, 2019) (on file with *The University of the Pacific Law Review*) (defining a large brewery as one that produces over 6 million barrels of beer annually).

9. *Who We Are*, ALCOHOL JUST., https://alcoholjustice.org/about/who-we-are/ (last visited Oct. 20, 2018) (on file with *The University of the Pacific Law Review*).

10. ASSEMBLY COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF AB 2573, at 5 (Apr. 18, 2018); *About the CCBA*, CALIFORNIA CRAFT BEER ASS'N https://www.californiacraftbeer.com/about-the-ccba/about-ccba-2/ (last visited Oct. 21, 2018) (on file with *The University of the Pacific Law Review*).

11. Brown Letter, *supra* note 3.

12. *See id.* ("Allowing beer manufacturers to give items of value to on-sale retail licensees could unduly influence such retailers to purchase those manufacturers' products").

13. *See id.* ("this law creates an economic disadvantage for small beer manufactures [sic] who might not be able to provide free glassware in the same manner as the larger manufacturers").

14. ASSEMBLY COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF AB 2573, at 4 (Apr. 18, 2018). *Compare* Brown Letter, *supra* note 3 (postulating that the law creates a benefit only for large manufacturers), *with* 1935 Cal. Stat. ch. 330, § 54 at 1148 (prohibiting manufacturers from giving "any money or other thing of value" to retail licensees), *and* MARKETING LAWS SURVEY, *supra* note 5, at 20–22 (discussing how the prohibition of interests in retail outlets was designed to "prevent a recurrence of the evils that were prevalent . . . when large liquor interests controlled . . . the industry").

15. *Compare* Brown Letter, *supra* note 3 ("I also worry that this law creates an economic disadvantage for small beer manufactures [sic]"), *with* California Beer Wholesalers Ass'n. v. Alcoholic Beverage Control Appeals Bd., 5 Cal.3d 402, 407 (1971) ("state legislatures aimed to prevent two particular dangers: the ability and potentiality of large firms to dominate local markets").

16. *See* ASSEMBLY GOVERNMENTAL ORGANIZATION COMMITTEE, COMMITTEE ANALYSIS OF AB 2772, at 5 (Mar. 27, 1990) ("Allows Coors Beer to sponsor waterskiing exhibitions at Marine World theme park in Vallejo while still permitting the sale of Coors beer at Marine World."). *See also* Letter from Richard Floyd, Assembly Member, Cal. State Assembly to George Deukmejian, Governor, Cal. State (July 9, 1990) (on file with *The University of the Pacific Law Review*) (naming Anheuser-Busch as the specific manufacturer who would be performing the actions permitted by the bill).

example of a systemic problem with California's beer laws.[17] Legislating the beer industry in California is akin to David and Goliath, where "Big Beer" spends millions of dollars lobbying for laws that are favorable to large manufacturers.[18] Given their limited resources,[19] craft brewers rely on groups like the CCBA to show legislators why Big Beer-sponsored legislation is harmful to the brewing industry.[20] The revenue disparity between large and craft brewers is a major impediment to craft brewers' ability to keep up with the Big Beer lobby.[21]

In 2017, the brewing industry generated $111.4 billion nationally, and 6,266 craft brewers earned less than a quarter of the total retail sales value.[22] Meanwhile, Big Beer earned fifty-eight percent of the total retail sales in 2017.[23] In total, the seven companies that own all seventy-one large breweries in the United States earned $64.8 billion compared to the $26 billion split amongst 6,266 craft breweries.[24] Craft brewers earned an average of $4.1 million per brewery in 2017 compared to Big Beer earning an average of $900 million per company.[25] Big Beer's command over the market enables it to spend more money on annual lobbying activities than many craft breweries make in retail sales per year.[26]

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17. *See* AB 2573, 2018 Leg., 2017–2018 Sess. (Cal. 2018) (as passed on Aug. 21, 2018, but not enacted) (proposing to allow manufacturers to provide retail licensees with free glassware).

18. *See* Blair Anthony Robertson, *As Craft Beer Flourishes, Big Beer Continues to Buy in and Blur the Lines*, SACRAMENTO BEE (Dec. 12, 2016, 8:00 AM), https://www.sacbee.com/food-drink/beer/article118258943.html (on file with *The University of the Pacific Law Review*) (defining "Big Beer" as Anheuser-Busch InBev, MillerCoors, Constellation Brands, and Heineken); MARIN INSTITUTE, BIG BEER DUOPOLY 6 (2009), *available at* https://alcoholjustice.org/images/reports/big_beer_duopoly.pdf (on file with *The University of the Pacific Law Review*).

19. *Compare National Beer Sales & Production Data*, BREWERS ASS'N, *supra* note 8 (showing that craft brewers earned $26 billion in 2017), *with* E-mail from MacKenzie Staples, Educational Content Manager, Brewers Ass'n, to Thomas A. Gerhart, Staff Writer, The University of the Pacific Law Review (Nov. 20, 2018, 09:12 PST) [hereinafter Brewers Ass'n E-mail] (on file with *The University of the Pacific Law Review*) (explaining that large breweries earned $64.8 billion in retail sales value in 2017).

20. *About the CCBA*, CALIFORNIA CRAFT BEER ASS'N, *supra* note 10.

21. *See supra* note 19 (discussing the difference in retail sales value between large and craft brewers).

22. *National Beer Sales & Production Data*, BREWERS ASS'N, *supra* note 8; *Number of Breweries and Brewpubs in U.S.*, BREWERS ASS'N, *supra* note 8.

23. *National Beer Sales & Production Data*, BREWERS ASS'N, *supra* note 8; Brewers Ass'n E-mail, *supra* note 19.

24. Brewers Ass'n E-mail, *supra* note 19; *United States Breweries*, BREWERS ASS'N, *supra* note 8; *National Beer Sales & Production Data*, BREWERS ASS'N, *supra* note 8; *Number of Breweries and Brewpubs in U.S.*, BREWERS ASS'N, *supra* note 8.

25. Brewers Ass'n E-mail, *supra* note 19; *United States Breweries*, BREWERS ASS'N, *supra* note 8; *National Beer Sales & Production Data*, BREWERS ASS'N, https://www.brewersassociation.org/statistics/national-beer-sales-production-data/ (last visited Oct. 21, 2018) (on file with *The University of the Pacific Law Review*); *Number of Breweries and Brewpubs in U.S.*, BREWERS ASS'N, *supra* note 8.

26. *Compare* MARIN INSTITUTE, BIG BEER DUOPOLY, *supra* note 18, at 6 (observing that ABI and MillerCoors collectively spent over $5 million on lobbying in 2009), *with National Beer Sales & Production Data*, BREWERS ASS'N, *supra* note 8 (noting that the entire craft brewing industry earned $26 billion in 2017). *See also Number of Breweries and Brewpubs in U.S.*, BREWERS ASS'N, *supra* note 8 (observing that there were

In 1935, the California Legislature enacted its tied-house laws to prevent market dominance by powerful industry members.[27] The Legislature preserved the spirit of these laws when it codified them in 1953.[28] Since 1953, the Legislature has passed a multitude of exceptions to its tied-house laws targeting industry growth, but these exceptions are slowly eroding California's beer laws.[29] Like AB 2573, some of these exceptions are bad policies because they only benefit particular industry members—a practice the 1935 Legislature originally banned.[30] Today, California has numerous exceptions to its beer laws that contravene the spirit of the law and give Big Beer a government-approved advantage over craft brewers.[31] With Governor Brown termed out of office and a legislature complacent toward Big Beer's political agenda, California must find a way to preserve the spirit of its tied-house laws and protect its craft brewing industry.[32]

This Comment proposes a framework that the California Legislature should codify as a constitutional amendment to eliminate inequitable exceptions to its tied-house laws.[33] A constitutional amendment with retroactive applicability will ensure current and new beer laws in California maintain the spirit of the law while avoiding legislative entrenchment.[34] Part II provides the history of beer

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6,266 craft brewers in 2017).

27. *See* 1935 Cal. Stat. ch. 330, § 54(a) at 1148 (prohibiting manufacturers from owning "any interest in any 'on sale' license").

28. *Compare id.* § 54(a), at 1148 (banning manufacturers from having ownership interests in retail licensees), *with* 1953 Cal. Stat. ch. 152, § 25500(a) at 1017 (preserving the 1935 prohibition that manufacturers shall not "hold the ownership . . . in any on-sale license").

29. ALCOHOL JUST., TEARING DOWN CALIFORNIA'S ALCOHOL REGULATIONS 1 (2013), *available at* https://alcoholjustice.org/images/reports/tearing_down_jan_2013.pdf (on file with *The University of the Pacific Law Review*).

30. *See Curbing Favoritism in Government*, MERCATUS CTR. https://www.mercatus.org/publications/curbing-favoritism-government (last visited Oct. 21, 2018) (on file with *The University of the Pacific Law Review*) (noting that a government that grants privileges to businesses "misdirects resources, impedes genuine economic progress, breeds corruption, and undermines the legitimacy of both the government and the private sector"). *See also* MARKETING LAWS SURVEY, *supra* note 5, at 34 ("The fundamental principles . . . expressed in these statutes are apparently for the purpose of preventing monopolistic practices and undue stimulation of sales [resulting from inducements]").

31. *See* CAL. BUS. & PROF. CODE § 25503.12 (West 2018) (allowing retail licensees to purchase stock in manufacturers); CAL. BUS. & PROF. CODE § 25503.23 (West 2018) (permitting manufacturers to sponsor water ski shows hosted by retail licensees); CAL. BUS. & PROF. CODE § 25503.27 (West 2018) (allowing manufacturers to give sporting event tickets to retail licensees); CAL. BUS. & PROF. CODE § 25511 (West 2018) (approving manufacturers to give draught equipment to retailers after a natural disaster).

32. Melody Gutierrez, *Termed-out Gov. Brown Signs his Final California Budget*, S.F. CHRONICLE (June 27, 2018, 2:55 PM), https://www.sfchronicle.com/politics/article/Termed-out-Gov-Jerry-Brown-signs-his-last-13030976.php (on file with *The University of the Pacific Law Review*). *See* Brown Letter, *supra* note 3 (declining to enact a proposed law that would give a market advantage to large manufacturers).

33. *Infra* Part V.

34. John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CALIF. L. REV. 1773, 1776 (2003); *see also* Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1106 (1997) (observing that legislation can be retroactive to achieve regulatory goals that prospective laws cannot accomplish).

laws in California.[35] Part III investigates four existing exceptions that disregard the original purpose of California's tied-house laws.[36] Part IV discusses how the Legislature's current approach to regulating beer is adversely impacting the industry.[37] Part V proposes a legislative framework that will ensure current and new beer laws maintain the spirit of California's tied-house laws.[38]

II. REGULATING BEER IN CALIFORNIA

With the passage of the Twenty-First Amendment to the Constitution of the United States, the federal government left the task of regulating alcohol production and sales to the states.[39] In a 1941 study, the Works Progress Administration ("WPA") reported that states regulated alcohol either by monopoly control, licensing, or prohibition.[40] California, along with twenty-six other states, utilized a tiered licensing system to prevent large alcohol interests from controlling the market.[41] Tied-house laws protect markets from large-business influence by requiring the manufacturing, distribution, and retail tiers to operate as distinct members of the industry.[42]

This part of the Comment provides a history of California's beer laws from 1933 through 1953.[43] Section A presents the post-Prohibition beer laws that California adopted in 1933 and 1935.[44] Section B discusses California's codification of the California Statutes, a project that finished in 1953.[45]

A. Post-Prohibition Legislation in California

In anticipation of the federal government repealing Prohibition, California passed preliminary alcohol legislation titled the State Liquor Control Act.[46] Congress's ratification of the Twenty-First Amendment would have created a legislative void because it left the responsibility of regulating alcohol to the individual states.[47] Fortunately, California's State Liquor Control Act took effect

35. *Infra* Part II.
36. *Infra* Part III.
37. *Infra* Part IV.
38. *Infra* Part V.
39. U.S. CONST. amend. XXI, § 2.
40. MARKETING LAWS SURVEY, *supra* note 5, at 21.
41. *Id.* at 20, 22, 25.
42. Croxall, *supra* note 2.
43. *Infra* Sections II.A–B.
44. *Infra* Section II.A.
45. *Infra* Section II.B.
46. *See* 1933 Cal. Stat. ch. 658, § 39 at 1707 (becoming effective "If and when it shall become lawful under the Constitution and the laws of the United States to manufacture, sell, . . . intoxicating liquors").
47. U.S. CONST. amend. XXI, § 2.

with Congress's 1933 ratification of the Twenty-First Amendment.[48] After the repeal of Prohibition became official, the California Legislature began work on a comprehensive statutory scheme.[49] These laws took effect in 1935 and were known as the Alcoholic Beverage Control Act.[50]

By enacting the Alcoholic Beverage Control Act, California created tied-house laws that explicitly barred integration to prevent large manufacturers from dominating the market.[51] These laws forbade manufacturers and distributors from holding ownership interests in "any premises where alcoholic beverages are sold for consumption."[52] Further, the laws forbade inducements to prevent members of the manufacturing and distribution tiers from influencing the retail tier.[53] The Legislature prohibited manufacturers and distributors from giving "any money or other thing of value" to a person who owns or maintains a retail location.[54]

One of the ways California diverged from traditional three-tier systems is that it permits manufacturers to distribute their own products.[55] California created a quasi-two-tier system where manufacturers may self-distribute,[56] but California's goal remained the same: preserve market fairness by separating manufacturers and distributors from retail licensees.[57] Although this provision permits manufacturers to self-distribute, it does not eliminate the distribution tier altogether; rather, it provides manufacturers with the option to distribute their beer.[58] The provision allowing for self-distribution evolved over time, but it still exemplifies market fairness in an unbiased manner by giving all licensed manufacturers the ability to self-distribute.[59]

In its analysis of how the states responded to the repeal of Prohibition, the

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48. *Compare generally,* U.S. CONST. amend. XXI, (completing ratification on December 5, 1933), *with* 1933 Cal. Stat. ch. 658, § 39 at 1707 (receiving approval from the governor on June 3, 1933 with the indefinite effective date tied to the repeal of prohibition).

49. *Compare generally,* U.S. CONST. amend. XXI, (satisfying ratification requirements in December 1933), *with* 1935 Cal. Stat. ch. 330, § 1 at 1123 (enacting the Alcoholic Beverage Control Act within two years of the ratification of the Twenty-First Amendment).

50. *See* 1935 Cal. Stat. ch. 330, § 1 at 1123 (enacting the Alcoholic Beverage Control Act upon approval by the governor on June 13, 1935).

51. *Id.* § 54(a)–(b), at 1148; MARKETING LAWS SURVEY, *supra* note 5, at 25.

52. 1935 Cal. Stat. ch. 330, § 54(d)–(e) at 1148.

53. *Id.* § 54(b), at 1148.

54. *Id.*

55. *Id.* § 6(a), at 1127.

56. *Id.* § 6(a), at 1127.

57. MARKETING LAWS SURVEY, *supra* note 5, at 20.

58. CAL. BUS. & PROF. CODE § 23357 (West 2018).

59. *Compare* 1935 Cal. Stat. ch. 330, § 6 at 1127 ("Any manufacturer's license authorizes the . . . manufacturer of the alcoholic beverage specified in the license, to . . . sell such alcoholic beverage to persons holding [retail] licenses"), *with* 1953 Cal. Stat. ch. 152, § 23357 at 965 ("Licensed beer manufacturers may also sell beer to any person holding a license authorizing the sale of beer"), *and* CAL. BUS. & PROF. CODE § 23357(a) ("Licensed beer manufacturers may . . . sell [their] beer to any person holding a license authorizing the sale of beer").

WPA released a survey titled "State Liquor Legislation."[60] This federally-sponsored publication examined the different states' approaches to regulating alcohol and discussed the benefits that a three-tier system would have on the alcohol industry.[61] The WPA concluded that state legislatures implemented tied-house laws "to prevent a recurrence of the evils that were prevalent before prohibition when the large liquor interests controlled [the industry] through vertical and horizontal integration."[62] Further, the WPA explained that legislatures sought to protect their alcohol markets by prohibiting both integration and "commercial bribery."[63]

B. The Transition to the Business and Professions Code

The California Legislature created the Business and Professions Code two years after it enacted the Alcoholic Beverage Control Act.[64] Between 1930 and 1953, the California Code Commission completed a comprehensive statutory cleanup that had been in the works since the California Legislature's first meeting in 1849.[65] The commission identified twenty-five statutory groupings and separated the California Statutes—an amalgamation containing all of California's laws—into these distinct categories.[66] As a result, the commission codified California's beer laws within the newly created Business and Professions Code.[67] Although the California Code Commission relocated the state's beer laws, the laws remained substantively the same.[68] The commission's objective was to restate the law, not create new enactments; thus, the spirit of the law remained unaltered.[69]

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60. *See generally* MARKETING LAWS SURVEY, *supra* note 5 (analyzing the different types of alcohol statutes across the nation).

61. *See id.* at 20–22 (examining how restricting vertical and horizontal integration prevent large interests from controlling the market).

62. *Id.* at 20.

63. *Id. at* 20–21.

64. *Compare generally*, CAL. BUS. & PROF. CODE § 1 (West 2018). (establishing the Business and Professions Code in the 1937 statutes), *with* 1935 Cal. Stat. ch. 330 at 1123 (enacting the original Alcoholic Beverage Control Act on June 13, 1935).

65. Ralph N. Kleps, *The Revision and Codification of California Statutes 1849-1953*, 42 CALIF. L. REV. 766, 766, 792 (1954).

66. *Id.* at 793.

67. *Compare generally* U.S. CONST. amend. XXI, (repealing the Eighteenth Amendment on December 5, 1933), *with* 1953 Cal. Stat. ch. 152 (taking effect on September 9, 1953), *and* Kleps, *supra* note 65, at 793 ("the Commission had settled upon twenty-five subjects which were to be incorporated into the new code system[and] was finally carried out by 1953").

68. *Compare* 1935 Cal. Stat. ch. 330, § 54(a)–(b) at 1148 ("No manufacturer . . . shall (a) Hold the ownership . . . interest in any 'on-sale' license [or] give . . . any . . . thing of value [to a retail licensee]"), *with* CAL. BUS. & PROF. CODE § 25500(a)(2) ("No manufacturer . . . shall hold the ownership . . . interest in any on-sale license [or] give . . . any . . . thing of value [to a retail licensee]").

69. *See* CAL. BUS. & PROF. CODE § 2 (West 2018) ("The provisions of this code in so far as they are substantially the same as existing statutory provisions relating to the same subject matter shall be construed as

There have not been any major overhauls to California's beer laws since their codification in 1953.[70] In the years after the transition, California revised and modernized its beer laws through new additions to the code.[71] One way the Legislature continues to expand its beer laws is by creating exceptions that allow brewers to engage in activities that the code previously prohibited.[72] When the Legislature allows activities that the law previously prohibited, it may be disregarding the spirit of the law and creating inequitable exceptions.[73]

III. EXCEPTIONS TO CALIFORNIA'S TIED-HOUSE LAWS

California's beer laws are permissive statutes, meaning licensees may not perform an act unless the statutes explicitly permit it.[74] Manufacturers responded to this strict statutory system by lobbying the Legislature to permit more activities.[75] As a result, California's beer laws evolved a great deal between 1953 and today; however, two core principles remain constant.[76] First, the laws continue to prohibit manufacturers and distributors from giving inducements to

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restatements and continuations thereof, and not as new enactments").

70. *See generally* CAL. BUS. & PROF. CODE §§ 25500–25512 (West 2018) (noting that California codified its Tied-House Restrictions in 1953).

71. *See generally id.* (listing nineteen statutes that were added to California's Tied-House Restrictions after 1953).

72. *See generally id.* (implementing multiple statutes utilize the phrase "notwithstanding any other provision of this chapter" to permit activities that were formerly prohibited).

73. *Compare* CAL. BUS. & PROF. CODE § 25511 (creating an exception that permits manufacturers to give tap equipment to a retail licensee), *with* CAL. BUS. & PROF. CODE § 25500(a)(2) (prohibiting manufacturers from giving any "thing of value [to a retail licensee]").

74. *Compare* CAL. BUS. & PROF. CODE § 23300 (West 2018) ("No person shall . . . perform any act . . . unless the person is authorized to do so by a license issued pursuant to this division"), *with* CAL. BUS. & PROF. CODE § 25503 (West 2018) ("No manufacturer, . . . bottler, importer, or wholesaler, or any officer, director, or agent of any such person, shall do any of the following"), *and* CAL. BUS. & PROF. CODE § 25503.5 (West 2018) ("A winegrower, beer manufacturer, or . . . wholesaler may, without charge, . . . conduct courses of instruction for licensees and their employees, on the subject of wine or beer"); Daniel Croxall, *Are "Beers for a Cause" an Illegal Inducement?*, CRAFT BEER LAW PROF (Oct. 10, 2018), https://www.craftbeerprofessor.com/2018/10/beers-cause-illegal-inducement (on file with *The University of the Pacific Law Review*).

75. *See* CAL. BUS. & PROF. CODE § 25511 (creating an exception that allows manufacturers to purchase new tap equipment for retailer after a government-declared state of emergency); SENATE GOVERNMENTAL ORGANIZATION COMMITTEE, COMMITTEE ANALYSIS OF AB 3175, at 2 (June 26, 1990) (documenting support for the bill from MillerCoors and ABI); CAL. BUS. & PROF. CODE § 25503.23 (allowing licensees to sponsor annual water ski shows); ASSEMBLY COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF AB 2772, at 1 (Mar. 28, 1990) ("The purpose of this bill is to allow Coors Beer to sponsor waterskiing exhibitions at the[] Marine World Park").

76. *Compare* 1935 Cal. Stat. ch. 330, § 6(a) at 1127 ("Any manufacturer's license authorizes the person . . . sell . . . alcoholic beverages to persons holding licenses issued by the board authorizing the sale of such alcoholic beverage[s]"), *and* 1935 Cal. Stat. ch. 330, § 54 at 1148 ("No manufacturer . . . shall hold the ownership . . . interest in any 'on-sale' license [or] give . . . any . . . thing of value [to a retail licensee]"), *with* CAL. BUS. & PROF. CODE § 23357 ("Licensed beer manufacturers may also . . . . Sell [his or her] beer to any person holding a license authorizing the sale of beer"), *and* CAL. BUS. & PROF. CODE § 25500(a)(2) ("No manufacturer . . . shall hold the ownership . . . interest in any on-sale license [or] give . . . any . . . thing of value [to a retail licensee]").

retail licensees.[77] Second, California's tied-house laws still prohibit vertical and horizontal integration with an exception for manufacturers who opt to distribute their own beer.[78]

California has remained mostly true to the two principles at the heart of its beer laws, despite legislators creating exceptions that contradict the spirit of the law.[79] Some legislative exceptions echo the spirit of the law by impacting all brewers equally;[80] however, other exceptions only benefit large manufacturers.[81] This Comment presents four exceptions to California's tied-house laws, enacted between 1971 and 1990, that illustrate the negative impact of the state's digression from the purpose of its beer laws.[82]

Section A discusses an exception that circumvents the three-tier system by allowing retail licensees to hold stock in brewing companies.[83] Section B explains the Marine World exception, which allows brewers to sponsor events hosted by retail licensees under very specific circumstances.[84] Section C explores the earthquake exception, which allows brewers to provide new tap equipment to retail licensees in the event of a natural disaster.[85] Section D examines an exception that directly contradicts the inducement ban by allowing manufacturers to give retail licensees food, beverages, and transportation to business meetings, as well as tickets to sporting events.[86]

A. The Stock Market Exception

Since their enactment in 1935, California's tied-house laws have prohibited manufacturers and retailers from holding ownership interests in one another.[87] California enacted an exception in 1971, allowing retail licensees to purchase

77. CAL. BUS. & PROF. CODE § 25500(a)(2).

78. CAL. BUS. & PROF. CODE § 23357(a)(1) (West 2018); CAL. BUS. & PROF. CODE § 25500(a)(1) (West 2018).

79. *Compare* CAL. BUS. & PROF. CODE § 23357(a)(1) (allowing all brewers to sell their beer directly to retail licensees), *with* CAL. BUS. & PROF. CODE § 25503.12 (allowing retail licensees to purchase a diminutive amount of stock in a manufacturer).

80. *E.g.*, CAL. BUS. & PROF. CODE § 25502.2(a) (West 2018) (permitting licensees to appear at promotional events to sign autographs). *See also* CAL. BUS. & PROF. CODE § 25503.55 (West 2018) (allowing brewers to conduct courses for consumers about beer manufacturing).

81. *Compare* CAL. BUS. & PROF. CODE § 25503.12 (allowing retail licensees to purchase stock in manufacturers), *with infra* text accompanying notes 96–97 (noting that there are only two publicly traded, non-large breweries; one is the second largest craft brewery in the United States and the other is a regional Canadian brewery).

82. *Infra* Sections III.A–D.

83. *Infra* Section III.A.

84. *Infra* Section III.B.

85. *Infra* Section III.C.

86. *Infra* Section III.D.

87. 1935 Cal. Stat. ch. 330, § 54(a) at 1148.; CAL. BUS. & PROF. CODE § 25500(a)(1).

"diminutive" shares of stock in licensed manufacturers.[88] The only additional requirement is that the stock is a part of the New York Stock Exchange, American Stock Exchange, or NASDAQ.[89]

In a letter to then-Governor Ronald Reagan, Assembly Member Robert Badham explained that his proposed exception would resolve problems arising from large manufacturer's diversified investments.[90] The legislator explained there were "instances where one level of an industry held limited amounts of corporate stock in other levels . . . without intention to violate [the] law."[91] Badham believed that, by creating an exception to resolve large manufacturers' non-compliance, he was creating "a more realistic 'tied house' law under current conditions."[92]

In reality, many breweries are not public companies, and the majority of breweries on the stock market are large breweries.[93] Of the eight publicly traded beer companies, five of the stocks belong to large companies such as ABI and MillerCoors.[94] Another stock is the Craft Brew Alliance, a company that ABI owns and markets as a craft brewery.[95] Only two of the stocks do not belong to large brewers,[96] one of which is a Canadian regional brewery, and the other is the second-largest craft brewery in the United States.[97]

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88. CAL. BUS. & PROF. CODE § 25503.12.

89. *Id.*

90. Letter from Robert E. Badham, Assembly Member, Cal. State Assembly to Ronald Reagan, Governor, Cal. State (July 1, 1971) [hereinafter Badham Letter] (on file with *The University of the Pacific Law Review*).

91. *Id.*

92. *Id.*

93. *Compare United States Breweries*, BREWERS ASS'N, https://www.brewersassociation.org/directories/breweries/?type=craft&term=United%20States&searchby=country (last visited Oct. 28, 2018) (on file with *The University of the Pacific Law Review*) (identifying 6,959 craft breweries in the United States as of October 28, 2018), *and United States Breweries*, BREWERS ASS'N, *supra* note 8 (listing seven parent companies owning the seventy-nine large breweries in the United States as of October 21, 2018), *with Beer Stocks*, MOTLEY FOOL http://caps.fool.com/tag/beer.aspx?source=itxsittst0000001 (last visited Oct. 28, 2018) (on file with *The University of the Pacific Law Review*) (identifying eight publicly traded stocks tied to breweries or beer companies).

94. *Compare United States Breweries*, BREWERS ASS'N, *supra* note 8 (listing sixty-six large breweries in the United States that are owned by ABI or MillerCoors), *with Beer Stocks*, MOTLEY FOOL, *supra* note 93 (presenting information on eight beer stocks, including large brewers such as the Companhia de Bebidas das Americas [ABI], Diageo, ABI, MillerCoors, and Foster's).

95. Jeremy Bowman, *How to Invest in Craft Beer*, MOTLEY FOOL (June 11, 2018, 9:31 PM), https://www.fool.com/investing/2018/06/11/how-to-invest-in-craft-beer.aspx (on file with *The University of the Pacific Law Review*).

96. *Compare Beer Stocks*, MOTLEY FOOL, *supra* note 93 (including Boston Beer Company and Big Rock Brewery on its list of publicly traded beer companies), *with United States Breweries*, BREWERS ASS'N, *supra* note 93 (identifying the Boston Beer Company as the only United States craft brewer from The Motley Fool's list of publicly traded breweries), *and Breweries*, BREWERS ASS'N, https://www.brewersassociation.org/directories/breweries/ (last visited Mar. 20, 2019) (on file with *The University of the Pacific Law Review*) (identifying the Big Rock Brewery, Ltd. as a regional brewery from Canada). *See also Craft Beer Industry Market Segments*, BREWERS ASS'N, *supra* note 8 (defining a regional brewery as one that satisfies the craft brewery production requirements).

97. *BREWERS ASSOCIATION RELEASES 2017 TOP 50 BREWING COMPANIES BY SALES*

This statute appears innocuous at first glance, but upon close examination it creates a benefit that only larger breweries can utilize.[98] Its legislative history provides evidence that the Legislature created this statute to help large manufacturers comply with California's tied-house laws by changing the laws—effectively endorsing some integration between retail licensees and large manufacturers.[99] In the end, almost all large brewing companies benefit from this exception, while only two of over six-thousand craft brewers are public companies.[100]

B. The Marine World Exception

In its 1941 analysis of inducements, the WPA equated inducements to commercial bribery and cited the Federal Trade Commission as the source of its definition.[101] The WPA noted that commercial bribery involved secretly paying money to a vendor to influence its purchasing habits.[102] California took a more rigid approach and did not include secrecy as part of its inducement ban.[103] Three provisions within California's tied-house laws prohibit brewers from giving "any money or other thing of value" to businesses that sell alcoholic beverages for on-site consumption.[104] In 1990, this provision created an issue for Marine World and MillerCoors regarding the brewer's sponsorship of an annual water ski event.[105]

VOLUME, BREWERS ASS'N, https://www.brewersassociation.org/press-releases/brewers-association-releases-2017-top-50-brewing-companies-by-sales-volume/ (last visited Oct. 28, 2018) (on file with *The University of the Pacific Law Review*); *Big Rock Brewery History*, BIG ROCK BREWERY https://bigrockbeer.com/brewery-history/ (last visited Oct. 28, 2018) (on file with *The University of the Pacific Law Review*).

98. *See* MARKETING LAWS SURVEY, *supra* note 5, at 22 (noting an essential aspect of the three-tier system is to prevent corporate control, or stock ownership, between manufacturers/wholesalers and retail licensees). *Compare Beer Stocks*, MOTLEY FOOL, *supra* note 93 (listing six large breweries and two craft breweries that are publicly traded), *with United States Breweries*, BREWERS ASS'N, *supra* note 8 (listing seven parent companies that own every large brewery in the United States);), *and United States Breweries*, BREWERS ASS'N, *supra* note 93 (identifying 6,959 craft breweries that sell beer in the United States as of October 21, 2018).

99. Badham Letter, *supra* note 90.

100. *See supra* text accompanying notes 94–96 (observing that there are eight breweries on the stock market and that six of them are owned by Big Beer).

101. MARKETING LAWS SURVEY, *supra* note 5, at 36.

102. *Id.*

103. *See* CAL. BUS. & PROF. CODE § 25500(a)(2) (barring manufacturers from giving "any money or other thing of value" to a business holding an on-sale liquor license), CAL. BUS. & PROF. CODE § 25502(a)(2) (West 2018) (prohibiting manufacturers from giving "any money or other thing of value" to a business holding an off-sale liquor license), CAL. BUS. & PROF. CODE § 25600 (West 2018) (forbidding licensees from giving "any premium, gift, or free goods in connection with the sale or distribution of any alcoholic beverage").

104. CAL. BUS. & PROF. CODE § 25500(a)(2).

105. *See* Letter from Thomas M. Hannigan, Assembly Member, Cal. State Assembly to George Deukmejian, Governor, Cal. State (May 25, 1990) [hereinafter Hannigan Letter] (on file with *The University of the Pacific Law Review*) (explaining that MillerCoors and Marine World had unknowingly violated the law for sixteen years and now—urgently—wanted to legalize their actions).

Marine World—a theme park that opened in Redwood City, California in 1968—aspired to be the equivalent to Disneyland for marine life.[106] The park's offerings included various animal exhibitions, water ski shows, boat rides, and other aquatic events.[107] In the mid-1970s, Marine World—aided by a sponsorship from MillerCoors—began hosting the annual Coors International Water Ski Jumping Championships.[108]

In 1990, Marine World and MillerCoors realized they had been violating California's tied-house laws for sixteen years.[109] Marine World asked its local Assembly Member, Thomas Hannigan, to create an exception within California's tied-house laws that would allow MillerCoors to legally sponsor the event that June.[110] Hannigan proposed the bill in early 1990 and, as justification, explained the "current law prevents Coors from sponsoring [the event] since Marine World sells Coors beer."[111] Ultimately, the Legislature classified the bill as an "urgency statute necessary for the immediate preservation of the public peace, health, or safety," approved it, and sent it to the governor.[112] The final version of the law is extremely narrow, permitting brewers to purchase advertising space from retail licensees who own stadiums with more than 3,000 seats for annual water ski shows.[113]

From the beginning, Hannigan marketed this exception as a bill to legalize the business dealings between Marine World and MillerCoors.[114] To support the bill, he argued current law prohibited MillerCoors's sponsorship because Marine World sells MillerCoors's beer.[115] One committee's analysis observed the purpose of the bill was to allow MillerCoors to sponsor the Marine World events "while still permitting the sales of Coors beer at the park."[116]

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106. Redwood City History, *Marine World: A Splashy Part of Redwood City's Past*, (Mar. 15, 2017), http://www.redwoodcityhistory.org/blog/2017/3/10/zm6utap2wmxcyjo4b15w4yorx8utsn (on file with *The University of the Pacific Law Review*).

107. *Id.*

108. *See* Hannigan Letter, *supra* note 105 (admitting that MillerCoors had illegally sponsored Marine World's water ski show for sixteen years); *Grimditch Moves Up in Water Ski Jump*, S.F. EXAMINER, June 10, 1978, at 34 (on file with *The University of the Pacific Law Review*).

109. Hannigan Letter, *supra* note 105.

110. *Id.*; Andrew Sheeler, *He 'kept the Democratic cats herded:' Former California legislator Tom Hannigan dies*, SACRAMENTO BEE (Oct. 11, 2018, 3:16 PM), https://www.sacbee.com/news/politics-government/capitol-alert/article219868020.html (on file with *The University of the Pacific Law Review*).

111. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 2772, at 2 (May 15, 1990); CAL. LEG., ASSEMBLY FINAL HISTORY 1824 (1990) *available at* https://clerk.assembly.ca.gov/sites/clerk.assembly.ca.gov/files/archive/FinalHistory/1989/volumes/8990vol1_2ahr.PDF/ (on file with *The University of the Pacific Law Review*).

112. 1990 Cal. Stat. ch. 124, § 2 at 1095 (enacting CAL. BUS. & PROF. CODE § 25503.23 as an urgency statute).

113. CAL. BUS. & PROF. CODE § 25503.23.

114. *See* ASSEMBLY COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF AB 2772, at 1 (Mar. 28, 1990) ("The purpose of this bill is to allow [MillerCoors] to sponsor waterskiing exhibitions at thee [sic] Marine World Park").

115. SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 2772, at 2 (May 15, 1990).

116. ASSEMBLY COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF AB 2772,

Considering the statute applies to all brewers, this exception may seem fair, but even a shallow investigation reveals that it contradicts the purpose of California's beer laws.[117] The Marine World exception achieved two things: it legitimized sixteen years of illegal business practices, and it granted MillerCoors a monopoly over Marine World's water ski show.[118] The exception is so narrow that it only benefits the two businesses that registered support for it: Marine World and MillerCoors.[119] In essence, MillerCoors received government approval to turn Marine World's outdoor stadium into a tied house for a few days each year.[120]

The argument in support of the exception provides no logical basis to justify the bill, and it failed to explain how the bill would impact California's tied-house laws.[121] The law violates a major tenet of the three-tier system by allowing MillerCoors to sponsor Marine World's water ski show because Marine World sells alcoholic beverages.[122] Additionally, the law contravenes the spirit of California's beer laws because it created a cost-prohibitive exception that is advantageous for larger brewers.[123] This exception serves no purpose other than to benefit Marine World and MillerCoors; therefore, the exception digresses from

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at 1 (Mar. 28, 1990).

117. *Compare* CAL. BUS. & PROF. CODE § 25503.23 (granting manufacturers the ability to sponsor water ski shows hosted by retail licensees), *with* CAL. BUS. & PROF. CODE § 25500(a)(2) (prohibiting manufacturers from giving any "thing of value" to a retail licensee).

118. *Compare* Hannigan Letter, *supra* note 105 ("For the past 16 years Marine World held a water ski show sponsored by [MillerCoors]. It was recently brought to Marine World's attention that they were not in compliance with the tied-house law"), *and* ASSEMBLY COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF AB 2772, at 1 (Mar. 28, 1990) ("The purpose of this bill is to allow [MillerCoors] to sponsor waterskiing exhibitions at thee [sic] Marine World Park"), *with* CAL. BUS. & PROF. CODE § 25503.23 (allowing manufacturers to purchase advertising space from a retail licensee that owns a stadium with a minimum of 3,000 seats during "an annual water ski show").

119. ASSEMBLY COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF AB 2772, at 1 (Mar. 27, 1990).

120. *Compare* ASSEMBLY COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF AB 2772, at 1 (Mar. 28, 1990) ("The purpose of this bill is to allow [MillerCoors] to sponsor waterskiing exhibitions at thee [sic] Marine World Park"), *with* CAL. BUS. & PROF. CODE § 25503.23 (creating an exception that allows manufacturers to sponsor annual water ski shows from a retail licensee that owns a stadium with more than 3,000 seats).

121. *See* SENATE RULES COMMITTEE, COMMITTEE ANALYSIS OF AB 2772, at 2 (May 15, 1990) ("According to the author's office Coors would like to sponsor a water ski show at Marine World, however, current law prevents Coors from sponsoring since Marine World sells Coors beer.").

122. *Compare* ASSEMBLY COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF AB 2772, at 1 (Mar. 28, 1990) ("The purpose of this bill is to allow [MillerCoors] to sponsor waterskiing exhibitions at thee [sic] Marine World Park"), *with* MARKETING LAWS SURVEY, *supra* note 5, at 36 (defining commercial bribery as the giving of gifts to vendors intending to induce the vendor to do business with the manufacturer).

123. *See* Paul Hartley, *Measuring the Value of Sponsorships*, MARKET STRATEGIES INT'L (Mar. 24, 2015), https://www.marketstrategies.com/blog/2015/03/measuring-the-value-of-sponsorships/ (on file with *The University of the Pacific Law Review*) (noting that ABI had an annual sponsorship budget of $260 million and MillerCoors' budget is $120 million in 2013, while more than 100 other companies budgeted over $15 million for sponsorships).

the fairness and equitability that California sought to create in its tied-house laws.[124]

C. The Earthquake Exception

In 1964, a 9.2 magnitude earthquake struck Anchorage, Alaska, causing a tsunami that surged down the coast and headed directly toward Crescent City, California.[125] The tsunami killed four people in Oregon and caused catastrophic damage when its main waves eventually made landfall.[126] The waves that struck Crescent City peaked at nearly twenty-one feet, obliterated twenty-nine city blocks, damaged or destroyed over 100 businesses, and caused $15 million in damages.[127] Less than two months later, the Legislature created a narrow exception to its tied-house laws, allowing manufacturers to replace alcohol inventories damaged by the March 1964 tsunami.[128]

In October 1989, disaster struck again when a 6.9 magnitude earthquake devastated California's coast from Santa Cruz to the San Francisco Bay.[129] The earthquake's epicenter was in the Santa Cruz Mountains, and people felt the quake as far away as San Diego, California and western Nevada.[130] The twenty-second quake caused an estimated $6.8 billion in damages to homes, businesses, and local infrastructure.[131] In total, the Loma Prieta Earthquake devastated thousands of homes, damaged 2,575 businesses, and destroyed another 147 businesses.[132] Within two weeks, the California Grocers Association ("CGA") circulated a letter—which the Legislature eventually received—

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124. *Compare* ASSEMBLY COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF AB 2772, at 1 (Mar. 28, 1990) ("The purpose of this bill is to allow [MillerCoors] to sponsor waterskiing exhibitions at thee [sic] Marine World Park"), *and United States Breweries*, BREWERS ASS'N, *supra* note 8 (classifying MillerCoors as a large brewery), *with* MARKETING LAWS SURVEY, *supra* note 5, at 20–22 (implementing tied-house laws to prevent large manufacturers from controlling the brewing industry).

125. Richard Gonzales, *California Town Still Scarred By 1964 Tsunami*, NPR (Nov. 17, 2005, 12:00 AM), https://www.npr.org/2005/11/17/5007860/california-town-still-scarred-by-1964-tsunami (on file with *The University of the Pacific Law Review*); *Crescent City Tsunami Tour Home Page*, CITY OF CRESCENT CITY http://crescentcity.org/tsunamitour/index.html (last visited Dec. 24, 2018) (on file with *The University of the Pacific Law Review*).

126. Richard Gonzales, *Tsunami Legacy Lives with People of Crescent City*, NPR (Nov. 18, 2005, 12:00 AM), https://www.npr.org/templates/story/story.php?storyId=5007869 (on file with *The University of the Pacific Law Review*); *Crescent City Tsunami Tour Home Page*, CITY OF CRESCENT CITY, *supra* note 125.

127. Gonzales, *supra* note 126; *Crescent City Tsunami Tour Home Page*, CITY OF CRESCENT CITY, *supra* note 125; Amy Graff, *The day in 1964 when a tsunami ravaged Crescent City*, S.F. CHRONICLE (last updated Jan. 23, 2018, 3:19 PM), https://www.sfchronicle.com/news/article/Crescent-City-tsunami-1964-Alaska-earthquake-12517983.php (on file with *The University of the Pacific Law Review*).

128. 1964 Cal. Stat. ch. 86, § 1 at 275 (enacting CAL. BUS. & PROF. CODE § 25511).

129. *Loma Prieta Earthquake - 20th Anniversary (1989-2009)*, CAL. DEP'T OF CONSERVATION https://www.conservation.ca.gov/cgs/Pages/Earthquakes/loma_prieta.aspx (last visited Dec. 25, 2018) (on file with *The University of the Pacific Law Review*).

130. *Id.*

131. *Id.*

132. *Id.*

discussing its desire for legislation that would allow manufacturers to replace damaged alcohol inventories.[133]

Two months later, the Legislature set out to repeal the statute specific to the 1964 Crescent City disaster and replace it with something much broader.[134] Assembly Member Dick Floyd introduced AB 3175 on February 26, 1990, intending to repeal the 1964 tsunami statute, eliminate disaster-specific legislation, and suspend the inducement ban following a governor-declared disaster.[135] In a committee hearing on March 28, 1990, a legislator explained that the bill would allow ABI to provide canned water to stricken areas and that current law forbids retail licensees from "accepting a single can."[136] The legislator did not address that the bill reached beyond both canned water and the 1964 statute to include equipment, fixtures, and supplies.[137] The legislator's misrepresentation appeared in other legislative sessions and accompanied the bill through the Assembly.[138] The bill left the Assembly in May and eventually enacted provisions that allow manufacturers to provide retail licensees with tap equipment, refrigeration units, and other non-alcohol supplies.[139]

There are vast differences between the 1964 tsunami statute, the CGA's request, and the law that the Legislature enacted.[140] Essentially, the CGA hoped

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133. *Compare id.* (noting that the earthquake occurred on October 17, 1989), *with* Letter from Don Beaver, President, Cal. Grocers Assoc. to Members, Cal. Grocers Assoc. (Oct. 27, 1989) [hereinafter CGA Letter] (on file with *The University of the Pacific Law Review*) (sending a letter to its members on October 27, 1989, which became part the legislature's files on AB 3175, proposing legislation allowing manufacturers to replace damaged alcohol).

134. *Hearing on AB 3175 Before the Assemb. Comm. on Governmental Org.*, 1990 Leg., 1989–1990 Sess. (Cal. 1990) (on file with *The University of the Pacific Law Review*).

135. *Id.*

136. *Statement on AB 3175 (Disaster/Tied House) before the Assemb. Comm. on Governmental Org.*, 1990 Leg., 1989–1990 1 (Cal. 1990) (statement by an unidentified legislator on March 28, 1990) (on file with *The University of the Pacific Law Review*).

137. *Compare* 1964 Cal. Stat. ch. 86, § 1 at 275 (enacting CAL. BUS. & PROF. CODE § 25511, which allowed manufacturers to replace alcohol inventories damaged by the 1964 tsunami), *and Statement on AB 3175 (Disaster/Tied House) before the Assemb. Comm. on Governmental Org.*, 1990 Leg., 1989–1990 1 (Cal. 1990) (statement by an unidentified legislator on March 28, 1990) (on file with *The University of the Pacific Law Review*) (insinuating that the bill would allow manufacturers to provide canned water and generators), *with* CAL. BUS. & PROF. CODE § 25511 (allowing manufacturers to replace tap equipment and supplies but not alcohol).

138. *Statement on AB 3175 (Disaster/Tied House) before the Assemb. Comm. on Governmental Org.*, 1990 Leg., 1989–1990 1 (Cal. 1990) (statement by an unidentified legislator on March 28, 1990) (on file with *The University of the Pacific Law Review*); *Statement on AB 3175 (Disaster/Tied House) before the Assemb. Comm. on Governmental Org.*, 1990 Leg., 1989–1990 1 (Cal. 1990) (statement by an unidentified legislator on April 16, 1990) (on file with *The University of the Pacific Law Review*); *Statement on AB 3175 (Disaster/Tied House) before the Assemb. Comm. on Governmental Org.*, 1990 Leg., 1989–1990 1 (Cal. 1990) (statement by an unidentified legislator on April 30, 1990) (on file with *The University of the Pacific Law Review*).

139. CAL. BUS. & PROF. CODE § 25511; CAL. LEG., CONCURRENCE IN SENATE AMENDMENTS AB 3175 (FLOYD) - AS AMENDED: JULY 7, 1990, 1989–1990 Sess., at 1 (1990).

140. *Compare* 1964 Cal. Stat. ch. 86, § 1 at 275 (enacting CAL. BUS. & PROF. CODE § 25511 in 1964, allowing manufacturers to replace alcohol damaged by a specific tsunami), *and* CGA Letter, *supra* note 133 (indicating that the CGA preferred a law that would allow manufacturers to replace destroyed alcohol

the Legislature would extend the 1964 statute and make it applicable to the Loma Prieta Earthquake.[141] Instead, the Legislature started anew and allowed manufacturers to replace retail licensees' damaged tap equipment, refrigeration systems, glycol coolers, etc. if a natural disaster damaged the equipment.[142]

This exception created an advantage for large manufacturers because of the costs associated with replacing tap equipment.[143] The CGA wanted to expand the 1964 statute, which would allow craft brewers to replace damaged alcohol at cost.[144] Considering that ingredients, packaging, and labor represent roughly twenty-four percent of the retail value of beer, brewers would be able to replace $20,000 of damaged product for less than $5,000.[145] Even the legislator's statement about manufacturers providing canned water would be fair because it would cost a craft brewer approximately fourteen percent of beer's retail price.[146] Today, manufacturers may only replace equipment—not product—but the purchase and installation of a complete tap system could cost a manufacturer $20,000 or more.[147] Unless a brewery manufactures equipment, it will be unable to mitigate the cost of equipment in the same manner that it could by replacing damaged product.[148]

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inventories), *with* CAL. BUS. & PROF. CODE § 25511 (allowing brewers to give "any equipment, fixtures, or supplies, other than alcoholic beverages, to a retailer" whose equipment was damaged during a government-declared natural disaster).

141. *Compare* 1964 Cal. Stat. ch. 86, § 1 at 275 (enacting CAL. BUS. & PROF. CODE § 25511, which allowed manufacturers to replace damaged alcohol inventories), *with* CGA Letter, *supra* note 133 (indicating that the CGA would prefer the law to allow manufacturers to replace destroyed alcohol inventories).

142. *See* CAL. BUS. & PROF. CODE § 25511 (allowing beer manufacturers to give "any equipment, fixtures, or supplies, other than alcoholic beverages, to a retailer" whose equipment was damaged during a natural disaster).

143. *Compare* E-mail from Justin Zalusky, Draft Specialist, KegWorks, to Thomas A. Gerhart, Staff Writer, The University of the Pacific Law Review (Jan. 3, 2019, 13:24 PST) (on file with *The University of the Pacific Law Review*) (quoting over $4,600 for two four-tap beer dispensers, which does not include any refrigeration equipment or installation costs), *with supra* text accompanying note 24 (noting that 6,266 craft brewers earned $26 billion in retail sales value in 2017).

144. CGA Letter, *supra* note 133; 1964 Cal. Stat. ch. 86, § 1 at 275 (enacting CAL. BUS. & PROF. CODE § 25511).

145. Joe Satran, *Here's How A Six-Pack Of Craft Beer Ends Up Costing $12*, HUFFINGTON POST (last updated Dec. 6, 2017, 11:39 AM), https://www.huffpost.com/entry/craft-beer-expensive-cost_n_5670015 (on file with *The University of the Pacific Law Review*).

146. *See id.* (noting that packaging costs thirteen percent and labor amounts to one percent of the retail price of beer).

147. *Compare* E-mail from Justin Zalusky, Draft Specialist, KegWorks, to Thomas A. Gerhart, Staff Writer, The University of the Pacific Law Review, *supra* note 143 (providing an estimate for two four-tap dispensers at over $4,600, but noting that price does not include refrigeration equipment or installation costs), *with* Tyler Rueth, *Beer Taps - How Many Should You Have?*, COPPERTIE (Oct. 7, 2016), http://coppertie.com/beer-tap-quantity/ (on file with *The University of the Pacific Law Review*) (estimating the average number of draught taps is between eight and twelve for a single venue).

148. *Compare* E-mail from Justin Zalusky, Draft Specialist, KegWorks, to Thomas A. Gerhart, Staff Writer, The University of the Pacific Law Review, *supra* note 143 (pricing two four-tap dispensers at $4,660.57, but excluding refrigeration equipment or installation costs in the quote), *with* Satran, *supra* note 145 (noting that the cost to produce beer, without factoring in profit margins, distributor fees, and taxes represents twenty-four percent of the price of beer).

This exception created an advantage for Big Beer because large manufacturers are better suited to purchase replacement equipment for affected retail licensees.[149] However, at face value, the statute does not appear problematic because it does not require brewers to purchase replacement equipment.[150] The WPA's 1941 survey explained that inducements are detrimental to the alcohol industry because such gifts may influence retail licensees to conduct business with certain manufacturers.[151] In essence, this exception creates the opportunity for large manufacturers to give retail licensees replacement equipment, potentially impacting consumer loyalty and disadvantaging brewers who cannot afford the expensive equipment.[152]

D. The Entertainment Exception

California's rigid inducement ban leaves no room for interpretation—three different provisions unequivocally forbid brewers from giving any "thing of value" to retail licensees.[153] The WPA observed that many alcohol laws, if applied to other industries, would be "unconstitutional extension[s] of State authority."[154] Nevertheless, the WPA explained that the liquor industry is "differentiated from all other occupations" because "the right to deal in intoxicating liquors is not an inherent right."[155] Despite the unambiguous statutory language and the WPA's research, the California Department of Alcoholic Beverage Control ("ABC") planned to change the law via agency rulemaking.[156]

In May 1990, the ABC distributed a bulletin communicating its intent to draft a regulation that would allow manufacturers to gift retail licensees with "entertainment and hospitality."[157] Three weeks later, the California Senate championed the cause and amended a similar bill that had just passed the

149. *See supra* note 19 (discussing the retail sales disparity between large and craft brewers).

150. *See generally* CAL. BUS. & PROF. CODE § 25511 (imposing no requirement on manufacturers to exercise the provisions of the statute).

151. MARKETING LAWS SURVEY, *supra* note 5, at 36.

152. *Compare supra* notes 19–25 (noting that 6,266 craft brewers split $26 billion compared to the seven companies that own seventy-one large breweries sharing $64.8 billion in 2017), *with* MARKETING LAWS SURVEY, *supra* note 5, at 36 (equating inducements to commercial bribery, and noting that gifts may impact how retail licensees contract with other manufacturers).

153. CAL. BUS. & PROF. CODE § 25500(a)(2); CAL. BUS. & PROF. CODE § 25502(a)(2); CAL. BUS. & PROF. CODE § 25600(d).

154. MARKETING LAWS SURVEY, *supra* note 5, at 19.

155. *Id.*

156. DEP'T OF ALCOHOLIC BEVERAGE CONTROL, BULL., (May 30, 1990) [hereinafter ABC Bulletin].

157. *See id.* ("As part of its proposed rulemaking, the Department is in the process of drafting a regulation that would authorize suppliers to furnish modest entertainment and hospitality to retailers and/or their employees.").

Assembly.[158] The Senate added a second provision to AB 3175—the bill that would eventually allow manufacturers to purchase replacement equipment for retail licensees after a natural disaster.[159] The new addition to AB 3175 would allow manufacturers to give retail licensees food, beverages, and transportation for business meetings, as well as tickets to sporting events.[160] A lobbyist for MillerCoors issued an immediate response to the change, submitting a letter of support for the modifications on the same day that the Senate modified AB 3175.[161]

While explaining the entertainment exception, one legislator commented, "it is unclear what the rules are."[162] This legislator reasoned that the law should allow manufacturers "to pay for meals and tickets on the same basis as allowable business expenses under the federal tax laws."[163] A subsequent letter from MillerCoors to the governor expressed the company's desire to "participate in ordinary business practices which are common to all industries."[164] Both ABI and MillerCoors conveyed support for AB 3175 by the time it reached Governor Deukmejian.[165]

Multiple follies contributed to the support and passage of this amendment to AB 3175.[166] First, the ABC's bulletin planned to adopt the exception as a

158. *Compare* SENATE GOVERNMENTAL ORGANIZATION COMMITTEE, COMMITTEE ANALYSIS OF AB 3175, at 1 (June 26, 1990) (noting that AB 3175 was amended on June 21, 1990), *with* CAL. LEG., CONCURRENCE IN SENATE AMENDMENTS AB 3175 (FLOYD) - AS AMENDED: JULY 7, 1990, 1989–1990 Sess., at 1 (1990) (noting that AB 3175 passed the Assembly on May 10, 1990).

159. *Compare Hearing on AB 3175 Before the Assemb. Comm. on Governmental Org.*, 1990 Leg., 1989–1990 Sess. (Cal. 1990) (statement by a legislator in favor of the bill on April 30, 1990) (on file with *The University of the Pacific Law Review*) (communicating that the bill would only be addressing tied-house laws with regard to natural disasters), *with* SENATE GOVERNMENTAL ORGANIZATION COMMITTEE, COMMITTEE ANALYSIS OF AB 3175, at 1 (June 26, 1990) (including a provision that would allow manufacturers to provide food, beverage, and transportation to retailers who are attending business meetings).

160. SENATE GOVERNMENTAL ORGANIZATION COMMITTEE, COMMITTEE ANALYSIS OF AB 3175, at 1 (June 26, 1990).

161. Letter from Parke D. Terry, Lobbyist, Livingston & Mattesich Law Corp. to Ralph Dills, Senator, Cal. State Senate (June 21, 1990) (on file with *The University of the Pacific Law Review*); Parke Terry, LINKEDIN, https://www.linkedin.com/in/parketerry/ (last visited Dec. 31, 2018) (on file with *The University of the Pacific Law Review*).

162. *Statement on AB 3175 (Tied House) before the S. Governmental Org. Comm.*, 1990 Leg., 1989–1990 1 (Cal. 1990) (statement by an unidentified legislator in favor of the bill) (on file with *The University of the Pacific Law Review*).

163. *Id.*

164. Letter from Sunny Jones, W. Gov't Aff. Manager, Miller Brewing Co. to George Deukmejian, Governor, Cal. State (July 12, 1990) [hereinafter Miller Letter] (on file with *The University of the Pacific Law Review*).

165. SENATE GOVERNMENTAL ORGANIZATION COMMITTEE, COMMITTEE ANALYSIS OF AB 3175, at 2 (June 26, 1990).

166. *Compare* ABC Bulletin, *supra* note 156 (indicating that the agency planned to propose a regulation that would substantively alter the statute), *and supra* text accompanying note 153 (identifying three separate statutes that all unmistakably prohibit manufacturers giving "any money or other thing of value" to a retail licensee), *with* CAL. BUS. & PROF. CODE § 25500(a)(2) (barring manufacturers from giving of anything of value to a retail licensee), *and* CAL. GOV'T CODE § 11342.2 (West 2018) ("a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no

regulation, yet California law does not allow agencies to adopt regulations contrary to statute.[167] Second, the tied-house laws thrice prohibit manufacturers from giving anything of value to retail licensees, but a legislator argued for an exception by saying the laws were unclear.[168] Third, arguments favoring the exception indicated that tied-house laws prohibit business practices common across all industries and ignored the WPA's explanation for why alcohol laws are unique.[169] Finally, legislators enacted this exception to align California's tied-house laws with federal law despite the Twenty-First Amendment declaring that individual states are responsible for enacting alcohol legislation.[170] Nevertheless, California enacted the exception, permitting manufacturers to give retail licensees free transportation, food, and beverages for business meetings, as well as tickets to sporting events.[171]

IV. CALIFORNIA'S APPROACH TO LEGISLATING BEER DISREGARDS THE PURPOSE OF ITS BEER LAWS

Less than a year after Congress repealed Prohibition, the federal government explained why new alcohol laws focused on tied houses.[172] The Federal Alcohol Control Administration reasoned that tied houses receive gifts—such as alcohol and fixtures—from brewers, and that practice makes competition unfair.[173] Then, the WPA analyzed individual states' post-Prohibition legislation and concluded that states designed tied-house laws to prevent large manufacturers from

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regulation adopted is valid or effective unless consistent and not in conflict with the statute"). *See also Statement on AB 3175 (Tied House) before the S. Governmental Org. Comm.*, 1990 Leg., 1989–1990 1 (Cal. 1990) (statement by an unidentified Sen. on June 26, 1990) ("it is unclear what the rules are").

167. *See* CAL. GOV'T CODE § 11342.2 (invalidating agency actions that do not comport with statute). *See also* SENATE GOVERNMENTAL ORGANIZATION COMMITTEE, COMMITTEE ANALYSIS OF AB 3175, at 1–2 (June 26, 1990) (citing the May 30, 1990 bulletin as the background for adding the entertainment exception).

168. *See* ABC Bulletin, *supra* note 156 (identifying three different statutes that all prohibit inducements); *Statement on AB 3175 (Tied House) before the S. Governmental Org. Comm.*, 1990 Leg., 1989–1990 1 (Cal. 1990) (on file with *The University of the Pacific Law Review*) ("Now it is unclear what the rules are.").

169. *Compare* Miller Letter, *supra* note 164 ("Miller would like to participate in ordinary business practices which are common to all industries. We would like to provide meals, tickets on occasion, and hospitality on a periodic basis to our retailers. Such forms of entertainment are standard and normal in today's business world."), *with* MARKETING LAWS SURVEY, *supra* note 5, at 19 ("The liquor business does not stand upon the same plane, in the eyes of the law, with other commercial occupations. It is placed under the ban of the law, and it is therefore differentiated from all other occupations").

170. *See* U.S. CONST. amend. XXI, § 2 ("The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."). *See also Statement on AB 3175 (Tied House) before the S. Governmental Org. Comm.*, 1990 Leg., 1989–1990 1 (Cal. 1990) (statement by an unidentified Sen. on June 26, 1990) ("This bill allows manufacturers to pay for meals and tickets on the same basis as allowable business expenses under the federal tax laws.").

171. CAL. BUS. & PROF. CODE § 25503.27.

172. *Brewers Face New F.A.C.A. Ax*, L.A. TIMES, Sept. 8, 1934, at 3 (on file with *The University of the Pacific Law Review*).

173. *Id.*

dominating the market.[174] Also, numerous post-Prohibition courts reaffirmed the explanation that tied-house laws protect the beer industry from unfair trade practices.[175]

California's State Liquor Control Act and Alcoholic Beverage Control Act took two approaches to prevent tied houses and promote market fairness.[176] First, the state prohibited manufacturers from giving retail licensees inducements because, as the federal government noted, gifts promote unfair competition.[177] Second, California implemented a modified three-tier system that allows manufacturers to self-distribute, but the system keeps the retail tier completely separate from the other tiers.[178] These laws prevent large manufacturers from purchasing retail locations, controlling the alcohol they serve, and consequently cutting small breweries out of the market.[179] The self-distribution exception is available to any brewery that wishes to reduce costs by distributing its own product and does not disadvantage other brewers.[180]

Large manufacturers, facing a united front opposed to tied houses and integration, turned to the Legislature for statutory exceptions that would give them a market advantage.[181] The practice of creating legislative exceptions to California's tied-house laws is almost as old as the laws themselves and has increased in frequency over time.[182] If carefully crafted, these exceptions can

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174. MARKETING LAWS SURVEY, *supra* note 5, at 20.

175. *See* Cal. Beer Wholesalers Ass'n v. Alcoholic Beverage Control Appeals Bd., 5 Cal. 3d 402, 408 (1971) (en banc) ("By enacting prohibitions against 'tied-house' arrangements, state legislatures aimed to prevent . . . the ability and potentiality of large firms to dominate local markets through vertical and horizontal integration"); Allied Properties v. Dept. of Alcoholic Beverage Control, 53 Cal. 2d 141, 148 (1959) (en banc) ("that the Legislature could reasonably proceed on the theory that the public will be adequately protected against excessive prices by the ordinary play of competition between manufacturers.").

176. *See* CAL. BUS. & PROF. CODE § 25500(a)(2) (prohibiting manufacturers from giving "money or other thing of value" to a retail licensee); CAL. BUS. & PROF. CODE § 25503.16(d) (West 2018) ("it is necessary and proper to require a separation between manufacturing interests, wholesale interests, and retail interests in the production and distribution of alcoholic beverages in order to prevent suppliers from dominating local markets").

177. CAL. BUS. & PROF. CODE § 25500(a)(2); MARKETING LAWS SURVEY, *supra* note 5, at 34.

178. CAL. BUS. & PROF. CODE § 23357; CAL. BUS. & PROF. CODE § 25503.16(d).

179. Croxall, *supra* note 2.

180. *See* CAL. BUS. & PROF. CODE § 23357 ("Licensed beer manufacturers may . . . . Sell beer to any person holding a license authorizing the sale of beer"); Kary Shumway, *Brewbound Voices: Deconstructing Self-Distribution (Part I)*, BREWBOUND (July 3, 2017, 3:14 PM), https://www.brewbound.com/news/brewbound-voices-deconstructing-self-distribution-part (on file with *The University of the Pacific Law Review*) (observing brewers can save between twenty-five to thirty percent by self-distributing their product). *But see* CAL. BUS. & PROF. CODE § 25503.12 (allowing a retail licensee to purchase stock in a manufacturer, which may influence the retailer's business decisions and disadvantage brewers that are not publicly traded).

181. *See* AB 2573, 2018 Leg., 2017–2018 Sess. (Cal. 2018) (as passed on Aug. 21, 2018, but not enacted) (proposing an exception to California's tied-house laws in 2018 that would benefit large manufacturers); CAL. BUS. & PROF. CODE § 25503.23 (creating an exception that allowed MillerCoors to sponsor Marine World's water ski show, an activity previously prohibited by law).

182. *Compare* CAL. BUS. & PROF. CODE §§ 25500–25512 ("Chapter 15 added by Stats. 1953, Ch. 152"), *with* 1964 Cal. Stat. ch. 86, § 1 at 275 (enacting CAL. BUS. & PROF. CODE § 25511 in 1964, which created an exception to California's tied-house laws to help businesses impacted by a tsunami). *See also* CAL. BUS. &

coexist with tied-house laws and preserve market fairness, but ignoring the purpose of tied-house laws undermines the reason they exist.[183] In fact, the legislative history of each exception discussed above demonstrates how considering the spirit of the law alleviates damage caused by legislative ignorance.[184]

The California Legislature is on a trajectory that will eventually create so many exceptions that the government may not be able to justify the law's existence.[185] While some exceptions may promote the spirit of the law,[186] the concerted effort of creating exceptions to California's beer laws is bringing about the slow demise of those laws.[187] Creating exceptions for specific businesses, without consideration of the industry as a whole, is eroding the foundation of California's tied-house laws.[188] Instead of promoting a healthy industry where all individuals have the same rights, the Legislature is creating the precise scenario that the original laws sought to prevent.[189] Rather than maintaining a united front against tied houses and integration, today's Legislature is making uninformed policy decisions based on the desires of large companies.[190] This practice will eventually permit "a recurrence of the evils that were prevalent before prohibition when large liquor interests controlled . . . the industry."[191] The WPA

PROF. CODE §§ 25500–25512 (showing that in the current laws—excluding repealed statutes—there were two exceptions added between 1960–1980, eight between 1980–2000, and nine between 2000–2015).

183. *Compare* 1964 Cal. Stat. ch. 86, § 1 at 275 (enacting CAL. BUS. & PROF. CODE § 25511, which allowed brewers to replace damaged alcohol supplies at cost), *with* CAL. BUS. & PROF. CODE § 25511 (creating an exception that allows all manufacturers to purchase expensive equipment for retailers that only larger manufacturers can afford).

184. *See supra* note 166 (citing instances where the legislature and the regulatory agency issued a statement for regarding an exception that contradicted California's tied-house laws).

185. *See* Daniel Croxall, *Ever Played Jenga? Too Many Exceptions to Tied-House Laws Render the Whole System Vulnerable*, CRAFT BEER LAW PROF (Feb. 9, 2017), https://www.craftbeerprofessor.com/2017/02/ever-played-jenga-many-exceptions-tied-house-laws-render-whole-system-vulnerable/ (on file with *The University of the Pacific Law Review*) (observing that California has dozens of exceptions to its tied-house laws and that more exceptions lessen a government's ability to uphold the law).

186. *See supra* note 80 (identifying two exceptions to California's beer laws that impact all brewers equally).

187. Croxall, *supra* note 185.

188. *Compare* Hannigan Letter, *supra* note 105 (creating an exception that allowed brewers to sponsor water ski shows because Marine World asked the Legislature to legalize a business relationship with MillerCoors), *with* MARKETING LAWS SURVEY, *supra* note 5, at 20–21 (observing that states adopted alcohol laws to prevent vertical integration, horizontal integration, and commercial bribery).

189. *Compare* CAL. BUS. & PROF. CODE § 25503.12 (permitting retail licensees to purchase stock in manufacturers), *with* MARKETING LAWS SURVEY, *supra* note 5, at 20 ("to promote temperance and prevent vertical and horizontal integration, the legislatures of the various States have employed controls which fall into five categories").

190. *Compare* ABC Bulletin, *supra* note 156 (identifying three statutes that prohibit manufacturers giving things of value to retail licensees), *with Statement on AB 3175 (Tied House) before the S. Governmental Org. Comm.*, 1990 Leg., 1989–1990 1 (Cal. 1990) (statement by an unidentified Sen. on June 26, 1990) ("it is unclear what the rules are").

191. MARKETING LAWS SURVEY, *supra* note 5, at 20.

explained that governments must differentiate the liquor industry from all other industries; therefore, legislators must approach new alcohol legislation with an informed, heightened scrutiny.[192]

V. THE ALCOHOL LEGISLATION AMENDMENT

The constitutional law principle of legislative entrenchment prohibits a legislature from enacting a statute that binds subsequent legislatures' "exercise of legislative power."[193] Unlike legislation, a constitutional amendment could bind California's future lawmakers to preserve the purpose of the 1933 and 1935 tied-house laws.[194] Further, to address existing laws that undermine the purpose of California's tied-house laws, the Legislature should write the amendment to apply retroactively.[195]

This Comment proposes a holistic legislative framework in the form of a constitutional amendment to guarantee that present and future beer laws comport with the original purpose of California's tied-house laws.[196] History has demonstrated that the current approach to beer legislation yields results that contravene the reason for the laws' existence.[197] Without an informed approach to legislating alcohol, California will continue to enact laws that imprudently blur the lines between alcohol and other industries.[198]

The constitutional amendment should address three major issues that adversely affect California's tied-house laws: business-specific legislation, inducements, and integration.[199] Section A explains why the Legislature must

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192. *Id*. at 19.

193. Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1665 (2002).

194. *See* MARKETING LAWS SURVEY, *supra* note 5, at 20 (declining to discuss temperance or propose binding legislation as a way to resolve the problems with California's beer laws); Roberts & Chemerinsky, *supra* note 34, at, 1776.

195. *See* Fisch, *supra* note 34, at 1106 ("Retroactivity may be appropriate . . . if retroactive application is specifically necessary to achieve an important component of the regulatory goal that cannot be adequately achieved through prospective application.").

196. *Compare supra* Part II (explaining that legislatures enacted tied-house laws to ensure market fairness), *with* Roberts & Chemerinsky, *supra* note 34, at 1776 ("If a legislature wishes to bind future legislatures, it must invoke the constitutional amendment process.").

197. *See supra* Part III (identifying four current statutes that benefit large manufacturers, do little for small manufacturers, and do not synergize with the spirit of the law).

198. *Compare Statement on AB 3175 (Tied House) before the S. Governmental Org. Comm.*, 1990 Leg., 1989–1990 1 (Cal. 1990) (statement by an unidentified Sen. on June 26, 1990) (communicating that the legislator did not know what the laws were but that he or she wanted to normalize California's beer laws with federal tax law), *with* CAL. LEG., CONCURRENCE IN SENATE AMENDMENTS AB 3175 (FLOYD) - AS AMENDED: JULY 7, 1990, 1989–1990 Sess., at 1 (1990) (noting that AB 3175 passed the senate unanimously), *and* MARKETING LAWS SURVEY, *supra* note 5, at 19 ("The liquor business does not stand upon the same plane, in the eyes of the law, with other commercial occupations. It is placed under the ban of the law, and it is therefore differentiated from all other occupations").

199. *See infra* Sections V.A–V.C (presenting three distinct areas where beer laws diverge from the spirit of the law).

avoid business-specific beer laws.[200] Section B recommends a framework for prohibiting inequitable inducement exceptions.[201] Section C discusses why it is important to preserve California's quasi-two-tier system by preventing integration.[202]

A. Business-Specific Legislation

The first step of the recommended framework is to prohibit beer laws written for specific manufacturers—or groups of manufacturers—because the spirit of tied-house laws is market fairness.[203] As the Marine World exception demonstrates, the Legislature must thoroughly examine the implications of narrow exceptions written in seemingly broad terms because these exceptions may only benefit a single manufacturer.[204] Additionally, the stock market exception explicitly benefits large manufacturers as a group, and it created an advantage that nearly all craft brewers cannot utilize.[205] To ensure market fairness, legislators should only create beer laws that impact all manufacturers equally; therefore, the Legislature should determine whether a proposed law explicitly benefits a specific manufacturer.[206]

B. Inducement Exceptions

The second step in the proposed framework is to prohibit inducement-permitting legislation that all manufacturers cannot reasonably utilize.[207] This task is difficult because it excludes exceptions that create implicit benefits for a

200. *See infra* Section V.A (eliminating legislation that was enacted to benefit a specific manufacturer or group of manufacturers).

201. *See infra* Section V.B (asking whether all brewers can reasonably utilize the inducement).

202. *See infra* Section V.C (probing proposed legislation to determine if it permits integration between manufacturers/distributors and retail licensees).

203. *Compare* MARKETING LAWS SURVEY, *supra* note 5, at 20 (observing that the purpose of the law was to prevent large manufacturers from dominating the market), *with* ASSEMBLY GOVERNMENTAL ORGANIZATION COMMITTEE, COMMITTEE ANALYSIS OF AB 2772, at 5 (Mar. 27, 1990) (proposing the law to legitimize MillerCoors' and Marine World's tied-house violations).

204. *See supra* Section III.B (creating an exception for all manufacturers but narrowly crafting it to only apply to the business dealings of Marine World and MillerCoors).

205. *See supra* Section III.A (noting that Assembly Member Badham proposed the exception to resolve problems emanating from large manufacturer's diversified investments).

206. *Compare* 1964 Cal. Stat. ch. 86, § 1 at 275 (enacting CAL. BUS. & PROF. CODE § 25511, which allowed brewers to replace damaged alcohol inventories at cost after a 1964 tsunami), *with* CAL. BUS. & PROF. CODE § 25511 (allowing manufacturers to purchase and give replacement fixtures and equipment retailers who lost the equipment in a natural disaster).

207. *Compare* MARKETING LAWS SURVEY, *supra* note 5, at 20 (noting that the states enacted tied-house laws to prevent large manufacturers from dominating the market), *with supra* text accompanying note 149 (explaining why the earthquake exception is available to all brewers but that it only benefits large manufacturers).

single brewer or group of brewers.[208] Inducement exceptions are a pervasive problem in the brewing industry—of the four exceptions presented in this Comment, three circumvent the inducement ban.[209] When amending its constitution, California should identify two factors to help the Legislature determine whether all manufacturers can reasonably utilize the proposed exception.[210]

First, cost-prohibitive exceptions benefit larger manufacturers because smaller brewers cannot afford to perform the newly permitted activity.[211] California's constitution should prohibit beer laws that disproportionately inconvenience different groups of manufacturers.[212] Large manufacturers expressed support for, and in some cases requested, the activities permitted by the Marine World, earthquake, and entertainment exceptions.[213] Because California enacted its tied-house laws to rein in unfair market conditions, legislators should discern whether the exception "creates an economic disadvantage for small beer manufactures [sic]."[214] Under the earthquake exception, a smaller brewery might only be able to afford one piece of equipment at great expense to its profitability.[215] Similarly, the entertainment exception permits manufacturers to give retail licensees tickets to sporting events, yet gifting Super Bowl tickets may be out of the question for many craft brewers.[216] The Marine World, earthquake, and entertainment exceptions all give brewers the

208. *See* CAL. BUS. & PROF. CODE § 25503.23 (creating an exception for all brewers but narrowly tailoring the exception so that it only applies to the business relationship between MillerCoors and Marine World).

209. *See id.* (allowing manufacturers to give money or goods, in the form of sponsorship, to a retail licensee hosting a water ski show); CAL. BUS. & PROF. CODE § 25511 (permitting manufacturers to purchase all new fixtures and equipment for retailers impacted by natural disasters); CAL. BUS. & PROF. CODE § 25503.27 (granting manufacturers the ability to give retail licensees food, beverage, and transportation to business meetings, as well as tickets to sporting events).

210. *See infra* notes 211–22 (identifying activities that are cost-prohibitive or do not permit a manufacturer to mitigate as evidence of unfair legislation).

211. *See supra* note 24 (noting that the seven companies that own all seventy-one large breweries made twice as much as the 6,266 craft brewers in 2017).

212. *Compare* CAL. BUS. & PROF. CODE § 25503.27 (allowing manufacturers to gift sporting event tickets to retail licenses), *and Super Bowl 53 Tickets*, SEATGEEK https://seatgeek.com/events/super-bowl (last visited Dec. 29, 2018) (on file with *The University of the Pacific Law Review*) (calculating that Super Bowl tickets cost an average of $2,500 per ticket), *with* Brewers Ass'n E-mail, *supra* note 19 (noting that large breweries made $64.8 billion in retail sales value in 2017), *and National Beer Sales & Production Data*, BREWERS ASS'N, *supra* note 8 (reporting that craft brewers earned $26 billion in retail sales value in 2017).

213. ASSEMBLY COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF AB 2772, at 1 (Mar. 27, 1990); SENATE GOVERNMENTAL ORGANIZATION COMMITTEE, COMMITTEE ANALYSIS OF AB 3175, at 2 (June 26, 1990).

214. MARKETING LAWS SURVEY, *supra* note 5, at 20; Brown Letter, *supra* note 3.

215. *Compare supra* note 143 (observing that a single, four-tap beer dispenser without refrigeration and installation costs over $4,600, and 6,266 craft brewers earned a total of $26 billion in retail sales value in 2017), *with* Satran, *supra* note 145 (calculating that brewers who use distributors earn eight percent of total retail value as profits).

216. CAL. BUS. & PROF. CODE § 25503.27; *Super Bowl 53 Tickets*, SEATGEEK, *supra* note 212 (valuing the average price for Super Bowl tickets as $2,500 per ticket).

ability to engage in expensive activities.[217] Large brewers have more resources available to regularly utilize these exceptions, whereas craft brewers would struggle to do so.[218]

Second, a brewer's ability to mitigate costs is indicative of the reasonableness of the exception.[219] The 1964 tsunami statute illustrates this principle because brewers could help retail licensees by replacing lost inventories at a reduced cost.[220] The current version of this law creates an exception where brewers cannot mitigate costs in the natural course of business.[221] Therefore, creating exceptions where manufacturers can mitigate the expense may result in statutes that impact all brewers equally.[222]

C. Integration Exceptions

The final component of the framework is to prohibit laws that undermine the three-tier system by permitting vertical integration between retail licensees and manufacturers.[223] California uses a quasi-two-tier system where manufacturers may self-distribute, and both two- and three-tier systems preserve the divide between the retail tier and the other tiers.[224] Here, the primary concern is keeping the retail tier free from influences that arise through vertical integration.[225] The stock market exception exemplifies this concern because it permits integration with the retail tier by allowing retail licensees to hold diminutive amounts of stock in manufacturers.[226] This exception undermines two- and three-tier systems by creating an advantage for publicly traded manufacturers because retail licensees can have ownership interests in such manufacturers.[227] Exceptions that

217. *See* CAL. BUS. & PROF. CODE § 25503.23 (permitting brewers to sponsor annual water ski shows in stadiums owned by retail licensees); CAL. BUS. & PROF. CODE § 25511 (allowing brewers to give fixtures, tap equipment, and non-alcohol supplies to retailers after a natural disaster); *and* CAL. BUS. & PROF. CODE § 25503.27 (granting brewers the ability to give sporting event tickets to retail licensees).

218. *See supra* note 24 (noting that the seventy-one large breweries, owned by seven companies, made nearly $40 billion more in retail sales value than the 6,266 craft brewers did in 2017).

219. *See* 1964 Cal. Stat. ch. 86, § 1 at 275 (enacting CAL. BUS. & PROF. CODE § 25511, which allowed manufacturers to replace alcohol damaged by a 1964 tsunami); Satran, *supra* note 145 (calculating the cost of producing and packaging beer to be less than a quarter of the actual price).

220. *Compare* 1964 Cal. Stat. ch. 86, § 1 at 275 (enacting CAL. BUS. & PROF. CODE § 25511, which permitted manufacturers to give retailers alcohol to replace inventories damaged during a tsunami in 1964), *with* Satran, *supra* note 145 (observing that the cost to manufacture beer is less than a quarter of its retail value).

221. *See* CAL. BUS. & PROF. CODE § 25511 (allowing brewers to give equipment, not beer, to retailers impacted by a natural disaster).

222. *Compare* 1964 Cal. Stat. ch. 86, § 1 at 275 (enacting CAL. BUS. & PROF. CODE § 25511 to help retailers by allowing manufacturers to replace damaged alcohol inventories), *with* CAL. BUS. & PROF. CODE § 25511 (replacing the 1964 exception with an exception that a manufacturer cannot utilize without easing costs).

223. MARKETING LAWS SURVEY, *supra* note 5, at 20.

224. CAL. BUS. & PROF. CODE § 23357; Croxall, *supra* note 2.

225. MARKETING LAWS SURVEY, *supra* note 5, at 22.

226. CAL. BUS. & PROF. CODE § 25503.12.

227. *Compare* Croxall, *supra* note 2 ("the three-tier system is a market regulation concept whereby each

permit integration with the retail tier consequently sanction a form of tied houses that California sought to prevent with its post-Prohibition laws.[228]

The three components of the amendment—preventing business-specific legislation, unfair inducements, and integration—target common forms of inequitable alcohol legislation.[229] By amending this framework to California's constitution, the Legislature will protect California's beer industry from discriminatory beer laws that stifle competition.[230] If California enacts this framework as a constitutional amendment, it will ensure that new beer laws comport with the spirit of California's tied-house laws by preventing laws that do not impact all brewers equally.[231]

VI. CONCLUSION

Two trends are simultaneously threatening California's tied-house laws.[232] First, the Legislature is proposing and enacting an increasing number of exceptions to California's beer laws.[233] Second, manufacturers and their lobbies are working together to create new exceptions to expand their business practices.[234] The Legislature may not realize it, but California is facing a harsh reality.[235] It must either reevaluate its approach to alcohol legislation, or California's beer industry will become the precise thing it created tied-house laws to prevent: a monopolized industry.[236] California's governor cannot be the lone bulwark of fairness between the Legislature and the beer industry because, as history demonstrates, that practice produces inconsistent results.[237]

'tier' of alcohol manufacture, wholesale (distribution), and retail must remain completely separate from the others"), *with* CAL. BUS. & PROF. CODE § 25503.12 ("a retail licensee may hold a diminutive amount of stock in a corporate licensed manufacturer").

228. *See* MARKETING LAWS SURVEY, *supra* note 5, at 22 ("the most widespread provision is the one that prohibits any interest by the manufacturer or wholesaler in the retail outlet.").

229. *See supra* Part III (identifying four statutes that created unfair beer laws).

230. *See* MARKETING LAWS SURVEY, *supra* note 5, at 20–22 (noting that inducement and integration bans prevent traditional problems in the alcohol industry).

231. *Compare* Croxall, *supra* note 185 (observing that California has enacted dozens of exceptions to its tied-house laws), *and supra* Part III (identifying four exceptions that do not impact all brewers equally), *with supra* Part V (proposing a constitutional amendment that will eliminate beer legislation that contravenes the spirit of the law).

232. *See supra* Part IV (observing an increasing number of exceptions over time); Croxall, *supra* note 185 (noting that manufacturers are working together to create new exceptions).

233. *See* CAL. BUS. & PROF. CODE §§ 25500–25512 (showing that there were two exceptions added between 1960–1980, eight between 1980–2000, and nine between 2000–2015).

234. Croxall, *supra* note 185.

235. *See* AB 2573, 2018 Leg., 2017–2018 Sess. (Cal. 2018) (as passed on Aug. 21, 2018, but not enacted) (presuming the Legislature would not have sent beer legislation designed for larger manufacturers to the governor in 2018 if had it been aware of the problem).

236. *See* MARKETING LAWS SURVEY, *supra* note 5, at 20, 36 (noting that integration and commercial bribery resulted in large manufacturers dominating the alcohol industry before Prohibition).

237. *Compare* Badham Letter, *supra* note 90 (illustrating the Legislature's intent that it communicated to Governor Reagan when it asked him to sign the stock market exception into law), *and* Hannigan Letter, *supra*

Although there is no legal requirement for the Legislature to preserve the spirit of California's tied-house laws, the state runs the risk of destabilizing its beer laws by ignoring history.[238] It is unreasonable to expect the Legislature to research history for every proposed beer law because the legislative process is cumbersome.[239] This Comment synthesizes the history and purpose of California's beer laws into a three-pronged framework.[240] Amending this framework to California's constitution would benefit the state greatly because the framework precludes legislation that undermines the purpose of California's beer laws.[241]

Incorporating this framework into California's constitution will ensure that future beer legislation adheres to the spirit of the law.[242] If the Legislature utilized this framework between 1935 and 2018, it is unlikely California would have enacted any of the exceptions discussed in this Comment.[243] The Marine World exception would not exist because it is so narrow that it only affects a single manufacturer, and it is cost prohibitive.[244] The earthquake and entertainment exceptions, as well as the vetoed glassware exception, do not adhere to the framework because not all manufacturers can reasonably utilize these exceptions.[245] The stock market exception would not exist because it allows integration with the retail tier.[246]

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note 105 (communicating the purpose of the Marine World exception to Governor Deukmejian before he signed it into law), *with* Brown Letter, *supra* note 3 (declining to sign the glassware exception into law because of fairness concerns).

238. Posner & Vermeule, *supra* note 193, at 1665. *Compare* MARKETING LAWS SURVEY, *supra* note 5, at 20, 36 (pointing to integration and inducements as factors that corrupt the alcohol industry), *with* CAL. BUS. & PROF. CODE § 25503.27 (legalizing inducements from manufacturers to retail licensees), *and* CAL. BUS. & PROF. CODE § 25503.12 (permitting vertical integration with the retail tier).

239. INS v. Chadha, 462 U.S. 919, 951 ("The division of the Congress into two distinctive bodies assures that the legislative power would be exercised only after opportunity for full study and debate in separate settings").

240. *Compare supra* Part II (presenting evidence that California created its tied-house laws to ensure market fairness), *and supra* Part III (identifying four statutes that create advantages for large manufacturers), *with supra* Part V (analyzing characteristics from various, unfair exceptions to create an analytical framework focused on the purpose of California's tied-house laws).

241. *See supra* Part V (utilizing three focused questions to determine whether an exception is business-specific, unreasonably expensive, or causes integration with the retail tier).

242. *See supra* note 194 (discussing how a constitutional amendment, not legislation, can bind future legislators).

243. *See supra* Part V (identifying aspects within each exception that would fail various aspects of the framework).

244. *See* CAL. BUS. & PROF. CODE § 25503.23 (allowing manufacturers to sponsor annual water ski shows at outdoor stadiums, owned by retail licensees, that have more than 3,000 seats).

245. *See* CAL. BUS. & PROF. CODE § 25503.27 (allowing manufacturers to give retail licensees food, beverage, transportation, and tickets to sporting events); CAL. BUS. & PROF. CODE § 25511 (permitting manufacturers to give expensive equipment to retailers after a natural disaster); ASSEMBLY COMMITTEE ON GOVERNMENTAL ORGANIZATION, COMMITTEE ANALYSIS OF AB 2573, at 4 (Apr. 18, 2018) (proposing an exception that would allow manufacturers to give $5,000 in glassware per year per retail location).

246. *See* CAL. BUS. & PROF. CODE § 25503.12 (giving a retail licensee the ability to hold an ownership

At a minimum, California should amend this framework to its constitution to curb the erosion of its tied-house laws by ensuring that future beer laws are equitable.[247] Additionally, the Legislature should take steps to reverse the damage done while reinforcing the spirit of California's beer laws.[248] By broadening the tsunami statute, the Legislature demonstrated its willingness and ability to reassess the validity of existing legislation.[249] Therefore, the Legislature should draft the amendment to be retroactive, which would enable it to eliminate existing beer laws that disregard the spirit of the law.[250] If California does nothing, the pace of erosion to its beer laws will quicken as large beer interests—aided by uninformed legislating—will enact inequitable laws that disadvantage small breweries.[251]

interest in a publicly traded manufacturer).

247. *Compare* MARKETING LAWS SURVEY, *supra* note 5, at 20 (expressing the intent to prevent large interests from dominating the market), *with supra* Part V (proposing a framework that identifies legislation that favors specific manufacturers or groups of manufacturers).

248. *Compare Hearing on AB 3175 Before the Assemb. Comm. on Governmental Org.*, 1990 Leg., 1989–1990 Sess. (Cal. 1990) (on file with *The University of the Pacific Law Review*) (intending to repeal the 1964 version of section 25511 of the California Business and Professions Code), *and* MARKETING LAWS SURVEY, *supra* note 5, at 20 (noting that the purpose of the laws was to prevent large liquor interests from dominating the industry), *with* CAL. BUS. & PROF. CODE § 25503.12 (creating an exception designed specifically for publicly traded manufacturers).

249. *See Hearing on AB 3175 Before the Assemb. Comm. on Governmental Org.*, 1990 Leg., 1989–1990 Sess. (Cal. 1990) (on file with *The University of the Pacific Law Review*) ("The bill also repeals an obsolete statute relating to a 1964 earthquake.").

250. Myers v. Philip Morris Cos., 28 Cal. 4th 828, 840 (2002) (observing that statutes will be prospective "unless there is an express retroactivity provision").

251. Croxall, *supra* note 185; *see also supra* Section III.C (enacting legislation under the guise of not knowing what the laws are).