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From Craft Brews to Craft Booze: It's Time for Home Distillation

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— Note —

FROM CRAFT BREWS TO
CRAFT BOOZE: IT'S TIME
FOR HOME DISTILLATION

ABSTRACT

This Note proposes that a personal-use exemption to the federal ban and excise tax on home distillation is a historic American right. Such an exemption would result in significant economic and consumer benefits. Home distillation can be a safe and exciting hobby to develop unique liquors and reduce the distillation industry's entry barriers. Just as home brewing and the craft-brewing industry have elevated the quality of U.S. beers, propagated thousands of breweries and eateries, reinvigorated neighborhoods, and heightened beer customers' sophistication, home distillation may propel the craft-distilling industry to similar heights. Further, this Note argues that the federal ban on all home distillation violates the Constitution's Commerce and Equal Protection Clauses while failing to advance the federal government's policy objectives of public safety and revenue collection. Finally, because the popularity of craft distilleries is already on the rise, outdated laws prohibiting home distillation work only to stifle economic growth and opportunities for delicious drink.

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INTRODUCTION: A CONFUSED LEGAL STRUCTURE

This Note advocates for the freedom to distill spirits at home. Although federal alcohol regulations rarely spur legal debates or incite talk show hosts into angry rants,¹ potential gains remain. And while infrequently litigated, Americans’ love for high-quality spirits has undergone significant renewal, and it is now time for U.S. law to encourage this passion, rather than undermine it.

The default structure of federal alcohol regulation creates the primary problem. Typically, people are free to produce purely intrastate goods until they begin to impact the national market for those goods and are then subjected to federal regulation.² For example, a common backyard garden need not comply with the Department of Agriculture’s requirements.³ Similarly, people can brew beer and wine in their homes for personal consumption while not paying any federal excise taxes.⁴ But when it comes to distilled spirits, the federal government bans *all* home distillation for personal use.⁵ Instead of permitting some home distillation, the federal government, through the Alcohol and Tobacco Tax and Trade Bureau (“TTB”),

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1. See, e.g., BILL O’REILLY, <http://www.billoreilly.com> (last visited Apr. 18, 2014) (search query “distillation” returns zero results); COLBERT NATION, <http://www.colbertnation.com> (last visited Apr. 18, 2014) (same).
 2. See *United States v. Lopez*, 514 U.S. 549, 559 (1995) (“[I]n order to be within Congress’ power to regulate it under the Commerce Clause . . . the proper test requires an analysis of whether the regulated activity ‘substantially affects’ interstate commerce.”); see also *Wickard v. Filburn*, 317 U.S. 111, 125 (1942) (“[E]ven if [the] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce . . .”).
 3. See *Gonzales v. Raich*, 545 U.S. 1, 51 (2005) (O’Connor, J., dissenting) (“*Wickard*, then, did not extend Commerce Clause authority to something as modest as the home cook’s herb garden . . . [and] did not hold or imply that small-scale production of commodities is always economic, and automatically within Congress’ reach.”).
 4. 26 U.S.C. § 5042(a)(2)(A) (2012) (exemption from federal excise taxes on wine); *id.* § 5053(e) (exemption from federal excise taxes on beer).
 5. *Id.* § 5171(a) (“[O]perations as a distiller, warehouseman, or processor may be conducted only on the bonded premises of a distilled spirits plant.”); 27 C.F.R. § 19.51 (2013) (“A person may not produce distilled spirits at home for personal use.”).

requires strict licensing and imposes heavy fees.⁶ Farmer Filburn may be allowed his wheat but not his whiskey.⁷

This Note argues that a complete ban on home distillation violates the Constitution and fails to advance either of the government's dual policy objectives of public safety and revenue collection. A personal-use exemption to the federal excise tax—similar to the exemptions for home brewing beer and wine—will have no appreciable impact on federal tax revenues.⁸ The safety risks associated with operating a small-batch still in one's home are no greater than those associated with home brewing beer and wine. While some risks exist, they are largely exaggerated by Prohibition-era lore and are best alleviated through education, regulation, and access to basic information. Further, allowing home distillation through a personal-use exemption from federal excise taxes may foster industry growth rather than stunt it.

This Note proceeds in four parts. Part I provides a historical perspective on the United States' liquor laws and some basics about alcohol and the distillation process. Part II discusses how the homebrewing industry's success foreshadows home distillation's economic potential. Part III explains why the current ban on home distillation violates the Constitution's Commerce and Equal Protection Clauses and exceeds the TTB's legislative authority. Part IV outlines a

6. 26 U.S.C. §§ 5001–5314 (2012).

7. *Gonzales*, 545 U.S. at 51 (O'Connor, J., dissenting) (“When Filburn planted the wheat at issue in *Wickard*, the statute exempted plantings less than 200 bushels (about six tons), and when he harvested his wheat it exempted plantings less than six acres.”).

8. Because the author was unable to locate any comprehensive studies on the subject, some rough math using IRS data may help. The total gross revenues from federal excise taxes on all distilled spirits for FY 2010 was approximately \$4.924 billion. INTERNAL REVENUE SERV., STATISTICS OF INCOME BULLETIN, HISTORICAL TABLE 20: FEDERAL EXCISE TAXES REPORTED TO OR COLLECTED BY THE INTERNAL REVENUE SERVICE, ALCOHOL AND TOBACCO TAX AND TRADE BUREAU, AND CUSTOMS SERVICE, BY TYPE OF EXCISE TAX, FISCAL YEARS 1999–2012 (last reviewed or updated Nov. 22, 2013) [hereinafter IRS TABLE 20]. The total federal revenue for FY 2010 was \$2.162 trillion. OFFICE OF MGMT. AND BUDGET, HISTORICAL TABLES, BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2014 33 tbl.2.1 (2013) [hereinafter FY 2014 BUDGET]. Thus, the entire distilled-spirits industry accounts for approximately 0.23% of the federal government's income from taxes. Noticeably, beer and wine contributed \$4.572 billion in the same year, a comparable number. IRS TABLE 20, *supra*; see also Melkon Khosrovian, Proposal: Small Spirits Makers' Equal Tax Act 3, <http://artisanspiritmag.com/wp-content/uploads/2013/08/Craft-Distillers-FET-Bill-Text-whitepaper.pdf> (last visited May 11, 2014) (finding a 0.21% reduction in revenue if federal excise taxes were lowered for small batch distillers).

legislative proposal permitting home distillation for personal consumption.

I. ALCOHOL BASICS AND U.S. LIQUOR LAWS

The goals of alcohol regulation are public safety and the collection of tax revenue,⁹ but questions surrounding the priority of these goals remain. Why does the federal government treat fermented drinks, like beer and wine, differently from (and with more preference than) distilled spirits, like vodka and whiskey?¹⁰ Is alcohol consumed in beer *less* dangerous than alcohol consumed in gin?¹¹ Do federal excise taxes actually achieve the behavior modification sought?¹²

When people drink alcoholic beverages they are consuming ethyl alcohol, or ethanol. Ethanol is the chemical compound C₂H₆O, pure and simple.¹³ Ethanol is produced only through fermentation, while

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9. Ethan P. Davis, *Liquor Laws and Constitutional Conventions: A Legal History of the Twenty-First Amendment* 36 (Apr. 9, 2008) (unpublished student paper), http://digitalcommons.law.yale.edu/student_papers/65.
 10. *See* 26 U.S.C. §§ 5001, 5041, 5051 (2012) (imposing lower tax rates for wine and beer than distilled spirits); *id.* §§ 5042, 5053 (allowing home brewing of wine and beer, respectively); *id.* § 5601 (imposing criminal penalties—up to \$10,000 and imprisonment for five years—for distilling liquor on prohibited premises); 27 C.F.R. § 19.51 (2013) (banning all home distillation).
 11. Historically, beer was viewed as a far more serious threat to the nation's health and welfare than distilled spirits. “[O]pen saloons” that sold beer were outlawed in some states, while “private clubs” were permitted to sell liquor. Marcia Yablon, *The Prohibition Hangover: Why We Are Still Feeling the Effects of Prohibition*, 13 VA. J. SOC. POL'Y & L. 552, 565–66 (2006); *see also* DANIEL OKRENT, *LAST CALL: THE RISE AND FALL OF PROHIBITION* (2010) (describing early movements, such as Mother Thompson's Crusade and Carry Nation's hatchet-wielding mania, to abolish saloons).
 12. Though it is nearly impossible to empirically measure any behavioral modification resulting from the excise tax, one study suggests such an effect does exist. *See* PANEL ON ALT. POLICIES AFFECTING THE PREVENTION OF ALCOHOL ABUSE AND ALCOHOLISM, NAT'L RESEARCH COUNCIL, *ALCOHOL AND PUBLIC POLICY: BEYOND THE SHADOW OF PROHIBITION* 78 (Mark H. Moore & Dean R. Gerstein eds., 1981) (“There is good evidence from econometric studies that alcohol prices, as affected by excise taxation, can affect consumption levels, and probably the consequent rates of alcohol-related problems.”).
 13. The formula may be expressed as C₂H₅OH, and its molecular form is CH₃CH₂OH. *See Ethanol*, NAT'L LIBRARY OF MED.: HAZARDOUS SUBSTANCES DATA BANK, <http://toxnet.nlm.nih.gov/cgi-bin/sis/search/f?./temp/~CG8DEM:1> (last visited Apr. 18, 2014) [hereinafter *Ethanol*, HAZARDOUS SUBSTANCES DATA BANK].

the process of distillation, by itself, makes nothing.¹⁴ Through cycles of evaporation and condensation, distillation separates the ethanol from other impurities in the fermented mixture.¹⁵ This process effectively concentrates the ethanol and creates what are legally known as “distilled spirits”¹⁶—beverages that contain more than twenty-four percent ethanol by volume. Regardless, whether people prefer budget-friendly options such as Ripple¹⁷ or high-end palate pleasers such as The Glenlivet,¹⁸ they are consuming the same ethanol.

Many people view “hard liquor” as distinct from, and more evil than, beer and wine.¹⁹ But the higher percentage of alcohol in distilled spirits does not cause people to become more intoxicated than if they consumed beer or wine. Only the volume of the alcohol consumed

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14. See *Distillation*, HOWSTUFFWORKS.COM, <http://science.howstuffworks.com/distillation-info.htm> (last visited Apr. 18, 2014) [hereinafter *Distillation*] (noting that distillation is “the separation of one substance from another by evaporation and condensation”); *Fermentation*, HOWSTUFFWORKS.COM, <http://science.howstuffworks.com/dictionary/biology-terms/fermentation-info.htm> (last visited Apr. 18, 2014) (“[W]ine is the product of yeast fermentation in fruit juice, while beer is the product of yeast fermentation in grain.”); see also William Gurstelle, *Whiskey Rebellion*, POPULAR MECHANICS, Feb. 2012, at 60; Mike Nixon, *Distillation—How It Works*, HOMEDISTILLER.ORG (Nov. 16, 1999), <http://homedistiller.org/howitworks.pdf>. While ethyl alcohol can be produced synthetically by adding a strong base to ethyl acetate, it is beyond the scope of this Note and highly unlikely to be practiced by amateur distillers.
 15. See *Distillation*, *supra* note 14.
 16. 26 U.S.C §§ 5002(a)(8), 5041, 5051 (2012) (distinguishing “distilled spirits” from “wine” and “beer”).
 17. Ripple was a cheap, sweet wine produced by E. & J. Gallo Winery and popular in the U.S. during the 1970s. See Jerry Hirsch, *At 75, Wine Giant Gallo is Refining Its Palate*, L.A. TIMES, Apr. 4, 2008, at C1.
 18. The Glenlivet is a single malt scotch whisky. THE GLENLIVET, <http://www.theglenlivet.com> (last visited Apr. 18, 2014).
 19. See OKRENT, *supra* note 11, at 110–11 (discussing the careful selection of wording by the drafters of the Eighteenth Amendment to only prohibit “intoxicating liquors”). By not using the word “alcoholic” in the text of the Amendment itself, the drafters “enabled fence-sitters, conflict avoiders, and wishful thinkers to support the amendment in the hope that the eventual definition would leave room for some of the milder forms of liquid stimulation.” *Id.* at 110. But the milder forms were not accommodated: “The words ‘beer, wine, or other intoxicating malt or vinous liquors’ . . . shall be hereafter construed to mean any such beverages which contain one-half of [one] per centum or more of alcohol by volume.” National Prohibition (Volstead) Act, ch. 85, tit. 1, § 1, 41 Stat. 305, 305 (1919), *repealed by* U.S. CONST. amend. XXI.

matters.²⁰ The percentage of alcohol within the drink—whether five percent as in a beer or twenty to forty percent as in some distilled spirits—makes no difference. The intoxicating chemical is the same, and only the amount of impurities varies between the beverages.

Alcohol is alcohol, and it is intoxicating in all forms. So why allow private citizens to brew beer and wine to create alcohol from fruit while categorically banning home distillation? Not surprisingly, the reason is money. The real difference between these various alcoholic mixtures is their respective rates of taxation.²¹ Compare the tax rate imposed on beer (\$0.58 per gallon) and wine (less than \$2 per gallon) with distilled spirits at a substantial \$13.50 per “proof gallon.”²² For a gallon of 100-proof ethanol, the federal government takes \$27.00 immediately upon production—almost three times the amount for the exact same amount of ethanol in beer.²³ Thus, the federal government has a greater interest, literally, in monitoring the production of distilled spirits than monitoring the production of beer or wine. But

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20. *Alcohol and Public Health: Frequently Asked Questions*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/alcohol/faqs.htm#beerWine> (last updated July 31, 2013) [hereinafter CDC] (“Is beer or wine safer to drink than liquor? No. One 12-ounce beer has about the same amount of alcohol as one 5-ounce glass of wine, or 1.5-ounce shot of liquor. *It is the amount of alcohol consumed that affects a person most, not the type of alcoholic drink.*” (emphasis added)).
21. 26 U.S.C. §§ 5001, 5041, 5051 (2012) (imposing lower tax rates for wine and beer than distilled spirits).
22. Distilled spirits are taxed at a rate of \$13.50 per gallon of 100-proof alcohol, or \$27 per gallon of 100% ethanol. *Id.* § 5001(a)(1). The rates of taxation for wines vary by type and by alcohol percentage. *Id.* § 5041(b). Most wine sold within the United States carries a tax rate of \$1.57 per gallon. Beer is taxed at \$18.00 “for every barrel containing not more than 31 gallons,” which is approximately \$0.58 per gallon. *Id.* §§ 5002(a)(10), 5051(a)(1). For an easy-to-read chart displaying the different rates for all types of beverages, see *Tax and Fee Rates*, ALCOHOL AND TOBACCO TAX AND TRADE BUREAU, http://www.ttb.gov/tax_audit/atftaxes.shtml (last updated Nov. 6, 2013).
23. Because a gallon of distilled spirits contains significantly more ethanol than a gallon of beer, a per-ounce-of-ethanol analysis may help to clearly and accurately illuminate the tax disparity. At \$18 per thirty-one-gallon barrel of beer, assuming beer is six percent alcohol by volume, it is \$18 per 1.86 gallons of beer ethanol (238.08 ounces of beer ethanol), which is about \$0.076 per ounce of beer ethanol. Distilled spirits, however, are taxed at \$13.50 per “proof gallon,” which is a gallon containing fifty percent ethanol by volume. 26 U.S.C. § 5002(a)(11) (2012). Because one gallon equals 128 ounces, a gallon of 50% ethanol, which contains 64 ounces of ethanol, comes out to just over \$0.21 per ounce of spirit ethanol. That’s nearly three times as much tax on ethanol from spirits than from beer.

profit margins alone should not dictate tax policy, especially in light of such a longstanding and culturally significant product and trade.²⁴

A. *Colonial America and Free Distilling*

From the very first settlements until the tail end of the eighteenth century, Americans were free to brew their own beer and distill their own spirits.²⁵

Americans drank beer, cider, wine, and liquor—nearly anything they could get their hands on.²⁶ People drank in the morning with the birds, at the 11:00 a.m. “grog time” and the 4:00 p.m. “grog time,” and had several “stiffeners” in the afternoon.²⁷ People feared water more than alcoholic drinks.²⁸ While drinking in all forms was hugely popular, the public’s taste eventually shifted from beer to distilled spirits for several reasons: (1) distilled spirits made more economic sense; (2) the raw ingredients were readily available; (3) it kept

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24. When the *Arbella* brought Puritans to Boston in 1630, the ship carried three times as much beer as water and ten thousand gallons of wine. MARK EDWARD LENDER & JAMES KIRBY MARTIN, *DRINKING IN AMERICA: A HISTORY* 2–3 (rev. ed. 1987); see discussion *infra* Part III.D (discussing that home distilling would not significantly impact tax revenues from distilled spirits).
25. *Cf.* Act of March 3, 1791, ch. 15, §§ 1, 14–15, 1 Stat. 199, 199, 202–03 (imposing duties not only on imported spirits, but also on domestic liquor made with foreign materials and domestic liquor using domestic materials).
26. LENDER & MARTIN, *supra* note 24, at 9 (noting that “most settlers drank often and abundantly” and further noting that even children partook in the dinner beer); see also OKRENT, *supra* note 11, at 8 (“By 1810 the number of distilleries in the young nation had increased . . . to more than fourteen thousand . . .”).
27. OKRENT, *supra* note 11, at 8; see also LENDER & MARTIN, *supra* note 24, at 9–12 (noting the significance of beer and cider at the table, but also enumerating many social catalysts for drinking outside the home); Ed Crews, *Rattle-Skull, Stonewall, Bogus, Blackstrap, Bombo, Mimbo, Whistle Belly, Syllabub, Sling, Toddy, and Flip: Drinking in Colonial America*, COLONIAL WILLIAMSBURG J., Holiday 2007, at 71 (“Many [Colonists] started the day with a pick-me-up and ended it with a put-me-down. Between those liquid milestones, they also might enjoy a midmorning whistle wetter, a luncheon libation, an afternoon accompaniment, and a supper snort.”).
28. LENDER & MARTIN, *supra* note 24, at 2 (noting that “[i]t was an age that considered alcohol safer than water”). A saying commonly attributed to Ben Franklin sums up the sentiment of the times: “In wine there is wisdom, in beer there is freedom, in water there is bacteria.” See, e.g., Lucy Gillmore, *Get Into the Holiday Spirit*, THE INDEPENDENT (London), Nov. 6, 2013, at 40.

longer; and (4) could be more easily transported.²⁹ Before the American Revolution, rum was the Colonists' drink of choice.³⁰ But as molasses became scarce and expensive, and as trade routes opened up into Appalachia, American tastes quickly shifted to grain-based whisky.³¹

Of the many circumstances that bred early Americans' preference for frequent drinking, the most obvious is that nothing stopped them. They could brew their own beer, make their own wine, and certainly distill almost everything possible.³² There simply was no federal law regulating alcohol production until 1791, when then Secretary of the Treasury Alexander Hamilton pushed for and secured an excise on alcohol to help repay the debt incurred during the Revolution.³³ The fact that no federal alcohol regulation existed until the government needed funds suggests that behavior modification ("corrective" taxation) and public safety concerns are not primary motivations for

29. See LENDER & MARTIN, *supra* note 24, at 30 ("By the late seventeenth century, a fundamental shift in colonial drinking preferences was well under way. . . . [N]ew settlers had quickly turned to distilled spirits—mostly out of necessity. . . . America's first commercial distillery opened in Boston in 1700.").

30. Crews, *supra* note 27 ("By 1770, the colonies had more than 140 rum distilleries, making about 4.8 million gallons annually. That was on top of the 3.78 million gallons imported each year.").

31. LENDER & MARTIN, *supra* note 24, at 30–33 ("[B]y the [end of the] eighteenth century, rum had passed its zenith; whiskey was fast becoming the premier American beverage."). "Whiskey gained popularity after the conflict as a new sense of American identity flourished and patriots sought a beverage devoid of English ties." Crews, *supra* note 27. George Washington helped lead the way:

By 1798, the father of our country had a solid building in which several stills were bubbling away. Mount Vernon's whiskey production went from 600 gallons in 1797 to 4,500 gallons in 1798 to 11,000 gallons in 1799. [When] Washington died that year . . . he was one of the largest distillers in the United States.

Id.

32. While the Colonists were creative, "pumpkin gin" would not come until much later. *Cf.* OKRENT, *supra* note 11, at 337 (describing Senator Jim Reed's pumpkin gin formula: "Cut a hole in pumpkin, remove seeds, pack with sugar, seal top back in place with paraffin. In thirty days, the sugar and the meat of the pumpkin would be 'transformed into a high-powered gin.'"); see also ANDREW SINCLAIR, *ERA OF EXCESS: A SOCIAL HISTORY OF THE PROHIBITION MOVEMENT* 439 n.84 (1964) (indicating that John Judge Jr. revealed Senator Reed's pumpkin gin recipe in 1930).

33. Act of March 3, 1791, ch. 15, § 1, 1 Stat. 199. That is not to say that there were *no* laws. See LENDER & MARTIN, *supra* note 24, at 17 ("Each colony developed an extensive legal code to combat all aspects of liquor violations.").

the tax impositions.³⁴ While it is not surprising that excise taxes are imposed for revenue generation, it is important. If there is no appreciable impact on revenues, the only remaining logical ground for distinguishing between beer and spirits must be public safety aims. And in the absence of any proof that beer is somehow safer than liquor, the ban on home distillation makes little sense.

Given the significance of alcohol in Colonial Pennsylvania, both socially and economically, Pennsylvanians strongly resisted the tax, culminating in the “Whiskey Rebellion.”³⁵ Although the Excise Act of 1791 “established [the] constitutional right to impose an excise, [and displayed the federal government’s] power to enforce such a tax,” the first tax on alcohol was short lived—ending abruptly in 1802 after Thomas Jefferson took office.³⁶ The excise tax was again imposed by President Madison to help cover the costs of the War of 1812, suspended again in 1817 (after the U.S. public debt was erased), and re-imposed again by President Lincoln in 1862 during the Civil War.³⁷ Following the Civil War, Congress rescinded the majority of excise taxes with legislation in 1867 and 1870, but the “liquor and tobacco taxes remained in place and became permanent fixtures of the federal revenue system.”³⁸

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34. OKRENT, *supra* note 11, at 53 (“Hamilton’s real interest was revenue and the encouragement of abstinence [was] only a peripheral virtue,” thus “the precedent he and Congress set with the Excise Act of 1791 did not put the [socially-motivated Anti-Saloon League] on the side of history.”).
35. OKRENT, *supra* note 11, at 54 (“[W]hiskey was not simply a commercial product to Pennsylvanians. It also served as a medium of exchange and as a delivery system . . . liquor was a portable cash crop.”); *see also* TUN YUAN HU, *THE LIQUOR TAX IN THE UNITED STATES, 1791–1947: A HISTORY OF THE INTERNAL REVENUE TAXES IMPOSED ON DISTILLED SPIRITS BY THE FEDERAL GOVERNMENT 12–30* (describing the attacks on federal revenue collectors in western Pennsylvania between 1792 and 1794 that eventually required President Washington to order militia to quell the “Insurrection”); Brenda Yelvington, *Excise Taxes in Historical Perspective*, in *TAXING CHOICE: THE PREDATORY POLITICS OF FISCAL DISCRIMINATION* 31, 33–35 (William F. Shugart II ed., 1997) (describing the Whiskey Rebellion of 1794).
36. HU, *supra* note 35, at 28, 30. “[T]he laws laying duties on stills and domestic distilled spirits were struck from the statute books by the act of April 6, 1802 (effective July 1, 1802)” *Id.* at 32–33.
37. OKRENT, *supra* note 11, at 54; *see also* Yelvington, *supra* note 35, at 37 (“During the period of 1817 to 1857, the government usually ran a budget surplus.”).
38. Yelvington, *supra* note 35, at 37 (citation omitted).

B. The Temperance Movement and National Prohibition

Just as drinking is integral to American history, so is the fight against it. One of the first groups advocating temperance was the temperance society established in 1789 in Litchfield, Connecticut.³⁹ Though support has waxed and waned over the centuries, the push for moderation, or even prohibition, remains today.⁴⁰

“America’s love affair with liquor prompted the emergence of a strong, well organized temperance movement with roots stretching back to the 1600s.”⁴¹ This movement took off in the mid-nineteenth century with groups led by women activists like Eliza Thompson (Mother Thompson’s Crusade), Frances Willard (Woman’s Christian Temperance Union), Carry Nation (Hatchetation), even Susan B. Anthony and Elizabeth Cady Stanton.⁴² During the Civil War, the fight against alcohol temporarily took a backseat to obviously much larger issues: “The Civil War distracted the temperance movement for a decade, but by 1869 the dries had regained their momentum.”⁴³

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39. Julie Frey, *Flying the Banner for Temperance*, HOG RIVER J., Winter 2008–09, at 48, 48; *see also* LENDER & MARTIN, *supra* note 24, at 64 (noting that the Litchfield farmers concluded that drinking on the job did more harm than good). “Temperance” originally meant “moderation,” although the meaning shifted as momentum for the abolition of alcohol gained traction through the mid-to-late nineteenth century. OKRENT, *supra* note 11, at 9. The problem with moderation was that it allowed good men to be sucked back into the bottle by temptation, thus “prohibition” became the battle cry. *Id.* at 10 (noting “large numbers” of abstaining drinkers that “fell back” to lower positions because “the tempter was permitted to live and throw out his seductive toils”).
40. *See, e.g., Alcoholic Beverages Wet-Dry Map*, DEP’T OF REVENUE, STATE OF MISSISSIPPI (Sept. 1, 2013), http://www.dor.ms.gov/abc/abc_wet-drymap.html (displaying a map of the “wet” and “dry” counties within the state). Two significant examples of modern “temperance” groups include Students Against Drunk Driving (“SADD”) and Mothers Against Drunk Driving (“MADD”). LENDER & MARTIN, *supra* note 24, at 175. Even the alcohol industry got on board with “responsible drinking.” *See, e.g., Alcohol Responsibility*, ANHEUSER-BUSCH, <http://anheuser-busch.com/index.php/our-responsibility/alcohol-responsibility-our-families-our-roads/> (last visited Apr. 18, 2014); *Responsibility*, DISTILLED SPIRITS COUNCIL OF THE UNITED STATES, <http://www.discus.org/responsibility/> (last visited Apr. 18, 2014). Seagram’s even donated \$5.8 million to Harvard for medical research on alcoholism. LENDER & MARTIN, *supra* note 24, at 175.
41. Davis, *supra* note 9, at 5.
42. OKRENT, *supra* note 11, at 12–25. Okrent further notes that “the rise of the suffrage movement was a direct consequence of the widespread Prohibition sentiment.” *Id.* at 14.
43. Davis, *supra* note 9, at 6.

By the 1880s, the prohibition “wave” picked back up and was in full swing by the next decade.⁴⁴ This continued into the twentieth century.⁴⁵ By April 1917, twenty-six states had adopted some form of prohibition.⁴⁶ The states tried a wide variety of licensing systems, including: high-license fees; low-license fees; segregation of licenses that were geographically close to residences, schools, and churches; restrictions based on population ratios; and many classifications of licenses.⁴⁷

The fight against alcohol gained further support during the First World War, which played an “indispensable role” in the push for prohibition.⁴⁸ “An influx of beer drinking German immigrants over the past half century had produced an explosion in breweries.”⁴⁹

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44. That is not to say the temperance movement was effective. In 1870 there were approximately 100,000 saloons across America; by 1900, that figure had ballooned to nearly 300,000. OKRENT, *supra* note 11, at 27. Of course, in those years, saloons were more than just places to get drunk. *Id.* at 28–29. “[S]aloonkeepers cashed paychecks, extended credit, supplied a mailing address or a message drop [for those without a] permanent home” and even “provided sleeping space.” *Id.* at 28.
45. The Anti-Saloon League (ASL), established in 1893, became the biggest lobby for prohibition, focusing solely on the issue of alcohol and enlisting the support of churches around the nation. *Id.* at 35–36. Encouraged by the overwhelming congressional override of Taft’s veto of the Webb-Kenyon Act (outlawing the importation of alcohol into a dry state), the ASL began serious work toward a constitutional amendment prohibiting alcohol. *Id.* at 58–61.
46. Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 1, 5 n.6 (2006) (citing JAMES H. TIMBERLAKE, PROHIBITION AND THE PROGRESSIVE MOVEMENT 1900–1920, at 149–66 (1963)); *see also* RAYMOND B. FOSDICK & ALBERT L. SCOTT, TOWARD LIQUOR CONTROL 3 (1933) (stating that at the time the United States entered the war, twenty-five states had prohibition laws, and describing this movement as the foundation for the Eighteenth Amendment).
47. FOSDICK & SCOTT, *supra* note 46, at 4.
48. Davis, *supra* note 9, at 8 (“In several ways, World War I played an indispensable role. An influx of beer drinking German immigrants over the past half century had produced an explosion in breweries.”) (citing EDWARD BEHR, PROHIBITION: THIRTEEN YEARS THAT CHANGED AMERICA 63–65 (1996)); *see also* OKRENT, *supra* note 11, at 98–99 (“The notion of national emergency also handed the drys the keys to an arsenal of practical arguments easily draped in patriotic rhetoric. . . . ‘How can we justify the making of any part of our breadstuffs into intoxicating liquor . . . when [soldiers] are crying out for bread?’” (quoting the famous prohibitionist William Jennings Bryan)).
49. Davis, *supra* note 9, at 8 (citing BEHR, *supra* note 48, at 63–65).

Moreover, the brewing industry had an “indelible Germanness.”⁵⁰ Woodrow Wilson’s famous denunciations of “hyphenated Americans,”⁵¹ “made hostility to German-Americans and their beer drinking culture seem a patriotic duty.”⁵²

The final hurdle to national prohibition fell with the passage of the Sixteenth Amendment,⁵³ paving the way for the Income Tax Act of 1913,⁵⁴ the Revenue Act of 1916,⁵⁵ and the War Revenue Act of 1917.⁵⁶ Without some way to replace the revenues generated by the excise tax on alcohol, the federal government would struggle to pay its bills.⁵⁷ But with income tax on individuals and corporations steadily rising, the government was less dependent on alcohol taxation.⁵⁸ In 1912, internal tax receipts accounted for 50.8% of the total federal collections; by 1918, just six years later, that number jumped to 95.4%.⁵⁹ With the income tax’s astounding ability to bring in cash, “the importance of liquor taxation fell precipitously.”⁶⁰ The

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50. OKRENT, *supra* note 11, at 85 (noting the German names of the breweries’ owners: Schmidt, Ruppert, Hamm, Pabst, and Busch).
 51. Davis, *supra* note 9, at 9; *see also* OKRENT, *supra* note 11, at 87.
 52. Davis, *supra* note 9, at 9.
 53. U.S. CONST. amend. XVI; *see also* Donald J. Boudreaux & A. C. Pritchard, *The Price of Prohibition*, 36 ARIZ. L. REV. 1, 2 (1994) (“The income tax proved a viable alternative to liquor taxation for raising revenue, thus making prohibition possible.”).
 54. Act of Oct. 3, 1913, ch. 16, 38 Stat. 114.
 55. Revenue Act, ch. 463, 39 Stat. 756 (1916).
 56. War Revenue Act, ch. 63, 40 Stat. 300 (1917).
 57. *See* OKRENT, *supra* note 11, at 95 (“The income tax had made a Prohibition amendment fiscally feasible.”); Adam Gifford, Jr., *Whiskey, Margarine, and Newspapers: A Tale of Three Taxes*, in TAXING CHOICE, *supra* note 35, at 57, 64 (“From 1873 to 1915, revenue from taxes on alcoholic beverages exceeded revenue *from all other internal sources combined*, and for nineteen of those years, these taxes provided more than three-fourths of the revenue from all internal sources.” (emphasis added) (citation omitted)).
 58. Davis, *supra* note 9, at 10.
 59. Yelvington, *supra* note 35, at 47–48.
 60. Donald J. Boudreaux, *Prohibition Politics*, TRIB. TOTAL MEDIA LIVE (July 25, 2007), http://triblive.com/x/pittsburghtrib/opinion/columnist/s/boudreaux/s_518872.html#axzz2NX9yv7BE, 2007 WLNR 14228910. “By 1920 . . . bulging income-tax revenues made it possible for Congress finally to give in to the decades-old movement for alcohol prohibition.” *Id.*

passage of both the Wilson Act⁶¹ and Webb-Kenyon Act,⁶² which restricted interstate alcohol sales, hinted at alcohol's future.⁶³

Ratified in 1919, the Eighteenth Amendment banned the manufacture, sale, and transportation of all intoxicating liquors in the United States.⁶⁴ "Intoxicating liquors" included not just the devil rum, but also wine and beer.⁶⁵ The consequences of national prohibition were widespread and varied. Though a victory for the 'drys' on paper, the federal government was ill equipped to enforce the law.⁶⁶ Several studies reveal that Prohibition actually *increased* the availability of alcohol.⁶⁷ Liquor was no longer just for sale at the saloon, but rather

61. ch. 729, 26 Stat. 313 (1890) (codified at 27 U.S.C. § 121 (2012)) (allowing the states to entirely forbid the sale of liquor).

62. ch. 90, 37 Stat. 699 (1913) (codified at 27 U.S.C. § 122 (2012)) (allowing the states to only prevent importation of alcohol at their borders).

63. See generally Stuart Banner, *Granholt v. Heald: A Case of Wine and a Prohibition Hangover*, CATO SUP. CT. REV. 263, 272-77 (2004-05) (discussing the enactment and effects of the Wilson and Webb-Kenyon Acts).

64. Section 1, as ratified:

After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

U.S. CONST. amend. XVIII.

65. Definition of intoxicating liquors in Volstead Act: "intoxicating liquor" shall be construed to include alcohol, brandy, whiskey, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor . . . by whatever name called, containing one-half of [one] per centum or more of alcohol by volume." National Prohibition (Volstead) Act, ch. 85, 41 Stat. 305 (1919).

66. Federal enforcement of the Volstead Act was severely underfunded and understaffed. OKRENT, *supra* note 11, at 247-66. "Beyond the nickels devoted to the Prohibition Bureau, the resolutely dry Congress, in league with falsely dry Harding and the hypothetically dry Coolidge, had appropriated virtually nothing to support the legal apparatus that such a radical change in the criminal law required." *Id.* at 255. By 1927, some cities had officially given up. In Detroit (one of the "wettest" cities during Prohibition), the Detroit Board of Commerce boasted "that the city's illicit alcohol trade employed fifty thousand people and racked up \$215 million in annual sales, making it the city's second largest industry." *Id.* at 256.

67. See, e.g., OKRENT, *supra* note 11, at 128. The futility of Prohibition actually led one federal judge to "bl[ow] his brains out." *Id.* at 261. See generally MARK THORNTON, CATO INSTITUTE POLICY ANALYSIS NO. 157: ALCOHOL PROHIBITION WAS A FAILURE 2 (1991) ("[The] pattern of consumption . . . is to be expected after an entire industry is banned:

at every corner.⁶⁸ People quickly organized to meet the growing demand for illegal liquor.⁶⁹ Artificial suppression of demand was no match for the profit-driven ingenuity of the supply chain.⁷⁰ This led to the proliferation of organized crime to operate a huge and unlawful business.⁷¹ Moonshining, bootlegging, and rum-running efforts became focused and well managed rather than fringe activities. Facing popular demand for alcohol and threats from dangerous mobsters, without proper incentives or tools, local officials were easily corrupted.⁷²

The entire system of federal enforcement was positioned to fail, and within a decade, the end was in sight. Simply, the public had realized none of the prohibitionists' promised returns.⁷³ Prisons and jails were not closed for want of criminals, children were not more lovingly raised, venereal disease was not exterminated, and the mortality rate from alcoholism in New York City actually increased six-fold from 1920–1925.⁷⁴ National prohibition had done little but

new entrepreneurs in the underground economy improve techniques and expand output, while consumers begin to realize the folly of the ban.”).

68. OKRENT, *supra* note 11, at 334. In Manhattan alone, one could buy alcohol from such varied places as “saloons, restaurants, night clubs . . . drugstores . . . confectionaries” and even from the “fish store.” *Id.* (quoting a *New York Telegram* article).
69. THORNTON, *supra* note 67, at 1 (“[C]rime increased and became ‘organized.’”).
70. *Id.* at 2 (“Illicit production and distribution continued to expand throughout Prohibition despite ever-increasing resources devoted to enforcement.”).
71. OKRENT, *supra* note 11, at 267–88. “[N]o one had a greater financial stake [in Prohibition] than the criminals who daily sought to undermine it.” *Id.* at 302.
72. *Id.* at 302–03 (“[H]owever the dollars found their way from a mobster’s hoard of cash to a pol’s campaign treasury, the connection was inevitable, the logic unimpeachable. . . . Bootleggers required dry laws to keep legitimate businessmen out of the booze industry, and they needed wet administrations to keep the cops and other enforcement officials off their backs.”).
73. THORNTON, *supra* note 67, at 8 (“In summary, Prohibition did not achieve its goals. Instead, it added to the problems it was intended to solve and supplanted other ways of addressing problems.”). Specifically, prohibition: (1) caused a lack of control over places of drinking, and increased consumption of alternatives such as patent medicine and medicinal alcohol—up 400% from 1923 to 1931; (2) did not result in fewer alcohol related deaths or improved health and hygiene in America; and (3) caused increased crime rates and severity rather than “emptying the prisons” by reforming man. *Id.* at 4–8.
74. CLARENCE DARROW & VICTOR S. YARROS, *THE PROHIBITION MANIA: A REPLY TO PROFESSOR IRVING FISHER AND OTHERS* 96–98 (1927).

sanction hypocrisy and “only one thing could save the nation from its epidemic of cant and falseness—[r]epeal of the Eighteenth Amendment.”⁷⁵

On top of all that, the government’s coffers took a severe beating with the onslaught of the Great Depression.⁷⁶ Federal revenue collections from income tax in 1931—barely one year after the stock market crash—were already down fifteen percent.⁷⁷ The following year yielded another thirty-seven percent reduction, and 1933 saw an additional twenty-six percent decrease.⁷⁸ In all, this amounted to a sixty percent plunge over just three years.⁷⁹ These combined forces eventually tipped the scale against Prohibition. “When the Depression did arrive, bringing with it massive unemployment, diminishing respect for the federal government, a dizzying collapse in federal tax collections, and wide distaste for the Republican Party, Prohibition was on the ropes.”⁸⁰ Prohibition was hugely unpopular, difficult to enforce, and had stripped the federal government of badly needed funds during the most terrible economic times and thus was an easy target for legislators seeking a silver bullet.

C. The Twenty-First Amendment’s Lingering Effects

The Twenty-First Amendment repealed the Eighteenth Amendment and ended nationwide prohibition in 1933.⁸¹ However, the Twenty-First Amendment preserved the dry’s right to be free from alcohol.⁸² While the federal government retained control over transportation *between* states, the states retained the authority to stay dry if they so wished. Because the Twenty-First Amendment was not necessarily an overwhelming rejection of the prohibition movement, but rather an overwhelming rejection of national prohibition as a practical matter,⁸³ some states chose to remain dry.⁸⁴

75. OKRENT, *supra* note 11, at 294–95 (quoting U.S. Senator James Wadsworth).

76. *Id.* at 331.

77. Boudreaux & Pritchard, *supra* note 53, at 6.

78. *Id.*

79. *Id.*

80. OKRENT, *supra* note 11, at 328.

81. U.S. CONST. amend. XXI.

82. *Id.* § 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.”).

83. Yablon, *supra* note 11, at 554.

84. Davis, *supra* note 9, at 36; *see also* OKRENT, *supra* note 11, at 374 (noting that Mississippi remained legally dry until 1966).

While alcohol taxes were in place before Prohibition and still in effect after the Twenty-First Amendment, the federal government immediately sought to reap the rewards sown by repeal.⁸⁵ “The designing of new taxes for the reestablished alcoholic beverage trade now pressed for immediate attention. It was the first subject of legislation by Congress” during their first session in 1934.⁸⁶ The new tax differentiated between distilled spirits and “lighter beverages” in order to garner the most revenue, while simultaneously encouraging a shift to beer and wine, on the “ground[s] that the personal and social problems arising from the use of alcoholic beverages were almost entirely associated with the stronger liquors.”⁸⁷ Congress was so desperate for money that the Liquor Taxing Act of 1934⁸⁸ journeyed from committee to President Roosevelt’s desk in just nine days.⁸⁹ Aside from increases in the amount, little has changed in America’s excise-tax-on-alcohol landscape.

II. THE HOME BREWING BOOM AND EMERGING CRAFT-DISTILLERY MARKET

A. *Home Brewing Success*

On October 14, 1978, President Carter signed the Cranston Act,⁹⁰ exempting home-brewed beer for personal or family use from federal

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85. HU, *supra* note 35, at 55–56 (noting the various sources excise tax rates and regulations on alcohol enacted just prior to Prohibition, including the War Revenue Act of 1917, the Revenue Act of 1918, the Reed ‘Bone Dry’ Amendment, the Food Control Act of 1917, and the War Prohibition Act of 1918). As Hu explains, when national prohibition went into operation, “the taxes on distilled spirits . . . were carried forward into the prohibition period, together with all other existing federal internal revenue laws relating to liquor” so far as allowed by the Eighteenth Amendment. *Id.* at 56.
86. *Id.* at 64. An important consideration in setting the tax rates was the necessity to supply legal booze at a price low enough to “drive out illegal production by price competition.” *Id.* The burden of taxation could not be so large as to encourage further bootlegging. *Id.* at 68.
87. *Id.* at 75 (citing *Tax on Intoxicating Liquor Joint Hearings Before the H. Comm. on Ways and Means and the S. Comm. on Fin.*, 73d Cong. 159-60 (1933)); *see also* 78 Cong. Rec. H116–17 (daily ed. Jan. 4, 1934) (debating a tax rate that would keep reasonable prices but also drive out bootleggers).
88. Pub. L. No. 73-83, 48 Stat. 313 (1934).
89. HU, *supra* note 35, at 81 (stating that the final bill imposed a \$2 per-proof-gallon tax on distilled spirits).
90. Pub. L. No 95-458, 92 Stat. 1255 (1978) (codified at 26 U.S.C. § 5053(e) (2012)).

taxation.⁹¹ This exemption went into effect in February 1979.⁹² Homemade wine, for personal consumption, had always been exempt from federal taxation and was permitted throughout Prohibition by an exemption for fermented “cider and fruit juices” in the Volstead Act.⁹³ These exemptions, however, did not apply to distilled spirits.⁹⁴

Since removing the federal excise tax on home brewing, the craft beer industry has undergone astounding nationwide growth.⁹⁵ According to the Brewers Association, in 1978, there were only eighty-nine breweries operating in the United States, whereas, after the Cranston Act, that number skyrocketed to 2,538 by June 2013.⁹⁶

91. 26 U.S.C. § 5053(e) (2012):

[A]ny adult may, without payment of tax, produce beer for personal or family use and not for sale. The aggregate amount of beer exempt from tax under this subsection with respect to any household shall not exceed—(1) 200 gallons per calendar year if there are 2 or more adults in such household, or (2) 100 gallons per calendar year if there is only 1 adult in such household.

92. Cranston Act § 2(c), 92 Stat. at 1256.

93. National Prohibition (Volstead) Act, ch. 85, § 29, 41 Stat. 305, 316 (1919) (“The penalties provided in this Act, against the manufacture of liquor without a permit shall not apply to a person for manufacturing nonintoxicating cider and fruit juices exclusively for use in his home, but such cider and fruit juices shall not be sold or delivered except to persons having permits to manufacture vinegar.”) These exempted beverages made from “fruit juices” were not limited by the half-percent ceiling on all other liquor, but instead subjected to a looser test of whether they were “intoxicating in fact,” as determined by a jury. OKRENT, *supra* note 11, at 112.

94. Revision of Distilled Spirits Plant Regulations, 76 Fed. Reg. 9080 (Feb. 16, 2011) (“While Federal law allows for the limited home production of wine and beer, no such provision exists for distilled spirits.”).

95. *Prohibition Hangover*, ECONOMIST, Sept. 8, 2012, at 65 [hereinafter *Prohibition Hangover*] (“[The Cranston Act] allowed America’s fledgling craft-brewing industry to flourish.”). While overall U.S. beer sales was down 1.9% by volume in 2013, the craft-brewing industry grew 18% by volume and 20% by dollars. *Craft Brewing Facts*, BREWERS ASS’N, <https://www.brewersassociation.org/pages/business-tools/craft-brewing-statistics/facts> (last updated Mar. 17, 2014) [hereinafter *Craft Brewing Facts*]. Craft brewers currently provide an estimated 110,273 jobs and sold an estimated 15.6 million barrels of beer in 2013, with a retail dollar value of nearly \$14.3 billion. *Id.* There were 2,768 craft breweries operating in the U.S. in 2013, consisting of 1,237 brewpubs, 1,412 microbreweries and 119 regional craft breweries. *Id.*

96. *Number of Breweries*, BREWER’S ASS’N, <https://www.brewersassociation.org/pages/business-tools/craft-brewing-statistics/number-of-breweries> (last visited Feb. 17, 2014).

And home brewing is now rabidly popular and widely practiced.⁹⁷ More significantly, craft brewing is a formidable industry that generates millions in tax revenues for both state and federal governments.⁹⁸ The craft-brewing industry's success was driven by competition from small breweries, which increased customer awareness, developed tastes, and helped sophisticate the U.S. beer market.⁹⁹ Major, large-scale breweries were forced to make competing products to mimic the small-batch quality because new breweries were impinging on their market share.¹⁰⁰ By repealing the ban on home distillation, similar benefits would likely be realized in the craft-distilling industry.¹⁰¹

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97. Homebrewing even reclaimed the White House. See Sam Kass, *Ale to the Chief: White House Beer Recipe*, THE WHITE HOUSE BLOG (Sept. 1, 2012, 1:30 PM), <http://www.whitehouse.gov/blog/2012/09/01/ale-chief-white-house-beer-recipe>. Inspired by homebrewers from across the country, President Obama bought a home brewing kit for the White House kitchen, resulting in recipes for President Obama's "Honey Ale" and "Honey Porter." *Id.*
98. See *Craft Brewing Facts*, *supra* note 95. In 2011, California's craft-brewing industry contributed approximately \$3 billion to that state's economy and paid more than \$41 million in state and federal excise taxes. DAVID RICHEY, CAL. CRAFT BREWERS ASS'N, CALIFORNIA CRAFT BREWING INDUSTRY: AN ECONOMIC IMPACT STUDY 2, 20 (2012).
99. "The increase [in craft breweries] represents a shift in consumer tastes toward local, artisan products." Olga Khazan, *In Washington, Bottoms Up*, WASH. POST, Apr. 8, 2012, at A14. "As more Americans crave artisanal alternatives to Miller and Budweiser, the craft brewing industry . . . has exploded around the country over the past few years." Dan Frosch, *Craft Brewing Finds a Welcoming Atmosphere*, N.Y. TIMES, Mar. 2, 2012, at A11. In 1983, the top six beer companies—Anheuser-Busch, Miller, Heileman, Stroh, Coors, and Pabst—controlled 92% of the U.S. market. *History of American Beer*, BEER ADVOCATE, http://beeradvocate.com/beer/101/history_american_beer (last visited Apr. 19, 2013).
100. See *Prohibition Hangover*, *supra* note 95, at 65 ("Even the big breweries recognise the value in craft-beer cachet. Shock-Top, for instance, may be 'a Belgian-style unfiltered wheat ale brewed with real citrus peels and coriander spice,' but it is brewed by Anheuser-Busch.").
101. "All of these little mom-and-pop [distilleries] could add big bucks to state coffers, if other artisan alcohol industries are any indication. Last year, craft breweries contributed \$3 billion to the state of California's economy. California's Napa Valley, which is home to 391 wineries, has a \$9.5 billion economic impact in the state. In New York, breweries are responsible for about 3,000 jobs, while wineries contribute \$1 billion in economic impact and 5,000 jobs." Martha C. White, *States Hope Hard Liquor Will Fix Their Economies*, TIME ONLINE (Oct. 15, 2012), <http://business.time.com/2012/10/15/states-hope-hard-liquor-will-help-fix-their-economies/>.

Secondary businesses have also benefited, like: home brewing supply operations, rent-a-brewer operations, bottling plants, raw ingredient producers, competitions, restaurants, gastro-pubs, and brew pubs.¹⁰² The craft-brewing business is not just good for beer, but for entire neighborhoods.¹⁰³ Many of the most economically vibrant neighborhoods throughout America's large cities revolve around drinking establishments. These new bars and brewpubs, serving quality, small-batch beers are often paired with top-notch restaurants and music venues, providing an entire entertainment package. Soon, craft distilleries could be in on the action.

B. Craft Distilling Is Already Here—Let's Get ~~Intoricated!~~ Involved!

Just as with craft breweries, there is a growing market and consumer demand for craft distilleries. Why fight it? The sheer volume of newspaper, magazine, and Internet articles illustrating the craft-distilling industry's rise¹⁰⁴ foreshadows the inevitable growth.

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102. See, e.g., JOHN DUNHAM & ASSOCS., THE BEER INSTITUTE ECONOMIC CONTRIBUTION STUDY: METHODOLOGY AND DOCUMENTATION 1 (2013) (“The brewing industry is a dynamic part of the U.S. economy, accounting for about \$246.6 billion in output or 1.6 percent of GDP. American and international brewers, along with their wholesale and retail partners, directly or indirectly employed approximately 2.02 million Americans in 2010. These workers earned almost \$79 billion in wages and benefits.”).
103. Pittsburgh's “Homewood” neighborhood and Cleveland's “Ohio City” neighborhood are two examples where breweries have led revitalization efforts. Joe Baur, *Craft Breweries Revitalizing the Rust Belt*, CRAFT BEER, <http://www.craftbeer.com/craft-beer-muses/craft-brewers-revitalizing-the-rust-belt#> (last visited Apr. 19, 2014) (“[S]ince Great Lakes [Brewery] has opened, a lot has changed for the better. . . . The perception has caught up with the reality that Ohio City is a thriving neighborhood.” (quoting Sam McNulty, owner of The Market Garden Brewery and Distillery in Cleveland's Ohio City)).
104. See, e.g., Emily Stewart, *Local Spirits Alive, Well*, POUGHKEEPSIE J., Apr. 15, 2014, at 1A (identifying small distilleries that have opened around the Hudson Valley); Jim Camden, *Spirited Industry: Washington Leads Growing Business of Craft Distilleries*, SPOKESMAN-REV. (Spokane, Wash.), Apr. 13, 2014, at A1 (providing that there is a large number of craft distilleries in the state of Washington); Jason Wilson, *Over a Barrel*, WASH. POST, May 19, 2010, at E5 (“American microdistilling is more vibrant than it has been since before Prohibition.”); Qainat Khan, *Craft Distillers Fuel American Whiskey Renaissance*, BOSTON NPR: HERE & NOW (Jan. 14, 2014), <http://hereandnow.wbur.org/2014/01/14/american-whiskey-renaissance> (describing the changes that craft distilleries have brought to the American whiskey market); *The Lines Between Established Distillers and Small Craft Distillers Are Becoming Blurred*, THE WHISKEY ADVOCATE (Mar. 23, 2011), <http://whiskyadvocate.com/whisky/2011/03/23/the-lines-between-established-distillers-and-small-craft-distillers-are>

The logical response is to embrace and encourage this growth, rather than stifle or burden it.

The following snippets, quotes, and statistics, highlight the craft-distilling industry's sudden popularity and need for new legislative efforts:

- “[T]he [distilling] gold rush is on, even if it’s wrapped in a ball of red tape.” Noting that “there were only a few dozen legal craft distilleries [in the United States] until just a few years ago. Now there are well over 200.”¹⁰⁵

- In July 2012, New York created a new class of liquor licenses for “farm distilleries” whose liquor is made almost entirely from in-state materials.¹⁰⁶ “The law allowed the distilleries to mimic wineries and micro-breweries by opening tasting rooms and retail shops on their premises.”¹⁰⁷ In October 2012, New York expanded the law to permit microdistilleries to sell their liquor at farmers’ markets and fairs.¹⁰⁸

- In New Jersey, two identical bills to help microdistillers enter the market were introduced into the state’s legislature for the second year in a row. The proposed law would establish a craft distillery license at a reduced price for small, local distillers.¹⁰⁹

- Massachusetts passed a similar law granting affordable “farmer-distillery” licenses that permit the importation of juice and plants, but not wine or alcohol.¹¹⁰ Distillers can ferment the

-becoming-blurred/ (describing the increasing ability with which craft distillers compete with established distillers).

105. Joe Ray, *Distilling’s Gold Rush*, THE DAILY (June 18, 2011), <http://www.thedaily.com/page/2011/06/18/061811-arts-food-distilling-1-6/>.

106. Act of July 18, 2012, ch. 108, § 10, 2012 N.Y. LAWS 736, 742 (codified as amended at N.Y. ALCO. BEV. CONT. LAW § 61(2-c)(a)).

107. Glenn Blain, *Boonshine! Home Booze Makers Get Ok to Sell Their Hooch*, N.Y. DAILY NEWS, Oct. 4, 2012, at 14, available at <http://www.nydailynews.com/new-york/cuomo-shot-arm-small-booze-makers-article-1.1174470>.

108. Act of Oct. 3, 2012, ch. 484, § 1, 2012 N.Y. LAWS 1242, 1242 (codified as N.Y. ALCO. BEV. CONT. LAW § 61(2-c)(b)(iv)); see also Blain, *supra* note 107.

109. Tara Nurin, *Craft Distillers Ask State to Repeal Prohibition-Era Laws*, N.J. SPOTLIGHT (Oct. 15, 2012), <http://www.njspotlight.com/stories/12/10/14/craft-distillers-ask-state-to-repeal-prohibition-era-laws>. The bills, House A-1464 and Senate S-463, would give a license to producers of less than 20,000 gallons annually, and who source at least fifty-one percent of their materials in-state, for just \$938 a year. *Id.*

110. MASS. GEN. LAWS ANN. ch. 138, § 19E (West Supp. 2014).

juice and use the wine to distill alcohol for wholesale or retail. They can even sell the resulting liquor on their premises.¹¹¹

- In May 2012, Connecticut effectively repealed its “blue laws” prohibiting Sunday alcohol sales. The new law expands the days and hours for off-premises alcohol sales, including allowing sales on Sundays.¹¹² It also allows retailers who sell alcohol for off-premises consumption to sell one item below cost each month and establishes a task force to study Connecticut’s liquor laws compared with surrounding states.¹¹³

- Notably, only one state, Indiana, still prohibits the Sunday sale of beer, wine, and liquor at grocery and package stores. The majority of states now allow alcohol sales on Sunday, with sixteen states having changed from not allowing such sales since 2002.¹¹⁴

- Five “control states” recently passed legislation to allow liquor tastings at distilled spirits outlets.¹¹⁵

- West Virginia became the ninth state since 2009 to allow spirits tastings at liquor stores, bringing the total number of states allowing such tastings to thirty-six.¹¹⁶ Seven more states are considering spirits tasting legislation in 2012.¹¹⁷

- In 2008, Ohio allowed microdistillery licenses, but limited such licenses to only counties with a population above 8,000 and only one license could be issued in each county.¹¹⁸ In December 2011,

111. *Id.* For producers of up to 5,000 gallons annually, the license costs a mere \$22. Producers of up to one million gallons per year pay only \$110. *Id.*

112. Pub. Act 12-17, §§ 9–10, 2012 Conn. Acts 38, 41–42 (Reg. Sess.).

113. § 12, 2012 Conn. Acts at 44.

114. *Sunday Alcohol Sales*, DISTILLED SPIRITS COUNCIL OF THE UNITED STATES, <http://www.discus.org/policy/sunday> (last visited Apr. 20, 2014). *But see* IND. CODE ANN. § 7.1-3-1-14 (West Supp. 2013).

115. *West Virginia Governor Signs Spirits Tasting Legislation*, DISTILLED SPIRITS COUNCIL OF THE UNITED STATES (Apr. 4, 2012, 12:58 PM), <http://www.discus.org/west-virginia-governor-signs-spirits-tasting-legislation> (listing Maine (2009), Vermont (2009), Michigan (2010), Virginia (2010), and Washington (2011) as having recently “modernized liquor laws to allow spirits tastings at distilled spirits outlets”).

116. *Id.*

117. *Id.* (listing Georgia, Kansas, Mississippi, Oklahoma, Rhode Island, Utah, and Wisconsin as “states [that] are considering spirits tasting legislation in 2012”).

118. Act of June 10, 2008 (codified as amended at OHIO REV. CODE ANN. § 4303.041 (West Supp. 2014)).

the Ohio General Assembly removed its limitation on the number of microdistillery licenses that can be issued, allowing more microdistilleries to operate within the state and meet consumer demand.¹¹⁹

•In 1992, only sixty legal microdistilleries—those producing less than 65,000 gallons annually—existed. By 2012 that number jumped to over 300.¹²⁰ This represents more than a fivefold increase since 2000, and the number is expected to reach 1,000 by 2021.¹²¹

III. THE CURRENT PROHIBITION ON HOME DISTILLATION

The U.S. government expressly forbids all home distillation. Under the TTB's regulation (the "Regulation"):

A person may not produce distilled spirits at home for personal use. Except as otherwise provided by law, distilled spirits may only be produced by a distilled spirits plant registered with TTB under the provisions of 26 U.S.C. 5171. All distilled spirits produced in the United States are subject to the tax imposed by 26 U.S.C. 5001.¹²²

It is of no import whether the homemade liquor is intended for commercial sale or personal consumption. While the federal government concededly has the requisite authority to regulate interstate commerce, the regulation of a noneconomic, wholly intrastate activity to the point of extinction, however, implicates considerable Commerce Clause issues.¹²³ Moreover, because the government tolerates *home brewers* and *home vintners*, yet imposes severe criminal sanctions against *home distillers*, the prohibition also

119. Act of Dec. 14, 2011, sec. 1, § 4303.041, 2011 Ohio Laws 69 (effective Mar. 22, 2012) (deleting the following language from § 4303.041(A): "Not more than one A-3a permit may be issued per county and only in a county with a population exceeding eight hundred thousand."); see also OHIO DEP'T OF COMMERCE, ANNUAL REPORT 2012 ("The result was the . . . creation of seven new businesses. A dozen more are making preparations to begin operations in FY 2013."). Previously only three licenses were allowed in the entire state—one for each county with more than 800,000 residents. OHIO LEGIS. SERV. COMM'N, FISCAL NOTE & LOCAL IMPACT STATEMENT FOR H.B. 243, 129th Gen. Assemb., at 2 (2011).

120. Gurstelle, *supra* note 14, at 60.

121. Nurin, *supra* note 109.

122. 27 C.F.R. § 19.51 (2013).

123. U.S. CONST. art. I, § 8, cl. 3.

implicates Fifth Amendment equal protection problems.¹²⁴ Finally, because the actual statutes passed by Congress fail to even address—let alone ban—home distillation for personal use, the TTB may have misinterpreted Congress’s intent, exceeding its authority.¹²⁵ Even if the ban on home distilling passes constitutional muster, it still makes little sense because it neither advances tax policy nor increases the public’s safety.

A. *The Ban on Home Distilling Stretches the
Commerce Clause Beyond Even Wickard*

The prohibition on distilled spirits involves two powers that the Constitution grants to the federal government, which must be construed narrowly to avoid impinging the states’ police power.¹²⁶ The Constitution authorizes Congress “[t]o regulate Commerce . . . among the several States.”¹²⁷ This means that “Congress may regulate the use of the channels of interstate commerce, . . . persons or things in interstate commerce, . . . and those activities that substantially affect interstate commerce.”¹²⁸ The power over activities that substantially affect interstate commerce can be expansive but is not without limit (at least in theory). Congress’s power to regulate *activities* extends to “such seemingly local matters as a farmer’s decision to grow wheat for himself and his livestock, and a loan shark’s extortionate collections from a neighborhood butcher shop.”¹²⁹

124. U.S. CONST. amend. XIV, § 1. This argument may be better made under the Due Process Clause because there is no state law at issue: Is this a due process problem if the law is facially nondiscriminatory but through loopholes (exemptions) treats distillers, brewers, and vintners differently?

125. *See generally* Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984) (holding that in the absence of congressional guidance, the agency’s interpretation must only be a “permissible construction” in light of the statute’s plain language, legislative history, and policy considerations).

126. Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

127. U.S. CONST. art. I, § 8, cl. 3.

128. United States v. Morrison, 529 U.S. 598, 609 (2000) (quoting United States v. Lopez, 514 U.S. 549, 558–59) (internal quotation marks omitted).

129. *Sebelius*, 132 S. Ct. at 2578–79 (citing Wickard v. Filburn, 317 U.S. 111 (1942); *Perez v. United States*, 402 U.S. 146 (1971)). Congress may also “tax and spend.” U.S. CONST. art. I, § 8, cl. 1; *Sebelius*, 132 S. Ct. at 2579. This grant further extends the federal government’s ability to regulate activity. *See, e.g.*, License Tax Cases, 72 U.S. (5 Wall.) 462, 471 (1867). This Note does not contest Congress’s ability to tax goods, except to the extent that a tax on anything that might possibly affect commerce, in some tangential manner, would be impractical.

The prohibition against all home distillation¹³⁰ exceeds Congress's power because a limited exemption for home distillation of alcohol for personal consumption would not "substantially affect interstate commerce." While congressional authority under the Commerce Clause is understood to "extend[] to activities that [substantially affect interstate commerce] only when aggregated with similar activities of others,"¹³¹ it is not without bounds. Any contention that home distillation would substantially impact the interstate market, à la *Gonzales v. Raich*,¹³² at this stage, is premature. Such conclusions would "amount to nothing more than a legislative insistence that the regulation of [distilled spirits] must be absolute. They [would be] asserted without any supporting evidence—descriptive, statistical, or otherwise."¹³³ Congress's bare conclusion "that a particular activity substantially affects interstate commerce does not necessarily make it so."¹³⁴

Here, as in *Raich*, the federal government seeks to regulate an entirely intrastate, noneconomic activity on the hypothetical grounds that it would substantially impact the interstate market for legal spirits. But as Justice O'Connor explained:

It will not do to say that Congress may regulate noncommercial activity simply because it may have an effect on the demand for commercial goods, or because the noncommercial endeavor can, in some sense, substitute for commercial activity. Most commercial goods or services have some sort of privately producible analogue. . . . To draw the line wherever private activity affects the demand for market goods is to draw no line at all, and to declare everything economic.¹³⁵

Further, it is hard to imagine a complete prohibition of an activity as *regulation*. As Chief Justice Roberts explained in *National Federation of Independent Business v. Sebelius*,¹³⁶ "[t]he power to regulate commerce presupposes the existence of commercial activity to be regulated."¹³⁷ An analogous inference may be made here: if the

130. 27 C.F.R. § 19.51 (2013).

131. *Sebelius*, 132 S. Ct. at 2586 (citing *Wickard*, 317 U.S. at 127–28).

132. 545 U.S. 1 (2005).

133. *Id.* at 54 (O'Connor, J., dissenting).

134. *Id.* (Rehnquist, J., concurring) (quoting *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 311 (1981)).

135. *Id.* at 49–50.

136. 132 S. Ct. 2566 (2012).

137. *Id.* at 2586.

power to regulate does not include the power to create, neither should it include the power to destroy.

*B. The Discriminatory Treatment of Home Distillers
Violates the Equal Protection Clause*

The regulation on home distilling is unconstitutional because it violates the equal protection component of the Fifth Amendment's Due Process Clause.¹³⁸ The prohibition violates equal protection by arbitrarily distinguishing between *home brewers*, *home vintners*, and *would-be home distillers* for personal use. There is no rational reason for the law to distinguish between consumer production of beer, wine, or spirits, based solely on the percentage of alcohol in the resulting beverage. Absent proof that beer is safer than whiskey, at best, the regulation is irrational; at worst, it amounts to economic protectionism designed to protect the distilling industry at the expense of their (potential) competitors—craft distillers and home artisans.

The government would likely argue that distilled spirits are more dangerous than beer or wine. But this argument fails when juxtaposed with the personal use exemption for cigarettes—the cause of approximately six million deaths each year worldwide.¹³⁹ Cigarettes produced by consumers for their personal use, whether produced manually or electronically, are completely legal, although they are subject to federal excise taxes.¹⁴⁰ Cigarette papers are taxed at a rate

138. U.S. CONST. amend. V; *see also* *Hodel v. Indiana*, 452 U.S. 314, 331–32 (1981) (upholding a mining act that treated coal miners in Midwestern states less preferably than coal miners in more mountainous regions against equal protection and due process challenges). “Social and economic legislation . . . that does not employ suspect classifications or impinge on fundamental rights must be upheld against equal protection attack when the legislative means are rationally related to a legitimate governmental purpose.” *Id.* at 331 (citing *Schweiker v. Wilson*, 450 U.S. 221 (1981)). “Moreover, such legislation carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality. . . . [S]ocial and economic legislation is valid unless ‘the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [a court] can only conclude that the legislature’s actions were irrational.’” *Id.* at 332 (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979) (noting further that “[t]his is a ‘heavy burden’”).

139. WORLD HEALTH ORGANIZATION, WHO REPORT ON THE GLOBAL TOBACCO EPIDEMIC, 2011–12 (2011) (“[A] request [for global tobacco control] was made in response to the rapid globalization of the tobacco epidemic and the growing magnitude of the health burden associated with tobacco use, which kills nearly 6 million people and causes hundreds of billions of dollars in economic damage worldwide every year.”).

140. 26 U.S.C. § 5701 (2012).

of 12.6 cents per 200.¹⁴¹ Cigarette tubes are taxed at a rate of 25.2 cents per 200.¹⁴² Loose smoking tobacco—roll-your-own tobacco and pipe tobacco—is also taxed, respectively, at \$24.78 and \$2.83 per pound.¹⁴³ (One pound of tobacco makes approximately 400 cigarettes.)

Cigarette smokers are free to manufacture hundreds of cigarettes within their homes, assisted even by electronic machines. This certainly impacts the interstate market for smokes. If that is not substantial, it is hard to envision home distilling's potential impact as having any greater impact. Further, at least home distilling offers the potential to boost local economies, whereas cigarette smoking has little positive economic impact on a community. Accordingly, the regulation violates equal protection in that it treats similar conduct—homebrewing or fermentation—dramatically differently from distillation—purifying what was already fermented—without any rational reason.

C. The Tax and Trade Bureau's (TTB) Misinterpretation of Congress's Intent Cannot Withstand Even Chevron Deference

When Congress passes a law but grants an agency the responsibility of interpreting and implementing that law, reviewing courts give deference to the agency's rulings and regulations.¹⁴⁴ “The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress.”¹⁴⁵ Regarding the regulation and taxation of alcoholic beverages, the TTB is the interpretative agency left to fill the gaps.¹⁴⁶ The courts’ “review of tax regulations should . . . be guided by agency expertise pursuant to *Chevron* to the same extent as our review of

141. § 5701(c).

142. § 5701(d).

143. § 5701(f)–(g).

144. *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

145. *Id.* (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).

146. *See* Homeland Security Act of 2002 Pub. L. No. 107-296, § 1111, 116 Stat. 2135 (2002) (codified as 6 U.S.C. § 531 (2012)) (dividing the Bureau of Alcohol, Tobacco and Firearms (ATF) into two new agencies: the Alcohol and Tobacco Tax and Trade Bureau (TTB) in the Department of the Treasury and the Bureau of Alcohol, Tobacco, Firearms and Explosives in the Department of Justice). “The regulation and taxation of alcohol beverages remains a function of the Department of the Treasury and is the responsibility of TTB.” Proposed Revision of Distilled Spirits Plant Regulations, 73 Fed. Reg. 26,200 (proposed May 8, 2008) (to be codified at 27 C.F.R. pt. 19).

other regulations.”¹⁴⁷ This applies to Treasury Department regulations like the ban on home distillation under 27 C.F.R. § 19.51.¹⁴⁸ Under the standard announced in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,¹⁴⁹ an agency’s interpretive rule will be upheld if: (1) Congress has not “directly addressed the precise question at issue,” and (2) the rule is not “arbitrary, capricious, or manifestly contrary to the statute.”¹⁵⁰

An analysis into whether Congress has “directly addressed” the issue of home distillation is circular and confusing. While Distilled Spirits Plants (“DSP”) are regulated under the provisions of both the Internal Revenue Code¹⁵¹ (“IRC”) and the Federal Alcohol Administration Act¹⁵² (“FAA”), neither law specifically addresses home distillation for personal use. A DSP is “an establishment which is qualified . . . to perform any distilled spirits operation,”¹⁵³ and an “operation” means “any operation for which qualification is required.”¹⁵⁴ Helpful? Subchapter B requires that distilling operations occur only at distilling plants established on registered, bonded, permitted premises, and not “in any dwelling house, in any shed, yard, or inclosure connected with any dwelling house.”¹⁵⁵ While Congress has prohibited distilling “operations” and “plants” in personal homes, it says nothing of distilling for personal use—and there is a distinction between operational or business use and one’s personal use.¹⁵⁶

147. *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 713 (2011).

148. 27 C.F.R. § 19.51 (2013).

149. 467 U.S. 837 (1984).

150. *Id.* at 842–44 (“When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First . . . whether Congress has directly spoken to the precise question at issue. . . . [Second, if] Congress has not directly addressed the precise question . . . [or] if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”).

151. 26 U.S.C. §§ 1–9834 (2012).

152. 27 U.S.C. §§ 1–228 (2012). Provisions of this title have been largely repealed and omitted following the Twenty-First Amendment and subsequent regulations.

153. 26 U.S.C. § 5002(a)(1) (2012).

154. § 5002(a)(2).

155. 26 U.S.C. §§ 5171–78.

156. *See, e.g.*, 26 U.S.C. § 5702(d)(1) (2012) (exempting from the definition of “manufacturer” a “person who produces cigars, cigarettes, smokeless tobacco, pipe tobacco, or roll-your-own tobacco solely for the person’s own personal consumption or use”). *But see* § 5702(d) (including in the

Further, nothing in the statute's plain language or legislative history indicates that a person's home would qualify as a DSP; rather, the statute's language sounds firmly within the context of "business," implying at least *some* economic activity.

The FAA states that "[i]n order effectively to regulate interstate . . . commerce in distilled spirits, wine, and malt beverages, to enforce the twenty-first amendment," it shall be unlawful to engage in the business of importing; to engage in the business of distilling; to engage in the business of purchasing for resale at wholesale; or "for any person so engaged to sell," receive, "offer or deliver for sale, contract to sell, or ship, in interstate . . . commerce . . . distilled spirits, wine, or malt beverages so imported."¹⁵⁷

Similarly, the IRC refers only to *the business* of manufacturing distilled spirits intended as economic goods. "[O]perations as a distiller, warehouseman, or processor may be conducted only on the bonded premises of a distilled spirits plant," which may "be established only by a person who intends to conduct at such plant operations as a distiller, as a warehouseman, or as both."¹⁵⁸ The plain language demonstrates that Congress intended merely to restrict and monitor "operations" and "the business" of distilling spirits to ensure the efficient and complete collection of tax revenues. Wholly absent from either law is any discussion of distilling for personal use. Further, the tax exemption for ethanol for fuel purposes¹⁵⁹ suggests that Congress may actually provide for limited practices that, in the aggregate, may substantially affect not only the interstate commerce in alcohol, but in gas, too.

Of course an opposite interpretation is plausible. The absence of any mention of *personal use* or the word *home* may indicate, as the

definition of "manufacturer," "any person who for commercial purposes makes available for consumer use . . . a machine capable of making cigarettes, cigars, or other tobacco products").

157. 27 U.S.C. § 203 (2012).

158. 26 U.S.C. § 5171(a)–(b) (2012).

159. 26 U.S.C. § 5181 (2012) (providing further "that the Secretary shall, to the greatest extent possible, take steps to simplify the application so as to expedite the issuance of such permits"). Interestingly, Congress has provided many other exemptions for certain uses of distilled spirits, including for the following: use by federal or state agencies; use by nonprofit educational organizations, scientific universities or colleges, laboratories, hospitals, blood banks, sanitariums, and charitable clinics; denatured distilled spirits; use in the production of vinegar by the vaporizing process; use in the production of wine; volatile fruit-flavor concentrates; export; as supplies for certain U.S. vessels and aircraft (including those employed in the United States' whaling business); to foreign-trade zones; and for use in certain research, development or testing. *See* 26 U.S.C. § 5003 (2012) (providing references for each of the above, among others).

TTB believes, that Congress intentionally aimed to preclude all home distillation. After all, Congress has affirmatively enacted laws that permit home-brewing beer and wine. The omission of legislation allowing home distilling spirits may imply that Congress intended the distinction.

D. A Tax Exemption for Home Distillation Will Not Significantly Impact Federal Revenues

The obvious reason to prohibit all home distillation is to facilitate the collection of federal excise taxes through careful monitoring of all manufacture. But this premise is inherently flawed as the federal government only collects 3.1% of its total revenue from all excise taxes—including alcohol, tobacco, and gas-guzzling trucks and cars.¹⁶⁰ Even among these small contributors, revenue from alcohol fails to rank anywhere near the top of the heap.¹⁶¹ The fraction of revenue collected directly from distilled spirits is approximately 0.22%,¹⁶² an insignificant contribution to the federal government's budget.

One study predicts only a \$7,375,816 loss from the reduction of excise taxes on small producers.¹⁶³ Compared with the government's budget, this amount of excise tax is small, and this estimate includes the potential revenue loss from commercial distillers making hundreds of thousands of gallons of spirits annually. Even accounting for some error, the potential revenue loss from a personal-use exemption for home distillation would be insignificant. Further, even with home brewing's success since its legalization in 1978, the three largest U.S. brewers still controlled eighty percent of the market in 2009.¹⁶⁴

As further support, when the tax revenue collected from alcohol excise taxes post-1978 (when exceptions were made for home brewing beer and wine) are compared with pre-1978 levels, any hypothetical effect on the federal income is unsubstantiated. For the five years preceding the act (1974 to 1978), the average income from excise

160. JOINT COMM. ON TAXATION, 112TH CONG., TESTIMONY OF THE STAFF OF THE JOINT COMMITTEE ON TAXATION BEFORE THE JOINT SELECT COMMITTEE ON DEFICIT REDUCTION 3 fig.1 (September 22, 2011) [hereinafter JOINT COMMITTEE].

161. *Id.* at 44 (“The largest excise taxes in terms of revenue (for fiscal year 2009) are those for gasoline motor fuels (\$25.1 billion), domestic cigarettes (\$11.0 billion), diesel motor fuel (\$8.5 billion), and domestic air ticket taxes (\$7.3 billion).”).

162. Total revenue collections for FY 2012 (last year data available) from excise taxes on distilled spirits was \$5.419 billion; the federal government's total receipts for the same year was \$2.450 trillion. FY 2014 BUDGET, *supra* note 8, at 33 tbl.2.1.

163. KHOSROVIAN, *supra* note 8, at 3.

164. OKRENT, *supra* note 11, at 358.

taxes on alcohol was roughly \$5.57 billion.¹⁶⁵ The average collected from the next five years (1979 to 1983) was \$5.54 billion.¹⁶⁶ Moreover, for the period of time from 1950 to 2010, excise taxes have played a diminishing role in the federal revenue stream—down from 19.1% percent of total revenues to 3.1%.¹⁶⁷ When scrutinized, the impact of home distillation on the interstate market for alcohol is distinguishable beyond even the reach of *Gonzalez v. Raich*. While there is no accepted definition for what substantially affects interstate commerce, the fraction of revenues lost to home distillers from the industry's total contribution, which is only 0.5% of GDP, would not be substantial.

E. Home Distilling Is at Least as Safe as Home Brewing and Far Safer Than Smoking Roll-Your-Own Cigarettes

The safety concerns associated with distilling alcohol are largely overstated and sound more in folklore than fact. Distillation is no more dangerous than many other home activities, such as home brewing, which often involves heating raw ingredients in a turkey fryer with portable propane tanks. Exactly how dangerous home distillation may be is unclear, however, because no studies on the subject have been performed.¹⁶⁸ Without some empirical evidence to the contrary, the regulation against home distilling is arbitrary.

The primary safety issue surrounding alcohol is overconsumption. Overconsumption of alcohol may lead to drunkenness, cirrhosis, and even death.¹⁶⁹ But this applies as equally to beer and wine as it does to distilled liquors.¹⁷⁰ The stage of alcohol refinement—whether brewed or distilled—makes no difference; only the volume of alcohol consumed impacts the human body. A person metabolizes one ounce of alcohol from rum at the same rate as one ounce of alcohol from wine.

165. See U.S. GOV'T PRINTING OFFICE, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2012: HISTORICAL TABLE 2.4—COMPOSITION OF SOCIAL INSURANCE AND RETIREMENT RECEIPTS AND OF EXCISE TAXES, 1940–2016 (2011).

166. *Id.*

167. JOINT COMMITTEE, *supra* note 160, at 50 tbl.A-8.

168. At least none the author could find.

169. CDC, *supra* note 20 (listing problems from excessive drinking, which included “cirrhosis (damage to liver cells); pancreatitis (inflammation of the pancreas); various cancers including liver, mouth, throat, larynx[geal] (of the voice box), and esophag[ieal]; high blood pressure; and psychological disorders.”).

170. *Id.* (“The intensity of the effect of alcohol on the body is directly related to the amount consumed.”).

However, distilling spirits carries some unobvious risks. A frequently cited safety concern regarding distilled spirits is poisoning from poor manufacturing processes. “Moonshining,” or the practice of illegally distilling alcohol for tax-free sale, incentivizes cheap production in order to boost profit margins.¹⁷¹ Old ‘shiners used lead components, which can be toxic, in the still itself and often utilized lead in the brazing materials as well.¹⁷² It was also common to use car radiator parts, containing toxic lead soldering and refrigerant residue, to condense the alcohol.¹⁷³ Car radiators often contained lead and provided a path for introduction into the product.

A simple way to discourage the use of hazardous materials would be to provide a legal market for quality distilling equipment. In fact, one already exists—only for distilling ethanol for fuel.¹⁷⁴ One can purchase a kit from the Internet today for just a couple hundred dollars, complete with everything necessary to distill liquor from potatoes, corn, or any other sugar.¹⁷⁵ While the TTB requires those wanting to distill their own fuel to jump a few more hurdles, nonetheless, it is not too concerned with the public’s safety as to prohibit it entirely.¹⁷⁶

171. OKRENT, *supra* note 11 at 165 (noting that as demand for, and the price of, moonshine soared, small-time criminals were “elbowed aside by “industrial-scale operations”).

172. *Lead*, NAT’L LIBRARY OF MED. HAZARDOUS SUBSTANCES DATA BANK, <http://chem.sis.nlm.nih.gov/chemidplus/rn/7439-92-1> (last visited Apr. 14, 2014).

173. “The use of automobile radiators containing lead-soldered parts in the illicit distillation of alcohol (i.e., ‘moonshine’) is an important source of lead poisoning among persons in some rural Alabama counties.” Ctrs. for Disease Control, *Elevated Blood Lead Levels Associated with Illicitly Distilled Alcohol: Alabama 1990–1991*, 41 MORBIDITY & MORTALITY WKLY. REP. 294 (1992). “Moonshine is typically produced in ground stills using barrels, automobile radiators, and multiple copper tube units sealed with solder as condensers. During the production of moonshine, the leaching of lead from solder or other lead-containing materials in the radiators can result in lead contamination of the moonshine.” Christopher P. Holstege, et al., *Analysis of Moonshine for Contaminants*, 42 J. TOXICOLOGY 597, 599 (2004).

174. See 26 U.S.C. § 5181 (2012).

175. See *Ethanol Fuel Distillation Equipment*, FUELDISTILLATION.COM, http://www.fueldistillation.com/still_kits.html (last visited Apr. 20, 2014) (“The Distillers Listed Above produce Ethanol Alcohol, also known as Grain Alcohol or Moonshine. With practice and the right ingredients you can also produce Whiskey, Vodka, Rum, Brandy, and other distilled spirits. Legal requirements must be met in most cases. Check your federal and local legal requirements before distilling.”).

176. See TTB FORM 5110.74: APPLICATION AND PERMIT FOR AN ALCOHOL FUEL PRODUCER UNDER 26 U.S.C. § 5181 (2013).

Another safety concern arises from the process itself, which creates different types of alcohol that can cause poisoning. Methanol (CH₃OH), a byproduct of the distillation process, evaporates at a lower temperature than ethanol, and can have serious health effects.¹⁷⁷ While methanol boils at sixty-five degrees centigrade, ethanol boils at just over seventy-eight degrees centigrade.¹⁷⁸ Because methanol evaporates at a lower temperature, it is consequently condensed first. If the first portion of the product containing methanol is not removed after the still is at temperature to produce ethanol, than the liquor may become toxic.¹⁷⁹ Ethanol contaminated by methanol can be noticed by smell or taste and should be discarded as these contain the most volatile congeners.¹⁸⁰ More easily still, sugar-based materials that do not contain any pectin will not create any methanol.¹⁸¹

In addition to concerns about the contents of the alcohol, the process itself creates fumes that can pose dangers.¹⁸² As the mash is heated, alcohol vapors are created. If not condensed, these vapors may accumulate, creating potential for ignition. But simple mechanisms, like condensers, exist to prevent vapor accumulation.

Again, the potential danger from vapor would be easily negated by the availability of commercially made stills. Commercially made stills could be registered, licensed, regulated, monitored, and made from the best quality products and processes—including cooling

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177. Bernard Foley & Ian R. Rogers, *Fatal Methanol Poisoning Following Home Distillation of Methylated Spirits*, 11 EMERGENCY MED. 287, 287 (1999) (“The man had been consuming a home distilled liquor produced from methylated spirits that . . . contained 90% ethanol and 5% methanol. His normal practice was to discard the initial methanol-rich fraction but, having run out of liquor, he had resorted to drinking it the previous evening.”). The Foley & Rogers study was the only report the author could find documenting any actual medical cases resulting from home distilling and is from New Zealand, where home distilling has been legal since 1997. “The first [five] percent of the run, aka the foreshots or heads, contains large amounts of congeners, or volatile chemical compounds such as acetone, aldehydes, esters, and fusel oils.” Gurstelle, *supra* note 14, at 61.
178. *Ethanol*, HAZARDOUS SUBSTANCES DATA BANK, *supra* note 13; *Methanol*, NAT’L LIBRARY OF MED. HAZARDOUS SUBSTANCES DATA BANK, <http://chem.sis.nlm.nih.gov/chemidplus/rn/67-56-1> (last visited Apr. 20, 2014). National Library of Medicine, Hazardous Substances Data Bank, “Ethanol,” “Methanol,” <http://toxnet.nlm.nih.gov> (last visited on Mar. 13, 2013).
179. MICHAEL NIXON & MICHAEL McCAW, THE COMPLEAT DISTILLER 62 (2001).
180. *Id.*
181. *Id.* at 120.
182. *Id.* at 43 (noting that hot ethanol vapor can escape and a confined space can form an explosive mixture with air).

devices and over-pressure protections.¹⁸³ Further, stills could be mandated to incorporate safety features such as an electronic interlocks to prevent power to the heating element without sufficient cooling.

Although home distillation carries risks, there is no evidence that the risks outweigh the benefits or that they are so severe as to warrant complete prohibition. People assume dangerous conditions within their home daily, including home brewing and turkey frying. The legislature's conclusion that an activity is too dangerous "does not necessarily make it so."¹⁸⁴ Moreover, Congress has already determined that stills are *not* too dangerous, just as long as you put the product into a tractor's gas tank and not your mouth. Home distillation for ethanol fuel has been exempted from the federal excise tax, and there is no evidence suggesting those who distill their own fuel are in any danger.

What about the social costs of alcohol from lost wages, associated medical expenses, and drunk driving? "[T]here is no good case for yet higher taxes on alcoholic beverages, and in the presence of penal sanctions, it could even be argued that existing taxes are too high."¹⁸⁵ Richard Cowan's "Iron Law of Prohibition" states that the more intense the law enforcement is against a substance, the more potent the prohibited substance becomes.¹⁸⁶ So if the TTB's aim is to reduce consumption of alcohol and protect its citizens' health, legalizing home distillation may actually drive potency down. This has been true of beer. Before prohibition, Americans spent equally on beer and spirits; but during prohibition beer was disfavored because of its bulk.¹⁸⁷ This led to the rise in popularity of distilled spirits and thus an increase in potency in Americans' alcoholic drinks.¹⁸⁸

As Cowan illustrates, the government's war on drugs during the 1980s led to the invention of 'crack' cocaine—a more potent version than its powder form.¹⁸⁹ Similarly, the marijuana smoked today is far removed from the innocuous 'grass' in people's pipes on Haight &

183. Stills available now for ethanol production come equipped with cooling coils. *Ethanol Fuel Distillation Equipment*, *supra* note 175.

184. *Gonzalez v. Raich*, 545 U.S. 1, 54 (2005) (O'Connor, J., dissenting).

185. Richard E. Wagner, *The Taxation of Alcohol and the Control of Social Costs*, in *TAXING CHOICE*, *supra* note 35, at 227, 244.

186. Richard S. Cowan, *How the Narcs Created Crack*, *NAT'L REV.*, Dec. 5, 1986, at 26–27 ("The iron law of drug prohibition is that the more intense the law enforcement, the more potent the drugs will become.").

187. THORNTON, *supra* note 67, at 3.

188. OKRENT, *supra* note 11, at 205–24 (discussing many ways that Prohibition altered Americans' drinking habits).

189. Cowan, *supra* note 186, at 26–28.

Ashbury in 1968.¹⁹⁰ The war on marijuana caused the cost to rise and forced dealers to charge more.¹⁹¹ Because, like most drugs, marijuana's quality is proportional to its strength, when consumers demand *better* product, they really mean *stronger* product. Thus to minimize their risks from the cultivation and transportation of an illicit substance, marijuana dealers could only charge higher prices per ounce if justified by increased potency.

The ban on home distillation incentivizes moonshiners to create the strongest, cheapest product.¹⁹² This leads 'shiners to cut their product with other chemicals, stretching their supply, and increasing revenue. But 'shiners are not incentivized to honestly consider their customers' safety, especially when it would impact profits, and so they do not always cut their product with safe substances. Often 'shiners will cut their finished product with the methylated spirits that are first condensed, which are toxic.¹⁹³

But if everyone were able to distill whiskey, the demand for illegal moonshine would drop. It would certainly be less attractive to buy illegal moonshine when one could easily maintain a custom still. Also, the road to legal distilling would be less steep as industry knowledge spread, and people could enter the craft booze market with some experience.¹⁹⁴ The lack of home experimentation is a real entry barrier and restricts options.¹⁹⁵ Essentially, the major distillers have enjoyed a government-subsidized advantage over the market for centuries.

IV. PROPOSED SOLUTION: THE PERSONAL-USE EXEMPTION

In addition to a reduced tax on small-batch producers, which would allow small producers to compete with the largest distillers, a personal use exemption should be enacted to encourage small business growth and market participation.

Step 1: Repeal 27 C.F.R. § 19.51.

190. Marijuana strains are more potent because of the war on drugs. *Id.* at 27.

191. *Id.*

192. *Cf. id.* (“The iron law of drug prohibition is that the more intense the law enforcement, the more potent the drugs will become.”).

193. See Lessley Anderson, *White-Collar Moonshine*, CHOW (Mar. 2, 2007), <http://www.chow.com/food-news/53868/white-collar-moonshine>.

194. *Cf. id.* (noting that “[m]any of today’s . . . moonshiners buy their stills online, and learn how to use them from friends, Web-based forums, and small-press books”).

195. See also Matt Lee & Ted Lee, *Still Waters*, N.Y. TIMES, Oct. 22, 2006, § 6 (Magazine), at 111 (noting an author who “interviewed more than 30 extralegal distillers”).

Step 2: Enact a specific exemption for home distillation similar to the homebrewing exemption under 26 U.S.C. § 5053, by inserting the following language before 26 U.S.C. § 5002 and renumbering the subsequent sections.

(1) Distilled Spirits for personal or family use.—Subject to regulation prescribed by the Secretary, any adult may, without payment of tax, produce distilled spirits for personal or family use and not for sale. The aggregate amount of distilled spirits exempt from tax under this subsection with respect to any household shall not exceed—

(a) 100 gallons per calendar year if there are 2 or more adults in such household, or

(b) 50 gallons per calendar year if there is only 1 adult in such household.

(2) For purposes of this subsection, the term “adult” means an individual who has attained 18 years of age, or the minimum age (if any) established by law applicable in the locality in which the household is situated at which distilled spirits may be sold to individuals, whichever is greater.

All other regulations on distilling premises for sale and distribution should remain the same.

CONCLUSION

The time for home distillation is now. Legislation that propels society’s goals, rather than stifling them, will help lead the craft-distilling industry’s growth and benefit millions of liquor-loving Americans.

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