Equal Protection of Grocery Stores in the Sale of Alcoholic Beverages

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The United States alcoholic beverage industry is unique as it is the only industry for which two amendments to the Federal Constitution have been passed. The first of those amendments, the ill–fated Eighteenth, enacted nationwide Prohibition.[3] After the complete failure of that "Noble Experiment,"[4]

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3 The Eighteenth Amendment was affected by the National Prohibition (Volstead) Act, 27 U.S.C. §§ 1–94 (repealed 1935). The Eighteenth Amendment provided:

> Section 1. 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.
> Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.
> Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

U.S. Const. amend. XVIII (repealed 1933). The Eighteenth Amendment is unique in that it alone aimed to deprive persons of a previously existing right. Rhode Island had the good sense to not approve the amendment. *Rhode Island Defeats Prohibition*, N.Y. Times, Mar. 13, 1918, at 5. Prohibition was to remain in force "thirteen years, ten months, eighteen days and a few hours." *Final Action by Utah*, N.Y. Times, Dec. 5, 1933, at 1. As observed by H.L. Mencken:

> Prohibition went into effect on January 16, 1920, and blew up at last on December 5, 1933—an elapsed time of twelve years, ten months and nineteen days. It seemed almost a geologic epoch while it was going on, and the human suffering that it entailed must have been a fair match for that of the Black Death or the Thirty Years' War.

H. L. Mencken, The Noble Experiment, in A Choice of Days 307, 307 (1980). The different descriptions of Prohibition's term being 12 or 13 years depends on how one counts the one year phase in period of Section 1 of the Eighteenth Amendment.

4 The moniker the "Noble Experiment" has been long ascribed to President Herbert Hoover. *See* Loretto Winery Ltd. v. Gazzara, 601 F. Supp. 850, 856 n.7 (S.D.N.Y. 1985) ("President Herbert Hoover, who had some difficulty in deciding whether he was a Wet or Dry, coined this expression for National Prohibition.").

the Twenty–First Amendment was enacted, ending Prohibition and vesting in the various states the power to regulate the manufacture, purchase and sale of alcoholic beverages.[5]

Since the passage of the Twenty–First Amendment there have been questions as to its relationship to the balance of the Constitution. Essentially, is the Twenty–First Amendment plenary, removing all aspects of the regulation of the alcoholic beverage industry from oversight by the balance of the provisions of the Constitution or, in the alternative, must state regulation accord with other constitutional requirements? In the early years after the passage of the Twenty–First Amendment, the trend was to view it as controlling over other constitutional provisions.[6] More recently, the trend has been to require regulation under the Twenty–First Amendment to comport with other constitutional limitations.[7] As such, while the states are afforded particular authority with respect to the regulation of the alcoholic beverage industry, that authority must be balanced with other constitutional requirements. To that end, a state may not (i) treat men and women differently with respect to the legal age of drinking[8] or impose differentials between men and women in serving and consuming alcoholic beverages,[9] (ii) impose price affirmation obligations in a state that have the effect of limiting price flexibility in foreign jurisdictions,[10] (iii) enact a tax system that grants preferential treatment to

5 The Twenty–First Amendment of the United States Constitution provides:

> Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.
> Section 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.
> Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

U.S. Const. amend. XXI. The Twenty–First Amendment was proposed to the States on February 20, 1933, and was approved on December 5, 1933. Kentucky approved the Amendment on November 27, 1933. *See* Everett Somerville Brown, Ratification of the Twenty–First Amendment to the Constitution of the United States 166–79 (1938). *See also* Robert E. Dundon, *Kentucky Seeking High Whisky Taxes*, N.Y Times, Aug. 27, 1933) at E6. The Amendment was rejected by South Carolina on December 4, 1933 and was never subsequently approved. *See* Brown, *supra*, at 375–378.

6 *See*, *e.g.*, Mahoney v. Joseph Triner Corp., 304 U.S. 401, 403 (1938); State Bd. of Equalization v. Young's Market Co., 299 U.S. 59, 60–61 (1936). *See also* McCanless v. Klein, 188 S.W.2d 745, 748 (Tenn. 1945).

7 *See*, *e.g.*, Granholm v. Heald, 544 U.S. 460, 486 (2005) (explaining the Twenty–First Amendment "does not supersede other provision of the Constitution"); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 516 (1996) (finding state law ban on advertising prices, other than at the point of sale, violated the First Amendment).

8 Craig v. Boren, 429 U.S. 190, 210 (1976).

9 *See*, *e.g.*, Kentucky Alcoholic Beverage Control Bd. v. Burke, 481 S.W.2d 52, 54 (1972) (striking down, on equal protection grounds and applying an intermediate standard of review, state laws prohibiting women from being bartenders and from drinking liquor at a bar).

10 *See* Healy v. Beer Inst., 491 U.S. 324, 343 (1989); Brown–Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 585 (1986); *see also* Thomas E. Rutledge, *The Questionable Viability*

locally manufactured products,[11] (iv) afford a religious institution a veto over the granting of a liquor license,[12] or (v) grant preferential treatment to wine manufactured in a particular jurisdiction while not granting similar treatment to wine manufactured out–of–state.[13]

While these various battles, particularly those involving the Commerce Clause, will no doubt continue, there has of late been litigation involving the inter–relationship of state alcoholic beverage regulation and the Equal Protection Clause.[14] This article will focus upon the decision of the Sixth Circuit Court of Appeals rendered in *Maxwell's Pic–Pac, Inc. v. Dehner*, wherein the Sixth Circuit reversed a determination by the trial court[15] that a Kentucky statute permitting, *inter alia*, the sale of wine and liquor by pharmacies while not affording a similar opportunity to grocery and convenience stores violated the equal protection rights of the latter category of stores.[16]

Through this article, we explore the history of the limitations imposed in Kentucky with respect to the retail sale of wine and spirits, highlighting the contrast between those retailers who are classified as grocery stores versus those retailers classified as pharmacies, the challenge to that distinction brought by Maxwell's Pic–Pac, the arguments of the grocers, the drugstores, and the free–standing liquor retailers, Judge Heyburn's decision holding the statutory distinction to be invalid under equal protection principles, and finally the decision of the Sixth Circuit reversing that determination.

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of the Des Moines Warranty in Light of Brown–Forman Corp. v. New York, 78 Ky. L.J. 209 (1989–90).

11 Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 276 (1984).

12 Larkin v. Grendel's Den, Inc., 459 U.S. 116, 127 (1982).

13 *See*, *e.g.*, Cherry Hill Vineyards, LLC v. Lilly, 553 F.3d 423, 435 (6th Cir. 2008); *Granholm*, 544 U.S. 460, 493; *see also* Thomas E. Rutledge & Micah C. Daniels, *Who's Selling the Next Round: Wines, State Lines, the Twenty–First Amendment and the Commerce Clause*, 33 N. Ky. L. Rev. 1 (2006).

14 Although not the topic of this article, *Southern Wine and Spirits of Am., Inc. v. Division of Alcohol and Tobacco Control* was another case in the vein of equal protection challenges to liquor regulation. 731 F.3d 799 (8th Cir. 2013). In that case, a challenge was brought by Southern Wine and Spirits, a Florida corporation with its principal place of business in Florida, after it was denied a license to operate as a liquor wholesaler in Missouri on the basis of a Missouri statute that requires that all wholesalers be incorporated in that jurisdiction and that all directors be resident in Missouri. Notwithstanding precedent from the Fifth Circuit Court of Appeals to the effect that such limitations violate the Commerce Clause, the Eighth Circuit determined that Missouri's interest in regulating wholesalers was sufficient to trump any equal protection rights; it does not appear a Commerce Clause argument was made. *Contrast* Cooper v. McBeath, 11 F.3d 547, 555 (5th Cir. 1994). While a discussion for another day, one of the authors (Rutledge) believes that decision of the Eighth Circuit to be normatively incorrect.

15 Maxwell's Pic–Pac, Inc. v. Dehner, 887 F. Supp. 2d 733 (W.D. Ky. 2012). Neither author was involved as counsel to any party in this litigation.

16 Maxwell's Pic–Pac, Inc. v. Dehner, 739 F.3d 936, 943 (6th Cir. 2014).

I. The Macro Structure of the Alcoholic Beverage Industry

Since the end of Prohibition, the various states have enacted a bewildering array of rules and regulations intended, *inter alia*, to militate against the perceived evils of alcohol consumption. To that end, save with respect to those "control states" jurisdictions in which retail sales are made through state agencies with the state acting as its own wholesaler, the industry is divided into three tiers. At the top are the various manufacturers of beer, wine, and spirits. Generally speaking, these manufacturers are not permitted to sell either to consumers or to retailers. Rather, they are restricted to making sales to licensed wholesalers and distributors. The wholesaler/distributor segment, the middle tier, purchases from the various manufacturers and re–sells to individual retail licensees.

Individual retail outlets, whether package stores or bars/restaurants selling by the drink, are the bottom tier and are obligated to acquire all of their alcohol from a licensed wholesaler or distributor.[17] In turn, it is usually only from such a retail licensee that an ultimate consumer may purchase alcoholic beverages.[18]

17 *See*, *e.g.*, Ky. Rev. Stat. §§ 243.250, 243.084(2), 243.088(2)(b). There are multiple small volume exceptions to this general statement. For example, in certain jurisdictions a patron is permitted to bring a bottle of wine to a restaurant to be consumed there. *See*, *e.g.*, N.Y. Alco. Bev. Cont. Law § 64B. The restaurant may, in turn, charge the patron a "corkage" fee to, at least in part, make up for the lost markup on a bottle of wine not otherwise sold. In other instances, including in a number of Kentucky's "dry" counties, there are "bottle clubs" in which, while the facility does not have a license to distribute alcoholic beverages, individual patrons may store bottles, typically of liquor, for personal consumption. *See*, *e.g.*, Ky. Rev. Stat. § 242.230; Ky. Op. Atty. Gen. 389; 84–185; Ky. Op. Atty. Gen. 79–389; Ky. Op. Atty. Gen. 74–574; Ky. Op. Atty. Gen. 74–313; Ky. Op. Atty. Gen. 73–820; Ky. Op. Atty. Gen. 70–831.

18 *See*, *e.g.*, Ky. Rev. Stat. § 243.240 ("A quota retail package . . . licensee shall purchase distilled spirits and wine in retail packages only and only from licensed wholesalers."). It also falls upon these retailers to police various end user alcoholic limitations such as minimum age requirements and the avoidance of sales to persons who are intoxicated. Although a controversial topic for an entirely separate article, the trend of granting certain rights and privileges traditionally reserved to retailers to manufacturers are perceived by some as eroding the three–tier system. For example, in Kentucky, a distiller located in wet territory, along with the holders of a quota retail drink license, a quota retail package license and an NQ2 license, are allowed to also hold a sampling license, which allows that licensee to offer limited free samples to its visitors under certain circumstances. *See* Ky. Rev. Stat. § 244.050.

Furthermore, with the changes passed by the 2013 Kentucky General Assembly, distillers located in wet territory are now automatically granted the right to sell limited amounts of packaged alcohol from their gift shops, and breweries located in wet territory may provide complimentary samples of malt beverages produced at the brewery in an amount not to exceed 16 ounces per visitor per day. *See* Ky. Rev. Stat. § 243.0305; Stacy C. Kula & Steve Humphress, *Lifting the Spirits of Kentucky: How the 2013 Legislative Changes Impact the Alcohol Industry*, Ky. Bench & Bar, Nov. 2013, at 8; Ky. Rev. Stat. § 243.150(3). Microbreweries, to some degree, operate at all three tiers by engaging in the business of a brewer but limited to producing 25,000 barrels in one year, serve on the premises complimentary samples of malt beverages in an amount not to exceed 16 ounces per patron per day if located in wet territory, and sell malt beverages on its premises for both on premises and off premises consumption, so long as certain criteria is met. Ky. Rev. Stat. § 243.157. It bears noting that while the three–tier system may be constitutionally permissible, it is not constitutionally required. *See* North Dakota v. United States, 495 U.S. 423, 432 (1990). What

A myriad of state–specific limitations have been imposed upon various retailers, some positively comical in nature. For example, until a state constitutional amendment in 2005, South Carolina required that all sales by the drink be done by means of miniature bottles actually presented to the patrons, allowing them to pour the drink and thereby assuring they received the full amount of spirits purchased.[19] And in Utah, restaurants' mixed drinks have to be prepared out of sight of the patron, typically behind a "Zion curtain."[20]

II. Kentucky's Differentiation of Pharmacies and Grocers, Convenience Stores and Gas Stations in the Sale of Alcoholic Beverages

Kentucky's peculiar law allowing the sale of wine and spirits in drugstores while precluding grocery stores and gas stations from making similar sales[21] can be traced to a seldomly discussed aspect of Prohibition.[22] During the pendency of the Eighteenth Amendment and notwithstanding Prohibition, in addition to the availability of wine for sacramental purposes, alcohol could be prescribed for "medicinal purposes."[23] By 1932, the last full year of Prohibition, some 11 million prescriptions were issued nationwide. This alcohol, prescribed by physicians, was in turn dispensed from pharmacies. With the repeal of Prohibition, even as other avenues for retail sales were being discussed and implemented, sales by pharmacies were already accepted and operational.[24]

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some might characterize as an undesirable erosion of the three–tier system is equally subject to characterization as desirable rationalization of an archaic, inefficient system that is rife with cartel behavior.

19 S.C. Const. art. VIII–A, §1. Free pours became legal in South Carolina on January 1, 2006. *See*, *e.g.*, Jeffrey Collins, *Free Pour Liquor Rings in New Year in South Carolina*, Spartanburg Herald–Journal, Jan 1, 2006, at B1.

20 *See*, *e.g.*, Michael Cooper, *Utah Liquor Laws, as Mixed Up as Some Drinks*, N.Y. Times, July 19, 2011, at A1; Annie Knox, *Utah Liquor Bill Aims to Take Down 'Zion Curtains'*, Wash. Times, Feb. 27, 2013 (http://www.washingtontimes.com/news/2013/feb/27/utah–liquor–bill–aims–take–down–zion–curtains).

21 This is not to suggest that Kentucky is unique in having such a law. For example, under the Colorado law, drugstores may sell wine and spirits, while grocery stores may not. *See* Colo. Rev. Stat. §§ 12–47–408, –407(1).

22 It appears similar malt beverage products have been allowed to be sold by Kentucky grocery stores since at least 1938. *See* Ky. Stat. § 2554b–200, enacted 1938 Ky. Acts, ch. 2, § 99 (creating retail beer license). While grocery stores and gas stations were precluded from holding a retail package or retail drink license (Ky. Stat. § 2554b–154(8), enacted 1938 Ky. Acts, ch. 2, § 54(8)), no similar statute limited them from holding a retail beer license.

23 Ky. Stat. §§ 2554b–17, –18, –27 (1936).

24 *See*, *e.g.*, Maxwell's Pic–Pac, Inc. v. Dehner, 887 F. Supp. 2d 733 (W.D. Ky. 2012) ("Perhaps the General Assembly sought to extend the status quo under which drugstores which had sold alcohol ostensibly only for medicinal purposes throughout Prohibition."); Amicus Curiae Brief of American Beverage Licensees in Support of Defendants–Appellants, et al., for Reversal, Maxwell's Pic–Pac, Inc. v. Dehner, 887 F. Supp. 2d 733 (W.D. Ky. 2012) (No. 12–6056), 2013 WL 588470, at 5 ("This is because during the preceding era of National Prohibition pharmacies had been

Ultimately, grocery and convenience stores were barred from holding the license required to sell either liquor or wine because of the limitations triggered by the sale of either staple food products or gasoline.[25] It is important to keep in mind the nature of the distinction drawn by this statute. It does not provide that, aside from pharmacies, wine and spirits may be sold only in establishments dedicated to that purpose. Rather, the statute provides, in effect, that any retailer may hold a license to sell wine and spirits *unless* the establishment is otherwise primarily in the business of the sale of either staple groceries or of gasoline and lubricating oil.[26]

This regulatory scheme was challenged in 2011 by Maxwell's Pic–Pac, as well as the Wine With Food Coalition, who argued that that the distinction grossly drawn between pharmacies on the one hand, and convenience and grocery stores and gas stations on the other, lacks a rational basis and, as such, violates equal protection rights.[27]

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permitted to sell medicinal [alcohol] [*sic*], while neither grocery stores nor gasoline stores had that experience."):

> So when the Kentucky Legislature determined in 1938 to allow pharmacies to sell spirits and wine it was clearly engaging in rational line drawing, given that pharmacies had been allowed to fill prescriptions for medicinal alcohol even during National Prohibition. In 1938 pharmacies were not similarly situated to groceries and gasoline stations since neither had been allowed to sell beverage alcohol during National Prohibition.

Id. at 12. Ignored in this recognition of Prohibition era pharmacy sales is the appreciation that post–Prohibition the intervening acts of the pharmacists were absent. During Prohibition a pharmacist filled a prescription for alcoholic beverages. Post–Prohibition, at least at the current time, wine and spirits are on the shelves and customers self–select what they want; no pharmacist is involved. Further, if the pharmacy is the relevant factor, why are wine and spirits sales permitted when the pharmacy is closed?

25 Ky. Rev. Stat. § 243.230(7) provides:

> No quota retail package license or quota retail drink license for the sale of distilled spirits or wine shall be issued for any premises used as or in connection with the operation of any business in which a substantial part of the commercial transaction consists of selling at retail staple groceries or gasoline and lubricating oil.

This statute is the successor to Ky. Stat. § 2554b–129, –154, enacted 1938 Ky. Acts ch. 2, § 31½, 54. Following therefrom, in 1992 the Alcoholic Beverage Control Board promulgated a regulation defining what constitutes the "substantial part of a commercial transaction," defining it to mean 10% or greater of gross receipts measured on a monthly basis, and "staple groceries," defined as food intended for human consumption but excluding alcoholic beverages, tobacco, soft drinks, candy, hot food and food intended for immediate consumption. 802 Ky. Admin. Regs. 4:270. It should be recognized that this statute does draw its distinction between those who do or do not derive 10% or more of their monthly gross sales from staple groceries and gasoline from those who do not. A combination bookstore/liquor store can derive 50% of its gross sales from books without violating Ky. Rev. Stat. § 243.230(7); books are neither staple groceries nor gasoline.

26 *See also Maxwell's Pic–Pac*, 887 F. Supp. 2d at 749 ("Quite simply, the Statute does not limit sales of spirits and wine to stores whose primary business is the sale of those products. Instead, it allows package liquor licenses to stores whose primary business is anything other than groceries and gas."). There is a Louisville consignment home furniture and accessories dealer named Highlands Furniture and Decor that is also licensed to sell wine and spirits by the package.

27 U.S. Const. Amend. XIV, § 1 ("[N]or deny to any person within its jurisdiction the equal

III. Judge Heyburn's Analysis

In an August 14, 2012 opinion, Judge John G. Heyburn II of the Western District of Kentucky found for Maxwell's Pic–Pac on cross–motions for summary judgment. After disposing of standing[28] and statute of limitations[29] challenges, he began the substance of his opinion by noting that the statutes at issue must be upheld if they had a rational basis.[30]

The trial court identified six factors that could constitute a legitimate governmental interest that might support the deferential treatment of groceries and gas stations from other retailers, namely:

1. Stricter regulation of more potent alcoholic beverages;
2. Curbing potential abuse by limiting access to the products;
3. Keeping pricing among merchants competitive, but not so low as to promote excessive consumption;
4. Limiting the potential for underage access;
5. Limiting alcohol sales to premises where personal observation of the purchase occurs; and
6. Balancing the availability of a controversial product between those who want to purchase it and those who seek to ban it.[31]

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protection of the laws.").

28 The defendants asserted that plaintiff Food With Wine Coalition lacked standing and that the lawsuit dealt with the question of whether grocery and convenience stores could sell both liquor and wine while the plaintiff's associational focus was upon wine sales only. After considering associational standing as set forth in Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333 (1977), the district court noted that the license at issue related to sales of both wine and liquor. As such, while the Association and its members might not be focused upon liquor sales, they were equally negatively impacted by the distinction drawn against grocery and convenience store sales of wine as they are by the similar prohibition against sales of liquor by those establishments. *Maxwell's Pic–Pac*, 887 F. Supp. 2d at 742.

29 The defendants asserted that the plaintiffs were untimely in bringing the claim in that the initial injury they had suffered predated the applicable statute of limitations of one year. Judge Heyburn rejected this assertion, finding that the injury suffered was ongoing, and as such no statute of limitations had yet begun to run. *Maxwell's Pic–Pac*, 887 F. Supp. 2d at 742–3.

30 Equal protection analysis is divided into three categories. The first, identified as "strict scrutiny," is applied with respect to, for example, legal distinctions based upon race. *See*, *e.g.*, 37712, Inc. v. Ohio Dep't of Liquor Control, 113 F.3d 614, 618, 621 (6th Cir. 1997). The second, identified as "intermediate scrutiny," is applied with respect to distinctions based upon gender. *Id.* at 621. The third, identified as "rational basis," is imposed upon all distinctions not subject to strict or intermediate scrutiny. Applying a rational basis, a statute will be held constitutional "so long as it bears a rational relation to some legitimate end." *Maxwell's Pic–Pac*, 887 F. Supp. 2d at 744 (quoting Romer v. Evans, 517 U.S. 620, 631 (1996). The court as well cited F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 313–14 (1993).

31 *See Maxwell's Pic–Pac*, 887 F. Supp. 2d at 747. The Court noted that protecting current liquor and wine retailers from further economic competition does not constitute a legitimate purpose, citing Craigmiles v. Giles, 312 F.3d 220, 224 (6th Cir. 2002).

Seriatim, the Court addressed and rejected each of the proffered justifications for the distinction.

Acknowledging that the state may have a legitimate interest in restricting the availability of spirits and wine as contrasted with beer on the basis of the former's "higher potencies,"[32] Judge Heyburn stated that the argument failed to show how this benefit was achieved by restricting sales by grocers and convenience stores but allowing them in "a grocery–selling drugstore like Walgreens."[33] Additionally, Heyburn explained that while maintaining appropriate levels of price competition may be a legitimate state objective, there was no showing that restricting spirits and wine sales from grocery and convenience stores would influence pricing.[34] In response to the claim that the statute is an effort to reduce underage access to alcohol, Judge Heyburn found that the distinction drawn against grocery and convenience stores lacked a rational basis.

> Of course, reducing the number of wine and liquor retailers could also diminish underage access. Kentucky is free to reduce the number of outlets for wine and liquor sales, as it does through its statutory quota system, *see* Ky. Rev. Stat. Ann. § 241.065, but may not do so in an arbitrary and discriminatory manner. The Statute's classification regulates the type, not the number, of premises that can receive a license. There must be a rational basis for excluding grocery stores from wine and liquor sales, but including other retailers.
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> The State argues that "[l]imiting the package sale of spirits and wine to liquor stores whose primary business is the sale of spirits and wine ... is an increased control measure [that] is rationally related to controlling access to distilled spirits and beverages." Def.'s Mot. Summ. J. 4. True, limiting alcohol sales to stores that disallow underage persons on the premises would

32 *Maxwell's Pic–Pac*, 887 F. Supp. 2d at 748. The suggestion that spirits and wine are more "potent" than beer is of significant currency, although it is without scientific support. *See*, *e.g.*, David J. Hanson, *Alcoholic Content of Beer, Wine & Distilled Spirits*, Alcohol Problems and Solutions, http://www2.potsdam.edu/hansondj/Controversies/1107281458.html, (last visited Mar. 9, 2014) ("A glass of white or red wine, a bottle of beer, and a shot of whiskey or other distilled spirits all contain equivalent amounts of alcohol and are the same to a Breathalyzer."); *Facts and Fictions of Alcohol*, AlcoMeters, http://www.breathalyzeralcoholtester.com/alcohol–facts–and–fiction/, (last visited Nov. 18, 2013) ("A glass of white or red wine, a bottle of beer, and a shot of whiskey or other distilled spirits all contain equivalent amounts of alcohol and are the same to a Breathalyzer. A standard drink is: a 12–ounce bottle or can of regular beer; a 5–ounce glass of wine; a one and 1/2 ounce of 80 proof distilled spirits (either straight or in a mixed drink)."); *Alcohol Impaired Driving*, Insurance Institute for Highway Safety (Mar. 2014), http://www.iihs.org/iihs/topics/t/alcohol–impaired–driving/qandah ("Impairment is not determined by the type of drink but rather by the amount of alcohol ingested over a specific period of time. There is a similar amount of alcohol in such standard drinks as a 12–ounce glass of beer, a 4–ounce glass of wine, and 1.25 ounces of 80–proof liquor."). Further, the suggested distinction between "low potency" beer and allegedly "high potency" wine and spirits entirely fails when one considers what must be acknowledged to be high proof, and therefore "high potency," beers such as Armageddon (164 proof) that are available.

33 *Maxwell's Pic–Pac*, 887 F. Supp. 2d at 748.

34 *Id.* at 748 ("The Court cannot conceive how the degree to which a business sells non–grocery items more than it sells grocery items bears on liquor and wine prices in any manner."). Kentucky law otherwise forbids sales of alcoholic beverages below wholesale cost. *See* Ky. Rev. Stat. Ann. § 242.050(1).

> rationally relate to Kentucky's interest in reducing underage access to wine and liquor. *See* Ky. Rev. Stat. Ann. § 244.085(8) (barring persons under the age of twenty–one from premises that sell packaged alcohol, unless "the usual and customary business of the establishment is a convenience store, grocery store, drugstore, or similar establishment"). And it would also limit the sale of package wine and liquor only in places where persons disposed to temperance would have no occasion to frequent. *See infra* Part IV.D.
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> The fallacy of this argument is that it completely mischaracterizes the Statute. Quite simply, the Statute does not limit package sales of spirits and wine to stores whose primary business is the sale of those products. Instead, it allows package liquor licenses to stores whose primary business is anything other than groceries or gas. The primary business of stores like Walgreens and CVS is not spirits and wine, yet they are free to hold package liquor licenses. Thus, the rational bases for limiting package liquor licenses to traditional package liquor stores are irrelevant here because the Statute does not make this classification. They have no bearing whatsoever on treating gas and grocery retailers differently than all other retailers for the purpose of applying for package liquor licenses.[35]

From there, Heyburn addressed the argument that because some grocery stores use self–checkout, there is less protection in those facilities against underage access. This argument failed for two reasons. First, the statutory distinction is not based on the use of self–checkout facilities, and drug stores today are permitted to use self–checkout machines, regardless of whether they actually do. Second, self–scan checkout machine technology did not exist when the statutory scheme at issue was first put in place in 1938. Hence, it could not provide the rational basis for the legislative distinction because the legislature could not have had it in mind at that time.[36]

Last, the State asserted that the distinction is meant to balance the interests of those who believe they should have access to alcoholic beverages versus those who would seek its prohibition. To that end, it was suggested that grocery stores are "community gathering centers" in which conflicts between teetotalers and imbibers should be avoided. This argument was ultimately rejected on the basis that:

> If grocery stores are community gathering centers in some places, they are so presumably because they sell staple groceries and other necessities that attract the wider community. However, this attribute does not distinguish them from stores currently selling wine and liquor, like Walgreens, CVS, and Rite–Aid. Nor does it seem plausible that a rural grocery store is more or less of a community gathering place than a rural drugstore. Drugstores

35 *Maxwell's Pic–Pac*, 887 F. Supp. 2d at 748–49.

36 *Id.* at 749–50. With respect to this point, Judge Heyburn wrote:

> Although the asserted rational basis need not have been the legislator's actual motivation, it must have least been conceivable or possible. Nordlinger v. Hahn, 505 U.S. 1, 15 (1992) (rational review "does require that a purpose may conceivably or 'may reasonably have been the policy' of the relevant governmental decision maker.") (quoting Allied Stores of Ohio, Inc. v Bowers, 358 U.S. 522, 528–29 (1959)).

Id. at 49; *see also* Nashville, Chattanooga & St. Louis. Ry. v. Walters, 294 U.S. 405, 415 (1935) ("[A] statute valid when enacted may become invalid by a change in the conditions to which it is applied."). The Court did not mention, although it is a path worthy of pursuit, that as grocery stores often use self–checkout equipment, and as grocery stores already sell beer and other malt beverages, self–checkout of itself must not be a significant contributor to underage access.

> also sell both staple groceries and other necessities that undoubtedly draw bibbers and teetotalers alike. Like grocers, they do not specialize in the sale of alcoholic beverages that would attract only customers for that product.[37]

Judge Heyburn declined to decide whether Kentucky's equal protection guarantee, in this specific case, would afford a higher level of protection compared to its federal equivalent.[38] Instead, he held that as the statute violated the low standard of rational basis review it necessarily violated state equal protection law.[39]

In a pyrrhic victory, the plaintiff's challenge based on excessive legislative delegation to the Alcohol Beverage Control Board to define "substantial part" and "staple groceries" as used in the statute was rejected.[40] The plaintiffs argued that this regulation involved excessive delegation of the legislative function to the executive branch agency so as to justify a separation of powers challenge under the Fourteenth Amendment.[41] The Court determined that the term "substantial" did imply a limiting standard and thus was not too vague and that the discretion exercised by the Alcohol Beverage Control Board was no different from that exercised by other agencies.[42]

Judge Heyburn granted the defendants request for a stay pending appeal to the Sixth Circuit. In determining whether the stay was appropriate, the Court balanced the following four factors:

> (1) whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.[43]

As to the first factor, the Court noted that the defendants were unlikely to be successful on appeal and that defendant's failure to specifically discuss the Twenty–First Amendment was not reversible error.[44] As to the other three factors, the Court found that neither party's interest would be damaged irreparably or substantially by a stay, even if some retail establishments were precluded from obtaining a quota retail package license, and that, "neither interest trumps the public's interest in a fair and final result without unnecessary regulatory confusion."[45] In drawing its conclusion, the Court viewed the question of a stay in a broader context than just the parties' immediate interests.[46]

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37 *Maxwell's Pic–Pac*, 887 F. Supp. 2d at 750.

38 *Id.* at 752.

39 *Id.*

40 *See supra* note 25.

41 *Maxwell's Pic–Pac,* 887 F. Supp. 2d at 752–54.

42 *Id.*

43 *Id.* at 754 (quoting Hilton v. Braunskill, 481 U.S. 770, 776, (1987)).

44 *Id.* at 754.

45 *Id.* at 755.

46 *Id.* at 754–55.

Notably, the Court expressly stated that it did not decide that the plaintiffs had a right to sell package liquor, only that the current statutory scheme regulating the licensing of package liquor and wine sales violates the Equal Protection Clause, and suggested that the legislature could enact legislation to avoid the default result of the decision.[47]

In response to Judge Heyburn's ruling and the stay, proponents of the current law introduced House Bill 310 to the 2013 General Assembly, which would have made the ruling a moot point. Under this so–called grocery store bill, grocery stores and newly–built drugstores could sell wine and liquor only if they had a separate entrance to an adjoined structure, which is essentially what grocery stores are currently required to build if they want to sell spirits and wine under the current statute. Existing drugstores that already sold wine and liquor would be "grandfathered in" and could continue to sell alcohol without building a separate entrance and adjoining structure. Supporters of the bill argued that Judge Heyburn's decision would allow any retailer, including the most unlikely of sorts, like pawn shops, to receive a license to sell alcohol and the availability of licenses would quickly diminish. Although an interesting concept, that ideology failed to acknowledge that many of the businesses, with the right qualifications, would be entitled to receive a quota retail package license regardless of whether HB 310 was enacted into law. Ultimately, the bill did not pass.

It is questionable, had HB 310 passed, whether it would have been sufficient to resolve the question. While it at best would have precluded the issuance of new wine and spirits licenses to pharmacies without separate entrances, it would have continued to prohibit most groceries and convenience stores from even holding such a license. Essentially "freezing" the existing fact pattern would not address the determination that the equal protection rights of groceries and convenience stores were, vis–à–vis license holding pharmacies, being violated.

IV. The Arguments to the Sixth Circuit

The various briefs presented to the Sixth Circuit were the expected arguments, but with a few interesting points. The plaintiffs (now the appellees) emphasized that not only must the differential treatment of grocery and convenience stores from pharmacies have satisfied equal protection at the time of its enactment in 1938, but it must also do so today.[48] The defendants (now the

47 *Id.* at 755.

48 Principal and Response Brief of Appellees/Cross Appellants Maxwell's Pic–Pac, Inc. and Food with Wine Coal., Inc. at 28–32, Maxwell's Pic–Pac, Inc. v. Dehner, No. 3:11–CV–18–H, 739 F.3d 936 (6th Cir. Feb. 6, 2013) (Nos. 12–6056, 12–6057, 12–6182); *id.* at 29 ("Nevertheless, assuming the differences between drug stores in [sic] grocery stores in 1938 provided a rational basis for KRS 243.230(5)'s classifications when the law was passed, those differences have since evaporated, meaning that the (unarticulated) rational basis for the classification evaporated as well.")

appellants) argued, in effect, for Twenty–First Amendment primacy[49] and that Judge Heyburn failed to consider the various arguments in favor of the statue on a cumulative, rather than only an individual basis.[50] The Intervening Plaintiff made the specious argument that KRS § 244.230(7) actually discriminates against package stores by precluding them from being able to generate more than 10% of their gross sales from staple groceries and gasoline.[51]

At the oral argument, the intervenors sought to portray a world in which not only would convenience stores be selling liquor and wine by the package but potentially also by the drink.[52] In contrast, the Commonwealth focused its argument on challenging Heyburn's determination that grocery and drugstores are substantially equivalent[53] in that most people are in a grocery store at least weekly (some daily) while pharmacy visits are less frequent.[54] Based upon this pattern of visitation, it was argued that the General Assembly could have drawn

49 Principal Brief of the Intervening Defendant/Appellant/Cross–Appellee Liquor Outlet, LLC d/b/a the Party Source at 20–26, Maxwell's Pic–Pac, Inc. v. Dehner, 739 F.3d 936 (6th Cir. 2014) (Nos. 12–6056, 12–6057, 12–6182); Principal Brief on Behalf of Tony Dehner and Danny Reed Defendants – Appellants Cross–Apellees at 7–8, Maxwell's Pic–Pac, Inc. v. Dehner, No. 3:11–CV–18–H, 739 F.3d 936 (6th Cir. 2014) (Nos. 12–6056, 12–6057, 12–6182).

50 *See* Principal Brief on Behalf of Dehner and Reed, *supra* note 49 at 14 ("The District Court analyzed each of these interests in a vacuum and concluded they did not provide a rational basis for the statute…. The District Court also failed to consider the relationship between the combination of some or all of these interests and the challenged classification.") (emphasis in original). One wonders how this argument could lead to reversal of the trial court's decision. Judge Heyburn found that none of the six proffered bases had any validity. The accumulation of ineffective theories will not create an effective theory. Zero, multiplied by anything, equals zero, and the addition of zero to any sum does not alter the sum. How these theories could cumulatively have more value than they did individually is not clear.

51 *See* Principal Brief of the Intervening Defendant/Appellant/Cross–Appellee Liquor Outlet, LLC d/b/a the Party Source at 53–55, Maxwell's Pic–Pac, Inc. v. Dehner, 739 F.3d 936 (6th Cir. 2014) (Nos. 12–6056, 12–6057, 12–6182).

52 On closer examination the Intervenors' lamentations are unjustified. Today a package retailer can also hold a sampling license and a quota retail drink license. *See* Ky. Rev. Stat. Ann. § 244.050(2) (West 2013); Ky. Rev. Stat. Ann.§ 243.110(2) (West 2013). The suggestion that it is inappropriate to combine on–premise and package sales has already been considered and rejected. There is, as well, the analogous statute that permits a restaurant patron to leave with the unconsumed portion of a bottle of wine purchased with a meal. Ky. Rev. Stat. Ann. § 243.115 (West 2013). While not regulated as a package, but rather an on–premise by–the–drink sale, from the perspective of the consumer, there likely is little, if any, distinction.

53 *See supra* notes 35 and 37and accompanying text.

54 *See* Transcript of Oral Argument at 2, Maxwell's Pic–Pac, Inc. v. Dehner, 739 F.3d 936 (6th Cir. 2014) (Nos. 12–6056, 12–6057, 12–6182) ("The premise remains the same that the primary place that people have to go weekly if not daily is the grocery store so that that is where your exposure is the greatest and it supports the, the hypothesis at least that prohibiting the sale there limits some of the ills intended to be avoided by the statute."). *See also id*. at 2 ("Well, I think the difference is in terms of the quota licenses, that person makes a choice to go make the purchase at any venue that offers it for sale, but in Kentucky, at least, where you're trying to sustain a political balance between those who would prohibit it altogether and those who would put it on every corner, that's the reason why it needs to be limited in groceries because that's where everyone in the community has to go and that's the way I would draw that distinction Judge.").

a distinction restricting wine and liquor sales, implicitly characterizing them as more problematic than beer sales, to forums less frequented by those who may not approve of alcoholic beverages. The Commonwealth also argued for an equal protection analytic paradigm in which any debatability over the propriety of a legislatively drawn distinction would indicate it to be a valid balancing.[55]

V. The Sixth Circuit's Analysis

On January 15, 2014, the Sixth Circuit Court of Appeals issued its decision reversing Judge Heyburn's determination that the limitations imposed upon alcoholic beverage sales by grocery stores and gas stations violate equal protection while affirming his determination that the distinctions drawn do not violate separation of powers principles through excessive delegation of authority to alcoholic beverage control regulators.

The Sixth Circuit's determination that equal protection was satisfied based upon a variety of factual assumptions. Initially, the Court of Appeals found that the distinctions drawn between grocery stores and gas stations, on the one hand, and other retailers on the other, conceivably serve a legitimate function in that they "reduce access to high–alcohol products."[56]

Second, precluding gas stations and grocery stores from selling wine and spirits benefits those persons who have moral objections to alcoholic beverages from being exposed thereto.[57]

Third, the Court explained that the current distinction is rationally related to decreasing minors' access to alcohol. It reasoned that more minors work at grocery stores and gas stations than other establishments and that the larger size of grocery stores could allow minors to more easily steal wine or liquor.[58]

Last, the Court noted that since many gas stations are located "near highways" there is a "greater danger" in allowing alcohol sales.[59]

The Court reasoned that:

> [the] legislature "chose to prohibit the sale in those places where all in the community must come together." We conclude that reasonably conceivable facts support the contention that grocery stores and gas stations pose a greater

55 *See* Transcript of Oral Argument at 12, Maxwell's Pic–Pac, Inc. v. Dehner, 739 F.3d 936 (6th Cir. 2014) (Nos. 12–6056, 12–6057, 12–6182) ("…the fact that they are attempted to be balanced demonstrates the debatability of the issue and because the question is debatable, we satisfy the rational basis test. That there is a debatable hypothesis at all defeats the grocer's challenge in this case. That's all that's required under the rational basis test.").

56 Maxwell's Pic–Pac, Inc. v. Dehner, 739 F.3d 936, 938 (6th Cir. 2014). *See also id.* at 940 ("The state indisputably maintains a legitimate interest in reducing access to products with high alcohol content.").

57 *See id.* at 940–941 ("grocery stores and gas stations pose a greater risk of exposing citizens to alcohol than do other retailers…. On the other hand, most people who object to confronting wine and liquor conceivably cannot avoid grocery stores and gas stations.").

58 *Id.* at 941.

59 *Id.*

> risk of exposing citizens to alcohol than do other retailers. A legislature could rationally believe that average citizens spend more time in grocery stores and gas stations than in other establishments; people typically need to buy staple groceries (for sustenance) and gas (for transportation) more often than items from retailers that specialize in other, less–frequently–used products. Consider the district court's pharmacy example. Kentucky could believe that its citizenry visits grocery stores and gas stations more often than pharmacies — people can survive without ever visiting a pharmacy given that many grocery stores fill prescriptions. On the other hand, most people who object to confronting wine and liquor conceivably cannot avoid grocery stores and gas stations. Though some modern pharmacies sell staple groceries, grocery stores may remain the go–to place for life's essentials. And though Kentucky otherwise reduces access to wine and liquor by capping the number of places that supply it, the state can also reduce access by limiting the types of places that supply it — just as a parent can reduce a child's access to liquor by keeping smaller amounts in the house and by locking it in the liquor cabinet.
>
> Our conclusion also rings true regarding minors. According to a plausible set of facts, more minors work at grocery stores and gas stations than other retailers; after all, grocery stores and gas stations conceivably provide more low–skilled and low experience jobs, including clerks, baggers, and stockers. Kentucky could also believe that grocery stores typically outweigh other retailers in size and traffic, allowing minors to more easily steal wine or liquor. Regarding gas stations, their convenience and prevalence near highways suggest an even greater danger in allowing alcohol sales.[60]

The Sixth Circuit affirmed Judge Heyburn's determination that the delegation of authority to determine what does and does not constitute "a substantial part" of sales of groceries and gasoline did not involve an excessive delegation of legislative powers by the General Assembly to the executive branch. Rather, in that the General Assembly must have help in rule–making, and parameters were provided, the delegation was appropriate[61]

VI. A Critique of the Sixth Circuit's Decision

Especially when contrasted with the decision rendered by Judge Heyburn, the decision of the Sixth Circuit Court of Appeals is unsatisfactory in several respects, including its lack of critical assessment of the required standard for satisfaction of equal protection, its failure to examine the question presented both at the time of the initial statutory enactment and under today's factual circumstances, and the failure to explicate how the various factual assumptions assumed of themselves either are valid or satisfy equal protection. Rather than being the explication of an analytic process, the ruling of the Sixth Circuit is best characterized as the recitation of a conclusion.

An immediately obvious failing of the decision of the Sixth Circuit is its failure to recite the requirements of a rational basis equal protection analysis. This is in contrast to the detailed explanation provided by Judge Heyburn.[62]

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60 *Id.* at 940–941.

61 *Id.* at 942.

62 Maxwell's Pic–Pac, Inc. v. Dehner, 887 F. Supp. 2d 733, 749–50 (W.D. Ky. 2012). *See also supra* note 33 and accompanying text.

In consequence, the reader of the decision of the Sixth Circuit is unaware of what is being required by the Sixth Circuit, and it is likewise unclear whether the Sixth Circuit agreed or disagreed with Judge Heyburn's analytic framework.

On a related point, Judge Heyburn had made clear that the equal protection analysis with respect to the distinction drawn, namely between those retailers whose sales were comprised of more than 10% of staple groceries of gasoline/oil products and those whose sales were not so comprised, must have been rational at the time of enactment shortly after the end of Prohibition and must be rational today. The Court of Appeals in no manner either endorsed or rejected that two–prong path.

Having initially failed to set forth an analytic framework, the Court of Appeals recited a series of possible explanations, but without placing them in the context of the statute as related to sales of staple groceries and gasoline. The Sixth Circuit found that "the state indisputably maintains a legitimate interest in reducing access to products with high alcohol content," relying upon a 1933 alcohol study,[63] and that "[p]roducts with high alcohol content exacerbate the problems caused by alcohol, including drunken driving."[64] As noted above,[65] the law does not currently restrict supposed "low potency" beer to grocery and convenience stores. Rather, these stores are permitted to sell "high potency" beers that approach or exceed the alcoholic content of wine and spirits. To repeat a point hopefully already clear, the statutory distinction is based upon the degree to which the retailer's sales are comprised of staple groceries or gasoline/lubricating oil. Assuming segregation of alcoholic beverage products based upon potency is a legitimate state interest, the Sixth Circuit entirely failed to explain how the statutory distinction with respect to staple grocers/ gasoline–lubricating oil furthers the state interest. Simply stating that the state has an interest is not enough for equal protection; it is necessary that the interest is rationally furthered by the subject statute and the distinctions it draws. Judge Heyburn found there to be no such linkage;[66] the Sixth Circuit failed to explain how that determination was erroneous.

The Sixth Circuit also relied upon the notion that certain market segments should be free of alcoholic beverages in order that those having moral objections

63 *Maxwell's Pic–Pac*, 739 F.3d at 940.

64 *Id.* A distinction drawn between easier access to "low potency" beer versus "high potency" wine and spirits as a means of reducing drunk driving fails in that most drunk driving is consequent to consumption of beer. *See*, *e.g.*, *Drunk Drivers More Likely to Drink Beer, Discovery News* (Dec. 30, 2011) http://news.discovery.com/human/drunk–drivers–drink–beer–111230.htm (last visited Jan. 30, 2014); Naimi *et al*, *What Do Binge Drinkers Drink? Implications for Alcohol Control Policy*, 33 American Journal of Preventive Medicine 188–93 (Sept. 2007) (binge drinkers consume primarily beer); Jeffrey W. Runge, MD, Administrator, National Highway Traffic Safety Administration, *Impaired Driving in the U.S.: Progress and Research Notes* (drivers arrested for DUI report 80% having been drinking beer while 20% report having been drinking wine or spirits).

65 *See supra* note 32 and accompanying text.

66 *See supra* note 35 and accompanying text.

thereto may engage in necessary commerce without exposure to alcoholic beverages.[67] This argument fails for a variety of reasons.

Initially, it is stated as a conclusion that the state has an interest in protecting "abstinent citizens" from "exposure" to "alcohol."[68] No authority is cited in support of this proposition. This argument begs an interesting question, namely whether in a wet territory the state has a legitimate interest in shielding a minority from the consequences of a majority vote.[69] To the extent that objections to exposure to alcohol are religious in nature, the General Assembly's drawing of distinctions based thereon may violate Establishment Clause[70] limitations.[71] Further, if that is the objective of the statute, it fails. The statute precludes a retailer whose sales are 10% or more of staple groceries or gasoline/lubricating oil from selling wine or spirits; those retailers may and often do sell beer, and beer contains alcohol. Note here that the Sixth Circuit moved from alleged distinctions based upon potency to one simply against beverage alcohol in general.[72] If the statutory construct is intended to create a zone of necessary retailers that includes grocery stores, especially those with pharmacies and gas stations in which those who object to alcohol exposure may shop,[73] the state has absolutely failed and the statutory distinction lacks a rational basis.

Furthermore, the Court failed to acknowledge that a growing number of malt beverages now have alcohol content as high as, or higher than, some wines and distilled spirits. Consequently, the "minors, inexperienced and impressionable,"[74] as well as the abstinent, can and likely will nevertheless be exposed to high alcohol content beverages in the community gathering place if a licensee chooses to carry those malt beverages. And why would it not? Kentucky law does not define malt beverage by its alcohol content; instead, it is defined as "any fermented undistilled alcoholic beverage of any name or

67 *Maxwell's Pic–Pac*, 749 F.3d at 140 ("And the state's interest applies to abstinent citizens who, morally or practically objecting to alcohol exposure, wish to avoid retailers that sell such drinks.").

68 *See id.*

69 *Cf.* Educ. Media Co. at Va. Tech, Inc. v. Insley, 731 F.3d 291, 301 (4th Cir. 2013) (holding that a law forbidding advertisement of alcoholic beverages in college newspapers is unconstitutional).

70 U.S. Const., amend. I ("Congress shall make no law respecting an establishment of religion").

71 *See, e.g.*, Larkin v. Grendel's Den, 459 U.S. 116, 127 (1982); Corp. of Presiding Bishops v. Amos, 483 U.S. 327, 349, 107 S. Ct. 2862, 2875 (1987) (O'Connor, J., concurring) (questioning whether exemption of religious corporation's for–profit activities constitutes a violation of the Establishment Clause); Larson v. Valente, 456 U.S. 228, 244 (1982) ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.").

72 The authors will concede that some persons may have an objection to wine and spirits but not beer, but as the alcohol in all is indistinguishable that is not a rational distinction. Regardless, the Sixth Circuit did not indicate it was relying upon such a distinction.

73 *Maxwell's Pic–Pac*, 739 F.3d at 941.

74 *See Maxwell's Pic–Pac*, 739 F.3d at 940.

description, manufactured from malt wholly or in part, or from any substitute for malt."[75]

Furthermore, the Sixth Circuit's distinction between grocery stores without wine/spirits but with pharmacies and pharmacies selling wine and spirits fails as it is based upon a fact pattern that may exist today but was apparently not present in 1938 when the distinction was initially drawn.[76] There was no reference to a record demonstrating that in 1938 there existed grocers with pharmacies where those objecting to either alcohol or the wine/spirits varieties thereof could have their prescriptions filled. Rather, the combination grocery/pharmacy dates to the 1980's – it is not a feature of post–Prohibition Kentucky that any more than self–scan checkout machines could have been contemplated by the 1938 General Assembly.[77]

The distinctions drawn by the Sixth Circuit as to the supposed employee characteristics and the possibility of theft are likewise unavailing. To continue flogging a deceased equine, the statute places on one side of the divide stores in which sales are less than 10% comprised of staple groceries or gas/lubricating oil and those in which staple groceries or gas/lubricating oil are more than 10% of sales.[78] A big box home improvement center likely sells lubricating oil, but it will not amount to 10% or more of its total sales and, in consequence, the store may apply for and conceivably receive a license to sell wine and spirits. In the same vein, a liquor store may install gas pumps and sell gas so long as those sales do not constitute more than 10% of its total sales.

As to employee ages, and assuming the Sixth Circuit's supposition that a significant portion of the typical grocer's employees are minors, it never explained: (i) whether that distinction existed at the time of the statute's adoption; (ii) how this differentiates grocers from pharmacies selling wine and spirits; (iii) how the distinction relates to other potential retailers of wine and spirits; or (iv) how exposure to beer in groceries and convenience stores is for purposes of equal protection analysis acceptable while exposure to wine and spirits is problematic. Specifically, in the current environment, where is the comparison of grocery employees who are under 21 with employees of

75 Ky. Rev. Stat. Ann. § 241.010(32).

76 *See Maxwell's Pic–Pac*, 739 F.3d at 941 ("Kentucky could believe that its citizenry visits grocery stores and gas stations more often than pharmacies—people can survive without *ever* visiting a pharmacy given that many grocery stores fill prescriptions. On the other hand, most people who object to confronting wine and liquor conceivably cannot avoid grocery stores and gas stations. Though some modern pharmacies sell staple groceries, grocery stores may remain the go–to place for life's essentials.") (emphasis in original).

77 Kroger, ubiquitous throughout Kentucky, did not install a pharmacy in a grocery store until 1983, that store in Richmond, Kentucky. E–mail from Tim McGurk, Public Relations Manager, Kroger, Louisville Div. to author (Jan. 28, 2014) (on file with author). *See also supra* note 37 and accompanying text; Principal Brief of Intervening Defendant, *supra* note 51 at 39 ("Historically, and certainly in 1938, there was a clear divide between the business of a drug store and the business of a grocery store.").

78 *See* Ky. Rev. Stat. Ann. § 243.230(7).

wine/spirits selling pharmacies who are under 21? Further, where is the comparison of the minor employees of grocery or convenience stores against all other establishments that might apply for a wine/spirits retail package license? If the statute's rational basis for a distinction between A and B is based upon a characteristic X of A, there is no rational basis for the distinction until the X of B is likewise known. Once known, where are the similar comparisons from 1938 and the original enactment of the statute? Last is that the distinction between licenses is not based upon high versus low potency alcoholic beverages: a distinction premised upon segregating certain portions of the public, in this instance minor employees of the retailer, from allegedly high proof wine and spirits while allowing them to be in proximity to beer must fail.[79] The supposed "low potency" versus "high potency" distinction is itself simply not valid, and it is not the distinction drawn by the statute.[80]

As for greater risk of theft, with due respect to the Sixth Circuit, that is at best a red herring. In an age in which party megastores are a ubiquitous feature of the landscape, the suggestion that increased size[81] increases the risk of theft simply challenges credulity. As to proximity to highways increasing the danger of alcohol sales, the Sixth Circuit did not explain whether its concern was with theft, underage access, or driving while intoxicated. Regardless, stand–alone liquor stores, party megastores, pharmacies selling wine and spirits, and grocery stores with separate wine/spirits sections are already in proximity to highways, as are those with on–premise permits.[82] Further, the danger of drunk–driving is neither increased nor otherwise affected by the degree to which the retailer's sales are or are not comprised of staple groceries or gasoline/lubricating oil.

VII. Conclusion

The hangover from Prohibition continues to torment licensees and consumers alike. While the nationwide experiment at Prohibition resoundingly failed, many individuals wished it remained, at least in part, in effect. State

79 Kentucky law permits minors to be employed in retailers selling "high potency" wine and spirits. *See* Ky. Rev. Stat. Ann. § 244.090(1)(c)(3)(b).

80 *See also supra* note 32 and accompanying text.

81 Maxwell's Pic–Pac, Inc. v. Dehner, 739 F.3d 936, 941 (6th Cir. 2014).

82 Any argument that the statute reduces the likelihood of drunk driving by preventing gas stations/convenience stores from selling wine and spirits does not stand up to even cursory scrutiny. For example, under Romer v. Evans, 517 U.S. 620, 632 (1996), rational basis review obligates the court to "insist on knowing the relation between the classification adopted and the object to be attained." Gas stations and convenience stores already sell beer. *See supra* note 82. There is no statute which provides, *inter alia*, that wine and spirits may not be sold in proximity to sales of gasoline. It is not uncommon to see a convenience store selling gasoline located adjacent to either a package or on–premise retailer. Also, since grocers can open a wine and spirits retail establishment so long as the establishment has a separate entrance from the grocery store, and as more and more grocers also sell gasoline, there is a close physical relationship of the sales, sales which are made under the same retailer name.

legislatures attempt to balance on a three–legged stool comprised of those who favor Prohibition, those in support of free access to a legal product and the state's desire for the tax revenues derived from alcoholic beverage sales.[83] At the same time the industry's regulatory structure, particularly at the wholesaler and retailer levels, is rife with cartel conduct as evidenced by the fact that it was a package store already licensed to sell wine and spirits that intervened as a defendant in this action, thereby hoping to preclude grocery and convenience stores from selling those same products.

With Judge Heyburn's decision in *Maxwell's Pic–Pac*, it appeared a significant step was being taken in rationalizing the retail structure, eliminating a distinction tied to a low threshold of staple groceries or gas/lubricating oil sales, distinctions which he concluded lacked any rational basis in support of a legitimate state interest in controlling alcoholic beverage sales. While no doubt some would challenge the ultimate factual determinations he made, the structure and depth of the analysis undertaken cannot be criticized.

Unfortunately, as is detailed above, the decision of the Sixth Circuit Court of Appeals reversing Judge Heyburn cannot be so characterized. Rather than setting forth an analytic paradigm, the decision leaps to a conclusion that equal protection was satisfied by the statutory distinction even though that conclusion is not supported by an explication of equal protection analysis or reference to a factual underpinning existing both at the time of the statute's enactment and today. That said, absent a decision in the future in which the matter is reconsidered,[84] the ruling of the Sixth Circuit that the distinctions drawn by KRS § 243.230(7) satisfy equal protection will stand.

83 In fiscal year 2011, Kentucky derived $113.3 million in excise and manufacturer and wholesaler sales taxes from the sale of alcoholic beverages. *See* Governor's Office of Economic Analysis, Office of State Budget Director, Tax Expenditure Analysis, Fiscal Year 2012–2014 25 (2011).

84 Maxwell's Pic–Pac sought rehearing and *en banc* reconsideration. *See* Petition for Rehearing and Rehearing En Banc, Maxwell's Pic–Pac, Inc. v. Dehner, 739 F.3d 936 (6th Cir. 2014) (No. 12–6182) (filed by the plaintiffs/appellees on January 28, 2014). The request was denied on April 10, 2014.