LIVE OAK BREWING CO., LLC, ET AL. V. TABC, ET AL.

Zack Voell

ABSTRACT: *Economic liberty is a cornerstone of every prosperous society and has far-reaching implications for a plethora of other crucial civil liberties as well. Texas state legislators recently prohibited craft brewers from earning revenue from the sale distribution licenses within the state. This note explores this blatant violation of economic liberty in the context of the decision in Live Oak Brewing Co., LLC, et al. v. TABC, et al. which ruled the prohibition as a violation of the Texan constitution.*

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I: Introduction

Thin, one-note beers like Budweiser and Miller Lite that have long dominated the American beer diet are being increasingly displaced by a menagerie of full-bodied draughts called "craft beers" like "Three Chords and the Truth,[1]" "No Veto,[2]" and "Zombie Dust.[3]" The Millennial generation's penchant craft beer is one of the primary causal factors for the rapid, recent growth of America's craft beer industry.[4] In fact, 43% of Millennials have never tasted Budweiser beer.[5] And as of June 2016, craft beer claims $22.3 billion of a $106 billion beer market[6] with a record-setting 917 new breweries opening in the past year.[7]

But craft beer's bright future is overshadowed by a dark cloud of government regulations. The complex maze of certificatory and regulatory processes—some dating back to Prohibition—

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1 The Best of Craft Beer Awards, 2016 BEST OF CRAFT BEER AWARDS (2016). A gold medal Brett beer from Oakshire Brewing in Eugene, Oregon.

2 *Id.* A bronze metal British brown ale from Three Notch'd Brewing in Charlottesville, Virginia.

3 *Id.* An intensely hopped American pale ale from 3 Floyds Brewing Co. in Munster, Indiana.

4 Amy Nordrum, *Craft Beer Breaks Double-Digit Market Share For The First Time In US*, International Business Times, (Mar. 17, 2015), http://www.ibtimes.com/craft-beer-breaks-double-digit-market-share-first-time-us-1849648.

5 Finn B. Knudsen, *The Future of Craft Beer as seen from an Industry Insider*, Rocky Mountain Microbrewing Symposium (2016), http://www.uccs.edu/Documents/rmms/2016%20Presentations/4%20Keynote%20Future%20of%20CraftBeer%20as%20Seen%20From%20Industry%20Insider.pdf.

6 *See*, Bart Watson, *National Beer Sales & Production Data*, Brewers Association (2015)

7 *See*, Abby Cohen, *Brewers Association Mid-Year Metrics Show Continued Growth for Craft*, Brewers ASSOCIATION (2016).

that every would-be brewmaster must navigate before and after opening for business is stunning. One can only imagine the growth possibility for craft beer absent the status quo of alcohol regulation. Texas state legislators recently upgraded their craft brewing laws from knotty to nefarious by overtly outlawing a revenue source key to every craft brewer. Three Texan craft breweries quickly filed suit against the new restriction, and the ensuing court case of *Live Oak Brewing Co., LLC, et al. v. Texas Alcoholic Beverage Commission (TABC)* was adjudicated by District Judge Karin Crump in August 2016.

Part II of this note describes the growth and constitution of the craft beer industry. Part III profiles the elaborate regulatory scheme in which craft beer has emerged and the new laws from the Texas legislature. Part IV and V summarize and analyze the complaint and ruling in *Live Oak* respectively. Part VI considers the positive precedent of *Live Oak* in context of similar standing cases in Texas courts.

II: History of Craft Beer Industry

A home-brewing trend that spread across the U.S. after President Jimmy Carter legalized and tax-exempted home brewing catalyzed American craft beer production in the late 1980s.[8] The early craft beer craze plateaued at the turn of the twenty-first century,[9] but recommenced in 2006.[10] Since then, local artisan

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8 Kenneth G. Elzinga, et al., *Craft Beer in the United States: History, Numbers, and Geography,* 10 J. Wine Economics 3, 255 (2015).

9 See, Brewers Ass'N, *Historical U.S. Brewery Count,* (2016).

10 Watson, *Economic Impact Data,* Brewers Ass'n (2016), https://www.brewersassociation.org/statistics/economic-impact-data/.

brewers have occupied neither a small nor a stagnant portion of the American economy.

The 917 new breweries that opened last year pushed the craft beer industry to a record-high 4,656 operational breweries[11] which are both directly and indirectly responsible for over 420,000 jobs.[12] Texas holds the third largest state craft beer market with 189 craft breweries and $3.8 billion of annual economic output.[13] Texas also houses two of the three fastest growing craft breweries in the country: Karbach Brewing Co. in Houston and Austin Beerworks in Austin.[14]

By definition a craft brewery is small,[15] independent[16] and hallmarked by individualistic approaches to brewing and deep community involvement.[17] Craft beers, moreover, are understood to be flavorfully complex draughts brewed in limited quantities and select locations. Irrespective of the fact that craft beer connoisseurs are interminably branded as only pretentious, faddy beer-drinkers, craft breweries collectively are sizable contributors to all of the fifty state economies across America.

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11 Cohen, *supra* note 7.

12 Watson, *supra* note 13.

13 BREWERS ASS'N, *supra* note 12. Only the Californian and Pennsylvanian craft beer markets contribute more each year at $6.9 billion and $4.5 billion respectively.

14 *See*, THE NEW YORKER, *Mapping the Rise of Craft Beer*, (2012), https://projects.newyorker.com/story/beer/.

15 Annual production of 6 million barrels of beer or less. *Id.*

16 *Id*, Less than 25 percent of the craft brewery is owned or controlled (or equivalent economic interest) by an alcoholic beverage industry member that is not itself a craft brewer.

17 *See*, *Craft Brewer Defined*, BREWERS ASS'N (2016)

III: ALCOHOL REGULATION BACKGROUND

After the calamitous failure of Federal Prohibition under the eighteenth amendment, states essentially received *carte blanche* to regulate the alcohol industry via the twenty first amendment. Nearly every state adopted a three-tiered production structure which separated brewers, distributors, and retailers. Brewers could only sell to distributors who sold to retailers, and only retailers could sell to consumers.

Through this tiered system, state legislators endeavored to prevent the recurrence of pre-prohibition monopolization in the alcoholic beverage market via the "tied-house system." The tied house system consisted of beverage manufacturers that incentivized bar-owners to exclusively sell the manufacturer's products, and bar-owners quickly became quasi-agents of the manufacturers rather than independent business-owners.[18] Lawmakers coated the reality of a quasi-monopolized alcohol industry with relentless propaganda about how tied houses also bred all manners of vices and created social discord between otherwise peaceful entrepreneurs making corrective legislation urgent.[19] A tiered rather than tied market configuration promised to neatly organize the alcoholic market and compel manufacturers and retailers to contract a distributary middleman.

Within this regulatory scheme, American craft breweries eventually cropped up to compete in a market dominated by

18 Benjamin Grubb, *Exorcising the Ghosts of the Past: An Exploration of Alcoholic Beverage Regulation in Oklahoma*, 37 Okla. City Univ. Law Rev. 297 (2012).

19 *Id.* at 298.

international macro breweries with multi-billion-dollar market capitalizations. These market giants are unsurprisingly masters of the "complex set of overlapping state and federal regulations" that reinforces the three-tiered system.[20] But the undersized, neophyte craft brewers must survive a series of even more arduous certificatory and regulatory procedures before brewing a single batch of wort.

Regulatory compliance costs frequently keep aspiring brewers from opening a brewery.[21] Some market analysts even draw parallels between the regulatory hindrances that face American craft brewers and the notoriously protected Venezuelan and Chinese economies.[22] But Texan legislators not only made craft beer regulation burdensome, but overtly perverse, by outlawing a key revenue source for every craft brewer via Senate Bill 639.

In early 2013, State Senator John Carona[23] (R-16)[24] authored, introduced, and successfully passed SB 639 thereby instituting Section 102.75 (a)(7) of the Texas Alcoholic Beverage Code which prohibits beer manufacturers from "accept[ing] payment in exchange for an agreement setting forth territorial rights.[25]" Territorial rights delimit local geographical areas wherein a given

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20 *Granholm v. Heald,* 544 U.S. 460 (2005)

21 Antony Davies, *Consumers Are the Best Regulators,* U.S. NEWS & WORLD REPORT, May 12, 2014, http://www.usnews.com/opinion/economic-intelligence/2014/05/12/many-regulations-stifle-entrepreneurs-and-small-businesses.

22 Matthew Mitchell and Christopher Koopman, *Bottling Up Innovation in Craft Brewing: A Review of the Current Barriers and Challenges,* MERCATUS CENTER (Jun. 4, 2012), https://www.mercatus.org/publication/bottling-innovation-craft-brewing-review-current-barriers-and-challenges.

23 S. 639, 2013 S., 83rd Sess. (Tex. 2013).

24 *John Carona,* Wikipedia

25 See TEX. ALCOHOLIC BEVERAGE CODE, tit. 4, § 102.75 (2013).

distributor can freely sell a brewer's product. Normally brewers and distributors openly negotiate the financial terms of brand licensing contracts like any two parties considering a business agreement would. But SB 639 comprehensively illegalizes this activity.

Craft brewers are not wholly forced to sell their products through an alcohol distributor. Texas law allows self-distribution of no more than 40,000 barrels of beer per year for craft breweries that produce no more than 125,000 barrels per year,[26] and a large majority of Texas' 189 breweries produce less than the 125,000 barrel quota.[27] But brewers occasionally contract distributors before reaching the quota, and any brewer who meets this quota and wishes to produce more beer must transfer distributional rights to a licensed beer distributor.

After SB 639, craft brewers may not receive any compensation for transferring rights to their brand and are essentially forced to give them away.[28] By acquiring distributional rights, beer distributors are free to sell a brewer's products at whatever price they deem appropriate and profit accordingly. A distributor can also sell distributional rights for any given brand to another distributor.[29] These interactions are expressly permitted in other sections of the

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26 Katharine Shilcutt, *Senfronia Thompson Introduces Bill to Reduce Craft Beer Distribution*, HOUSTONIA MAG. (March 17, 2015), https://www.houstoniamag.com/articles/2015/3/17/houston-march-2015.In 2015, State Representative Senfronia Thompson (D-141) introduced HB 3389 which proposed slashing the self-distribution quota from 40,000 barrels per year to 5,000 barrels per year. The bill did not pass.

27 *See*, *State Craft Beer Statistics*, BREWERS ASSOCIATION (2015)

28 *Supra* note 23

29 *See*, Amy McCarthy, *Peticolas and Other Craft Brewers Are Suing Texas Over Distribution Laws*, DALLAS OBSERVER (2014)

Texas Alcoholic Beverage Code and not changed by SB 639.[30] Now, only brewers—the original owners of these rights—cannot profit.

Irrespective of how *prima facie* ruinous this law seems, it is exponentially more so upon realization brewers must pay to reassume their brand distribution rights. Instead of a brewer or a distributor paying the other for the release or reclamation of distributional rights, brewers must give the rights away and pay to reassume them. Put another way, if the brewer and distributor renegotiate the distribution license so as to terminate it, the brewer must *compensate the distributor* before reassuming their original distributional rights.

IV: Summary of *Live Oak* Complaint and Ruling

Plaintiff attorney Arif Panju vilified SB 639 as a "naked transfer of wealth"[31] that is "stifling the Texas craft beer renaissance"[32] and "depriv[ing] the creators of the product from realizing its full value.[33]" Panju's language is not hyperbolic because brand distribution rights carry incredible value. And the revenue paid to brewers by distributors serves two key purposes.

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30 *Id.*

31 InstituteForJustice, *Live Oak Brewing et al. v. Texas Alcoholic Beverage Commission,* YouTube (Dec. 15, 2014) https://www.youtube.com/watch?v=4EWZCS2H9gM.

32 Reeve Hamilton, *Brewers sue Texas for "stifling the Texas craft beer renaissance,* The Washington Post Dec. 11, 2014, https://www.washingtonpost.com/blogs/govbeat/wp/2014/12/11/brewers-sue-texas-for-stifling-the-texas-craft-beer-renaissance/?utm_term=.1340f1a8829f.

33 *See,* Phaedra Cook, *Judge Says Banning Brewers From Selling Distribution Rights Violates Texas Constitution,* Houston Press, Aug. 29, 2016, http://www.houstonpress.com/restaurants/judge-says-banning-brewers-from-selling-distribution-rights-violates-texas-constitution-8713391.

Revenue from distribution agreements is how distributors compensate brewers for exclusive distributional rights of the brewery brand in perpetuity, and the lucrativeness of rights to an established craft beer brand is not lost on brewers or distributors.[34] Every brewery tries to strengthen their reputation and mindshare by populating their menu with brilliantly flavored, one-off brews that showcase the brewer's proprietary recipes and idiosyncratic brewing techniques. Owning the distribution rights to this type of brewery is valuable.

Quintessential to every brewery business model, moreover, is the reinvestment of revenue from the sale of distribution rights in production maintenance or expansion.[35] By throttling this key source of revenue, SB 639 directly undercuts a key aspect of breweries' basic financial strategies. When interviewed, Peticolas Brewing Co. owner Michael Peticolas corroborated the significance of losing this large chunk of revenue because of the subsequent inability to reinvest, and cited it as a primary harm of SB 639.[36]

Filed on behalf of Live Oak Brewing Co., Peticolas Brewing Co., and Revolver Brewing, the plaintiffs' petition condensed all of the aforementioned information to a two-plank constitutional argument.[37] Under the first plank, the plaintiffs argued that SB 639 violates Article 1, Section 17 of the Texas Constitution through

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34 But apparently it is lost on lawmakers.

35 Claire Ricke and Calily Bien, *Beer battle: Texas craft brewers say law is losing them millions*, KXAN NEWS Aug. 15, 2016, http://kxan.com/2016/08/15/beer-battle-texas-craft-brewers-say-law-is-losing-them-millions/..

36 Evan Faram, *The Man with the Velvet Hammer: Michael Peticolas*, CSTX (Mar. 17, 2015), http://www.thecooleststuffintexas.com/coolest-texans/man-with-the-velvet-hammer-michael-peticolas-of-peticolas-brewing/.

37 Cook, *supra* note 29.

nonconsensual deprivation of property, namely compensation for distribution rights.[38] Section 17 (called the "Takings Clause") protects "the right to be secure in one's property"[39] by ensuring that "no person's property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person."[40]

In the second plank, the plaintiffs argued that SB 639 infringed on the right to earn an honest living thereby violating Article 1, Section 19 of the Texas Constitution.[41] Section 19 guarantees that "no citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disenfranchised, except by the due course of the law of the land."[42] The plaintiffs argued that the TABC blatantly violated the "honest living" right protected by this "due process" guarantee by "prohibiting the sale of territorial rights by beer producers" without any substantial, legitimate, or rational reason" for doing so.[43] Judge Crump upheld the "honest income" plank but dismissed the Takings Clause argument with prejudice.[44]

V: Analysis of *Live Oak* Ruling

That SB 639 *prima facie* qualifies as governmental

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38 *Live Oak Brewing v Tex Alcoholic Beverage Comm,* No. D-1-GN-14-005151 (98th Dist Ct Tex, 2014).

39 *Id.*

40 *See,* U.S. Const. art. I, § 17.

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42 *Id.* at § 19.

43 Cook, *supra* note 29.

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obstruction of earning an honest living is certain. Both the U.S. Supreme Court[45] and the Texas Supreme Court[46] have resolutely upheld the constitutional right to pursue any form of honest, legal labor "free from unreasonable governmental interference" protected by the Fourteenth Amendment to the federal Constitution and Article 1, Section 19 of the Texas Constitution. Outlawing income squarely qualifies as unreasonable interference. As Justice Phil Johnson wrote, echoing Alexander Hamilton, the courts have a duty to oppose "irrational," "anticompetitive," and "unconstitutional" "legislative encroachments" by virtue of their stance as "bulwarks of a limited Constitution."[47]

Parsing the court's summary judgement against the plaintiffs' Takings Clause plank is of course solidly relegated to speculation, and the benefits of speculation are limited. But an eerily prescient defense of SB 639 given by supporters in the senate gives perspective to Judge Crump's judgement. Two prior Texas cases, moreover, underscore the curiousness of Judge Crump's dismissal of *Live Oak's* Takings Clause claim.

A House Research Organization (HRO) bill analysis report summarized the justification offered by state senators who supported SB 639. They argued that the bill would protect the independence of distributors by reducing breweries' pricing power over distribution rights contracts. (Curiously, absolutely no statistical or anecdotal evidence was ever offered to support the claim that breweries can or are abusing their pricing power.) The senators justified stripping

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45 *Greene v. McElroy*, 360 U.S. 474, 492 (1959).

46 *Patel v. Texas Dept. of Licensing*, 464 S.W.3d 369 (2012)

47 *Id.*

distribution rights from brewers by noting that manufacturers and distributors may still "enter into contracts on a number of common interests" like advertising[48] and retail pricing[49] under the bill. Brewers also may still earn profits from other parts of the beer business since the bill "would not prohibit practice that are part of the ordinary functioning of the alcohol beverage industry."[50]

At best, the arguments in the HRO report are a weak attempt to contend that because brewers can still earn *some* profit under the bill, garroting a key source of income—profit earned from the brewer's *own brand*—is passable. And how the Texas senators deduced that brewers somehow possess disproportionate or abusive pricing power is abundantly unclear. Opponents of the bill, per the HRO report, responded that the bill "would effectively coerce manufacturers into giving away an extremely valuable commodity," namely distributional rights.[51]

That SB 639 does not violate the Takings Clause in context of Texas Supreme Court precedent is incredibly unclear. In *Harris County Flood Control District v. Kerr*, the government authorized a private housing developer to develop a plot of land, and the construction caused the flooding of the plaintiffs' neighboring houses.[52] The plaintiffs argued—and the Court's opinion upheld—that this constituted a Takings Claim violation since construction and

48 John Carona, et al., *SB 639 Bill Analysis*, House Research Organization (May 17, 2013), http://www.hro.house.state.tx.us/pdf/ba83R/SB0639.PDF.

49 *Id.*

50 *Id.*

51 *Id.*

52 *Harris County Flood Control Dist. v. Kerr*, 485 SW 3d 1, 58 Tex. Sup. Ct. J. 1085 (Tex. 2015).

the flooding it caused would not have transpired absent government approval.[53] This opinion was not unanimously supported, and the dissenting opinion pointedly attacked the understanding that damage to private property from the private use of adjacent property somehow qualifies as a Takings Clause violation.[54] Clearly *Live Oak* does not involve the "public use" phrase of the Takings Clause, but *Harris County* is telling of the Texas Court's willingly liberal protection of private property.

Edwards Aquifer v. Day involved a Takings Clause violation analogous to *Live Oak* where the plaintiff's complaint was easily upheld because of property interest, a criteria clearly met in *Live Oak*. Texas groundwater legislation passed in 1993 "froze each landowner's water use and water rights roughly in place, with an overall usage cap set by law.[55]" Any additional private use of groundwater was prohibited unless an individual permit was granted.[56] In 2008, the plaintiffs filed for "a permit for the use of 700 acre-feet of water per year" and sought legal recourse when the permit request was denied.[57] The Court did not reject the plaintiff's appeal to pursue their claim after an unfavorable district court ruling, and nodded at a recognition of property interest in groundwater use. The Texas Supreme Court eventually declined to hear this high-

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53 *Id.*

54 *Id.*

55 Don Cruse, *Landmark Texas water rights case may lead to future takings claims or legislative fixes: Edwards Aquifer v. Day*, SCOTX Blog (Feb. 24, 2012), http://www.scotxblog.com/case-notes/landmark-texas-water-rights-case-may-lead-to-future-takings-claims-or-legislative-fixes-edwards-aquifer-v-day-feb-24-2012/.

56 *Id.*

57 *Id.*

profile case which robs Texas' groundwater rights laws of much needed clarification and this note of helpful precedent. But the appellate court's decision is not insignificant.

Property interest[58] is a necessary threshold for any constitutional takings claim.[59] Given Texas' murky groundwater laws and rights, arguing for property interest in *Edwards Aquifer* was challenging. Yet the Court recognized it. Proving property interest—and the subsequent violation—in a revenue earned by a craft brewer should be colloquial duck soup by comparison.[60] The enormously low bar for substantiating a Takings Clause violation as per the Court's opinion in *Harris County* is also helpful. But Judge Crump curiously dismissed the Takings Clause claim in *Live Oak* all the same. In upholding the plaintiffs' "honest income" plank, the district court nonetheless fulfilled their constitutional duty to, as Justice Johnson quipped,[61] "tap the breaks" on government power

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58 Property interest refers to the extent of a person's or entity's rights in property. It deals with the percentage of ownership, time period of ownership, right of survivorship, and rights to transfer or encumber property. *See, Property Interest Law & Legal Definition,* USLegal.

59 *Id.* note 43.

60 *See* J. Justin Wilson, *Texas Doubles Down In Fight To Stifle Craft Brewers' Property Rights*, INSTITUTE FOR JUSTICE (Nov. 23, 2016), http://ij.org/press-release/texas-doubles-fight-stifle-craft-brewers-property-rights/.The property interest threshold is uniquely relevant to both *Live Oak* and *Edwards Aquifer* (and strengthens their analogousness) since neither case involves the absolute deprivation of private property as would be seen in a licensing cases like *Patel v. Texas Department of Licensing and Regulation,* but only a partial limitation on profits earned from selling craft beer and the use of groundwater respectively. That the Texas appellate court confirmed the property interest in a case surrounded by thorough legal ambiguity, it is not irrational to wonder why a similar, seemingly cut-and-dry burden in *Live Oak* was dismissed.

61 "Such is life in a constitutional republic, which exalts constitutionalism over majoritarianism precisely in order to tell government 'no.' That's the paramount point, to tap the brakes rather than punch the gas." *Supra* note 38.

rather than allowing the legislature to "punch the gas."[62]

But the lawmakers who supported SB 639 dishonored a crucial responsibility as public servants which transcends revenue and contracts. That responsibility is good policymaking, and parsing this duty is simple. First, as a prior Supreme Court Justice once opined, "the State must specifically identify an 'actual problem' in need of solving," not pursue abstract, even arbitrary ideals.[63] A problem and accompanying proposal must past strict scrutiny, which is to say it must be isolate a compelling public interest and be "narrowly drawn to serve that interest."[64] And "ambiguous proof will not suffice."[65] Absent strict scrutiny, public policy just as easily shapes society in the interest of the people as in what lawmakers think *ought* to be the interest of the people.[66]

Senate Bill 639 claims to bolster competitiveness in the craft beer market without even loosely proving an existing threat to competition nor linking any sort of consumer harm to a marginally less-than-competitive craft beer market. Instead, the bill was grounded in patently vague, thoroughly unsubstantiated ideals like "guarantee[ing] the state's ability to exercise oversight over the alcohol industry" and preventing unproven pricing "pressure from manufacturers" over distributors. This byzantine economic interference is entirely disconnected from the public interest at best

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62 As of Nov. 22, 2016, TABC filed a notice of appeal in *Live Oak*. *See*, J. Justin Wilson, *Texas Doubles Down In Fight To Stifle Craft Brewers' Property Rights*, INSTITUTE FOR JUSTICE (2016)

63 *Brown v. Entertainment Merchants Association*, 564 U.S. 786 (2011).

64 *Id.*

65 *Id.*

66 *Id.*

and squarely opposed to it at worst. Instead of mitigating existing harms, Texas state legislators have created economic troubles where none previously were.

In the midst of an intensely flavorless, homogenized "big beer" industry, the entrepreneurial potential and flavorful idiosyncrasies of American craft brewers should be fully unleashed. Not only will state economies, American beer-drinkers, and brewmasters all benefit from economic freedom, but the U.S. Constitution thoroughly protects this type of activity against lawmakers' stymieing proposals. When economic liberty becomes passé, however, brewmasters metaphorically sink or swim not by the quality of their beverages but by their ability to survive convoluted, protectionist regulations. Both the beers and the businesses are soured as a result.

VI: IMPORTANCE OF *LIVE OAK* PRECEDENT

Live Oak is noteworthy because it offers positive precedent to similar standing suits against the TABC. *Live Oak* is only one instantiation of an intensifying legal war for market freedom waged by Texas breweries against the TABC, but it is nonetheless important. For example, prompted by a ban on Crowlers, Deep Ellum Brewing Company, LLC of Austin, Texas—later joined by Grapevine Craft Brewery of Grapevine, Texas[67]—filed suit against the TABC in late 2015 for its comprehensive ban on breweries' on-site sale of alcohol for off-site consumption. Like many craft breweries, Deep Ellum and Grapevine both heavily invested in Crowlers—a portmanteau

67 Cook, *supra* note 29.

of "growler" and "can"—to offer customers a higher-quality, more convenient means of transporting beer purchased at the brewery. Growlers and Crowlers were both legal beer containers until last year when the TABC unexpectedly banned Crowlers for violating a few vaguely worded sections of the Texas Alcoholic Beverage Code that prohibited various means of on-site "canning" and "repackaging" beer for off-site consumption.

Deep Ellum seeks the enjoinment of these allegedly unconstitutional sections of the Texas Alcoholic Beverage Code, namely Sections 12, 62 and 74.[68] These are interpreted to ban the use of Crowlers and prescribe which sorts of alcoholic beverage manufacturers may and may not generally sell on-site for off-site consumption.[69] As trumpeted on Deep Ellum's website, "Texas allows every other alcoholic beverage manufacturer to do just that — wineries, distilleries and even brewpubs are allowed to sell their products directly to the end consumer for off-premise consumption."[70] But craft breweries cannot. Similar to *Live Oak*, *Deep Ellum* argues that the TABC infringes on "the right to pursue legitimate occupations free from unreasonable government interference."[71] It also claims that the TABC patently violates the Equal Protection Clause of the federal Constitution's Fourteenth

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68 *See* TEX. ALCOHOLIC BEVERAGE COMMISSION, *General Questions*, (2015), https://www.tabc.state.tx.us/faq/general.asp.

69 *Id.*

70 *See* DEEP ELLUM BREWING, *Sue TABC: Operation Six Pack To Go* (2016), https://www.indiegogo.com/projects/sue-tabc-operation-six-pack-to-go#/updates.

71 Deep Ellum v. Tex. Alcoholic Bev. Comm 'n, 835 F. Supp.2d 227, 234 (W.D. Tex. 2011)

Amendment.[72]

Like *Live Oak*, Crowlers perfectly embody the aforementioned divergence between public interests and policymakers' agendas in context of Texas' alcohol regulation that. In a similar case against the TABC's Crowler ban filed by the Cuvee Coffee Bar of Austin, Texas, Cuvee owner Mike McKim says that Crowlers have "been a big hit with customers" and that "Cuvee sells about 50 a week and the quantity sold now far surpasses traditional growler fills.[73]" But the TABC would keep customers who enjoy a particular brew from either buying a six-pack to go or filling an improved version of a perfectly legal container.

Encouragingly, in the Cuvee Crowler suit, state administrative judge John Beeler wrote, "There is no material difference between growlers and Crowlers."[74]" In fact the *San Antonio Current* opines, "Beeler's findings pretty much dismantle every argument TABC threw at him for why Crowlers shouldn't be sold by bars.[75]" But *Deep Ellum's* suit against the ban of on-site alcohol sales for off-site consumption is much more challenging than Cuvee's Crowler suit and could benefit from *Live Oak*'s decision. As the *Houston Press* correctly observed, "The court battles are likely to continue for as long as brewers believe their rights are being infringed.[76]"

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72 *Id.*

73 Cook, *Austin Craft Beer Bar Defies TABC Ban on Crowlers*, HOUSTON PRESS Sep. 15, 2015, http://www.houstonpress.com/restaurants/austin-craft-beer-bar-defies-tabc-ban-on-crowlers-7764392.

74 *See*, Michael Barajas, *TABC Faces Setback in Its War on Crowlers*, SAN ANTONIO CURRENT Nov. 23, 2016, http://www.sacurrent.com/the-daily/archives/2016/11/23/tabc-faces-setback-in-its-war-on-crowlers.

75 *Id.*

76 Cook, *supra* note 29.

VII: CONCLUSION

To paraphrase Milton Friedman, economic freedom is requisite to all other freedoms.[77] All entrepreneurs should be alarmed when a legislative body is willing and eager to hamstring private enterprise by outlawing a legitimate revenue streams of some to benefit the private interests of others. Although *Live Oak* lessens government interference in private industry and offers potentially helpful precedent for cases like *Deep Ellum*, the legal battle for economic freedom in Texas is far from over. But cases like *Live Oak* signal that TABC's ludicrous power over the craft beer industry cannot persist indefinitely, and that any similar future laws from the Texan Congress will meet serious litigious pushback. Brewmasters and beer drinkers across Texas, therefore, have good reason to continue wholeheartedly pursuing their craft and raise a cold one to freedom—preferably a glass of Live Oak's "Liberator" Doppelbock.[78]

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77 Raplh Reiland, *Freedom's Requisite*, MISES INSTITUTE (2004), https://mises.org/library/freedoms-requisite.

78 *See Live Oak Liberator*, BEER ADVOCATE (2005), https://www.beeradvocate.com/beer/profile/383/27598/.