

The Untapped Potential of Bourbon Tourism: Regulatory Effects on Kentucky's Agritourism Industry

Andrew Bocanumenth*

INTRODUCTION

Agriculture is a source of pride for most Kentuckians, and agritourism, or the act of touring any agriculturally based operation, offers Kentucky a unique opportunity to bridge the relationship between its agricultural community and its hospitality industry.¹ The need for economic development profits in rural farming communities spawned various policy analyses for promoting agritourism as a means of generating the supplemental revenue necessary to preserve and sustain family farms.² In order to be complete, a study of agritourism's economic impact in Kentucky should include an analysis of the policies currently affecting Kentucky's bourbon, craft beer, and wine industries.³ Most studies focus on the numerous failures of Kentucky's prohibition and local option laws, but several analyze whether the recent reforms of these policies have been sufficient to help agritourism reach its full potential of stimulating economic development in rural communities.⁴ In 2018, bourbon distilling was a multibillion-dollar industry in Kentucky.⁵ To better

* Administrative Editor, KY. J. OF EQUINE, AGRIC., & NAT. RESOURCES L., 2019-2020; B.A. Economics August 2016, Florida International University; J.D. expected May 2020, University of Kentucky.

¹ *What is Agritourism?*, KY. DEP'T AGRICULTURE, <http://www.kyagr.com/marketing/agritourism.html> [<https://perma.cc/A8H9-UJNY>].

² *Id.*; see generally *Kentucky Agritourism Market Study*, GLENGARIFF GRP., (Dec. 2005), <http://www.kentuckyfarmsarefun.com/Resources/documents/KY%20Marketing%20Study%20Final%20Report.PDF> [<https://perma.cc/3NBB-MWTW>] (providing a summary and recommendation regarding the Kentucky agritourism market).

³ See GLENGARIFF GRP., *supra* note 2.

⁴ See, e.g., Thomas E. Rutledge & Micah C. Daniels, *Who's Selling the Next Round*, 33 N. KY. L. REV. 1 (2006); Williams Charles Ferrell Jr., Note, *You Don't Have to Go Home, But You Can't Stay Here: Last Call For the Local Option Law In Kentucky*, 43 BRANDEIS L.J. 115 (2004).

⁵ *Kentucky Bourbon Quick Shots 2018*, KY. DISTILLERS' ASS'N, <https://kybourbon.com/wp-content/uploads/2018/10/2018-Quick-Shots-September.pdf> [<https://perma.cc/Q6LQ-YG9M>].

capitalize on this economic opportunity, Kentucky must adopt a multifaceted approach that combines free-market, anti-Red Tape measures with provisions that help address public health and safety concerns.

The Bluegrass State has an array of agritourism offerings for tourists seeking the full “Kentucky experience,” including the world-famous Kentucky Bourbon Trail, picturesque vineyards with rolling green hills and white picket fences, horse farms and races, as well as craft beer and food festivals.⁶ The \$8.5 billion bourbon industry facilitated Kentucky’s hospitality industry renaissance with a surge in conferences, new hotel construction, bourbon-inspired food and restaurants, and retail branding.⁷ The Kentucky Distillers’ Association (“KDA”) reported in 2017 that more than “1.2 million people visited distilleries along the Kentucky Bourbon Trail.”⁸ Due to the links with many other sectors of the economy, the total economic impact of bourbon tourism in 2017 is estimated to have produced approximately 17,500 jobs across the state with an annual payroll of nearly \$800 million.⁹

Kentucky bourbon is not the only industry responsible for this new age of Kentucky tourism.¹⁰ Fueled by consumer interest in agritourism, visits to Kentucky wineries have also increased.¹¹ In 2014, Kentucky ranked ninth in the nation for the production of wine, producing 2.2 million commercial gallons of wine in vineyards across 600 acres of Kentucky farmland.¹² Moreover, the “rise in the market for [Kentucky] craft beer resulted in a 25

⁶ GLENGARIFF GRP., *supra* note 2.

⁷ Debra Gibson Issacs, *Kentucky’s Authenticity is Key to Tourism Success*, LANE REP. (Apr. 11, 2018), <https://www.lanereport.com/89057/2018/04/kentuckys-authenticity-is-key-to-tourism-success/> [<https://perma.cc/5M78-4QSN>].

⁸ *Id.*

⁹ *Id.*

¹⁰ *See Go Wine Tasting in Kentucky This Summer*, BED & BREAKFAST ASS’N KENTUCKY (July 3, 2018), <https://www.kentuckybb.com/BlogVersion2/GoWineTastinginKentuckyThisSummer.html> [<https://perma.cc/HAD3-EU9V>].

¹¹ *See id.*

¹² Thomas Pellechia, *Kentucky: First at American Commercial Wine*, FORBES (June 7, 2016, 10:02 AM), <https://www.forbes.com/sites/thomaspellechia/2016/06/07/kentucky-first-at-american-commercial-wine/#b853bd781645> [<https://perma.cc/BY4K-V82R>].

percent increase in brewery industry workforce” and was estimated to have a \$495 million economic impact in 2016.¹³

The Commonwealth invests in marketing campaigns for all of its agritourism attractions.¹⁴ While these marketing campaigns presented remarkable results for agritourism, the overregulation of the distilling industry also led many groups, such as “licensees, state regulators, law enforcement, and private citizens,” to push for modernizing Kentucky’s liquor laws that have been in place since the Prohibition Era.¹⁵ Those calling for statutory reform believe that the regulations currently in place have become redundant, inefficient, and are no longer suitable in the context of a “21st-century economy and standard of law.”¹⁶

There are four main characteristics in Kentucky’s alcoholic beverage laws that impede the development of bourbon tourism and the agritourism industry at large. First, Kentucky’s local option laws make it unnecessarily difficult to lift bans on the sale of alcoholic beverages in dry counties and do little to address health and safety concerns.¹⁷ Second, the inconsistent and often conflicting patchwork of regulations between state and local authorities places substantial regulatory burdens on cross-jurisdictional businesses.¹⁸ Third, the three-tier regulatory system and production caps inhibit the expansion of many agritourism venues.¹⁹ Finally, the state’s licensing quota system denies liquor

¹³ Kevin Gibson, *Projections look bright for Kentucky breweries in 2017 and beyond*, INSIDER LOUISVILLE (Feb. 16, 2017), https://insiderlouisville.com/lifestyle_culture/projections-look-bright-for-kentucky-breweries-in-2017-and-beyond/ [<https://perma.cc/HQJ8-FZC6>].

¹⁴ Rick Bates, *Marketing Assistance Available for Tourism Businesses in Kentucky*, U. OF KY. C. AGRICULTURE, <http://www2.ca.uky.edu/agcomm/pubs/dev/dev4/dev4.pdf> [<https://perma.cc/3E8G-FSC5>].

¹⁵ Jack Brammer, *Want to buy or sell an alcoholic drink in Kentucky? That'll depend on where you are*, LEXINGTON HERALD-LEADER (Aug. 10, 2012, 12:47 PM), <https://www.kentucky.com/news/politics-government/article44371632.html> [<https://perma.cc/G2NW-RXQ6>].

¹⁶ *Id.*

¹⁷ Ferrell, *supra* note 4, at 130—32.

¹⁸ Stephen G. Amato, *Mandatory Alcohol Server Training: Kentucky ABC Regulation*, MCBRAYER: HOSPITALITY L. BLOG (Oct. 27, 2017), <https://www.mmlk.com/blogs-hospitality-law-blog/mandatory-alcohol-server-training-kentucky-abc-regulation> [<https://perma.cc/LB7V-LKLV>].

¹⁹ Taylor Inman, *Hard Pressed: KY Winery Owners Feel Stifled By Caps On Production*, CINCINNATI PUB. RADIO (Nov. 14, 2018), <http://www.wvxu.org/post/hard-pressed-ky-winery-owners-feel-stifled-caps-production#stream/0> [<https://perma.cc/K377-KW5F>].

licenses to many valid applicants and has created fears that the current limits have resulted in monopolies within select sectors of the alcohol industry.²⁰ In order to avoid lost opportunities in the agritourism industry for the economic development of Kentucky's rural communities, the Kentucky General Assembly should pass legislation to reform the means by which local option laws are held, create a coherent and consistent system of regulations between state statutes and local ordinances, vertically integrate the three-tier system for agritourism businesses, and adhere to the advice of the Kentucky Alcoholic Beverage Control Board ("ABC") to eliminate the liquor license quota system.

This note will explore and analyze the various attitudes taken by anti-prohibitionists and neo-prohibitionists to the recent reforms in Kentucky's liquor laws and evaluate whether the Commonwealth should do more to improve Kentucky's agritourism industry. Part I will provide an overview of how the overly stringent regulations on the distribution of alcohol have impacted different sectors of Kentucky's agritourism industry. Part II will examine the major Kentucky cases and statutes that currently regulate the distribution of alcohol and the problems they create for agritourism in their implementation. Part III will analyze and compare arguments by anti-prohibitionists and neo-prohibitionists to decide whether Kentucky should do more to reform its liquor laws. Finally, the conclusion will summarize how modernizing Kentucky's liquor laws can help improve the agritourism industry to bring vital economic development dollars to farmers and rural communities while also addressing certain public health and safety concerns.

I. THE IMPACT OF REGULATIONS ON AGRITOURISM

A. The Prohibition Era and Its Evolution Into Kentucky's Current Liquor Law

Alcoholic beverages are an important trading commodity in the global economy and are consumed for a variety of purposes,

²⁰ *Id.*

including entertainment, socialization, and business events.²¹ Although alcohol is a key part of many societies, alcoholic beverages should be treated with the “respect and care attributed to other addictive and mood altering substances.”²² Unlike other retail products, reckless or abusive consumption of alcohol has dangerous outcomes, ranging from anti-social behavior to health-related problems, and even to violent crimes.²³ Results like these have prompted local and state governments to create regulations regarding the production and sale of alcohol on licensed premises, sometimes instituting complete bans.²⁴

In the pre-Prohibition Era, producers of spirits and beers commonly owned and controlled saloons and “retailers by threatening to cut off supply or offering rebates only to those who complied with their marketing or sales demands.”²⁵ This system of operation “tied” retailers to producers, thus creating “tied houses” that typically required maximized sales without regard for the general public.²⁶ The rampant alcoholism, family violence, and saloon-based political corruption prompted pietistic protestants and teetotalers to campaign for laws prohibiting the consumption of alcohol.²⁷ In Kentucky, these bans date as far back as 1874 when the General Assembly enacted the first local option law.²⁸ Under this legislation, a county court held a referendum on the ban of the sale of alcohol following a petition of twenty or more voters in any district of the county.²⁹ By 1915, 106 of Kentucky’s 120 counties had adopted prohibition, and only twenty-three towns continued to grant liquor licenses to establishments.³⁰

²¹ JAMES PETER MURPHY, *RESPONSIBLE SALES AND SERVICE OF ALCOHOL FOR THE TOURISM, HOSPITALITY AND RETAIL INDUSTRIES* vii (Goodfellow Publishers Limited 2015).

²² *Id.*

²³ *See id.*

²⁴ *Id.* at 5.

²⁵ Stephen B. Humphress, Gen. Couns., Off. of Alcohol Beverage Control, Address at Kentucky Bar Association’s Hot Topics in Local Government Law CLE Seminar: ABC Law: The Confusing Maze of Obscure Statutory Language – Regulation, Enforcement, and Recently Passed Legislation, at 45, 67 (Apr. 26, 2007).

²⁶ *Id.*

²⁷ *See id.*

²⁸ Thomas H. Appleton, Jr., *Prohibition and Politics in Kentucky: The Gubernatorial Campaign and Election of 1915*, 75 REG. KY. HIST. SOC’Y 1, 28 (Jan. 1977), <https://www.jstor.org/stable/23378823> [<https://perma.cc/YFN3-BSHU>].

²⁹ *Id.*

³⁰ *Id.*

On January 16, 1919, Congress ratified the Eighteenth Amendment to the U.S. Constitution, prohibiting the production, transportation, and sale of alcohol across the nation.³¹ Although many Americans at the time mourned the ban, some prohibitionists celebrated due to their belief that the consumption of alcohol was sinful and their fear of the social dangers of irresponsible consumption of alcohol.³² Even after federal and state lawmakers realized that Prohibition failed to mitigate these dangerous outcomes,³³ and therefore abolished Prohibition in 1933 through the ratification of the Twenty-First Amendment to the U.S. Constitution,³⁴ cautious attitudes persisted in areas where the culture of abstinence during Prohibition had a lasting residual impact.³⁵

Although the Twenty First Amendment lifted prohibition, some states continued the ban on their own.³⁶ Kentucky, along with a majority of states, adopted a “three-tier” regulatory system to prevent the return of tied-houses.³⁷ Under this system, tier-one consists of licensed producers, who are permitted to sell their products only to licensed wholesalers in tier-two.³⁸ The wholesalers are then required to distribute their alcoholic products only to a retailer in the third and final tier, and no sole entity may be involved in more than a single tier of production.³⁹

The three-tier system is meant to create a structure of checks and balances that provides safe alcohol to consumers while ensuring a simple method to collect tax revenue.⁴⁰ However, Kentucky continued to pass additional liquor laws further

³¹ U.S. Const. amend XVIII, § 1.

³² A.V., *Why America Still Has Dry Counties*, ECONOMIST: ECONOMIST EXPLAINS (June 5, 2018), <https://www.economist.com/the-economist-explains/2018/06/05/why-america-still-has-dry-counties> [<https://perma.cc/5SAU-MD54>].

³³ Humphress, *supra* note 25.

³⁴ U.S. CONST. amend. XXI § 1.

³⁵ See A.V., *supra* note 32.; U.S. CONST. amend. XXI, §§ 1—2.

³⁶ Humphress, *supra* note 25, at 67; U.S. CONST. amend. XXI, §3.

³⁷ Stephen G. Amato, *The Basics of Alcohol Beverage Control Laws*, MCBRAYER HOSPITALITY L. BLOG (June 18, 2015), <https://www.mmlk.com/blogs-hospitality-law-blog,the-basics-of-alcoholic-beverage-control-laws> [<https://perma.cc/7WB8-J77J>]; see also Humphress, *supra* note 25..

³⁸ Amato, *supra* note 37.

³⁹ *Id.*

⁴⁰ See *id.*

regulating the production and sale of alcoholic beverages to a point that one Kentucky Supreme Court justice found perplexing.⁴¹

Confusion begins with Kentucky's reinstated local option laws after the repeal of the Eighteenth Amendment. The Commonwealth's local option laws grant counties and municipalities the ability to decide for themselves by vote whether or not to allow alcoholic beverages within their jurisdiction.⁴² The means and methods by which counties and municipalities can make that decision has resulted in a complex patchwork of counties that either ban ("dry" counties), permit ("wet" counties), or allow specific exceptions ("moist" counties) for the production and sale of alcoholic beverages.⁴³ The inability of state alcohol regulators to maintain an up-to-date map of Kentucky's dry, wet, and moist cities and counties illustrates the bewilderment felt by many in Kentucky's hospitality industry.⁴⁴ The inconsistent and often conflicting regulations between state and local authorities add to the perplexity of this regulatory regime by placing substantial regulatory burdens on cross-jurisdictional businesses.⁴⁵

B. Overview of Kentucky Agritourism and the Impact of Bourbon, Wine, and Craft Beer

The farming population in the United States is less than 2 percent, and there is a growing disconnect between those living in urban areas and those in agricultural communities.⁴⁶ Historically, people living in urban areas visited farms belonging to their grandparents or neighbors to develop an understanding of where

⁴¹ See Humphress, *supra* note 25, at 45 ([T]he alcoholic beverage statutes [are] a "maze of obscure statutory language," which were "confusing at best," and whose meaning was "anybody's guess." (quoting *Howard v. Salyer*, 695 S.W.2d 420, 427 (Ky. 1985)).)

⁴² Brammer, *supra* note 15.

⁴³ *Id.*

⁴⁴ See Bill Estep, *Legal Alcohol Sales Spread in Kentucky as Economy, Laws and Attitudes Change*, LEXINGTON HERALD-LEADER (July 3, 2016), <https://www.kentucky.com/news/state/article87501707.html> [https://perma.cc/TU2H-QMEM].

⁴⁵ Amato, *supra* note 18.

⁴⁶ Lisa Chase, *Agritourism: What is it and why does it matter?*, MORNING AGCLIPS (May 14, 2018), <https://www.morningagclips.com/agritourism-what-is-it-and-why-does-it-matter/> [https://perma.cc/R4MK-CKW6].

and how their food was produced.⁴⁷ Today, however, those living in urban areas must turn to agrarians who have opened their barns, fields, and farmhouses to the public to seek a firsthand experience on how food and fibers are produced.⁴⁸ In exchange, visitors provide additional revenue that farmers and rural communities need to maintain their family farms.⁴⁹

In Kentucky, agritourism is defined by KRS § 247.801(1) as “[t]he act of visiting: (a) a farm or ranch; or [a]ny agricultural, horticultural, or agribusiness operation; for the purpose of enjoyment, education, or active involvement in the activities of the farm or operation.”⁵⁰ Harvesting local produce, interacting with farm animals and other similar activities are all popular aspects of agritourism.⁵¹ The Kentucky Office of Agritourism was established by KRS § 247.802(2) with the purpose of “[d]eveloping a unified Kentucky agritourism marketing strategy... to promote Kentucky agritourism.”⁵² Additionally, the Office of Agritourism has not limited the term “agritourism” solely to activities on working farms that educate the public on agriculture and its direct sales.⁵³ Other activities such as farmers markets, weddings, bed and breakfasts, and outdoor recreation have also been associated with agritourism.⁵⁴ The Office of Agritourism also listed distillery and winery tours as part of the Commonwealth’s agritourism offerings, which are the primary focus of market research.⁵⁵

Centered around bourbon, tourism emerged as one of Kentucky’s main industries.⁵⁶ On May 4, 1964, Congress designated bourbon whiskey as a distinctive product of the United

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ KY. DEP’T AGRIC., *supra* note 1.

⁵⁰ KY. REV. STAT. ANN. § 247.801 (LexisNexis 2019).

⁵¹ Chase, *supra* note 46.

⁵² KY. REV. STAT. ANN. § 247.802 (LexisNexis 2019).

⁵³ See *Kentucky Agritourism Handbook*, KY. DEP’T AGRIC., https://www.kyagr.com/marketing/documents/AT_Handbook.pdf AGRICULTURE, (last visited Feb. 13, 2020); see also *Reviewing Kentucky Farms and Agritourism*, KENTUCKY FARMS ARE FUN, <http://www.kentuckyfarmsarefun.com> [<https://perma.cc/4VFK-FMBR>].

⁵⁴ See KENTUCKY FARMS ARE FUN, *supra* note 53.

⁵⁵ See *id.*; see also GLENGARIFF GRP., *supra* note 2.

⁵⁶ Hank Philips, *Ky. Tourism Growing But is Still in Need of Boosts*, LEXINGTON HERALD-LEADER (January 29, 2016, 6:55 PM), <https://www.kentucky.com/opinion/oped/article57379858.html> [<https://perma.cc/Y72L-9985>].

States.⁵⁷ As such, whisky may only be labelled as “bourbon” if it is produced within the United States.⁵⁸ Although bourbon can be produced outside of Kentucky, the Commonwealth produces 95 percent of the world’s supply of bourbon whiskey, thereby making Kentucky the historic and spiritual birthplace of bourbon.⁵⁹

Over a million tourists visited Kentucky in 2018 with the sole purpose of touring distilleries and tasting the bourbon in its native land.⁶⁰ Seventy percent of these visitors came from other states and, on average, spent between \$400 to \$1,200 per trip on tours, food, accommodation, and automobile rentals.⁶¹ In addition to the benefits received by regional hotels and restaurants, Kentucky grain farms profited from bourbon tourism in 2017 by providing over 9 million bushels of corn used in bourbon production by KDA distilleries.⁶² Not only does bourbon tourism create jobs for highly skilled and highly paid technical, managerial, and professional workers, but it also generates opportunities for less-skilled workers and entrepreneurs.⁶³ At the third-highest rate in the country, amounting to \$190 million in state and local tax revenue in 2016, the tax revenue collected from alcoholic beverages is another important byproduct of Kentucky’s bourbon tourism.⁶⁴

While bourbon is central to Kentucky agritourism, the wine industry is looking to share the limelight.⁶⁵ Kentucky wineries may not be as dominant in U.S. wine production as other popular areas, but wineries across the Commonwealth are working toward world recognition.⁶⁶ Historically, Kentucky’s winemaking dates as far back as 1798, and first commercial winery in the United States

⁵⁷ 88 S. Con. Res. 19, 78 Stat. 1208 (1964).

⁵⁸ 27 C.F.R. § 5.22 (2019).

⁵⁹ Janet Kelly, Barry Kornstein & Ryan Marshall, *The Economic and Fiscal Impact of the Distilling Industry in Kentucky*, URB. STUD. INST. U. LOUISVILLE 4 (Jan. 2017), <https://kybourbon.com/wp-content/uploads/2017/03/Kentucky-Bourbon-Economic-Impact-Study-2017-Final.pdf> [<https://perma.cc/BB3M-G98Z>].

⁶⁰ KY. DISTILLERS’ ASS’N, *Bourbon Facts*, https://kybourbon.com/bourbon_culture-2/key_bourbon_facts/ [<https://perma.cc/A77R-5XDD>].

⁶¹ *Id.*

⁶² *Id.*

⁶³ Philips, *supra* note 56.

⁶⁴ Kelly, *supra* note 59.

⁶⁵ *See* Inman, *supra* note 19.

⁶⁶ BED & BREAKFAST ASS’N KENTUCKY, *supra* note 10.

originated in Kentucky.⁶⁷ Kentucky's wine tourism attracted "86,258 tourist visits and generated \$35.4 million in annual tourism expenditures, benefiting local economies and tax bases."⁶⁸

Kentucky's wine market rejuvenation corresponds with the growing Kentucky craft beer market.⁶⁹ In 2016, brewing industry positions increased by 25 percent and had an estimated impact of \$495 million for the Commonwealth.⁷⁰ The rise in demand in both industries has encouraged vineyards to enter into a joint-venture with craft breweries to provide tourists with guides to the Commonwealth's sixty small-wineries and over twenty breweries and possibly to form a trail similar to the Kentucky Bourbon Trail.⁷¹

C. The Economic Impact of Regulations and Reforms on Kentucky Agritourism

The Commonwealth's liquor laws and regulations do not always allowed for economic success and currently place significant limitations on the industry.⁷² For example, the 1920s prohibition on alcohol production destroyed Kentucky's bourbon, wine, and craft beer industries.⁷³ Of the one hundred and fifty-seven distilleries that operated in Kentucky before Prohibition, only thirty-four reopened after Congress ratified the Twenty-First Amendment.⁷⁴ As evidence of the magnitude, Kentucky was once the third largest grape and wine producer in the country,⁷⁵ with

⁶⁷ *Id.*; see Inman, *supra* note 19.

⁶⁸ John Dunham & Associates, *The Wine Industry Boosts the Kentucky Economy by \$1.1 Billion in 2017*, NAT'L ASS'N AM. WINERIES (2017), <http://wineamerica.org/wp-content/themes/wineamerica/pdfs/impact/reports/Kentucky-Report.pdf> [<https://perma.cc/86AT-K48D>].

⁶⁹ Inman, *supra* note 19.

⁷⁰ Kevin Gibson, *Projections Look Bright for Kentucky Breweries in 2017 and Beyond*, INSIDER LOUISVILLE (Feb. 16, 2017), https://insiderlouisville.com/lifestyle_culture/projections-look-bright-for-kentucky-breweries-in-2017-and-beyond/ [<https://perma.cc/2Q9M-5KV6>].

⁷¹ See BED & BREAKFAST ASS'N KENTUCKY, *supra* note 10.

⁷² See Inman, *supra* note 19.

⁷³ *Id.*

⁷⁴ *Prohibition – The Great Experiment*, LEXHISTORY, <http://lexhistory.org/wikilex/prohibition-great-experiment> [<https://perma.cc/LWA9-Y3Z7>].

⁷⁵ *State of the Grape at Kentucky Wineries*, SMILEY PETE PUB., <https://smileypete.com/business/2013-04-11-state-of-the-grape-at-kentucky-wineries/>

Bracken county producing more wine than anywhere else in the nation.⁷⁶ During Prohibition, however, many winemakers were forced to shut down, and by the time Prohibition ended, vineyards in Kentucky were almost non-existent.⁷⁷ Kentucky's pre-Prohibition craft beer producers, widely popular among the working class, died with the coming of Prohibition.⁷⁸

Instead of putting policies in place to revive its bourbon, craft beer, and wine industries, the majority of Kentucky's 120 counties continued to be, and still are, considered dry or moist counties where the sale or distribution of alcohol is either completely banned by law or allowed only under specific circumstances.⁷⁹ Ironically, Bourbon County itself banned the production and sale of bourbon for nearly a century after Prohibition.⁸⁰ Alcohol producing facilities located in "dry" counties under Kentucky local option laws are not permitted to reward visitors touring their facilities with a taste of their bourbon or craft beer, let alone sell them a bottle.⁸¹ Tourism researchers surveying agritourists found that tourists seek an experience or adventure rather than mere sight-seeing amenities, and such an experience cannot be provided by distilleries and wineries under the limitations placed by Kentucky's local option laws, local and state regulations, and license quota system.⁸²

[<https://perma.cc/W4RY-GZBW>] (stating that Kentucky was producing large quantities of wine in the 1800s).

⁷⁶ Bonnie App, *Kentucky Wine*, THEWINEBUZZ (Aug. 30, 2017), <https://www.thewinebuzz.com/kentucky-wine-2/> [<https://perma.cc/M5VH-6GDY>].

⁷⁷ Cathy Lockman, *Kentucky's Wine Industry Grows As New Commercial Vineyard Opens*, FARM FLAVOR (Nov. 6, 2012), <https://www.farmflavor.com/kentucky/kentucky-agritourism/grape-expectations-for-kentuckys-wine-industry/> [<https://perma.cc/DFJ3-6UUX>].

⁷⁸ Nick Carr, *Kentucky Common: An Indigenous American Beer Style*, KEGERATOR (Jan. 28, 2018), <https://learn.kegerator.com/kentucky-common/> [<https://perma.cc/59LZ-J7LY>].

⁷⁹ Brammer, *supra* note 15.

⁸⁰ Andrea Walker, *Watch: Kentucky's Famous Spirit Returns to Bourbon County*, WKYT (Oct. 3, 2018), <https://www.wkyt.com/content/news/WATCH-Kentuckys-famous-spirit-returns-to-Bourbon-Co-495024731.html> [<https://perma.cc/9LG4-FPBZ>].

⁸¹ *See In Focus: Kentucky Bourbon's Tourism Booms*, SPIRIT BUS. (Oct. 23, 2018), <https://www.thespiritsbusiness.com/2018/10/in-focus-kentucky-bourbons-tourism-boom/> [<https://perma.cc/SCS3-FEAR>].

⁸² *Id.* (internal citations omitted).

Several advocacy groups organized to push for reforms.⁸³ The Kentucky Distilleries Association (“KDA”) was established after the end of Prohibition to protect the bourbon industry from “needless and obstructive laws and regulations.”⁸⁴ Similarly, several brewers in the craft beer industry rallied together to form the Kentucky Guild of Brewers (“KYGB”) “to act as a singular voice and advocate for... all pertinent matters of legislation” regarding the brewing industry.⁸⁵ Additionally, the Kentucky General Assembly took measures to make Kentucky wineries more well-known by establishing the Kentucky Grape and Wine Council within the Department of Agriculture with the purpose to “promote and facilitate the development of a Kentucky-based grape industry.”⁸⁶

In recent years, the Kentucky General Assembly took steps to remove several of the archaic Prohibition regulations to increase tourism’s economic impact from the state’s distilleries and wineries.⁸⁷ On March 29, 2016, the General Assembly amended several state statutes to help Kentucky distilleries and wineries compete with other states in attracting and expanding hospitality-related businesses.⁸⁸ “Package sale limits for distillers in certain jurisdictions increased by [fifty percent] from 3 liters per visitor per day up to 4.5 liters.”⁸⁹ Now, a distillery with a sampling license can provide samples of 1.75 ounces per visitor per day.⁹⁰ Additionally, distilleries can apply for an NQ3 license, which allows them to “serve alcohol by the drink, and local option elections are available to authorize the sale of alcohol by both the drink and by the package at distilleries in dry or moist territories.”⁹¹

⁸³ See, e.g., *Our History*, KY. DISTILLERS ASS’N, https://kybourbon.com/about/about_us_history/ [<https://perma.cc/6NZC-9QS4>]; *Our Mission*, KY. GUILD BREWERS, <http://www.kygbrewers.org/about-us/> [<https://perma.cc/9Y35-ZQC5>]; KY. REV. STAT. ANN. § 260.165 (LexisNexis 2019).

⁸⁴ KY. DISTILLERS ASS’N, *supra* note 83.

⁸⁵ KY. GUILD BREWERS, *supra* note 83.

⁸⁶ KY. REV. STAT. ANN. § 260.165 (LexisNexis 2019).

⁸⁷ Stephen G. Amato, *SB 11 Brings a Host of Changes to Kentucky Alcohol Law*, MCBRAYER HOSPITALITY L. BLOG (May 2, 2016), <https://www.mmlk.com/blogs-hospitality-law-blog,sb-11> [<https://perma.cc/3DUZ-QZ7P>].

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

These amendments introduced statutorily-mandated training, requiring distillery employees that serve alcohol by the drink to complete mandatory server training through the Kentucky Department of Alcoholic Beverage Control's Server Training in Alcohol Regulations ("S.T.A.R.") program.⁹² Additionally, state "law allows distillers to give free novelties or production by-products with a value of up to \$75 during tours and charitable events, and distilleries are free to sample and sell souvenir packages of all types of distilled spirits" in addition to bourbon.⁹³ Moreover, changes in the law increased the maximum production cap.⁹⁴ Now, a microbrewery license may produce from 25,000 barrels per year to 50,000 barrels per year, and a small winery license may produce from 50,000 gallons per year to 100,000 gallons per year for a small winery license.⁹⁵ Public consumption of alcohol was also authorized for tourists riding in "commercial quadricycles."⁹⁶ Insiders characterized the changes as transformative to Kentucky's hospitality and agritourism industry.⁹⁷

State legislatures implemented additional statutory reforms in March 2018, freeing microbreweries from the three-tier distribution system.⁹⁸ Under the former scheme, microbrewers had to "contract with a distributor to collect reports and taxes, and distribute the microbrewery's products to other retailers."⁹⁹ The reforms eliminated "the role of the distributor with regard to retail sales (only) made by the microbrewery itself, with all taxes reported and paid by the microbrewery."¹⁰⁰ On April 2, 2018, the

⁹² *Id.*

⁹³ Amato, *supra* note 87.

⁹⁴ Bailey Loosemore, *8 Changes to Kentucky's Alcohol Laws*, COURIER JOURNAL, (July 16, 2016) <https://www.courierjournal.com/story/life/food/spirits/bourbon/2016/07/16/8-changes-under-kentuckys-new-alcohol-law/86971620/> [<https://perma.cc/73GS-34QB>].

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See Bailey Loosemore, *Bourbon, Beer Regulations Change Under New Law*, COURIER-JOURNAL (Mar. 30, 2016), <https://www.courierjournal.com/story/news/politics/ky-general-assembly/2016/03/30/distilleries-can-now-sell-drink/82426316/> [<https://perma.cc/YP8X-Z2TU>].

⁹⁸ Stephen G. Amato, *Hospitality Law Update 2018 Volume I*, MCBRAYER HOSPITALITY L. BLOG (Jan. 24, 2018), <https://www.mmlk.com/blogs-hospitality-law-blog/hospitality-law-update-2018-vol-i> [<https://perma.cc/3XBE-QFKM>].

⁹⁹ *Id.*

¹⁰⁰ *Id.*

Kentucky legislature further amended state statutes to allow Kentucky distilleries and small farm wineries to ship products directly to the visitors.¹⁰¹ These provisions are an important way to influence the interest in Kentucky bourbon because of the rapidly increasing number of tourists coming to Kentucky distilleries.¹⁰²

II. ANALYZING THE CURRENT REGULATORY SCHEME

A. Kentucky's Local Option Laws

After the repeal of Prohibition, the Commonwealth of Kentucky permitted the production and sale of alcohol, but individual districts and precincts had the option to reinstate bans on alcohol.¹⁰³ Section 59 of the Kentucky Constitution provides that “the General Assembly shall not pass local or special acts concerning... the sense of the people of any city, town, district, precinct, or county, whether they wish to authorize, regulate or prohibit therein the sale of vinous, spirituous or malt liquors, or alter the liquor laws.”¹⁰⁴ The Kentucky General Assembly is empowered by Section 61 to establish the means and methods of holding local option elections.¹⁰⁵ As such, the Kentucky legislature enacted KRS § 242.020, which requires that petitions for elections to change a “dry” county to a “wet” county must be “signed by a number of constitutionally qualified voters of the territory to be affected, equal to twenty-five percent (25%) of the votes cast in the territory at the last preceding general election.”¹⁰⁶ Once a petition meets the requirements of KRS § 242.020, the county judge-executive must direct an election to be held within the county.¹⁰⁷

A recent case involving a winery in Henderson County highlights how Sections 59 and 61 adversely affect agritourism

¹⁰¹ Stephen G. Amato, *Hospitality Law 2018, Vol. II: Direct Shipping from Kentucky Distilleries and the Quota System*, MCBRAYER HOSPITALITY L. BLOG (Apr. 14, 2018), <https://www.mmlk.com/blogs-hospitality-law-blog,hospitality-law-2018-vol-ii-direct-shipping> [https://perma.cc/LLA3-E8JZ].

¹⁰² *Id.*

¹⁰³ Brammer, *supra* note 15.

¹⁰⁴ KY. CONST. § 59.

¹⁰⁵ KY. CONST. § 61.

¹⁰⁶ KY. REV. STAT. ANN. § 242.020 (LexisNexis 2019).

¹⁰⁷ *Id.*

businesses in practice.¹⁰⁸ Henderson County permitted the production and sale of alcohol at the time the winery owners sought to launch their agritourism project, but they were required to obtain two licenses: a small farm winery license to produce wine and an NQ2 (non-quota) license to sell wine on the premises.¹⁰⁹ After the owners of The Farmer and The Frenchman had their small farm winery license signed by a Henderson County judge-executive, a disgruntled neighbor claimed that the subdivided land on which the winery was to be located fell within the borders of a dry precinct prompting the ABC board to open an investigation before granting the winery owners an NQ2 license.¹¹⁰ Despite the claim, the ABC board found no evidence to support the allegation that the winery was located in a dry precinct and granted the winery an NQ2 license.¹¹¹ After investing a million dollars into building their winery and bed and breakfast, the winery owners faced yet another inquiry by the ABC.¹¹² After another investigation was launched, the ABC board finally realized that the precinct in which the winery was located voted to remain dry in 1943, and the board had relied on a map from 1938 in the Henderson County Clerk's Office for their investigation.¹¹³ The ABC board acknowledged the possibility that the borders of the voting precinct could have been altered to exclude the location of the winery in the 1940 census, but the majority of the county records were destroyed in the 1960s leading to no discoverable evidence of a border change placing the winery outside of the precinct at the time of the vote.¹¹⁴ Because the 1943 map placed the winery's plot of land in the precinct at the time of the vote, the ABC board ultimately revoked the NQ2 license it had granted to winery owners.¹¹⁵

¹⁰⁸ See Sam Knef, *Wet or Dry? The Case of Farmer and Frenchman*, TRISTATE (May 8, 2018), <https://www.tristatehomepage.com/news/local-news/wet-or-dry-the-case-of-the-farmer-and-frenchman/1167945391> [<https://perma.cc/5YU6-LMEA>].

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Knef, *supra* note 108.

¹¹⁵ *Id.*

By adhering to the requirements of KRS § 242.020,¹¹⁶ the winery owners were able to collect the necessary signatures for a petition to revert the precinct back to a wet county, and they were able to avoid losing their million-dollar investment.¹¹⁷ Despite the initial victory for the winery, a legal issue arose regarding whether the winery needed to win a countywide vote to clear their premises for alcohol sales, or if they needed to win a vote at the precinct level.¹¹⁸ This same confusing, but common, question was the principal issue facing the Kentucky Supreme Court in *Howard v. Salyer*.¹¹⁹ In that case, the Court held that “where a precinct or magisterial district has once been made dry by a vote of the county, it must forever remain dry, unless the bond is lifted by the people of the entire county.”¹²⁰

Fortunately for the Farmer and the Frenchman Winery, the Kentucky General Assembly amended the requirements in 2017 to allow precincts that voted to remain dry to revert to a wet territory.¹²¹ Although the winery was ultimately able to secure a win in an election to revert the precinct to a wet precinct, the winery owners still had to overcome an unnecessarily difficult legal hurdle—a remnant of Prohibition—to permanently open their agritourism business.¹²²

An analysis of this cautionary tale from Henderson County brings to light several issues with Kentucky’s current local option laws. First, the reforms that loosened the petition and the precinct dry-wet reversion requirements did nothing to address the inability of state alcohol regulators to maintain an up-to-date map of dry, wet, and moist locations. As pointed out in the Henderson county predicament, the borders of precincts and cities can change with each census. Additionally, a subdivided land located in a dry jurisdiction at the time of a dry vote will retain that status, even after border changes places it within a wet jurisdiction.

¹¹⁶ KY. REV. STAT. ANN. § 242.020 (LexisNexis 2019).

¹¹⁷ Sam Knef, *Farmer and Frenchman Discuss Plans After Latest Hangup*, TRISTATE (May 25, 2018), <https://www.tristatehomepage.com/news/farmer-and-frenchman-discuss-plans-after-latest-hangup/> [<https://perma.cc/QEM2-4N3Y>].

¹¹⁸ *Id.*

¹¹⁹ *Howard v. Salyer*, 695 S.W.2d 420, 427 (Ky. 1985).

¹²⁰ *Id.* at 424.

¹²¹ KY. REV. STAT. ANN. § 242.125 (LexisNexis 2019).

¹²² Aimee Blume, *Farmer and Frenchman forging into the future*, COURIER & PRESS (Nov. 22, 2018), <https://www.courierpress.com/story/news/2018/11/22/farmer-and-frenchman-future/1964411002/> [<https://perma.cc/7KQH-A6LF>].

Another issue that arises from the patchwork of Kentucky's local option laws is that business owners, regulators, and local officials are left confused as to whether a plot of land is permitted to be used for the production and sale of alcohol. As a result, there may be a minefield of subdivided lands in wet counties where an agritourism business may unknowingly find itself in dry territory. Not only do entrepreneurs risk losing their investments to dry territory traps hidden by subdivided lands, but they must also face the uncertainty that any given county, city, or precinct may revert to a dry status on a given whim.

B. The Patchwork of Local and State Regulations

While Kentucky local governments have the exclusive option to decide the status of prohibition in their territory, state regulations generally preempt any regulations on the production, distribution, and retail sale of alcoholic beverages.¹²³ Kentucky's liquor laws already provide for a fairly complex and stringent regulatory regime, yet local ordinances and regulations can further intensify regulations.¹²⁴ This has led to an inconsistent and complex patchwork of state and local regulations, thus presenting yet another cumbersome inconvenience for those existing agribusinesses operating in multiple jurisdictions.¹²⁵ One area of local regulation that has caused problems for multi-jurisdictional retailers of wine, distilled, and craft-brewed drinks is the authority of local governments to create more stringent and redundant regulations on top of those already provided by the state legislature.¹²⁶

For instance, a case involving a multi-jurisdictional off-premise store with a retail beverage license illustrates just how overburdening the combination of these regulations is on businesses.¹²⁷ In that case, a retailer with two stores in a Western Kentucky city that adopted an ordinance requiring all employees of licensed businesses to participate in a "city-approved server

¹²³ Amato, *supra* note 18.

¹²⁴ *Id.*

¹²⁵ *See id.*

¹²⁶ *See id.*

¹²⁷ *Id.*

training within 90 days of employment.”¹²⁸ The ordinance, however, deviated from state law, in which “server training is only mandatory for distillers with an NQ2 license and operators of quadricycles that participate in pub crawls.”¹²⁹

When the city’s ABC board administrator visited the retailer’s business and discovered that the employees have not undergone the city-mandated server training through the state’s S.T.A.R. training system, the business was sanctioned and fined because they had violated the local ordinance.¹³⁰ The case was brought before the Kentucky ABC board, which stated that retail businesses are required to have its employees participate in the state-sponsored training sessions even if it would be redundant and too great a burden for employees who have already undergone an in-house training session.¹³¹

The ABC board ruled in favor of the retailer on due process violations instead, leaving the question whether local governments have the authority to expand their regulation of alcoholic beverage sales lingering.¹³² Kentucky’s General Assembly maintains virtually unqualified authority to regulate alcoholic beverages, granting only limited powers to local jurisdictions, such as the imposition of license fees and the local option election, as required by the Kentucky Constitution.¹³³ Nevertheless, it is the confusing patchwork of local ABC requirements that have caused issues for agritourism businesses.¹³⁴ Every cross-jurisdictional business faces rules and regulations that vary from jurisdiction to jurisdiction, often encumbering them with unnecessary and redundant requirements.¹³⁵

C. The Three-Tier Regulatory System and Production Caps

KRS § 243.040 illustrates that Kentucky lawmakers do not want producers of alcoholic beverages mixing their liquor

¹²⁸ *Id.*

¹²⁹ Amato, *supra* note 18.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *See id.*

¹³³ *Id.*

¹³⁴ *See id.*

¹³⁵ Amato, *supra* note 18.

licenses.¹³⁶ The post-Prohibition three-tier system, as explained earlier in this note, establishes that wineries and distilleries in the producer tier make alcoholic beverages, distributors in the distribution tier store and deliver the product to retailers in the retail tier, who then sell the beverages to the general public.¹³⁷ No single entity may participate in the activities of more than one tier.¹³⁸ The three-tier regulatory system is often “likened to an hourglass whereby distributors, the center tier, is the constriction point that controls the flow of the system.”¹³⁹ Vertical integration of tiers in the industry creates powerful entities that have an overwhelming amount of political influence on alcohol regulation, effectively eroding ABC laws and consistently pushing for deregulation.¹⁴⁰

Nevertheless, to promote agritourism, Kentucky has made some exceptions to the three-tier regulatory system for small wine farms, microbreweries, and distillers.¹⁴¹ KRS § 243.157 allows microbreweries “to sell malt beverages produced on the premises for on-premises or off-premises purposes” without a distributor if they have both a retail drink license and a retail package license.¹⁴² KRS § 243.155 permits small farm wineries to make and bottle wines, bottle wines produced at other small farm wineries, hold tastings subject to limits per patron, and sell wine by the drink or by the package on the premises or at events located in a wet territory.¹⁴³ Furthermore, KRS § 243.0305 authorizes distillers with gift shops in wet territories to sell up to four and a half liters of souvenir packages per person of legal drinking age per day at retail to visitors.¹⁴⁴ The souvenir packages sold under

¹³⁶ KY. REV. STAT. ANN. §§ 243.020-243.675 (LexisNexis 2019)

¹³⁷ *See* Amato, *supra* note 37.

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *See, e.g.*, KY. REV. STAT. ANN. § 243.155 (LexisNexis 2019); KY. REV. STAT. ANN. § 243.157 (LexisNexis 2019); KY. REV. STAT. ANN. § 243.0305(3)(a) (LexisNexis 2019); *see also id.*

¹⁴² KY. REV. STAT. ANN. § 243.157 (LexisNexis 2019).

¹⁴³ KY. REV. STAT. ANN. § 243.155 (LexisNexis 2019).

¹⁴⁴ KY. REV. STAT. ANN. § 243.0305(3)(a) (LexisNexis 2019).

KRS § 243.0305, however, must be invoiced to a wholesaler and then back to the distiller to preserve the three-tier system on paper.¹⁴⁵

These statutory reforms passed by the Kentucky General Assembly may have a positive economic impact on tourism for distilleries and wineries, but concern remains whether the law is catching up with the overwhelming growth of agritourism.¹⁴⁶ Small wineries, farms, and microbreweries continue to have concerns.¹⁴⁷ One small farm winery in Paducah, Kentucky already sells its products in 400 stores across the Commonwealth, and is expected to produce more than 100,000 gallons of wine in 2018, exceeding the maximum production limit for a small farm winery license.¹⁴⁸

The growth of Kentucky's craft beer industry has put microbreweries in the same predicament as the Paducah, Kentucky winery.¹⁴⁹ Unfortunately, if either licensee decides to upgrade their license to a regular brewery or winery, they lose the benefit of being able to provide samples or sell by the drink to agritourists who come to visit their microbreweries and small farm wineries in person.¹⁵⁰ To solve the issue, state Senate bills have proposed simply eliminating the production cap on how much these smaller producers can sell on-site, but retailers and producers pushed back, arguing that even small producers should not be allowed to bypass the three-tier system.¹⁵¹

While distilleries do not stand to lose any benefits by upgrading their licenses, bourbon tourism is constrained by other legal limitations. For example, most distilleries are still required to have visitors go on a production tour—which usually is about an

¹⁴⁵ *Id.* § 243.0305(2).

¹⁴⁶ Stephen G. Amato, *Kentucky's Microbreweries, Small Farm Wineries and Craft distilleries Are Growing by Leaps and Bounds, but is the Law Catching Up?*, MCBRAYER HOSPITALITY L. BLOG (Apr. 15, 2015), <https://www.mcbrayerfirm.com/blogs-hospitality-law-blog,kentucky-s-microbreweries-small-farm-winerries-and-craft-distilleries-are-growing-by-leaps-and-bounds-but-is-the-law-catching-up> [https://perma.cc/79MS-FZMC].

¹⁴⁷ *See* Inman, *supra* note 19.

¹⁴⁸ *Id.*

¹⁴⁹ *See id.*

¹⁵⁰ *Id.*

¹⁵¹ Ryland Barton, *Bill Allowing Kentucky Craft Breweries to Sell More Beer Advances*, 89.3 WFPL NEWS (Feb. 27, 2018), <https://wfpl.org/bill-allowing-kentucky-craft-breweries-sell-beer-advances/> [https://perma.cc/UY8B-S36U].

hour long—before they can taste the product.¹⁵² Tours prevent tourists from being able to impulse buy, as they are time-consuming for visitors and labor-intensive for distilleries, which leads them to being tired or bored and ready to leave for another location by the time the tour ends.¹⁵³ These regulations make it difficult to compete with other destinations like the wineries in California, Oregon, and Washington, all states that have “long ago switched to a no-tour, more-flexible emphasis on providing singular tasting room experiences.”¹⁵⁴

Despite the recent amendments, the Kentucky bourbon, craft beer, and wine industries have struggled to introduce their products to the nationwide market.¹⁵⁵ The law was designed to allow distillery visitors to ship bottles home that they purchased while also enjoying the agritourism venues and events of the Bluegrass State.¹⁵⁶ While distilleries can ship bourbon out of Kentucky, only seven states and the District of Columbia currently allow it to be imported.¹⁵⁷ Much like what is allowed in Kentucky, the Alcoholic Beverage Control boards of the other remaining states do not allow the shipment of bourbon under their three-tier distribution system.¹⁵⁸ Along with the restriction of the nationwide market, the international market is also expected to be restricted in the trade war between the United States and the European Union.¹⁵⁹ In 2017, Kentucky. Exported more than \$450 million in bourbon and distilled spirits, nearly half of which went to European Union countries.¹⁶⁰ As a result, retaliatory tariffs on

¹⁵² *In Focus*, *supra* note 81.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Chris Williams and Mary Lyon, “*Bourbon Without Borders*” law still has borders, WHAS11 (July 21, 2018), <https://www.whas11.com/article/news/politics/bourbon-without-borders-law-still-has-borders/417-579084297> [<https://perma.cc/QD3X-TWJW>].

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *See id.*

¹⁵⁹ *See* Kevin Willis, *What Will 2019 Hold for Kentucky Bourbon? It Largely Depends on Length of Trade War*, CINCINNATI PUBLIC PUB. RADIO (Dec. 28, 2018), <http://www.wvxu.org/post/what-will-2019-hold-kentucky-bourbon-it-largely-depends-length-trade-war#stream/0> [<https://perma.cc/76BS-KWA9>].

¹⁶⁰ Eric Gregory, *KDA Statement on Trade/Tariff Issue*, KY. DISTILLERS ASS’N (June 20, 2018), <https://kybourbon.com/kda-statement-on-trade-tariff-issue/> [<https://perma.cc/D2XG-JUKN>].

bourbon are projected to have a significant economic impact on the industry.¹⁶¹

D. Liquor License Quota System

Under KRS § 241.060(2), the Kentucky ABC board is authorized “to limit in its sound discretion the number of licenses of each kind or class to be issued in the state or any political subdivision.”¹⁶² Historically, the Kentucky ABC board limited the number of licenses issued through administrative regulations.¹⁶³ 804 KAR 9:010 set limits for quota licenses for counties,¹⁶⁴ while 804 KAR 9:040 and 804 KAR 9:050 are concerned with quota licenses in cities for retail package sales (the license applicable to liquor stores) and sales by the drink (the license applicable to bars), respectively.¹⁶⁵ The Alcoholic Beverage Control board, in December 2017, promulgated 804 KAR 9:051, seeking to repeal the quota system.¹⁶⁶ The ABC board explained it “believes that market forces rather than arbitrary quota limits should determine the number of businesses competing in a community.”¹⁶⁷ Moreover, the ABC board had concerns that the application process held potential for bias or undue influence¹⁶⁸ and determined that “quota limits based on annual population statistics were burdensome to enforce.”¹⁶⁹

The Kentucky General Assembly disagreed with the ABC Board's policy determination and codified the license quota system into statute to preserve it.¹⁷⁰ KRS § 241.065 requires the ABC Board to set the number of issued quota retail package licenses to a number not exceeding one for every 1,500 residents in wet counties containing a city of the first class (population of 100,000

¹⁶¹ *Id.*

¹⁶² KY. REV. STAT. ANN. § 241.060(2) (LexisNexis 2019).

¹⁶³ Joseph Fuerst, *Cheers! Kentucky Removes Quota Limits For “Liquor-By-The-Drink” Licenses*, ADAMS TEPNER WOLTERMANN AND DUSING PLLC: BLOG (July 30, 2018), <http://www.aswdlaw.com/2018/07/30/cheers-kentucky-removes-quota-limits-for-liquor-by-the-drink-licenses/> [https://perma.cc/YZ82-W2F5].

¹⁶⁴ 804 KY. ADMIN. REGS. 9:010 (West 2020).

¹⁶⁵ *See, e.g.*, 804 KY. ADMIN. REGS. 9:040 (West 2020); 804 KY. ADMIN. REGS. 9:050 (West 2020) (repealed).

¹⁶⁶ Fuerst, *supra* note 163.

¹⁶⁷ *Id.* (internal citations omitted).

¹⁶⁸ Amato, *supra* note 98.

¹⁶⁹ Fuerst, *supra* note 163.

¹⁷⁰ *Id.*

residents or more).¹⁷¹ For wet counties not containing cities of the first class or cities that become wet separate from their county, the number of issued quota retail package licenses is set to a number not exceeding one for every 2,300 residents pursuant to KRS § 241.066–241.067.¹⁷² The population criteria is based on by the Kentucky State Data Center, except on census years.¹⁷³ On these years, the ABC should rely on the United States government census data.¹⁷⁴

In effect, these statutes only preserve the quota limits applicable to liquor stores, but not those applicable to bars and other venues that wish to sell by the drink.¹⁷⁵ This new arrangement is seen as helpful to agribusiness owners and entrepreneurs.¹⁷⁶ Under the old quota system, Kenton and Campbell Counties had reached their respective quota limits for retail drink licenses, resulting in business owners often having to pay \$20,000 or more to purchase such a license from an already existing business.¹⁷⁷ These owners were not able to turn to non-quota liquor licenses at the time because those licenses were only available to specific types of business like caterers, golf courses, restaurants, and bed and breakfasts.¹⁷⁸ With the new codified quota system, however, licenses will become more available to agribusinesses with wedding venues.¹⁷⁹ Wine is treated as a liquor in Kentucky, and therefore, existing taprooms and breweries that were not able to previously sell these products will now be able to do so with the new availability of the drink licenses.¹⁸⁰

¹⁷¹ KY. REV. STAT. ANN. § 241.065 (LexisNexis 2019).

¹⁷² KY. REV. STAT. ANN. §§ 241.066–241.067 (LexisNexis 2019).

¹⁷³ KY. REV. STAT. ANN. § 241.065 (LexisNexis 2019).

¹⁷⁴ *Id.*

¹⁷⁵ Fuerst, *supra* note 163.

¹⁷⁶ *See id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *See id.*

¹⁸⁰ *Id.*

III. ANALYSIS OF STATUTORY REFORMS

A. The Anti-Prohibitionists Argument

Anti-prohibitionists argue that deregulation brings greater prosperity with increased jobs, tax revenues, and other economic benefits, and that the recent statutory reforms do not go far enough to address many of the issues currently confronting the agritourism industry.¹⁸¹ Despite the lack of political will, there is a growing sentiment among anti-prohibitionists that Kentucky's local option laws should be eliminated or substantially reformed.¹⁸² Anti-prohibitionists seek to protect their businesses from local laws and regulations that are not only obstructive, but also create a confusing patchwork of laws for multi-jurisdictional businesses.¹⁸³ Moreover, anti-prohibitionists question the need for a three-tier regulatory system and take the view that more vertical integration among the tiers should be permissible.¹⁸⁴ As a result, anti-prohibitionists are against a population-based quota license system and instead advocate for its elimination.¹⁸⁵

Advocates for agritourism and anti-prohibitionist policies believe that Kentucky's local option laws present an unnecessary legal burden for wineries and distilleries wanting to access regions in need of economic development.¹⁸⁶ The map of wet and dry territories in Kentucky is constantly changing, often placing random patches of lands in legally dry areas.¹⁸⁷ Agritourism advocates and anti-prohibitionist also argue that local option laws

¹⁸¹ *Local option in Kentucky: Wet or Dry?*, ALCOHOL PROBS. AND SOLUTIONS, <https://www.alcoholproblemsandsolutions.org/local-option-in-kentucky-wet-dry/> [perma.cc/DXP4-WSQE].

¹⁸² Brammer, *supra* note 15.

¹⁸³ KY. DISTILLERS ASS'N, *supra* note 84.

¹⁸⁴ Tim McKirdy, *In the Age of Instant Everything, the Three-Tier System Persists, for Better or Worse*, VINEPAIR (Oct. 3, 2018) <https://vinepair.com/articles/three-tier-wine-selling-supreme-court/> [perma.cc/NJV2-TCLB].

¹⁸⁵ Herald-Leader Editorial Board, *More competition in alcohol sales? We'll drink to that*, LEXINGTON HERALD-LEADER (Feb. 23, 2018), <https://www.kentucky.com/opinion/editorials/article201897534.html> [perma.cc/5QRB-AQT4].

¹⁸⁶ *See generally* ALCOHOL PROS. AND SOLUTIONS, *supra* note 181; Brammer, *supra* note 15.

¹⁸⁷ Estep, *supra* note 44.

go beyond only giving territories the right to choose their status.¹⁸⁸ They point to the law's chilling effect that wineries and distillers can no longer be certain where in the wet and dry territories they can operate an agritourism venue.¹⁸⁹ It has also caused distilleries on the Kentucky Bourbon Trail to be located far apart instead of being concentrated in one area like the wineries in California's Napa Valley, therefore making it inconvenient for tourists who do not always have the ability or time to travel across the state.¹⁹⁰ The simple fact remains that local option law regulations promulgating dry counties have impeded economic development and tourism.¹⁹¹

The complex patchwork of laws and regulations imposed by a combination of local and state governments have been viewed as unacceptable to anti-prohibitionists. Retailers argue that local governments should not be authorized to regulate the liquor laws that the General Assembly has already explicitly and limitedly regulated.¹⁹² Adopting such a policy would lift the burden placed on multi-jurisdictional businesses by inconsistent local standards and would eliminate any redundant or arbitrary ordinances passed by local governments.¹⁹³ National and regional hotel operators and restaurants value consistency, and state and local jurisdictions should strive for this if they want to attract the economic benefits of these businesses.¹⁹⁴

The three-tier regulatory system is viewed by some as antiquated, and many feel it should be eliminated.¹⁹⁵ Anti-prohibitionists argue that the three-tier system is ineffective and counterintuitive in a twenty-first-century capitalist society.¹⁹⁶ Companies need to raise the cost of the bottle to make a profit. Thus, in the end, producers receive a negligible portion of the profit

¹⁸⁸ See Brammer, *supra* note 15.

¹⁸⁹ Sam Knef, *How petition for wet/dry vote could impact Henderson County*, TRISTATE (Apr. 19, 2018), <https://www.tristatehomepage.com/news/local-news/how-petition-for-wetdry-vote-could-impact-henderson-county/1130618862> [<https://perma.cc/N37A-7L9T>].

¹⁹⁰ SPIRIT BUS., *supra* note 81.

¹⁹¹ GLENGARIFF GRP., *supra* note 2 at 39.

¹⁹² See Amato, *supra* note 18.

¹⁹³ See *id.*

¹⁹⁴ *Id.*

¹⁹⁵ McKirdy, *supra* note 184.

¹⁹⁶ *Id.*

that wholesalers and retailers do.¹⁹⁷ Moreover, the biggest challenge for producers is finding a distributor since, depending on the size of the wholesaler, “the distributor may be too small to carry two producers from the same region” or so large that the producer would become a number.¹⁹⁸

Anti-prohibitionists have also taken a firm position in support of eliminating population-based quota license systems.¹⁹⁹ These individuals view the preservation of quotas on retail package licenses as an attempt by license holders to maintain monopolies in the industry.²⁰⁰ Eligible distillers are ready to expand upon the existing infrastructure of the bourbon, craft beer, and wine agritourism business, but are prohibited from joining due to the combination of state and local license quota systems.²⁰¹ Furthermore, some lawmakers believe limits on licenses have the potential to create monopolies in select sectors of the alcohol industry and act counterintuitively to the goals of American liquor regulations, which are to prevent the creation of powerful liquor entities that will influence alcohol laws.²⁰²

B. The Neo-Prohibitionist Arguments

On the other hand, neo-prohibitionist take the view that the per capita consumption of alcoholic beverages should be reduced by legislation.²⁰³ Neo-prohibitionists welcome Kentucky’s local option laws as a way to change social norms and to reduce the acceptability of drinking.²⁰⁴ Similarly, neo-prohibitionists promote the expansion of local ordinances and regulations that focus on the problems excessive alcohol consumption can cause and that

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ Herald-Leader Editorial Board, *supra* note 185.

²⁰⁰ *Id.*

²⁰¹ Bruce Schreiner, *Bill to Preserve Liquor License Quotas in Kentucky Advances*, U.S. NEWS (Feb. 13, 2018), <https://www.usnews.com/news/best-states/kentucky/articles/2018-02-13/bill-to-preserve-liquor-license-quotas-in-kentucky-advances> [perma.cc/K6A3-ZMV6].

²⁰² *Id.*

²⁰³ *See Temperance Movement Today in US: Neo-Prohibitionism*, ALCOHOL PROBS. AND SOLUTIONS, <https://www.alcoholproblemsandsolutions.org/temperance-movement-today-us-neo-prohibitionism/> [https://perma.cc/9AQ2-KZMP].

²⁰⁴ *See id.*

promote abstinence.²⁰⁵ Moreover, they argue that the three-tier system is well-intended and necessary to combat alcohol abuse.²⁰⁶ Naturally, neo-prohibitionists support a quota license system, believing it acts as a check and balance on the unrestrained proliferation of alcoholic beverage venues.²⁰⁷

Neo-prohibitionists argue that Kentucky's local option laws were designed to mend the political tension driven by the sale of alcoholic beverages that remained after Prohibition.²⁰⁸ Any bill dealing with alcoholic beverages may cause legislators from dry territories to remain reluctant to vote for it, and, arguably, they should since they were democratically elected to represent the position their county takes on alcoholic beverages.²⁰⁹ Opponents to reforming Kentucky's local option laws note that community policies and disagreements led to individual choices, and the democratic choice of those communities should be respected.²¹⁰

Regardless of how overly stringent local ordinances may seem when contrasted with state regulations, neo-prohibitionists would argue that cities and counties should be able to exercise their police powers granted under the current system.²¹¹ In *Blue Movies, Inc. v. Louisville/Jefferson County Metro Government*, the Kentucky Supreme Court concluded that a city ordinance did not violate section 61 of the Kentucky Constitution, although it was enacted without voter approval, and that the legislature granted cities local police powers to enact ordinances that are not preempted by state statute.²¹² In that case, an adult entertainment business in a wet territory violated a city ordinance that prohibited the sale of alcohol on premises featuring nude or semi-nude dancers.²¹³ The Court held that “the statutes concerning alcoholic beverages seem to not only allow cities to regulate conduct in such

²⁰⁵ *See id.*

²⁰⁶ McKirdy, *supra* note 184.

²⁰⁷ Amato, *supra* note 101.

²⁰⁸ *See* Brammer, *supra* note 15.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *See* *Blue Movies, Inc. v. Louisville/Jefferson Cty. Metro Gov't*, 317 S.W.3d 23, 33–35 (Ky. 2010); *see also* Amato, *supra* note 18.

²¹² *Blue Movies, Inc.*, 317 S.W.3d at 33–35.

²¹³ *Id.* at 28.

establishments, but also require that such standards be maintained.”²¹⁴

In response to calls to eliminate the three-tier system, neo-prohibitionists can point to the overwhelming support in the General Assembly in 2015 to ban brewers from self-distributing beer in order to prevent the larger companies from harming smaller craft brewers.²¹⁵ Neo-prohibitionists would argue that state laws supporting a distribution tier that is free from the undue influence or control by larger brewers protect both small agritourism businesses and consumers.²¹⁶ Notably, large-scale distributors offer national sales to smaller regional wine producers, thereby introducing their products to potential agritourists otherwise unreachable.²¹⁷ National distributors benefit local economies by employing community members, contributing to local charities, and supplying extra income to state governments via taxes.²¹⁸

Neo-prohibitionists also favor preserving the current quota license system because they believe that the “substance of alcohol is, in itself, the cause of drinking problems” and measures must be taken to reduce the number of sales outlets.²¹⁹ They see the three-tier system as a way to counter the potential social consequences.²²⁰ An additional point made by neo-prohibitionists is that many communities voted to become wet counties with the understanding that a quota system would be put in place.²²¹ Moreover, the elimination of the current quota regime could be

²¹⁴ *Id.* at 33–35.

²¹⁵ Lisa Brown, *Kentucky law bans brewers from self-distributing beer*, ST. LOUIS POST-DISPATCH (Mar. 23, 2015), https://www.stltoday.com/business/local/kentucky-law-bans-brewers-from-self-distributing-beer/article_2a38d637-06c1-5343-8480-53dc5f235d28.html [<https://perma.cc/NE8H-MJJF>].

²¹⁶ *Id.*

²¹⁷ McKirdy, *supra* note 184.

²¹⁸ *Id.*

²¹⁹ ALCOHOL PROBS. AND SOLUTIONS, *supra* note 203.

²²⁰ *See* Amato, *supra* note 101.

²²¹ *Senate Moves to Keep Liquor License Quotas*, MOREHEAD NEWS (Mar. 2, 2018), https://www.themoreheadnews.com/news/senate-moves-to-keep-liquor-license-quotas/article_2ec9a4ce-1e50-11e8-9962-4b5aa0b64cc8.html [<https://perma.cc/PML2-NY5R>].

detrimental to those businesses that relied on the value and investment of their liquor license under the current system.²²²

C. The Argument for Further Reform

The question of alcoholic beverages is a highly contentious issue in Kentucky politics, but it is indisputable that recent statutory reforms of cumbersome regulations have led to an economic boom for agritourism businesses.²²³ Tourism agencies often turn a blind eye to dry counties when organizing agritourist excursions, and it is unthinkable to have local option laws deny potential economic development dollars from agritourism to rural areas.²²⁴ Agritourism businesses commonly operate as a multi-jurisdictional business, and Kentucky's lack of a coherent set of regulatory policies across several jurisdictions undermines the Commonwealth's ability to attract hospitality-related businesses.²²⁵ While the three-tier regulatory system enjoys popularity in Kentucky and among the majority of states, the purpose of such a system remains unpersuasive in its application to small farm wineries and craft distilleries.²²⁶ Furthermore, the population-based quota license system has increasingly become inadequate, particularly when market forces and other types of regulations can sufficiently restrain the proliferation of alcoholic beverage venues.²²⁷ Thus, notwithstanding the tremendous success of recent statutory reforms, Kentucky must take bold reformatory steps to become the forefront of the nation's agritourism industry.

First, the need to reform the superfluous complexity of Kentucky's local option laws outweighs the democratic value neo-

²²² See Associated Press, *Move to Scrap Kentucky's Limits on Liquor Licenses Stirs Opposition*, WCPO CINCINNATI (Jan. 21, 2018),

<https://www.wcpo.com/news/government/state-government/kentucky-state-government-news/move-to-scrap-kentuckys-limits-on-liquor-licenses-stirs-opposition> [<https://perma.cc/P9LW-4RLH>]; see also *id.*

²²³ Brammer, *supra* note 15; see also Kelly, *supra* note 59.

²²⁴ GLENGARIFF GRP., *supra* note 2 at 39.

²²⁵ See Amato, *supra* note 18.

²²⁶ See Inman, *supra* note 19.

²²⁷ See McKirdy, *supra* note 184; see also Herald-Leader Editorial Board, *supra* note 185.

prohibitions may have placed on such laws.²²⁸ Sixteen other states have already prohibited local option laws on the sale of alcohol.²²⁹ Most of the states that do have local option laws have not allowed such an incredibly dense patchwork of dry, moist, and wet counties to plague their jurisdictions²³⁰ unlike Kentucky. Notably, Kentucky's younger generations are more willing to vote to allow for the production and sale of alcohol in their local jurisdictions.²³¹ The supposedly democratic process advocated by neo-prohibitionists in local option laws has heavily skewed counties to favor a dry status for nearly a century.²³² For those seeking to initiate a local option election, the most difficult part has not been getting votes, but rather, getting the necessary signatures for the legally required petition.²³³

Recent statutory reforms such as allowing for petitions to be signed electronically and permitting local option elections at the same time as general elections has helped, but more can be done.²³⁴ While the surest solution to these issues would be to amend the Kentucky Constitution to prohibit local option laws, political will is tremendously lacking.²³⁵ Alternatively, the General Assembly could require dry territories to automatically hold local options elections every two years instead of the petition requirement.²³⁶ This approach could also remind everyone where these sometimes-unsuspecting dry status territories are located.

²²⁸ See Brammer, *supra* note 15.

²²⁹ David J. Hanson, *Local Option Alcohol Laws in the US: History & Status*, ALCOHOL PROBS. AND SOLUTIONS, <https://www.alcoholproblemsandsolutions.org/local-option-alcohol-laws-in-the-u-s/> [<https://perma.cc/2YND-X5T3>].

²³⁰ See *id.*; Brammer, *supra* note 15.

²³¹ John S.W. Spinda, *Keep it Local or Keep it Out? An Examination of the Spiral of Silence and Local Alcohol Option Laws in Kentucky*, 33 KY J. COMMUNICATION 44 (2014).

²³² See Brammer, *supra* note 15.

²³³ See Don Sergent, *'Wet' forces, many incumbents win in county races*, BOWLING GREEN DAILY NEWS (Nov. 6, 2018), https://www.bgdailynews.com/news/wet-forces-many-incumbents-win-in-county-races/article_dd93dc0f-6925-52a5-ba0d-d2a2523ad22c.html [<https://perma.cc/P2KT-VX7R>].

²³⁴ See Brammer, *supra* note 15.

²³⁵ *Id.*

²³⁶ Erica Horn and Stephen Sherman, *Kentucky Attorney General Rules Constitutional Amendment Required for Authorization of Local Options Sales Tax*, PUBLICATIONS, STOLL KEENON, AND OGDEN (Jan. 6, 2013) <https://www.skofirm.com/publications/kentucky-attorney-general-rules-constitutional-amendment-required-for-authorization-of-local-option-sales-tax/> [<https://perma.cc/747V-XH6S>].

To further attract multi-jurisdictional agritourism businesses, Kentucky's liquor laws need to create a more coherent regulatory scheme among local governments.²³⁷ It is unnecessarily burdensome to have every hospitality-related business that crosses jurisdictional lines faced with a patchwork of rules and regulations that vary from jurisdiction to jurisdiction.²³⁸ The Commonwealth has retained "near absolute authority to regulate alcoholic beverages, granting authority to local jurisdictions to do so only in specific circumstances."²³⁹ Arguably, the state's delegation of authority must be specific and express.²⁴⁰ Thus, it should be made clear that if the Commonwealth regulation states that only certain types of licensees require state-mandated server training, then local governments should be preempted from requiring other types of licensees to do the same.²⁴¹ It merely means that if the Commonwealth has regulated in a certain area and determined it to be sufficient, local governments should not be allowed to tighten those regulations further.²⁴²

Admittedly, the three-tier regulatory system serves as a necessary evil to prevent larger companies from negatively impacting consumers, small farm wineries, and craft micro-distilleries;²⁴³ however, it should not apply to the businesses it alleges to protect. The Kentucky General Assembly has slowly come to realize this by enacting laws authorizing wineries, microbreweries, and distilleries to sell directly to consumers under certain circumstances.²⁴⁴ Nuances persist, however, where bourbon distilleries still have to invoice the products they sell to a wholesaler.²⁴⁵ Production caps on small agritourism businesses have also inhibited the growth of small farm wineries and microbreweries.²⁴⁶ The General Assembly should consider a more

²³⁷ See Amato, *supra* note 18 (describing the problem with the current patchwork of rules).

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² See Amato, *supra* note 18. *Cf.* Amato, *supra* note 18 (supporting the theory that local governments should not be able to further tighten regulations).

²⁴³ Brown, *supra* note 215; *but see* McKirdy, *supra* note 184.

²⁴⁴ See Amato, *supra* note 101.

²⁴⁵ KY. REV. STAT. ANN. § 243.170 (LexisNexis 2019).

²⁴⁶ Inman, *supra* note 19.

permanent solution to these issues by authorizing further vertical integration of tiers in agritourism specific businesses and allowing hospitality-related businesses to maintain direct customer selling benefits when they upgrade their licenses.

Finally, the General Assembly should eliminate the quota license system. Only sixteen other states rely on a population-based quota license system, showing that there are various alternatives to the current system that has become costly for the Kentucky ABC board to enforce.²⁴⁷ Contrary to the neo-prohibitionist arguments, there is no evidence that the elimination of the quota system will lead to an over-saturation of alcoholic beverage venues.²⁴⁸ The existing oversight and vetting processes regulating license obtainment as well as industry self-regulation are sufficient.²⁴⁹ Other sectors of the alcoholic beverage industry have eliminated the quota license system, and a mass onslaught of liquor stores did not materialize.²⁵⁰ Elimination would allow for equitable treatment of all alcoholic beverage licenses and will foster creativity for new businesses.²⁵¹

CONCLUSION

Modernizing Kentucky's liquor laws can improve the agritourism industry and bring vital economic development dollars to farmers and rural communities while also addressing specific public health and safety concerns. To best capitalize on these economic and fiscal opportunities, Kentucky must adopt a multifaceted approach that combines free-market, anti-red tape measures with provisions that help address public health and safety concerns.

²⁴⁷ Hanson, *supra* note 229.

²⁴⁸ Associated Press, *supra* note 223.

²⁴⁹ *See id.*

²⁵⁰ *See id.*; *see also* Fuerst, *supra* note 163.

²⁵¹ Associated Press, *supra* note 223.