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## Hold My Beer, Hold My Price: State Post-and-Hold Regulatory Schemes Constitute Price Fixing Preempted by Federal Antitrust Law

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HOLD MY BEER, HOLD MY PRICE:  
STATE POST-AND-HOLD REGULATORY  
SCHEMES CONSTITUTE PRICE FIXING  
PREEMPTED BY FEDERAL  
ANTITRUST LAW

*Kathrine Maldonado\**

ABSTRACT

*The Supreme Court has created various tests in cases involving antitrust preemption of state regulations—such as Midcal’s state immunity two-pronged analysis and Fisher’s hybrid versus unilateral restraint test—without clarifying how the various tests fit together. This has led to circuit splits not only in regard to how courts approach antitrust preemption cases but also in regard to the preemption findings of nearly identical laws in different circuits. In a departure from the Ninth and Fourth Circuits, the Second Circuit recently upheld the validity of Connecticut’s post-and-hold alcohol-pricing regulation. State post-and-hold regulations effectuate illegal price fixing between competitors in violation of the Sherman Act, and therefore should be preempted by federal antitrust law. Under all the tests in Supreme Court antitrust preemption jurisprudence, post-and-hold regulations fail to escape preemption. Though post-and-hold regulations have been shown to temper consumption, there are better approaches to protect consumer welfare without also hindering it through anticompetitive means.*

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## I. INTRODUCTION

Situated at the nexus of constitutional law and antitrust law, state alcohol regulatory schemes often sacrifice generally accepted principles of competition and free markets for the paternalistic aim of reducing alcohol consumption. Questions of preemption always invoke the difficult balance of state and federal interests, but preemption of state regulation of alcohol requires even deeper constitutional consideration because of the Twenty-first Amendment.<sup>1</sup> As this Comment will show, antitrust and alcohol have had a surprisingly intertwined history over the past century.

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1. U.S. CONST. amend. XXI.

Complicating the matter is the lack of clarity around antitrust preemption of state regulatory action.

Part I of this Comment will provide background on the pieces of the legal puzzle surrounding antitrust preemption of state alcohol regulatory schemes: § 1 of the Sherman Act, the principles of federalism in regard to the regulation of alcohol derived from the Twenty-first Amendment, and the purposes and dangers of post-and-hold provisions. Part II will describe the judicially created state action immunity doctrine and the distinction between hybrid and unilateral restraints.

Part III discusses the current circuit split. The Ninth and Fourth Circuits correctly found that post-and-hold provisions violate § 1 of the Sherman Act because the scheme amounts to per se illegal price fixing, and that the provisions cannot be saved by the state action immunity doctrine because they lack the requisite government involvement. The Second Circuit incorrectly found that despite the presence of tacit collusion, the lack of an explicit agreement or contract between rivals was dispositive of an antitrust violation. In reality, the interdependent interest created by the post-and-hold scheme is exactly what obviates the need for an *explicit* agreement because the state facilitates the collusion. Lastly, this Part will emphasize the importance of clarification in this area of the law: currently one-third of U.S. states have post-and-hold regulatory schemes.<sup>2</sup>

Part IV argues that post-and-hold laws are always collusive in violation of § 1 of the Sherman Act, and because they allow private actors—rather than the state government—to determine the nature and extent of consumer harm, they cannot escape preemption. This Part proposes alternatives to post-and-hold provisions that achieve similar objectives while avoiding anticompetitive conduct that acts as a counterbalance to the purported welfare-enhancing goals of post-and-hold provisions.

Finally, the Conclusion iterates the importance of Supreme Court or congressional clarity in this area and warns that private actors may open themselves up to risks of liability if they continue to operate in compliance with state schemes that are preempted by federal law.

#### A. SECTION ONE OF THE SHERMAN ACT

Section 1 of the Sherman Act makes “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . illegal.”<sup>3</sup> This restriction seeks to prevent the perceived “supreme evil” at the heart of American antitrust law: collusion among competitors.<sup>4</sup> The Sherman Act was enacted in 1890 in reaction to the large amounts of power concentrated in big trusts at the

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2. See *Wholesale Pricing Practices and Restrictions*, ALCOHOL POL’Y INFO. SYS., <https://alcoholpolicy.niaaa.nih.gov/apis-policy-topics/wholesale-pricing-practices-and-restrictions/3> [<https://perma.cc/KFX8-4D2P>] (last updated Jan. 1, 2020); see also *infra* Table 1.

3. 15 U.S.C. § 1.

4. *Verizon Commc’ns, Inc. v. Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).

time, and in the words of its eponymous proponent, Senator John Sherman, the Act aimed to preserve “freedom of trade and production, the natural competition of increasing production, [and] the lowering of prices by such competition.”<sup>5</sup> The language of the Sherman Act is exceptionally broad, and Congress left the Judicial Branch substantial allowance to determine how to interpret and apply antitrust principles.<sup>6</sup> Consequently, the practical application of antitrust law, somewhat similarly to constitutional law, has ebbed and flowed over the past hundred years with varying judicial outlooks, market conditions, and economic schools of thought.<sup>7</sup> The judiciary has had “the principal responsibility for distinguishing the pernicious from the inoffensive” in its application of § 1.<sup>8</sup>

Shortly after the passage of the Sherman Act, the Supreme Court came to the conclusion that surely not *all* agreements in restraint of trade are forbidden; if that were the case, nearly any business agreement would be a violation of § 1, making the Act “destructive of all right to contract or agree [or] combine in any respect.”<sup>9</sup> Justice White’s majority opinion in *Standard Oil Co. v. United States*<sup>10</sup> has been interpreted to mean that “[a]cts are not forbidden merely because they fall literally within some statutory prohibition. . . . [but are] forbidden only when they seem likely to create the evil the legislature sought to avoid.”<sup>11</sup> Justice White’s instrumentalism was influential; today, restraints of trade are generally reviewed under either the rule of reason or the per se rule.<sup>12</sup>

Under the rule of reason, “the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited.”<sup>13</sup> Other restraints, such as “horizontal agreements among competitors to fix prices,” are treated as “necessarily illegal” under the per se rule.<sup>14</sup> The per se rule is used for restraints “that would always or almost always tend to restrict competition and decrease output”<sup>15</sup> and have “‘manifestly anticompetitive’ effects.”<sup>16</sup> Though the Supreme Court has been hesitant in recent years to utilize the per se rule, it has said the rule can be used for the types of restraints that “courts have had considerable experience with” and that the “courts can predict with confidence . . . would be invalidated in all or almost all instances under the

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5. 19 CONG. REC. S6041 (daily ed. July 10, 1888) (statement of Senator John Sherman).

6. C. PAUL ROGERS III & WILLIAM R. ANDERSEN, *ANTITRUST LAW: POLICY AND PRACTICE* 12 (Carolina Acad. Press 5th ed. 2020) (1985).

7. *See id.* at 12–13.

8. *Id.* at 13.

9. *Standard Oil Co. v. United States*, 221 U.S. 1, 63 (1911).

10. *See generally id.*

11. ROGERS & ANDERSEN, *supra* note 6, at 22.

12. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 885–86 (2007).

13. *Id.* at 885.

14. *Id.* at 886.

15. *Id.* (quoting *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988)).

16. *Id.* (quoting *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 (1977)).

rule of reason.”<sup>17</sup>

## B. FEDERALISM AND ALCOHOL

While principles of antitrust law and federalism frequently collide in many state regulatory schemes, the constitutional element is even further heightened in regulatory programs involving the alcohol market in light of the Twenty-first Amendment of the United States Constitution.<sup>18</sup> Notwithstanding other immunities potentially available to protect a state regulation facing preemption by federal law, a provision involving alcohol has an additional escape route if the court finds that it is a legitimate exercise of the state’s Twenty-first Amendment powers.<sup>19</sup>

In a feeble attempt to curtail crime and corruption and address social issues, Congress passed the Eighteenth Amendment in 1919.<sup>20</sup> The now infamous amendment gave concurrent power to Congress and the states to enforce the prohibition of “the manufacture, sale, or transportation of intoxicating liquors.”<sup>21</sup> By 1933, liquor stockpiles by the wealthy, a booming black market, and countless speakeasies were proof that the social experiment had largely failed, leading Congress to repeal the Eighteenth Amendment through ratification of the Twenty-first Amendment.<sup>22</sup> The Amendment states, “The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited,” which has been interpreted to effectively give the states regulatory power over alcohol.<sup>23</sup> Thus, in situations where a state alcohol regulation has been found to be in violation of federal antitrust law, states often try to assert that the Twenty-first Amendment permits the state to “countermand the congressional policy—adopted under the commerce power—in favor of competition.”<sup>24</sup> Despite the “wide latitude” given to state liquor regulation,<sup>25</sup> the Supreme Court has “stressed that important federal interests in liquor matters survived the ratification of the Twenty-first Amendment,”<sup>26</sup> and the Court has “resisted the contention that [the Amendment] ‘freed the States from all restrictions upon the police power

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17. *Id.* at 886–87.

18. U.S. CONST. amend. XXI.

19. Lindsey Champlin, Comment, *Inebriated and Unbalanced: TFWS, Inc. v. Schaefer’s Misguided Reconciliation of the Twenty-first Amendment with the Sherman Act*, 17 GEO. MASON L. REV. 1195, 1204 (2010).

20. U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI; see Karen Powell, *Raise a Glass to Constitutional History: Dec. 5 Marks Anniversary of 1933 Repeal of the 18th Amendment, Prohibition*, MONT. LAW., Nov. 2014, at 9, 9 (2014).

21. U.S. CONST. amend. XVIII, §§ 1–2, *repealed by* U.S. CONST. amend. XXI.

22. *Id.* amend. XXI, § 1; Powell, *supra* note 20, at 9, 19.

23. U.S. CONST. amend. XXI, § 2; Powell, *supra* note 20, at 19.

24. *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980).

25. *Id.* at 108 (quoting *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 42 (1966), *abrogated by* *Healy v. Beer Inst., Inc.*, 491 U.S. 324 (1989)).

26. *Id.*

to be found in other provisions of the Constitution.’”<sup>27</sup>

Antitrust and alcohol regulation have had a long and strained history. Both invoke values that sometimes seem in conflict. While there is ample debate around what should constitute the central goals of antitrust, the importance of preserving competition in order to reduce prices, minimize harm to consumers, and promote innovation is widely accepted.<sup>28</sup> The emphasis the United States places on those free-market values can be witnessed in the language the Supreme Court has used to describe federal competition policy: “Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.”<sup>29</sup>

The sale and purchase of alcohol, however, requires considerations that may not be relevant in other product markets. Generally, states assert the aim of temperance as a justification for maintaining tight control of the alcohol market rather than allowing free conditions, as is done for other products.<sup>30</sup> Whether price maintenance actually leads to temperance has been debated throughout the past few decades,<sup>31</sup> but it is generally agreed that tempered alcohol consumption leads to a healthier and more cohesive society.<sup>32</sup> The Supreme Court, however, seems to have rejected the sufficiency of that justification and found arguments of temperance tend to be a pretext for promotion of a local industry: “We have examined whether state alcohol laws that burden interstate commerce serve a State’s legitimate . . . interests [under § 2 of the Twenty-first Amendment]. And protectionism, we have stressed, is not such an interest.”<sup>33</sup>

Another justification for manipulating alcohol market conditions is the safeguard of “small licensees from predatory pricing policies of large retailers,”<sup>34</sup> despite this protectionist approach being generally rejected as a priority for antitrust for several decades.<sup>35</sup> For example, in *324 Liquor*

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27. *Id.* (quoting *State Bd. of Equalization v. Young’s Mkt. Co.*, 299 U.S. 59, 64 (1936), *abrogated by* *Granholm v. Heald*, 544 U.S. 460 (2005)).

28. See ROGERS & ANDERSEN, *supra* note 6, at 26–27.

29. *Midcal*, 445 U.S. at 110 (quoting *United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972)).

30. See, e.g., *id.* at 112 (citing *Rice v. Alcoholic Beverage Control Appeals Bd.*, 579 P.2d 476, 490 (Cal. 1978)).

31. See *id.* (citing *Rice*, 579 P.2d at 494).

32. See Frank J. Chaloupka, Michael Grossmand & Henry Saffer, *The Effects of Price on Alcohol Consumption and Alcohol-Related Problems*, 26 ALCOHOL RSCH. & HEALTH 22, 28–32 (2002). But see James C. Cooper & Joshua D. Wright, *Alcohol, Antitrust, and the 21st Amendment: An Empirical Examination of Post and Hold Laws*, 32 INT’L REV. L. & ECON. 379, 388–89 (2012) (finding that post-and-hold laws “reduce alcohol consumption but have no measurable effect on two of the most important social ills associated with alcohol—drunk driving accidents and teen drinking”).

33. *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2469–70 (2019) (citing *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 276 (1984)).

34. *Midcal*, 445 U.S. at 112 (quoting *Rice*, 579 P.2d at 493).

35. See *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (“[T]he legislative history illuminates congressional concern with the protection of *competition*, not *competi-*

*Corp. v. Duffy*, a case involving review of New York’s liquor pricing system, the Supreme Court held “the State’s unsubstantiated interest in protecting small retailers ‘simply [is] not of the same stature as the goals of the Sherman Act,’” and therefore the State’s asserted Twenty-first Amendment interest “d[id] not suffice to afford immunity from the Sherman Act.”<sup>36</sup>

For many decades, courts have been trying to strike a balance between states’ rights enumerated in the Twenty-first Amendment and the supremacy of federal antitrust laws; however, before reaching the question of whether an otherwise preempted state regulatory scheme is protected by the Twenty-first Amendment, courts engage in other judicially created tests to ascertain whether the regulation should be saved. This Comment focuses on the tests that come prior to application of the Twenty-first Amendment in the preemption process, but it is nonetheless important to understand the role of federalism and other moral considerations that influence the discussion around post-and-hold provisions.

### C. POST-AND-HOLD PROVISIONS

After the Twenty-first Amendment ended Prohibition, two primary methods of state regulation developed: one is the “operation of a state monopoly on liquor sales with state-run stores,” and the second is “a licensing system that grants licenses to those in the liquor distribution chain . . . who must operate under detailed regulations.”<sup>37</sup> A frequent restriction imposed by states with a liquor licensing system is the post-and-hold pricing system.<sup>38</sup> Post-and-hold provisions require “alcohol distributors to both ‘post’ their proposed prices in advance, thus sharing future prices with rival distributors before they go into effect, and then to ‘hold’ these prices for a specified period of time.”<sup>39</sup> In many states, for a short period after the prices are posted, competitors may file amended prices until the “hold” enforcement goes into effect.<sup>40</sup> Currently, one-third of states have post-and-hold regulations.<sup>41</sup>

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*tors*, and its desire to restrain [market activity] only to the extent that [it] . . . may tend to lessen competition.” (emphasis added)).

36. 324 *Liquor Corp. v. Duffy*, 479 U.S. 335, 338, 350–51 (1987) (first alteration in original).

37. *TFWS, Inc. v. Schaefer*, 242 F.3d 198, 202 (4th Cir. 2001).

38. See *Cooper & Wright*, *supra* note 32, at 380–81 (Over the period from 1983 to 2010, “nineteen states . . . adopted [post-and-hold] laws . . . [As of 2010,] ten states ha[d] [post-and-hold] laws applying to wine wholesalers, nine states ha[d] [post-and-hold] laws applying to beer wholesalers, and nine states ha[d] [post-and-hold] laws applying to spirit wholesalers.” However, over this period, “seven states . . . repealed their [post-and-hold] laws, primarily as a result of court decisions.” (footnotes omitted)).

39. *Id.* at 380.

40. See *Schaefer*, 242 F.3d at 202 (“Of course, when one wholesaler posts a price change for an existing product, a competitor may match that price . . . Under the post-and-hold system wholesalers must sell to retailers at the prices established in the posted schedule for at least the month following the posting.”).

41. See *Wholesale Pricing Practices and Restrictions*, *supra* note 2.

TABLE 1: STATES WITH POST-AND-HOLD PROVISIONS<sup>42</sup>

<b>State</b>	<b>Beverage Type</b>	<b>Minimum Hold Period (days)</b>
Connecticut	Beer	30
	Wine	30
	Spirits	30
Georgia	Beer	180
	Spirits	14
Idaho	Beer	180
	Wine	180
Indiana	Beer	7
	Wine	7
	Spirits	7
Iowa	Wine	30
Maine	Beer	30
Massachusetts	Beer	30
	Wine	30
	Spirits	30
Michigan	Beer	90
	Wine	90
Missouri	Wine	30
	Spirits	30
New Jersey	Beer	30
	Wine	30
	Spirits	30
New York	Wine	30
	Spirits	30
Ohio	Wine	90
Oklahoma	Wine	60
	Spirits	60
Oregon	Beer	14
South Dakota	Beer	10
	Wine	10
	Spirits	10
Tennessee	Beer	360
Vermont	Beer	14
West Virginia	Beer	90

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42. *Id.* The table displays policies as of January 1, 2020.

Alcohol retailers often bear the brunt of the anticompetitive effects caused by post-and-hold provisions; this economic impact is then passed on to consumers.<sup>43</sup> This Comment will argue that the vast majority of post-and-hold provisions effectuate “horizontal price fixing under a vague *imprimatur* in form and agency inaction in fact,” thus effectuating the ultimate evil of antitrust: price fixing.<sup>44</sup> One empirical study found nearly 75% of product-months featured identical prices among all the wholesalers, more than 80% of product-months had spreads of less than 2%, and when multiple firms offered the same product, “they nearly always price[d] it almost identically.”<sup>45</sup>

Often, the party seeking injunction of state post-and-hold provisions follows a business model that delivers efficiency and profitability despite small margins due to its large volume of sales.<sup>46</sup> A post-and-hold pricing scheme leads to supracompetitive prices, ultimately causing consumer harm through a subversion of the free market.<sup>47</sup> Because in most cases wholesalers have the opportunity to match a lower price with no risk of sparking a price war, there is no incentive for any particular wholesaler to reduce its price in the first place.<sup>48</sup> Pricing uncertainty, particularly in an oligopolistic market, helps prevent price fixing and other instances of cartel-like behavior.<sup>49</sup> If a wholesaler reduces its price, other wholesalers will just likely meet it, and even if the original wholesaler *wanted* to undercut its competitor by setting the lower price, it would “be required to ‘hold the lower price for an entire month—during which it would have no competitive advantage because its competitors would be charging the same price.’”<sup>50</sup> The resulting pattern is months upon months of identical prices across wholesalers, and any changes in price are made in lockstep.<sup>51</sup>

Consistent with states’ other attempts at regulating the distribution of “intoxicating liquors,”<sup>52</sup> states frequently assert goals of temperance and

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43. See *Schaefer*, 242 F.3d at 202–03.

44. *FTC v. Tico*, 504 U.S. 621, 639 (1992) (“No antitrust offense is more pernicious than price fixing.” (citing *FTC v. Superior Ct. Trial Laws. Ass’n*, 493 U.S. 411, 434 & n.16 (1990))).

45. Christopher T. Conlon & Nirupama Rao, *The Price of Liquor is Too Damn High: Alcohol Taxation and Market Structure* 21–22 (Univ. of Chi. Booth Sch. of Bus. Kilts Ctr. for Mktg., Paper No. 2-009, 2015), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2610118](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2610118) [<https://perma.cc/BW5S-THAQ>].

46. See *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 882 (9th Cir. 2008) (“Costco’s warehouse businesses are ‘based on the concept that offering [its] members very low prices on a limited selection of nationally branded and selected private-label products . . . will produce high sales volumes and rapid inventory turnover.’ Costco’s business model also relies upon ‘operating efficiencies achieved by volume purchasing, efficient distribution and reduced handling of merchandise . . . .’” (original) (citation omitted)).

47. *Conn. Fine Wine & Spirits, LLC v. Seagull*, 932 F.3d 22, 27–28 (2d Cir. 2019).

48. *Id.* at 27.

49. See *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 238 (1993) (“Uncertainty is an oligopoly’s greatest enemy.”).

50. *Conn. Fine Wine & Spirits, LLC*, 932 F.3d at 27 (citing Brief for Plaintiff-Appellant at 9, *Conn. Fine Wine & Spirits, LLC*, 932 F.3d 22 (No. 17-2003-cv)).

51. *Id.* at 27–28.

52. *Battipaglia v. N.Y. State Liquor Auth.*, 745 F.2d 166, 180 (2d Cir. 1984) (Winter, J., dissenting).

health as a justification for artificially raising market prices. Judge Winter of the Second Circuit strongly critiqued such claims:

Although the statute expresses a concern over the perils of cheap (competitively priced) liquor, the notion that this [type of] legislation was even remotely the result of political pressure exerted by aroused temperance groups is a quaint fiction. The self-evident purpose of the statute is to create a cartel of liquor wholesalers for their benefit.<sup>53</sup>

States must develop more effective approaches to discourage the consumption of alcohol, if that is to be the goal.

Talk of temperance appears to be a pretext; the “self-evident purpose is not to protect the public from the evils of the demon rum, but to preserve the high standard of living of those who sell it.”<sup>54</sup> The effect of the provision is to encourage wholesalers to post inflated prices for alcohol, safe in the knowledge that they will have the opportunity to match any price cuts of a competitor, though the possibility of a price cut is itself highly unlikely.<sup>55</sup> The anticompetitive effects extend beyond just the existing market: “[A] market entrant hoping to gain market share by lowering prices will inevitably be frustrated by the adjust-and-hold provisions of the statute, which will prevent the entrant from further reducing prices.”<sup>56</sup> The result is a “de facto cartel” free to maintain supracompetitive prices “without fear of market reprisal.”<sup>57</sup>

## II. THE STATE IMMUNITY DOCTRINE AND THE ROLE OF UNILATERAL AND HYBRID RESTRAINTS

### A. PREEMPTION AND THE STATE ACTION IMMUNITY DOCTRINE

Despite the federal policy to promote competition and free-market activity, antitrust laws may be superseded by state regulatory programs where there is “[a]ctual state involvement, not deference to private pricefixing arrangements under the general auspices of state law.”<sup>58</sup> “Immunity is conferred [to the state regulation] out of respect for ongoing regulation by the State, not out of respect for the economics of price restraint.”<sup>59</sup> As in all preemption cases, to determine whether the Sherman Act preempts a state statute, “the inquiry is whether there exists an irreconcilable conflict between the federal and state regulatory schemes.”<sup>60</sup>

Because a “hypothetical or potential conflict is insufficient” for preemption, a state statute is preempted only if “on its face [it] irreconcilably

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53. *Id.*

54. *Id.*

55. *Conn. Fine Wine & Spirits v. Seagull*, 936 F.3d 119, 122 (2d Cir. 2019) (Sullivan, J., dissenting from denial of rehearing en banc).

56. *Id.*

57. *Id.*

58. *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 633 (1992).

59. *Id.*

60. *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982).

conflicts with federal antitrust policy.”<sup>61</sup> In the antitrust context, that has come to mean that a state statute is preempted “only if it mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or if it places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute.”<sup>62</sup> In other words, the conduct effectuated by the statute must be a per se violation for preemption to apply.<sup>63</sup> Once a statute has been determined to violate federal antitrust laws per se, it may have the potential to escape preemption through doctrines based on the preservation of constitutional state rights.

In one early case involving state regulation of alcohol, the Supreme Court held “when a state compels retailers to follow a parallel price policy, it demands private conduct which the Sherman Act forbids.”<sup>64</sup> The Court found that the minimum resale agreements authorized by Louisiana fair trade law were preempted by the Sherman Act because “when retailers are *forced* to abandon price competition, they are driven into a compact in violation of the . . . proviso which forbids ‘horizontal’ price fixing” and are therefore in per se violation of the Act.<sup>65</sup> Importantly, anticompetitive state “[l]egislation that would otherwise be preempted . . . may nonetheless survive if it is found to be state action immune from antitrust scrutiny.”<sup>66</sup>

Though the doctrine was arguably foreshadowed in earlier cases, the Supreme Court’s decision in *Parker v. Brown* is considered to be the origin of what is known today as the state action immunity doctrine.<sup>67</sup> In *Parker*, the Court acknowledged that a California program regulating the price for raisins that effectively eliminated price competition in the market “would violate the Sherman Act if it were organized” and operated by “private persons, individual or corporate.”<sup>68</sup> The Court found that the state-run program was not preempted by the Sherman Act, however, because “[i]t derived its authority and its efficacy from the legislative command of the state,” and “nothing in the language of the Sherman Act . . . suggests that its purpose was to restrain a state or its officers or agents from activities *directed* by its legislature.”<sup>69</sup> The Court noted that a state cannot simply bestow immunity on Sherman Act violators by “authorizing” their behavior or “by declaring that their action is lawful.”<sup>70</sup> Rather, to fall within the state action immunity doctrine, the state must “itself exercise[ ] its legislative authority in making the regulation” as sovereign; the state’s close involvement in the anticompetitive regulation is thus a

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61. *Id.*

62. *Id.* at 661.

63. *See id.*

64. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 389 (1951).

65. *Id.* at 385–86, 389 (emphasis added).

66. *Fisher v. City of Berkeley*, 475 U.S. 260, 265 (1986).

67. *Parker v. Brown*, 317 U.S. 341, 350–51 (1943).

68. *Id.* at 347–350.

69. *Id.* at 350–51 (emphasis added).

70. *Id.* at 351.

requirement for immunity.<sup>71</sup>

The interaction between, and overlap of, preemption principles and the state action immunity doctrine has been blurry at best; however, in *Fisher v. City of Berkeley*, the Supreme Court provided some clarification: “[C]onsideration of state action is not necessary unless an actual conflict with the antitrust laws is established.”<sup>72</sup> Even despite this clarification, since *Parker*, courts have struggled in their effort to apply the state action immunity doctrine and strike a balance between the goals of federal antitrust laws and the rights of states as sovereigns, leading to inconsistent results.<sup>73</sup> In light of the inconsistencies in subsequent opinions, in 1980 the Supreme Court adopted a two-pronged test for antitrust immunity for state regulatory programs.<sup>74</sup>

In *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, a wine distributor successfully challenged California’s price-posting statutes as an illegal restraint of trade under the Sherman Act.<sup>75</sup> The state regulation required wholesalers to post wine prices and then banned licensees from selling below the posted price.<sup>76</sup> The Court found that the regulation in *Midcal* amounted to resale price maintenance and violated the Sherman Act, so the question then became whether the regulation could escape preemption through immunity.<sup>77</sup> After reviewing state action immunity cases that took place post-*Parker*, the *Midcal* Court synthesized the holdings into a two-step test: “First, the challenged restraint must be ‘one clearly articulated and affirmatively expressed as state policy’; second, the policy must be ‘actively supervised’ by the State itself.”<sup>78</sup> Although the state program was found to pass the first step, it did not meet the second requirement because “[t]he State neither establishes prices nor reviews the reasonableness of the price schedules” and “does not monitor market conditions or engage in any ‘pointed reexamination’ of

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71. *Id.* at 352 (noting that the Commission was required to approve the program; “enforce[ ] it with penal sanctions, in the execution of a governmental policy”; “prescrib[e] the conditions of [the regulation’s] application”; and vote on referendum for the application of the regulations).

72. *Fisher v. City of Berkeley*, 475 U.S. 260, 264 (1986).

73. Christopher J. Heck, *Concerted Action and the Preemption of State Fair Trade Provisions After Leegin*, 2009 COLUM. BUS. L. REV. 853, 854.

74. *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

75. *Id.* at 99–102.

76. *Id.* at 99.

77. *Id.* at 102–03. It is worth noting that at the time *Midcal* was decided, resale price maintenance was considered a per se violation of the Sherman Act. *See id.* at 102. In a 2007 decision, the Supreme Court narrowed the per se rule by finding that, although resale price maintenance presents economic dangers, the conduct should be subject to the rule of reason. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 882 (2007) (“[V]ertical price restraints are to be judged by the rule of reason.”). Importantly, although the resale price maintenance at issue may have been a vertical price restraint, the Court suggested its effect could still amount to horizontal price fixing, which is still per se illegal today. *See id.* at 886, 892–93, 907–08.

78. *Midcal*, 445 U.S. at 105 (quoting *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 410 (1978)).

the program.”<sup>79</sup>

The Supreme Court explained that the importance of the second requirement “stems from the recognition that where a private party is engaging in . . . anticompetitive activity, there is a real danger that he is acting to further his own interests . . . . [T]he active supervision requirement mandates that the State exercise *ultimate control* over the challenged anticompetitive conduct.”<sup>80</sup> In such situations where the state lacks ultimate control, “[t]he national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.”<sup>81</sup> The state may be permitted to exercise regulatory control, “but only by taking ultimate responsibility for the choices” made as part of its interference in the free market.<sup>82</sup>

#### B. FISHER v. CITY OF BERKELEY’S IMPACT ON ANTITRUST PREEMPTION

For conduct to violate § 1 of the Sherman Act,<sup>83</sup> it must involve more than one actor.<sup>84</sup> Even if one actor’s conduct directly impacts prices in a way similar to concerted action, “there can be no liability under § 1 in the absence of agreement.”<sup>85</sup> In *Fisher v. City of Berkeley*, the Supreme Court emphasized the importance of distinguishing between unilateral and concerted action.<sup>86</sup> Although the municipal rent-control scheme in *Fisher* had the effect of nearly eliminating any price competition, the Court did not find it to be in violation of § 1 of the Sherman Act (and therefore subject to preemption) because it found that the government unilaterally imposed the restraint.<sup>87</sup> The Court held that because there was no “meeting of the minds” between the landlords subject to the rent-control program, § 1’s contract, conspiracy, or combination requirement was not met: “A restraint imposed unilaterally by government does not become concerted-action . . . simply because it has a coercive effect upon parties who must obey the law. . . . [It] is not enough to establish a con-

79. *Id.* at 105–06.

80. *FTC v. Tigor Title Ins. Co.*, 504 U.S. 621, 634 (1992) (emphasis added) (quoting *Patrick v. Burget*, 486 U.S. 94, 100–01 (1988)).

81. *Midcal*, 445 U.S. at 106.

82. William H. Page & John E. Lopatka, *Parker v. Brown, the Eleventh Amendment, and Anticompetitive State Regulation*, 60 WM. & MARY L. REV. 1465, 1479 (2019).

83. 15 U.S.C. § 1 (making illegal “any contract” or “combination or conspiracy” in “restraint of trade or commerce”).

84. *Fisher v. City of Berkeley*, 475 U.S. 260, 266 (1986) (“[T]his Court has always limited the reach of [§ 1] to ‘unreasonable restraints of trade effected by a ‘contract, combination . . . , or conspiracy’ between *separate* entities,’” (quoting *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984)), and it is “therefore . . . ‘of considerable importance’ that independent activity by a single entity be distinguished from a concerted effort by more than one entity to fix prices or otherwise restrain trade.” (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 763 (1984))).

85. *Id.* at 266. (first citing *Monsanto*, 465 U.S. at 760–61; and then citing *United States v. Parke, Davis & Co.*, 362 U.S. 29, 44 (1960)).

86. *Id.*

87. *Id.* at 265–67, 270.

spiracy.”<sup>88</sup> By contrast, a hybrid restraint—one in which “nonmarket mechanisms . . . enforce private marketing decisions,” such as the liquor pricing scheme in *Midcal*—is subject to antitrust scrutiny.<sup>89</sup> Where there is “a degree of private regulatory power” granted to private actors,<sup>90</sup> “the mere existence of legal compulsion [will] not turn [the State’s] scheme into unilateral action by the State.”<sup>91</sup>

The *Fisher* Court differentiated the regulatory scheme imposed by the City of Berkeley from the *Midcal* regulation because it “place[d] complete control . . . exclusively in the hands of the [governmental agency]”; “Not just the controls themselves but also the [price] ceilings they mandate have been unilaterally imposed on the [competitors] by the city.”<sup>92</sup> The Court acknowledged that “[t]here may be cases in which what appears to be a . . . [government]-administered price[-]stabilization scheme is really a private price-fixing conspiracy,”<sup>93</sup> which “might occur even where prices are ostensibly under the absolute control of government officials.”<sup>94</sup> The Court did not provide guidance as to how the hybrid versus unilateral restraint distinction should apply in such a situation.

What most courts have taken away from the *Fisher* decision is that if a restraint is unilateral, it escapes preemption by § 1 of the Sherman Act; only hybrid restraints will lead to an assessment of whether the state action immunity doctrine can save it from preemption.<sup>95</sup> Further, state action immunity “applies to the hybrid restraint only if it satisfies the two-part *Midcal* inquiry.”<sup>96</sup> The *Fisher* Court, however, did not provide substantial guidance on *how* to classify a restraint as hybrid or unilateral, leaving lower courts the responsibility of attempting to ascertain the “extraordinarily elusive” line between the two.<sup>97</sup>

### III. POST-AND-HOLD PROVISIONS INDUCE PRICE FIXING AMONGST COMPETITORS AND LACK SUFFICIENT GOVERNMENT OVERSIGHT TO ESCAPE PREEMPTION

The Second Circuit recently diverged from its sibling circuits in finding that Connecticut’s post-and-hold provisions did *not* constitute a violation

88. *Id.* at 267, 277.

89. *Id.* at 267–69, 277 n.2.

90. *Id.* at 268 (quoting *Rice v. Norman Williams Co.*, 458 U.S. 654, 666 n.1 (1982) (Stevens, J., concurring)).

91. *Id.* at 269.

92. *Id.*

93. *Id.* (citing *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980)).

94. *Id.*

95. See John E. Lopatka & William H. Page, *State Action and the Meaning of Agreement Under the Sherman Act: An Approach to Hybrid Restraints*, 20 *YALE J. ON REG.* 269, 271–72 (2003).

96. *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 887 (9th Cir. 2008).

97. Lopatka & Page, *supra* note 95, at 272; see also ROGERS & ANDERSEN, *supra* note 6, at 875 (“The issue of ‘hybrid restraints’ has been exhaustively litigated in a series of cases” (citing *Freedom Holdings, Inc. v. Cuomo*, 624 F.3d 38 (2d Cir. 2010))).

of § 1 of the Sherman Act.<sup>98</sup> The plaintiff, Total Wine, argued that the regulatory scheme eliminated price competition among wholesalers, which effectively led to price fixing, and the result was that retailers could not compete on the basis of cost because the wholesalers essentially controlled both the retail price and the retailers' profit margins.<sup>99</sup> In regard to the post-and-hold provisions, the Second Circuit's analysis focused on the *Fisher* inquiry: whether the provisions were unilateral in nature or whether they permitted a degree of freedom to wholesalers, allowing them to reach an agreement as to pricing, in which case the provisions would be considered hybrid.<sup>100</sup>

The Second Circuit constrained itself to its precedent in *Battipaglia v. New York State Liquor Authority*, which held that similar provisions under New York law were *not* preempted by the Sherman Act.<sup>101</sup> In so holding, the court prioritized the *method* in which anticompetitive collusion was formed; relying on *Battipaglia*, the court found that the post-and-hold provision "'[d]id not compel . . . agreement' among wholesalers," but only "individual act[ion]."<sup>102</sup> Despite acknowledging that the provision "invites and facilitates conscious parallelism in pricing," which amounts to price fixing,<sup>103</sup> the court found that the posted and held prices were ultimately "individual acts,"<sup>104</sup> and thus the conduct lacked the "meeting of the minds" required for a § 1 violation.<sup>105</sup> The court stated that "conscious parallel acts based on competitors' mutual recognition of 'shared economic interests' are not 'in [themselves] unlawful.'"<sup>106</sup> Though it is true conscious parallelism alone does not necessarily constitute a conspiracy, other factors indicating a lack of independent action are present: "high market concentration[ ] and lack of product differentiation."<sup>107</sup> Therefore, as the Fourth and Ninth Circuits held (without needing to reach the question of whether the private actors' conscious parallelism was coupled with plus factors),<sup>108</sup> the requisite collusion was present.

The Second Circuit's deviation from the stance taken by the Fourth and Ninth Circuits is due to its misplaced focus on the presence—or alleged lack thereof—of private agreements rather than the correct emphasis on

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98. *Conn. Fine Wine & Spirits, LLC v. Seagull*, 932 F.3d 22, 39 (2d Cir. 2019). Following the decision, a judge requested to rehear the case *en banc*, but a majority was not reached and the hearing was denied. *Conn. Fine Wine & Spirits, LLC v. Seagull*, 936 F.3d 119 (2d Cir. 2019).

99. *Conn. Fine Wine & Spirits, LLC*, 932 F.3d at 27–28.

100. *See id.* at 30–32; *Fisher v. City of Berkley*, 475 U.S. 260, 267–68 (1986).

101. *Id.* at 34, 36 (citing *Battipaglia v. N.Y. State Liquor Auth.*, 745 F.2d 166, 170 (2d Cir. 1984)).

102. *Id.* at 34, 39 (quoting *Battipaglia*, 745 F.2d at 170).

103. *Id.* at 39.

104. *Id.* at 34, 39 (quoting *Battipaglia*, 745 F.2d at 170).

105. *Id.* at 31, 39 (quoting *Fisher*, 475 U.S. at 267).

106. *Id.* at 38 (alteration in original) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 553–54 (2007)).

107. *See Heck*, *supra* note 73, at 884.

108. *See TFWS, Inc. v. Schaefer*, 242 F.3d 198, 208–09 (4th Cir. 2001); *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 894–96 (9th Cir. 2008).

the degree of government oversight and involvement when addressing anticompetitive state pricing laws. The Fourth Circuit explained that “post-and-hold system[s] [are] classic hybrid restraint[s]” because “the State requires wholesalers to set prices and stick to them, but it does not review those privately set prices for reasonableness; the wholesalers are thus granted a significant degree of private regulatory power.”<sup>109</sup> Echoing this analysis, the Ninth Circuit found that post-and-hold provisions could not be considered unilateral because (1) “a showing of concerted activity among the [state] wholesalers is not necessary to establish an antitrust violation,” and (2) the state “allows private parties to set the prices and does not review the reasonableness of those prices.”<sup>110</sup> The Ninth Circuit explicitly rejected the reasoning in *Battipaglia*—the case by which the Second Circuit claimed to be bound—due to the lack of governmental monitoring or oversight.<sup>111</sup>

Section 1 preemption of a state post-and-hold provision should turn on the degree of government involvement and private regulatory power granted to competitors rather than the presence of conscious agreement among competitors because the harmful effects of tacit collusion are present regardless of a “meeting of the minds,”<sup>112</sup> and therefore, the conduct falls squarely within the spirit of what antitrust law seeks to prevent.

A. THE NINTH AND FOURTH CIRCUITS APPLIED THE *MIDCAL* TEST  
AND *FISHER* ANALYSIS DIFFERENTLY BUT REACHED THE  
SAME CORRECT CONCLUSION

In *Costco Wholesale Corp. v. Maleng*, Costco alleged that Washington state’s Liquor Control Board (LCB) imposed beer and wine regulations that “restrict[ed] many of [Costco’s] efficient and competitive practices . . . and create[d] or facilitate[d] agreement among distributors and among [manufacturers] . . . in restraint of competition.”<sup>113</sup> The complaint challenged nine different state restraints on the sale and distribution of beer and wine, two of which were “price posting” and “hold” requirements that forced beer and wine distributors to publicly post their wholesale prices for all brands of beers or wine sold and hold those posted prices for at least thirty days.<sup>114</sup> The LCB argued that the provisions it

109. *Schaefer*, 242 F.3d at 208–09.

110. *Miller v. Hedlund*, 813 F.2d 1344, 1350–51 (9th Cir. 1987).

111. *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 893–95 (9th Cir. 2008).

112. *Contra Conn. Fine Wine & Spirits, LLC v. Seagull*, 932 F.3d 22, 31, 38 (2d Cir. 2019) (quoting *Fisher v. City of Berkley*, 475 U.S. 260, 267 (1986)).

113. *Maleng*, 522 F.3d at 882 (second alteration in original).

114. *Id.* at 883. Other restraints included: (1) a “uniform pricing rule” under which distributors “must sell a particular product at the same price to every distributor”; (2) a “minimum mark-up provision” which required distributors “to price . . . products at no less than 10% above their acquisition costs”; (3) a ban on volume discounts; (4) a ban on selling beer and wine on credit; (5) a “delivered price” requirement which requires distributors to sell products at the same “‘delivered’ price to all retailers, even if the retailer pays the freight and picks up the goods itself”; (6) a “central warehousing ban” which “prohibits retailers from storing or taking delivery of beer and wine at a central warehouse;” (7) and a “prohibition on retailers selling beer and wine to other retailers.” *Id.* at 883–84. All restraints

imposed were unilateral restraints of trade and therefore were not preempted by the Sherman Act.<sup>115</sup>

Before proceeding to answer the question of whether Washington's beer and wine regulatory scheme facially violated the Sherman Act, the court acknowledged the methodological problem posed "because of the uncertain relationship between the 'active supervision' inquiry under [*Midcal*] and the 'hybrid/unilateral' inquiry under [*Fisher*]." <sup>116</sup> The Ninth Circuit contended that the "substantial overlap between [*Midcal*'s] active supervision and [*Fisher*'s] hybrid inquiries" is so strong that "they effectively merge."<sup>117</sup> The court asserted that the bottom-line rule emerging from the Supreme Court's string of cases involving preemption is that "state statutes . . . creating unsupervised private power in derogation of competition are subject to preemption."<sup>118</sup> Quoting a case from the Second Circuit, the Ninth Circuit remarked, "Where the anti-competitive effects of a state statute obviate the need for private parties to act on their own to create an anti-competitive scheme, the statute may be attacked as a 'hybrid' restraint on trade."<sup>119</sup> However, the court noted that anticompetitive effects are not solely determinative because the "forbidden" aspect is the state regulatory programs that "facilitate arrangements between private parties that suppress competition."<sup>120</sup>

Despite observing that "the line between a hybrid and unilateral restraint 'is extraordinarily elusive,'" the Ninth Circuit easily found that Washington's post-and-hold provision was a hybrid restraint subject to preemption by the Sherman Act.<sup>121</sup> The court rejected the LCB's assertion that the "combination" or "conspiracy" requirement for a violation of § 1 of the Sherman Act was lacking and therefore dispositive: "While it is true that there is no agreement or concerted activity . . . it can not [sic] be ignored that the challenged regulations facilitate the exchange of price information and require adherence to the publicly posted prices," and therefore, "through non-market mechanisms, [the state] . . . enforced or

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apart from the post-and-hold provision were found to be unilateral and therefore not subject to preemption by the Sherman Act. *Id.* at 901.

115. *Id.* at 884.

116. *Id.* at 886–87 (citations omitted) (first citing *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980); and then citing *Fisher v. City of Berkley*, 475 U.S. 260 (1986)) ("[T]he Supreme Court has not provided clear guidance in defining the relationship between the 'hybrid' restraint inquiry and the *Midcal* 'active supervision' inquiry." (citing *Snake River Valley Elec. Ass'n v. PacifiCorp*, 238 F.3d 1189, 1192 n.8 (9th Cir. 2001))).

117. *Id.* at 887–88 ("[W]e believe that a determination of whether a restraint is hybrid will largely answer the question of whether the state actively supervises the restraint.").

118. *Id.* at 889 (citing *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 223 (2d Cir. 2004)).

119. *Id.* (quoting *Freedom Holdings*, 357 F.3d at 223).

120. *Id.* (emphasis added) (quoting *Mass. Food Ass'n v. Mass. Alcoholic Beverages Control Comm'n*, 197 F.3d 560, 566 (1st Cir. 1999)).

121. *Id.* at 888, 894 (quoting *Lopatka & Page*, *supra* note 95, at 272). The court found "[s]tate enforcement of adherence to privately set, supra-competitive prices is precisely the danger which the Supreme Court envisioned in crafting the hybrid and active supervision tests." *Id.* at 896. In short, "[the court] ha[d] little trouble concluding that the post-and-hold scheme would constitute a per se violation of the Sherman Act." *Id.*

facilitated privately-made pricing decisions.”<sup>122</sup>

The court distinguished the hybrid post-and-hold restraint from a unilateral restraint in which, although there still may be an anticompetitive effect, “public officials determine[ ] the nature and extent of the resulting consumer injury, with no degree of discretion delegated to private actors.”<sup>123</sup> The anticompetitive effect of a unilateral restraint is not achieved through private action but “is simply part-and-parcel of the state-imposed” trade restraint; such restraints lack the “‘concerted action’ requirement of *Fisher*.”<sup>124</sup> By contrast, the post-and-hold scheme “facilitates and encourages *interdependent* prices, which . . . are set solely according to private marketing decisions of non-state actors.”<sup>125</sup> Such prices, set by private actors rather than by the state, create an anticompetitive outcome because they are “highly likely to facilitate horizontal collusion among market participants.”<sup>126</sup>

In oligopolistic markets, “the dissemination of information about prices and a credible commitment to maintain those prices reduce a firm’s uncertainty about its rivals’ pricing behavior and thereby predictably foster a non-competitive outcome.”<sup>127</sup> After finding the post-and-hold pricing scheme was a hybrid restraint that per se violated § 1 of the Sherman Act, the court considered the state action immunity doctrine only in a footnote, saying “we view the *Midcal* active supervision prong in this case as largely collapsing into *Fisher*’s hybrid/unilateral inquiry.”<sup>128</sup> Even so, the court emphasized that “viewing the post-and-hold scheme through the active supervision prism [did] not help Washington” because the State did not determine the prices, did not review the prices for reasonableness, and did not reexamine the program.<sup>129</sup> After dismissing any chance of the state’s regulatory scheme receiving state action immunity, the Ninth Circuit also found the State failed to carry its burden for the Twenty-first Amendment defense, and therefore the provision was preempted by the Sherman Act.<sup>130</sup>

The Fourth Circuit addressed a similar post-and-hold provision, this time enforced by the state of Maryland, in *TFWS, Inc. v. Schaefer*.<sup>131</sup> The

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122. *Id.* at 893 (second alteration in original) (quoting *Miller v. Hedlund*, 813 F.2d 1344, 1349 (9th Cir. 1987)).

123. *Id.* at 890 (quoting Lopatka & Page, *supra* note 95, at 272) (Although “[t]he ban removes from the market certain firms or persons who might otherwise compete” and “prices for the consumer may be higher than they would otherwise be in the absence of the ban[,] . . . the potential anti-competitive effect is not the result of private pricing or marketing decisions, but the logical and intended result of the statute itself.”).

124. *Id.* at 890.

125. *Id.* at 895 (emphasis added).

126. *Id.* at 896.

127. Lopatka & Page, *supra* note 95, at 311.

128. *Maleng*, 552 F.3d at 901 & n.22.

129. *Id.* at 901 n.22.

130. *Id.* at 895–96, 904 (“The Supreme Court has held that an agreement to adhere to posted prices is a per se violation without regard to its reasonableness.” (citing *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 649–50 (1980) (per curiam))).

131. *TFWS, Inc. v. Schaefer*, 242 F.3d 198, 201–02 (4th Cir. 2001).

court observed a “[c]ommon thread[ ]” running through three Supreme Court decisions that found state liquor or wine and beer laws were hybrid restraints involving concerted action: each “empowered private parties to set prices, and those prices were enforced by government mechanisms.”<sup>132</sup> After finding that Maryland’s post-and-hold pricing scheme irreconcilably conflicted with the Sherman Act, the court held that Maryland could not claim state action immunity.<sup>133</sup>

Maryland’s involvement in the regulatory scheme included the authority to “revoke or suspend a wholesaler’s license for a violation” of the post-and-hold restriction, or other relevant provisions.<sup>134</sup> The comptroller also published notices of violations and resulting sanctions, and distributed the information to all liquor wholesalers.<sup>135</sup> Despite those actions of the comptroller enforcing the regulatory scheme, the court did not find its involvement sufficient to meet the second prong of the *Midcal* analysis because, similar to New York in *324 Liquor*, Maryland did not set liquor prices, did not review prices for reasonableness, and “did not monitor [liquor market] conditions” or “engage in any ‘pointed reexamination’ of [Maryland’s liquor pricing] program.”<sup>136</sup>

Maryland appealed the finding that its post-and-hold regulatory scheme was a per se violation of § 1 of the Sherman Act in *TFWS, Inc. v. Franchot*; the resulting opinion was issued ten years following the initial complaint seeking injunctive relief.<sup>137</sup> The court found that the posted-and-held prices were hybrid restraints and per se violations of § 1 of the Sherman Act because they “mandated activity that was ‘essentially a form of horizontal price fixing.’”<sup>138</sup> Maryland unsuccessfully relied on the Supreme Court’s decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*<sup>139</sup> to argue that “resale price maintenance is no longer subject to [per se] analysis under federal antitrust law, but instead must be judged under a rule-of-reason standard,” and thus, its post-and-hold provision did not facially violate § 1 of the Sherman Act.<sup>140</sup> The court rejected Maryland’s assertion because the post-and-hold scheme was “a form of *horizontal* price fixing,” whereas *Leegin* “concerned *vertical* resale price maintenance.”<sup>141</sup> In fact, the Fourth Circuit explained that the decision in

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132. *Id.* at 208 (first citing *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951); then citing *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); and then citing *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987)). The Fourth Circuit also noted that “[t]he Supreme Court found that the hybrid restraint in each case was a per se violation of § 1.” *Id.*

133. *Id.* at 210.

134. *Id.* at 203.

135. *Id.*

136. *Id.* at 210–11 (quoting *324 Liquor Corp.*, 479 U.S. at 344–45).

137. *TFWS, Inc. v. Franchot*, 572 F.3d 186, 188 (4th Cir. 2009) (beginning the opinion with the observation that “[t]his long-running antitrust suit is on appeal for the fourth time”).

138. *Id.* at 190 (quoting *Schaefer*, 242 F.3d 198, 209 (4th Cir. 2001)).

139. 551 U.S. 877 (2007).

140. *Id.* at 191–92 (quoting Brief of Appellants at 28, *Franchot*, 572 F.3d 186 (No. 07-2108)).

141. *Id.* (first citing *Schaefer*, 242 F.3d at 209; and then citing *Leegin*, 551 U.S. at 904).

*Leegin* actually reinforced Supreme Court precedent applying the per se rule to horizontal price fixing: there is a “plain distinction between the lawful right to publish prices . . . on the one hand,” such as in vertical resale-price maintenance, “and an agreement among competitors limiting action with respect to the published prices, on the other,” such as in post-and-hold schemes.<sup>142</sup>

Although the Ninth Circuit “collapse[d]”<sup>143</sup> the *Midcal* “active supervision” assessment into its unilateral versus hybrid *Fisher* analysis<sup>144</sup> while the Fourth Circuit appeared to distinctly address the characteristics,<sup>145</sup> both courts came to the same conclusion: post-and-hold provisions are hybrid restraints that violate § 1 of the Sherman Act and cannot be saved by state action immunity because the requisite government involvement is lacking.<sup>146</sup> Several district courts have reached the same opinion.<sup>147</sup>

#### B. THE SECOND CIRCUIT MISSED ITS OPPORTUNITY TO CORRECT *BATTIPAGLIA*

Connecticut’s post-and-hold provision requires wholesalers to post a monthly “bottle price” and “case price” with the state’s Department of Consumer Protection (DCP) for each product that will be sold during that month.<sup>148</sup> Posted prices are disseminated throughout the industry, and in the following four days, wholesalers may amend their prices to match competitors’ lower prices for a particular product.<sup>149</sup> The lower prices, however, must not be lower than the price being met.<sup>150</sup> Wholesalers must hold their prices at the posted price for the following month.<sup>151</sup> Total Wine, “the largest retailer of wine and spirits in the United States,” brought suit against the Commissioner of the DCP, seeking injunctive and declaratory relief, similar to that granted in the Ninth and Fourth Circuit decisions preempting state regulatory post-and-hold pricing provisions.<sup>152</sup> Total Wine alleged that the post-and-hold scheme, in conjunction with two other liquor regulations, had resulted in “retail prices for wine and spirits in Connecticut that [were] as much as 24% higher than prices offered for identical products in the surrounding states.”<sup>153</sup>

142. *Id.* at 192 (alteration in original) (quoting *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 649–50 (1980) (per curiam)).

143. Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 YALE L.J. 486, 507 (1986).

144. *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 887 (9th Cir. 2008)

145. *Schaefer*, 242 F.3d at 207, 210.

146. *Maleng*, 522 F.3d at 887–88, 904; *Schaefer*, 242 F.3d at 210–11.

147. *See Beer & Pop Warehouse v. Jones*, 41 F. Supp. 2d 552, 561–62 (M.D. Pa. 1999); *Canterbury Liquors & Pantry v. Sullivan*, 16 F. Supp. 2d 41, 45–46 (D. Mass. 1998).

148. CONN. GEN. STAT. ANN. § 30-63(a), (d) (West 2021); CONN. AGENCIES REGS. § 30-6-B12(a) (2021).

149. § 30-63(c); § 30-6-B12(g).

150. § 30-63(c); *see also* § 30-6-B12.

151. § 30-63(c); § 30-6-B12(b), (d).

152. *Conn. Fine Wine & Spirits, LLC v. Seagull*, 932 F.3d 22, 27 (2d Cir. 2019).

153. *Id.* at 28 (citing Complaint ¶ 18, *Seagull*, 932 F.3d 22 (No. 17-2003-cv)).

At the beginning of its preemption analysis, the Second Circuit placed emphasis on the requirement that a state statute “must bring about conduct that would require [per se] condemnation under § 1” in order to face preemption.<sup>154</sup> The court stated it read Supreme Court precedent to constitute a two-step inquiry: (1) whether the conduct compelled by the state is unilateral or hybrid and whether it per se violates the Sherman Act, and (2) whether the state action immunity doctrine applies.<sup>155</sup> This approach is more similar to that taken by the Fourth Circuit, rather than the “collapsed” approach taken by the Ninth Circuit. In working through the first step, the court had to decide whether it would follow its prior decision in *Battipaglia v. New York State Liquor Authority*, which was decided by a divided panel prior to *Fisher* and upheld liquor price constraints similar to Connecticut’s post-and-hold provision.<sup>156</sup>

In *Battipaglia*, Judge Friendly, who remarked that he was “present at the creation” of the Twenty-first Amendment, opened the opinion by identifying “an aura of unreality” in any expectation that the constitutionality of state liquor laws should be examined in a similar fashion as other state regulatory statutes.<sup>157</sup> Judge Friendly, however, acknowledged that the Supreme Court had made “clear that the [Twenty-first] Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause.”<sup>158</sup> The court held that because § 1 of the Sherman Act bans restraints of trade formed through “contract[s], combination[s], . . . or conspiracies,” the liquor sale regulations could not induce a per se antitrust violation.<sup>159</sup>

The Second Circuit distinguished *Midcal* as “involving an implicit agreement for resale price maintenance,”<sup>160</sup> whereas the New York price provision did not “suffer[ ] from the same infirmity”<sup>161</sup> because “[§] 1 requires an agreement, state compulsion of individual action is the very antithesis of an agreement, and the argument that an agreement could have been inferred if the wholesalers had voluntarily done what they have been compelled to do is simply too ‘iffy.’”<sup>162</sup> Judge Friendly did,

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154. *Id.* at 30 (“A party may successfully enjoin the enforcement of a state statute only if the statute on its face irreconcilably conflicts with federal antitrust policy.” (citing *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982)).

155. *Id.* at 31–32, 32 n.11 (citing *Freedom Holdings Inc. v. Spitzer*, 357 F.3d 205, 223 (2d Cir. 2004)).

156. *Id.* at 33–34, 36 (citing *Battipaglia v. N.Y. State Liquor Auth.*, 745 F.2d 166, 168, 179–80 (2d Cir. 1984)).

157. *Battipaglia*, 745 F.2d at 168–69 (discussing the role the Twenty-first Amendment played in ending the federal government’s “noble experiment” to control the drinking habits of all citizens, and the grant of “full authority” to the states to deal with “intoxicating liquor free from limitations imposed by the Commerce Clause”).

158. *Id.* at 169–70 (quoting *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 275 (1984)).

159. *Id.* at 170 (alteration in original) (quoting 15 U.S.C. § 1 (“[S]chedules required to be filed by the wholesalers are their individual acts.”)).

160. *Id.* at 172 (citing *U.S. Brewers Ass’n, Inc. v. Healy*, 532 F. Supp. 1312, 1329–30 (D. Conn.), *rev’d on other grounds*, 692 F.2d 275 (2d Cir. 1982), *aff’d*, 464 U.S. 909 (1983)).

161. *See id.* at 172–75 (quoting *Lewis-Westco & Co. v. Alcoholic Beverage Control Appeals Bd.*, 186 Cal. Rptr. 552, 557 (Cal. Ct. App. 1982)).

162. *Id.* at 173.

however, acknowledge a counterargument: “[A] statute compelling conduct which, in its absence, would permit the inference of an agreement unlawful under § 1 is inconsistent with that section.”<sup>163</sup>

Ignoring the economic realities compelled by the state liquor regulatory scheme, the court held that the state statute did not violate the Sherman Act because “an exchange of price information and price adherence compelled by a state” has “never [been] held” to “necessarily constitute[ ] a violation of the antitrust laws in all cases.”<sup>164</sup> The Second Circuit argued that even if the state regulation caused “‘conscious parallelism[,]’ i.e., identical or nearly identical pricing,” additional “plus factors” would be required to indicate an agreement among competitors.<sup>165</sup> Ultimately, the court decided that because “New York wholesalers can fulfill all of their obligations under the statute without . . . *conspiring* to fix prices,” the statute did not violate federal antitrust laws and was not subject to preemption.<sup>166</sup>

Because the court found that the statute was not in conflict with the Sherman Act, evaluation of the applicability of the state action immunity doctrine was not necessary; however, the court addressed it in dicta.<sup>167</sup> The court sought to distinguish the New York statute from the one in *Midcal* by saying the California regulatory scheme “sought to achieve a system of minimum resale prices,” and thus it was “appropriate to require active state involvement in price setting as a condition to immunity,” whereas the New York restraint of trade “sought only to produce orderly market conditions.”<sup>168</sup> Judge Friendly asserted that “[u]nder such a program there is nothing that the state can ‘actively supervise’ except to see that the statutory requirements are obeyed—and there [was] no claim that the state ha[d] neglected this.”<sup>169</sup>

The objectives of *both* statutes serve to artificially impact the market, and therefore it does not matter that the New York regulatory scheme only “stabilized” the market rather than setting minimum prices,<sup>170</sup> because removing any pricing uncertainties disincentivizes competitors from providing lower prices to consumers and can result in just as much harm

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163. *Id.*

164. *Id.* at 174.

165. *Id.* at 175 (first citing *Interstate Cir., Inc. v. United States*, 306 U.S. 208 (1939); and then citing *United States v. Gen. Motors Corp.*, 384 U.S. 127 (1966)). *But see, e.g.*, *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954); *Levitch v. Columbia Broad. Sys., Inc.*, 495 F. Supp. 649, 674–75 (S.D.N.Y. 1980), *aff’d*, 697 F.2d 495 (2d Cir. 1983). Such factors may include: whether an industry was “dominated by relatively few sellers”; that “[t]he product is fungible and the competition for sales is price”; and that “[t]he demand is inelastic, as buyers place orders only for immediate, short term needs.” *Battipaglia*, 745 F.2d at 175 (alterations in original) (quoting *United States v. Container Corp. of America*, 393 U.S. 333, 337 (1969)). As mentioned earlier in this Comment, one could convincingly argue that some of those factors are present in the liquor or beer and wine industry.

166. *Battipaglia*, 745 F.2d at 175 (emphasis added).

167. *Id.* at 176–77.

168. *Id.* at 176.

169. *Id.*

170. *Contra id.*

to consumers caused by a minimum price-setting scheme. The Supreme Court has emphasized that the purpose of the active supervision requirement in the *Midcal* test is “to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties.”<sup>171</sup> The Second Circuit’s assertion that there is “nothing that the state can ‘actively supervise’” in a market stabilizing regulatory scheme<sup>172</sup> is misguided, as shown by the opinions of the Fourth and Ninth Circuits emphasizing the importance of state review of post-and-hold prices for reasonableness.<sup>173</sup> Despite its discussion around the state action immunity doctrine, the *Battipaglia* court said, “[R]eliance on *Parker v. Brown* is unnecessary in this case,” and “we think it best to . . . leave the issue for another day.”<sup>174</sup>

In dissent, Judge Winter criticized the *Battipaglia* majority opinion’s focus on the “post” part of the New York statute and the failure to place equal attention on the “hold” requirement, pointing out that “[a] requirement of adherence to announced prices has been uniformly held illegal without regard to its reasonableness.”<sup>175</sup> As a result of the per se illegality of such a provision, the dissent argued that *Midcal*’s two-pronged assessment for state action immunity would in fact apply.<sup>176</sup> Judge Winter asserted that the “majority’s concern that the arrangement here [was] compelled by law rather than achieved through private arrangement” was relevant only to the first part of the *Midcal* test—“whether the challenged restraint is ‘clearly articulated and affirmatively expressed as state policy’”<sup>177</sup>—but “the fact that the state compels a private cartel offers no reason to exempt the legislation from scrutiny under the [S]upremacy [C]lause.”<sup>178</sup>

Moving to the second prong, Judge Winter found that the New York statute failed to meet the “active supervision” requirement: “[T]he only ‘monitoring’ of the state program lies in the provision that responsive price changes cannot be lower than those announced by competitors. . . . which *heightens* rather than monitors the anti-competitive impact of the legislation . . . .”<sup>179</sup> Both the Fourth and Ninth Circuits and leading anti-trust experts, have found the *Battipaglia* dissent’s argument to be more

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171. *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 634–35 (1992).

172. *Battipaglia*, 745 F.2d at 176.

173. *See Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 894–95 (9th Cir. 2008); *TFWS, Inc. v. Schaefer*, 242 F.3d 198, 208–09 (4th Cir. 2001).

174. *Battipaglia*, 745 F.2d at 177.

175. *Id.* at 179 (Winter, J., dissenting) (first citing *Sugar Inst. v. United States*, 297 U.S. 553, 601 (1936); then citing *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 649–50 (1980) (per curiam); and then citing *United States v. Trans-Mo. Freight Ass’n*, 166 U.S. 290 (1897)).

176. *Id.*

177. *Id.* (quoting *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980)).

178. *Id.*

179. *Id.* at 180 (emphasis added).

compelling.<sup>180</sup>

Despite this, in 2019, the Second Circuit applied the majority approach from *Battipaglia*—which was decided prior to the Supreme Court’s *Fisher* opinion—to Connecticut’s post-and-hold regulatory provision.<sup>181</sup> The Second Circuit overlooked *Fisher*’s focus on hybrid versus unilateral restraints and instead focused on the Supreme Court’s use of the term “concerted action.”<sup>182</sup> The Second Circuit admitted that the restraint was hybrid under a *Fisher* analysis, but found that it did not “mandate[ ] or authorize[ ] ‘concerted action’ among the wholesalers subject to it” and therefore could not be the type of “concerted action” that § 1 of the Sherman Act seeks to prohibit.<sup>183</sup> Despite conceding that the post-and-hold provision was hybrid, the court quoted *Fisher*, making a note that “[a] restraint imposed *unilaterally* by government does not become concerted-action within the meaning of the statute simply because it has a coercive effect upon parties who must obey the law.”<sup>184</sup>

The Second Circuit’s decision is puzzling considering that in an earlier decision, it had found that “since [its] decision in *Battipaglia*, the Supreme Court [had] made it clear that an *actual* ‘contract, combination[,] or conspiracy’ need not be shown for a state statute to be preempted by the Sherman Act.”<sup>185</sup> In rejecting the observation from its previous opinion, the Second Circuit distinguished the cited Supreme Court case by claiming that because the conduct in that case was vertical and the wholesalers and retailers “were in privity . . . [t]hey entered . . . agreements against the backdrop (and presumably with the knowledge) of the price-fixing term that state law would supply,” and therefore the collusion requirement of § 1 was met.<sup>186</sup> The Second Circuit further asserted that “Connecticut’s prohibition on altering prices for a 30-day period is a purely negative restraint. It does not call for any private action, let alone concerted action.”<sup>187</sup>

Citing *Fisher*’s mention of concerted action, the Second Circuit concluded that “Judge Friendly was right both to focus on the posting, rather than the holding, component of New York’s post-and-hold law, and to

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180. See *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 893–96 (9th Cir. 2008); *TFWS, Inc. v. Schaefer*, 242 F.3d 198, 210 (4th Cir. 2001); 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 217, at 308–09 (2d ed. 2000) (“Given the great danger that agreements to post and adhere will facilitate horizontal collusion, the dissent’s position [in *Battipaglia*] is more consistent with [Supreme Court precedent].”).

181. *Conn. Fine Wine & Spirits, LLC v. Seagull*, 932 F.3d 22, 34, 36 (2d Cir. 2019).

182. See *id.* at 37–38 (quoting *Fisher v. City of Berkeley*, 475 U.S. 260, 267 (1986)).

183. *Id.* at 38 (“The mere fact that all competing owners must comply with the same provisions of the Ordinance is not enough to establish a conspiracy among landlords.” (quoting *Fisher*, 475 U.S. at 267)).

184. *Id.* (emphasis added) (quoting *Fisher*, 475 U.S. at 267).

185. *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 223 n.17 (2d Cir. 2004) (emphasis added) (quoting *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 345–46 n.8 (1987)).

186. *Conn. Fine Wine & Spirits, LLC*, 932 F.3d at 37.

187. *Id.* at 38 (first citing *Hertz Corp. v. City of New York*, 1 F.3d 121, 127 (2d Cir. 1993); and then citing *Flying J, Inc. v. Van Hollen*, 621 F.3d 658, 662–63 (7th Cir. 2010)).

find the law non-preempted.”<sup>188</sup> Although *Fisher* and its progeny have created confusion around the interplay between per se illegality and state supervision requirements, the Second Circuit’s disjointed assessment and its overlook of *Midcal* have further muddied the waters. The court held that “[t]he gravamen of § 1 is an agreement among competitors,”<sup>189</sup> and quoted another Second Circuit case to say that “parallel behavior that does not result from an agreement is not unlawful even if it is anticompetitive.”<sup>190</sup>

Deviating from its sibling circuits, the Second Circuit found that the post-and-hold provision “facilitates . . . conduct that parties c[ould] legally undertake on their own under § 1” of the Sherman Act.<sup>191</sup> It claimed that because “there [was] a ‘natural’ explanation . . . for the[ ] competitors to arrive at common monthly product prices” due to common economic interests, there was not an agreement among them.<sup>192</sup> The court declined to consider a key point: that the interdependent interest created by the post-and-hold scheme is exactly what obviates the need for an *explicit* agreement because the state regulation fills that role. The court acknowledged that “the law itself invites and facilitates conscious parallelism in pricing” but claimed that such lockstep conduct does not constitute concerted action simply because “[n]othing about th[e] arrangement *requires, anticipates, or incents* communication or collaboration among the competing wholesalers.”<sup>193</sup> To argue that one could not *anticipate* that a post-and-hold provision would result in supracompetitive, nearly identical prices across the wholesaler landscape is to ignore basic economic incentives. To argue that a post-and-hold provision does not *incent* competitors to avoid price wars that would lead to lower prices is to ignore the explicitly stated purpose of such provisions: to keep prices high in order to discourage alcohol consumption.

C. CLARIFICATION IS NEEDED: THE RELATIONSHIP BETWEEN THE UNILATERAL/HYBRID DISTINCTION, ACTIVE GOVERNMENT SUPERVISION, AND THE AGREEMENT REQUIREMENT OF SECTION ONE

Unsatisfied with the Second Circuit’s selective assessment of Connecticut’s post-and-hold pricing scheme, a judge requested a poll on whether to rehear the case en banc.<sup>194</sup> Though the poll did not receive the required majority for a rehearing, four judges composed a scathing dissent criticizing the majority’s failure to take the opportunity to “join federal courts across the country in rejecting *Battipaglia’s* majority opinion” and

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188. *Id.*

189. *Id.*

190. *Id.* (quoting *United States v. Apple, Inc.*, 791 F.3d 290, 315 (2d Cir. 2015)).

191. *Id.* at 39.

192. *Id.*

193. *Id.* (emphasis added).

194. *Conn. Fine Wine & Spirits, LLC v. Seagull*, 936 F.3d 119, 119–20 (2d Cir. 2019).

correctly follow Supreme Court precedent.<sup>195</sup> Judge Sullivan’s dissent highlighted the harsh result of the refusal to rehear the case: in so doing, “[W]e perpetuate a longstanding circuit split and continue to allow de facto state-sanctioned cartels of alcohol wholesalers to impose artificially high prices on consumers and retailers across all three states in our Circuit.”<sup>196</sup> The dissent began its discussion with the striking observation that “the correct legal analysis has been staring us in the face for more than thirty-five years.”<sup>197</sup>

The dissent identified the Second Circuit majority’s primary misstep: “[I]t cites *Fisher* for the proposition that preemption is not warranted unless the statute in question authorizes or compels *actual* ‘concerted action’ among private parties. But again, *Fisher* requires no such thing.”<sup>198</sup> Judge Sullivan highlighted the majority’s preoccupation with finding an unequivocal agreement between competitors, which in turn caused a disregard for the Supreme Court’s decision in *Midcal*: “Simply ending the analysis because of the lack of concerted activity among the wholesalers fails to take into account the presence and effect of the state’s involvement in the matter.”<sup>199</sup>

Given the “unusual circumstances of this case, which turns on a 1984 split decision that has been undermined by intervening Supreme Court case law and roundly rejected by courts and commentators alike,”<sup>200</sup> it was surprising when the Supreme Court declined to consider Total Wine’s challenge to Connecticut’s post-and-hold pricing scheme in early 2020.<sup>201</sup> Scholars and judges alike have bemoaned the confusion caused by the terminology courts have used to develop the state action doctrine.<sup>202</sup> Justice Rehnquist went so far as to say, “I think it quite clear that questions involving the so-called ‘state action’ doctrine are more properly framed

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195. *Id.*

196. *Id.*

197. *Id.* at 120–21 (“In the years following our decision in *Battipaglia*, courts outside our Circuit have—without exception—rejected Judge Friendly’s position and instead followed Judge Winter’s dissent in striking down similar post-and-hold laws.” (first citing *Costco Wholesale Corp. v. Maleng*, 522 F.3d 874, 893–96, 893 n.15 (9th Cir. 2008); then citing *TFWS, Inc. v. Schaefer*, 242 F.3d 198, 209–10 (4th Cir. 2001); then citing *Canterbury Liquors & Pantry v. Sullivan*, 16 F. Supp. 2d 41, 47 (D. Mass. 1998); then citing *Miller v. Hedlund*, 813 F.2d 1344, 1348–51 (9th Cir. 1987); and then citing *Beer & Pop Warehouse v. Jones*, 41 F. Supp. 2d 552, 560–62 (M.D. Pa. 1999))). *But see id.* at 123 n.1 (“[T]wo state supreme courts ruled that their states’ post-and-hold laws were unilateral restraints not subject to preemption under the Sherman Act.” (first citing *Intercontinental Packaging Co. v. Novak*, 348 N.W.2d 330, 337–38 (Minn. 1984); and then citing *Wine & Spirits Specialty, Inc. v. Daniel*, 666 S.W.2d 416, 418–19 (Mo. 1984))).

198. *Id.* at 122 (emphasis added) (citation omitted) (citing *Conn. Fine Wine & Spirits, LLC v. Seagull*, 932 F.3d 22, 38 (2d Cir. 2019)) (“[A] hybrid restraint may be attacked under *Fisher* even when ‘there is no “contract, combination . . . , or conspiracy, in restraint of trade.”’ (quoting *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 345 n.8 (1987))).

199. *Id.* (quoting *Hedlund*, 813 F.2d at 1349).

200. *Id.* at 124.

201. *See Conn. Fine Wine & Spirits, LLC v. Seagull*, 140 S. Ct. 2641, 2641 (2020).

202. *See Lopatka & Page, supra* note 95, at 270 n.3.

as being ones of pre-emption rather than exemption.”<sup>203</sup> The Supreme Court should have taken the opportunity to clarify the requirements of state liquor regulatory programs in light of federal antitrust laws. Specifically, the case would have been an ideal opportunity to elucidate the relationship between the unilateral versus hybrid distinction, the requirement for active state supervision, and the per se violation requirement for antitrust preemption.

#### IV. POST-AND-HOLD LAWS ARE NECESSARILY COLLUSIVE AND ARE A COSTLY WAY TO PROMOTE CONSUMER WELFARE

##### A. THE ANTICOMPETITIVE COLLUSION FACILITATED BY POST-AND-HOLD SCHEMES IS SUFFICIENT TO MEET THE CONCERTED ACTION REQUIREMENT OF SECTION ONE

The Supreme Court has previously recognized that “the federal antitrust laws pre-empt state laws authorizing or *compelling* private parties to engage in anticompetitive behavior,”<sup>204</sup> and in doing so rejected the “contention that there is no ‘contract, combination . . . , or conspiracy, in restraint of trade’” underlying the behavior.<sup>205</sup> The Second Circuit’s requirement of an explicit agreement in order to satisfy the collusion aspect of the Sherman Act is misguided because the primary purpose of a state regulatory scheme is to compel a particular behavior from market participants, which in the case of post-and-hold provisions, forces what—in practice—amounts to cartel-like behavior that could otherwise be accomplished only through express agreement. It is precisely the government’s scheme that allows collusion to *appear* tacit rather than explicit. The Second Circuit’s interpretation of the *Midcal* and *Fisher* tests means that it would likely *never* find the requisite explicit collusion in a state regulatory scheme because the state could claim that there was no “meeting of the minds.” The Supreme Court has expressly rejected that stance, saying “a state [can]not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful.”<sup>206</sup>

The post-and-hold scheme is “a repeated game, played by the same participants month after month,” in which the supposed regulator makes cartel prices possible.<sup>207</sup> The players are aware of this; the game is rigged in their favor, and there is no incentive for the oligopolists to compete on price. In schemes where rivals are able to revise their prices after seeing their competitors’ prices, there is no incentive to do so: “Cutting prices in

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203. *Id.* (quoting *Cnty. Commc’ns Co. v. City of Boulder*, 455 U.S. 40, 62 (1982) (Rehnquist, J., dissenting)).

204. *324 Liquor Corp.*, 479 U.S. at 345 n.8 (emphasis added) (citing *N. Securities Co. v. United States*, 193 U.S. 197, 345–46 (1904) (plurality opinion)).

205. *Id.* (quoting 15 U.S.C. § 1).

206. *Parker v. Brown*, 317 U.S. 341, 351 (1943) (citing *N. Securities Co.*, 193 U.S. at 332, 344–47).

207. Conlon & Rao, *supra* note 45, at 11.

the first stage merely reduces the size of the profits *without any change to the division*" of the profits.<sup>208</sup> Empirical studies have found that rivals very rarely update their prices in the second stage because the players have already figured out how to exploit the regulatory scheme.<sup>209</sup> Such consistent economic patterns are evidence of tacit collusion in the marketplace.

Another phenomenon goes to show there is an understanding amongst competitors: in markets free of collusion, an increase in the number of firms who sell a particular product usually leads to a decrease in price.<sup>210</sup> In a post-and-hold market, however, "unless the entrant has a lower opportunity cost of selling than any firm in the existing market, prices would not decline, and . . . the division of surplus . . . [would] be reduced for the incumbents to accommodate the entrant."<sup>211</sup> Under such a scheme, the introduction of additional competitors may "counterintuitively lead to higher prices."<sup>212</sup> The economic patterns are sufficient to infer an illegal agreement among the competitors: "If a firm raises price in the expectation that its competitors will do likewise, and they do, the firm's behavior can be conceptualized as the offer of a unilateral contract that the offer-ees accept by raising their prices."<sup>213</sup>

Scholars who have argued against holding anticompetitive tacit agreements as unlawful have often based their reasoning on the difficulty of crafting a "sensible and appropriate remedy" to address the oligopolists' engagement in the collusion.<sup>214</sup> The arguments that a remedy would be "hopelessly vague" or "demand 'irrational behavior'" are unpersuasive, however, in situations where the tacit collusion is caused by a government regulatory scheme.<sup>215</sup> The remedy is straightforward: enjoin the state provision causing the anticompetitive collusive behavior.<sup>216</sup>

Judge Posner has argued that "[t]acit collusion is not an unconscious state," and therefore appropriate remedies would not attempt to force "oligopolists to behave irrationally."<sup>217</sup> Even scholars that would not

208. *Id.* at 10, 13 ("The competitive equilibrium under [post-and-hold] results in prices at least as high as the lowest-opportunity-cost single-product monopolist would have set, even though firms play a single period non-cooperative game, in which several firms distribute identical products."); *see also* Lopatka & Page, *supra* note 95, at 300 n.157 (arguing "if a state allowed a single competitor to choose a price, and ordered all other competitors to charge the price selected, the regulation would amount to authorization of an explicit price fixing arrangement," which, in practice, is what the post-and-hold endorses).

209. *See, e.g.,* Conlon & Rao, *supra* note 45, at 13, 15 ("[L]ess than 1% of prices are amended in the second stage.").

210. *Id.* at 13.

211. *Id.*

212. *Id.* at 14.

213. Lopatka & Page, *supra* note 95, at 302 (quoting *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 654 (7th Cir. 2002)).

214. *See id.* at 304 (citing Donald F. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 669-70 (1962)).

215. *See id.* at 304-05, 308-09.

216. *See id.* at 312.

217. RICHARD A. POSNER, *ANTITRUST LAW*, 97-98 (2d ed. 2001).

readily hold tacit collusion (such as interdependent pricing) as unlawful are “willing to condemn cases of oligopolistic interdependence supported by facilitating practices”—such as the government’s facilitation of competitors’ fixed prices through post-and-hold schemes—because they “can envision a sensible injunction against such practices.”<sup>218</sup> Of course, if the competitors continued to fix prices after the preemption of the state regulatory scheme, “then the relevant restraint would be the subsequent agreement, a wholly private restraint, and . . . the actors would be liable for violating [§] 1.”<sup>219</sup>

B. POST-AND-HOLD PROVISIONS ALLOW PRIVATE ACTORS TO  
DETERMINE THE NATURE AND EXTENT OF CONSUMER  
HARM PERPETUATED BY THE STATE-PROTECTED  
CARTEL

Particularly in post-and-hold schemes that allow competitors to revise their prices within a set period of time after the initial posting, the government’s involvement is not sufficient to meet *Midcal*’s second prong for state action immunity because the state is merely enforcing private marketing decisions rather than prescribing specific uniform behavior. In post-and-hold schemes, “private discretion . . . is not the discretion to engage in the facilitating practice; the statute may unambiguously compel private actors to engage in the precise conduct that facilitates tacit collusion.”<sup>220</sup> Rather, “private discretion inheres in the private collusion that compliance with the statute predictably enables.”<sup>221</sup> The resulting collusion, “not the conduct required by the statute, is the source of the anticompetitive injury.”<sup>222</sup> In effect, the state acts as a conduit for what would otherwise be illegal cartel behavior: disseminating specific pricing information and allowing competitors to respond to the unveiled information which inevitably leads to fixed prices.<sup>223</sup> The complete transparency creates a risk-free marketplace for oligopolists that they would not otherwise enjoy in a free market, and hinders both interbrand and intrabrand competition.

Post-and-hold regulatory schemes place “irresistible pressure on . . . private part[ies] to” fix monopolistic, artificially high prices in concert with one another and therefore must be condemned under § 1 of the Sherman Act.<sup>224</sup> As Justice Stevens has stated, “[e]ven though the State presumably could regulate the . . . market by fixing . . . prices itself, it

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218. See, e.g., Lopatka & Page, *supra* note 95, at 304–06.

219. *Id.* at 312.

220. *Id.* at 301–02.

221. *Id.* at 302.

222. *Id.*

223. See *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 238 (1993) (“Tacit coordination is facilitated by a stable market environment, fungible products, and a small number of variables upon which the firms seeking to coordinate their pricing may focus.”). Post-and-hold provisions provide fertile ground for tacit collusion.

224. See *Rice v. Norman Williams Co.*, 458 U.S. 654, 661 (1982).

could not empower private parties to undertake such regulation.”<sup>225</sup> Post-and-hold schemes allow the individual actors to collectively “determine the nature and extent of the resulting consumer injury”—a right that must remain with the state government in order for the regulation to avoid antitrust violation and thus preemption.<sup>226</sup> Post-and-hold schemes create a state-enabled cartel, and the Supreme Court has already recognized that a state law that facilitates cartelization is grounds for invalidation.<sup>227</sup>

C. THERE ARE ALTERNATIVES TO POST-AND-HOLD PROVISIONS  
THAT MORE EFFECTIVELY PROMOTE TEMPERANCE WHILE  
AVOIDING THE PROVOCATION OF  
ANTICOMPETITIVE INJURIOUS CONDUCT

Both courts and scholars have acknowledged that there are likely better ways to promote the goals that post-and-hold provisions purport to encourage without “run[ning] afoul” of antitrust law, such as the adoption of higher excise taxes.<sup>228</sup> There is widespread agreement that lower societal consumption of alcohol leads to important benefits such as lower rates of vehicular accident fatalities, a healthier population, and reduced crime;<sup>229</sup> however, a recent study found that post-and-hold regulations are a “costly way to reduce [the] consumption [of alcohol]” because they “also distort[ ] relative prices and thus product choices.”<sup>230</sup> For example, through the post-and-hold system, “[b]ecause market power leads firms to price to inverse elasticities, relative markups are higher on higher-quality premium products, and consumers distort their purchase decisions downwards on the quality ladder.”<sup>231</sup> Because the state-created cartel sets prices based on “consumer[s]’ willingness to pay,” free from the normal requirement to compete on price, the monopolist sets perceived “high-end” products at the highest price without regard to alcohol content.<sup>232</sup> Replacing post-and-hold provisions with alternative means of promoting temperance that focus on the ethanol content of the products, rather than just the willingness of consumers to pay for a perceived no-

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225. *Id.* at 667 n.2 (Stevens, J., concurring).

226. Lopatka & Page, *supra* note 95, at 273.

227. *See* 324 Liquor Corp. v. Duffy, 479 U.S. 335, 342–43 (1987).

228. Costco Wholesale Corp. v. Maleng, 522 F.3d 874, 885 (9th Cir. 2008); Conlon & Rao, *supra* note 45, at 3.

229. *E.g.*, Conlon & Rao, *supra* note 45, at 8.

230. *Id.* at 3.

231. *Id.* at 35.

232. *See id.* at 14–15. The study provided the following example:

Dubra Vodka and Grey Goose Vodka . . . contain identical amounts of pure ethanol. Dubra does not spend any money on advertising and is available only in plastic bottles, and Grey Goose spends almost \$15 million on advertising each year. While Grey Goose frequently sells for over \$29.99 per bottle, Dubra sells for \$7.99. Concerned about only the *externality*, the social planner would set similar price-cost margins for both goods. Concerned with *profits*, the monopolist might be inclined to set a relatively low margin on the more elastically-demanded Dubra, and a higher margin on the more inelastically demanded Grey Goose. . . .

tion of luxury, would more effectively achieve the benefits derived from lower consumption. Additionally, although post-and-hold provisions have, in some cases, been found to successfully reduce consumption, replacing the anticompetitive provisions with a tax would promote temperance while also serving the additional purpose of raising revenue for the state government.<sup>233</sup>

Lower alcohol consumption in the abstract should not necessarily be the end goal of regulatory schemes; rather, the benefits derived from lower consumption should be the focus of any protectionist attempts to temper consumption. Post-and-hold provisions have been associated with lower levels of consumption, but studies have found “no statistically measurable relationship between [post-and-hold] laws and either drunk driving accidents or underage drinking.”<sup>234</sup>

Another oft-cited goal of post-and-hold schemes—the protection of small retail businesses—is met in some regards but fails in other important ways. States with post-and-hold provisions have been found to have a larger share of small retailers, but also “lower employment in the liquor retail sector[ ] and fewer retail stores per capita.”<sup>235</sup> Further, “[w]hile under [post-and-hold laws,] small retailers enjoy uniform pricing, they also pay the higher prices that result from non-competitive wholesaler pricing behavior.”<sup>236</sup> These higher prices are then passed on to the consumer. In Connecticut, for example, the state’s regulatory scheme has resulted in “retail prices for wine and spirits . . . that are as much as 24% higher than prices offered for identical products in the surrounding states.”<sup>237</sup>

## V. CONCLUSION

Courts, scholars, and participants at all levels in the alcohol distribution chain lack clarity about the legality of post-and-hold provisions. More alarmingly, there is considerable confusion about key elements in the Supreme Court’s antitrust and preemption jurisprudence regarding the extent to which an explicit agreement is needed for preemption based on

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By undoing the distortion the monopolist creates in relative prices, we would expect to lower the price of the most inelastically-demanded goods.

*Id.* (emphasis added). Essentially, by replacing the post-and-hold provision with an excise tax, consumers would be able to pay lower prices for higher quality products. *See id.* This is one conception of an improvement in consumer welfare through the riddance of post-and-hold provisions.

233. *See id.* at 8; Cooper & Wright, *supra* note 32, at 382 n.35 (noting “the Supreme Court has stated in dicta that raising revenues” was a valid state interest under the Twenty-first Amendment).

234. *See, e.g.,* Cooper & Wright, *supra* note 32, at 391 (“If states wish to reduce the social ills associated with drinking, our results—which are consistent with others—suggest that increasing taxes and enacting laws directly targeting social harms are superior policy instruments to [post-and-hold] laws.”).

235. Conlon & Rao, *supra* note 45, at 20.

236. *Id.* at 19.

237. *Conn. Fine Wine & Spirits, LLC v. Seagull*, 932 F.3d 22, 28 (2d Cir. 2019) (citing Complaint ¶ 18, *supra* note 153).

§ 1 of the Sherman Act, the interplay between *Fisher's* distinction of unilateral versus hybrid restraints and *Midcal's* two-pronged state immunity doctrine, and the order of operations for the application of all these analyses. The complexity and disarray in this area have not only led to different processes—shown by the Ninth and Fourth Circuits' divergent approaches in applying Supreme Court precedent to post-and-hold provisions—but have also led to disparate results shown by the Second Circuit's decision to reapply *Battipaglia's* holding even in light of newer Supreme Court guidance. Post-and-hold provisions should not be permitted to continue to cast a “gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.”<sup>238</sup>

Though the involvement of alcohol in post-and-hold regulations requires unique consideration under the Twenty-first Amendment, the Supreme Court's clarification of the law in the area of preemption by antitrust laws would have broader implications for other state fair trade and regulatory practices. The lack of clarity surrounding state action analysis could lead to troubling circumstances in which private parties—engaging in a state-imposed hybrid restraint ultimately found to violate federal antitrust laws and to fail immunity tests—are then exposed to liability for treble damages.<sup>239</sup> Without Supreme Court resolution, “private parties who restrain trade pursuant to government directives do so at their peril.”<sup>240</sup>

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238. *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980); *see also* *N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494, 505–06 (2015) (“[P]rohibitions against anticompetitive self-regulation by active market participants are an axiom of federal antitrust policy.” (citing *Hoover v. Ronwin*, 466 U.S. 558, 584 (1984) (Stevens, J., dissenting) (“The risk that private regulation of . . . prices . . . may be designed to confer monopoly profits on members of an industry at the expense of the consuming public has been the central concern of . . . our antitrust jurisprudence.”))).

239. Lopatka & Page, *supra* note 95, at 292.

240. *Id.*