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DON'T BAN THE BARS: WHY THE SOUTH CAROLINA GENERAL ASSEMBLY SHOULD DECLINE TO ADOPT A REVENUE REQUIREMENT FOR LIQUOR LICENSES

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"You can lead a horse to water, but you cannot force it to drink."
– Old English Proverb

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I. INTRODUCTION

The turn of the twenty-first century was an especially difficult time to be a South Carolina Gamecocks football fan. Famed Notre Dame Irish head coach Lou Holtz had just come out of retirement, only to lead the Gamecocks to a 0–11 record in his inaugural season.[1] However, hope—something Gamecock fans never seem to have a shortage of—was right around the corner.

On September 2, 2000, the Gamecocks defeated the New Mexico State Aggies to break a twenty-one game losing streak, the longest in the nation at the time.[2] A week later, the Gamecocks would intercept Georgia Quarterback Quincy Carter five times, leading to a 21–10 upset of the tenth-ranked team in the country.[3] At the conclusion of the game, South Carolina fans feverishly stormed the field and tore down the goal posts.[4] A particularly motivated crowd of fans carried one of the goal posts almost three miles from Williams-Brice stadium to the center of student nightlife in Columbia: Five Points.[5]

The Five Points retail district, located in Columbia, South Carolina, and a mere five-minute walk from the campus of the state's flagship university,

1. Joe Drape, *Holtz Goes from 0-11 to Oh, Boy*, N.Y. TIMES (Sep. 25, 2000), https://www.nytimes.com/2000/09/25/sports/on-college-football-holtz-goes-from-0-11-to-oh-boy.html [https://perma.cc/PN2P-JA29].

2. Pete Iacobelli, *South Carolina 21, No. 9 Georgia 10*, ASSOCIATED PRESS (Sep. 9, 2000), https://apnews.com/article/81ac46ef067b88a741a17b774a8a1888 [https://perma.cc/XFN6-HNXC]; Brandon Larrabee, *Where We Came From: Remember When*, SB NATION (Jul. 9, 2010, 10:30 AM), https://www.teamspeedkills.com/2010/7/9/1560531/where-we-come-from-remember-when [https://perma.cc/VNC6-VAL9].

3. Iacobelli, *supra* note 2.

4. *See* Larrabee, *supra* note 2; RockThrillCock, Comment to *Who remembers 9/2/2000 and 9/9/2000*, GAMECOCK CENT. (Oct. 14, 2016), https://southcarolina.forums.rivals.com/threads/who-remembers-9-2-2000-and-9-9-2000.205485 [https://perma.cc/55T9-VG9T].

5. *See* sources cited *supra* note 4.

has been the city's "original village neighborhood" for over one hundred years.[6] During the daytime, it has been described as a "quaint area [filled with] an array of cafés, coffee shops, and locally owned boutiques."[7] However, after the sun sets and the boutiques lock up for the night, the area transforms from a "funky urban village" into a "vivid nightlife" scene.[8] Although, according to some local residents, this vivid nightlife scene is more aptly described as a "raucous college party."[9] These residents view Five Points as "an 'attractive nuisance' for underage drinkers leading to 'obnoxious alcohol-fueled shenanigans' that harm the neighboring area."[10] The residents "report a wide range of problems" that they believe stem from late-night activity in Five Points, including vandalism, littering, public urination, property damage, and public intoxication.[11]

A similar discussion on Five Points and state liquor laws was published by *South Carolina Law Review* member Annie Day Bame in 2019.[12] In her Note, she attributed the "social harms" alleged by some residents to "the density of bars" in Five Points and "the high rate of underage overconsumption in the area."[13] Bame suggested that "[t]he alcohol-related problems in the Five Points area exemplify the precise issues South Carolina alcohol laws ineffectively seek to prevent."[14] To address these perceived shortcomings, Bame endorsed a state-wide requirement that liquor licensees for on-premises consumption derive a certain percentage of their revenue from the sale of food relative to the sale of alcohol.[15] This view is also shared by local trial attorney and State Senator Dick Harpootlian,[16] who introduced legislation in 2021 to require on-premises liquor licensees to derive at least 51% of their revenue from the sale of food compared to the sale of alcoholic beverages.[17]

While this Note does not seek to dispute that underage drinking and nuisance behavior occur in Five Points, nor does it seek to dispute that some

6. *Welcome to Five Points!*, FIVE POINTS COLUMBIA, https://fivepointscolumbia.com [https://perma.cc/BE24-AWXY].

7. Annie Day Bame, Note, *Antiquated Relics or Misunderstood Mess: Why South Carolina Liquor Laws Are Ripe for Restructuring*, 70 S.C. L. REV. 1017, 1018 (2019).

8. Sarah Ellis et al., *Lust, Long Lines and Liquor Towers: How Five Points Lights Up After Dark*, STATE (Mar. 9, 2018, 10:50 PM), https://www.thestate.com/news/local/article204038224.html [https://perma.cc/SQ53-G8YB].

9. *Id.*

10. Bame, *supra* note 7, at 1018.

11. *Id.*

12. *See generally id.*

13. *Id.* at 1018.

14. *Id.*

15. *See id.* at 1042.

16. Bame worked for Harpootlian during law school.

17. S. 536, 124th Gen. Assemb., Reg. Sess. (S.C. 2021).

form of government action may be beneficial, this Note argues that the revenue requirement proposed by Bame and Harpootlian would be both ineffective and harmful to the state's economy and small business, and it should not be adopted in lieu of better solutions for these issues. This Note will begin by briefly discussing the history of South Carolina's alcohol laws and the origins of the revenue requirement debate in Part II. Part III examines the potential efficacy of a revenue requirement and the impacts that it may have on South Carolina business owners and the state's economy. Part IV will analyze constitutional challenges that a revenue requirement may face in court. Finally, Part V will explore the potential for dram shop liability to more effectively curb alcohol-related harms.

II. BACKGROUND

A. Historical Perspectives

South Carolina has regulated the manufacture, sale, and consumption of alcohol since colonial times.[18] Driven by religious and moral concerns over the effects of alcohol, South Carolina adopted a statewide prohibition on the sale and consumption of alcohol in 1915, and, three years later, voted to ratify the Eighteenth Amendment enacting nationwide prohibition.[19] Two years after the national prohibition was repealed in 1933 by the Twenty-first Amendment, South Carolina began to permit the sale of liquor by retail liquor stores.[20]

However, the now-common practice of ordering liquor drinks at a restaurant was prohibited.[21] Restaurant patrons who sought to imbibe during their meal resorted to the common practice of "brown-bagging," whereby they would bring their own liquor to the restaurant in a brown paper bag.[22] It was not until 1973 that the state legislature permitted the on-premises sale of liquor by restaurants through the use of mini-bottles, and allowed pours from full-sized liquor bottles in 2006.[23]

B. South Carolina's Current Alcohol Licensing Regime

Section One of Article VIII-A of the South Carolina constitution, grants the General Assembly the "police power . . . to prohibit and to regulate the

18. Bame, *supra* note 7, at 1020.
19. *Id.* at 1023.
20. *Id.*
21. *See id.* at 1024.
22. *Id.*
23. *Id.* at 1024–25.

manufacture, sale, and retail of alcoholic liquors or beverages within the State."[24] Under this constitutional provision, only four categories of businesses may be licensed to sell liquor: liquor stores, hotels, non-profit organizations closed to the general public (i.e., private clubs), and "businesses which engage *primarily and substantially in the preparation and serving of meals*" (i.e., restaurants).[25] Liquor stores may only sell liquor for off-premises consumption, while the latter three categories may only sell liquor for on-premises consumption.[26] The laws enacted by the General Assembly under this grant of police power are codified in Title 61 of the South Carolina Code of Laws.[27]

Chapter 6 of Title 61, also known as the Alcoholic Beverage Control Act (ABC Act), governs the sale of "alcoholic liquors" or "alcoholic beverages," which are defined circularly as a beverage containing alcohol but not "declared by statute to be nonalcoholic or nonintoxicating."[28] This definition is not particularly illuminating until it is read in conjunction with Chapter 4 of Title 61, which declares beer, ale, porters, and wine of a certain alcoholic content to be "nonalcoholic and nonintoxicating" beverages.[29] This definition, counterintuitive to the plain and ordinary meaning of the term "alcoholic beverage,"[30] means that most beer, ale, porter, and wine products are excluded from both the provisions of the ABC Act and the restrictions on the sale of

24. S.C. CONST. art. VIII-A, § 1.

25. *Id.* (emphasis added). Absent from that list is a category of business that a layperson would consider to be a bar. That is not to say that bars do not exist in South Carolina; a Google search of "Columbia bars" leads to articles ranking the best bars in Columbia. *See, e.g.*, *Best of Columbia 2020: Clubs and Bars*, FREE TIMES (Aug. 20, 2020), https://www.postandcourier.com/free-times/best-of-columbia-2020-clubs-and-bars/article_ba16f2f0-e173-11ea-9317-b390ee49f1c4.html [https://perma.cc/E2KZ-ND42]. Despite the existence of de facto bars selling liquor in South Carolina, these establishments are de jure restaurants, or perhaps more accurately, these establishments are engaged primarily and substantially in the preparation and serving of meals. The requirements for a business to engage primarily and substantially in the preparation and serving of meals is at the center of this debate.

26. *See* S.C. CONST. art. VIII-A, § 1.

27. *See* S.C. CODE ANN. §§ 61-2-10 to -12-70 (2022).

28. *Id.* § 61-6-20(1)(a).

29. *Id.* § 61-4-10. More specifically: "(1) all beers, ales, porters, and other similar malt or fermented beverages containing not in excess of five percent of alcohol by weight; (2) all beers, ales, porters, and other similar malt or fermented beverages containing more than five percent but less than fourteen percent of alcohol by weight that are manufactured, distributed, or sold in containers of six and one-half ounces or more or the metric equivalent; and (3) all wines containing not in excess of twenty-one percent of alcohol by volume." *Id.*

30. *See Alcoholic Beverage*, ENCYC. BRITANNICA (Nov. 10, 2021), https://www.britannica.com/topic/alcoholic-beverage [https://perma.cc/VH8Q-ZTSF] (defining an alcoholic beverage as including beer, wine, and spirits).

liquor under Section One of Article VIII-A.[31] The manufacture, sale, and consumption of these "nonalcoholic" alcohol containing beverages are governed exclusively by the provisions of Chapter 4 of Title 61.[32]

Article 5 of the ABC Act sets the requirements for a license for the on-premises sale of liquor.[33] This Article allows three categories of businesses to receive a license for on-premises liquor sales: hotels, non-profit organizations,[34] and for-profit businesses that are "bona fide engaged primarily and substantially in the preparation and serving of meals or furnishing of lodging."[35] This language "mirrors the language of the mandate of our state's constitution."[36]

The provisions of Title 61 are administered by the South Carolina Department of Revenue (SCDOR) and enforced by the South Carolina Law Enforcement Division (SLED).[37] The legislature granted the SCDOR the sole authority to issue beer, wine, and liquor licenses and the authority to promulgate regulations.[38] These regulations are codified in Chapter 7 of the South Carolina Regulations.[39] A party wishing to contest a decision of the SCDOR may appeal to the South Carolina Administrative Law Court (SCALC).[40]

C. The "Crusade" Begins

Among those calling for change to the state's liquor laws and to Five Points, there is no louder voice than that of Dick Harpootlian.[41] During an April 2017 Columbia City Council meeting, Harpootlian proclaimed that he would "shut down every bar in Five Points without [the City Council's] help,

31. *See* § 61-6-40 (2022) (explaining that the ABC Act is "not in conflict with the laws providing for the lawful sale of beers, wine, and other vinous, fermented or malt liquors."). This explains why, for example, beer and wine may be sold in a convenience store at any time of day, while liquor may only be sold during certain hours and only in a liquor store.

32. *See id.* § 61-4-10.

33. *See generally id.* §§ 61-6-1600 to -6-2610.

34. *Id.* § 61-6-1600(A).

35. *Id.* § 61-6-1610(A)(1).

36. Five Points Roost, LLC v. S.C. Dep't of Revenue, No. 18-ALJ-17-0005-CC, 2018 WL 1724696, at *10 (S.C. Admin. Ct. Apr. 3, 2018). The only difference between the constitutional provision and the statute is that the statute prefaces the constitutional language with the term "bona fide." *Compare* § 61-6-1610(A)(1), *with* S.C. CONST. art. VIII-A, § 1.

37. S.C. CODE ANN. § 61-2-20.

38. *Id.* §§ 61-2-20, -60, -70.

39. *See* S.C. CODE ANN. REGS. 7-200 (2011 & Supp. 2021).

40. *See* S.C. CODE ANN. § 61-2-260 (2022).

41. *See* Chris Trainor, *Dick's Last Resort: Harpootlian is Hell-Bent on Changing Five Points*, FREE TIMES (Dec. 16, 2019), https://www.postandcourier.com/free-times/cover_story/dick-s-last-resort-harpootlian-is-hell-bent-on-changing-five-points/article_1f68d22f-258e-5603-a657-c444f6ea9594.html [https://perma.cc/PA5P-YGDL].

apparently, because the city does not have the will to enforce its own laws."[42] According to Harpootlian, the city had failed to enforce its own zoning ordinance that stated that "drinking places shall not be located closer than 400 feet to any other lot used as a drinking place."[43] The next year, Harpootlian brought a lawsuit against the City of Columbia that sought to compel the enforcement of the zoning ordinance.[44] The City Council subsequently repealed the zoning ordinance in 2019.[45]

Undeterred, the veteran trial lawyer decided to take the matter into his own hands by taking the bar owners to court. Harpootlian began his self-proclaimed "crusade" [46] against Five Points earlier that year when he began representing residents of the University Hill neighborhood (which sits adjacent to Five Points) in successfully blocking liquor licensure for a planned Five Points Roost bar, Roost.[47] In his filings with the SCALC, Harpootlian described Five Points as an "attractive nuisance" where inebriated often underage students congregate in mass, commit crimes, and "vomit, urinate, defecate, and engage in sexual acts in public."[48] Harpootlian argued that Roost should be denied a liquor license on various grounds, including, *inter alia*, that the proposed bar would not qualify as a business "primarily and substantially engaged in the preparation and serving of meals" because "the sale of food [would] contribute[] only five to ten percent of revenue to the business."[49]

To support this position, Harpootlian has cited *Brunswick Capital Lanes v. South Carolina Alcoholic Beverage Commission*, a 1976 South Carolina Supreme Court case, which held that a liquor license could not be granted to a business that derived only 10% of its revenue from food because that business would not be "bona fide primarily and substantially engaged in the preparation and serving of meals."[50] In that case, the South Carolina Alcoholic Beverage Commission, whose duties have since been subsumed by the SCDOR, appealed a circuit court decision granting Brunswick Capital Lanes,

42. *Id.*

43. *Id.*; COLUMBIA, S.C., MUNICIPAL CODE § 17-269(1) (2018); *see also id.* § 17–55 (defining drinking place as "an establishment having as its principal use the retail sale of alcoholic beverages, such as beer, liquor or wine for consumption on the premises").

44. *See* Petition for Declaratory Judgment and Injunctive Relief at 1, DuBose v. Aggressive Lifestyle, LLC, No. 2018-CP-40-02582 (S.C. Ct. Comm. Pl. May 10, 2018).

45. *See* COLUMBIA, S.C., ORDINANCE 2019-013 (Aug. 20, 2019) (enacting a new zoning regime not including the 400 feet rule for drinking places).

46. Trainor, *supra* note 41.

47. Five Points Roost, LLC v. S.C. Dep't of Revenue, No. 18-ALJ-17-0005-CC, 2018 WL 1724696, at *1 (S.C. Admin. Ct. Apr. 3, 2018).

48. *Id.* at *4.

49. *Id.* at *2, *12.

50. *Id.* at *12 (quoting Brunswick Cap. Lanes v. S.C. Alcoholic Beverage Comm., 273 S.C. 782, 784, 260 S.E.2d 452, 453 (1979)).

a bowling alley, a license to sell mini-bottles of liquor.[51] The bowling alley contained a snack bar and lounge that generated approximately 10% of the bowling alley's total revenue, with approximately 80% coming from the bowling operations.[52]

At the time, the General Assembly defined "bona fide primarily and substantially engaged in the preparation and serving of meals" as "a business which has been issued a Class A restaurant license prior to issuance of license under this article and in addition provides facilities for seating for not less than forty persons simultaneously at tables for the service of meals."[53] Despite possessing the requisite restaurant license and having seating for fifty-two, the supreme court reversed the trial court's determination that the bowling alley was entitled to a liquor license.[54] The court stated that meeting the statutory requirements was "not the determinative factor; rather, the legislature has stated that the critical test is whether the business engaged 'primarily and substantially in the preparation and serving of meals.'"[55]

To determine whether the bowling alley was "bona fide engaged primarily and substantially in the preparation and serving of meals," the court relied on the plain and ordinary meaning of the word "primarily" as "of first importance" or "principally."[56] The court concluded that "a business which attributes only ten percent of its gross revenues to food preparation and sale does not fulfill the 'primary' and 'substantial' requirements of the statute."[57] In essence, the court interpreted the statute as adding threshold requirements to obtain a liquor license, rather than defining what constitutes primarily and substantially engaged in the preparation and serving of meals.

However, in 2008, the General Assembly amended the ABC Act to modify the definition of "primarily and substantially engaged in the preparation and serving of meals."[58] The Act also added a new section defining the meaning of the word "primarily":

51. *Brunswick,* 273 S.C. at 783–84, 260 S.E.2d at 453.

52. *Id.* at 783, 260 S.E.2d at 452.

53. *Id.* at 783, 260 S.E.2d at 452–53 (quoting S.C. CODE ANN. § 61-5-10(1) (Supp. 1978) (recodified as S.C. CODE ANN. § 61-6-20(2) (Supp. 1996) by Act of Jun. 4, 1996, No. 415, § 8, 1996 S.C. Acts 2458, 2543)).

54. *Id.* at 783–84, 260 S.E.2d at 453.

55. *Id.* at 784, 260 S.E.2d at 453.

56. *Id.* at 783, 260 S.E.2d at 453 (citing Malat v. Riddell, 383 U.S. 569, 572 (1966)).

57. *Id.* at 784, 260 S.E.2d at 453.

58. Act of Jun. 11, 2008, No. 287, § 2(A), 2008 S.C. Acts 2417, 2418 (codified as amended at S.C. CODE ANN. § 61-6-20(2) (2022)). The Act replaced the requirement for a "Grade A retail food establishment permit," with the requirement that establishments licensed as restaurants be equipped with a kitchen, post menus in conspicuous places, and offer at least one hot meal per day. *Id.*

> "Primarily" means that the serving of the meals by a business establishment is a regular source of business to the licensed establishment, that meals are served upon the demand of guests and patrons during the normal mealtimes that occur when the licensed business establishment is open to the public, and that an adequate supply of food is present on the licensed premises to meet the demand.[59]

Roost argued that the intent of the 2008 Act was to supersede the court's decision in *Brunswick*, "rendering the percentage of sales attributable to food an irrelevant test of a restaurant's bona fides."[60] The SCALC disagreed.[61] This same issue, i.e., whether the 2008 Act renders *Brunswick* moot, was also brought before the South Carolina Court of Appeals by another Five Points bar in 2019.[62] However, the parties settled before an appellate decision on the issue could be rendered.[63] Consequently, until a higher court rules otherwise, the ten percent threshold announced in *Brunswick* still looms over liquor licensees.

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59. *Id.* § 2(B)(3), 2008 S.C. Acts at 2419 (codified as amended at S.C. CODE ANN. § 61-6-1610(I) (2022)).

60. Five Points Roost, LLC v. S.C. Dep't of Revenue, No. 18-ALJ-17-0005-CC, 2018 WL 1724696, at *12 (S.C. Admin. Ct. Apr. 3, 2018).

61. *Id.* ("While it is true that the language and code section number of the definition has changed since Brunswick was decided, a specific definition of 'bona fide engaged primarily and substantially in the preparation and serving of meals' was codified in statute and considered by the Brunswick court. The court held that despite a specific definition of 'bona fide engaged primarily and substantially in the preparation and serving of meals' (found in Code Section 61-[5-10(1)] at that time) a business must not only meet the technical requirements outlined in the statute, but must also actually be 'primarily' engaged in the preparation and serving of meals.").

62. *See* Final Brief of Respondent at 14-19, Rooftop Bar, LLC v. S.C. Dep't of Revenue, No. 2018-1870 (S.C. Ct. App. Mar. 12, 2019), 2019 WL 1979426, at *14–*19 ("A plain reading of the Act and Amendments make it clear that the language placed in the statute responded to the Court's points in Brunswick. The General Assembly defined 'Primarily' in a way that would change the outcome of Brunswick. Moreover, it added additional requirements for clarity. [SC]DOR has followed this licensing scheme and granted licenses according to these requirements ever since. Appellants demand that this Court overturn Act 287 and direct that the standard for determining restaurant status return to a squishy and easily manipulated percentage of sales. Numerous problems emanate from such a determination.").

63. *See* Rooftop Bar, LLC v. S.C. Dep't of Revenue, No. 2018-1870 (S.C. Ct. App. Jun. 15, 2021) (order dismissing case per party agreement).

D. Senate Bill 536: The Revenue Requirement Bill

During his "crusade," Harpootlian was elected as a state senator for a district bordering Five Points.[64] And, in February of 2021, he introduced legislation to amend the definition of "bona fide engaged primarily and substantially in the preparation and serving of meals" in the ABC Act to include a requirement that a business "derives gross revenue from its sale of meals and foods, and non-alcoholic beverages, that is not less than fifty-one percent of its total gross revenue from the sale of meals and foods, non-alcoholic beverages, and alcoholic beverages."[65]

As a threshold matter, it is unclear what the precise effect of this Bill in its current form would be. Under South Carolina rules of statutory construction, a "statute must be read as a whole and sections which are part of the same [Act] must be construed together and each one given effect."[66] As previously discussed, Title 61 of the South Carolina Code defines a "nonalcoholic beverage" as any beer, wine, porter, and ale containing a certain percentage of alcohol content.[67] An "alcoholic beverage" is defined as any beverage containing alcohol that is not deemed a nonalcoholic beverage by statute.[68] Thus, if the statutory definitions were applied to this requirement, an establishment could sell 90% beer and wine, 10% liquor, and no food, and still satisfy this requirement to obtain a liquor license.

Considering Harpootlian's comments on this Bill, I doubt that this is the intended result.[69] Thus, for the purposes of this Note, I will assume that the Bill would be amended or interpreted to effectuate the plain and ordinary meaning of those words (i.e., that a non-alcoholic beverage means a beverage containing no alcohol, and that an alcoholic beverage means any beverage containing alcohol). Additionally, it is worth noting that this Bill does not

64. *See Dick Harpootlian*, BALLOTPEDIA, https://ballotpedia.org/Dick_Hartpootlian [https://perma.cc/VDT2-SC8A]; *South Carolina State Senate District 20*, BALLOTPEDIA, https://ballotpedia.org/South_Carolina_State_Senate_District_20 [https://perma.cc/VDT2-SC8A].

65. S. 536, 124th Gen. Assemb., Reg. Sess. (S.C. 2021).

66. S.C. Ports Auth. v. Jasper Cnty., 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006); *see also* Burns v. State Farm, 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989) (stating that "statutes which are part of the same Act must be read together.").

67. *See supra* Section II.B.

68. *See supra* Section II.B.

69. *See Hearing on S. 28, S. 456, S. 536, and S. 619 before the Sen. Judiciary Subcomm.*, 124th Gen. Assemb., Reg. Sess. (S.C. Mar. 2, 2021) [hereinafter *March Hearing*] (statements by Sen. Dick Harpootlian, Member, Sen. Comm. on the Judiciary); *Hearing on S. 224, S. 230, and S. 536 before the Sen. Judiciary Subcomm.*, 124th Gen. Assemb., Reg. Sess. (S.C. Apr. 14, 2021) [hereinafter *April Hearing*] (statements by Sen. Dick Harpootlian, Member, Sen. Comm. on the Judiciary); Trainor, *supra* note 41; Chris Trainor, *A longtime critic of Five Points bars, Harpootlian files bill to amend SC liquor law*, STATE (Feb. 9, 2021, 4:48 PM), https://www.thestate.com/news/local/article249124650.html [https://perma.cc/YW6U-RKQB].

apply to businesses seeking a license for the on-premises sale of beer and wine, because the sale of those beverages is governed by a different chapter of Title 61.[70]

III. DISCUSSING THE POLICY IMPLICATIONS OF A REVENUE REQUIREMENT

The proposed revenue requirement would fail to remedy any of the ills that its supporters seek to cure, while simultaneously causing extensive damage to the South Carolina economy and small businesses.

A. The Revenue Requirement Would Fail to Prevent Alcohol-Related Harm

The supporters of the revenue requirement seek to curb the problems they believe are stemming from the alleged widespread underage consumption and overconsumption of alcohol, especially in Five Points.[71] However, the revenue requirement would fail to prevent either. First, the supporters of the revenue requirement have not offered any evidence to suggest that restaurants are less likely to serve underage patrons than bars.[72] To the contrary, I argue that bars have more stringent measures in place to prevent underage drinking. Bars commonly employ "bouncers" at the entrance to the establishment whose primary job is to verify the age of the patrons. Whereas in a restaurant, age is typically verified by a server who may be preoccupied with taking orders and waiting on multiple tables. Additionally, the server has a financial interest not to inconvenience or offend the patron by asking for an ID and, because a server's tip is typically a percentage of the bill, to see the patron purchase more items.

Second, the revenue requirement would fail to prevent the overconsumption of alcohol because it does nothing to prevent a patron seeking to consume only alcohol from consuming only alcohol. According to an attorney representing several of the bars in Five Points, "you can lead a horse to water, but you cannot force it to drink," or, rather, in this case eat.[73] Further, the revenue requirement would effectively encourage businesses to increase the cost of food and decrease the cost of alcoholic drinks to maintain the necessary ratio of food to alcohol revenue.

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70. *See supra* Section II.B (explaining that the sale of beer and wine is governed exclusively by Chapter 4 of Title 61).

71. *See supra* Part I.

72. No evidence found to the author's best abilities.

73. Interview with Joe McCulloch, Partner, McCulloch-Schillaci, in Columbia, S.C. (Sep. 24, 2021).

The revenue requirement would also be ripe for dubious practices and loopholes.[74] To illustrate this point, suppose a bar owner sells $10,000 in alcohol and $1,000 in food in a month. To avoid the violating the revenue requirement, the bar owner could purchase a $10,000 sandwich from her own bar at the end of every month to boost her food sales. In another example, the bar owner could set up a buffet and charge a cover fee.[75] This fee may count towards food sales, regardless of whether the food is actually consumed.[76] More potential ambiguities arise in the context of packaged sales of food and beverages.[77] It is unclear whether packaged sales would contribute towards food revenue, alcohol revenue, or both.[78] In other words, there are simply too many opportunities for businesses "to meet the letter of this law while eschewing its spirit."[79]

B. The Revenue Requirement Would Harm Small Businesses and the South Carolina Economy

Assuming, *arguendo,* that businesses would not resort to such gamesmanship, a statewide revenue requirement would have devastating impacts on small business owners and South Carolina's economy by forcing hundreds of establishments that cannot meet the revenue requirement out of business. In 2018, in response to the SCALC decision denying Roost's application for a liquor license,[80] Dr. Robin B. DiPietro, a professor at the University of South Carolina School of Hotel, Restaurant, and Tourism Management, studied the potential impacts of eliminating bars in South Carolina.[81] She found that there were over 1,000 bars currently operating in South Carolina, each averaging $136,000 in annual sales, and employing over 7,154 South Carolina workers in total.[82]

74. *See* Letter from Robin B. DiPietro, Professor, Univ. of S.C. Sch. of Hotel, Rest. and Tourism Mgmt. (Apr. 26, 2018) (on file with author).

75. *See id.*

76. *See id.*

77. *See id.*

78. *See id.*

79. *Id.* Consider, for example, the lengths to which the South Carolina video poker industry took to escape regulatory restrictions in the late 90s. *See* Tony Horwitz, *South Carolina Is Dealing with A Messy Video-Poker Addiction*, WALL ST. J. (Dec. 2, 1997), https://www.wsj.com/articles/SB881015184113868000 [https://perma.cc/4E5V-5NJV]. For instance, when video poker operators were confronted with state laws limiting a gambling premise to five video poker machines and prohibiting the sale of alcohol, they simply divided their buildings into multiple rooms—each with a separate license and electricity bill. *Id*.

80. *See supra* Section II.C (discussing Five Points Roost, LLC v. S.C. Dep't of Rev., No. 18-ALJ-17-0005-CC, 2018 WL 1724696 (S.C. Admin. Ct. Apr. 3, 2018)).

81. *See* Letter from Robin B. DiPietro, *supra* note 74.

82. *Id.*

If these bars were forced out of business by a revenue requirement, the consequences for the state could be devastating. In terms of tax revenue, the state could stand to lose approximately $6,949,600 in business tax revenue, $2,780,000 in hospitality tax revenue, lost sales tax, and face a reduction in $87,493,420 in taxable wages.[83] A revenue requirement "also has the potential to negatively impact towns and neighborhoods. If businesses were to close, they would leave behind empty spaces. These spaces would in turn become eyesores which would see reductions in consumer traffic within their vicinity."[84] Harpootlian disagrees with the predicted impact.[85] According to him, "[The revenue requirement] will not put [bars] out of business. It may affect their business model. But food has to be the primary and substantial reason for their business, and there are a number of ways you can prove that."[86]

However, establishments that do not meet the revenue requirement and attempted to remain in business would likely face large financial burdens to ensure compliance.[87] For example, businesses may have to make large capital expenditures to "[increase] the size and scope of the kitchen within the location[]."[88] Even if a business is willing to invest the money to upgrade its kitchen, customers may not be interested in purchasing food items, resulting in increased inventory costs and wasted food.[89] Not only is this costly for the business owner but potentially harmful to the environment.[90]

According to DiPietro, there is no inherent reason why bars cannot serve alcohol in as safe of a manner as restaurants.[91] She believes the problems associated with Five Points stem from underage clientele, a culture of overconsumption, and late operating hours, and that Five Points is not a representation of the statewide bar industry as a whole.[92] Thus, Senate Bill 536 seeks to punish—likely capitally—an entire industry in response to issues largely confined to a few city blocks.

83. *Id.*
84. *Id.*
85. *See* Trainor, *supra* note 41 (describing the study as "bulls**t").
86. *Id.*
87. *See* Letter from Robin B. DiPietro, *supra* note 74.
88. *Id.*
89. *Id.*
90. *See* Quora, *What Environmental Problems Does Wasting Food Cause?*, FORBES (Jul. 18, 2018 3:31 PM), https://www.forbes.com/sites/quora/2018/07/18/what-environmental-problems-does-wasting-food-cause/?sh=2c8ecfad2f7a [https://perma.cc/8F2A-AC2V] (discussing impact on climate change and natural resources from wasted food).
91. Telephone Interview with Robin B. DiPietro, Professor, Univ. of S.C. Sch. of Hotel, Rest. and Tourism Mgmt. (Nov. 11, 2021).
92. *Id.*

IV. POTENTIAL CONSTITUTIONAL CHALLENGES TO THE REVENUE REQUIREMENT

Joe McCulloch, the attorney representing several of the bars in Five Points, has indicated that if this Bill were to pass, the bars would seek to challenge the constitutionality of the revenue requirement.[93] This Part will analyze the viability of several potential constitutional challenges to the revenue requirement. Section A will discuss how the revenue requirement likely falls within the state's broad police power to regulate the sale of alcohol. Furthermore, Section B concludes that establishments would not be able to succeed on a claim for violation of due process because they do not possess a liberty or property interest in their liquor licenses. Section C concludes, however, that establishments may likely succeed on an equal protection claim.

A. The Revenue Requirement Falls Within the Scope of the General Assembly's Police Power

The revenue requirement likely falls within the General Assembly's police power because the purpose of the legislation is to address public safety concerns associated with the sale of alcohol. Article VIII-A grants the General Assembly "the right to prohibit and to regulate the manufacture, sale, and retail of alcoholic liquors or beverages within the State" "in the exercise of [its] *police power*."[94] Thus, "if the act is not a police measure, it is unconstitutional."[95] The state may exercise its police power to regulate a business if "the unrestrained pursuit of [that business] *might affect injuriously the public health, morals, safety or comfort*." [96] This power is "especially broad with respect to [the] regulat[ion] of liquor."[97]

The bounds to the state's broad power to regulate liquor were tested in the 2017 South Carolina Supreme Court case *Retail Services & Systems, Inc. v. South Carolina Department of Revenue*.[98] In that case, the appellant, Retail Services, owned and operated three retail liquor store locations in Charleston, Greenville, and Columbia, and sought to open a fourth liquor store in Aiken.[99] The respondent, the SCDOR denied Retail Services a fourth liquor license in accordance with §§ 61-4-140 and -150 of the South Carolina Code, "which

93. Interview with Joe McCulloch, *supra* note 73.

94. S.C. CONST. art. VIII-A § 1 (emphasis added).

95. State *ex rel.* George v. City Council of Aiken, 42 S.C. 222, 247, 20 S.E. 221, 230 (1894).

96 Retail Servs. & Sys., Inc. v. S.C. Dep't of Revenue, 419 S.C. 469, 473, 799 S.E.2d 665, 667 (2017).

97. *Id.* at 473, 799 S.E.2d at 667.

98. *Retail Servs.*, 419 S.C. 469, 799 S.E.2d 665.

99. *Id.* at 471, 799 S.E.2d at 666.

limit[s] a liquor-selling entity to three retail liquor licenses."[100] Retail Services sought a declaratory judgment that §§ 61-4-140 and -150 were unconstitutional.[101]

Retail Services argued that the statutes "exceed[ed] the scope of the General Assembly's police power . . . violat[ed] its rights to equal protection under the law by creating arbitrary distinctions . . .; and violat[ed] its due process rights because [the statutes] unfairly prevent[ed] [Retail Services] from operating in its chosen field of business."[102] Retail Services contended that the "licensing limits do not promote the health, safety, or morals of the State, but merely provide[ed] economic protection for exiting retail liquor store owners."[103]

The trial court granted summary judgment for the SCDOR, upholding §§ 61-4-140 and 61-4-150 of the South Carolina Code as constitutional because "they [were] within the scope of the State's police power; and [] they satisf[ied] the rational basis test, which, because they do not infringe on a fundamental right or implicate a suspect class, is all that is required"[104] The South Carolina Supreme Court reversed solely on the police power issue, finding that the that the statute did not "advance the safety and moral interests of the State" and the statute was merely a form of "economic protectionism."[105]

The key factor in the court's decision was the absence of "any evidence of the alleged safety concerns incumbent in regulating liquor sales in this way."[106] The court highlighted the SCDOR's counsel's repeated statements "that the *only* justification for these provisions is that they support small businesses."[107] Thus, "[w]ithout any [] supportable police power justification present"—i.e., a justification related to public health, safety, or morals—the court found that "economic protectionism for a certain class of retailers is not a constitutionally sound basis for regulating liquor sales."[108]

Attempting to apply this standard here, however, is far from straightforward. It is unclear what exactly constitutes evidence of alleged safety concerns. As the dissent highlights, the majority ignored various

100. *Id.* at 471, 799 S.E.2d at 666.
101. *Id.* at 471, 799 S.E.2d at 666.
102. *Id.* at 471–72, 799 S.E.2d at 666.
103. *Id.* at 472, 799 S.E.2d at 666.
104. *Id.* at 472, 799 S.E.2d at 666.
105. *Id.* at 474–75, 799 S.E.2d at 668. The court did not reach a conclusion regarding the equal protection and due process arguments because the police power argument was dispositive of the issues on appeal. *Id.* at 475–76, 799 S.E.2d at 668 n.8 (citing Futch v. McAllister Towing of Georgetown, Inc., 355 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (stating that when one issue is dispositive of the case, an appellate court need not consider the remaining issues)).
106. *Id.* at 474, 799 S.E.2d at 667.
107. *Id.* at 474, 799 S.E.2d at 667.
108. *Id.* at 474, 799 S.E.2d at 667.

justifications that were introduced into the record including "promoting trade stability and temperance by protecting against the dangers of aggressive sales tactics like price cutting and excessive advertising."[109] Further complicating the analysis, both the majority and dissent accused each other of improperly blending principles of due process and equal protection grounds into their analysis of the scope of police power.[110] The dissent maintained that if the justification for police power is analyzed similarly to the justification for rational basis, "the actual motivations of the enacting governmental body are entirely irrelevant."[111] Thus, the burden should be on the party challenging a statute to "to negate every conceivable basis which might support it."[112] According to the dissent, the majority disregarded the various justifications introduced into the record at the trial court level and focused on statements made by counsel during oral arguments that the "*only* justification for these provisions is that they support small business."[113]

As a result, the appropriate burden for justifying the exercise of police power under Section One of Article VIII-A is unclear. It appears from the court's decision in *Retail Services*, that the burden for challenging the scope of police power is lower than the burden to disprove a legitimate government interest under a rational basis analysis. However, even under *Retail Services*'s lower burden, the proposed revenue requirement would likely fall within the scope of the General Assembly's police power to regulate liquor because the motivation behind the revenue requirement is to mitigate safety concerns

109. *Id.* at 481, 799 S.E.2d at 671 (Kittredge, J., dissenting); *see also* Retail Servs. & Sys., Inc. v. S.C. Dep't of Revenue, No. 2014-CP-02-00259, 2014 WL 12692756, at *5 (S.C. Ct. Com. Pl. Nov. 21, 2014) (quoting Johnson v. Martignetti, 375 N.E.2d 290, 297 (Mass. 1978)) ("[M]any sound reasons have been advanced to support restrictions on the number of liquor licenses allowed any one business interest. Concentration of retailing in the hands of an economically powerful few has been thought to intensify the dangers of liquor sales stimulations, thereby threatening trade stability and promotion of temperance. Regulation of the number of licenses issued, therefore, aims at controlling the tendency toward concentration of power in the liquor industry; preventing monopolies; avoiding practices such as indiscriminate price cutting and excessive advertising; and preserving the right of small, independent liquor dealers to do business.").

110. *Retail Servs.*, 419 S.C. at 483–84, 799 S.E.2d at 672 n.21 (Kittredge, J., dissenting) ("I find the majority's reference to due process jurisprudence puzzling because, after all, the majority purports to not consider Appellant's due process challenge to the Statutes."); *Id.* at 473, 799 S.E.2d at 667 n.5 ("We reference this background merely to provide historical context to the type of extreme industry regulation Respondents ask this Court to uphold, and not as the dissent suggests, to resolve this matter on due process grounds.").

111. *Id.* at 481, 799 S.E.2d at 671 n.16 (Kittredge, J., dissenting) (quoting Lee v. S.C. Dep't of Nat. Res., 339 S.C. 463, 470, 530 S.E.2d 112, 115 n.4 (2000)).

112. *Lee*, 339 S.C. at 470, 530 S.E.2d at 115 n.4 (quoting FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 314–15 (1993)).

113. *Retail Servs.*, 419 S.C. at 481, 799 S.E.2d at 671 n.16 (Kittredge, J., dissenting).

associated with underage and binge drinking.[114] Regardless of whether the statute is effective in remedying the safety concerns it seeks to mitigate,[115] "it is not within [the province of the courts] to weigh [] in on the wisdom of legislative policy determinations."[116] Furthermore, unlike the statutory regime at issue in *Retail Services*, there is no indication that this legislation is related to any form of economic protectionism. As a result, a court would most likely find the revenue requirement to fall within the scope of the General Assembly's police power under Section One of Article VIII-A.

B. The Revenue Requirement Would Not Deprive Any Party of Due Process

A court would likely find that the revenue requirement would not violate the Due Process Clauses of either the South Carolina constitution or the United States Constitution because businesses do not possess any vested right or cognizable property interest in their ability to sell liquor. Both the South Carolina constitution and the Fourteenth Amendment to the United States Constitution prohibit the depravation of "life, liberty, or property without due process of law."[117] "Accordingly, a claim of denial of due process must be analyzed with a two-part inquiry: (1) whether the interest involved can be defined as 'liberty' or 'property' within the meaning of the Due Process Clause; and, if so (2) what process is due in the circumstances."[118]

First, businesses engaged in the sale of liquor do not possess a right to operate "in any manner other than that dictated by the state."[119] Unlike many other occupations, which have a "presumption of free entry," the state possesses the right to restrict—or outright ban—the sale of liquor.[120] Consequently, the "liberty interest each person has in pursuing that

114. *See* Bame, *supra* note 7, at 1033; *March Hearing*, *supra* note 69 (statements by Sen. Dick Harpootlian, Member, Sen. Comm. on the Judiciary); *April Hearing*, *supra* note 69 (statements by Sen. Dick Harpootlian, Member, Sen. Comm. on the Judiciary).

115. *See supra* Section III.A (discussing how the revenue requirement would be ineffective).

116. *Retail Servs.*, 419 S.C. at 482, 799 S.E.2d at 671 (Kittredge, J., dissenting) (quoting Town of Hilton Head Island v. Kigre, Inc., 480 S.C. 647, 649–50, 760 S.E.2d 103, 104 (2014)).

117. S.C. CONST. art. I, § 3; U.S. CONST. amend. XIV, § 1.

118. State v. Binnarr, 400 S.C. 156, 165, 733 S.E.2d 890, 894 (2012) (citing Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 571–73 (1972)); *see also* Grimsley v. S.C. Law Enf't Div., 396 S.C. 276, 283, 721 S.E.2d 423, 427 (2012) ("[T]o prove a denial of substantive due process, a party must show that he was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law.").

119. Davis v. Query, 209 S.C. 41, 56, 39 S.E.2d 117, 124 (1946); *accord* Scott v. Vill. of Kewaskum, 786 F.2d 338, 340–41 (7th Cir. 1986) ("The sale of liquor, like the sale of guns, has been subjected to special controls for a long time, and these controls may reduce the private interest at stake.").

120. *Scott*, 786 F.2d at 341.

occupation" is extinguished.[121] In other words, a license to sell liquor is a privilege granted by the state, not a right.[122] All that "remains is the 'property' interest, if any, established by the substantive criteria of the statute."[123]

Here too, no interest exists. In *Grimsley v. South Carolina Law Enforcement Division*, the South Carolina Supreme Court provided the following guidance to determine whether a legitimate property interest exists:

> Property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." To determine if the expectation of entitlement is sufficient "will depend largely upon the extent to which the statute contains mandatory language that restricts the discretion of the [agency]" . . . . [T]he use of the word "shall" in a statute ordinarily means the action referred to is mandatory.[124]

Examining the language of Section One of Article VIII-A of the South Carolina constitution and Title 61, it is evident that liquor licensees do not possess a property interest in their license because the authority to grant licenses is discretionary rather than mandatory. The South Carolina constitution provides that "[t]he General Assembly *may license* persons or corporations to manufacture, sell, and retail alcoholic liquors or beverages within the State *under the rules and restrictions as it considers proper*, including the right to sell alcoholic liquors or beverages in containers of such size as the General Assembly considers appropriate."[125]

Similarly, the ABC Act states "the [SCDOR] *may issue* a license . . . upon finding . . . the applicant conducts a business bona fide engaged primarily and substantially in the preparation and serving of meals."[126] Furthermore, the Act explicitly states that "[l]icenses and permits are the property of the [SCDOR]."[127] Additionally, the South Carolina Supreme Court has stated that

121. *Id.*

122. Feldman v. S.C. Tax Comm'n, 203 S.C. 49, 26 S.E.2d 22, 26 (1943).

123. *Scott*, 786 F.2d at 341.

124. Grimsley v. S.C. Law Enf't Div., 396 S.C. 276, 284, 721 S.E.2d 423, 427 (2012) (first quoting Snipe v. McAndrew, 280 S.C. 320, 324, 313 S.E.2d 294, 297 (1984); then quoting Jacobson v. Hannifin, 627 F.2d 177, 180 (9th Cir. 1980); and then citing TNS Mills, Inc. v. S.C. Dep't of Revenue, 331 S.C. 611, 620, 503 S.E.2d 471, 476 n. 3 (1998)) (citations omitted).

125. S.C. CONST. art. VIII-A, § 3 (emphasis added).

126. S.C. CODE ANN. § 61-6-1820 (2022) (emphasis added).

127. *Id.* § 61-6-4280; *see also id.* at § 61-2-140(B) ("Licenses and permits are the property of the [SCDOR] and are not transferable.").

> liquor licenses are neither contracts nor rights of property. They are mere permits, issued or granted in the exercise of the police power of the state to do what otherwise would be unlawful to do; and to be enjoyed only so long as the restrictions and conditions governing their continuance are complied with.[128]

Accordingly, since businesses possess neither a liberty interest nor a property interest in their ability to sell liquor, they could not sustain a claim for a violation of due process.

C. The Revenue Requirement Violates the Equal Protection Clause of the South Carolina and United States Constitutions

The revenue requirement violates the Equal Protection Clauses of the United States Constitution and South Carolina constitution because it treats similarly situated businesses differently based on their revenue sources, and there is no basis for the disparate treatment that rationally relates to the state's legitimate interest in regulating liquor.

Equal protection of the laws is mandated by the Fourteenth Amendment to the United States Constitution[129] and Section Three of Article I of the South Carolina constitution.[130] Both of these constitutional provisions require that "all persons similarly situated [] be treated alike" under the law.[131] However, "[t]he initial discretion to determine what is 'different' and what is 'the same' resides in the [state legislature]," not the courts.[132] "Where an alleged equal protection violation does not implicate a suspect class or abridge a fundamental right, the rational basis test is used" to determine whether the legislature's classification is permissible under the equal protection clauses of both the United States and South Carolina Constitutions.[133]

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128. Feldman v. S.C. Tax Comm'n., 203 S.C. 49, 26 S.E.2d 22, 26 (S.C. 1943).

129. U.S. CONST. amend. XIV, § 1 ("[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.").

130. S.C. CONST. art. I, § 3 ("[N]or shall any person be denied the equal protection of the laws.").

131. Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439 (1985) (citing Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920)); *accord* Marley v. Kirby, 271 S.C. 122, 123–24, 245 S.E.2d 604, 605 (1978) ("The constitutional guarantee of equal protection of the laws requires that all persons be treated alike under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.").

132. Plyler v. Doe, 457 U.S. 202, 216-17 (1982); *accord* Bodman v. State, 403 S.C. 60, 69, 742 S.E.2d 363, 367 (2013) ("We give great deference to the General Assembly's decision to create a classification.").

133. Town of Hollywood v. Floyd, 403 S.C. 466, 480, 744 S.E.2d 161, 168 (2013) (first citing Vill. of Willowbrook v. Olech, 528 U.S. 562, 564 (2000); and then citing Dunes W. Golf

The rational basis test gives "great deference to the General Assembly's classification decisions because it presumably debated and weighed the advantages and disadvantages of the legislation at issue."[134] A party seeking to challenge the validity of a law under the rational basis test must demonstrate that (1) the party is being treated differently than others "similarly situated," and (2) that "the disparate treatment [does not bear any] rational relationship to a legitimate government purpose."[135] Moreover, "[t]he fact a classification may result in an inequity or may be unwise in an economic sense does not render it unconstitutional."[136] Nonetheless, the revenue requirement fails to clear this incredibly deferential standard because it treats similarly situated businesses differently, and there is no rational relationship between that disparate treatment and the General Assembly's legitimate interest in regulating liquor.

First, the revenue requirement would treat similarly situated entities differently. Here, similarly situated entities could be considered businesses selling alcohol for on-premises consumption.[137] The disparate treatment is best illustrated through an example. Suppose a restaurateur operates two bar and grills in Columbia. The two bar and grills have identical food and drink offerings, atmospheres, and their staffs are trained to follow the same policies and procedures to prevent underage drinking or serving to intoxicated guests. Initially, both locations derive 60% of their revenue from the sale of food and 40% from the sale of alcohol.

Now suppose a popular sporting venue opens across the street from one of the locations, and the sporting venue does not sell alcohol. As a result, the sale of alcohol drastically increases at the location next to the venue. The

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Club, L.L.C. v. Town of Mt. Pleasant, 401 S.C. 280, 293, 737 S.E.2d 601, 608 (2013)). Some South Carolina cases refer to this test as the "reasonable basis" test. *See, e.g.*, Fraternal Order of Police v. S.C. Dep't of Revenue, 352 S.C. 420, 430, 574 S.E.2d 717, 722 (2002). Recent cases, like *Town of Hollywood* use the rational basis language. These standards are equivalent with one distinction noted at the end of this Section.

134. Ed Robinson Laundry & Dry Cleaning, Inc. v. S.C. Dep't of Revenue, 356 S.C. 120, 126, 588 S.E.2d 97, 101 (2003*)*; *see also Plyler*, 457 U.S. at 216–18.

135. *Ed Robinson Laundry*, 356 S.C. at 124, 588 S.E.2d at 99 (citing Bibco Corp. v. City of Sumter, 332 S.C. 45, 52–53, 504 S.E.2d 112, 116 (1998)); *Town of Hollywood*, 403 S.C. at 480, 744 S.E.2d at 168 ("The *sine qua non* of an equal protection claim is a showing that similarly situated persons received disparate treatment."); *accord* Ind. Petroleum Marketers & Convenience Store Ass'n v. Cook, 808 F.3d 318, 322 (7th Cir. 2015) (citing Srail v. Village of Lisle, 588 F.3d 940, 943 (7th Cir. 2009)).

136. *Ed Robinson Laundry*, 356 S.C. at 126, 588 S.E.2d at 100 (citing Davis v. Cnty. of Greenville, 313 S.C. 459, 465, 443 S.E.2d 383, 386 (1994)).

137. *See id.* at 124, 588 S.E.2d at 99 ("A class may be constitutionally confined to a particular trade."); *cf.* Retail Servs. & Sys., Inc. v. S.C. Dep't of Revenue, 419 S.C. 469, 485–86, 799 S.E.2d 665, 673 (2017) (Kittredge, J., dissenting) (explaining that restaurants and liquor stores are not similarly situated because the former sells alcohol for on-premises consumption, and the latter sells alcohol for off-premises consumption).

increased sales of alcohol change the revenue sources for that location to 55% from the sale of alcohol and 45% from the sale of food. Despite being identical to its sister location, the location next to the venue would now be disqualified from possessing a liquor license.

Alternatively, suppose there are two alcohol-serving establishments situated adjacent to one another. The first establishment operates as a restaurant serving food and alcohol from 9:00 A.M. to 9:00 P.M. but remains open until 2:00 A.M. each night serving only alcohol and light hors d'oeuvres. In a given day, this establishment receives 60% of its revenue from the sale of food, and 40% from the sale of alcohol, despite the fact that it receives 80% of its revenue from the sale of alcohol from 9:00 P.M. to 2:00 A.M. The second establishment only serves alcohol and light bar food and operates from 9:00 P.M. to 2:00 A.M. In a given day, this establishment receives 80% of its revenue from the sale of alcohol and 20% from the sale of food. Even though both establishments sell the same ratio of alcohol to food from 9:00 P.M. to 2:00 A.M., the first would retain its liquor license, while the second would not. Furthermore, consider the potential loopholes with the revenue requirement discussed previously.[138]

While a classification does not need to be totally effective in accomplishing its purpose to survive an equal protection challenge, it cannot arbitrarily treat similarly situated entities differently.[139] The revenue requirement may, for example, allow a bar that operates a buffet to keep its liquor license, even if no one actually eats the food from the buffet, as long as the bar charges for the buffet as a cover. How could it be that another establishment, similar in all respects but without the unused buffet, is situated any differently? No rational answer exists to this question.

Having determined that the revenue requirement would treat similarly situated entities differently, the next step in the rational basis analysis is to determine whether the disparate treatment is rationally related to any legitimate state interest. It is not. First, I concede that the state certainly has a legitimate interest in regulating the sale of liquor to mitigate the potential for alcohol-related harms.[140] This includes the objectives of the revenue requirement, i.e., the prevention of underage drinking and overconsumption

138. *See supra* Section III.A.

139. Walker v. S.C. Dep't of Highways & Pub. Transp., 320 S.C. 496, 500, 466 S.E.2d 346, 348 (1995) (first citing Foster v. S.C. Dep't of Highways & Pub. Transp., 306 S.C. 519, 526, 413 S.E.2d 31, 36 (1992); then citing Flemming v. Nestor, 363 U.S. 603, 611 (1960)).

140. *See Ind. Petroleum*, 808 F.3d at 325; *Retail Servs*., 419 S.C. at 485–86, 799 S.E.2d at 673 (Kittredge, J., dissenting); Davis v. Query, 209 S.C. 41, 57–58, 39 S.E.2d 117, 125 (1946); State *ex rel.* George v. City Council of Aiken, 42 S.C. 222, 224, 20 S.E. 221, 224 (1894).

(or "binge drinking") of alcohol.[141] However, the revenue requirement does not bear any rational relationship to these goals. The following case provides an example of the rational basis analysis in the context of state alcohol laws.

In *Indiana Petroleum Marketers & Convenience Store Association v. Cook*, an Indiana trade association representing gas stations and convenience stores challenged an Indiana law that permitted package liquor stores to sell cold beer, but not grocery and convenience stores, on the grounds that it deprived its members of equal protection of the law under the Fourteenth Amendment.[142] The association argued that,

> beer is beer, and grocery and convenience stores already sell it, just not cold; grocery and convenience stores are permitted to sell chilled drinks with higher alcohol content (like wine coolers) so why not chilled beer; grocery and convenience stores have a better record of compliance with state alcohol laws than liquor stores; grocery and convenience stores are frequented by police officers and other adult customers, deterring underage persons from trying to buy alcohol there; and selling beer in refrigerators makes it less accessible than selling it warm.[143]

"Indiana defend[ed] [the classification] by noting that package liquor stores [we]re subject to stricter regulations designed to enhance the State's ability to limit and control the distribution of alcohol."[144] These stricter regulations included: a prohibition on anyone under the age of 21 from entering the premises of a package liquor store, a requirement that sales clerks be at least 21 years old, and restricted hours and days of operations.[145] The state explained that "the goal of [the] regulatory scheme [was] to curb underage beer consumption by limiting the sale of immediately consumable cold beer."[146]

The Seventh Circuit found that "restricting the sale of cold beer to stores . . . more rigorously regulated [was] rationally related to" the state's legitimate interest in curbing underage beer consumption.[147] The court found the association's arguments unpersuasive under rational basis review: "[t]he Association's policy arguments for allowing cold-beer sales by grocery and

141. *See* Bame, *supra* note 7, at 1033; *March Hearing*, *supra* note 69 (statements by Sen. Dick Harpootlian, Member, Sen. Comm. on the Judiciary); *April Hearing*, *supra* note 69 (statements by Sen. Dick Harpootlian, Member, Sen. Comm. on the Judiciary).

142. *Ind. Petroleum*, 808 F.3d at 320.

143. *Id.* at 325.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

convenience stores are matters for the Indiana legislature, not the federal judiciary."[148]

While I agree with the association's policy arguments that the law at issue in that case was somewhat pointless,[149] I also believe the Seventh Circuit correctly decided this case. Indiana was able to point to differences in the regulations governing grocery and convenience stores and the regulations governing liquor stores.[150] They were then able to draw a coherent and rational—albeit attenuated—relationship between the more restrictive regulations governing liquor stores, the fact that cold beer is more likely to be consumed in a shorter timeframe, and the state's interest in preventing underage consumption of alcohol.[151] That "conceivable basis" was enough to pass muster under the rational basis test.[152]

A similar nexus cannot be formed that rationally relates the revenue requirement to South Carolina's interest in preventing alcohol-related harms. First, unlike the difference between grocery and convenience stores and liquor stores in *Industrial Petroleum*, there is no difference—in terms of regulation or otherwise—between an establishment that derives 60% of its revenue from the sale of alcohol versus an establishment that derives 40% of its revenue from the sale of alcohol. As illustrated earlier in this Section, the ratio of food to alcohol sales may be influenced by factors wholly independent of menu offerings, atmosphere, or establishment policies.

Second, there is no link between an establishment's ratio of food to alcohol sales and the potential for alcohol-related harms. I acknowledge, and I imagine that a court would take judicial notice of, the fact that the presence of food in a person's stomach slows the absorption of alcohol. However, as previously discussed, the revenue requirement is not adequately tailored to capture this principle. The revenue requirement does not prevent an individual from going into an establishment serving food and only purchasing alcohol.[153] Nor does it prevent an establishment from only offering alcohol after a certain time. Additionally, since the requirement is based on the ratio of *revenue* from food and alcohol, it would encourage businesses to increase food prices and decrease alcohol prices. This effect is thoroughly inconsistent with the state's interest in preventing alcohol-related harms.

148. *Id.*

149. Do underage drinkers really care about the temperature of the beer? Also, ice exists.

150. *Ind. Petroleum*, 808 F.3d at 325.

151. *Id.*

152. *See id.* ("To succeed on its claim, the Association must 'negative every conceivable basis which might support' the statutory scheme.") (quoting Armour v. City of Indianapolis, 556 U.S. 673, 681 (2012)).

153. *Cf.* UTAH CODE ANN. § 32B-6-205(7)(a) (West, Westlaw through 2021 2d Spec. Sess.) (requiring that a food order must be placed with every drink order).

Furthermore, unlike the link between cold beer's tendency for immediate consumption and underage drinking, there is no rational relationship between an establishment's ratio of food to alcohol sales and underage drinking. As previously discussed, the rate of underage drinking at an establishment is related to the culture of that establishment, and the establishment's policies and procedures for verifying age rather than the establishment's ratio of revenue from food and alcohol.[154]

In short, any conceivable basis offered to argue that classifying establishments differently based on their revenue ratio is rationally related to the state's interest in preventing alcohol-related harms can be readily negated. Not only is the revenue requirement bad public policy that would be both ineffective and economically unwise, but it is wholly arbitrary and treats similarly situated establishments differently based on factors largely beyond their control without any justifiable basis in protecting the health, safety, or morals of the public. As a result, the revenue requirement would violate constitutional mandates to provide equal protection under the law.

Finally, South Carolina equal protection jurisprudence stresses that even if a court found some rational relationship between the revenue requirement and the state's interest in preventing alcohol-related harms, the requirement must be applied equally to all establishments within the classification.[155] Thus, for example, if the revenue requirement was used to revoke the liquor licenses of establishments located in Five Points that failed to meet the requisite revenue ratio, but a blind eye was turned to those located in Myrtle Beach or Hilton Head, the requirement would violate the equal protection clause of the South Carolina constitution.[156]

D. Constitutional Challenges Conclusion

Both state and federal courts have long recognized the potential damage that the unconstrained sale of liquor could have on the health, safety, and morals of the public.[157] Consequently, the General Assembly is granted exceptionally broad police powers and discretion to regulate the sale of

154. *See supra* Section III.B.

155. Samson v. Greenville Hosp. Sys., 295 S.C. 359, 365, 368 S.E.2d 665, 668 (1988) ("Equal Protection also requires that members of the [same] statutory class be treated alike under similar circumstances and conditions."). This proscription against intra-class discrimination, although likely violative of the Fourteenth Amendment Equal Protection Clause as well, is rarely discussed in federal equal protection jurisprudence. *See, e.g.*, Sims v. Rives, 84 F.2d 871, 878 (D.C. Cir. 1936) ("[E]qual protection of the laws means . . . that a law must deal alike with all of a given class within the jurisdiction to which the law is applicable.").

156. Consider comments made during a Senate Judiciary Committee Hearing on the Bill, asking whether the Bill could just apply to Five Points. *March Hearing*, *supra* note 69 (statement of Sen. Sandy Senn, Member, Sen. Comm. on the Judiciary).

157. *See supra* Sections IV.A, IV.B.

liquor.[158] Thus, it follows that the revenue requirement—as an additional requirement to obtain a liquor license—falls within the scope of that power. Moreover, considering that a liquor license is a privilege granted by the state to do what would otherwise be prohibited, the revenue requirement would not deprive any party of due process.[159] However, because the revenue requirement would treat similarly situated entities differently with no rationally related nexus between the disparate treatment and the state's interest in preventing alcohol-related harms, the revenue requirement would deprive these similarly situated entities of equal protection under the law.[160]

V. A BETTER SOLUTION: USING CIVIL LIABILITY TO CURB BAD ACTORS

Harpootlian alleges that the operators of some bars, especially those in Five Points, are complicit in—and knowingly profiting from—the sale of alcohol to underage and intoxicated customers.[161] I do not necessarily disagree. However, for the reasons stated above, a revenue requirement would not only fail to prevent these unlawful sales, but it would unfairly (and likely unconstitutionally) punish responsible business owners to the detriment of the state's economy. A more tailored approach is required to solve this problem.

This Section proposes that the General Assembly enact a comprehensive dram-shop liability act[162] to hold licensed establishments liable in civil court for damages caused by the unlawful provision of alcohol to an underage or intoxicated person. Such legislation would effectively and efficiently compel negligent or complicit actors into compliance with the state's liquor laws and regulations, while minimizing the collateral impact on responsible bar operators. This Section will begin with a brief overview of the history and development of dram shop liability. Next, I will discuss South Carolina's current dram-shop liability regime and discuss its shortcomings. Finally, I will consider how adopting a statutory dram shop liability scheme would address those issues and ultimately reduce alcohol-related harms.

158. *See supra* Section IV.A.

159. *See supra* Section IV.B.

160. *See supra* Section IV.C.

161. *See March Hearing*, *supra* note 69 (statements by Sen. Dick Harpootlian, Member, Sen. Comm. on the Judiciary).

162. *See* Tobias v. Sports Club, Inc., 323 S.C. 345, 348, 474 S.E.2d 450, 451–52 (Ct. App. 1996) ("[Dram Shop] statutes impose civil liability on tavern owners under various circumstances, such as supplying alcoholic beverages to minors or to obviously intoxicated persons.").

A. History and Development of Dram Shop Liability

The degree to which an establishment[163] may be held liable for damages resulting from its provision of alcohol to an underage or intoxicated person varies widely by jurisdiction. Under the common law view, it is the "drinking of the [alcohol], not the furnishing of it, [that] is the proximate cause of any subsequent injury."[164] Consequently, the general common law rule is that establishments are not liable for any damages resulting from its negligent provision of alcohol to an intoxicated adult or an underage person.[165] In other words, neither the person served (i.e., a first party), nor any third party, may bring a claim against an establishment for injuries they suffered as a result of its negligent sale.

Notwithstanding the common law rule, many jurisdictions have held establishments liable for damages resulting from unlawful sales of alcohol to an intoxicated or underage person under the doctrine of negligence per se.[166] In these jurisdictions, courts have found that certain state statutes governing the sale of alcohol create a duty of care.[167] An establishment that violates such a statute breaches this duty of care and, hence, is liable for injuries that are proximately caused by the establishment's breach of the duty of care created by the statute.[168] However, an establishment is not necessarily liable to all potential plaintiffs for all potential harms resulting from its violation of a statute. An establishment is only liable to a plaintiff if "the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered[,] and [the plaintiff] is a member of the class of persons the statute is intended to protect."[169] Thus, in these jurisdictions, the question of who may sue whom

163. For the purposes of this Section, an establishment refers to a business licensed to sell alcohol for on-premises consumption.

164. 45 AM. JUR. 2D *Intoxicating Liquors* § 442 (2021).

165. *Id.* §§ 442, 443. A few exceptions to this general rule do exist. For example, the common law did permit a minor may bring a claim for any damages she suffered if the provision of alcohol was reckless. *Id.* § 422.

166. *See, e.g.*, *Tobias*, 323 S.C. at 352–53, 474 S.E.2d at 454; Fandozzi v. Kelly Hotel, Inc., 711 A.2d 524, 525 (Pa. Super. Ct. 1998); Ono v. Applegate, 612 P.2d 533, 539 (Haw. 1980); Vesely v. Sager, 486 P.2d 151, 165 (Cal. 1971), *superseded by statute*, 1978 Cal. Stat. 2903, CAL. BUS. & PROF. CODE § 25602 (West, Westlaw current through Ch. 770 of 2021 Reg. Sess.), *as recognized in* Cory v. Shierloh, 629 P.2d 8, 10–11 (Cal. 1981).

167. *See, e.g.*, *Tobias*, 323 S.C. at 352–53, 474 S.E.2d at 454; *Fandozzi*, 711 A.2d at 525; *Ono*, 612 P.2d at 539; *Vesely*, 486 P.2d at 165. This is also true for certain regulations promulgated under statutory authority. *See, e.g.*, Norton v. Opening Break of Aiken, Inc., 313 S.C. 508, 512–13, 443 S.E.2d 406, 409 (Ct. App. 1994).

168. *See, e.g.*, Whitlaw v. Kroger Co., 306 S.C. 51, 53–54, 410 S.E.2d 251, 252–53 (1991).

169. *Id.* at 53, 410 S.E.2d at 252 (quoting Rayfield v. S.C. Dep't of Corr., 297 S.C. 95, 103, 374 S.E.2d 910, 914 (Ct. App. 1988)).

for what is largely coextensive with the court's interpretation of the purpose of that state's alcohol laws.[170]

Other jurisdictions have declined to hold establishments liable under the doctrine of negligence per se all together, instead choosing to adhere to the common law rule.[171] Moreover, some legislatures have expressly adopted the common law rule by statute.[172] Conversely, some states have disclaimed the common law approach to varying degrees by passing so-called "dram shop acts" that create a statutory cause of action independent of the common law of negligence.[173]

B. South Carolina's Current Dram Shop Liability Regime: The Christiansen/Daly/Tobias Trilogy

South Carolina is among those jurisdictions whose legislatures have not passed any laws regarding civil liability for damages caused by an establishment's provision of alcohol to an underage or intoxicated person.[174] Thus, the issue has been left up to the courts.

South Carolina courts first considered an establishment's liability for the unlawful sale of alcohol in *Christiansen v. Campbell*.[175] In that case, the plaintiff brought a negligence claim against a bar owner for injuries he sustained after leaving the bar in an intoxicated condition and being struck by a vehicle.[176] The plaintiff alleged that the defendant sold him multiple beers despite being visibly intoxicated.[177] Such sales would be in violation of a state

170. *See Whitlaw*, 306 S.C. at 54–55, 410 S.E.2d at 253 (finding that the statute is "designed to prevent harm to the minor who purchased the alcohol and to members of the public harmed by the minor's consumption of that alcohol[,]" not to all persons whom may receive the alcohol from the purchasing minor).

171. *See, e.g.*, Felder v. Butler, 438 A.2d 494, 499 (Md. 1981) (declining to adopt dram shop liability out of legislative deference); Williamson v. Old Brogue, Inc., 350 S.E.2d 621, 625 (Va. 1986) (holding that Virginia's ABC Act is a licensing measure, rather than a public safety measure and, thus, the purpose of the Act is not to protect the public from harm).

172. *See, e.g.*, MISS. CODE ANN. § 67-3-73 (West, Westlaw through 2021 Reg. Sess.); CAL. BUS. & PROF. CODE § 25602(b) (West, Westlaw current through Ch. 770 of 2021 Reg. Sess.); S.D. CODIFIED LAWS § 35-11-1 (West, Westlaw current through 2021 1st Spec. Sess.); LA. STAT. ANN. § 9:2800.1 (West, Westlaw current through Current through 2021 Reg. Sess. and Veto Sess.).; KY. REV. STAT. ANN. § 413.241 (West, Westlaw current through laws effective April 26, 2022), *invalidated by* Taylor v. King, 345 S.W.3d 237 (Ky. Ct. App. 2010).

173. *See* 1 *Liquor Liability Law* § 2.01 (Mathew Bender).

174. *See id.* n.22; Tobias v. Sports Club, Inc., 323 S.C. 345, 350, 474 S.E.2d 450, 452 (Ct. App. 1996) (explaining that South Carolina courts recognize a civil cause of action arising from the violation of a penal statute, which permits holding vendors of alcohol liable for damages arising from the provision of alcohol to a minor or intoxicated person).

175. *See* Christiansen v. Campbell, 285 S.C. 164, 166, 328 S.E.2d 351, 353 (Ct. App. 1985).

176. *Id.* at 165–66, 328 S.E.2d at 353.

177. *Id.* at 166, 328 S.E.2d at 353.

statute forbidding beer and wine licensees from selling beer to any person "while such person is in an intoxicated condition."[178] Violations of the statute could result in suspension or revocation of the establishment's beer and wine permit.[179]

The court of appeals held that the statute was designed to promote public safety and to "protect intoxicated persons from their own incompetence and helplessness," and that the intoxicated plaintiff was a member of the class protected by the statute.[180] Consequently, the court concluded that an intoxicated plaintiff who suffers injuries proximately caused by the unlawful sale of alcohol to the intoxicated plaintiff by a licensed seller of beer and wine could recover damages from that seller.[181] In *Daley v. Ward*, the court of appeals expanded *Christiansen* to allow third parties injured by an intoxicated person who was unlawfully served by a licensed seller of beer and wine to bring an action against the seller for damages proximately caused by the sale of alcohol to the intoxicated person.[182] In its reasoning, the court stated, "that the purpose of the statute is to protect not only the individual served in violation of the statute, but also the public at large, from the possible adverse consequences."[183] Subsequently, the supreme court changed course in *Tobias v. Sports Club, Inc.*, when it overruled *Christiansen* and held that it was against public policy to allow an "intoxicated adult patron to maintain a suit for injuries which result from his own conduct."[184] Despite this, the *Tobias* court affirmed the court of appeal's holding in *Daley*, i.e., that third parties may bring a claim against bars for injuries resulting from an intoxicated person who was overserved at that bar.[185]

Liability for the sale of alcohol to underaged persons by a licensed establishment is currently unclear. In *Whitlaw v. Kroger Co.*, the South Carolina Supreme Court held that statutes prohibiting the sale of alcohol to minors "are designed to prevent harm to the minor who purchased the alcohol and to members of the public harmed by the minor's consumption of that alcohol."[186] Thus, both first-party and third-party claims were permitted. However, *Whitlaw* was decided prior to the *Tobias* decision, and the *Tobias*

178. *Id.* at 167, 328 S.E.2d at 354.
179. *Id.* at 167, 328 S.E.2d at 354.
180. *Id.* at 168, 328 S.E.2d at 354.
181. *Id.* at 170, 328 S.E.2d at 355.
182. *See* Daley v. Ward, 303 S.C. 81, 84, 399 S.E.2d 13, 14–15 (Ct. App. 1990).
183. *Id.* at 84, 399 S.E.2d at 14–15.
184. Tobias v. Sports Club, Inc., 332 S.C. 90, 92, 504 S.E.2d 318, 319–20 (1998).
185. *Id.* at 93, 504 S.E.2d at 320.
186. Whitlaw v. Kroger Co., 306 S.C. 51, 54–55, 410 S.E.2d 251, 253 (1991).

court left unanswered the issue of whether an underage plaintiff may bring a claim for provision of alcohol to him.[187]

C. Issues with South Carolina's Current Judicially Created Approach to Dram Shop Liability

As evidenced by the preceding Section, South Carolina's current dram shop liability regime, based on negligence per se, is complex, volatile, and places too much policy discretion in the judiciary. And, frankly, that is only scratching the surface. Consider this: there are at least a dozen provisions in Title 61 of the South Carolina Code of Laws and Chapter 7 of the South Carolina Code of Regulations that could form the basis of a dram shop action, and possible defenses to a dram shop action, under the current negligence per se regime.[188] Different statutes would apply in different situations depending on the type of alcohol provided (i.e., beer and wine versus liquor),[189] whether the provider is a licensed seller of alcohol, and whether the consumer is under twenty-one.[190] Each of these provisions require different elements to prove a violation, and some (but not all) of them are subject to certain statutory exceptions.[191]

Also consider that for each statute, a court would need to decide, for a particular plaintiff, if the essential purpose of that particular statute is to protect from the kind of harm the plaintiff has suffered, and if the plaintiff is a member of the class of persons the statute is intended to protect.[192] This is not a straightforward determination, as evidenced by the *Christiansen/Daley/Tobias* trilogy. In fact, none of those cases provide any rationale for their decisions apart from unrevealing and boilerplate public

187. *Tobias*, 332 S.C. at 93, 504 S.E.2d at 320 ("We leave for another day the issue whether we will recognize a first party action brought by a minor.").

188. *See* S.C. CODE ANN. §§ 61-4-50, -80 to -100, -580(a)(1)–(2), -6-2200, -4075 to -4085; S.C. CODE ANN. REGS. 7-200.4 (2011).

189. The distinction between beer and wine versus liquor is arbitrary. If a bar continues to sell an intoxicated person alcohol, and she proceeds to leave the bar and gets hit by a car while trying to cross the street, should it really matter whether the establishment sold her a White Claw or a Vodka Soda?

190. *See supra* note 188.

191. *See* statutes and regulations cited *supra* note 188.

192. *See* Whitlaw v. Kroger Co., 306 S.C. 51, 53, 410 S.E.2d 251, 252 (1991).

policy justifications.[193] This enigma is not, however, the court's fault. It is trying to assume a role that should have been decided by the legislature.[194]

The issues present with the current regime discourage dram shop cases from being brought. Many potential cases may present an issue of first impression, and almost all would be certain to go through a time-consuming and expensive appeal—just to be decided on the court's opaque characterization of legislative "purpose" and public policy views. I do not foresee many personal injury lawyers yearning for the opportunity to undertake such an expensive and risky case on a contingency basis barring truly exceptional damages. Ultimately, these issues prevent the current system from adequately dissuading bad actors as evident by the problems the revenue requirement's supporters highlight in Five Points.

D. Adopting a Statutory Dram Shop Liability Regime Would Encourage Responsible Serving Practices

If the General Assembly truly seeks to protect the health, safety, and morals of the public, it should consider replacing the defective negligence per se approach to dram shop liability and enact a robust statutory regime. Such legislation could effectively coerce the industry into policing itself and, in so doing, efficiently conserve state resources. Additionally, the legislation could not only benefit the public, but it would also provide clarity to establishment operators by categorically identifying their duty to their patrons and the public.[195] Furthermore, unlike the revenue requirement, this legislation would have marginal effects on responsible law-abiding establishments.

How would such legislation target bad actors specifically? The answer is quite simple: insurance premiums. Title 61 requires every establishment in the state to carry at least a million dollars in liability insurance.[196] And while a more liberal approach to dram shop liability would almost certainly increase all establishment's premiums, the impact would not be equally felt. Since an insurer bases premiums on an establishment's level of risk, establishments with a history of problems with underage drinking or overserving would face

193. Similar to a criticism of the First Restatement of Conflict of Laws, see, e.g., WILLIAM M. RICHMAN ET AL., UNDERSTANDING CONFLICT OF LAWS § 68 (4th ed. 2013), the negligence per se doctrine allows the court to characterize the "purpose" of a statute to obtain a desired result without the need to offer any explicit reasoning for the decision.

194. *See* Tobias v. Sports Club, Inc., 323 S.C. 345, 351, 474 S.E.2d 450, 453 (Ct. App. 1996) ("Since this cause of action was judicially created in South Carolina, we have no statutory guidance on the class of persons who may recover or on the availability of defenses.").

195. *See* Letter from Robin B. DiPietro, *supra* note 74 (discussing the general need for statutory clarity in the State's liquor laws and the need to enforce dram shop liability).

196. S.C. CODE ANN. § 61-2-145(a) (2022) (requiring both beer and wine licensees and liquor licensees to carry liability insurance).

much higher premiums. It follows that establishments with a record of responsible practices would be rewarded with lower premiums. Thus, riskier establishments will seek to minimize premium costs by implementing—either by their own volition or at the behest of their insurer—policies and best practices to prevent the provision of alcohol to underage or intoxicated persons.[197]

Using civil liability and, consequently, insurance premiums, as a tool to mitigate poor behavior is not a novel concept. This concept is applied extensively throughout our society. Perhaps the clearest example is liability for automobile accidents. All South Carolina drivers are required to maintain a minimum amount of liability coverage.[198] If an insured driver causes an accident, not only will the victim be compensated for her injuries, but the driver will be penalized by higher insurance premiums. Similarly, drivers with a history of traffic violations are deemed riskier by insurers and likewise face higher premiums. As a result, drivers are not only encouraged to avoid getting into accidents but also to follow traffic laws. This approach is inherently more flexible and responsive than any regulatory or penal scheme alone, and it has the advantage of operating without the need for state regulatory and enforcement resources.

It is likely that the restaurant and bar industry in South Carolina would oppose—and lobby against—a dram shop liability statute. I would ask, however, that it take the following points into consideration. First, given the ambiguity and volatility of the current judicially created regime, the courts could reverse course at any point and hold establishments liable under whatever circumstances they deem to best suit public policy. Second, Harpootlian's claims about Five Points are not without merit. Eventually, the legislature will be forced to act. Between broad regulatory measures, such as the revenue requirement, or a dram shop act—I would advise the industry to support the latter.

E. The Rhode Island Liquor Liability Act: A Model Statutory Regime

Justice Brandeis famously stated, "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[199] The General Assembly need not, however, experiment in this area. It may glean insight from the dram shop liability acts

197. For example, an insurer may require an insured to train all employees on proper age verification procedures.

198. S.C. CODE ANN. § 38-77-140 (2015).

199. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

adopted by the legislatures of our sister states.[200] This Section will discuss the Rhode Island Liquor Liability Act[201] (R.I. Act) as a model for the General Assembly to consider. Of the dram shop acts I have reviewed,[202] I believe Rhode Island's approach in particular strikes a proper balance between the interests of the public and the interests of the establishment operators.

The R.I. Act was passed in 1986 with the goal of "prevent[ing] intoxication-related injuries, deaths and other damages among Rhode Island's population."[203] It provides a legal basis for those who suffer damages as a result of an establishment's provision of liquor[204] to an underaged or visibly intoxicated person.[205] The Rhode Island legislature recognized the potential for dram shop liability to "encourage all servers of alcohol to exercise responsible serving practices," but wisely understood that liability must be fairly allocated so that liability insurance would not become prohibitively expensive.[206]

The Rhode Island legislature appropriately balanced those competing interests by establishing two separate civil causes of actions.[207] The first cause of action for the "negligent service of liquor," applies if the establishment "knows, or if a reasonable and prudent person in similar circumstances would know[,] that the individual being served is [underage] or is visibly intoxicated."[208] Additionally, service of alcohol to an underage person without requesting proof of identification "forms a rebuttable presumption of negligence."[209] An establishment that negligently serves alcohol is liable for "damages proximately caused by the individual's consumption of the liquor."[210] When the negligent sale is to an underaged person, the establishment is liable to both the underaged person and any injured third parties.[211] However, when the negligent sale is to an intoxicated adult, the

200. *See generally* Kaufman & Cohen, *supra* note 173, at n.22 (providing citations to the Dram Shop laws of the states that have them).

201. R.I. GEN. LAWS ANN. § 3-14-1 to -13 (2016).

202. *See* Kaufman & Cohen, *supra* note 173, at n.22.

203. § 3-14-2(a).

204. The statute defines liquor as any intoxicating beverage containing more than 3.2% alcohol. *Id.* § 3-14-3(e). Thus, most beer and wine products would be within the scope of the R.I. Act.

205. *Id.* § 3-14-6(a), (b).

206. *Id.* § 3-14-2(b)(2), (b)(3).

207. *See id.* §§ 3-14-6 to -7.

208. *Id.* § 3-14-6(c).

209. *Id.* § 3-14-6(e).

210. *Id.* § 3-14-6(b).

211. *See id.* § 3-14-4(a).

establishment is liable to injured third parties but not the intoxicated adult.[212] This is similar to the South Carolina's current regime under *Tobias*.[213]

An establishment may, however, be liable to an intoxicated adult under the second cause of action created by the R.I. Act.[214] This cause of action holds an establishment liable for the "reckless service of liquor."[215]. "Service of liquor is reckless if a defendant intentionally serves liquor to an individual when the server knows that the individual being served is [underage] or is visibly intoxicated, and the server consciously disregards an obvious and substantial risk that serving liquor to that individual will cause physical harm to the drinker or to others."[216] An establishment is liable for the reckless service of liquor to both the individual served, regardless of age, and to all third parties injured as a result of the reckless service.[217] Additionally, the R.I. Act permits punitive damages for the reckless, but not negligent, service of liquor.[218]

The General Assembly should consider adopting a dram shop act similar to the R.I. Act.[219] This statutory scheme would encourage establishments to follow responsible serving practices which would, in turn, lead to less nuisance behavior, allow injured plaintiffs the opportunity to recover damages in more serious cases, and avoid the need for the legislature to enact broad-sweeping measures like the revenue requirement. Further, limitations on liability like those in the R.I. Act would mitigate the moral hazard associated with allowing first party adult dram shop cases and prevent the cost of liability insurance from becoming prohibitively expensive.

VI. CONCLUSION

As a former undergraduate and now graduate student at the University of South Carolina and a frequent visitor to the Five Points area, I do not believe that the description of Five Points as "an 'attractive nuisance' for underage

212. *Id.* § 3-14-4(a), (b)(1).

213. *See supra* Section V.B (discussing South Carolina's current dram shop regime under *Tobias*).

214. § 3-14-4(b), -7.

215. *Id.* § 3-14-7.

216. *Id.* § 3-14-7(c)(1).

217. *See id.* §§ 3-14-4(b), -7(a), (b).

218. *Id.* § 3-14-8(b).

219. It is worth noting that Rhode Island follows the *pure* comparative fault system, i.e., a party can recover regardless of his own fault in causing his damages. *See* R.I. GEN. LAWS ANN. § 9-20-4 (2012). *Contra* Nelson v. Concrete Supply Co., 303 S.C. 243, 245, 399 S.E.2d 783, 784 (1991) (announcing South Carolina's adoption of the *modified* comparative fault system, i.e., a party can only recover if she is less than 50% at fault). The General Assembly could maintain the default South Carolina rule or allow pure comparative fault to be used in dram shop liability cases.

drinkers leading to 'obnoxious alcohol-fueled shenanigans'"[220] is completely without merit. Frankly, that is a fair depiction. I have seen and experienced the level of debauchery that occurs in Five Points on any given weekend. And the dangers that underage drinking and overconsumption pose to the individuals involved and the surrounding communities do not escape me. Legislative action to curb alcohol-related harms in Five Points, and throughout the state, is not only appropriate but necessary.

A revenue requirement, however, is not a feasible solution to these problems. A feasible solution would encourage establishments to curb underage drinking and overconsumption. The revenue requirement does neither. A feasible solution would need to minimize harm to responsible establishments and preserve the state's economic progress. The revenue requirement would destroy thousands of small businesses, put a substantial number of South Carolinians out of work, and cost the state close to $100 million dollars in lost tax revenue. A feasible solution comports with the fundamental principle embodied in our constitutions that the law should apply fairly and equally to those similarly situated. The revenue requirement violates this mandate.

The General Assembly should recognize these failures and decline to enact a revenue requirement. Instead of enacting a revenue requirement, it should tackle the problems that alcohol-related harms pose to the public with legislation that holds culpable parties liable for their actions, minimizes damage to law-abiding businesses and the greater economy, encourages compliance with responsible practices, and honors our constitutions. A thoughtfully drafted dram shop liability act would do just that.

220. Bame, *supra* note 7, at 1018 (internal quotation marks omitted).