

License to Sell: Constitutional Protection Against State or Local Government Regulation of Liquor Licensing

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Introduction

I am alone here, running the store. These people, I don't know why they hate me like that. I am a Christian. I have done nothing wrong. I have a family. If they close me down, I'll have to go on welfare.¹

A liquor license is undoubtedly a powerful commodity. But license holders are subject to state and local regulation affecting their right to sell a product which has commonly been deemed harmful to public health, safety, welfare, and morals. In many cases, licensees may be constitutionally protected against such public regulation.² The holder of a liquor license will receive procedural due process protec-

1. Kathryn Balint, *Key Meeting About Liquor Store Evaporates*, S. D. UNION-TRIB., Dec. 8, 1993, at B3 (liquor store owner expresses dismay at being "unfairly targeted" by neighborhood activists and California Department of Alcohol Beverage Control to control liquor sales).

2. Constitutional claims such as Commerce Clause violations, First Amendment interferences, and even Establishment Clause violations may be raised when the sale of liquor is regulated. These challenges, however, are beyond the scope of this Article. See *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 127 (1982) (holding Massachusetts statute, which vested power in churches and schools to control liquor licenses within five hundred foot radius, violates Establishment Clause of the First Amendment because it "enmeshes churches in the process of government"); *California v. LaRue*, 409 U.S. 109, 110-11 (1972) (upholding regulation which prohibited explicitly sexual live entertainment and films in bars and other establishments licensed to dispense liquor); *State Bd. of Equalization v. Young's Mkt. Co.*, 299 U.S. 59, 62 (allowing states to impose license fee on beer importation that would have been prohibited under the Commerce Clause); *S & S Liquor Mart, Inc. v. Pastore*, 497 A.2d 729, 731 (R.I. 1985) (rejecting plaintiff's claim that a liquor-advertising ban offended both the Commerce Clause and the Sherman Anti-Trust Act). Typically, First Amendment challenges to liquor license regulation arise in the context of live sexual entertainment. In a decision upholding the constitutionality of denying a liquor license to an establishment that promoted explicit sexual live entertainment, the Court held that state regulations under the Twenty-first Amendment are entitled to a presumption of validity. *LaRue*, 409 U.S. at 115. Subsequent decisions involving similar challenges have found that "a state may regulate such entertainment as part of a liquor license program without violating the First Amendment" based on the *LaRue* holding. *City of Rancho Cucamonga v. Warner Consulting Servs.*, 262 Cal. Rptr. 349, 351 (Ct. App. 1989). Accordingly, when liquor control is involved, the Twenty-first Amendment confers "something more than the normal state authority over public health, welfare, and morals." *Id.* (quoting *LaRue*, 409 U.S. at 114); see *infra* notes 6-9 and accompanying text.

tion and protection against a "taking" of property for public purposes only if the liquor license is considered "property."³ Thus, it is necessary, in addressing these particular constitutional concerns, to identify potential property interests which may exist in the license itself.⁴ Constitutional protection for substantive due process and equal protection violations does not require the existence of a property interest, but does require that the regulatory action be at a minimum rationally related to a legitimate state purpose.⁵

Public regulation of liquor licensing seeks to address many different social issues at both the state and local levels. Under the Twenty-first Amendment, great deference is given to states to regulate in this area.⁶ The Twenty-first Amendment in no way preempts constitutional requirements of other amendments,⁷ even though it "created an exception to the normal operation of the Commerce Clause."⁸ Thus, although states are granted authority to regulate intoxicating liquors under the Twenty-first Amendment, these regulations are still subject to other constitutional guarantees.⁹

The over-concentration of liquor stores in urban neighborhoods and its significant detrimental impact on inner-city communities are

3. "No person shall . . . be deprived of life, liberty, or *property*, without due process of law. . . ." U.S. CONST. amend. V (emphasis added). "No state shall . . . deprive any person of life, liberty, or *property*, without due process of law. . . ." U.S. CONST. amend. XIV, § 1 (emphasis added).

4. Identification of a license as property may also be essential to issues such as lien attachments by creditors, or for tax purposes. See *21 West Lancaster Corp. v. Main Line Restaurant, Inc.*, 614 F. Supp. 202, 205 (E.D. Pa. 1985), *rev'd*, 790 F.2d 354 (3rd Cir. 1986) (stating it is "well-settled in Pennsylvania that a liquor license cannot be subject to the execution process, nor can it be subject to a valid security interest"). See *infra* text accompanying note 61; see also *infra* note 59.

5. See *infra* text accompanying notes 229-50.

6. *Craig v. Boren*, 429 U.S. 190, 206 (1976) (citing *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964)).

7. The Twenty-first Amendment to the United States Constitution states:

The transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws *thereof*, is hereby prohibited.

U.S. CONST. amend. XXI, §2 (emphasis added).

8. *Craig v. Boren*, 429 U.S. 190, 206 (1976) (citing *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330 (1964)). In expressly granting power to the states, the Twenty-first Amendment "confer[s] something more than the normal state authority over public health, welfare and morals." *S & S Liquor Mart, Inc. v. Pastore*, 497 A.2d 729, 732 (R.I. 1985) (quoting *California v. LaRue*, 409 U.S. 109, 114 (1972)).

9. *Boren*, 429 U.S. at 206 (citing *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330 (1964)). The Twenty-first Amendment does, however, entitle any state action regulating alcohol to "an added presumption in favor of [its] validity." *S & S Liquor Mart, Inc.*, 497 A.2d at 732 (quoting *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714, 718 (1981)).

areas in which public regulation has been used to address societal ills associated with liquor sales.¹⁰ Some state legislatures have tried to combat this problem by exercising regulatory powers aimed at liquor licensing.¹¹ Local authorities have also endeavored to control liquor sales by invoking the Twenty-first Amendment power or by invoking the general police power to regulate for the public health, safety, morals, or general welfare. Constitutional concerns may arise, however, when government attempts to resolve the social problems associated with overconcentration of retail sales through control of such sales.

Any person whose constitutional rights have been violated by another person acting under color of state law has a cause of action under title 42, section 1983 of the United States Code (hereinafter § 1983).¹² Section 1983 provides the bases for suits against state and

10. A University of Southern California study by Dr. Richard Scribner suggests a "high correlation between the number of liquor stores and a neighborhood's crime rate." Jill Gottesman, *Corking the Bottle; Cities Try to Limit the Sale of Packaged Spirits*, L.A. TIMES, July 26, 1992, at J1 (citing Karen Bass, Executive Director of Community Coalition for Substance Abuse Prevention). According to the National Institute on Alcoholism, liquor contributes to 80% of the homicides and 60% of the injuries in African-American and Hispanic dominated inner-cities. Clarence Johnson, *L.A. After the Riots; A Fight to Keep Liquor Stores Shut*, S.F. CHRON., July 1, 1992, at A5; see also Marc Lacey, *Last Call For Liquor Outlets*, L.A. TIMES, Dec. 14, 1992, at A14 (stating that "[i]n roughly one-half to two-thirds of homicides and serious assaults, alcohol is found in the perpetrator or victim, or both").

11. See CAL. BUS. & PROF. CODE § 23958 (West 1985) (application for a license may be denied "if issuance of such license would tend to create a law enforcement problem, or if issuance would result in or add to an undue concentration of licenses . . ."); COLO. REV. STAT. § 12-47-137(2)(a) (1991) (local licensing agency shall consider evidence regarding the "number, type, and availability of liquor outlets located in or near the neighborhood under consideration" before approving or denying an application); CONN. GEN. STAT. § 30-46(a)(3) (1990) (department of liquor control may deny permit if "number of permit premises in the locality is such that the granting of a permit is detrimental to public interest, and, in reaching a conclusion in this respect, the department may consider the character of, the population of, the number of like permits and number of all permits existent in the particular town and the immediate neighborhood concerned, the effect which a new permit may have on such town or neighborhood or on like permits existent in such town or neighborhood"); D.C. CODE ANN. § 25-115(b)(2)(c) (1992) (Board may consider "whether issuance of license would create or contribute to an overconcentration of licensed establishments"); KY. REV. STAT. ANN. § 241.075(a) (Michie/Bobbs-Merrill 1981) (retail package liquor license may not be issued if proposed business will be within 700 feet of a similar establishment); MD. ANN. CODE ART. 2B, § 10-202(f) (1994) (in certain counties, Board of License Commissioners must take into consideration "the number of licenses already issued" before issuing another).

12. E. CHEMERINSKY, *FEDERAL JURISDICTION* 370 (1989). Forty-two U.S.C. § 1983 provides that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia subjects, or causes to

local governments and officials to remedy U.S. constitutional violations.¹³ A § 1983 claim may allow a licensee to collect damages and attorneys fees when there has been an unconstitutional interference with liquor license rights.

First, a liquor licensee may allege a denial of procedural due process under the Fourteenth Amendment.¹⁴ To be protected against a state action taken without proper notice or hearing, however, a licensee must have a "property" or a "liberty" interest at stake.¹⁵ Occasionally, real property interests are affected when government regulates property use. Most procedural due process challenges involving liquor licensing, however, arise when the personal property aspect of the license is affected.¹⁶ The procedural due process analysis in this Article therefore focuses on the extent of protection required from a governmental unit when its actions affect the personal property interest in a liquor license.

Second, the license holder may claim that a particular state action constitutes a "taking" of her "property" under the Fourteenth Amendment,¹⁷ justifying an inverse condemnation remedy. Such a "takings" claim may apply to state or local actions affecting either the land use regulation of retail liquor sale locations, or actions affecting the personal property interest in the license itself.¹⁸ This Article discusses the takings issue as it applies to both the interference with real property interests and the impact on the liquor license as personal property.¹⁹

be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (1989).

13. *See Reed v. Village of Shorewood*, 704 F.2d 943 (7th Cir. 1983) (concerning a suit for damages under 42 U.S.C. § 1983 by bar owners who alleged that the Village interfered with and eventually destroyed their business, in violation of the due process clause of the Fourteenth Amendment).

14. U.S. CONST. amend. XIV, § 1 ("[n]or shall any State deprive any person of life, liberty, or property, without due process of law").

15. *Arnett v. Kennedy*, 416 U.S. 134, 164 (1973) (Powell, J., concurring).

16. *See infra* notes 104-119 and accompanying text.

17. U.S. CONST. amend. XIV, § 1.

18. *See Fulmer Supermarket, Inc. v. State Director, Dep't of Liquor Control*, No. 88AP-26, 1988 WL 96210, at *5 (Ohio Ct. App. Sept. 13, 1988) (distinguishing between property interest in the license, which was not lost or interfered with by local-option election, and location at which rights under the license could be exercised).

19. Many states do not recognize liquor licenses as "property" interests. *See infra* notes 150-159 and accompanying text.

Third, the licensee may assert a denial of substantive due process under the Fourteenth Amendment,²⁰ which prohibits state actions that are arbitrary, capricious or without a rational or reasonable relationship to the "public health, safety, morals, or general welfare."²¹ Often, a closely associated claim that equal protection under the Fourteenth Amendment has been denied is also made.²² A license holder claiming an equal protection violation may argue that she is unequally burdened by a governmental action not applied to similar license holders under similar circumstances.

Part I of this Article examines the constitutional issues that arise when a liquor license is considered a property right. Section A discusses four attributes of liquor licenses that can be used to determine whether the license is a constitutionally protected property interest in a given state. Section B illustrates the applicability of these four attributes to the extent that procedural due process is accorded in actions involving liquor licenses, by examining the licensing provisions and court decisions of several states.²³ Section C discusses how courts have decided whether procedural due process rights have been violated in liquor licensing actions. Section D evaluates the protection that may be available for liquor licensees under the Takings Clause of the Fifth Amendment.

Part II of the Article explores the constitutional protections provided to liquor licensees based on substantive due process and equal

20. U.S. CONST. amend. XIV, § 1.

21. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). The Court developed this standard to judge whether the statute satisfied the constitutional requirements of substantive due process in determining whether local police power included the right to enact zoning regulations for legitimate purposes. *Id.* at 394.

22. *See infra* note 229.

23. Several states, including Alabama, California, Colorado, Georgia, and Illinois, have determined whether due process must be accorded in refusing to issue a liquor license. *See discussion infra* part I.B. Other states have only ruled on the level of due process which must be accorded for revocation or suspension hearings. *Myers v. Holshouser*, 214 S.E.2d 630, 637-39 (N.C. Ct. App. 1975), *cert. denied*, 216 S.E.2d 907 (N.C. 1975). Still other states have only ruled on the level of due process which must be given for a revocation of a license as opposed to refusals to issue. *See, e.g., Malito v. Marcin*, 303 N.E.2d 262, 265 (Ill. Ct. App. 1973) (holding that no due process concerns were implicated by the refusal to issue a license). *But see Las Fuentes, Inc. v. City of Chicago*, 567 N.E.2d 1093, 1096 (Ill. Ct. App. 1991) (holding that although a liquor license was not property, revocation of such a license had to satisfy due process). Although state law may specifically decline to define a liquor license as property, federal courts may require due process protection and construe the holding of a liquor license as a property interest. *Hoo Chung v. Blase*, No. 86-C-3012, 1987 U.S. Dist. LEXIS 11859 at *9 (N.D. Ill. Dec. 17, 1987) (stating that, although Illinois law defines a license as a privilege and not a property right, "federal constitutional law determines whether" the Due Process Clause applies).

protection. These two claims do not require a finding that the liquor license is a property interest. The Article concludes by offering guidelines as to whether a particular state will provide constitutional protection, and to what degree, to a liquor licensee affected by state or local regulation.

I. Constitutional Protection of a Liquor License as a Property Interest

A. Indicators of a License's Status as a Property Interest

The word "property" denotes a legal relationship between persons with respect to an object.²⁴ Property interests are created and defined by "existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and support claims of entitlement to those benefits."²⁵ A constitutionally protected property interest must be an interest that is securely held, so that it is more than a mere expectation of an interest.²⁶ Consequently, the need for due process and the extent of its application depends upon the characteristics of the interest granted by a liquor license in a particular state.²⁷

A liquor license has four attributes which delineate its property characteristics: the right to obtain, the right to alienate, the right to renew, and the state's right to revoke.²⁸ These attributes determine

24. ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY* § 1.2 (2d ed. 1993).

25. *Board of Regents v. Roth*, 408 U.S. 564, 578-79 (1972) (holding that non-tenured professor had no liberty or property interest in continued employment).

26. *Id.* at 577 ("To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. . . . He must, instead, have a legitimate claim of entitlement to it.").

27. "These issues are resolved by application of a balancing test that weighs the strength of the plaintiff's interest, the utility of the procedure being used and of the procedure which the plaintiff urges, and the strength of the government's interest in resisting the procedure." Michael Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. REV. 1067, 1085 (1992) (citing *Mathews v. Eldridge*, 424 U.S. 319, 347-49 (1976)).

This Article does not examine the extent and timing of due process required for each of the model states beyond the basic requirements of notice, hearing and an impartial decisionmaker since "[t]he types of 'liberty' and 'property' protected by the Due Process Clause vary widely, and what may be required under that Clause in dealing with one set of interests which it protects may not be required in dealing with another set of interests." *Arnett v. Kennedy*, 416 U.S. 134, 155 (1974). See *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971) (holding that "[t]he formality and procedural requisites for [a due process] hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings").

28. See, e.g., *Sea Girt Restaurant v. Borough of Sea Girt*, 625 F. Supp. 1482, 1487 (D.N.J. 1986), *aff'd*, 802 F.2d 448 (3d Cir. 1986) (explaining that the New Jersey Supreme

whether a liquor license constitutes a property interest for purposes of procedural due process or takings challenges. The level of constitutional protection accorded a liquor license depends upon which of these characteristics are present in the state liquor licensing provisions.²⁹

1. *The Right To Obtain*

The right to obtain a liquor license arises from the substantive criteria specified in a state's statutory scheme for granting licenses.³⁰ When a statute lacks substantive criteria for identifying when a license must be granted, a license is not a property interest.³¹ When the statutory scheme sets forth detailed rules for deciding whether to grant a license, giving little discretion to the granting authority, it creates a constitutionally protected property interest.³²

Court held that a liquor license constitutes "property" in New Jersey after "the Court looked beyond the language of the Alcoholic Beverage Law [which clearly pronounced that the license was *not* property] to examine the attributes of the license itself" (citing *Boss Co. v. Board of Comm'rs*, 192 A.2d 584, 586 (N.J. 1963)). The attributes of the liquor license examined by the Court in *Boss* included its monetary value and transferability. *Boss*, 192 A.2d at 586-87.

29. Linda L. Munden, Note, *Retail Liquor Licenses and Due Process: The Creation of Property Through Regulation*, 32 EMORY L.J. 1199, 1241 (1983) (noting that both legislatures and courts have implicitly recognized that requirements of due process protection are determined by the property characteristics of a liquor license). Munden analyzes the manner in which the number of licenses issued is limited by the state in order to determine the due process protection given to liquor licensees. *Id.* at 1200. Although a similar analysis of this feature is included within the "right to obtain" attribute discussion, other attributes such as the "right to renew" are also critical in determining the level of property characteristics accorded liquor licenses by the various states.

30. *Scott v. Village of Kewaskum*, 786 F.2d 338, 340 (7th Cir. 1986) (stating that Wisconsin statute conditions the grant of a liquor license on the citizenship, age and moral character of the applicant).

31. *Id.* ("To the extent a request appeals to discretion rather than to rules, there is no property . . ."); *Wilcox v. Miller*, No. 89-C-20053, 1990 U.S. Dist. LEXIS 19172, at *9 (N.D. Ill. Nov. 6, 1990); see also *Pietrofeso v. United States*, 801 F. Supp. 743, 747 (Ct. Int'l Trade 1992) (stating that the rationale from the *Scott* decision is applicable to statute and regulations pertaining to customs brokers' licenses which do not state when a license must be granted).

32. *Atlanta Bowling Ctr., Inc. v. Allen*, 389 F.2d 713, 716 (5th Cir. 1968) (due process rights arise where a state sets forth specific criteria for decision to grant a license); *Benel, Inc. v. Barry*, No. C-88-3413 1989 U.S. Dist. LEXIS 9692, at *7-8 (D.D.C. Jan. 17, 1989) (statutory framework of rules along with "presumption of an applicant's appropriateness in the absence of an objection, creates a legitimate property interest for applicants"); *Bayview-Lofberg's, Inc. v. City of Milwaukee*, 710 F. Supp. 1267, 1269 (E.D. Wis. 1989), *aff'd*, 905 F.2d 142, 146 (7th Cir. 1990) (ordinance does not establish any criteria which entitles applicants to license and since liquor license application may be denied within the discretion of the Committee and the Common Council, plaintiffs have no property interest in license); *Mirshak v. Joyce*, 652 F. Supp. 359, 367-68 (N.D. Ill. 1987) (municipal code of

A state or local government may also limit the number of liquor licenses issued,³³ increasing the difficulty of obtaining a license and, thus, increasing the license's value to a holder.³⁴ Property has been defined as "every thing to which a man may attach a value and have a right."³⁵ Further, property is characterized as a legally protected expectation where one derives an advantage from the object possessed.³⁶ When the state places greater limitations on obtaining a license, a holder's heightened expectation of receiving a valuable, legally protected asset generates property characteristics in the license.³⁷ "The most 'property-like' licenses are those issued in states that set an arbitrary and inflexible limit on the number issued"³⁸ and those issued in states that specify substantive criteria identifying when a license must be granted.

States generally follow one of four schemes in issuing liquor licenses.³⁹ Under the first scheme, the state issues a license to any applicant who meets the statutory qualifications.⁴⁰ If the statute clearly specifies that the license must be granted whenever these qualifications are met, then the applicant's expectations of receiving a pro-

Chicago specifies criteria for obtaining a liquor license, thus creating a property right for a license applicant).

33. State *ex rel.* Howie v. Common Council of Northfield, 101 N.W. 1063, 1064 (Minn. 1902) (power to regulate and control liquor licenses includes power to limit number of licenses for municipality's welfare). Gartland v. Talbott, 237 P.2d 1067, 1070 (Idaho 1951) ("A limitation of the number of licenses which will be issued for the sale of intoxicants within a municipality or within a given area is not of itself prohibitory, and is recognized as a legitimate regulation tending to promote public health, safety and welfare within the police power . . .").

34. Munden, *supra* note 29, at 1242-43 (limiting licenses issued makes the license a valuable asset separate from the business operating under the license).

35. 6 JAMES MADISON, *Property, in WRITINGS OF JAMES MADISON* 101 (Gaillard Hunt ed., 1906).

36. Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127, 130-31 & nn.10-11 (1990) (discussing the "reasonable expectations" approach to defining property).

37. "The 'value' of the permit is gained not from the permit itself, or the business conducted pursuant to the permit but, instead, because of statutory and rule limitations upon the number of permits that may be issued within a given area." Fulmer Supermarket, Inc. v. State Director, Dep't of Liquor Control, No. AP-26, 1988 Ohio App. LEXIS 96210, at *7 (Ohio Ct. App. Sept. 13, 1988).

38. Munden, *supra* note 29, at 1243.

39. *See id.* at 1200.

40. *See, e.g.*, GA. CODE ANN. §§ 3-2-3, -3, -302 (Harrison, 1991); KAN. STAT. ANN. § 41-301 (1993); LA. REV. STAT. ANN. §§ 26:84-85 (West 1989); OKLA. STAT. ANN. tit. 37, § 527 (West Supp. 1995). For states falling into this category, there is some expectation that if a prospective licensee meets the necessary state and local requirements, she will be granted the right to operate a retail liquor business. Munden, *supra* note 29, at 1211-12.

tectable and valuable asset may create a property interest.⁴¹ On the other hand, the mere application for a license does not create a property interest if the statute specifies that the license may be denied if certain qualifications are not met.⁴²

The second licensing scheme gives the state discretion to determine how many licenses should be issued.⁴³ Licenses issued under this scheme have more property characteristics than those issued in unlimited numbers due to state-imposed limitations on the issuance of new licenses.⁴⁴ The third scheme limits the number of new licenses to a fixed statutory quantity.⁴⁵ These licenses have more property characteristics than the two previously mentioned schemes because numerical limits are placed on the issuance of the new licenses.⁴⁶

Under the fourth scheme, retail liquor outlets are operated by the state, rather than licensed to the private sector.⁴⁷ Jurisdictions employing this approach will not be discussed since this scheme does not allow private ownership subject to public regulation.

2. *The Right To Alienate*

The second attribute indicating that a liquor license is a property interest is the right to alienate the license by transfer, assignment, or

41. See *Tokumoto v. Department of Revenue of Montana*, 869 P.2d 782, 783 (Mont. 1994) (licensee must fulfill criteria required by statute prior to issuance of a license); *B & R Stores, Inc. v. City of Lincoln*, 511 N.W.2d 101, 103 (Neb. 1994) (license must be issued to licensee satisfying statutory requirements).

42. See *Moon Jung v. Soo*, 167 P.2d 929, 931 (Ariz. 1946) (every liquor licensee must be a "qualified elector"); *A & H Servs. v. City of Wahpeton*, 514 N.W.2d 855, 858 (N.D. 1994) (city had discretion to deny license if certain criteria were not met).

43. See, e.g., ARK. CODE ANN. §§ 3-4-201(b), (c) (Michie 1987); COLO. REV. STAT. § 12-47-105 (1991); MINN. STAT. § 340A.301 (1992); N.Y. ALCO. BEV. CONT. LAW §§ 2, 17(2) (McKinney 1987); TEX. ALCO. BEV. CODE ANN. § 11.43 (West Supp. 1994). In some states, this authority may be delegated to the local governing unit. See ALASKA STAT. § 04.06.090 (1994).

44. See *supra* notes 37-38. For states following this scheme, the state licensing authority is empowered to determine whether issuing new licenses will harm the public welfare and well-being of the public. Munden, *supra* note 29, at 1220.

45. The state legislature sets an arbitrary limit on the number of licenses which may be issued within a district. Munden, *supra* note 29, at 1231. See, e.g., ALASKA STAT. § 04.11.400 (1994); CAL. BUS. & PROF. CODE §§ 23815-23825 (West 1985); FLA. STAT. ANN. § 561.20 (West Supp. 1994); MICH. COMP. LAWS ANN. § 436.19(c) (West Supp. 1994); MONT. CODE ANN. § 16-4-201 (1993).

46. *Keation v. State*, 173 So. 2d 673, 676 (Fla. 1965). "[D]ue to the limitations respecting the number and location of liquor establishments and the conditions under which the license is issued, a liquor license has come to have the quality of property . . ." *Id.* See Munden, *supra* note 29, at 1200-01.

47. See N.C. GEN. STAT. § 18B-800 (1993); VT. STAT. ANN. tit. 7, § 104 (1988); W. VA. CODE § 60-1-4 (1992).

bequest. When a state liquor licensing statute allows holders to transfer licenses, holders have the opportunity to enter the marketplace and obtain fair market value for the property interest.⁴⁸ Federal courts have looked at the transferability and market value of licenses in determining whether state-created interests constitute property to which a federal tax lien attaches.⁴⁹ “[A] liquor license will constitute property, within the meaning of federal law [for I.R.S. purposes], if the license has beneficial value for its holder, and is sufficiently transferable.”⁵⁰ A transferable liquor license has “intrinsic worth that is subject to bargain and sale in the marketplace.”⁵¹ Thus, the federal courts regard transferable liquor licenses as personal property.

States have also used alienability to determine whether a liquor license is a property interest. California, for example, has recognized that a liquor license is a property right with the attributes of value and assignability.⁵² The Minnesota Supreme Court, in *State v. Saugen*,⁵³ also recognized that the license has monetary value due to its alienability, entitling the owner of a liquor business condemned through em-

48. *Nelson v. Naranjo*, 395 P.2d 228, 231 (N.M. 1964) (“Where the [liquor licensing] statute recognizes the right of transfer from one to another, and where the right is a valuable right . . . the license or right to do business becomes a valuable property right.” (quoting *Deggender v. Seattle Brewing & Malting Co.*, 83 P. 898, 899 (1906))); *Boss Co. v. Board of Comm’rs*, 192 A.2d 584, 587 (N.J. 1963) (holding that “the liquor license is a legal interest in the nature of an economic asset . . . and because it has monetary value and is transferable, either by consent of the licensee or by operation of law . . . it possesses the qualities of property”).

49. *In re Terwilliger’s Catering*, 911 F.2d 1168, 1171 (6th Cir. 1990). Federal courts have sometimes disagreed with a state’s assessment of whether or not a liquor license is a property interest. *Brookpark Entertainment, Inc. v. Taft*, 951 F.2d 710, 714-15 (6th Cir. 1991) (federal courts must “look behind labels” given by the state to the license interest to determine whether a license is property in a functional sense (citing *Reed v. Village of Shorewood*, 704 F.2d 943, 948 (7th Cir. 1983))). In *Brookpark Entertainment*, the court found that because Ohio allows a liquor license to be transferred, sold, inherited, and renewed, the liquor license has pecuniary value to its holder and is protected under the Due Process Clause prior to its revocation. *Id.* at 716. The *Brookpark* court noted, however, that its holding did not include the recognition of a property interest for a first-time liquor license applicant. *Id.* at 716, n.4.

50. *Kimura v. Battley*, 969 F.2d 806, 811 (9th Cir. 1992). The ability to transfer a license is an important factor in determining whether the license has acquired the necessary property characteristics, because it corresponds with the rights of ownership and gives the license a market value. *See Golden v. State*, 285 P.2d 49, 52-53 (Cal. Ct. App. 1955); *see also Harvey Levin, Economic and Regulatory Aspects of Liquor Licensing*, 112 U. PA. L. REV. 785, 807-08 (1964).

51. *Kimura*, 969 F.2d at 811. *See also Little v. United States*, 704 F.2d 1100, 1105-06 (9th Cir. 1983) (pecuniary worth and transferability determine whether an asset is property).

52. *See, e.g. Roehm v. Orange County*, 196 P.2d 550, 554 (Cal. 1948) (en banc) (finding liquor license to be taxable property).

53. 169 N.W.2d 37 (Minn. 1969).

inent domain to compensation.⁵⁴ Minnesota, however, typically does not recognize a property interest in a liquor license for purposes other than eminent domain.⁵⁵ This apparent inconsistency in Minnesota's view of liquor licenses is not uncommon among the states. States differ widely, even within their own boundaries, as to whether a liquor license is treated as property for all purposes. This difference of opinion may be due to the fact that not all courts recognize that a license has monetary value to a licensee who possesses a right to alienate the license.⁵⁶

There is wide variation in how states view the element of alienability and the corresponding property interest in the license. This variation exists because there are different reasons why a license might be treated as an asset. For example, some courts treat the license as a privilege in issues involving the relationship of the licensee to the government, and as property in issues involving the relationship of the licensee to third parties, such as creditors or heirs. Further, the monetary value created when a state allows the transfer of a liquor license for compensation does not necessarily justify treating the license as property for all purposes.⁵⁷

In Pennsylvania a state statute provides that a liquor license can be transferred upon the death of the licensee to the surviving spouse, or personal representative, or a person designated by the licensee.⁵⁸ The courts in Pennsylvania, however, have consistently held that under the Pennsylvania Liquor Code a liquor license is not property, even though the license enhances the value of the licensee's business and the state is required to pay compensation to the licensee in con-

54. *Id.* at 40, 46.

55. *Country Liquors, Inc. v. City Council of Minneapolis*, 264 N.W.2d 821, 826 (Minn. 1978).

56. *Saugen*, 169 N.W.2d at 40. The *Saugen* court stated:

"This difference of opinion as to the legal nature of a liquor license is apparently due to the fact, not always recognized by the courts, that such license, while a mere privilege as far as the relation between the government and the licensee is concerned, nevertheless constitutes a definite economic asset of monetary value for its owner. . . . It is submitted that wherever the legislature has made licenses assignable or transferable, and the transfer can be effected with the consent of the authorities to anyone qualifying under the statute, the property element in the license is sufficiently recognized to warrant its exposure to seizure by the creditors of the licensee."

Id. (quoting Annotation, 148 A.L.R. 492 (1944)).

57. *Fulmer Supermarket, Inc. v. State Director, Dep't of Liquor Control*, No. 88 AP-26, 1988 Ohio App. LEXIS 3789, at *3-4 (Ohio Ct. App. Sept. 13, 1988).

58. 47 PA. STAT. ANN. tit. 4 § 468(a) (1994).

demnation proceedings.⁵⁹ New Mexico also limits the treatment of liquor licenses as property by stating that there is no vested right in a liquor license as against the State.⁶⁰ Nevertheless, New Mexico law states, "as against creditors of the licensee the license shall be considered property subject to execution, attachment, security transactions, liens, receivership and any and all other incidents of tangible personal property."⁶¹

The right to alienate is an attribute that may be used to generate property characteristics in a liquor license. Its use may be limited, however, by state decisions which differentiate between the relationship of the licensee to the government and the relationship of the licensee to third parties.

3. *The Right To Renew*

The third attribute, the right to renew, may also create a property interest in the liquor license. The renewal procedure varies within each state and most liquor licenses are valid for only one year. Some states allow the licensee to renew without a formal reapplication. These "perpetual" statutes give specific guidelines for renewal and allow rejection of renewal only upon "good cause."⁶² In these jurisdictions, the licensee comes to expect that the license will be renewed as a matter of course.⁶³ The perpetual renewal procedures provide for abbreviated and expedited review processes, avoiding the rigid proce-

59. *See* 21 West Lancaster Corp. v. Main Line Restaurant, Inc., 614 F. Supp. 202, 205 (E.D. Pa. 1985); *see also* *In re* Ryan's Estate, 99 A.2d 562, 563-64 (Pa. 1953) (holding that the license was not an asset of the state and, therefore, state inheritance tax could not be imposed on such a transfer to a surviving spouse since the license terminated upon the death of the licensee, and the Liquor Control Board had the power to grant a new license to the designated person).

60. N.M. STAT. ANN. § 60-6A-19 (Michie 1993).

61. *Chronis v. State*, 670 P.2d 953, 956 (N.M. 1983).

62. For example, the Colorado renewal statute provides that the "licensing authority may refuse to renew any license for good cause, subject to judicial review." COLO. REV. STAT. § 12-47-106(b) (1991).

63. *Bundo v. Walled Lake*, 238 N.W.2d 154, 161 (Mich. 1976) (holding that when "the statutory scheme for renewal of liquor licenses is geared to permit renewal of licenses to take place as a matter of course . . . the nature of an understanding exists that once a license is granted a licensee will be permitted to operate for more than one year"); *Reed v. Village of Shorewood*, 704 F.2d 943, 948-49 (7th Cir. 1983) (renewal of liquor license is a property right). *See also* *Perry v. Sindermann*, 408 U.S. 593, 601 (1972) (stating that an employment contract which guarantees continued employment unless the employer shows good cause for termination can amount to a legitimate claim of entitlement regardless of whether the guarantee is stated or implied); *Brookpark Entertainment, Inc. v. Taft*, 951 F.2d 710, 714 (6th Cir. 1991) (stating that liquor licenses can be considered a form of property when they constitute a given entitlement, thus, "[a]n individual having 'present enjoyment of the benefit and a claim of entitlement to its continuation under state law . . . [has] a

dures required for initial license issuance.⁶⁴ In these states, renewal is considered a continuation of the original liquor license and little, if any, investigation or examination of the licensee is required.⁶⁵ A perpetual liquor license therefore may be characterized as property due to the licensee's entitlement to renewal.⁶⁶ Where there is an expectation that a license will be renewed, the license acquires a greater property interest due to the reliance that the license will be renewed.⁶⁷

Other states follow a "provisional" renewal procedure, instead of the "perpetual" renewal procedure. The provisional renewal scheme requires holders to reapply each year for renewal.⁶⁸ Provisional statutes deny the licensee any expectation of automatic renewal.⁶⁹ There-

property interest") (quoting 2 RONALD D. ROTUNDA ET AL., TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 17.5 (1986)).

64. See ALA. CODE § 28-3A-5 (Supp. 1994); COLO. REV. STAT. § 12-47-106 (Supp. 1994); OHIO REV. CODE ANN. § 4303.29.2 (Anderson 1989).

65. *Golden v. State*, 285 P.2d 49, 52 (Cal. Ct. App. 1955); *Saso v. Furtardo*, 232 P.2d 583, 585 (Cal. Ct. App. 1951); *Scioto Trails Co. v. Ohio Dep't of Liquor Control*, 462 N.E.2d 1386, 1391 (Ohio 1983) (plaintiff's liquor license subject to automatic renewal provisions unless precluded by local-option election).

66. *Brookpark Entertainment, Inc. v. Taft*, 951 F.2d 710, 716 (6th Cir. 1991) (Ohio liquor licensee has a property interest protected under the Due Process Clause since the licensee holds a claim to license's continuation under state law); *Bundo v. City of Walled Lake*, 238 N.W.2d 154, 160 (Mich. 1976) (holder of a liquor license in Michigan can assume that there is a great likelihood that license will be renewed). *But see Scioto Trails Co.*, 462 N.E.2d at 1391 (stating it is "well-established that a liquor permit is not property in the traditional sense").

67. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). The Court states: "It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Id.* See *Manos v. City of Green Bay*, 372 F. Supp. 40, 49 (E.D. Wis. 1974) (tavern owner's business investment affected by city's refusal to renew liquor license, and existing understanding in this situation is that once license is granted it will likely be renewed).

68. The "provisional" category is similar to the "probationary" status of an employee who has only "an abstract concern in being rehired," not a property interest requiring a hearing. *Roth*, 408 U.S. at 578 (1972). A liquor license with a provisional status specifically denies any expectation that a license will be renewed as a matter of course. For example, the Illinois renewal statutes explicitly provide that no expectation of continued renewal should be assumed and that the state has the right to change the qualifications for renewal after the licensee has obtained the original license. ILL. ANN. STAT. ch. 235, para. 5/6-1 (Smith-Hurd 1993). Specifically, the code provides that "the renewal privilege herein provided for shall not be construed as a vested right which shall . . . prevent the city council . . . from decreasing the number of licenses to be issued within its jurisdiction." *Id.* Likewise, the Georgia statute mandates that all liquor licenses "issued pursuant to this title shall expire on December 31 of each year and application for renewal shall be made annually." GA. CODE ANN. § 3-2-7 (Harrison 1991).

69. See generally *Chesser v. Johnson*, 387 F.2d 341, 342 (5th Cir. 1967) (holding that the requirements for a renewal applicant must be "considered under the standards of the ordinance governing the matter" at the time the license is up for renewal). *Bundo v. Walled Lake*, 238 N.W.2d 154 (Mich. 1976); *But see Reed v. Village of Shorewood*, 704

fore, the licensee is not granted the "legitimate claim of entitlement"⁷⁰ necessary to raise the license to the level of constitutionally protected property.⁷¹ In Colorado, for example, liquor licenses expire annually,⁷² yet license holders may commit "their lives and their capital to building their businesses" relying on license renewal.⁷³ Regardless, Colorado courts have held that such license holders have "acted at their peril and assumed the risk that their licenses may not be renewed."⁷⁴ License holders, in states that follow a provisional renewal scheme, do not have a reasonable expectation that their license will be protected as property.

4. *The State's Right to Revoke*

The fourth and final attribute, the state's right to revoke, arises from restrictions that statutes place on state actions in revocation hearings. States often require different due process standards for revocation hearings than for issuance decisions. For example, rudimentary due process requirements of adequate notice and an opportunity to be heard are necessary to revoke or suspend a liquor license in Illinois.⁷⁵ Prior to an issuance of a liquor license in Illinois, however, no property right exists and the application procedure is not subject to due process protection at all.⁷⁶ Some states, on the other hand, apply the same due process standards for both the issuance procedure and the revocation procedure. In Georgia, for example, the local governing authority for liquor licenses is bound to follow the same due

F.2d 943, 948-49 (7th Cir. 1983) (renewal procedures in Illinois are so routine and uncomplicated they imply a legislative intent to renew most licenses, which results in a "property right" entitled to due process protection).

70. *Roth*, 408 U.S. at 577.

71. *Munden*, *supra* note 29, at 1217-18. When a statute requires annual reapplication, the only entitlement that the applicant can claim is that during the licensed period, the licensee has the right to engage in the sale of liquor. *Id.* See *State ex rel. Garrett v. Randall*, 527 S.W.2d 366, 373 (Mo. 1975) (en banc) (holding that since applicant for renewal of license had no property interest in a one year liquor license, failure to hold evidentiary hearing was not denial of due process). *But see* *ARO Sys., Inc. v. Supervisor of Liquor Control*, 684 S.W.2d 504, 507 (Mo. Ct. App. 1984) (holding that liquor licensee has a property interest in a validly issued liquor license).

72. COLO. REV. STAT. § 12-47-106(1)(a) (1994).

73. *Ficarra v. Department of Regulatory Agencies*, 849 P.2d 6, 18 (Colo. 1993) (en banc) (non-renewal of bail bondsman's license was not unconstitutional since he had no vested right to renewal of inactive license).

74. *Id.* (citing *Board of County Comm'rs v. Buckley*, 213 P.2d 608, 612 (Colo. 1949)).

75. ILL. REV. STAT. ch. 235, para. 5/7-5 (1994).

76. *Ole, Ole, Inc. v. Kozubowski*, 543 N.E.2d 178, 180-82 (Ill. Ct. App. 1989) (holding that due process was not necessary for filing a local option referendum petition to restrict future alcohol sales within the district).

process guidelines set forth in the statute for “[t]he granting or refusal and the suspension or revocation of the permits or licenses.”⁷⁷ The level of procedural protection accorded the licensee at a revocation hearing is a good indication of whether the state treats the interest as a vested property right, or merely as an expectation of continued entitlement.⁷⁸

The presence of any of these four attributes indicates the existence of a sufficient property interest necessary to accord liquor licenses due process protection. Although none of the attributes are mandatory to a determination that the license is a property right,⁷⁹ their presence encourages courts to find that the licensee’s interest in the liquor license has risen to the level of a constitutionally protected property interest. These characteristics may also influence the *level* of due process protection required for any state action. As the degree of property like characteristics increases, the level of constitutional protection accorded the applicant or licensee also increases.

B. Extent of Procedural Due Process Protection Accorded Actions Involving Liquor Licenses

The Fourteenth Amendment provides that no state shall “deprive any person of life, liberty or property, without due process of law.”⁸⁰ The procedural due process implicated by the Due Process Clause “assures appropriate notice, hearing, and an unbiased decisionmaker before government deprives a person of certain protected interests.”⁸¹ Because liquor licensing is regulated under statutory or constitutional provisions,⁸² a state or local agency’s refusal to issue licenses, or decisions to revoke or to transfer a license, is a state action which may

77. GA. CODE ANN. § 3-3-2(a) (Harrison 1991).

78. See Munden, *supra* note 29, at 1210-11. The greater the protection accorded for revocation hearings, the more it appears that the state intended the interest in a liquor license to be a vested property right. *Contra* *Leafer v. State*, 104 So. 2d 350, 351 (Fla. 1958) (holding that because a license is not property and confers no vested interest, “it is at all times revocable at the pleasure of the authority from which it emanates”) (quoting *State ex. rel. First Presbyterian Church v. Fuller*, 187 So. 148, 150 (Fla. 1939)).

79. *Reed v. Village of Shorewood*, 704 F.2d 943, 948-49 (7th Cir. 1983) (holding that although an Illinois liquor license could not be sold or bequeathed, it could be considered property within the meaning of the due process clause).

80. U.S. CONST. amend. XIV, § 1.

81. Asimow, *supra* note 27, at 1084; see also *Arnett v. Kennedy*, 416 U.S. 134, 164 (1974) (Powell, J., concurring); Edward L. Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044, 1109 (1984). It is beyond the scope of this Article to discuss federal due process in detail. For a comprehensive discussion of due process, see generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 663-768 (2d ed. 1988).

82. See *supra* notes 6-9 and accompanying text.

trigger a claim that the licensee has been deprived of procedural due process.⁸³ Due process protection against state action requires that the action impair a constitutionally protected “liberty” or “property” interest.⁸⁴ The nature of the liquor license interest determines whether due process is required at all,⁸⁵ and, if so, the extent of the process due and when it must be provided.⁸⁶ In addition, “[a]lthough the underlying substantial interest is created by ‘an independent source such as state law,’ federal constitutional law determines whether that interest rises to the level of a ‘legitimate claim of entitlement’ protected by the Due Process Clause.”⁸⁷

The nature of the liquor license interest is defined by state and local liquor licensing provisions and state court decisions interpreting these provisions.⁸⁸ Initially, some states attempted to circumvent due process considerations by labeling the liquor license a “privilege” rather than a “property interest.”⁸⁹ The Supreme Court rejected this classification in *Board of Regents v. Roth*, reasoning that it is not the label attached by the state, but the nature of the interest being de-

83. For purposes of this section procedural due process will generally be referred to as “due process.”

84. See *Arnett v. Kennedy*, 416 U.S. 134, 164 (1974); *Board of Regents v. Roth*, 408 U.S. 564, 569 (1972). Not everyone agrees with the Court’s use of the terms “liberty” and “property” for due process analysis. At least one commentator has suggested that instead “the inquiry should focus on the fairness of the governmental action.” Rubin, *supra* note 81, at 1047. California has also expanded procedural due process under the California Constitution to make it more inclusive than federal due process. California considers freedom from arbitrary government action to be itself a liberty interest protected by due process. Asimow, *supra* note 27, at 1086 n.57 (citing *People v. Ramirez*, 599 P.2d 622, 627 (Cal. 1979) (refusing to follow federal constitutional law)).

85. *Roth*, 408 U.S. at 570-71.

86. Asimow, *supra* note 27, at 1085 n.52 (citing *Mathews v. Eldridge*, 424 U.S. 319, 347-49 (1976)).

87. *Hoo Chung v. Blase*, No. 86-C3012, 1987 U.S. Dist. LEXIS 11859 at *9 (N.D. Ill. Dec. 17, 1987) (quoting *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978)).

88. States were given control over liquor licensing under the Twenty-first Amendment. See *supra* notes 6-9 and accompanying text. Deprivation of a “liberty interest” also requires due process protection. A liberty interest has been broadly defined to include, among other rights, the right to contract and to “engage in any of the common occupations of life.” *Roth*, 408 U.S. at 572 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)). Thus, liberty rights could be implicated if a liquor license owner was forced to discontinue his business due to state action. Nevertheless, this Article focuses only on the property interest aspect of due process deprivation rather than addressing state action involving liquor licenses as affecting a liberty interest.

89. See *Kicklighter v. City of Jesup*, 135 S.E.2d 890, 892 (Ga. 1964); *Ole, Ole, Inc. v. Kozubowski*, 543 N.E.2d 178, 181 (Ill. App. Ct. 1989); *State ex rel. Carman v. Ross*, 162 S.W. 702, 704 (Mo. Ct. App. 1914); *Gas ‘N Shop, Inc. v. Nebraska Liquor Control Comm’n*, 427 N.W.2d 784, 789 (Neb. 1988); *State v. Bush*, 253 S.W.2d 269, 272-73 (Tex. 1952).

prived, that must be considered in determining whether due process is required.⁹⁰ The Court looked to state law to determine whether a liquor license should be considered property for due process purposes.⁹¹ Courts, in determining the nature of the interest, typically focus on the property characteristics of the liquor license⁹² rather than any liberty interest.⁹³ Finally, a few states ignore the definitional analysis used in *Roth*, and instead afford due process protection as a matter of fairness.⁹⁴

If the interest in a liquor license rises to the level of a protected liberty or property interest under federal constitutional law, the court must decide what procedures are required to satisfy due process and whether these procedures have been satisfied.⁹⁵ The level of due process required in a particular situation will depend on the nature of the property interest affected and the type of state action involved.⁹⁶ The concept of due process is flexible and "calls for such procedural protections as the particular situation demands."⁹⁷

90. *Roth*, 408 U.S. at 570-71.

91. *Id.* at 577.

92. *See supra* notes 24-79 and accompanying text for a discussion of attributes of a liquor license used to determine property interest.

93. In *Scott v. Village of Kewaskum*, 786 F.2d 338, 340 (7th Cir. 1986), however, the court analyzed the allegation of a due process violation based on the deprivation of a property interest in the liquor license itself, as well as a deprivation of the liberty interest in being allowed to sell liquor as an occupation. "Liberty," as used in the due process clause, includes:

[T]he right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.

Roth, 408 U.S. at 572 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

94. *Berry v. Arapahoe & Shoshone Tribes*, 420 F. Supp. 934, 944 (D. Wyo. 1976) (protectable interest may be small because there is no property right in obtaining an initial liquor license, but plaintiff is entitled to have initial application treated fairly); *Manos v. City of Green Bay*, 372 F. Supp. 40, 50 (E.D. Wis. 1974) (society's interest in insuring that liquor licenses are not arbitrarily revoked entitles license holder to minimal standards of procedural due process, even though property interest is not enough to entitle holder to renewal); *People v. Ramirez*, 599 P.2d 622, 627 (Cal. 1979) (freedom from arbitrary adjudicative procedures is itself a liberty interest protected by due process).

95. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542-43 (1985) (pretermination notice and opportunity to be heard required to satisfy due process prior to terminating an educational employee).

96. *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970) (pretermination hearing required to satisfy due process when welfare payments are discontinued).

97. *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).

The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.⁹⁸ Determining the extent of procedural requirements, and whether a hearing must take place *before* a person is deprived of a protected liberty or property interest, requires the weighing of three factors: 1) the importance of the interest involved; 2) the value of the procedural safeguards to that interest; and 3) the burden on the government entity providing the hearing.⁹⁹

In analyzing the first factor, the importance of the interest involved, the four property attributes discussed earlier¹⁰⁰ influence the level of due process required for state action affecting licensing actions. As to the second factor, the value of the procedural safeguards, the opportunity to receive notice and a hearing may be critical to obtaining or retaining a liquor license.¹⁰¹ Third, the burden on the government entity of providing notice and a hearing will likely depend on the procedural structure of the licensing function. Most states, however, will likely find it less burdensome to accommodate procedural notice and hearing requirements during licensing actions than to deal with the litigation following an erroneous deprivation.¹⁰²

States which have addressed the due process issue through their state liquor licensing provisions and through court decisions interpreting these provisions, vary as to the level of due process accorded. For those states which have not yet determined the level of due process required for liquor licenses, an examination of the four property attributes discussed above¹⁰³ will help determine the due process protection the state should provide the licensee, or potential licensee, either by judicial decision or legislative action. It is beyond the scope of this Article to analyze each of the states and their current view as to due process protection afforded liquor licenses. Instead, representative state examples will be discussed to illustrate how property charac-

98. *Morrissey*, 408 U.S. at 481.

99. *Mathews*, 424 U.S. at 335. See *Greco v. Guss*, 775 F.2d 161, 170-72 (7th Cir. 1985), for an example of how a court might determine whether a post-deprivation remedy satisfies the due process required when the failure to renew a liquor license causes the deprivation of a property right.

100. See *supra* notes 24-79 and accompanying text.

101. *Hoo Chung v. Blase*, No. 86-C3012 1987 U.S. Dist. LEXIS 11859, at *12-*13 (N.D. Ill. Dec. 17, 1987).

102. *Id.* at 13 (cost of pre-deprivation hearing probably less than costs of an appeal to the Illinois Liquor Control Commission).

103. See *supra* notes 24-79 and accompanying text, discussing the right to obtain, the right to transfer, the right to renew, and revocability.

teristics have determined whether, and to what extent, procedural due process is provided.

1. *Due Process Required Because Liquor License is a Property Interest*

States that consider liquor licenses to be property require full constitutional protection for all licensing actions. Full constitutional protection requires that a pre-deprivation hearing and the opportunity to be heard be given every time a licensee's interest in the liquor license is impacted.¹⁰⁴

Colorado, for example, classifies the liquor license as a property interest entitling the licensee to full due process protection.¹⁰⁵ An examination of the four property attributes confirms that Colorado's licensing provisions create a vested property right. First, while the number of licenses issued is not limited, the right to obtain a license is limited by the state licensing authority's discretion to deny an application if "in its opinion licenses already granted for the particular locality are adequate for the reasonable needs of the community."¹⁰⁶ This scheme, which gives the state discretionary authority to determine how many licenses should be issued, creates more property characteristics in the license than are created in states where licenses are issued in unlimited numbers. This scheme does, however, create less property interests than in those jurisdictions which statutorily limit the number of licenses issued.¹⁰⁷

The right to alienate a Colorado liquor license also indicates the existence of a property interest, since the licensing authority must allow transfers where certain statutory qualifications are met.¹⁰⁸ Colorado liquor licenses also have monetary value.¹⁰⁹ A Colorado licensee has a high expectation of renewal, which can be classified as a perpetual interest, because the licensing authority can only refuse to renew if

104. Munden, *supra* note 29, at 1204-05.

105. *Mr. Lucky's, Inc. v. Dolan*, 591 P.2d 1021, 1022 (Colo. 1979) (holding that a liquor license is viewed as a property right subject to due process protection); *A.D. Jones & Co. v. Parsons*, 319 P.2d 480, 483 (Colo. 1957); *Fueston v. City of Colorado Springs*, 713 P.2d 1323, 1326 (Colo. Ct. App. 1985); *Price Haskel, Inc. v. Denver Dep't of Excise and Licenses*, 694 P.2d 364, 366 (Colo. Ct. App. 1984).

106. COLO. REV. STAT. ANN. § 12-47-108 (West 1992); *MacArthur v. Sanzalone*, 225 P.2d 1044, 1045 (Colo. 1950) (wide discretion granted to local agencies regarding liquor license issuance).

107. *See supra* notes 43-46 and accompanying text.

108. COLO. REV. STAT. ANN. § 12-47-106(4)(c) (West 1992).

109. "A liquor license . . . is a *valuable* and *personal right*." *Bullock v. Cayot*, 501 P.2d 147, 149 (Colo. Ct. App. 1972) (emphasis added) (liquor license was part of consideration received by defendant for amount paid on lease of premises from plaintiff).

it can show "good cause."¹¹⁰ Finally, the license can only be revoked or suspended upon certain conditions, and specific procedural requirements must be satisfied by the licensing authority.¹¹¹ These attributes all contribute to the conclusion that a Colorado liquor license is property.

California also recognizes a vested property interest in a liquor license.¹¹² Unlike Colorado, California imposes a statutory quota on the issuance of new licenses within the state.¹¹³ This restrictive limitation on the right to obtain a license generates a high level of property characteristics in the license.¹¹⁴ The right to alienate a license in California also increases the level of property rights held by a licensee, because the liquor license's value is recognized and the license can be sold commercially.¹¹⁵ Similar to Colorado, the right to renew a license in California generates a perpetual interest because the licensee expects automatic reapproval from the licensing authority.¹¹⁶ The licensing authority, however, is given broad discretion to revoke or suspend a license when it decides that "the continuance of a license

110. COLO. REV. STAT. ANN. § 12-47-106(1)(b) (West 1992).

111. COLO. REV. STAT. ANN. § 12-47-110(1) (West 1992); *A.D. Jones & Co. v. Parsons*, 319 P.2d 480, 483 (Colo. 1957) (holding that a license is "revocable during the year only for breach of the conditions upon which it was issued").

112. *Dash, Inc. v. Alcoholic Beverage Control Appeals Bd.*, 683 F.2d 1229, 1233 (9th Cir. 1982) ("Under California law, a liquor license issued pursuant to the Alcoholic Beverage Control Act is a valuable property right"). California courts have impliedly recognized that full due process must be accorded liquor licensing applicants. *Munden*, *supra* note 29, at 1236-38. *See, e.g.*, *Walsh v. Kirby*, 529 P.2d 33, 42 (Cal. 1974); *Cooper v. State Bd. of Equalization*, 290 P.2d 914, 919 (Cal. Ct. App. 1955); *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.*, 173 Cal. Rptr. 582, 588 (Cal. Ct. App. 1981).

113. CAL. BUS. & PROF. CODE § 23817 (West 1993) (limiting the issuance to one license per 2000 inhabitants of a county).

114. *See supra* notes 45, 46 and accompanying text.

115. *Golden v. State*, 285 P.2d 49, 52 (Cal. Ct. App. 1955) (a liquor license can be transferred upon board approval and can be given value and sold commercially). The buying and selling of liquor licenses is big business in California. Marc Lacey, *Liquor in Los Angeles; Can Prohibition-Era Laws Handle Today's Problems?*, L.A. TIMES, Dec. 14, 1992, at A14. This article illustrates the profitability of the license resale business. Art Rodriguez, after the conviction of Soon Ja Du on manslaughter charges for shooting Latasha Harlins, contacted Soon Ja Du and informed her of a state law that prohibits "convicted criminals from holding liquor licenses." *Id.* He purchased the license, as he has similarly done "with equal swiftness" after the L.A. riots. *Id.* "While the city was still on edge, he took to the phones trying to snatch up the licenses of those places that had burned to the ground." *Id.* The result of this type of activity coupled with the system, initially created to clean up after prohibition, is that California liquor licenses can be "bought and sold on the open market for five, 10, even 20 times the state's \$6,000 selling price." *Id.*

116. "[R]enewal is deemed a continuation of the original license." *Golden*, 285 P.2d at 52.

would be contrary to public welfare or morals.”¹¹⁷ Regardless of this discretionary leeway, the high level of property characteristics demonstrated by the first three attributes establishes that a California liquor licensee can expect to receive full constitutional due process when licensing actions impair this personal property interest.¹¹⁸

2. *Due Process Required By Type of Licensing Action At Issue and By Legislative Mandate*

The majority of states provide some due process protection by legislating the procedural processes which must be accorded to licensees and by differentiating the various licensing actions such as issuance, renewal, and revocation. Liquor licenses may not rise to the level of property required for due process rights to be granted for all purposes. Many states, however, by statute or decision, grant limited due process protection for certain licensing actions such as renewal or revocation.¹¹⁹ In those states, the legislature has determined that the liquor license is an interest requiring due process protection for certain actions. Nevertheless, an analysis of the four property attributes is relevant to decide whether the state statute provides sufficient due process for the interest at stake. In states granting limited due process by judicial decision, such decisions differentiate due process requirements based upon an analysis of property attributes or the type of licensing action at issue.

Georgia and Alabama are examples of states which grant due process protection by statute. In Georgia, the legislature specified due process guidelines for issuance, refusal, suspension, or revocation of a liquor license, but refused to recognize the existence of a property interest in the license.¹²⁰ An analysis of the four property attributes

117. CAL. BUS. & PROF. CODE § 24200(a) (West 1993).

118. California has recognized the existence of a property interest by declaring that a liquor license is “property” within the Civil Code section defining property and things subject to ownership. *Golden*, 285 P.2d at 52.

119. *E.g.*, *S & S Liquor Mart, Inc. v. Pastore*, 497 A.2d 729, 736 (R.I. 1985) (“A liquor license, although not property in the strict legal sense, ‘is regarded as having some aspect of a property right that protects the possessor from arbitrary action by the local licensing board.’” (quoting *Rhode Island Ophthalmological Soc’y v. Cannon*, 317 A.2d 124, 129 & n.5 (R.I. 1974) (dictum))).

120. Under section 3-3-2, the issuance of liquor licenses or permits must “be in accordance with the following guidelines of due process . . .” GA. CODE ANN. § 3-3-2(b) (1993). While some due process concerns are guaranteed to liquor licensees, section 3-3-2 has not been construed to create a constitutionally protected property interest. *Cheek v. Gooch*, 779 F.2d 1507, 1508-09 (11th Cir. 1986) (refusal to issue any licenses is not subject to procedural guidelines because applicant does not have a property interest in the opportunity to acquire a liquor license, and local unit’s failure to establish standards for granting a license

supports Georgia's limited, but extant due process protection. Governing authorities in Georgia have complete discretion in deciding who may obtain a liquor license, with no limitations on the number of retail liquor licenses issued.¹²¹ As noted above, this type of issuance scheme does not indicate that the interest received is protectable and valuable. Therefore, the liquor license under Georgia law has few property characteristics. The right to alienate a license has also been severely, although not completely, limited in Georgia.¹²² Regardless, both the right to renew and the revocability attributes of a Georgia liquor license offer some expectation of a protected property interest. Furthermore, a statutory provision requires that due process guidelines be followed in the granting, refusal, suspension, or revocation of a license.¹²³

Alabama also grants limited due process protection to licensees by statute.¹²⁴ The license, much like in Georgia, has few property characteristics. The right to obtain a license in Alabama is discretionary,¹²⁵ with no limit on the number of licenses that can be issued.¹²⁶ The right to alienate is also limited; the licensing code mandates that licenses may not be assigned and can only be transferred within the same jurisdiction upon the board's approval.¹²⁷ This limited right to

does not violate due process rights); *McCullum v. City of Powder Springs*, 720 F. Supp. 985, 988 (N.D. Ga. 1989); *Johnson v. Brown*, 584 F. Supp. 510, 512 (M.D. Ga. 1984); *Scoggins v. Moore*, 579 F. Supp. 1320, 1325 (N.D. Ga. 1984), *aff'd*, 747 F.2d 1466 (11th Cir. 1984).

121. See *supra* note 40.

122. There is no provision in the Georgia statutes allowing a licensee to transfer his license. Section 3-2-3 of the Georgia code provides that whenever the licensee is no longer in the retail liquor business, the license may be denied, suspended, or cancelled. GA. CODE ANN. § 3-2-3(1)(c) (1993); see also *Allen v. Carter*, 177 S.E.2d 245, 246 (Ga. 1970) (holding that "the city of Columbus had a discretion to grant or withhold from the applicants their approval of the proposed transfer of a city license to sell spirituous liquors"); *Shannondoah, Inc. v. Smith*, 230 S.E.2d 351, 352 (Ga. Ct. App. 1976) (citing a city of Atlanta ordinance which prevented a liquor licensee from transferring his rights under the license to another).

123. GA. CODE ANN. §§ 3-2-3, 3-3-2 (1993). Under section 3-3-2, the revocation of a license can only occur based upon "ascertainable standards" which must be set in the local licensing ordinance. GA. CODE ANN. § 3-3-2(b)(1) (1993). Atlanta Code of Ordinances, section 5-48 provides for revocation only when "due cause" for such an action has been shown. *Atlanta Attractions, Inc. v. Massell*, 330 F. Supp. 865, 866 (N.D. Ga. 1971) (revocation involves state action and requires Fourteenth Amendment procedural due process).

124. See ALA. CODE § 28-3A-23 (1992); *Potts v. Bennett*, 487 So.2d 919, 923 (Ala. Ct. App. 1985) (holding that "an applicant for an off-premises beer license must [not] be given any more due process than is required by the AAPA and the Alcoholic Beverage Licensing Code").

125. "The board is granted discretionary powers in acting upon license applications under the provisions of this chapter." ALA. CODE § 28-3A-3(b) (1992).

126. ALA. CODE § 28-3A-23(e) (1994).

127. ALA. CODE § 28-3A-23(k) (1994).

alienate indicates a low level of property interest in a Georgia liquor license, particularly when coupled with the lack of protection against revocation provided to the licensee.¹²⁸ Yet, a licensee's right to renew receives some protection because the Alabama statute requires the state to prove "good cause" for denying a renewal.¹²⁹ In Alabama, the limited right to alienate and the limited protection afforded against the state's right to revoke, indicate that the liquor license is not a property interest. Nonetheless, the state, by statute, provides limited due process protection to liquor licensees.

States may also grant limited due process protection through judicial decision. This protection may extend to some, but not all licensing actions. Courts have examined the type of licensing action and the property attributes associated with such an action to determine whether there is an interest requiring protection. New Jersey statutes, for example, provide that a liquor license is not property.¹³⁰ New Jersey case law supports this legislative pronouncement, holding that a liquor license is not a contract or a property right, it is a permit or privilege to pursue an otherwise illegal occupation.¹³¹ Nevertheless, judicial decisions involving federal issues have required due process. For instance, the New Jersey Supreme Court, in *Boss Co. v. Board of Commissioners*,¹³² held that a liquor license is "property" within the meaning of section 6321 of the Internal Revenue Code, allowing the attachment of a federal lien.¹³³ The court looked beyond the legislative language of the state Alcoholic Beverage Law and examined the attributes of the license itself.¹³⁴ The court concluded that the license possessed the qualities of property because the license had monetary value to the licensee and was transferable.¹³⁵ The court's holding was

128. "The board shall have the full right and authority to suspend any retail license issued by it for any reason which it may deem sufficient and proper." ALA. CODE § 28-3A-24(a) (1992).

129. ALA. CODE § 28-3A-5(b) (1992).

130. N.J. REV. STAT. § 33:1-26 (1992).

131. *Sea Girt Restaurant v. Borough of Sea Girt*, 625 F. Supp. 1482, 1486 (D.N.J. 1986) (citing *Butler Oak Tavern v. Alcoholic Beverage Control Div.*, 120 A.2d 24, 29 (N.J. 1956); *Mazza v. Cavicchia*, 105 A.2d 545, 548-49 (N.J. 1954); *G. & J.K. Enters. Inc. v. Division of Alcoholic Beverage Control*, 500 A.2d 43, 45 (N.J. Super. Ct. App. Div. 1985); *Gober v. Township Comm. of Pemberton*, 448 A.2d 516, 522 (N.J. Super. Ct. Law Div. 1982)).

132. 192 A.2d 584 (N.J. 1963).

133. *Id.* at 588.

134. *Sea Girt*, 625 F. Supp. at 1487 (citing *Boss Co.*, 192 A.2d at 586).

135. *Boss Co.*, 192 A.2d at 587. The Court stated:

This license has value—not merely the personal value to the licensee that inheres in the right to engage in the business of selling intoxicating liquors, but also the monetary value that arises from the power possessed by the licensee to substitute, with the municipal consent, some other person in his place as licensee. . . . Thus,

bolstered by the existence of state statutes that provided that once a liquor license was granted, it would be protected against arbitrary revocation, suspension, or refusal to renew.¹³⁶

A federal district court in New Jersey subsequently held that "a New Jersey liquor license is an interest in property for purposes of federal due process analysis" because it has economic value, is capable of being transferred, and is protected against arbitrary suspension, revocation, or refusal to renew.¹³⁷ The district court noted that its decision posed a potential conflict with the "well-established relationship between the state and local government and the licensee, as defined by statute and developed by case law."¹³⁸ The district court also emphasized that its "holding that a license is property subject to federal due process protection in no way undermines the established state licensing scheme."¹³⁹

Michigan courts have historically stressed that a liquor license creates no vested property rights.¹⁴⁰ Recent Michigan decisions, however, differentiate between cases involving the right to obtain a license and the right to renew a license.¹⁴¹ Due process protection has been granted to licensees seeking to renew, but not to applicants seeking to obtain a license.¹⁴² Michigan statutorily limits the number of licenses

the liquor license is a legal interest in the nature of an economic asset, created and protected by statute, and because it has monetary value and is transferable, either by consent of the licensee or by operation of law . . . it possesses the qualities of property.

Id. at 586-87.

136. N.J. STAT. ANN. §§ 33:1-22, 33:1-31 (West Supp. 1985); *Blanck v. Mayor & Borough Council of Magnolia*, 185 A.2d 862 (N.J. 1962).

137. *Sea Girt*, 625 F. Supp. at 1487-88 (citing *Blanck*, 185 A.2d at 862).

138. *Id.* at 1487-88 n.4 (citing *Boss*, 192 A.2d at 598).

139. *Id.* at 1488 & n.4.

140. *Gamble v. Liquor Control Comm'n*, 36 N.W.2d 297, 298 (Mich. 1949) (liquor license creates no vested property rights and may be revoked without violating due process); *Johnson v. Liquor Control Comm'n*, 254 N.W. 557, 559 (Mich. 1934) (liquor license is not property within constitutional provision against depriving any person of property without due process of law); *People v. Schafran*, 134 N.W. 29, 31 (Mich. 1912) (no vested property right in a license to sell intoxicating liquors).

141. *See Bundo v. City of Walled Lake*, 238 N.W.2d 154, 160 (Mich. 1976) ("The procedure for obtaining a new license and that for renewing an existing license are quite different").

142. *Compare Bisco's, Inc. v. Michigan Liquor Control Comm'n*, 238 N.W.2d 166, 167 (Mich. 1976) (individual's seeking renewal of class C liquor license has an interest in property such that he is entitled to due process protection once license has been issued and expenditures have been made in reliance on it) *with Bundo*, 238 N.W.2d at 161 (license renewed as a matter of course between 1968 and 1971 gave licensee a property interest which entitled him to due process protection) *and Wong v. City of Riverview*, 337 N.W.2d 589, 590 (Mich. Ct. App. 1983) (holder of liquor license has due process rights as to guidelines or standards governing decision whether or not to renew liquor license, but not as to

which can be issued.¹⁴³ This limitation is not considered sufficient indication of the existence of a property right to justify requiring due process protection for the issuance process itself.¹⁴⁴ The Michigan Supreme Court, however, held that the right to renew is a perpetual interest that creates a property right requiring due process because the Michigan licensing practice provides for “renewal of licenses to take place as a matter of course in most instances.”¹⁴⁵

Wisconsin courts have actually specified the procedural framework required when a liquor license is revoked. In *Manos v. City of Green Bay*,¹⁴⁶ the district court emphasized that a municipality must provide a tavern owner or licensee with certain procedural safeguards prior to revoking a liquor license.¹⁴⁷ Notwithstanding a recognition of property rights at revocation, Wisconsin law does not provide due process protection for liquor license applicants because courts have found that the Wisconsin statute for licensing does not create a property interest in a liquor license.¹⁴⁸

guidelines required under due process for decisions as to whether or not to issue license to first-time applicants).

143. MICH. COMP. LAWS ANN. § 436.19(c)(1) (West Supp. 1994) (licenses are limited to one license for each fifteen hundred (1,500) of population); *Alexander v. Michigan Liquor Control Comm’n*, 192 N.W.2d 505, 506 (Mich. Ct. App. 1971) (clarifying that the above provision “that no public license shall be granted for sale of alcoholic liquor for consumption on premises in excess of one license for each 1,500 of population or major fraction thereof does not mean one license for each 1,500 of population on a statewide basis, but rather refers to allocation of licenses according to population of local governmental units”).

144. *Shamie v. City of Pontiac*, 620 F.2d 118, 120 (6th Cir. 1980).

145. *Bundo*, 238 N.W.2d at 161. “[O]ne who seeks a renewal of a liquor license has a vested property right which requires a due process hearing.” *Barr v. Pontiac City Comm’n*, 282 N.W.2d 348, 350 (Mich. Ct. App. 1979).

146. 372 F. Supp. 40 (E.D. Wis. 1974).

147. *Id.* at 51.

[T]he municipality must provide the tavern owner or licensee with (1) notice of the charges upon which denial of the liquor license is predicated, (2) an opportunity to respond to and challenge such charges, (3) an opportunity to present witnesses under oath, (4) an opportunity to confront and cross-examine opposing witnesses under oath, and (5) the opportunity to have a verbatim, written transcript made upon his own initiative and expense. In addition, the conclusions made by the hearing body must be based on the evidence adduced at the hearing.

Id.

148. *Bayview-Lofberg’s, Inc. v. City of Milwaukee*, 905 F.2d 142, 144 (7th Cir. 1990) (finding that Milwaukee Municipal ordinance also did not support the creation of a property interest since it did not establish substantive criteria which, if met, automatically entitled the applicant to a license (citing *Scott v. Village of Kewaskum*, 786 F.2d 338, 340 (7th Cir. 1986))).

3. *Due Process Not Required Because Liquor License is Not a Property Interest*

Most states provide that licensees be given some due process consideration when state action affects a liquor license interest. A state that refuses to extend such constitutional protection, however, usually does so because it refuses to recognize the license as a constitutionally protected property interest for the action at issue.¹⁴⁹ In Illinois, for example, a liquor license is commonly found to be a privilege rather than a property right.¹⁵⁰ Illinois courts have held that an applicant for a liquor license does not have a constitutionally protected right to obtain a liquor license.¹⁵¹ Although the State Commission has a duty to issue a retailer's license to an applicant who has conformed with all statutory and local requirements for obtaining a liquor license,¹⁵² applicants have no vested right to obtain a license.¹⁵³ This contrasts with other states where statutes express substantive criteria for the issuance of the license and where liquor licenses are considered property interests.¹⁵⁴

149. *Berry v. Arapahoe & Shoshone Tribes*, 420 F. Supp. 934, 942 (D. Wyo. 1976) (citing *State ex rel. Noble v. City Council of Cheyenne*, 52 P. 975 (Wyo. 1898)) (Wyoming state law provides that there is "no vested right in any person to have a liquor license."); see also *Fulmer Supermarket, Inc. v. State*, No. 88AP-26, 1988 WL 96210, at *6 (Ohio Ct. App. Sept. 13, 1988) (noting that Ohio Supreme Court has twice held that liquor licenses are not contracts or property); *Ahmad v. City of Milwaukee*, 478 N.W.2d 596 (Wis. Ct. App. 1991) ("In Wisconsin 'a liquor license is a privilege and terming it a right is considered to be against public policy.'" (quoting *Moedern v. McGinnis*, 236 N.W.2d 240, 245 (Wis. Ct. App. 1975))). *But see Country Liquors, Inc. v. City Council of Minneapolis*, 264 N.W.2d 821, 826 (Minn. 1978) (stating that "under Minnesota law there is no property right in a liquor license" but also noting that there might be a "tacit property right in an existing license . . . for due process purposes"); *State v. Saugen*, 169 N.W.2d 37, 46 (Minn. 1969) (although a liquor license is only a privilege as to licensing authorities, it is a property right for purposes of eminent domain compensation); *Tavern League of Wisconsin v. City of Madison*, 389 N.W.2d 54, 59 (Wis. Ct. App. 1986) (liquor license is a valuable property right requiring minimum due process when a license is not issued due to nonpayment of taxes).

150. ILL. REV. STAT. ch. 43, para. 119 (1985); *Sapir v. City of Chicago*, 749 F. Supp. 187, 190 (N.D. Ill. 1990); *Black Knight Restaurant, Inc. v. City of Oak Forest*, 513 N.E.2d 109, 111 (Ill. App. Ct. 1987) (stating that "under Illinois law, a license is not a property right"); *Two Kats, Inc. v. Village of Chicago Ridge*, 497 N.E.2d 1314, 1315 (Ill. App. Ct. 1986); *Malito v. Marcin* 303 N.E.2d 262, 265 (Ill. App. Ct. 1973).

151. *Mirshak v. Joyce*, 652 F. Supp. 359, 366 (N.D. Ill. 1987) (citing *Jacobsen v. Illinois Liquor Control*, 423 N.E.2d 531, 533 (Ill. App. Ct. 1981)).

152. ILL. ADMIN. CODE tit. 235, § 5/3-14 (1993).

153. See *supra* notes 41-42 and accompanying text. *But see Mirshak*, 652 F. Supp. at 367 & n.7 (holding that applicant for a liquor license in Chicago has a property right for purposes of the Fourteenth Amendment based on Chicago's Municipal Code, while not reaching the question of whether an applicant has a property right under Illinois law).

154. See *supra* note 41 and accompanying text.

The right to alienate a liquor license in Illinois is also limited. The legislature has specifically stated that a license shall not be "subject to attachment, garnishment or execution, nor shall it be alienable or transferable, voluntarily or involuntarily, or subject to being encumbered or hypothecated."¹⁵⁵ This limited right to alienate an Illinois liquor license decreases the degree to which the license can be considered a property interest. The Illinois statutory right to renew guidelines also suggest that the property interest in a liquor license is low or nonexistent because the license is treated as merely provisional in nature.¹⁵⁶ Nevertheless, a few courts have concluded that a licensee's interest in renewal is property for purposes of the Fourteenth Amendment.¹⁵⁷

The State's right to revoke an Illinois license is limited by statutory law requiring notice and a hearing before a license is revoked or suspended.¹⁵⁸ This procedural scheme suggests that the license might be characterized as a property interest for other purposes as well. However, since three out of the four attributes indicate that liquor licenses are not property in Illinois, it is not surprising that the majority of Illinois court decisions do not grant due process protection to liquor licensees unless provided for by statute.¹⁵⁹

155. ILL. ADMIN. CODE tit. 235, § 5/6-1 (1993). However, the statutory scheme does permit the purchaser of a bankrupt business to acquire the license if he is otherwise qualified. See ILL. REV. STAT. ch. 43, para. 119 (1985); *Schechter v. Village of Niles*, No. 86-C4683, 1989 WL 103380, at *2 (N.D. Ill. Aug. 28, 1989).

156. The statute code section also explicitly states that the right to renew does not give a licensee any vested right and shall not prevent the licensing authorities from "decreasing the number of licenses to be issued within its jurisdiction." ILL. REV. STAT. ch. 43, para. 119 (1985).

157. See *Reed v. Village of Shorewood*, 704 F.2d 943, 948-49 (7th Cir. 1983) (holding that Illinois liquor licensee's interest in renewal is property for purposes of due process); *Hoo Chung v. Blase*, No. 86-C3012, 1987 U.S. Dist. LEXIS 11859, at *10 (N.D. Ill. Dec. 17, 1987) (licensee has a property interest in renewal of liquor license); *supra* notes 48-51 and accompanying text. Most Illinois courts have declined to follow these decisions, finding that they "directly [contradict] controlling Illinois law." *Black Knight Restaurant, Inc. v. City of Oak Forest*, 513 N.E.2d 109, 111 (Ill. App. Ct. 1987).

158. The revocation statute grants the licensee some due process rights such as the right to a hearing, an opportunity to appear and defend, and the right to not have a license revoked without cause. ILL. ADMIN. CODE tit. 235, § 5/7-5 (1993).

159. See *Black Knight Restaurant, Inc. v. City of Oak Forest*, 513 N.E.2d 109, 112 (Ill. App. Ct. 1987); *Bec-N-Call, Inc. v. Village of Steger*, 394 N.E.2d 728, 730 (Ill. App. Ct. 1979).

It is well-established under Illinois law that a license to sell alcoholic beverages is a privilege, not a property right, and thus, is not subject to due process protections. . . . In our view, the *Reed* court's conclusion directly contradicts controlling Illinois law, and we decline to follow it as precedent.

Black Knight Restaurant, Inc., 513 N.E.2d at 111 (citing *Reed v. Village of Shorewood*, 704 F.2d 943, 948 (7th Cir. 1983)). In *Reed*, the court "looked behind" the state label and de-

C. Determination of Whether Procedural Due Process Rights Are Violated

Once a court determines that the liquor license is a constitutionally protected liberty or property interest under the Fourteenth Amendment and the extent of due process it must receive, the court must then determine whether the appropriate level of procedural due process has been provided to the liquor licensee.¹⁶⁰ Revocation or failure to renew a license may require notice and hearing.¹⁶¹ Many courts, however, find that a license application can be denied without notice or hearing without violating due process.¹⁶² Courts probably distinguish between these actions based on the applicant's lower expectation of receiving the initial license, and the current licensee's reliance interest in renewal or in avoiding revocation of an existing license.

Other actions involving liquor licenses, such as zoning referendums, petition procedures, and local-option elections, also implicate procedural due process concerns. In the District of Columbia, for example, liquor licenses are obtained by a petition procedure.¹⁶³ The District of Columbia Alcoholic Beverage Control Board must deny the application if a majority of registered voters within 600 feet of the license applicant object to the issuance of a license.¹⁶⁴ In *Benel, Inc. v.*

cided that a liquor license in Illinois was property within the meaning of federal tax lien law. *Reed*, 704 F.2d at 948; *see Sapir v. City of Chicago*, 749 F. Supp. 187, 190 (N.D. Ill. 1990); *Hornstein v. Illinois Liquor Control Comm'n*, 106 N.E.2d 354, 357 (Ill. 1952); *Ole, Ole, Inc. v. Kozubowski*, 543 N.E.2d 178, 181 (Ill. App. Ct. 1989); *Malito v. Marcin*, 303 N.E.2d 262, 265 (Ill. App. Ct. 1973) (holding that issuance of liquor licenses not given due process protection); *Golden Egg Club, Inc. v. Illinois Liquor Control Comm'n*, 260 N.E.2d 329, 330-331 (Ill. App. Ct. 1970) ("[R]ight to sell liquor is a privilege subject to proper regulation, which includes the discretion of the Commission to revoke that privilege."); *see also City of Wyoming v. Illinois Liquor Control Comm'n*, 362 N.E.2d 1080, 1083 (Ill. App. Ct. 1977).

160. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985).

161. *See Hoo Chung v. Blase*, No. 86-C3012, 1987 U.S. Dist. LEXIS 11859, at *13 (N.D. Ill. Dec. 17, 1987); *Schechter v. Village of Niles*, No. 86-C4683, 1989 WL 103380, at *2 (N.D. Ill. Aug. 28, 1989).

162. *See Brookpark Entertainment, Inc. v. Taft*, 951 F.2d 710, 714-16 (6th Cir. 1992); *Mirshak v. Joyce*, 652 F. Supp. 359, 368 (N.D. Ill. 1987) (court found a property right, but summary judgment motion based on alleged delay in approval of application for license cannot be granted without more support for plaintiff's conclusion that such delay was a deprivation of due process).

163. D.C. CODE ANN. § 25-115(e) (1992); *see also* CONN. GEN. STAT. ANN. § 30-39(c) (West Supp. 1994) (ten local residents may file a remonstrance "containing any objections to the suitability of [an] applicant or proposed place of business").

164. *Benel, Inc. v. Barry*, No. 88-3413, 1989 U.S. Dist. LEXIS 9692, at *1 (D.D.C. Aug. 15, 1989).

Barry,¹⁶⁵ the court concluded that the license was a property interest that required due process protection. It then determined that the petition procedure, which delegated authority to citizens, did not violate due process.¹⁶⁶

The referendum process, used in New Jersey to allow municipalities to set hours during which alcoholic beverages may be sold,¹⁶⁷ has also been challenged as violating procedural due process. The court in *Sea Girt Restaurant v. Borough of Sea Girt*,¹⁶⁸ held that this "referendum procedure . . . constitutes a fair process of decision-making and consequently does not violate procedural due process."¹⁶⁹ In arriving at its decision, the court explained that some due process procedures were required because an increase or decrease in the number of hours a liquor outlet was allowed to operate would affect the value of the property interest held by the liquor licensee.¹⁷⁰ The court found the voters to be appropriate decisionmakers because they were "affected on a day-to-day basis by the hours of operation" of liquor outlets, and could "balance the problems created by alcohol consumption, such as drunk driving, with the inconvenience of having to travel outside their community to purchase liquor."¹⁷¹ The procedure provided by the referendum statute gave those opposed to a change in the liquor sale hours a minimum of 30 days notice to make full use of the campaign process to place their position before the voters.¹⁷² The court found that the plaintiffs in this case had made full use of this opportunity and were afforded procedural due process.¹⁷³

Local-option elections¹⁷⁴ have also been challenged as violations of procedural due process,¹⁷⁵ but have generally been upheld as valid

165. *Id.* at *7-8.

166. *Id.* at *20.

167. N.J. STAT. ANN. § 33:1-47.1 (West 1992).

168. 625 F. Supp. 1482 (D.N.J. 1986).

169. *Id.* at 1491.

170. *Id.* at 1490.

171. *Id.* at 1490-91.

172. *Id.* at 1491.

173. *Id.*

174. A local option law, with respect to intoxicating liquors, authorizes a subdivision of a state to determine whether to adopt a restrictive or prohibitive liquor licensing law within its locality. *See Ohio ex rel Lloyd v. Dollison*, 194 U.S. 445 (1904). This determination is not made by traditional legislative enactment but is instead carried out by popular vote of the people. *Id.*

175. Local-option elections have also been challenged as violations of substantive due process and equal protection. *See, id.* at 448-50. These challenges will be addressed in section IV.

exercises of police power.¹⁷⁶ The Seventh Circuit, for example, examined the local-option election in *Philly's v. Byrne*,¹⁷⁷ where citizens voted to make the precinct "dry" under Illinois' local-option liquor law. As a result of this vote, any license to sell liquor in the precinct automatically lapsed 30 days after the election.¹⁷⁸ The licensees who lost their licenses as a result of the referendum alleged that they were deprived of property without due process of law in violation of the Fourteenth Amendment.¹⁷⁹ Judge Posner explained in the majority opinion that because the referendum is a legislative procedure, notice and opportunity for a hearing is not required, and, therefore, the licensees were not denied procedural due process in violation of the Fourteenth Amendment.¹⁸⁰

Ohio state court decisions have held that the termination of liquor licenses as a result of local-option elections do not violate either the Due Process or Equal Protection Clauses of the United States or Ohio Constitutions, "even though there is no provision for specific notice to the potentially affected permit holder prior to the holding of the local-option election."¹⁸¹ The Ohio court in *Fulmer Supermarket, Inc. v. State*,¹⁸² compared the local-option election to a referendum and noted that the underlying principals were the same since "[l]egislative acts by the people are to be controlled and construed by the same principles as are applied to legislative acts of the state legislature."¹⁸³ In a recent Sixth Circuit decision, however, the court held that Ohio's local-option law violated procedural due process on its face because it allowed voters to cancel a liquor license without the necessary procedural safeguards to protect the licensee's interest.¹⁸⁴

176. *Replogle v. Commonwealth of Penn.*, 523 A.2d 327, 331 (Pa. 1987).

177. 732 F.2d 87 (7th Cir. 1984).

178. *Id.* at 89.

179. *Id.*

180. *Id.* at 93 (stating that "although the appellants did not have notice or an opportunity for a hearing in the sense familiar in adjudicative proceedings, they of course had ample notice of the forthcoming election and an opportunity to campaign against the proposition that the precinct should vote itself dry").

181. *Rickard v. Ohio Dep't of Liquor Control*, 504 N.E.2d 724, 725 (Ohio Ct. App. 1986); *Fulmer Supermarket, Inc. v. State*, No. 88 AP-26, 1988 WL 96210, at *10-*11 (Ohio Ct. App. Sept. 13, 1988) (stating that local-option elections do not violate due process since "plaintiff's complaint that he [sic] had no specific notice of the impending local-option election is no different from a contention that it did not receive specific notice of a proposed act, subsequently adopted by any other legislative body, such as a city council or the state legislature").

182. 1988 WL 96210 (Ohio Ct. App. Sept. 13, 1988).

183. *Id.* at *14-*15.

184. *Brookpark Entertainment, Inc. v. Taft*, 951 F.2d 710 (6th Cir. 1991), *cert. denied*, 113 S. Ct. 68 (1992).

Procedural due process is violated when a statutory procedure outlining the process required for a licensing action has not been followed, or when a court determines that sufficient notice and hearing have not been provided for an action affecting a protected property interest. Challenges to referendum processes or local-option elections may also violate due process unless the court determines that the action is legislative in nature.

D. Protection of Liquor Licenses Under the Takings Clause

The Fifth Amendment provides that private property shall not be “taken for public use without just compensation.”¹⁸⁵ A violation of the “Takings Clause” first requires that private property be somehow impaired. State or local actions involving liquor licenses may affect private property in one of two ways.¹⁸⁶ First, a state or local action may restrict or prohibit the use of real property for the retail sale of liquor. Second, the liquor license itself may be considered personal property¹⁸⁷ and may be affected by state action.

1. Regulation of Land Used for Retail Liquor Sales

States inherently possess the power to regulate land use to protect citizens’ health, safety, and welfare. The authority to use this police power is typically delegated to local governing units, either through the state constitution or through an enabling statute. Justice Holmes’ majority opinion in *Pennsylvania Coal Co. v. Mahon*,¹⁸⁸ in 1922, however, encouraged courts to scrutinize the exercise of police power to regulate land when it appears that the regulation has gone “too far” and should be “recognized as a taking” of property.¹⁸⁹ Since the declaration of this vague, but “oft-cited maxim,”¹⁹⁰ courts have struggled to determine when land use regulation goes “too far” and becomes an appropriation by the government of private property for public purposes, requiring just compensation for the impairment or destruction of property interests.

185. U.S. CONST. amend. V.

186. *United States v. Security Indus. Bank*, 459 U.S. 70, 75-78 (1982) (“property” for the purposes of the Takings Clause includes both personal property and real property interest).

187. See *supra* notes 24-79 and accompanying text, for a discussion of whether liquor license is a property right.

188. 260 U.S. 393 (1922).

189. *Id.* at 415.

190. *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886 (1992).

The takings test developed in *Agins v. City of Tiburon*¹⁹¹ finds a Fifth Amendment violation when land-use regulation “does not substantially advance legitimate state interests or denies an owner economically viable use of his land.”¹⁹² In *Lucas v. South Carolina Coastal Council*,¹⁹³ the Court expanded the *Agins* test by establishing a per se taking whenever the “regulation denies all economically beneficial or productive use of the land.”¹⁹⁴ In the case of local control over liquor stores, the regulation will most likely advance legitimate state interests by reducing or eliminating local problems such as loitering, graffiti, and other crime associated with having a liquor store in the neighborhood.¹⁹⁵ Therefore, if a liquor store owner challenges the action, the challenge will likely be based on the assertion that the action constitutes an interference with the property owner’s economic expectations.

When a zoning action precludes a land owner from using her property for a retail liquor operation, the land owner is not denied all economically viable use of her land, since other retail use can be made of the property.¹⁹⁶ Although the land owner may be able to show that a retail liquor sales outlet is the most profitable use of her property, it is unlikely that a court will agree that it is the *only* economically viable use of her land.¹⁹⁷ Thus, the takings principle outlined in the *Lucas* decision, requiring that the land owner be denied all economically viable use,¹⁹⁸ will not be the appropriate test to use in a challenge against

191. 447 U.S. 255 (1980).

192. *Id.* at 260 (emphasis added).

193. 112 S. Ct. 2886 (1992).

194. *Id.* at 2893 (emphasis added). In *Lucas* the Court admits that it has not adopted any “‘set formula’ for determining how far is ‘too far,’ preferring to ‘engag[e] in . . . essentially ad hoc, factual inquiries.’” The Court does describe “two discrete categories of regulatory action as compensable without case-specific inquiry into the public interest advanced in support of the restraint.” *Id.* The first category requires compensation when there is a physical invasion of the property, and the second category requires compensation where the “regulation denies all economically beneficial or productive use of land.” *Id.*

195. See *infra* notes 288-289 and accompanying text.

196. *Ross v. City of Chicago*, No. 89 C8049, 1990 U.S. Dist. LEXIS 3276, at *7 (N.D. Ill. Mar. 22, 1990) (plaintiff is not prevented from using his leasehold for other types of retail businesses or conveying his interest in the leasehold, therefore the referendum precludes only one of several economically viable uses for plaintiff’s property).

197. See *Kessler v. Department of Transp.*, 235 S.E.2d 636 (Ga. Ct. App. 1977) (evidence of “unique” value of condemned land based on business being located in choice location for a liquor store in the county justified special damages in an eminent domain action for loss of business caused by the taking of a liquor dealer’s leasehold interest in the condemned property).

198. *Lucas*, 112 S. Ct. at 2894 (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).

land use restrictions prohibiting a liquor store operation. In *Ross v. City of Chicago*,¹⁹⁹ for example, the court noted that the owner of a Chicago liquor store, located in a precinct where a local liquor referendum prohibited liquor sales, was not prevented from using his leasehold "for other types of retail businesses or conveying his interest in the leasehold."²⁰⁰ The referendum only prohibited "one of several economically viable uses" for the owner's property.²⁰¹

If the land owner can show that no other economically viable use can be made of her property, the government may still be able to regulate land use without compensating the land owner. Under *Lucas*, land use regulation that denies a land owner all economically viable use of property will be allowed if the regulation prevents an activity that would have been considered a nuisance under historical state common law.²⁰² The sale of intoxicating liquor has been deemed a common law nuisance by some courts,²⁰³ although many of the decisions involved liquor operations that were illegal.²⁰⁴

In *Mugler v. Kansas*,²⁰⁵ a brewery owner asserted that the state had "taken" his factory by prohibiting the manufacture or sale of alcohol. The Court held that such a prohibition was not a violation of the Fourteenth Amendment since the state was legislating to prevent a public harm.²⁰⁶ Although the Court did not directly hold that the manufacture or sale of alcohol was a nuisance, it reasoned that "[t]he exercise of the police power by the destruction of property which is

199. No. 89 C 8049, 1990 U.S. Dist. LEXIS 3276 (N.D. Ill. Mar. 22, 1990).

200. *Id.* at *3.

201. *Id.* at *8.

202. *Lucas*, 112 S. Ct. at 2900.

203. *See, e.g.,* *Smith v. Nickoloff*, 277 N.W. 880, 881 (Mich. 1938) (court will restrain as a nuisance disturbances accompanying the operation of defendants' restaurant, which serves liquor, such as the presence of "intoxicated persons about the premises, fighting and making considerable noise until as late as 2 o'clock in the morning").

204. *See* *State v. Phoenix Sav. Bank & Trust*, 198 P.2d 1018 (Ariz. 1948); *Pensacola and Atl. R.R. v. State*, 5 So. 833, 841 (Fla. 1889) ("State has the constitutional power to declare that any place kept and maintained for the illegal manufacture and sale of intoxicating liquors shall be deemed a common nuisance and be abated"); *State v. Mitchell*, 399 P.2d 556 (Kan. 1965) (property used for illegal possession and sale of intoxicating liquor constitutes a common nuisance); *State v. Saskey's Lounge, Inc.*, 249 N.W.2d 156 (Mich. 1976) (purpose of public nuisance abatement statute is to eliminate use of real or personal property in connection with gambling, prostitution, and illicit sale of liquor); *Parker v. State*, 208 S.W.2d 380, 384 (Tex. Civ. App.), *aff'd*, 212 S.W.2d 132 (Tex. 1948) (in order to show a common nuisance on the ground that "intoxicating liquors are kept, possessed, sold, manufactured, bartered or given away," it must be alleged and proved that such activity was in violation of some penal law of the state).

205. 123 U.S. 623 (1887).

206. *Id.* at 669.

itself a public nuisance, or the prohibition of its use in a particular way” is a nuisance abatement, not a taking.²⁰⁷ The mere location of a lawful retail liquor store may constitute a nuisance — not because of illegality, but because of the associated crime problems accompanying such a land use.²⁰⁸ If such land use is found to constitute a nuisance under state historic common law, the government authority may constitutionally deprive a land owner of *all* economically viable use of her property for retail liquor sales, provided the regulatory action is rationally or reasonably related to a legitimate state purpose, such as preventing criminal activity.²⁰⁹

Assuming the more likely finding that a landowner has *not* been deprived of *all* economically viable use when denied the opportunity to operate a retail liquor sales outlet, the landowner will be unable to establish a “per se” taking claim under *Lucas*. A court, however, must perform an ad hoc factual analysis of the circumstances by using those factors that have “particular significance” in a takings decision as outlined by Justice Brennan in *Penn Central Transportation Co. v. New York City*.²¹⁰ Significant factors to consider are: 1) “the economic impact of the regulation on claimant,” 2) its interference with reasonable “investment-backed expectations,” and 3) “the character of the governmental action” (e.g. whether there has been a physical invasion).²¹¹

207. *Id.* See also *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2890 (1992) (noting “our *Mugler* line of cases recognizes governmental power to prohibit ‘noxious’ uses of property—i.e., uses of property akin to ‘public nuisances’—without having to pay compensation”). But see *id.* at 2913 (Blackmun, J., dissenting) (stating “[t]he brewery closed in *Mugler* itself was not a common-law nuisance, and the Court specifically stated that it was the role of the legislature to determine what measures would be appropriate for the protection of public health and safety”); Joseph L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v. South Carolina Coastal Council*, 45 STAN. L. REV. 1433, 1436 n.22 (1993) (“conduct proscribed by the alcohol prohibition law which was sustained in *Mugler v. Kansas* would not have been enjoined as a common law nuisance”).

208. The court in *Ross v. City of Chicago*, N. 89 C 8049, 1990 U.S. Dist. LEXIS 3276, at *8 (N.D. Ill. March 22, 1990), cited *Mugler v. Kansas* for the conclusion that the local referendum law at issue, which prohibited retail alcohol sales in the precinct, was not a taking since the restriction of the plaintiff’s property was no greater than the restriction in *Mugler*, which rendered the brewery buildings and machinery of little value.

209. *Lucas*, 112 S. Ct. at 2900. See *Wynehamer v. People*, 13 N.Y. 378 (1856) (liquor is not a common nuisance).

210. 438 U.S. 104 (1978). The *Lucas* Court makes clear in a footnote that a “landowner whose deprivation is one step short of complete” is not necessarily deprived of a remedy for a taking, but is only unable to “claim the benefit of our categorical formulation.” *Lucas*, 112 S. Ct. at 2895 & n.8. The Court notes that there is still a takings analysis that should be made based on the factors noted in *Penn Central*, such as “the economic impact of the regulation on the claimant.” *Id.* (quoting *Penn Central*, 438 U.S. at 124).

211. *Penn Central*, 438 U.S. at 124.

It is difficult to predict how a court will decide any particular takings claim involving a retail liquor sales outlet due to the ad hoc analysis of the particular facts surrounding each challenged regulatory action required under *Penn Central*.²¹² When the owner of a license is prohibited from using the license at a particular location, however, this deprivation may give rise to an interference with the landowner's "investment-backed expectations" of using her real property in conjunction with her liquor license.²¹³ Liquor store owners in inner city locations have insisted that liquor stores are the only profitable use that can be made of their property.²¹⁴ In some cases, liquor store owners have argued that operational restrictions imposed by local authorities may drastically reduce their profitability.²¹⁵ Thus, any land use regulation which prohibits licensees from using their property as liquor stores, or which severely restricts the operation of their businesses, will have a distinct "economic impact" on ownership interests and may constitute a taking.²¹⁶

2. Regulation of Liquor Licenses as Personal Property

If the liquor license itself is considered a property interest,²¹⁷ a takings challenge can be raised whenever a regulatory action detri-

212. See *Berkowitz v. United States*, 304 F.2d 168, 172 (1st Cir. 1965) (stating that "[t]he medicines which courts administer when liquor is involved have their own peculiar emotional or, conceivably, rational elements, and are not suitable prescriptions for the generality of cases").

213. See *Wilcox v. Miller*, No. 89 C 20053, 1990 U.S. Dist. LEXIS 19172 (N.D. Ill. Nov. 6, 1990) (denial of a liquor license does not give rise to a complaint that real property has been "taken" without due process under the Fourteenth Amendment, even if that property's value is somewhat diminished); *State v. Saugen*, 169 N.W.2d 37, 42-43 (Minn. 1969) (loss of going-concern value is recoverable in a condemnation action where liquor license may be transferable between persons, but must relate to the specific premises identified in the liquor license).

214. The owner of a liquor store that burned down in the Spring 1992 riots in Los Angeles laments that his income will "be more than wiped out if the city successfully imposes new restrictions on [his store], such as reducing operating hours to 9 a.m. to 9 p.m. and requiring two licensed security guards to patrol the store and parking lot during business hours. The guards alone could cost \$8,000 a month." Greg Krikorian, *The Bottleneck*, L.A. TIMES, Aug. 29, 1993, at A14.

215. *Id.*

216. *Misurelli v. City of Racine*, 346 F. Supp. 43, 48 (E.D. Wis. 1972) (denial of renewal of liquor license impairs both occupation of selling liquor and the value of investment in the tavern). *But see* *Scott v. Village of Kewaskum*, 786 F.2d 338, 341 (7th Cir. 1986) (denial of license does not diminish economic interest in tavern since building may be sold or converted to another use).

217. This is a lofty assumption since many states do not recognize a property interest in liquor licenses. See *supra* notes 30-79 and accompanying text for a discussion of how certain property attributes can be used to determine whether or not a particular state will recognize a property interest in a liquor license. See *Dagley v. Incorporated Town of*

mentally impacts a licensee's ownership interests. Some courts do not address the issue of whether the license itself is property, but instead address whether a property right exists to "engage in or continue to engage in the liquor business."²¹⁸ The distinction between whether the liquor license constitutes property or whether the right to engage in liquor sales constitutes property does not appear to affect the takings analysis when regulatory action interferes with a liquor license holder.²¹⁹

The analysis of a personal property taking is similar to the analysis of a taking of real property.²²⁰ Thus, the *Agins* test must be ap-

Fairview Park, 371 N.E.2d 1338 (Ind. Ct. App. 1978) (license to sell alcoholic beverages is not property and, therefore, no constitutional question concerning the taking of property arises); Opinion of the Justices to the House of Representatives, 333 N.E.2d 414 (Mass. 1975) (liquor licenses confer no property rights on licensees thus liquor licenses may be revoked without compensation); State *ex rel.* Carman v. Ross, 162 S.W. 702 (Mo. Ct. App. 1914) (revocation of liquor license not unconstitutional since license is not a "right of property"); Yarbrough v. Montoya, 214 P.2d 769 (N.M. 1950) (liquor license is a privilege and not property). *But see* Kimura v. Battley, 969 F.2d 806 (9th Cir. 1992) (holding that a liquor license in Alaska constitutes property, within the meaning of federal law, subject to a federal tax lien); State v. Saugen, 169 N.W.2d 37 (Minn. 1969) (owner of liquor lounge entitled to compensation for loss of liquor license in condemnation proceeding for property on which lounge was located); Redevelopment Auth. of Phila. v. Driscoll, 405 A.2d 975 (Pa. Commw. Ct. 1979) (loss of liquor license is a compensable property interest in a condemnation proceeding); Mary J. Cavins, Annotation, *Loss of Liquor License as Compensable in Condemnation Proceeding*, 58 A.L.R.3d 581 (1974). It should be noted that although a state may determine that a liquor license is property for the purposes of due process, the same state may find that the license is *not* property for the purposes of finding a taking. Nunnally v. Moore, 570 P.2d 195, 196 (Ariz. Ct. App. 1977) (while a liquor license may be considered a property right between a licensee and a third party, the license is only considered a privilege between the licensee and the state, however, the licensee is still entitled to procedural due process before her license may be suspended or revoked).

218. Country Liquors, Inc. v. City Council, 264 N.W.2d 821, 826 (Minn. 1978) (citing Arens v. Village of Rogers, 61 N.W.2d 508, 519 (1953)) (no vested property right to engage in liquor business); Gas 'N Shop, Inc. v. Nebraska Liquor Control Comm'n, 427 N.W.2d 784, 789 (Neb. 1988) ("right to engage in the sale of intoxicating liquors involves a mere privilege").

219. The court in Myers v. Holshouser, 214 S.E.2d 630, 638 (N.C. 1975), notes that the prevailing view among states is that a liquor license is not property, but explains that "North Carolina has taken the position that ' [a] license to engage in a business or practice a profession is a property right that cannot be suspended or revoked without due process of law.'" *See also* AGL, Inc. v. North Carolina Alcoholic Beverage Control Comm'n, 315 S.E.2d 718, 720 (N.C. Ct. App. 1984) (right to sell beer and wine is not a constitutional or property right).

220. "There is no question that the takings clause protects against uncompensated takings of tangible real property and tangible personal property." Jack M. Beermann, *Government Official Torts and the Takings Clause: Federalism and State Sovereign Immunity*, 68 B.U. L. REV. 277, 301-02 (1988) (citing L. TRIBE, *CONSTITUTIONAL CHOICES* 169-74 (1985)) *see also* Sutfin v. California 67 Cal. Rptr. 665, 666 (1968) (federal and state constitutions and California decisions do not distinguish between real property and personal property with respect to the requirement of just compensation). The *Lucas* opinion, how-

plied to any regulatory action affecting a liquor license.²²¹ Because the liquor licensing regulation will most likely advance legitimate state interests by reducing or eliminating local crime associated with neighborhood liquor outlets, the first prong of the *Agins* test is met. The second prong of the *Agins* test, however, requires an examination of the nature of the challenged regulatory action. If the license is denied, revoked, or not renewed, then the licensee, or potential licensee, will be denied *all* economically viable use of the license itself and the action will be subject to a per se takings claim under *Lucas*²²² — a claim based on the personal property interest in the liquor license itself. Under *Lucas*, the licensee might have a claim of entitlement to just compensation for the value of the license to the licensee.²²³

If the regulation affects only one portion of the property interest in the license, then *Lucas* is not applicable and the court must perform an ad hoc analysis based upon the *Penn Central* factors.²²⁴ In New Mexico, for example, a newly enacted section of the Liquor Control Act was challenged as a taking of property because it provided that, after an amortization period of 10 years, licensees would be unable to convey, encumber, or devise their liquor licenses.²²⁵ The dissent in the New Mexico Supreme Court decision argued that liquor licenses were “in the nature of property interests” and that the “Act does deprive licensees of substantially all their beneficial use of certain property interests in the licenses” therefore justifying compensation as a taking.²²⁶ The majority, however, reiterated its earlier holding that “a

ever, appears to draw a “peculiar distinction between land and personal property.” *Sax supra* note 207, at 1441 (citing *Lucas v. South Carolina Coastal Council*, 112 S. Ct. 2886, 2899-900 (1992), “in the case of personal property, by reason of the State’s traditionally high degree of control over commercial dealings, [an owner] ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property’s only economically productive use is sale or manufacture for sale)”).

221. *See supra* text accompanying note 192.

222. *But see* *Replogle v. Commonwealth of Pa.*, 523 A.2d 327, 331 (Pa. 1987) (no taking of property without compensation as a result of a local-option election since license was issued subject to condition that voters could ban liquor sales at some future time).

223. *See Philly’s v. Bryne*, 732 F.2d 87 (7th Cir. 1984). Although the *Philly’s* decision addressed only the issue of deprivation of due process, the expiration of the license as a result of a local-option election may have also been subject to a takings claim.

224. *Wilcox v. Miller*, No. 89 C 20053, 1990 U.S. Dist. LEXIS 19172, at *9 (N.D. Ill. Nov. 6, 1990) (denial of liquor license is not a taking because it does not prevent plaintiff from pursuing an occupation and it “does not even diminish significantly the economic interest in the tavern” (quoting *Scott v. Village of Kewaskum*, 786 F.2d 338, 341 (7th Cir. 1986))); *see supra* note 211 and accompanying text.

225. *Chronis v. State*, 670 P.2d 953 (N.M. 1983) (constitutional challenge to the Liquor Control Act, 1981 N.M. Laws, ch. 39, § 36).

226. *Id.* at 960-61.

liquor license is a privilege . . . and not a . . . right.”²²⁷ The Court, applying a takings analysis, also noted that the regulation is reasonably related to a proper purpose and does not unreasonably deprive the owner of all or substantially all of the beneficial use of his license. “[C]urrent liquor license holders have the continued right to engage in the alcoholic beverage business” in addition to other rights, such as using the license away from the premises for special occasions.²²⁸

Regulatory actions that affect only certain rights or privileges of the licensee may not be considered a taking if some beneficial use of the license remains. When a state or local authority deprives the licensee of all rights in the liquor license, however, the licensee may be entitled to demand compensation. Just compensation for a taking of personal property will be required under the Fifth Amendment, but only if the liquor license itself is considered a property interest entitled to constitutional protection against government action.

II. Constitutional Protections That do Not Require a Finding That the License is a Property Interest

Substantive due process and equal protection do not require the existence of a property right. Thus, it is not necessary to decide whether a liquor license is property for purposes of determining constitutional protection under these principles.²²⁹

A. Substantive Due Process

Constitutional substantive due process, as applied to state or local regulatory actions, protects against state action that is “arbitrary and unreasonable or without proper relation to the legitimate legislative

227. *Id.* at 956.

228. *Id.* at 957.

229. Illinois grants minimal procedural due process protection to liquor licenses because a license is not considered a property interest. Some Illinois decisions, however, have required that any action taken be fair and not arbitrary, a holding that is most likely based on substantive due process considerations. *Goode v. Thomas*, 334 N.E.2d 300 (Ill. Ct. App. 1975) (liquor license is a privilege, not a right, but a person entitled to sell liquor is entitled to fair treatment when public officers grant, deny, suspend or revoke liquor licenses); *Spiros Lounge, Inc. v. State Liquor Control Comm’n*, 423 N.E.2d 1366 (Ill. Ct. App. 1981) (“State Liquor Control Commissioner is vested with broad discretionary power to be exercised reasonably.”); *McCray v. Daley*, 272 N.E.2d 815 (Ill. App. Ct. 1971) (“Regulation of a liquor business must be pursuant to a reasonable exercise of police power; it must not be arbitrary or discriminatory, and one applying for a license is entitled to fair treatment from those empowered to grant or deny license.”).

purpose.”²³⁰ The right to engage in retail liquor sales as a lawful business must “yield to the greater right of the public to be protected in its moral, social, and economic welfare.”²³¹ However, a “real and substantial relationship [must exist] between the regulations imposed and the prevention of injury to the moral, social, or economic welfare of the public.”²³² The governmental unit must act within its authority when it takes action against a liquor licensee and must demonstrate that the action is rationally related to a legitimate state purpose.²³³

Many decisions find a rational relationship between liquor regulations and legitimate state purposes²³⁴ because the rational basis test is easy to meet²³⁵ and because great deference is given to state liquor regulations under the Twenty-first Amendment.²³⁶ In *Sea Girt Restaurant v. Borough of Sea Girt*,²³⁷ for example, the district court permitted the Borough to restrict, by popular vote, the hours liquor could be sold within a community. The court held that the referendum process used to limit the liquor licensee was not a violation of substantive due process because it was “rationally related to any number of valid health, safety and welfare concerns, including the concerns of reducing such problems caused by the influx of summer tourists as traffic and parking problems, vandalism and noise and reducing the incidents

230. B.P.O.E. Lodge No. 2043 v. Ingraham, 297 A.2d 607, 613 (Me. 1972) (quoting *Crane v. Campbell*, 245 U.S. 304, 308 (1917)).

231. *Reynolds v. Louisiana Bd. of Alcoholic Beverage Control*, 173 So. 2d 57, 64-65 (La. Ct. App. 1965).

232. *Id.* at 65.

233. *Weber v. Aetna Casualty & Sur. Co.*, 406 U.S. 164 (1972); see, e.g., *B.P.O.E. Lodge No. 2043*, 297 A.2d 607 (rational relationship exists where a liquor license is denied because private Lodge membership was restricted to “whites” and state’s public policy is not to discriminate).

234. *Thurlow v. Massachusetts (License Cases)*, 46 U.S. 504 (1847) (laws regulating liquor licenses are proper exercise of police power to protect public health, welfare, and morals as “intoxicating drinks [are] an evil”); *Berry v. Arapahoe & Shoshone Tribes*, 420 F. Supp. 934, 943 (D. Wyo. 1976) (tribal council’s denial of application for a liquor license was not shown to be arbitrary and capricious).

235. *Gregory v. Ashcroft*, 501 U.S. 452, 471 (1991) (under rational basis test, a law will not be overturned unless it is “so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the . . . actions [of the legislature and voters] were irrational” (quoting *Vance v. Bradley*, 440 U.S. 93, 97 (1979))). This, coupled with the heightened state interest discussed *supra* notes 8-9, makes the rational basis test very easy to satisfy.

236. States have authority to specify the times, places, and circumstances under which liquor may be sold within their borders. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); *California v. LaRue*, 409 U.S. 109 (1972); *Seagram & Sons v. Hostetter*, 384 U.S. 35 (1966). See *supra* notes 6-9 and accompanying text.

237. 625 F. Supp. 1482 (D.N.J. 1986).

of drunk driving.”²³⁸ The court explained that the Twenty-first Amendment gives the states almost limitless power to regulate the sale and distribution of liquor, including hours of sale.²³⁹

In contrast, the court in *Reynolds v. Louisiana Board of Alcoholic Beverage Control*²⁴⁰ found no rational relationship between certain statutory requirements for the issuance of a license and the protection of the morals, health, safety, economic, or general welfare of the public.²⁴¹ The regulations at issue limited: the number of square feet of storage space for the wholesaler’s liquor stock, the wholesaler’s ownership or operation of delivery trucks, the brand representation maintained with distilleries, the number of customers and the extent of the wholesaler’s trade area, the percentage of sales to customers, and the volume and cost of the wholesaler’s inventory.²⁴² The Louisiana court agreed that “economic stability and financial responsibility of liquor dealers, both wholesale and retail, are desirable” goals and that legislation reasonably designed to accomplish such goals might be a lawful exercise of police power to protect the public moral, social, or economic welfare.²⁴³ The court, however, found no rational connection between the regulations and these goals and observed that insuring the economic and financial stability of wholesale liquor dealers could be accomplished by more direct and appropriate means.²⁴⁴ Because courts grant great deference to states in regulating liquor sales²⁴⁵ and apply a rational basis test to state action, most liquor sale regulation is practically immune to a substantive due process attack.

B. Equal Protection

Whenever the government treats similarly situated individuals differently, an equal protection violation may arise.²⁴⁶ Land use regu-

238. *Id.* at 1493.

239. *Id.* at 1492 (citing *California v. LaRue*, 409 U.S. 109, 119 (1972); *G. & J.K. Enters. v. Division of Alcoholic Beverage Control*, 205 N.J. Super. 77, 82 (1985)).

240. 173 So. 2d 57 (La. 1965).

241. *Id.* at 65-66. *See also* *Castlewood Int’l Corp. v. Wynne*, 294 So. 2d 321, 324 (Fla. 1974) (restrictions on retail vendors of beer and wine, which were subjected to a “cash only” purchase policy while vendors of hard liquors and spirits were granted credit, were not rationally related to the purposes of promoting temperance and anti-monopoly and were, therefore, unconstitutional).

242. *Id.* at 65.

243. *Id.*

244. *Id.* at 66.

245. *See supra* notes 6-9.

246. *Plyler v. Doe*, 457 U.S. 202, 216 (1982); *State v. Smart*, 136 P. 452 (Wyo. 1913) (no violation of equal protection when police regulation is applied uniformly to all persons similarly situated).

lations raise equal protection concerns because they classify landowners based upon their use of their land.²⁴⁷ Whether such classification denies equal protection, however, will depend on whether a particular decision, either legislative or administrative, “unreasonably discriminates in its definition of a class, in its treatment of fundamental rights, or in its choice of means to accomplish an intended objective.”²⁴⁸ Land use regulations may be attacked facially, or as applied to an individual landowner.²⁴⁹ An equal protection challenge may also arise when a regulatory action, interfering with liquor licenses as personal property, affects similarly situated individuals differently.²⁵⁰

The standard of judicial review applied to equal protection claims varies according to the interest affected by the regulatory action. As a general rule, the statute is presumed valid and will be upheld if the statutory classification at issue bears some rational relationship to a legitimate state purpose.²⁵¹ “It is well settled that economic and social legislation generally is presumed valid.”²⁵² On the other hand, “quasi-suspect” classifications, such as gender, illegitimacy, and alienage, are subject to intermediate judicial scrutiny that requires a substantial relationship to an important or substantial state interest.²⁵³ Finally, the court will apply a strict scrutiny standard if it finds that distinctions are based upon a suspect classification, such as race, or that a fundamental

247. MANDELKER, *LAND USE LAW* 60, § 2.41 (2d ed. 1988).

248. *Patch Enters. v. McCall*, 447 F. Supp. 1075, 1079 (M.D. Fla. 1978) (Powell, J., concurring) (“There is nothing inherently suspect about regulating businesses that deal in alcoholic beverages.”).

249. *Cohen v. City of Des Plaines*, 742 F. Supp. 458 (N.D. Ill. 1990) (denial of special use permit to operate day care center while allowing nursery schools in church building is equal protection violation).

250. *Parham v. Hix*, 608 F. Supp. 546 (M.D. Ga. 1985) (It was a denial of equal protection for the sheriff and county commissioners to refuse to grant a beer and wine license to a qualified applicant while at the same time conspiring to ignore illegal beer sales by other establishments in the county).

251. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985); *Morey v. Doud*, 354 U.S. 457 (1957); *Williamson v. Lee Optical of Okla.*, 348 U.S. 483 (1955); *Gulf, Colo. & Santa Fe R.R. v. Ellis*, 165 U.S. 150 (1897); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); see *Weller v. Hopper*, 379 P.2d 792, 795 (Idaho 1963) (holding that a statute prohibiting felons from holding liquor licenses was a denial of equal protection because the classification was unreasonable, arbitrary and discriminatory).

252. *Oklahoma Educ. Ass’n v. Alcoholic Beverage Laws Enforcement Comm’n*, 889 F.2d 929, 932 (10th Cir. 1989) (analyzing state employees’ equal protection claim regarding state provisions prohibiting them from obtaining liquor licenses or working in positions in a business that requires such licenses).

253. *Id.* (citing *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440-41 (1985); *Plyler v. Doe*, 457 U.S. 202, 223-24 (1982)).

interest, such as privacy, is affected.²⁵⁴ Under the strict scrutiny standard, the regulatory authority must have a compelling governmental interest to justify distinguishing between regulatory targets based upon a suspect classification or fundamental interest.²⁵⁵

Suspect classifications and fundamental interests are generally not at issue when regulating liquor licenses and, therefore, strict scrutiny of regulatory action is not applied.²⁵⁶ As a result, most regulations are upheld under the rational basis test. For example, in *Adams v. Department of Law Enforcement*²⁵⁷ the Idaho Supreme Court observed that “[s]ome discrimination is inherent in any legislative attempt to limit the number of retail outlets for liquor by the drink.”²⁵⁸ Legislation, according to the Court, should be presumed constitu-

254. *TRIBE*, *supra* note 81, at 1000; *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Brown v. Board of Educ.*, 347 U.S. 483 (1954); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

255. This is a “strict scrutiny” standard of review, which is much more difficult to satisfy than the rational basis test. Strict scrutiny is applied when a regulation is *intended* to treat people dissimilarly, not when the impact unintentionally results in the dissimilar treatment of people. *Washington v. Davis*, 426 U.S. 229, 239 (1976). If the legislation calls for discrimination on its face (as written), or is specifically applied so as to create a discriminatory effect, this might require heightened scrutiny. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) (holding that operation of ordinances regulating laundry facilities was discriminatory in its application and, thus, violated the Equal Protection Clause). The Court in *Yick Wo* stated that it was unnecessary to consider the potential impartiality which the regulation provided, because the laws were, in fact, applied in violation of the Fourteenth Amendment. *Id.* at 373.

Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution.

Id. at 373-74.

256. *See, e.g.*, *Brown v. City of Lake Geneva*, 919 F.2d 1299, 1302 (7th Cir. 1990) (rational basis test is applied because plaintiff cannot allege any classification receiving heightened scrutiny and “a liquor license does not rise to the level of a fundamental right”); *Oklahoma Educ. Ass’n. v. Alcoholic Beverage Laws Enforcement Commn.*, 889 F.2d 929, 932 (10th Cir. 1989) (ability to pursue employment in the alcoholic beverage business is a “fundamental right only in the limited context of the privileges and immunities clause”); *Benel, Inc. v. Barry Civil Action*, No. 88-3413, 1989 U.S. Dist. LEXIS 9692 (D.D.C. Aug. 15, 1989) (petition process creating two classes of applicants was rationally related to legitimate interest in increasing citizen involvement in decisions affecting their neighborhoods); *Jones v. City of Troy*, 405 F. Supp. 464, 470 (E.D. Mich. 1975) (no invidious discrimination against suspect class or fundamental personal right found to justify more than a rational basis analysis of the liquor licensing regulations); *Grand Union Co. v. Sills*, 204 A.2d 853, 860 (N.J. 1964) (legislature may constitutionally terminate or severely regulate all liquor sales within the State “[s]o long as the regulations contain no irrational classifications or invidious discriminations”).

257. 580 P.2d 858, 860 (Idaho 1978).

258. *Id.*

tional provided the discriminatory classification is reasonably related to a legitimate public purpose.²⁵⁹ The court held that the denial of a liquor license application to a sports club did not violate the Equal Protection Clause because liquor licenses were confined to city limits and no new licenses were available, even though exemptions were available in the statute for golf courses, ski resorts, common carriers, lake resorts, and operators of convention centers.²⁶⁰ The dissent in *Adams* pointed out that liquor control statutes have, however, been invalidated when statutes create a classification that violates equal protection.²⁶¹

Legislation has been invalidated on the basis that the regulations created arbitrary classifications that were not rationally related to a legitimate state purpose.²⁶² In *State ex rel. Classics Tavern Co. v. McMahan*,²⁶³ for example, the court found that an ordinance requiring a tavern to pay taxes allegedly owed as a condition for renewal of a liquor license was invidious discrimination and a denial of equal protection because it did not impose a similar tax burden on other non-liquor businesses in the same shopping center.²⁶⁴

Challenges to regulations that classify sellers of alcoholic beverages do not typically invoke either intermediate scrutiny or strict scrutiny because the classifications are not generally based on a quasi-suspect class, a suspect class, or a fundamental right.²⁶⁵ However, strict scrutiny will be applied when a liquor license applicant has been discriminated against on the basis of race or national origin. In *Flores*

259. *Id.*

260. *Id.*

261. *Id.* at 861, 862 (Donaldson, J., dissenting) (observing that it is not rational to refuse license to a sports club because the sport involved is tennis and not golf since “[i]t does not seem to me that tennis players require greater protection from the evils of drink than golfers”). The *Adams* court also cites several cases illustrating the court’s willingness to invalidate these statutes if they violate equal protection: *Women’s Liberation Union v. Israel*, 512 F.2d 106 (1st Cir. 1975), *Daugherty v. Daley*, 370 F. Supp. 338 (N.D. Ill. 1974), *United States v. Cantrell*, 307 F. Supp. 259 (E.D. La. 1969), *Pacific Fruit & Produce Co. v. Martin*, 16 F. Supp. 34 (W.D. Wash. 1936), *Arizona State Liquor Bd. v. Ali*, 550 P.2d 663 (Ariz. 1976), *City of Miami v. Kayfetz*, 92 So. 2d 798 (Fla. 1957), *Alcoholic Beverage Control Bd. v. Burke*, 481 S.W.2d 52 (Ky. 1972), *George Benz Sons, Inc. v. Ericson*, 34 N.W.2d 725 (Minn. 1948).

262. *Tavern League v. City of Madison*, 389 N.W.2d 54, 58 (Wis. Ct. App. 1986) (violation of equal protection to “arbitrarily and unreasonably [classify] sellers of alcoholic beverages separately from all other city licensees for the purpose of tax collection”).

263. 783 S.W.2d 463 (Mo. Ct. App. 1990).

264. *Id.* at 466.

265. See *supra* notes 252-256 and accompanying text.

v. Pierce,²⁶⁶ the police chief filed a protest with the California ABC against the liquor license application of a Mexican-American couple stating that "granting the license would lead to an undue concentration of licenses in Calistoga and aggravate an existing police problem."²⁶⁷ The court held that the evidence presented in district court was sufficient to support a jury finding that city officials violated the Flores' equal protection rights by filing protests against the applicants that were motivated by race or national origin.²⁶⁸ Similarly, the court in *Sherwin Manor Nursing Center, Inc. v. McAuliffe*²⁶⁹ found that plaintiff had stated a claim for denial of equal protection based upon allegations that Illinois state licensing officials forced the applicant to undertake "extraordinary measures" by reason of their race or national origin for issuance of a license for a long-term nursing care facility.²⁷⁰ The plaintiff in *Sherwin* alleged that he "was subjected to differential treatment by the state surveyors based upon the surveyor's anti-Semitic animus."²⁷¹ Although the court recognized that "[t]he defendants' anti-Semitic remarks may not by themselves give rise to an equal protection action," this "verbal abuse accompanied by the imposition of a special administrative burden forms the basis of an equal protection claim."²⁷² Regulatory action following the 1992 Los Angeles riots may arguably require use of a strict scrutiny standard if equal protection claims are made. It has been observed that "most of the stores burned down in South-Central were owned by Korean-Americans."²⁷³ When these store owners apply for rebuilding permits, attempts by local authorities to "clamp down" on the liquor store overconcentration problem may be subject to a strict scrutiny standard.²⁷⁴ Korean-Americans argue that prohibiting the rebuilding

266. 617 F.2d 1386,1390 (9th Cir. 1980), *cert. denied*, 449 U.S. 875 (1980); *see also* Shaw v. California Dept. of Alcoholic Beverage Control, 788 F.2d 600, 610 (9th Cir. 1986) (allegations that excessive police activity at plaintiffs' bar was undertaken because the plaintiffs are black constitute an allegation of a policy of unconstitutional discriminatory enforcement of the laws sufficient to withstand a motion to dismiss).

267. *Flores*, 617 F.2d at 1388. It is interesting to note that the police chief's stated concern about an overconcentration problem in the *Flores* case is the same concern voiced by Los Angeles citizens in the rebuilding efforts after the 1992 riots. *See infra* notes 269-272 and accompanying text.

268. *Id.* at 1390.

269. 37 F.3d 1216 (7th Cir. 1994).

270. *Id.* at 1222.

271. *Id.* at 1221.

272. *Id.*

273. Johnson, *supra* note 10, at A1.

274. *See Flores v. Pierce*, 617 F.2d 1386, 1391 (9th Cir. 1980) ("If the rigors of the governmental or administrative process are imposed upon certain persons with an intent to

of their stores will deepen the emotional scars already inflicted.²⁷⁵ Ryan Song of the Korean-American Grocers Association complained that “it’s almost like a witch hunt” because “the liquor stores are being made scapegoats for problems that are far more complicated than who sells alcohol.”²⁷⁶

Decisions regulating the rebuilding process in Los Angeles may not be based upon race or national origin. The decisions, however, may disproportionately affect Korean-Americans because they appear to have been targeted by the arsonists. The Supreme Court’s decision in *Washington v. Davis*²⁷⁷ indicates that an equal protection claim by Korean-American liquor store owners, based solely upon disproportionate impact, is unlikely to succeed. In *Washington v. Davis*, the Court determined that District of Columbia recruiting procedures for police officer applicants did not violate the Equal Protection Clause.²⁷⁸ The Court reasoned that discriminatory impact alone was not sufficient to show a violation and that the plaintiffs (African-Americans in this case) “could no more successfully claim that the test denied them equal protection than could white applicants who also failed.”²⁷⁹ Nevertheless, “disparate racial effect is evidence that may be adduced to prove the invidious intent that is the essence of the violation.”²⁸⁰

The degree to which courts will scrutinize regulatory actions having a disproportionate impact may also be influenced by the *California v. LaRue*²⁸¹ decision. In *LaRue*, the Court confirmed that a state agency, whose authority is based on the Twenty-first Amendment, will be given “wide latitude” in choosing how it will accomplish a permissible end.²⁸² One state court has interpreted *LaRue* as declaring that

burden, hinder, or punish them by reason of their race or national origin, then this imposition constitutes a denial of equal protection . . .”).

275. *Id.*

276. Krikorian, *supra* note 214, at A14.

277. 426 U.S. 229 (1976).

278. *Id.* at 246.

279. *Id.* See also *Conti v. City of Fremont*, 919 F.2d 1385, 1387-88 (9th Cir. 1990) (noting that even though majority of patrons affected were minorities, impact of restaurant closing due to failure to amend liquor license was not a violation of equal protection).

280. See *Flores v. Pierce*, 617 F.2d 1386, 1389 (9th Cir. 1980) (“Disparate racial impact is of unquestioned relevance in proving the forbidden intent to discriminate.”).

281. 409 U.S. 109 (1973).

282. *Id.* at 116 (citing *Seagram & Sons v. Hostetter*, 384 U.S. 35, 48 (1966)). The state does not, however, have a right under the Twenty-first Amendment to “elevate police power absolutely over the other provisions of the Constitution.” *New Safari Lounge, Inc. v. City of Colorado Springs*, 567 P.2d 372, 375 (Colo. 1977) (citing *Craig v. Boren*, 429 U.S. 190 (1976)).

the Twenty-first Amendment "modifies the demands of the Fourteenth as to regulation of alcohol use and distribution and makes state action in this area subject only to the most lenient equal protection review, the rational relationship standard."²⁸³ In fact, "[t]here is perhaps no other area of permissible state action within which the exercise of the police power of a state is more plenary than in the regulation and control of the use and sale of alcoholic beverages."²⁸⁴

Courts will probably not apply a strict scrutiny standard to challenged liquor license regulatory actions, unless such actions disproportionately affect a suspect classification or fundamental right and there is evidence of discriminatory motive.²⁸⁵ Moreover, since liquor license regulations and land use regulation of liquor outlets affect only the economic interests of the licensee or landowner, the application of a rational relationship standard is appropriate in most instances.²⁸⁶ Under this standard, the regulatory action will be valid provided a rational basis supports it.²⁸⁷ One of the greatest justifications for regulatory action is the protection of the health, safety, welfare, and morals of the communities affected by overconcentration of liquor

283. *Houser v. State*, 540 P.2d 412, 414 (Wash. 1975), *overruled by State v. Smith*, 610 P.2d 869 (Wash. 1980).

284. *In re Tahiti Bar, Inc.*, 150 A.2d 112, 115 (Pa. 1959).

285. *See Flores v. Pierce*, 617 F.2d 1386, 1390 (9th Cir. 1980) ("There is also evidence that the defendants acted with reference to racial classifications and offered explanations which invoked stereotypes from which one could infer an intent to adopt a racial classification.").

286. *Weber v. Aetna Casualty and Sur. Co.*, 406 U.S. 164, 172 (1978); *Conti v. City of Fremont*, 919 F.2d 1385, 1389 (9th Cir. 1990) (noting that when the city's refusal to amend a conditional use permit does not implicate a suspect class nor interfere with a constitutional right the court will apply the 'rational basis' test under the Equal Protection Clause).

287. *Atlanta Bowling Center, Inc. v. Allen*, 389 F.2d 713, 717 (5th Cir. 1968) (states may make classifications within the purview of the Equal Protection Clause provided the classifications are not arbitrary); *State ex rel. Garrett v. Randall*, 527 S.W.2d 366 (Mo. 1975) (en banc) (liquor control law, which requires no evidentiary hearing for new or renewal liquor licenses but which requires an evidentiary hearing before revocation or suspension of liquor licenses, does not deny equal protection, in view of rational basis for distinction); *Gas 'N Shop, Inc. v. Nebraska Liquor Control Comm'n*, 427 N.W.2d 784, 789 (Neb. 1988) (restrictive regulations do not deprive persons of equal protection of the law provided they do not contain "irrational classifications or invidious discriminations"); *Helms v. Texas Alcoholic Beverage Comm'n*, 700 S.W.2d 607 (Tex. Ct. App. 1985) (denial of liquor permit does not deny applicant right to equal protection, even though other restaurants along the same street have been granted permits, because location of applicant's premises would cause increased traffic hazard and result in increased danger to children and residents); *see also Castlewood Int'l Corp. v. Wynne*, 294 So. 2d 321, 324 (Fla. 1974) (statute requiring that all sales of beer and wine to retail licensees be made in cash only violates the Equal Protection Clause since such statutory discrimination is not rationally related to the purposes of the Act).

stores.²⁸⁸ Indeed, the harmful effects that liquor stores have on the communities they serve have become more evident throughout the country.²⁸⁹ Based on these considerations, it is doubtful that equal protection challenges will be successful against most liquor license regulation.

III. Conclusion

A liquor license is a valuable asset to the license holder, whether it be considered a privilege or a property interest. There is great diversity among and within the states as to whether the license should be considered property and for what purposes. If the license is not deemed to be property, procedural due process, which protects liberty and property interests, will not be required and a regulatory takings claim will not be warranted.

The determination of whether the liquor license is property may be facilitated by examining the attributes attached to the license under state law. The right to obtain, the right to alienate, the right to renew, and the state's right to revoke the license are attributes that can determine whether the license has the traditional characteristics found in the property bundle of rights. The greater the expectation generated by state law, the greater the possibility that a liquor license will acquire the characteristics of property. Statutory declarations of whether the license is property may also exist under state law, but courts may not always consider these declarations when making decisions regarding constitutional protection of rights.

288. In Sacramento, for example, an ordinance proposed in 1993 would restrict sales at liquor stores "that operate in a manner that is 'detrimental to the public peace, health or safety.'" *Liquor Store Pollution*, SACRAMENTO BEE, May 25, 1993, at B6 (quoting a local ordinance). "[C]ontrols would be imposed only where it can be shown that the store constitutes a public nuisance by contributing to such problems as 'public inebriation, excessive littering, public urination, harassment of passersby, illegal drug activity, assaults, batteries, vandalism or police detentions and arrests.'" *Id.* (quoting a new local ordinance.) One commentator has gone as far as to suggest that "no one disputes that trouble often accompanies an abundance of [retail liquor] outlets." Judy Ronningen, *Twisting the Tail of Demon Rum; Neighborhoods Go After Drinking*, S.F. CHRON., June 3, 1993, at A1.

289. Alexei Barrionuevo & Nora Lopez, *Liquor Stores Warned; Police conduct sweep near S. Dallas school*, DALLAS MORNING NEWS, Nov. 16, 1993, at 15A (liquor stores near school expose students "to street drunks and prostitutes on a daily basis"); Marina Dundjerski, *MetroWire Activists Rally to Rebuild L.A. Without Liquor Stores*, UPI, June 20, 1992, available in LEXIS, News Library, Arcnus File ("liquor stores create an environment of drug dealing, prostitution, gambling, alcohol sales to minors and fights"). See Phuong Le, *Measure Would Curtail Liquor Sales in the Mission*, S.F. CHRON., July 1, 1993, at A13 ("liquor outlets foster public drunkenness, property defacement, drug trafficking, domestic violence and other criminal activities").

Many state and most federal courts will judge the license to be a property right for the purpose of granting federal due process protection, particularly when the action is for renewal or revocation of the license. The majority of decisions that recognize a protectable property right in a liquor license, however, find that the licensing actions at issue do not violate procedural due process. The courts typically find that no violation occurred either because some type of notice or opportunity to be heard is given or because the licensee should have been aware at the time of licensing that certain actions, such as a referendum or a local option election, were a potential threat to his or her license.

Similar results occur in most regulatory taking challenges to liquor licensing actions. In takings challenges, however, the courts generally recognize a protectable property right and then determine no taking of property occurred.²⁹⁰ Most liquor regulation will likely be deemed to substantially advance legitimate state interests and the court will probably find that the owner will not be denied economically viable use of his land.²⁹¹ If the regulation affects the location of the liquor store, the owner can still use the property for other economically viable uses. However, if the license itself, as personal property, is "taken," the licensee may have a valid claim for compensation unless the licensee was aware that the license was not permanent at the time it was first obtained.

State or local governing authorities may regulate liquor licensing actions without violating a licensee's substantive due process rights provided the government's action is rationally related to a legitimate state purpose. Broad power is given to the state to regulate liquor under the Twenty-first Amendment and this power may be delegated to local units. This regulatory power is almost limitless, as most liquor licensing controls will pass the lenient rational-relationship test. State and local authorities may also treat similarly situated liquor licensees differently, without violating equal protection rights, so long as the regulatory classification bears some rational relationship to a legitimate state purpose. As with a substantive due process challenge, an equal protection challenge against a regulatory classification or licensing action will usually fail because courts apply a minimal review standard of rational relationship for actions that affect only the economic interests of the licensee.

290. See *supra* notes 217-228 and accompanying text.

291. See *Ross v. City of Chicago*, No. 89 C8049, 1990 U.S. Dist. LEXIS 3276, at *7 (N.D. Ill. Mar. 22, 1990).

The regulation of liquor is a matter of great concern to the state, to local residents, to the liquor industry, and to the owners of liquor licenses and retail outlets. When regulatory authorities regulate this trade to resolve problems such as the overconcentration of liquor stores in urban areas, these authorities must be aware of the potential constitutional challenges that may arise. Whenever the state confers a privilege via a license, the licensee is likely to expect constitutional protection. The extent of constitutional protection the state must provide will depend upon how state law has defined the licensee's rights, whether the license is considered property, the reasonableness of the state action, and the licensee's reliance on the expectation of protection.