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A Seat at the Bar: Modernizing Alcohol Laws to Meet the Demands of Responsible Consumers, 54 UIC L. Rev. 1011 (2021)

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A SEAT AT THE BAR: MODERNIZING ALCOHOL LAWS TO MEET THE DEMANDS OF RESPONSIBLE CONSUMERS

ALICE VAGUN*

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I. INTRODUCTION

Everyone dreams of a weekend getaway in Napa, California — even if you’re not a wine connoisseur. What’s not to love? Days are filled with wine tasting, the weather is beautiful, and the downtown district is the closest anyone feels to being in a quaint European city. While visiting wineries is an adventure in itself, strolling through the downtown district and visiting specialty wine shops is just as fun. Most of these shops are run by locals, so people have the ability to support small business owners that want to help you find the perfect wine to come home to and unwind with.

But the reality is that not everyone gets the chance to sneak away for a weekend to Napa. And, those who get to might not be able to return so soon to visit and support their new favorite wine shop. Enter online shopping. Ordering directly from the winery? Not a problem. But, typing in your home address when you’re checking out with the wine shop? Napa, we have a problem — a possible constitutional problem. The issue soon becomes clear: You cannot get that wine delivered to you because the direct-to-consumer interstate shipment of alcohol from a retailer will

immediately raise a constitutional challenge.¹ Nowadays, just about anything can be shipped to your doorsteps — and consumers prefer it that way.² There was no issue with being able to have a bottle of wine shipped from the manufacturer itself. So, why does it matter when the alcohol is coming from a retailer?

Generally, the free marketplace permits retailers to engage in unrestricted commerce.³ Now, with the rise of the Internet, retailers look to online marketplaces to facilitate the sales of their products.⁴ For commodities such as clothing or furniture, consumers typically find no issue with being able to have these items shipped directly from the retailer to their homes.⁵ However, this particular

* Alice S. Vagun, Juris Doctor, University of Illinois Chicago School of Law, 2021. Thank you to mama, papa, and Bobby for their continued support throughout law school. Because of you three, I will always have a reason to raise my glass with pride and gratitude. Na Zdarovya!

1. First Am. Compl., *Freeman v. Graziano*, No. 2:19-cv-14716-BRM-SCM (D. N.J. 2019) (challenging the State of New Jersey's regulatory scheme that prohibits out-of-state retailers from delivering and shipping wine directly to consumers in New Jersey from their out-of-state locations); Compl., *Tannins of Indianapolis, LLC v. Bevin, Beshear, and Arflack*, No. 3:19-CV-504-RGJ (W.D. Ky. 2019) (challenging the State of Kentucky's regulatory scheme that prohibits out-of-state wine retailers from selling, delivering, and shipping wine directly to Kentucky consumers while in-state wine retailers are permitted to do so); Compl., *Springer v. Holcomb*, No. 1:19-cv-2785 (S. D. Ind. 2019) (challenging the State of Indiana's regulatory scheme that permits in-state wine retailers to sell, deliver, and ship wine directly to Indiana consumers, but prohibits out-of-state wine retailers from doing the same); Compl., *Brockie v. Abbott*, No. 3:19-cv-01675-L (N. D. Tex. 2019) Plaintiffs challenged the constitutionality of the State of Texas's law, practices, and regulations that allow in-state wine retailers to sell, deliver, and ship wine directly to Texas consumers, but prohibit out-of-state wine retailers from doing the same. *Id.* The plaintiffs in the Texas case voluntarily dismissed their case approximately four months after filing their initial complaint. *Id.*

2. *US Direct-to-Consumer Ecommerce Sales Will Rise to Nearly \$18 Billion in 2020*, EMARKETER (Apr. 1, 2020), www.emarketer.com/content/us-direct-to-consumer-ecommerce-sales-will-rise-to-nearly-18-billion-in-2020 [perma.cc/W84B-7PNR].

3. See *Lebamoff Enters. v. Whitmer*, 956 F.3d 863, 868 (6th Cir. 2020) (noting that certain restrictions placed on the manufacturers, wholesalers, and retailers in the three-tier system for alcohol distribution does not reflect the idea that economic development is promoted in a free market).

4. See Gary Drenik, *Marketplace Models Find Growth Opportunities Amidst The Power Of Amazon And The Pandemic*, FORBES (Feb. 23, 2021), www.forbes.com/sites/garydrenik/2021/02/23/marketplace-models-find-growth-opportunities-amidst-the-power-of-amazon-and-the-pandemic/?sh=1c1bad1b7fc4 [perma.cc/88K6-QBF5] (noting that “[m]arketplaces already account for more than 50% of global online sales,” and the pandemic will only cause that number to rise); see also Richard Kestenbaum, *What Are Online Marketplaces And What Is Their Future?*, FORBES (Apr. 26, 2017), www.forbes.com/sites/richardkestenbaum/2017/04/26/what-are-online-marketplaces-and-what-is-their-future [perma.cc/LB68-46QK] (explaining the different type of online marketplaces available for retailers).

5. D2C CHEAT SHEET SUCCESS STORIES ANALYZED, CB INSIGHTS,

issue of direct retailer-to-consumer alcohol interstate shipping is amplified by the fact that States have the right to control the transportation or importation of alcohol into their borders.⁶ As the novel coronavirus pandemic has revealed the growing reliance on online shopping, the modern consumer should be able to order the products that they want to enjoy responsibly. Moreover, businesses around the country have adapted their business models during the pandemic to accommodate consumers that seek delivery options for food, clothing, and other types of orders.⁷ While nearly all states adhere to the traditional three-tier system for alcohol distribution, the interstate shipment of alcohol continues to present a unique challenge as each state has its own regulatory scheme to control the distribution of alcohol.⁸

As this Comment will demonstrate, by modernizing our current alcohol laws and by revamping our current regulatory scheme, there is a way that the consumer's interest, and thirst, can be quenched while still meeting the interests of state regulators and key players in the three-tier system. The issue of whether retailers are permitted to directly ship their alcohol products to consumers out of the state has not been directly answered by the courts.⁹ However, the issue of prohibiting states from enacting protectionist economic regulations that are aimed at keeping out-of-state retailers from participating in another state's alcohol market has been addressed by the United States Supreme Court in *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*.¹⁰

www.cbinsights.com/reports/CB-Insights_D2C-Cheat-Sheet.pdf
[perma.cc/77W4-XGUR] (last visited Oct. 12, 2020).

6. U.S. CONST. amend. XXI, § 2 (mirroring the language of the Webb-Kenyon Act of 1913, section 2 states “[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.”).

7. Gabriela Barkho, *As cities slowly reopen, more retailers look toward same-day delivery services*, MODERNRETAIL (June 9, 2020), www.modernretail.co/retailers/as-cities-slowly-reopen-more-retailers-look-toward-same-day-delivery-services/ [perma.cc/HMN9-4MFK].

8. *Alcohol Beverage Authorities in United States, Canada, and Puerto Rico*, ALCOHOL & TOBACCO TAX & TRADE BUREAU, www.ttb.gov/wine/alcohol-beverage-control-boards#US [perma.cc/256H-FL5D] (last visited Oct. 12, 2020).

9. *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2476 (2019). The Court held that a residency requirement for an out-of-state wine and spirits retailer violated the Commerce Clause and “[was] not saved by the Twenty-first Amendment.” *Id.* This 2019 case did not address any specific issues of alcohol importation from out-of-state retailers, but rather addressed the issue of prohibiting out-of-state retailers from establishing a physical presence in another state. *Id.* at 2471 (“At issue in the present case is not the basic three-tiered model of separating producers, wholesalers, and retailers, but the durational-residency requirement that Tennessee has chosen to impose on new applicants for liquor store licenses.”).

10. Oral Argument at 42:36, *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449 (2019) (No. 18-96), www.oyez.org/cases/2018/18-96 [perma.cc/6YNB-JTD2]. United States Supreme Court Justice Neil Gorsuch

Part II of this Comment will discuss the evolution of alcohol laws, beginning with states' attempts to find uniformity in the shipment and importation of alcohol prior to the ratification of the 18th Amendment. Part II will also discuss the social movements that led to the ratification of the 18th Amendment and the enactment of national prohibition. It will discuss how the failure of Prohibition resulted in the repeal of the 18th Amendment and the ratification of the 21st Amendment. Additionally, Part II will discuss how the modern three-tier system for alcohol distribution arose out of the enactment of the 21st Amendment.

Further, Part III will analyze and compare current cases that have been brought forward by wine retailers that seek to ship their alcohol products to consumers out of the state. Finally, Part IV will propose recommendations on how state regulators can enact regulations that will serve their concerns for recuperating lost revenue and serving public health and safety through a new licensing scheme for direct retailer-to-consumer interstate shipment.

II. BACKGROUND

Sections A and B will explore the evolution of interstate alcohol shipment beginning with pre-prohibition statutes and the national prohibition of alcohol through the ratification of the 18th Amendment. Section C will then address the subsequent repealing of national prohibition through the ratification of the 21st Amendment. Finally, Section C will discuss the emergence of the modern three-tier system and the modern regulatory scheme.

A. *Pre-Prohibition: A Nation Struggles to Find Uniformity*

In the late 1800s to 1900s, the United States Supreme Court began to issue decisions relating to the interstate importation of liquor.¹¹ Central to these cases were the competing interests of interstate commerce as well as states' interests in promoting temperance among its citizens.¹² In most of these cases, the Court

expressed concern that getting rid of a residency requirement for a wine and spirits retailer "would help enable online alcohol sales with no state regulation." *Id.* Justice Gorsuch famously asked the attorney for the wine and spirits retailer, "But isn't the next business model just to -- to try and operate as the Amazon of -- of liquor?" *Id.*

11. PAUL AARON & DAVID MUSTO, ALCOHOL AND PUBLIC POLICY: BEYOND THE SHADOW OF PROHIBITION 149 (Mark Moore & Dean Gerstein, eds., 1981).

12. *Leisy v. Hardin*, 135 U.S. 100, 108-09 (1890), *superseded by statute*, 27 U.S.C. § 121 (2021). In *Leisy*, an Illinois liquor manufacturer and importer wanted to sell and import liquor into the State of Iowa, which at the time had a state law in place that banned the importation of liquor. *Id.* at 124. The Supreme Court found that despite the fact that the Commerce Clause was silent on the specific issue of the importation of liquor, it is within Congress's authority to manage trade between states and foreign countries. *Id.* at 119, 125.

would invalidate state liquor regulations for one of two reasons: either that the regulation was in direct violation of the Commerce Clause and Congress's ability to regulate interstate commerce;¹³ or that the regulation placed a "discriminating burden" on interstate commerce.¹⁴

1. *Wilson Act – Promoting Uniformity in the Regulation of Alcohol Laws.*

While the Commerce Clause has prevented any state from discriminating against out-of-state manufacturers of liquor, the Court recognized that states did have the right to regulate the sale and importation of liquor.¹⁵ Specifically, the Court recognized that states could ban domestic production and transportation of alcohol, which would essentially create a "dry state."¹⁶ However, the question of whether out-of-state manufacturers and importers could bring liquor into a dry state was still left unanswered.¹⁷ In response

The *Leisy* court concluded that the importation of liquor fell within the meaning of "trade" within the Commerce Clause, and as such, the state law banning importation of liquor was void. *Id.* at 124-25.

13. *Scott v. Donald*, 165 U.S. 58, 91 (1897) (holding that

"[s]o long . . . as state legislation continues to recognize wines, beer and spirituous liquors as articles of lawful consumption and commerce, so long must continue the duty of the Federal courts to afford to such use and commerce the same measure of protection, under the Constitution and laws of the United States, as is given to other articles.").

14. U.S. CONST. art. I, § 8, cl. 3; *see also* *Bowman v. Chi. & N. Ry.*, 125 U.S. 465, 486 (1888), *superseded by statute*, 27 U.S.C. § 121 (2021) (recognizing that "[a] state legislation, which seeks to impose a direct burden upon interstate commerce, or to interfere directly with its freedom, does encroach upon the exclusive power of Congress.").

15. *Leisy*, 135 U.S. at 113 (noting "[f]or the purpose of protecting its people against the evils of intemperance, [the State] has the right to prohibit the manufacture within its limits of intoxicating liquors . . .").

16. *Mugler v. Kansas*, 123 U.S. 623, 658 (1887) (quoting *Thurlow v. Massachusetts*, 46 U.S. 504, 577 (1847)) (stating that

"[i]f any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, [there is] nothing in the Constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether, if [the State believes it to be] proper.").

17. *See id.* at 659-660 (noting that

"although the State may prohibit the manufacture of intoxicating liquors for sale or barter within her limits, for general use as a beverage, 'no convention or legislature has the right, under our form of government, to prohibit any citizen from manufacturing for his own use, or for export, or storage, any article of food or drink not endangering or affecting the rights of others.'").

to this issue, Congress passed the Wilson Act in 1890.¹⁸ Essentially, the Wilson Act permitted States to enforce a statewide prohibition of alcohol.¹⁹ Specifically, it gave states the power to enforce specific liquor laws so long “as the regulation of out-of-state liquor was equal to the regulation of in-state liquor.”²⁰ If a state imposed statewide prohibition of alcohol, then they could, without inviting a constitutional challenge, prohibit an out-of-state manufacturer from importing any liquor into the state.²¹

While the passage of the Wilson Act allowed the states to regulate imported liquor on the same level playing field as domestic liquor, it did not address the issue of direct shipment of alcohol to consumers. The Supreme Court attempted to answer this question by narrowing the Wilson Act to only apply to the resale of imported liquor in its original package and not to liquor that is directly shipped to consumers.²² However, additional action from Congress was still required to further the states’ interest in promoting temperance within its borders.

2. *Webb-Kenyon Act— Recognizing states’ interests in regulating alcohol.*

In 1913, Congress passed the Webb-Kenyon Act, which effectively prohibited interstate “shipment or transportation” of alcoholic beverages “in violation of any law of [any] State, Territory, or District of the United States.”²³ Considered to be an extension of the Wilson Act, dry states were now empowered to completely ban the sale and importation of alcohol within their borders.²⁴ Before, States immediately faced constitutional challenges to the right to regulate interstate commerce when they enacted laws prohibiting the importation of alcohol.²⁵ However, the Webb-Kenyon Act was

18. 227 U.S.C § 121 (2021) (stating that

“[a]ll fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.”).

19. *Id.*

20. *Id.*

21. *Id.*

22. *Rhodes v. Iowa*, 170 U.S. 412, 423-24 (1898).

23. Webb-Kenyon Act of 1913, Pub. L. No. 62-398, 37 Stat. 699 (1913).

24. *Clark Distilling Co. v. Western M. R. Co.*, 242 U.S. 311, 331 (1917) (upholding the Webb-Kenyon Act of 1913).

25. See Winfred T. Denison, *States’ Rights and the Webb-Kenyon Liquor Law*, 14 COLUM. L. REV. 321, 322-23 (1914) (noting that the “liquor traffic”

interpreted to be the first federal endorsement for states' right to regulate alcohol without issue.²⁶

B. Prohibition: A Nation Attempts to Stay Sober

At the same time that the Court's decisions began to reflect states' interests in promoting temperance, social movements around the country began lobbying for abstinence from alcohol consumption.²⁷ In 1893, Reverend Howard Hyde Russell founded the Anti-Saloon League ("ASL") in Oberlin, Ohio.²⁸ The group believed that alcohol consumption was the root of societal problems and criminal activities.²⁹ ASL became a leader in the temperance movement in the United States and lobbied for national wide prohibition of alcohol.³⁰ In addition to ASL's work, the National Woman's Christian Temperance Union ("WCTU"), founded earlier in 1874, also lobbied Congress for action.³¹ As one of the leading women's organizations at the time, WCTU argued that spousal and familial abuse was a direct result of alcohol abuse.³² The solution to these "social evils," they argued, was prohibition.³³

The driving force of national prohibition and the ratification of the 18th Amendment were direct results of the lobbying efforts from these temperance groups.³⁴ In turn, Congress ratified the 18th Amendment in 1919, which officially established the prohibition of alcohol in all of the United States.³⁵ The Volstead Act, which was subsequently passed by Congress in 1919 and went into effect in 1920, provided for a federal law that enforced the 18th Amendment.³⁶ The Volstead Act, mirroring the 18th Amendment,

creates a conflict between "states police powers" and "federal power over its interstate.").

26. *Id.* at 325, 329.

27. *Howard Hyde Russell: Early Years of the Anti-Saloon League*, OHIO STATE UNIV., www.prohibition.osu.edu/anti-saloon-league/howard-hyde-russell [perma.cc/TE9G-4Q5F] (last visited Oct. 12, 2020).

28. *Id.*

29. See Michael deHaven Newsom, *Some Kind of Religious Freedom: National Prohibition and the Volstead Act's Exemption for the Religious Use of Wine*, 70 BROOKLYN L. REV. 739, 784 (2005) (noting how in the eyes of the Anti-Saloon League and other temperance groups, "the saloon was . . . 'a sleazy, beery, spittoon-filthy iniquitous gathering place,' . . . and the locus of 'crime, delinquency, poverty, prostitution, disease and corruption.'" (citations omitted).

30. *Id.* at 784, 801.

31. See Erin M. Masson, *The Woman's Christian Temperance Union, 1874-1898: Combating Domestic Violence*, 3 WM. & MARY J. WOMEN & L. 163 (1997) (explaining that WCTU "began as a temperance movement.").

32. *Id.*

33. *Id.* at 163-65 (noting how sexual violence against women was committed by "drunken husbands.").

34. *Id.* at 187.

35. U.S. CONST. amend. XVIII.

36. Volstead Act of 1919, Pub. L. No. 66-66, 41 Stat. 305 (1919).

prohibited the production, sale, and transport of intoxicating liquors.”³⁷ However, the Volstead Act went a step further by defining what intoxicating liquors were.³⁸

C. *Post-Prohibition: A Nation Gives Alcohol Distribution*

Another Shot

After the ratification of the 18th Amendment, the production, sale, and transport of alcohol was prohibited nationwide.³⁹ Unsurprisingly, not everyone agreed with nationwide prohibition, and over the next 13 years, a black market for liquor emerged.⁴⁰ Prohibition did not cure the societal evils that the temperance movement sought to address, and the need to regulate and tax a thriving black market led to the repealing of the 18th Amendment.⁴¹

1. *The 21st Amendment and the Birth of the Three-Tier System – The Modern Regulatory Scheme for Alcohol*

The States ratified the 21st Amendment in 1933, which effectively ended the nationwide prohibition of alcohol.⁴² Section 2 of the 21st Amendment, strongly mirroring the language of the 1919 Webb-Kenyon Act, gave states the ability to once again regulate the sale, importation, and transport of alcohol within their borders.⁴³

With the ratification of the 21st Amendment and the official end to nationwide prohibition, states were once again empowered to regulate the sale, importation, and transport of alcohol within their borders.⁴⁴ This gave rise to the three-tier system.⁴⁵ Under this

37. *Id.*

38. *Id.* (explaining that “[t]he Term ‘liquor’ or the phrase ‘intoxicating liquor’ shall be construed to include alcohol, brandy, whisky, rum, gin, beer, ale, porter, and wine, and in addition thereto any spirituous, vinous, malt, or fermented liquor, liquids, and compounds whether medicated, proprietary, patented, or not, and by whatever name called, containing one-half of [one] per centum or more of alcohol by volume.”).

39. U.S. CONST. amend. XVIII, § 1.

40. See Jeffrey A. Miron & Jeffrey Zwiebel, *Alcohol Consumption During Prohibition*, 81(2) AM. ECON. REVIEW 242 (1991) (demonstrating how alcohol consumption actually rose by sixty to seventy percent during Prohibition period).

41. See Jay Stooksberry, *Prohibitions create black markets and cause violent crimes*, INST. OF ECON. AFFAIRS (Aug. 10, 2016), www.iea.org.uk/blog/prohibitions-create-black-markets-and-cause-violent-crime (noting that during Prohibition, [t]he transport and sale of illicit booze became a prolific criminal enterprise backed by well-armed, violent gangs,” resulting in an increased homicide rate).

42. U.S. CONST. amend. XXI, § 1.

43. U.S. CONST. amend. XXI, § 2.

44. *Id.*

45. *Id.*

system, states control the distribution and sale of alcohol through three key players: manufacturers, wholesalers, and retailers.⁴⁶

Manufacturers, as the name suggests, are those who produce the alcohol and provide the products to wholesalers.⁴⁷ This includes, but is not limited to, producers of spirits and hard liquors, distilleries, wineries, and breweries.⁴⁸ For manufacturers to be able to sell their products, in the traditional regulatory scheme, they must go through a state-licensed wholesaler.⁴⁹

Wholesalers, also referred to as distributors, are the link in the chain between manufacturers and retailers.⁵⁰ Wholesalers are licensed by the states and primarily serve as a conduit between manufacturers and retailers.⁵¹ In a majority of states, alcohol is required to “come to rest” at a wholesaler before it can be distributed to a licensed retailer in the state.⁵² In addition, wholesalers provide a unique role in the three-tier system as they “identify[] the local retail markets where unique products will have the most success.”⁵³

Retailers are the final step in the three-tier system. Under the traditional three-tier model, they alone may sell the alcohol directly to the consumer.⁵⁴ Retailers may either sell alcohol for consumption on premise or consumption off premise.⁵⁵

Because the 21st Amendment reinstated the power to control liquor distribution back into the states, a number of them decided to take complete control of distribution.⁵⁶ These states, also known

NAT'L ALCOHOL BEVERAGE CONTROL ASS'N, *THE THREE-TIER SYSTEM: A MODERN VIEW* (2015), www.nabca.org/three-tier-system-modern-view-0 [perma.cc/A9LH-MAVG] [hereinafter NABCA WHITE PAPER].

46. *Id.*

47. Roni A. Elias, *Three Cheers for Three Tiers: Why the Three-Tier System Maintains Its Legal Validity and Social Benefits After Granholm*, 14 DEPAUL BUS. & COMM. L.J. 209, 211-12 (2015).

48. *Three-Tier System of Alcohol in U.S. Causes Competing Interests of Producers, Distributors & Retailers*, ALCOHOL PROBS. & SOLUTIONS, www.alcoholproblemsandsolutions.org/three-tier-system-of-alcohol [perma.cc/8V6K-62UQ] (last visited Oct. 12, 2020).

49. Elias, *supra* note 47, at 210.

50. *Id.* at 212.

51. *Id.*

52. *Beer Distribution Rules*, SOVOS SHIPCOMPLIANT, www.sovos.com/shipcompliant/resources/beer-distribution-rules-by-state/ [perma.cc/GHT3-VAV5] (last visited Oct. 12, 2020) (explaining state-by-state beer distribution rules).

53. Elias, *supra* note 47, at 212.

54. *Id.*

55. Harry G. Levine & Craig Reinerman, *Alcohol Prohibition And Drug Prohibition: Lessons From Alcohol Policy For Drug Policy*, 69(3) MILBANK Q. 461, 477 (1991). On-premise consumption refer to places such as “hotels, restaurants, clubs, railway dining cars, and passenger boat” — places where you can be served on the physical premises. *Id.* In contrast, alcohol that is for sold off-premise consumption refers to alcohol that is sold in its original packaging, such as in liquor stores. *Id.* at 476.

56. *Control State Directory and Info*, NAT'L ALCOHOL BEVERAGE CONTROL ASS'N, www.nabca.org/control-state-directory-and-info [perma.cc/32QJ-5ATM]

as Alcohol Beverage Control states, have taken complete control of the sale of alcohol by either directly owning all of the liquor stores in the state, or by controlling the distribution to private retailers.⁵⁷ The effect of state-controlled stores is that the government is now able to decide how many liquor stores will be available in the state and where consumers may purchase their alcohol.⁵⁸ One argument in support of state-controlled stores is that it generates more money for the state since it is the state itself that is selling to the consumer.⁵⁹ Any profit, then, from the sale of liquor comes directly back to the state.⁶⁰ By restricting the number of liquor stores available, states have more control in curbing alcohol abuse, especially among youth.⁶¹ Although there are benefits to state-controlled stores, in states where private liquor stores are permitted, consumers have a larger variety of options available for them and prices for liquor are generally cheaper.⁶²

In either model, the traditional three-tier system has a number of benefits that provide for the insurance of public health and safety.⁶³ It promotes orderly markets within the alcohol industry and helps to protect against the sale of tainted or otherwise dangerous alcohol.⁶⁴ In addition, the traditional three-tier system

(last visited Nov. 1, 2020).

57. *Id.* There are currently seventeen states that have either complete or indirect control over liquor distribution. *Id.* Iowa, Maine, Michigan, Mississippi, Montana, Ohio, Oregon, Vermont, Wyoming, and West Virginia control liquor distribution by taking on wholesaler operations. Alabama, Idaho, New Hampshire North Carolina, Pennsylvania, Utah, and Virginia are states that own all of the liquor stores directly. *Id.*

58. Meenakshi S Subbaraman & William C Kerr, *Opinions on the Privatization of Distilled-Spirits Sales in Washington State: Did Voters Change Their Minds?*, 77(4) J. STUD. ON ALCOHOL & DRUGS 568–76 (2016) (explaining how in 2012, voters in the State of Washington voted to cede liquor distribution from the state and privatize liquor stores and over the next couple of years, the number of private liquor stores increased from 329 to 1,400).

59. NAT'L ALCOHOL BEVERAGE CONTROL ASS'N, ALABAMA INFORMATION SHEET (2018) www.nabca.org/sites/default/files/assets/files/Alabama_1.pdf [perma.cc/RB86-TK3N] (last visited Nov. 1, 2020). In the fiscal year 2017-18, the Alabama Alcohol beverage Control Board contributed \$263,049,354.54 to the state through liquor sales. *Id.* Since 1937, the Alabama ABC Board has contributed more than \$7.3 billion in total. *Id.*

60. *Id.*

61. Subbaraman & Kerr, *supra* note 58, at 571. A sample study conducted on 1,202 adult voters in the State of Washington about a June 2012 proposal to privatize liquor stores found that of the 450 adults in the study who voted against privatization, 40.4% of them answered “Yes” to the question: “Do you think youth alcohol abuse has increased since liquor sales were privatized as of June 2012?” *Id.*

62. Michael Siegel et al., *Differences in liquor prices between control state-operated and license-state retail outlets in the United States*, 108(2) ADDICTION 339, 344 (2013) (finding that on average, liquor in license states was \$2.03 cheaper than in control states).

63. NABCA WHITE PAPER, *supra* note 45.

64. *Id.*

provides economic benefits to its key players and state regulators.⁶⁵ The system provides states with an efficient means to collect taxes for alcohol for every aspect of alcohol, from creation to distribution to sale.⁶⁶

Since the end of Prohibition, states have adopted and generally adhered to the three-tier system of alcohol distribution.⁶⁷ However, as Internet sales and the rate of online shopping have increased in the last two decades, changes to the traditional three-tier system have become inevitable.⁶⁸ With those changes have come new considerations for the future of the traditional three-tier system and how manufacturers and retailers are permitted to act.⁶⁹

III. ANALYSIS

The policy concerns of direct-to-consumer interstate alcohol shipment and Prohibition's failure are identical; yet have been dealt with contrarily. While 1930s legislators repealed Prohibition after realizing its detrimental effects on public health, safety, and the loss of revenue from illegal alcohol sales, modern legislators are slow to adapt their alcohol laws, despite the similarities of the problems faced in the 1930s. Moreover, the disparate application of *Granholm v. Heald*'s holding to manufacturers and retailers need to be analyzed and harmonized.⁷⁰

First, Section A will discuss why the issue of direct-to-consumer interstate alcohol shipment largely mirrors the policy concerns that were addressed after the failure of Prohibition in that there is a need to create a compliant system for liquor distribution. Next, this Section will compare the inconsistencies between the regulation of direct-to-consumer interstate alcohol shipment as applied to manufacturers and retailers post-*Granholm*. This section will further analyze the two main concerns that arise out of permitting retailers to directly ship alcohol to consumers out-of-state: taxes and public health and safety.

65. *Id.*

66. *Id.*

67. Elias, *supra* note 47, at 210.

68. EMARKETER, *supra* note 2.

69. *Compare* *Granholm v. Heald*, 544 U.S. 460, 493 (2005) (striking down two state regulations from New York and Michigan that effectively banned out-of-state wineries from directly shipping their products to consumers within their states) *with* *Tenn. Wine & Spirits*, 139 S. Ct. at 2476 (striking down a state regulation that required out-of-state retailers to be physically present in the state for two years before being able to acquire a license to sell alcohol in Tennessee).

70. *Granholm*, 544 U.S. at 492-93. The Court held that it is unconstitutional to exclude out-of-state wineries from shipping their products to consumers in a different state without a compelling justification that is narrowly tied to the regulation. *Id.* While this holding specifically allowed for out-of-state manufacturers to ship their products out-of-state, it left unanswered whether out-of-state retailers would be afforded the same constitutional protections. *Id.*

A. *Prohibition's Failure Led to Future Success In Alcohol*

Regulation and Distribution

As noted by former president Herbert C. Hoover, prohibition was “the great social and economic experiment, noble in motive and far reaching in purpose.”⁷¹ Although the purpose behind Prohibition was to promote temperance and cure society of the supposed evils associated with drinking,⁷² this era in American history only revealed a sobering truth: When consumers want a product and it is not available, they will find a way to get it.⁷³ It should come as no surprise, then, that the Prohibition era led to the increased consumption of illegal alcohol in the black market.⁷⁴ However, because this black market was not being regulated by the states, this created two major problems for state regulators.⁷⁵ The first is the safety of alcohol on the black market, and the second is the loss in liquor sales taxes.⁷⁶ Unregulated alcohol presented serious consequences for public health, as an average of 1,000 Americans died each year during the Prohibition era due to tainted alcohol.⁷⁷ In addition, because the sale of liquor was prohibited throughout the nation, states were unable to collect taxes from any illegal liquor sales, which resulted in an estimated eleven billion in lost revenue during the Prohibition era.⁷⁸

With the ratification of the 21st Amendment, states were finally permitted to promote public health and safety and collect liquor sales taxes by way of the three-tier system.⁷⁹ Since then, this system has harmonized the interests of state regulators, manufacturers, wholesalers, retailers, and consumers by creating a system of checks and balances to ensure that there is an orderly market for liquor distribution.⁸⁰

Over time, the system has evolved, and the way that a

71. *Prohibition*, HISTORY, www.history.com/topics/roaring-twenties/prohibition [perma.cc/A89G-7NVX] (last visited Nov. 1, 2020).

72. deHaven Newsom, *supra* note 29 (noting how drinking establishments were associated with crime and corruption).

73. Stooksberry, *supra* note 41 (noting the emergence of a black market for liquor when national prohibition was enacted).

74. Miron & Zwiebel, *supra* note 40, at 242.

75. Jack S. Blocker, Jr., *Did Prohibition Really Work? Alcohol Prohibition as a Public Health Innovation*, 96 AM. J. PUB. HEALTH 233-43 (2006).

76. *See id.* (noting how “[f]rom 1919 to 1929, federal tax revenues from distilled spirits dropped from \$365 million to less than \$13 million, and revenue from fermented liquors from \$117 million to virtually nothing.”).

77. *Prohibition: A Nation of Scofflaws* (PBS television broadcast Oct. 3, 2011).

78. *Id.*

79. U.S. CONST. amend. XXI.

80. Elias, *supra* note 47, at 211.

consumer receives alcohol has found a way to bypass the traditional three tiers.⁸¹ Just as the rate of online shopping for traditional retail products has increased in recent times, so has the rate of online alcohol sales.⁸²

While there is currently no data that speaks to the frequency of illegal interstate alcohol shipment, to claim that it is not happening would be equivalent to saying that no one was selling alcohol or drinking it during Prohibition.⁸³ Similar to the policy concerns that arose during Prohibition—promoting public health and safety and collecting taxes—the same concerns arise out of an unregulated market for direct retailer-to-consumer interstate alcohol shipment.⁸⁴ However, instead of establishing regulations in place to address these concerns, the desire to create a compliant system for direct retailer-to-consumer interstate alcohol shipment has not been met with uniform support.⁸⁵

1. *Arguments in Support of Regulating Direct Retailer-to-Consumer Shipment*

In 2005, with its holding in *Granholm*, the Supreme Court expressly allowed direct-to-consumer shipments from manufacturers by ruling that wineries can ship directly to

81. *Granholm*, 544 U.S. at 493. The Court held that it is constitutionally permitted to ship wine products directly to consumers in a different state. *Id.* This holding stood for the theory that for the first time, it possible for an alcohol product to traverse the three-tier system. *Id.*

82. *U.S. online alcohol sales jump 243% during coronavirus pandemic*, MARKETWATCH (Apr. 2, 2020), www.marketwatch.com/story/us-alcohol-sales-spike-during-coronavirus-outbreak-2020-04-01 [perma.cc/V3FT-YX7C]. Market research data that the sale of alcoholic beverages in the United States “rose [fifty-five percent] in the week ending March 21,” which was around the time many states began issuing “stay-at-home” orders in the beginning of the 2020 Coronavirus pandemic. *Id.* The data also noted that the amount of online alcohol sales “far outpaced in-store sales.” *Id.*

83. *Miron & Zwiebel*, *supra* note 40, at 242 (demonstrating how alcohol consumption actually rose by 60 to 70% during Prohibition period).

84. *See Lebamoff Enters.*, 956 F.3d 863, 872 (6th Cir. 2020) (noting that an out-of-state wine retailer’s challenge to the in-state requirement “would create a sizeable hole in the three-tier system.”); *id.* at 879 (McKeague, J., concurring) (noting that while the Michigan regulation that barred out-of-state retailers from shipping to customers within the state served the public health interest of state regulators, there were “other baked-in public health justifications that flow from [traditional three-tier systems,] like promoting temperance.”).

85. *Compare Lebamoff Enters.*, 956 F.3d at 873-74 (holding that Michigan’s in-state presence requirement sufficiently served state regulator’s interests of “preventing sales to minors, facilitating tax collection, and ensuring safe products.”) *with Lebamoff Enters. v. Rauner*, 909 F.3d 847, 850 (7th Cir. 2018) (holding that Illinois’s in-state requirement of an in-state presence requirement for out-of-state wine retailers violated the Commerce Clause because state regulators did not present sufficient evidence that the intent behind the regulation was to protect the “health and well-being of Illinois Residents”).

customers that were out-of-state.⁸⁶ For the first time since the end of Prohibition, *Granholm* stood for the proposition that an alcohol product can traverse the three-tier system in a compliant manner.⁸⁷ Moreover, this ruling stands for the theory that it is possible to challenge the boundaries of the 21st Amendment, so long as there is a compliant system in place to address policy concerns of the state.⁸⁸

However, there are a few key differences between the holding in *Granholm* that permitted wineries to ship directly to consumers out-of-state and the issues facing wine retailers that are currently litigating to ship their products out-of-state.⁸⁹ The first key difference is the point at which the product is reaching the consumer. In the traditional three-tier system, once the alcohol leaves the manufacturer, it goes to the wholesaler who is then responsible for bringing it to the retailer.⁹⁰ The large support for a traditional three-tier system may also stem from the fact that it is easier to recall a product that has been compromised.⁹¹ If there

86. *Granholm*, 544 U.S. at 493. The Court held that a state could not “ban, or limit severely limit the direct shipment of out-of-state wine while simultaneously authorizing direct shipment [of wine] by in-state producers” without “demonstrating the need for the discrimination.” *Id.* As such, wineries could now ship to consumers out-of-state, so long as that state permits shipment from in-state producers. *Id.*

87. *Id.* at 492 (emphasizing that it is possible to “facilitat[e] orderly market conditions, protect[] public health and safety, and ensur[e] regulatory accountability” through alternatives to the traditional three-tier system).

88. *Id.* 489-92. The Court noted that the States of Michigan and New York had recourses available to them to ensure that their concerns of “keeping alcohol out of the hands of minors and facilitating tax collection” would be met. *Id.* at 489. With respect to the first concern, the Court noted that the states could require “an adult signature on delivery and a label so instructing on each package.” *Id.* at 490-91. With respect to tax collection, the Court noted that that states can protect themselves against lost tax revenues by “requiring a permit as a condition to direct shipping.” *Id.* at 491.

89. *Compare Granholm*, 544 U.S. at 466 (challenging the right for a wine manufacturer to ship wine directly to consumers in New York and Michigan) with *Lebamoff Enters.*, 956 F.3d at 868-69 and *Lebamoff Enters.*, 909 F.3d at 851. In both lawsuits, there was a challenge to the right for a wine retailer to directly ship products to consumers in Michigan and Illinois. *Id.* In both lawsuits in the Sixth and Seventh Circuit, the lead plaintiff was an out-of-state wine retailer based in Indiana that sued state regulators, alleging that the regulations that prevented out-of-state retailers from shipping directly to consumers in the state violated the Commerce Clause. *Id.*

90. Elias, *supra* note 47, at 210.

91. See *Michigan Beer Distributor Highlights Benefits of Three-Tier System and State Alcohol Regulation in Wake of Recall*, NAT'L BEER WHOLESALERS ASS'N (June 30, 2010), www.nbwa.org/news/michigan-beer-distributor-highlights-benefits-three-tier-system-and-state-alcohol-regulation [perma.cc/RNS8-8LWC] (explaining how a Canadian Brewery Company was able to recall a shipment within hours of learning of its contamination). In 2010, Labatt Brewing Company, a Canadian brewery, issued a voluntary recall after learning its beer may have been contaminated with glass. *Id.* As soon as they learned of the contamination, the brewery informed its beer distributor, Bayside

happens to be a defect with an alcohol product in its quality or safety, manufacturers can recall their products or wholesalers can ensure that those products never reach the consumers by making sure it doesn't get to the retailers in the first place.⁹²

Although the safety of the product is a valid concern for state officials that want to prevent out-of-state retailers from shipping their alcohol to consumers within their state, the fact is that the alcohol product has already passed the three-tier system — it just did so in a different state.⁹³ Thus, the policy concern of safety with the product itself has already been satisfied.⁹⁴ Moreover, the interests of state regulators and all the key players have been met, as all three tiers in the retailer's state were able to move the product from the manufacturer to the retailer.⁹⁵ Thus, the only issue left to be resolved is whether the state in which the product is being shipped to has the authority to further regulate an out-of-state purchase of alcohol.

Take a look back at the example that was presented in the Introduction. Someone visits a quaint specialty wine shop while on vacation and finds the best Cabernet Sauvignon that they have ever sampled. Wanting to open up a bottle from the comfort of their own home, instead of waiting for the next time to fly across the country to visit this shop, they purchase it while they're on the premises. After they have completed a legal purchase, they place that bottle in their luggage and fly back home. In most states, this would be a non-issue as one is permitted to bring alcohol into one state that was purchased from another for personal use.⁹⁶

Beverage Corporation, a wholesaler in Petoskey, Michigan. *Id.* Within hours, the wholesaler was able to identify the “[eighty-six] affected cases that had been shipped into retail, including when those cases were shipped to Michigan, when they left the distributorship and what stores received them.” *Id.* When discussing the incident, the wholesaler's president, Steven Arbaugh, said that “[a]s a system of regulation, [the three-tier system] emphasizes consumer safety through effective tracking and accountability. *Id.* In addition, he noted that, “[t]ight regulations and territorial integrity helped us respond quickly, efficiently and responsibly in a recall.” *Id.*

92. *Id.*

93. Elias, *supra* note 47, at 218-20.

94. *Id.*

95. *Id.*

96. *See* U.S. CONST. amend. XVIII, § 2 (noting that “the transportation of alcohol . . . into any state, . . . for . . . use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.”) However, some states still impose some restrictions on what individuals can do with alcohol that is intended for person use. *See* PA. CONS. STAT. § 492(2)(ii) This provision states:

None of the provisions herein contained shall prohibit nor shall it be unlawful for any person to import into Pennsylvania, transport or have in his possession, an amount of liquor not exceeding one gallon in volume upon which a State tax has not been paid, if it can be shown to the satisfaction of the board that such person purchased the liquor in a foreign country or United States territory and was allowed to bring it

However, imagine now that someone didn't want to risk having the bottle break in their luggage and soaking all of their clothes. So instead, when they come back home, they look up the store's website to see if they can purchase it online and then have it shipped to them in their home state. As they start typing in their home address into the shipping details, however, they see that they are not able to complete the purchase because the store is not permitted to ship to their state.⁹⁷ In both scenarios, someone has completed a lawful purchase of a product that has already gone through the three-tier system, so why is the end result in the latter different? The issue that needs to be addressed is why at that point of the purchase when the sale has been consummated, does the receiving state get to regulate it at all?

The Supreme Court of Mississippi recently provided an approach to this issue and sided with state regulators who argued that shipping wine to consumers in the State of Mississippi violates their three-tier system as the online transactions took place within the state.⁹⁸ When an in-person purchase occurs, it is clear to the naked eye that a sale has just occurred between the consumer and the retailer.⁹⁹ However, the same principle can be extended in the context of an online transaction as well.¹⁰⁰ This is because jurisdiction has been viewed in terms of historic, traditional tangible contacts.¹⁰¹ Thus, when an online transaction takes place, it is thought to have taken place in the jurisdiction of the retailer.¹⁰²

into the United States.

This amendment to Pennsylvania's liquor code ultimately decriminalized bringing in liquor from out of the state, but still required individuals to pay state taxes on them. *Id.*

97. See sources cited *supra* note 1 (demonstrating how, in the aftermath of the Supreme Court's decision in *Tenn. Wine & Spirits*, wine retailers across the nation filed lawsuits to challenge in-state residency requirements for retailers).

98. *Fitch v. Wine Express Inc.*, 297 So. 3d 224, 233 (Miss. 2020).

99. U.C.C. § 2-106(1). A "sale" consists in the passing of title from the seller to the buyer for a price. *Id.* The State of Mississippi adopted this definition of the U.C.C., and it is codified in MISS. CODE ANN. § 75-2-106(1).

100. *Fitch*, 297 So. 3d at 227. The wine retailers in the Mississippi case specifically provide on their website that they sell their products "free onboard" ("FOB"). *Id.* FOB is defined by the Uniform Commercial Code. U.C.C. § 2-319(1). The UCC provision provides that "when the term is F.O.B. the place of shipment, the seller must at that place ship the goods in the manner provided in this article . . . and bear the expense and risk of putting them into the possession of the carrier[.]" U.C.C. § 2-319(1)(a). The effect of this provision is that the title to the product passes to the buyers when it leaves the physical premises of the wine retailer's stores, which in the context of the Mississippi case, would be from New York and California. *Fitch*, 297 So. 3d at 227.

101. *Id.*

102. *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 581-82, 585 (1986). The Court held that a State may not take internal action that has the effect of regulating alcoholic beverages in another state. *Id.* Additionally, the Court held that a statute that regulates conduct occurring outside of the State violated the Commerce Clause. *Id.*

Because there is a completed sale, the title to the alcohol then transforms to the consumer.¹⁰³ At that point, in theory, whatever happens post-sale should not be blocked by another state's alcohol law.¹⁰⁴ However, in practice, this theory puts retailers at odds with state regulators who believe that the law of the state in which the alcohol product is being shipped should govern the transaction.¹⁰⁵

While the Supreme Court has not explicitly ruled on whether an online transaction takes place on the premises of the retailer in the context of an alcohol sale, the recent ruling in the Mississippi State Supreme Court may provide greater clarity down the line.¹⁰⁶ In the Mississippi case, a number of out-of-state retailers were shipping wine products directly to consumers in the State of Mississippi.¹⁰⁷ The State contended that this was a violation of Mississippi's three-tier and alcohol licensure system.¹⁰⁸ The trial court believed that there was no personal jurisdiction because the online retailers specifically wrote in their terms and conditions that the transaction and transfer of title took place in New York and California, where direct-to-consumer retail wine shipments are permitted.¹⁰⁹ Upon appeal, the State Supreme Court reversed this decision and found that the defendants operated "a virtual store" in the State of Mississippi, which made them subject to personal jurisdiction within the state.¹¹⁰

However, this decision stands in contrast to the very manner in which a majority of direct-to-consumer sellers, even outside of the alcohol industry, operate.¹¹¹ Typically, direct-to-consumer sellers

103. *See Fitch*, 297 So. 3d at 231 (noting that the contracts on the website "specified that title would pass to the buyers at the time of the sale, and thus the buyers were solely responsible for any shipment.").

104. *Id.* Defendant wine retailers argued that because the online purchases occurred as if they took place in the States of New York and California – where wine shipment is legal — the State of Mississippi's ban on wine shipment should not affect the shipment of alcohol as their law does not apply in the transaction. *Id.* at 227, 231.

105. *Id.* at 229-30 (finding that the State of Mississippi's laws governed the online transaction of wine where Mississippi residents bought wine from websites whose brick and mortar stores were located in the States of New York and California).

106. *Id.*

107. *Id.* at 227-28.

108. *Id.* at 229-30.

109. *Id.*

110. *Id.*

111. Brief for Appellee at 4-5, *Fitch v. Wine Express, Inc.*, 297 So. 3d 224 (Miss. 2020) (No. 2018-SA-01259). In the Mississippi case, the three wine retailers provided disclaiming language on their website as follows:

Title to, and ownership of, all wine passes from seller to buyer in the State of California, and buyer takes all responsibility for shipping the wine from California to his or her home state. . . . The buyer is solely responsible for the shipment of wine and other goods purchased and for determining the legality and the tax/duty consequence of having the

operate a website that contains a disclaimer that puts the consumer on notice that sale is consummated in the seller's state, the title to the alcohol passes to the consumer in that same state, and that no taxes will be collected as a result of the interstate nature of the transaction.¹¹² Thus, from the standpoint of the seller, the sale is deemed to have occurred on the site of the seller's premises, the title to the alcohol has passed to the consumer, and they could have the alcohol product shipped to them for personal use in a manner that does not violate their state alcohol laws.¹¹³

2. *Arguments Against Permitting Direct Retailer-to-Consumer Shipment*

Section 2 of the 21st Amendment provides that, "[t]he transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."¹¹⁴ Therefore, the power to regulate alcohol within the borders of one's state is solely vested within the state itself.¹¹⁵ In practice, this means that a state has the power to effectively control how liquor is not only distributed within the state but also how it comes in from out-of-state. The only caveat is that if there is a restrictive or limiting regulation placed on out-of-state companies, but not in-state companies, then there must be a compelling reason that is narrowly tailored to the objective of that state regulation.¹¹⁶ Specifically, the largest policy concern that is often used by state officials to bar out-of-state companies from shipping alcohol directly

wine and other goods shipped to the applicable destination... By submitting your order electronically you are signing that you have read and understand the above conditions.

All alcoholic beverages are sold in Westchester, New York and title passes to the buyer in New York. We make no representation to the legal rights of anyone to ship or import wines into any state outside of New York. The buyer is solely responsible for shipment of alcoholic beverage products.

... You certify that it is legal to ship alcohol into the state and county of the intended recipient and the recipient of this shipment is at least 21 years of age and may legally possess alcohol. You acknowledge that title for your purchase transfers from our Syosset warehouse in the State of New York.

112. *See id.* (noting how disclaiming language specifically defines in which state title passes to the buyer).

113. *Id.*

114. U.S. CONST. amend. XXI, § 2.

115. *Id.*

116. *Tenn. Wine & Spirits*, 139 S. Ct. at 2474 (holding that state regulators cannot use protectionist economic arguments to prohibit out-of-state retailers from selling within the estate unless the in-state retailer requirement is actually intentioned to serve the public health).

to consumers in-state is the concern for public health and safety.¹¹⁷

In 2016, a wine retailer based in Indiana filed multiple suits against state officials in Michigan and Illinois alleging that their alcohol laws violated the Commerce Clause and the Privileges and Immunities Clause by permitting in-state wine retailers to deliver directly to consumers within the state while prohibiting out-of-state retailers from doing so.¹¹⁸ The facts and the allegations for both lawsuits were nearly identical, but the outcomes differed.¹¹⁹ The holding in the Michigan case, which was decided after *Tennessee Wine & Spirits Retailers Association v. Thomas*, concluded that there was enough evidence to show that having an in-state presence requirement served public health and safety.¹²⁰ In contrast, the Illinois case, which was decided prior to *Tenn. Wine & Spirits*, found that there was not enough evidence that supported a showing that an in-state presence requirement would serve public health and safety.¹²¹ Protecting public health and safety is a valid policy concern for state regulators who seek to prevent having more alcohol enter their state's market — especially from out-of-state.¹²² However, if the concern for public health and safety is thinly veiled over an actual concern from protecting in-state companies from competing against out-of-state companies, then the regulation will fail.¹²³ This is the proposition that *Tenn. Wine & Spirits* stood for; that a state cannot advance its interest of public health and safety by using protectionist economic arguments.¹²⁴

117. *Lebamoff Enters.*, 956 F.3d at 869 (asking whether a regulation barring out-of-state retailers from shipping their products to consumers in Michigan “can be justified as a public health or safety measure or on some other legitimate non-protectionist ground.”). The Sixth Circuit held that if the intent behind the law is to financially protect in-state competitors, rather than promote legitimate public health interests, then the law will not be saved by the Twenty-first Amendment.

118. *Id.*; see MICH. COMP. LAWS § 436.1203(3), (15) (providing that only in-state retailers may deliver to consumer using “state-licensed ‘third party facilitators’ or common carriers like FedEx or UPS”); *Lebamoff Enters.*, 909 F.3d at 850-1; See 235 ILCS 5/6-2(a)(1) (providing that retailers must have a physical location in Illinois. See also 235 ILCS 5/6-29.1(b) (prohibiting “the shipping or transportation of any alcoholic liquor from a point outside this State to a person in this State” who does not hold a valid Illinois license”).

119. Compare *Lebamoff Enters.*, 956 F.3d at 868 (explaining that an Indiana wine retailer and several Michigan wine consumers filed suit against Michigan’s regulation that prohibited out-of-state retailers from shipping wine directly to Michigan residents) with *Lebamoff Enters.*, 909 F.3d at 851 (explaining that an Indiana wine retailer and an Illinois resident who is a wine connoisseur filed suit against the Illinois statutory scheme prohibiting out-of-state wine retailers from shipping directly to Illinois residents).

120. *Lebamoff Enters.*, 956 F.3d at 879.

121. *Lebamoff Enters.*, 909 F.3d at 850.

122. *Lebamoff Enters.*, 956 F.3d at 869.

123. *Tenn. Wine & Spirits*, 139 S. Ct. at 2474 (noting that “[w]here the predominant effect of a law is protectionism, not the protection of public health or safety, it is not shielded by § 2 [of the 21st Amendment].”).

124. *Id.*

Finally, one of the biggest arguments against permitting direct-to-consumer retailer interstate alcohol shipment is the concern for lost taxes to the receiving state.¹²⁵ When alcohol is initially transported into the state by the manufacturer, the state collects on the excise tax from that import, and may also collect additional excise taxes at wholesale.¹²⁶ When a consumer purchases alcohol, the state collects the sales tax that is associated with that purchase.¹²⁷ By permitting an out-of-state retailer to ship a product that has already traversed the three-tier system directly to the consumer, the receiving state loses out on potential taxes.¹²⁸

Ultimately, that leaves two main issues that need to be resolved by state regulators to fairly allow out-of-state retailers to compete: how can the receiving state recuperate from the lost taxes, and how can that same state ensure the public health and safety of its consumers when the retailer is not physically within the state?

IV. PROPOSAL

In the aftermath of *Tenn. Wine & Spirits*, a number of wine retailers have filed suits challenging the policies and procedures of their respective states' three-tier systems.¹²⁹ As online shopping continues to grow and more alcohol purchases continue to be conducted online, states need to be cognizant of the fact that consumers want to have alcohol products shipped to them, even from out-of-state. There need to be safeguards put in place to ensure that these out-of-state purchases and shipments are done lawfully. In addition, these protections should not interfere with state regulators' interests in maintaining public health and safety. As such, adjustments need to be made to the states' traditional three-tier alcohol system. Specifically, there needs to be permits available and licensing requirements in place that allow out-of-state retailers to lawfully ship their products to out-of-state consumers. In addition, state regulators need to put a regulatory mechanism in place that ensures that these products are only reaching lawful

125. *Granholm*, 544 U.S. at 491 (noting that tax-collection by itself is not a sufficient justification to bar out-of-state wineries from shipping their products into the state, but it is an issue that state regulators often advance).

126. *See Bacchus Imps. V. Dias*, 468 U.S. 263, 276 (U.S. 1984) (finding that exempting local products from a twenty percent excise tax on liquor at wholesale was a violation of the Commerce Clause not protected by the Twenty-first Amendment); *see also Fitch*, 297 So. 3d at 227 (arguing that damages for the out-of-state retailers' failure to abide by the State of Mississippi direct shipping laws were "the unpaid sales taxes and excise taxes due in relation to the taxable illegal transaction and the unrealized wholesale markup.").

127. *Granholm*, 544 U.S. at 489.

128. *Id.*

129. *See sources cited supra*, note 1 (demonstrating how, in the aftermath of the Supreme Court's decision in *Tenn. Wine & Spirits*, wine retailers across the nation filed lawsuits to challenge in-state residency requirements for retailers).

consumers.

First, Section A will provide state regulators with guidance on how a state may recoup on taxes that were collected from an alcohol purchase that had already occurred in another state. Second, Section B will discuss manners in which state regulators can enact a system that prevents underage consumers from receiving alcohol products that have been shipped from out-of-state.

A. Taxes

For alcohol products, the state authority that has authorized their distribution has already collected all of the relevant taxes associated with the manufacture and distribution of those products.¹³⁰ Thus, the only taxes left to be collected are those from the purchase itself.¹³¹ Once a sale has been completed, the title to the alcohol has transferred to the consumer.¹³² When this purchase is completed, the relevant state and local taxes on that purchase apply in accordance with where that sale took place.¹³³ The same typically applies in a context of an online transaction as well, with limited exceptions.¹³⁴

However, if we look back to the scenario presented in the Introduction, the specific question left to be answered is how one state collects the taxes from an alcohol purchase that, accordingly, took place in a completely different state. The United States Supreme Court has, on two occasions, provided guidance for state regulators to employ in an effort to recoup on taxes they believe they lose to out-of-state purchases.¹³⁵ While one of those occasions, *Granholm*, specifically focused on how the state can recoup on taxes from direct wine shipments from out-of-state manufacturers, this same holding can be extended to out-of-state retailers as well.¹³⁶

130. Elias, *supra* note 47, at 219 (noting that “in-state retailers and wholesalers are physically inspect[ing] and checked[ing] to verify that [the] regulatory system is being followed, that only approved alcoholic beverages are being sold, that alcoholic beverages are not being sold to underage persons, and that taxes are being paid.”).

131. *Id.*

132. U.C.C. § 2-106(1) (providing that definition of sale consists “in the passing of title from the seller to the buyer for a price.”).

133. Elias, *supra* note 47, at 219 (noting that the effective enforcement of the three-tier system allows taxes on alcohol products to be paid).

134. *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2096 (2018) (holding that states are permitted to enact legislation that would require out-of-state sellers to collect and remit sales taxes on products sold to buyers for delivery within the state).

135. *See Granholm*, 544 U.S. at 491 (suggesting that “[l]icensees could be required to submit regular sales reports and to remit taxes.”); *Wayfair*, 138 S. Ct. at 2096.

136. *Id.* (The interest to promote tax collection is not “wholly illusory,” but that the state liquor authority could still advance their tax-collection interest by “requiring a permit as a condition of direct shipping.” *Id.* The Court struck

First, there is already an obligation on sellers that do not have a physical presence in a state to remit sales taxes to the state should the total number of sales made by that seller surpass a specific threshold set by the state.¹³⁷ In *South Dakota v. Wayfair*, the Court upheld legislation by the State of South Dakota that required remote sellers to collect and remit sales taxes if they made more than \$100,000 in sales or 200 or more separate transactions to South Dakota consumers.¹³⁸ The effect is that states can now require remote sellers that have a high volume of sales activity in the state to remit sales taxes on purchases made to their residents. Thus, state regulators can work to set the appropriate thresholds to promote tax collection from out-of-state purchases of alcohol products.

However, not every out-of-state retailer is always going to reach this threshold. Consider an out-of-state retailer that does not make more than \$100,000 sales or 200 or more transactions like in *Wayfair*, like the small novelty retailer presented in the Introduction. In this instance, the seller may decide not to charge a sales tax. Now, it is the buyer that has the obligation to report the use tax on that purchase on their annual tax income worksheet. Here, the state must rely on its citizens to pay the use tax owed on that purchase from the out-of-state retailer. It is understandable how this may not be the most reliable form of tax collection for the state.¹³⁹

But, despite the fact that there are already obligations placed on both sellers and buyers to remit sales and use taxes for later collection by the state, regulators can still use other means to recoup what they believe to be lost revenue. Although state regulators cannot impose an additional tax for consumers on a product that has already been purchased in a different state, they can impose certain requirements on sellers such as obtaining a license or permit

down a New York regulation that did not allow out-of-state wineries to directly ship their products to New York consumers as the regulation discriminated against interstate commerce with no compelling objective from the state. *Id.* at 493.

137. *Wayfair*, 138 S. Ct. at 2089. The State of South Dakota enacted legislation that required “. . . sellers that, on an annual basis, deliver more than \$100,000 of goods or services into the State or engage in 200 or more separate transactions for the delivery of goods or services into the State” to collect and remit sales tax “as if the seller had a physical presence in the state.” *Id.* Although the Court evaluated South Dakota’s legislation that created a threshold of “\$100,000 total sales or 200 or more transactions,” before remote sellers are required to collect and remit sales tax, this is not a bright-line rule for every state. *Id.* at 1098-99. Instead, each state has the power and flexibility to accordingly set the threshold. *Id.*

138. *Id.*

139. *Nat’l Geographic Soc. v. Cali. Bd. of Equalization*, 430 U.S. 551, 555 (1977) (noting that “[s]tates necessarily impose the burden of collecting the tax on the out-of-state seller; the impracticability of its collection from the multitude of individual purchasers is obvious.”).

to ship their products into the state. While the *Tenn. Wine & Spirits* decision warned state regulators that economic protectionism is not allowed when making certain permitting requirements (i.e., a residency requirement), they are allowed to require those interested in obtaining a license to, for example, pay a fee.¹⁴⁰ If in-state retailers must pay a certain price for the ability to ship their products to consumers in the state, then so can out-of-state retailers.¹⁴¹ By requiring out-of-state retailers to obtain a permit to ship alcohol products to consumers within the state, regulators are able to collect additional fees that they would have otherwise lost in a purchase made out-of-state. Finally, by requiring out-of-state regulators to obtain a permit with the state liquor authority, these regulators will be able to have more regulatory oversight over these out-of-state retailers, which will assist in meeting their second pressing interest: public health and safety.

B. Public Health and Safety

Alcohol is heavily regulated for many reasons, the biggest of which is the interest to protect public health and safety from an intoxicating product. Specifically, there is an overarching interest in ensuring that underage persons are not using or abusing a product that may stunt or harm their well-being or development.

Traditionally, state liquor regulators have an easier ability, compared to online retailers, to investigate in-state retailers they suspect of selling to minors as they are able to simply send inspectors to the physical premises of the store.¹⁴² In the context of an online purchase, verifying that the purchaser is actually a lawful consumer can look a bit different.

However, this is no different than what state regulators are already requiring for wineries that ship their products to consumers within the state.¹⁴³ Some state regulators believe that they have no

140. *Tenn. Wine & Spirits*, 139 S. Ct. at 2474 (holding that “[w]here the predominant effect of a law is protectionism, not the protection of public health or safety, it is not shielded by § 2 [of the 21st Amendment].”).

141. *Granholm*, 544 U.S. at 491 (noting how the State of New York already required in-state wineries to obtain a permit to ship their products to consumers within the state and that the New York State Liquor Authority failed to show how the same exact approach “would prove ineffective for out-of-state wineries.”).

142. *See Lebamoff Enters.*, 956 F.3d at 879 (McKeague, J., concurring) (explaining how the State of Michigan argued that “an in-state requirement allowe[d] [the State] to monitor the sale of alcohol to underage individuals” and discovered 3,125 violations during a five-year period, but “opening up online sales to out-of-state retailers would make a bad situation worse.”).

143. *See* 235 ILCS 5/6-29 (b-5) (2021) (providing an example of how the Illinois Liquor Control Commission sets requirements for wine shipment to ensure that wine shipments are delivered only to lawful consumers). The statute contains the following provision:

ability to enforce a retailer that is not within the purview of their jurisdiction. However, if state regulators already require in-state retailers to obtain a permit to ship to consumers within the state, then they can impose the same requirement on out-of-state retailers as well. By obtaining a permit, the out-of-state retailer will be required to abide by the state's set rules and regulations. Within the context of preventing alcohol from reaching underage consumers, state regulators should require out-of-state retailers to abide by certain requirements when shipping their alcohol to out-of-state consumers.

First, they can require that the package include a label that indicates that it contains an alcohol product within. Second, they can require that delivery of the product can only be made by the purchaser of the product unless the purchaser has authorized another individual over the age of twenty-one to receive the shipment. Third, they can require a signature and ID verification of the person receiving the delivery to ensure that they are indeed of lawful drinking age. While some states in recent years have opted out of the signature requirement, it may be more prudent to require that out-of-state retailers receive a signature and some sort of age verification upon delivery since they lack the physical presence in the state. Finally, state regulators could go a step further and require that couriers use an ID verification scanner to ensure that the person receiving the delivery is a lawful consumer.

V. CONCLUSION

Consumers rely on online transactions for a majority of their life now, and the novel coronavirus pandemic has only heightened our reliance and necessity for online delivery and shipment of basic necessities and more. Consumers are going to find ways to get the products that they want, while retailers will continue to maximize their consumer base and profits. If it can be done in a safe and compliant fashion for other products, then there is no reason why it

The shipping container of any wine shipped . . . shall be clearly labeled with the following words: "CONTAINS ALCOHOL. SIGNATURE OF A PERSON 21 YEARS OF AGE OR OLDER REQUIRED FOR DELIVERY. PROOF OF AGE AND IDENTITY MUST BE SHOWN BEFORE DELIVERY." This warning must be prominently displayed on the packaging. A licensee shall require the transporter or common carrier that delivers the wine to obtain the signature of a person twenty-one years of age or older at the delivery address at the time of delivery. At the expense of the licensee, the licensee shall receive a delivery confirmation from the express company, common carrier, or contract carrier indicating the location of the delivery, time of delivery, and the name and signature of the individual twenty-one years of age or older who accepts delivery.

cannot be done for alcohol either. The Supreme Court has already shown that the traditional three-tier system is not always set in stone. Instead of fighting for a return to this rigid system, it is time for the laws to catch up and find a way to harmonize everyone's interests so that out-of-state retailers, state regulators, and consumers can all have a seat at the table — or home bar.

