Delirium of Disorder[1]: Tension Between the Dormant Commerce Clause and the Twenty-first Amendment Stunts Independent Craft Brewery Growth

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ABSTRACT

The United States has a strange relationship with alcohol. Alcohol is the only specific subject that can claim two constitutional amendments (the Eighteenth Amendment and the Twenty-first Amendment), and alcohol is one of the most heavily regulated industries in the country. The COVID-19 pandemic has wreaked havoc on alcoholic beverage laws and regulations, but it has specifically harmed the independent craft brewing industry. More specifically, the pandemic closed two of the three main revenue sources for craft breweries: taproom sales and sales to bars and restaurants. This left DtC sales as the only revenue source for many small and independent breweries. That is, craft breweries had to find ways to get their products into the hands of consumers directly, in a legal way, to survive. This is where DtC shipping comes in.

DtC shipping is legal in some states, partially legal in some, and prohibited in others. This is so because tension between the Twenty-first Amendment and the dormant Commerce Clause has led to a federal circuit split and inconsistent interpretations and analyses regarding whether states can discriminate against out-of-state breweries by prohibiting shipping into the state while allowing in-state breweries to do so. Despite the Supreme Court seemingly reconciling this issue in 2005 in *Granholm v. Heald*, the states have been anything but consistent in legislating this issue. Once thing is clear: the marketplace for DtC shipping could be incredibly

1. BAD RELIGION, *Delirium of Disorder*, *on* SUFFER (Epitaph Records 1990).

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beneficial to independent craft breweries. This Article examines the history of DtC shipping prohibitions, a circuit split regarding the application of Supreme Court precedent directly on point, and a proposed solution for states to ensure their laws and regulations are consistent with the Twenty-first Amendment, the dormant Commerce Clause. Further, this Article argues that independent craft breweries should be able to ship directly to customers to open new markets, to survive the pandemic that has rocked the market, and as a matter of constitutional law.

Table of Contents

I. INTRODUCTION

If the craft beer industry learned anything during the COVID-19 pandemic, it is the importance of shipping and delivering directly to consumers. With bars and restaurants shuttered, taprooms closed, and the

ability to get craft beer into consumers' hands hampered by government restrictions, selling directly to consumers became a live-or-die lifeline for most independent breweries. Thus, craft beer manufacturers are increasingly focusing efforts on direct-to-consumer ("DtC") methods of delivery and shipping to the extent allowed by law.[2] But the available avenues for DtC shipping and delivery are scarce and involve serious constitutional concerns.

More specifically, state legislatures have been slow to see the value of allowing breweries to ship beer directly to consumers from inside and outside their respective states, but change is starting to occur rapidly.[3] To illustrate states' reluctance, only twelve states currently allow out-of-state breweries to ship beer directly to consumers from outside their state boundaries.[4] In contrast, *forty-five* states allow wineries to ship wine directly to consumers from wineries outside of the state.[5] The unfairness (perhaps even discrimination) is plain. It should be easy for a consumer to go online, find a much sought-after beer, and order it directly, just like wine. Instead, states have created an inconsistent maze of laws and regulations across the entire spectrum of possibility—some allowing direct shipments, some prohibiting them, and some allowing direct shipments to consumers from in-state breweries only.

As with many issues in alcoholic beverage law, this problem raises constitutional tensions.[6] An ongoing battle between the dormant Commerce Clause and states' rights under the Twenty-first Amendment has recently become a hotbed of litigation and regulation.[7]

To make matters worse, a circuit split has developed—with some circuits finding that the dormant Commerce Clause prohibits states from favoring in-state breweries by prohibiting out-of-state breweries from

2. *See* Alex Koral, *Direct-to-Consumer Shipping of Beer*, THE NEW BREWER, https://bit.ly/2XhsFbm (last visited Sept. 12, 2021).

3. *See* Marc Sorini, *A Legal Primer on Direct-to-Consumer Beer Sales*, BREWERS ASS'N (Mar. 31, 2021), https://bit.ly/3z6pXmf.

4. *See* Delaney McDonald, *Can I Ship Beer Directly to Consumers? An Overview of DtC Shipping for Breweries*, SOVOS (Dec. 9, 2020), https://bit.ly/3k3gxDr.

5. *See Direct-To-Consumer Shipping Laws for Wineries*, WINE INST., https://bit.ly/3tCqzP2 (last visited Sept. 12, 2021).

6. Perhaps unsurprisingly, given that alcohol is the specific subject matter of two constitutional amendments, alcoholic beverage laws and regulations often require constitutional analysis and scrutiny. *See* Daniel J. Croxall, *Cheers to Central Hudson: How Traditional Intermediate Scrutiny Helps Keep Independent Craft Beer Viable*, 113 NW. U. L. REV. ONLINE 1, 2–5 (2018) [hereinafter Croxall, *Cheers to Central Hudson*].

7. *See generally* Bridenbaugh v. Freeman-Wilson, 227 F.3d 848 (7th Cir. 2000) (holding that Indiana statute prohibiting direct shipments of alcohol from out of state to Indiana consumers survived dormant Commerce Clause challenge); *see also* Swedenburg v. Kelly, 358 F.3d 223, 239 (2d Cir. 2004) (finding that New York statute prohibiting direct shipments of wine to New York consumers from out of state wineries permissible infringement on commerce under the Twenty-first Amendment).

shipping directly to consumers.[8] Other circuits have found that the dormant Commerce Clause yields rights concerning all things alcohol to the states because the text of the Twenty-first Amendment explicitly reserved alcohol regulation to the states.[9] The result has been a decades-long battle between these two constitutional principles. Wine manufacturers and distributors have been able to lobby state legislatures over time to allow for inter-state shipping in most contexts,[10] and now craft beer is wading into the argument.

Recognizing that craft breweries are economic engines,[11] a minority of states are starting to follow a trend towards permitting breweries to ship beer DtC.[12] As one example, California law currently only allows out-of-state wineries to ship directly to consumers within the state under certain conditions.[13] More specifically, California law provides that "an individual or retail licensee in a state that affords California retail licensees or individuals an equal reciprocal shipping privilege, may ship, for personal use and not for resale, no more than two cases of wine (no more than nine liters each case) per month to any adult" Californian.[14] Beer and breweries are noticeably absent from this statute. And since the California Alcoholic Beverage Control Act is a permissive statute, like most states' alcoholic beverage regulation schemes, if it does not grant a privilege, the privilege does not exist.[15] Accordingly, Californians, like most citizens from other states, cannot receive DtC beer shipments from out of state, but of course those consumers can receive wine shipments.

Perhaps recognizing the disparate treatment and an increase in litigation surrounding the DtC marketplace, California SB 517 seeks to rectify the problem. Introduced in February of 2021, SB 517 seeks to add a provision to the Business and Professions Code to allow DtC shipments into the state, subject to several restrictions and exceptions.[16] More

8. *See Swedenburg*, 358 F.3d at 230; *see also* Lebamoff Enterpr., Inc. v. Rauner, 909 F.3d 847, 853 (7th Cir. 2018).

9. *See* Arnold's Wines, Inc. v. Boyle, 571 F.3d 185, 190–91 (2d Cir. 2009).

10. *See Direct-To-Consumer Shipping Laws for Wineries*, WINE INST., https://bit.ly/3tCqzP2 (last visited Sept. 12, 2021).

11. Independent craft beer totaled $22.2 billion in sales in 2020, down 22% from 2019. *See* Bart Watson et al., *National Beer Sales & Production Data*, BREWERS ASS'N, https://bit.ly/3nwF6Lv (last visited Sept. 12, 2021).

12. DtC can mean several things in different contexts. It can refer to shipping or delivery, as well as licensed and unlicensed shipping or delivery. *See* Sorini, *supra* note 3. Shipping typically refers to a producer's shipment of beer across state lines, and delivery typically refers to a producer's delivery of beer within the state. *Id.* For the purposes of this Article, DtC refers to either shipping or delivery by the producer unless specifically noted.

13. *See* CAL. BUS. & PROF. CODE § 23661.2.

14. *See id.*

15. *See* Candace L. Moon & Stacy Allura Hostetter, *Frequently Asked Questions*, THE CRAFT BEER ATT'Y (2017), https://bit.ly/3tC8jW9.

16. *See* S.B. 517, 2021–2022 Gen. Assemb., Reg. Sess. (Cal. 2021).

specifically, the bill provides that any licensee "in this state or any other state as a *beer manufacturer* who obtains a beer direct shipper permit . . . may sell and ship beer directly to a resident of California, who is 21 years of age or older, for the resident's personal use and not for resale."[17] Thus California, like a minority of other states, is ahead of the game in terms of attempting to equalize DtC shipping laws. The significance of steps like this to make the privilege available across the country cannot be overstated. During the COVID-19 pandemic, most independent craft breweries have struggled to stay afloat. DtC shipping offers another much-needed revenue stream.

As set forth below, states should allow DtC shipping through properly licensed distributors or straight from the breweries themselves because it will help independent craft breweries to resume their successful trajectories. In addition, it will help to ensure equal treatment among similarly situated citizens and to avoid the type of favorable treatment that the dormant Commerce Clause prohibits. Further, legalizing DtC shipping from breweries themselves will help to preserve the states' ability to control alcoholic beverages under the Twenty-first Amendment.[18]

The time has come for courts and states to harmonize their DtC laws and analyses to conform to constitutional requirements, prohibit discrimination against out-of-state breweries, and allow independent breweries to realize their full potential by providing a much-needed revenue stream while preserving states' rights to regulate alcohol under the Twenty-first Amendment.

II. THE THREE-TIER SYSTEM AND TRADITIONAL BEER DISTRIBUTION

After the Twenty-first Amendment ended Prohibition, the states were left to their own devices to control alcoholic beverage manufacture, distribution, and sales.[19] The main goals behind these new laws were twofold: promoting responsible drinking or temperance, and maintaining an orderly marketplace free from corruption and monopolization.[20] In furtherance of those goals, most states implemented what has become known as the three-tier system.[21] Under the three-tier system, alcoholic beverage manufacturers (breweries, wineries, distilleries), distributors

17. *Id.*

18. *See* Croxall, *Cheers to Central Hudson*, *supra* note 6, at 5; *see also* Andre Nance, *Don't Put a Cork in* Granholm v. Heald*: New York's Ban on Interstate Direct Shipments Is Unconstitutional*, 16 J. L. & POL'Y 925, 953 (2009).

19. *See* U.S. CONST. amend XXI; Daniel J. Croxall, *Helping Craft Beer Maintain and Grow Market Shares with Private Enforcement of Tied-House Laws*, 55 GONZ. L. REV. 167, 171 (2019) [hereinafter Croxall, *Helping Craft Beer*].

20. *See* Cal. Beer Wholesalers Ass'n, Inc. v. Alcoholic Beverage Control App. Bd., 5 Cal. 3d 402, 408 (1971); Actmedia, Inc. v. Stroh, 830 F.2d 957, 966 (9th Cir. 1986).

21. *See Cal. Beer Wholesalers*, 5 Cal. 3d at 408; *Actmedia*, 830 F.2d at 966.

(wholesalers), and retailers (bars, bottle shops, restaurants) each have their own privileges and restrictions.[22] Thus, alcoholic beverage manufacturers are deemed tier one; distributors are tier two; and retailers are tier three.[23] The three-tier system generally prohibits a given tier from influencing licensees of another tier or performing the functions reserved to another tier.[24] Thus under a strict three-tier system,[25] manufacturers cannot sell directly to consumers and must instead sell their products wholesale to licensed distributors who then sell the products at marked-up prices to licensed retailers.[26] This Article focuses on the second tier: distribution.

Alcoholic beverage distribution is heavily regulated in every state.[27] This area of law can get quite complicated given states' differing approaches, including specific statutes limiting or granting privileges, strict distribution contract requirements, and franchise laws.[28] Regardless of the different approaches, the three-tier system and tied-house laws[29] generally require that distributors serve as the "middleman" between tier one and tier three, which oftentimes makes breweries dependent on distributors for selling and delivering beer to various retail outlets.

While requiring the use of a distributor is still the norm, there has been some movement over the last decade toward allowing small breweries to self-distribute in limited ways. For example, in California, breweries can distribute and sell their own beer to retailers and individual consumers and thus effectively cut out the middleman.[30] Some states modify this rule and only allow breweries to self-distribute up to a certain amount of barrels.[31] Other states prohibit self-distribution altogether and require that the three-tier system remain intact and thus make the second tier mandatory.[32]

With these limited exceptions, the states decided post-Prohibition that the best regulatory policy is to require that manufacturers go through

22. *See* Daniel J. Croxall, *Independent Craft Breweries Struggle Under Distribution Laws That Create a Power Imbalance in Favor of Wholesalers*, 402 WM. & MARY BUS. L. REV. 401, 405 (2021) [hereinafter Croxall, *Independent Craft Breweries*].

23. *See* Gregory E. Durkin, *What Does* Granholm v. Heald *Mean for the Future of the Twenty-first Amendment, the Three-Tier System, and Efficient Alcohol Distribution?*, 63 WASH. & LEE L. REV. 1095, 1097 (2006).

24. *See id.*

25. *See* Croxall, *Independent Craft Breweries*, *supra* note 22, at 406.

26. *See* Barry Kurtz & Bryan H. Clements, *Beer Distribution Law as Compared to Traditional Franchise Law*, 33 FRANCHISE L.J. 397, 399–401 (2014).

27. *See* Croxall, *Independent Craft Breweries*, *supra* note 22, at 406.

28. *See* Croxall, *Helping Craft Beer*, *supra* note 19, at 171.

29. *See id.* at 171–73.

30. *See* CAL. BUS. & PROF. CODE § 23357.

31. *See* N.C. GEN. STAT. § 18B-1104.

32. *See* Marc E. Sorini, *Beer Franchise Law Summary*, BREWERS ASS'N (2014), https://bit.ly/3hnS0HB.

a distributor to get their products to the market.[33] Indeed, several courts have found that a state's interest in maintaining a three-tier system of alcoholic beverage regulation is a compelling government interest enough to survive constitutional scrutiny, including the Supreme Court in *Granholm v. Heald*.[34] However, modern developments and gray areas such as online ordering and vague application of the laws, including the relationship between the Twenty-first Amendment and the dormant Commerce Clause in the federal courts of appeals, have created an unpredictable and oftentimes unfair market environment for small breweries trying to survive and expand in a post-pandemic world.

III. THE COURT'S APPLICATION OF THE DORMANT COMMERCE CLAUSE AND TWENTY-FIRST AMENDMENT

The alcoholic beverage industry, particularly at the shipping and distribution level, provides a rich case study into the tension between the dormant Commerce Clause and the Twenty-first Amendment. Stated simply, the dormant Commerce Clause prohibits states from discriminating against interstate commerce.[35] With respect to alcohol, in 2005, the Supreme Court held that state laws prohibiting out-of-state wineries from shipping directly to consumers were direct violations of the dormant Commerce Clause when those same states allowed in-state wineries to do so.[36]

Since then, multiple circuit courts have applied the dormant Commerce Clause differently in the context of DtC alcohol shipments.[37] Section A briefly explains the dormant Commerce Clause, its nondiscrimination principle, and the application of the Twenty-first Amendment.[38] Section B documents the nebulous dormant Commerce Clause analysis that applied to the alcohol industry prior to *Granholm*.[39] Section C examines *Granholm* and the ensuing circuit split concerning the appropriate analysis and interplay between the dormant Commerce Clause and the Twenty-first Amendment.[40]

33. *See* Croxall, *Independent Craft Breweries*, *supra* note 22, at 402–06.

34. Granholm v. Heald, 544 U.S. 460, 466 (2005); Actmedia, Inc. v. Stroh, 830 F.2d 957, 966 (9th Cir. 1986); Retail Dig. Network, LLC v. Prieto, 861 F.3d 839, 850 (9th Cir. 2017).

35. *See* Dennis v. Higgins, 498 U.S. 439, 447 (1991).

36. *See Granholm*, 544 U.S. at 466.

37. *See infra* Section III.B.2.

38. *See infra* Section III.A.

39. *See infra* Section III.B.

40. *See infra* Section III.C.

A. The Dormant Commerce Clause and Twenty-first Amendment

The Commerce Clause of the United States Constitution grants Congress the power to "regulate commerce . . . among the several states."[41] The Court has interpreted this express power to not only confer power onto the federal government, but also to imply a restraint onto the states.[42] In the absence of federal legislation, the dormant Commerce Clause prohibits state regulations that discriminate against or unduly burden interstate commerce.[43] Subsection 1 discusses the nondiscrimination principle of the dormant Commerce Clause.[44] Subsection 2 explains the relationship between the dormant Commerce Clause and the Twenty-first Amendment.[45]

1. The Dormant Commerce Clause's Nondiscrimination Principle

Courts start the dormant Commerce Clause analysis by asking whether the challenged law discriminates against interstate commerce.[46] A law can discriminate against interstate commerce in three ways—facially, purposefully, or in practical effect.[47] More specifically, a law is generally discriminatory when a state treats intrastate and interstate commerce differently, in a manner that is favorable to intrastate commerce.[48] When a state's regulation benefits intrastate commerce but burdens interstate commerce, the discriminatory law is virtually per se invalid.[49] A clear example of a virtually per se invalid regulation is a law

41. U.S. CONST. art. I, § 8, cl. 3.

42. *See* Dennis v. Higgins, 498 U.S. 439, 447 (1991); *see also* Granholm v. Heald, 544 U.S. 460, 472 (2005) ("The rule prohibiting state discrimination against interstate commerce follows also from the principle that States should not be compelled to negotiate with each other regarding favored or disfavored status for their own citizens.").

43. *See* R & M Oil & Supply, Inc. v. Saunders, 307 F.3d 731, 734 (8th Cir. 2002).

44. *See infra* Section III.A.1.

45. *See infra* Section III.A.2.

46. *See* Dep't. of Revenue of Ky. v. Davis, 553 U.S. 328, 338 (2008).

47. *See* Nat'l Ass'n of Optometrists & Opticians LensCrafters, Inc. v. Brown, 567 F.3d 521, 525 (9th Cir. 2009) (quoting LensCrafters, Inc. v. Robinson, 403 F.3d 798, 802 (6th Cir. 2005)).

48. *See* Or. Waste Sys., Inc. v. Dep't. of Env't Quality of Or., 511 U.S. 93, 99 (1994) (explaining that state laws violate the Commerce Clause if they mandate "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."); Granholm v. Heald, 544 U.S. 460, 472 (2005) ("The rule prohibiting state discrimination against interstate commerce follows also from the principle that States should not be compelled to negotiate with each other regarding favored or disfavored status for their own citizens.").

49. *See Or. Waste*, 511 U.S. at 99; *see also Granholm*, 544 U.S. at 472 (holding states many not enact laws that burden out-of-state producers or shippers simply to give an economic advantage to in-state businesses); Bowman v. Chicago & Nw. Ry. Co., 125 U.S. 465, 465 (1888) (holding the Commerce Clause prevents the States from passing facially neutral laws that place an impermissible burden on interstate commerce).

that blatantly prohibits the flow of interstate commerce into the State for economic protectionist reasons.[50] This type of law constitutes economic isolationism that the Court prohibits.[51]

Even if a state law is discriminatory against interstate commerce, however, the law may survive constitutional scrutiny if it advances a legitimate local purpose for which no reasonable nondiscriminatory alternatives exist.[52] Legitimate local purposes include State actions made under the State's police powers—protecting public health, safety, and general welfare.[53] Further, alternative means that would adequately serve the State's purpose must not already exist for the regulation to survive.[54]

To illustrate these concepts, in *Dean Milk Company v. City of Madison, Wisconsin*, the Supreme Court struck down a city ordinance for violating the dormant Commerce Clause's nondiscrimination principle.[55] An Illinois milk distributor challenged two sections of an ordinance that involved the regulation of the sale of milk and milk products within the city's jurisdiction.[56] The first section made it "unlawful to sell any milk as pasteurized unless it has been processed and bottled at an approved pasteurization plant within a radius of five miles from the central square of Madison."[57] The other section prohibited the sale or importation of milk and receipt or storage of milk for sale in the city unless the supplier possessed a permit issued after inspection by city officials; however, city inspectors were not required to inspect farms located outside the twenty-five mile radius from the city's center.[58]

The Illinois milk distributor was denied a permit to sell its milk products because its pasteurization plants were not within the required five mile radius of Madison's center.[59] The city argued its interest in ensuring the health of its citizens permitted it to regulate milk and milk products to

50. *See* Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) ("But where other legislative objectives are credibly advanced and there is no patent discrimination against interstate trade, the Court has adopted a much more flexible approach."); *see also* West v. Ks. Nat. Gas Co., 221 U.S. 229, 255, 260 (1911) (holding that when a state recognizes a product to be a subject of commerce, it cannot prohibit it from being subject to interstate commerce because the right to engage in interstate commerce is not the gift of the state).

51. *See Philadelphia*, 437 U.S. at 624; *see also Granholm*, 544 U.S. at 472 ("The mere fact of nonresidence should not foreclose a producer in one State from access to markets in other States."); Hughes v. Oklahoma, 441 U.S. 322, 325–26 (1979) (explaining the Commerce Clause reflects "a central concern of the Framers . . . that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization").

52. *See* New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 278 (1988).

53. *See* Maine v. Taylor, 477 U.S. 131, 138 (1986).

54. *See id.* at 151.

55. *See* Dean Milk Co. v. City of Madison, 340 U.S. 349, 356 (1951).

56. *See id.* at 350.

57. *Id.*

58. *See id.* at 350, 351.

59. *See id.* at 351, 352.

meet sanitary standards through its permit system.[60] The Court rejected the city's argument because the ordinance plainly discriminated against interstate commerce by erecting an economic barrier that protected a major local industry against competitors outside of the State.[61] Even though protecting the health and safety of its citizens is a proper exercise of the city's powers, it could not discriminate against interstate commerce when nondiscriminatory alternatives that adequately promote the city's interests were available.[62]

The Court found reasonable alternatives to the ordinance existed, including the city's ability to inspect distant milk sources.[63] Further, testimony from the Health Commissioner of Madison proved the imposition of geographical limitations was not required to promote the city's interests.[64] Accordingly, the Court struck down the Madison regulation because upholding such a law when it is not necessary for the protection of public health and when it burdens interstate commerce in a discriminatory manner "would invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause."[65]

To illustrate a situation where the Court found permissible discrimination and burden on interstate commerce, in *Maine v. Taylor*, the Court upheld Maine's facially discriminatory law that completely banned the importation of out-of-state fish.[66] The Court found the State's interests in preventing the spread of parasites to fish inside the state and disruption of Maine's aquatic ecology to be legitimate local purposes.[67] Further, the Court found no reasonable alternatives to exist as the State produced evidence showing that no scientifically accepted techniques were available for sampling and inspecting imported fish.[68] The Court explained that methods that "could be easily developed" do not satisfy the requirement

60. *See id.* at 352; *see also* H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 531–32 (1949) (recognizing the broad power of a state to protect its citizens' health and safety against fraudulent traders and highway hazards even through measures that are adverse to interstate commerce).

61. *See Dean Milk Co*., 340 U.S. at 354; *see also* Philadelphia v. New Jersey, 437 U.S. 617, 627 (1978) (holding a presumably legitimate state goal cannot be achieved by the illegitimate means of isolating the State from the national economy); *Du Mond*, 336 U.S. at 532 ("[T]he police power may [not] be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents.").

62. *See Dean Milk Co*., 340 U.S. at 354.

63. *See id.* at 354, 355.

64. *See id.* at 355, 356.

65. *Id*. at 356.

66. *See* Maine v. Taylor, 477 U.S. 131, 132, 138 (1986).

67. *See id*. at 141.

68. *See id.* at 146.

that alternative means must be readily available.[69] Accordingly, the Court held that while a "State must make reasonable efforts to avoid restraining the free flow of commerce across its borders, . . . it is not required to develop new and unproven means of protection at an uncertain cost."[70]

These two cases generally show the scope of the dormant Commerce Clause analysis in isolation. But when the Twenty-first Amendment becomes part of the analysis, the Court must reconcile competing and oftentimes antithetical constitutional concepts.

2. The Twenty-first Amendment

The states ratified the Twenty-first Amendment in 1933, repealing the Eighteenth Amendment's alcohol prohibition.[71] Section 2 of the Twenty-first Amendment provides that, "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."[72] Shortly thereafter, the Supreme Court interpreted its language to confer onto the states the power to prohibit importations that do not comply with conditions the states mandate in their laws.[73] Accordingly, the Court found that the Twenty-first Amendment immunized the Commerce Clause and authorized states to treat interstate commerce differently than intrastate commerce in the alcoholic beverage context.[74]

Today, the Court rejects the rationale that the Twenty-first Amendment "repeals" the Commerce Clause in that regard.[75] The constitutional amendment's aim is "to allow states to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use, and it [does] not give the states the authority to pass nonuniform laws in order to discriminate against out-of-state goods."[76]

69. *Id.* at 147 (explaining that "the 'abstract possibility,' of developing acceptable testing procedures, particularly when there is no assurance as to their effectiveness, does not make those procedures an '[a]vailabl[e] . . . nondiscriminatory alternativ[e],' for purposes of the Commerce Clause" (quoting Hunt v. Wash. State Apple Advert. Comm'n, 432 U.S. 333, 353 (1977))).

70. *Id.* at 147.

71. *See* U.S. CONST. amend. XXI, § 1.

72. U.S. CONST. amend. XXI, § 2.

73. *See* State Bd. of Equalization of Cal. v. Young's Market Co., 299 U.S. 59, 62 (1936).

74. *See id.* at 62.

75. *See* Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 332 (1964); *see also* Walling v. Michigan, 116 U.S. 446, 455 (1886) (holding states may not pass laws that only burden out-of-state products).

76. 48 C.J.S. *Intoxicating Liquors* § 54 (2021); *see also* North Dakota v. United States, 495 U.S. 423, 432 (1990) (holding that States may mandate a three-tier distribution system under their authority granted by the Twenty-first Amendment); Cap. Cities Cable,

Therefore, the Court analyzes state alcohol regulation under both the Twenty-first Amendment and the Commerce Clause.[77] But it can often be a delicate dance between the two. State alcohol laws are generally protected under the Twenty-first Amendment when they treat intrastate and interstate commerce equally.[78] However, if there is discrimination against interstate alcohol commerce, the Twenty-first Amendment provides only limited protection for the offending state law, and thus the law can violate the dormant Commerce Clause.[79]

*B. Pre-*Granholm*: A Confusing Time*

The Court explained a modern, pre-*Granholm* analytical framework for the interplay between the Twenty-first Amendment and the dormant Commerce Clause in *Bacchus Imports, Ltd. v. Dias*.[80] In *Bacchus*, the Court used a two-part analysis to examine Hawaii's excise tax exemption for certain locally produced fruit wines.[81] First, the Court found the tax exemption had a discriminatory purpose favoring local products and therefore violated the dormant Commerce Clause.[82] Next, the Court turned to whether the Twenty-first Amendment could absolve the law of its unconstitutionality under the Commerce Clause.[83] In doing so, the Court explained that it has changed its perspective on the Twenty-first Amendment from prior cases, stating "[i]t is by now clear that the Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause."[84] This, of course, left room for discriminatory laws to survive a dormant Commerce Clause challenge through application of the Twenty-first Amendment.

Instead of allowing the Twenty-first Amendment to entirely save a discriminatory law, the Court found that proper analysis was a highly fact-based inquiry, balancing the two provisions, because "[b]oth the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution [and] each must be considered in light of the other and in the

Inc. v. Crisp, 467 U.S. 691, 716 (1984) (holding Section 2 does not abrogate Congress' Commerce Clause powers with regards to alcohol).

77. *See Hostetter*, 377 U.S. at 332 ("[T]he Twenty-first Amendment and Commerce Clause] each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.").

78. *See* Granholm v. Heald, 544 U.S. 460, 488 (2005) (holding states have broad powers to regulate alcohol distribution under the Twenty-first Amendment so long as the state law does not burden interstate commerce simply to give an economic advantage to intrastate commerce).

79. *See id.* at 488–89.

80. Bacchus Imps., Ltd. v. Dias, 468 U.S. 263, 274–76 (1984).

81. *See id.* at 268–77.

82. *See id.* at 273.

83. *See id.* at 274.

84. *Id.* at 275.

context of the issues and interests at stake in any concrete case."[85] Essentially, the Court felt it had to engage in a complicated analysis to determine whether the states' interests in alcohol regulation under the Twenty-first Amendment or the interests of the dormant Commerce Clause were stronger. The key question according to the Court was "whether the principles underlying the Twenty-first Amendment are sufficiently implicated by the exemption for [local fruit wines] to outweigh the Commerce Clause principles that would otherwise be offended."[86] Ultimately, the Court was unclear about what principles "underly" the Twenty-first Amendment,[87] but in finding that Hawaii's tax exemption did not implicate one of those principles, the Court directly stated that economic protectionism is not a justifiable or sufficient state concern for the Twenty-first Amendment to save a law that violates the dormant Commerce Clause.[88] Accordingly, the Court held that Hawaii's tax scheme was unconstitutional because it violated a "central tenet" of the Commerce Clause while a "clear concern" of the Twenty-first Amendment did not support the scheme.[89]

While *Bacchus* did provide a broad framework for circuit courts to analyze the relationship between the dormant Commerce Clause and the Twenty-first Amendment, it proved to be difficult and vague for the appellate courts to apply, which resulted in disparate and inconstant analyses between the circuits.[90] The majority of circuit courts applied the

85. *Id.* (alterations in original) (quoting Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 332 (1964)).

86. *Id.*

87. It is clear from federal and state law that essential interests under the Twenty-first Amendment include at a minimum a marketplace free of undue influence and vertical integration and promotion of responsible drinking. *See* Cal. Beer Wholesalers Ass'n., Inc. v. Alcoholic Beverage Control App. Bd., 5 Cal. 3d 402, 407–08 (1971); Actmedia, Inc. v. Stroh, 830 F.2d 957, 966 (9th Cir. 1986).

88. *See Bacchus*, 468 U.S. at 276 ("[O]ne thing is certain: The central purpose of [Section Two of the Twenty-first Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition.").

89. *See id.*

90. *Compare* Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 853–54 (7th Cir. 2000) (finding a law allowing direct-to-consumer alcohol shipment for local wineries but not out-of-state wineries to be nondiscriminatory because all producers equally needed to go through the three-tiered distribution system to ship from out of state and because the Twenty-first Amendment allows states to prohibit out of state shipments of alcohol to prevent uncontrolled alcohol distribution), *and* Swedenburg v. Kelly, 358 F.3d 223, 232, 238 (2d Cir. 2004) (upholding a law that permitted alcohol producers with physical presence in the state to ship directly to consumers was not discriminatory because a physical presence requirement did not completely preclude out-of-state businesses from shipping directly to consumers and stating the Twenty-first Amendment "effectively constitutionalizes most state prohibitions regulating importation, transportation, and distribution of alcoholic beverages from the stream of interstate commerce into the state" (quoting *Bacchus*, 468 U.S. at 276)), *with* Bainbridge v. Turner, 311 F.3d 1104, 1111–12 (11th Cir. 2002) (holding that a Florida law exempting local wineries from a direct

Bacchus framework, although two circuits firmly rejected *Bacchus*'s two-step analysis as it pertained to DtC shipping laws.[91] These two circuits—the Second and Seventh—rejected the *Bacchus*'s balancing test in favor of the view that the Twenty-first Amendment completely protected the law from a dormant Commerce Clause violation.[92] In fact, the Second Circuit in 2004 explicitly stated that a two-step approach is improper because it would "unnecessarily limit[] the authority delegated to the states through the clear and unambiguous language of section 2 [of the Twenty-first Amendment]."[93] Both courts also argued that the statutes were not discriminatory, and received criticism for doing so.[94] However, the majority of courts did not struggle with the first step of the *Bacchus* analysis, often finding DtC laws to be discriminatory.[95]

The real challenge for the circuit courts was the second part of the *Bacchus* analysis that pertained to the core principles of the Twenty-first Amendment that might outweigh the dormant Commerce Clause concerns.[96] Since the Court did not explicitly state what the core or inherent principles of the Twenty-first Amendment are, the appellate courts had to discern what "core principles" means for themselves.[97] Additionally, the Court was unclear if the purposes of direct shipment laws fell into that category.[98]

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shipment ban unfairly reduced competition from out-of-state wineries by subjecting them to mark ups in the three-tiered system in violation of the Commerce Clause, and that the Twenty-first Amendment cannot immunize a Commerce Clause violation when the law is motivated by "mere economic protectionism"); Kristin Woeste, *Reds, Whites, and Roses: The Dormant Commerce Clause, the Twenty-first Amendment, and the Direct Shipment of Wine*, 72 U. CIN. L. REV. 1821, 1840–41 (2004).

91. *See Bridenbaugh*, 227 F.3d at 849 ("This case pits the twenty-first amendment, which appears in the Constitution, against the 'dormant commerce clause,' which does not."); *Swedenburg*, 358 F.3d at 237; Woeste, *supra* note 90.

92. *See Bridenbaugh*, 227 F.3d at 851 ("[Section Two] of the twenty-first amendment empowers Indiana to control alcohol in ways that it cannot control cheese."); *Swedenburg*, 358 F.3d at 231 (finding that the two-step analysis in *Bacchus* is flawed because it takes authority away from states that was expressly reserved to the states in the Twenty-first Amendment).

93. *Swedenburg*, 358 F.3d at 231.

94. *See* Woeste, *supra* note 90, at 1840–44.

95. *See id.* at 1832 ("Prior to Swedenburg, a the [sic] circuits seemed to have reached consensus that direct shipment laws are unconstitutional violations of the dormant Commerce Clause unsalvageable by the Twenty-[f]irst Amendment.").

96. *See id.* at 1841 ("Unfortunately, no clear standard exists for determining what is a "core concern" of the Twenty-[f]irst Amendment.").

97. Several courts have analyzed this issue. *See* Cal. Beer Wholesalers Ass'n, Inc. v. Alcoholic Beverage Control App. Bd., 482 P.2d 745, 748 (Cal. 1971); Actmedia, Inc. v. Stroh, 830 F.2d 957, 966 (9th Cir. 1986). Thus, it should not be terribly difficult for courts to figure out.

98. *See* Woeste, *supra* note 90, at 1841 ("Therefore, without final word from the Supreme Court on what other interests are 'core concerns,' it is difficult to judge whether the other purposes of direct shipment laws would qualify as such.").

One point was clear from *Bacchus*: "mere economic protectionism" was not a core concern of the Twenty-first Amendment.[99] But some circuits disagreed with the Court's suggestion that temperance was a core concern, while other circuits claimed other legitimate Twenty-first Amendment interests could salvage an interest in economic protectionism.[100] As the direct shipment issue and an associated circuit split came to a head in the early twenty-first century, it became clear that the Court would need to at least attempt to rectify the circuit split.[101]

C. Granholm *and the Circuit Split*

The Supreme Court's decision in *Granholm* seems to be clear: the dormant Commerce Clause prohibits states from treating out-of-state alcoholic beverage producers and retailers differently than in-state producers and retailers.[102] However, the circuits have not applied this seemingly clear holding consistently.[103] Subsection 1 discusses the *Granholm* decision.[104] Subsection 2 explains the current circuit split after *Granholm*.[105]

1. The Supreme Court's Standard for Alcoholic Beverage Shipping

In 2005, the Court in *Granholm* had to determine whether New York and Michigan's regulatory schemes permitting in-state wineries to ship directly to consumers—but restricting out-of-state wineries from doing so—violated the Commerce Clause.[106] New York and Michigan both use three-tier distribution systems to regulate the sale and importation of

99. *See* Bacchus Imp., Ltd. v. Dias, 468 U.S. 263, 276 (1984).

100. *See* Swedenburg v. Kelly, 358 F.3d 223, 231 (2d Cir. 2004) (noting "state laws that constitute mere economic protectionism are . . . not entitled to the same deference as law enacted to combat the perceived evils of an unrestricted traffic in liquor" to explain that if there is an additional interest other than economic protectionism, the Twenty-first Amendment will shield the law from a Commerce Clause violation (quoting *Bacchus*, 468 U.S. at 276)); Bainbridge v. Turner, 311 F.3d 1104, 1113 (11th Cir. 2002) (looking at Supreme Court jurisprudence to identify that temperance on its own and economic protectionism are not "core concerns" of the Twenty-first Amendment); Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 849 (7th Cir. 2000) (noting that the Twenty-first Amendment directly authorized states to control alcohol imports, even in a discriminatory manner); North Dakota v. United States, 495 U.S. 423, 432 (1990) (plurality opinion) (noting that temperance is at the heart of the Twenty-first Amendment).

101. *See* Woeste, *supra* note 90, at 1847–48.

102. *See* Granholm v. Heald, 544 U.S. 460, 466 (2005).

103. *See infra* Section III.B.2.

104. *See infra* Section III.B.1.

105. *See infra* Section III.B.2.

106. *See Granholm*, 544 U.S. at 466 (explaining that the Court consolidated these cases because, while the regulatory schemes slightly differ, their objectives and effects are the same).

alcoholic beverages.[107] Their laws prohibited—or at least made it economically impractical—for out-of-state wineries to ship directly to consumers, while in-state wineries were free to do so.[108]

In Michigan, wine producers were required to distribute their product through wholesalers.[109] However, there was an exception for Michigan's in-state wineries that allowed them to apply for a license to ship directly to in-state consumers.[110] Out-of-state wineries had the option of seeking a shipping license, but those licenses would only allow them to sell to wholesalers in the state.[111] The Court found Michigan's regulatory scheme to be clearly discriminatory.[112] For an out-of-state winery to sell to in-state consumers, it had to pass through an in-state wholesaler and retailer instead of shipping directly to consumers.[113] By adding these additional layers of overhead, the cost increase essentially barred small wineries from the Michigan market.[114]

New York's regulation scheme was similar to that of Michigan, but had a slight difference.[115] New York only issued licenses to ship directly to consumers to wineries who used grapes grown in state to produce their wines.[116] An out-of-state winery could obtain a license, but the winery had to establish "a branch factory, office or storeroom within the state of New York."[117] While New York did not completely ban direct shipments, requiring out-of-state wineries to establish distribution in New York subjected out-of-state—but not in-state—wineries to an impermissible burden.[118] The Court found New York's regulatory scheme violated the dormant Commerce Clause because it effectively required out-of-state wineries "to become . . . resident[s] in order to compete on equal terms."[119]

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107. *See id.* ("Separate licenses are required for producers, wholesalers, and retailers.").

108. *See id.* at 467 (holding that this "differential treatment . . . constitutes explicit discrimination against interstate commerce").

109. *See id.* at 469.

110. *See id.*

111. *See id.* at 469.

112. *See id.* at 473.

113. *See id.* at 473–74 ("Out-of-state wineries, whether licensed or not, face a complete ban on direct shipment.").

114. *See id.* at 474.

115. *See id.* at 470.

116. *See Granholm*, 544 U.S. at 470 ("[L]icensees are authorized to deliver the wines of other wineries as well . . . but only if the wine is made from grapes 'at least seventy-five percent the volume of which were grown in New York state.'" (citations omitted)).

117. *Id.* (quoting N.Y. ALCO. BEV. CONT. LAW § 3(37) (McKinney 2005)).

118. *See id.* at 474 (noting that not a single out-of-state winery has availed itself to New York's regulatory scheme that requires the winery to establish a physical presence within the State).

119. *Id.* at 475 (quoting Halliburton Oil Well Cementing Co. v. Reilly, 373 U.S. 64, 72 (1963)).

The Court found both states' laws to be discriminatory and thus virtually per se invalid.[120] The states defended their statutes on the grounds that Section two of the Twenty-first Amendment allowed them to regulate the transportation and importation of alcoholic beverages into their state, which the Second and Seventh Circuits would have likely countenanced.[121] The Court explicitly rejected the states' position by holding "Section 2 does not allow States to regulate the direct shipment of wine on terms that discriminate in favor of in-state producers."[122] Instead, the Twenty-first Amendment only protects state policies when they treat alcoholic beverages produced out-of-state equally to alcoholic beverages produced in the state.[123] Therefore, the Supreme Court held that the nondiscrimination principle in the Commerce Clause restricts state laws regulating alcohol even in light of any added authority the Twenty-first Amendment reserved to the states.[124] This conclusion should have resolved the matter once and for all. It did not. Instead, it led to further confusion among the circuit courts with new and differing interpretations and approaches.

2. The Post-*Granholm* Circuit Split on Alcoholic Beverage Shipping

Despite *Granholm*'s seemingly clear standard, the circuits are still split in applying the nondiscrimination principle to laws regulating the ability to ship alcohol directly to the consumer.[125] The situation is apparently so fraught that the Ninth Circuit declined to resolve the issue head on when it had an opportunity to do so.[126] Subsection A discusses circuits that only apply the nondiscrimination principle to producers.[127] Subsection B describes circuits that apply the nondiscrimination principle to all tiers, but with application depending on what part of the three-tier system is at issue.[128] Subsection C explains the view of circuits that apply the nondiscrimination principle to any part of the three-tier system.[129]

120. *See id.* at 476 (citing Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978)).

121. *See id.*; U.S. CONST. amend. XXI, § 2; *see also Bridenbaugh*, 227 F.3d at 849; *Swedenburg*, 358 F.3d at 231.

122. *Granholm*, 544 U.S. at 476.

123. *See id.* at 489.

124. *See id.* at 487.

125. *See, e.g.*, Lebamoff Enter., Inc. v. Whitmer, 956 F.3d 863, 853 (6th Cir. 2020) (noting that circuits are divided as to the application of *Granholm* and the balance between the commands of the Commerce Clause and the Twenty-first Amendment).

126. *See* Orion Wine Imp., LLC v. Appelsmith, 837 F. App'x. 585, 586–87 (9th Cir. 2021) (dismissing a direct-to-consumer retail shipping challenge under the dormant Commerce Clause for lack of standing).

127. *See infra* Section III.C.2.a.

128. *See infra* Section III.C.2.b.

129. *See infra* Section III.C.2.c.

Lastly, Subsection D describes a hybrid approach that some states employ to require reciprocity in DtC shipping.[130]

a. Approach Number One: No Application of the Nondiscrimination Principle to Alcoholic Beverage Producers for Interstate Shipping

A few circuits apply the nondiscrimination principle exclusively to producers of alcohol, but not to retailers or wholesalers.[131] These courts interpret *Granholm* to shield three-tier systems from Commerce Clause violations unless there is discrimination between in-state and out-of-state producers.[132] These circuits find that the Commerce Clause requires states to treat producers the same regardless of origin, but that the Twenty-first Amendment permits different treatment for out-of-state retailers or wholesalers to advance Twenty-first Amendment interests like preventing uncontrolled alcohol consumption.[133]

More specifically, in *Lebamoff v. Whitmer*, the Sixth Circuit addressed a Michigan law permitting Michigan retailers—but not out-of-state retailers—to deliver directly to Michigan consumers.[134] The court held that the Twenty-first Amendment preserved state interests in the "unquestionably legitimate" three-tier system, so the law barring out-of-

130. *See infra* Section III.C.2.d.

131. *See, e.g.*, Lebamoff Enter., Inc. v. Whitmer, 956 F.3d 863, 875 (6th Cir. 2020) ("The purpose of the [three-tier] system, for better or worse, is to make it harder to sell alcohol by requiring it to pass through regulated in-state wholesalers . . . . [I]t's worth noting that Michigan has loosened some regulations to increase choice. That was the point of allowing limited direct deliveries by out-of-state wine producers . . . . Broadening product options seems far afield from the tied-saloon system that the three-tier system was designed to replace . . . . But the Twenty-first Amendment leaves these considerations to the people of Michigan, not to federal judges."); Arnold's Wines, Inc. v. Boyle, 571 F.3d 185, 190–91 (2d Cir. 2009) (refusing to apply the nondiscrimination principle because out-of-state liquor producers were not affected by the New York law at issue); Brooks v. Vassar, 462 F.3d 341, 352 (4th Cir. 2006) (Niemeyer, J., writing only for himself) (citing Granholm v. Heald, 544 U.S. 460 (2005) as evidence that three-tier systems are "unquestionably legitimate" and protected under the Twenty-first Amendment if they treat "liquor produced out of state the same as its domestic equivalent").

132. *See Arnold's*, 571 F.3d at 190–91 ("Appellants challenge provisions that make no distinction between liquor produced in New York and liquor produced out of the state . . . . The [*Granholm*] Court reaffirmed that the three-tier system is an 'unquestionably legitimate' exercise of the states' powers under the Twenty-first Amendment . . . . Appellants' argument is therefore directly foreclosed by [this] express affirmation of the legality of the three-tier system.").

133. *See Whitmer*, 956 F.3d at 871 ("Due to the [Twenty-first] Amendment, Commerce Clause challenges to alcohol regulation face a 'different' test. We ask only whether the law 'can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground.'" (citation omitted) (quoting Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2474 (2019))).

134. *See id.* at 868.

state retail shipping was constitutional under the Commerce Clause.[135] Noting that the three-tier system promotes controlled alcohol distribution, the court found the state interests to be legitimate and a valid exercise of the state's Twenty-first Amendment rights.[136] The court did not see the state interests as protectionist; instead, the court found the limits on out-of-state retail shipping to be traditional regulations that characterized the alcohol market.[137] Curiously, the *Whitmer* court stated that *Granholm* was not on point because "it concerned a discriminatory exception to a three-tier system" that allowed in-state producers to bypass the other tiers while out-of-state producers could not do so.[138]

In addition, the *Whitmer* court refused to apply *Granholm*'s "exacting standard" that required the state to provide concrete evidence that the law serves a legitimate interest without any workable nondiscriminatory alternatives.[139] Instead, the Sixth Circuit called this standard "skeptical" and did not require evidence from the state to prove that the ban actually advanced a legitimate interest.[140] The court did not discuss alternative means and merely pointed to the Twenty-first Amendment as a shield for states to enact discriminatory alcohol laws.[141] This is a marked shift from *Granholm*'s principles that the Twenty-first Amendment does not save laws that violate other constitutional provisions and the nondiscrimination principle applies to state regulation of alcohol.[142]

b. Option Two: Limited Application of the Nondiscrimination Principle

Most circuits apply a standard that affirms the nondiscrimination principle but varies in application based on what aspects of the three-tier system are at issue.[143] Rather than barring nondiscrimination analysis for

135. *Id.* at 869–70 (quoting Granholm v. Heald, 544 U.S. 460, 489 (2005)).

136. *See id.* at 871–73.

137. *See id.* at 871 ("The States, the Court has explained, have legitimate interests in 'promoting temperance and controlling distribution of [alcohol].' To promote these interests, States have 'virtually complete control over whether to permit importation or sale of liquor and how to structure the[ir] liquor distribution system[s].'" (alteration in original) (citations omitted) (quoting North Dakota v. United States, 495 U.S. 423, 438–39 (1990); *Granholm*, 544 U.S. at 484)).

138. *Id.* at 874 (emphasis omitted); *Granholm*, 544 U.S. at 466–67.

139. *See Whitmer*, 956 F.3d at 869; *Granholm*, 544 U.S. at 493.

140. *Whitmer*, 956 F.3d at 869.

141. *See id.* at 872–73.

142. *See Granholm*, 544 U.S. at 486–87 ("[T]he Court has held that state laws that violate other provisions of the Constitution are not saved by the Twenty-first Amendment . . . [and] that state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause.").

143. *See, e.g.*, Sarasota Wine Mkt., LLC v. Schmitt, 987 F.3d 1171, 1184 (8th Cir. 2021) ("The Missouri laws at issue in this case are an essential feature of its three-tiered scheme . . . . We conclude we should be no more invasive of the 'unquestionably

wholesalers and retailers, these circuits apply the nondiscrimination principle to parts of the three-tier system that are not "inherent" or "essential."[144]

A recent Eighth Circuit case—*Sarasota Wine v. Schmitt*—tracks this reasoning.[145] The plaintiffs in *Schmitt* challenged Missouri's retail liquor license requirements of residency and in-state presence under the Commerce Clause because Missouri prevented out-of-state retailers from shipping to consumers.[146] According to the Eighth Circuit, these requirements were valid because they concerned aspects "inherent" of an "unquestionably legitimate" three-tier system.[147] The court reasoned that allowing out-of-state retail alcohol shipping would defeat the purpose of the state's right to regulate alcohol under a three-tier system.[148] According to the court, shipping directly to the consumer could allow out-of-state retailers to avoid the three-tier system and flood the state with cheaper or more conveniently accessible alcohol.[149] In turn, this would undermine the state's legitimate interests in regulating alcohol with a three-tier system: temperance and responsible alcohol consumption.[150] In other words, the Eighth Circuit was concerned that the state would not have access to data regarding consumption, deliveries, and taxes. Therefore, the Eighth

legitimate' three-tiered system than the Supreme Court has mandated."); Wine Country Gift Baskets.com v. Steen, 612 F.3d 809, 818–20 (5th Cir. 2010) (reasoning that because of *Granholm's* approval of the three-tier system, "discrimination that would be questionable, then, is that which is not inherent in the three-tier system itself . . . . [A] beginning premise is that wholesalers and retailers may be required to be within the State."); Brooks v. Vassar, 462 F.3d 341, 352 (4th Cir. 2006) (challenging the requirement that out-of-state retailers sell through Virginia's three-tier system "is nothing different than an argument challenging the three-tier system itself," which *Granholm* upheld as "unquestionably legitimate").

144. *See, e.g.*, *Sarasota Wine*, 987 F.3d at 1184 ("The licensing requirements and restrictions at issue have been consistently upheld, before and after *Granholm* and *Tennessee Wine*, as essential to a three-tiered system that is 'unquestionably legitimate.'"); Byrd v. Tenn. Wine & Spirit Retailers Ass'n, 883 F.3d 608, 623 (6th Cir. 2018), *aff'd sub nom.*, Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449 (2019) (noting that, prior to *Whitmer*, "requiring wholesaler or retailer businesses to be physically located within Tennessee may be an inherent aspect of a three-tier system"); Cooper v. Tex. Alcoholic Beverage Comm'n, 820 F.3d 730, 743 (5th Cir. 2016) (finding distinctions between in-state and out-of-state retailers and wholesalers permissible "if they are an inherent aspect of the three-tier system").

145. *Sarasota Wine*, 987 F.3d at 1184.

146. *See id.* at 1175.

147. *See id.* at 1182 (citing *Byrd*, 883 F.3d at 622–23; *Cooper*, 820 F.3d at 743; *Wine Country Gift Baskets.com*, 612 F.3d at 818–20; *Brooks*, 462 F.3d at 352; and *Granholm*, 544 U.S. at 488 as support for the inherent aspect interpretation of *Granholm*).

148. *See id.* at 1182–83 (quoting *Tenn. Wine*, 139 S. Ct. at 2475 and Lebamoff Enters., Inc. v. Whitmer, 956 F.3d 863, 869–70 (6th Cir. 2020) to support the reasoning that challenging an essential aspect of the three-tier system under the Commerce Clause would undermine the Twenty-first Amendment's guarantees).

149. *See id.* at 1183.

150. *See id.*

Circuit believed a physical presence requirement was an "essential" aspect of the three-tier system and refused to apply the nondiscrimination principle.[151] Instead, the court implied it was necessary to discriminate against out-of-state retail interests to have a functioning three-tier system.[152]

This reasoning does not follow a plain reading of *Granholm*'s statement that the nondiscrimination principle limits state regulation of alcohol.[153] Instead, this interpretation adds a new requirement: assessing what aspects of the three-tiered system are inherent or essential, and then applying the principle to alcohol laws outside those categories.[154] This interpretation still calls for courts to apply the nondiscrimination principle to state alcohol laws, but only in limited circumstances where the laws are not inherent to the three-tier system.[155] Perhaps the *Granholm* court intended to apply the principle only to non-essential aspects of state alcohol laws, but the Court never expressed this sentiment.[156]

Additionally, the opaque and perhaps subjective standard of determining what is "essential" to the Twenty-first Amendment likely presents a significant administrative burden and inefficiencies, given the many different types of licenses states have.[157] The Court obviously did not intend to create such an unworkable standard in *Granholm*, particularly

151. *See id.* at 1184.

152. *See id.*

153. *See* Granholm v. Heald, 544 U.S. 460, 486–87 (2005) (explaining that the Twenty-first Amendment does not save state laws that violate other provisions of the Constitution, and the nondiscrimination principle applies to state alcohol laws).

154. *See* Sarasota Wine Mkt., 987 F.3d at 1184 (noting that the Court in *Tennessee Wine* "invalidated a durational residency requirement that 'is not an essential feature of a three-tiered scheme'" to conclude that *Granholm* applies to all aspects of the three-tier system that are not inherent) (quoting Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2471 (2019)).

155. *Compare* Byrd v. Tenn. Wine & Spirit Retailers Ass'n, 883 F.3d 608, 623 (6th Cir. 2018) ("[A]lthough requiring wholesaler or retailer businesses to be physically located within Tennessee may be an inherent aspect of a three-tier system . . . imposing durational-residency requirements is not inherent—a three-tier system can still function without these restrictions." (internal citations omitted)), *with* Lebamoff Enters., Inc. v. Whitmer, 956 F.3d 863, 869–70 (6th Cir. 2020) (refusing to apply the nondiscrimination principle to a physical presence requirement for direct-to-consumer shipping because the Twenty-first Amendment preserved state interests in the "'unquestionably legitimate'" three-tier system, not because presence was an inherent aspect of the three-tier system (quoting *Granholm*, 544 U.S. at 489)).

156. *See Granholm*, 544 U.S. 460.

157. *See* S. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control, 731 F.3d 799, 810 (8th Cir. 2013) ("There is no archetypal three-tier system from which the 'integral' or 'inherent' elements of that system may be gleaned." (quoting *Granholm*, 544 U.S. at 468–70)); Lebamoff Enters., Inc., v. Rauner, 909 F.3d 847, 855 (7th Cir. 2018) (finding the intrinsic aspect interpretation unpersuasive and unworkable due to inefficiencies).

in light of the fact that it remains unclear what "essential" actually means under the three-tier system.

c. Option Three: Full Application of the Nondiscrimination Principle

Some circuits interpret *Granholm* to require the full application of the nondiscrimination principle to out-of-state alcoholic beverage shipping.[158] Among these circuits is the Seventh Circuit, which read *Granholm* to reaffirm prior case law in *Lebamoff v. Rauner*.[159] In *Rauner*, an Illinois law required in-state presence for a license to ship alcohol directly to consumers, without any analogous license for out-of-state retailers.[160] The court held that a state cannot create "exceptions to the system or modif[y] the rights that come with licenses" that violate the Commerce Clause or another constitutional provision.[161] Quoting prior precedent, the court explained the proper standard is examining whether the interests of the state "are so closely related to the powers reserved by the Twenty-first Amendment [so] that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies."[162] As a result, the court refused to dismiss the case because the statute explained its interests were for the health of its residents and the state economy, the second of which is an economic protectionist interest prohibited by the nondiscrimination principle.[163] The court also mentioned the need for the state to produce actual evidence on remand for the court to adequately assess whether the law was unconstitutional or was intended for a valid Twenty-first Amendment interest in health.[164]

Unlike in *Whitmer*, this interpretation more closely tracks the holding the Court arrived at in *Granholm* because it applies the Commerce Clause

158. *See Rauner*, 909 F.3d at 855–56 (explaining that the nondiscrimination principle fully applies to alcohol retailers and wholesalers, not just to producers).

159. *See id.* at 855 ("The better understanding of *Granholm* is that it simply reaffirmed the position first announced in *Bacchus*."); *see also* Brooks v. Vassar, 462 F.3d 341, 361 (4th Cir. 2006) (Goodwin, J., concurring in part and dissenting in part) ("I read *Granholm* as requiring us to apply the same dormant Commerce Clause analysis to discriminatory liquor laws that we apply to other discriminatory laws.").

160. *See Rauner*, 909 F.3d at 850–51.

161. *See id.* at 855 (explaining that states cannot make exceptions to the three-tier system that "offend the Commerce Clause" and that Illinois's law allowing in-state shipments "signaled that it is not quite so concerned about face-to-face sales" while also "barring [out-of-state] businesses from obtaining a license solely on the basis of state residency," potentially violating the Commerce Clause).

162. *Id.* (quoting Byrd v. Tenn. Wine & Spirit Retailers Ass'n, 883 F.3d 608, 614 (6th Cir. 2018)).

163. *See id.* at 856.

164. *See id.* ("Illinois must show why its restrictions are necessary to further [the health of its residents], and not just [economic protectionism of in-state businesses].").

analysis equally to state laws regulating alcohol.[165] Rather than limiting the analysis to certain inherent aspects, this interpretation does not read between the lines to impose any additional analysis.[166] Instead, these circuits simply examine the states' expressed interests and what evidence the state has that these interests are real and valid under the Commerce Clause.[167]

Accordingly, under this approach, the Twenty-first Amendment is relevant, but it does not partially or completely shield discriminatory laws from the nondiscrimination principle.[168] The role of the Twenty-first Amendment is simply for the state to rely on in presenting a valid state interest that is not protectionist, such as public health, welfare, or temperance.[169] If the state actually proves the law is not protectionist, but instead is seeking to further a legitimate purpose with no alternative nondiscriminatory means, then the law is valid under the Commerce Clause, as *Granholm* stated plainly.[170]

This approach is most consistent with *Granholm* because *Granholm* directly explained that the Twenty-first Amendment does not allow states to disadvantage out-of-state producers by only allowing local producers to

165. *Compare* Lebamoff Enters., Inc. v. Whitmer, 956 F.3d 863, 869–70 (6th Cir. 2020) (refusing to apply the nondiscrimination principle to non-producers of alcohol because the Twenty-first Amendment allows states to control imports, including via a three-tier system), *with Rauner*, 909 F.3d at 855–56 (finding that *Granholm*'s acceptance of a three-tier system does not bar Commerce Clause challenges against discriminatory liquor laws that make up any part of the three-tier system if protectionism is the motivation for the laws rather than legitimate state interests).

166. *Compare* Wine Country Gift Baskets.com v. Steen, 612 F.3d 809, 818–19 (5th Cir. 2010) ("When analyzing what else is invalid under the Supreme Court's *Granholm* reasoning, we find direction in a source for some of the Court's language. The Court quoted a 1986 precedent that North Dakota's three-tier system was 'unquestionably legitimate.' North Dakota's system was similar to that in Texas, in which producers sell to state-licensed wholesalers, who sell to state-licensed retailers. That sort of system has been given constitutional approval. The discrimination that would be questionable, then, is that which is not inherent in the three-tier system itself. . . . [*Granholm*'s legitimizing of the tiers] is thus a caveat to the statement that the Commerce Clause is violated if state law authorizes 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'" (citations omitted) (quoting Granholm v. Heald, 544 U.S. 460, 472–89 (2005))), *with Rauner*, 909 F.3d at 855 (questioning how courts are meant to assess what aspects of the three-tier system are "'inherent'" (quoting S. Wine & Spirits of Am. v. Div. of Alcohol & Tobacco Control, 731 F.3d 799, 810 (8th Cir. 2013))), *and Granholm*, 544 U.S. 460 (making no mention of "inherent" or "essential" aspects of the three-tier system receiving more protection than those that are "non-inherent" or "non-essential").

167. *See Rauner*, 909 F.3d at 855–56.

168. *See id.* at 855.

169. *See id.* at 855–56.

170. *See id.* at 856; *see Granholm*, 544 U.S. at 486–87 ("[S]tate laws that violate other provisions of the Constitution are not saved by the Twenty-first Amendment . . . . [S]tate regulation of alcohol is limited by the nondiscrimination principle." (citations omitted)).

ship directly to consumers.[171] Thus, despite being the perceived remedy to the circuit splits on direct shipment laws, not all circuits choose to apply *Granholm's* seemingly plain meaning.

d. Option Four: California's Hybrid Reciprocity Approach

The fourth approach that some states currently use, including California, appears constitutionally fraught. These states allow intrastate shipping and delivery but prohibit or make DtC shipping unduly burdensome for out-of-state breweries. Despite the differing interpretations and understandings of the circuit courts, DtC alcohol shipping laws that bar out-of-state interests from shipping, but permit shipping for in-state interests, violate *Granholm*'s dormant Commerce Clause analysis.

Using California as a case study, California has limited DtC shipping of alcohol, with exceptions exclusively covering its world-famous wine industry.[172] One of these exceptions covers out-of-state retailers, but the law does not impose any similar restrictions on in-state retailers or producers to ship wine in California.[173]

Current California law specifies that out-of-state individuals or retail licensees may only ship a statutorily defined amount of wine into California if their state of origin offers an equal reciprocal shipping privilege to California individuals or retail licensees.[174] Further, California law specifically allows breweries to self-distribute their own products.[175]

171. *See Granholm*, 544 U.S. at 489 ("State policies are protected under the Twenty-first Amendment when they treat liquor *produced out of state the same as its domestic equivalent*. The instant cases, in contrast, involve straightforward attempts to discriminate in favor of *local producers*. The discrimination is contrary to the Commerce Clause and is not saved by the Twenty-first Amendment.") (emphasis added). *But see* Byrd v. Tenn. Wine & Spirit Retailers Ass'n, 883 F.3d 608, 621–22 (6th Cir. 2018) ("[T]he Supreme Court did not state that the Commerce Clause applies only to alcoholic-beverages laws regarding producers. The statement that '[s]tate policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent' must be read in its context . . . . A fair reading of this passage leads to one conclusion: the Supreme Court discussed the relationship between the dormant Commerce Clause and the Twenty-first Amendment in the context of 'producers' simply because *Granholm* involved statutes addressing that step in the three-tier system." (alterations in original) (quoting *Granholm*, 544 U.S. at 489)).

172. *See, e.g.*, CAL. BUS. & PROF. CODE § 23661.3 (West 2019) (allowing direct-to-consumer shipping of wine for in-state and out-of-state winegrowers if the winegrower obtains a permit from the state).

173. *See* BUS. & PROF. § 23661.2 (allowing direct-to-consumer shipping of wine for out-of-state retailers only if the retailer is in California or is from a state that has a reciprocal arrangement with California).

174. *See id.*

175. *See* BUS. & PROF. § 23357.

This provision has been specifically interpreted to mean that California breweries can deliver directly to California customers.[176]

An overly narrow interpretation of *Granholm* might permit this California law because it does not target producers, which was the main focus of *Granholm*.[177] But under a limited application of the Commerce Clause, a court would likely find this law to be unconstitutional.[178] Under this application of *Granholm*, barring producers from shipping alcohol directly to consumers, if they are not residents in a state that grants similar reciprocity to California producers, is not an essential aspect of the three-tier system; rather, it is simply economic protectionism.[179] California producers and producers in states with reciprocity would not be allowed to completely circumvent the distribution tier if this aspect were in fact essential.[180] The essential notion of preventing direct shipping by retailers from some states—but not other states that loosen restrictions on California interests—is dubious and likely fails constitutional scrutiny.[181] In fact, *Granholm* itself criticizes the idea of reciprocity and mentions this exact California law in *dicta*.[182]

176. *See* Joe Stange, *Shipping Beer Straight to Drinkers: Greater Potential on the Horizon*, BREWING INDUS. GUIDE (Sept. 13, 2019), https://bit.ly/2X3h1k6.

177. *See, e.g.*, Arnold's Wines, Inc. v. Boyle, 571 F.3d 185, 190–91 (2d Cir. 2009) (refusing to apply the nondiscrimination principle because out-of-state liquor producers were not affected by the New York law at issue); Brooks v. Vassar, 462 F.3d 341, 352 (4th Cir. 2006) (Niemeyer, J., writing only for himself) (noting that three-tier systems are "unquestionably legitimate" and "protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent" (citing Granholm v. Heald, 544 U.S. 460, 489 (2005))); *Granholm*, 544 U.S. at 489.

178. *See, e.g.*, Cooper v. Tex. Alcoholic Beverage Comm'n, 820 F.3d 730, 743 (5th Cir. 2016) (finding distinctions between in-state and out-of-state retailers and wholesalers permissible "if they are an inherent aspect of the three-tier system").

179. *Cf.* Byrd v. Tenn. Wine and Spirits Retailers Ass'n, 883 F.3d 608, 623 (6th Cir. 2018) ("[A]lthough requiring wholesaler or retailer businesses to be physically located within Tennessee may be an inherent aspect of a three-tier system, imposing durational-residency requirements is not inherent—a three-tier system can still function without these restrictions.").

180. *See* BUS. & PROF. § 23661.2.

181. *See* New Energy Co. of Ind. v. Limbach, 486 U.S 269, 278 (1988) (invalidating an Ohio statute that provided a tax credit to users of ethanol produced in Ohio or in a state with a reciprocal tax credit for Ohio-produced ethanol and noting that Ohio discriminated when it denied the tax credit for ethanol produced in Indiana which furnished a subsidy to Indiana ethanol producers but no reciprocal tax credit).

182. *See Granholm*, 544 U.S. at 473 ("The perceived necessity for reciprocal sale privileges risks generating the trade rivalries and animosities, the alliances and exclusivity, that the Constitution and, in particular, the Commerce Clause were designed to avoid . . . . California, for example, passed a reciprocity law in 1986, retreating from the State's previous regime that allowed unfettered direct shipments from out-of-state wineries. Prior to 1986, all but three States prohibited direct shipments of wine. The obvious aim of the California statute was to open the interstate direct-shipping market for the State's many wineries. The current patchwork of laws—with some States banning direct shipments altogether, others doing so only for out-of-state wines, and still others requiring reciprocity—is essentially the product of an ongoing, low-level trade war. Allowing States

Instead of exercising an inherent or essential aspect of the three-tier system, the law distinguishes between California producers, out-of-state producers fortunate enough to operate in a state with reciprocity, and out-of-state retailers that are not so fortunate.[183] This distinction is a violation of the dormant Commerce Clause because it discriminates against out-of-state interests and places a regulatory burden on interstate commerce by entirely preventing the direct shipment of out-of-state wine from certain states for the benefit of in-state wine interests—all while prohibiting breweries from shipping interstate altogether.[184]

Under a full application of the dormant Commerce Clause, the out-of-state retailer reciprocity law would also fail because it plainly makes exceptions to the three-tier system for in-state interests and certain out-of-state interests at the expense of interstate commerce—in direct conflict with federal policies.[185] Again, California law does not place a limit on retailers or producers shipping wine directly to the consumer if they have the proper license.[186] Meanwhile, California law requires reciprocity for out-of-state retailers to ship wine directly to California adult consumers—an exception to the three-tier system because it avoids the distribution tier in California.[187]

Requiring reciprocity is a discriminatory practice designed to favor the famous California wine industry.[188] First, the reciprocity requirement encourages other states to allow California wineries to ship directly to out-of-state consumers, expanding the number of consumers that can purchase

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to discriminate against out-of-state wine 'invite[s] a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause.'" (citations omitted) (quoting Dean Milk Co. v. Madison, 340 U.S. 349, 356 (1951))).

183. *See* CAL. BUS. & PROF. CODE § 23661.2; *cf. Byrd*, 883 F.3d at 623 (noting that there are some regulations of the distribution and retail tiers that are not inherent aspects of the three-tier system, such as durational-residency requirements, which the three-tier system can operate without).

184. *New Energy Co. of Ind.*, 486 U.S at 278 ("The Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but only action of that description *in connection with the State's regulation of interstate commerce*.").

185. *See* Lebamoff Enters. v. Rauner, 909 F.3d 847, 856 (7th Cir. 2018) (refusing to dismiss a case because the statute explained its interests were for the health of its residents *and* the state economy; according to the court, the economic interest is protectionist prohibited by the nondiscrimination principle).

186. BUS. & PROF. § 23661.2; *Limited Off-Sale Wine License*, CAL. DEP'T OF ALCOHOLIC BEVERAGE CONTROL, https://bit.ly/3A2p4fE (last visited July 10, 2020).

187. *See Rauner*, 909 F.3d at 855 (explaining that states cannot make exceptions to the three-tier system that "offend the Commerce Clause" and that Illinois's law allowing in-state shipments "signaled that it is not quite so concerned about face-to-face sales" while also "barring [out-of-state] businesses from obtaining a license solely on the basis of state residency," potentially violating the Commerce Clause).

188. *See, e.g.*, Granholm v. Heald, 544 U.S. 460, 473 (2005) ("The obvious aim of the California statute was to open the interstate direct-shipping market for the State's many wineries.").

California wines. Second, the reciprocity requirement prevents many competing wineries from outside California from easily penetrating the California wine market, making it more likely that consumers will purchase California wine. Though the law advances an interest in health, it also serves protectionist purposes for the wine industry, an interest prohibited by the nondiscrimination principle.[189] Therefore, the state's interests are not "closely related to the powers reserved by the Twenty-first Amendment [so] that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies."[190]

This is precisely the type of law that *Granholm* seems to reject. This interpretation would also require the state to produce actual evidence to rebut the presumption that the law was unconstitutional and instead was intended for a valid Twenty-first Amendment interest in health.[191] This California law is but one example of DtC alcohol shipping laws that are likely unconstitutional under *Granholm*. Several other states allow intrastate breweries to deliver beer (also known as self-distribution), but also prohibit out-of-state breweries from shipping or delivering to consumers within state lines.[192] Both types of laws violate the anti-discrimination of the dormant Commerce Clause due to favorable treatment of in-state producers.

IV. THE TENSION BETWEEN CIRCUITS AND THE VARIOUS STATE APPROACHES HAVE PROVIDED OPPORTUNISTS WITH A "FOURTH-TIER" OPTION AND WEAKENED THE THREE-TIER SYSTEM AS A WHOLE

As noted above, the second tier (distribution) is traditionally recognized as an essential part of the three-tier system of American alcoholic beverage regulation. Indeed, the Supreme Court has recognized that "states have legitimate interests in 'promoting temperance and controlling the distribution of [alcohol]'" within their borders.[193] And to further those interests, nothing stops states from "funnel[ing] sales through

189. *See Rauner*, 909 F.3d at 856.

190. *Id.* at 855 (quoting Byrd v. Tenn. Wine and Spirits Retailers Ass'n, 883 F.3d 608, 614 (6th Cir. 2018)).

191. *See Rauner*, 909 F.3d at 856 ("Illinois must show why its restrictions are necessary to further [the health of its residents], and not just [economic protectionism of in-state businesses].").

192. Examples of states that allow intrastate producers, but not out-of-state producers, to deliver directly include, among others, Arizona, Colorado, Hawaii, New Mexico, and Texas. *See State Laws*, BREWERS ASS'N, https://bit.ly/3nj7ccZ (last visited Nov. 14, 2021).

193. Lebamoff Enters. v. Whitmer, 956 F.3d 863, 869 (6th Cir. 2020) ("The courts have frequently said that the Twenty-first Amendment permits a three-tier system of alcohol distribution, and the Commerce Clause does not impliedly prohibit it." (alteration in original) (quoting North Dakota v. United States, 495 U.S. 423, 433, 438–39)).

the three-tier system" a practice that is "unquestionably legitimate."[194] Many in the industry would agree that distribution is a fundamental and necessary part of the industry, otherwise craft breweries would need to become trucking and delivery companies if they were forced to handle all deliveries and shipping.[195] Traditional distributors must have distribution licenses in the states in which they operate, and their activities and sales numbers are carefully monitored by the states' regulating bodies by design: to control the sale and distribution of alcohol within the jurisdiction.[196] To clarify, "Until recently, most states' laws required alcohol shipped into the state to be received by an in-state licensee—a wholesaler or, in many cases a manufacturer."[197]

But because of the vague circumstances surrounding the interplay between the dormant Commerce Clause and the Twenty-first Amendment, as well as the circuit courts' disagreements, companies have sprung up and expanded rapidly to fill the unmet need for DtC shipping.[198] As a general proposition, third parties expanding independent craft breweries' reach provides economically beneficial opportunities to such breweries and are thus a benefit to the independent craft beer market. However, as noted below, they pose a risk to the three-tier system and thus states' abilities to regulate and control alcohol within state lines because absent licensure and oversight, alcohol will be able to move freely within states and across borders in an unregulated manner.

Like traditional distributors, these companies, such as Drizly, Instacart, Bevv.com, and Saucey exist to get alcohol in the hands of the consumers. But unlike traditional distributors, these companies are often unlicensed and operate simply as "middlemen" without regulatory oversight.[199] To be clear, there is money to be made in ecommerce by serving as the middleman through an app or a cell phone, and many breweries would love the chance to open new markets through this avenue.[200] Economic benefits to breweries aside, this begs the question of

194. Granholm v. Heald, 544 U.S. 460, 489 (2005) (quoting *North Dakota*, 495 U.S. at 432).

195. *See* Telephone Interview with Tom McCormick, Exec. Dir., Cal. Craft Brewers Ass'n (Dec. 8, 2020).

196. *See* Croxall, *Helping Craft Beer*, *supra* note 19, at 168–71.

197. Sorini, *supra* note 3.

198. *See* Jessica Jacobsen, *Direct-to-Consumer Models Expanding Through Ecommerce Market*, BEVERAGE INDUS. (June 7, 2021), https://bit.ly/3tAjz5B.

199. *See* Evan Pitchford, *The "Fourth Tier" of Beer: Internet Sales and Direct-to-Consumer Delivery*, CONKLE, KREMER & ENGEL: CONKLE LAW BLOG (Feb. 12, 2021), https://bit.ly/3E8iR46.

200. *See* Kate Bernot, *Signed, Sealed, Delivered? – Proponents Say Current Conditions are Ripe for Legalizing Alcohol Shipping via US Postal Service*, GOOD BEER HUNTING: SIGHTLINES (July 15, 2021), https://bit.ly/3k2LU11.

the best path forward for states to regulate alcoholic beverage sales within their borders.

To maintain control of the alcoholic beverage market as envisioned by the Twenty-first Amendment, states would have to prevent unlicensed "middlemen" from circumventing the three-tier system. Every state in the union employs some version of the three-tier system to regulate the alcohol industry.[201] The goals of the three-tier system can be varied at times among the states, but the main purposes are to promote temperance and responsible drinking, to ensure an orderly marketplace, and for the states to maintain oversight through reporting and taxation.[202] Thus, allowing unregulated middlemen to operate outside of the three-tier system, essentially as a fourth tier, lessens a state's ability to monitor and control the flow of alcohol within its borders.[203]

Industry members recognize that middlemen shippers and delivery services are subjected to less restrictions and reporting requirements as traditional distributors who require licenses from their states.[204] In effect, they are operating in a gray area of legality, with serious questions about whether their conduct is even allowed from state-to-state.[205] In short, states simply cannot control how much alcohol is coming into the state or how it is being sold when it enters outside the three-tier system.

Thus, maintaining a version of the three-tier system that explicitly allows the state regulating agencies to maintain control and oversight over the alcoholic beverage market is most consistent with the Twenty-first Amendment's vision and the three-tier system itself. DtC shipping is a good thing for independent craft breweries financially, and it is good for consumer choice. But if states desire to maximize control over their alcoholic beverage markets, shipping and delivery should at least remain within the three-tier system.

Perhaps the time has come to re-imagine whether states need to maintain such control. If not, interstate shipping services through such middlemen provide expansion opportunities for independent breweries. If so, states should require interstate shipping to come directly from the producer or through a licensed wholesaler or shipper.

V. CONCLUSION

Given the differing and at times antagonistic approaches among the states and the circuit courts, the Supreme Court should weigh in and

201. *See* Nance, *supra* note 18.

202. *See* Cal. Beer Wholesalers Ass'n, Inc. v. Alcoholic Beverage Control App. Bd., 5 Cal. 3d 402, 408 (1971); Actmedia, Inc. v. Stroh, 830 F.2d 957, 966 (9th Cir. 1986).

203. *See* Sarasota Wine Mkt., LLC v. Schmitt, 987 F.3d 1171, 1183 (8th Cir. 2021).

204. *See* Sorini, *supra* note 3.

205. *See id.*

clearly annunciate the meaning of *Granholm*. However, until the Court provides that opinion, one analytical approach stands out as the most consistent with *Granholm's* anti-discrimination directive.

The Seventh Circuit's approach in *Lebanoff v. Rauner*[206] most closely tracks *Granholm's* underlying non-discrimination directive.[207] This approach provides consistency in that it does not distinguish between tiers in the alcoholic beverage industry, and it consistently applies the Commerce Clause equally.[208] More specifically, under the Seventh Circuit's approach, intrastate and interstate breweries are on equal footing in the marketplace—precisely what the dormant Commerce Clause requires. Further, for those states that do not desire to allow DtC shipping, this approach allows them to prohibit it entirely, as some states have done,[209] as long as the prohibition applies equally to in-state and out-of-state breweries. For those states that seek to expand economic opportunities for small businesses—like independent craft breweries—this approach also allows for DtC shipping provided that both interstate and intrastate breweries can enjoy the privilege equally. Finally, this approach will certainly survive constitutional scrutiny because it most equally applies *Granholm's* view of the anti-discrimination principle of the dormant Commerce Clause but still allows states to regulate alcohol as they see fit under the Twenty-first Amendment and within the three-tier system. As the Supreme Court stated, "State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent."[210]

As ecommerce continues to dominate and the Coronavirus pandemic drags on, states should carefully re-evaluate their DtC laws to bring them into conformity with the Seventh Circuit's approach that most equally balances the Twenty-first Amendment and the dormant Commerce Clause. This approach would increase market opportunities for breweries within and without a state equally while also providing the most consistent interpretation of two competing constitutional provisions and the Supreme Court's latest pronouncement concerning DtC shipping.

206. Lebamoff Enters., Inc. v. Rauner, 909 F.3d at 855 (7th Cir. 2018).
207. *See id.*
208. *See id.*
209. *See, e.g.*, ALA. CODE § 28-3A-6 (2021).
210. Granholm v. Heald, 544 U.S. 460, 489 (2005).