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NOTE

Missouri's Hangover: Wine-ing about Direct-to-Consumer Prohibition

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

Matthew D. Warren*

I. INTRODUCTION

“[W]ine,” Thomas Jefferson once said, “[is] a necessary of life with me.”¹ The French Ambassador turned president spent well over \$365,000 in today’s currency on imported wines during his eight-year tenure as president of the United States.² The intoxicating rights once afforded to Jefferson, as a drafter of the Constitution, have shifted throughout history with the passing of the Eighteenth and Twenty-First Amendments.³

Many view the repeal of prohibition as the end of the temperance movement across the American political landscape, but this view ignores the continuing importance of Section 2 of the Twenty-First Amendment (“Section 2”).⁴ Section 2 states 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.”⁵ Multiple states, including Missouri, passed stringent Liquor Control Acts as a “comprehensive scheme for regulation and control of the manufacture, sale, possession, transportation, and distribution of

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¹ Letter from Thomas Jefferson to Thomas Appleton (Jan. 14, 1816), 9 The Papers of Thomas Jefferson 349, 351 (J. Jefferson Looney ed., 2012).

² See JOHN HAILMAN, THOMAS JEFFERSON ON WINE 256 (2006).

³ See U.S. CONST. amends. XVIII (repealed 1933), XXI.

⁴ Marcia Yablon, *The Prohibition Hangover: Why We Are Still Feeling the Effects of Prohibition*, 13 VA. J. SOC. POL’Y & L. 552, 552 (2006).

⁵ U.S. CONST. amend. XXI.

intoxicating liquor.”⁶ Although there are no completely dry states, some states severely limit liquor sales and distribution.⁷ For example, only the State government may import alcohol in Utah, making it the leading retailer of all alcoholic products other than light beer.⁸ Similarly, in Michigan, the State is the only permitted wholesaler for liquor, but not wine and beer.⁹

In 2007, Missouri amended its Liquor Control Act to allow in-state and out-of-state wine producers to ship wine directly to Missouri consumers.¹⁰ This amendment, however, requires wine retailers to have a physical presence within Missouri and a retail license to ship wine directly to consumers.¹¹ A wine retailer in Sarasota, Florida, recently challenged the validity of the Missouri amendment on Dormant Commerce Clause grounds.¹² In *Sarasota Wine Market, LLC v. Schmitt*, the Eighth Circuit faced two important, yet competing interests: (1) Missouri’s power under the Twenty-First Amendment, which allows states to regulate the transportation or importation of alcohol within its economic system; and (2) the freedoms of retailers like Sarasota Wine Market to ship and sell alcohol within an interstate system of commerce.¹³

The year 2020 would likely have restricted a founding father from enjoying his favorite glass of French wine or, as he might say, his “Life, Liberty, and pursuit of Happiness” in Missouri.¹⁴ The Eighth Circuit’s interpretation of current legal doctrines surrounding alcohol distribution similarly inhibits the alcohol industry’s growth during a pandemic and e-commerce driven world—bringing to light a new kind of prohibition. Part II of this Note describes the prohibitory history in the United States, the three-tier alcohol distribution system in Missouri, and the facts in *Sarasota*. Part III provides the relevant legal background of the Dormant Commerce Clause and the Twenty-First Amendment. Part IV explains the Eighth Circuit’s decision in *Sarasota*, which held that Missouri’s retail licensing residency requirement is constitutional, as it does not discriminate against out-of-state retailers and is necessary to protect the health and safety of Missouri citizens. Finally, Part V argues that the Supreme Court of the United States needs to reevaluate the constitutionality of the three-tier system under its new *Tennessee Wine*

⁶ *John Bardenheir Wine & Liquor Co. v. City of St. Louis*, 135 S.W.2d 345, 346 (Mo. 1939) (en banc).

⁷ *Sarasota Wine Mkt., LLC v. Schmitt*, 987 F.3d 1171, 1176 (8th Cir. 2021).

⁸ See UTAH CODE ANN. §§ 32B-2-202, -204, -501, 32B-7-202 (2019).

⁹ See MICH. COMP. LAWS § 436.1231 (1998).

¹⁰ See MO. REV. STAT. § 311.185 (2007).

¹¹ *Id.*

¹² *Sarasota*, 987 F.3d at 1177.

¹³ See *id.* at 1179–80.

¹⁴ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

test, which addresses the relationship between the Dormant Commerce Clause and Section 2 of the Twenty-First Amendment within the growing world of e-commerce.¹⁵

II. FACTS AND HOLDING

To understand the facts of *Sarasota*, it is necessary to first explain the three-tier alcohol distribution system and prohibitory history in the United States.

A. *An Old Fashion: The Traditional Three-tier Model of Alcohol Distribution*

Throughout the twentieth century, many states enacted laws composed of a “three-tier model” for alcohol distribution.¹⁶ Under the original three-tier system, there are three distinct and independently-owned levels of distribution through which alcohol must travel before being sold to consumers.¹⁷ First, the producer – often a winery, brewer, or distiller – sells its product to a licensed in-state wholesaler.¹⁸ Second, the wholesaler – typically the most essential and restrictive level of the three-tier system – pays the excise taxes and delivers the alcohol to the in-state retailers.¹⁹ Generally few in number and sometimes state-owned, wholesalers are the pathway through which all alcohol travels when entering a state’s commerce system.²⁰ States often use the wholesaler-tier to control alcohol sales through inflated or competitive pricing, taxation, and other regulations.²¹ In the final step, after the producer’s shipment and wholesaler’s regulations, the retailer sells the alcoholic products directly to the consumer while collecting the applicable taxes.²² The consumer is

¹⁵ See *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2459 (2019).

¹⁶ *Sarasota*, 987 F.3d at 1176.

¹⁷ *Id.*

¹⁸ *Id.*; Throughout this Note, singular “they” is used to respect and acknowledge nonbinary individuals; the author believes that “they” should be the default singular pronoun for an individual of unknown gender, rather than utilizing “he or she.” See *Singular ‘They’*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/words-at-play/singular-nonbinary-they> [<https://perma.cc/KET9-ERSL>] (last visited Jan. 2, 2022).

¹⁹ *Sarasota*, 987 F.3d at 1176; *Lebamoff Enters. v. Whitmer*, 956 F.3d 863, 868 (6th Cir. 2020).

²⁰ *Lebamoff*, 956 F.3d at 868.

²¹ In Missouri, the State prohibits wholesalers from offering volume discounts to retailers. See, e.g., MO. REV. STAT. § 311.322 (2009); *Lebamoff*, 956 F.3d at 868.

²² *Sarasota*, 987 F.3d at 1176.

then free to “cheers” and drink within the bounds of the state’s statutory laws.

In the nineteenth century, the Missouri legislature passed the original three-tier model to prevent a return to the “tied-house system,” which facilitated monopolies throughout the alcohol distribution process from the producer down to the consumer.²³ Historically, tied-house systems and alcohol monopolies in the United States were run by “absentee owners” who were part of the producer tier.²⁴ The absentee owners provided potential saloonkeepers with property, equipment, and supplies to start their own saloons in exchange for exclusive alcohol distribution contracts.²⁵ As a result, the absentee owners never witnessed the local damage produced by the liquor distributed within their respective communities.²⁶ Instead, the absentee owners were solely focused on turning a profit.²⁷

In early American history, those states without a protective three-tier system often struggled with excess alcohol consumption among children and adults, leading to unstable households and greater levels of misery, addiction, and crime.²⁸ Because each tier of the three-tier system is independently owned and operated, no member of one tier will have a financial interest in a higher or lower tier.²⁹ Thus, the original three-tier system effectively helped eliminate tied-house systems and alcohol monopolies within Missouri and minimized the dangerous effects of alcohol within a community.³⁰

In 1919, Congress quashed the need for the three-tier system when it ratified the Eighteenth Amendment after citizens lobbied to ban alcohol manufacture, sale, and transportation.³¹ That nationwide experiment came to a halt in 1933 when the ratification of the Twenty-First Amendment

²³ See *id.* at 1175–76. A study by the FTC found that this system raises costs, reduces selection, and burdens the overall market. FED. TRADE COMM’N, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE at 3–4 (2003), <https://www.ftc.gov/reports/possible-anticompetitive-barriers-e-commerce-wine> [<https://perma.cc/4S9W-JTS3>].

²⁴ See *Lebamoff*, 956 F.3d at 867.

²⁵ The “absentee owners” of the producer tier were often focused on the economics of the alcohol industry, forcing heavy sales and ease of access to alcohol. See *id.* This blind ownership ignored the social impacts of increased alcohol sales within various communities nationwide. *Id.*

²⁶ *Lebamoff*, 956 F.3d at 867.

²⁷ See *id.*

²⁸ *Id.*; *Sarasota*, 987 F.3d at 1176.

²⁹ *Sarasota*, 987 F.3d at 1176.

³⁰ *Id.*

³¹ See *id.* at 1175; *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2467 (2019); *Lebamoff*, 956 F.3d at 867–68; U.S. CONST. amend. XVIII (repealed 1933).

ended alcohol prohibition.³² Section 1 of the Twenty-First Amendment repealed the Eighteenth Amendment, while Section 2 provided that “the transportation or importation into any state . . . for the delivery or use therein of intoxicating liquors, *in violation of the laws thereof*, is hereby prohibited.”³³ As the Supreme Court once wrote, Section 2 essentially grants “complete control to the states to permit the importation or sale of liquor and [decide] how to structure [their own] liquor system.”³⁴ As such, Section 2 effectively gave states three avenues: prohibit the sale of alcohol within its borders, permit the sale of alcohol in a market heavily regulated by the state’s visible hand, or permit the sale of alcohol with little to no regulation.³⁵ In response to ratification, Missouri promptly enacted the Liquor Control Act in 1933, reviving its pre-prohibition three-tier system.³⁶

B. The King of Beers: Missouri’s Liquor Control Act and License Provisions

In Missouri, not every drop of alcohol goes through the three-tier system. For example, Missouri allows out-of-state wineries to ship wine directly to consumers.³⁷ Allowing producers to ship directly to consumers is unlike allowing retailers to do so. The former is an *exception* to the general rule that all alcohol must pass through licensed wholesalers and retailers before arriving to consumers.³⁸ Typically, licensed retailers ship alcohol purchased from licensed wholesalers, causing both transactions to occur wholly within a state’s three-tier distribution system.³⁹

³² *Sarasota*, 987 F.3d at 1175.

³³ *Id.* (quoting U.S. CONST. amend. XVIII, § 2) (emphasis added).

³⁴ *Sarasota Wine Mkt., LLC v. Parson*, 381 F. Supp. 3d 1094, 1097 (Mo. Ct. App. 2019) (quoting *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980)).

³⁵ *Lebamoff*, 956 F.3d at 868.

³⁶ MO. REV. STAT. Ch. 311; *Sarasota*, 987 F.3d at 1175–76.

³⁷ *See* MO. REV. STAT. § 311.185.1 (2007). In 2007, in response to the Supreme Court’s ruling in *Granholm v. Heald*, the Missouri legislature amended the Liquor Control Act allowing in-state and out-of-state wine producers and retailers to ship wine directly to Missouri consumers. *Sarasota*, 987 F.3d at 1176. However, this statutory provision was repealed in 2017, limiting direct-to-consumer shipment of wine and other alcoholic beverages to those exclusively holding an in-state retailer license or direct from wineries as producers. *See id.* This simultaneously removed out-of-state retailers from their ability to ship directly to in-state consumers. *See id.* at 1177.

³⁸ *Sarasota*, 987 F.3d at 1176; MO. REV. STAT. §§ 311.465, 311.300.2, 311.240.3.

³⁹ *Sarasota*, 987 F.3d at 1176. The State of Missouri also argues that another distinction of Missouri’s alcohol regime is that it is consistently rated “one of the least restrictive in the United States.” WILLIAM P. RUGER & JASON SORENS, FREEDOM IN

Unique to Missouri's traditional three-tier system is a ban preventing the sale of alcohol "without taking a license."⁴⁰ To obtain a license, an applicant must demonstrate "good moral character" and establish that they are "a qualified legal voter and taxpaying citizen of the county, town, city or village" in which the act of alcohol distribution will occur.⁴¹ A corporate licensee's managing officer must also abide by Missouri licensing rules and operate from the physical premises in Missouri listed in the license.⁴² Finally, the managing retailer and officer must purchase liquor exclusively from Missouri-licensed wholesalers.⁴³

C. Brewing a New Debate: Sarasota Wine Market, LLC v. Schmitt

Sarasota involved two sets of plaintiffs: Missouri residents seeking to buy wines from out-of-state retailers and an out-of-state retailer ("Magnum Wine") wanting to ship wines directly to Missouri residents.⁴⁴ If the Missouri Liquor Control Act – which requires physical residency in Missouri for retailers – were ruled unconstitutional under the Dormant Commerce Clause,⁴⁵ these residents could purchase wine from the out-of-state retailer and the out-of-state retailer could sell and ship the wine directly to the Missouri residents.⁴⁶

Magnum Wine did not intend to establish Missouri residency or restrict its purchases to Missouri-licensed wholesalers.⁴⁷ Although these

THE 50 STATES 159 (3d ed. 2013). In fact, since 2000, Missouri has ranked either first or second in terms of "alcohol freedom," a category that includes the distribution regulations challenged in this case. *Missouri Alcohol Freedom*, FREEDOM IN THE 50 STATES, <https://www.freedominthe50states.org/alcohol/missouri> [<https://perma.cc/J5B5-EUDY>] (last visited Apr. 25, 2022).

⁴⁰ See MO. REV. STAT. § 311.180.1 (2007). Missouri also licenses "solicitors" who can act as intermediaries between producers and wholesalers. See *id.* § 311.180.2. Although solicitors may be considered a "fourth tier," their inclusion "does not alter the basic features of the three-tier system" that the Supreme Court has endorsed, including in-state presence requirements. *S. Wine & Spirits of Am. v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799, 805 n.3 (8th Cir. 2013); *Sarasota Wine Mkt., LLC v. Parson*, 381 F. Supp. 3d 1094, 1097 (Mo. Ct. App. 2019); MO. REV. STAT. § 311.050.

⁴¹ MO. REV. STAT. § 311.060.1 (2021).

⁴² *Id.* § 311.280.1 (2009).

⁴³ *Id.* §§ 311.220.3 (2016), 311.240.3 (2007).

⁴⁴ *Sarasota*, 381 F. Supp. 3d at 1094.

⁴⁵ "The Congress shall have the power to... regulate Commerce ... among the several states." U.S. CONST., art. I, § 8, cl. 3. Although phrased as an affirmative grant of power to Congress, the Supreme Court has long held that this Clause also prohibits state laws that unduly restrict interstate commerce. *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2459 (2019).

⁴⁶ *Sarasota*, 381 F. Supp. 3d at 1097–98.

⁴⁷ *Sarasota Wine Mkt., LLC v. Schmitt*, 987 F.3d 1171, 1177 (8th Cir. 2021).

procedures would permit Magnum Wine to qualify for an in-state retail license and allow direct-to-consumer shipments to Missouri residents, they would also impose unreasonable economic stress on Magnum Wine's business that similarly situated Missouri-based retailers do not encounter.⁴⁸ The plaintiffs (together, "Sarasota") sued the defendants, Missouri Governor Mike Parson and Attorney General Eric Schmitt ("Missouri Officials") in their official capacities.⁴⁹

Sarasota alleged that, as applied to retailers shipping wine directly to Missouri consumers, the residency and physical presence license requirements violate the Dormant Commerce Clause because they discriminate against interstate commerce and constitute economic protectionism of local businesses.⁵⁰ By contrast, Missouri Officials argued that the licensing requirements are permissible components of the three-tier system that the United States Supreme Court has deemed "unquestionably legitimate" under Section 2 of the Twenty-First Amendment.⁵¹ While the Eighth Circuit previously stated that only *producers* are protected from state restrictions fashioned under Section 2,⁵² here the district court held that Magnum Wine is a *retailer* and therefore subject to state restrictions under Section 2.⁵³

Sarasota appealed, relying on the Supreme Court's recent interpretation of Section 2 in *Tennessee Wine & Spirits Retailers Association v. Thomas*,⁵⁴ where the Court rejected the Eighth Circuit's original approach.⁵⁵ Noting that Missouri imposes the same licensing

⁴⁸ *Sarasota*, 381 F. Supp. 3d at 1098.

⁴⁹ *Id.*

⁵⁰ *Sarasota*, 987 F.3d 1171, 1177.

⁵¹ It is important to note that this is mentioned in the concurrence as dicta. *Id.* at 1177, 1180 (8th Cir. 2021) (citing *North Dakota v. United States*, 495 U.S. 423, 447 (1990) (Scalia, J., concurring)).

⁵² *Sarasota*, 987 F.3d at 1177 (emphasis added) (citing *S. Wine & Spirits of Am., Inc. v. Div. of Alcohol and Tobacco Control*, 731 F.3d 799 (8th Cir. 2013)).

⁵³ *Id.* (emphasis added).

⁵⁴ *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449 (2019).

⁵⁵ *Tennessee Wine*, which explicitly rejected the Eighth Circuit's reasoning in *Southern Wine*, was decided after the holding in *Sarasota*. See generally *id.* The Eighth Circuit, however, heavily relied on *Southern Wine* in its reasoning and decision in *Sarasota*. *Sarasota*, 987 F.3d at 1177. This now preempted reliance led to seemingly inconsistent holdings within the law of alcohol distribution within Missouri. Attorney General (now Senator) Joshua Hawley, whom current Attorney General Eric Schmitt later replaced, specifically requested that the United States District Court of the Eastern District of Missouri not wait for the Supreme Court's decision in *Tennessee Wine* to be announced. Hawley claimed that *Tennessee Wine* was not directly related to the issues of *Sarasota* and, therefore, should be decided before a new precedent is released. Defs. Resp. to Pls. Notice of Action by U.S. Supreme Ct., *Sarasota Wine Mkt., LLC v. Parsons*, No. 4:17-cv-2792 HEA (Mo. Ct. App. Mar. 30, 2019); *Sarasota*, 987 F.3d at 1177.

requirements on in-state and out-of-state retailers, the Eighth Circuit in *Sarasota Wine Market* ultimately affirmed the district court's decision and held that the licensing requirements are constitutional under the Dormant Commerce Clause.⁵⁶

III. LEGAL BACKGROUND

The Commerce Clause and Twenty-First Amendment together provide a legal framework for policing alcohol manufacturing, consumption, and distribution within the United States.⁵⁷ The history of American alcohol laws can be separated into three main categories: (1) the pre-prohibition period, from the Wilson Act of 1890 to the ratification of the Eighteenth Amendment in 1919;⁵⁸ (2) the post-prohibition period, from the adoption of the Twenty-First Amendment in 1933 to the Court's narrow approach to state power in the 1980s;⁵⁹ and (3) the modern legal doctrine used to analyze restrictions on alcohol distribution. Circuit courts are currently split in their approach to these issues, and the United States Supreme Court attempted to resolve this tension in *Tennessee Wine*.

A. Sweet to Dry Regulations: Pre-Prohibition and the Dormant Commerce Clause

The regulation of interstate alcohol began well before the ratification of the Eighteenth Amendment, as the Supreme Court struck down state laws banning or burdening the sale of imported liquor in a series of cases in the 1880s.⁶⁰ These cases advanced the Dormant Commerce Clause theory that Article I, Section 8, Clause 3 of the United States Constitution prevented states from discriminating against imported liquor and passing facially neutral laws that placed an impermissible burden on interstate commerce.⁶¹ For example, in *Bowman v. Chicago & Northwestern R. Co.*,

⁵⁶ *Sarasota*, 987 F.3d at 1184–85.

⁵⁷ Amdt 21.1 Twenty-First Amendment: Doctrine and Practice, CONGRESS.GOV, https://constitution.congress.gov/browse/essay/amdt21-1/ALDE_00001007/ [<https://perma.cc/QZN7-5FU4>].

⁵⁸ See generally *Granholm v. Heald*, 544 U.S. 460 (2005).

⁵⁹ *Id.*

⁶⁰ See *Granholm*, 544 U.S. at 476 (citing multiple cases).

⁶¹ See *Rhodes v. Iowa*, 170 U.S. 412 (1898); *Vance v. W.A. Vandercook Co.*, 170 U.S. 438 (1898); *Scott v. Donald*, 165 U.S. 58 (1897); *Leisy v. Hardin*, 135 U.S. 100 (1890) (allowing for any liquor in its original package to be immune from any state regulation); *Bowman v. Chicago & Northwestern R. Co.*, 125 U.S. 465 (1888) (striking down an Iowa statute that required all liquor importers to have a permit (Iowa responded by banning the sale of all imported liquor)); *Walling v. Michigan*, 116 U.S. 446, 445 (1886) (invalidating a Michigan tax that discriminated against liquor imported from other states while exempting the sale of local products as an

the Court struck down an Iowa statute that prohibited the transportation of alcohol within the limits of the State unless accompanied with a specific license.⁶² The Court reasoned that the Iowa law was repugnant to the Dormant Commerce Clause because alcohol shipments from Illinois to Iowa directly affect interstate commerce—which Congress has the exclusive right to control under Article I, Section 8, Clause 3.⁶³

Two years later, in *Leisy v. Hardin*, the Court again faced a constitutional challenge to an Iowa statute—this time one that prohibited the sale of alcohol except by local pharmacists for medicinal, chemical, or religious purposes.⁶⁴ While the *Leisy* Court expressly acknowledged the rights of states to pass legislation to protect their citizens from the harmful effects of alcohol, its decision seemed to rely on *Bowman* and was based more on whether states could usurp powers explicitly reserved for Congress.⁶⁵ The *Leisy* Court held that, in the absence of Congress's permission, the Iowa legislature violated the Dormant Commerce Clause because it had no authority to pass statutes which interfered with the interstate importation of alcohol.⁶⁶

In response to *Leisy*, Congress passed the Wilson Act in 1890,⁶⁷ which empowered states to regulate interstate liquor on the same terms as intrastate alcohol so long as they did not discriminate against out-of-state liquor.⁶⁸ Congress also passed the Webb-Kenyon Act in 1913, which prohibited the shipment or transportation of alcohol only where it ran afoul of the state's generally applicable laws governing receipt, possession, sale, or use.⁶⁹ These acts allowed a state to declare itself dry, provided that the state treated in-state and out-of-state liquor equally by banning the shipment and sale of both.⁷⁰ The success of these acts fueled the temperance movement's call for an amendment for total prohibition at the federal level.⁷¹ The regulatory scheme between state powers granted under the Wilson and Webb-Kenyon Acts and federal regulatory powers inherent in the Dormant Commerce Clause halted with the ratification of

“usurpation of power conferred by the constitution to Congress.”); *Tieman v. Rinker*, 102 U.S. 123 (1880).

⁶² *Rhodes*, 170 U.S. at 415.

⁶³ *Id.*

⁶⁴ *Leisy*, 135 U.S. at 122.

⁶⁵ *Id.* at 111.

⁶⁶ *Id.* at 125–25.

⁶⁷ See *Granholt v. Heald*, 544 U.S. 460, 478 (2005).

⁶⁸ 27 U.S.C. § 121.

⁶⁹ *Id.* § 122.

⁷⁰ *Granholt*, 544 U.S. at 481.

⁷¹ Kendall Dicke, *Wait or Discriminate? Implications of Tennessee Wine & Spirits Retailers Ass'n v. Thomas on the Alcohol Market*, 81 LA. L. REV. 581, 595 (2021).

the Eighteenth Amendment, which called for the total prohibition manufacture, sale, or transportation of alcohol within the United States.⁷²

B. On the Rocks to Neat: The Twenty-First Amendment in the Twentieth Century

The ratification of the Twenty-First Amendment in 1933 brought an end to prohibition's thirteen-year failed experiment.⁷³ Section 1 of the Twenty-First Amendment directly repealed the Eighteenth Amendment, while "[t]he wording of Section 2 closely follow[ed] the Webb-Kenyon and Wilson Acts, expressing the clear intention of constitutionalizing the Dormant Commerce Clause framework established throughout those [historical] statutes."⁷⁴ However, the legislative intent of Section 2, including the effective adoption of the Dormant Commerce Clause's wording and reasoning, was quickly lost by the judiciary.⁷⁵ The early courts misinterpreted Section 2 as transferring interstate commerce power from Congress to the states by constitutional amendment.⁷⁶ This interpretation led to absolute state control over interstate commerce affecting intoxicating liquors and rendered the Dormant Commerce Clause immaterial to liquor regulations.⁷⁷

The Supreme Court further solidified this broad overreach of state powers under Section 2 in a series of cases where states took it upon themselves to expand their trade barriers.⁷⁸ The seminal case providing an initial judicial review of Section 2 was *California Board of Equalization*

⁷² U.S. CONST. amend. XVIII; *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 194 (2d Cir. 2009) (Calabresi, Circuit Judge, concurring).

⁷³ U.S. CONST. amend. XXI.

⁷⁴ Section 2 states, "the transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is prohibited." (quoting *Craig v. Boren*, 429 U.S. 190, 205–06 (1976)).

⁷⁵ See *Arnold's Wines, Inc.*, at 195. (Calabresi, Circuit Judge, concurring) ("The language of section two is rather opaque. In its terms, it does not authorize any state regulation but rather just forbids people from transporting alcohol into a state in ways that violate that state's laws. Courts, nevertheless, have consistently (and understandably) read the section to authorize broad state regulation.").

⁷⁶ See *id.*

⁷⁷ *Id.*

⁷⁸ See *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938); *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391 (1939) (holding that the Dormant Commerce Clause does not limit the right of a state to regulate the importation of liquor even when faced with a discriminating reciprocity statute); *Ziffrin, Inc. v. Reeves*, 308 U.S. 132 (1939) (holding states possessed full policing authority over the exportation of alcohol across state lines); *Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395 (1939); *State Bd. Of Equalization of Cal. v. Young's Mkt. Co.*, 299 U.S. 59 (1936).

*v. Young's Market Co.*⁷⁹ In *Young's Market*, the Court acknowledged that a California statute, which imposed a license fee for importing beer within its borders, would have violated the Dormant Commerce Clause *before* Section 2's enactment.⁸⁰ But the Court argued that Section 2 narrowed the scope of the Dormant Commerce Clause as it relates to alcohol distribution and therefore held that the California statute was constitutional.⁸¹ This laissez-faire approach to state statutes regarding alcohol shifted after the implementation of FDR's "New Deal" amid the Great Depression.

In 1945, the Court laid a new foundation to reincorporate the Dormant Commerce Clause's influence into alcohol regulation.⁸² In *United States v. Frankfort Distilleries*, for example, wholesalers, retailers, and producers in Colorado conspired to artificially inflate the prices of out-of-state-imported liquor.⁸³ The Court held that while Section 2 gives states power over the importation of alcohol, it does not remove the federal government's ability to regulate interstate commerce of liquor outside the respective state.⁸⁴ The Court reasoned that even if Section 2 grants states broad regulatory power over liquor traffic within their boundaries, both the Sherman Act and Colorado Fair Trade Act prohibited this type of price inflation under the Dormant Commerce Clause.⁸⁵ The "rewriting" of the judicial interpretation of Section 2 and the Dormant Commerce Clause continued until 1964 when the Court further clarified the relationship in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*⁸⁶ In *Hostetter*, the Court mentioned that Section 2 did not repeal the Dormant Commerce Clause when liquor is involved, but instead, the two constitutional provisions must be considered in light of the other and within the context of the issues at stake.⁸⁷

The Court continued to narrow its reading of Section 2's state protections throughout the 1980s.⁸⁸ First, in *Bacchus Imports, Ltd. v. Dias*, the Court noted that economic protectionism was not "the central purpose"

⁷⁹ See *State Bd.*, 299 U.S. at 59.

⁸⁰ *Id.* at 60–62.

⁸¹ See *id.* at 63–64.

⁸² See *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293 (1945).

⁸³ *Id.* at 295.

⁸⁴ *Id.* at 299.

⁸⁵ *Id.*

⁸⁶ See *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964).

⁸⁷ *Id.* at 331–32; See also *Craig v. Boren*, 429 U.S. 190, 206 (1976) (reaffirming its point in *Hostetter* that the Dormant Commerce Clause must be considered with Section 2 of the Twenty-first Amendment when considering regulation of intoxicating liquors); cf. *Dep't. of Revenue v. James Beam Distilling Co.*, 377 U.S. 341 (1964); *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518 (1938).

⁸⁸ See *Healy v. Beer Inst.*, 491 U.S. 324, 343 (1989); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 585 (1986); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984).

of Section 2.⁸⁹ Instead, the Court provided that state laws enacted for the sole purpose of protectionism are not entitled to the same deference as state laws that use Section 2 to support temperance and protect the health and safety of a state's citizens.⁹⁰ In an effort to prevent states from relying on Section 2 to control economic competition, the *Bacchus* Court ultimately struck down a Hawaiian tax exemption favoring locally-produced alcohol.⁹¹ In two subsequent cases, the Court continued to strike down protectionist state statutes—ones which required liquor producers to affirm they were not charging higher prices to citizens in different states.⁹² The Court reasoned that Section 2 does not permit states to regulate sales prices in other states because the Dormant Commerce Clause grants that power to Congress.⁹³

In addition to a narrower reading of Section 2's protections for states, the Court noted in *North Dakota v. United States* that Section 2 directly supports the three-tier system.⁹⁴ In *North Dakota*, the State enacted a statute requiring that all liquor sold within its borders be purchased through a licensed in-state wholesaler.⁹⁵ The Court held that states could assume direct control of liquor distribution through state-run outlets or funnel sales through a wholesaler within a traditional three-tier system.⁹⁶ In *dictum*, the Court even recognized that the three-tier system itself is “unquestionably legitimate.”⁹⁷

C. Shaken or Stirred: The Implementation of North Dakota Ultimatum and the Granholm Test

Before *North Dakota*, the three-tier system remained largely untouched by judiciary challenges throughout the twentieth century. In 1994, however, the Fifth Circuit examined a Dormant Commerce Clause challenge to a Texas law which required a three-year residency to receive a retail liquor license in the state.⁹⁸ The case also examined a related Texas statute which required all corporations with a liquor-license to be owned in a majority by license-eligible individuals—whom are those that meet

⁸⁹ *Bacchus Imports, Ltd.*, 468 U.S. at 276.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² See *Healy*, 491 at 343 (invalidating a Connecticut price affirmation statute that requires producers to limit the price of liquor based on the lowest price they offered out of State); See also *Brown-Forman Distillers Corp.*, 475 U.S. at 585 (invalidating a similar New York price affirmation statute).

⁹³ *Brown-Forman Distillers Corp.*, 475 U.S. at 585.

⁹⁴ See *North Dakota v. United States*, 495 U.S. 423 (1990) (plurality opinion).

⁹⁵ *Id.* at 428.

⁹⁶ *Id.* at 432.

⁹⁷ *Id.*; see *id.* at 447 (Scalia, J., concurring) (emphasis added).

⁹⁸ See *Cooper v. McBeath*, 11 F.3d 547, 549 (5th Cir. 1994).

the residency requirements.⁹⁹ The Fifth Circuit relied on the Supreme Court's more modern Section 2 doctrine to establish that the burden of proof shifts to states when a statute gives rise to the tension between Section 2 and the Dormant Commerce Clause. According to the Fifth Circuit, the Supreme Court's Section 2 precedent requires that such states show a legitimate local purpose that cannot be adequately served by reasonable, nondiscriminatory alternatives.¹⁰⁰ The standards for such a task are towering and invoke the strictest scrutiny as economic protectionism affected by state legislation is *prima facie* invalid.¹⁰¹ Texas officials provided sufficient evidence of the statute's local benefits but failed to prove the unavailability of nondiscriminatory alternatives.¹⁰² Thus, the Fifth Circuit struck down Texas's protectionist residency requirement for liquor retailers as unconstitutional and not within the powers reserved by Section 2.¹⁰³

The Sixth Circuit took up a similar challenge in *Granholm v. Heald*—a case that would permanently sever the producer level from the rest of the three-tier model.¹⁰⁴ In *Granholm*, New York and Michigan had traditional three-tier systems to regulate alcohol transportation and distribution which permitted the direct-to-consumer shipment of wine from in-state wine producers.¹⁰⁵ They did not afford out-of-state wine producers the same privilege.¹⁰⁶ In other words, in-state wineries could bypass the middleman (i.e., wholesalers) in the three-tier system, but their out-of-state competitors could not.¹⁰⁷ However, New York provided a statutory scheme that permitted an out-of-state winery to bypass the wholesaler and ship direct-to-consumer if it: (1) used seventy-five percent New York grapes and (2) established a physical presence, such as a “branch, office or storeroom,” within the State lines.¹⁰⁸ These requirements were

⁹⁹ In this case, the owners needed to require Texas' three-year prior residency requirement to receive and hold a valid liquor license within the State. *Id.*

¹⁰⁰ See *North Dakota*, 495 U.S. at 432; *Healy v. Beer Inst.*, 491 U.S. 324, 343 (1989); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 585 (1986); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984).

¹⁰¹ *Cooper*, 11 F.3d at 553; *Cf.*, *Hughes v. Oklahoma*, 441 U.S. 322, 337 (1979) (“[F]acial discrimination by itself may be a fatal defect” and “[a]t a minimum ... invokes the strictest scrutiny”); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) (“Where simple economic protectionism is effected by state legislation, a virtually per se rule of invalidity has been erected.”).

¹⁰² *Cooper*, 11 F.3d at 554.

¹⁰³ *Id.* at 555. (quoting *Capital Cities Cable, Inc. v. Crips*, 467 U.S. 691, 714 (1984)).

¹⁰⁴ See *Granholm v. Heald*, 544 U.S. 460, 468 (2005).

¹⁰⁵ *Id.* at 466.

¹⁰⁶ *Id.* at 466–67.

¹⁰⁷ *Id.*

¹⁰⁸ N.Y. ALCO. BEV. CONT. LAW §§ 3(20-a), 3(37); *Granholm*, 544 U.S. at 470 (quoting N.Y. ALCO. BEV. CONT. LAW § 3(37)).

prohibitory in nature and created a slippery slope for state protectionism under Section 2, as expanding its protections to allow every state to impose similar residency requirements would be unreasonable.¹⁰⁹ *Granholm* made its way to the Supreme Court, where the majority mentioned that the courts have continually “viewed with particular suspicion state statutes requiring business operations to be performed in the home state that could be more efficiently performed elsewhere.”¹¹⁰

In 2005, the *Granholm* Court held that the New York and Michigan statutes were unconstitutional as straightforward attempts to discriminate in favor of in-state wine producers.¹¹¹ The Court reasoned that the states provided little evidence that they could not police out-of-state shipments as efficiently as those shipped from in-state wineries.¹¹² *Granholm* effectively severed the producer level from the three-tier system because it upheld the direct shipment of wine from producer to consumer—so long as this privilege is afforded to *both* in-state and out-of-state wine producers.¹¹³

The *Granholm* Court also reanalyzed the Wilson and Webb-Kenyon Acts, which did not provide for immunization of all alcohol regulations from Dormant Commerce Clause scrutiny, but protected only those laws which treat in-state liquor the same as its out-of-state equivalent.¹¹⁴ This analysis produced the *Granholm* test, now used to determine the constitutionality of state liquor regulations.¹¹⁵ The *Granholm* test provides that courts shall not uphold a state alcohol statute which discriminates in favor of in-state producers or products unless the statute reasonably advances legitimate state interests that reasonable, nondiscriminatory alternatives cannot adequately serve.¹¹⁶ This new framework opened the gates for a flood of new litigation regarding the constitutionality of state restrictions on the wholesaler and retailer tiers.

D. Seltzers or Beer: The Modern Debate Outside the Producer Tier

The Eighth Circuit was the first to explore tensions between the Twenty-First Amendment and the Dormant Commerce Clause regarding state licensing of *wholesalers*.¹¹⁷ In *Southern Wine & Spirits of America*

¹⁰⁹ *Granholm*, 544 U.S. at 475.

¹¹⁰ *Id.* (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145 (1970)).

¹¹¹ *Id.* at 493.

¹¹² *Id.* at 492–93.

¹¹³ *Id.* at 493 (emphasis added).

¹¹⁴ *Id.* at 462.

¹¹⁵ *Arnold’s Wines, Inc. v. Boyle*, 571 F.3d 185, 189 (2d Cir. 2009).

¹¹⁶ *Granholm*, 544 U.S. at 489.

¹¹⁷ *See S. Wine & Spirits of Am., Inc. v. Div. of Alcohol and Tobacco Control*, 731 F.3d 799, 809 (8th Cir. 2013) (emphasis added).

v. Division of Alcohol and Tobacco, the Eighth Circuit examined a Missouri statute that imposed a three-year *durational* residency requirement on alcohol wholesalers and wholesaler officials and directors.¹¹⁸ Southern Wine challenged the statute on Dormant Commerce Clause grounds because it had officers located in Florida and could not qualify for a Missouri wholesaler license.¹¹⁹

The Eighth Circuit used a modified *Granholm* test that considered the reasoning found in the Supreme Court's *North Dakota* analysis.¹²⁰ The court first determined that the Missouri statute provided an equal playing field between out-of-state and in-state products or producers.¹²¹ According to the court, both were required to use the same three-tier system with the same three year-residential restrictions.¹²² The Eighth Circuit also explained that the true purpose of the statute was to "promote responsible consumption, combat illegal underage drinking, and achieve other important state policy goals. . . ." ¹²³ Importantly, the court determined that the statute was *not* enacted for economic protectionism.¹²⁴ Relying on *North Dakota*, the Eighth Circuit noted that state policies that define the structure of the liquor system are "unquestionably legitimate."¹²⁵ Under this framework, the court concluded that Section 2 protects the three-tier system and therefore insulates licensing requirements placed on wholesalers within a three-tier system.¹²⁶ Because the three-year resident requirement passed the *Granholm* test, the Eighth Circuit determined that the wholesaler residency restriction survived Dormant Commerce Clause scrutiny.¹²⁷ The Second Circuit provided support for the Eighth Circuit's *Southern Wine* approach when it reached a similar conclusion in *Arnold's Wines v. Boyle*.¹²⁸

The Fifth Circuit flipped the focus from wholesaler licensing regulations to the licensing of *retailers* in *Cooper v. Texas Alcoholic*

¹¹⁸ *Id.* at 802 (citing MO. REV. STAT. §§ 311.180(1), 311.200).

¹¹⁹ *Id.* at 803.

¹²⁰ *Id.* at 809. The North Dakota test said that Section 2 directly supports the three-tier system that is "unquestionably legitimate" *Cooper v. McBeath*, 11 F.3d 547, 549 (5th Cir. 1994).

¹²¹ *Id.* at 810.

¹²² *Id.*

¹²³ *Id.* at 808–09.

¹²⁴ *Id.*

¹²⁵ *Id.* at 809 (citing *North Dakota v. United States*, 495 U.S. 423, 447 (1990) (Scalia, J., concurring)).

¹²⁶ *Id.* at 810.

¹²⁷ *Id.* at 812.

¹²⁸ *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 189–91 (2d Cir. 2009) (holding that a New York statutory scheme that allowed for in-state retailers to obtain off-premises delivery licenses, but not out-of-state retailers constitutional under Section 2 and not subject to Dormant Commerce Clause scrutiny).

Beverage Commission.¹²⁹ In *Cooper*, the Fifth Circuit discussed the tensions between Section 2 and the Dormant Commerce Clause when it examined a Texas statute requiring a one-year durational residency requirement for alcohol retailers and retailer officials.¹³⁰ The Fifth Circuit declined to follow the Eighth Circuit’s approach in *Southern Wine* regarding wholesaler residency licensing requirements.¹³¹ The Fifth Circuit reasoned that, unlike at the producer tier, state regulations imposed upon the retailer and wholesaler tiers are not immune from Dormant Commerce Clause scrutiny simply because they do not favor in-state producers or products.¹³² According to the *Cooper* court, Section 2 insulates a *physical*-residency requirement on retailers and wholesalers from Dormant Commerce Clause scrutiny, even though such provision favors in-state businesses, as it is vital to the three-tier system.¹³³ The court argued that Section 2 does not, however, authorize a *durational*-residency requirement because such requirements favor in-state wholesalers and retailers but are not an “inherent” aspect of the three-tier system.¹³⁴ Therefore, the Fifth Circuit held that the *durational*-residency statute was subject to Dormant Commerce Clause scrutiny and unconstitutional.¹³⁵ The Seventh Circuit endorsed the Fifth Circuit’s interpretation of the *Granholm* and *North Dakota* tests when it reached a similar conclusion in *Lebamoff Enterprises, Inc. v. Rauner*.¹³⁶

As two interpretations of the *Granholm* and *North Dakota* tests emerged throughout the various circuits, the Supreme Court granted certiorari in *Tennessee Wine & Spirits Retailers Association v. Thomas* to resolve the circuit split.¹³⁷ This case involved a Tennessee statute requiring two years of “bona fide” durational residency to apply for a *retail* liquor license.¹³⁸ In 2012, Tennessee’s Attorney General stopped the

¹²⁹ See *Cooper v. Tex. Alcoholic Bev. Comm’n*, 820 F.3d 730 (5th Cir. 2016) (emphasis added).

¹³⁰ *Id.* at 734.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* (“Distinctions between in-state and out-of-state retailers and wholesalers are permissible only if they are an inherent aspect of the three-tier system.”).

¹³⁶ *Lebamoff Enterp. Inc. v. Rauner*, 909 F.3d 847, 849–50 (7th Cir. 2018) (holding that an Illinois statutory scheme that required retailers to obtain physical in-state presence to ship directly to consumers via mail order, but not out-of-state retailers is unconstitutional under the Dormant Commerce Clause and is not protected under Section 2 of the Twenty-first Amendment).

¹³⁷ *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2459 (2019).

¹³⁸ TENN. CODE ANN. § 57-3-204(b)(2)(A) (2015); *Tenn. Wine & Spirits Retailers Ass’n*, 139 S. Ct. at 2457 (emphasis added).

enforcement of the durational residential requirement on grounds that it violated the Dormant Commerce Clause under the previous holdings in the Fifth and Seventh Circuits.¹³⁹ In retaliation, the Tennessee General Assembly amended the relevant statute with a legislative purpose and intent statement to protect the statute from apparent Dormant Commerce Clause scrutiny.¹⁴⁰ The amendment cited health, safety, welfare, control, and accountability of retail liquor stores as its rationale for the two-year durational residency requirements for retailers.¹⁴¹

The Supreme Court ultimately held that the two-year durational residency requirement lacked Section 2 protection and was unconstitutional under the Dormant Commerce Clause.¹⁴² The test applied in *Tennessee Wine* provides that any state law that discriminates against out-of-state goods or nonresident economic actors may be sustained only on a showing that it is narrowly tailored to advance a legitimate local purpose and that there are no nondiscriminatory means available.¹⁴³ The Court determined that the Tennessee statute at issue was protectionist in nature and that there was little relationship between the durational licensing requirements and the advancement of public health or safety interests.¹⁴⁴ *Tennessee Wine* ultimately confirmed the Fifth Circuit's argument in *Cooper* that a durational-residency requirement for retailers or wholesalers is not an "essential feature" of a three-tier scheme.¹⁴⁵ After *Tennessee Wine*, it appeared that the Supreme Court had effectively corked the tensions between Section 2 and the Dormant Commerce Clause for good.

Shortly thereafter, the Sixth Circuit was the first to interpret the new *Tennessee Wine* standard.¹⁴⁶ In *Lebamoff Enterprises v. Whitmer*, a Michigan statute allowed in-state liquor retailers to deliver directly to an in-state consumer.¹⁴⁷ Therefore, the court faced a narrow question: if a state has a three-tier system that requires all alcohol sales to run through its in-state wholesalers,¹⁴⁸ and if it requires retailers to be located within

¹³⁹ Specifically, the holdings found in *S. Wine & Spirits of Am., Inc. v. Div. of Alcohol and Tobacco Control*, 731 F.3d 799 (8th Cir. 2013) and *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185 (2d Cir. 2009); *Tenn. Wine & Spirits Retailers Ass'n*, 139 S. Ct. at 2457–58.

¹⁴⁰ Specifically, the holdings found in *Lebamoff*, 909 F.3d at 847 and *Cooper v. Tex. Alcoholic Bev. Comm'n*, 820 F.3d 734 (5th Cir. 2016); TENN. CODE ANN. § 57-3-204(b)(4) (2015); *Tenn. Wine & Spirits Retailers Ass'n*, 139 S. Ct. at 2458.

¹⁴¹ TENN. CODE ANN. § 57-3-204(b)(4) (2015); *Tenn. Wine & Spirits Retailers Ass'n*, 139 S. Ct. at 2458.

¹⁴² *Lebamoff*, 956 F.3d at 869 (quoting *Tenn. Wine & Spirits Retailers Ass'n*, 139 S. Ct. at 2461).

¹⁴³ *Tenn. Wine & Spirits Retailers Ass'n*, 139 S. Ct. at 2474–75.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 2471.

¹⁴⁶ See *Lebamoff*, 956 F.3d at 863.

¹⁴⁷ *Id.* at 868.

¹⁴⁸ See *Tenn. Wine & Spirits Retailers Ass'n*, 139 S. Ct. at 2457.

the state,¹⁴⁹ may it restrict the delivery options of out-of-state retailers via statute while allowing for delivery of alcohol by in-state retailers?¹⁵⁰ Under *Tennessee Wine*, the answer – according to the Sixth Circuit – was yes.¹⁵¹ The court noted that an in-state retailer is subject to the rules and regulations of Michigan’s three-tier system, whereas an out-of-state retailer is not bound by the same safety standards.¹⁵² The Sixth Circuit held that the Michigan statute did not violate the Dormant Commerce Clause because Section 2 granted states express authority over the importation of alcohol within their borders.¹⁵³ The Court also asserted that the law promoted legitimate state interests and the law’s limiting factors did not flow from economic protectionism.¹⁵⁴

IV. INSTANT DECISION

In *Sarasota*, Judge Loken wrote the opinion for a unanimous panel in the Eighth Circuit.¹⁵⁵ The Eighth Circuit held that the Missouri laws at issue are essential to a three-tier system and that the rules governing the license of direct shipments of wine to Missouri consumers apply evenhandedly to all who qualify for an in-state retailer’s license.¹⁵⁶

The court’s analysis follows *Tennessee Wine*, expanding the coverage of the Dormant Commerce Clause over the implementation of a state’s three-tier system that is otherwise “unquestionably legitimate.”¹⁵⁷ To effectively defeat Dormant Commerce Clause scrutiny, the principles underlying a Section 2 argument must be sufficiently implicated—specifically, the state must show a valid interest in regulating alcohol.¹⁵⁸ The Eighth Circuit laid out several successfully-claimed state interests that previously survived Dormant Commerce Clause scrutiny and received Section 2 protection, such as: (1) promoting responsible consumption, (2)

¹⁴⁹ *Cooper v. Tex. Alcoholic Bev. Comm’n*, 820 F.3d 730, 734 (5th Cir. 2016).

¹⁵⁰ *Lebamoff*, 956 F.3d at 870.

¹⁵¹ *Id.*

¹⁵² *Id.* at 872–73.

¹⁵³ *Id.* at 873 (citing *Tenn. Wine & Spirits Retailers Ass’n*, 139 S. Ct. at 2471).

¹⁵⁴ *Lebamoff*, 956 F.3d at 871.

¹⁵⁵ *Sarasota Wine Mkt., LLC v. Schmitt*, 987 F.3d 1171, 1175 (8th Cir. 2021).

¹⁵⁶ By Missouri imposing the same licensing requirements on in-state and out-of-state retailers selling to Missouri Consumers, every use of Section 2 could be defined as “discriminatory because every statute limiting importation leaves intrastate commerce unaffected. If that were the sort of discrimination that lies outside state power, Section 2 would be facially irrelevant.” *Sarasota*, 987 F.3d at 1184.

¹⁵⁷ *Sarasota*, 987 F.3d at 1180 (citing *Tenn. Wine & Spirits Retailers Ass’n*, 139 S. Ct. at 2471; *Granholm v. Heald*, 544 U.S. 460, 488–90 (2005); *North Dakota v. United States*, 495 U.S. 423, 432 (1990); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 275 (1984)).

¹⁵⁸ *Sarasota*, 987 F.3d at 1180.

preventing underage drinking, and (3) collecting sales and excise taxes to benefit the state's alcohol-based education and treatment programs.¹⁵⁹ However, the court also acknowledged that those claims would fail when combined with a theory of economic protectionism unless there was no other non-discriminatory alternative to achieve the alleged purpose.¹⁶⁰

The Eighth Circuit then illustrated *Granholtz*, *Southern Wine*, and *Tennessee Wine* as binding precedents.¹⁶¹ The court, however, first needed to rectify and reexamine its prior precedent in *Southern Wine*. The Eighth Circuit argued that the Supreme Court overruled only *part* of the *Southern Wine* reasoning when it held in *Tennessee Wine* that the Dormant Commerce Clause applied to all three-tiers of the three-tier system.¹⁶² The Eighth Circuit further explained that Missouri's three-year wholesaler residency requirement passes muster because it serves valid health, safety, and regulatory interests.¹⁶³ The court clarified that although the Supreme Court invalidated Tennessee's two-year durational residency requirement, its holding was limited to those seeking an initial *retail* license, as opposed to *wholesalers* who are the true backbone of the three-tier system.¹⁶⁴ The Eighth Circuit also noted that the residency requirement in *Tennessee Wine* was protectionist by nature and had no adequate state interests to survive Dormant Commerce Clause scrutiny.¹⁶⁵

The Eighth Circuit then cited many cases to explain that the retail licensing requirements at issue here were consistently upheld as essential to a three-tier system that is "unquestionably legitimate."¹⁶⁶ The court specifically applied the reasoning in *Cooper v. Texas Alcoholic Beverage Commission* to support its proposition, stating that "distinctions between in-state and out-of-state retailers and wholesalers are permissible if they are an inherent aspect of the three-tier system."¹⁶⁷ *Cooper*, however, outright declined to follow the Eighth Circuit's prior holding in *Southern Wine*, leading to a complete change in the Eighth Circuit's reasoning and

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* (citing *Tenn. Wine & Spirits Retailers Ass'n*, 139 S. Ct. at 2469).

¹⁶¹ *Id.* at 1180–81.

¹⁶² *Id.* at 1181.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 1181–82 (emphasis added).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 1182 (citing *Byrd v. Tenn. Wine & Spirits Retailers Ass'n*, 883 F.3d 608, 623 (6th Cir. 2018); *Cooper v. Tex. Alcoholic Beverage Comm'n*, 820 F.3d 730, 743 (5th Cir. 2016); *Tex. Package Stores Ass'n v. Fine Wine & Spirits of N. Tex.*, 137 S. Ct. 494 (2016); *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 818–20 (5th Cir. 2010); *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 191; *Brooks v. Vassar*, 462 F.3d 341, 352 (4th Cir. 2006)).

¹⁶⁷ *Sarasota*, 987 F.3d at 1182.

precedent for the present issue.¹⁶⁸ The Eighth Circuit then, unexpectedly, relied on the Sixth Circuit's recent holding in *Lebamoff Enterprises v. Whitmer*, which, in turn, relied on *Southern Wine*—the Eighth Circuit case that was overturned by the Supreme Court in *Tennessee Wine*.¹⁶⁹ The court agreed with the Sixth Circuit's holding in *Lebamoff* that opening Missouri to direct deliveries from out-of-state retailers undermined the protective path of alcohol distribution expressly afforded by a three-tier system within a state.¹⁷⁰ Therefore, the *wholesale* durational residency requirements in *Sarasota* were distinguished from the *retail* durational residency requirements in *Tennessee Wine* because wholesaler regulations are an inherently necessary part of the three-tier system.¹⁷¹

V. COMMENT

When some people hear of an impending blizzard or hurricane, they form excessive lines at the gas station, clear grocery store shelves where bread, milk, and eggs once stood, and buy out generators at hardware stores across the nation.¹⁷² There is one location that a few revelers will journey to in case of an emergency: the liquor store.¹⁷³ This stock-up-before-the-lockdown mentality only multiplied throughout the Covid-19 pandemic.¹⁷⁴ In fact, when the world went into lockdown, consumers

¹⁶⁸ See *Tex. Alcoholic Beverage Comm'n*, 820 F.3d at 743 (“We [] expressly decline to follow *Southern Wine* and instead adhere to the reading of *Heald* adopted in *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 821 (5th Cir. 2010).”).

¹⁶⁹ *Sarasota*, 987 F.3d at 1182–83. *Southern Wine* was expressly overturned in *Tennessee Wine*. *Id.* at 1181.

¹⁷⁰ *Id.* at 1183 (citing *Lebamoff Enters. v. Whitmer*, 956 F.3d 863, 872–73 (6th Cir. 2020)).

¹⁷¹ *Id.*

¹⁷² Milk, bread, and eggs have been dubbed the Trinity of Winter-Storm Panic Shopping by THE ATLANTIC, even though they have an extremely short shelf life. Joe Pinsker, *Milk, Bread, and Eggs: The Trinity of Winter-Storm Panic -Shopping*, THE ATLANTIC (Jan. 22, 2016), <https://www.theatlantic.com/business/archive/2016/01/buy-same-foods-snowstorm/425664/> [<https://perma.cc/9WTL-5TUD>].

¹⁷³ Hurricane parties have dated back to 1969, with powerful storms striking the Florida Panhandle. Walmart also sees a dramatic increase in alcohol sales pending any type of natural disaster or storm. Christie Armario, *For Some in Florida, Hurricane Season is Time to Party*, INSURANCE JOURNAL (May 14, 2009), <https://www.insurancejournal.com/news/southeast/2009/05/14/100493.htm> [<https://perma.cc/S58B-VDND>]; Aditi Shrikant, *The psychology behind the pre-hurricane run to the grocery store*, VOX (Oct. 10, 2018, 12:13 PM), <https://www.vox.com/the-goods/2018/9/12/17851440/hurricane-michael-shopping-preparedness> [<https://perma.cc/A9TE-FL2S>].

¹⁷⁴ Elva Ramirez, *U.S. On Track To Be Biggest Alcohol E-Commerce Market by 2021*, FORBES (Nov. 30, 2020, 2:54 PM), <https://www.forbes.com/sites/elvaramirez/2020/11/30/us-on-track-to-be-biggest-alcohol-e-commerce-market-by-2024/?sh=6e7f3b182986> [<https://perma.cc/N9HR-NCKU>].

enjoyed ordering their booze direct-to-their-door more than ever.¹⁷⁵ The United States e-commerce market for liquor and wine tripled in 2020, reaching an eighty percent increase, while general e-commerce grew only nineteen percent.¹⁷⁶ This dramatic upsurge demonstrates America's newfound thirst for alcohol delivered directly to their door.

Following the Supreme Court's opinion in *Granholm*, online alcohol sales have rarely entered the judicial dialogue about the intersection between Section 2 and the Dormant Commerce Clause.¹⁷⁷ In *Lebamoff Enterprises v. Huskey*, Judge Hamilton, in his concurrence, opened the conversation surrounding the regulation and distribution of alcohol in the modern e-commerce era by stating: "the three-tier distribution system [is] a model that may seem to have less and less value as the internet and e-commerce flatten the global marketplace."¹⁷⁸ Under the modern *Tennessee Wine* test, it is clear that the three-tier model, once endorsed by the Supreme Court as "unquestionably legitimate" and given Section 2 protection, now violates the Dormant Commerce Clause.

The *Tennessee Wine* test maintains that any state law discriminating against out-of-state goods or nonresident economic actors can be sustained only on a showing that it is narrowly tailored to advance a legitimate local purpose and that there is no evidence of a nondiscriminatory alternative available.¹⁷⁹ As explained below, the Missouri statutes limiting direct-to-consumer transactions to licensed, in-state retailers are not narrowly tailored to serve a legitimate local purpose that could not otherwise be served with nondiscriminatory alternatives.

First, some argue that a three-tier system and ban on interstate direct-to-consumer sales is necessary to prevent sales to minors.¹⁸⁰ Although preventing illegal sales to minors is unquestionably a legitimate state interest, a state can accomplish this goal in a narrower, less discriminatory manner. A state that permits in-state retailers to ship alcohol directly to consumers but prohibits out-of-state retailers from doing the same cannot

¹⁷⁵ Chris Furnari, *Online Alcohol Sales Surge Amid Coronavirus Pandemic*, FORBES (Dec. 1, 2020, 5:23 PM), <https://www.forbes.com/sites/chrisfurnari/2020/12/01/online-alcohol-sales-surge-amid-coronavirus-pandemic/?sh=1144144e4f3a> [<https://perma.cc/9ESU-FE2J>].

¹⁷⁶ *Beverage alcohol eCommerce value grew by 42% in 2020, to reach US\$24 billion*, IWSR DRINKS MARKET ANALYSIS (2020), <https://www.theiwsr.com/beverage-alcohol-eCommerce-value-grows-by-42-in-2020-to-reach-us24-billion/> [<https://perma.cc/NQA9-C4QU>].

¹⁷⁷ See *Granholm v. Heald*, 544 U.S. 460, 490 (2005) (referring to the internet as a way for minors to access alcohol illegally).

¹⁷⁸ *Lebamoff Enters. v. Huskey*, 666 F.3d 455, 472 (7th Cir. 2012) (Hamilton, J., concurring).

¹⁷⁹ *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2474–75 (2019).

¹⁸⁰ *Lebamoff*, 956 F.3d at 874.

plausibly argue that its approach is tailored at all – let alone narrowly – to prevent sales to minors.¹⁸¹ There is no evidence that out-of-state retailers are more likely to or have a higher capability to ship alcohol directly to minors. For example, one way a state may address sales to minors is to require common carriers to check appropriate government-issued identification at the time of delivery for age verification.¹⁸² And most state statutory schemes already require that the common carriers delivering the alcohol to the consumer be licensed by their respective states to check for proper and legal consumer identification.¹⁸³ Therefore, there is no reason why out-of-state retailers should be treated any differently than in-state retailers for the purposes of preventing sales to minors.

Second, some argue that a three-tier system and ban on interstate direct-to-consumer sales is necessary to prevent excessive alcohol consumption within a given community.¹⁸⁴ A state undoubtedly has a legitimate interest in preventing alcoholism and monitoring alcohol sales, but again, states can accomplish this goal in a narrower, less discriminatory manner. A consumer is not likely to differentiate between in-state and out-of-state retailers when making alcohol purchases online; and if a legal adult wants to purchase alcohol, they will find a way, regardless of who is selling the product.¹⁸⁵

Proponents of a three-tier system often argue that the taxation imposed at each level of the three-tier system raises the price of the alcohol, which in turn leads to decreased consumption.¹⁸⁶ This assertion is inaccurate.¹⁸⁷ Online prices are often compared to brick-and-mortar inventory and priced competitively, including heavy shipping mark-ups or

¹⁸¹ *Id.* at 878 (McKeague, J., concurring).

¹⁸² *Id.* (McKeague, J., concurring).

¹⁸³ Heather Morton, *Direct Shipment of Alcohol State Statutes*, NAT'L CONF. OF STATE LEGIS. (July 22, 2020), <https://www.ncsl.org/research/financial-services-and-commerce/direct-shipment-of-alcohol-state-statutes.aspx> [<https://perma.cc/CP6P-2T6S>].

¹⁸⁴ *See Lebamoff*, 956 F.3d at 867.

¹⁸⁵ *See Susan Lorde Martin, Wine Wars-Direct Shipment Of Wine: The Twenty-First Amendment, The Commerce Clause, And Consumers' Rights*, 38 AM. BUS. L.J. 1, 7 (2000).

¹⁸⁶ *See* National Alcohol Beverage Control Association, *The Three-tier System: A Modern View* (2015), <https://www.nabca.org/three-tier-system-modern-view-0> [<https://perma.cc/CT6K-EA5E>].

¹⁸⁷ *See* David Roodman, *The impacts of alcohol taxes: A replication review*, OPEN PHILANTHROPY PROJECT (2015), <https://davidroodman.com/david/The%20impacts%20of%20alcohol%20taxes%206.pdf> [<https://perma.cc/2ZNH-X5KQ>]; James I. Daley, *The impact of a 25-cent-per-drink alcohol tax increase*, 42 AM. J. PREV. MED. 382 (2012); Randy W. Elder, *The Effectiveness of Tax Policy Interventions for Reducing Excessive Alcohol Consumption Related Harms*, 38 AM. J. PREV. MED. 217 (2010).

subscription-based service fees.¹⁸⁸ There is no evidence that consumers will feel inclined to purchase more alcohol online than they would in person when the prices are similar. Therefore, on its face, this approach is neither tailored nor narrowed to limit excessive alcohol consumption. Those in favor of the three-tier system also cite its ability to create a paper trail of taxation at each level to determine where alcohol is distributed and consumed.¹⁸⁹ Within the past decade, however, companies like Drizzy, Amazon, DoorDash, and Uber have built such large data infrastructure systems that shipments and sales are all easily accounted for and tracked like never before.¹⁹⁰ Thus, a ban on interstate direct-to-consumer shipment is not necessary to accomplish the legitimate state interest of monitoring alcohol sales within a community.

Third, a three-tier system's ban on interstate direct-to-consumer sales is a greater danger to public health than the nondiscriminatory alternative of a less restrictive system built around e-commerce.¹⁹¹ Throughout most of 2020, every State and Territory, along with the District of Columbia, was under a state of emergency because of the Covid-19 pandemic.¹⁹² The state of emergency orders called for people to shelter-in-place, thus restricting brick-and-mortar visits and human-sales interactions.¹⁹³ From the perspective of modern-day consumers, there is a significant public health and safety appeal to buying wine online and receiving it at their door instead of subjecting themselves to imminent exposure to a novel virus. In addition, the impact of the Covid-19 pandemic has led to favoring a direct-to-consumer market because it promotes a legitimate state interest in public health by better allocating resources, minimizing exposure for consumers, and promoting efficiency within the economy.¹⁹⁴ Covid-19

¹⁸⁸ See FED. TRADE COMM'N, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE 22 (2003), https://www.ftc.gov/sites/default/files/documents/reports/possible-anticompetitive-barriers-e-commerce-wine/winereport2_0.pdf [<https://perma.cc/3MX3-W53L>].

¹⁸⁹ Gurney Pearsall, *When Wine Enters, Sense Leaves: A Case For Why the Three-Tier System's Regulations Stir Competition, Boost Diversity, and Protect Consumers*, CTR. FOR ALCOHOL POL'Y (2016), <https://www.centerforalcoholpolicy.org/wp-content/uploads/2016/02/Gurney-Pearsall-Essay.pdf> [<https://perma.cc/DXN6-ED4W>].

¹⁹⁰ Martin Hjalm, *Alcohol ECommerce: 2021 Trends, Strategies, and Markets*, VAIMO (Aug. 2, 2021), <https://www.vaimo.com/alcohol-ecommerce-trends-strategies-and-markets/> [<https://perma.cc/B6ED-X42D>].

¹⁹¹ See *Lebamoff Enters. Inc., v. Whitmer*, 956 F.3d 863, 877 (6th Cir. 2020) (McKeague, J., concurring).

¹⁹² *Emergency Declarations*, NCSBN: LEADING REGULATORY EXCELLENCE (2021), <https://www.ncsbn.org/14582.htm> [<https://perma.cc/64GQ-P6A8>].

¹⁹³ *What Does a Shelter-In-Place Order For COVID-19 Mean?*, 360TRAINING, <https://www.360training.com/blog/what-does-shelter-in-place-mean> [<https://perma.cc/MFK9-DLAQ>] (last visited Apr. 24, 2022).

¹⁹⁴ See *Lebamoff*, 956 F.3d at 878 (McKeague, J., concurring).

demonstrated the strength of the American economy's safe and effective e-commerce system, leading to more expansive and accessible options for purchasing outside of brick-and-mortar locations.

And finally, a three-tier system and ban on interstate, direct-to-consumer sales unreasonably limits consumer variety when compared to nondiscriminatory alternatives. For example, consumers in Missouri can currently purchase wine direct-to-consumer from *wineries* across the country under the holding of *Granholm*.¹⁹⁵ Imported wine, however, cannot be directly shipped from a producer or *retailer* located outside of Missouri.¹⁹⁶ Therefore, Missouri consumers are limited to the wine inventory held by in-state licensed retailers and domestic producers under the current statutory scheme and judicial interpretation.¹⁹⁷ As a result, if a Missouri consumer were to go online looking to buy wine for a special event, their options would be extremely limited, leading to disappointment and frustration when living in a global, mobile, and online-based economy.¹⁹⁸

Under the new *Tennessee Wine* test, the three-tier model endorsed by the Supreme Court violates the Dormant Commerce Clause. As explained above, the Missouri statutes supporting the three-tier system's traditional, direct-to-consumer restrictions on out-of-state retailers are not narrowly tailored to serve a legitimate local purpose that could not be otherwise served with nondiscriminatory alternatives. Therefore, the courts need to reconsider and review *Sarasota* because a three-tier system is inherently unconstitutional within the modern intersection of Section 2 of the Twenty-First Amendment and the Dormant Commerce Clause.

VI. CONCLUSION

Sarasota represents a new type of prohibition within Missouri in a modern economy driven by e-commerce. This decision followed the precedent established by the Supreme Court in *Granholm*, *Southern Wine*, and *Tennessee Wine* and balanced the Dormant Commerce Clause and the Twenty-First Amendment. The implications of the new *Tennessee Wine* test will continue to play out for years to come in judicial challenges and will almost certainly transform the interpretation of the Dormant Commerce Clause and Twenty-First Amendment as we know it. Unfortunately, by denying *Sarasota*'s writ for certiorari in 2021,¹⁹⁹ the Supreme Court missed a fantastic opportunity to update Missouri's Liquor

¹⁹⁵ See *Granholm v. Heald*, 544 U.S. 460 (2005).

¹⁹⁶ MO. REV. STAT. § 311.462 (2007) (repealed 2017).

¹⁹⁷ *Id.*; See *Sarasota Wine Mkt. LLC, v. Schmitt* 987 F.3d 1171, 1175 (8th Cir. 2021).

¹⁹⁸ *Lebamoff*, 956 F.3d at 877–78 (McKeague, J., concurring).

¹⁹⁹ *Sarasota*, 987 F.3d at 117.

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Control Act and disband the traditional three-tier system. As the world becomes more digitalized and e-commerce-based, the Court will have no choice but to find that the current approach to state liquor laws is unconstitutional and not protected by the Twenty-First Amendment.