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Don't Feel like Going to the Store, I'll Drink to That, How to Govern the Direct Shipment of Alcohol in South Carolina

Frederick N. Hanna

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**DON'T FEEL LIKE GOING TO THE STORE? I'LL DRINK TO THAT!
HOW TO GOVERN THE DIRECT SHIPMENT OF ALCOHOL IN SOUTH
CAROLINA**

Frederick N. Hanna*

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I. INTRODUCTION

A week has gone by since you've returned home from your much-needed Alaskan vacation. The return to work has been brutal; multiple partners have ceased all work in your absence so that you could pick up their slack upon your return. As you toil away at your desk, you begin to daydream about the wonderful Alaskan beer you tried for the first time on your trip after a great day of fishing. Shortly thereafter, you decide that another glass would be the only proper way to recover after a long day in the office. There's just one problem: because South Carolina wholesalers don't purchase that particular beer, no local stores sell it. The only way you'll legally be able to get your hands on another delicious bottle of your new favorite beer—short of taking another vacation—will be to drive to the closest state where it is distributed.

Unfortunately for South Carolina's adult beverage aficionados, this hypothetical dilemma is likely to occur frequently in the near future. As the number of craft alcohol producers throughout the United States continues to rise,¹ it will be impossible for state alcohol distributors to fill local retail stores with all the available craft alcohol options offered across the country.² Thus, in states like South Carolina that have a low number of breweries per capita,³ citizens have few local alcoholic beverages to choose from and must rely on wholesalers to make their favorite drinks available in nearby stores.

In today's world where the Internet can link even the most distant people and businesses, there's little reason consumer preferences should be so restrained. Before the rise of e-commerce and the subsequent evolution of the freight industry,⁴ individuals could, for the most part, only buy whatever goods local brick and mortar stores had on their shelves. Now, however, online shopping has given consumers the ability to purchase goods regardless

1. See, e.g., *Number of Breweries and Brewpubs in U.S.*, BREWERS ASS'N, <https://www.brewersassociation.org/statistics/number-of-breweries> (last visited May 8, 2019).

2. There are currently over 7,000 breweries operating in the United States. *Id.* South Carolina, however, distributes the products of less than 240 breweries. *U.S. Beer Distribution Map*, SEEKABREW, <http://www.seekabrew.com/distro/index.html> (last updated May 17, 2019).

3. South Carolina ranks forty-first among states in number of craft breweries per capita. Joshua Malin, *Where Does Your State Rank in Craft Beer Production?*, VINEPAIR (Sept. 8, 2016), <https://vinepair.com/articles/map-states-ranked-craft-beer-breweries>.

4. See Zach Schonbrun, *Reminding E-Commerce Customers Who Delivers*, N.Y. TIMES (Dec. 10, 2017), <https://www.nytimes.com/2017/12/10/business/media/delivery-fedex-post-office.html>.

of their availability in local shops, and online sales have skyrocketed as a result.⁵

Despite the consumer choice benefits presented by e-commerce, limits have been imposed on vendors' ability to make certain goods available online.⁶ Such restrictions are often necessary; the anonymity afforded by the internet should never allow individuals to obtain dangerous goods online more easily than they could from a physical store. However, if a dangerous product could be purchased as safely online as it could be from a brick and mortar store, then states would have a tougher time justifying a ban on the e-commerce transaction.

Almost all states have recognized that the benefits of allowing wine to be shipped directly from out-of-state wineries directly to their citizens outweigh any of the risks associated with the product being sold in such a manner.⁷ Indeed, forty-six states, including South Carolina, allow both in and out-of-state wineries to apply for a "direct shipper's permit" that allows them to ship their products directly to individuals in the state—provided that the wineries are approved, pay a licensing fee, and comply with other requirements the state wishes to impose.⁸ The general trend among states, however, has been to limit direct shipping privileges to wineries that actually manufacture the wine they subsequently ship to consumers.⁹ Thus, in South Carolina and the majority of states, it is illegal for breweries, distilleries, and retailers of all types of alcohol—including wine—to ship directly to consumers.¹⁰

5. Madeline Farber, *Consumers Are Now Doing Most of Their Shopping Online*, FORTUNE (June 8, 2016), <http://fortune.com/2016/06/08/online-shopping-increases/> (explaining that, "[f]or the first time ever, shoppers are going to the web for most of their purchases").

6. Online vendors of certain goods, like alcohol, must obtain state licensing prior to selling their product to individuals within the state's jurisdiction. *See, e.g.*, S.C. CODE ANN. § 61-4-747(A)–(B) (2009).

7. *See* Heather Morton, *Direct Shipment of Alcohol State Statutes*, NAT'L CONF. ST. LEGISLATURES (Jan. 12, 2016), <http://www.ncsl.org/research/financial-services-and-commerce/direct-shipment-of-alcohol-state-statutes.aspx>; *see also* FED. TRADE COMM'N, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE 3 (July 1, 2003), https://www.ftc.gov/sites/default/files/documents/reports/possible-anticompetitive-barriers-e-commerce-wine/winereport2_0.pdf.

8. *See, e.g.*, § 61-4-747(B).

9. *See* Morton, *supra* note 7 ("Five states—Arizona, Florida, Hawaii, Nebraska and New Hampshire—and the District of Columbia authorize the direct shipment of all spirits as specified. Eight states allow the direct shipment of beer and wine as specified: Delaware, Massachusetts, Montana, North Dakota, Ohio, Oregon, Vermont and Virginia. The remaining states only allow direct wine shipments.").

10. *See id.*

Despite the high demand for alcohol delivered through the mail,¹¹ state lawmakers assert that direct shipping bans are necessary because adherence to the three-tier system—which requires that each stage of the alcohol supply chain remain separate in a production tier, a distribution tier, and a retail tier¹²—allows states to collect taxes more efficiently and reduce alcohol sales to minors.¹³ However, states that have allowed increased direct alcohol shipping—such as Virginia, Nebraska, and New Hampshire—have reported little or no problems with tax collection or direct shipments to minors.¹⁴ Therefore, the more likely reason that states enforce direct shipping bans is their loyalty to local wholesalers.¹⁵ Indeed, recent reports indicate that wholesalers have been lobbying with extreme vigor to ensure the three-tier system—and their monopoly over alcohol distribution—remains in its current form.¹⁶ In South Carolina during the 2018 election, for example, both the South Carolina Beer Wholesalers Association and the Wine and Spirits Wholesalers Association of South Carolina Political Action Committee groups made contributions to candidates of both political parties, as well as to both the House Democratic Caucus Committee and House Republican Caucus Committee.¹⁷

While prohibiting out-of-state manufacturers and retailers from shipping alcohol directly to in-state consumers may benefit state wholesalers, shipping bans do not benefit consumers and states as a whole. First, by limiting consumers' ability to choose from the vast number of craft alcohol products available across the country, these laws deter free choice and hinder interstate commerce.¹⁸ Second, because direct shipping bans are being widely disregarded by out-of-state retailers, states without a mechanism for holding

11. ShipCompliant reports that consumers spent \$3 billion on “direct-to-consumer” wine shipments in 2018. *2019 Direct to Consumer Wine Shipping Report*, SHIPCOMPLIANT, <https://www.shipcompliant.com/dtcreport18> (last visited May 8, 2019) [hereinafter *2019 Direct Shipping Report*].

12. Wilson Daniel, Note, *Contemporary Tastes: How South Carolina's Regulation of the Craft Beer Industry Could Better Reflect Modern Societal Attitudes and Current Industry Needs*, 69 S.C. L. REV. 827, 831 (2018).

13. See FED. TRADE COMM'N, *supra* note 7, at 6.

14. *Id.* at 3.

15. See Thomas Pellechia, *A New Study Says State Political Campaign Contributions Affect Wine Excise Taxes*, FORBES (May 1, 2018, 9:29 AM), <https://www.forbes.com/sites/thomaspellechia/2018/05/01/a-new-study-says-state-political-campaign-contributions-affect-wine-excise-taxes/#6dab6bbe508b>.

16. See *id.*

17. *Contribution Reports*, S.C. ST. ETHICS COMM'N, <http://apps.sc.gov/PublicReporting/Contributions/ContributorResults.aspx> (last visited May 8, 2019).

18. See FED. TRADE COMM'N, *supra* note 7, at 14–15.

these retailers financially accountable are incurring large tax revenue losses.¹⁹ Third, the lack of legislation providing for responsible direct shipment has created legitimate safety concerns, as a lack of state regulation has resulted in a high risk of alcohol being delivered to minors by unlicensed direct shippers.²⁰

This Note calls for South Carolina's legislature to amend its direct shipping law—which currently only allows wineries to obtain a direct shipper's permit²¹—by extending direct shipping privileges to both in-state and out-of-state manufacturers and retailers of beer and wine. Amending the law in such a manner would discourage minor consumption by supplementing the existing winery direct shipping law's safety provisions and allowing South Carolina to punish any business that fails to comply with those provisions in a strict manner. An amendment to the law would also allow South Carolina to collect the tax revenue it currently foregoes as a result of not licensing wine retailers and beer manufacturers and retailers.

This Note examines the history and current state of alcohol distribution in South Carolina, as well as the rise of direct shipping as a result of the current e-commerce craze.²² Part II identifies the problematic effects of South Carolina's current direct shipping law and discusses how the laws of other states allow for more effective direct shipping.²³ Part III proposes a comprehensive amended statute for South Carolina to adopt, and discusses how each of its provisions promote safety, financial accountability, and consumer choice.²⁴ Part IV, a brief conclusion, summarizes the reasons that South Carolina should adopt the statute proposed by this Note.²⁵

19. See Alyson Outenreath, *Cheers! Ending Quill . . . What can be Learned From the Wine Industry*, 48 N.M. L. REV. 372, 373 (2018) (explaining that, because out-of-state online retailers are not required to remit taxes to states when they sell goods to those states' citizens, states incur large tax revenue losses).

20. See Anders Culiner & Jack Hall, *AG Jim Hood Stings Online Wine Vendors in Complaint*, DAILY MISSISSIPPIAN (Feb. 8, 2018, 7:59 AM), <http://thedmonline.com/ag-jim-hood-stings-online-wine-vendors-complaint> (explaining sting operation by Mississippi Attorney General in which online wine distributors sold wine into the state without verification of a 21-year-old living at the shipping address used).

21. See S.C. CODE ANN. § 61-4-747 (2009).

22. See discussion *infra* sections I.A–I.E.

23. See discussion *infra* Part II.

24. See discussion *infra* Part III.

25. See discussion *infra* Part IV.

A. Early Alcohol Control: The Federal Government's Attempts to Regulate

America has always had somewhat of a “drinking problem” when it comes to passing and enforcing effective alcohol laws.²⁶ The high water mark of restrictive alcohol regulation occurred in the early twentieth century during the prohibition years, when the Eighteenth Amendment prohibited the “manufacture, sale, or transportation of intoxicating liquors” within the United States.²⁷ However, like some attempts at comprehensive alcohol regulation, prohibition failed—largely due to the federal government’s inability to enforce the ambitious and controversial scheme.²⁸

The Twenty-First Amendment ended prohibition and envisioned a new way for the federal government to deal with the troubling issue of alcohol control—put the burden of effectively controlling alcohol and the host of problems that accompany it on the states.²⁹ Importantly, the language of the Twenty-First Amendment gave states the ability to regulate alcoholic beverages entering their borders: “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.”³⁰

Wielding this new constitutional power to control the movement of alcohol within and through their borders, the states began drafting alcohol regulations. South Carolina—and nearly every other state—decided on the “three-tier system” of alcohol regulation, which is still in place across the country today³¹ and has been blessed by the Supreme Court as a constitutional exercise of states’ Twenty-First Amendment authority.³² The system, as its name would suggest, requires that three-tiers—producers, wholesalers, and

26. See generally Harry G. Levine, *The Birth of American Alcohol Control: Prohibition, the Power Elite, and the Problem of Lawlessness*, CONTEMP. DRUG PROBS., Spring 1985, at 63 (discussing the problems associated with early alcohol regulation attempts in America).

27. U.S. CONST. amend. XVIII, *repealed* by U.S. CONST. amend. XXI.

28. Elizabeth Norton, Comment, *The Twenty-First Amendment in the Twenty-First Century: Reconsidering State Liquor Controls in Light of Granholm v. Heald*, 67 OHIO ST. L.J. 1465, 1469–70 (2006) (“[D]uring the thirteen years of national Prohibition, the federal government’s many attempts to enforce Prohibition and regulate alcoholic beverages were generally unsuccessful.”).

29. See *id.* at 1470–71; see also U.S. CONST. amend. XXI.

30. U.S. CONST. amend. XXI, § 2.

31. See, e.g., S.C. CODE ANN. § 61-4-940(A) (2009) (requiring that manufacturers of alcoholic beverages not sell their products to any person other than a licensed wholesaler, who in turn must not re-sell that product to anyone other than a licensed retailer).

32. *Granholm v. Heald*, 544 U.S. 460, 466 (2005) (citing *North Dakota v. United States*, 495 U.S. 423, 432 (1990)).

retailers—all take part in the distribution of alcohol.³³ The Supreme Court, in a recent decision, explained the mechanics of the scheme: “Producers or distillers of alcoholic beverages, whether located in state or out of state, generally may sell only to licensed in-state wholesalers. Wholesalers, in turn, may sell only to in-state retailers. Licensed retailers are the final link in the chain, selling alcoholic beverages to consumers at retail locations”³⁴

Proponents of the three-tier system argue that limiting “vertical integration” between the various levels of distribution³⁵ “provides for ‘checks and balances’ in the way that alcohol is distributed and sold to retailers as well as consumers.”³⁶ Further, because states require that businesses obtain the licensing required for each tier—and operate exclusively in that tier—the system is said to ensure that alcoholic beverages are made available to the public in a “controlled and safe manner.”³⁷ Indeed, South Carolina wholesalers argue that the strength of the system is its “licensed nature,” or the requirement that all parties handling alcohol along the supply chain are duly licensed producers, distributors, or retailers.³⁸ Advocates also claim that the three-tier system “helps ensure that alcoholic beverage taxes are reliably collected.”³⁹ In South Carolina, for example, the first-tier pays excise taxes; the second-tier pays applicable state and local taxes, payroll taxes, federal income taxes, state and local income taxes, and state and local license fees; and the third-tier pays state and local sales taxes and license fees.⁴⁰

B. New Boss, Similar Problems: Troubling Instances of State Alcohol Regulation

Armed with robust Twenty-First Amendment authority and a new framework governing the distribution of alcohol within their borders, the states set out to pass alcohol laws. And, in the years immediately following

33. See, e.g., Marc Sorini, *Understanding the Three-Tier System: Its Impacts on U.S. Craft Beer and You*, CRAFT BEER (Mar. 6, 2017), <https://www.craftbeer.com/craft-beer-muses/three-tier-system-impacts-craft-beer>.

34. *Granholm*, 544 U.S. at 469 (citations omitted).

35. *Id.* at 466.

36. *Three-Tier System*, S.C. BEER WHOLESALERS ASS’N, <https://www.scbwa.com/three-tier-system> (last visited May 8, 2019).

37. See *id.*

38. See *id.*

39. Christian Hart Staples, Comment, *In Vino Veritas: Does the Twenty-First Amendment Really Protect a State’s Right to Regulate Alcohol? An Overview of the North Carolina Wine Industry and the Continuing Wine Distribution Litigation*, 31 CAMPBELL L. REV. 123, 126 (2008).

40. *Three-Tier System*, *supra* note 36.

the end of prohibition, they were generally allowed to do so with little oversight.⁴¹

However, the early freedom state legislators enjoyed concerning the oversight of alcohol eventually led to problems. Throughout the period following the enactment of the Twenty-First Amendment, citizens were left powerless against misguided and discriminatory laws that sought to protect local interests. For example, in 1936, the United States Supreme Court held that a California law requiring all state wholesalers to obtain a five-hundred-dollar license before importing any beer into the state did not violate the Commerce Clause.⁴² While the Court recognized that the law prevented out-of-state liquor from competing with domestic liquor “on equal terms,” it reasoned: “The words used [in the Twenty-First Amendment] are apt to confer upon the state the power to forbid all importations which do not comply with the conditions it prescribes.”⁴³

This ruling meant that “[t]he Court essentially carved the Twenty-First Amendment out of the Constitution,”⁴⁴ and that any state law enacted pursuant to the power to regulate alcohol would not be invalidated, even if it violated other substantive portions of the Constitution.⁴⁵ Thus, without other constitutional protections like the Commerce Clause to invalidate discriminatory laws, individuals and businesses were left defenseless against lawmakers as protectionist state policies were routinely held constitutional by the Court.⁴⁶ Indeed, the Court’s deference during this period allowed states to enact many laws that entrenched local wholesalers’ control over alcohol distribution within their home states.⁴⁷

However, it was not long until the Court reconsidered its stance on states’ regulatory power under the Twenty-First Amendment. In *United States v.*

41. See Rachel M. Perkins, Note, *Wine Wars: How We Have Painted Ourselves into a Regulatory Corner*, 12 VAND. J. ENT. & TECH. L. 397, 406 (2010) (noting that states could generally pass alcohol laws as they pleased following the ratification of the Twenty-First Amendment).

42. *State Bd. of Equalization of Cal. v. Young’s Mkt. Co.*, 299 U.S. 59, 64 (1936), abrogated by *Granholm v. Heald*, 544 U.S. 460 (2005).

43. *Id.* at 62.

44. See Perkins, *supra* note 41, at 406.

45. See *id.*

46. See Kevin C. Quigley, Note, *Uncorking Granholm: Extending the Nondiscrimination Principle to All Interstate Commerce in Wine*, 52 B.C. L. Rev. 1871, 1879 (2011) (“In a departure from its pre-prohibition decisions, the Court upheld protectionist liquor laws designed solely to insulate in-state businesses from out-of-state competition.”).

47. See, e.g., *Indianapolis Brewing Co. v. Liquor Control Comm’n of Mich.*, 305 U.S. 391, 394 (1939) (upholding discriminatory importing law); *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401, 404 (1938) (upholding discriminatory patent registration requirement); *Young’s Mkt.*, 299 U.S. at 64 (upholding discriminatory licensing law).

Frankfort Distilleries,⁴⁸ the Supreme Court landed the first blow to states' alcohol power, holding that state distributors who engaged in price-fixing activity violated the Commerce Clause.⁴⁹ The Court held that Colorado laws allowing state alcohol distributors and national producers to conspire to fix alcohol prices at an artificial level violated the Sherman Act.⁵⁰ In making this decision, the Court noted: "[The Twenty-First Amendment] has not given the states plenary and exclusive power to regulate the conduct of persons doing an interstate liquor business outside their boundaries."⁵¹

While *Frankfort Distilleries* informed the states that the Twenty-First Amendment would not shield every alcohol statute they enacted, it did not provide a test for determining which alcohol laws would exceed state power.⁵² A more definite outline of states' regulatory powers under the Twenty-First Amendment did not come until 1984 when the United States Supreme Court decided *Bacchus Imports, Ltd. v. Dias*.⁵³ That case involved a Hawaii law that exempted liquors made in-state from the twenty percent excise tax imposed on all other liquors at wholesale.⁵⁴ Upon analyzing the tax scheme, the Court noted Hawaii's intent to provide an advantage to in-state producers⁵⁵ and reasoned that the scheme was unconstitutional because the interests it promoted did not have a close enough relation to "the powers reserved by the Twenty-First Amendment."⁵⁶ While the *Dias* Court did not explicitly state what those powers might be, subsequent decisions indicated that "promoting temperance, ensuring orderly market conditions, and raising revenue" were paradigm examples of Twenty-First Amendment power.⁵⁷

However, even after *Dias*, the question still remained as to whether a state law that promoted an interest—such as temperance or raising revenue—would be valid if it also burdened interstate commerce by favoring local business.⁵⁸ As it turns out, that question would not be answered until subsequent

48. United States v. Frankfort Distilleries, 324 U.S. 293 (1945).

49. See *id.* at 299–300.

50. See *id.*

51. *Id.* at 299.

52. In *Frankfort Distilleries*, the Court merely noted that states do not have broad power to regulate the conduct of individuals engaging in interstate liquor distribution outside their borders; it did not shed much light on what powers the states did have under the amendment. See *id.* at 299.

53. 468 U.S. 263 (1984).

54. *Id.* at 265.

55. See *id.* at 268.

56. *Id.* at 275–76 (quoting *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984)).

57. See, e.g., *North Dakota v. United States*, 495 U.S. 423, 432 (1990).

58. See Quigley, *supra* note 46, at 1881 (citing *Dias*, 468 U.S. at 275–76).

revolutions in the alcohol industry—and the economy as a whole for that matter—began taking place in the following decades.

C. *An Interstate Wine Industry Emerges*

Since the earliest days of America’s founding, wine has been present.⁵⁹ Over the years, America’s love for wine has only grown.⁶⁰ America’s role in the production of wine has also increased—there are currently well over 7,000 operating wineries in the United States.⁶¹ While this high number of wineries has given wine aficionados many options when choosing their next bottle, it has also meant that wineries must hold a competitive edge to succeed in the marketplace.⁶²

One of the earliest ways that wine producers sought to hold a competitive edge was by abandoning the “closed production facility” approach⁶³ and allowing the public to tour their vineyards, taste their products, and eventually, order cases of wine for delivery to their homes.⁶⁴ Similarly, the concept of the “wine club”—which developed around the 1970s or 1980s⁶⁵—allowed wineries and specialty wine shops to take advantage of oenophiles’

59. Francis Hopkinson supposedly asked to be paid in a quarter-cask of wine for his work designing the first United States flag. Callum Hanton, *Despite Their Serious Public Images, America’s Founders Were a Really Rowdy Bunch*, HUFFPOST (Oct. 23, 2017, 3:34 PM), https://www.huffingtonpost.com/entry/despite-their-serious-public-images-americas-founders_us_59ee4262e4b031d8582f5759.

60. In 2016, Americans drank 949 million gallons of wine—up from 33 million immediately following Prohibition. *Wine Consumption in the U.S.*, WINE INSTITUTE, <https://www.wineinstitute.org/resources/statistics/article86> (last updated July 12, 2017).

61. *How Many Wineries Are There in the United States?*, USA WINE RATINGS (Mar. 9, 2018), <https://usawineratings.com/en/blog/insights-1/how-many-wineries-are-there-in-the-united-states-37.htm>.

62. MURRAY SILVERMAN ET AL., COMPETITION IN THE GLOBAL WINE INDUSTRY: A U.S. PERSPECTIVE (2002) <http://online.sfsu.edu/castaldi/bie/globcase.htm> (“With the high number of producers and with the market dominated by a few major wineries, competition in the U.S. wine market is high.”).

63. See *Wine Tourism*, SMITHSONIAN: NAT’L MUSEUM AM. HIST., <http://americanhistory.si.edu/food/wine-table/wine-tourism> (last visited May 8, 2019).

64. See ROB McMILLAN, SILICON VALLEY BANK: WINE DIVISION, STATE OF THE WINE INDUSTRY 2018 28 (2018), https://www.svb.com/globalassets/library/uploadedfiles/content/trends_and_insights/reports/wine_report/svb-2018-wine-report.pdf (explaining that, in the 1980s, winery owners began collecting the physical addresses and shipping bottles to the patrons visiting their wineries).

65. See Lulu Chang, *The Best Wine Subscriptions You Can Buy*, BUS. INSIDER (July 25, 2018, 10:00 AM), <https://www.businessinsider.com/best-wine-club>.

desire to sample a variety of expert-selected wines by shipping such products directly to their doors.⁶⁶

Importantly, these innovations in the wine industry resulted in wineries distributing a percentage of their products outside the confines of the three-tier system. Rather than depending on wholesalers to buy their products and resell them wherever they saw fit, wineries were able to bypass the second-tier and sell directly to willing—and paying—customers they might not have otherwise reached.⁶⁷ This development was particularly advantageous to smaller wineries that could not afford to rely on the three-tier system to ensure their products were introduced into the market, as wholesalers often favor business arrangements with larger producers.⁶⁸ As the Supreme Court stated: “The increasing winery-to-wholesaler ratio means that many small wineries do not produce enough wine or have sufficient consumer demand for their wine to make it economical for wholesalers to carry their products. This has led many small wineries to rely on direct shipping to reach new markets.”⁶⁹

Legal developments also paved the way for smaller wineries to ensure that end-users were able to purchase products, even if a wholesaler decided not to stock their products. While states historically remained loyal to the three-tier system and did not allow for any direct shipping from wineries to consumers,⁷⁰ the above-referenced changes in the alcohol industry led some states to adopt direct shipping laws. California, for example, in 1986, passed a reciprocity law that conditioned the right of out-of-state wineries to make direct wine sales to California citizens on a reciprocal right in the shipping state.⁷¹ While some states like California sought to protect local businesses by enacting reciprocity laws,⁷² many of the other states sought to protect local interests by only extending direct shipping privileges to in-state wineries.⁷³ By 2005, approximately half of the states had enacted a law allowing for some form of direct shipping,⁷⁴ thereby giving at least in-state wineries the

66. See JIM ARNOLD & INGRID LARNIS, *WINE CLUBS OF SONOMA COUNTY: A GUIDE TO THE PLEASURES AND PERKS OF BELONGING* 9–11 (2007).

67. See MCMILLAN, *supra* note 64, at 28.

68. See *id.* at 22; see also *Granholm v. Heald*, 544 U.S. 460, 467 (2005).

69. *Granholm*, 544 U.S. at 467 (citation omitted).

70. See *id.* at 473 (explaining that, prior to 1986, “all but three States prohibited direct shipments of wine”).

71. *Id.* (citing Gina Riekhof & Michael E. Sykuta, *Regulating Wine by Mail*, REGULATION, Fall 2004, at 30).

72. See *id.*

73. See *id.* at 473–76 (discussing Michigan’s and New York’s direct shipping laws allowing in-state wineries the privilege of shipping to local consumers while denying out-of-state wineries the same privilege).

74. *Id.* at 467.

opportunity to ship their wines directly to consumers who might not otherwise purchase them from a brick-and-mortar store.

Apart from changes within the alcohol industry and newly enacted state laws, advances in the e-commerce and shipping industries also led to an increased demand for direct alcohol shipping. When the internet commercially developed in the 1990s⁷⁵ and early e-commerce sites like Amazon began making online sales,⁷⁶ wineries followed suit and began seeking online business as well.⁷⁷ Noting the potential that the e-commerce industry presented, wineries stood poised to reap the benefits of online sales to consumers across the country. Unfortunately, however, the internet's potential to facilitate an efficient interstate alcohol market was not fully realized, largely because of state laws that only gave in-state wineries the ability to ship their products directly to consumers.⁷⁸

D. Early State Direct Shipping Laws and Supreme Court Input: Granholm v. Heald

While wineries profited by engaging in the limited forms of direct shipping that states allowed during the 1990s,⁷⁹ studies showed that expanding direct shipping privileges would lead to further economic benefits for both wine producers and consumers across the country.⁸⁰ Particularly, a study conducted by the Federal Trade Commission (FTC) found that state laws prohibiting interstate direct shipping “represent[ed] the single largest regulatory barrier to expanded online in wine sales.”⁸¹ The report further concluded that such barriers on interstate direct shipping led to higher prices for consumers, decreased selection, and were unlikely to result in minor consumption or tax accountability issues.⁸²

States, on the other hand, often asserted that limiting direct shipping privileges to in-state producers ensured that they could keep wine out of the

75. See *The Invention of the Internet*, HISTORY, <https://www.history.com/topics/inventions/invention-of-the-internet> (last updated Aug. 21, 2018).

76. See MCMILLAN, *supra* note 64, at 36.

77. *Id.*

78. See *id.* (explaining that “true online purchases” account for less than three percent of wineries’ total sales).

79. See *Granholm*, 544 U.S. at 467 (citing FED. TRADE COMM’N, *supra* note 7, at 5) (explaining that “[f]rom 1994 to 1999, consumer spending on direct wine shipments doubled, reaching \$500 million per year”).

80. See FED. TRADE COMM’N, *supra* note 7, at 22.

81. *Id.* at 14.

82. See *id.* at 22–38.

hands of minors and effectively collect taxes.⁸³ However, given the FTC report's conclusion that allowing interstate direct shipping would not present such risks, these laws were more likely motivated by a desire to protect local business.⁸⁴ In states like South Carolina where there are a relatively small number of wineries,⁸⁵ wholesalers necessarily generate the majority of their wine-related profits through imports from other states. Therefore, it stands to reason that they are opposed to the idea of allowing out-of-state producers to circumvent them by shipping directly to consumers.⁸⁶ Political contribution data in South Carolina confirms this theory that wholesalers are a politically active group with a history of seeking to win favor with state lawmakers.⁸⁷ Further, in-state wineries benefit from operating in states that ban interstate shipping, as they enjoy a monopoly over the direct shipping market under such a scheme.⁸⁸ State retailers also benefit from preventing local consumers from ordering out-of-state wines directly from wineries or retailers, as allowing the direct shipment of out-of-state wines could lead to less in-store purchases.⁸⁹ Retailers also oppose directly shipped wines because they are not subject to the price markups that occur during distribution throughout the three-tier system and could provide consumers with a cheaper option.⁹⁰

However, despite local interests in preventing interstate shipping, the unfortunate result of restrictive shipping laws has been to deny out-of-state wineries the potential business an entire state has to offer. For smaller wineries that do not command wholesaler attention, direct shipping served as the only method through which they could reach consumers in certain markets.⁹¹ Thus, by enacting intrastate-only direct shipping laws, states were reducing out-of-state wineries' potential clientele in massive quantities.⁹² Additionally, the ability of out-of-state wineries to lawfully reach markets where direct sales

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

84. *See id.* at 474.

85. There are twenty-one wineries located in South Carolina. *South Carolina Wineries*, AM. WINERY GUIDE, <http://www.americanwineryguide.com/regions/south-carolina-wineries> (last visited May 8, 2019).

86. State wholesalers' interests in limiting direct shipment is evidenced by wholesaler political contributions during times when alcohol regulations are being considered. *See Quigley, supra* note 46, at 1888 n.156.

87. *See Contribution Reports, supra* note 17 (discussing political contributions made recently by South Carolina wholesaler groups).

88. *See Granholm*, 544 U.S. at 474.

89. *See* FED. TRADE COMM'N, *supra* note 7, at 19.

90. *See id.* at 14–15.

91. *See Granholm*, 544 U.S. at 467.

92. New York's direct shipping law, for example, barred every non-New York winery from direct to consumer sales in the nation's second-largest wine market. *Id.* at 468.

were prohibited by using a state-licensed wholesaler was often meaningless, as wholesaler fees often made this process “economically infeasible.”⁹³

Eventually, dissatisfaction with state direct shipping laws led to a judicial challenge.⁹⁴ In *Granholm v. Heald*, the United States Supreme Court consolidated challenges to New York and Michigan laws that permitted intrastate direct shipping while banning interstate direct shipping.⁹⁵ In both instances, out-of-state wineries and local consumers sought to invalidate the state alcohol distribution laws on the basis that they discriminated against interstate commerce in violation of the dormant Commerce Clause.⁹⁶

In reaching its decision that the state laws did in fact violate the dormant Commerce Clause,⁹⁷ the Court took the opportunity to propound relevant constitutional principles. The Court noted, “in all but the narrowest circumstances, 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.’”⁹⁸ The Court explained that laws “burden[ing] out-of-state . . . shippers simply to give a competitive advantage to in-state businesses” patently discriminate against interstate commerce and face a “virtually *per se* rule of invalidity.”⁹⁹

In response, Michigan and New York contended that, regardless of any discriminatory effect their laws may have, the laws were still valid under states’ Twenty-First Amendment authority to regulate the transportation and importation of alcohol through and within their borders.¹⁰⁰ The Court, however, shot down this appeal to alcohol control power, reaffirming its decades-old position that the Twenty-First Amendment must be read in light of the entire Constitution: “Section 2 [of the Twenty-First Amendment] does not allow States to regulate the direct shipment of wine on terms that discriminate in favor of in-state producers.”¹⁰¹

In addition to providing an insightful summary of Twenty-First Amendment jurisprudence with historical origins in the pre-Prohibition era,¹⁰² the Court also laid down a clear rule defining when state alcohol regulation

93. *See id.*

94. *Id.* at 469.

95. *Id.* at 465.

96. *See id.* at 469–70.

97. *Id.* at 493.

98. *Id.* at 472 (quoting *Or. Waste Sys., Inc. v. Dep’t. of Envntl. Quality of Or.*, 511 U.S. 93, 99 (1994)).

99. *Id.* at 472, 476 (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)).

100. *See id.* at 476.

101. *Id.*

102. *See id.* at 476–89.

would violate the dormant Commerce Clause.¹⁰³ In its simplest form, that rule is that “[s]tates [are] required to regulate domestic and imported liquor on equal terms.”¹⁰⁴ The Court explained that if a state, hypothetically, wished to ban the importation of alcohol into the state, it would also have to ban the manufacturing, sale, and consumption of alcohol within the state as well.¹⁰⁵ Otherwise, banning other states from importing their alcoholic products into the state—while at the same time allowing local producers a monopoly over the market—would clearly violate the dormant Commerce Clause.¹⁰⁶ Thus, to be protected by the Twenty-First Amendment, a state policy must “treat liquor produced out of state the same as its domestic equivalent.”¹⁰⁷

The Court went on to explain, however, that the Michigan and New York laws’ discriminatory effect would not render them invalid if they “advance[d] a legitimate local purpose that [could not] be adequately served by reasonable nondiscriminatory alternatives.”¹⁰⁸ The states argued that their laws served two interests that would be undermined by interstate direct shipping: “keeping alcohol out of the hands of minors and facilitating tax collection.”¹⁰⁹ With regard to the minor consumption issue, New York and Michigan argued that minors “have easy access to credit cards and the Internet and are likely to take advantage of direct wine shipments as a means of obtaining alcohol illegally.”¹¹⁰

The Court, however, found this argument unpersuasive, noting the utter lack of evidence supporting it.¹¹¹ Primarily, the Court focused on the fact that, of the twenty-six states allowing direct shipment at that time, none reported problems with minors having increased access to wine.¹¹² The Court then afforded three reasons that minors were unlikely to order wine online: first, that minors are less likely to consume wine than beer or liquor; second, that minors often have more direct means of obtaining alcohol; and third, that minors want “instant gratification” and are unlikely to wait for alcohol to be delivered through the mail.¹¹³

More importantly, the Court noted that Michigan and New York presented no explanation as to why direct shipments from out-of-state

103. *See id.* at 483.

104. *Id.*

105. *See id.* at 488–89.

106. *See id.* at 489.

107. *Id.*

108. *Id.* (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988)).

109. *Id.*

110. *Id.*

111. *See id.* at 490.

112. *Id.* (citing FED. TRADE COMM’N, *supra* note 7, at 34).

113. *Id.* (citing FED. TRADE COMM’N, *supra* note 7, at 12, 33, 33 n.137).

wineries created a greater risk of minor consumption than direct shipments from in-state wineries.¹¹⁴ Additionally, the Court remarked that states could impose statutory requirements to ensure that direct shipping does not lead to minor consumption, such as requiring an adult signature at the time of delivery.¹¹⁵ Thus, the Court concluded that the minor consumption issue did not justify the states' discriminatory ban on interstate direct shipping.¹¹⁶

The Court also found the tax collection justification to be insufficient.¹¹⁷ While the Court appreciated that direct shipping would disrupt New York's current scheme of collecting taxes at each level of the three-tier system, it suggested simple methods for adapting their collection systems to incorporate for the direct shipment sales method.¹¹⁸ For example, New York could simply take the same approach with out-of-state wineries as it does with those in-state and require that the winery obtain a direct shipping permit.¹¹⁹ By imposing such a license requirement, the state could demand that the winery "submit regular sales reports and . . . remit taxes."¹²⁰ Thus, acknowledging that "various States use this approach for taxing direct interstate wine shipments and report no problems with tax collection," the Court held that state interests in tax collection also did not justify their discriminatory laws.¹²¹

The *Granholm* Court ultimately concluded that because Michigan and New York could not adequately justify their laws' discriminatory impact on interstate commerce, the direct shipping laws—which treated domestic and out-of-state wineries differently—could not stand.¹²² The implication of this decision, however, reached much further than simply Michigan and New York. Immediately following the Supreme Court's decision, states began "leveling up" by affording out-of-state wineries the same direct shipping privileges as domestic ones.¹²³ South Carolina, for example, implemented S.C. CODE ANN. § 61-4-747 in 2005, allowing "manufacturer[s] of wine located within th[e] State or outside th[e] State" to ship wine directly to local residents.¹²⁴

114. *See id.*

115. *Id.* at 490–91.

116. *Id.* at 490.

117. *Id.* at 491.

118. *See id.*

119. *Id.*

120. *Id.*

121. *Id.* at 491–92 (citation omitted).

122. *See id.* at 492–93.

123. Maureen K. Ohlhausen & Gregory P. Luib, *Moving Sideways: Post-Granholm Developments in Wine Direct Shipping and Their Implications for Competition*, 75 ANTI-TRUST L.J. 505, 512–13 (2008).

124. § 61-4-747 (2009).

E. Drinkers Left Wanting More – The Current Landscape of Direct Shipping

Despite the victory for out-of-state wineries that *Granholm* provided, almost fifteen years later the alcohol industry is still not content. As e-commerce has continued to grow nationwide, so has the number of online wine retailers.¹²⁵ Such growth has been problematic, as most states only allow direct shipping from wineries, yet they do not expressly prohibit direct shipping from retailers.¹²⁶ Despite the majority of states not allowing retailer direct sales, online retailers continuously ignore these laws and ship their wines into the states anyway.¹²⁷

Regrettably, for states like South Carolina that do not have any mechanism for overseeing online retailers, empirical evidence from a number of states suggests that these businesses are notorious for shipping wine to minors.¹²⁸ Indeed, whereas the *Granholm* Court was satisfied that direct shipment from out-of-state wineries would not lead to an increased risk of minors consuming mail-ordered wine, it did not discuss the risks posed by out-of-state online wine retailers engaging in the same activity.¹²⁹ With regard to shipments from such out-of-state online retailers, a former president of the National Conference of State Liquor Administrators has stated, “every state that has used a minor to do a sting has been able to buy.”¹³⁰ Many online merchants, according to the FTC Report, were willing to ship to minors with no more age verification than a mouse click.¹³¹

This contravention of states’ laws has occurred largely due to consumer ignorance and merchant greed. Despite landmark Supreme Court cases like *Granholm*, consumers are unlikely to know that South Carolina only allows direct shipments from actual wineries and they are technically breaking the

125. See, e.g., Courtney Schiessl, *Everything You Need to Know About Shipping Wine Across State Lines in 2017*, VINEPAIR (Oct. 31, 2017), <https://vinepair.com/articles/shipping-wine-interstate-2017> (explaining how a number of retailers “legally” ship wine into states where they have local warehouses and in-state shipping licenses).

126. See, e.g., S.C. CODE ANN. §§ 61-4-700 to 780 (2009 & Supp. 2018) (lacking any direct prohibition of direct wine sales from retailers).

127. See Culiner & Hall, *supra* note 20 (discussing retailer sales into Mississippi, despite state laws banning all forms of direct shipment).

128. See FED. TRADE COMM’N, *supra* note 7, at 35.

129. See *supra* notes 95–122 and accompanying text.

130. *Id.* (quoting Karen Brooks, *Texas Wineries in an Uproar over Bill; Measure Would Reinforce Restriction on Direct Out-of-State Shipping*, FORT WORTH STAR-TELEGRAM, Mar. 20, 1999, at 1).

131. *Id.*

law when they purchase wine from online retailers.¹³² Furthermore, the fact that online retailers appear to be willing to ship wine into states at alarming rates is not comforting as well.¹³³ This problem is unlikely to be resolved anytime in the near future, as it seems probable that the average consumer is more likely to continue ordering wine from a heavily marketed website such as wine.com or totalwine.com ad opposed to a winery holding a direct shipper’s permit with their state.¹³⁴ Consequently, citizens have an economic incentive to buy wine directly from online retailers rather than wineries, as they often have a greater selection of inexpensive wine and overall competitive pricing of all wines offered.¹³⁵

For states like South Carolina that do not allow direct shipments from out-of-state online wine retailers, there is little that can be done to stop retailers from shipping wines to their citizens. Indeed, because the retailer has no opportunity to be licensed in South Carolina, the state is left with little leverage over the violating retailer.¹³⁶ In fact, states’ only real hope at blocking direct shipments from retailers is that a common carrier like FedEx or UPS will refuse to ship wine into a state that it knows prohibits such conduct.¹³⁷ However, law-abiding common carriers are not required to “fix” this problem—they argue that the consignor—not the common carrier—has the responsibility of ensuring compliance with the laws and regulations in the origin and destination states.¹³⁸

Even more important, however, is the fact that states have been unsuccessful in attempts to hold retailers liable in their own judicial

132. See Jamie Murphy & Erica Rogers, *Wine and the On-line World Makes for a Potent Concoction*, WALL STREET J. (Apr. 7, 1998, 11:59 p.m.), <https://www.wsj.com/articles/SB895009032565721500>.

133. See generally FED. TRADE COMM’N, *supra* note 7, at 14–16 (discussing effect of state direct shipping laws on online retailers).

134. Although over five hundred wineries hold out-of-state shippers permits with South Carolina, the average consumer is not likely to be familiar with all of them. See *ABL License Location Query*, S.C. DEP’T REVENUE, https://mydorway.dor.sc.gov/_/#1 (click “Alcohol License Locations”; then select “Out of State Wine Shipper” from “Select a License Type” drop-down list; then select “Search” button) (last visited Jan. 19, 2019).

135. See FED. TRADE COMM’N, *supra* note 7, at 17.

136. See, e.g., Emma Balter, *Wine Lovers Face Increasing Hurdles Ordering Online*, WINE SPECTATOR (Feb. 1, 2018), <https://www.winespectator.com/webfeature/show/id/Wine-Lovers-Face-Increasing-Hurdles-Ordering-Online> (explaining that states cannot do much aside from sending the retailer a warning, informing them that they are not permitted to ship into the state).

137. Common carriers have been accused of destroying wines that retailers attempted to ship unlawfully. See W. Blake Gray, *Carriers Trashing Wine Shipments*, WINE-SEARCHER (July 30, 2018), <https://www.wine-searcher.com/m/2018/07/carriers-trashing-wine-shipments>.

138. E.g., FEDEX, RETAILERS WINE SHIPPING STATE PAIRING GUIDE (2019), <https://www.fedex.com/us/wine/Retailers-Wine-Shipping-State-Pairing-Guide.pdf>.

systems.¹³⁹ A recent attempt by the Mississippi Attorney General to hold out-of-state retailers liable for shipments into the state provides insight into the difficulties states face in trying to enforce direct shipping bans. In late 2017, Mississippi Attorney General Jim Hood—aided by the Alcoholic Beverage Control division of the Mississippi Department of Revenue—set up a “sting” operation in which state officials posed as consumers and ordered wine and liquor from sixty-three separate online retailers.¹⁴⁰ Despite the fact the Mississippi law does not contemplate direct shipping, and therefore does not expressly allow any form of direct alcohol shipment,¹⁴¹ twenty-two of the retailers sold and shipped wine or liquor into Mississippi, “some without verification of a 21-year-old purchaser or without verification of a 21-year-old living at the shipping address used.”¹⁴²

Attorney General Hood brought suit against four of the online retailers—two from California and two from New York—in the Chancery Court of Rankin County, Mississippi.¹⁴³ The complaint alleged that the out-of-state retailers violated MISS. CODE ANN. § 67-1-9(1), which makes it unlawful for any person to transport any alcoholic beverage except as otherwise authorized by state law.¹⁴⁴ Additionally, the complaint alleged that the defendants violated Mississippi laws prohibiting the sale of alcoholic beverages to minors¹⁴⁵ and requiring the possession of certain permits before engaging in the distribution of alcohol within the state.¹⁴⁶

The complaint listed the alleged offenses with considerable detail, describing the process through which the direct shipment occurred.¹⁴⁷ For example, paragraph sixteen of the complaint stated:

139. See John Hinman, *Mississippi Rising—A Victory for Legal Retailer to Consumer Sales, and Passage of Title Under the Uniform Commercial Code*, HINMAN & CARMICHAEL, LLP: BOOZE RULES BLOG (Aug. 28, 2018), <https://www.beveragelaw.com/booze-rules/2018/8/28/mississippi-rising-a-victory-for-legal-retailer-to-consumer-sales-and-passage-of-title-under-the-uniform-commercial-code>.

140. See Culiner & Hall, *supra* note 20.

141. See Morton, *supra* note 7.

142. Culiner & Hall, *supra* note 20. Four of the retailers shipped wine into “fully dry counties.” *Id.* Rather carelessly, one retailer actually shipped a bottle directly to Attorney General Hood’s office. Balter, *supra* note 136.

143. Complaint at 1, Hood v. Wine Express, Inc., No. 17-2064 (Miss. Ch. Dec. 7, 2017).

144. See *id.* at 14; see also MISS. CODE ANN. § 67-1-9(1) (West, Westlaw through legislation of the 2019 Reg. Sess.).

145. See Complaint, *supra* note 143, at 7, 14; see also § 67-1-81 (West, Westlaw through legislation of the 2019 Reg. Sess.).

146. See Complaint, *supra* note 143, at 5; see also § 67-1-51 (West, Westlaw through legislation of the 2019 Reg. Sess.).

147. See Complaint, *supra* note 143, at 5–13.

In 2017, Wine Express shipped and distributed alcoholic beverages into Madison County, State of Mississippi. More particularly Wine Express caused to be dispatched to a minor residing in Madison County, State of Mississippi, alcoholic beverages consisting of one (1) bottle of 2015 Sancerre Domaine Durand. Wine Express placed these alcoholic beverages into the possession of United Parcel Service and on February 17, 2017, United Parcel Service in turn delivered the alcoholic beverages for Wine Express to the minor's home located at 261 Second Street, Flora, Madison County, Mississippi. Madison County, Mississippi is "wet." However, Wine Express addressed the package of alcoholic beverages to a minor.¹⁴⁸

To remedy these violations, Attorney General Hood sought a permanent injunction prohibiting each of the defendants from soliciting unlawful activities within the state, selling alcohol within the state without the required licensing, and distributing alcohol in the state in a way that posed a risk to minors.¹⁴⁹ Additionally, the complainant sought an injunction requiring, in part, that defendants train and educate their employees that alcoholic beverages cannot be shipped directly to Mississippi consumers, place disclaimers in marketing materials that may be viewed in Mississippi clarifying that offers are not available for acceptance by Mississippi residents, and make necessary modifications to ensure that ordering systems do not result in the shipment of alcoholic beverages to Mississippi consumers.¹⁵⁰

The Mississippi Chancery Court, on August 27, 2018, granted defendants' motions to dismiss for lack of personal jurisdiction.¹⁵¹ John Hinman, national counsel for the defendants in the action,¹⁵² explained that the court's decision to grant defendants' motion was based on term of sale provisions in the Uniform Commercial Code (UCC).¹⁵³ Specifically, the court held that the Code's "Passage of Title" section applied, meaning that the beverage sales legally occurred in the states of licensure of the defendants, not in Mississippi.¹⁵⁴ The UCC states, in relevant part, "title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed

148. *Id.* at 7.

149. *Id.* at 14–17.

150. *Id.*

151. Hood v. Wine Express, Inc., No. 1702064, 2018 WL 5304332, at *1 (Miss. Ch. Aug. 27, 2018).

152. Hinman, *supra* note 139.

153. *Id.*

154. *See id.*

on by the parties.”¹⁵⁵ Thus, because defendants’ sales materials provided that title to the alcoholic beverages “passed” in their state of operation,¹⁵⁶ the court concluded that the Attorney General could not properly initiate an action against the online retailers in a Mississippi court.¹⁵⁷

This Mississippi case evidences the simple process through which businesses can reap the benefits of sales to a state not allowing direct shipment from retailers free of the threat of liability. Attorney John Hinman explains it succinctly:

If the terms of sale, including all sale documentation are carefully structured to require the buyer to pick up the goods at the seller’s location, retailers (and other sellers with the right to sell to consumers - such as breweries, distilleries and wineries) with websites may sell wine, beer and spirits to any consumer regardless of where that consumer may live.¹⁵⁸

Thus, online retailers are able to shift the entire responsibility of complying with state alcohol laws to the buyer by including passage of title provisions.¹⁵⁹

While this widely accepted UCC provision¹⁶⁰ is beneficial for retailers, it is problematic for states that do not allow direct retail shipment, as the twin aims of preventing minor consumption and ensuring tax collection are threatened. First, with regards to minor consumption, passage of title provisions are troubling because they suggest that, after the initial sale is made, the minor is solely responsible for importing the alcoholic beverage to himself.¹⁶¹ Additionally, because the sale is deemed to occur in the state where the online retailer is located, the only tax that is collectable by the consumer’s

155. U.C.C. § 2-401(1) (AM. LAW INST. & UNIF. LAW COMM’N 2017).

156. Wine Express’s website, for example, provides: “All alcoholic beverages are sold in Westchester County, New York. Title passes to the buyer in New York and Westchester County, NY sales tax is collected. We make no representation to the legal rights of anyone to ship or import wines into any state outside of New York. The buyer is solely responsible for shipment of alcoholic beverage products.” *Frequently Asked Questions: Why Do You Collect Tax?*, WINE EXPRESS, <https://www.wineexpress.com/frequently-asked-questions> (last visited May 8, 2019).

157. See Hinman, *supra* note 139; Hood v. Wine Express, Inc., No. 1702064, 2018 WL 5304332, at *1 (Miss. Ch. Aug. 27, 2018).

158. Hinman, *supra* note 139.

159. Interestingly, this meant that in the Mississippi Attorney General’s sting operation, state agents were actually the parties that violated state law, as they effectively shipped the liquor to themselves. See *id.*

160. The South Carolina code mirrors the U.C.C.’s passage of title section. S.C. CODE ANN. § 36-2-401(1) (2003) (stating “title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties”).

161. See Hinman, *supra* note 139.

state of residence is a use tax—a tax that states often have difficulty collecting.¹⁶²

Passage of title provisions are also likely to cause similar problems as more businesses begin selling beer and hard liquor online. While wineries were the first in the alcohol industry to recognize the business opportunities e-commerce and direct shipping presented, other players are starting to take notice as well. Notably, as the craft beer industry continues to grow,¹⁶³ brewers themselves—as well as retailers—are turning to the internet as a means of growing their customer base. Some states have embraced this trend and allow beer producers and retailers to ship directly to citizens of their states.¹⁶⁴ However, the vast majority of states do not allow beer to be shipped directly to their citizens, even while allowing the direct shipment of wine.¹⁶⁵

The following section of this Note proposes a model direct shipping law for South Carolina to adopt and explains why doing so would be beneficial.

II. ANALYSIS

A. *Why a New Statute is Needed*

In light of the foregoing discussion, this Note suggests that the South Carolina laws prohibiting direct wine shipments from retailers and direct beer shipments from breweries and retailers are ineffective. S.C. CODE ANN. § 61-4-747(G)(1) prohibits any person who does not possess a current out-of-state shipper's license from shipping wine to an individual in South Carolina.¹⁶⁶ However, South Carolina law does not contemplate the direct shipment of beer, liquor, or wine from retailers, and the lack of an express prohibition or approval of these practices has created myriad issues. First, the lack of an outright ban on beer or liquor direct shipping has led businesses like “Best

162. *See id.*; *see also* Outenreath, *supra* note 19, at 383 (quoting House Judiciary Committee, *Taxation of Online Retailers*, CSPAN (July 24, 2012), <https://www.c-span.org/video/?307223-1/taxation-online-retailers>).

163. In 2018, craft brewer sales grew at a rate of nearly four percent by volume, reaching over thirteen percent of the total United States beer market by volume. *National Beer Sales & Production Data*, BREWERS ASS'N, <https://www.brewersassociation.org/statistics/national-beer-sales-production-data> (last visited May 8, 2019).

164. *See* Morton, *supra* note 7.

165. *See id.*

166. S.C. CODE ANN. § 61-4-747(G)(1) (2009) (“A shipment of wine from out-of-state direct to consumers in this State from persons who do not possess a current out-of-state shipper's license is prohibited. A person who knowingly makes, participates in, transports, imports, or receives such a shipment from out-of-state is guilty of a misdemeanor and, upon conviction, must be fined one hundred dollars.”).

Damn Beer Shop” and “Liquor Store Online” to offer to ship beer and liquor, respectively, straight to South Carolina citizens.¹⁶⁷ Additionally, the lack of a statutory enforcement provision subjecting online retailers such as these to personal jurisdiction in South Carolina has allowed merchants to limit their liability in the state through contractual “passage of title” provisions in their sales materials.¹⁶⁸ Sadly, this utter lack of oversight has presented a high risk of merchants shipping alcohol to minors in the state, as South Carolina has no legitimate means of deterring businesses from doing so.¹⁶⁹

South Carolina’s current direct shipping laws have also allowed online alcohol retailers to avoid payment of sales and excise taxes despite sales to South Carolina consumers. Whereas wineries holding a direct shipper’s permit in the state are required to remit all sales and excise taxes due to South Carolina at the end of each year, no law requires retailers to do the same.¹⁷⁰ This is problematic due to the fact that there is no South Carolina law on point regarding the direct shipment of alcohol to consumers—each and every dollar of these sales generate zero dollars in sales and excise tax revenue for the state.¹⁷¹ Thus, South Carolina is unlikely to recover the taxes it is owed as a result of an online alcohol sale to a South Carolina citizen, as retailers are unlikely to remit taxes absent an agreement to do so and consumers rarely remit use taxes.¹⁷²

Aside from failing to protect South Carolina’s interest in guarding against minor consumption and preventing tax revenue losses, South Carolina’s current direct shipping laws also limit consumers’ ability to purchase certain alcohol not readily available in the state. Indeed, despite the current “craft beer revolution” that is taking place across the country as small breweries open to fulfill consumers’ demands for a greater variety of fuller flavored beer,¹⁷³ South Carolina drinkers’ glasses can only be filled with what local breweries have to offer or wholesalers choose to import. Thus, because South Carolina

167. *E.g.*, *Shipping Terms*, BESTDAMNBEERSHOP, <https://www.bestdamnbeershop.com/pages/shipping> (last visited Apr. 17, 2019) (including South Carolina as a state “we ship to”); *Shipping Policy*, LIQUOR STORE ONLINE, <https://www.liquorstore-online.com/shipping-policy> (select “SC” from drop-down menu) (last visited Mar. 14, 2019) (stating “USA Shipping Nationwide!”).

168. *See supra* notes 149–62 and accompanying text.

169. *See supra* notes 149–62 and accompanying text.

170. *See* § 61-4-747(C)(4).

171. *See, e.g.*, *Frequently Asked Questions*, *supra* note 156 (not including South Carolina on the list of states it cannot “arrange shipment” to).

172. *See generally* Outenreath, *supra* note 19, at 375–78 (discussing differences between sales and use taxes).

173. *See* Derek Thompson, *Craft Beer Is the Strangest, Happiest Economic Story in America*, ATLANTIC (Jan. 19, 2018), <https://www.theatlantic.com/business/archive/2018/01/craft-beer-industry/550850/>.

has a low number of breweries,¹⁷⁴ with the existing breweries primarily concentrated in metropolitan areas like Greenville, Charleston, and Columbia,¹⁷⁵ South Carolina citizens, especially those in rural areas, depend largely on wholesaler importation to satisfy their beer preferences.¹⁷⁶

South Carolinians' wine options are also curtailed by the current law that only allows wineries to ship to the local consumers. According to the FTC Report, "the total number of [wine] varieties available online may surpass the total number available in bricks-and-mortar stores that are within a reasonable distance of a particular consumer, because the Internet effectively expands the geographic market."¹⁷⁷ This is certainly true for many of South Carolina's more rural areas where local retailers might be less likely to stock a high variety of wines.¹⁷⁸

To remedy these problems, South Carolina should amend its direct shipping law to allow out-of-state wine retailers, breweries, and beer retailers to apply for a shipper's permit. Such a law would give South Carolina citizens the ability to purchase a number of beers and wines not currently available in the state—or available via direct shipment from out-of-state wineries—while also allowing South Carolina to collect licensing fees and tax revenue that would not otherwise be remitted by online merchants or consumers themselves.

B. What the New Bill Must Do

For a new South Carolina direct shipping bill to be effective, it must ensure that the risk of minors obtaining alcohol via common carrier is minimal. An amendment to the current direct shipping law would create greater protection against minor consumption. As this Note discussed above, online beer and wine retailers' inability to obtain a South Carolina direct shipper's permit has incentivized them to ship into the South Carolina completely un-monitored. By giving these merchants the ability to obtain licensing, South Carolina can encourage these businesses into complying with the requirements it sets forth.

174. South Carolina ranks forty-first in number of craft breweries per capita. Malin, *supra* note 3.

175. See *Beer Lovers Map*, S.C. BREWER'S GUILD, <https://www.southcarolinabeer.org/beer-lovers> (last visited May 8, 2019) (showing that, of South Carolina's forty-six breweries, thirty-two are located in the greater Greenville, Charleston, or Columbia areas).

176. *Cf. id.* (showing a lack of craft breweries in rural areas of South Carolina).

177. FED. TRADE COMM'N, *supra* note 7, at 17 (citation omitted).

178. See *id.* at 24.

South Carolina's current direct shipping statute features a number of provisions aimed at decreasing minor consumption, such as requiring that licensees only ship to persons over the age of twenty-one and mark all containers of alcohol with language indicating their contents.¹⁷⁹ However, more could be done to ensure that minors are not able to successfully order alcohol online. To that end, the model direct shipping bill proposed by this Note adopts certain provisions currently employed by other states to lower the risk of minor consumption.

One such provision is a requirement currently featured in the Virginia direct shipping statute that requires all direct shipper licensees to ship beer and wine to consumers using a state-approved common carrier.¹⁸⁰ Another such Virginia provision that would allow South Carolina to promote minor safety is a requirement that the recipient, upon delivery, demonstrate that he is at least twenty-one years of age and sign for the alcohol being delivered in accordance with requirements set forth by the state.¹⁸¹ Finally, South Carolina should also adopt the requirement currently featured in the Virginia statute that requires the state-approved common carrier submit to the state any information it requests.¹⁸²

By adding such safety provisions to its direct shipping statute, South Carolina will be more equipped to prevent alcohol from being delivered to minors. Allowing the South Carolina Department of Revenue (SCDOR) to vet common carriers to ensure that they can be relied on to transport alcohol safely will ensure that only trustworthy businesses—those with a track record of complying with state laws—are allowed to deliver alcohol to consumers. Further, the requirement that the recipient actively show that he is twenty-one years of age and sign for the alcohol must be added to the South Carolina direct shipping law, as the statute currently does not require that a recipient of alcohol offer any evidence that he is of legal age.¹⁸³ Finally, by allowing the SCDOR to request any information from the common carrier, South Carolina will be able to ensure that these businesses are verifying consumers' ages and obtaining their signatures.

Though the safety benefits that would flow from adopting these Virginia provisions in South Carolina law seem intuitive, data also suggests that they are a practicable way of deterring minor alcohol consumption. The safety requirements imposed by Virginia do not appear to deter out-of-state shippers

179. See S.C. CODE ANN. § 61-4-747(A), (C)(2) (2009).

180. VA. CODE ANN. § 4.1-209.1(C) (West, Westlaw through 2018 Reg. Sess. and 2018 Sp. Sess. 1.).

181. *Id.*

182. *Id.*

183. See S.C. CODE ANN. § 61-4-747.

from obtaining licensing, as 2,039 businesses currently hold out-of-state shipper's licenses according to the Virginia Alcoholic Beverage Control Authority.¹⁸⁴ Additionally, Virginia's requirement that common carriers obtain state approval and comply with other state-imposed requirements does not appear to deter companies from shipping alcohol to residents of the state, as six separate common carriers—including UPS and FedEx—are listed as state-approved common carriers on the Virginia Alcoholic Beverage Control Authority website.¹⁸⁵ Therefore, given the strong direct shipping market in Virginia, it is unlikely that adopting these provisions in South Carolina would deter companies from doing business in the state.

III. MODEL STATUTE

This Note has considered the weaknesses of South Carolina's current direct shipping law and the components that a new law must include to achieve the goals of preventing minor consumption, increasing tax revenue, protecting local businesses, and appeasing consumer preferences. This Note now proposes an amended statute that allows for increased direct shipping by breweries and wine and beer retailers, and then explains how it promotes South Carolina's interests. The proposed statute tracks S.C. CODE ANN. § 61-4-747, with the following proposed changes in italics:

(A) Notwithstanding any other provision of law, rule, or regulation to the contrary, a manufacturer *or retailer* of wine *or beer*, located within this State or outside this State that holds a wine producer and blenders basic permit *or brewer's permit* issued in accordance with the Federal Alcohol Administration Act, *or is licensed within its state of domicile to sell wine or beer*, may obtain an out-of-state shipper's license. As provided in this section, *the holder of an out-of-state shipper's license* may ship up to twenty-four bottles of wine *or 288 ounces of beer*¹⁸⁶ each month directly to a resident of

184. *Retail Licensee Search*, VA. ALCOHOLIC BEVERAGE CONTROL AUTHORITY, <https://www.abc.virginia.gov/licenses/licensee-search-staging> (click "Search for retail and banquet licensees by license number and other criteria"; then search by choosing "Shipper – Out of State" in the Establishment Type field) (last visited May 8, 2019).

185. *Shippers and Common Carriers*, VA. ALCOHOLIC BEVERAGE CONTROL AUTHORITY, <https://www.abc.virginia.gov/licenses/get-a-license/industry-licenses/shippers-license> (last visited May 8, 2019).

186. This language limiting the amount of beer shipped to 288 ounces is borrowed from the Virginia direct shipping statute. VA. CODE ANN. § 4.1-209.1(A) (West, Westlaw through 2018 Reg. Sess. and 2018 Sp. Sess. 1.). This monthly beer limit is also featured by a handful of other states. *See* Morton, *supra* note 7 (showing Delaware and New Hampshire have similar limits).

this State who is at least twenty-one years of age for such resident's personal use and not for resale.

(B) Before sending a shipment to a resident of this State, an out-of-state shipper first shall:

- (1) file an application with the Department of Revenue;
- (2) pay a biennial license fee of four hundred dollars;
- (3) provide to the department a true copy of its current wine producer and blenders basic permit *or brewer's permit*, issued in accordance with the Federal Alcohol Administration Act, *or its current alcoholic beverage license issued in this or any state*;
- (4) identify the brands of alcoholic beverages that the applicant is requesting the authority to ship either into or within South Carolina;¹⁸⁷ and
- (5) obtain from the department an out-of-state shipper's license.

(C) Each out-of-state shipper licensee shall:

- (1) not ship more than twenty-four bottles of wine or *288 ounces of beer* each month to a person;
- (2) only ship the brands of alcoholic beverages identified on the application;¹⁸⁸
- (3) ensure that all containers of wine *or beer* shipped directly to a resident in this State are labeled conspicuously with the words "CONTAINS ALCOHOL: SIGNATURE OF PERSON AGE 21 OR OLDER REQUIRED FOR DELIVERY";
- (4) report to the department annually, by August thirty-first of each year, the total amount of wine *or beer* shipped into the State the preceding year;
- (5) annually, by January twentieth of each year, pay to the department all sales taxes and excise taxes due on sales to residents of this State in the preceding calendar year, the amount of the taxes to be calculated as if the sale were in this State at the location where delivery is made;
- (6) permit the department to perform an audit of the out-of-state shipper's records upon request; and

187. This language requiring that the applicant identify the brands of alcohol it wishes to ship is borrowed from the Nebraska direct shipping statute. NEB. REV. STAT. § 53-123.15(7) (West, Westlaw through legislation effective Apr. 25, 2019, of the 1st Reg. Sess. of the 106th Legislature (2019)).

188. This language requiring that the shipper only ship the brands identified on its application is borrowed from the Nebraska direct shipping statute. *Id.* § 53-123.15(8)(a) (West, Westlaw through legislation effective Apr. 25, 2019, of the 1st Reg. Sess. of the 106th Legislature (2019)).

(7) be deemed to have consented to the jurisdiction of the department or another state agency and the courts of this State concerning enforcement of this section and any related laws.

(D) The out-of-state shipper must agree to notify any wholesaler licensed in South Carolina that has been authorized to distribute such brands that the application has been filed for a shipping license. The department may adopt and promulgate rules and regulations as it reasonably deems necessary to implement this subdivision, including rules and regulations that permit the holder of a shipping license under this subdivision to amend the shipping license by, among other things, adding or deleting any brands of alcoholic liquor identified in the shipping license.¹⁸⁹

(E) The out-of-state shipper on August thirty-first of each applicable year must renew its license with the department by paying a renewal fee of four hundred dollars and providing the department a true copy of its current alcoholic beverage license issued in another state.

(F) The department may promulgate regulations to effectuate the purposes of this section.

(G) The department shall enforce the requirements of this section by administrative proceedings to suspend or revoke an out-of-state shipper's license if the licensee fails to comply with the requirements of this section, and the department may accept payment of an offer in compromise instead of suspension.

(H) The direct shipment of wine or beer by holders of licenses issued pursuant to this section shall be by approved common carrier only. The department shall develop regulations pursuant to which common carriers may apply for approval to provide common carriage of wine or beer, shipped by holders of licenses issued pursuant to this section. Such regulations shall include provisions that require (i) the recipient to demonstrate, upon delivery, that he is at least 21 years of age; (ii) the recipient to sign an electronic or paper form or other acknowledgement of receipt as approved by the department; and (iii) the department-approved common carrier to submit to the department such information as the department may prescribe. The

189. This language providing that the Department of Revenue may amend the brands the shipper may ship is borrowed from the Nebraska direct shipping statute. *Id.* § 53-123.15(7)(e) (West, Westlaw through legislation effective Apr. 25, 2019, of the 1st Reg. Sess. of the 106th Legislature (2019)).

department-approved common carrier shall refuse delivery when the proposed recipient appears to be under the age of 21 years and refuses to present valid identification. Any delivery of alcoholic beverages to a minor by a common carrier shall constitute a violation by the common carrier. The common carrier and the shipper licensee shall be liable only for their independent acts.¹⁹⁰

(I)(1) A shipment of wine *or beer* from out-of-state direct to consumers in this State from persons who do not possess a current out-of-state shipper's license is prohibited. A person who knowingly makes, participates in, transports, imports, or receives such a shipment from out-of-state is guilty of a misdemeanor and, upon conviction, must be fined one hundred dollars. A shipment of wine *or beer* which violates any provision of this item is contraband.

(2) Without limitation on any punishment or remedy, criminal or civil, a person who knowingly makes, participates in, transports, imports, or receives a shipment as provided in item (1) of this subsection from out-of-state commits an unfair trade practice.

A. How Does the New Bill Keep Minors Safe?

While it may seem counterintuitive, extending direct shipping privileges to breweries and wine and beer retailers should make it more difficult for South Carolina's minors to order alcohol online. Although there will be a higher number of businesses shipping alcohol into the State, these businesses will have to obtain a direct shipper's permit to do so. This fact alone lowers the risk of businesses shipping wine or beer to minors, as doing so would be grounds for having their license revoked.

Further, the addition of section (H) to the South Carolina direct shipping statute will provide the necessary safeguards to ensure that increased direct shipping does not lead to a higher rate of minor alcohol consumption. As discussed by this Note in Part III, the requirement that all shipments take place via a state-approved common carrier, who will be required to submit requested information to the SCDOR, will ensure that all alcohol shipments are transported by responsible, law-abiding businesses that remain accountable to South Carolina. Additionally, the requirement that the recipient of the alcohol actively demonstrate that he is at least twenty-one years old and sign for the delivery will ensure that all alcohol is delivered to a responsible

190. This language requiring that all shipments be transported by an approved common carrier is borrowed from the Virginia direct shipping statute. VA. CODE ANN. § 4.1-209.1(C) (West, Westlaw through 2018 Reg. Sess. and 2018 Sp. Sess. 1.).

party. Given the high number of both out-of-state shipper licensees and approved common carriers in Virginia,¹⁹¹ the addition of these safety provisions presents no foreseeable risk of deterring business in South Carolina.

South Carolina's wholesalers are likely to argue that allowing beer to be shipped directly to citizens creates a minor consumption risk, as many people associate underage drinking with beer or liquor more so than they do with wine.¹⁹² Despite the fact that wholesalers are biased against all forms of direct shipping, these arguments must be taken seriously given the high costs of underage drinking. However, even if the data suggesting that teens are more interested in consuming beer than wine is accurate, the mechanics of direct alcohol shipping make the threat of minors consuming mail-ordered beer relatively low. As the Court noted in *Granholm*, minors have more direct means of obtaining beer than via direct shipping.¹⁹³ Indeed, irrespective of direct shipping, data suggests that minors are able to obtain alcohol in their communities with relative ease.¹⁹⁴ According to the FTC Report, "approximately 68% of eighth graders, 85% of tenth graders, and 95% of twelfth graders [surveyed] said that it is 'fairly easy' or 'very easy' to get alcohol."¹⁹⁵ Additionally, as the *Granholm* Court noted, direct shipping is an imperfect avenue of obtaining alcohol for minors because they want "instant gratification."¹⁹⁶ In other words, minors who want to drink "do not order premium wine over the Internet and then wait two or three days for it to arrive."¹⁹⁷ The same would be true with beer.

South Carolina should not, however, extend direct shipping privileges to distilleries and online liquor retailers. While all alcohol can be dangerous in the hands of underage drinkers—or any irresponsible drinker for that matter—data suggests that teenagers indulge in more hard liquor than beer or wine when they drink.¹⁹⁸ However, South Carolina should also limit direct shipping

191. See *supra* notes 184–85 and accompanying text.

192. See FED. TRADE COMM'N, *supra* note 7, at 12.

193. *Granholm v. Heald*, 544 U.S. 460, 490 (2005).

194. See FED. TRADE COMM'N, *supra* note 7, at 11.

195. *Id.* (citing Press Release, L.D. Johnston et al., Ecstasy Use Among American Teens Drops for the First Time in Recent Years, and Overall Drug and Alcohol Use Also Decline in the Year after 9/11 tbl.12–13, (Dec. 16, 2002), <http://monitoringthefuture.org/data/02data.html#2002data-drugs>).

196. *Granholm*, 544 U.S. at 490 (citing FED. TRADE COMM'N, *supra* note 7, at 33 n.137).

197. See FED. TRADE COMM'N, *supra* note 7, at 12 (quoting K. LLOYD BILLINGSLEY, *SHIP THE WINE IN ITS TIME* 6 (2002)).

198. Erica Robinson, *Underage Drinkers Are Binge Drinking Hard Liquors, Skipping Beer And Wine; What Does This Mean For Their Health?*, MEDICAL DAILY (June 15, 2014, 10:36 AM), <https://www.medicaldaily.com/underage-drinkers-are-binge-drinking-hard-liquors-skipping-beer-and-wine-what-does-mean-their-health>.

to beer and wine because the market for craft liquor made by small-scale distilleries does not yet demand the same consumer attention as the market for craft beer.¹⁹⁹ Indeed, whereas many craft breweries have large production levels and are able to distribute their beer by the truckload to distant customers, many craft liquor distilleries are smaller²⁰⁰ and make the majority of their sales to customers in their home state.²⁰¹ Further, because many craft distilleries enjoy non-adversarial relationships with larger companies in the liquor industry,²⁰² they may be able to distribute their products through the traditional three-tier system with greater ease than small-scale craft breweries or wineries.

B. *How Does the New Bill Ensure Tax Collection?*

Similarly, the best way for South Carolina to guarantee adequate and proper tax collection is to provide more businesses direct shipping privileges. Traditionally, it has been difficult for states to collect any taxes on sales made to their citizens by online retailers.²⁰³ This difficulty has stemmed from the fact that out-of-state sellers have historically only been required to collect and remit a sales tax to the consumer's state when the seller had a "physical presence" in that state.²⁰⁴ Thus, online sellers have benefitted by limiting their physical presence to just a handful of states, thereby avoiding "the regulatory burdens of tax collection and . . . offer[ing] *de facto* lower prices" in states where they had no presence.²⁰⁵ To make up for this loss, states that impose sales taxes also impose a "use tax."²⁰⁶ Under this complimentary sales and use

199. Currently, there are roughly 1,600 distilleries in the United States. Rachel Arthur, *Number of US Craft Distilleries Rises by 26%*, BEVERAGE DAILY (Jul. 18, 2018, 12:47 PM), <https://www.beveragedaily.com/Article/2018/07/18/Number-of-US-craft-distilleries-rises-by-26>. According to recent statistics, there are over 7,000 breweries operating in the United States as of 2018. Justin Kendall, *7,000 Breweries to Operate in U.S. in 2018*, BREWBOUND (Sept. 7, 2018, 4:36 PM), <https://www.brewbound.com/news/7000-breweries-operate-u-s-2018>.

200. Indeed, to be classified as a "craft distillery," the business must produce 750,000 gallons or less annually. Lisa Rabasca Roepe, *Craft Distillers*, SAGE BUS. RESEARCHER (Aug. 27, 2018), <https://businessresearcher.sagepub.com/sbr-1946-107769-2901291/20180827/craft-distillers>.

201. Micheline Maynard, *The Craft Spirits Industry is Taking Off as Drinkers Embrace Local Booze*, FORBES (July 20, 2018, 11:00 AM), <https://www.forbes.com/sites/michelinemaynard/2018/07/20/the-craft-spirits-industry-is-taking-off-as-drinkers-embrace-local-booze/#614c43f8505e>.

202. See Roepe, *supra* note 200.

203. See Outenreath, *supra* note 19, at 373, 378.

204. See *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2087–88 (2018).

205. See *id.* at 2094.

206. See Outenreath, *supra* note 19, at 375.

tax regime, when the seller does not remit a sales tax, the in-state consumer is “separately responsible for paying a use tax at the same rate.”²⁰⁷

Unfortunately, use taxes account for large amounts of revenue losses to states,²⁰⁸ as consumers are unlikely to pay them²⁰⁹ and enforcement by states would be infeasible.²¹⁰ Thus, as the internet “change[s] the dynamics of the national economy” and e-commerce retail sales skyrocket,²¹¹ states lose huge amounts of revenue in foregone sales and use taxes.²¹² Interestingly, a recent United States Supreme Court case has overruled the physical presence rule and placed states in a position to mitigate these massive tax losses.²¹³ In *South Dakota v. Wayfair, Inc.*, the Court considered the validity of a South Dakota statute that was enacted to combat its “inability to collect sales tax from remote sellers.”²¹⁴ The statute “require[d] out-of-state sellers to collect and remit sales tax as if the seller had a physical presence in the state,” if the seller “deliver[ed] more than \$100,000 of goods or services into the state or engage[d] in 200 or more separate transactions for the delivery of goods or services into the state” on an annual basis.²¹⁵

While the Court noted that abandoning the physical presence rule could burden interstate commerce by “subjecting retailers to tax-collection obligations in thousands of different taxing jurisdictions,”²¹⁶ it nonetheless held the rule unconstitutional, largely because of the rule’s practical effect of allowing e-commerce retailers to avoid sales tax obligations across bulks of the nation.²¹⁷ The Court went on to explain, however, that a tax must “appl[y] to an activity with a substantial nexus with the taxing State” to be valid.²¹⁸

207. *Wayfair, Inc.*, 138 S. Ct. at 2088.

208. Outenreath, *supra* note 19, at 380.

209. *Id.* (explaining that “in the 45 states having sales and use tax systems, only approximately 1.6% of taxpayers in those states actually pay use tax” (citation omitted)).

210. *Id.* (“It would simply cost too much for state taxing agencies to audit individuals to see what they purchased online or otherwise without paying use tax.” (citation omitted)).

211. *Wayfair, Inc.*, 138 S. Ct. at 2097 (“Last year, e-commerce retail sales alone were estimated at \$453.5 billion.”).

212. *Id.* (citing U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-18-114, REPORT TO CONGRESSIONAL REQUESTERS: SALES TAXES, STATES COULD GAIN REVENUE FROM EXPANDED AUTHORITY, BUT BUSINESSES ARE LIKELY TO EXPERIENCE COMPLIANCE COSTS 11-12 (2017) (noting that States are currently estimated to lose between \$8 to \$33 billion per year in sales tax revenues as a result of the physical presence rule)).

213. *See id.* at 2099.

214. *See id.* at 2088 (citing S. 106, 2016 Leg. Assemb., 91st Sess. §7(1) (S.D. 2016)).

215. *Id.* at 2089 (citing S. 106, 2016 Leg. Assembly, 91st Sess. §1 (S.D. 2016)) (internal quotations omitted).

216. *See id.* at 2093 (citing *Quill Corp. v. North Dakota*, 504 U.S. 298, 313 n.6 (1992)).

217. *See id.* at 2096 (noting that the physical presence rule has “prevented market participants from competing on an even playing field”).

218. *Id.* at 2099 (quoting *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977)).

“Such a nexus is established when the taxpayer [or collector] ‘avails itself of the substantial privilege of carrying on business’ in that jurisdiction.”²¹⁹ The Court ultimately concluded that, because the only out-of-state businesses affected by the South Dakota statute either delivered more than \$100,000 of goods into the state or engaged in two hundred or more separate transactions for the delivery of goods into the state on an annual basis, a nexus would clearly exist any time the tax applied.²²⁰

While the *Wayfair* decision could allow South Carolina to collect more tax revenue from ordinary online retailers if it chooses to enact a law like the South Dakota statute, the law would likely have no impact on beer and wine vendors. First, states can only require out-of-state retailers to remit taxes when the retailer’s activity has a “substantial nexus” to the taxing state.²²¹ A substantial nexus existed between South Dakota and the business in *Wayfair* because the business delivered more than \$100,000 of goods into the state on an annual basis.²²² However, even if South Carolina were to adopt a law requiring that online retailers who deliver such an amount of goods into the state remit taxes, it is unlikely that South Carolina could enforce the law with respect to online wine and beer retailers without first licensing them and subjecting them to sales-reporting requirements.

Even supposing that online retailers currently deliver upwards of \$100,000 worth of beer or wine into South Carolina each year and have a “substantial nexus” with the state, they would still be unlikely to remit any taxes to the SCDOR. Indeed, if retailers are currently delivering that much alcohol into the state, then they are doing so illegally, as South Carolina does not currently allow direct shipments from online alcohol retailers.²²³ That means South Carolina has no way of determining what amount of taxes these businesses should be remitting or what amount of use taxes are owed by local consumers. Additionally, if these retailers are willing to contravene state alcohol laws prohibiting direct shipment from out-of-state retailers, then the likelihood of their compliance with state tax law is not promising.

Therefore, South Carolina will place itself in the best position to collect tax revenue from remote alcohol retailers if it extends direct shipping privileges to online alcohol retailers. If South Carolina licenses out-of-state retailers, then it can guarantee tax income that is otherwise uncollectable by

219. *Id.* (quoting *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, 11 (2009)).

220. *See id.* (noting that the nexus would be “clearly sufficient based on both the economic and virtual contacts” the business had with the State).

221. *Id.* (citing *Complete Auto Transit, Inc.*, 430 U.S. at 279).

222. The businesses in that case were “large, national companies that undoubtedly maintain an extensive virtual presence.” *Id.*

223. *See* S.C. CODE ANN. §§ 61-4-700 to 780 (2009 & Supp. 2018).

subjecting these retailers to the same tax remittance requirements that currently apply to out-of-state wineries. First, each licensee will be required to pay a biennial license fee of four hundred dollars.²²⁴ Second, licensees will be required to pay both sales and excise taxes due on sales to South Carolina consumers each year.²²⁵ Thus, licensees will be required to pay certain alcohol-specific taxes—like excise taxes—for which a proposed out-of-state retailer tax remittance statute like the one adopted by South Dakota in *Wayfair* might not expressly account. Therefore, giving online retailers the opportunity to obtain direct shipper’s licenses is the best method of serving South Carolina’s interest in ensuring tax compliance by remote businesses.

C. Protecting Consumer Interest – At What Cost to Local Business?

Apart from generating tax revenue and preventing minor consumption, a direct shipping statute must also make more beer and wine labels available to South Carolina citizens to be effective. However, giving consumers the ability to purchase rare wines and craft beers that are not available locally is not the only interest South Carolina must serve. Instead, the state should also ensure that the direct shipping exception to the three-tier system of distribution does not injure local business interests. Specifically, direct shipping should be limited so that it does not disrupt the livelihood of state wholesalers, brick-and-mortar retailers, or local breweries and wineries.

South Carolina breweries and wineries are likely to oppose direct shipping. Local producers may view direct shipping as a mechanism that incentivizes consumers to drink imported beverages rather than local beers and wines. South Carolina’s direct shipping bill, however, would not incentivize local drinkers to order beers through the mail.²²⁶ The law proposed by this Note provides no special status to mail ordered alcohol and merely serves as a safe and state income-producing way for consumers of alcohol to order products not available locally. This law will not encourage remote craft

224. Out-of-state wineries are currently required to do this in South Carolina. *Id.* § 61-4-747(B)(2). With over five hundred wineries currently holding direct shipper’s licenses, that results in roughly \$120,000 in revenue to the state each year. *See ABL License Location Query*, SCDOR, https://mydorway.dor.sc.gov/_/#1 (click “Alcohol License Locations”; then select “Out of State Wine Shipper” from “Select a License Type” drop-down list; then select “Search” button) (last visited May 8, 2019).

225. Again, South Carolina currently imposes this requirement on wineries holding a direct shipper’s permit. *Id.* § 61-4-747(C)(4).

226. The law is more likely to make ordering alcohol through the mail less economical, as the various requirements it imposes on producers may lead them to charge a fee or raise prices. *Cf. FED. TRADE COMM’N, supra* note 7, at 14–15 (discussing how the economic benefits of e-commerce are lost when state law requires the product to pass through another party).

producers to replace South Carolina's wineries and breweries; it will simply allow dissatisfied consumers to purchase their favorite drinks when they find local options lacking.

The health of local breweries in other states that allow direct beer shipping is also telling of the minimal impact this law will have on local business. Virginia, a state that allows direct beer shipping²²⁷ and whose law served as a model for a portion of the statute proposed by this Note, ranks eighteenth in the United States in breweries per capita and has 236 breweries.²²⁸ Thus, with even a higher number of breweries competing for in-state business, Virginia has been able to allow direct shipping without harming local brewery interests. The strength of Virginia's local beer industry is also evidenced by the fact that since 2007, when it first enacted a law allowing for the direct shipment of beer,²²⁹ at least 150 new breweries have opened in the state.²³⁰

Additionally, direct shipments from wineries do not pose much of a problem to wholesalers and local retailers. In fact, wineries commonly turn to direct shipment when state wholesalers decline to distribute their goods and make them available to a wide range of consumers.²³¹ As the United States Supreme Court stated in *Granholtz*, "[t]he increasing winery-to-wholesaler ratio means that many small wineries do not produce enough wine or have sufficient consumer demand for their wine to make it economical for wholesalers to carry their products."²³² Therefore, the majority of wineries possessing direct shipper's permits are smaller businesses that otherwise would be unable to reach consumers in states where wholesalers do not carry their products.²³³

Similarly, direct shipments from breweries do not seriously threaten state wholesalers or local retailers. Like small wineries, small breweries—acting economically—are only likely to apply for an out-of-state shipper's license in states where their products are not already distributed by wholesalers. Thus, while wholesalers may compete with direct shipments from breweries in the sense that the consumer might have purchased a less desirable drink from a local store if shipping were not an option, there is little direct competition for sales of the same label.

227. VA. CODE ANN. § 4.1-209.1(C) (West, Westlaw through 2018 Reg. Sess. and 2018 Sp. Sess. 1.).

228. *Virginia Craft Beer Sales Statistics, 2018*, BREWERS ASS'N, <https://www.brewersassociation.org/statistics/by-state/?state=VA> (last visited May 8, 2019).

229. § 4.1-209.1(C).

230. See *Virginia Craft Beer Sales Statistics, 2018*, *supra* note 228 (indicating that, in 2011, only forty breweries operated in Virginia and that 190 operate there now).

231. See *Granholtz v. Heald*, 544 U.S. 460, 467 (2005).

232. *Id.* (citing FED. TRADE COMM'N, *supra* note 7, at 6).

233. See *id.*

Online retailers, however, could compete more directly with state wholesalers and local brick-and-mortar retailers for sales. Indeed, large online retailers offer hundreds of brands of wine and beer from across the country, many of which are doubtlessly distributed by South Carolina wholesalers and available at stores across the state. Thus, allowing consumers to purchase these products online, where they are often available at a lower price,²³⁴ could significantly interfere with local business interests.

Nebraska's direct shipping statute, which allows for direct shipment from online retailers,²³⁵ features a mechanism for avoiding such interference with local business interests. Nebraska, like South Carolina, implements the three-tier system²³⁶ and has an interest in protecting distributors. However, by requiring that an applicant for a shipper's license identify the brands it wishes to ship into the state, the Nebraska Liquor Control Commission is able to assess the impact a shipper might have on local markets before awarding it a license.²³⁷ Despite the burden these wholesaler protection provisions might place on direct shipper applicants and licensees, there are currently 563 Nebraska direct alcohol licenses held by companies across the country.²³⁸

To provide South Carolina businesses with a similar degree of protection, Section (B)(4) of the proposed amended statute requires that an out-of-state retailer applying for a South Carolina direct shipper's license "identify the brands of alcoholic beverages that the applicant is requesting the authority to ship either into or within South Carolina."²³⁹ Similarly, Section (C)(2) requires that a direct shipper only ship the brands of alcoholic beverages identified on the application.²⁴⁰

By adding these provisions to the direct shipping statute, South Carolina can protect local businesses from the threat of losing sales to online retailers while also making more wine and beer brands available to consumers. Indeed, the SCDOR will be able to determine exactly which products the retailer seeks to ship to consumers in South Carolina. Thus, if the department determines that the applicant is a high risk for shipping products to consumers that are

234. See FED. TRADE COMM'N, *supra* note 7, at 19.

235. See NEB. REV. STAT. § 53-123.15 (West, Westlaw through legislation effective Apr. 25, 2019, of the 1st Reg. Sess. of the 106th Legislature (2019)).

236. *The Three Tier System*, ASSOCIATED BEVERAGE DISTRIBUTORS NEB., <https://abdne.org/resources/the-three-tier-system> (last visited May 8, 2019).

237. See NEB. REV. STAT. § 53-123.15 (West, Westlaw through legislation effective Apr. 25, 2019, of the 1st Reg. Sess. of the 106th Legislature (2019)).

238. *Licensee Search: Results*, NEB. LIQUOR CONTROL COMMISSION, https://www.nebraska.gov/nlcc/license_search/licsearch.cgi (select "Retail Licenses"; choose "Shipper" category; choose "S1 – Direct Alcohol" class of license) (last visited May 8, 2019).

239. See *supra* note 187 and accompanying text.

240. See *supra* note 188 and accompanying text.

already available locally, it can simply deny the application. This will encourage retailers to exclude from their applications any wines and beers already heavily distributed through the three-tier system and to limit direct shipping to the more exclusive brands and bottles they carry.

Apart from having the power to deny an application for a direct shipper's license, the SCDOR will also be able to prevent online retailers from unduly harming local business after they obtain licensing. Under the proposed statute, retailers are required to only ship those wines identified on their application.²⁴¹ So, if retailers comply with this requirement, they will only be shipping those brands approved by the SCDOR—those which are not readily available in local stores. If, however, retailers ship other unapproved beers or wines into the state, the SCDOR has the power to suspend or revoke the shipper's license or accept payment from the licensee in compromise of suspension.²⁴²

While wholesalers are typically opposed to all forms of direct shipping,²⁴³ the addition of these local business protection provisions would most likely allay some of their concerns. At the same time, however, these provisions would ensure that consumers have access to a large number of alcoholic beverages. Indeed, for South Carolina to strike a balance between solely insulating local business at the expense of the consumer—and allowing remote online sellers free rein to the chagrin of wholesalers and brick and mortar retailers—it must adopt sections (B)(4) and (C)(2) of the model bill.

IV. CONCLUSION

While the three-tier system has served as an effective method of alcohol distribution in South Carolina for nearly a century, changes in consumer preferences—and the alcohol industry as a whole—show the need for limited exceptions to this system of distribution. The convergence of e-commerce shopping and craft alcohol popularity has created a demand for direct alcohol shipping, and by adopting the amended statute proposed by this Note, South Carolina can meet that demand without disrupting the alcohol industry as it currently exists. By supplementing current South Carolina law with provisions adopted from states with robust direct shipping markets, South Carolina can allow its citizens to have access to their favorite wines and beers delivered directly to their doors. More importantly, South Carolina can structure its laws so that direct shipping generate tax revenue without injuring

241. See *supra* note 188 and accompanying text.

242. This language is present in the current South Carolina direct shipping statute. See S.C. CODE ANN. § 61-4-747(F) (2009).

243. See Quigley, *supra* note 46, at 1888 n.156.

local businesses or creating a higher risk of minor consumption. Therefore, South Carolina should adopt the amended statute proposed by this Note.