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Addressing the "Tomorrow Arguments" Unanswered by Tennessee Wine

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ARTICLE

ADDRESSING THE “TOMORROW ARGUMENTS” UNANSWERED BY *TENNESSEE WINE*:

THE FUTURE FOR VIRTUAL RETAILERS IN THE
MARKETPLACE FOR WINES AND SPIRITS

*Rajendra Persaud**

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Introduction

Gone are the days of Y2K scares. The “dot-com” bubble has long since popped. We are left with a technological age that continues to mold mankind in every manner and endeavor. Our modern technological age is unmatched by any civilization that has come before us. With the widespread availability of mini-super-computers, or cellular phones, comes the ease and availability of information at our fingertips. Not just information, but actual, tangible goods. Archaic are the days of waiting multiple business days for goods to arrive. Everyone knows Amazon Prime Shipping arrives in two days, sometimes even one day. Whispers about drones delivering packages are more reality than rumor. And while the concept of ordering a pizza and having it delivered to your door is nothing new, using an app to have it delivered without ever speaking to a live human is the product of recent imagination. It should come as no surprise that next on the list after pizza would be beer, wine, spirits, and the like: alcohol. While the Supreme Court did not address all of these nuanced virtual possibilities in *Tennessee Wine and Spirits Retailers Assn. v. Thomas*,¹ the Justices hinted at concerns about how the legal system would respond to “tomorrow’s argument,”² or challenges posed by virtual sellers with no physical presence.

¹ 139 S. Ct. 2449 (2019).

² Transcript of Oral Argument at 56–57, *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449 (2019) (No.18-96) (“And we’ll see you again. And -- and, surely, you know, the state can achieve all the regulatory interests it wants to achieve through virtually -- dealing with virtual sellers from out of state, just as easily as it can with the physical presen[t] sellers in state. I mean, surely that’s tomorrow’s argument, isn’t it?”).

The *Tennessee Wine*³ case involved the rights of out-of-state liquor retailers vis-à-vis Tennessee's tough durational residency requirements for new alcohol retailers. Imagine a law that was impossible to comply with, forgetting for a second that some courts do not consider a law's impossibility of compliance as a means for invalidation.⁴ Tennessee Code §57-3-204,⁵ which governed durational residency requirements for alcohol retailers, set just the stage for the Supreme Court to reconcile past alcohol regulation jurisprudence in its first case addressing alcohol since *Granholm v. Heald*.⁶ In comparison to other state residency requirements, Tennessee's durational residency requirement (for renewals) is at the farthest end of the spectrum, making it difficult to defend under traditional public health and safety justifications.⁷ Judge Sutton described its effect as "the epitome of arbitrariness."⁸ Brick-and-mortar retailers seeking to widen their reach across the country,

³ Tenn. Wine, 139 S. Ct. 2449.

⁴ See, e.g., CAL. CIV. CODE § 3531 (West 2016) ("The law never requires impossibilities"); see *Nat'l Shooting Sports Found. v. California*, 420 P.3d 870, 872–73 (Cal. 2018) ("We understand Civil Code section 3531 just as Civil Code section 3509 provides: It is an interpretative canon for construing statutes, not a means for invalidating them. Impossibility can occasionally excuse noncompliance with a statute, but in such circumstances, the excusal constitutes an interpretation of the statute in accordance with the Legislature's intent, not an invalidation of the statute.").

⁵ TENN. CODE ANN. § 57-3-204 (West 2014).

⁶ *Granholm v. Heald*, 125 S. Ct. 1885, 1907 (2005) (holding that a state law that allows in-state wineries to directly ship alcohol to consumers, but restricts the ability of out-of-state wineries to do so, violates the dormant commerce clause in light of the Twenty-first Amendment).

⁷ Transcript of Oral Argument at 25, *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449 (No.18-96).

⁸ *Byrd v. Tenn. Wine & Spirits Retailers Ass'n*, 883 F.3d 608, 635 (6th Cir. 2018) (Sutton, J., dissenting).

including Total Wine (as some would call the “Walmart” of alcohol retail), have found the *Tennessee Wine*⁹ holding intoxicating. While the ruling invalidated Tennessee’s durational residency requirement for liquor retailers, the generally applicable legal principle derived therefrom invalidated the laws of thirty-four states¹⁰ with statutes that discriminated against out-of-state retailers seeking to operate within their jurisdictions. The door is now open to new out-of-state liquor retailers, and arguably those with no physical presence at all.

The Tennessee law at the heart of *Tennessee Wine*¹¹ was problematic because it created an onerous burden for individuals to compete with in-state residents. The individual must demonstrate that he or she was a “bona fide resident” of the State for the previous two years.¹² While the Tennessee Wine and Spirits Retailers Association tried to justify this through health, safety, and wellness rationales,¹³ renewal required a showing of residency in Tennessee for a period of ten consecutive

⁹ *Tenn. Wine*, 139 S. Ct. at 2476.

¹⁰ Transcript of Oral Argument at 38, *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449 (2019) (No.18-96) (“And it’s just history, but it is history. And -- and we discover that the states, the vast majority, always have had rules like the Tennessee rule. And, today, 34 states, apparently, according to my – our count, have rules just like this, except maybe not the same number of years.”).

¹¹ 139 S. Ct. at 2457.

¹² TENN. CODE ANN. § 57-3-204(b)(2) (2014).

¹³ *See, e.g., Mugler v. Kansas*, 123 U.S. 623, 661 (1887) (affirming the right of the States in exercising police power to protect the health, morals, and safety of their people); *see also Beer Co. v. Massachusetts*, 97 U.S. 25, 32 (1878) (“If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance, by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the State.”).

years.¹⁴ Corporations fared no better. Under §57-3-204(b)(3)(A),¹⁵ a corporation must demonstrate that its officers, directors, and owners of capital stock satisfy the durational residency requirements applicable to individuals. Accordingly, no publicly traded corporation could operate a liquor store in the state of Tennessee.

The Supreme Court held¹⁶ that Tennessee's two-year durational residency requirement applicable to retail liquor store license applicants violated the dormant Commerce Clause¹⁷ and was not saved by the Twenty-first Amendment. The problem was that the Tennessee law overreached. The two-year requirement was one matter, but the additional ten years created a legal quagmire that effectively killed the prospect of smaller out-of-state businesses from managing a liquor retailer in-state. The Court, in its dicta, discussed that States have never historically enjoyed absolute authority to

¹⁴ TENN. CODE ANN. § 57-3-204(b)(2) (2014).

¹⁵ TENN. CODE ANN. § 57-3-204(b)(3)(A) (2014).

¹⁶ *Tenn. Wine*, 139 S. Ct. at 2476.

¹⁷ U.S. CONST. art. I, § 8 cl. 3 (Under the Commerce Clause, Congress can “regulate Commerce . . . among the several States.”). *See, e.g., Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality of Or.*, 511 U.S. 93, 98 (1994) (While the Commerce Clause confers Congress the authority to regulate interstate commerce, the converse is that states cannot impede Congress’s power by “unjustifiably . . . discriminat[ing] against or burden[ing] the interstate flow of articles of commerce.”); *see also Am. Beverage Ass’n v. Snyder*, 735 F.3d 362, 369 (6th Cir. 2013) (quoting *Dep’t of Revenue v. Davis*, 553 U.S. 328, 337-38 (2007)) (The dormant Commerce Clause prevents “economic protectionism,” a state’s protection of in-state economic interests by burdening out-of-state economic interests.). *Fulton Corp. v. Faulkner*, 516 U.S. 325, 330-31 (1996) (quoting *Okla. Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175, 180 (1995)) (The dormant Commerce Clause helps to “effectuate[] the Framers’ purpose to ‘prevent a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole.’”).

police alcohol within their borders.¹⁸ The public morals or public safety rationale for the justification of a statute is likewise not absolute.¹⁹ The Court held that where the predominant effect of a law is protectionism, not the protection of public health or safety, it is not shielded by Section 2 of the Twenty-first Amendment.²⁰

In articulating its decision, the Court touched on tangential areas during oral arguments that were not explicitly discussed in the Court's written opinion, namely those concerning the rights of virtual sellers that are prohibited from operating in certain states. The opinion also discussed how courts will handle inevitable legal challenges from corporations that vie to become the Amazon of American wine and spirit distribution, in light of the "unquestionably legitimate" three-tier system.²¹

This paper addresses the future of alcohol policy in the United States. Part I briefly discusses the road to *Tennessee Wine*.²² Part II discusses the decision and its impact on states whose laws are now invalidated, which presents the immediate consequence of the *Tennessee Wine*²³ decision and is the logical next step in the American alcohol jurisprudence. Part III discusses the future for alcohol policy in the United States, analyzing the issues surrounding virtual direct shipping of alcohol to consumers. Finally, Part IV discusses where alcohol regulation ought to go, returning to the core public health and safety concerns that led to that great failed experiment, Prohibition.

¹⁸ 139 S. Ct. at 2473.

¹⁹ *Id.* at 2474.

²⁰ *Id.*

²¹ Granholm, 125 S. Ct. at 1904–05; Transcript of Oral Argument at 9, *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449 (2019) (No.18-96).

²² *Tenn. Wine*, 139 S. Ct. 2449.

²³ *Id.*

I. Go Sell It In Your Own State—The Road to *Tennessee Wine*

Tennessee Wine began with the application for retail licenses by retail juggernaut Total Wine & More, and Affluere Investments, a smaller, mom-and-pop type business owned by Doug and Mary Ketchum.²⁴ Neither Total Wine nor the Ketchums satisfied the minimum residency requirement set forth under Tennessee Law.²⁵ It is worth noting that Tennessee's own Attorney General Robert E. Cooper, Jr. declined to enforce the law, finding no legitimate public policy in the legislative history.²⁶ He went as far as to find some evidence that the legislative intent in enacting such requirements violated the federal Commerce Clause.²⁷ Again, in a second opinion letter, Attorney General Cooper found that the residency requirements challenged in the *Tennessee Wine* matter facially discriminated against nonresidents.²⁸ Tennessee Wine and Spirits Retailers Association threatened to sue the Tennessee Alcoholic Beverage Commission (TABC) if it granted the licenses, thus the TABC's executive director filed a declaratory judgment action in Tennessee state court to determine the legitimacy and validity of the state's residency requirements.²⁹ After removal to federal district court, the challenged durational residency requirements were found unconstitutional.³⁰

The case was appealed to the Sixth Circuit and affirmed by a divided panel.³¹ A plain reading of the

²⁴ Brief for the Respondent at 10–11, *Tenn. Wine & Spirits Retailers Ass'n v. Blair*, 139 S. Ct. 2449 (2019) (No. 18-96).

²⁵ *Byrd v. Tenn. Wine & Spirits Retailers Ass'n*, 259 F. Supp. 3d 785, 788–89 (M.D. Tenn. 2017).

²⁶ *Tenn. Op. Att'y Gen.* 12-59.

²⁷ *Id.*

²⁸ *Tenn. Op. Att'y Gen.* 14-83.

²⁹ Brief for the Respondent, *supra* note 24, at 11.

³⁰ *Byrd*, 259 F. Supp. 3d at 797–98.

³¹ *See Byrd*, 883 F.3d at 612.

decision reveals the differences in approach to the matter.³² The majority easily struck down the challenged statutes, as they facially discriminated against interstate commerce.³³ Not only did the majority find that the durational residency requirements were facially discriminatory, they also found that Tennessee could achieve its goal with a reasonable, non-discriminatory alternative.³⁴ The dissent, which is discussed further in Part IV of this paper, reflected upon the “responsible consumption” of alcohol and “orderly liquor markets.”³⁵

The Supreme Court, in a divided 7-2 opinion, approached the case similarly to the Sixth Circuit, with the majority focusing on the facial discrimination,³⁶ while the dissent by Justice Gorsuch expressed concern with the practical considerations of alcohol and its effect on local communities.³⁷ The residency requirement in the eyes of the dissent proposes a reasonable way of accomplishing an admittedly legitimate goal.³⁸ Residency itself increases the likelihood that retailers will have a stake in the communities they serve.³⁹ Residency requirements ensure that retailers will be amenable to state regulatory oversight.⁴⁰ Such local public health and safety measures are precisely what Section 2 of the Twenty-first Amendment was enacted to safeguard: the insulation of state regulation from judicial charges of unduly interfering with interstate commerce.⁴¹ Thus, the dissent analyzed the matter in a manner that considered

³² *See id.*

³³ *Id.* at 626.

³⁴ *Id.* at 625–26.

³⁵ *Id.* at 633 (Sutton, J., dissenting).

³⁶ *See* *Tenn. Wine*, 139 S. Ct. 2449 (2019).

³⁷ *Id.* at 2476 (Gorsuch, J., dissenting).

³⁸ *Id.* at 2482.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

the roles of local communities, which brings to light the sensitivity of the subject matter at issue.

Alcohol is unique.⁴² We are not dealing with paint, asphalt, or neon.⁴³ Americans consume alcohol at parties and social gatherings. We toast alcohol to celebrate special occasions. We pour out alcohol for those who cannot imbibe with us, in their memory. But as much as alcohol sits at the cornerstone of so many of our social functions, so too does it possess the unique and uncanny ability to cause physical ailments as trivial as hangovers or as dastardly as liver disease, or death. Even this is an understatement, as alcohol has both the power to loosen a person up, but also to destroy lives, ruin marriages, break apart families, cause fights amongst friends, or aid in rash and sometimes fatal decision making. Alcohol cannot and should not be treated as any other commodity, except perhaps narcotics. Concerns such as these lie at the heart of the dissenting opinions of Justice Gorsuch⁴⁴ and Judge Sutton,⁴⁵ concerns that are real and valid: alcohol remains one of the top killers worldwide, responsible for countless premature and preventable deaths.⁴⁶

⁴² Byrd, 883 F.3d at 629 (Sutton, J., dissenting) (“In repealing the Eighteenth Amendment, the Twenty-first Amendment allowed the States to regulate alcohol as a unique commercial article.”); *see also* *Frontier Saloon v. Alcoholic Beverage Control Bd.*, 524 P.2d 657, 660 (Alaska 1974) (“the state contends that the regulation of alcohol is unique and may justify a different treatment than is afforded to other activities . . .”). *See generally* *Cal. v. La Rue*, 409 U.S. 109 (1972).

⁴³ *Cf.* Transcript of Oral Argument at 28–29, *Tenn. Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449 (2019) (No.18-96).

⁴⁴ *Tenn. Wine*, 139 S. Ct. at 2476 (Gorsuch, J., dissenting).

⁴⁵ Byrd, 883 F.3d at 628 (Sutton, J., dissenting).

⁴⁶ *See generally Alcohol Facts and Statistics*, NATIONAL INSTITUTE ON ALCOHOL ABUSE AND ALCOHOLISM; *Average for United States 2006–2010 Alcohol-Attributable Deaths Due to Excessive Alcohol Use*, CENTERS FOR DISEASE CONTROL AND

II. Thirty-Four State's Laws Have Been Invalidated by *Tennessee Wine*, What Now?

In the wake of the *Tennessee Wine* ruling, thirty-four states will have to decide what to do with their laws imposing durational residency requirements on out-of-state retailers.⁴⁷ This is the immediate next step in American alcohol jurisprudence. These states essentially have three options for their legislation: rewrite their laws, repeal their laws, or do nothing. There are a number of viable alternatives to the former durational residency requirements, discussed herein.

For the states who choose to rewrite their laws, they could require a two-year (or longer) probationary period whereby the proposed merchant must complete educational programs and participate in community outreach to better acquaint itself with the makeup and individuality of the community it seeks to serve. This is more of a narrowly tailored approach that directly links the transitional period to the community goal. To take this requirement a step further, the renewal of the license could be tied to the completion of state mandated programs. State mandated programs could include programming coordinated with national organizations dedicated to alcohol abuse awareness, including Mothers Against Drunk Driving (MADD), Students Against Destructive Decisions (SADD), the National Institute on Alcohol Abuse and Alcoholism, the National Council on Alcoholism and Drug Dependence, and the Substance

PREVENTION; *Global status report on alcohol and health*, WORLD HEALTH ORGANIZATION.

⁴⁷ See generally Earl Crawford, *The Legislative Status of an Unconstitutional Statute*, 49 MICH. L. REV. 645 (1951); El McCormac, *The Supreme Court and Unconstitutional Laws*, 25 CALIF. L. REV. 552 (1937); Note, *What Is the Effect of a Court's Declaring a Legislative Act Unconstitutional?*, 39 HARV. L. REV. 373 (1926).

Abuse and Mental Health Services Administration. While this two-year buffer appears facially to create a similar effect of the Tennessee Code § 57-3-204,⁴⁸ it should pass muster because it lacks the prohibitive renewal process of § 57-3-204(b)(2)(A), which facially discriminated against out-of-state retailers.

Alternatively, states could enact a “match system” where one non-resident license is granted for every one resident-license, which would stymie the influx of out-of-state liquor license applications. States could also distribute licenses under a quota system based upon populations of local communities. States could also revert to “control state” status, where the alcohol industry is run by the state in a monopoly limited to the state’s rules and regulations.⁴⁹

From the *Tennessee Wine* opinion and oral argument, we learn what state legislation is unconstitutional in the governance of alcohol. States may not enact new durational residency requirements that fail to comply with the holding of *Tennessee Wine*.⁵⁰ States cannot impose a tax on the out-of-state applicants in a manner that benefits in-state retailers under *Bacchus*.⁵¹ States cannot justify their new law by avowing that the statute was enacted to promote local industry, as the Supreme Court in *Bacchus*⁵² addressed. In doing so, States incidentally act in a manner that confers benefit to one party, the in-state competitor, at the detriment of another, the out-of-state entrant.

In practical terms, while these alternatives serve the interests of public health and safety concerns, they do little to redress the creative means in which the states

⁴⁸ See TENN. CODE ANN. § 57-3-204 (2014).

⁴⁹ See generally John Pulitoa & Antony Davies, *Does State Monopolization of Alcohol Markets Save Lives?* KEY STONE RESEARCH (2012).

⁵⁰ 139 S. Ct. at 2476 .

⁵¹ *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 273 (1984).

⁵² *Id.* at 276.

were effectively prohibiting the entrance of out-of-state competitors in their wine and spirit marketplace. The Tennessee regulation was, in a sense, a noble one: protecting the interests of its resident merchants from the Walmart-like behemoths that are national liquor chains. From this perspective, *Tennessee Wine* is another landmark victory for nameless, faceless corporations,⁵³ at the expense of local markets. Behind the public health and wellness rationale was the true goal of the Tennessee statute: economic protectionism of residents against corporate actors and non-residents.⁵⁴ What was not considered was the fact that a national liquor retailer chain, with virtually unlimited resources, entering a local market where the shops are smaller and intimately familiar with the local communities effects the public health and wellbeing of that community by simple virtue of its entrance: cheaper liquor, wide variety, and ease of access inevitably lead to increased consumption and the ills that befall overconsumption. States will have to determine how they can satisfy that same agenda without the explicit, facial discrimination inherent in durational residency requirements.

For the states that choose to repeal their laws, doing so would bring them into compliance with the *Tennessee Wine*⁵⁵ ruling. The states who rewrite their laws will, by manner of the passage of the new law, effectually repeal the previously invalidated statute. Finally, as will more than likely be the case for most, for

⁵³ See, e.g., *Citizens United v. FEC*, 558 U.S. 310, 466 (2010) (Stevens, J., dissenting) (“It might also be added that corporations have no consciences, no beliefs, no feelings, no thoughts, no desires. Corporations help structure and facilitate the activities of human beings, to be sure, and their ‘personhood’ often serves as a useful legal fiction. But they are not themselves members of ‘We the People’ by whom and for whom our Constitution was established.”)

⁵⁴ See, *Tennessee Wine*, 588 U.S. ___ (2019) slip op. at 12 (Gorsuch, J., dissenting).

⁵⁵ 588 U.S. ___ (2019).

the states that choose to do nothing, history repeats itself.⁵⁶ The law will simply be unenforceable by the State and susceptible to challenge under Supreme Court precedent.

III. Virtual Retailers and Tomorrow's Legal Challenges

*“And if residency requirements are problematic, what about simple physical presence laws?”*⁵⁷

Tennessee Wine opens the door for constitutional challenges by virtual retailers under the same premise that durational residency requirements for brick-and-mortar retailers were found unconstitutional. Future cases in Twenty-first Amendment jurisprudence will challenge physical presence requirements. The Justices questioned the attorneys about these novel challenges, but the attorneys declined to wrestle with such hypotheticals, comfortable instead with the limited prospect of the question certified for Supreme Court interpretation.⁵⁸ While certainly the safer bet, less guidance is now available as a result. Next, this paper addresses arguments for and against the following question: whether the Twenty-first Amendment empowers States, consistent with the dormant Commerce Clause, to regulate liquor sales by granting retail or wholesale licenses only to individuals or entities with brick-and-mortar businesses, to the detriment of wholly virtual businesses.

⁵⁶ *Supra*, note 46.

⁵⁷ *Tennessee Wine*, 588 U.S. ___ (2019) slip op. at 14 (Gorsuch, J., dissenting); *see also* *Direct Mktg Ass'n v. Brohl*, 814 F.3d 1129, 1148, 1150–51 (10th Cir. 2016) (Gorsuch, J., concurring) (The physical presence rule has “been the target of criticism over many years from many quarters”).

⁵⁸ Transcript of Oral Argument, *supra* note 2, at 49–50.

A. Arguments for Virtual Alcohol Retailers

Direct shipping laws are next to face constitutional challenges post-*Tennessee Wine*.⁵⁹ In fact, direct shipping laws that burden out-of-state merchants have arguably run afoul of the Supreme Court's *Tennessee Wine* ruling. States that have established regulatory regimes that discriminate against interstate commerce and non-resident citizens to the benefit of their residents will need to reexamine their statutes due to the emergence of virtual retailers, but also popular mobile-application based alcohol delivery companies Drizly,⁶⁰ Saucey,⁶¹ Buttery,⁶² and others, that further cloud issues regarding the transportation and delivery of alcohol across state lines. There are several distinctions in the virtual space. Virtual retailers, such as Reservebar.com and Masterofmalt.com, occupy space in the virtual marketplace for spirits, competing directly with local retailers. They typically offer more exotic selections at competitive prices in comparison to their brick-and-mortar counterparts, who are burdened by limited shelf space, overhead costs including rent and utilities, and the limitation of being available for business during traditional business hours only. Mobile application-based companies offer similar virtual retail offerings, but are available for immediate shipping, utilizing local markets to fulfill online orders. For any party where the partygoers are too inebriated to drive, yet all of the kegs

⁵⁹ 588 U.S. ___ (2019).

⁶⁰ DRIZLY, "Let the drinks come to you. Beer, wine and liquor delivered in under 60 minutes," <https://drizly.com/> (last visited Jan. 26, 2021).

⁶¹ SAUCEY, "Alcohol. Sooner rather than later. Because instant gratification is underrated," <https://saucey.com/> (last visited Jan. 26, 2021).

⁶² BUTTERY, available at https://play.google.com/store/apps/details?id=com.buttery&hl=en_US.

are tapped, mobile apps have been developed to solve this exact problem.

Mobile apps also fill a void where standard commercial couriers refuse to operate, including the United States Postal Service,⁶³ FedEx,⁶⁴ and UPS,⁶⁵ which offer limited services with their own applicable rules and regulations. The statutes have not yet addressed whether these casual liquor couriers are subject to the same regulations that currently govern liquor wholesalers, distributors, and retailers.

Markets thrive when the law takes into consideration the realities of evolving marketplaces. Rules and regulations that discourage online businesses from operating within the boundaries of certain states ignore the desires of modern consumers. Capitalism suffers as a result of this ignorance, or refusal to “get with the times.” Physical presence requirements are archaic, similar to durational residency requirements. The “dramatic technological and social changes” of our “increasingly interconnected economy” mean that buyers are “closer to most major retailers” than ever before —

⁶³ See UNITED STATES POSTAL SERVICE, “*Beer, wine, and liquor may not be sent through the mail, except in limited circumstances.*” <https://www.usps.com/ship/shipping-restrictions.htm> (last visited Jan. 26, 2021) and “Intoxicating liquors having 0.5 percent or more alcoholic content are nonmailable” https://pe.usps.com/text/pub52/pub52c4_006.htm

⁶⁴ FEDEX, *FedEx Prohibits Consumers from Shipping Alcohol and Only Approves Commercial Merchants that Are FedEx-Approved and Licensed*, <https://www.fedex.com/en-us/shipping/alcohol/shipping-requirements.html> (last visited Jan. 26, 2021).

⁶⁵ UNITED PARCEL SERVICE, *UPS Prohibits Shipping Alcohol with Limited Exceptions for States Permitting Winery Direct Shipments*, <https://www.ups.com/us/en/help-center/packaging-and-supplies/special-care-shipments/wine.page> (last visited Jan. 26, 2021).

“regardless of how close or far the nearest storefront.”⁶⁶ There is a reason why Toys R Us, Circuit City, CompUSA, Sharper Image, Books-A-Million, and Blockbuster collapsed, but Amazon, eBay, and Netflix continue to thrive.

Under *Tennessee Wine*⁶⁷ and the Supreme Court’s discussion of virtual presence requirements in *South Dakota v. Wayfair*⁶⁸, virtual sellers have strong grounds for proclaiming that both physical presence requirements and durational residency requirements for virtual alcohol retailers violate the dormant commerce clause.

In *Wayfair*, the Supreme Court overruled its previous holdings in *Quill Corp. v. North Dakota*⁶⁹ and *National Bellas Hess, Inc. v. Department of Revenue of Illinois*⁷⁰. While *Wayfair* addressed the collection and remittance of taxes by virtual retailers with no in-state physical presence, its discussion of physical presence in the virtual context is instructive: “rejecting the physical presence rule is necessary to ensure that artificial competitive advantages are not created by this Court’s precedents”.⁷¹ In focusing on the avoidance of creating advantages for in-state retailers, one must also be cognizant of creating loopholes and advantages for new market entrants and out-of-state retailers. The movement towards greater virtual consumer demands must be considered against the States’ autonomy to recognize such endeavors: “states are not obligated to embrace every aspect of the Internet economy—

⁶⁶ *Direct Marketing Assn. v. Brohl*, 575 U.S. 1, 17–18 (2015) (Kennedy, J., concurring).

⁶⁷ 588 U.S. ___ (2019).

⁶⁸ *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018).

⁶⁹ 510 U.S. 859 (1993).

⁷⁰ 386 U.S. 753 (1967).

⁷¹ 138 S. Ct. at 2094.

especially when the product concerned has the capacity to inflict societal harms if abused".⁷²

In *Tennessee Wine*, the Supreme Court saw through the veil of health and wellness justifications for the Tennessee statute, finding its practical effect to be economic protectionist in nature.⁷³ The durational residency provision expressly discriminated against nonresidents, and the link between durational residency requirements and public health and safety was considered, at best, highly attenuated.⁷⁴ The same logic would be applied to any law discriminating against virtual alcohol retailers operating in state, as the virtual retailer carries the same, or similar status as the out-of-state retailer.

In some ways, the virtual retailer is even more connected to the in-state resident than the brick-and-mortar shop. Consider, for example, two retailers that are in the business of selling alcohol. The first is a mom-and-pop type of brick-and-mortar retailer located in a strip mall of a small American town. The second is a nationally recognized virtual seller, with state-of-the-art website, mobile application that facilitates local deliveries of alcohol, strong social media presence, and twenty-four-hour customer service representatives to answer the inquiries of consumers. The nationally operating virtual seller maintains an email database of thousands of local residents that have signed up through their website. The virtual seller also engages in real-time interactions with virtual patrons through live social media videos. They regularly respond to posts on their Facebook, Instagram, and Twitter pages. The mom-and-pop shop is open six days per week, for approximately eight hours per day, and is closed on all major holidays.

⁷² Brief for Wine and Spirits Wholesalers of America, Inc. as Amicus Curiae Supporting Petitioner at 31, *Tennessee Wine*, 588 U.S. ____ (2019).

⁷³ *Tennessee Wine*, 588 U.S. 33 slip op. at 5 (2019).

⁷⁴ *Id.* at 33.

They do not offer delivery services and they keep no records of their regular customers. Under these facts, the virtual seller has a strong argument to be considered more familiar with the local people than the local liquor store.

In one sense, the virtual seller removes the instant gratification component that brick-and-mortar alcohol retailers cannot overlook. An individual can visit a brick-and-mortar alcohol retailer, make a purchase, and ingest the alcohol right away. A bad day at work could result in quick consumption, poor decision making, and a car accident during the commute home. The individual could return multiple times, to the same or various physical retailers, and continue drinking throughout the day. That concern is eliminated by the fact that purchases made from the virtual seller require a time delay to allow for shipping. Purchases made by the virtual seller delay gratification. And while shipping has become quite faster in recent years than when mail order sales were first introduced to the general public, shipping times will never be as instantaneous as the sale of liquor by brick-and-mortar retailers. Thus, there is a sort of “cooling off period” when one purchases liquor online, in comparison to the immediacy of purchases from physical retailers. In this manner, virtual alcohol retailers are even safer than their physical counterparts.

Not only do virtual retailers satisfy the growing needs and desires of modern, savvy consumers, but the marketplace itself is reacting to higher demands for sales via mobile applications. Markets respond to public demand, and public demand is shifting when it comes to the utilization of mobile applications to secure and obtain that which was once only available through brick-and-mortar locations or traditional delivery services. Today, consumers need not leave their homes to obtain fast food.

Services like Uber Eats,⁷⁵ Grubhub,⁷⁶ and Doordash⁷⁷ have reshaped the casual dining market to allow consumers to order their favorite meals without leaving their homes. Other start-ups, like Postmates,⁷⁸ Udely,⁷⁹ and TaskRabbit,⁸⁰ take modern delivery services to a new level, offering the delivery of virtually any item.⁸¹ It is only natural that people would seek to order alcohol from the push of a button on their phone, but couriers have had difficulty traversing the legal landscape to avoid running afoul of existing regulations, many of which may not have been drafted with the contemplation that such modern delivery services would ever exist.

B. Arguments Against Virtual Alcohol Retailers

⁷⁵ UBER EATS, *Uber Eats: Food Delivery and Takeout*, <https://www.ubereats.com/en-US/> (last visited Jan. 26, 2021).

⁷⁶ GRUBHUB, *Food Delivery For Less*, <https://www.grubhub.com/> (last visited Jan. 26, 2021).

⁷⁷ DOORDASH, *Your Favorite Restaurants, Delivered*, <https://www.doordash.com/> (last visited Jan. 26, 2021).

⁷⁸ POSTMATES, “*Anything, anytime, anywhere. Postmate it. Food, drinks and groceries available for delivery or pickup.*” <https://postmates.com/> (last visited Jan. 26, 2021).

⁷⁹ UDELY, *Order Anything / Deliver Anything*, <https://udely.com/> (last visited Jan 26, 2021).

⁸⁰ TASKRABBIT, “*Help around the home, at your fingertips You don't always have to DIY. Get help from thousands of trusted Taskers for everything from home repairs to cleaning.*” <https://taskrabbit.com/> (last visited Jan. 26, 2021).

⁸¹ POSTMATES, “*What can I have delivered with Postmates? Just about anything! Whether it's a burrito, new headphones, or a fresh shirt for tonight's date, we will deliver it. Items we cannot deliver include controlled substances, weapons, live animals, people and gift cards.*” <https://support.postmates.com/buyer/articles/220089107-article-What-can-I-have-delivered-with-Postmates-> (last visited Jan. 26, 2021).

The States' authority to govern alcohol as they see fit stems from §2 of the Twenty-first Amendment:

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.⁸²

But, as we see in *Tennessee Wine*⁸³, this is not an absolute power, as the States' laws must comport with the

⁸² U.S. CONST. amend. XXI, § 2; *see, e.g.*, *Tennessee Wine*, 588 U.S. ___ (2019) slip op. at 9, n.6 (Gorsuch, J., dissenting) (“*See, e.g.*, 76 CONG. REC. 4143 (1933) (statement of Sen. Blaine) (“The purpose of section 2 is to restore to the States by constitutional amendment absolute control in effect over interstate commerce affecting intoxicating liquors”); *id.*, at 4225 (statement of Sen. Swanson) (“[I]t is left entirely to the States to determine in what manner intoxicating liquors shall be sold or used and to what places such liquors may be transported”); *Ratification of the Twenty-first Amendment to the Constitution of the United States: State Convention Records and Laws* 50 (E. Brown ed. 1938) (statement of President Robinson of the Connecticut convention) (“[F]undamentally our fight has been . . . for the return to the peoples of the several states of their constitutional right to govern themselves in their internal affairs”); *id.*, at 174 (statement of Del. Simmons to the Kentucky convention) (“The regulation of the sale of liquor is a state concern”); *id.*, at 247 (statement of Mme. Chairman Gaylord of the Missouri convention) (“We have never been in favor of a National Regulation to take the place of the 18th Amendment We believe that each state should work out sane and sensible liquor control measures, responsive to the sentiment of the people of each state”); *id.*, at 322 (statement of Gov. White of Ohio) (“[T]he control of intoxicating liquors presents a problem of first magnitude,” and “[t]he solution of the problem will be returned to the several states”).

⁸³ 588 U.S. ___ (2019).

dormant Commerce Clause.⁸⁴ In this section, we evaluate the health and safety justifications for the durational residency and physical presence of brick-and-mortar alcohol retailers, which are arguably multiplied in the consideration of a virtual alcohol retailer.

The legitimate concerns underlying out-of-state retailers' ability to sell alcohol in-state are amplified when dealing with virtual sellers. One of the legitimate government interests in creating durational residency requirements was an evaluation of interaction with the community.⁸⁵ Under the real, face-to-face understanding of "interaction," the virtual seller fails. Interactions in this sense are important, as they are triggered by the socially and emotionally combustible nature of alcohol usage. States must be able to enforce its laws against alcohol retailers, to ensure that alcohol is sold to those of legal age and standing, that over-selling and overserving are avoided, and to ensure that consumers purchase the product they contracted to purchase.

First, there is the concern for fraud, by a minor's usage of illegal identification, and underage consumption of alcohol, which is on the rise.⁸⁶ The traditional brick-and-mortar retailer can use common sense judgment to ascertain whether a potential consumer is of legal age to consume alcohol. For virtual retailers, absent facial recognition or live streaming point-of-sale transactions

⁸⁴ See *Cty. of Mobile v. Kimball*, 102 U.S. 691, 697 ("There would otherwise be no security against conflicting regulations of different States, each discriminating in favor of its own products and citizens, and against the products and citizens of other States.").

⁸⁵ *Tenn. Wine*, 139 S. Ct. at 36.

⁸⁶ CENTERS FOR DISEASE CONTROL AND PREVENTION, *Fact Sheets – Underage Drinking*, <https://www.cdc.gov/alcohol/fact-sheets/underage-drinking.htm> (last visited Jan. 26, 2021) ("Although the purchase of alcohol by persons under the age of 21 is illegal, people aged 12 to 20 years drink 11% of all alcohol consumed in the United States.")

via virtual alcohol retailers, these identification checks are simply incomparable. The risk for fraud is heightened for virtual alcohol retailers because of the ease that a minor could make purchases under someone else's identity, whether it is a friend or family member. Shipping is also complicated in that the minor could request that deliveries be made to an address other than the minor's home location. Brick-and-mortar alcohol retailers have less to worry about these concerns with face-to-face interactions, identification card scanners, and the gut instinct of intuition that only comes from evaluating a person's demeanor, body language, and other real-world qualities.

Virtual retailers would be quick to highlight the positive aspects of a controlled marketplace against the possibilities of dark web transactions. While underage consumption is a concern, surely an organized, legitimate, and governed virtual marketplace for liquor is better than the alternative: black market sales through the use of the dark web, hidden IP addresses, and bitcoin.⁸⁷ However, brick-and-mortar retailers would argue that this may be an exaggerated concern in light of the simpler alternatives a minor could implement to obtain alcohol than resorting to the dark web.

Second, durational residency requirements were said to create opportunities to observe a person's character. This was an important consideration because alcohol is not like other products, and its ability to be used, or overused to a person's detriment, are legitimate concerns. One simply cannot evaluate the character of the virtual seller in the same manner that a brick-and-mortar retailer can be evaluated. In-person interviews could be required for licensure, but this is only a short-

⁸⁷ See Aditi Kumar & Eric Rosenbach, *The Truth about the Dark Web*, INTERNATIONAL MONETARY FUND, 56 FINANCE & DEVELOPMENT 3 (Sept. 2019), <https://www.imf.org/external/pubs/ft/fandd/2019/09/the-truth-about-the-dark-web> kumar.htm.

term solution to a larger problem, especially considering personnel changes amongst larger retailers. Further, appearances online are all too deceiving – for instance, many Instagram and social media models are actually photoshopped caricatures of their true images, using creative brush strokes, filters, and other tricks-of-the-camera to appear in a light untrue to their actual image. With lingering concerns regarding fake profiles and bots used to meddle in the United States 2016 election,⁸⁸ the possibility that a virtual seller is not who they claim to be is a real concern in our modern technology age.

The virtual retailer responds with questioning whether concerns about observing a person's character are outdated. We are not comparing the virtual retailer or even the brick-and-mortar alcohol retailer to the rambunctious saloons of lawless American towns.⁸⁹ The rationale fails in the sense that many brick-and-mortar alcohol retailers operate in the traditional sense of a marketplace for goods. For example, consider the resemblance between Total Wines and a grocery store, or even Walmart.

That virtual retailer would be quickly reminded about society's pre-Prohibition problems that gave rise to sweeping legislation such as the Eighteenth

⁸⁸ See U.S. HOUSE OF REPRESENTATIVES, PERMANENT SELECT COMMITTEE ON INTELLIGENCE, *Exposing Russia's Effort to Sow Discord Online: The Internet Research Agency and Advertisements*, <https://intelligence.house.gov/social-media-content/> (last visited Jan. 26, 2021).

⁸⁹ See generally Harry G. Levine & Craig Reinerman, *From Prohibition to Regulation: Lessons from Alcohol Policy for Drug Policy*, 69 MILBANK QUARTERLY 3, CONFRONTING DRUG POLICY: Part 1 at 461–94 (1991); see also Ian Tyrell, *The US Prohibition Experiment: Myths, history and implications*, 92 ADDICTION 11 at 1405–09 (1997); see also NATIONAL ALCOHOL BEVERAGE CONTROL ASSOCIATION, *The Three Tier System: A Modern View*, https://www.nabca.org/sites/default/files/assets/files/ThreeTierSystem_Mar2015.pdf (last visited Jan 26, 2021).

Amendment⁹⁰. The concern about a retailer's ties to the local community is rooted in pre-Prohibition history.⁹¹ "Tied houses" were responsible for many of the social ills and evils associated with drunkenness.⁹² These bars, or saloons, were contracted to sell one manufacturer's product.⁹³ But manufacturers were not tied to local values.⁹⁴ Since the manufacturers were ignorant as to how their product affected local communities, they could focus on profits without having to witness the abuses of alcohol or succumb to the pressures of local social influence.⁹⁵ Virtual retailers would be hard pressed to identify how the liquor they sell affects every market in which they have made sales. As such, the concerns for alcohol retailers' ties to local communities and values reemerges in the virtual marketplace.

Quality control is also difficult evaluate for the virtual retailer. The brick-and-mortar retailer has actual stock, or perhaps a nearby warehouse. But questions arise as to where the stock is kept for the virtual seller and whether their chain of custody can be validated.

Proponents of virtual alcohol sales would note that the online outrage by a person purchasing one bottle of liquor and receiving something that he or she did not buy would destroy the reputation of that online retailer. That is why online review sites like Yelp and Amazon's customer reviews are so popular – they provide candid

⁹⁰ See U.S. CONST. amend. XVIII.

⁹¹ Brief for The Center for Alcohol Policy as Amicus Curiae Supporting Petitioner at 8–10, *Tennessee Wine*, 588 U.S. ____ (2019); see also Raymond B. Fosdick & Albert L. Scott, *TOWARD LIQUOR CONTROL* 10 (1st ed. 1933) (the most critical observation from *Toward Liquor Control* was that alcohol is a hyper-local problem requiring hyper-local solutions).

⁹² Brief for The Center for Alcohol Policy as Amicus Curiae Supporting Petitioner at 11, *Tennessee Wine*, 588 U.S. ____ (2019).

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

accounts that judge and evaluate a company's business. Negative comments on Yelp, Amazon, or eBay could potentially destroy a business. Virtual retailers would also point to the fact that the same concerns could arise in the context of online grocery shopping. However, this market is thriving as well.⁹⁶

IV. In Vino Veritas, or The Truth About How States Should be Able to Govern Alcohol

*Tennessee Wines*⁹⁷ is a major win for national liquor retailers looking to enter new markets across the country. What is eroded is the states' ability to regulate a dangerous good. In assessing the economic protectionist effect of Tennessee Code §57-3-204,⁹⁸ the Court discounts the public health and safety measures of the Tennessee statute.⁹⁹ Any statute that limits an individual's ability to purchase alcohol is a statute that protects the citizenry by limiting access to a dangerous product. States may look at virtual sellers and enact stern physical presence requirements if they think that a person's ability to purchase alcohol at any time, day or night, is excessive. Or, they may enact physical presence requirements for the simple premise of ensuring that someone within the confines and jurisdiction of the state will be accountable for the actions of the retailer. To exercise police power over an out-of-state retailer operating virtually within a

⁹⁶ Darren Tristano, *Online Grocery Sales Predicted To Surge By 2021, But Where Will That Growth Come From?*, FORBES.COM (Mar. 21, 2019), <https://www.forbes.com/sites/darrentristano/2019/03/21/online-grocery-sales-surge-through-digital-platforms-as-consumers-crave-convenience/#6250e5112b8f>.

⁹⁷ 588 U.S. ___ (2019).

⁹⁸ TENN. CODE ANN. § 57-3-204 (2014).

⁹⁹ See, *Tennessee Wine*, 588 U.S. ___ (2019) slip op. at 14 (Gorsuch, J., dissenting).

state could result in great cost to execute properly. One could characterize that as facially economic protectionist because every brick-and-mortar in-state retailer would indubitably benefit from a statute requiring physical presence, but the statute would promote reasonable consumption and an orderly liquor market – which were thought to be core powers of the States¹⁰⁰.

Greater deference should be given to a States' desire to promote positive public health and safety standards. *Granholm* conferred “virtually complete control” on States to structure their liquor distribution system as they see fit.¹⁰¹ *Tennessee Wines*¹⁰² walks back this “complete control”, but at the cost of the local communities as Justice Gorsuch articulated in his dissenting opinion¹⁰³: economic protectionism itself reduces competition in the liquor market, which increases the price of in-state alcohol and moderates its use.¹⁰⁴

Conclusion

Virtual retailers of wine and spirits will be able to operate in every state of the American union. That is the logical conclusion derived from the holdings of both *Tennessee Wine*¹⁰⁵ and *Wayfair*¹⁰⁶. There is simply too much pressure to expand the availability of alcohol into the virtual marketplace. For the few states that completely prohibit the practice, all that is needed is one law so facially wanting of legitimization as Tennessee

¹⁰⁰ *North Dakota v. United States*, 495 U.S. 423, 432 (1990).

¹⁰¹ *Granholm*, 544 U.S. at 488.

¹⁰² 588 U.S. ___ (2019).

¹⁰³ *Tennessee Wine*, 588 U.S. ___ (2019) slip op. at 14 (Gorsuch, J., dissenting).

¹⁰⁴ *Id.* at 12.

¹⁰⁵ 588 U.S. ___ (2019).

¹⁰⁶ *Wayfair*, 138 S. Ct. 2080.

statute §57-3-204¹⁰⁷ and the “tomorrow’s arguments” mentioned in *Tennessee Wine*¹⁰⁸ will be addressed. Unfortunately, the argument that will be left unaddressed is determining how much power the states will have to regulate the sale and control of alcohol in their territories if virtual sellers can undermine their interests by way of a Supreme Court ruling. The States’ police powers to govern alcohol within their borders will likely continue to diminish.

¹⁰⁷ TENN. CODE ANN. § 57-3-204 (West 2014).

¹⁰⁸ 588 U.S. ____ (2019).