DIRECT SHIPPING FOR MICHIGAN BEER? WINE NOT

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TABLE OF CONTENTS

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INTRODUCTION

The popularity of craft beer—and the corresponding size of the craft beer industry as a whole—has significantly increased in recent years.[1] In Michigan, the number of craft breweries has more than doubled in the past three years,[2] contributing to Michigan's position as a leader in American craft beer.[3] The state of Michigan regulates craft breweries, like most other states, under a three-tier system that divides actors into manufacturers or suppliers (tier one), wholesalers or distributors (tier two), and retailers (tier three).[4] This mandated division of roles imposes an obstacle on new, small breweries that face challenges when finding a distributor who will add their new, relatively unknown brand to the distributor's portfolio.[5] Even if a brewery finds a distributor willing and able to carry its product, using a distributor imposes additional costs that can hurt a small brewery's

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1. *See State Craft Beer Sales & Production Statistics, 2018*, BREWERS ASS'N FOR SMALL & INDEP. CRAFT BREWERS, https://www.brewersassociation.org/statistics-and-data/state-craft-beer-stats/?state=MI (last visited May 17, 2020) [hereinafter *State Craft Beer Stats*] (showing a rise in the number total number of breweries in the United States and in Michigan over the past five years). Craft beer is beer manufactured by a craft brewer, which the Brewers Association defines as a brewery where "[l]ess than 25 percent of the craft brewery is owned or controlled (or equivalent economic interest) by a beverage alcohol industry member that is not itself a craft brewer" and an "[a]nnual production of 6 million barrels of beer or less (approximately 3 percent of U.S. annual sales)." *Craft Brewer Definition*, BREWERS ASS'N FOR SMALL & INDEP. CRAFT BREWERS, https://www.brewersassociation.org/statistics-and-data/craft-brewer-definition/ [https://perma.cc/2A57-X25H] (last visited Apr. 27, 2020).

2. *See State Craft Beer Stats*, *supra* note 1 (showing the total number of breweries in the state was 159 in 2014 and 330 in 2017).

3. *See id.* (ranking Michigan fifth in the country in terms of absolute number of breweries and twelfth in breweries per capita); *see also* Ben Robinson, Andy Kryza & Matt Lynch, *All 50 States in the U.S., Ranked by Their Beer*, YAHOO! LIFE (Oct. 27, 2015, 1:53 PM), https://www.yahoo.com/lifestyle/every-state-in-the-us-ranked-by-its-beer-127816752267.html (ranking Michigan fourth among states).

4. *See* MICH. DEP'T OF LICENSING & REGULATORY AFFAIRS: LIQUOR CONTROL COMM'N, BREWER OR MICRO BREWER LICENSING REQUIREMENTS & GENERAL INFORMATION (2020) [hereinafter MICH. BREWER LICENSING REQUIREMENTS] (describing the structure of the three-tier system).

5. *See* MICH. COMP. LAWS § 436.1203(2)(b) (2017) (stating the legislature's intent to have alcoholic beverages move through the three-tier system); *see also Web Wine Sales Still Bottled Up*, WIRED (Mar. 31, 2004, 2:00 AM), https://www.wired.com/2004/03/web-wine-sales-still-bottled-up/ [https://perma.cc/9BCZ-NDBE] (explaining how the need to use a distributor imposes costs on small manufacturers that can threaten the success of their business).

ability to compete and remain profitable.[6] Further, the combination of wholesalers' superior bargaining position and state franchise laws often results in an agreement that disproportionately favors the distributor.[7] With this obstacle in the way of a brewery's ability to build brand recognition and reach consumers, the three-tier system forces start-up breweries to largely rely on their immediate locale for sales.[8]

On the other hand, Michigan, along with many other state legislatures, has freed wineries from the cumbersome regulations of the three-tier distribution system by enabling them to sell their products to licensed retailers and wholesalers alike.[9] Further, Michigan wineries are able to engage in the practice of direct shipping, which allows consumers to order wine online and receive it directly from the wineries.[10] The ability to connect directly with consumers—without being forced to go through wholesalers, or even retailers—is especially helpful for small wineries that lack the resources, bargaining power, and brand recognition to contract with a wholesaler.[11] Some states, such as Oregon, have even extended this direct shipping opportunity to breweries.[12] The Michigan legislature should follow the example of these other states and extend the same

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6. *See infra* Part I (discussing the costs that breweries incur when using a distributor and the relative hardship imposed on small alcohol manufacturers).

7. *See* Tammy Lam, *Brew Free or Die? A Comparative Analysis of U.S. and E.U. Craft Beer Regulations*, 23 CARDOZO J. INT'L & COMP. L. 197, 209 (2014) (explaining how a new brewer may find itself locked into an unfavorable contract with a wholesaler out of desperation and lack of distribution options).

8. *See* MICH. COMP. LAWS § 436.1537(1)(k) (2018) (describing how a licensed brewery or microbrewery is able to sell beer to consumers at the licensed location); *see also Web Wine Sales Still Bottled Up*, *supra* note 5 (explaining how an owner of a small winery relies on direct shipping to stay in business).

9. *See* Stariha & Brower, PLC, *Manufacturing License Types*, MICH. LIQUOR L., http://michiganliquorlaw.com/manufacturing-license-types.html [https://perma.cc/6L73-ZAJE] (last visited Apr. 27, 2020) (displaying different licenses available to alcohol manufacturers in Michigan, including wine manufacturer licenses allowing the license holder to sell product to wholesalers and retailers).

10. *See* MICH. COMP. LAWS § 436.1203(10)(a) (2017) (allowing wine makers to receive Direct Shipper licenses).

11. *See* Granholm v. Heald, 544 U.S. 460, 467 (2005) (explaining one of the reasons why the Michigan and New York laws imposed a burden on interstate commerce was 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").

12. *See* OR. REV. STAT. § 471.282(1) (2019) (providing that "a person may sell and ship malt beverages, wine or cider directly to a resident of Oregon only if the person holds a direct shipper permit").

direct shipping opportunity, and its accompanying benefits, to small breweries in Michigan.[13]

Part I of this Comment surveys the historical rise of—and justifications for—the three-tier system that governs the distribution of beer in Michigan.[14] Next, Part II of this Comment follows the divergence of wine distribution from the three-tier system, particularly with the practice of direct shipping, and identifies effects that the divergence has had on small wineries.[15] Finally, Part III explains that allowing small brewers in Michigan to direct ship to consumers would have the same beneficial effects on small breweries that it has had on small wineries, thus alleviating a portion of the obstacles the three-tier system creates for small breweries.[16] While direct shipping would provide small breweries with a chance to survive without facing the challenges that the three-tier system imposes, it would not disturb the benefits that the system provides to retailers.[17] Ultimately, Michigan should embrace its position in the world of American craft beer by pursuing policies that maximize the ease of operating a competitive small brewery in the state.[18]

I. Emergence of Brewing in the United States, the Three-Tier Distribution System, and Direct Shipping of Craft Beer

Following the repeal of the nationwide prohibition of alcohol through the states' ratification of the Twenty-first Amendment to the United States Constitution, the majority of states adopted a regulatory scheme for alcohol known as the "three-tier distribution system."[19]

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13. *See* Bob Barnes, *Beer Shipping Laws Deconstructed (Issue 34)*, BEER CONNOISSEUR (Jan. 8, 2018), https://beerconnoisseur.com/articles/beer-shipping-laws-deconstructed [https://perma.cc/E238-W6K6] (listing seven states that allow for direct shipping of beer from brewery to consumer: Nebraska, New Hampshire, North Dakota, Ohio, Oregon, Vermont, and Virginia).

14. *See infra* Part I (discussing the three-tier system's emergence following Prohibition and its current influence in Michigan).

15. *See infra* Part II (discussing how wineries across the country are able to circumvent the three-tier system through direct shipping).

16. *See infra* Part III (discussing how allowing breweries to direct ship would provide a benefit to small breweries).

17. *See infra* Part III (discussing how direct shipping would not remove the benefits of the three-tier system, which mostly relate to retailers).

18. *See* Robinson, Kryza & Lynch, *supra* note 3 (ranking Michigan craft beer fourth among states considering the quality of beer produced and the quantity of breweries in the state).

19. *See* Andrew D'Aversa, Comment, *Brewing Better Law: Two Proposals to Encourage Innovation in America's Craft Beer Industry*, 165 U. PA. L. REV. 1465,

This three-tier system prohibited an ownership interest in more than one of the three tiers: (1) manufacturer or supplier; (2) wholesaler or distributor; and (3) retailer.[20] What was once a system intended to protect many small distributors from a few large alcohol manufacturers now operates in an economic landscape that is increasingly the opposite—many small alcohol manufacturers and a few large distributors.[21] Not only are Michigan breweries forced to enter into agreements with distributors to reach retail outlets but they are also unable to sell their product directly to consumers, apart from on-premises sales.[22] Although commentators debate the effects of requiring beer manufacturers go through distributors to reach retailers, some states, such as Oregon, allow their breweries to ship beer directly to consumers.[23]

A. Craft Beer in the United States

Brewing beer was already an American tradition for more than a century before the United States was founded as a country.[24] The first known brewery began in 1612 in what was then called New Amsterdam, which is now present-day Manhattan.[25] Brewing in the United States continued to grow over the next few hundred years leading into the nineteenth century, what is known as the dawn of the modern era of American brewing.[26] Between the years 1810 and 1873,

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1476 (2017) (explaining that following the repeal of Prohibition, majority of states adopted the regulated three-tier distribution system).

20. *See id.* (explaining the fundamental structure of the three-tier system).

21. *See* Andrew Tamayo, Comment, *What's Brewing in the Old North State: An Analysis of the Beer Distribution Laws Regulating North Carolina's Craft Breweries*, 88 N.C.L. REV. 2198, 2213, 2218 (2010) (discussing how the mid-twentieth century saw large consolidation between beer manufacturers and how the three-tier system was seen as a way to protect small, family-owned distributors from being taken advantage of).

22. *See* Stariha & Browser, PLC, *supra* note 9 (showing no license available for Michigan beer manufacturers allowing them to engage in direct-to-consumer shipments).

23. *See* OR. REV. STAT. § 471.282 (2019) (allowing holders of Direct Shipper permits to ship products directly to consumers).

24. *See The History of Beer in America*, GREAT FERMENTATIONS, June 27, 2016, https://www.greatfermentations.com/the-history-of-beer-in-america/ (explaining that although the Native Americans had already been brewing a corn beer, the craft brewing industry at the time began in 1612 in modern day Manhattan).

25. *See id.* (describing the earliest breweries to be founded in the United States).

26. *See id*. (explaining that the earliest craft breweries were opened in the nineteenth century).

there was a significant increase in United States brewing when the number of breweries in the country jumped from 132 to 4,131.[27]

While the national prohibition of alcohol had an obvious detrimental effect on brewing in general, the number of small craft breweries began to decline in the mid- to late nineteenth century when larger breweries began to consolidate.[28] The number of small craft breweries began to slowly climb back following the Twenty-first Amendment, which ended Prohibition.[29] However, the initial apparent reemergence of small craft breweries was short-lived when larger beer manufacturers began to take advantage of scale production and consolidate, ultimately making it too difficult for many post-Prohibition small breweries to compete.[30] As a result, the presence of small breweries continually declined through the middle of the twentieth century before they began to bounce back in the 1980s.[31]

Beginning in the 1980s, the number of craft breweries in the United States began to grow, and some of the craft beer presence of pre-Prohibition reemerged.[32] In each year following 1980, through at least 2012, there were either fewer or the same number of macro breweries and more craft breweries than the previous year.[33] The

27. *Id.*

28. *See id.* (explaining how in 1918, two years before the dawn of the Prohibition era and the ratification of the Eighteenth Amendment, the number of breweries in the United States had decreased to only a quarter of the number that were in operation forty-five years prior).

29. *See* Theresa McCulla, *Prohibition Was Fantastic for American Beer, or, Cheers to Homebrewers*, NAT'L MUSEUM AM. HIST. (Apr. 7, 2018), http://americanhistory.si.edu/blog/homebrew [https://perma.cc/5CJS-NTQ6] (discussing how there were many quick openings of breweries following the Twenty-first Amendment).

30. *See* Mark Lewis, Rob Hornyak & Richard W. Pouder, *Highland Brewing Company: A Case of Product Design and Experience*, *in* CRAFT BEVERAGES AND TOURISM, VOLUME 1: THE RISE OF BREWERIES AND DISTILLERIES IN THE UNITED STATES 75, 77 (Carol Kline, Susan L. Slocum & Christina T. Cavaliere eds., 2017) (explaining how during post-Prohibition, the biggest beer manufacturers "remained intent on expansion, using production efficiencies and marketing to squeeze out smaller breweries").

31. *See generally id.* (explaining the effect of large brewery consolidation on the number of craft breweries); *see also* Kenneth G. Elzinga, Carol Horton Tremblay & Victor J. Tremblay, *Craft Beer in the United States: History, Numbers, and Geography*, 10 J. WINE ECON. 242, 245 (2015) (showing the number of craft breweries in the United States began to grow in the 1980s).

32. *See id*. (showing a record jump of total number of craft brewers in the United States between 1995 and 1996, where the number of craft breweries went from 977 to 1,277).

33. *See id.* (showing that between 1980 and 2012, craft breweries continued to grow in number and macrobreweries continually dropped or remained the same).

growth of craft breweries took an exponential leap moving into the 1990s, peaking in 1998 when there were over 1,600 craft breweries in the United States.[34] This record number of breweries remained unsurpassed until 2008 when the number of breweries exceeded 1,600, and the number continues to grow.[35]

This record growth of craft beer demonstrates changing tastes and flavor preferences among consumers.[36] American beer drinkers typically prefer the variation of styles and flavors offered by craft brewers, as opposed to what the larger macro brewers produce, which is largely light lagers that each taste only marginally different from one another.[37] The rise in the popularity of craft beer is not limited to the United States, but it is a global trend—and craft brewers in the United States, including those in Michigan, are at the forefront.[38]

B. Craft Beer in Michigan

North America is the largest contributor to the upward trend in the global craft beer landscape.[39] The United States sits in an elite position among North American craft beer, and Michigan craft

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34. *See id.* (tracking the rise of craft beer year by year, where the number temporarily peaked in 1998 with 1,625 craft breweries).

35. *See id.* (putting the number of craft breweries in the country in 2008 at 1,659); *Number of U.S. Breweries*, BREWERS ASS'N, https://www.brewersassociation.org/statistics/number-of-breweries/ [https://perma.cc/AWP3-N5W6] (last visited Apr. 27, 2020) (showing continued increase in the number of breweries in the United States).

36. *See* CNN Wire, *America's Changing Taste in Beer Is Bad News for Budweiser*, FOX 43 (Nov. 13, 2017, 2:54 PM), https://fox43.com/2017/11/13/americas-changing-taste-in-beer-is-bad-news-for-budweiser/ [https://perma.cc/223B-HP67] (discussing how Americans' taste in beer is changing toward a preference for craft beers and microbrews).

37. *See Craft Beer Market—Growth, Trends, and Forecast (2020–2025)*, MORDOR INTELLIGENCE, https://www.mordorintelligence.com/industry-reports/craft-beer-market?gclid=EAIaIQobChMI0qK16ZzN3QIVgzxpCh110guPEAAYAiAAEg KOPfDBwE (last visited Apr. 27, 2020) [hereinafter *Global Craft Beer Market Report*] (listing the United States as the largest contributor to the growth of craft beer); *see also* Lewis, Hornyak, Pouder, *supra* note 30, at 77–78 (discussing how a reason for the rise of craft beer was Americans' desire for flavors that were not offered by macro breweries, which largely offered "undifferentiated pale lagers").

38. *See Global Craft Beer Market Report*, *supra* note 37 (explaining how the market for, and incidental production of, craft beer is rising globally and the largest contribution to that growth is coming from North America—particularly, the United States).

39. *See id.* (discussing how North America is the largest contributor to recent growth in craft beer).

brewers are prominent among brewers in the United States.[40] Brewing beer has been a part of Michigan's history since John Pannel founding the first brewery in the state shortly after 1836.[41]

Today, Michigan breweries have earned acclaim among craft beer enthusiasts, both in terms of quantity and quality.[42] The craft beer industry in Michigan has seen consistent growth in the last decade.[43] As of 2019, there were 400 craft breweries in the state, which is nearly double what the total was only three years prior.[44] Four hundred craft breweries means that there are 5.4 breweries for every 100,000 adults of legal drinking age in the state.[45] Additionally, Michigan breweries regularly compete in international craft beer competitions, such as the 2018 Beer World Cup, and typically win against breweries representing more than fifty different countries around the world.[46] Further, as of 2018, small and independent craft breweries in Michigan had an estimated economic impact in the state of just over $2.5

40. *See id.*; *see also State Craft Beer Stats*, *supra* note 1 (ranking Michigan fifth among states after accounting for number of breweries per capita, total number of breweries, and amount produced in the previous year).

41. *See* Garret Ellison, *How Original Grand Rapids Brewers Laid the Foundation for Today's Beer Industry*, MLIVE (Oct. 17, 2012), https://www.mlive.com/news/grand-rapids/index.ssf/2012/10/grand_rapids_beer_history.html [https://perma.cc/HL5T-E4R4] (explaining how the first brewery in the state was opened shortly after the founder moved to what is now Grand Rapids, Michigan in 1836); *see also* History.com Editors, *Michigan*, HIST. (Nov. 9, 2009), https://www.history.com/topics/us-states/michigan [https://perma.cc/JD4S-AL9V] (stating that Michigan became a state in 1837).

42. *See State Craft Beer Stats*, *supra* note 1 (ranking Michigan fifth in the country in total number of breweries, ninth in terms of total economic impact, and eleventh in terms of breweries per capita); Amy Sherman, *These Michigan Breweries Are Award-Winning*, MLIVE (May 8, 2018), https://www.mlive.com/expo/erry-2018/05/e54dc8eb684285/these_michigan_breweries_are_a.html (discussing how in an international beer competition, wherein more than fifty countries participated, beers from Michigan breweries won ten different awards out of a possible 302); *see also* Robinson, Kryza & Lynch, *supra* note 3 (ranking Michigan fourth among states, taking into consideration the quality of beer states are brewing, along with the amount of breweries in a state).

43. *See State Craft Beer Stats*, *supra* note 1 (tracking the total number of breweries in Michigan beginning in 2011).

44. *See id.* (showing 159 total breweries in Michigan in 2014).

45. *See id.* (ranking states by breweries per capita and putting Michigan at twelfth in the country).

46. *See* Sherman, *supra* note 42 (discussing how ten different Michigan beers won awards in nine different categories at the 2018 Beer World Cup in Nashville, Tennessee, wherein 2,515 breweries from fifty different countries competed).

billion.[47] Through all of this growth and notoriety of its craft beer industry, Michigan has earned national attention as a destination for craft beer fans.[48]

The Michigan legislature recognized the prominence of Michigan craft alcoholic products when it created the Craft Beverage Council.[49] Formerly the Grape and Wine Industry Council, the legislature changed the advisory board's name in 2018, and it is now required to include one person who represents large brewers and one person who represents either microbrewers or holders of brewpub licenses.[50] The Council's members direct the Department of Agriculture and Rural Development to issue grants for research and other projects relating to growing high quality ingredients used in Michigan beer.[51] The change in the Board's name, the mandated inclusion of parties representing the Michigan beer industry, and the requirement that at least some grant recipients engage in projects that improve the knowledge and skill of brewers and those growing ingredients used in Michigan beer reveal the legislature's awareness and appreciation of the prominence of Michigan beer.[52]

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47. *See State Craft Beer Stats*, *supra* note 1 (ranking Michigan ninth in the United States in terms of the economic impact provided by craft breweries at $2,566,000,000. The figure is derived from the economic impact from beers manufactured by craft brewers as they move through the three-tier distribution system and also includes nonbeer items like food and merchandise sold by breweries and brewpubs).

48. *See* Gary Monterosso et al., *Grand Rapids Earns 'Best Beer Town' Title*, USA TODAY, https://www.10best.com/awards/travel/best-beer-town/ [https://perma.cc/69A6-V7TS] (last visited Apr. 27, 2020) (placing Grand Rapids, Michigan as the best beer town in America).

49. *See Michigan Craft Beverage Council*, MICH. DEP'T AGRIC. & RURAL DEV., https://www.michigan.gov/mdard/0,4610,7-125-1572_2885_25921---,00.html [https://perma.cc/K6BN-SLS9] (last visited Apr. 27, 2020) (describing the role of the Craft Beer Council).

50. *See* MICH. COMP. LAWS § 436.1303(1)(b) (2018) (setting the personnel requirements of the ten-person advisory board).

51. *See id.* § 436.1303(7) (describing how members of the Craft Beverage Council will direct the Department of Agriculture and Rural Development as to who should receive grants for research and projects that achieve one of various enumerated goals relating to ingredients used in beer, wine, and spirits).

52. *See id.* (listing various potential goals of eligible grant recipients).

> [T]he council shall direct the department of agriculture and rural development to award grants for the following: . . . [d]evelop and administer financial aid programs to hops growers to encourage increased planting in this state of desirable hops varieties in microclimates determined to provide the best conditions for producing quality beer.

Id.

C. Emergence of the Three-Tier Distribution System

Today, each state has adopted some form of the "three-tier system" or "three-tier distribution system," which controls the flow of alcohol through the supply chain from manufacturer to consumer.[53] Following the repeal of Prohibition with the passage of the Twenty-first Amendment, John D. Rockefeller, Jr. funded a study to develop a proposed regulatory scheme from which the states could model their laws.[54] Rockefeller, Jr. recruited Raymond Fosdick, a lawyer, and Albert Scott, an engineer with some expertise relating to social and religious movements, to conduct a study with the purpose of identifying a suitable regulatory scheme for the states.[55] The result of the study, titled *Toward Liquor Control*, was the three-tier system.[56] In its unaltered form, the three-tier system precludes any member of one tier from possessing an ownership interest in an entity belonging to another tier.[57] The three tiers of the system are: (1) the manufacturer or producer of alcohol; (2) the wholesaler or distributor of alcohol; and (3) the retailer, such as a bar, restaurant, or store.[58] By proposing this mandated independence between roles, Fosdick and Scott meant to address a number of societal and economic concerns that arose in the wake of pre-Prohibition practices.[59]

53. *See* D'Aversa, *supra* note 19, at 1474 (explaining that since the repeal of Prohibition, every state has since adopted one of the regulatory models proposed by Raymond Fosdick and Albert Scott).

54. *See id.* at 1473 (explaining how Rockefeller Jr., described as a staunch supporter of total personal abstinence from the consumption of alcohol, sought to advocate for a regulatory scheme that, while not as pervasive as the Eighteenth Amendment, would prevent the noneffectual regulation of alcohol that Congress implemented prior to the Prohibition era).

55. *See id.* (discussing the backgrounds of Fosdick and Scott).

56. *See id.* at 1474 (claiming that Fosdick and Scott's *Toward Liquor Control* has been more influential in shaping alcohol policy in the United States than any book besides the Bible).

57. *See* Tamayo, *supra* note 21, at 2210–11 (discussing how the original proposal from Fosdick and Scott prohibited financial relations between manufacturer and retailer, which the states later built on to also require financial independence at the distributor tier).

58. *See* D'Aversa, *supra* note 19, at 1475 (explaining how the proposed system prohibited any person or entity holding a license as a retailer to also hold a license as a producer or distributor and vice versa).

59. *See* Marc Sorini, *Understanding the Three-Tier System: Its Impacts on U.S. Craft Beer and You*, CRAFTBEER.COM (Mar. 6, 2017) https://www.craftbeer.com/craft-beer-muses/three-tier-system-impacts-craft-beer [https://perma.cc/R425-LAMV] (explaining that many blamed the movement for Prohibition on the wide-spread prevalence of saloons and tied houses).

Fosdick and Scott blamed the overlap of ownership between the alcohol manufacturers and the retailers, particularly with bars, for a number of the issues they intended the three-tier system to remedy.[60] The prevalence of saloons and their reputation as being hubs for drunkenness, gambling, violence, and prostitution were powerful motivators for those in favor of Prohibition prior to Congress passing the Eighteenth Amendment.[61] Communities' hatred of saloons survived Prohibition, and Fosdick and Scott cited a communal desire to never see the institution return as one of the six staples their proposal would address.[62]

Prohibition advocates especially blamed a subcategory of saloons, known as tied-houses, for much of saloons' bad reputation among communities.[63] These tied-houses were bars affiliated with a particular alcohol manufacturer and almost exclusively carried that manufacturer's product.[64] The excessive drunkenness that occurred at tied-houses was, in Fosdick and Scott's view, the result of absentee ownership on the part of the manufacturer.[65] Fosdick and Scott's solution to avoiding the amoral disinterest that absentee ownership caused was to prohibit manufacturers from possessing an ownership interest in retail establishments altogether.[66]

60. *See* Tamayo, *supra* note 21, at 2213 (explaining how Fosdick and Scott concluded that insulating the bar or saloon from the negative influences of a large alcohol manufacturer would help redress a number of the societal issues for which alcohol was blamed pre-Prohibition).

61. *See* Sorini, *supra* note 59 ("[Saloons], with [their] reputation for drunkenness, gambling, prostitution and violence [were] seen as a root cause for the backlash that spawned the temperance movement.").

62. *See* Tamayo, *supra* note 21, at 2210 (discussing how Fosdick and Scott conducted interviews to decipher what people wanted to see out of new, post-Prohibition regulation of alcohol).

63. *See* Sorini, *supra* note 59 (explaining how a subset of saloons were tied-houses that bore special responsibility not only for some of the social, drunkenness-related problems but for some economic issues as well).

64. *See The Brewing Industry and Prohibition*, OHIO ST. U., https://prohibition.osu.edu/brewing-industry-prohibition [https://perma.cc/YPQ7-VSNV] (last visited Apr. 27, 2020) (discussing how large brewers would create and finance retail outlets designed to carry their own beer).

65. *See* Tamayo, *supra* note 21, at 2210 (discussing how Fosdick and Scott concluded that when the manufacturer, who effectively controlled the tied-house, did not live in the same community that the tied-house was operating, the manufacturer's motives were purely financial and were not balanced out by concerns for the well-being of the community. This separation is what is meant by absentee ownership).

66. *See id.* (explaining how Fosdick and Scott recommended that states prohibit all financial relations between manufacturer and retailer).

Aside from the overserving and deviant behavior associated with tied-houses, Fosdick and Scott thought the overlap of ownership between manufacturer and retailer created a detrimental effect on the free market, specifically through squeezing out competition.[67] Again, the solution was to prevent overlap in ownership between what states and industry participants would eventually call tier one and tier three.[68] Tier two, independent wholesalers and distributors, provided even more insulation from tied-house related issues.[69] Although not a benefit Fosdick and Scott originally identified, some scholars and industry participants claim the three-tier system provides a more locally responsive regulation of the manufacture and sale of alcohol.[70]

Today, some commentators emphasize the role of the three-tier system in assisting retailers.[71] In particular, the three-tier system provides an efficient means for getting a higher volume of alcoholic products to retail than if retailers had separate, individual deliveries coming from all of the different manufacturers of the brands they carry.[72] Rather than deal with many different manufacturers, the retailer only has to work with one or a few distributors, which lowers the retailer's cost of acquiring a range of inventory.[73] Once the three-tier system limits retailers to buying from distributors, both state

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67. *See* D'Aversa, *supra* note 19, at 1474 (explaining how many manufacturers either had direct control over retail outlets and the product they carried or would use other coercive tactics to force retailers to sell as much of a given product as possible, contributing to negative impacts on the free market and over consumption).

68. *See id.*

69. *See* Tamayo, *supra* note 21, at 2210 (explaining how after Fosdick and Scott recommended a complete prohibition on overlapping financial interests between manufacturer and retailer, states took things one step further by adding a required independent distributor to the tier–chain).

70. *See* Roni A. Elias, *Three Cheers for Three Tiers: Why the Three-Tier System Maintains Its Legal Validity and Social Benefits After Granholm*, 14 DEPAUL BUS. & COM. L.J. 209, 218 (2015) (discussing how state exclusive control over licensing of alcohol manufacturing and sales in the three-tier system allows states to respond to local issues).

71. *See generally* Lam, *supra* note 7 (discussing benefits of three-tier system relating to retailers); Elias, *supra* note 70 (discussing how distributors lower costs for retailers).

72. *See* Lam, *supra* note 7, at 208 (discussing how, according to wholesalers, the flow of goods into retail space is made more manageable by retailers only having to engage with a few wholesalers, rather than many producers).

73. *See id*. ("Especially amongst smaller establishments, working with distributors could not only be preferable, but also easier and more efficient than dealing directly with producers.").

franchise laws[74] and the largely consolidated wholesaler/distributor tier guarantee that retailers have few parties to deal with when purchasing inventory.[75] Further, legally mandating that beer go through an independent distributor prevents large manufacturers, who may otherwise self-distribute, from squeezing out smaller, craft brands from accessing retailers who receive their inventory from distributors that have an interest in building diverse portfolios.[76]

The movement of beer through the wholesaler/distributor tier has a questionable effect on the final price that consumers pay when they finally purchase the beverages from retailers.[77] Some commentators claim that the use of distributors as intermediaries between producers and retailers decreases retailers' transaction costs when collecting the diverse range of alcoholic beverages consumers desire.[78] Purchasing from a distributor relieves a retailer from having to purchase high volumes of a given beer from a manufacturer when the demand for that beer at any particular time is low; instead, the

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74. *See id*. at 208–09 (describing how many state franchise laws restrict manufacturers to distributing within a certain geographic area, sometimes limiting distribution to within state lines).

75. *See* Tamayo, *supra* note 21, at 2218 (describing how distributors have undergone significant consolidation since the 1970s).

76. *See Michigan's Three-Tier Distribution System Creates Competition and a Level Playing Field*, MICH. BEER & WINE WHOLESALERS ASS'N, https://www.mbwwa.org/Michigans-Three-Tier-Distribution-System-Creates-Competition-and-a-Level-Playing-Field [https://perma.cc/Q3KG-CSA8] (last visited Apr. 27, 2020) ("An independent distribution tier that is free from the ownership and economic control of large multinational suppliers ensures that all brands, large and small, have a route to a competitive market."); *see also* Tamayo, *supra* note 21, at 2213, 2226–27 (discussing how the large American beer companies, such as Anheuser-Busch, support the three-tier system alongside many craft breweries, many of whom believing that "the independence of a middle tier allows for craft brewers to enter distribution channels"); Thierry Godard, *The Economics of Craft Beer*, SMART ASSET (May 18, 2018), https://smartasset.com/credit-cards/the-economics-of-craft-beer. In an interview with Eric Ottaway, the general manager of Brooklyn Brewery, Ottaway stated in regard to distributors' desire toward carrying craft brands that "[i]t's not a question of interest anymore—the big distributors are very interested—it's a question of whether they have room in their portfolio." *Id.*

77. *See* Elias, *supra* note 70, at 227 (explaining that distributors' ability to sell beer at lower costs to retailers translates to lower costs for consumers). *But see Web Wine Sales Still Bottled Up*, *supra* note 5 (discussing how the movement of beer between tiers increases the ultimate costs at retail).

78. *See* Elias, *supra* note 70, at 222–23 (explaining how distributors are able to purchase high volumes of a certain beer from a supplier before turning around and selling that beer in customized quantities and variations to retailers, who otherwise would have to bear the cost of purchasing more of a brand than is immediately demanded by consumers).

distributor purchases the beer at high volumes and sells it to individual retailers in more customizable amounts.[79] Through consolidating many different brands into one source, distributors create an opportunity for retailers and their customers to take advantage of economies of scale.[80] According to some experts, the result is that retailers save approximately $7.2 billion per year nationally, and those savings are passed on to consumers through lower prices.[81]

Conversely, other commentators have pointed out that forcing beer manufacturers to go through distributors for retail access increases retail prices.[82] Distributors do not operate as state-mandated intermediaries free of charge to the manufacturer but typically take between 18 to 25% of the retail price of the beer.[83] Also, the logistics of shipping the beer from the manufacturer to the wholesaler impose additional costs on the manufacturer, which in turn ultimately affect the end price of the beer that consumers pay at retail.[84] Though all breweries, both large and small, must suffer the price hike from moving product through a distributor, this markup disproportionately affects smaller breweries because they lack the capacity to produce

79. *See id.* at 221 (explaining how dealing with distributors, rather than dealing directly with manufacturers, allows retailers to "customize their ordering to meet the diverse demands of their customers without incurring the cost of maintaining a large inventory").

80. *See id.* at 222–23 ("These wholesaler-created economies of scale make it possible for consumers to purchase at lower prices . . . .").

81. *See id.* (discussing price effect of three-tier system on retail prices). "Sibley and Srinagesh [who conducted a study of the economics of the three-tier system in 2008] estimate that wholesaler activities reduce retailers' costs by almost $52.00 for every $1,000.00 in retailer sales, for a national savings in retailer operating costs of $7.2 billion per year." *Id.* at 222 (internal quotation marks omitted).

82. *See Web Wine Sales Still Bottled Up*, *supra* note 5 (discussing how the retail price of alcoholic beverages increases after wholesalers take a cut of the retail price).

83. *See id.* (discussing how moving through distributors makes it difficult for small manufacturers to make a profit because "[w]holesalers take about 18 to 25 percent of the retail price").

84. *See* Christopher Barnes, *Boost Your Craft Beverage Sales by Hiring a Wholesaler*, EQUIPPED BREWER, http://www.equippedbrewer.com/sales-and-distribution/boost-your-craft-beverage-sales-by-hiring-a-wholesaler [https://perma.cc/7QZE-XFXE] (last visited Apr. 27, 2020) (explaining the impact that going through a wholesaler will have on the final price of beer considering the price of the product when it initially changes hands from the manufacturer to the wholesaler; the added cost of shipping from manufacturer to wholesaler, any taxes levied on the transaction, which are usually paid by the brewery; and the percentage of the margin that the wholesaler will take as payment).

and sell enough beer to offset the decrease in profit.[85] Further, simply securing a place in a distributor's portfolio can present a challenge to small breweries, either due to a lack of demand for the brewery's product or because the distributor does not have the space.[86]

D. The Three-Tier System in Michigan and Direct Shipping of Beer

Today, Michigan maintains the three-tier system for regulating the distribution of beer with one minor exception.[87] After the *Toward Liquor Control* study, the majority of states adopted a version of the proposal that provided for state regulation through granting licenses to parties involved in the three-tier system, called "license states."[88] A minority of states chose to adopt the alternative version of the proposal, which provided a larger degree of state involvement in alcohol distribution, including holding a monopoly on an entire tier in some states.[89] The states in this group are "control states," and

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85. *See id.* (explaining that breweries will take a cut in their margins when using a distributor with the goal of selling more, which will make up for the initial profit decrease). *But see Web Wine Sales Still Bottled Up*, *supra* note 5 (explaining through an interview with an owner of small-scale winery that small manufacturers do not have the volume to make up for the lost profit and be competitive with large producers); *see also* David R. Scott, *Brewing Up a New Century of Beer: How North Carolina Laws Stifle Competition in the Beer Industry and How They Could Be Changed*, 3 WAKE FOREST J.L. & POL'Y 417, 431 (2013) (explaining that while higher prices resulting from using a distributor effect mass produced beer and craft beer alike, craft producers are impacted more heavily because their beer is already more expensive than that of mass produced beer).

86. *See* Granholm v. Heald, 544 U.S. 460, 467 (2005) (explaining how small wineries lacked "sufficient consumer demand for their wine to make it economical for wholesalers to carry their products"); *see also* Godard, *supra* note 76 (explaining that the problem for new breweries, having turned away from distributors, is not wanting to carry a brand due to lack of recognition but that there are too many different craft beer brands to carry, which has had the effect of clogging distribution channels).

87. *See* MICH. COMP. LAWS § 436.1203(19) (2017) (allowing for a beer manufacturer to self-distribute to retail outlets if it meets the requirements of "qualified micro brewer" under the statute).

88. *See* Barry Kurtz & Bryan H. Clements, *Beer Distribution Law As Compared to Traditional Franchise Law*, 33 FRANCHISE L.J. 397, 401 (2014) (identifying Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, and Wisconsin as license states).

89. *See Control State Directory and Info: Michigan*, NAT'L ALCOHOL BEVERAGE CONTROL ASS'N, https://www.nabca.org/sites/default/files/assets/files/

Michigan is one of them.[90] However, Michigan's involvement in the sale and distribution of alcohol is less pervasive than in some other control states because it utilizes licenses to control who is able to manufacture, distribute, and sell beer and wine.[91]

The Michigan Liquor Control Commission (MLCC), an agency of the Michigan Department of Licensing and Regulatory Affairs (LARA), controls who may manufacture, distribute, and sell alcoholic beverages in the state by issuing licenses.[92] The first license available to those wishing to start a brewery in Michigan is, aptly named, a Brewer license.[93] A brewery holding this license may manufacture an unlimited amount of beer at one of its licensed facilities, provide samples of beer to consumers in a tasting room, and sell its beer solely at the brewery's licensed premises to consumers for either on-premises or off-premises consumption.[94] Though the brewery may have multiple brewing facilities throughout the state, the brewery may only sell to consumers for on-premises consumption at two of its licensed premises.[95] Further, apart from selling to consumers in person and on premises, breweries holding a Brewer license may only sell their beer to licensed Michigan wholesalers, which requires the breweries to enter into an exclusive territory agreement with those wholesalers.[96]

Michigan_0.pdf [https://perma.cc/AY9Q-RQX2] (last visited Apr. 27, 2020) (describing how Michigan has "control on spirits at wholesale and licenses wholesalers for the distribution of beer and wine to retailers").

90. *See id.* (defining control jurisdictions as those that directly control the sale and distribution of beverage alcohol within their border); *see also* Kurtz & Clements, *supra* note 88, at 401 (identifying Michigan as one of eighteen states that operates as a "control state," along with Alabama, Idaho, Iowa, Maine, Mississippi, Montana, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming).

91. *See Control State Directory and Info: Michigan*, *supra* note 89 (explaining Michigan's control over the wholesale distribution of spirits).

92. *See* Stariha & Browser, PLC, *supra* note 9 (surveying the different types of licenses available to those involved with the sale of alcohol in the state).

93. *See* MICH. BREWER LICENSING REQUIREMENTS, *supra* note 4 (discussing the requirements of obtaining brewer and microbrewer licenses).

94. *See* MICH. COMP. LAWS § 436.1537(1)(k) (2018) (providing that brewers are able to sell beer manufactured on the licensed premises for consumption either on or off the premises).

95. *See* MICH. BREWER LICENSING REQUIREMENTS, *supra* note 4 (explaining how brewers are able to serve their beer at tasting rooms in only two licensed locations).

96. *See id.* (requiring brewers to enter into exclusive territory agreements with distributors).

The second license available to Michigan brewers is the Micro Brewer license.[97] The Micro Brewer license comes with all the same powers and restrictions that come with the Brewer license, with a few exceptions.[98] First, a brewery holding a Micro Brewer license may not produce over 60,000 barrels of beer in a given year.[99] A brewery holding this license that produces between 30,000 and 60,000 barrels may sell its beer directly to consumers on-premises at up to three of its licensed locations in the state.[100] Second, if the Micro Brewer produces a small enough amount of beer per year, it may be eligible for status as a "qualified micro brewer."[101] Qualified microbrewer status allows for the largest deviation from the three-tier system in Michigan for beer because a qualified microbrewer may circumvent tier two by selling and delivering its beer directly to retailers.[102] However, emerging breweries may quickly grow out of this allowance because a qualified microbrewer may not produce more than 1,000 barrels of beer in a given year.[103] Additionally, the qualified microbrewer may only use its own employees to deliver to retailers, as opposed to shipping with a third party or common carrier.[104] On a national level, a small number of states, including Oregon, have shown even more of a willingness to diverge from the traditional strictures of the three-tier system as it pertains to beer.[105]

Oregon is a prominent contributor to American craft beer and allows direct shipments of beer to residents of its state by any beer manufacturer holding a Direct Shipper permit.[106] In Oregon, Direct

97. *See id.* (listing the Micro Brewer license among those available for manufacturing beer).

98. *See* MICH. COMP. LAWS § 436.1203(19) (2017) (providing microbrewers with the opportunity to self-distribute to retailers).

99. *See* MICH. BREWER LICENSING REQUIREMENTS, *supra* note 4 (explaining the cap on production applied to microbrewers).

100. *See id.*

101. *See* MICH. COMP. LAWS § 436.1203(14)(j) (2017) (setting requirements for status as qualified microbrewer).

102. *See* MICH. BREWER LICENSING REQUIREMENTS, *supra* note 4 (describing how a qualified microbrewer can self-distribute to licensed retailers).

103. *See id.*

104. *See* MICH. COMP. LAWS § 436.1203(19) (2017) (providing requirements microbrewers must comply with when self-distributing).

105. *See* Barnes, *supra* note 13 (listing states allowing direct shipping of beer, which include Nebraska, New Hampshire, North Dakota, Ohio, Oregon, Vermont, and Virginia).

106. *See* OR. REV. STAT. § 471.282(1) (2019) ("[A] person may sell and ship malt beverages, wine or cider directly to a resident of Oregon only if the person holds a direct shipper permit."); *see also* Robinson, Kyrza & Lynch, *supra* note 3 (ranking

Shipper permits may issue to any person licensed to manufacture beer, either in Oregon or another state.[107] The state legislature has empowered the Oregon Liquor Control Commission (OLCC) to grant Direct Shipper permits to breweries, distilleries, and wineries, whether licensed to manufacture their alcohol by Oregon or another state.[108] The Direct Shipper permit prohibits the permit holder from selling more than two cases, or eighteen liters, of alcohol to any one resident in a single month, while requiring that the direct shipper only sell alcohol to a person who is at least twenty-one years old and for personal use only.[109] Further, the law mandates that holders of Direct Shipper permits take steps to ensure that the carrier who delivers the alcohol obtains the signature of the recipient and verifies that the recipient is of legal drinking age and not visibly intoxicated.[110] Similar to California's elite position in the world of American wine, Oregon holds a prominent position in the world of American craft beer, ranking fifth among the fifty states in breweries per capita and tenth in absolute number of breweries.[111]

Fosdick and Scott's three-tier system continues to dominate the distribution of beer throughout the United States.[112] In Michigan, breweries cannot distribute their beer directly to consumers unless the

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each state according to the beers being made in those states, taking into consideration the quality of the beers, the number of breweries in the state, and the ratio of breweries to state population).

107. *See id.* § 471.282(1)(a) ("The Oregon Liquor Control Commission shall issue a direct shipper permit only to . . . [a] person that holds a license issued by this state or another state that authorizes the manufacture of malt beverages, wine or cider . . . .").

108. *See id.* § 471.282(1)(b) ("The Oregon Liquor Control Commission shall issue a direct shipper permit only to . . . [a] person that holds a license issued by this state or another state . . . .").

109. *See id.* § 471.282(4) (listing the rules permit holders must comply when selling and shipping alcohol under a direct shipper permit).

110. *See id.* § 471.282(6) ("A person holding a direct shipper permit must take all actions necessary to ensure that a carrier used by the permit holder does not deliver any malt beverages, wine or cider unless the carrier: (a) [o]btains the signature of the recipient of the malt beverages, wine or cider upon delivery; (b) [v]erifies by inspecting government-issued photo identification that the recipient is at least 21 years of age; and (c) [d]etermines that the recipient is not visibly intoxicated at the time of delivery.").

111. *See State Craft Beer Stats*, *supra* note 1 (ranking Oregon fifth in the country in terms of breweries per capita at 8.8 and tenth in the country in terms of absolute number of breweries at 284).

112. *See* Tamayo, *supra* note 21, at 2206–07 (explaining how every state in the country regulates the distribution of beer with the three-tier system).

consumer purchases the beer at the brewery's licensed location.[113] In contrast, Oregon, along with a small number of other states, allows its breweries to ship their beer directly to consumers.[114] By offering this opportunity to its breweries, Oregon has embraced the economic effects that direct shipping has on small manufacturers.[115] The far more widespread use of direct shipping among wineries across the country demonstrates these effects' desirability among manufacturers.[116]

II. WINERIES AND DIRECT SHIPPING

Until the mid-1980s, the three-tier system generally bound both wineries' and beer manufacturers' ability to sell and distribute their products.[117] After 1986, when California began to allow wineries to accept remote orders and ship wine directly to consumers, other states began to pass similar laws, varying as to how much wine a winery could produce before its state's liquor laws disqualified it from doing so.[118] Wineries across the country are increasingly utilizing the ability to direct ship, which is particularly beneficial to smaller wineries.[119] In Michigan, while breweries remain unable to sell and ship their beer to consumers through online or over the phone orders, wineries may obtain a Direct Shipper license, allowing them to sell and ship their

113. *See* MICH. COMP. LAWS § 436.1537(1)(k) (2018) (providing that brewers can sell beer on the licensed premises for consumption either on or off the premises).

114. *See* Barnes, *supra* note 13 (listing seven states that allow for direct shipping of beer from brewery to consumer).

115. *See* Granholm v. Heald, 544 U.S. 460, 467 (2005) (discussing the economic benefits that being able to direct ship confers on small alcohol manufacturers).

116. *See* Robert Taylor, *U.S. Wine-Shipping Laws, State by State*, WINE SPECTATOR (July 14, 2014), https://www.winespectator.com/webfeature/show/id/50258 [https://perma.cc/DKW2-6XSC] (discussing how forty-three states allow direct shipping of wine).

117. *See* Jerry Ellig & Alan E. Wiseman, *The Economics of Direct Wine Shipping*, 3 J.L. ECON. & POL'Y 255, 257 (2007) (explaining how until 1986, wineries were included in the typical restrictions on distribution imposed by the three-tier system along with breweries).

118. *See* Jerry Ellig & Alan E. Wiseman, *Price Effects and the Commerce Clause: The Case of State Wine Shipping Laws*, 10 J. EMPIRICAL LEGAL STUD. 196, 199 (2013) (discussing various approaches states have taken in the last few decades regarding direct wine shipping laws, most of which involve setting a limit on the amount of wine a winery may produce and still be able to direct ship).

119. *See* Taylor, *supra* note 116 (stating that as of March 2018, forty-three states allow for some form of direct shipping of wine from manufacturer to consumer, including Michigan).

wine directly to off-premises consumers.[120] The United States Supreme Court recognized the benefits that direct shipping provides to wineries in *Granholm v. Heald* when it found that laws in Michigan and New York disallowing out-of-state wineries from obtaining direct shipping licenses, which were available to in-state wineries, violated the Dormant Commerce Clause (DCC).[121] The increasing use of direct shipping, as well as the legal acknowledgment that states denying manufacturers such an option presents an economic disadvantage, illustrates the degree to which access to a Direct Shipper license, or its equivalent, affects small manufacturers.[122]

A. Wine and the Three-Tier System

Half a century following the end of Prohibition and the near nationwide adoption of the three-tier system, states generally regulated the manufacture and distribution of wine the same as beer and spirits.[123] As a consequence of the three-tier system, wineries were unable to legally ship their wine directly to consumers, rather than moving through tiers two and three.[124] Prior to 1986, only California, Alaska, and Rhode Island allowed some form of direct shipping of wine from manufacturer to consumer.[125]

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120. *See* MICH. COMP. LAWS § 436.1203(4) (2017) (allowing for wine manufacturers to obtain licenses to ship wine directly to consumers who place an order "by means of any mail order, internet, telephone, computer, device, or other electronic means").

121. *See* Granholm v. Heald, 544 U.S. 460, 467 (2005) (invalidating state laws under the Dormant Commerce Clause, where Michigan offered licenses to in-state wineries that would allow them to ship their product directly to consumers through online or over-the-phone orders, while not extending such a license to out-of-state wineries).

122. *See id.* (discussing economic benefits of direct shipping); *see also* SOVOS & WINES & VINES, 2018 DIRECT TO CONSUMER: WINE SHIPPING REPORT 3 (2018) (tracking increasing use of direct shipping among small wineries).

123. *See* Ellig & Wiseman, *supra* note 117, at 257 (explaining that by the 1980s nearly every state had adopted the three-tier system, in which wine was included).

124. *See* Shirley Chen, *Craft Beer Drinkers Reignite the Wine Wars*, 26 LOY. CONSUMER L. REV. 526, 530 (2014) (discussing how under the traditional three-tier system wine was included among alcoholic beverages that had to move through the three-tier system).

125. *See* Ellig & Wiseman, *supra* note 117, at 257 (discussing how California, Alaska, and Rhode Island were the only states in the country that allowed their wineries to direct ship to consumers prior to 1986).

In 1986, wineries' relationships with the three-tier system began to change around the country with the spread of direct shipping laws.[126] California, which had already been allowing its wineries to ship wine directly to consumers, offered to allow out-of-state wineries to ship directly to California consumers, so long as California wineries could also ship to consumers in those other states.[127] This action started a trend that continued over the next few decades, with just under half of the states allowing direct shipping of wine from manufacturer to consumer by the year 2000.[128] As of October 2018, forty-three states allow wineries to direct ship to consumers, and the use of this sales avenue, which surpasses tiers two and three in the system, is continually increasing.[129]

Both the Supreme Court and industry participants have recognized the economic effects of shipping products directly to consumers, particularly in the context of small wineries.[130] The Supreme Court acknowledged a number of those benefits in *Granholm*, where the Court struck down laws in Michigan and New York for being unconstitutional under the DCC.[131] The DCC, though not explicit in the United States Constitution, prohibits states from passing laws that would burden interstate commerce by providing a competitive advantage to their own residents and businesses, while

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126. *See id.* (explaining how California started the trend of allowing direct shipment of wine in 1986 with "'reciprocity' agreements" that it reached with eleven different states).

127. *See* Chen, *supra* note 124, at 530 (discussing the reciprocity agreements California entered into beginning in 1986).

128. *See* Ellig & Wiseman, *supra* note 117, at 257 (discussing the trend of allowing wineries to direct ship).

129. *See* Taylor, *supra* note 116 (stating as of October 2018, forty-three states allow for some form of direct shipping of wine from manufacturer to consumer); *see* SOVOS & WINES & VINES, *supra* note 122, at 4 (observing that "the volume and value of direct shipments [increased in 2016] by 15.3% and 15.5% respectively").

130. *See generally* Granholm v. Heald, 544 U.S. 460 (2005) (recognizing the economic advantage of being able to direct ship as a part of finding that the denial of direct shipping to out-of-state wineries violated the Dormant Commerce Clause); *Web Wine Sales Still Bottled Up*, *supra* note 5 (discussing the necessity of being able to direct ship to small wineries).

131. *See Granholm*, 544 U.S. at 493 (invalidating state laws under the Dormant Commerce Clause). Michigan offered licenses to in-state wineries that would allow them to ship their product directly to consumers through online or over the phone orders, while declining to extend such a license to out-of-state wineries. *See id.* at 465–66. In its analysis of the disadvantages to out-of-state wineries, the Court recognized the inherent benefit that the ability to direct ship presented to small wineries that are too small to secure a deal with a wholesaler. *See id.* at 467.

conversely disadvantaging out-of-state businesses.[132] The Court found that allowing in-state wineries in Michigan to obtain Direct Shipper licenses while denying the same opportunity to out-of-state wineries placed an unconstitutional burden on interstate commerce due to the benefits of direct shipping that were unavailable to out-of-state wineries.[133] The ability to direct ship, which the Court referred to as an "emerging and significant" business, allowed smaller wineries to reach markets they otherwise could not.[134] Due to the wineries' small size, there was not yet enough recognition of and demand for their products to make them an attractive inclusion for a distributor's portfolio.[135] The Court also discussed how the higher price that came from having to move through the entire three-tier system, as opposed to shipping directly to consumers, could effectively bar out-of-state wineries from markets where they would have to compete with wineries that were able to direct ship.[136] Finally, growing consolidation among distributors illuminated the value of direct shipping to small wineries .[137]

Small wineries across the country are increasingly utilizing direct shipping for its economic benefits.[138] In *Granholm*, the Supreme Court noted that by 1999, direct shipments comprised 3% of all wine sales.[139] As of 2017, that figure had increased to 10% of all wine sales,

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132. *See id.* at 472 (stating "[t]ime and again this Court has held that, 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'") (quoting Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Or., 511 U.S. 93, 99 (1994)).

133. *See Granholm*, 544 U.S. at 473 (discussing how the benefit of direct shipping was so economically significant for small wineries that denying the opportunity to out-of-state wineries placed a burden on interstate commerce).

134. *See id.* at 460 (discussing how important the allowance of direct shipping is to small wineries).

135. *See id.* (discussing obstacles presented to small wineries when there is not yet enough "consumer demand for their wine to make it economical for wholesalers to carry their products").

136. *See id.* at 461 (emphasizing the consequences of not being able to ship directly).

137. *See id.* at 467 (discussing how the number of licensed wholesalers in the country dropped from 1,600 in 1984 to 600 in 2002).

138. *See* SOVOS & WINE & VINES, *supra* note 122, at 6 (tracking an increase in direct shipping from 2011 to 2017).

139. *See Granholm*, 544 U.S. at 467 (discussing the usage of direct shipping in the wine industry at the time).

accounting for just over $2 billion.[140] The majority of sales coming from direct wine shipping continues to come from manufacturers that industry observers categorize as small wineries and very small wineries, rather than large, established, nationally recognized brands.[141] Together, wineries belonging to these two categories were responsible for 70% of the overall value of direct shipping in 2017.[142]

B. Wine in Michigan

Licenses available to wine manufacturers in Michigan provide greater freedom as to whom a manufacturer may sell its product relative to those available to beer manufacturers.[143] One license available to a wine manufacturer is the Wine Maker license.[144] The Wine Maker license allows the holder to manufacture an unlimited amount of wine and sell that wine either to a licensed Michigan wholesaler or retailer, thus removing the legal mandate of an independent distributor in tier two.[145] The Small Wine Maker license is also available to wine manufacturers in Michigan.[146] The Small Wine Maker license carries all of the privileges of the Wine Maker license, but it limits the winery to producing 50,000 gallons or less in a calendar year.[147]

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140. *See* SOVOS & WINE & VINES, *supra* note 122, at 4 (noting the total amount of dollars consumers spent on directly shipped wines, which was $2,690,000,000, and the proportion of overall wine sales represented by that figure).

141. *See id.* at 19 (describing small wineries as those that produce between 5,000 and 49,999 cases and very small wineries as those that produce between 1,000 and 4,999 cases).

142. *See id.*

143. *See* MICH. DEP'T OF LICENSING & REGULATORY AFFAIRS: LIQUOR CONTROL COMM'N, WINE MAKER OR SMALL WINE MAKER REQUIREMENTS & GENERAL INFORMATION (2020) (explaining what Wine Maker and a Small Wine Maker licenses allow, which include the perk of being able to apply for a Direct Shipper license).

144. *See id.* (providing the available licenses available to manufacturers of wine).

145. *See id.*; *see also* MICH. COMP. LAWS § 436.1113(10) (2018) (providing that holders of the Wine Maker license are able to sell wine to retailers).

146. *See Small Wine Maker License*, MICH. DEP'T OF LICENSING & REGULATORY AFFAIRS: MICH. LIQUOR CONTROL COMM'N, https://www.michigan.gov/statelicensesearch/0,4671,7-180-24786-279105--,00.html [https://perma.cc/C3W3-F93X] (last visited Apr. 27, 2020) (describing the Small Wine Maker license).

147. *See id.* (providing limitations to holders of Small Wine Maker licenses); s*ee also* MICH. COMP. LAWS § 436.1111(12) (2018) ("[A] wine maker manufacturing or bottling not more than 50,000 gallons of wine in 1 calendar year.").

Michigan applies the three-tier system less rigorously with respect to wineries, which may distribute wine to consumers without moving through the tiers by means of direct shipping.[148] Holders of either the Wine Maker or Small Wine Maker license may obtain a Direct Shipper license.[149] Wine manufacturers holding a Direct Shipper license may ship wine directly to consumers, who may place orders for wine over the phone, through mail order, over the Internet, or by other means provided in the statute.[150] In an effort to prevent underage persons from ordering wine, the wine manufacturer must label each container it ships with a disclaimer that the package contains alcohol and that a person must be at least twenty-one years old to sign for the package.[151] Apart from having to comply with the MLCC's specific labeling requirements, the biggest restriction to a winery holding a Direct Shipper license is the limit to the amount of wine it may ship to Michigan consumers in a calendar year.[152] The legislature has set the current limit at either 1,500 nine-liter cases, or 13,500 liters of wine total.[153]

Similar to Michigan wineries, wineries in forty-two other states may circumvent the three-tier system through direct shipping.[154] Both the Supreme Court and some wine manufacturers have discussed how the ability to engage in sales of this kind can be the difference between a small winery staying in business or failing.[155] By providing wineries

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148. *See* MICH. COMP. LAWS § 436.1113(10) (2018) (providing that wine makers may sell their wine to consumers through direct shipment).

149. *See id.* § 436.1203(10)(a) (providing that a wine maker is one of two entities that may receive a Direct Shipper license).

150. *See id.* § 436.1203(4) ("[A] direct shipper may sell, deliver, or import wine to consumers in this state by means of any mail order, internet, telephone, computer, device, or other electronic means, or sell directly to a consumer on the winery premises.").

151. *See id.* § 436.1203(3)(e). A direct shipper must:

> Stamp, print, or label on the outside of the shipping container that the package "Contains Alcohol. Must be delivered to a person 21 years of age or older." The recipient at the time of the delivery shall provide [photo] identification verifying his or her age and sign for the delivery.

Id.

152. *See id.* § 436.1203(4)(h) (describing the limits of how much wine a manufacturer may ship under the Direct Shipper license).

153. *Id.*

154. *See* Taylor, *supra* note 116 (stating as of March 2018, forty-three states allow for some form of direct shipping of wine from manufacturer to consumer, including Michigan).

155. *See generally* Granholm v. Heald, 544 U.S. 460 (2005) (recognizing the economic advantage of being able to direct ship as a part of finding that the denial of

the opportunity to direct ship to consumers, the Michigan legislature has shown a willingness to deviate from the three-tier system in ways that assist smaller alcohol manufacturers.[156] Providing direct ship licenses also adjusts Michigan's regulation of alcoholic beverages in a manner that keeps the state on a competitive plane with others that possess national, if not global, repute for their wine.[157] The legislature should apply that same flexibility to Michigan breweries, some of which have received global acclaim, and allow direct shipping of beer.[158]

III. Providing Opportunity for Michigan Breweries While Preserving the Three-Tier System's Economic Benefits

Michigan breweries cannot legally ship their beer directly to consumers because of the state's adherence to the three-tier system.[159] Because direct shipping diverges from the traditional three-tier scheme, which requires beer to move through an independent distributor and retailer, the Michigan legislature should consider any benefits the system offers before making a change.[160] Though partially antiquated, the three-tier system provides some insulation from large manufacturers unduly influencing shelf space and number of taps in the retail tier.[161] The distribution tier also benefits retailers, who would otherwise have to deal with a variety of different manufacturers.[162] However, moving product through the mandated middleman imposes

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direct shipping to out-of-state wineries violated the Dormant Commerce Clause); *see also Web Wine Sales Still Bottled Up*, *supra* note 5 (discussing how moving through distributors makes it difficult for small manufacturers to make a profit because "[w]holesalers take about 18 to 25 percent of the retail price").

156. *See Web Wine Sales Still Bottled Up*, *supra* note 5 (discussing the importance of direct shipping for small alcohol manufacturers).

157. *See* Chen, *supra* note 124, at 530 (discussing how California began the trend of allowing direct shipping of wine).

158. *See* Sherman, *supra* note 42 (discussing how ten different Michigan beers won awards in nine different categories at the 2018 Beer World Cup in Nashville, Tennessee, wherein 2,515 breweries from over fifty different countries competed).

159. *See* Stariha & Browser, PLC, *supra* note 9 (explaining how beer manufacturers in Michigan are only able to sell their product to a licensed wholesaler).

160. *See* Elias, *supra* note 70, at 210 (discussing how the traditional three-tier system continues to provide social benefits).

161. *See Michigan's Three Tier Distribution System Creates Competition and a Level Playing Field*, *supra* note 76 (arguing that independence in the distributor tier is vital to assuring small manufacturers' ability to gain retail space).

162. *See id.* (emphasizing the benefit to retailers that the three-tier system provides).

challenges for startups and small manufacturers that may be unable get into a distributor's portfolio or possess the necessary resources to absorb any additional costs from distributing.[163]

Fortunately for small wineries in forty-three states, the obstacle of securing distribution presents far less of an impediment to growth because of direct shipping.[164] Eligible wineries in these states may bypass the system by receiving an order remotely and shipping the order directly to the consumer.[165] This option partially saves small wineries from the wholesale obstacle that small breweries must confront and provides the small wineries an attractive avenue to build their brand and customer base.[166] The Michigan legislature should allow breweries the ability to obtain a Direct Shipper license, just as it does for wineries in the state.[167] Conferring this benefit to the booming craft beer industry will not only give existing breweries direct access to new markets but will also make it easier for new start-up breweries to establish their brand.[168]

A. Benefits of the Three-Tier System

Proponents of the three-tier system argue that the regulatory scheme provides intrinsic benefits to the beer market.[169] The three-tier system benefits retailers by providing a much more efficient system for getting alcoholic products to retail than if retailers had separate, individual deliveries coming from all of the different brands they

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163. *See* Lam, *supra* note 7, at 210 (discussing how it may be argued that the wholesale requirement results in higher prices).

164. *See* Taylor, *supra* note 116 (explaining how forty-three states currently allow direct shipping of wine).

165. *See* MICH. COMP. LAWS § 436.1203(10)(a) (2018) (qualifying wine makers as eligible for a Direct Shipper license); MICH. DEP'T OF LABOR & ECON. GROWTH: LIQUOR CONTROL COMM'N, MICHIGAN DIRECT WINE SHIPPING REQUIREMENTS (2020) [hereinafter MICH. DIRECT WINE SHIPPING REQUIREMENTS] (showing that Michigan wineries are able to obtain a license to direct ship their products).

166. *See* SOVOS & WINE & VINES, *supra* note 122 (explaining the advantages of the direct-to-consumer shipping option, which offers small wineries that lack resources and brand recognition an opportunity to get in with distributors).

167. *See* MICH. COMP. LAWS § 436.1203(10)(a) (2017) (stating that wineries may obtain Direct Shipper licenses).

168. *See Global Craft Beer Market Report*, *supra* note 37 (tracking the growth in demand for craft beer and the expansion of market share).

169. *See generally* Elias, *supra* note 70 (discussing the continued relevance and benefits of the three-tier system); Lam, *supra* note 7 (discussing the market benefits of maintaining the three-tier system).

carry.[170] Rather than deal with many different manufacturers, retailers only order from one or a few distributors, lowering the retailer's cost of acquiring a range of inventory.[171] Further, the distributor tier of the system prevents a retailer from having to purchase high volumes of a given beer from a manufacturer.[172] Instead of retailers purchasing a brand at quantities that consumer demand may not support, distributors purchase the beer at high volumes and sell it to individual retailers in customizable amounts.[173] Retailers save approximately $7.2 billion per year nationally from their distributors' greater ability to both take advantage of economies of scale and consolidate many different brands into one source.[174] Retailers pass these savings on to consumers when they can charge less for the beers they carry, which also makes craft beers more competitive with their mass-produced and typically cheaper counterparts.[175]

Moreover, requiring independence at the wholesale level remains vital to preventing coercive abuses between large breweries and retailers.[176] Without this insulation between retailers and manufacturers, smaller breweries would be vulnerable to their larger, more powerful competitors pressuring retailers to carry more of their own brand and squeezing them out of shelf and tap space.[177] In this

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170. *See* Lam, *supra* note 7, at 208 (explaining how consolidating retailers' inventory into one provider makes the industry more efficient).

171. *See id.* (explaining the cost effect of the efficiency of the three-tier system).

172. *See* Elias, *supra* note 70, at 221 (discussing reasons the distributor tier increases efficiency and lowers costs).

173. *See id.* (explaining how dealing with distributors, rather than dealing directly with manufacturers, allows retailers to "customize their ordering to meet the diverse demands of their customers without incurring the cost of maintaining a large inventory").

174. *See id.* (explaining that wholesaler activities reduce retailers' costs by almost $52.00 for every $1,000.00 in retailer sales, resulting in billions of dollars of savings nationally).

175. *See id.* at 222–23 ("These wholesaler-created economies of scale make it possible for consumers to purchase at lower prices . . . ."); *see also* Scott, *supra* note 85, at 432 (discussing price effect of recent rise in craft beer popularity and gain in market share). "[T]here can be no doubt that if craft beers were to come down in price closer to the prices consumers are accustomed to paying for the mass-produced beers, the craft beer market would enjoy even greater success." *Id.*

176. *See Michigan's Three-Tier Distribution System Creates Competition and a Level Playing Field*, *supra* note 76 (emphasizing the importance of keeping the distributor tier independent to the goal of preventing large manufacturers from controlling which brands have retail access).

177. *See id.* (expressing concern that removal of tier two in the three-tier system would lead to expansion of large brewery abuses, such as pressuring retailers

regard, the three-tier system's mandated independence at the distributor level is important for breweries who want access to retail space because distributors typically desire diverse portfolios and respond to consumer demands, which call for record high amounts of craft beer.[178]

Some scholars have pointed out that the three-tier system, as an instrument of state regulation, continues to allow the state to monitor and respond to what happens at the local level.[179] Through exclusively controlling the sale and manufacture of alcohol through licenses and permits, states can effectively respond to local needs.[180] Accordingly, direct shipping would dilute the usefulness of states' localized understanding of alcohol-related issues because the directness of state control over the manufacture and sale of alcohol would be eroded.[181]

B. Drawbacks of the Three-Tier System

Despite the three-tier system's longstanding history in the United States and the states' near-unanimous adoption following Prohibition, the regulatory scheme creates a number of obstacles for emerging breweries.[182] Perhaps the worst of these obstacles involves the challenges of entering into a distribution agreement with a

to carry more of their own brands, which arguably takes place in the manufacturer-distributor context but would spill over to the manufacturer-retailer context).

178. *See id.* (arguing that the independence of distributors allows small breweries access to retail markets); *see also* Godard, *supra* note 76 (discussing how distributors have a desire to carry craft beer brands); Elias, *supra* note 70, at 223 (discussing how the intermediary role distributors play between manufacturers and retailers puts them in a unique position for identifying market trends); *Global Craft Beer Market Report*, *supra* note 37 (tracking the growth in demand for craft beer and the expansion of market share).

179. *See* Elias, *supra* note 70, at 219 (defending the three-tier system as being a state creation and thus more amendable to the needs of local residents as determined by the state).

180. *See id.* (discussing states' abilities to suspend licenses to noncompliant licensees).

181. *See id.* at 218 ("If the regulatory authority is centralized at a federal level, or if direct sales via the Internet effectively deprive state and local authorities of their ability to regulate sales, these kinds of locally oriented regulations would disappear.").

182. *See generally* Tamayo, *supra* note 21 (discussing challenges to emerging breweries created by the three-tier system); Godard, *supra* note 76 (explaining how distributors are unable to carry all of the different brands that may need a place in a distributor's portfolio).

wholesaler.[183] When Fosdick and Scott first proposed the three-tier system, the economic landscape and power dynamics between beer manufacturers and wholesalers were quite different from what they are today.[184] Formerly, distributors were small, often family-owned operations, while breweries were much larger and possessed a more advantageous bargaining position.[185] In such a landscape, states viewed the three-tier system's mandated distributor independence, coupled with franchise laws requiring exclusive territory provisions in distribution agreements, as necessary protections for the otherwise vulnerable wholesalers.[186] The trouble now stems from mass wholesaler consolidation and a record emergence of small breweries that do not possess the power and influence of large beer companies.[187] However, despite the recent rise in craft beer, large beer companies still possess the bulk of market share and could potentially pose the same sort of coercive threat even if states eliminated the three-tier system and other laws protecting distributors.[188] Therefore, the Michigan legislature should balance allowing small breweries to circumvent the three-tier system at the margins by maintaining parts of the system that still provide a benefit to the alcohol industry at large.[189]

Apart from the wholesaler-favoring provisions of the distribution agreements that breweries must enter into under the three-tier system, small breweries often have trouble finding a distributor

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183. *See* Granholm v. Heald, 544 U.S. 460, 467 (2005) (recognizing the significant challenge presented to small wineries when faced with having to find a distributor).

184. *See* Tamayo, *supra* note 21, at 2218 (explaining the differences in relative size and bargaining power between manufacturer and wholesaler during the early to mid-twentieth century and present day).

185. *See id.* (describing the relative bargaining positions between breweries and distributors pre-1970s).

186. *See id.* (discussing the three-tier system's original usefulness in the economic landscape where it was initially created).

187. *See id.* (describing the different relationships that today's craft breweries have with distributors today as compared to breweries and distributors in the mid-twentieth century).

188. *See* Jason Notte, *These 11 Brewers Make over 90% of All U.S. Beer*, MKT. WATCH (July 28, 2015, 10:32 AM), https://www.marketwatch.com/story/these-11-brewers-make-over-90-of-all-us-beer-2015-07-27 (placing craft beer market share in the United States at approximately 11%).

189. *See generally* Elias, *supra* note 70 (emphasizing the benefits provided by the three-tier distribution, primarily relating to efficiency lowering retail costs).

willing and able to carry their brand.[190] Just as the Supreme Court recognized in *Granholm* in the context of small wineries, many small breweries do not carry the requisite brand recognition to be an attractive addition to a distributor's portfolio.[191] Moreover, even if a distributor would like to add a brewery's beer to its portfolio, the rapid growth of different beer brands entering the marketplace often prevents a distributor from adding all the brands it desires.[192] Regardless of the reason, having to go through a wholesaler to reach off-premises consumers creates an obstacle that could have detrimental effects on a small brewery's ability to grow and expand its brand.[193]

Finally, when a brewery's product goes through a wholesaler and then a retailer before it reaches the consumer, additional costs and potential price markups are created.[194] Assuming a brewery finds a distributor able to add the brewery to its portfolio, the distributor will typically take between 18 to 25% of the retail price of the beer.[195] Further, the brewery will incur additional costs in having to transfer its beer to the distributor, which will ultimately affect the end price of the beer that consumers pay at retail.[196] This likelihood of increased retail prices disproportionately affects small breweries, which often lack the capacity to produce and sell enough beer to offset the decrease in profit.[197] The mandate of contracting with a distributor, therefore,

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190. *See* Granholm v. Heald, 544 U.S. 460, 467 (2005) (discussing the difficulty small wineries face when finding a distributor).

191. *See id.* (explaining how small wineries lacked "sufficient consumer demand for their wine to make it economical for wholesaler to carry their products").

192. *See* Godard, *supra* note 76 (explaining that distributors are sometimes unable to add a craft brand to their portfolio because there are too many, rather than out of a lack of consumer demand).

193. *See Web Wine Sales Still Bottled Up*, *supra* note 5 (discussing the detrimental effect that having to move through the three-tier system would have on at least some small wineries).

194. *See* Lam, *supra* note 7, at 210 (stating how a disadvantage of the three-tier system is that the movement through the tiers ultimately translates into higher prices for the consumer).

195. *See Web Wine Sales Still Bottled Up*, *supra* note 5 (describing how "[w]holesalers take about 18 to 25% of the retail price").

196. *See* Barnes, *supra* note 84 (explaining the price impact of breweries using a wholesaler).

197. *See id.* (explaining that breweries will take a cut in their margins when using a distributor with the goal of selling more, which will make up for the initial profit decrease). *But see Web Wine Sales Still Bottled Up*, *supra* note 5 (explaining, through an interview with an owner of small-scale winery, that small manufacturers do not have the volume to make up for the lost profit and be competitive with large producers); *see* Scott, *supra* note 85, at 431 (explaining that while higher prices

presents a burdensome obstacle to manufacturers that are unable to absorb the initial added costs of using the distributor.[198]

C. Allowing Breweries to Direct Ship Would Provide a Benefit to Michigan Beer Without Abandoning the Core Benefits of the Three-Tier System

Departing from Michigan's adherence to the three-tier system by allowing direct shipping for breweries will help to alleviate some of the obstacles that the three-tier system presents while simultaneously maintaining its benefits.[199] The Michigan legislature should provide breweries with the competitive advantage that direct shipping offers, which was a large part of why the Supreme Court in *Granholm* found Michigan and New York's discriminatory practices harmful to out-of-state wineries under the DCC.[200] The ability for small breweries, new to the industry and lacking in brand recognition and demand, to direct ship to consumers will allow them to take advantage of a less costly avenue for reaching new customers and spreading their brand.[201] Further, much of the benefits of the three-tier system are a result of the insulation it provides between manufacturers and retailers.[202] Allowing small breweries to bypass the retailer to reach some consumers would

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through using a distributor affect mass-produced beer and craft beer alike, craft producers are impacted more heavily because their beer is already more expensive than that of mass-produced beer).

198. *See Web Wine Sales Still Bottled Up*, *supra* note 5 (explaining that many small wineries are too small to bear the initial costs of using a distributor).

199. *See generally* Elias, *supra* note 70 (discussing the benefits of the three-tier system, which primarily involve benefits derived from the distributor-retailer relationship).

200. *See* Granholm v. Heald, 544 U.S. 460, 467 (2005) (discussing the advantage that direct shipping presents to small wineries, as well as the corresponding disadvantage to wineries that are unable to direct ship).

201. *See id.* (explaining how small wineries lacked "sufficient consumer demand for their wine to make it economical for wholesalers to carry their products"); *see also Web Wine Sales Still Bottled Up, supra* note 5 (discussing how small wineries are less able to cope with the added costs associated with moving product through a distributor).

202. *See* Tamayo, *supra* note 21, at 2213 (explaining how Fosdick and Scott's approach to addressing the problems associated with pre-Prohibition tied-houses and saloons could be solved by removing any overlap of ownership between alcohol manufacturers and retailers); *see also* Elias, *supra* note 70, at 221 (defending the three-tier system's distributor mandate as reducing retailer costs and making the acquisition of many different brands much more efficient).

not threaten these benefits attributable to the second tier in the system.[203]

Direct shipping can provide small breweries with a valuable avenue through which to reach consumers without having to pay distributors a percentage of the retail price.[204] Similar to the small wineries in *Granholm*, which relied on direct shipping to reach consumers, small breweries in Michigan would benefit from the ability to receive direct orders from consumers and ship their product directly.[205] This ability to direct ship would allow small breweries that are not yet able to enter into a distribution agreement with a wholesaler to reach consumers who cannot travel to the brewery premises, like the wineries discussed in *Granholm*.[206] Although using a distributor to get products to retail will likely be in a brewery's best interest after it grows and is able to produce its products at less cost, direct shipping offers breweries that have not yet reached that threshold an important sales opportunity.[207] Giving small breweries this avenue to sell and grow their brand does not diminish the benefits of the three-tier system, which are largely limited to the relationship between manufacturers and retailers.[208]

Direct shipping would also allow small breweries in Michigan to avoid the price markup that may result from beer traveling through the three-tier system.[209] Though this assistance would only occur at the

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203. *See generally* Elias, *supra* note 70 (focusing the justification of the three-tier system on the benefits distributors provide to retailers and consumers buying from retailers).

204. *See Web Wine Sales Still Bottled Up*, *supra* note 5 (explaining that a distributor will often take 18 to 25% of the retail price of the brewery's product).

205. *See Granholm*, 544 U.S. at 467 (discussing importance of direct shipping to small wineries).

206. *See* MICH. BREWER LICENSING REQUIREMENTS, *supra* note 4 (explaining that breweries and microbreweries are allowed to sell beer directly to consumers on the licensed premises only).

207. *See* Barnes, *supra* note 84 (advocating that using a distributor to get as much product to retail is the best option for growing breweries, despite the costs of doing so); *see also Web Wine Sales Still Bottled Up*, *supra* note 5 (discussing how small wineries unable to bear the additional costs of using a distributor rely on direct shipping sales).

208. *See generally* Elias, *supra* note 70 (justifying the three-tier system mostly with due to the beneficial effects that distributors provide to retailers and their consumers).

209. *See* Lam, *supra* note 7, at 210 (stating how a disadvantage of the three-tier system is that the movement through the tiers ultimately translates into higher prices for the consumer).

margins,[210] it would still give the breweries a means of reaching consumers outside of their locale while allowing them to avoid all of the costs associated with using a distributor.[211] While direct shipping to consumers would involve paying some shipping costs, similar to having to ship product to a distributor, the brewery may be able to save money by avoiding the percentage fee a distributor would charge.[212]

D. What Direct Shipping Would Look Like in Michigan

The Michigan legislature should create a Direct Shipper license for manufacturers of beer that reflects the direct shipping capabilities already provided to wineries in Michigan, as well as those provided to breweries in a number of other states.[213] While allowing breweries to direct ship to consumers may be novel in Michigan, the legislature can model its regulation and allowance of direct shipments of beer after Oregon, which already provides licensed breweries with the opportunity to obtain Direct Shipper permits.[214] These Direct Shipper permits that Oregon offers to breweries closely resemble the Direct Shipper licenses already provided to Michigan wineries.[215] Therefore, providing a framework through which the MLCC could issue Direct Shipper licenses to breweries in Michigan, and even out-of-state breweries, would not require a significant degree of ingenuity on the part of the state legislature, but simply the will to move the regulatory landscape in a direction friendlier to Michigan breweries.[216]

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210. *See* OR. REV. STAT. § 471.282(4) (2019) (placing a cap on the amount of beer a brewery may direct ship in a given time frame).

211. *See Web Wine Sales Still Bottled Up*, *supra* note 5 (describing the costs associated with using a distributor).

212. *See id.* (explaining how distributors typically take between 18 and 22% of the retail price of a product).

213. *See* MICH. COMP. LAWS § 436.1537(1)(d) (2018) (providing that in cases of direct shippers, "wine may be sold and shipped directly to the consumer"); Barnes, *supra* note 84 (listing seven states that allow for direct shipping of beer from brewery to consumer: Nebraska, New Hampshire, North Dakota, Ohio, Oregon, Vermont, and Virginia).

214. *See* OR. REV. STAT. § 471.282(1) (2019) ("The Oregon Liquor Control Commission shall issue a direct shipper permit only to . . . [a] person that holds a license issued by this state or another state . . . .").

215. *See* MICH. COMP. LAWS § 436.1203 (2018) (laying out requirements and rules regarding direct shipping of wine); *see also* OR. REV. STAT. § 471.282(1) (laying out requirements and rules regarding direct shipping of alcoholic beverages).

216. *See* OR. REV. STAT. § 471.282(1) (2019) (providing a model for the Michigan legislature to follow when creating Direct Shipper licenses for breweries).

Fortunately, the Michigan legislature has shown the will to create a small brewer-friendly legal environment through both the qualified microbrewer delivery option and the creation of the Craft Beverage Council.[217] Holders of the microbrewer license that produce less than 1,000 barrels of beer over a year are eligible for status as a qualified microbrewer.[218] The legislature has granted these small breweries the opportunity to circumvent the three-tier system by self-distributing to retailers.[219] Further, in 2018, the legislature created the Craft Beverage Council to assist the Department of Agriculture and Rural Development in identifying and funding research and other projects with the broad goal of aiding the craft beverage industry in Michigan.[220] Changing the name of the council to include all craft beverages in Michigan (rather than just wine), specifically including brewery-related concerns among the council's research projects, and requiring that two members of the council be brewers shows the legislature's willingness to pursue brewery-friendly policies.[221]

Oregon's approach to direct shipping of beer provides a model for the Michigan legislature to consider when designing its own Direct Shipper licenses.[222] In Oregon, the Direct Shipper permit, which allows manufacturers to sell their products online or over the phone and ship directly to the consumer–purchaser, is available to breweries, wineries, and cideries alike.[223] Oregon requires holders of Direct Shipper permits to police whether the carrier they employ to deliver

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217. *See* MICH. COMP. LAWS § 436.1203(19) (2017) (providing for qualified microbrewer status); *see also id.* § 436.1303 (2018) (creating the Craft Beverage Council).

218. *See* MICH. BREWER LICENSING REQUIREMENTS, *supra* note 4 (describing the 1,000-barrel production cap on qualified microbrewers).

219. *See* MICH. COMP. LAWS § 436.1203(19) (2017) (allowing qualified microbrewers to self-distribute to retailers but only so long as the delivery is made by the brewery's own employee, the brewery owns the vehicle used to deliver the beer, and the retailer is not within a geographic area in which the brewery has already granted exclusive distributing rights to a wholesaler).

220. *See id.* § 436.1303 (creating the Craft Beverage Council and establishing its objectives).

221. *See id.* (changing the name of the council from The Grape and Winery Industry Council to the Craft Beverage Council, listing financial aid to growers of beer ingredients among the various objectives that grant recipients must have, and requiring that of the ten members of the council, one must represent large brewers and one must represent microbrewers or holders of the brewpub license).

222. *See* OR. REV. STAT. § 471.282(1) (2019) (establishing direct shipping for beer in Oregon).

223. *See id.* (providing that "a person may sell and ship malt beverages, wine or cider directly to a resident of Oregon only if the person holds a direct shipper permit").

the alcohol obtains the signature of the recipient and verifies that the recipient is both of legal drinking age and not visibly intoxicated.[224] Mandating oversight of this nature would minimize any potential increased risk of underage drinking.[225]

Permitting direct shipping for breweries in Michigan can be as simple as allowing beer manufacturers the same shipping opportunities as the legislature already extends to wineries.[226] Wine manufacturers can obtain a Direct Shipper license through the MLCC, allowing them to ship wine directly to consumers who order over the phone, through mail order, over the Internet, or by other means provided in the statute.[227] The legislature imposes an annual license fee of $100, a specific labeling requirement disclosing that the shipped package contains alcohol, and a requirement that the direct shipper maintain detailed records about the quantity and type of product being shipped under the license, along with the names and addresses of recipients.[228] Simply applying these requirements to a Direct Shipper license that breweries may obtain would provide breweries with the same commercial opportunities that wineries possess.[229]

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224. *See id.* § 471.282(6) (requiring that a holder of a Direct Shipper permit "take all actions necessary to ensure" that the person delivering the direct shipment obtains the receiver's signature, verifies that the person is of legal drinking age by checking photo identification, and does not deliver to an intoxicated person).

225. *See* Granholm v. Heald, 544 U.S. 460, 489 (2005) (discussing how *amici curiae* for Michigan and New York claimed that a danger of direct shipping is that minors, with access to credit cards and the Internet, would take advantage of direct shipments to obtain alcohol illegally).

226. *See* MICH. COMP. LAWS § 436.1203(4) (2018) (providing direct shipping for wine manufacturers).

227. *See id.* ("[A] direct shipper may sell, deliver, or import wine to consumers in this state by means of any mail order, internet, telephone, computer, device, or other electronic means, or sell directly to a consumer on the winery premises.").

228. *See id.* § 436.1203(4)(f) (requiring that wineries "[s]tamp, print, or label on the outside of the shipping container that the package 'Contains Alcohol. Must be delivered to a person 21 years of age or older'"); *id.* § 436.1203(4)(i) (requiring wineries to "[p]ay wine taxes quarterly and report to the commission quarterly the total amount of wine, by type, brand, and price, shipped to consumers in this state during the preceding calendar quarter, and the order numbers"); MICH. DIRECT WINE SHIPPING REQUIREMENTS, *supra* note 165 ("There is a $100.00 annual license fee for Direct Shipper license (renewable May 1 of each year).").

229. *See* Granholm v. Heald, 544 U.S. 460, 467 (2005) (identifying the commercial benefits to small manufacturers that are able to direct ship).

CONCLUSION

The state of Michigan is home to the fifth most craft breweries in the United States, and these breweries together produce the eleventh highest quantity of beer in the country.[230] Because of its position in the world of American craft beer, Michigan should pursue a policy of fostering growth among breweries by making it easier for people to start a brewery and compete.[231] As part of this pursuit, Michigan should provide small breweries the same opportunity that it already provides to wineries—and that a select few other states provide to their breweries—which is the ability to direct ship to consumers.[232]

Allowing small breweries to ship beer directly to consumers would partially relieve breweries from the obstacles the three-tier system imposes, which forces breweries to go through wholesale distributors and retailers to reach off-premises consumers.[233] Providing small breweries with an avenue to reach consumers outside of the three-tier system and build their brand will allow them to avoid the price mark-up that comes with moving their products through a wholesaler and retailer.[234] Direct shipping spares small breweries from entering into contracts with distributors until they have grown in size and resources.[235] Further, granting direct shipping opportunities to the manufacturers that need it most will not strip the industry of the benefits derived from the three-tier system.[236] Joining the few states that have begun to allow breweries to direct ship would further

230. *See State Craft Beer Stats*, *supra* note 1 (ranking Michigan fifth in the country in total number breweries at 357, and eleventh in the country in terms of production at 899,792 barrels produced per year).

231. *See Web Wine Sales Still Bottled Up*, *supra* note 5 (discussing importance of direct shipping to small alcohol manufacturers' success).

232. *See* Stariha & Browser, PLC, *supra* note 9 (showing licenses available to wineries that allow them to direct ship their products); *see also* OR. REV. STAT. § 471.282(1) (2019) (allowing manufacturers of alcohol to direct ship if they hold a Direct Shipper permit).

233. *See* D'Aversa, *supra* note 19, at 1476 (explaining the three-tier system).

234. *See Web Wine Sales Still Bottled Up*, *supra* note 5 (explaining the cost to small manufacturers of moving through a distributor).

235. *See* SOVOS & WINES & VINES, *supra* note 122, at 13 (discussing the benefits that direct to consumer sales have on small wineries).

236. *See generally* Elias, *supra* note 70 (providing benefits of the three-tier system, which primarily involve benefits derived from the distributor-retailer relationship).

contribute to Michigan's prestige in the world of American craft beer.[237]

237. *See* Barnes, *supra* note 13 (providing the seven states that allow breweries to direct ship: Nebraska, New Hampshire, North Dakota, Ohio, Oregon, Vermont, and Virginia).