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2010 NOTE OF THE YEAR

THE LEGACY OF *GRANHOLM V. HEALD*: QUESTIONING THE CONSTITUTIONALITY OF FACIALLY NEUTRAL DIRECT-SHIPPING LAWS

*So I dreamed: Wouldn't it be terrific if I could be the heroine who stems the tide, slows the overwhelming production of hormonally overblown or sanitized wines—the ones that the world's most famous wine critic is credited with championing? If only I could stop the proliferation of four-square wines with utterly no sense of place or minerality that reflect nothing about where they come from.*¹

APÉRITIF

The wine industry is bifurcating. On the one hand, producers are consolidating and creating more similar-tasting wines. In 2007, approximately eleven percent of U.S. wineries produced ninety-eight percent of U.S. wine.² In fact, half of the total wine market consists of just twenty-two brand names.³ Some people believe these ubiquitous

¹ ALICE FEIRING, *THE BATTLE FOR WINE AND LOVE: OR HOW I SAVED THE WORLD FROM PARKERIZATION 3* (2008). The eponymous wine critic Robert M. Parker, Jr. has become so influential that many vintners have altered their winemaking techniques to suit his palate. This trend is called the “Parkerization” of wine; it is also known as the “international style” of winemaking. *E.g.*, Bill Daley, *A Sense of Place: As International Style Homogenizes Wine, Many Still Defend Terroir*, CHI. TRIB., July 13, 2005, § 7, at 8.

² *Family Winemakers of Cal. v. Jenkins*, No. 06-11682-RWZ, 2008 U.S. Dist. LEXIS 112074, at *23 (D. Mass. Nov. 19, 2008), *aff'd*, 592 F.3d 1 (1st Cir. 2010).

³ KEVIN ZRALY, *WINDOWS ON THE WORLD: COMPLETE WINE COURSE 2* (2010 ed. 2009).

wines taste “sanitized” in part because winemakers have taken to chemically manipulating their wines to achieve higher rankings from critics, and thus higher sales.⁴ But while the big producers have gotten bigger, there has also been a proliferation of small start-up wineries.⁵ In 1975, the United States had fewer than 580 wineries; today it boasts over 5,900.⁶ These smaller vintners are trying to “stem the tide” by producing more nuanced, boutique wines in smaller quantities. The Federal Trade Commission attributes the dramatic growth of boutique wineries to an increased demand for “individualistic, hand-crafted wines.”⁷

This backlash against the mass production and homogenization of wine is noteworthy because it reflects the venerable belief that wine’s nuance and diversity are what make it such a poetic and enduring drink. This philosophy—that no two wines could, or should, taste alike—stems from the concept of *terroir*, a French term that encompasses a grape’s “growing area, starting with the soil (*la terre*) and the slope, and taking into account other elements of the vineyard’s microclimate, such as sun, rain, wind, and temperature fluctuations. Each *terroir* produces a unique wine”⁸ In addition to *terroir*, “[v]ariations in varietal designation, vintage year, vineyard location, varietal blending, winemaking style and limitations on availability [also] contribute to wine’s uniqueness.”⁹ As a result of this uniqueness, “[w]ines are *not* fungible.”¹⁰

The fact that oenophiles enjoy exploring wine’s diversity helps explain why U.S. wineries currently produce 25,000 different wines.¹¹ But because alcohol is heavily regulated, consumer access to this vast array of wines is artificially limited. It can be difficult—if not

⁴ For example, Enologix Systems provides winemakers with “wine quality metrics” that help them improve the rankings their wines receive from critics. Enologix can also compare a wine’s “flavor chemistry profile” to those of wines that have received high scores from influential critics. ENOLOGIX SYSTEMS, <http://www.enologix.com> (last visited Oct. 16, 2010); see also FEIRING, *supra* note 1, at 1–5.

⁵ Susan C. Cagann, *Contents Under Pressure: Regulating the Sales and Marketing of Alcoholic Beverages*, in SOCIAL AND ECONOMIC CONTROL OF ALCOHOL: THE 21ST AMENDMENT IN THE 21ST CENTURY 57, 70 (Carole L. Jurkiewicz & Murphy J. Painter eds., 2008).

⁶ ZRALY, *supra* note 3, at 61.

⁷ FED. TRADE COMM’N, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE 6 (2003), available at <http://www.ftc.gov/os/2003/07/winereport2.pdf>.

⁸ TYLER COLMAN, WINE POLITICS: HOW GOVERNMENTS, ENVIRONMENTALISTS, MOBSTERS, AND CRITICS INFLUENCE THE WINES WE DRINK 42 (2008).

⁹ John A. Hinman & Robert T. Wright, Jr., *Free Commerce in Wine: Trapped in a Legal Web*, HINMAN & CARMICHAEL LLP, 4 (June 23, 2000), <http://www.beveragelaw.com/archives/wlf%20article%20062300%20publication.pdf>.

¹⁰ *Id.*

¹¹ James Alexander Tanford, *E-commerce in Wine*, 3 J.L. ECON. & POL’Y 275, 303 (2007).

impossible—for a consumer to purchase a particular wine, especially one from a boutique winery.¹² Wineries, consumers, and advocacy groups have begun challenging a variety of state laws that, they contend, unconstitutionally restrict their ability to sell and purchase wine.¹³ They point to wine’s uniqueness to help explain why state restrictions on the distribution of wine are particularly unacceptable.¹⁴

Most states regulate alcohol through a three-tier distribution system, which generally requires suppliers (whether a brewer, vintner, distiller, or importer—the first tier) to sell only to wholesalers (also known as distributors or shippers—the second tier) who, in turn, may sell only to retailers (including liquor stores, restaurants, and bars—the third tier).¹⁵ Over the past few decades, as producers have multiplied, wholesalers have consolidated, creating an hourglass-shaped system with wholesalers at the point of constriction.¹⁶ Consequently, the three-tier system has become a huge impediment to consumer choice.

What started out as a system to allow controlled and regulated distribution has become its major obstacle.

Of the 25,000 wines, only about 500 make it through the system to retail shelves. . . . Fewer than 100 wineries have stable national distribution in any form. Three thousand wineries have no wholesaler at all.¹⁷

¹² See, e.g., FED. TRADE COMM’N, *supra* note 7, at 18. The FTC conducted a study in McLean, Virginia, tracking the price and availability of the country’s most popular wines. It found that eighteen percent of the wines on its list were not available in bricks-and-mortar stores near McLean, compared with only five percent unavailable over the Internet. And of the wines that were not available in the McLean area, fifty-three percent of them were on *Wine and Spirits* magazine’s top-twenty most popular list. *Id.*

¹³ Groups such as the Coalition for Free Trade, Free the Grapes, the Wine Institute, and Family Winemakers of California support litigation and legislation in this arena. A number of journalists and academics have dubbed these legal challenges the “Wine Wars.” See, e.g., Susan Lorde Martin, *Wine Wars—Direct Shipment of Wine: The Twenty-First Amendment, the Commerce Clause, and Consumers’ Rights*, 38 AM. BUS. L.J. 1 (2000); Eryn Brown, *The Wine Wars*, N.Y. TIMES, Aug. 24, 2003, at BU4.

¹⁴ See, e.g., *Cherry Hill Vineyards, LLC v. Hudgins*, 488 F. Supp. 2d 601, 617 (W.D. Ky. 2006) (“We note that wine is a unique product. Accordingly, we agree with the plaintiffs that . . . the effect on interstate commerce is not *de minimus*.”), *aff’d sub nom.* *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423 (6th Cir. 2008).

¹⁵ DOUGLAS GLEN WHITMAN, *STRANGE BREW: ALCOHOL AND GOVERNMENT MONOPOLY* 5 fig.1 (2003).

¹⁶ *Family Winemakers of Cal. v. Jenkins*, 592 F.3d 1, 5–6 (1st Cir. 2010). The consolidation of the wholesaler tier has been quite significant. In the 1950s, there were several thousand wholesalers; today, there are only a few hundred. FED. TRADE COMM’N, *supra* note 7, at 6.

¹⁷ Tanford, *supra* note 11, at 303 (footnote omitted).

But despite this effect of the three-tier system, the Supreme Court continues to believe that it is “unquestionably legitimate.”¹⁸ Although some practitioners and scholars believe that the Court’s opinion of the three-tier system may change in the future, the system remains constitutional for the time being.¹⁹

Now that each state is home to at least one winery,²⁰ however, the states themselves want to do something about the bottleneck created by the three-tier system. Allowing producers to sell wine over the Internet and ship it directly to their customers is an obvious alternative to wholesale distribution. One way for a state to support its burgeoning wine industry while appeasing its powerful wholesalers²¹ is to create an exception to its three-tier system that allows in-state wineries to ship directly while continuing to require out-of-state wineries to sell only to wholesalers. Advocates of direct shipping have taken to challenging these exceptions as an alternative to attacking the three-tier system as a whole. While this strategy may seem counterintuitive, it may actually help *expand* direct shipping—at least in some states. The goal is that courts will declare these exceptions unconstitutional because they discriminate in favor of the state’s own wineries and that state legislatures will respond by extending direct-shipping privileges to out-of-state wineries—as opposed to revoking them from the in-state wineries.

In the landmark case *Granholm v. Heald*,²² for example, the plaintiffs challenged a Michigan law that allowed in-state wineries to sell directly to Michiganders via the Internet, but prevented out-of-state wineries from doing the same. The plaintiffs argued that this law violated the dormant Commerce Clause by discriminating against out-of-state wineries. Prior to *Granholm*, it was unclear whether the Twenty-First Amendment, which gives states broad authority to

¹⁸ *Granholm v. Heald*, 544 U.S. 460, 489 (2005) (quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1990) (plurality opinion)) (internal quotation marks omitted).

¹⁹ See, e.g., Jonathan M. Rotter & Joshua S. Stambaugh, *What’s Left of the Twenty-First Amendment?*, 6 CARDOZO PUB. L. POL’Y & ETHICS J. 601, 649 (2008) (“While the three-tier system is universally considered ‘unquestionably legitimate’ to this day, that status may be vulnerable in light of the courts’ increasing reluctance to leave state liquor regulatory systems untouched.”); Tanford, *supra* note 11, at 330 (listing the unconstitutional effects of the three-tier system and concluding that “*Granholm* suggests that its days may be numbered”).

²⁰ Cagann, *supra* note 5, at 70.

²¹ “Between 2004 and 2006, contributions to state-level political campaigns from beer, wine, and spirits concerns totaled \$21,362,727. The overwhelming majority of this money comes from distributors and wholesalers of alcohol. . . . Wholesalers and distributors have more to protect in terms of wealth . . . than any other industry, including producers.” Tom Wark, *State of the States: Money, Wine & Politics*, FERMENTATION: THE DAILY WINE BLOG (Mar. 31, 2006), http://fermentation.typepad.com/fermentation/2006/03/state_of_the_st.html, cited in Rotter & Stambaugh, *supra* note 19, at 645–46.

²² 544 U.S. 460 (2005).

regulate alcohol, could “save” a law like Michigan’s that would otherwise be a clear violation of the dormant Commerce Clause’s nondiscrimination principle. The *Granholm* Court made it clear that “straightforward attempts to discriminate in favor of local producers . . . [are] contrary to the Commerce Clause and [are] not saved by the Twenty-first Amendment.”²³

In response to *Granholm*, at least nine states with similarly discriminatory laws on the books chose to extend direct-shipping privileges to out-of-state wineries; no state revoked existing direct-shipping privileges completely.²⁴ To that extent, the direct-shipping advocates’ plan seems to have worked. But other states have tried to sidestep *Granholm* by passing “interesting legislative devices”²⁵ that apparently are meant to favor local wineries without “straightforwardly” discriminating against out-of-state wineries. At first glance, these devices, which allow limited direct shipping, do not appear to discriminate because they are nominally available to all wineries. But their opponents argue that the devices contain such severe restrictions that in-state wineries are effectively the only beneficiaries. Examples of such devices include: production limits, case limits, face-to-face purchase requirements, prohibitive permit costs, and reciprocity requirements.²⁶ Of these various restrictions, the production limit and the face-to-face purchase requirement are the most significant.²⁷ In general, a face-to-face purchase requirement limits direct shipping by requiring consumers to make their purchases in person at the winery. A production limit restricts direct shipping by allowing only those wineries producing less than a specified amount of wine per year to ship directly to consumers.

These types of laws tend to burden out-of-state wineries more than in-state wineries,²⁸ but because the language of the law applies equally to in-state and out-of-state wineries, they do not fall neatly into the *Granholm* rubric. Nevertheless, direct-shipping advocates have brought a number of challenges to such laws in the wake of *Granholm*; they have been met with mixed success.²⁹ This Note posits

²³ *Id.* at 489.

²⁴ Maureen K. Ohlhausen & Gregory P. Luib, *Moving Sideways: Post-Granholm Developments in Wine Direct Shipping and Their Implications for Competition*, 75 ANTITRUST L.J. 505, 512–13 (2008).

²⁵ Cary S. Wiggins, *Wine Online: A Sampling of What’s Happening with Online Wine Buying and Shipping*, E-COMMERCE L. & STRATEGY, Sept. 2008, at 1, 9, available at <http://www.technologybar.org/2009/02/wine-online/#fn-294-1>.

²⁶ *Id.* at 9–10.

²⁷ Ohlhausen & Luib, *supra* note 24, at 514.

²⁸ *Id.* at 506.

²⁹ *Compare* Family Winemakers of Cal. v. Jenkins, 592 F.3d 1 (1st Cir. 2010) (holding that Massachusetts’s production limit violated the dormant Commerce Clause), *Cherry Hill*

that this mixed success is the result of courts not applying the dormant Commerce Clause consistently. This Note further argues that the courts have been inconsistent not only because the proper application of the dormant Commerce Clause is unclear, but also because the dormant Commerce Clause is particularly difficult to apply to laws regulating the wine industry. The wine industry poses special problems not only because it implicates the Twenty-First Amendment, but also because it is bifurcated and geographically unbalanced.³⁰

Part I of this Note briefly summarizes the history of federal alcohol regulation in the United States through *Granholm v. Heald*. Part II lays out in general terms the various dormant Commerce Clause tests that courts use to analyze limited direct-shipping laws. Part III discusses how different courts have applied these tests to face-to-face

Vineyards, LLC v. Lilly, 553 F.3d 423 (6th Cir. 2008) (holding that Kentucky's in-person purchase requirement violated the Commerce Clause), *Siesta Vill. Mkt., LLC v. Granholm*, 596 F. Supp. 2d 1035 (E.D. Mich. 2008) (holding that Michigan's requirement that out-of-state retailers maintain an in-state location in order to ship directly to consumers violated the dormant Commerce Clause), *Freeman v. Fischer*, 563 F. Supp. 2d 493 (D.N.J. 2008) (holding that New Jersey's provision allowing in-state wineries more salesrooms than out-of-state wineries violated the dormant Commerce Clause), and *S. Wine & Spirits of Tex., Inc. v. Steen*, 486 F. Supp. 2d 626 (W.D. Tex. 2007) (holding that the facially discriminatory residency requirements imposed on out-of-state wine and liquor wholesalers was unconstitutional), with *Black Star Farms LLC v. Oliver*, 600 F.3d 1225 (9th Cir. 2010) (holding that Arizona's in-person purchase requirement and production limit did not violate the dormant Commerce Clause), *Baude v. Heath*, 538 F.3d 608 (7th Cir. 2008) (holding that the wholesale clause in Indiana's alcohol law, which authorized some direct sales of wine, was unconstitutional, but that the face-to-face clause was constitutional), *cert. denied*, 129 S. Ct. 2382 (2009), *Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28 (1st Cir. 2007) (holding that Maine's in-person purchase requirement did not violate the dormant Commerce Clause), *Brooks v. Vassar*, 462 F.3d 341 (4th Cir. 2006) (holding that Virginia's personal import exception did not violate the dormant Commerce Clause and that its policy of selling only in-state wines through its own stores was protected under the "market participant" exception to the dormant Commerce Clause), *Beau v. Moore*, No. 4:05CV000903 SWW, 2007 WL 3231890 (E.D. Ark. Nov. 1, 2007) (dismissing on the pleadings plaintiffs' claim that four different provisions of Arkansas's alcoholic beverage law worked together to discriminate against out-of-state wineries in violation of the dormant Commerce Clause), *Longstreet Delicatessen, Fine Wines & Specialty Coffees, L.L.C. v. Jolly*, No. 1:06-CV-00986-OWW DLB, 2007 WL 2815022 (E.D. Cal. Sept. 25, 2007) (dismissing for lack of standing a suit challenging the constitutionality of California's reciprocity law and chartered flight provision), and *Hurley v. Minner*, No. CIV 05-826-SLR, 2006 WL 2789164 (D. Del. Sept. 26, 2006) (dismissing for failure to state a claim a suit challenging the constitutionality of Delaware's in-person purchase requirement).

³⁰ The industry is bifurcated because there are now, "broadly speaking, two categories of wine[:] high-volume, lower-cost wines and low-volume, higher-quality, higher-priced boutique wines." *Family Winemakers of Cal.*, 592 F.3d at 6. The fact that the top eleven percent of U.S. wineries produce ninety-eight percent of U.S. wine illustrates the magnitude of this divide. *Family Winemakers of Cal. v. Jenkins*, No. 06-11682-RWZ, 2008 U.S. Dist. LEXIS 112074, at *23 (D. Mass. Nov. 19, 2008), *aff'd*, 592 F.3d 1 (1st Cir. 2010). It is also geographically unbalanced, because California accounts for over ninety percent of U.S. wine production. DONALD A. HODGEN, U.S. DEP'T OF COMMERCE, U.S. WINE INDUSTRY—2008, at 5 (2009), available at http://www.trade.gov/td/ocg/winereport_2009.pdf.

purchase requirements and suggests which of their approaches courts should adopt going forward. Part IV discusses how application of the tests has diverged in the context of production limits. The Digestif posits that the nonfungibility of wine might be used to bolster the argument that these post-*Granholm* cases portend: the three-tier system itself is unconstitutional.

I. THE ROAD TO *GRANHOLM*

A. *Pre-Prohibition*

The Commerce Clause provides that “Congress shall have Power . . . To regulate Commerce . . . among the several States.”³¹ These words reflect

a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation. The Commerce Clause has accordingly been interpreted by this Court not only as an authorization for congressional action, but also, even in the absence of a conflicting federal statute, as a restriction on permissible state regulation.³²

This implicit principle that the states may not interfere with interstate commerce is known as the “negative,” or “dormant,” Commerce Clause.³³

As the temperance movement gained strength during the nineteenth century, the dormant Commerce Clause became problematic for states wishing to go dry. If a state banned alcohol, residents could simply order some from a wet state.³⁴ If the state then tried to ban the importation of alcohol, the Court would strike the law down under the dormant Commerce Clause.³⁵ Essentially, it was

³¹ U.S. CONST. art I, § 8, cl. 3.

³² *Hughes v. Oklahoma*, 441 U.S. 322, 325–26 (1978) (citation omitted) (citing *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525 (1949)).

³³ *See, e.g., Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep’t of Natural Res.*, 504 U.S. 353, 359 (1992) (“As we have long recognized, the ‘negative’ or ‘dormant’ aspect of the Commerce Clause prohibits States from ‘advanc[ing] their own commercial interests by curtailing the movement of articles of commerce, either into or out of the state.’” (alteration in original) (quoting *H.P. Hood & Sons*, 336 U.S. at 535)).

³⁴ Tanford, *supra* note 11, at 285.

³⁵ *See, e.g., Bowman v. Chi. & Nw. Ry.*, 125 U.S. 465 (1888) (holding that states did not have the power to restrict or prohibit the importation of alcohol without the explicit or implicit

impossible for a state to enforce its dry laws. Congress responded by enacting the Wilson Act³⁶ in 1890, which allowed a state to regulate imported alcohol in the same way as its local alcohol.³⁷ The Supreme Court, however, construed the Act narrowly, holding that it applied only to the resale of imported alcohol, not to the direct shipment of alcohol to the ultimate consumer.³⁸ Therefore, a consumer could still circumvent his state's dry laws by having alcohol shipped directly to him from a wet state. To close this loophole, Congress enacted the Webb-Kenyon Act³⁹ in 1913, allowing dry states to prevent their residents from evading local prohibition.⁴⁰ The narrow scope of the Act is evident from its title, "An Act divesting intoxicating liquors of their interstate character in *certain cases*."⁴¹ It is clear from the debate surrounding the passage of the Act, and the few Supreme Court cases interpreting it before national Prohibition began, that it was intended only to give effect to prohibition laws in dry states, not to allow for disparate treatment of local and imported alcohol in wet states.⁴²

B. The Eighteenth and Twenty-First Amendments

National Prohibition began in January 1920, one year after thirty-six states ratified the Eighteenth Amendment.⁴³ When it came time to end the failed "Noble Experiment,"⁴⁴ Congress drafted the Twenty-First Amendment, which the states ratified in 1933. Section 1 of the Amendment repealed national Prohibition. Section 2 then added that

consent of Congress); *see also* Tanford, *supra* note 11, at 285 (describing same).

³⁶ Ch. 728, 26 Stat. 313 (1890) (current version at 27 U.S.C. § 121 (2006)).

³⁷ *Granholm v. Heald*, 544 U.S. 460, 478 (2005).

³⁸ *See, e.g., Rhodes v. Iowa*, 170 U.S. 412, 423 (1898) (holding that the words "upon arrival" in the Wilson Act meant that a state could not regulate imported alcohol until after delivery had been completed); *see also* Tanford, *supra* note 11, at 285–87 (discussing the Court's interpretation of the Wilson Act).

³⁹ Ch. 90, § 1, 37 Stat. 699 (1913) (current version at 27 U.S.C. § 122 (2006)).

⁴⁰ *See Granholm*, 544 U.S. at 481–82 (discussing how the Supreme Court previously interpreted the Webb-Kenyon Act to extend the Wilson Act's authority to interstate shipments and close the direct-shipment gap).

⁴¹ Tanford, *supra* note 11, at 288.

⁴² *See, e.g., Clark Distilling Co. v. W. Md. Ry. Co.*, 242 U.S. 311, 323–24 (1917) (stating that the sole purpose of the Webb-Kenyon Act was to give effect to dry laws in states that had prohibition); *see also* Tanford, *supra* note 11, at 287–89 (quoting statements made by several senators and representatives during debates in Congress and explaining the Supreme Court cases that held that the Act did not authorize discrimination against imported alcohol).

⁴³ *See* BORIS I. BITTKER WITH THE COLLABORATION OF BRANNON P. DENNING, BITTKER ON THE REGULATION OF INTERSTATE AND FOREIGN COMMERCE § 13.01, at 13-3 (1999).

⁴⁴ A term generally, though perhaps erroneously, attributed to Herbert Hoover. PAUL F. BOLLER, JR. & JOHN GEORGE, *THEY NEVER SAID IT: A BOOK OF FAKE QUOTES, MISQUOTES, AND MISLEADING ATTRIBUTIONS* 47–48 (1989); *see, e.g.,* Tanford, *supra* note 11, at 289 n.103 (attributing quotation to Herbert Hoover).

“[t]he transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.”⁴⁵ This language is very similar to the Webb-Kenyon Act, which provides:

The shipment or transportation, in any manner or by any means whatsoever, of any . . . intoxicating liquor of any kind, from one State . . . into any other State, . . . which said . . . intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State . . . is hereby prohibited.⁴⁶

The purpose of Section 2 is arguably the same as that of the Webb-Kenyon Act—that is, to empower states to enforce their dry laws if they wish to continue local prohibition.⁴⁷ Some evidence for this interpretation can be found in the statements of Senator Blaine, the Senate sponsor of the Amendment, who said during debate, “So, to assure the so-called dry States against the importation of intoxicating liquor into those States, it is proposed to write permanently into the Constitution a prohibition along that line.”⁴⁸ But other evidence suggests that Section 2 was meant to grant states much broader power to regulate alcohol.⁴⁹ In fact, Senator Blaine himself later said, “The purpose of section 2 is to restore to the States by constitutional amendment absolute control in effect over interstate commerce affecting intoxicating liquors which enter the confines of the States.”⁵⁰

⁴⁵ U.S. CONST. amend. XXI, § 2.

⁴⁶ 27 U.S.C. § 122 (2006); *see also* Craig v. Boren, 429 U.S. 190, 205–06 (1976) (“The wording of § 2 of the Twenty-first Amendment closely follows the Webb-Kenyon and Wilson Acts . . .” (footnote omitted)).

⁴⁷ Tanford, *supra* note 11, at 291–95.

⁴⁸ 76 CONG. REC. 4141 (1933); *see also* Rotter & Stambaugh, *supra* note 19, at 608–09 (discussing Blaine’s statements). Part of the motivation for writing the Webb-Kenyon Act into the Constitution may have been that the constitutionality of the Act was somewhat in doubt. *See* Granholm v. Heald, 544 U.S. 460, 481 (2005) (“The constitutionality of the Webb-Kenyon Act was in doubt.”); *see also* Tanford, *supra* note 11, at 291 & n.108 (stating that the purpose of the Twenty-First Amendment was to write the Webb-Kenyon Act into the Constitution so that it could not be repealed by Congress). The Act was passed over President Taft’s veto, Webb-Kenyon Act, ch. 90, § 1, 37 Stat. 699 (1913), and upheld by a divided Court in *Clark Distilling Co. v. Western Maryland Railway Co.*, 242 U.S. 311 (1917).

⁴⁹ *See* Rotter & Stambaugh, *supra* note 19, at 609–11 (discussing the argument that the text of the amendment and the Court’s initial interpretation of it are evidence that a broad interpretation is correct).

⁵⁰ 76 CONG. REC. 4143 (1933); *see also* Rotter & Stambaugh, *supra* note 19, at 609 (discussing Senator Blaine’s comments).

Given this murky legislative history, it is not surprising that the Amendment is open to a number of conflicting interpretations, which in turn have generated a large body of Supreme Court decisions. The Court's Twenty-First Amendment jurisprudence has evolved significantly over the past seventy-seven years; many decisions in this area reflect the fundamental disagreement about the intent of the Amendment's framers.⁵¹

C. The Court's Shifting Twenty-First Amendment Jurisprudence

Initially, the Court interpreted the Amendment broadly, as evidenced by its first major case on the subject, *State Board of Equalization v. Young's Market Co.*⁵² The Court focused on the text of the Amendment rather than its legislative history,⁵³ and Justice Brandeis famously announced:

The words used [in Section 2 of the Amendment] are apt to confer upon the State the power to forbid all importations which do not comply with the conditions which it prescribes. The plaintiffs ask us to limit this broad command. They request us to construe the Amendment as saying, in effect: The State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the Amendment, but a rewriting of it.⁵⁴

The Court's early Twenty-First Amendment cases, which followed in *Young's Market's* footsteps, "gave the Amendment such a broad reading that it looked like states could regulate, restrict, and burden interstate sales and deliveries of liquor in any way they wanted, 'unfettered by the Commerce Clause.'"⁵⁵ States used the broad authority granted to them in the Court's early cases to enact laws that favored in-state producers and discriminated against out-of-state producers and importers.⁵⁶

⁵¹ BITTKER, *supra* note 43, § 13.02, at 13-5 to -6.

⁵² 299 U.S. 59 (1936).

⁵³ Tanford, *supra* note 11, at 296.

⁵⁴ *Young's Mkt. Co.*, 299 U.S. at 62; *see also* BITTKER, *supra* note 43, § 13.03, at 13-7.

⁵⁵ Tanford, *supra* note 11, at 296-97 (footnote omitted) (quoting *Ziffirin, Inc. v. Reeves*, 308 U.S. 132, 138-39 (1939)).

⁵⁶ BITTKER, *supra* note 43, § 13.04, at 13-14.

In time the Court began to retreat from its initial position and instead attempted to balance the Twenty-First Amendment against the dormant Commerce Clause.⁵⁷ For example, in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*,⁵⁸ the Court recognized that earlier cases such as *Young's Market* had established broad state power over alcohol, but it qualified that power by reasoning that “[t]o draw a conclusion from this line of decisions that the Twenty-first Amendment has somehow operated to ‘repeal’ the Commerce Clause wherever regulation of intoxicating liquors is concerned would . . . be an absurd oversimplification.”⁵⁹

A major shift in the Court’s jurisprudence came in the 1980s. In *Bacchus Imports, Ltd. v. Dias*,⁶⁰ the Court finally took the opportunity to address the issue of discrimination, which it had left open in *Young’s Market*.⁶¹ In *Bacchus*, the Court struck down a Hawaiian law that exempted two local alcoholic beverages from the State’s twenty-percent excise tax on wholesale sales of liquor. The Court concluded that despite its doubts about the scope of, and intent behind, the Amendment,

one thing is certain: The central purpose of [Section 2] was not to empower States to favor local liquor industries by erecting barriers to competition. It is also beyond doubt that the Commerce Clause itself furthers strong federal interests in preventing economic Balkanization. State laws that constitute mere economic protectionism are therefore not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor. Here, the State does not seek to justify its tax on the ground that it was designed to promote temperance or to carry out any other purpose of the Twenty-first Amendment, but instead acknowledges that the purpose was “to promote a local industry.” Consequently, because the tax violates a central tenet of the Commerce Clause but is not supported by any clear concern of the Twenty-first Amendment, we reject the State’s belated claim based on the Amendment.⁶²

⁵⁷ *Id.* at 13-14 to -15. The Court also began balancing the Amendment against other federal and constitutional principles such as the federal antitrust laws and the individual rights found in the Bill of Rights and the Fourteenth Amendment. *Id.* at 13-14.

⁵⁸ 377 U.S. 324 (1964).

⁵⁹ *Id.* at 331-32; see also Tanford, *supra* note 11, at 298 (discussing *Idlewild*).

⁶⁰ 468 U.S. 263 (1984).

⁶¹ Tanford, *supra* note 11, at 298-99.

⁶² *Bacchus*, 468 U.S. at 276 (citations omitted); see also BITTKER, *supra* note 43, § 13.04.

The *Bacchus* Court essentially adopted a balancing test to determine “whether the principles underlying the Twenty-first Amendment are sufficiently implicated by [the challenged law] to outweigh the Commerce Clause principles that would otherwise be offended.”⁶³ The Court pointed to its decision in *Capital Cities Cable, Inc. v. Crisp*⁶⁴ for an alternative formulation of the test: “whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies.”⁶⁵ This balancing test was dubbed the “core concerns” test.⁶⁶ Given the ambiguity surrounding the original meaning of and intent behind the Twenty-First Amendment, identifying its core concerns was a somewhat dubious task. The *Bacchus* Court confirmed only that “mere economic protectionism” is not one of them.⁶⁷ But it was eventually settled that “promoting temperance, ensuring orderly market conditions, and raising revenue” were the Twenty-First Amendment’s core concerns.⁶⁸

*Milton S. Kronheim & Co. v. District of Columbia*⁶⁹ provides an example of how asserting a core concern can tip the balance in the state’s favor, even “in what would otherwise be a clear case of economic protectionism.”⁷⁰ In *Kronheim*, the District of Columbia had enacted a law that required alcoholic beverage licensees to store their entire inventory in the District. The District of Columbia Circuit found that even if the law were protectionist (and it acknowledged that *Kronheim* had made a credible argument that it was), the law was also motivated by the core concerns of the Twenty-First Amendment. By requiring alcoholic beverages to be stored in the District, the law facilitated the monitoring of licensees’ compliance with other alcohol beverage control laws and with tax laws. The fact that the law had mixed motives distinguished it from *Bacchus*; the *Bacchus* Court had

at 13-19 to -20 (discussing *Bacchus*).

⁶³ *Bacchus*, 468 U.S. at 275; see also Gregory E. Durkin, Note, *What Does Granholm v. Heald Mean for the Future of the Twenty-First Amendment, the Three-Tier System, and Efficient Alcohol Distribution?*, 63 WASH. & LEE L. REV. 1095, 1104 (2006) (discussing the same *Bacchus* language).

⁶⁴ 467 U.S. 691 (1984).

⁶⁵ *Id.* at 714; see also *Bacchus*, 468 U.S. at 275–76 (quoting the *Capital Cities* test).

⁶⁶ See, e.g., *Dickerson v. Bailey*, 336 F.3d 388, 404 (5th Cir. 2003) (stating that the *Bacchus* test is “commonly referred to as the ‘core concerns’ test”); see also Durkin, *supra* note 63, at 1104 & n.42.

⁶⁷ *Bacchus*, 468 U.S. at 276.

⁶⁸ *North Dakota v. United States*, 495 U.S. 423, 432 (1990) (plurality opinion); see also Durkin, *supra* note 63, at 1104 & n.44.

⁶⁹ 91 F.3d 193 (D.C. Cir. 1996).

⁷⁰ BITTKER, *supra* note 43, § 13.04, at 13-21.

found that the Hawaiian excise tax violated the Commerce Clause and was *not* supported by any core Twenty-First Amendment concern.⁷¹ Accordingly, the *Kronheim* court concluded, “[A]lthough the Act facially violates the negative commerce clause, it is supported by a clear concern for the core enforcement function of the Twenty-first Amendment” and is therefore constitutional.⁷² In other words, applying the core-concerns test gives a court the opportunity to “save” a discriminatory alcohol regulation by allowing the Twenty-First Amendment to outweigh the dormant Commerce Clause.

D. The First Shoe Drops

But about a decade later, the balance shifted in favor of the dormant Commerce Clause when the Court announced its opinion in *Granholm v. Heald*. The consolidated cases in *Granholm* dealt with direct-shipping laws in Michigan and New York. Michigan allowed in-state wineries to ship wine directly to in-state customers; out-of-state wineries were not allowed to apply for this type of license. New York allowed wineries that produce wine only from New York grapes to ship directly to in-state customers; other wineries (i.e., out-of-state wineries) could do so only if they first established a presence (a factory, office, or storeroom) in New York.⁷³ In both cases, the plaintiffs were in-state consumers and out-of-state “small wineries that rely on direct consumer sales as an important part of their businesses.”⁷⁴

Before beginning its analysis of the challenged exceptions to the three-tier system, the Court reaffirmed that “the three-tier system itself is ‘unquestionably legitimate.’”⁷⁵ The Court, however, offered no explanation of *why* the system is still legitimate. Perhaps it believed that its choice of adverb obviated any need to do so. The Court did, however, explain why these particular exceptions were not legitimate. Interestingly, the Court characterized Michigan and New York’s alcohol regulatory schemes not as general three-tier systems with exceptions for in-state wineries, but as limited three-tier systems that applied only to out-of-state wineries.⁷⁶ Either way one looks at it, the Court’s conclusion is accurate: “The differential treatment

⁷¹ *Kronheim*, 91 F.3d at 203–04; see also BITTKER, *supra* note 43, § 13.04, at 13-21.

⁷² *Kronheim*, 91 F.3d at 204.

⁷³ *Granholm v. Heald*, 544 U.S. 460, 469–70 (2005).

⁷⁴ *Id.* at 468.

⁷⁵ *Id.* at 489 (quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1990) (plurality opinion)).

⁷⁶ *Id.* at 465–67.

between in-state and out-of-state wineries constitutes explicit discrimination against interstate commerce.”⁷⁷

The Court was able to reach this conclusion by holding that “the Twenty-first Amendment does not supersede other provisions of the Constitution and, in particular, does not displace the rule that States may not give a discriminatory preference to their own producers.”⁷⁸ With regard to direct shipping in particular, the Court held, “If a State chooses to allow direct shipment of wine, it must do so on evenhanded terms” because the Twenty-First Amendment “does not allow States to ban, or severely limit, the direct shipment of out-of-state wine while simultaneously authorizing direct shipment by in-state producers.”⁷⁹ The Court concluded that both States’ laws, “by their own terms,” violated the Commerce Clause’s proscription against discriminating against interstate commerce.⁸⁰

In his dissent, Justice Thomas noted that this holding is strange because although “[t]he Court place[d] much weight upon the authority of *Bacchus* . . . [it did] not even mention, let alone apply, the ‘core concerns’ test that *Bacchus* established. The Court instead *sub silentio* cast[] aside that test, employing otherwise-applicable negative Commerce Clause scrutiny and giving no weight to the Twenty-first Amendment.”⁸¹ Therefore, by clarifying that the Twenty-First Amendment cannot save a discriminatory state law, *Granholm* created a new question: whether the core-concerns test has any remaining validity. Moreover, the *Granholm* Court did not clarify how lower courts should determine discrimination in less clear-cut cases. This dual uncertainty makes it difficult to analyze the “interesting legislative devices” that have been enacted since *Granholm*. These new limitations on direct shipping do burden interstate commerce, but they do not discriminate “by their own terms,” like the laws at issue in *Granholm*. It is also unclear how much weight to give the States’ arguments that these limitations promote core Twenty-First Amendment concerns.⁸²

⁷⁷ *Id.* at 467.

⁷⁸ *Id.* at 486.

⁷⁹ *Id.* at 493.

⁸⁰ *Id.* at 476.

⁸¹ *Id.* at 524 (Thomas, J., dissenting).

⁸² For example, States have argued that face-to-face purchase requirements help limit minors’ access to alcohol. *See, e.g.,* *Baude v. Heath*, 538 F.3d 608 (7th Cir. 2008), *cert. denied*, 129 S. Ct. 2382 (2009).

II. DORMANT COMMERCE CLAUSE ANALYSIS

When analyzing a law that has been challenged under the dormant Commerce Clause, a court must first choose which level of scrutiny to apply. Laws that discriminate against interstate commerce are subject to heightened scrutiny. Laws that burden interstate commerce, but do not rise to the level of being discriminatory, are analyzed under the balancing test established in *Pike v. Bruce Church, Inc.*⁸³ This threshold question of discrimination is often outcome determinative because the heightened-scrutiny test contains a strong presumption of invalidity, whereas the *Pike* balancing test is much more lenient.⁸⁴

The plaintiff has the burden of establishing that the law discriminates against interstate commerce. “[D]iscrimination” simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.⁸⁵ There are potentially three ways to prove discrimination. First, a law may be facially discriminatory. If the language of the statute itself distinguishes between in-state and out-of-state entities, then the law is discriminatory on its face.⁸⁶ Second, a law may be discriminatory in effect. Even if the statute appears to treat all entities the same way, i.e., it is facially neutral, it may in reality still discriminate in favor of in-state entities.⁸⁷ Third, a law may be discriminatory in purpose. The test for determining whether the legislature passed the law for a discriminatory purpose is not entirely clear; it is also unclear whether a finding of discriminatory purpose, on its own, is sufficient to trigger heightened scrutiny.⁸⁸ In any case, once the plaintiff establishes that the law is discriminatory, the burden shifts to the State to prove that the law “advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.”⁸⁹

⁸³ 397 U.S. 137 (1970).

⁸⁴ ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 430–31 (3d ed. 2006); Ohlhausen & Luib, *supra* note 24, at 524–28.

⁸⁵ *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 99 (1994).

⁸⁶ CHEMERINSKY, *supra* note 84, at 431. For example, the Michigan law at issue in *Granholm* was facially discriminatory because it provided that in-state wineries could ship directly but that out-of-state wineries could not. *Granholm v. Heald*, 544 U.S. 460, 476 (2005).

⁸⁷ CHEMERINSKY, *supra* note 84, at 433. The criteria for determining discriminatory effect are not exactly clear and will be discussed in more detail in Parts III and IV.

⁸⁸ See *infra* Part IV.A.1.

⁸⁹ *Granholm*, 544 U.S. at 463 (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988)) (internal quotation marks omitted). The *Granholm* Court did not actually use the words “heightened scrutiny” but several circuit cases do describe this test as the heightened-scrutiny test. See, e.g., *Wine & Spirits Retailers, Inc. v. Rhode Island*, 481 F.3d 1, 10–11 (1st Cir. 2007). Unfortunately, the Supreme Court once referred to this test as “strict scrutiny.” See *Or. Waste Sys., Inc.*, 511 U.S. at 94. This has caused some confusion among lower courts. See, e.g., *infra* note 119 and accompanying text.

This opportunity to defend the law is all but illusory because discriminatory laws “face ‘a virtually *per se* rule of invalidity.’”⁹⁰

If the law is not discriminatory, then the plaintiff must prove that the law’s burdens clearly outweigh its benefits in order for the court to declare it unconstitutional. Or, as the *Pike* Court put it, “Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”⁹¹

Two interesting features of this formulation make the *Pike* test difficult to apply. First, the test requires the court to balance the burdens on all of interstate commerce against the benefits to a single state. The two sides of the balance seem to be measuring very different things; consequently, there are no set standards for how the court should make this comparison.⁹² The only guidance provided by the *Pike* Court is, “[T]he extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.”⁹³ Second, although the State must show a significant local benefit in order to win the balancing test, if the benefit is too great, it might appear that the State passed the law for a discriminatory purpose. This makes the *Pike* test a bit paradoxical.⁹⁴ Moreover, because *Granholm* left the core-concerns test up in the air, there is a possibility that the Twenty-First Amendment is still relevant to *Pike* analysis. *Granholm* held that the Twenty-First Amendment cannot save a *discriminatory* law; it did not explain how the Twenty-First Amendment affects a nondiscriminatory alcohol regulation that is at risk of failing the *Pike* test.⁹⁵

III. FACE-TO-FACE PURCHASE REQUIREMENTS

The courts that have addressed the constitutionality of face-to-face purchase requirements have treated them quite differently. Sections A through C discuss three recent cases in this area: *Baude v. Heath*,⁹⁶ *Cherry Hill Vineyards, LLC v. Lilly*,⁹⁷ and *Cherry Hill Vineyard, LLC*

⁹⁰ *Granholm*, 544 U.S. at 476 (quoting *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)).

⁹¹ *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

⁹² See CHEMERINSKY, *supra* note 84, at 437.

⁹³ *Pike*, 397 U.S. at 142.

⁹⁴ See BITTKER, *supra* note 43, § 6.06, at 6-34.

⁹⁵ See Durkin, *supra* note 63, at 1108–10.

⁹⁶ 538 F.3d 608 (7th Cir. 2008), *cert. denied*, 129 S. Ct. 2382 (2009).

⁹⁷ 553 F.3d 423 (6th Cir. 2008).

v. Baldacci.⁹⁸ Section D proposes a mode of analysis for future face-to-face requirement challenges. The main question appears to be where to draw the line between an incidental burden and a discriminatory effect. And within that issue lies a secondary question of how to deal with the difference between state borders and geographic distance. Interestingly, two of these courts also considered the nonfungibility of wine, but came to different conclusions about its implications; Section D addresses this issue as well.

A. Baude v. Heath

In *Baude v. Heath*, the plaintiffs challenged certain restrictions on the direct-shipping exception to Indiana's three-tier system. One of the challenged restrictions was the face-to-face purchase requirement, which "requires any consumer who wants to receive direct shipments of wine—from any winery, in or out of Indiana—to visit the winery once and supply proof of name, age, address, and phone number, plus a verified statement that the wine is intended for personal consumption."⁹⁹ The parties sparred over which standard should govern the court's analysis—heightened scrutiny or the *Pike* balancing test.¹⁰⁰ The district court noted, "[T]here is 'no clear line separating the category of state regulation that is virtually *per se* invalid under the Commerce Clause, and the category subject to the *Pike v. Bruce Church* balancing approach."¹⁰¹ The Seventh Circuit has characterized the difference between a law that is discriminatory in effect and a law that burdens interstate commerce incidentally as a difference of degree.¹⁰²

The district court in *Baude* concluded that the face-to-face requirement was discriminatory in effect. It reasoned that the degree of the burden imposed depends on how far the winery is from Indiana and that, "as the parties know, the overwhelming number of out-of-state [wineries] are not located close to Indiana's borders. They are hundreds of miles away. . . . [Therefore, i]n practical effect, the statute discriminates far more heavily against out-of-state wineries."¹⁰³ The district court further held that although Indiana had

⁹⁸ 505 F.3d 28 (1st Cir. 2007).

⁹⁹ *Baude*, 538 F.3d at 612.

¹⁰⁰ *Baude v. Heath*, No. 1:05-cv-0735-JDT-TAB, 2007 WL 2479587, at *12–13 (S.D. Ind. Aug. 29, 2007), *aff'd in part and rev'd in part*, 538 F.3d 608 (7th Cir. 2008), *cert. denied*, 129 S. Ct. 2382 (2009).

¹⁰¹ *Id.* at *13 (quoting *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986)).

¹⁰² *Id.* (citing *Nat'l Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1131 (7th Cir. 1995)).

¹⁰³ *Id.* at *22.

a legitimate interest in curbing underage drinking, it failed to prove that there were no less discriminatory means available.¹⁰⁴ The plaintiffs had offered two alternatives: requiring the common carrier to verify the recipient's age upon delivery, or requiring wineries to use a third-party age verification service.¹⁰⁵

On appeal, the Seventh Circuit decided that the *Pike* test was the proper standard to apply. Chief Judge Easterbrook wrote that the rule of per se invalidity applies to laws that are discriminatory on their face, and that the provisions challenged in this case were not facially discriminatory. He did not, however, explicitly say that laws that are discriminatory in effect do not merit heightened scrutiny. Instead, he rephrased the district court's finding to eliminate the word discrimination, thus making it appear that the *Pike* balancing test was the appropriate test. Specifically, he said that the district court had concluded that the challenged laws "impose higher costs on interstate commerce."¹⁰⁶

Forced to use the *Pike* framework, the plaintiffs-appellees argued that the burdens of the face-to-face requirement outweigh its benefits. The law burdens interstate commerce because the farther away the winery is, the more expensive it becomes for the customer to make the visit; the law's benefit (curbing underage consumers' access to wine) is minimal because underage people can find a way to obtain wine no matter what the law provides.¹⁰⁷

Without addressing the district court's observation that the vast majority of out-of-state wineries are located on the West Coast, the Seventh Circuit emphasized that many Indianans live closer to Michigan or Illinois wineries than to in-state wineries. Chief Judge Easterbrook also hypothesized that an oenophile could take one vacation to Napa and sign up for direct shipping at a multitude of wineries, making the cost per winery quite small. Because not as many people vacation in Indiana wine country, and because Indiana's wineries are much more spread out than Napa's, it could actually be more costly for a non-Indianan oenophile to sign up at an equivalent number of Indiana wineries. He concluded,

¹⁰⁴The test is actually whether any "reasonable nondiscriminatory alternatives" exist. *Granholm v. Heald*, 544 U.S. 460, 489 (2005) (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988)) (internal quotation marks omitted). The district court may have gotten this confused with the *Pike* inquiry, which is whether the purpose could be accomplished with a "lesser impact" on interstate commerce. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

¹⁰⁵*Baude*, 2007 WL 2479587, at *24.

¹⁰⁶*Baude v. Heath*, 538 F.3d 608, 611 (7th Cir. 2008), cert. denied, 129 S. Ct. 2382 (2009).

¹⁰⁷*Id.* at 612–14.

[A]lthough it may be more costly for a person living in Indianapolis to satisfy the face-to-face requirement at five Oregon wineries than at five Indiana wineries, it is not necessarily substantially more expensive (per winery) to sign up at a larger number of west-coast wineries than at an equivalent number of Indiana wine producers.¹⁰⁸

As for the law's minimal benefits, the plaintiffs argued that the two alternative age-verification methods they had proposed in the district court were just as effective as a face-to-face verification. They also argued that studies have shown that face-to-face age verification is actually ineffective. The court gave little weight to these arguments and their supporting evidence. It also reasoned that the fact that underage people will try to get around the law does not imply that there is no point in having the law in the first place. "The face-to-face requirement makes it harder for minors to get wine. Anything that raises the cost of an activity will diminish the quantity—not to zero, but no law is or need be fully effective."¹⁰⁹

Baude illustrates why the level of scrutiny applied is so important. By finding that the law was not discriminatory, the Seventh Circuit forced the plaintiffs to argue that the cost of visiting a winery clearly outweighs the benefit of restricting minors' access to alcohol; it also saved the State from having to argue that the less costly age-verification alternatives are unreasonable.

B. Cherry Hill Vineyards, LLC v. Lilly

Kentucky's face-to-face purchase requirement, at issue in *Cherry Hill Vineyards, LLC v. Lilly*, differed from Indiana's requirement in that it required the customer to make *each* purchase in person, not just the initial purchase.¹¹⁰ The plaintiffs argued that the law was discriminatory in effect. Out-of-state wineries are burdened because the law drives up the cost of their wines; they must either incur extra costs by selling through a Kentucky wholesaler or wait for Kentucky customers to travel thousands of miles to their wineries to make purchases. And wineries that cannot secure wholesaler representation are completely shut out of the Kentucky market unless the Kentucky customers come to them. Even if a winery has an established relationship with a customer and has verified his age and address, the customer must still come to the winery each time he wants to place an

¹⁰⁸ *Id.* at 613.

¹⁰⁹ *Id.* at 614.

¹¹⁰ *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 427–28, 433 (6th Cir. 2008).

order.¹¹¹ Both Kentucky wineries and Kentucky wholesalers benefit from the law. Small Kentucky wineries benefit from less competition from out-of-state wineries, especially wineries that are very far away and whose wines are preferred by consumers. Wholesalers benefit because the law limits the extent to which wineries can bypass the wholesale tier; “the statute guarantees the Wholesalers a source of revenue that would not exist but for the statute.”¹¹²

In the district court, Kentucky had argued that the requirement’s effect on interstate commerce was incidental because Kentucky has seven border states and some Kentuckians are closer to those out-of-state wineries than to Kentucky wineries.¹¹³ The plaintiffs made three counterpoints. First, they argued that the State’s observation ignored the fact that there are wineries outside of Kentucky and its border states. Second, wine is a unique product. Third, many of the desirable wines come from the West Coast, not from Kentucky’s border states.¹¹⁴ The district court agreed with the plaintiffs that the State was not looking at “interstate economic interests *as a whole*.”¹¹⁵ Kentucky and its border states account for only 0.6% of the nation’s total wine production.¹¹⁶ The court said,

We note that wine is a unique product. Accordingly, we agree with the plaintiffs that “it is false to presume that a wine consumer would purchase from the closest winery all things being equal.” Thus, the defendants’ argument is flawed. We are convinced that the effect on interstate commerce is not *de minimis*.¹¹⁷

After the court found that the requirement was discriminatory in effect, the State argued that the requirement should still be upheld because it furthered the legitimate purposes of promoting temperance, curbing underage drinking, and maintaining tax revenue.¹¹⁸ But the district court held that the requirement was not sufficiently narrowly tailored to achieving those goals.¹¹⁹ On appeal, the Sixth Circuit

¹¹¹ *Id.* at 432–33.

¹¹² *Id.* at 433.

¹¹³ *Cherry Hill Vineyards, LLC v. Hudgins*, 488 F. Supp. 2d 601, 616 (W.D. Ky. 2006), *aff’d sub nom. Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423 (6th Cir. 2008). The named state defendant changed when the case went up on appeal because the Kentucky Department of Alcoholic Beverage Control changed executive directors during that time period. *Lilly*, 553 F.3d at 426 n.1.

¹¹⁴ *Hudgins*, 488 F. Supp. 2d at 616–17.

¹¹⁵ *Id.* at 616 (emphasis added).

¹¹⁶ *Id.* at 617.

¹¹⁷ *Id.* (citations omitted).

¹¹⁸ *Id.* at 618–22.

¹¹⁹ *Id.* at 622. Determining whether the law is narrowly tailored to achieve its purpose is

affirmed the district court's findings that the requirement was discriminatory in effect and unconstitutional.¹²⁰

The district court's finding of discriminatory effect seems to rest on its observation that most out-of-state wineries are located on the West Coast, not in the states that border Kentucky. This means that it is generally much more costly for a Kentuckian to visit an out-of-state winery than an in-state winery. This added cost is a burden on Kentucky wine consumers as well as on interstate commerce. These same arguments also apply to Indiana's face-to-face requirement. The reason Kentucky's requirement was struck down while Indiana's was not is probably that the Kentucky requirement applied to every purchase, not just the initial purchase. Over the long term, Kentucky's requirement is much more burdensome than Indiana's.

C. Cherry Hill Vineyard, LLC v. Baldacci

In *Cherry Hill Vineyard, LLC v. Baldacci*, the plaintiffs challenged an exception to Maine's three-tier system that allows small wineries ("farm wineries" in the statute) to sell directly to consumers, provided that it is a face-to-face sale at the winery, or at one of up to two off-site locations established by the winery.¹²¹ The plaintiffs argued that the requirement is discriminatory in effect because it raises the cost of West Coast wines as compared with Maine wines.¹²²

The court noted that the Supreme Court has never explicitly said what showing is required to prove discriminatory effect. The First Circuit decided, "[T]hat showing must be substantial."¹²³ Consequently, it made short work of the plaintiffs' arguments.

[T]he plaintiffs have proffered no evidence that permitting farm wineries to sell only face to face, either on premises or at approved in-state locations, discriminates against interstate commerce. There is no evidence that Maine law acts to protect Maine vineyards or that Maine consumers substitute

not the proper test. The proper test is whether there are reasonable nondiscriminatory alternatives that could achieve the same purpose. The district court did refer to the correct test, but it mistakenly labeled the test as the "strict scrutiny" test. *See id.* at 617–18. It may have made this mistake because the Court once referred to this test as "strict scrutiny." *See Or. Waste Sys., Inc. v. Dep't of Env'tl. Quality*, 511 U.S. 93, 94 (1994). The actual strict scrutiny test is used in the Equal Protection setting; it requires that a law be narrowly tailored to serve a compelling government interest. *See, e.g., Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 714 (2007); *see also supra* note 89 and accompanying text.

¹²⁰ *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 426 (6th Cir. 2008).

¹²¹ *Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28, 30–31 (1st Cir. 2007).

¹²² *Id.* at 31–34 & n.2.

¹²³ *Id.* at 36.

wine purchased directly from Maine vineyards for wines that they otherwise would have purchased from out-of-state producers. There is not even evidence that any wines at all are purchased by consumers directly from Maine vineyards. And, finally, nothing contained in the stipulated record suggests that the locus option somehow alters the competitive balance between in-state and out-of-state firms.

The substitution scenario is further weakened by the fact that the plaintiffs have adduced no evidence that would in any way undermine the plausible impression that Maine consumers (like imbibers everywhere) view trips to a winery as a distinct experience incommensurate with—and, therefore, unlikely to be replaced by—a trip to either a mailbox or a retail liquor store. Nor have they offered evidence to impeach the suggestion, made in one of the cases on which they rely, that bottles of wine are unique and, thus, unlikely to be perceived by consumers as interchangeable.¹²⁴

The plaintiffs responded by arguing “that even if ‘the impact is small because direct sales do not constitute a significant market and . . . in-state wineries do not do much walk-in business,’ the regime is nonetheless unconstitutional because the dormant commerce clause contains no de minimis exception.”¹²⁵ The plaintiffs relied on *Camps Newfound/Owatonna, Inc. v. Town of Harrison*¹²⁶ for this proposition. In that case, the Supreme Court reaffirmed that under the Commerce Clause, there is no de minimis defense to a finding of discriminatory taxation.¹²⁷ The First Circuit found that the case was not on point because it dealt with a law that was discriminatory on its face, as opposed to being discriminatory in effect.¹²⁸ The First Circuit reasoned,

[T]he plaintiffs cannot succeed in this case merely by invoking the de minimis standard and ignoring their burden to proffer substantial evidence of discrimination. . . . Were we to require no showing beyond the de minimis level, no

¹²⁴ *Id.* at 36–37 (footnote omitted) (citations omitted) (citing *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 351 (1977); *Jelovsek v. Bresden*, 482 F. Supp. 2d 1013, 1021 (E.D. Tenn. 2007)).

¹²⁵ *Id.* at 38 (omission in original) (quoting Reply Brief of Plaintiffs-Appellants at 8, 2007 U.S. 1st Cir. Briefs LEXIS 44, at *10).

¹²⁶ 520 U.S. 564 (1997).

¹²⁷ *Id.* at 581 n.15.

¹²⁸ *Baldacci*, 505 F.3d at 38.

distinction would exist between the discriminatory effect test and the incidental burden test . . . in *Pike*.¹²⁹

The court decided that the plaintiffs' main complaint was about the effects of geography, and concluded, "An effect is not discriminatory . . . if it results from natural conditions."¹³⁰ The court also reasoned, "Given Maine's large land mass and the concentration of its population in the southern end of the state, it cannot plausibly be said that the farm winery exception redounds to the exclusive benefit of Maine vineyards."¹³¹ After finding that the requirement is not discriminatory in effect, the court did not analyze the requirement under the *Pike* balancing test because the plaintiffs had made a "rifle-shot appeal," arguing only discriminatory effect.¹³²

The *Baldacci* court apparently chose to formalize the distinction between an incidental burden and a discriminatory effect by imposing a higher burden of proof—substantial showing—on plaintiffs who argue discriminatory effect. The *Baldacci* court also declined to recognize that the U.S. wine industry is geographically unbalanced—that is, most out-of-state wineries are not located anywhere near the southern end of Maine. But even if the court had recognized that the face-to-face requirement raises the cost of West Coast wine in comparison to Maine wine, this fact alone probably would not have been sufficient. Instead, the First Circuit wanted evidence that Maine wineries have actually benefitted from this law to the detriment of out-of-state wineries—that Mainers have actually visited in-state wineries to purchase wine and that such purchases replaced potential purchases of out-of-state wine. The court gave two reasons why such a result is unlikely. First, visiting a winery is recreational and will therefore not replace a Mainer's regular alcohol purchasing habits.¹³³ And second, because wines are unique, a Mainer will not replace an out-of-state wine with a Maine wine just because it is cheaper to visit the Maine winery.¹³⁴

D. Proposed Analysis of Face-to-Face Purchase Requirements

First, courts should not place a higher burden of proof on plaintiffs who argue discriminatory effect. The *Baldacci* court decided that the

¹²⁹ *Id.* at 38–39.

¹³⁰ *Id.* at 37 n.7.

¹³¹ *Id.* at 37–38 (citation omitted) (citing *Grant's Dairy—Me., LLC v. Comm'r of Me. Dep't of Agric., Food & Rural Res.*, 232 F.3d 8, 21 (1st Cir. 2000)).

¹³² *Id.* at 33.

¹³³ *Id.* at 37.

¹³⁴ *Id.*

plaintiffs' showing must be substantial, but that is illogical.¹³⁵ Instead of requiring a substantial showing of discriminatory effect, courts should require a showing of a substantial burden on interstate commerce. When phrased in this way, the requirement echoes the Seventh Circuit's observation that the difference between an incidental burden and a discriminatory effect is one of degree. "Substantial burden" is simply the name for the point at which a law's incidental effects on interstate commerce become discriminatory. This proposed formulation is meant only to clarify the framework; it should not actually affect a court's analysis. Deciding whether a law is discriminatory in effect or places only incidental burdens on interstate commerce remains a fact-sensitive balancing task. The complement to this proposal is that a de minimis burden on interstate commerce should not trigger a finding of discriminatory effect. A de minimis burden is analogous to an incidental burden,¹³⁶ which the Court has established is not discriminatory.¹³⁷

If a court does find that the burden on interstate commerce is sufficient to establish that the law is discriminatory in effect, then the court should apply heightened scrutiny. *Baude* implied that heightened scrutiny is reserved for laws that are facially discriminatory. The Seventh Circuit may have been relying on the Supreme Court's statement, "State laws discriminating against interstate commerce *on their face* are 'virtually *per se* invalid.'"¹³⁸ But the Court has also said the rule of *per se* invalidity applies "where simple economic protectionism is effected by state legislation."¹³⁹ And in *Bacchus* the Court said, "A finding that state legislation constitutes 'economic protectionism' may be made on the basis of

¹³⁵ Although the *Baldacci* court did not explain why it decided to require a substantial showing, Professor David Day offers one possible explanation: a finding of discriminatory effect requires a higher degree of judicial intervention because the court must review empirical evidence, which is frequently disputed. David S. Day, *The Expanded Concept of Facial Discrimination in the Dormant Commerce Clause Doctrine*, 40 CREIGHTON L. REV. 497, 513 (2007). But for those who dislike this high degree of judicial intervention, the solution is apparently to reject the theory of discriminatory effect altogether—not to require a higher degree of proof. *See id.* (explaining that Justices Scalia and Thomas have rejected the discrimination-in-effect theory largely because it depends on heightened judicial intervention).

¹³⁶ De minimis means "[t]rifling," "minimal," or something "so insignificant that a court may overlook it in deciding an issue or case." BLACK'S LAW DICTIONARY 496 (9th ed. 2009). Incidental means "[s]ubordinate to something of greater importance; having a minor role." *Id.* at 830.

¹³⁷ *See, e.g., Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979) ("[W]e must inquire . . . whether the challenged statute regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce.").

¹³⁸ *Fullton Corp. v. Faulkner*, 516 U.S. 325, 331 (1996) (first emphasis added) (quoting *Or. Waste Sys., Inc. v. Dep't of Env'tl. Quality*, 511 U.S. 93, 99 (1994)).

¹³⁹ *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

either discriminatory purpose or discriminatory effect.”¹⁴⁰ Therefore, it appears that heightened scrutiny should apply if a law is discriminatory on its face, in its purpose, or in effect. The *Granholm* Court accordingly generalized the rule, declaring: “State laws that discriminate against interstate commerce face ‘a virtually *per se* rule of invalidity.’”¹⁴¹ Although the Court has not been crystal clear on this point, this Note argues that heightened scrutiny should apply to laws with discriminatory effects because they are just as harmful to interstate commerce as facially discriminatory laws.

The trickier question is how to determine when a law’s burdens on interstate commerce rise to the level of being discriminatory in effect. More specifically, the issue is whether face-to-face purchase requirements place only an incidental or a de minimis burden on interstate commerce or whether the burden is substantial enough to rise to the level of discrimination. In making that determination, the First, Sixth, and Seventh Circuits seemed to struggle with the relevance of the wine industry’s geographic imbalance and the nonfungible nature of wine.

Courts should not ignore the wine industry’s geographic imbalance; the reality is that the majority of U.S. wineries are located on the West Coast.¹⁴² It is true that “[t]he costs of a face-to-face meeting depend on distance, not on borders,”¹⁴³ and that “[d]istance is not congruent with state lines.”¹⁴⁴ But for Indianans, Kentuckians and Mainers, the large distance between them and sixty percent of U.S. wineries is congruent with those wineries being out-of-state. As a result of their distance from the West Coast, it is much more costly for residents of these states to purchase a wine in person at most out-of-state wineries than at an in-state winery.

The difference is even starker when one realizes that those West Coast wineries produce ninety-three percent of U.S. wine.¹⁴⁵ This effect should be considered discriminatory. *Hunt v. Washington State Apple Advertising Commission*¹⁴⁶ established that laws that raise the cost of doing business for out-of-state producers while leaving in-

¹⁴⁰ *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 270 (1984) (citations omitted).

¹⁴¹ *Granholm v. Heald*, 544 U.S. 460, 476 (2005) (quoting *City of Philadelphia*, 437 U.S. at 624).

¹⁴² As of 2010, almost sixty percent of U.S. wineries were located in California, Oregon, or Washington. *Growth of the U.S. Wine Industry*, WINEAMERICA, <http://www.wineamerica.org/newsroom/wine%20data%20center/2010-Growth-of-US-Wine-Industry.pdf> (last visited Oct. 16, 2010).

¹⁴³ *Baude v. Heath*, 538 F.3d 608, 613 (7th Cir. 2008), *cert. denied*, 129 S. Ct. 2382 (2009).

¹⁴⁴ *Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28, 37 n.7 (1st Cir. 2007).

¹⁴⁵ *Wiggins*, *supra* note 25, at 1.

¹⁴⁶ 432 U.S. 333 (1977).

state producers unaffected are discriminatory in effect.¹⁴⁷ One might argue that this rule does not apply in this situation as the state has not raised the cost of doing business for any winery, but has instead created a new direct-shipping market, which is available to both in-state and out-of-state wineries. But by restricting this new direct-shipping market with a face-to-face purchase requirement, the state ensures that only in-state wineries will have any real chance of doing business in this new market. The requirement generally makes it too time consuming and expensive to buy directly from most out-of-state wineries. The *Hunt* rule that it is discriminatory to alter an existing market to make out-of-state goods more costly should be extended to forbid states from creating new markets that do the same thing.

One might argue that the consumer still has the option of purchasing out-of-state wine at an in-state retailer instead of traveling to the winery himself. The wholesale and retail markups will not cost nearly as much as flying out to the West Coast. Thus, the burden on interstate commerce is de minimis.

But this reasoning ignores the fact that of the 25,000 wines produced in the United States, only about 500 make it to retail shelves.¹⁴⁸ If the customer happens to want one of the other 24,500 wines, he must travel to the winery to buy it in person. And as discussed above, the out-of-state wines in that group of 24,500 will cost a lot more to obtain than the in-state ones. Therefore when one considers the geographic imbalance of the wine industry, most states' face-to-face purchase requirements are discriminatory in effect—at least with respect to the group of wineries that do not have stable national distribution networks.

In a state that borders California, however, it may not cost significantly more to visit the majority of out-of-state wineries; therefore, the burden on interstate commerce may be only incidental. Of California's border states, only Arizona has a face-to-face purchase requirement.¹⁴⁹ The Ninth Circuit recently held that Arizona's face-to-face purchase requirement is not discriminatory in effect without relying on the fact that Arizonans live relatively close to most out-of-state wineries.¹⁵⁰

¹⁴⁷ *Id.* at 350–51.

¹⁴⁸ Tanford, *supra* note 11, at 303.

¹⁴⁹ See *State Shipping Laws: Arizona*, WINE INSTITUTE, <http://wineinstitute.shipcompliant.com/StateDetail.aspx?StateId=31> (last visited Oct. 16, 2010) (summarizing Arizona wine shipment laws).

¹⁵⁰ See *Black Star Farms LLC v. Oliver*, 600 F.3d 1225, 1234 (9th Cir. 2010) (reading *Granholm* as prohibiting only *facially* discriminatory direct-shipping laws). Because Arizona's face-to-face purchase requirement applies to both in-state and out-of-state wineries, it is not *facially* discriminatory and therefore, according to the Ninth Circuit, not unconstitutional. *Id.*

It is less clear how courts should treat the argument that wine is not fungible. In *Lilly*, Kentucky argued that the law's effects on interstate commerce were incidental. It explained that many Kentuckians live closer to out-of-state wineries located in Kentucky's border states than to in-state wineries. For them, it will actually be cheaper to visit the out-of-state winery than the in-state winery. In response, the plaintiffs pointed to both the wine industry's geographic imbalance and wine's nonfungibility. The geography argument is that most wines come from the West Coast, not Kentucky's border states. Therefore, for all Kentuckians, most out-of-state wines are going to be much more expensive than in-state wines. The nonfungibility argument is that although some Kentuckians may be closer to out-of-state wineries than in-state wineries, those are not the wineries they are buying from; most Kentuckians want to buy specific wines from the West Coast. The law punishes them for preferring West Coast wines by raising the cost of those wines. The plaintiffs' dual argument is that *most* out-of-state wines, and the wines Kentuckians are *actually buying*, are much more costly as a result of this law.

The district court responded to this argument by noting, "[W]ine is a unique product. Accordingly, we agree with the plaintiffs that 'it is false to presume that a wine consumer would purchase from the closest winery all things being equal'"; therefore, "the defendants' argument is flawed."¹⁵¹ Essentially, the court recognized that the law does not make some out-of-state wines cheaper because no one is buying those wines; they are buying the wines from California. And because the law has the effect of raising the price of *those* wines, it is discriminatory in effect.

It is good that the District Court for the Western District of Kentucky took into account the reality of which wines Kentuckians are actually buying. To the extent that the nonfungibility argument helps highlight that reality, it is beneficial. But even without this fact, the district court probably still would have found the law to be discriminatory in effect because it raises the cost of *so many* out-of-state wines.

Interestingly, the *Baldacci* court used the nonfungibility of wine argument against the plaintiffs. It reasoned that if a customer really wants a particular out-of-state wine, he will not purchase an in-state wine just because it is cheaper. The court implied that a law cannot have a discriminatory effect if it does not actually change people's

¹⁵¹Cherry Hill Vineyards, LLC v. Hudgins, 488 F. Supp. 2d 601, 617 (W.D. Ky. 2006) (quoting Plaintiff's Response to Defendants' Supplemental Brief at 7), *aff'd sub nom.* Cherry Hill Vineyards, LLC v. Lilly, 553 F.3d 423 (6th Cir. 2008).

behavior.¹⁵² But this conclusion ignores the fact that the law essentially punishes its residents for preferring out-of-state wines by making those wines more costly than their in-state counterparts. Moreover, in some situations, the law *will* induce customers to change their behavior. For example, if the particular out-of-state wine that the customer wants is not available at retail, and if he does not have the time or money to fly to the winery to purchase it, then he probably will substitute it with a wine that he can buy at home—either at a nearby in-state winery or at a retailer. Even if he goes to the retailer and buys another out-of-state wine, an in-state wholesaler and an in-state retailer have profited from that transaction and the out-of-state winery that he wanted to buy from has lost a sale.

This raises the question of whether a court may compare out-of-state wineries to in-state wholesalers and retailers when determining discriminatory effect. One might argue that shifting business from out-of-state wineries to in-state wholesalers is not discriminatory because “discrimination assumes a comparison of substantially similar entities.”¹⁵³ But Professor James Tanford has argued that some laws, while not technically discriminatory, may still violate the dormant Commerce Clause under the theory of economic protectionism.

Although the Court occasionally uses economic protectionism and discrimination interchangeably, the two concepts are slightly different. . . . [A] law that disadvantages an out-of-state business for the benefit of an in-state business of a different type (e.g., out-of-state wineries vs. in-state wholesalers) is not discriminatory, because the two businesses are not similarly situated, but it is still protectionist.¹⁵⁴

Such a law works to “protect local industry by erecting barriers to interstate competition.”¹⁵⁵ And the Supreme Court has noted, “Preservation of local industry by protecting it from the rigors of

¹⁵²The *Baldacci* court also implied that people will not replace their regular trip to the local liquor store with a trip to a winery because trips to wineries are primarily recreational. People go to a winery to talk to the winemaker and visit the tasting room, not to do their grocery shopping. But this argument fails to recognize that for the 24,500 wines not available at retail, the face-to-face purchase requirement gives the customer only two options: either visit the winery or don't buy the wine.

¹⁵³*General Motors Corp. v. Tracy*, 519 U.S. 278, 298 (1997) (footnote omitted) (holding in part that the State's differential treatment of public utilities companies and independent marketers did not violate the Commerce Clause).

¹⁵⁴Tanford, *supra* note 11, at 282–83.

¹⁵⁵*Id.* at 282.

interstate competition is the hallmark of the economic protectionism that the Commerce Clause prohibits.”¹⁵⁶ But even if courts do not accept Tanford’s economic-protectionism argument, they should still find face-to-face purchase requirements to be discriminatory in most states for the reasons discussed above. The *Baldacci* court did not accept the discriminatory-effect argument because it was looking for evidence that the law changed people’s purchasing habits. It seemed to ignore the fact that under *Hunt*, a law can be discriminatory in effect merely by raising the cost of the out-of-state product.

IV. PRODUCTION LIMITS

Two recent cases examined the validity of production limits under the dormant Commerce Clause: *Family Winemakers of California v. Jenkins*¹⁵⁷ and *Black Star Farms LLC v. Oliver*.¹⁵⁸ These opinions raise a number of questions regarding how to prove a discriminatory purpose, a discriminatory effect, or a *Pike* undue burden. The fact that the wine industry is bifurcated (which makes it top heavy) complicates courts’ analyses because it is unclear whether, in determining discriminatory effect, the courts should look at the amount of wine excluded or the number of wineries excluded by the production limit. Sections A and B discuss *Family Winemakers* and *Black Star Farms* respectively. Section C proposes which approach courts should apply to production-limit challenges going forward.

A. Family Winemakers of California v. Jenkins

In *Family Winemakers of California v. Jenkins*, the plaintiffs challenged Massachusetts’s production limit. Prior to 2005, Massachusetts had a facially discriminatory exception to its three-tier system that allowed only in-state wineries to sell directly to retailers and consumers.¹⁵⁹ Shortly after *Granholm* was decided, the District Court for the District of Massachusetts held this law to be unconstitutional in *Stonington Vineyards, Inc. v. Jenkins*.¹⁶⁰ In response to *Stonington Vineyards*, the Massachusetts legislature amended the exception so that it excluded wineries based on a production limit instead of their out-of-state location. The new

¹⁵⁶ *W. Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 205 (1994) (holding that a Massachusetts pricing order was unconstitutional because it created barriers that eliminated the economic advantages enjoyed by out-of-state milk producers).

¹⁵⁷ 592 F.3d 1 (1st Cir. 2010).

¹⁵⁸ 600 F.3d 1225 (9th Cir. 2010).

¹⁵⁹ *Family Winemakers*, 592 F.3d at 7.

¹⁶⁰ No. 1:05-cv-10982-JLT (D. Mass. Oct. 5, 2005).

exception applied to all “small” wineries—those producing no more than 30,000 gallons of grape wine annually—and allowed them to combine distribution methods by selling to wholesalers, retailers, and consumers simultaneously. The legislature also created a new exception for the remaining “large” wineries. These wineries were given the choice of selling only to wholesalers (i.e., remaining in the three-tier system) or selling only to consumers.¹⁶¹ In other words, unlike the exception for small wineries, the direct-shipping option available to large wineries did not allow them to continue wholesale distribution and it authorized direct sales only to consumers, not to retailers.

The *Family Winemakers* plaintiffs argued that these new provisions violated the dormant Commerce Clause. The district court granted their motion for summary judgment, finding the provisions to be discriminatory in purpose and effect; the court also noted that even if the provisions were not discriminatory, they still failed the *Pike* balancing test.¹⁶² District Court Judge Rya W. Zobel’s analysis for each of these findings is worthy of discussion, as are the arguments Massachusetts advanced on appeal, and the First Circuit’s selective clarification of the various issues raised.

1. Discriminatory Purpose

Judge Zobel first addressed the exceptions’ discriminatory purpose. In her statement of the facts, Judge Zobel discussed the history of the bill’s passage, including damning statements made by the bill’s sponsors and Massachusetts winery and wholesaler lobbyists, who were involved in the drafting process.¹⁶³ For example, the wholesaler lobbyists initially argued against allowing any sort of direct shipping; but once they could see that they were going to lose that battle, they shifted their focus to arguing for a very low production limit. In response to this request, the bill was revised to lower the production limit from 50,000 gallons to 30,000 gallons. At that point, the owner of Massachusetts’s largest winery voiced his concern. Although he currently produced fewer than 30,000 gallons, he feared that he might surpass the limit in the near future because he made a lot of apple wine in addition to grape wine.¹⁶⁴ The final

¹⁶¹ See *Family Winemakers*, 592 F.3d at 7–8.

¹⁶² *Family Winemakers of Cal. v. Jenkins*, No. 06-11682-RWZ, 2008 U.S. Dist. LEXIS 112074, *41–42 (D. Mass. Nov. 19, 2008), *aff’d*, 592 F.3d 1 (1st Cir. 2010).

¹⁶³ See *id.* at *13–22.

¹⁶⁴ *Id.* at *15–16.

version of the bill kept the 30,000-gallon production limit but provided that only grape wine would count toward that limit.¹⁶⁵

During debate in the Massachusetts Senate, Senator Morrissey pointed out that Massachusetts wholesalers were protected because most wine would still go through the three-tier system because the “choice” given to “large” wineries was really a false one. He reasoned, “[Y]ou got to think they are going to go with the wholesaler because they can’t move that much wine. So they are going to use the wholesale market. So it’s a very small percentage [of wineries which may choose direct sales over wholesalers]. But we give them a choice.”¹⁶⁶ He also observed, “[I]ronically, with the limitations that we are suggesting in the legislation, we are really still giving an inherent advantage indirectly to the local wineries.”¹⁶⁷ This observation alludes to the fact that 100% of Massachusetts wine is made by “small” wineries that can take advantage of the economic benefits of direct shipping, whereas ninety-eight percent of out-of-state wine is produced by “large” wineries, which will most likely have to use a Massachusetts wholesaler to reach the Massachusetts market.¹⁶⁸

Judge Zobel felt that Senator Morrissey’s comments and the events leading up to the bill’s passage supported the plaintiffs’ argument that the exceptions were “designed to allow all in-state wineries to continue direct shipping while forcing the majority of interstate wine to go through the three-tier system, thereby preserving the economic interests of both Massachusetts wholesalers and Massachusetts wineries.”¹⁶⁹ She seemed to place the most weight on the inexplicable exemption of nongrape wine, the false choice given to “large” wineries, and Senator Morrissey’s comment about indirectly advantaging in-state wineries.¹⁷⁰ She rejected Massachusetts’s argument that the purpose of the exemptions was to level the playing field for small wineries, which have historically had difficulty obtaining wholesaler representation. But Judge Zobel did not fully articulate her reason for rejecting this argument, stating only that “it does not logically follow that aiding ‘small’ wineries must be done at the expense of burdening ‘large’ wineries with the more onerous requirements of § 19F(a) [the provision forcing large wineries to choose between the three-tier system or direct shipping only to

¹⁶⁵ *Id.* at *10.

¹⁶⁶ *Id.* at *20 (alteration in original) (internal quotation marks omitted).

¹⁶⁷ *Id.* at *21 (internal quotation marks omitted).

¹⁶⁸ *See id.* at *34.

¹⁶⁹ *Id.* at *27–28.

¹⁷⁰ *See id.* at *20–21.

consumers].”¹⁷¹ Judge Zobel’s explanation is problematic because it does not actually explain why Massachusetts’s asserted purpose is not legitimate; instead, it seems to implicitly attack the three-tier system itself by arguing that the liberal small-winery exemption should be extended to all wineries because large wineries are also burdened when forced to sell only to wholesalers.

On appeal, the First Circuit upheld the district court’s finding of discriminatory purpose, but only after discussing and upholding the finding of discriminatory effect.¹⁷² In discussing discriminatory purpose, the First Circuit relied on the test it had developed in *Alliance of Automobile Manufacturers v. Gwadosky*.¹⁷³ The *Alliance of Automobile Manufacturers* test focuses on the statute as a whole, including its language, context, and legislative history; but it also considers whether the statute is closely tailored to achieve the purported legislative purpose.¹⁷⁴ Although Massachusetts’s production-limit provisions did not contain a stated statutory purpose, the court found other evidence of discriminatory purpose on which to base its holding. First, the new provisions were codified near other statutory exceptions to Massachusetts’s three-tier system, many of which did explicitly state that their purpose was to assist Massachusetts industries, such as breweries and distilleries. Second, the legislators’ statements evidenced an intent to benefit the local wine industry. And third, the fact that the provisions were discriminatory in effect undercut the argument that they were motivated by a nondiscriminatory purpose.¹⁷⁵

Interestingly, the court stressed that its finding of discriminatory purpose was “not dependent on the many statements of discriminatory purpose by lobbyists and the intermediate steps in the legislative process the district court relied upon in its opinion.”¹⁷⁶ It is unclear why the First Circuit shunned these factors; at the district court level, Judge Zobel explained their relevance by quoting from *Edwards v. Aguillard*.¹⁷⁷

The plain meaning of the statute’s words, enlightened by their context and the contemporaneous legislative history, can control the determination of legislative purpose. Moreover, in determining the legislative purpose of a statute, the Court has

¹⁷¹ *Id.* at *32.

¹⁷² *Family Winemakers of Cal. v. Jenkins*, 592 F.3d 1, 10, 13 (1st Cir. 2010).

¹⁷³ 430 F.3d 30 (1st Cir. 2005).

¹⁷⁴ *Family Winemakers*, 592 F.3d at 13.

¹⁷⁵ *Id.* at 14.

¹⁷⁶ *Id.* at 17 n.22.

¹⁷⁷ 482 U.S. 578 (1987).

also considered the historical context of the statute and the specific sequence of events leading to passage of the statute.¹⁷⁸

In fact, in *Alliance of Automobile Manufacturers*, the First Circuit itself declared that “context is a critically important interpretive tool,” and cited *Edwards v. Aguillard*.¹⁷⁹ In any case, whatever the factors, the First Circuit came to the same conclusion as the district court—that the production limit was discriminatory in purpose.

The First Circuit more clearly explained why Massachusetts’s asserted purpose (to level the playing field for small wineries) was questionable. The selection of a 30,000-gallon grape-wine production limit has no apparent correlation to the goal of helping small wineries. The wine industry defines small wineries as those producing fewer than 120,000 gallons annually of any type of wine, not just grape wine. The federal government gives tax breaks to wineries producing 250,000 gallons or fewer annually of any type of wine. Of the other states that have adopted production limits, none has chosen 30,000 gallons as its cutoff and none has exempted nongrape wine. Moreover, if the goal is to help those wineries that struggle to find wholesaler representation, then almost all wineries should be included because only the largest fifty to 100 wineries in the United States are able to distribute most of their wines through wholesalers.¹⁸⁰ What the 30,000-gallon grape-wine limit *does* correlate to is the makeup of the *Massachusetts* wine industry. All thirty-one of Massachusetts’s wineries produce between 200 and 24,000 gallons of grape wine annually. Significantly, Massachusetts’s largest winery has produced more than 30,000 gallons of wine in past years, but between half and three-quarters of that was apple wine.¹⁸¹ Given these facts, the court did not believe Massachusetts that the true purpose of the provision was to help small wineries.

The First Circuit’s discussion of discriminatory purpose, however, left two important questions unanswered: what the proper test for discriminatory purpose in the context of dormant Commerce Clause challenges is and whether a finding of discriminatory purpose on its own is sufficient to trigger heightened scrutiny. First, the court chose to use its own discriminatory-purpose test without any justification. In

¹⁷⁸ *Family Winemakers of Cal. v. Jenkins*, No. 06-11682-RWZ, 2008 U.S. Dist. LEXIS 112074, at *26–27 (D. Mass. Nov. 19, 2008) (quoting *Edwards*, 482 U.S. at 594 (citations omitted)), *aff’d*, 592 F.3d 1 (1st Cir. 2010).

¹⁷⁹ *Alliance of Auto. Mfrs. v. Gwadosky*, 430 F.3d 30, 37 (1st Cir. 2005).

¹⁸⁰ *Family Winemakers*, 592 F.3d at 12, 15–16.

¹⁸¹ *Id.* at 16–17.

a footnote, the court admitted that other courts have looked to a wider range of factors than those listed in *Alliance of Automobile Manufacturers* and that some have even used the discriminatory-purpose test laid out in Equal Protection Clause cases. But instead of giving a reasoned basis for rejecting those tests, the court merely decided that because it found that Massachusetts's production limit had a discriminatory purpose under the narrower *Alliance of Automobile Manufacturers* test, it need not look to other factors or consider whether Equal Protection analysis is appropriate in the Commerce Clause context.¹⁸²

Second, the court made a conscious choice to affirm the district court's finding of discriminatory effect before reaching the question of discriminatory purpose. Then, after finding discriminatory purpose as well, the court reasoned that "when . . . a state statute is both discriminatory in effect and in purpose, it is clearly discriminatory within the meaning of the Commerce Clause, and we need not address whether evidence of a legislative intent to discriminate would suffice on its own."¹⁸³ The First Circuit had sidestepped this question in *Alliance of Automobile Manufacturers* as well. In that decision, it noted that despite *Bacchus's* assertion that "[a] finding that state legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory purpose *or* discriminatory effect,"¹⁸⁴ there is still some doubt as to "whether a showing of discriminatory purpose alone will invariably suffice to support a finding of constitutional invalidity under the dormant Commerce Clause."¹⁸⁵

It is unfortunate that the sufficiency of discriminatory purpose remains an open question because it is at the heart of the problem.

After the *Granholm* decision, states with [facially] discriminatory laws on their books had to make a choice: they could either "level up" by extending direct-shipping privileges to out-of-state wineries, or "level down" by revoking such privileges from in-state wineries. The good news for competition and consumers is that to date no state has leveled down by completely prohibiting wine direct shipping. The bad news is that several states that nominally leveled up have moved "sideways" by levying new restrictions—including on-site purchase requirements and

¹⁸² *Id.* at 13–14 & n.15.

¹⁸³ *Id.* at 14 n.16.

¹⁸⁴ *Alliance of Auto. Mfrs.*, 430 F.3d at 36 (emphasis added) (quoting *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 270 (1984)) (internal quotation marks omitted).

¹⁸⁵ *Id.* at 36 n.3.

production limitations—on direct shipping, which typically fall more heavily on out-of-state producers. In some cases, such restrictions effectively make direct shipping by out-of-state wineries economically impossible.¹⁸⁶

It seems highly likely that these states moved “sideways” in an attempt to retain as much of the in-state advantage as possible while avoiding constitutional challenges under *Granholm*. This is exactly what Massachusetts did when it transformed its facially discriminatory direct-shipping law into a facially neutral (but still discriminatory) production limit after *Stonington Vineyards*. Because it is highly likely that many of these post-*Granholm* provisions were passed with a discriminatory purpose, and because courts are not applying the discriminatory-effect test consistently, it is important to clarify the proper test for discriminatory purpose and to determine whether a finding of discriminatory purpose alone is sufficient to trigger heightened scrutiny.

2. Discriminatory Effect

Determining whether a production limit is discriminatory in effect is difficult for several reasons. First, the *Baldacci* court proclaimed that plaintiffs must provide *substantial* evidence of discriminatory effect, but it is unclear what exactly that means. Second, it is unclear how courts should measure the burden that these laws place on interstate commerce. Part of that uncertainty stems from the fact that the U.S. wine industry is very top heavy. Under Massachusetts’s scheme, only eleven percent of all U.S. wineries were excluded from the liberal small-winery direct-shipping provision; but those eleven percent account for ninety-eight percent of U.S. wine production.¹⁸⁷

The plaintiffs argued that the scheme was discriminatory in effect because it allowed 100% of Massachusetts’s wine to be shipped directly while essentially preventing ninety-eight percent of out-of-state wine from being shipped directly. Massachusetts argued that the production limit was not discriminatory because it allowed eighty-nine percent of all wineries in the country to ship directly to Massachusetts, and most of those wineries are located outside of Massachusetts.¹⁸⁸ Judge Zobel adopted the plaintiffs’ interpretation, pointing to *Exxon Corp. v. Governor of Maryland*’s¹⁸⁹ pronouncement

¹⁸⁶ Ohlhausen & Luib, *supra* note 24, at 506 (footnote omitted).

¹⁸⁷ *Family Winemakers of Cal. v. Jenkins*, No. 06-11682-RWZ, 2008 U.S. Dist. LEXIS 112074, at *23 (D. Mass. Nov. 19, 2008), *aff’d*, 592 F.3d 1 (1st Cir. 2010).

¹⁸⁸ *Id.* at *33–34.

¹⁸⁹ 437 U.S. 117 (1978) (holding that a Maryland law prohibiting producers or refiners

that “the [Commerce] Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.”¹⁹⁰ The *Exxon* Court meant that just because a few out-of-state businesses are burdened by a law does not mean that it is unconstitutional because the relevant inquiry is whether the interstate market as a whole is burdened. Interestingly, *Family Winemakers* presents the opposite situation; *most* out-of-state wineries are *not* burdened by the production limit, but the group that *is* burdened accounts for ninety-eight percent of the market.

The First Circuit affirmed the district court’s finding of discriminatory effect. It claimed to uphold this finding under the same substantial-evidence standard it used in *Baldacci*. The First Circuit noted that in *Baldacci*, the plaintiffs had conceded that Maine’s face-to-face requirement was nondiscriminatory in purpose; therefore, *Baldacci* had not addressed “whether a lesser showing might suffice when a law is allegedly discriminatory in both effect and purpose.”¹⁹¹ The court did not address this issue in *Family Winemakers* either because it was able to find that Massachusetts’s scheme was discriminatory in effect even under the higher *Baldacci* standard.

The First Circuit noted that Massachusetts’s scheme confers a clear competitive advantage on small wineries, which include all Massachusetts wineries, and places large wineries, all of which are out-of-state, at a comparative disadvantage. The court emphasized that even though the small-winery exemption is available to thousands of out-of-state wineries, only twenty-six have actually applied for Massachusetts’s small-winery license. In contrast, twenty-seven of Massachusetts’s thirty-one wineries have applied for the license. Additionally, those twenty-seven in-state wineries actually benefit from the license; in 2007, they made seventy-one percent of their sales through the alternative outlets created in the small-winery exemption provision.¹⁹² This evidence helped the court distinguish *Baldacci*. This is evidence that Massachusetts wineries actually benefit from the law. In contrast, the *Baldacci* plaintiffs produced no evidence that people actually visit Maine wineries and purchase wine.¹⁹³

The court also emphasized that the exemptions did not do what Massachusetts claimed they were meant to do: level the playing field

from operating retail service stations within the State does not violate the Due Process Clause).

¹⁹⁰ *Id.* at 127–28, quoted in *Family Winemakers*, 2008 U.S. Dist. LEXIS 112074, at *33.

¹⁹¹ *Family Winemakers of Cal. v. Jenkins*, 592 F.3d 1, 11 n.11 (1st Cir. 2010).

¹⁹² *Id.* at 11 & n.12.

¹⁹³ *Id.* at 12 n.13.

for wineries that do not have stable wholesaler representation. On the contrary, many wineries that qualify as “large” under Massachusetts’s scheme are not large enough to obtain stable wholesaler representation, so they are put at a particular disadvantage—they cannot fully function in the three-tier system and they cannot use the liberal direct-shipping provision either.¹⁹⁴

Massachusetts responded by arguing that *Granholm* applies only to *facially* discriminatory laws. In other words, the Twenty-First Amendment still protects laws that are merely discriminatory in purpose or effect.¹⁹⁵ Presumably, Massachusetts meant that its production limit should be upheld despite its discriminatory effect and purpose because it advanced core Twenty-First Amendment concerns. But the Commonwealth did not say this explicitly or even allude to which core concerns it thought the production limit promoted. The First Circuit noted that it is unclear whether the core-concerns balancing test survived *Granholm*; but it went on to hold, “[T]he Twenty-first Amendment does not exempt facially neutral state alcohol laws with discriminatory effects from the non-discrimination rule of the Commerce Clause. Nor, of course, are such laws exempt when they also discriminate by design.”¹⁹⁶ This holding does not extend the *Granholm* rule; instead, it simply recognizes that it would be illogical to interpret *Granholm* as applying only to facially discriminatory laws. The First Circuit essentially clarified that the core-concerns test can no longer be applied to discriminatory laws.¹⁹⁷ The remaining question is whether the core-concerns test is still relevant to the *Pike* analysis.

3. *Pike Balancing Test*

Judge Zobel concluded her analysis of Massachusetts’s direct-shipping scheme by noting that even if the exceptions were not discriminatory in purpose or effect, they would still fail the *Pike* balancing test. Under Massachusetts’s scheme, large wineries effectively may sell only to wholesalers. Such restrictions burden interstate commerce. She felt that the scheme served no local benefit.¹⁹⁸ Even if one accepts Massachusetts’s argument that the

¹⁹⁴ See *id.* at 12.

¹⁹⁵ *Id.* at 18–19.

¹⁹⁶ *Id.* at 20–21.

¹⁹⁷ One could argue that the First Circuit’s holding left some room to apply the core-concerns test to laws that are discriminatory *only in purpose*. This is just another way of phrasing the question the court raised earlier—that is, whether a finding of discriminatory purpose alone is sufficient to invoke heightened scrutiny.

¹⁹⁸ *Family Winemakers of Cal. v. Jenkins*, No. 06-11682-RWZ, 2008 U.S. Dist. LEXIS

scheme helps small wineries nationwide, she felt that this goal would not be undercut by allowing the large wineries to ship directly as well.¹⁹⁹

On appeal, Massachusetts argued that the Twenty-First Amendment and the Wilson and Webb-Kenyon Acts foreclose the plaintiffs' claim under *Pike* and that *Granholm* supports this position.²⁰⁰ Indeed, Gregory Durkin has argued that *Granholm* should be interpreted as establishing that nondiscriminatory state laws regulating alcohol and closely advancing a core concern of the Twenty-First Amendment cannot be invalidated under *Pike*.²⁰¹ But the First Circuit declined to address this issue, stating that because it found the laws to be discriminatory in effect and in purpose, it did not need to decide whether the Twenty-First Amendment immunizes nondiscriminatory laws that fail the *Pike* balancing test.²⁰²

B. Black Star Farms, LLC v. Oliver

In *Black Star Farms, LLC v. Oliver*, the plaintiffs challenged the production-limit exception to Arizona's three-tier system.²⁰³ The exception allows wineries producing fewer than 20,000 gallons of wine annually to ship an unlimited amount of wine directly to all Arizona customers and retailers. Twenty-six of Arizona's twenty-seven wineries produce fewer than 20,000 gallons of wine annually.²⁰⁴ The plaintiffs argued that this exception discriminates against the hundreds of out-of-state wineries that produce more than 20,000 gallons of wine annually because those wineries are essentially forced to go through Arizona's three-tier system and endure wholesaler markups, whereas all but one of Arizona's wineries are completely exempt from the three-tier system, giving them preferential access to Arizona customers.²⁰⁵

The district court rejected this argument. It reasoned that preferential access implies that in-state wineries benefit to the exclusion of out-of-state wineries, which is not what the production

112074, at *41 (D. Mass. Nov. 19, 2008), *aff'd*, 592 F.3d 1 (1st Cir. 2010).

¹⁹⁹ *Id.* at *41–42.

²⁰⁰ The Commonwealth pointed out that although *Baude v. Heath* applied *Pike* to an alcohol regulation, it apparently did so without any objection from the parties. Reply Brief of Appellants at 26–27, *Family Winemakers*, 592 F.3d 1 (No. 09-1169).

²⁰¹ See Durkin, *supra* note 63, at 1108 n.72.

²⁰² *Family Winemakers*, 592 F.3d at 19 n.27.

²⁰³ *Black Star Farms LLC v. Oliver*, 544 F. Supp. 2d 913, 916 (D. Ariz. 2008), *aff'd*, 600 F.3d 1225 (9th Cir. 2010).

²⁰⁴ *Id.* at 917.

²⁰⁵ *Id.* at 918.

limit does. More than half of all U.S. wineries produce fewer than 20,000 gallons of wine annually and are therefore eligible for direct-shipping privileges in Arizona. Given that only twenty-six of these eligible wineries are in Arizona, the benefits of this privilege go mainly to out-of-state wineries.²⁰⁶

The mere fact that all but one of the excluded wineries happen to be out-of-state does not mean that the law is discriminatory in effect.²⁰⁷ The court analogized this situation to *Minnesota v. Clover Leaf Creamery Co.*²⁰⁸ In *Clover Leaf Creamery*, the Supreme Court upheld a Minnesota law that prohibited the sale of milk in plastic nonreturnable, nonrefillable containers, but permitted sales in other nonreturnable, nonrefillable containers, such as paperboard milk cartons.²⁰⁹ The *Black Star Farms* court latched onto the similarity that the Minnesota law benefited the paper industry, which consisted of both in-state and out-of-state companies, and burdened the plastics industry, which consisted entirely of out-of-state companies.²¹⁰

As a result, the *Black Star Farms* court wanted the plaintiffs to present substantial evidence showing that the production limit had the effect of increasing in-state wineries' proportional share of the market.²¹¹ The court noted that showing that some out-of-state wineries missed out on sales is not sufficient.

[S]urely out-of-state wineries are subject to lost sales under the "unquestionably legitimate" three-tiered distribution system [as well]. Lost sales are troublesome . . . only to the extent that a state's statutory scheme is designed to favor in-state wineries, such that in-state wineries are able to gain a greater share of the market.²¹²

The court concluded that although the production limit does effectively prevent some out-of-state wineries from shipping directly to Arizona consumers, "those wineries may still gain access to [Arizona] consumers through the State's three-tiered distribution system."²¹³ Therefore, the plaintiffs cannot show that the production

²⁰⁶ *Id.* at 926.

²⁰⁷ *See id.* at 918, 926.

²⁰⁸ 449 U.S. 456 (1981).

²⁰⁹ *Id.* at 458 n.1, 474.

²¹⁰ *See Black Star Farms*, 544 F. Supp. 2d at 923–24.

²¹¹ *See id.* at 927. The court did not say whether it took this "substantial evidence" standard from *Baldacci*. But on appeal, the attorney for the State urged the Ninth Circuit to adopt the *Baldacci* standard. *See* Oral Argument at 19:57, *Black Star Farms LLC v. Oliver*, 600 F.3d 1225 (9th Cir. 2010) (No. 08-15738), available at http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000003915.

²¹² *Black Star Farms*, 544 F. Supp. 2d at 927.

²¹³ *Id.* at 928.

limit “somehow alter[s] the proportional share of the State’s wine market in favor of in-state wineries.”²¹⁴ The fact that more out-of-state wineries than in-state wineries are required to use the three-tier system does not establish a discriminatory effect. “That fact at best supports the contention that Arizona’s statutory scheme places an incidental burden on interstate commerce.”²¹⁵ But the court declined to analyze whether the law’s burdens outweigh its benefits because the plaintiffs had not challenged the law under *Pike*.²¹⁶

On appeal the Ninth Circuit affirmed the district court’s holding that the exception was not discriminatory in effect.²¹⁷ The court framed the issue as “whether Arizona’s statutory scheme for regulating the shipment of wine to consumers has the *practical effect* of ‘favor[ing] in-state economic interests over out-of-state interests.’”²¹⁸ The court adopted *Baldacci*’s substantial-evidence standard and concluded that the plaintiffs failed to provide substantial evidence that the exception has an actual adverse effect on interstate commerce.²¹⁹ On the contrary, almost twice as many out-of-state wineries as in-state wineries have obtained the direct-shipping license.²²⁰

Black Star Farms may have had better luck if it had argued that the production limit was also discriminatory in purpose. Prior to *Granholm v. Heald*, Arizona had a facially discriminatory small-winery exception. Wineries that produced no more than 75,000 gallons of wine annually were eligible for direct-shipping privileges, but only if seventy-five percent of their wine was produced from grapes grown in Arizona.²²¹ After *Granholm*, the Arizona legislature revised the law so that it would be nondiscriminatory and in conformance with *Granholm*. But instead of merely removing the requirement that seventy-five percent of the grapes come from Arizona, the legislature also lowered the production limit from 75,000 gallons to 20,000 gallons.²²² The only apparent purpose of lowering the production limit is to exclude as many out-of-state wineries as possible while still allowing in-state wineries to ship directly. In fact,

²¹⁴ *Id.* at 927.

²¹⁵ *Id.* at 928.

²¹⁶ *Id.*

²¹⁷ *Black Star Farms, LLC v. Oliver*, 600 F.3d 1225, 1230–31 (9th Cir. 2010).

²¹⁸ *Id.* at 1231 (alteration in original) (quoting *Granholm v. Heald*, 544 U.S. 460, 487 (2005)).

²¹⁹ *See id.* (agreeing with the district court’s conclusion that the plaintiff failed to meet its burden of offering substantial evidence of an actual discriminatory effect).

²²⁰ *Id.* at 1232.

²²¹ *Id.* at 1228.

²²² *Id.*

Senator Ken Chevront, who sponsored the bill that lowered the production limit, admitted that the production limit was “chosen by the legislature in order to ‘take care of’ the Arizona wineries and protect their economic viability. Senator Chevront . . . testified that ‘the specific purpose of the new legislation . . . was to secure that the Arizona wineries were included except Kokopelli and thus permit them to ship in-state.’”²²³ Unfortunately, Black Star Farms did not pursue the discriminatory-purpose argument on appeal, reasoning that “it does not matter if the legislature had protectionist intent, because a finding that state legislation constitutes economic protectionism may be made on the basis of *either* discriminatory purpose *or* discriminatory effect.”²²⁴

C. Proposed Analysis of Production Limits

One of the questions that arise when analyzing the constitutionality of a production limit is whether to focus on the amount of out-of-state wine excluded or the number of out-of-state wineries excluded. The First and Ninth Circuits’ analyses differed in this respect. The *Family Winemakers* court focused on the fact that Massachusetts’s production limit excluded ninety-eight percent of out-of-state wine. The *Black Star Farms* court focused on the fact that Arizona’s production limit excluded fewer than half of out-of-state wineries. Focusing on the number of wineries, however, obscures the fact that the U.S. wine industry is very top heavy and geographically unbalanced. California, Oregon, and Washington wineries alone account for ninety-three percent of U.S. wine production.²²⁵ Consequently, any state other than California, Oregon or Washington can draft a direct-shipping provision that is available to most out-of-state *wineries* while at the same time excluding almost all out-of-state *wine*. Therefore, in order to take into account the realities of the wine industry, courts should focus on the amount of out-of-state wine excluded by a production limit—not the number of wineries.

But even if the Ninth Circuit had taken this approach, it likely still would have concluded that Arizona’s production limit is not discriminatory in effect. Even though the production limit excludes the vast majority of out-of-state wine, some out-of-state wine can

²²³ Opening Brief of Appellants at 11, *Black Star Farms*, 600 F.3d 1225 (No. 08-15738), 2009 WL 2444182 (footnote omitted) (citations omitted) (quoting Chevront Affidavit ¶¶ 7–8). Kokopelli is the only Arizona winery that produces more than 20,000 gallons of wine annually. It has wholesaler representation and does not desire to ship directly to customers. *Id.* at 11 n.5.

²²⁴ *Black Star Farms*, 600 F.3d at 1230 (emphasis added) (quoting Reply Brief of Appellants at 24, 2009 WL 2444186) (internal quotation marks omitted).

²²⁵ Wiggins, *supra* note 25, at 1.

benefit from the exception. In fact, most of the wine that can benefit from the law will be from out-of-state; only twenty-seven of the thousands of “small” wineries in the United States are located in Arizona. Therefore, the exception does not benefit solely—or even mostly—in-state wine.

The second question that arises is how to determine whether a production limit “burdens” out-of-state economic interests. The First Circuit found that the “large” wineries, all of which were out-of-state, were burdened because no matter which option they chose (selling only to wholesalers or selling only to consumers), they would lose sales compared to the small wineries, which could combine all three distribution methods. Essentially, the First Circuit analyzed Massachusetts’s alcohol distribution scheme as a whole and concluded that the three-tier system plus its exceptions benefited all in-state wine and burdened virtually all out-of-state wine. By contrast, the Ninth Circuit analyzed only the production-limit provision. It concluded that the exception did not burden the “large” wineries because it did not put any new requirements on them. The large wineries could still sell only to wholesalers, as was the case before the exception existed. While the Ninth Circuit’s approach seems myopic, it avoids the conclusion that the three-tier system as a whole is discriminatory in effect. That would be an uncomfortable conclusion for a court of appeals to reach given that the *Granholm* Court emphasized that the three-tier system remains unquestionably legitimate.²²⁶

While considering a state’s entire alcohol distribution scheme in light of the realities of the U.S. wine market seems to be the more logical approach, courts may decline to follow the First Circuit to avoid having to find the three-tier system discriminatory in effect. But even if courts follow the Ninth Circuit’s discriminatory-effect analysis, they could still find production limits to be discriminatory in purpose. Unless a state’s production limit reflects the volume at which a winery can achieve stable wholesale distribution, it is probably discriminatory in purpose. The only reason to set the limit any lower than that is to exclude midsize out-of-state wineries that might otherwise compete with the state’s small wineries in the direct-shipping market. Because the use of a low production limit is clearly an attempt to sidestep *Granholm*, the discriminatory-purpose test is an important tool for direct-shipping advocates. Consequently, it is

²²⁶This is essentially what the *Family Winemakers* court held, but the First Circuit obfuscated the holding by referring to “§ 19F” when in reality it was discussing the effects of Massachusetts’s three-tier system as a whole. See *Family Winemakers of Cal. v. Jenkins*, 592 F.3d 1, 11–12 (1st Cir. 2010).

unfortunate that the *Family Winemakers* court did not clarify the test for discriminatory purpose nor address whether discriminatory purpose alone could trigger heightened scrutiny.

DIGESTIF

Going forward, courts should follow the examples set by the District Court for the Southern District of Indiana in *Baude v. Heath*, the Sixth Circuit in *Cherry Hill Vineyards, LLC v. Lilly*, and the First Circuit in *Family Winemakers of California v. Jenkins*—that is, to give proper weight to the realities of the wine industry when considering the constitutionality of narrow direct-shipping exceptions to states' three-tier systems. One of the realities that should be confronted is that the vast majority of U.S. wines do not make it through the three-tier system to retail shelves. Given that fact, it becomes hard not to question whether the three-tier system as a whole remains constitutional.

Although the *Granholm* Court pronounced that the three-tier system remains unquestionably legitimate, “there is good reason to doubt the efficacy of such boilerplate language.”²²⁷ Professor Tanford argues that the three-tier system is the quintessential dormant Commerce Clause violation: it “closes the market to most out-of-state wineries, serves no public interest, and economically benefits only the wholesalers.”²²⁸ Tanford also argues that the Twenty-First Amendment does not save the three-tier system because it was meant only to “give states power to regulate *local* production and sale within their borders, and to prohibit interstate commerce *in violation of local dry laws*.”²²⁹ The *Granholm* Court itself emphasized that the Twenty-First Amendment does not supersede the dormant Commerce Clause.²³⁰ Tanford has concluded,

One cannot realistically argue that the Twenty-First Amendment gave wet states the power to erect trade barriers that prevent nonresidents from selling wine, to give preferential access to the market to local wine sellers, or to protect the economic interest of in-state wholesalers. That is

²²⁷ Tanford, *supra* note 11, at 329.

²²⁸ *Id.* The reason states' three-tier systems close the market only to most *out-of-state* wineries is that most wineries are in California and California does not have a three-tier system, therefore, there is no state with a three-tier system that acts to exclude mostly *in-state* wineries. See Wiggins, *supra* note 25, at 1.

²²⁹ Tanford, *supra* note 11, at 330.

²³⁰ *Granholm v. Heald*, 544 U.S. 460, 486 (2005) (“[T]he Twenty-first Amendment does not supersede other provisions of the Constitution and, in particular, does not displace the rule that the States may not give a discriminatory preference to their own producers.”).

what the three-tier system does, and *Granholm* suggests that its days may be numbered.²³¹

Professor Tanford makes some good observations in support of his argument that the three-tier system is no longer constitutional, but he does not invoke the nonfungibility of wine as part of this attack. Given that at least two courts have considered wine's uniqueness when analyzing exceptions to states' three-tier systems, one wonders whether the nonfungibility argument could bolster the more ambitious claim that the three-tier system itself is unconstitutional. In other words, can we attack the three-tier system with *terroir*?

The claim is that because each wine—and each of our palates²³²—is unique, a system in which the wholesalers dictate which wines we may have access to is unacceptable. This argument may have less to do with how a state's three-tier system burdens interstate commerce and more to do with how it burdens the state's own consumers. It helps explain why wine consumers find restrictions on wine distribution to be unfair; if a consumer cannot purchase the wine he wants, there is literally nothing he can replace it with that will taste the same. And this is not trivial because “[w]ine does not just give pleasure. It is . . . a product which has a substantial and far-ranging symbolic significance.”²³³ *Terroir* is an important part of this significance. For example, it embodies “a collective taste memory, which has matured over a long time, through several generations of people . . .”²³⁴ *Terroir* helps explain why wine is culturally important. Of course, it also means that the wine industry can produce an endless supply of different wines to sell, which makes the industry economically important.²³⁵ It is an industry that we should try to foster, not unquestioningly restrict because the Rehnquist Court said that was okay in a plurality opinion from twenty years ago.²³⁶

²³¹ Tanford, *supra* note 11, at 330.

²³² “The first thing you should consider after you’ve tasted a wine is whether or not you like it. Is it your style? . . . The definition of a good wine is one that you enjoy. I cannot emphasize this enough. Trust your own palate and do not let others dictate taste to you!” ZRALY, *supra* note 3, at 13.

²³³ STEVE CHARTERS, *WINE AND SOCIETY: THE SOCIAL AND CULTURAL CONTEXT OF A DRINK* 5 (2006).

²³⁴ *Id.* at 107 (quoting Emmanuelle Vaudour, *The Quality of Grapes and Wine in Relation to Geography: Notions of Terroir at Various Scales*, 13 J. WINE RESEARCH 121 (2002)) (internal quotation marks omitted).

²³⁵ In 2005, the retail value of U.S. wines totaled \$23.8 billion. Barbara Insel, *The U.S. Wine Industry*, 43 BUS. ECON. 68, 68 (2008).

²³⁶ See *North Dakota v. United States*, 495 U.S. 423, 432 (1990) (plurality opinion) (describing North Dakota’s three-tier system as “unquestionably legitimate”).

Of course, when criticizing these undesirable effects of the three-tier system, one must not lose sight of the fact that some of them were actually intended. Alcohol is a commodity that provides

many acceptable outcomes [but] at the same time can be the cause[] of tremendous social strife. . . . [T]he challenge for government is to provide a realistic system for its accessibility while at the same time attempting to limit its abusive consumption through controlled access. . . .

The present regulatory scheme in some states requires a minimum markup price for wholesale and retail tiers. The intention here is not to guarantee a profit to wholesale and retailers at the expense of the consumer, but to maintain alcohol at a certain price level so that it cannot become too cheap and therefore easily accessible. . . .

Deregulators looking at this relationship through a lens of pure economic theory miss the . . . proposition of intentional fractionalization using a middle tier as the monopoly. . . . State laws that may appear to make no sense in an ordinary economic model . . . are easily understood within the context of what was intended in 1933, and now need[] to be analyzed from a 21st amendment perspective instead of an economic one.²³⁷

Although it is true that one must be sensitive to the safety and public-health concerns surrounding alcohol consumption, it is also important to recognize that the goal is to have a *realistic* system for *accessibility*. Instead, over the past few decades, the current system has become a “three-tier non-distribution system.”²³⁸ The explosion of small producers, the consolidation of the wholesale tier, and the rise of the Internet and e-commerce have combined to make the current regime inadequate. Significantly, California, Oregon, and Washington, which collectively account for ninety-three percent of U.S. wine production, have all abandoned the three-tier system in favor of a two-tier system in which retailers can purchase directly from producers.²³⁹ They also all allow direct shipping without any face-to-face purchase requirements or production limits.²⁴⁰ Even with

²³⁷ Carole L. Jurkiewicz & Murphy J. Painter, *Why We Control Alcohol the Way We Do*, in *SOCIAL AND ECONOMIC CONTROL OF ALCOHOL* 7–9 (Carole L. Jurkiewicz & Murphy J. Painter eds., 2008) (citation omitted).

²³⁸ Tanford, *supra* note 11, at 303.

²³⁹ Wiggins, *supra* note 25, at 1.

²⁴⁰ See *State Shipping Laws Map*, WINE INSTITUTE, <http://wineinstitute.shipcompliant.com/Home.aspx?SaleTypeID=1> (last visited Oct. 16, 2010).

these liberalizations, there are still ways to limit abusive consumption. For example, Oregon limits the number of cases a customer can purchase directly from a winery.²⁴¹ These states serve as examples of how to evolve beyond the three-tier system in a responsible way.

As the Wine Wars continue, direct-shipping advocates should emphasize wine's nonfungibility and its cultural significance as well as the economic importance of the wine industry. Using California, Oregon, and Washington as examples, states should modernize their alcohol distribution systems in ways that responsibly foster the wine industry as a whole, not just their local wineries.

ALEXANDRA THOMPSON[†]

²⁴¹ See *State Shipping Laws: Oregon*, WINE INSTITUTE, <http://wineinstitute.shipcompliant.com/StateDetail.aspx?StateId=15> (last visited Oct. 16, 2010) (summarizing Oregon wine shipment laws). In reality this might do little to curb alcohol abuse. Even with access to only one bottle of wine, one can drink an excessive amount. States cannot really limit consumers' access to alcohol enough to stop abusive consumption. To stop abusive consumption, states need to focus on things like education and effective enforcement of drunk-driving laws.

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