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Constitutional Law—Direct Shipment of Alcohol—Well-Aged and Finally Uncorked: The Supreme Court Decides Whether the Twenty-First Amendment Grants States the Power to Avoid the Dormant Commerce Clause. Granholm v. Heald, 125 S. Ct. 1885 (2005).

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CONSTITUTIONAL LAW—DIRECT SHIPMENT OF ALCOHOL—WELL-AGED AND FINALLY UNCORKED: THE SUPREME COURT DECIDES WHETHER THE TWENTY-FIRST AMENDMENT GRANTS STATES THE POWER TO AVOID THE DORMANT COMMERCE CLAUSE. *Granholm v. Heald*, 125 S. Ct. 1885 (2005).

I. INTRODUCTION

An Arkansas resident visits the San Sebastian Winery in Saint Augustine, Florida. Upon returning home, he decides that he desires that bottle of wine he forgot to purchase. Unfortunately, the Arkansas resident learns that Arkansas, like many other states, bans the direct shipment of out-of-state wine. This brings up the question: How is this possible?

Alcohol holds a special place within interstate commerce. On any given day in the United States, numerous interstate, commercial transactions occur. With the acceptance of the Internet as an avenue of commerce, one can purchase almost any modern convenience while sitting within one's home and ship the item to one's front door. Yet, despite the technological innovations that enable consumers to gain previously unimaginable access to markets, one item remains off-limits for certain people. That item is alcohol.

Fortunately, though, in *Granholm v. Heald*,[1] the United States Supreme Court recently came to the rescue of those like our hypothetical Arkansas resident.[2] There, the Supreme Court weighed in on the direct shipment of wine controversy in favor of the small wineries, wine connoisseurs, and consumers.[3]

America's struggle with alcohol stretches far back into the annals of history.[4] This struggle is not unique; in fact, the perception that alcohol is evil dates at least as far back as the Bible.[5] While the merits of the struggle over whether alcohol is evil are not insignificant, the issue addressed in this note is whether a state may regulate alcohol, even if the regulation violates the Dormant Commerce Clause.[6]

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1. 125 S. Ct. 1885, 1907 (2005).
2. *Id.*
3. *Id.*
4. Sidney J. Spaeth, Comment, *The Twenty-First Amendment and State Control over Intoxicating Liquor: Accommodating the Federal Interest*, 79 CAL. L. REV. 161, 165 (1991) (providing a thorough discussion of the history of alcohol regulation and influence in our country).
5. *See Proverbs* 20:1 (King James) ("Wine is a mocker, strong drink is raging; and whosoever is deceived thereby is not wise.").
6. *See generally* Granholm v. Heald, 125 S. Ct. 1885 (2005).

First, this note sets forth the facts of the Court's decision in *Granholm*.[7] Next, the note focuses on the background upon which the decision was based.[8] This second section includes the following: a discussion of direct shipment laws, the Commerce Clause, the history of federal regulation of alcohol—including the Wilson Act, the Webb-Kenyon Act, the Eighteenth and Twenty-First Amendments—and the early and modern case law concerning the intersection of the Commerce Clause and the Twenty-First Amendment.[9] Next, the note reviews the Court's reasoning in *Granholm*.[10] Finally, the note discusses the impact of the decision, including: an assessment of the effect on Arkansas's direct shipment laws and the three-tiered system of alcohol regulation.[11]

II. FACTS

The decision in *Granholm* arose from two separate lawsuits involving small wine producers "that rely on direct consumer sales as an important part of their businesses."[12] State regulations that forbade or severely limited the direct shipment of wine prevented the wineries from shipping directly to consumers.[13] The plaintiffs in the first case were wine connoisseurs, wine journalists, and a small winery in California.[14] They challenged a portion of Michigan's alcohol distribution regulations as unconstitutional because it violated the Dormant Commerce Clause by discriminating between in-state and out-of-state wineries.[15] The second action involved three New York wine consumers and two out-of-state wineries.[16] These plaintiffs challenged sections of New York's Alcoholic Beverage Control Law ("ABC Law") on the same grounds as in the Michigan lawsuit.[17]

A. The Michigan Lawsuit

Domaine Alfred's California winery received orders for wine from Michigan consumers.[18] Michigan, like many other states, mandates a three-

7. *See* discussion *infra* Part II.
8. *See* discussion *infra* Part III.
9. *See* discussion *infra* Parts III.A.–D.
10. *See* discussion *infra* Part IV.
11. *See* discussion *infra* Part V.
12. *Granholm*, 125 S. Ct. at 1893.
13. *Id.* at 1891–92.
14. Heald v. Engler, 342 F.3d 517, 519 (6th Cir. 2003). *See* discussion *infra* Part II.A.
15. *Heald*, 342 F.3d at 519. *See* discussion *infra* Part II.A.
16. Swedenburg v. Kelly, 358 F.3d 223, 229 (2d Cir. 2004). *See* discussion *infra* Part II.B.
17. *Swedenburg*, 358 F.3d at 229. *See* discussion *infra* Part II.B.
18. *Granholm*, 125 S. Ct. at 1893.

tiered distribution structure for alcohol sales.[19] Michigan generally requires producers of alcoholic beverages to sell only to licensed in-state wholesalers, who, in turn, may sell only to licensed in-state retailers.[20] An exception exists, however, for Michigan wineries.[21] In-state wineries can apply for "wine maker" licenses that allow them to ship directly to Michigan consumers.[22]

Due to the direct shipment ban, the orders placed to wineries like Alfred's remained incomplete.[23] Also, Alfred's could not use a Michigan wholesaler because its winery produced only about 3,000 bottles a year and the wholesaler's markup would make shipment unprofitable.[24] Even if Alfred's found a Michigan wholesaler to distribute the wine, the markup by the wholesaler would cause shipment via the three-tiered system to be economically infeasible.[25] The plaintiffs challenged the Michigan alcohol distribution system for violating the Commerce Clause because it prohibited the direct shipment of wine to consumers and yet allowed in-state direct shipment.[26] The State of Michigan defended the system, with help from an intervening trade association, as a valid exercise of the State's power under Section Two of the Twenty-First Amendment.[27] The State of Michigan argued that Section Two creates an exception to traditional Commerce Clause analysis.[28] The State's argument rests upon the proposition that the Twenty-First Amendment removed alcohol distribution from the scope of the Dormant Commerce Clause.[29]

The United States District Court for the Eastern District of Michigan upheld the regulatory scheme, but the United States Court of Appeals for the Sixth Circuit reversed.[30] The Sixth Circuit concluded that the Twenty-First Amendment did not remove all state liquor laws from Commerce Clause analysis.[31] Applying Dormant Commerce Clause principles, the Sixth Circuit then held that the Michigan system was unconstitutional be-

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19. *Id.* at 1892.
20. *Id.* at 1893.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Granholm*, 125 S. Ct. at 1893.
25. *Id.* In-state wineries avoid the markup and thereby realize a higher profit margin. *Heald,* 342 F.3d at 521. In addition to this markup, an out-of-state winery pays $300 for a license to sell to a Michigan wholesaler, while an in-state winery pays only $25 for a license to sell directly to consumers. *Id.*
26. *Heald*, 342 F.3d at 519.
27. *Granholm*, 125 S. Ct. at 1894.
28. Reply Brief for Petitioners at 19, Granholm v. Heald, 125 S. Ct. 1885 (2005) (No. 03-1116).
29. *Granholm*, 125 S. Ct. at 1894.
30. *Id.*
31. *Id.*

cause the State failed to show that its policy objectives could not be achieved by nondiscriminatory means.[32] More specifically, the State was unable to demonstrate that the objectives of protecting minors and collecting tax revenue could be accomplished only by discriminating against out-of-state wineries.[33]

B. The New York Lawsuit

The wineries in the New York dispute involved the Swedenburg Estate Vineyard in Virginia and the Lucas Winery in California.[34] These wineries typically attracted tourists who often wished to purchase wine once they returned home.[35] Like Michigan, New York has legally instituted the three-tiered distribution model for alcohol production and sales.[36] Once again like Michigan, the New York statutory scheme required an exception from the three-tiered system for in-state wineries.[37] If such a winery produced wine only from New York grapes, the winery could apply for a license to sell and ship directly to in-state consumers.[38] The wineries holding these licenses also were permitted to deliver wines from other wineries provided that seventy-five percent of the volume of the grapes used by the other wineries came from New York grapes.[39] New York also allowed an out-of-state winery to ship directly to New York consumers by becoming a licensed New York winery.[40] To achieve this status, however, the winery had to establish a "branch factory, office, or storeroom within the state of New York."[41] Thus, the New York scheme required two hurdles—first, the use of New York grapes and second, a physical presence in New York.[42]

Due to New York's distribution scheme, the Swedenburg and Lucas wineries were unable to fill orders from that state, the nation's second largest wine market.[43] The plaintiffs sued seeking a declaration that the system violated the Dormant Commerce Clause.[44] The United States District Court for the Southern District of New York granted summary judgment to the

32. *Id.*
33. *Heald*, 342 F.3d. at 527.
34. *Granholm*, 125 S. Ct. at 1893.
35. *Id.*
36. *Id.* at 1892.
37. *Id.*
38. *Id.* at 1894.
39. *Id.*
40. *Granholm*, 125 S. Ct. at 1894.
41. *Id.*
42. *Id.*
43. *Id.* at 1893.
44. *Id.* at 1894.

plaintiffs.[45] The United States Court of Appeals for the Second Circuit reversed.[46] The Second Circuit found that the New York regulations were within the powers granted to the states by the Twenty-First Amendment.[47]

The Supreme Court consolidated the Michigan and New York cases to answer whether a "[s]tate's regulatory scheme that permits in-state wineries to directly ship" wine while restricting out-of-state wineries from doing so violates the Dormant Commerce Clause in light of Section Two of the Twenty-First Amendment.[48] The similarities between the two systems enabled the Court to consider them together to answer the question.[49] Both systems discriminated against out-of-state wineries in favor of in-state wineries.[50] The difference between New York and Michigan's systems is that New York's system theoretically allowed an out-of-state winery to apply for a license while Michigan's system did not.[51] Yet, not a single out-of-state winery successfully obtained a license under the New York scheme.[52] The next section involves a discussion of the historical background behind the dispute over the direct shipment of wine.[53]

III. BACKGROUND

This section traces the historical foundations underlying the controversy over the direct shipment of wine to consumers that the Supreme Court recently decided in *Granholm*. First, the section will provide a brief overview of direct shipment laws enacted by the States.[54] Second, the section will examine the Commerce Clause.[55] Third, the section will analyze the history of the Twenty-First Amendment.[56] Finally, the section will discuss the interaction of the Commerce Clause and the Twenty-First Amendment in light of the shipment of liquor directly to consumers.[57]

45. *Id.*
46. *Granholm*, 125 S.Ct. at 1894.
47. *Id.* at 1894–95.
48. *Id.* at 1895.
49. *See* discussion *supra* Part II.A.–B.
50. *See* discussion *supra* Part II.A.–B.
51. *Granholm*, 125 S. Ct. at 1896.
52. *Id.* at 1897.
53. *See* discussion *infra* Part III.
54. *See* discussion *infra* Part III.A.
55. *See* discussion *infra* Part III.B.
56. *See* discussion *infra* Part III.C.
57. *See* discussion *infra* Part III.D.

A. Direct Shipment Laws

The existence of direct shipment laws dates back decades, at least as far back as the period following Prohibition.[58] The function of these laws is to restrict the shipment of alcoholic beverages directly from out-of-state producers and retailers to in-state consumers.[59] States created a three-tiered system for regulating alcohol following the repeal of the Eighteenth Amendment—the constitutional amendment instituting prohibition of alcohol.[60] The three-tiered system requires a producer to sell to a distributor, who in turn must sell to a retailer, who then sells to the consumer.[61] All fifty states regulate the sale of alcohol in some form.[62] State laws generally fall into three categories: reciprocity states, limited shipment states, and anti-direct shipment states.[63] Twenty-three states ban the direct shipment of alcohol to consumers; fifteen have limited shipment regulations; and thirteen states are considered reciprocal states.[64] The number of states in each category appears to fluctuate considering that in the last eighteen years, forty-three states have considered over 160 bills proposing changes to their direct shipment laws.[65]

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58. Vijay Shanker, Note, *Alcohol Direct Shipment Laws, the Commerce Clause, and the Twenty-First Amendment*, 85 VA. L. REV. 353, 355 (1999).

59. *Id.*

60. Louisa Thomas Hargrave, *Let It Flow*, N.Y. TIMES, June 5, 2005, at 13; Stephen Meuse, *Decision Clarifies, Clouds Wine World*, BOSTON GLOBE, May 25, 2005, at E3. *See also* Shanker, *supra* note 57, at 355; Lucas, *infra* note 83, at 902.

61. Shanker, *supra* note 58, at 355; Meuse, *supra* note 59. The United States Supreme Court recognized the three-tier system as "unquestionably legitimate" in *North Dakota v. United States*, 495 U.S. 423, 432 (1990). *Granholm*, 125 S. Ct. at 1905.

62. James Molnar, Comment, *Under the Influence: Why Alcohol Direct Shipment Laws are a Violation of the Commerce Clause*, 9 U. MIAMI BUS. L. REV. 169, 172 (2001); *see also* Hargrave, *supra* note 59, at 13.

63. Duncan Baird Douglass, Note, *Constitutional Crossroads: Reconciling the Twenty-First Amendment and the Commerce Clause to Evaluate State Regulation of Interstate Commerce in Alcoholic Beverages*, 49 DUKE L.J. 1619, 1648–49 (2000). Generally, limited shipment states limit the amount of direct shipments to consumers, reciprocal states allow direct shipment from states that have similar or reciprocal provisions allowing direct shipment, and anti-direct shipment states ban direct shipment. *Id.* at nn.134–36. Also, see *id.* for a discussion, comprehensive listing, and analysis of the different wine statutes.

64. Wine Institute, *Direct Shipment Laws by State for Wineries*, State Shipping Laws, http://www.wineinstitute.org/shipwine/ (last visited June 11, 2005). Arkansas is included in the category of states that ban direct shipments of wine. *Id.*
Also, Arkansas's neighboring state of Texas recently passed legislation allowing for direct shipment of wine throughout their state. *See* Wine Institute, *Texas Opens Direct to Consumer Wine Sales*, http://www.wineinstitute.org/communications/statistics/texasbillsigned2005.htm (last visited June 11, 2005).

65. Gina M.Riekhof & Michael E. Sykuta, *Politics, Economics, and the Regulation of Direct Interstate Shipping in the Wine Industry*, 87 AM. J. AGRIC. ECON. 439 (2005).

Arkansas is representative of the direct shipment states.[66] Arkansas bars the direct shipment of alcohol from outside of the state unless the wine-maker first obtained a permit or paid an excise tax.[67] An exception to requiring a permit is created for Arkansas wine.[68] Recently, Arkansas enacted Act 1806 of 2005, which is an outright direct shipment law.[69] The Act specifically addresses direct shipping.[70] It allows Arkansas consumers visiting in-state wineries to directly ship wine.[71] The Act does not address Arkansas residents who visit out-of-state wineries.[72] The statute also repeals a portion of the Arkansas Code that banned direct shipment by Arkansas wineries to in-state consumers.[73]

States generally offer two rationales for prohibiting the direct shipment of alcohol to consumers.[74] First, such bans better enable states to collect tax revenue from alcohol sales.[75] Currently, "unless the vendor has a 'substantial nexus' with the state, a state cannot require an out-of-state vendor to collect sales taxes."[76] Second, "restrictions on mail-order and Internet sales will prevent minors from obtaining access to alcohol."[77] The proponents of direct shipment bans argue that direct shipment will allow minors to avoid state laws preventing the sale of alcohol to minors.[78]

While it is questionable whether direct shipment prohibitions actually serve their stated purposes of enhancing tax collection and reducing consumption by minors, there is no doubt that such laws prevent small wineries

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66. *Id.*

67. ARK. CODE ANN. §§ 3-7-106(a)(1), 3-3-216 (Michie 1987); Arkansas's direct shipment ban reads as follows:

> It shall be unlawful for any person to ship or transport or cause to be shipped or transported into the State of Arkansas any spirituous liquors, vinous liquors, wines other than Arkansas wines, or beer or malt beverages from points without the state without first having obtained a permit from the Director of the Alcoholic Beverage Control Division.

Id. § 3-7-106(a)(1). "It shall be unlawful for any person to buy, bargain, sell, loan, own, have in possession, or knowingly transport in this state any intoxicating liquor of any kind upon which the Arkansas excise tax prescribed by law has not been paid." *Id.* § 3-3-216.

68. ARK.CODE ANN. § 3-7-106(a)(1) (Michie 1987).

69. 2005 Ark. Acts 1806.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. Shanker, *supra* note 58, at 357.

75. *Id.* Transactions that go through the three-tier system are subject to a sales tax at the wholesale tier, while out-of-state suppliers who ship directly to consumers avoid charging sales tax. *Id.*

76. *Id.* (citing Quill Corp. v. North Dakota, 504 U.S. 298, 311 (1992)).

77. *Id.* Also, a poll by Americans for Responsible Alcohol Access suggested 85% of Americans believe direct shipments would allow easier access for minors. *Id.*

78. Douglass, *supra* note 63, at 1652 n.138.

from effectively accessing certain markets.[79] This problem is due to consolidation in the liquor distributing industry.[80] Some small wineries are unable to meet certain levels of production or volume required by many distributors, and, thus, they would prefer to ship directly to consumers.[81] The advent of e-commerce makes this method of distribution especially appealing to small wineries.[82]

B. The Commerce Clause

The Commerce Clause provides that "Congress shall have Power . . . to regulate Commerce . . . among the several states."[83] This clause grants Congress the power to regulate interstate commerce.[84] Moreover, the Supreme Court held in *Cooley v. Board of Wardens*[85] that the Commerce Clause also incorporates an implicit restraint on state power even in the absence of congressional action—this restraint is known as the "Dormant Commerce Clause."[86] The primary purpose of the Commerce Clause—including the Dormant Commerce Clause—is to ensure the free flow of trade between the States.[87] When addressing the propriety of a state law under a current Dormant Commerce Clause analysis, the Court first examines "whether [the statute] regulates evenhandedly with only incidental effects on interstate commerce."[88] Second, even if there is a legitimate purpose, a statute that discriminates against interstate or out-of-state commerce is per se invalid.[89] Finally, courts will strike down a nondiscriminatory statute if "the burden it imposes on interstate commerce is clearly excessive in

79. 145 CONG. REC. 19193 (1999). Representative Thompson listed the obstacles facing small wineries. He also pointed out that in 1999 there were 2,000 small wineries as opposed to 375 in 1963. *Id.*

80. *Id.* Representative Thompson pointed out that in 1963 there were 10,900 distributors, but by 1999 there were only 300 distributors. *Id.*

81. Molnar, *supra* note 62, at 173.

82. *Id.* at 172.

83. U.S. CONST. art. I., § 8, cl. 3.

84. *See id.*; *see also* Lisa Lucas, Comment, *A New Approach to the Wine Wars: Reconciling the Twenty-First Amendment with the Commerce Clause*, 52 UCLA L. REV. 899, 911 (2005).

85. 53 U.S. (12 How.) 299 (1852).

86. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-2, at 1030 (3d ed. 2000). This restraint has been interpreted for at least 140 years, beginning with *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1852). Nevertheless, it is possible that the dormant Commerce Clause really began with Justice Marshall's opinion in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824). *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 311–12 (Aspen Law & Business 1997).

87. Lucas, *supra* note 84, at 910–11.

88. Oregon Waste Sys., Inc. v. Dep't. of Envtl. Quality, 511 U.S. 93, 99 (1994).

89. *Id.*; *See* TRIBE, *supra* note 86 § 6-5, at 1050.

relation to the putative local benefits."[90] The Twenty-First Amendment alters the traditional Dormant Commerce Clause analysis in cases dealing with state alcoholic beverage regulation.[91] It is to that Amendment, and the United States' experience with alcohol regulation, that this note now turns.[92]

C. A Brief History of Federal Regulation of Alcohol Distribution and Consumption

There have been three phases of federal regulation of alcohol: pre-Prohibition, Prohibition, and post-Prohibition.[93] Pre-Prohibition includes the early case law, the Wilson Act of 1890, and the Webb-Kenyon Act of 1913.[94] The Eighteenth Amendment marks the beginning of the era of Prohibition.[95] The ratification of the Twenty-First Amendment marks the beginning of the post-Prohibition era.[96]

1. *Pre-Prohibition*

a. Early case law and history

As the Supreme Court has explained, "the history of state regulation of alcoholic beverages dates from long before adoption of the Eighteenth Amendment."[97] In fact, the American temperance movement began in the 1800s.[98] The country's struggle with alcohol largely began on a local level, and the regulation of alcohol was primarily a state-by-state affair.[99] The first challenge to a state's regulation of alcohol under the Dormant Commerce Clause claims came in 1847.[100] The case, *Thurlow v. Massachusetts*,[101] con-

90. *Oregon Waste Sys., Inc.*, 511 U.S. at 99; *see also* TRIBE, *supra* note 86 § 6-5, at 1050.

91. *See* discussion *infra* Part III.D.2.b.

92. *See* discussion *infra* Part III.C.

93. *See* discussion *infra* Part III.C.

94. *See* discussion *infra* Part III.C.1.a.–c.

95. *See* discussion *infra* Part III.C.2.

96. *See* discussion *infra* Part III.C.3.

97. Craig v. Boren, 429 U.S. 190, 205 (1976).

98. Spaeth, *supra* note 4, at 165. "The first successful political movement . . . began in 1826 with the founding of the American Society for the Promotion of Temperance, better known as the American Temperance Society (ATS)." *Id.* at 168. Eventually, the temperance movement was advanced "by the formidable Anti-Saloon League (ASL), a federation of churches and temperance societies" including "large Protestant denominations[:] namely, Methodist, Baptist, Presbyterian, and Scandinavian Lutherans." *Id.* at 170 n.55.

99. Russ Miller, Note, *The Wine Is in the Mail: The Twenty-First Amendment and State Laws Against the Direct Shipment of Alcoholic Beverages*, 54 VAND. L. REV. 2495, 2496–97 (2001).

100. *Id.* at 2503–04.

cerned three state statutes enacted by Massachusetts, Rhode Island, and New Hampshire that required citizens to obtain a license to sell alcohol within their respective borders.[102] *Thurlow* incorporated challenges to all three state statutes, and the cases, commonly known as "License Cases," were argued together.[103] In the License Cases,[104] the Court recognized that state governments possess broad authority to regulate the trade of alcoholic beverages within their borders free from implied restrictions under the Commerce Clause.[105]

Prior to the next Commerce Clause challenge, the temperance movement gained an important victory in the fight to ban liquor in *Mugler v. Kansas*,[106] which the Court decided in 1887.[107] The case concerned a Kansas constitutional amendment prohibiting the manufacture and sale of liquor within the state.[108] The Court found that such a restriction was within the State's police power.[109] Importantly, *Mugler* did not involve Commerce Clause principles; thus, the Court did not reach that issue.[110]

The next Commerce Clause challenge came in *Bowman v. Chicago and Northwestern Railway Co.*,[111] which involved an Iowa statute requiring permits for the importing of liquor.[112] In *Bowman*, the Court held that the permit statute violated the Dormant Commerce Clause,[113] despite the fact that the law was an exercise of Iowa's police power intended to protect its citizens from the effects of alcohol.[114] The Court explained that the statute was beyond the police power because there was a difference between "the right of the state to restrict or prohibit sales of intoxicating liquor within its limits" and "the right to prohibit its importation."[115] The Court concluded

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101. 46 U.S. (5 How.) 504 (1847).
102. Miller, *supra* note 99, at 2503.
103. *Id.* at 2503 n.50.
104. Thurlow v. Massachusetts, 46 U.S. (5 How.) 504 (1847).
105. Miller, *supra* note 99, at 2503–04 (citing *Craig*, 429 U.S. at 205). Chief Justice Taney stated in *Thurlow* that "the power of Congress over [commerce] does not extend further than the regulation of commerce with foreign nations and among the several States; . . . beyond these limits the States have never surrendered their power over trade and commerce, and may still exercise it . . . ." *See* Richard H. Seamon, Note, *The Market Participant Test in Dormant Commerce Clause Analysis—Protecting Protectionism?*, 1985 DUKE L.J. 697, n.15 (1985) (citing *Thurlow*, 46 U.S. (5 How.) at 504, 574).
106. 123 U.S. 623 (1887).
107. Miller, *supra* note 99, at 2504.
108. *Mugler*, 123 U.S. at 624.
109. *Id.* at 661–63.
110. *See generally id.*
111. 125 U.S. 465 (1888).
112. *Id.* at 474.
113. *Id.* at 499–500.
114. *Id.* at 476.
115. *Id.* at 498–99.

that the former was a legitimate exercise of the police power, while the latter was not.[116] The Court in *Bowman* ruled that alcohol must arrive in the state before it is subject to local regulation.[117] In other words, physical transportation must end before the state may exercise its police power, even though the state may ban the consumption and distribution of liquor entirely once it arrived.[118] The Court justified this limitation on state power to regulate liquor by relying on the Commerce Clause, under which regulation of interstate commerce is the exclusive domain of Congress.[119]

The next alcohol regulation case to reach the Supreme Court was *Leisy v. Hardin*.[120] In *Leisy*, the Court allowed the importation of liquor provided it was in its original packaging.[121] In *Leisy*, the authorities seized a shipment of beer in Iowa upon shipment from Illinois.[122] Iowa had recently passed a law prohibiting the sale and manufacture of intoxicating liquors in the state with few exceptions.[123] The Court found this to be in conflict with the Commerce Clause and held that the beer could be shipped into Iowa and then reshipped by the recipient as long as it remained in the original packaging.[124] Thus, *Leisy* presented a dilemma for the states.[125] They could ban the production of domestic liquor; but, they were unable to bar out-of-state liquor as long as it remained in its original package.[126]

b. The Wilson Act of 1890

Following *Leisy*, Congress enacted the Wilson Act of 1890,[127] which resolved the *Leisy* dilemma and provided that keeping alcohol in its original

116. *Id.* at 499.
117. *Bowman*, 125 U.S. at 499.
118. *Id.*; *see* Spaeth, *supra* note 4, at 171.
119. *Bowman*, 125 U.S. at 499.
120. 135 U.S. 100 (1890).
121. Miller, *supra* note 99, at 2506 (citing *Leisy*, 135 U.S. at 124).
122. *Leisy*, 135 U.S. at 100–01.
123. *Id.* at 104–05.
124. *Id.* at 124.
125. *Granholm*, 125 S. Ct. at 1898.
126. *Id.*
127. Wilson Act, 27 U.S.C. § 121 (2000). The Wilson Act reads:

> All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt there from by reason of being introduced therein in original packages or otherwise.

Id.

packaging would not exempt it from state regulation.[128] More specifically, the Wilson Act tied alcohol transported into a state to the laws and regulations of that state to the same extent and in the same manner as the alcohol produced in that state.[129] While the Wilson Act corrected the "original packaging" problem, the alcohol industry soon discovered another loophole.

In 1898, the Supreme Court declared that the Wilson Act, and, thereby, state regulations, did not apply until the liquor was actually received by the local recipient.[130] The laws of a state did not take effect until the shipping assignee received the shipment of alcohol.[131] Thus, a state's ban on the sale of alcohol did not attach until after the alcohol was delivered in the state.[132] Accordingly, directly shipping alcohol to the end-user avoided the state and local regulations because the state regulations attached only after delivery.[133]

c. The Webb-Kenyon Act

In response to the loophole under the Wilson Act, Congress enacted the Webb-Kenyon Act of 1913.[134] That statute extended the Wilson Act by permitting states to regulate in-state liquor sales to "any person interested therein, to be received, possessed, sold, or in any manner used."[135] This

128. *Id.*

129. *Id.*

130. Rhodes v. Iowa, 170 U.S. 412, 426 (1898).

131. *Id.* at 421–23.

132. *Id.*

133. 49 CONG. REC. 761 (1912). Senator Kenyon of Iowa observed the following problem:

> Every State in which the traffic in liquors has been prohibited by law is deluged with whisky sent in by people from other States under the shelter of the interstate-commerce law. There are daily trainloads of liquors in bottles, jugs, and other packages sent into the State consigned to persons, real and fictitious, and every railway station and every express company office in the State are converted into the most extensive and active whisky shops, from which whisky is openly distributed in great quantities. Liquor dealers in other States secure the names of all persons in a community, and through the mails flood them with advertisements of whisky, with the most liberal and attractive propositions for the sale and shipment of the same. Freed from the expense of the middleman, the distiller or dealer in other States is enabled to sell to the individual in the prohibition State at a less price than the purchaser formerly paid to the domestic whisky dealer. It is evident that under such circumstances the prohibition law of a State is practically nullified, and intoxicating liquors are imposed upon its people against the will of the majority.

Id.

134. Webb-Kenyon Act, 27 U.S.C. § 122 (2000).

135. *Id.*; Scott F. Mascianica, Student Article, *Why All the Wine-ing? The Wine Industry's Battle with States over the Direct Shipment Issue*, 17 LOY. CONSUMER L. REV. 91, 95 (2004).

effectively barred the importation and transportation of any alcohol into a state by anyone who intended to use the product in any way that violated the state's laws.[136] It should be noted that the Webb-Kenyon Act, unlike the Wilson Act, contained no language relating to the prevention of discrimination.[137] The Wilson Act provided that liquor shipped into the state would be subject to local laws to the same extent and in the same manner as the liquor produced in the state.[138] But, the Webb-Kenyon Act had no comparable language.[139]

In *Clark Distilling Co. v. Western Maryland Ry. Co.*,[140] the Supreme Court interpreted the Webb-Kenyon Act rather narrowly, explaining that the statute was merely intended to extend the Wilson Act of 1917.[141] The Court effectively read the Wilson Act's discriminatory language into the Webb-Kenyon Act.[142] The Wilson Act provided that states could regulate out of state alcohol "to the same extent and in the same manner as though such . . . liquors had been produced in such State."[143] The Court in *Clark Distilling Co.* recognized that the purpose of the Webb-Kenyon Act was to "prevent the immunity characteristic of interstate commerce . . . [and] to permit the receipt of liquor through such commerce in States contrary to their laws."[144] The Webb-Kenyon Act removed all receipt and possession of liquor prohibited by state law from the protection of the Dormant Commerce Clause.[145]

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136. 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, 12 (2000).

137. *Granholm*, 125 S. Ct. at 1912 (Thomas, J., dissenting). The Webb-Kenyon Act reads as follows:

> [t]he shipment or transportation, in any manner or by any means whatsoever, of any spiritous, vinous, malted, fermented, or other intoxicating liquor of any kind from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spiritous, vinous, malted, fermented, or other 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, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is prohibited.

27 U.S.C. § 122 (200).

138. *Granholm*, 125 S. Ct. at 1912.

139. *Id.*

140. 242 U.S. 311 (1917).

141. *Id.* at 323–24; *see* Miller, *supra* note 99, at n.112.

142. *See Clark Distillery Co.*, 242 U.S. at 324.

143. Wilson Act, 27 U.S.C. § 121 (2000).

144. *Clark Distilling Co.*, 242 U.S. at 324.

145. *See id.* at 325.

This removal resulted in immunity for alcohol from Dormant Commerce Clause analysis.[146]

The Court's interpretation in *Clark Distilling Co.* is consistent with the legislative history surrounding the Webb-Kenyon Act.[147] Senator Webb, one of the drafters of the Act, explained during the debate over passage that those in favor of the Act were asking "to deprive liquors . . . of interstate commerce character, and let [the states] deal with such imported liquors as . . . liquors of domestic production."[148]

2. *Prohibition*

The Eighteenth Amendment,[149] ratified on January 16, 1919, began the period commonly known as "Prohibition."[150] The Constitution completely prohibited liquor distribution, consumption, and production until the repeal of the Eighteenth Amendment by the Twenty-First Amendment in 1933.[151]

The Eighteenth Amendment was largely unsuccessful and, in many ways, undesirable.[152] With the arrival of the Great Depression, the public opinion of Prohibition began to wither.[153] Most people thought economic benefits could be achieved through the revenues that could be raised by taxation of alcohol.[154] As the unemployment numbers increased, resentment

146. *See id.*

147. 49 CONG. REC. 2913 (1913). Senator Kenyon stated that the purpose of the Wilson Act was for states to "have prohibition, high license, local option, or free liquor, as they please." *Id.* "It was the intention that each State should be free to determine its own policy in regard to liquor traffic." 49 CONG. REC. 828 (1912); *see also* Miller, *supra* note 99, at 2511 n.113.

148. 49 CONG. REC. 2912–13 (1913). The Webb-Kenyon Act originally was vetoed by President Taft. Nevertheless, Congress passed the Act over the presidential veto. 49 CONG. REC. 4257, 4291 (1913).

149. U.S. CONST. amend. XVIII (repealed 1933). The text reads as follows:

> Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited. Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation. Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

U.S. CONST. amend. XVIII, §§ 1–3 (repealed 1933).

150. Marc Aaron Melzer, Comment, *A Vintage Conflict Uncorked: The Twenty-first Amendment, the Commerce Clause, and the Fully-Ripened Fight over Interstate Wine and Liquor Sales*, 7 U. PA. J. CONST. L. 279, 279 (2004).

151. U.S. CONST. amend. XXI, § 1.

152. Spaeth, *supra* note 4, at 179–80.

153. *Id.* at 179.

154. *Id.*

of the salaries that the revenue agents received began to grow.[155] The combination of these two factors pushed "the consensus of public opinion toward the repeal of the Eighteenth Amendment."[156] The dismal experience with Prohibition under federal control contributed to both Congress's and the states' insistence on state control of liquor upon repeal.[157] In fact, upon the repeal of the Eighteenth Amendment, Congress reenacted the Webb-Kenyon Act in 1935, exactly as it existed prior to the Eighteenth Amendment.[158] The Webb-Kenyon Act removed all receipt and possession of liquor prohibited by state law from the protection of the Dormant Commerce Clause.[159]

3. *Post-Prohibition: The Meaning of Section Two*

With the Eighteenth Amendment's popularity failing, the people ratified the Twenty-First Amendment with three sections.[160] Section One specifically repeals the Eighteenth Amendment, and Section Three provides a time limitation for ratification.[161] Section Two provides a prohibition of the transportation or importation of alcohol if it is contrary to state law, but many questions surround the scope and meaning of Section Two.[162]

In construing Section Two's meaning, the United States Supreme Court initially found that the plain meaning of the words was an appropriate starting point.[163] To ascertain the plain meaning requires a textual analysis of the words of the Twenty-First Amendment.[164] Such an analysis requires

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155. *Id.* at 179–80.

156. *Id.* at 180.

157. *Id.*

158. *See* Act of Aug. 27, 1935, ch. 740 § 2020(b), 49 Stat. 877 (1935).

159. *Clark Distillery Co.*, 242 U.S. at 325. *See* discussion *supra* Part III.C.1.c.

160. U.S. CONST. amend. XXI. The text reads as follows:

> Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed. Section 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited. Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

U.S. CONST. amend. XXI, §§ 1–3.

161. *Id.* at §§ 1, 3.

162. *See* discussion *infra* Part III.C.3.

163. *See* State Bd. of Equalization of Cal. v. Young's Mkt. Co., 299 U.S. 59, 63–64 (1936) (declining to look beyond the text of the Twenty-First Amendment because "the language of the Amendment is clear" and "the Amendment has, in respect to liquor, freed the States from all restrictions upon the police power to be found in other provisions of the Constitution").

164. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 326 (1816) ("The words are to

consideration of the words in context.[165] The text can be read to give states a complete exemption from the Commerce Clause, or it can be read to allow states only to regulate without violating the Commerce Clause.[166] Unfortunately, this approach presents no clear answer regarding whether Congress and the states intended Section Two to remove the regulation of liquor from the reach of the Commerce Clause or any other constitutional provisions.[167] Despite the lack of a clear answer from the text, the Court initially felt that the language of Section Two was sufficiently clear to avoid resorting to the history of the Amendment.[168]

Even though the language of Section Two at first appeared clear to the Court, the Court's approach to interpretation based on plain meaning is inconsistent with tradition.[169] The Supreme Court's "traditional" approach to statutory interpretation includes consideration of contextual evidence, even when the text has an apparent "plain meaning."[170] The contextual evidence includes legislative history and the text itself.[171] Congress proposed the Twenty-First Amendment, and the state conventions ratified the Amendment without much debate.[172]

The legislative history, however, offers some guidance to understanding the purpose as initially understood by the Court.[173] Although the history of Senate Joint Resolution 211, which eventually would become the Twenty-First Amendment, provides no clear answer as to Section Two's meaning,[174] both the Senate and the House of Representatives understood

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be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged.").

165. United States v. Balsys, 524 U.S. 666, 673 (1998) (looking at only the bare words of a constitutional amendment "overlooks the cardinal rule to construe provisions in context").

166. Douglass, *supra* note 63, at 1648–49.

167. *See id.*

168. *Young's Mkt.*, 299 U.S. at 64. The Court stated that "we think the language of the amendment is clear." *Id.* at 63–64.

169. Rebecca L. Spiro, Note, *Federal Sentencing Guidelines and the Rhenquist Court: Theories of Statutory Interpretation*, 37 AM. CRIM. L. REV. 103, 106 (2000). *See also* Stephen Breyer, *Of the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992) (discussing the use of legislative history in statutory interpretation).

170. Spiro, *supra* note 169, at 106. Given that the *Granholm* decision considered the legislative history of the Twenty-First Amendment, it is intriguing that Justice Scalia sided with the majority given his propensity to eschew legislative history. *Id.* Scalia's jurisprudence aligns him with the textualism of the earlier Court's grant of broad powers to the States. *Id.*

171. *Id.*

172. Douglass, *supra* note 63, at 1631–32. Nevertheless, the initial proposal, Senate Joint Resolution 211, received a substantial amount of debate over the "concurrent powers" section. Miller, *supra* note 98, at 2512–13.

173. *See generally* 76 CONG. REC. 4138–79 (1933).

174. 76 CONG. REC. 4138 (1933). The initial proposed resolution mirrored the Twenty-first Amendment exactly as it exists today. Of interest to Arkansans, Senator Joe Robinson of

Senate Joint Resolution 211 as protecting the dry states.[175] Congress understood Senate Joint Resolution 211 as turning absolute control over interstate commerce in regards to alcohol to the states.[176] Congress, however, appeared to focus more on the repeal of the Eighteenth Amendment than the implications of Section Two.[177] The legislative history provides some evidence that Section Two was added to remove the regulation of liquor from a Commerce Clause analysis.[178]

D. The Intersection of the Twenty-First Amendment and the Commerce Clause

A unique relationship between the Twenty-First Amendment and the Commerce Clause evolved after the latter's ratification. This section traces the developments of the case law following that ratification. This section begins with a discussion of the early interpretations of the Twenty-First Amendment in light of the Commerce Clause.[179] Next, this section examines the modern case law.[180]

1. *State's Power Under the Twenty-First Amendment Peaks*

Following the passage of the Twenty-First Amendment, in a series of five cases, the Court read the Twenty-First Amendment as a broad grant of power to the states over the regulation of intoxicating liquor.[181] In *State Board of Equalization of California v. Young's Market Co.*,[182] the Court found that the words of the Twenty-First Amendment "are apt to confer

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Arkansas proposed the Amendment to the resolution striking Section Two entirely as well as a section granting concurrent power to Congress and the states. Ultimately, his motion to amend did not pass with regard to Section Two but did pass as to the concurrent powers section. *Id.* at 4138–39, 4171, 4179.

175. *Id.* at 4171. Senator Robinson's statements summarizing the Bill to other representatives show that the perception of Section Two was that it was a protection for dry states after the repeal of prohibition. *Id.*

176. 76 CONG. REC. 4143 (1933). "Senator Blaine stated that the purpose was to restore to the States . . . absolute control in effect over interstate commerce affecting intoxicating liquor." Miller, *supra* note 98, at n.130.

177. Spaeth, *supra* note 4, at 180.

178. Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 274–75 (1984) ("[W]e have recognized the obscurity of the legislative history of § 2. No clear consensus concerning the meaning of the provision is apparent.") (citation omitted)).

179. *See* discussion *infra* Part III.D.1.

180. *See* discussion *infra* Part III.D.2.

181. Carter v. Virginia, 321 U.S. 131, 137 (1944); Joseph S. Finch & Co. v. McKittrick, 305 U.S. 395, 397 (1939); Mahoney v. Joseph Triner Corp., 304 U.S. 401, 403 (1938); Ziffrin, Inc. v. Reeves, 308 U.S. 132, 138 (1939); State Bd. of Equalization of Cal. v. Young's Market Co., 299 U.S. 59, 62 (1936).

182. 299 U.S. 59 (1936).

upon the state the power to forbid all importations which do not comply with the conditions which it prescribes."[183] The Court rejected the idea that a state must allow imported liquor to compete with domestic liquor on equal terms if it allows in-state liquor to be sold to consumers.[184] In *Joseph S. Finch & Co. v. McKittrick*,[185] the Court held that such an argument constituted a rewriting of the Amendment rather than a mere construction of the text.[186] The Court also emphasized that the Dormant Commerce Clause did not apply to alcohol regulation.[187]

In *Carter v. Virginia*,[188] the Court again held that the broad powers of the Twenty-First Amendment, allowing states to regulate the importation of liquor, were not limited by the Commerce Clause.[189] "The Twenty-[F]irst Amendment placed liquor in a [different category] from other articles of commerce."[190] Furthermore, despite the fact that the precise amount of power left in Congress to regulate liquor under the Commerce Clause was unclear, the Court stated that "local, not national, regulation of . . . liquor . . . is now the general Constitutional policy."[191]

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183. *Young's Market*, 299 U.S. at 62. In *Young's Market*, the issue was the constitutionality of a California license fee for the privilege of importing beer into the state. *See id.* at 60. Before the Twenty-First Amendment, the fee would have been unconstitutional. *Id.* at 62. The fee would have been void because the fee would have caused a direct burden on interstate commerce. *Id.* The Commerce Clause grants the right to import merchandise without restrictions into any state, except as Congress may require. *Id.*

184. *Id.* at 62.

185. 305 U.S. 395 (1939).

186. *Young's Market*, 299 U.S. at 62.

187. *Joseph S. Finch & Co.*, 305 U.S. at 398. In *Joseph S. Finch & Co.*, a Missouri statute prevented the importation or transportation into the state of any alcoholic beverage manufactured in a state in which discrimination existed against Missouri alcohol. *Id.* at 396. The Court held that the Twenty-first Amendment removed alcohol from Commerce Clause protection. *Id.* at 398; *See also Ziffrin Inc.*, 308 U.S. 132, 138 (1939) (The Twenty-first Amendment sanctions the right of a State to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause); *Joseph S. Finch & Co.*, 305 U.S. at 397; *Mahoney*, 304 U.S. at 403.

188. 321 U.S. 131 (1944). *Carter* involved two cases. The first case involved two men, Carter and Macemore, who received 168 gallons of whiskey from a wholesaler in Maryland and drove it via truck through Virginia to deliver it to Thomasville, North Carolina. *Id.* at 134. The second case involved Dickerson, who was arrested with more than one gallon of alcohol while driving through Virginia from Maryland to North Carolina. *Id.* at 134.

189. *Id.* at 137.

190. *Id.* at 138 (Black, J., concurring).

191. *Id.* The Court clarified the extent of congressional authority to regulate liquor in *William Jameson & Co. v. Morgenthau*, 307 U.S. 171 (1939) (per curiam). The lawsuit in *Morgenthau* arose when the Federal Alcohol Administration Act (FAAA) refused to allow the distributor to import a shipment of blended Scotch whiskey because of improper labeling. *Id.* at 172. In that case, the Court found that the FAAA did not violate the Twenty-First Amendment. *Id.* at 172–73. The Court stated that

Also, in *Ziffrin, Inc. v. Reeves*,[192] the Court found that states may decide not to consider liquor as an article of interstate commerce.[193] In *Ziffrin*, the Court upheld a comprehensive Kentucky statute by deciding that "the State may protect her people against evil incident to intoxicants and may exercise large discretion as to means employed."[194] According to Justice Jackson's concurrence in *Duckworth v. Arkansas*,[195] "[i]f the Twenty-[F]irst Amendment is not to be resorted to for the decision of liquor cases, it is on the way to becoming another 'almost forgotten' clause of the Constitution."[196] The Twenty-First Amendment gives the states broad power to regulate liquor in such a manner.[197] In fact, the Court initially confirmed the view that the Twenty-First Amendment primarily created an exception to the normal operation of the Commerce Clause.[198]

2. *Supreme Court Begins to Put a Cork in the States' Power to Regulate Liquor*

The Supreme Court's broad interpretation of Section Two did not last for long. This section discusses the beginning of the Court's interpretative change regarding the relationship between the Twenty-First Amendment and the Commerce Clause. First, this section follows the Court's interpretation of the Twenty-First Amendment in light of other constitutional provi-

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> the Federal Alcohol Administration Act was attacked upon the ground that the Twenty-[F]irst Amendment to the Federal Constitution gives to the States complete and exclusive control over commerce in intoxicating liquors, unlimited by the commerce clause, and hence that Congress has no longer authority to control the importation of these commodities into the United States. We see no substance in this contention.

Id. at 173.

192. 308 U.S. 132 (1939). *Ziffrin* involved a Kentucky requirement of a permit for liquor to pass through its borders. *Id.* at 135–36. The Court held that the Twenty-First Amendment granted Kentucky the right to regulate liquor despite the Commerce Clause implications. *Id.* at 138.

193. *Id.* at 140.

194. *Id.* at 138–39 (citation omitted).

195. 314 U.S. 390 (1941). In *Duckworth* the state required a permit from the Commissioner of Revenue to transport liquor through the state of Arkansas. *Id.* at 391.

196. *Id.* at 399 (Jackson, J., concurring).

197. *Id.* at 398.

198. Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 330 (1964). The Court made it clear during the years immediately after ratification of the Twenty-First Amendment that "a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders." *Id.*

sions.[199] Then, this section turns to the Court's creation of the "core concerns" test.[200] Finally, this section outlines the recent federal legislation.[201]

a. The Supreme Court defines the Twenty-First Amendment's power in relation to other constitutional provisions

The Court gradually changed positions and began to chip away at the power of the states to regulate liquor under the Twenty-First Amendment.[202] The Twenty-First Amendment was subjected to a continually narrowing construction.[203] In 1964 the Court began to restrict state power under the Twenty-First Amendment in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*[204] In *Hostetter*, the Court stated that the Twenty-First Amendment and the Commerce Clause exist as part of the same Constitution and require joint consideration.[205] The Supreme Court limited state power under the Twenty-First Amendment with respect to the Equal Protection Clause,[206] the First Amendment,[207] the Sherman Antitrust Act,[208] and the Federal Communications Commission regulations of cable television.[209] Nevertheless, the Court did not apply this kind of limitation of state power to the Commerce

199. *See* discussion *infra* Part III.D.2.a.

200. *See* discussion *infra* Part III.D.2.b.

201. *See* discussion *infra* Part III.D.2.c.

202. *See generally* Craig v. Boren, 429 U.S. 190 (1976) (refusing to allow the Twenty-First Amendment to be given greater weight than the Equal Protection Clause); Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964) (recognizing that the Commerce Clause was not repealed by the Twenty-First Amendment); Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) (conceding that Congress still retained power to regulate liquor under the Sherman Act despite the Twenty-First Amendment); Capital Cities Cable, Inc v. Crisp., 467 U.S. 691 (1984) (identifying that regulations of the Federal Communications Commission outweighed state concerns under the Twenty-First Amendment); Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984) (balancing the Twenty-First Amendment and the Commerce Clause); 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) (declining to allow First Amendment to be trumped by the Twenty-First Amendment).

203. TRIBE, *supra* note 86, at 1169.

204. 377 U.S. 324 (1964). In *Hostetter*, the Court found that in-state sales of intoxicating liquor intended to be used only in foreign countries could be made under the supervision of the Federal Bureau of Customs. *Id.* at 333–34. The state regulation was not aimed at preventing unlawful use of alcoholic beverages within the state, but rather was designed "totally to prevent transactions carried on under the aegis of a law passed by Congress in the exercise of its explicit power under the Constitution to regulate commerce with foreign nations." *Id.*

205. *See Hostetter*, 377 U.S. at 332. The Court rejected the idea that the Twenty-First Amendment has somehow operated to repeal the Commerce Clause where the regulation of liquor is concerned. *Id.* at 331.

206. Craig v. Boren, 429 U.S. 190 (1976).

207. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996).

208. Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980).

209. Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984).

Clause until 1984, despite the Court's earlier statement in *Hostetter* that they were both part of the same Constitution.[210]

For instance, in *Craig v. Boren*[211] the Court held that the Twenty-First Amendment did not save a statute from an equal protection challenge.[212] The Court noted that where the Twenty-First Amendment ventures outside of the sphere of the Commerce Clause, the implications of the Amendment's relevance "to other constitutional provisions becomes increasingly doubtful."[213] The Court, emphasizing language from *Hostetter*, stated that the Twenty-First Amendment did not operate as a pro tanto repeal of the Commerce Clause; rather, each provision must be considered in light of the other.[214] Additionally, the Court found that the wording of Section Two of the Twenty-First Amendment closely follows the Webb-Kenyon and Wilson Acts.[215]

Another example of the Court's shift in analysis is *California Retail Liquor Dealers Ass'n v. MidCal Aluminum, Inc.*[216] The Court found in that case that the terms of Section Two did not free the states from the restrictions of the federal police power found in other provisions of the Constitution.[217] While subsequent decisions gave substantial deference to state liquor regulation, important federal interests survived the ratification of the Twenty-First Amendment.[218] Despite the grant of power to the states under Section Two and the lack of a bright-line test, the federal government still retained some Commerce Clause power over alcohol.[219] "The Twenty-[F]irst Amendment gran[ted] the states virtually complete control over whether to permit importation or sale of liquor and how to structure the liq-

210. *See* Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984).

211. 429 U.S. 190 (1976). *Craig* involved an Oklahoma statute that prohibited the sale of non-intoxicating 3.2% beer to males under the age of twenty-one and to females under the age of eighteen. *Id.* at 191–92. The question for the Court was whether this statute violated the Fourteenth Amendment. *Id.* at 192. The Court found that the statute invidiously discriminated against males eighteen to twenty old. *Id.* at 204.

212. *Id.* at 209.

213. *Id.* at 206.

214. *Id.*

215. *Id.* at 205–06. The Court points out that the reason for the similarity in wording is due to the framers' clear intention of placing the Commerce Clause framework established by those statutes into the Constitution. *Id.*

216. 445 U.S. 97 (1980). *Cal. Retail Liquor Dealers Ass'n* involved a California statute that required all wine producers and wholesalers to file fair trade contracts or price schedules with the state. *Id.* at 99. The Court held that the California pricing system violated the Sherman Act and that the Twenty-First Amendment does not prevent application of the Sherman Act. *Id.* at 114.

217. *Id.* at 108. The Court noted that the determination of state powers under the Twenty-First Amendment rested primarily on the language rather than the history behind it. *Id.* at 106–07 (citing *Young's Market*, 299 U.S. at 63–64).

218. *Cal. Retail Liquor Dealers Ass'n*, 445 U.S. at 108.

219. *Id.*

uor distribution system."[220] The Court, however, added that states may establish other liquor regulations but that "those controls may be subject to the federal commerce power."[221]

The Court next considered the Twenty-First Amendment in light of Federal Communications Commission regulations in *Capital Cities Cable, Inc. v. Crisp*.[222] The Court considered the conflict of an Oklahoma statute with the Federal Communications Commission regulations.[223] The Court held that the federal policies of regulating advertising outweighed the state interests of preventing advertising of alcohol.[224] The Court clarified the balancing test first hinted at in *Craig* and developed in *California Retail Liquor Dealers Ass'n*.[225] The states enjoy broad power under Section Two of the Twenty-First Amendment to regulate the importation and use of intoxicating liquor within their borders, but "the Amendment does not [allow] the States to ignore their obligations under other provisions of the Constitution."[226] When a state regulation conflicts with federal law and does not directly implicate the state's central power of regulation under the Twenty-First Amendment, the balance between state and federal power tips in favor of federal law.[227]

b. The Court creates the "core concerns" test

The balancing test of federal and state interest as it relates to federal law foreshadowed the Court's shift in interpretation of the relationship between the Twenty-First Amendment and the Commerce Clause.[228] This shift in interpretation occurred in *Bacchus Imports, Ltd. v. Dias*,[229] in which the

220. *Id.* at 110.

221. *Id.* While the Court may have unintentionally made this subtle distinction, it does not change the fact that it exists. *See id.* The Court explicitly granted the states absolute power over importation and distributing and stated that the Commerce power only comes into play in other types of liquor regulation. *Id.*

222. 467 U.S. 691 (1984). *Capital Cities Cable, Inc.* involved the prohibition by the Oklahoma Constitution and state statutes of advertising of alcoholic beverages. *Id.* at 695. The Oklahoma Attorney General in 1980 advised that the retransmission of out-of-state alcoholic beverage commercials on television systems operating in the state would be a violation of the ban. *Id.*

223. *Id.* at 698.

224. *Id.* at 716.

225. *Id.* at 712–13.

226. *Id.* at 712. (citing Ziffrin, Inc. v. Reeves, 308 U.S. 132 (1939); Larkin v. Grendel's Den, Inc., 459 U.S. 116, 122 n.5 (1982); Cal. v. LaRue, 409 U.S. 109, 115 (1972); Wis. v. Constantineau, 400 U.S. 433, 436 (1971); Dep't of Revenue v. James B. Beam Distilling Co., 377 U.S. 341, 345–46 (1964)).

227. *Id.* at 716.

228. *See* Patterson, *supra* note 129, at 780.

229. 468 U.S. 263 (1984).

Court created the "core concerns" test.[230] In that case, the Court, citing *Hostetter*,[231] stated "that the [Twenty-First] Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause."[232] The Court stated that the central purpose of Section Two "was not to empower States to favor local liquor industries by erecting barriers to competition."[233] The Court effectively created a balancing test: the federal interests implicated by the Commerce Clause and its negative implication, the Dormant Commerce Clause, against the state interests under the Twenty-First Amendment.[234] The Court stated the test as "whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-[F]irst Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies."[235]

In *Bacchus Imports*, a Hawaii excise tax on alcohol was challenged as facially discriminatory against out-of-state interests.[236] The tax applied to both in-state and out-of-state alcohol, but an exemption was available for certain Hawaiian alcoholic beverages.[237] The Court noted that the Hawaii Legislature enacted these exemptions solely to protect and encourage development of the Hawaiian liquor industry.[238] The state of Hawaii argued that the Twenty-First Amendment gave the states power to enact these discriminatory exemptions.[239] The Court first concluded that the tax scheme violated the Dormant Commerce Clause.[240] The Court then addressed whether the statute was "saved by the Twenty-[F]irst Amendment."[241] To make this determination, the Court found that the Dormant Commerce Clause protects federal interests in preventing economic "[b]alkanization."[242] The state side of this balancing test focused on the state's purpose of protecting and pro-

230. *Id.* at 275–76.

231. 377 U.S. 324 (1964). In *Hostetter*, the Court stated that in-state sales of intoxicating liquor intended to be used only in foreign countries could be made under the supervision of the Federal Bureau of Customs. *Id.* at 333–34. The state regulation was not aimed at preventing unlawful use of alcoholic beverages within the state, but rather was designed "totally to prevent transactions carried on under the aegis of a law passed by Congress in the exercise of its explicit power under the Constitution to regulate commerce with foreign nations." *Id.*

232. *Bacchus Imports*, 468 U.S. at 275.

233. *Id.* at 276.

234. *Id.*

235. *Id.* (citing *Capital Cities Cable, Inc.*, 467 U.S. at 714).

236. *Id.* at 265.

237. *Id.*

238. *Bacchus Imports*, 468 U.S. at 265.

239. *Id.* at 274.

240. *Id.* at 273.

241. *Id.* at 274–76.

242. *Id.* at 276.

moting the local liquor industry.[243] The Court found that the balance should shift to the federal interests in this type of case because economic protectionism is not a "core concern" of the Twenty-First Amendment.[244]

The Court's narrowing of state power under the Twenty-First Amendment continued in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*.[245] The problem with New York's law in *Brown-Forman* was the control of liquor prices in other states.[246] In that case, the Court conceded that the Twenty-First Amendment "gives the states wide latitude to regulate the importation and distribution of liquor within their territories," but that this power does not include the ability to regulate sales in other states.[247] The Court considered the same issue in *Healy v. Beer Institute*[248] and once again held that the Twenty-First Amendment did not "immunize state statutes from invalidation under the Commerce Clause [if the] laws have the practical effect of regulating sales in other states."[249]

By the time the Court decided *Healy*, all that remained was a concrete definition of a "core concern" of the Twenty-First Amendment that will "save the statute" under a *Bacchus Imports* analysis.[250] In *North Dakota v. United States*,[251] the Court upheld a North Dakota regulation because the regulation was enacted "[i]n the interest of promoting temperance, ensuing orderly market conditions and raising revenue."[252] The narrow construction of the Twenty-First Amendment left the states with the power to enact regulations concerning the importation of alcohol as long as the regulations satisfied the language in *North Dakota*.[253]

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243. *Id.* at 271.

244. *Bacchus Imports*, 468 U.S. at 276.

245. 476 U.S. 573 (1986). In *Brown-Forman*, a New York law required every liquor distiller or producer selling to wholesalers within the state to affirm that the prices it charged were no higher than the lowest price at which the same product would be sold in any other state during a particular month. *Id.* at 575–76.

246. *Id.*

247. TRIBE, *supra* note 86, at 1170.

248. 491 U.S. 324 (1989).

249. *Id.* at 342–43. *Healy* involved a Connecticut statute requiring out of state beer shippers to affirm that their posted prices for products sold to Connecticut wholesalers were no higher than the prices at which those same products were sold in states bordering Connecticut. *Id.* at 324.

250. *See generally* Miller, *supra* note 99, at 2544.

251. 495 U.S. 423 (1990). *North Dakota* involved a state regulation which required out-of-state liquor delivered to Air Force bases to be labeled and reported. *Id.* at 426.

252. *Id.* at 432. Nevertheless, the opinion was only a plurality opinion, and a review of the Congressional Record reveals limited history, if any at all, that these were considered "core concerns" when the Twenty-First Amendment was ratified. *See* 76 CONG. REC. 4171 (1933).

253. TRIBE, *supra* note 86, at 1169.

c. Recent Federal Legislation

Congress recently weighed in regarding the direct shipment issue by proposing the Twenty-First Amendment Enforcement Act.[254] The Act failed to clearly yield direct power to the states over alcohol.[255] Instead, the Act provided a federal forum for state attorneys general to seek injunctive relief against those violating state laws respecting importation or transportation of liquor.[256] Also, President George W. Bush recently signed legislation allowing the direct shipment of wine to a consumer during periods of heightened security if the consumer possessed the ability to directly carry the wine from the vineyard.[257] Nevertheless, the federal government's involvement suggests a potential conflict for any future federal legislation on direct shipment that could create an issue between a state's power under the Twenty-First Amendment and the Supremacy Clause of the Constitution.[258]

IV. REASONING

This section will trace in detail the reasoning of the Court in *Granholm* that led it to decide that both the New York and Michigan statutes were unconstitutional. The Supreme Court decided *Granholm* by first deciding that the New York and Michigan statutes discriminated against interstate commerce.[259] Next, the Court held that the Twenty-First Amendment failed to save the discrimination.[260] The Court discussed the history of state liquor regulations prior to the Twenty-First Amendment, the early history of the Twenty-First Amendment, and the modern Twenty-First Amendment cases.[261] Then, the Court further decided that New York and Michigan advanced legitimate local purposes with the direct shipment statutes but that these purposes could be served by reasonable, nondiscriminatory alterna-

254. Douglass, *supra* note 63, at 1654; *see* 27 U.S.C.A. 122a (West Supp. 2005).

255. 27 U.S.C. 122a(e)(2)(2000). *See also* Tracy Shimer Garman, Comment, *These Grapes Are Ripe for Pickin': A Respectful Limit on State Power to Regulate Importation of Wine Under the Twenty-First Amendment*, 57 SMU L. REV. 1555, 1569 (2004).

256. 27 U.S.C.A. 122a(b) (West Supp. 2005). *See* Garman, *supra* note 255, at 1569.

257. Department of Justice Appropriations Authorization Act, 27 U.S.C. § 124(a)(1), (5) (West Supp. 2005). The Act also requires that the purchaser of the wine "provided the winery verification of legal age to purchase alcohol;" "the shipping container in which the wine is shipped is marked to require an adult's signature upon delivery;" and "the wine is for personal use only" and "not for resale." 27 U.S.C. § 124(a)(2)–(4) (Supp. 2002); *see* Garman, *supra* note 250, at 1569.

258. Garman, *supra* note 255, at 1572.

259. *See* discussion *infra* Parts IV.A.1–2.

260. *See* discussion *infra* Part IV.B.

261. *See* discussion *infra* Parts IV.B.1–3.

tives.[262] Thus, the Court held that the Twenty-First Amendment does not grant states the power to avoid the Dormant Commerce Clause.[263]

A. The New York and Michigan Statutes Discriminate Against Interstate Commerce

1. *Michigan's System*

The Michigan distribution system allowed "in-state wineries to ship directly to consumers, subject only to a licensing requirement."[264] Meanwhile, out-of-state wineries were completely banned from direct shipping.[265] The system also required all out-of-state wine to pass through an in-state wholesaler and retailer before reaching the consumer while allowing in-state wine to bypass this restriction.[266] The extra steps required for out-of-state wine increased the cost of out-of-state wines.[267] The difference in cost, and sometimes the inability to secure an in-state wholesaler due to low production, could result in preventing small wineries from accessing the Michigan wine market.[268]

2. *New York's System*

The three-tiered system in New York did not ban direct shipments outright.[269] The New York system required the out-of-state winery to establish a distribution operation in New York to directly ship to consumers.[270] In-state wineries could obtain a license to ship directly to consumers.[271] Out-of-state wineries, however, had to establish a distribution operation in New York to obtain a license, and this extra step increased the cost of their wine.[272] The Court noted that the cost of establishing a "bricks-and-mortar" distribution operation is cost prohibitive in one state much less all fifty states.[273] The Court concluded that New York's requirement was contrary to

262. *See* discussion *infra* Part IV.C.
263. *See* discussion *infra* Part IV.C.
264. *Granholm*, 125 S. Ct. at 1896.
265. *Id.*
266. *Id.*
267. *Id.*
268. *Id.*
269. *Id.*
270. *Granholm*, 125 S. Ct. at 1896.
271. *Id.* at 1896–97.
272. *Id.* at 1897.
273. *Id.* The Court found that "[i]t comes as no surprise that not a single out-of-state winery has availed itself of New York's direct-shipping privilege." *Id.* The Court noted that no out-of-state winery has run the gauntlet of New York's regulatory scheme to gain access to the market. *Id.* at 1896.

the idea that an out-of-state firm be required "to become a resident in order to compete on equal terms."[274] The Court also acknowledged that New York discriminated against out-of-state wineries in other functions, such as "farm winery" licenses.[275] The Court had no difficulty in finding the New York regulations discriminated against interstate commerce.[276]

B. The Twenty-First Amendment Did Not Save the Discrimination

1. *The History of State Liquor Regulations Prior to the Twenty-First Amendment*

The Court discussed the history of state liquor regulations prior to the enactment of the Twenty-First Amendment.[277] The early case law, the Wilson Act, and the Webb-Kenyon Act were included in this historical account.[278] The Court concluded that the Webb-Kenyon Act failed to repeal the Wilson Act and that the Wilson Act did not allow states to discriminate against out-of-state goods.[279] Thus, the Court decided that, in order for states to discriminate against out-of-state goods, Congressional repeal of the Wilson Act was the first step.[280] The Court noted that the Wilson Act reaffirmed, and the Webb-Kenyon Act did not displace, the Court's early case law that required states to regulate domestic and imported liquor equally.[281]

2. *The Early History of the Twenty-First Amendment*

The Court next considered the case law construing the Twenty-First Amendment.[282] The Court concluded that the words of Section Two "restored to the states powers they had under the Wilson and Webb-Kenyon Acts"[283] and did not grant states power to discriminate against out-of-state goods.[284] Section Two's purpose "was to allow states to maintain an effec-

274. *Id.* at 1897 (citing Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64 (1963)).

275. *Id.* at 1897. A farm winery license allows for the most direct shipping to New York consumers. *Id.* Out-of-state wineries are only eligible for a commercial winery license. *Id.* Commercial wineries must obtain a separate certificate from the state allowing direct shipments, which, if the winery is from another state, requires a distribution operation to be set up in New York. *Id.*

276. *Graholm*, 125 S. Ct. at 1897.

277. *Id.* at 1899–1902.

278. *Id.*

279. *Id.* at 1901.

280. *Id.*

281. *Id.* at 1901–02.

282. *Graholm*, 125 S. Ct. at 1902.

283. *Id.*

284. *Id.*

tive and uniform system for controlling liquor by regulating its transportation, importation, and use."[285] Section Two denied states the authority to pass non-uniform laws to discriminate against out-of state goods.[286]

After deciding the purpose of Section Two of the Amendment, the Court proceeded to the early cases in which the Court had interpreted the Amendment.[287] The Court found that these early cases were inconsistent with the current view put forth by the Court and failed to take a full account of the history behind the Amendment.[288] These early cases reaffirmed the broad grant of power to the states under Section Two.[289] The Court recognized that *Young's Market*[290] did not even concern a question of discrimination prohibited by the Commerce Clause.[291] Also, the earlier Court declined to examine the underlying history of the Twenty-First Amendment.[292] The Court then proceeded to the modern case law.[293]

3. *The Modern Twenty-First Amendment Cases*

Previous decisions of the Court affirmed that the Twenty-First Amendment did not save "state laws that violated other provisions of the Constitution."[294] The Court in *Granholm* stated that Section Two did not abrogate Congress's commerce powers over liquor.[295] Finally, the Court noted the modern case law in which "the Court [] held that state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause."[296] The Court decided the final area of the modern case law as the most relevant to the Michigan and New York direct shipment regulatory systems.[297]

The Court, in light of the nondiscrimination principle, focused on *Bacchus Imports*.[298] According to the Court, *Bacchus Imports* "foreclose[d] any contention that [Section] Two of the Twenty-[F]irst Amendment immunizes

285. *Id.* at 1902.
286. *Id.*
287. *Id.*
288. *Graholm,* 125 S. Ct. at 1902.
289. *Id.*
290. 299 U.S. 59 (1936); *see* discussion *supra* Part III.D.1. and notes accompanying.
291. *Granholm*, 125 S. Ct. at 1903.
292. *Id.*
293. *Id.*
294. *Id.*
295. *Id.*
296. *Id.* The Court cited and discussed the modern cases, which included *Craig*, 429 U.S. 190; *Capital Cities Cable Inc.*, 467 U.S. 691; *Cal. Retail Liquor Dealers Ass'n*, 445 U.S. 97; and *Bacchus Imports*, 468 U.S. 263. *Granholm*, 125 S. Ct. at 1903–04.
297. *Granholm*, 125 S. Ct. at 1904.
298. *Id.*

discriminatory direct-shipment laws from Commerce Clause scrutiny."[299] The purpose of the Twenty-First Amendment "was not to empower States to favor local liquor industries by erecting barriers to competition."[300] The Court declined the invitation to either overrule or limit *Bacchus Imports*.[301] Furthermore, the Court felt that to retreat from *Bacchus Imports* would undermine *Brown-Forman* and *Healy*, both of which invalidated state liquor regulations under Commerce Clause principles.[302] The Court held that the Twenty-First Amendment protects only state policies that treat liquor produced out-of-state the same as liquor produced in-state.[303] The New York and Michigan laws were straightforward attempts to discriminate in favor of local producers.[304]

The Court dismissed the idea that its holding might undermine the three-tiered system of regulating the distribution of alcohol used by most states.[305] Instead, the Court pointed out that the Twenty-First Amendment accords states "virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system."[306] If a state were to ban the sale of alcohol, the state would thereby be permitted to ban its importation.[307] The Court pointed out that the state would have to ban the importation in order to effectuate its laws.[308] The Court reemphasized its decision in *North Dakota v. United States*, which upheld the three-tiered system as "unquestionably legitimate."[309]

C. The Court Held that the Twenty-First Amendment Does Not Grant States the Power to Avoid the Dormant Commerce Clause

The states offered two purposes for direct shipment regulations: preventing access to alcohol to minors and tax collection.[310] The Court found that the states lacked sufficient evidence to show that the direct shipment of

299. *Id.*
300. *Id.* (quoting *Bacchus Imports*, 468 U.S. at 276).
301. *Id.*
302. *Id.* (quoting *Bacchus Imports*, 468 U.S. at 276).
303. *Granholm*, 125 S. Ct. at 1905.
304. *Id.*
305. *Id.* at 1904–05.
306. *Id.* at 1905. (quoting Cal. Retail Liquor Dealers Ass'n, 445 U.S. at 110).
307. *Id.*
308. *Id.*
309. *Granholm*, 125 S. Ct. at 1905 (quoting North Dakota v. United States, 485 U.S. 423, 432 (1986)).
310. *Id.* at 1905. The other state justifications were "including facilitating orderly market conditions, protecting public health and safety, and ensuring regulatory accountability." *Id.* at 1907. These objectives could be achieved through an evenhanded licensing requirement. *Id.* at 1907.

wine would increase consumption by minors.[311] Also, the Court concluded that, even if the states could show evidence of an increase, restricting only *out-of-state* direct shipments would not sufficiently ameliorate the problem.[312] Thus, the Court held that preventing access by minors was not a sufficient reason for the regulatory prohibition on direct shipment.[313] Instead, the state could utilize less restrictive alternatives to curb access by minors, such as using the Model Direct Shipping Bill.[314]

Next, the Court dealt with the states' tax collection argument, which was also found to be insufficient.[315] The Court observed that Michigan did not rely upon wholesalers to collect taxes.[316] It further noted that the alternatives available, such as licensing and self-reporting, should be sufficient for direct shipment.[317] As for New York, the Court explained that the state could require a permit for direct shipment of wine by out-of-state wineries just as it does for in-state wineries as an alternative.[318] The Court also concluded that the federal regulations of alcohol, such as the loss of a federal license to operate issued by the Tax and Trade Bureau, would assist the states in tax collection.[319]

The Court decided that the states' power under the Twenty-First Amendment is broad.[320] Nevertheless, this power does not include the power to "ban, or severely limit, the direct shipment of out-of state wine while simultaneously authorizing direct shipment by in-state producers."[321] The Dormant Commerce Clause requires more than mere speculation to support discrimination against out-of-state goods.[322] The burden is on the state to show that the discrimination was demonstrably justified, which New York and Michigan failed to do in *Granholm*.[323]

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311. *Id.* at 1905.
312. *Id.* at 1905–06.
313. *Id.* at 1905.
314. *Id.* at 1906. The Model Direct Shipping Bill was developed by the National Conference of State Legislatures. *Id.* The Model Bill requires an adult signature upon delivery and a label on the package instructing to obtain an adult signature. *Id.*
315. *Granholm*, 125 S. Ct. at 1906.
316. *Id.*
317. *Id.*
318. *Id.*
319. *Id.*
320. *Id.* at 1907.
321. *Granholm*, 125 S. Ct. at 1907.
322. *See id.*
323. *Id.*

V. SIGNIFICANCE

The significance of the Court's decision in *Granholm* can be divided into two categories: (1) the Court's faulty decision placing state alcohol regulations under a Dormant Commerce Clause analysis despite the history surrounding the Twenty-First Amendment[324] and (2) the impact of the Court's decision regarding the economics of wine sales, the future of the three-tiered system, and the remaining options available to the states, including Arkansas.[325]

A. The Twenty-First Amendment Does Not Grant States the Power to Avoid the Dormant Commerce Clause Under *Granholm*

The Twenty-First Amendment granted states broad power over the regulation of alcohol.[326] *Granholm* ignores that grant and restores liquor regulation to a Dormant Commerce Clause analysis.[327] A state must now satisfy the Court's Dormant Commerce Clause jurisprudence in regulating direct shipments of alcohol, despite the legislative history of the Twenty-First Amendment suggesting alcohol be removed from Dormant Commerce Clause analysis.[328] The Court's interpretation of the legislative history of the Twenty-First Amendment, the Webb-Kenyon Act, and the Wilson Act undermines the legal precedent the Court establishes in *Granholm*.[329] Beginning with *Hostetter* and *Craig*, the Court began chipping away at state power under the Twenty-First Amendment as it related to provisions *other* than the Commerce Clause.[330] The Court did not apply Dormant Commerce Clause principles to state regulation of alcohol until *Bacchus Imports*.[331]

The decision in *Granholm* restricts state power further than the Court's decision in *Bacchus Imports*.[332] Recall that in *Bacchus Imports* the Court left open the chance for the state regulation to be "saved by the Twenty-First Amendment."[333] The chance for salvation was determined based upon

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324. *See* discussion *infra* Part V.A.

325. *See* discussion *infra* Parts V.B.1–2.

326. *See* discussion *supra* Part III.D.1.

327. *See* discussion *infra* Part IV.C.

328. *See* discussion *supra* Part IV.C. For a discussion of the legislative history see *supra* Part III.C.

329. *Granholm*, 125 S. Ct. at 1910 (Thomas, J., dissenting). Justice Thomas questioned the history of the majority's opinion and argued that the Court rejected such a historical account in *Young's Market*, 299 U.S. at 64. *Id.*

330. *See* discussion *supra* Part III.D.2.a.

331. *See* discussion *supra* Part III.D.2.b.

332. *See* discussion *supra* Part IV.B.3.

333. *See* discussion *supra* Part III.D.2.b.

the "core concerns" test established under *Bacchus Imports*.[334] The "core concerns" of the Twenty-First Amendment, according to the Court in *North Dakota*, included "temperance, orderly market conditions and revenue."[335] In *Granholm*, the Court foreclosed the option of salvation by the Twenty-First Amendment when the state seeks to employ the reasons of collection of tax revenue and protection of minors.[336] Even if the state uses these two reasons, the regulations will still remain subject to a Dormant Commerce Clause analysis.[337] Furthermore, the regulations will then fail under the Dormant Commerce Clause if they discriminate unevenly between out-of-state and in-state wineries.[338] The Twenty-First Amendment was designed to allow states to regulate alcohol without the constraints of the Dormant Commerce Clause.[339]

While the decision results in a favorable policy for wine connoisseurs and small wineries, the Court should not rewrite the Twenty-First Amendment on its own. Even though *Craig* and *Hostetter* stated that the Commerce Clause and the Twenty-First Amendment are to be read as part of the same Constitution, the Court did not decide that principle.[340] In fact that principle was merely dicta as neither case involved the Commerce Clause and the Twenty-First Amendment.[341] The Court's interpretation in *Granholm* creates the problem Justice Brandeis warned against: not a construction but a re-writing of the Amendment.[342] The Legislature writes the laws, not the Court. If the Court's desire was to return alcohol to a Dormant Commerce Clause analysis, then a Constitutional Amendment repealing the Twenty-First Amendment is appropriate.[343]

B. The Impact of the Court's Decision

1. *Wineconomics*

Economically, the decision might boost direct sales figures for alcohol. In *Granholm v. Heald*, the alcohol involved was wine. Wine, including chardonnays, merlots, pinot noirs, cabernet sauvignons, and many others,

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334. *See* discussion *supra* Part III.D.2.b.
335. North Dakota v. United States, 495 U.S. 423, 432 (1990).
336. *See* discussion *supra* Part IV.C.
337. *See* discussion *supra* Part IV.C.
338. *See* discussion *supra* Part III.B.
339. *See* discussion *supra* Part III.C.
340. *See* discussion *supra* Part III.D.2.a.
341. *See* discussion *supra* Part III.D.2.a.
342. *See* discussion *supra* Part III.D.1; *see also Young's Market*, 299 U.S. at 62.
343. It is possible that congressional legislation may be prevented by the Twenty-First Amendment itself; thus, only a Constitutional Amendment can alter the relationship of alcohol regulations and dormant Commerce Clause implication.

vary throughout the country, and a wine's qualities are as distinct as the region where it is produced. Yet, despite all the differences, one thing remains common to each: the public's desire. Wine sales alone account for over 18 billion dollars in sales in this country, while direct sales amount to about 350 million dollars.[344] Despite this 350 million dollar figure, the direct sales portion could potentially grow larger after the Court's decision in *Granholm*.

The Court's decision opens more markets to small wineries. This might enable these small wineries to earn greater profits and expand their business. The benefits of a larger market, however, bring about consequences. One potential effect on the wine market will be the rise in the number of competitors.[345] The competition, as a result of freedom of access to markets, might cause a consolidation effect on small wineries, thus resulting in a survival-of-the-fittest effect. This freedom of competition might benefit wine consumers.

2. *States' Dilemma: Ban All Direct Shipment, Allow Everyone Access or Possibly Lose the Three-Tiered System*

This section will first explain generally the options facing the states following the Court's decision in *Granholm*.[346] Next, the section will focus on a possible challenge to the three-tiered system as applied to wholesalers.[347] Finally, this section will discuss options specifically available to Arkansas following *Granholm*.[348]

a. Two options available to the states regarding direct shipments following *Granholm*

The States face two choices: ban direct shipment for both in-state and out-of-state alcohol or allow in-state and out-of-state direct shipments on equal terms. *Granholm* does not mandate that States permit direct shipments; it merely requires that the states apply the same rules to out-of-state direct shipments if in-state direct shipments are allowed by the states.[349] The

344. Linda Greenhouse, *Court Lifts Ban on Wine Shipping*, N.Y. TIMES, May 17, 2005, at A1. The number of wine sales has been reported as high as 21.6 billion. Tom Ramstack, *Limits on Sales of Wine Rejected Top Court Hits Interstate Bans*, WASH. TIMES (D.C.), May 17, 2005, at A01.

345. *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 378 (6th ed., Aspen Publishers 2003). Posner argues that "the removal of comprehensive regulation exposes the regulated firm to competition." *Id.*

346. *See* discussion *infra* Part V.B.2.a.

347. *See* discussion *infra* Part V.B.2.b.

348. *See* discussion *infra* Part V.B.2.c.

349. Eric Asimov, *The Pour; The Wine Store Just Got Bigger*, N.Y. TIMES, May 18,

Court's decision gives small winery owners, wine connoisseurs, and consumers cause to rejoice.[350] Yet, despite the cause to celebrate, the decision causes the erosion of the states' power to prevent direct shipments. The states retain the power to ban direct shipment altogether or allow it on equal terms.

Banning direct shipment altogether would harm in-state wineries as well as prevent access to out-of-state wineries. The elimination of a source of tax revenue from the in-state wineries discourages the states from an outright ban of direct shipment. That is not to say this is not an option. A few states already ban direct shipment outright to both in-state and out-of-state producers.[351] One solution available after *Granholm* is to create a licensing requirement whereby both in-state and out-of-state alcohol producers obtain a direct shipment license on the same terms. The state could regulate and recover taxes from both the in-state and out-of-state producers, thereby increasing tax revenue. In fact, the New York legislature began considering legislation to comply with the *Granholm* decision in which direct shipment would be allowed via the Internet.[352]

b. Possible challenge available to the three-tiered system as applied to wholesalers

The Court's decision results in sound policy, but the rationale used leaves the future of the three-tiered system in doubt.[353] Justice Thomas, dissenting in *Granholm*, argued that acceptance of the three-tiered system supports the principle that the Twenty-First Amendment freed states from Dormant Commerce Clause limitations.[354] If the Twenty-First Amendment does not allow states to escape Dormant Commerce Clause limitations on discriminatory direct shipment laws affecting manufacturers, then the following question remains: Can the three-tiered system remain legitimate when it discriminates against wholesalers? Thus, Justice Thomas's disagreement provides insight into a future problem—the downfall of the three-tiered system. The Court's distinction that there is a difference between discrimination against manufacturers and wholesalers does not fit with Dormant Commerce Clause principles that existed prior to the Twenty-

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2005, at F10.

350. *In Vino, Some Split Decision Veritas*, N.Y. TIMES, May 17, 2005, at A20.

351. For the number of these states see discussion *supra* Part III.A.; *see also* Douglass, *supra* note 62 (discussing a comprehensive listing and analysis of the different wine statutes).

352. Al Baker, *Plan to Let New York Use Web for Out-of-State Wine Has Some Toasting, but Others Stewing*, N.Y. TIMES, May 30, 2005, at B3.

353. *See* discussion *supra* Part V.B.1.

354. *Granholm*, 125 S. Ct. at 1921 (Thomas, J., dissenting).

First Amendment.[355] *Granholm* holds that states may not discriminate against out-of-state manufacturers without running afoul of the Dormant Commerce Clause; therefore, out-of-state wholesalers are owed the same protections. In fact, Justice Thomas warned that such discrimination against out-of-state wholesalers risks *constituting* "economic protectionism."[356]

Liquor must pass through licensed in-state wholesalers under the three-tiered system.[357] The Court, in dicta, conceded that this scheme is within the state's power under the Twenty-First Amendment.[358] Given the Court's reasoning in *Granholm*, however, that direct shipment laws discriminating against out-of-state manufacturers are unconstitutional, the discrimination against out-of-state wholesalers under the three-tiered system appears ripe for attack. The Court's reasoning in *Granholm* suggests that its strong language in *North Dakota* that the three-tiered system is "unquestionably constitutional" may no longer hold up. Manufacturers should attack the three-tiered system as specifically unconstitutional as applied to them under the Court's reasoning in *Granholm*. Either the Court must reverse *Granholm* to uphold the three-tiered system or force states to no longer discriminate in favor of in-state wholesalers. The removal of discriminatory laws against wholesalers would provide similar benefits to the wine and alcohol market as the benefits from the removal of discriminatory direct shipment laws.[359]

c. Options specifically available to Arkansas following *Granholm*

Arkansas' three-tiered distribution system, under the Court's decision in *Granholm*, discriminates against out-of-state wineries. Particularly important for the State of Arkansas is the recent Act 1806 of 2005.[360] The Act, which allows wine to be shipped directly to in-state customers that visit Arkansas wineries, discriminates against out-of-state wineries. There is no provision for out-of-state wineries to have the same access to the consumers of Arkansas.[361] Thus, what happens if an Arkansas resident visits an out-of-state winery and returns home to order a bottle from the out-of-state winery? The Act does not provide an answer to our dilemma faced at the beginning of this note. Yet, with the Court's decision in *Granholm,* the Act will

355. *Id.* at 1923.
356. *Id.* at 1924.
357. *See* discussion *supra* Part III.A.
358. *Granholm*, 125 S. Ct. at 1904–05. Perhaps the Court failed to see the implications of its holding in light of the discriminatory effect on wholesalers because that actual situation was not before them.
359. *See supra* Part V.B.1.
360. *See* discussion *supra* Part III.A.
361. *See* 2005 Ark. Acts 1806.

not survive a Dormant Commerce Clause inquiry. The Act will not survive because it discriminates against out-of-state wine producers for the benefit of in-state wine producers. Thus, following *Granholm*, the law is unconstitutional.

In order for the law to survive, Arkansas must show that the statute's purpose is justifiable in light of the discriminatory effects and that there are no other reasonably available, less discriminatory alternatives. The purpose of protecting in-state wineries from competition or favoring the local wine industry will not suffice. After *Granholm*, the protection of minors or the ability to collect revenue will not protect the statute. Thus, Arkansas faces the choice of either banning direct shipment entirely or allowing direct shipment on equal terms to out-of-state wineries and in-state wineries. The Legislature needs to amend the Act to either allow the same access for Arkansas consumers who visit out-of-state wineries or repeal the in-state law. This limitation by the Court on state power is precisely the outcome the Twenty-First Amendment was designed to prevent.

VI. CONCLUSION

Commerce between states according to the Constitution falls under congressional power. In the absence of an exercise of that power, the States are left to regulate so long as the regulations are done on equal terms. Yet, alcohol received special consideration following the Twenty-First Amendment. The Supreme Court finally decided in *Granholm* that the Twenty-First Amendment provides no such protection for state legislation that blatantly constitutes economic protectionism for in-state interests. The Court's decision results in sound policy and is favorable to the small wineries, wine connoisseurs, and consumers. Nonetheless, the decision does not rest on sound legal precedent, and it appears plausible that with a shift in members of the Court, this decision could change. The legal framework and the future of the three-tiered system following *Granholm* remains shaky at best. Thus, offer a toast to the Supreme Court for the recent decision allowing the direct shipment of wine, but beware the further restriction of a state's power that the precedent creates.

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