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STRETCHING THE TWENTY-FIRST AMENDMENT BEYOND ITS LIMIT: A CRITIQUE OF *S. WINE & SPIRITS OF AM., INC. v. DIV. OF ALCOHOL & TOBACCO CONTROL*

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STRETCHING THE TWENTY-FIRST AMENDMENT BEYOND ITS
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INTRODUCTION

The alcohol industry plays a strong role in American society and is responsible for over four hundred billion dollars in United States economic activity.¹ It is both directly and indirectly responsible for creating approximately four million jobs in the United States, paying wages totaling almost ninety million dollars, and contributing roughly forty-one million dollars to state and local taxes in 2010.² Of these numbers, the distilled liquor industry alone contributed to the creation of over one and a quarter million jobs, paid out almost twenty-nine million dollars in wages, and contributed fifteen and a half million dollars in state and local taxes.³ The United States is also the world's leader in wine consumption.⁴ In the United States, there exist more than six thousand operating wineries, and the total value of their annual sales was thirty billion dollars in 2010.⁵

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¹ *Economic Contribution of the Distilled Spirits Industry*, DISTILLED SPIRITS COUNCIL OF THE UNITED STATES, available at <http://www.discus.org/economics/>.

² *Economic Contribution of Alcohol Beverage Industry 2010*, DISTILLED SPIRITS COUNCIL OF THE UNITED STATES, available at <http://www.discus.org/assets/1/7/ContributionFactSheet.pdf>.

³ *Id.*

⁴ *2010 California/U.S. Wine Sales*, WINE INST. (Mar. 17, 2011), <http://www.wineinstitute.org/resources/pressroom/02222011> (noting that in 2010, United States surpassed France as the world's largest consumer of wine).

⁵ *Id.*; *Number of U.S. Wineries Continues to Grow*, WINE BUS. MONTHLY (Jan. 16, 2010), <http://www.winebusiness.com/news/?go=getArticle&dataId=70601> [hereinafter *Number of U.S. Wineries*] (noting that there were 6,223 wineries in the United States as of November 2009).

Given the substantial and ever-increasing⁶ role alcohol plays in the United States economy and its citizens' lives, this note will discuss the recent United States Court of Appeals for the Eighth Circuit holding in *S. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control*.⁷ Here, the Eighth Circuit held as constitutional a Missouri law that only allowed for the licensure of alcohol wholesalers incorporated in the State, and whose officers, directors, and majority of owners are residents for a minimum of three years.⁸ The Court held this "residency requirement" to be permitted under the dormant Commerce Clause and the Twenty-first Amendment of the United States Constitution.

Given that state restrictions on competition may adversely affect the overall alcohol market,⁹ which is a large contributor to the United States' economy, the Eighth Circuit's holding in *S. Wine* is of great importance. In Part I, the Eighth Circuit's holding and reasoning in *S. Wine* will be developed and discussed. Part II provides the historical backdrop of the Twenty-first Amendment as well as its precedential interplay with the dormant Commerce Clause. In Part III, the Supreme Court's most recent Twenty-first Amendment case, *Granholm*, will be analyzed and explained. In Part IV, it will be argued that the Eighth Circuit erroneously applied Supreme Court case law. Part IV will additionally point out the negative consequences and implications that could result from *S. Wine*, as well as analyze important issues that were mentioned, but not ruled on in that case.

⁶ See *Wine Consumption in the U.S.*, WINE INST. (Apr. 5, 2010), <http://www.wineinstitute.org/resources/statistics/article86>; *2010 California/U.S. Wine Sales*, WINE INST. (Mar. 17, 2011), <http://www.wineinstitute.org/resources/pressroom/02222011>.

⁷ *S. Wine & Spirits of Am., Inc. v. Div. of Alcohol & Tobacco Control*, 731 F.3d 799 (8th Cir. 2013).

⁸ *Id.*

⁹ See MKF RESEARCH, LLC, *The Impact of Wine, Grapes and Grape Products on the American Economy 2007*, at 15 (2007) [hereinafter *Impact on the Economy*], available at https://www.wineinstitute.org/files/mfk_us_econ_report07.pdf ("The continuing consolidation in the distribution sector makes it increasingly difficult for smaller wineries to gain access to the market, especially the national market."); Gina M. Riekhof & Michael E. Sykuta, *Regulating Wine by Mail*, REGULATION, Fall 2004, at 30–31 (discussing that between 1984 and 2002, the number of licensed liquor wholesalers in the United States dropped from 1,600 to fewer than 600).

I. THE EIGHTH CIRCUIT'S HOLDING IN *S. WINE**A. Factual Background*

Missouri funnels liquor sales through a four-tier system, separating the distribution market into discrete levels: the first tier consists of producers (e.g. brewers, distillers, winemakers);¹⁰ the second consists of solicitors that acquire alcohol from the producers and sell it “to, by or through” wholesalers;¹¹ the third tier is made up of wholesalers, who purchase alcohol from producers or solicitors and sell it to retailers;¹² and the fourth tier consists of retailers who sell alcohol to consumers.¹³

In Missouri, any individual or corporation who “manufacture[s], sell[s], or expose[s] for sale . . . intoxicating liquor” must first “tak[e] out a license.”¹⁴ To obtain a wholesaler license “for the sale of intoxicating liquor containing alcohol in excess of five percent by weight,” a corporation must be a “resident corporation.”¹⁵ Furthermore, to be a “resident corporation,” a corporation must be incorporated under the laws of Missouri, and all of its officers and directors must be “qualified legal voters and taxpaying citizens of the county . . . in which they reside” and have been “bona fide residents” of Missouri for at least three continuous years.¹⁶ In addition, “all the resident stockholders . . . shall own, legally and beneficially, at least sixty percent of all the financial interest in the business to be licensed under this law.”¹⁷ The residency requirement also contains a grandfather clause, which exempts corporations licensed as wholesalers as of January 1, 1947, or “any corporation succeeding to the business of [such] a corporation . . . as a result of a tax-free reorganization.”¹⁸ Only one nonresident corporation is licensed as a wholesaler in Missouri due to the grandfather clause.¹⁹

¹⁰ See MO. REV. STAT. § 311.180.1 (2011).

¹¹ MO. REV. STAT. § 311.180.2 (2011).

¹² See MO. REV. STAT. § 311.180.4 (2011).

¹³ See MO. REV. STAT. § 311.200 (2011).

¹⁴ See MO. REV. STAT. § 311.050 (2011).

¹⁵ See MO. REV. STAT. § 311.060.2(3) (2011).

¹⁶ MO. REV. STAT. § 311.060.3 (2011).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *S. Wine*, 731 F.3d at 803.

Southern Wine & Spirits of Missouri, Inc. (“SM”) applied for a license to sell liquor at wholesale in Missouri.²⁰ The Division of Alcohol and Tobacco Control of the Missouri Department of Public Safety (“the Division”) denied the application, because SM did not satisfy a residency requirement.²¹ This is because Southern Wine & Spirits of America (“SWSA”), a Florida corporation, is a “distributor of wine, spirits, beer, and various non-alcoholic beverages, with operations in 32 states and the District of Columbia.”²² “Four Florida residents own over 97 percent of SWSA’s voting shares and more than 51 percent of all shares. SM is incorporated in Missouri and is a wholly-owned subsidiary of SWSA. In July 2011, SM applied to the Division for a wholesaler-solicitor license.”²³

On its application, SM stated that its sole shareholder is SWSA, and that its officers and directors are Florida residents.²⁴ The Division denied SM’s application because SM failed to “qualify as a resident corporation” within the meaning of the statute.²⁵ The given corporation must not only become incorporated under the laws of Missouri, but also its officers and directors must be “qualified legal voters and taxpaying citizens of the county . . . in which they reside” and have been “bona fide residents” of Missouri for at least three continuous years immediately preceding an application for licensure.²⁶ SM, its parent company SWSA, and four individuals thereby challenged the constitutionality of this residency requirement.²⁷

B. The Purpose of Missouri’s Residency Requirement

The legislative history of Missouri’s Residency Requirement is scarce at best. On appeal, SM presented statements that were documented by two newspapers, which quoted the bill’s sponsor, Senator M.C. Matthes.²⁸ Here,

²⁰ *S. Wine*, 731 F.3d at 803.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ MO. REV. STAT. § 311.060.3 (2011).

²⁷ *S. Wine*, 731 F.3d at 802.

²⁸ *Id.*

Senator Matthes explained to the General Assembly floor that his bill was “intended to prevent a few big national distillers from monopolizing the wholesale liquor business in Missouri. . . .”²⁹ Two other news articles from 1947, submitted by Missouri’s own *amici*, only underscored the aforementioned protectionist intent. The first separately reported on the very same statement by Matthes.³⁰ The second quoted counsel for Missouri’s wholesalers, who stated the requirement, “protect[s] small businesses against huge corporations which threaten the small businessman in Missouri.”³¹ The news article also quotes a former state legislator who “attacked the bill’s constitutionality” and “said it was discriminatory.”³²

However, in looking to the plain language of the residency requirement, the chapter of the Missouri Code containing the Requirement includes a “purpose clause.” This purpose is “to promote responsible consumption, combat illegal underage drinking, and achieve other important state policy goals such as maintaining an orderly marketplace composed of state-licensed alcohol producers, importers, distributors, and retailers.”³³ However, this provision applied to the entire chapter rather than just the residency requirement, and was also enacted sixty years after the residency requirement was adopted.³⁴

1. Discriminatory-Intent Claim Waived

Unfortunately for SWSA et al., the Eighth Circuit deemed discriminatory-intent arguments waived on appeal, because Appellants failed to present the issue or pertinent evidence while at the trial level in front of the district court.³⁵ The Court was not inclined to consider this argument in its discretion for the first time on appeal.³⁶

²⁹ *S. Wine*, 731 F.3d at 807 (emphasis added).

³⁰ See *Donnelly Is Urged to Veto Liquor Bill*, JOPLIN GLOBE, May 10, 1947, available at <http://www.newspapers.com/newspage/38513306/>.

³¹ *Governor Hears Liquor Men Tell of Pressurizing*, JEFFERSON CITY DAILY CAPITAL NEWS, May 17, 1947, available at <http://www.newspapers.com/newspage/2816198/> (internal quotations omitted).

³² *Id.*

³³ MO. REV. STAT. § 311.015 (2011).

³⁴ *S. Wine*, 731 F.3d at 809.

³⁵ *S. Wine*, 731 F.3d at 807.

³⁶ *Id.* at 807–08.

Nonetheless, in an abundance of caution the Eighth Circuit stated several reasons why the SWSA's discriminatory-intent argument must fail. First, the only evidence of discriminatory intent was a newspaper article, which the court qualified as being "rank hearsay."³⁷ Second, the article only described one legislator's viewpoint, not the legislature as a whole.³⁸ Third, even assuming the viewpoint was representative of the entire state legislature, the law's assumed purpose of "prevent[ing] a few big national distillers from monopolizing the wholesale liquor business in Missouri" can be justified on permissible grounds, such as to promote social responsibility and public accountability among liquor wholesalers or to facilitate law enforcement.³⁹ The Court also pointed to the later-enacted "purpose clause" of the statute, which stated the aforementioned reasons for discriminating between in-state and out-of-state wholesalers.⁴⁰

2. *The Eighth Circuit's Approval of the Residency Requirement*

With the discriminatory-purpose claim waived, the Eighth Circuit went on to analyze whether a state may require a wholesaler to be an in-state resident. Quoting the Supreme Court of the United States, the Eighth Circuit wrote, "[s]tate policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent."⁴¹ Here, the Court continued, "the proper inquiry in a Commerce Clause challenge to a state liquor regulation asks 'whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies.'"⁴²

The Eighth Circuit held that States are permitted broad discretion in requiring "licensed in-state wholesalers"⁴³ given this is an inherent part of

³⁷ *S. Wine*, 731 F.3d at 808 (citing *Nooner v. Norris*, 594 F.3d 592, 603 (8th Cir. 2010)).

³⁸ *S. Wine*, 731 F.3d at 808.

³⁹ *Id.*

⁴⁰ *S. Wine*, 731 F.3d at 808–09 (quoting MO. REV. STAT. § 311.015 (2011)).

⁴¹ *S. Wine*, 731 F.3d at 808–09 (quoting *Granholm v. Heald*, 544 U.S. 460, 489 (2005)).

⁴² *S. Wine*, 731 F.3d at 809 (quoting *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 275–76 (1984)).

⁴³ *S. Wine*, 731 F.3d at 810 (quoting *Granholm*, 544 U.S. at 489).

the tier system, which is “unquestionably legitimate.”⁴⁴ The only caveat to this general statement is that in licensing a state wholesaler, a State must give equal treatment to in-state and out-of-state liquor products and producers.⁴⁵ Thus, finding Missouri indiscriminately limited the licensure of persons or businesses that meet its residency requirements, the law was found constitutionally permissible.⁴⁶

3. Missouri’s Residency Requirement Passed Rational Basis

With the Eighth Circuit having interpreted *Granholm* as providing Missouri’s residency requirement a “protected” status,⁴⁷ SM next argued that the constitutionality of the residency requirement in the wholesale-tier depends on a case-specific balancing of interests under the Commerce Clause and the Twenty-first Amendment.⁴⁸ Furthermore, SM contended that even if there were a bright-line rule established by *Granholm* for the wholesale tier, this only concerned “inherent” or “integral” aspects of the tier system, which do not intrude upon the residency requirement.⁴⁹ To this end, for the residency requirement to be constitutionally permissible, a rational basis for the requirement must be found.

SM maintained that the State’s assertion of legitimate interests were undermined by the deposition testimony of a deputy state supervisor for the Division, who was designated to testify on behalf of the Division.⁵⁰ This deputy supervisor testified that he did not “think” the residency rule “impacts the distribution system,” because “we have a three-tier system of distribution,” and residency “doesn’t affect the distribution.”⁵¹ Furthermore, he agreed that allowing Southern Wine to be a licensed wholesaler would not erode the tier system or do anything to the current system because one non-resident corporation was already licensed due to the grandfather

⁴⁴ *S. Wine*, 731 F.3d at 808.

⁴⁵ *Id.*

⁴⁶ *Id.* at 808–09.

⁴⁷ *Id.* at 810.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *S. Wine*, 731 F.3d at 811.

⁵¹ *Id.*

provision.⁵² Last, wholesalers also have “little impact upon” the “direct sale” of alcohol to minors, and that he could not “think of any” relationship between the residency requirement and the safety of Missouri citizens.⁵³

The Eighth Circuit rejected SM’s argument under the rational basis test. First, the Court reasoned “[t]here is no archetypal three-tier system from which the ‘integral’ or ‘inherent’ elements of that system may be gleaned. . . .”⁵⁴ Second, even if there was such an archetype, *Granholm* cited the “in-state wholesaler” in connection with the very sentence, affirming that “the three-tier system itself is unquestionably legitimate.”⁵⁵ Thus, the Court concluded that in-state wholesalers are an “integral” part of the tier system, which are *per se* valid.⁵⁶

Nonetheless, in an abundance of caution, the Eighth Circuit went on to reason that even if Missouri’s residency requirement did not enjoy a “protected” status under *Granholm*, the Missouri law would pass a rational basis test.⁵⁷ One rational basis the legislature could legitimately believe for making the requirement is that

a wholesaler governed predominantly by Missouri officers, directors, and owners are residents of the community and thus subject to negative externalities—drunk driving, domestic abuse, underage drinking—that liquor distribution may produce . . . are more likely to respond to concerns of the community, as expressed by their friends and neighbors whom they encounter day-to-day in ballparks, churches, and service clubs.⁵⁸

Additionally the legislature could conclude the requirement helps facilitate law enforcement against wholesalers because it is easier to pursue in-state owners, directors, and officers, as opposed to out-of-state ones.⁵⁹

⁵² *S. Wine*, 731 F.3d at 811.

⁵³ *Id.*

⁵⁴ *Id.* at 810.

⁵⁵ *Id.* at 801 (quoting *Granholm*, 544 U.S. at 489).

⁵⁶ *S. Wine*, 731 F.3d at 801. The Court also cited *Brooks v. Vassar*, 462 F.3d 341, 352 (4th Cir. 2006) (“[A]n argument that compares the status of an in-state retailer with an out-of-state retailer—or that compares the status of any other in-state entity under the three-tier system with its out-of-state counterpart—is nothing different than an argument challenging the three-tier system itself. . . . [T]his argument is foreclosed by the Twenty-first Amendment and the Supreme Court’s decision in *Granholm*[.]”).

⁵⁷ *S. Wine*, 731 F.3d at 810–11.

⁵⁸ *S. Wine*, 731 F.3d at 811.

⁵⁹ *Id.*

While the Court noted that the deputy state supervisor “did not mount the most vigorous defense of Missouri’s law,” the witness did not disclaim the possibility that Missouri’s residency requirement furthers some of the interests asserted by the State. First, many of his comments were couched in his own knowledge and thoughts about the matter.⁶⁰ Second, his remarks to some questions were directed at the impact of licensing SM alone, not at the effects of the licensing of unlimited out-of-state wholesalers.⁶¹ Lastly, some of the deputy supervisor’s testimony offered support for the Division’s asserted interest in ensuring community responsibility: “Some wholesalers do get involved in community action committees and things like that. So some of them do get involved in anti-drinking campaigns with various coalitions.”⁶² He also testified that the requirement “may serve” the State’s interest in promoting temperance, just “not as much as it used to.”⁶³

As for the grandfather clause and the one non-resident “grandfathered” wholesaler in Missouri, the Court held these did not undercut a rational basis for the residency requirement.⁶⁴ The Court reasoned that Missouri’s legislature in 1947 could have reasonably chosen to incrementally address the perceived ills targeted by the residency requirement and to accommodate preexisting business interests while keeping the floodgates closed.⁶⁵ The deputy director admitted that dealing with the nonresident wholesaler was sometimes difficult, but even absent a negative effect from the single nonresident wholesaler, this did not preclude the possibility that unlimited nonresident wholesalers could still pose a threat to legitimate state interests.⁶⁶

SM attempted to argue that the durational residency requirement of three years does not meet a rational basis. However, the Eighth Circuit deemed this argument waived because it was not developed in the district court or the opening brief on appeal.⁶⁷ Furthermore, because SM’s officers, directors, and a super-majority of its shareholders are not current residents

⁶⁰ *S. Wine*, 731 F.3d at 811.

⁶¹ *Id.*

⁶² *Id.* at 812.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *S. Wine*, 731 F.3d at 812.

⁶⁶ *Id.*

⁶⁷ *Id.*

of Missouri, the court refused to discuss the matter since no matter what the durational requirement may have been, no redress could take place.⁶⁸

II. THE TWENTY-FIRST AMENDMENT AND THE DORMANT COMMERCE CLAUSE

As demonstrated in *S. Wine*, the central issue of lawsuits involving a state's regulation of liquor is the tensions created by the Commerce Clause and the Twenty-first Amendment of the United States Constitution.⁶⁹ For the purpose of setting out a background so as to better analyze the Eighth Circuit's holding and reasoning, Part II(A) discusses the history of the Twenty-first Amendment and the subsequent adoption of the three-tier distribution system by the States. Part II(B) will then explain the function of the Commerce Clause and the "dormant" restrictions it places upon state regulation. Lastly, Part II(C) will discuss the Supreme Court's precedential trend of more narrowly interpreting § 2 of the Twenty-first Amendment as being subject to the dormant Commerce Clause.

A. History of the Twenty-First Amendment and the Tiered Distribution System

As drafted, the Eighteenth Amendment of the United States Constitution sought to prohibit "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."⁷⁰ Yet, a catastrophic byproduct of the Prohibition was that illegal liquor trade flourished via illegal manufacturing and smuggling operations, which in turn resulted in the formation of crime syndicate operations.⁷¹ What is more, the rise of black markets and lost tax

⁶⁸ *S. Wine*, 731 F.3d at 812.

⁶⁹ See U.S. CONST. art. I, § 8, cl. 3; *id.* amend. XXI; *Granholm*, 544 U.S. at 471 (identifying the central issue of the case as whether liquor regulations "violate[d] the dormant Commerce Clause in light of § 2 of the Twenty-first Amendment").

⁷⁰ U.S. CONST. amend. XVIII, § 1, *repealed by* U.S. CONST. amend. XXI.

⁷¹ RICHARD MENDELSON, FROM DEMON TO DARLING: A LEGAL HISTORY OF WINE IN AMERICA 80–85 (2009).

revenues from the legitimate liquor trade exacerbated an already depressed economy.⁷²

Given these unintended consequences, Congress repealed the Prohibition via the Twenty-first Amendment,⁷³ and since the Twenty-first Amendment's enactment virtually every state has adopted a three-tier distribution system.⁷⁴ The three-tier distribution system provides a framework in which alcohol producers (brewers) can only sell their products to wholesalers.⁷⁵ Wholesalers, in turn, can only sell to retailers, who are finally able to sell to consumers.⁷⁶

The idea behind creating a three-tier system was to separate the “production” end from the “selling” end of the industry in order to curtail bootlegging.⁷⁷ While there exists mixed criticism of the three-tier system, the Supreme Court has expressed that such is a valid exercise of state authority, which functions “[i]n the interest of promoting temperance, ensuring orderly market conditions, and raising revenue, the State has established a comprehensive system for the distribution of liquor within its borders.”⁷⁸ On a number of occasions, the Supreme Court of the United States noted that the tiered distribution system is an “unquestionably legitimate” use of the state’s regulatory power.⁷⁹

B. Dormant Commerce Clause

The Constitution expressly grants Congress the authority to “regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”⁸⁰ While the Commerce Clause does not explicitly prohibit certain State conduct and grants specific powers to Congress, the Clause

⁷² See generally Donald J. Boudreaux & A.C. Pritchard, *The Price of Prohibition*, 36 ARIZ. L. REV. 1 (1994).

⁷³ U.S. CONST. amend. XXI § 1; *Granholm*, 544 U.S. at 488.

⁷⁴ Andrew Tamayo, *What's Brewing in the Old North State: An Analysis of the Beer Distribution Laws Regulating North Carolina's Craft Breweries*, 88 N.C. L. REV. 2198, 2201 (2010).

⁷⁵ *Id.* at 2200–01.

⁷⁶ *Id.*

⁷⁷ Russ Bridenbaugh, *The 3-Tier System: Is Anyone Happy?*, WINES & VINES (Apr. 2002), <http://www.highbeam.com/doc/1G1-85242685.html> (last visited Nov. 13, 2013).

⁷⁸ *N.D. v. United States*, 495 U.S. 423, 432 (1990).

⁷⁹ See, e.g., *Granholm*, 544 U.S. at 489 (quoting *N.D.*, 495 U.S. at 432).

⁸⁰ U.S. CONST. art. I, § 8, cl. 3.

has been read by the Supreme Court as implying a substantive constraint on the power of states to interfere with interstate commerce (“dormant” Commerce Clause).⁸¹ The Court has understood this interpretation as promoting the Commerce Clause’s purpose of preventing a state from retreating into economic isolation and thereby jeopardizing the welfare of the nation’s commerce as a whole.⁸² Thus, the Commerce Clause reflects a central concern of the Constitution’s framers that was an immediate motive for calling the Constitutional Convention, namely to avoid the tendencies toward economic Balkanization that had hampered symbiosis.⁸³

Given the backdrop of the Commerce Clause, the Supreme Court of the United States has held that a state may not discriminate against interstate commerce in either effect or in purpose.⁸⁴ Such discriminatory laws, presumed to be motivated by “simple economic protectionism,” face a “virtually per se” rule of invalidity.⁸⁵ At a minimum, a state’s discriminatory law will be analyzed under a strict scrutiny standard.⁸⁶ Thus, a discriminatory law in purpose⁸⁷ or effect will be held invalid unless it both serves a legitimate local purpose that cannot adequately be served by reasonable “nondiscriminatory alternatives.”⁸⁸ Yet, absent a discriminatory policy in purpose or clear effect, a statute that “only incidentally” burdens interstate commerce will “violate the Commerce Clause only if the burdens they impose on interstate trade are ‘clearly excessive in relation to the putative local benefits.’”⁸⁹

⁸¹ See, e.g., *Or. Waste Sys. v. Dep’t of Envtl. Quality*, 511 U.S. 93, 98 (1994) (“[T]he [Commerce] Clause has long been understood to have a ‘negative’ aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce.”).

⁸² *Okla. Tax Com’n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179–80 (1995).

⁸³ *Wardair Canada, Inc. v. Fla. Dep’t of Revenue*, 477 U.S. 1, 7 (1986) (citing *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979)).

⁸⁴ See *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (citing *Hughes*, 441 U.S. at 336).

⁸⁵ *Phila. v. N.J.*, 437 U.S. 617, 624 (1978) (striking down discriminatory waste management rule).

⁸⁶ *Hughes*, 441 U.S. at 337.

⁸⁷ *McCreary County, Ky. v. American Civil Liberties Union of Ky.*, 545 U.S. 844 (2005) (stating that the examination of statutory purpose may be relevant for deciding whether State regulatory conduct is discriminatory in nature).

⁸⁸ See *Taylor*, 477 at 151–52 (holding that a state’s public health interest in keeping diseased fish out of its waters was a rare example of legitimate local purpose that could not be served by nondiscriminatory means).

⁸⁹ See *id.* at 138 (quoting *Pike v. Bruch Church, Inc.*, 397 U.S. 137, 142 (1970)).

C. History of the Twenty-First Amendment's Interaction with the Commerce Clause

Given the limitations placed upon a state's regulatory powers by the dormant Commerce Clause, absent a constitutional provision, alcohol is to be treated as any other article of commerce and subordinated to the right of free trade across state lines.⁹⁰ However, matters were complicated with the enactment of the Twenty-first Amendment, in which § 2 reads, "[t]he 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."⁹¹ The meaning of § 2 of the Twenty-first Amendment has proven historically elusive and much debate has ensued with regard to its purpose and meaning.⁹²

Looking to the language of § 2 of the Twenty-first Amendment, the Supreme Court originally held that the amendment carved out an exception to the dormant Commerce Clause, whereby states were permitted to discriminate in interstate commerce for alcohol.⁹³ Yet, by 1964, the Supreme Court substantially restrained the Court's original reading of the Twenty-first Amendment.⁹⁴ Here, the Court rejected as "an absurd oversimplification" the notion that states should be given full deference under the Twenty-first Amendment.⁹⁵ Noting that "both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution[.]" the Court held that "each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case."⁹⁶

⁹⁰ See, e.g., *Bowman v. Chi. & Nw. Ry. Co.*, 125 U.S. 465, 500 (1888) (holding Iowa law requiring permits for liquor importers unconstitutional).

⁹¹ U.S. CONST. amend. XXI, § 2.

⁹² See Sidney J. Spaeth, Comment, *The Twenty-First Amendment and State Control over Intoxicating Liquor: Accommodating the Federal Interest*, 79 CALIF. L. REV. 161, 180–81 (1991) (noting that the meaning of Section 2 is "incapable of precise divination" because congressional debate was ambiguous and there was no discussion at ratification conventions).

⁹³ See, e.g., *Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395, 398 (1939) (upholding retaliatory boycotts); see also *State Bd. of Equalization of Cal. v. Young's Mkt. Co.*, 299 U.S. 59, 64 (1936), abrogated by *Granholm*, 544 U.S. 460 (upholding discriminatory licensing fee).

⁹⁴ *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 333–34 (1964).

⁹⁵ *Id.* at 331–32.

⁹⁶ *Id.* at 332.

A result of the Supreme Court's restrained reading was that several state alcohol laws were struck down for violating federal law or for being unconstitutional.⁹⁷ Yet, the current test used for analyzing a state's regulation of alcohol was not laid out until 1984, in the Supreme Court decision *Bacchus Imports Ltd. v. Dias*.⁹⁸ In *Bacchus*, the Court held that for a discriminatory state law to prevail against the dormant Commerce Clause, it must be designed to promote a "central purpose" of the Twenty-first Amendment.⁹⁹ Unfortunately, the *Bacchus* Court did not articulate this purpose.¹⁰⁰

D. Current Approach to the Twenty-First Amendment: Granholm v. Heald

In 2005, the Supreme Court of the United States in *Granholm v. Heald*¹⁰¹ shed some light on how the Twenty-first Amendment interacts with the dormant Commerce Clause. *Granholm* dealt with two states, New York and Michigan, which enacted statutes limiting which wineries could ship alcohol directly to consumers within each state's borders. Michigan's statute was discriminatory on its face.¹⁰² Simply put, Michigan completely banned out-of-state wineries from directly shipping to consumers within its borders while allowing in-state wineries to do so as long as they had acquired the proper license.¹⁰³

However, the New York law at issue in *Granholm* was more complex given that it was not explicitly discriminatory in purpose. The New York law required *all* wineries to obtain a license with the State before they could legally ship wine directly to customers in the state of New York. However,

⁹⁷ See, e.g., *United States v. State Tax Comm'n of Miss.*, 412 U.S. 363 (1973) (striking down a Mississippi attempt to prevent a U.S. military base within its borders from obtaining cheaper alcohol out-of-state).

⁹⁸ See *Bacchus Imports, Ltd.*, 468 U.S. at 276; see also Kevin C. Quigley, Note, *Uncorking Granholm: Extending the Nondiscrimination Principle to All Interstate Commerce in Wine*, 52 B.C. L. REV. 1871, 1907 (2011).

⁹⁹ *Bacchus Imports, Ltd.*, 468 U.S. at 275–76.

¹⁰⁰ *Id.*; see also Quigley, *supra* note 98, at 1881.

¹⁰¹ *Granholm*, 544 U.S. 460.

¹⁰² *Id.*

¹⁰³ *Id.* at 473–74.

as the Court pointed out, to become a licensee a winery must have a physical presence in the state.¹⁰⁴

The Supreme Court of the United States first held the Michigan law as unconstitutional. Here, the premise of the Court's holding was simple: "[S]tate regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause."¹⁰⁵ Thus, reiterating the Court precedent that "[t]he central purpose of [§ 2 of the Twenty-first Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition,"¹⁰⁶ the Court held both states' statutes as unconstitutional.¹⁰⁷ Furthermore, while the Court called the three-tier system "unquestionably legitimate,"¹⁰⁸ this statement was qualified, and it pertained only to situations where States "treat liquor produced out-of-state the same as its domestic equivalent."¹⁰⁹

However, unlike the Michigan law, New York's license requirement was at least neutral on its face. As New York argued, under its law, "an out-of-state winery has the same access to the State's consumers as in-state wineries: All wine must be sold through a licensee fully accountable to New York; it just so happens that in order to become a licensee, a winery must have a physical presence in the State."¹¹⁰ Nonetheless, the Supreme Court rejected this argument, stating that the law not only "grants in-state wineries access to the State's consumers on preferential terms[,]"¹¹¹ but also that "New York's in-state presence requirement runs contrary to our admonition that States cannot require an out-of-state firm 'to become a resident in order to compete on equal terms.'"¹¹²

Given the discriminatory nature of the contested laws, which violated the dormant Commerce Clause, the Court then inquired as to whether the Twenty-first Amendment could save them.¹¹³ Here, to be held

¹⁰⁴ *Granholm*, 544 U.S. at 474.

¹⁰⁵ *Id.* at 487.

¹⁰⁶ *Id.* (quoting *Bacchus Imports, Ltd.*, 468 U.S. at 276).

¹⁰⁷ *Granholm*, 544 U.S. at 489.

¹⁰⁸ *Id.* (quoting *N.D.*, 495 U.S. at 432 (1990)).

¹⁰⁹ *Granholm*, 544 U.S. at 489.

¹¹⁰ *Id.* at 474.

¹¹¹ *Id.*

¹¹² *Id.* at 475 (quoting *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 72 (1963)).

¹¹³ *Granholm*, 544 U.S. at 489 (quoting *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269, 278 (1988)).

constitutional, both laws must “advance[] a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.”¹¹⁴ The two legitimate local purposes advanced by New York and Michigan were keeping alcohol out of the hands of minors and facilitating tax collection.¹¹⁵ Yet, both of these purported purposes failed to satisfy the Court’s requirement that the “clearest showing” must justify the discriminatory regulation.¹¹⁶ Looking to an FTC report and noting minors could just as easily order from in-state wineries, the Court held the first justification to fail strict scrutiny.¹¹⁷ Furthermore, the justification of facilitating tax collection failed strict scrutiny given that not only did there exist alternative nondiscriminatory means for achieving the objective, but also because in-state direct shipping posed a high potential for tax evasion as well.¹¹⁸

III. ANALYSIS OF THE EIGHTH CIRCUIT’S HOLDING IN *S. WINE*

While the Eighth Circuit in *S. Wine* concluded that Missouri was permitted to have a residency requirement, and that SM did not have standing to challenge the law’s durational requirement, the case nonetheless brings up important questions of law. First, whether requiring a company’s shareholders, officers, and executive to live in Missouri if they wish to do business in the state, is permissible under the dormant Commerce Clause. Second, whether a state can additionally require that company’s shareholders, officers, and executives to then stay in the state for at least three years and then remain there if they wish to gain and keep their license to sell alcohol. Last, whether a state’s discretion in implementing its three-tier distribution system is truly “protected” and need only pass a rational basis test, unconditionally. In this portion of the paper, it will be argued that these questions must be answered in the negative.

¹¹⁴ *Granholm*, 544 U.S. at 489.

¹¹⁵ *Id.* at 489, 493 (reiterating that States must regulate alcohol “on even-handed terms.”).

¹¹⁶ *Id.* at 490 (quoting *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 393 (1994)).

¹¹⁷ *Granholm*, 544 U.S. at 490.

¹¹⁸ *Id.* at 491.

A. Limits on a State's Regulatory Power with Regard to Alcohol

As discussed in Part III, the Commerce Clause serves the purpose of preventing States from retreating into economic isolation and Balkanization,¹¹⁹ which would jeopardize the welfare of the nation's commerce as a whole.¹²⁰ The Twenty-first Amendment did not draw an exception to this purpose,¹²¹ nor did it allow states to pass discriminatory laws dealing with alcohol, either in purpose or effect. For this reason, in *Bacchus*, the Twenty-first Amendment could not salvage a state law, which discriminatorily regulated alcohol.¹²² It is for this reason that states cannot use the three-tier distribution system as a means to negotiate which out-of-state entities can sell alcohol in their state,¹²³ nor can a state add extra burdens onto out-of-state wineries to have a physical presence within the state.¹²⁴ Nor does the Twenty-first Amendment allow states to promote locally grown and produced alcohols over other out-of-state sourced alcohols,¹²⁵ or fix the beer prices for out-of-state shippers based on surrounding state market prices.¹²⁶

The residency requirement involved in *S. Wine* pushes the limits as to how far a State may take its “unquestionably legitimate”¹²⁷ power to regulate alcohol and require “licensed in-state wholesalers”¹²⁸ within its

¹¹⁹ *Wardair Canada, Inc. v. Fla. Dep't of Revenue*, 477 U.S. 1, 7 (1986) (citing *Hughes*, 441 U.S. at 325).

¹²⁰ *Okla. Tax Com'n*, 514 U.S. at 179–80.

¹²¹ *Granholm*, 544 U.S. at 487 (quoting in part *Brown—Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573, 579 (1986)) (“[This] Court has held that state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause. . . . ‘When a state statute directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry.’”).

¹²² *Granholm*, 544 U.S. at 490.

¹²³ *Id.* at 472 (“The rule prohibiting state discrimination against interstate commerce follows also from the principle that States should not be compelled to negotiate with each other regarding favored or disfavored status for their own citizens. States do not need, and may not attempt, to negotiate with other States regarding their mutual economic interests. *Cf.* U.S. CONST. art. I, § 10, cl. 3. Rivalries among the States are thus kept to a minimum, and a proliferation of trade zones is prevented.”).

¹²⁴ *Id.*

¹²⁵ *Bacchus Imports, Ltd.*, 468 U.S. at 276.

¹²⁶ *Healy v. Beer Inst., Inc.*, 491 U.S. 324 (1989).

¹²⁷ *Healy*, 491 U.S. at 808 (quoting *Granholm*, 544 U.S. at 489).

¹²⁸ *S. Wine*, 731 F.3d 799 (quoting *Granholm*, 544 U.S. at 489).

borders. Indeed, the Eighth Circuit's analysis is likely flawed. *Granholm*, in striking down the New York law as unconstitutional, clearly stood for the principle that even though a state may "require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler[.]"¹²⁹ this does not mean it can do so if it would burden the out-of-state entity in a way that does not affect an in-state entity.¹³⁰

Save for requiring all alcohol wholesalers to become incorporated in Missouri, Missouri's residency requirement is much like the New York law involved in *Granholm*. The law, although uniformly applied to Missourians and non-Missourians alike, places a much higher burden on out-of-state residents to compete in the State's alcohol market. Additionally, Missouri's residency requirement creates less barriers to cross so as to qualify for an alcohol license. For instance, an out-of-state person applying for a license faces moving costs and the buying of property or rent that they would not otherwise have to deal with, and an in-state applicant will always be able to obtain a license before its out-of-state counterpart. What is more, Missouri's law also places on out-of-state businesses the burden to move a large percentage of its shareholders to Missouri, make them residents, and keep them there for at least three years.¹³¹

B. The Residency Requirement Applied Universally

In *Granholm*, the Supreme Court explained that States may not implement protectionist policies or even enter into negotiated interstate agreements because "[r]ivalries among the States are thus kept to a minimum, and a proliferation of trade zones is prevented."¹³² It was for this

¹²⁹ *N.D.*, 495 U.S. at 432 (Scalia, J., concurring). Interestingly, Scalia's concurrence and language is found in a plurality decision with four justices writing the main opinion, Justice Scalia writing a sole concurrence, and the other four justices concurring in part and dissenting in part, which was written Justice Kennedy, Marshall, Blackmun, and Brennan. Justice Kennedy, Marshall, Blackmun, and Brennan did not join Justice Scalia's concurrence.

¹³⁰ *Granholm*, 544 U.S. at 487.

¹³¹ All officers and directors must be "qualified legal voters and taxpaying citizens of the county . . . in which they reside" and have been "bona fide residents" of Missouri for at least three years. MO. REV. STAT. § 311.060.3 (emphasis added). "[A]ll the resident stockholders . . . shall own, legally and beneficially, at least sixty percent of all the financial interest in the business to be licensed under this law." MO. REV. STAT. § 311.060.3.

¹³² *Granholm*, 544 U.S. at 472.

very reason, in *Healy v. Beer Inst., Inc.*, the Supreme Court held unconstitutional a State law which fixed the price of beer sold in-state by out-of-state shipping companies to that of the price found in adjacent states.¹³³ Utilizing a common-sense test for helping to determine whether State alcohol regulation violated the Commerce Clause, the Court explained:

the practical effect of the statute must be evaluated not only by considering the consequences of the statute itself, but also by considering how the challenged statute may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation. Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the protection of one state regulatory regime into the jurisdiction of another State.¹³⁴

If Missouri is constitutionally permitted to require all officers and directors of the company to be long-term residents of the state, then every state is allowed to pass similar legislation.¹³⁵ Taken to its logical extreme, we enter a parade of horrors. Missouri's residency requirement, in effect, requires out-of-state persons to permanently move to Missouri if they wish to gain license to wholesale alcohol in that state. Yet, if every state were to enact a similar law to Missouri's residency requirement, that would mean alcohol wholesalers could never gain license in more than one state. Furthermore, even if a given wholesale corporation wished to move, they would also have to wait at least three years before they could gain a new license.

This potential problem is not detached from reality. In *Granholm*, the Court discussed how, as of 2005, there were 13 states that had "reciprocity laws, which allow direct shipment from wineries outside the State, provided the State of origin affords similar nondiscriminatory treatment."¹³⁶ The Court explained,

The perceived necessity for reciprocal sale privileges risks generating the trade rivalries and animosities, the alliances and exclusivity, that the Constitution and, in particular, the Commerce Clause were designed to avoid. State laws that

¹³³ *Healy*, 491 U.S. at 336–37.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Granholm*, 544 U.S. at 467–68.

protect local wineries have led to the enactment of statutes under which some States condition the right of out-of-state wineries to make direct wine sales to in-state consumers on a reciprocal right in the shipping State. California, for example, passed a reciprocity law in 1986, retreating from the State's previous regime that allowed unfettered direct shipments from out-of-state wineries. Prior to 1986, all but three States prohibited direct shipments of wine. The obvious aim of the California statute was to open the interstate direct-shipping market for the State's many wineries. The current patchwork of laws—with some States banning direct shipments altogether, others doing so only for out-of-state wines, and still others requiring reciprocity—is essentially the product of an ongoing, low-level trade war. Allowing States to discriminate against out-of-state wine “invite[s] a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause.”¹³⁷

In a twenty year period, the amount of states with reciprocity laws increased five-fold. Missouri's residency requirement invites this same multiplication. For example, if SM still desires to obtain a license to sell alcohol, its four Florida residents who own ninety-seven percent of SWA must move out of Florida and reside in Missouri on a long-term basis. This way, SM can conduct business in *both* Florida and Missouri. However, if four Missourian shareholders owning ninety-seven percent of a corporation attempted to reside in Florida (or anywhere else), they would only be able to receive a license to sell alcohol in Florida. Thus, wholesale corporations desiring to conduct business in Missouri in addition to other states will be rationally compelled to reside in Missouri. In short, this means that any state that has a residency requirement has an interstate advantage over any state that does not. Thus, as this thought experiment demonstrates, Missouri's residency requirement undermines the very purpose of the Commerce Clause, which is to prevent economic Balkanization that had hampered symbiosis amongst the states.¹³⁸

C. The Residency Requirement Would Fail Strict Scrutiny

As argued in Part III(A) & (B), Missouri's residency requirement is likely to violate the dormant Commerce Clause. Thus, the next inquiry is whether the residency requirement can pass a strict scrutiny test, which

¹³⁷ *Granholm*, 544 U.S. at 473 (quoting, in part, *Dean Milk Co. v. Madison*, 340 U.S. 349, 356 (1951)) (citations omitted).

¹³⁸ See generally Part II(B), *supra*.

looks to whether the law “advances a legitimate local purpose that cannot adequately be served by reasonable nondiscriminatory alternatives.”¹³⁹ Here, Missouri carries the burden of making a “clear[] showing,” based on “concrete record evidence,” that the discrimination is necessary and other alternatives are “unworkable.”¹⁴⁰

Missouri justifies its residency requirement on the grounds that

a wholesaler governed predominantly by Missouri officers, directors, and owners are residents of the community and thus subject to negative externalities—drunk driving, domestic abuse, underage drinking—that liquor distribution may produce . . . [and] are more likely to respond to concerns of the community, as expressed by their friends and neighbors whom they encounter day-to-day in ballparks, churches, and service clubs.¹⁴¹

Additionally, the legislature could conclude the requirement helps facilitate law enforcement against wholesalers, because it is easier to pursue in-state owners, directors, and officers, as opposed to out-of-state ones.¹⁴²

Like *Granholm*, where New York and Massachusetts “offer[ed] a handful of other rationales, such as facilitating orderly market conditions, protecting public health and safety, and ensuring regulatory accountability,”¹⁴³ under strict scrutiny, the Court will reject these arguments. In *Granholm*, the Court simply responded to these claims by saying that these goals could be ensured through an even handed licensing requirement.¹⁴⁴ Yet, Missouri’s argument is even further weakened as compared with the arguments made in *Granholm* because of its own witness’s testimony. The Division’s own witness, the deputy state supervisor, testified he did not “think” the residency requirement “impacts the distribution system,” because “we have a three-tier system of distribution,” and residency “doesn’t affect the distribution.”¹⁴⁵ Furthermore, he agreed that allowing SM to be a licensed wholesaler would

¹³⁹ See *Taylor*, 477 U.S. at 151–52 (holding that a state’s public health interest in keeping diseased fish out of its waters was a rare example of legitimate local purpose that could not be served by nondiscriminatory means).

¹⁴⁰ *Granholm*, 544 U.S. at 490–93 (quoting *C & A Carbone, Inc.*, 511 U.S. at 393).

¹⁴¹ *S. Wine*, 731 F.3d at 811.

¹⁴² *Id.*

¹⁴³ *Granholm*, 544 U.S. at 492.

¹⁴⁴ *Id.*

¹⁴⁵ *S. Wine*, 731 F.3d at 811.

not erode the tier system or do anything to the current system because one non-resident corporation was already licensed due to the grandfather provision, and added that wholesalers also have “little impact upon” the “direct sale” of alcohol to minors, and that he could not “think of any” relationship between the residency requirement and the safety of Missouri citizens.¹⁴⁶ Thus, Missouri’s residency requirement will not be saved by the Twenty-first Amendment.

CONCLUSION

The Eighth Circuit’s holding in *S. Wine* stretches the State’s regulatory powers under the Twenty-first Amendment beyond its limit. Yet, with little to no case-law explicitly stating the limits of a State’s right to require wholesalers be in-state residents, lower courts are likely blind as to how they should rule when the law is facially uniform in nature. Here, it would be instructive for courts to look at whether the state law cuts against the core philosophy underlying the dormant Commerce Clause. If the Eighth Circuit had analyzed Missouri’s law in this way, the Court would have likely come to a different conclusion. First, Missouri’s residency requirement promotes interstate fragmentation—not harmony. Second, it is a law that compels business executives, officers, and shareholders to leave their current state, and it is a law that places heavier burdens on out-of-state wholesalers. Last, with an ever expanding interstate market for alcohol, which brings new challenges to local business operations, it is also a law that is likely to become multiplied across the states, which would likely have a chilling effect on the alcohol market.

¹⁴⁶ Part I(A)(3), *supra*.