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## Wine Wars: How We Have Painted Ourselves into a Regulatory Corner

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# Wine Wars: How We Have Painted Ourselves into a Regulatory Corner

## ABSTRACT

*A private citizen can violate the Constitution in two ways. The first is by enslaving another person, an atrocious act that should be proscribed by the highest law in the land. The second is by transporting alcohol across a state line in violation of the laws of that state. The two actions are hardly of the same magnitude.*

*The history of alcohol regulation has been a litany of failed attempts—on both the state and federal levels. Each new layer of legislation created additional problems. Most are familiar with the infamy of Prohibition, the federal ban on the manufacture or sale of alcohol repealed by the Twenty-First Amendment. Few, however, realize post-Prohibition state bans on the sale of alcohol, ostensibly under power granted by the Twenty-First Amendment, create a web of regulation that effectively instituted a new prohibition—one on out-of-state alcohol. Fueled by the increasing popularity of wine tourism and online shopping, consumers have begun to notice the lack of availability in their local stores. This awareness has sparked an onslaught of consumer activism, energized by online advocacy groups. States, however, have staunchly held on to their convoluted regulation schemes with the strong support of wholesalers, a powerful industry group which benefits significantly from the current mandated distribution system. The result is an on-going trade war with consumers and producers on one side and states and wholesalers on the other.*

*This Note argues that the Twenty-First Amendment has been distorted and stretched to an impermissible extreme and advocates a reexamination of alcohol regulation in the United States. It begins with an exploration of the legislative and judicial historical backgrounds of the regulation of intoxicating liquors. This note next provides an overview of the current regulatory scheme for the distribution of alcohol. It then analyzes a proposed ulterior motive for this patchwork of laws and reexamines the statutory and constitutional language that allegedly supports the current regulation. Finally, this*

*Note proposes various remedies to this maze of state laws preventing free trade and burdening the economy.*

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“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.”

- Justice Kennedy in *Granholm v. Heald*<sup>1</sup>

There are only two ways that a private citizen can violate the Constitution.<sup>2</sup> One is to enslave another human being.<sup>3</sup> The other is to transport an alcoholic beverage across state lines in violation of the

1. 544 U.S. 460, 473 (2005).

2. Laurence H. Tribe, *How to Violate the Constitution Without Really Trying: Lessons from the Repeal of Prohibition to the Balanced Budget Amendment*, 12 CONST. COMMENT. 217, 220 (1995).

3. U.S. CONST. amend. XIII.

laws of that state.<sup>4</sup> The gravity of the former and the relative insignificance of the latter lead one to wonder why this prohibition exists in the Constitution. With the growing popularity of “wine tourism”<sup>5</sup> and the Internet both exposing consumers to a wide variety of products and revealing the significant barriers to the distribution of these products, this incongruity in alcohol regulation has come to a head in recent years.<sup>6</sup>

Wine consumption in the United States has steadily increased in the seventy-five years since the repeal of Prohibition,<sup>7</sup> indicating a growing demand for the product. Additionally, the advent of the Internet has changed the nature of commerce.<sup>8</sup> It allows every small business with an Internet connection to access a huge market for little cost.<sup>9</sup> Retailers can easily maintain an online store, foregoing the costs of a brick-and-mortar establishment.<sup>10</sup> A network of warehouses allows an online business to develop an inventory far beyond the capacity of any physical store.<sup>11</sup> These sellers are thus able to sell an enormous amount of product at lower prices while still garnering a sizeable profit.<sup>12</sup> That is, unless your business is alcohol.<sup>13</sup>

The battle over the regulation of alcohol has historically pitted states (through their officials) against producers and retailers.<sup>14</sup> Recently, however, consumers have entered the fray, in part because

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4. See U.S. CONST. amend. XXI.

5. Elizabeth Thach, *Trends in Wine Tourism*, WINE BUSINESS MONTHLY, Aug. 15, 2007, <http://www.winebusiness.com/wbm/?go=getArticle&dataId=50125> (last visited Dec. 18, 2009).

6. Mary Wagner, *Patchwork of Laws*, INTERNET RETAILER, June 2008, <http://www.internetretailer.com/article.asp?id=26588>.

7. See The Wine Institute, *Wine Consumption in the U.S.*, <http://www.wineinstitute.org/resources/statistics/article86> (last visited Nov. 4, 2009).

8. See generally CHRIS ANDERSON, *THE LONG TAIL: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE* (2006) (exploring the effect of Internet business on the traditional economic model).

9. *Id.*

10. *Id.*

11. *Id.* at 19-20.

12. *Id.* at 24 (“A very, very big number . . . [of products] multiplied by a relatively small number (the sales of each) is still equal to a very, very big number. And, again, that very, very big number is only getting bigger.”)

13. See FED. TRADE COMM’N, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE 14 (July 2003) [hereinafter FTC REPORT], available at <http://www.ftc.gov/os/2003/07/winereport2.pdf> (concluding that “state bans on interstate direct shipping represent the single largest regulatory barrier to expanded online wine sales”).

14. See, e.g., *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964) (retailer vs. state); *Indianapolis Brewing Co. v. Liquor Control Comm’n*, 305 U.S. 391 (1939) (producer vs. state); *Bowman v. Chi. & Nw. Ry. Co.*, 125 U.S. 465 (1888) (common carrier vs. state); *Walling v. Michigan*, 116 U.S. 446, 455 (1886) (taxpayer vs. state); *Tiernan v. Rinker*, 102 U.S. 123 (1880) (retailers vs. state).

of the Internet, and wholesalers have increasingly begun to intervene as defendants against the producers, retailers, and consumers.<sup>15</sup> For example, imagine that a consumer in one state wants to try a bottle of Meritage, a wine that was highly recommended by a friend in another state, but finds that it is not available through any retailer in his area, and even though he can find it on the Internet, local law prohibits the shipment of alcohol directly to consumers in his state.<sup>16</sup> Unless the consumer is willing to travel to the vineyard, potentially thousands of miles away, the consumer must simply do without.

The desire of producers and retailers to capitalize on the new e-commerce model and the parallel desire of consumers to access their products have sparked demand for free trade in the wine industry.<sup>17</sup> For example, the Internet has helped fuel this movement by facilitating the creation of consumer advocacy groups such as Free the Grapes!<sup>18</sup> and the Coalition for Free Trade.<sup>19</sup> However, these grassroots initiatives have met with considerable opposition, and the development of commerce remains stagnated.<sup>20</sup>

This Note argues that the Twenty-First Amendment has been distorted and stretched to an impermissible extreme and advocates for a reexamination of alcohol regulation in the United States. Part I of this note explores the legislative and judicial historical backgrounds of intoxicating liquor regulation. Part II provides an overview of the current regulatory scheme for the distribution of alcohol. Part III

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15. See, e.g., *Jelovsek v. Bresden*, 545 F.3d 431 (6th Cir. 2008) (winery and consumers vs. state with wholesaler as intervenor and additional wholesalers as amici); *Baude v. Heath*, 538 F.3d 608 (7th Cir. 2008) (winery and consumers vs. state with wholesaler as intervenor; wholesalers and internet-based advocacy group as amici); *Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28 (1st Cir. 2007) (winery vs. state with wholesalers as amici); *Siesta Vill. Mkt., LLC v. Granholm*, 596 F. Supp. 2d 1035 (E.D. Mich. 2008) (retailer and consumer vs. state with wholesaler as intervenor); *Black Star Farms, LLC v. Oliver*, 544 F. Supp. 2d 913 (D. Ariz. 2008) (winery and consumers vs. state with wholesaler as intervenor).

16. For example, if the consumer lived in Kentucky, state law prohibits the direct shipment of wine from the winery to the consumer. KY. REV. STAT. ANN. § 244.165(1) (2007). There is a limited exception for wine purchased at a “small farm winery,” defined as one producing less than fifty thousand gallons per year. See KY. REV. STAT. ANN. § 241.010 (2008) (definitions). However, the consumer must purchase the wine *in person* at the small farm winery and may only ship two cases. § 244.165(2). Therefore, unless our Kentuckian wants a small-vintage wine and is willing to travel to the state where it is grown to get it, he will not be able to have it shipped to his home.

17. Wagner, *supra* note 6.

18. <http://www.freethethegrapes.org> (last visited Nov. 4, 2009) (national coalition of consumers, wineries, and retailers).

19. <http://www.coalitionforfreetrade.org> (last visited Nov. 4, 2009) (non-profit foundation of wine industry representatives and legal experts).

20. Wagner, *supra* note 6.

analyzes a proposed ulterior motive for this patchwork of laws and reexamines the statutory and constitutional language that allegedly supports the current regulation. Part IV proposes various remedies to this maze of state laws that prevents free trade and burdens the economy.

## I. HISTORY OF STATE AND FEDERAL ALCOHOL REGULATION

### *A. Federal Power under the Commerce Clause*

The Constitution grants Congress the “power to . . . regulate commerce . . . among the several states . . . .”<sup>21</sup> The Supreme Court of the United States has interpreted this authority broadly,<sup>22</sup> and has upheld Congressional regulation of a wide variety of areas under the Commerce Clause.<sup>23</sup> This expansive interpretation “reflect[s] a central concern of the Framers . . . : the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.”<sup>24</sup> The Commerce Clause thus “prohibit[s] state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent.”<sup>25</sup>

The Dormant Commerce Clause provides that discriminatory state laws “must be rejected absent the clearest showing that the unobstructed flow of interstate commerce itself is unable to solve the

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21. U.S. CONST. art. I, § 8.

22. See, e.g., *Katzenbach v. McClung*, 379 U.S. 294, 305 (1964) (“The power of Congress in this field is broad and sweeping; where it keeps within its sphere and violates no express constitutional limitation it has been the rule of this Court, going back almost to the founding days of the Republic, not to interfere.”); see also *Gibbons v. Ogden*, 22 U.S. 1 (1824).

23. See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) (prohibiting segregation in hotels); *Hudson Distribs., Inc. v. Eli Lilly & Co.*, 377 U.S. 386 (1964) (resale price maintenance); *Radovich v. Nat’l Football League*, 352 U.S. 445 (1957) (professional football); *Moore v. Mead’s Fine Bread Co.*, 348 U.S. 115 (1954) (protection of small businesses from injurious price cutting); *Wickard v. Filburn*, 317 U.S. 111 (1942) (crop control); *United States v. Darby*, 312 U.S. 100 (1941) (wages and hours); *Brooks v. United States*, 267 U.S. 432 (1925) (criminal enterprises); *Weeks v. United States*, 245 U.S. 618 (1918) (misbranding of drugs); *Champion v. Ames*, 188 U.S. 321 (1903) (gambling).

24. *Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979).

25. *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994) (citing THE FEDERALIST NO. 22, at 143-45 (Alexander Hamilton) (Clinton Rossiter ed., 1961); James Madison, Vices of the Political System of the United States, in 2 WRITINGS OF JAMES MADISON 361, 362-63 (Gaillard Hunt ed., 1901)).

local problem.”<sup>26</sup> To determine “whether a State has overstepped its role in regulating interstate commerce,” the reviewing court first ascertains whether the statute affirmatively discriminates against interstate transactions or rather burdens such transactions “only incidentally.”<sup>27</sup> If a statute in the former group is “shown to discriminate against interstate commerce ‘either on its face or in practical effect,’ the burden falls on the state to demonstrate both that the statute ‘serves a legitimate local purpose,’ and that this purpose could not be served as well by available nondiscriminatory means.”<sup>28</sup> The latter group of statutes, which only incidentally burdens interstate commerce, “violate[s] the Commerce Clause only if the burdens they impose on interstate trade are ‘clearly excessive in relation to the putative local benefits.’”<sup>29</sup>

Both direct and incidental burdens on interstate commerce are thus evaluated based on the local benefits they serve. Statutes directly burdening interstate transactions must meet a higher threshold than those that only inhibit commerce incidentally. Yet both must serve a local benefit without imposing disproportionately on commerce amongst the states.

### *B. Regulation of Alcohol before 1920*

Although some of the earliest Supreme Court cases seemed to favor broad state authority over the sale of alcohol,<sup>30</sup> judicial interpretation in this period treated interstate alcohol commerce much like the interstate movement of any other product.<sup>31</sup> The Court held that the Dormant Commerce Clause prohibited states from discriminating against imported liquor.<sup>32</sup> It also “held that the

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26. *Id.* at 393.

27. *Maine v. Taylor*, 477 U.S. 131, 138 (1986).

28. *Id.* (citing *Hughes*, 441 U.S. at 336).

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

30. *See, e.g.*, *Thurlow v. Massachusetts (The License Cases)*, 46 U.S. 504 (1847) (presenting a view in favor of broad state authority over the sale of alcohol).

31. *See, e.g.*, *Scott v. Donald*, 165 U.S. 58 (1897); *Walling v. Michigan*, 116 U.S. 446, 455 (1886) (“A discriminating tax imposed by a State operating to the disadvantage of the products of other States when introduced into the first mentioned State, is, in effect, a regulation in restraint of commerce among the States, and as such is a usurpation of the power conferred by the Constitution upon the Congress of the United States.”); *Tiernan v. Rinker*, 102 U.S. 123 (1880) (invalidating a law levying a tax on persons selling liquors but exempting the sale of liquors manufactured in the state).

32. *Granholm v. Heald*, 544 U.S. 460, 476-77 (2005) (citing *Scott*, 165 U.S. 58; *Walling*, 116 U.S. 446; *Tiernan*, 102 U.S. 123).

Commerce Clause prevented States from passing facially neutral laws that placed an impermissible burden on interstate commerce.”<sup>33</sup>

As the Temperance Movement<sup>34</sup> grew, the Supreme Court found itself in the awkward situation of protecting those states that chose to prohibit the manufacture and sale of alcohol on the one hand and facilitating the free flow of interstate commerce on the other. In *Mugler v. Kansas*, the Supreme Court recognized a state’s police power to prohibit the production and sale of alcohol in the state and thus declared state prohibition legitimate.<sup>35</sup> The following year, however, *Bowman v. Chicago & Northwestern Railroad Co.* invalidated an Iowa law requiring liquor importers to have a permit.<sup>36</sup> The Supreme Court held that “the power to regulate or forbid the sale of a commodity, after it has been brought into the state, does not carry with it the right and power to prevent its introduction by transportation from another state.”<sup>37</sup> Iowa tried again, passing a law banning the sale of imported liquor in its original package, but the Supreme Court in *Leisy v. Hardin* invalidated this law as well, holding that alcohol in its original package remained an article of interstate commerce beyond a state’s regulatory reach.<sup>38</sup> The problematic result was that states could declare themselves, or parts of their jurisdictions, “dry,” but “wet” states could still ship intoxicating liquors—often intended for illegal sale—into the state.

Responding to this paradox, Congress passed the Wilson Act in 1890, which overturned the “original package doctrine”—previously upheld by *Leisy*—and thus subjected all alcohol sold in the state to the same laws enacted under that state’s police power.<sup>39</sup> However, the

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33. *Id.* (citing *Vance v. W.A. Vandercook Co.*, 170 U.S. 438 (1898); *Rhodes v. Iowa*, 170 U.S. 412 (1898); *Leisy v. Hardin*, 135 U.S. 100 (1890); *Bowman v. Chi. & Nw. Ry. Co.*, 125 U.S. 465 (1888)).

34. The Temperance Movement began as a religious group advocating the abstention from alcohol use and later grew into the political group that championed Prohibition. Temperance Movement, Free Legal Encyclopedia, <http://law.jrank.org/pages/10714/Temperance-Movement.html> (last visited Nov. 4, 2009).

35. 123 U.S. 623 (1887).

36. 125 U.S. 465 (1888).

37. *Id.* at 500.

38. 135 U.S. 100, 124 (1890).

39. See 27 U.S.C. § 121 (2006). The Act states,

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 therefrom by reason of being introduced therein in original packages or otherwise.



Supreme Court held that this law was “not intended to confer upon any State the power to discriminate injuriously against the products of other States in articles whose manufacture and use are not forbidden, and which are therefore the subjects of legitimate commerce.”<sup>40</sup> The Wilson Act thus seemed to do little more than invalidate the original package doctrine. The question of whether a dry state could prevent the shipment of alcohol into its territory remained unanswered.

Testing its power under this new Act, Iowa reenacted the law struck down in *Bowman*.<sup>41</sup> In the resulting case, *Rhodes v. Iowa*, the Supreme Court held that *Bowman* remained intact.<sup>42</sup> The Wilson Act granted states the power to equally regulate in-state and out-of-state alcohol “upon arrival” in the state.<sup>43</sup> Because alcohol did not “arrive” in the state until the consignee received it, states did not have the authority under the Act to prevent the importation of alcohol into the state.<sup>44</sup> In *Vance v. W.A. Vandercook Co.*, decided that same year, the Supreme Court clarified further that the Act only authorized states to regulate the resale of imported liquor.<sup>45</sup> The Court further noted that forbidding the direct shipment of alcohol for personal use was “repugnant” to the Commerce Clause.<sup>46</sup> Thus, the Wilson Act overturned the original package doctrine but did not extend states’ power to the regulation of the transportation of alcohol across state borders.

Congress attempted to close this loophole left open by *Rhodes* by passing the Webb-Kenyon Act in 1913.<sup>47</sup> The Act permitted dry states to prohibit the importation of intoxicating liquor intended for

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*Id.*

40. *Scott v. Donald*, 165 U.S. 58, 100 (1897).

41. *Rhodes v. Iowa*, 170 U.S. 412, 418 (1898).

42. *See id.* at 442.

43. 27 U.S.C. § 121.

44. *Rhodes*, 170 U.S. at 426.

45. 170 U.S. 438 (1898).

46. *Id.* at 442.

47. *Granholm v. Heald*, 544 U.S. 460, 481 (2005); *see* 27 U.S.C. § 122. The Act states, “The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, 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, 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 spirituous, 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.”

*Id.*

illegal resale in the state. However, the constitutionality of this Act was in question from the beginning. Following the advice of Attorney General George W. Wickersham—who believed that it was unconstitutional<sup>48</sup>—President Taft vetoed the Act.<sup>49</sup> Congress overruled the Presidential veto and the Webb-Kenyon Act became law.<sup>50</sup> A divided Supreme Court then held in *Clark Distilling Co. v. Western Maryland Railroad Co.* that the Webb-Kenyon Act was constitutional.<sup>51</sup> The Court noted that, regarding dry states, the Act's purpose was “to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in states contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught.”<sup>52</sup>

In 1919, the passage of the Eighteenth Amendment, prohibiting “the manufacture, sale, or transportation of intoxicating liquors” in the United States, temporarily suspended the alcohol regulation debate.<sup>53</sup> Thus, by the early Twentieth Century, the vast majority of states had sought to ban the use of alcohol entirely, attempting to do so through state law, federal legislation, and finally, Constitutional amendment.

### *C. Regulation of Alcohol since 1933*

Fourteen years later, the states proposed the Twenty-First Amendment, which repealed the Eighteenth Amendment and Federal Prohibition.<sup>54</sup> Section 2 of this Amendment “restored to the States the powers they had under the Wilson and Webb-Kenyon Acts.”<sup>55</sup>

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48. 30 Op. Atty. Gen. 88, \*22 (1913) (“[T]his fundamental right [to regulate interstate commerce] which, . . . is protected by the Constitution, and subjected only to the exclusive power of regulation vested in Congress would be entirely destroyed by this legislation.”). Attorney General Wickersham was concerned that the statute improperly delegated Congressional power to the states, and would hamper legitimate business “by preventing them from making contracts of sale and delivery which would be lawful in the State where made, but which could not be enforced by delivery within the State of the purchaser if such delivery were prohibited by the laws of such State.” *Id.* at \*21-22.

49. See *Granholm*, 544 U.S. at 481 (citing S. REP. NO. 63-103, at 3-6 (1913)).

50. *Id.*

51. 242 U.S. 311 (1917).

52. *Id.* at 324.

53. U.S. CONST. amend. XVIII. The Eighteenth Amendment stated, “[T]he 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.” *Id.* § 1. It also granted concurrent power to Congress and the states “to enforce this article by appropriate legislation.” *Id.* § 2.

54. See U.S. CONST. amend. XXI, § 1.

55. *Granholm*, 544 U.S. at 484.

However, rather than picking up where pre-Prohibition litigation had left off, the Supreme Court adopted an expansive interpretation of the Twenty-First Amendment.<sup>56</sup> The Court essentially carved the Twenty-First Amendment out of the Constitution, arguing that it—and thus state laws promulgated thereunder—were not constrained by other parts of the Constitution.<sup>57</sup> In *Indianapolis Brewing Co. v. Liquor Control Commission of State of Michigan*, for example, the Court specifically held that *neither* the Commerce Clause *nor* the Equal Protection Clause limited state regulation of alcohol.<sup>58</sup> Thus, states could pass laws that would otherwise violate these constitutional provisions, were it not for the states' purported power under the Twenty-First Amendment.<sup>59</sup> Later, the Court held that states even had the power to regulate shipments of alcohol merely passing through the state.<sup>60</sup>

*United States v. Frankfort Distilleries*, decided in 1945, was one of the first cases to draw a line limiting states' power under the Twenty-First Amendment by finding that state laws promulgated thereunder were subject to the Sherman Antitrust Act.<sup>61</sup> The Supreme Court remarked that the amendment "has not given the states plenary and exclusive power to regulate the conduct of persons doing an interstate liquor business outside their boundaries."<sup>62</sup> The initially expansive reading of the amendment as an island unto itself was reinterpreted in *Hostetter v. Idlewild Bon Voyage Liquor Corp.* in 1964, which held that the amendment must be read in light of the rest

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56. See, e.g., *State Bd. of Equalization of Calif. v. Young's Mkt. Co.*, 299 U.S. 59, 62-63 (1936) (holding states have broad, unconfined power to regulate intoxicating liquors pursuant to the Twenty-First Amendment).

57. See *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391, 394 (1939); see also *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939) ("Without doubt a State may absolutely prohibit the manufacture of intoxicants, their transportation, sale, or possession, irrespective of when or where produced or obtained, or the use to which they are to be put. Further, she may adopt measures reasonably appropriate to effectuate these inhibitions and exercise full police authority in respect of them."); *Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395 (1939) (holding statute that prohibited the importation of intoxicating liquors manufactured in such states that had laws that discriminated against intoxicating liquors manufactured in other states did not violate the Commerce Clause).

58. 305 U.S. at 394 (citing *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938); *Young's Mkt.*, 299 U.S. 59).

59. See *id.*

60. *Carter v. Virginia*, 321 U.S. 131, 137 (1944).

61. 324 U.S. 293 (1945). Interestingly, States still wage this debate 65 years later. For example, for the past decade, Maryland has been arguing in *TFWS, Inc. v. Franchot*, 572 F.3d 186 (4th Cir. 2009), that alcohol price-fixing regulations are removed from federal antitrust review.

62. 324 U.S. at 299.

of the Constitution.<sup>63</sup> In rather strong language, the Supreme Court declared the idea “that the Twenty-first Amendment has somehow operated to ‘repeal’ the Commerce Clause wherever regulation of intoxicating liquors is concerned would . . . be an absurd oversimplification.”<sup>64</sup> Such a conclusion would mean that “Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor,” which “would be patently bizarre and . . . demonstrably incorrect.”<sup>65</sup>

Despite this strong language in *Idlewild*, the judiciary continued to adopt a broad and permissive interpretation. For example, the Supreme Court upheld a price affirmation statute, which requires producers to affirm that their sale prices to wholesalers are no higher than the lowest price the producer sold its products for in other states, as constitutionally valid.<sup>66</sup> Later a California district court, against a challenge under the Civil Rights Act, upheld a state statute making it a misdemeanor to employ a female bartender as within the power of the state under the Twenty-First Amendment.<sup>67</sup>

In the 1980s, however, the Supreme Court changed course and began to restrict the boundaries of states’ power under the Twenty-First Amendment. In *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, the Court held that “uniform minimum price schedules” were a restraint of trade in violation of the Sherman Act and that the national policy in favor of competition should prevail over the state interest of promoting temperance.<sup>68</sup> “Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations.”<sup>69</sup> The Supreme Court proceeded to reverse some of its earlier decisions, holding, for example, that state price affirmation statutes do violate the Commerce Clause because they regulate out-of-state intoxicating liquor transactions and are thus not a valid exercise

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63. 377 U.S. 324, 332 (1964) (“Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, 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.”).

64. *Id.* at 331-32.

65. *Id.* at 332.

66. *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966).

67. *Krauss v. Sacramento Inn*, 314 F. Supp. 171, 178 (E.D. Cal. 1970).

68. 445 U.S. 97, 114 (1980) (“The unsubstantiated state concerns [of temperance and protection of small retailers] put forward in this case simply are not of the same stature as the goals of the Sherman Act.”).

69. *Id.* at 110.

of state powers under the Twenty-First Amendment.<sup>70</sup> Further, the amendment does not save state statutes that violate other provisions of the Constitution.<sup>71</sup> The new test for whether a law is within a state's power thus became "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."<sup>72</sup> Acceptable state interests included "promoting temperance, ensuring orderly market conditions, and raising revenue."<sup>73</sup>

In 2002, Congress passed two laws regarding interstate commerce in alcohol: The Twenty-First Amendment Enforcement Act (Enforcement Act)<sup>74</sup> and an appropriations bill rider that created "Federal On-Site Shipping."<sup>75</sup> The Enforcement Act gives State Attorneys General the power to bring civil actions in federal court for injunctive relief against out-of-state suppliers that violate the state's liquor laws.<sup>76</sup> Federal On-Site Shipping permits limited direct shipping in certain enumerated circumstances.<sup>77</sup> Wineries may ship directly to a consumer if (1) the consumer was physically present at the winery when he or she purchased the wine;<sup>78</sup> (2) the winery verified the purchaser's age;<sup>79</sup> (3) the package is "marked to require an adult's signature upon delivery;"<sup>80</sup> (4) the wine is intended for personal

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70. *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 585 (1986); *see also Healy v. Beer Inst.*, 491 U.S. 324 (1989) (holding that a state beer price affirmation statute violated the Commerce Clause and was not saved by the Twenty-First Amendment); *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 352 (1987) (holding a state statute that regulated liquor prices violated the Sherman Act and was not a valid exercise of State power under the Twenty-First Amendment).

71. *See, e.g., 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (invalidating statute banning alcohol price advertising under the First Amendment's prohibition against laws abridging the freedom of speech); *see also Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (Establishment Clause); *Craig v. Boren*, 429 U.S. 190 (1976) (Equal Protection Clause); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (Due Process Clause); *Dep't of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964) (Import-Export Clause).

72. *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 714 (1984); *see also Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 276 (1984) ("State laws that constitute mere economic protectionism are therefore not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor.").

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

74. 27 U.S.C. § 122a (2006).

75. *Id.* § 124.

76. *Id.* § 122a. Thus, the States no longer need to ask for federal assistance in enforcing their alleged Twenty-First Amendment powers.

77. *Id.* § 124.

78. *Id.* § 124(a)(1).

79. *Id.* § 124(a)(2).

80. *Id.* § 124(a)(3).

use only;<sup>81</sup> and (5) “the purchaser could have carried the wine lawfully into the State or the District of Columbia to which the wine is shipped.”<sup>82</sup> The last requirement, that the destination state be one into which the purchaser could have carried the wine personally,<sup>83</sup> appears to prevent Federal On-Site Shipping to nine states, as of December 2009.<sup>84</sup> In fact, the Federal On-Site Shipping statute only changes the status quo for consumers in four states.<sup>85</sup>

The Supreme Court’s reading of the Twenty-First Amendment has been inconsistent but largely permissive. Although the Court slightly restricted the states’ power in subsequent decisions, states were still able to institute numerous barriers so long as they could point to one of many nebulous state interests. Additionally, Congress has done little to regulate interstate alcohol commerce on a federal level. In 2005, this uneasy power balance was reexamined in *Granholm v. Heald*.<sup>86</sup>

#### *D. A Turning Point?*

*Granholm v. Heald* combined two suits by small wineries and consumers against Michigan and New York,<sup>87</sup> which had passed statutes that treated in-state and out-of-state producers differently in regard to the direct shipment of wine.<sup>88</sup> The Michigan law mandated that all wine be distributed in the state through a three-tier system, which consists of producers, wholesalers, and retailers; each group must sell to the next, and vertical integration or bypassing is

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81. *Id.* § 124(a)(4).

82. *Id.* § 124(a)(5).

83. This requirement means that the state law would have permitted the consumer to carry the wine home on an airplane, if the Federal Aviation Administration had not prohibited liquids in carry-ons. *See* § 124(a); *Cherry Hill Vineyards, LLC v. Hudgins*, 488 F. Supp. 2d 601, 620 (W.D. Ky. 2006), *aff’d sub nom.* *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423 (6th Cir. 2008).

84. The Wine Institute, State Shipping Laws – Onsite, <http://wi.shipcompliant.com/Home.aspx?SaleTypeID=2> (last visited Nov. 5, 2009).

85. *Id.* (as of December 2009). In these states, direct shipping is prohibited, but there is a limited exception for the shipment of wine purchased by the consumer at the winery. 27 U.S.C. § 124; State Shipping Laws, *supra* note 84.

86. 544 U.S. 460 (2005).

87. *Id.* at 468.

88. Interestingly, New York ranks fourth in number of wineries per state, and Michigan ranks ninth. MKF RESEARCH LLC, THE IMPACT OF WINE, GRAPES & GRAPE PRODUCTS ON THE AMERICAN ECONOMY 2007: FAMILY BUSINESS BUILDING VALUE 24 (2007) [hereinafter IMPACT ON THE ECONOMY], available at [http://www.house.gov/radanovich/wine/documents/Economic\\_Impact\\_on\\_National\\_Economy\\_2007.pdf](http://www.house.gov/radanovich/wine/documents/Economic_Impact_on_National_Economy_2007.pdf) (last visited Oct. 12, 2009).

prohibited.<sup>89</sup> The Michigan system provided an exception for in-state wineries, which allowed these domestic producers to ship directly to consumers.<sup>90</sup> The New York law similarly forced all wine sales into the three-tier system with an exception allowing direct shipment of wine produced with at least 75 percent New York grapes.<sup>91</sup> Even if an out-of-state winery met the ingredient requirement, it had to apply to become a New York winery in order to obtain a direct shipment license, which required establishing a physical presence in the state.<sup>92</sup>

The Supreme Court held that “[t]he differential treatment between in-state and out-of-state wineries constitutes explicit discrimination against interstate commerce.”<sup>93</sup> As a result, *Granholm* constrained state power under the Twenty-First Amendment, stating that “States may not enact laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses.”<sup>94</sup>

The Supreme Court also rejected several state interests that had previously been held to support laws burdening interstate commerce.<sup>95</sup> First, the Court discarded the argument that direct shipment of wine would allow minors to purchase wine over the Internet.<sup>96</sup> Justice Kennedy, writing for the majority, noted that this argument was invalid for several reasons<sup>97</sup>: (1) “minors are less likely to consume wine, as opposed to beer, wine coolers, and hard liquor;”<sup>98</sup> (2) “minors who decide to disobey the law have more direct means of doing so;”<sup>99</sup> (3) “direct shipping is an imperfect avenue of obtaining alcohol for minors who, in the words of the past president of the National Conference of State Liquor Administrators, ‘want instant gratification;”<sup>100</sup> and (4) because “[o]ut-of-state wineries face the loss

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89. See discussion *infra* Part II.A.

90. *Granholm*, 544 U.S. at 469.

91. *Id.* at 470.

92. *Id.*

93. *Id.* at 467.

94. *Id.* at 472.

95. See *id.* at 490-92.

96. *Id.* at 490.

97. *Id.*

98. *Id.* (citing FED. TRADE COMM’N, SELF-REGULATION IN THE ALCOHOL INDUSTRY: A REVIEW OF INDUSTRY EFFORTS TO AVOID PROMOTING ALCOHOL TO UNDERAGE CONSUMERS app. A (Sept. 1999), available at <http://www.ftc.gov/reports/alcohol/appendixa.shtm> (“When youngsters first start drinking, they consume primarily beer and wine coolers; by twelfth grade, students use all types of alcohol, although beer use is most common.”)).

99. *Id.*

100. *Id.* (citing FTC REPORT, *supra* note 13, at 33).

of state and federal licenses if they fail to comply with state law,” they have “strong incentives not to sell alcohol to minors.”<sup>101</sup> Thus, concern over alcohol ending up in the hands of minors is an insufficient state interest to justify burdening interstate commerce.

Second, the Supreme Court dismissed the states’ justification that tax collection would be difficult as “insufficient.”<sup>102</sup> Justice Kennedy noted that, “[i]f licensing and self-reporting provide adequate safeguards for wine distributed through the three-tier system, there is no reason to believe they will not suffice for direct shipments.”<sup>103</sup> Further, federal law provides harsh “incentives for wineries to comply with state regulations.”<sup>104</sup> If the wineries “fail to comply voluntarily, states can report problems to [the Alcohol and Tobacco Tax and Trade Board] or other states, or use the Twenty-First Amendment Enforcement Act”<sup>105</sup> to sue the alleged violator in civil court. The Supreme Court thus concluded, “These federal remedies, when combined with state licensing regimes, adequately protect States from lost tax revenue.”<sup>106</sup> Finally, the Supreme Court rejected the state interests of ensuring orderly market conditions, protecting public health and safety, and ensuring regulatory accountability, reasoning that these interests can be protected through alternative measures

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101. *Id.*; see also 27 U.S.C. § 122a (2006) (providing remedy in federal court).

102. *Granholm*, 544 U.S. at 491. Interestingly, the tax collection argument actually seems to favor the deregulation of direct shipments. See FTC REPORT, *supra* note 13, at 39 n.166 (citing BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS, INDUSTRY CIRCULAR 96-3, DIRECT SHIPMENT SALES OF ALCOHOL BEVERAGES (Feb. 11, 1996) [hereinafter INDUSTRY CIRCULAR 96-3], available at [http://www.ttb.gov/industry\\_circulars/archives/1996/96-03.html](http://www.ttb.gov/industry_circulars/archives/1996/96-03.html)). The Federal Trade Commission’s (FTC) report, which the Supreme Court relied heavily on in *Granholm*, noted that according to the National Conference of State Liquor Administrators (NCSLA) prohibitions on “direct shipment cost[] states ‘tens of millions of dollars’ in lost tax revenue.” *Id.* Post-*Granholm* direct sales support this suspicion. See, e.g., Eleanor Heald & Ray Heald, *Direct-to-Consumer Shipping—Not Quite the Green Light for Every State*, APPELLATION AM., May 14, 2007, <http://wine.appellationamerica.com/wine-review/378/Wine-Direct-Shipping-Review.html> (“[T]he website for Florida’s Division of Alcohol Beverages and Tobacco demonstrates that the 2005 *Granholm v. Heald* decision has benefited the state’s tax coffers.”). In Florida, for example, in the first five months the state allowed direct shipments, “337 out-of-state wineries registered with the state and paid \$52,480 in taxes.” *Id.* In the next five comparable months, “468 wineries paid \$104,622 in excise taxes to the state.” *Id.* (Note that the tax revenue almost doubled.) Thus, as the NCSLA predicted, states’ tax revenues actually seem to increase from direct sales.

103. *Granholm*, 544 U.S. at 491.

104. *Id.* at 492 (citing 27 U.S.C. § 204 (2006) (prohibiting a winery from operating without a federal license); 27 U.S.C. § 122a(b) (2006) (granting state attorneys general the power to sue wineries in federal court to enjoin violations of state law); INDUSTRY CIRCULAR 96-3, *supra* note 102 (authorizing the Tax and Trade Bureau to revoke a winery’s federal license if it violates state law)).

105. FTC REPORT, *supra* note 13, at 39.

106. *Granholm*, 544 U.S. at 492.



that do not unduly burden interstate commerce.<sup>107</sup> Justice Kennedy noted that “improvements in technology have eased the burden of monitoring out-of-state wineries.”<sup>108</sup> For example, “[b]ackground checks can be done electronically” and “[f]inancial records and sales data can be mailed, faxed, or submitted via e-mail.”<sup>109</sup>

Thus, *Granholm* seems to stand “for the proposition that all traditional Commerce Clause principles apply to liquor just like other products.”<sup>110</sup> As the next section demonstrates, however, the *Granholm* rule has been slow—and at times ineffective—to loosen restrictions on the interstate wine trade.

## II. THE CURRENT BATTLEFIELD

An examination of the current regulatory landscape reveals that *Granholm* has had less effect than free trade advocates anticipated.<sup>111</sup> Even though the decision enabled an increase in the number of consumers who can purchase wine for direct shipment, “the reality is that it has become more difficult to comply with the state laws.”<sup>112</sup> The myriad reporting and licensing laws in the fifty states, in addition to the volume limitations, make nationwide compliance extremely burdensome.<sup>113</sup> For example, “[a] winery that is shipping to all of the possible states could submit between 400 and 500 state reports (excise, sales, and direct shipping) per year.”<sup>114</sup> The very fact that companies can exist solely to assist in shipping compliance demonstrates the complexity of the post-*Granholm* world.<sup>115</sup>

Consumers in thirty-five states and the District of Columbia may have wine shipped directly to them (with limitations) without face-to-face purchase requirements, as of September 2009.<sup>116</sup> Iowa

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107. *Granholm v. Heald*, 544 U.S. 460, 492 (2005); see *North Dakota v. United States*, 495 U.S. 423, 432 (1990) (originally upholding these state interests as justifying states burdening interstate commerce).

108. *Id.* at 491.

109. *Id.*

110. James Alexander Tanford, *E-Commerce in Wine*, 3 J.L. ECON. & POL'Y 275, 328 (2007).

111. See Heald & Heald, *supra* note 102.

112. *Id.*

113. *Id.*

114. *Id.* (quoting Jeff Carroll, VP of Compliance for ShipCompliant, a company specializing in assisting wineries and retailers comply with local and state shipping laws).

115. See, e.g., ShipCompliant, <http://www.shipcompliant.com/> (last visited Nov. 4, 2009).

116. The Wine Institute, *Direct Shipment Laws by State for Wineries*, [http://www.wineinstitute.org/programs/shipwine/docs/direct\\_shipping\\_laws\\_map.pdf](http://www.wineinstitute.org/programs/shipwine/docs/direct_shipping_laws_map.pdf) (last visited Nov. 4, 2009). These states are: Alaska, Arizona, California, Colorado, Connecticut, Florida,

and New Mexico have reciprocal arrangements, which allow direct shipping from a state that permits direct shipment of Iowa's or New Mexico's wine.<sup>117</sup> The remaining thirteen states prohibit direct shipment.<sup>118</sup> Of those thirteen, four states allow an exception for Federal On-Site Shipping<sup>119</sup>—consumers can purchase wine in person at a winery and have it shipped back to the state, provided the transaction complies with the requirements of 27 U.S.C. § 124.<sup>120</sup> However, even if the state permits direct shipping, confusing and restrictive laws often discourage retailers from selling to consumers and carriers from delivering shipments in that state.<sup>121</sup> For example, TheWineBuyer.com will not ship to seventeen states.<sup>122</sup> Similarly, MyWinesDirect.com will not ship to twenty states.<sup>123</sup> Thus, consumers in a significant percentage of the country are still prohibited, de facto or de jure, from purchasing wine over the Internet.

### A. The Three-Tier System

The most popular state regulatory system is the three-tier model.<sup>124</sup> Tier One includes producers—wineries, distilleries, and

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Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Louisiana, Maine, Michigan, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New York, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Carolina, Tennessee, Texas, Vermont, Virginia, Washington, District of Columbia, West Virginia, Wisconsin, and Wyoming. *Id.*

117. *Id.*

118. *Id.* These states are: Alabama, Arkansas, Delaware, Kentucky, Maryland, Massachusetts, Mississippi, Montana, New Jersey, Oklahoma, Pennsylvania, South Dakota, and Utah. *Id.*

119. The Wine Institute, State Shipping Laws – Onsite, <http://wi.shipcompliant.com/Home.aspx?SaleTypeID=2> (last visited Nov. 4, 2009). These states are: Delaware, New Jersey, Oklahoma, and South Dakota. *Id.*

120. 27 U.S.C. § 124 (2006).

121. For FedEx's wine shipment policies, see Alcohol Shipping (Wine), FedEx FedEx International—Wine Shipping, <http://fedex.com/us/wine/> (last visited Sept. 13, 2009). For UPS's policies, see Shipping Wine, UPSUPS: Shipping Wine, <http://www.ups.com/wine> (last visited Sept. 13, 2009). The United States Postal Service does *not* accept alcohol for shipment. UNITED STATES U.S. POSTAL SERVICE, PUBLICATION 52, HAZARDOUS, RESTRICTED, AND PERISHABLE MAIL, 75-76 (J, Jan. 2008), available at <http://pe.usps.gov/cpim/ftp/pubs/Pub52/pub52.pdf> (last visited Sept. 13, 2009). DHL will not accept shipments of alcohol from unlicensed persons. DHL, International, Ltd., Prohibited and Restricted Commodities, [http://www.dhl-usa.com/resources/Prohibited\\_Restricted\\_Commodities.pdf](http://www.dhl-usa.com/resources/Prohibited_Restricted_Commodities.pdf) (last visited Sept. 13, 2009).

122. TheWineBuyer.com, Shipping Information, [http://www.thewinebuyer.com/main.asp?request=SHIPPING\\_INFO](http://www.thewinebuyer.com/main.asp?request=SHIPPING_INFO) (last visited Dec. 1, 2009).

123. MyWinesDirect.com, Wine Shipping Laws, <http://www.mywinesdirect.com/our-difference/wine-shipping> (last visited Nov. 4, 2009).

124. FTC REPORT, *supra* note 13, at 5.

breweries.<sup>125</sup> Tier Two consists of wholesalers, who act as middlemen.<sup>126</sup> A wholesaler receives the alcohol from the producer, pays the excise taxes to the state, and then distributes the alcohol to various in-state retailers.<sup>127</sup> Finally, Tier Three includes of licensed retail outlets physically present in the state.<sup>128</sup> Tier Three is the only level permitted to sell directly to a consumer (excepting face-to-face purchases made at the producer's facilities, such as a tasting room at a winery).<sup>129</sup> To prevent loopholes, the laws prohibit vertical integration of the tiers (a producer or retailer acting as a wholesaler or vice versa).<sup>130</sup>

States have offered several justifications for this multi-layered system,<sup>131</sup> such as requiring distribution through wholesalers facilitates the collection of excise taxes.<sup>132</sup> Prohibiting vertical integration is an attempt to "prevent organized crime from gaining control of alcohol distribution."<sup>133</sup> Additionally, keeping the price of alcohol artificially high by incorporating several layers of price mark-ups allegedly promotes temperance.<sup>134</sup> Thus, this seventy-five-year-old system is an attempt to serve state interests in tax revenue, public safety, and temperance.

### *B. Post-Granholm Litigation*

Several recent federal cases demonstrate the inconsistent application of the *Granholm* decision. For example, the Seventh Circuit recently upheld an Indiana law requiring a face-to-face transaction for direct shipments,<sup>135</sup> while the Sixth Circuit held, four

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125. *Id.* These producers must have a valid permit from the Alcohol Tobacco Tax and Trade Bureau (TTB) in order to sell wine under any system. *Id.*

126. *Id.*

127. *Id.* The excise taxes and a profit margin are incorporated into the price charged to the retailers. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* at 6.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Baude v. Heath*, 538 F.3d 608, 615 (7th Cir. 2008), *cert. denied*, 129 S. Ct. 2382 (2009). The First Circuit has also adopted this approach. *Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28 (1st Cir. 2007).

months later, that a similar Kentucky law was invalid.<sup>136</sup> The Sixth Circuit reasoned that, although not discriminatory on its face, the law “makes it economically and logistically infeasible for most consumers to purchase wine from out-of-state small farm wineries” because “[i]t is impractical for customers to travel hundreds or thousands of miles to purchase wine in-person.”<sup>137</sup> Thus, “out-of-state wineries are clearly burdened by Kentucky’s regulatory scheme.”<sup>138</sup> Further, “the Wholesalers fail to establish that the state regime advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory means.”<sup>139</sup> The Sixth Circuit therefore held that an in-person purchase requirement is discriminatory, burdens interstate commerce, and that the Twenty-First Amendment does not save it.<sup>140</sup>

Another area of differing interpretation pertains to laws providing an exception to the ban on direct shipment for wineries producing below a certain amount of wine per year, usually set just above the production volume of the largest winery in the state (“gallonage cap exception”).<sup>141</sup> This loophole allows all in-state wineries to ship directly, but excludes larger out-of-state wineries.<sup>142</sup> In *Black Star Farms, LLC v. Oliver*, for example, a district court upheld a gallonage cap exception to Arizona’s three-tier distribution system, which permitted wineries producing less than twenty thousand gallons of wine per year to ship directly to Arizona consumers.<sup>143</sup> Conversely, a district judge in Massachusetts granted

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136. *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 434 (6th Cir. 2008) (“[W]e conclude that Kentucky’s in-person purchase requirement, which is discriminatory in practical effect, violates the dormant Commerce Clause.”).

137. *Id.* at 433. Interestingly, the Sixth Circuit held that same year in *Jelousek v. Bresden*, in upholding Tennessee’s ban on direct shipping, that “[t]he Commerce Clause does not require that states optimize commerce, only that “[i]f a State chooses to allow direct shipment of wine, it must do so on evenhanded terms.” 545 F.3d 431, 436 (6th Cir. 2008), *reh’g denied*, 2009 U.S. App. LEXIS 10975 (6th Cir. 2009) (citing *Granholm v. Heald*, 544 U.S. 460, 493 (2005)). *Jelousek* did invalidate Tennessee’s Grape and Wine Law, which provided various exceptions for Tennessee wineries. 545 F.3d at 435, 438-39.

138. *Lilly*, 553 F.3d at 433.

139. *Id.* at 434.

140. *Id.*

141. Thus, all in-state wineries fall within the exception to the state ban on direct shipment. For a further discussion of discriminatory production caps, see *infra* Part II.C.

142. For a further discussion of discriminatory production caps, see *infra* Part II.C.

143. 544 F. Supp. 2d 913 (D. Ariz. 2008). (This case is on appeal to the Ninth Circuit.) Twenty six of Arizona’s twenty seven wineries fell under this gallonage cap exception. *Id.* at 918. The statute thus permitted almost every Arizona winery to bypass the state’s three-tier system and ship directly. *Id.* At the same time, it prevented the hundreds of out-of-state wineries that produced more than twenty thousand gallons a year from shipping directly. *Id.*

summary judgment to the plaintiffs—individual consumers and a wine advocacy group—who challenged a gallonage cap requirement that wineries must be a certain size to apply for a direct shipping license.<sup>144</sup>

As can be seen, federal courts disagree on the application of *Granholm*. The stage is therefore set for another Supreme Court review of state alcohol regulatory schemes.

### C. Representative States<sup>145</sup>

A brief glance at several states' legislative responses to *Granholm* reveals a pattern of defiance. Massachusetts passed a law in 2005 that barred shipping from both in-state and out-of-state wineries that produce more than thirty thousand gallons annually, a gallonage cap similar to the one Arizona passed.<sup>146</sup> Conveniently, all of Massachusetts's in-state wineries produce less than that amount.<sup>147</sup> Thus, while the law regulates in-state and out-of-state producers equally on its face, it in fact discriminates against out-of-state producers.

For instance, Michigan, one of the defendant states in *Granholm*, continues to resist free trade in wine. In 2008, a district judge ordered Michigan to allow out-of-state retailers to ship wine directly to consumers in the state.<sup>148</sup> Within five legislative days, Michigan had "introduced, edited, voted upon, and enrolled" House Bill 6644.<sup>149</sup> Under this new law, retailers are allowed to ship directly

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144. *Family Winemakers of Calif. v. Jenkins*, 2008 U.S. Dist. LEXIS 112074, \*39 (D. Mass. Dec. 18, 2008), *aff'd*, 2010 U.S. App. LEXIS 886 \*5-6 (1st Cir. Jan. 14, 2010) ("We hold that [Mass. Gen. Laws ch. 138,] § 19F violates the Commerce Clause because the effect of its particular gallonage cap is to change the competitive balance between in-state and out-of-state wineries in a way that benefits Massachusetts's wineries and significantly burdens out-of-state competitors.").

145. For an excellent summary of state law, albeit neither "a complete summary of the relevant law [n]or a compliance handbook," see R. CORBIN HOUCHINS, NOTES ON WINE DISTRIBUTION (June 23, 2009), [http://shipcompliant.com/blog/document\\_library/dist\\_notes\\_current.pdf](http://shipcompliant.com/blog/document_library/dist_notes_current.pdf).

146. David Kesmodel, *Wine Lovers See Red over State Laws that Restrict Home Delivery of Bottles*, WALL ST. J., Sept. 24, 2008, at D1, available at <http://online.wsj.com/article/SB122220717634568663.html>; see *Black Star Farms*, 544 F. Supp. 2d 913.

147. *Id.* This law was recently invalidated in a summary judgment proceeding. *Family Winemakers of Calif. v. Jenkins*, 2008 U.S. Dist. LEXIS 112074 (D. Mass. Dec. 18, 2008).

148. *Siesta Vill. Mkt., LLC v. Granholm*, 596 F. Supp. 2d 1035 (E.D. Mich. 2008).

149. Posting of Jane Hwang to ShipCompliant Blog (*Michigan Levels Down on Wine Retailers*), <http://shipcompliantblog.com/blog/2009/01/13/michigan-levels-down-on-wine-retailers> (Jan. 13, 2009, 9:59 EST); see H.R. 6644, 94th Leg., Gen. Sess. (Mich. 2008), available at

to consumers only if the retailer meets very strict guidelines: (1) the retailer must obtain a special merchant license; (2) the retailer may only deliver products using its own employees; (3) the retailer's employees must verify the recipient's age upon delivery; and (4) the retailer's employees must receive alcohol server training through a Michigan Liquor Control Commission approved program.<sup>150</sup> The employee-delivery requirement effectively makes shipment by any retailer entirely impractical.<sup>151</sup>

The Legislative Analysis that accompanied House Bill 6644 reveals something about the underlying legislative understanding.<sup>152</sup> The report makes empty arguments against allowing direct shipment, such as the claim that "there is no legal framework to license these out-of-state retail liquor establishments and to collect the same excise taxes and sales and use taxes levied on Michigan retailers and suppliers."<sup>153</sup> It further predicts that "[t]here would be no oversight by state regulators regarding quality, compliance with labeling laws, adherence to the prohibition on selling to minors, and no way to collect sales taxes, use taxes, and various excise taxes which generate more than two hundred million dollars a year in revenue."<sup>154</sup> This argument ignores federal quality and labeling laws, and the Supreme Court has already dismissed the arguments regarding the collection of taxes and sales to minors.<sup>155</sup> The Legislative Analysis further complains that, "with only 44 enforcement officers, the Liquor Control Commission would be unable to enforce provisions of the liquor code that would apply to out-of-state retailers."<sup>156</sup>

Most importantly, the report argues that a strong reason for passing the bill is that in-state businesses would otherwise be disadvantaged: "current licensees would be disadvantaged economically if they had to compete with large out-of-state Internet or

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<http://legislature.mi.gov/doc.aspx?2008-HB-6644>; see also 2008 Mich. Pub. Acts No. 474-08, available at <http://www.legislature.mi.gov/documents/2007-2008/publicact/pdf/2008-PA-0474.pdf>.

150. H.R. 6644; see also 2008 Mich. Pub. Acts No. 474-08.

151. Posting of Jane Hwang to ShipCompliant Blog, *supra* note 149.

152. See MICH. HOUSE FISCAL AGENCY, LEGISLATIVE ANALYSIS, ALCOHOL: DISCONTINUE DIRECT SALES TO CONSUMERS BY RETAILERS (Dec. 12, 2008) [hereinafter MICHIGAN LEGISLATIVE ANALYSIS], available at <http://www.legislature.mi.gov/documents/2007-2008/billanalysis/House/pdf/2007-HLA-6644-3.pdf>. "This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent." *Id.* at 7.

153. *Id.* at 2.

154. *Id.* at 6.

155. See discussion *supra* Part I.D.

156. MICHIGAN LEGISLATIVE ANALYSIS, *supra* note 152, at 6.

mail order alcohol companies;”<sup>157</sup> and further, “not enacting the bill could also negatively affect in-state retailers by opening up competition with out-of-state companies that would not be paying license fees, collecting and remitting taxes, or complying with other liquor code regulations.”<sup>158</sup> This justification arguably reveals that a motivation for passing this law was state protectionism, rather than a permissible state interest. Thus, Michigan continues to resist compliance with the spirit of *Granholm*.

Some states, however, are relaxing their regulations post-*Granholm*. For example, Oregon amended its laws in 2007 to allow out-of-state wineries to ship directly to retailers (a process known as self-distribution) and consumers.<sup>159</sup> The winery must have an Oregon direct shipping permit and must comply with certain mailing restrictions, such as limiting shipments to two nine-liter cases to each address per month and labeling the packages as requiring the signature of a recipient who is twenty-one years or older upon delivery.<sup>160</sup> Even Tennessee, one of the three states where transporting alcoholic beverages (outside the prescribed regulatory system) into the state is a felony,<sup>161</sup> has slightly relaxed its restrictions.<sup>162</sup> The newly enacted legislation permits limited direct shipping to individuals for personal use with similar restriction to those Oregon imposed.<sup>163</sup> Although these represent a loosening of restrictions, these laws still impose obstacles to interstate commerce.

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157. *Id.* at 6.

158. *Id.* at 6-7. Interestingly, other than the Michigan Liquor Control Commission, the other supporter of the bill is the Michigan Beer and Wine Wholesalers Association, *id.* at 7, who arguably stands to lose the most profits if consumers are permitted to have wine shipped directly.

159. Stephen C. Bush, *Oregon Wine Lovers Toast New Law*, OR. WINE PRESS, Oct. 2007, available at [http://oregonwinepress.com/index.php?pr=Oct07\\_06\\_HB2171](http://oregonwinepress.com/index.php?pr=Oct07_06_HB2171); see also OR. REV. STAT. ANN. § 471.282 (West 2009).

160. *Id.*

161. See TENN. CODE ANN. § 57-3-401 (2009). The other two states are Utah, UTAH CODE ANN. § 32A-12-201, and Kentucky, KY. REV. STAT. ANN. § 244.165 (West 2009).

162. See H.R. 1160, 106th Gen. Assem., Reg. Sess. (Tenn. 2009) (allowing direct shipment from a winery to a consumer if the winery obtains a direct shipping license). However, shipping alcohol into the state without a license or carrying it on one's person remains a felony, and Federal Onsite Shipping, 27 U.S.C. § 124, does not permit the shipment of alcohol without a license under TENN. CODE ANN. § 57-3-217 (2009). See Op. Att'y Gen. 09-15, 2009 Tenn. AG LEXIS 14 (Tenn. Feb. 24, 2009), available at <http://www.tennessee.gov/attorneygeneral/op/2009/op/op15.pdf> (“A Tennessee resident who makes an onsite purchase of wine at an out-of-state winery may not use a common carrier to ship such wine back to his or her residence in Tennessee.”).

163. TENN. CODE ANN. § 57-3-217. However, shipment or transportation without a license is still a felony. § 57-3-217(g).

This overview of the regulatory schemes in various states reveals that, despite *Granholm*, states continue to enact protectionist statutes that arguably violate the Constitution and undoubtedly disadvantage consumers, producers, and retailers.

### III. ANALYSIS OF THE COMBATANTS' STRATEGIC POSITIONS

#### A. Problems Resulting from the Imbalance of Regulatory Power

##### 1. Economic Impact

The advent of the Internet has brought state regulation of alcohol into the spotlight, sparking consumer ire with the restrictions on free trade.<sup>164</sup> E-commerce currently accounts for approximately 3.6 percent of total retail sales,<sup>165</sup> up from less than 1 percent in 2000,<sup>166</sup> and has been increasing steadily.<sup>167</sup> This growing popularity is due to the ease of shopping from home, the convenience of home delivery, and the wide selection available from vast inventories far surpassing the capacity of any one brick-and-mortar establishment.<sup>168</sup> The Internet has also created a truly national (and often international) market, increasing product availability and encouraging price competition on scales never before realized.<sup>169</sup> The “defining characteristic of the decade-long rise of e-commerce” is the “phenomenon of eliminating the middleman through Internet sales,”<sup>170</sup> which enables the consumer to buy directly from the winery at lower prices.

Wine consumption in the United States has also experienced a steady overall increase in the seventy-five years since the repeal of Prohibition.<sup>171</sup> In 2007, the wine consumption per resident in the U.S.

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164. See, e.g., FTC REPORT, *supra* note 13, at 14 (“[N]umerous consumers in numerous states submitted comments complaining that the bans prevented them from purchasing particular brands of wine. FTC staff received more complaints about interstate direct shipping laws than about any other single restriction or practice in any other industry.”).

165. U.S. CENSUS BUREAU, QUARTERLY RETAIL E-COMMERCE SALES: 2ND QUARTER 2009 (Aug. 17, 2009), available at <http://www.census.gov/retail/mrts/www/data/html/09Q2.html>.

166. *Id.*

167. See *id.*

168. FTC REPORT, *supra* note 13, at 14 (“[O]nline wine sales give consumers the opportunity to save money and to choose from a much greater variety of wines.”).

169. See generally *id.* at 23 (“[E]ven if consumers choose to buy wine from a bricks-and-mortar retailer, direct shipping still encourages price competition between online and offline sources.”).

170. Michael A. Pasahow, Note, *Granholm v. Heald: Shifting the Boundaries of California Reciprocal Wine Shipping Laws*, 21 BERKELEY TECH. L.J. 569, 574 (2006).

171. See Wine Consumption in the U.S., *supra* note 7.



was 2.47 gallons per year, an increase from 1.94 gallons a decade earlier, and a substantial increase from 0.26 gallons per year in 1934.<sup>172</sup> The United States is the third-largest wine consumer, behind France and Italy,<sup>173</sup> and the fourth-largest producer of wine, behind Italy, France, and Spain.<sup>174</sup> In 2005, the total revenue from domestic wine sales was approximately twenty-four billion dollars,<sup>175</sup> and the total economic impact of the wine and grape industry—including sales, employment, taxes, etc.—was one-hundred and sixty-two billion dollars.<sup>176</sup> Grapes are now the sixth-largest crop in the country.<sup>177</sup> The Tax and Trade Bureau lists over six thousand current holders of Wine Producer and Blender Permits,<sup>178</sup> more than double the number of licensed wineries a decade ago.<sup>179</sup> The industry is thus a strong and growing sector of the economy.

Yet, amidst this overall economic boom, small wineries are failing, due in part to the states' aggressive market barriers.<sup>180</sup> David and Dorothy Gahimer, who in 2006 had to close the doors of their Terre Vin Winery in Indiana, stated that “[n]ew state legislation, decline in local tourism and general economic conditions made it impossible to continue.”<sup>181</sup> Similarly, Bojan Boskovic, owner of Balic Winery in New Jersey, criticized the ancient three- and two-tier systems: “It makes it harder for us smaller wineries to sell our wines,

172. *Id.*

173. The Wine Institute, World Wine Consumption by Country, <http://www.wineinstitute.org/files/WorldWine%20ConsumptionbyVolume.pdf> (last visited Nov. 4, 2009).

174. The Wine Institute, World Wine Production by Country, <http://www.wineinstitute.org/files/WorldWineProductionbyCountry.pdf> (last visited Nov. 4, 2009).

175. IMPACT ON THE ECONOMY, *supra* note 88, at 17 (\$23,821,773,000); *see also* Andre Nance, Note & Comment, *Don't Put a Cork in Granholm v. Heald: New York's Ban on Interstate Direct Shipments of Wine is Unconstitutional*, 16 J.L. & POL'Y 925, 927 (2008) (estimating wine retail market at thirty billion dollars in 2007).

176. IMPACT ON THE ECONOMY, *supra* note 88, at 3-4 (\$162,026,166,000).

177. IMPACT ON THE ECONOMY, *supra* note 88, at 28; Heald & Heald, *supra* note 102.

178. Alcohol and Tobacco Tax and Trade Bureau, Frequently Requested Listings, Wine Producer and Blender Permit Lists, <http://www.ttb.gov/foia/frl.shtml> (last visited Nov. 4, 2009). These permits are required to operate a winery. *Id.* Thus, the number of permits indicates the number of wineries in the United States.

179. IMPACT ON THE ECONOMY, *supra* note 88, at 24. In 1999, there were 2688 bonded wineries. *Id.*

180. *See id.* at 15 (“The continuing consolidation in the distribution sector makes it increasingly difficult for smaller wineries to gain access to the market, especially the national market. This trend requires them to increase their own sales and marketing expenses, or engage independent marketing services and brokers, even as they face increasing pressure on margins—all of which has highlighted the importance of direct-to-consumer sales strategies for wineries.”).

181. Heald & Heald, *supra* note 102.

because we do not have the big distribution network that the biggest wineries have. We simply cannot afford it.”<sup>182</sup> State Assemblyman John J. Burzichelli of New Jersey sums up the problem, stating, “The existing system is antiquated and doesn’t fit in with how society currently works in the era of eBay and Internet shopping. . . . It has served its useful purpose, but it’s time to update it.”<sup>183</sup>

The FTC staff stated in 2003, “[S]tate bans on interstate direct shipping represent the single largest regulatory barrier to expanded online wine sales.”<sup>184</sup> Noting that “online wine sales offer consumers lower prices and greater selection,” the Commission staff determined “that states could significantly enhance consumer welfare by allowing the direct shipment of wine to consumers.”<sup>185</sup>

Despite the recommendations of the FTC staff, outspoken consumer advocacy groups, lobbying efforts by winery and retail trade organizations, and criticism in the federal courts, these trade restrictions get increasingly complicated by the year. The primary driving force behind this legislation is the combined efforts (and dollars) of powerful wholesaler political action committees (PACs) and trade associations.<sup>186</sup> Consider Figure 1,<sup>187</sup> which compares political contributions by sector. Spending by wholesalers clearly surpasses that of all other alcohol beverage interests combined.<sup>188</sup> With powerful national organizations, such as Wine & Spirits Wholesalers of America (WSWA),<sup>189</sup> wholesalers are able to target specific state legislatures when alcohol regulation is on the legislative docket. For example, in 2006, the year after the *Granholm* decision, wholesaler political donations in Texas exceeded the combined contributions from gambling and casino interests, retail interests, food interests,

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182. Rob Spahr, *Proposal Would End Ban on Shipping N.J. Wines to Your Door*, PRESS OF ATL. CITY, Jan. 12, 2009, at C1.

183. *Id.*

184. FTC REPORT, *supra* note 13, at 14.

185. *Id.* at 3.

186. See generally Vijay Shanker, Note, *Alcohol Direct Shipment Laws, the Commerce Clause, and the Twenty-First Amendment*, 85 VA. L. REV. 353, 362-68 (1999) (discussing lobbying efforts of alcohol wholesalers).

187. Nat’l Inst. on Money in State Politics, Industry Influence, <http://www.followthemoney.org/database/IndustryTotals.phtml> (use filters in Table 2 to narrow down industries under “General Business: Beer, Wine, & Liquor”) (last visited Nov. 4, 2009).

188. See *id.*

189. Wine & Spirits Wholesalers of America, <http://www.wswa.org> (last visited Nov. 4, 2009). Of particular interest is the “Our Views on Issues” section, which provides dire predictions regarding the effects of direct shipment and the breakdown of the three-tier system. See <http://www.wswa.org/content.cfm?sectionid=3> (last visited Nov. 4, 2009).

and all business services.<sup>190</sup> They also outspent the insurance industry and various interests in the financial industry.<sup>191</sup> That same year in Massachusetts, wholesalers contributed more than all labor unions as well as lawyer and lobbyist interests.<sup>192</sup>

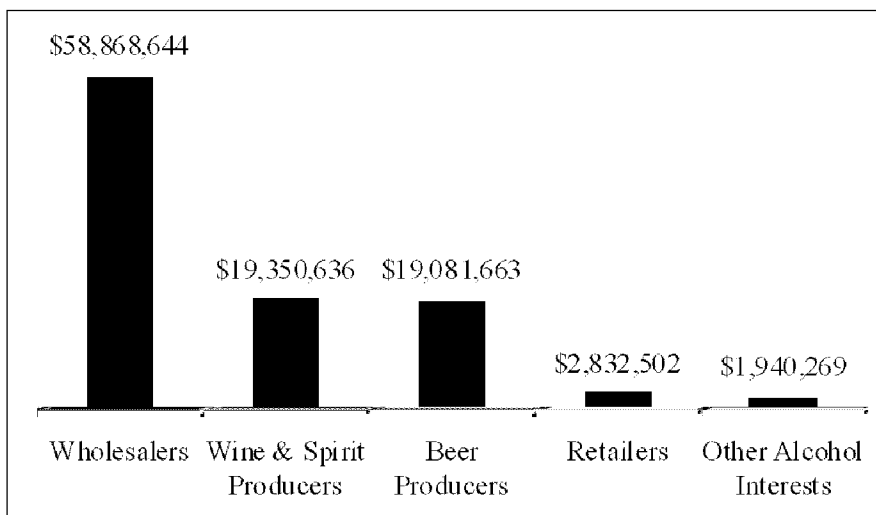


Figure 1: Political Contributions by Industry Sector

Wholesalers are able to afford these monumental contributions across the nation because the state-mandated three-tier system is wildly profitable. According to 2002 census data, the total value of shipments by wineries,<sup>193</sup> distilleries,<sup>194</sup> and breweries<sup>195</sup> was over

190. SPECIALTY WINE RETAILERS ASS'N, WHOLESALER PROTECTION: ALCOHOL WHOLESALERS' CONTROL AND WEAKENING OF THE AMERICAN WINE MARKET THROUGH ITS \$50,000,000 IN CAMPAIGN CONTRIBUTION 9 (Jan. 8, 2008) [hereinafter WHOLESALER PROTECTION], available at <http://www.specialtywineretailers.org/documents/WholesaleProtection-2008.pdf>; see generally Follow the Money, [www.followthemoney.org](http://www.followthemoney.org) (last visited Nov. 4, 2009); OpenSecrets.org, <http://www.opensecrets.org> (last visited Nov. 4, 2009).

191. WHOLESALER PROTECTION, *supra* note 190, at 9.

192. *Id.* Similarly, in Ohio that year, wholesalers "spent more on campaign contributions . . . than the combined contributions of organizations and individuals identifying themselves with the following ideological concerns: Christian Conservative, Human Rights, Liberal Policy Organizations, Anti-Gun Control, Pro-Choice, Gay & Lesbian Rights, Minority and Ethnic Rights, Conservative Policy, Pro-Environment, Foreign & Defense Policy, Pro-Life and Tax Issues." *Id.*

193. U.S. Census Bureau, Industry Statistics Sampler: Wineries, <http://www.census.gov/econ/census02/data/industry/E31213.HTM> (last visited Nov. 4, 2009).

194. U.S. Census Bureau, Industry Statistics Sampler: Distilleries, <http://www.census.gov/econ/census02/data/industry/E31214.HTM> (last visited Nov. 4, 2009).

thirty-one billion dollars. By comparison, beer, wine, and alcoholic beverage merchant wholesalers had a total shipment value of more than eighty-seven billion dollars,<sup>196</sup> almost triple that of their producers. Research sponsored by the Congressional Wine Caucus found that the total revenue of wineries in 2005 was approximately eleven billion dollars.<sup>197</sup> Of that amount, nine billion dollars in product was distributed by wholesalers through the three-tier system.<sup>198</sup> Wholesalers are also highly centralized: in the 1990s, “the number of wine wholesalers and distributors in the US declined by more than 50%, largely through mergers and acquisitions.”<sup>199</sup> As the adage goes, “money speaks,” and this “superior ability to influence the political process possessed by in-state wholesalers/distributors and retailers should provide ample evidence that direct shipment laws were passed for the purpose of economic protectionism.”<sup>200</sup>

Consumers and producers, on the other hand, are decentralized.<sup>201</sup> The ever-growing number of wineries and the preoccupation of consumer advocacy groups with a multitude of issues<sup>202</sup> mean that rallying to counteract the powerful lobbying of the wholesalers is difficult. Additionally, larger wineries, which have more negotiating power with wholesalers, would have different

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195. U.S. Census Bureau, Industry Statistics Sampler: Breweries, <http://www.census.gov/econ/census02/data/industry/E31212.HTM> (last visited Nov. 4, 2009).

196. U.S. Census Bureau, Industry Statistics Sampler: Beer, Wine, and Distilled Alcoholic Beverage Merchant Wholesalers, <http://www.census.gov/econ/census02/data/industry/E4248.HTM> (last visited Nov. 4, 2009).

197. IMPACT ON THE ECONOMY, *supra* note 88, at 17 (\$11,372,366,000).

198. *Id.* (\$8,892,434,000).

199. *Id.* at 15. “In 1991 the top twenty US wine and spirits wholesalers and distributors represented \$7.5 billion in sales. By 2005, the top five US wine wholesalers and distributors represented \$14.5 billion in sales and 43% of the total wine and spirits market.” *Id.*

200. Shanker, *supra* note 186, at 382; *see also* David Kesmodel, *supra* note 146 (“What the wholesalers really want is to preserve as much as they can their monopoly pricing power, which is considerable.” (quoting Bill Nelson, president of WineAmerica, a trade group for wineries)).

201. Consider that the population of the U.S. is an estimated three billion, U.S. Census Population Clock, <http://www.census.gov/population/www/popclockus.html> (last visited Feb. 1, 2009), and the number of producer permits is about 6,000, Alcohol and Tobacco Tax and Trade Bureau, *supra* note 178.

202. The Consumer Action Website, maintained by the Federal Citizen Information Center of the U.S. General Services Administration, provides a list of national consumer organizations. Fed. Citizen Info. Ctr., National Consumer Organizations, <http://www.consumeraction.gov/resprt2.shtml> (last visited Dec. 22, 2009). The majority of groups focus on a broad range of issues, from health care, to automobiles, to food safety, to financial services. *Id.*

priorities than the smaller wineries,<sup>203</sup> and thus, industry-wide producer trade groups are less likely. Some national groups are emerging and gaining strength,<sup>204</sup> but tedious state-by-state lobbying and litigating, especially without the financial reserves to match those of the wholesalers, is often slow and sometimes stymied by counter-legislation.<sup>205</sup>

An economical and logical first step to counter this unfair and unconstitutional protectionism is for states to allow direct shipping from wineries to consumers and retailers nationally (meaning a three-tier distribution system is voluntary, rather than mandatory). Allowing direct shipment may marginally lower sales of in-state wineries initially, since the increased competition would dilute purchases as consumers have more out-of-state choices.<sup>206</sup> Overall revenues are more likely to increase in the long run, though, as these small wineries gain more streamlined and less costly access to a larger market.<sup>207</sup> Despite protests from wholesalers, a mandatory three-tier system is economically damaging and violates consumers' rights.<sup>208</sup> Direct sales through the Internet will bring the long-needed market competition to the industry, and

[t]he continued growth of an interstate, internet-based retail wine industry to compete with the three-tier system will further decrease the political and economic clout of the wholesalers and will continue to put pressure on states to streamline their traditional distribution channels, leading to greater efficiency and customer savings in the longer term.<sup>209</sup>

Ultimately, despite dire predictions by the wholesale industry,<sup>210</sup> a voluntary three-tier system will likely survive. Still, even absent a mandatory three-tier distribution system, many wineries will choose

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203. For instance, smaller wineries have more difficulty getting wholesalers to carry their product, since their production is limited. FTC REPORT, *supra* note 13, at 6. Thus, smaller wineries would have a harder time getting their product on store shelves in states requiring distribution through wholesalers. The ability to ship directly would have a greater impact on them than on the larger wineries, which already have the ability to distribute their product through wholesalers.

204. See, e.g., Coalition for Free Trade, *supra* note 19 (non-profit foundation of wine industry representatives and legal experts); Free the Grapes!, *supra* note 18 (national coalition of consumers, wineries, and retailers); WineAmerica, The National Association of American Wineries, <http://www.wineamerica.org> (last visited Nov. 4, 2009).

205. See discussion of Michigan's response to *Siesta Village* decision *supra* Part II.C.

206. Pasahow, *supra* note 170, at 583.

207. *Id.*

208. See FTC REPORT, *supra* note 13, at 41 ("As e-commerce continues to expand, the potential cost to consumers of restrictions will rise."); Tanford, *supra* note 110, at 329 ("[I]t is an act of economic protection that serves little purpose except to line the wholesalers' pockets.").

209. Pasahow, *supra* note 170, at 583-84.

210. *Id.* at 583.

the convenience of having a third party navigate the myriad of state sales and excise taxes and legal limitations on in-state sales, much in the way that manufacturers of most consumer products do not self-distribute.

## 2. State Regulation Unduly Burdens Interstate Commerce

Most state regulation of alcohol intends neither to promote state interests nor to protect consumers, but rather to protect established businesses.<sup>211</sup> As a result, the majority of state regulation regarding alcohol distribution amounts to unconstitutional protectionism.<sup>212</sup> Since *Granholm*, patently discriminatory legislation that overtly treats in-state and out-of-state industries differently has been begrudgingly repealed and replaced with alternative laws.<sup>213</sup> However, the replacements, while less apparent, are no less discriminatory and burdensome.

The mandated three-tier system, although approved by the Supreme Court,<sup>214</sup> unduly burdens interstate commerce. Proponents argue that this system is not discriminatory because it regulates in-state and out-of-state producers equally. In *C & A Carbone, Inc. v. Clarkstown*, however, the Supreme Court, examining a New York municipal law requiring all solid waste to be processed at a certain private facility before it could be shipped out of the municipality, held the statute unconstitutional.<sup>215</sup> The Court found that “the ordinance prevents everyone except the favored local operator from performing the initial processing step . . . [and] thus deprives out-of-state businesses of access to a local market.”<sup>216</sup> Additionally, the Supreme Court dismissed the equal treatment argument, stating, “The ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition.”<sup>217</sup> The mandated

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211. See FTC REPORT, *supra* note 13, at 42 (“On numerous workshop panels, consumer representatives and scholars warned that new restrictions on e-commerce are often driven more by the desire to protect established businesses than to protect consumers.”); Tanford, *supra* note 110, at 329 (“[I]t imposes significant burdens on interstate commerce by raising costs and limiting market access, which exceed local benefits.”).

212. See BLACK’S LAW DICTIONARY (8th ed. 2004) (defining “protectionism” as “[t]he protection of domestic businesses and industries against foreign competition by imposing high tariffs and restricting imports”).

213. See discussion *supra* Part II.

214. See *Granholm v. Heald*, 544 U.S. 460 (2005).

215. 511 U.S. 383, 386 (1994).

216. *Id.* at 389.

217. *Id.* at 391.

three-tier system for alcohol distribution operates no differently. As with the law in *C & A Carbone*, it forces a product through a designated private processor, drives up prices, and prohibits competition by out-of-state competitors. The state-mandated three-tier system thus clearly violates the non-discrimination principle.

Some state systems not utilizing the three-tier system also unduly burden interstate commerce. This arsenal of regulatory schemes demonstrates the creativity and ingenuity of the bill drafters. Permit laws, for instance, may seem to comply with the *Granholm* decision, yet often “the regulations attached to the permit are so burdensome that they have the practical effect of excluding many small wineries from the market.”<sup>218</sup> High fees for out-of-state shipping permits, especially in the aggregate, effectively exclude smaller nonresident wineries.<sup>219</sup> Case limits, which ration the number of cases (either per shipper or per recipient) shipped into a state, are also discriminatory, by “giv[ing] limited, rather than full, access to the market and preserv[ing] most of the wholesalers’ monopolistic position as the only distribution route for most major wine brands.”<sup>220</sup> Similarly, production limits, which grant access to only those wineries producing under a certain threshold, are usually set just above the highest producing domestic winery, effectively discriminating against larger out-of-state wineries.<sup>221</sup>

Other laws seem to allow direct shipment with an unfettered permit, but include a law requiring the producer’s own employees, who often have to be certified under the receiving state’s law, make these deliveries in the producer’s own vehicles.<sup>222</sup> Such a delivery method is so impractical that the state market will effectively remain closed.<sup>223</sup> Other laws create impracticable obstacles for the purchaser by allowing direct shipment for wine purchased in a face-to-face

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218. Tanford, *supra* note 110, at 323.

219. FTC REPORT, *supra* note 13, at 41 (“Even seemingly small fees can deter smaller wineries from shipping wine to a particular state . . . .”); Tanford, *supra* note 110, at 323. Consider the scenario where the permit fee per state is \$500, a minimal cost if considered on a state-by-state basis. But for a winery to ship to all 50 states, the total cost would be \$25,000, a significant investment, especially for a small business. The result is that the smaller wineries would be forced to pick and choose a handful of states in which they can afford to sell their product.

220. Tanford, *supra* note 110, at 323.

221. *Id.* at 324.

222. *Id.* at 328; *see, e.g.*, H.R. 6644, 94th Leg., Gen. Sess. (Mich. 2008), <http://legislature.mi.gov/doc.aspx?2008-HB-6644>.

223. Tanford, *supra* note 110, at 328.

transaction;<sup>224</sup> not many can afford or would want to take a 3,300-mile trip to Napa Valley from Maine, or a 1,500-mile trip from Arizona to Washington state for a few bottles of wine. Still other state restrictions encroach on the retailers' contractual options with the wholesalers. Franchise laws,<sup>225</sup> credit bans,<sup>226</sup> minimum mark-up laws,<sup>227</sup> bans on volume discounts,<sup>228</sup> and central warehousing bans<sup>229</sup> severely limit retailers' contracting ability and have raised antitrust concerns.<sup>230</sup>

Thus, even under the current Commerce Clause framework, many state regulatory schemes violate the Constitution because they discriminate against out-of-state goods. Most directly harm consumers by over-inflating prices and reducing availability. To favor in-state wholesalers and distributors at the expense of out-of-state alcohol producers and in-state consumers is, at its very core, favoring small in-state economic interests over general and out-of-state interests.<sup>231</sup> Ultimately, this patchwork scheme of protectionist laws "frustrates the intent of the framers to create a single national economic union."<sup>232</sup>

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224. *Id.* at 324 (noting also that "[s]ome states compound this problem by limiting the quantity of wine that an individual may personally bring back into the state").

225. WHOLESALE PROTECTION, *supra* note 190, at 4 ("[P]roducers may not change [or terminate] wholesalers . . . without substantial monetary payments.").

226. *Id.* (noting that such laws require retailers to pay cash upon delivery but allow wholesalers to buy from producers on credit).

227. *Id.* (noting that these laws require retailers to mark up their products at a specified amount).

228. *Id.* (noting that retailers are not permitted to buy in bulk, and thus cannot take advantage of volume discounts).

229. *Id.* (noting that laws prevent retailers from keeping "back stock," limiting their purchase power to the capacity of their shelves).

230. *See* TFWS, Inc. v. Franchot, 572 F.3d 186 (4th Cir. 2009); Costco Wholesale Corp. v. Maleng, 522 F.3d 874 (9th Cir. 2008).

231. *See* Vance v. W.A. Vandercook Co. 170 U.S. 438, 455 (1898) ("On the face of these regulations, it is clear that they subject the constitutional right of the nonresident to ship into the state, and of the resident in the state to receive for his own use, to conditions which are wholly incompatible with and repugnant to the existence of the right which the statute itself acknowledges. The right of the citizen of another state to avail himself of interstate commerce cannot be held to be subject to the issuing of a certificate by an officer of the state of South Carolina, without admitting the power of that officer to control the exercise of the right. But the right arises from the constitution of the United States. It exists wholly independent of the will of either the lawmaking or the executive power of the state. It takes its origin outside of the state of South Carolina, and finds its support in the constitution of the United States. Whether or not it may be exercised depends solely upon the will of the person making the shipment, and cannot be in advance controlled or limited by the action of the state in any department of its government.").

232. Tanford, *supra* note 110, at 329.



### 3. Less Restrictive Means

Most of the arguments against direct shipping focus on the potential delivery to minors and the potential tax evasion.<sup>233</sup> Despite the wholesalers' argument that less restrictive means are impossible to implement because they do not yet exist, other effective regulatory schemes have been demonstrated and still others can be developed.<sup>234</sup> In its report addressing e-commerce and alcohol, upon which the Supreme Court relied heavily in *Granholm*, the FTC staff noted, "[M]any states have decided that they can prevent direct shipping to minors through less restrictive means than a complete ban, such as by requiring an adult signature at the point of delivery."<sup>235</sup> Further, despite dire predictions to the contrary, "[t]hese states generally report few, if any, problems with direct shipping to minors."<sup>236</sup> The FTC staff also observed that "several federal courts have suggested that registration and labeling requirements could be effective regulatory tools,"<sup>237</sup> and that "in addition to regulating the suppliers, states also could develop statutory systems that would impose similar requirements on package delivery companies as on retail stores."<sup>238</sup> Thus, the availability and adequacy of alternative regulatory schemes has been established and discussed extensively in government reports and legal scholarship.

#### *B. A Look at the Text—An Argument for Reinterpretation*

Much could be resolved by reexamining the text allegedly providing the basis for state regulation. A strict textual analysis of the Wilson Act, Webb-Kenyon Act, and the Twenty-First Amendment reveals that states may have been delegated less power than they now claim. Although some scholars<sup>239</sup> give little weight to legislative

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233. See discussion of state interests, including consumption of alcohol by minors and tax collection *supra* Part I.D.

234. See also discussion of rejected "saving" state interests *supra* Part I.D.

235. FTC REPORT, *supra* note 13, at 26.

236. *Id.*

237. *Id.* at 28.

238. *Id.* at 26 ("There is no practical difference from requiring such a procedure that required of store clerks or bartenders who regularly check customers for valid identification to verify age before allowing the sale of alcoholic beverages." (quoting *Bolick v. Roberts*, 199 F.Supp.2d 397, 445 n.41 (E.D. Va. 2002) (addendum to district court's opinion), *vacated on other grounds*, *Bolick v. Danielson*, 330 F.3d 274 (4th Cir. 2003)); see, e.g., *Beskind v. Easley*, 325 F.3d 506, 516-17 (4th Cir. 2003).

239. Such as Justice Scalia. Robert J. Gregory, *Overcoming Text in an Age of Textualism: A Practitioner's Guide to Arguing Cases of Statutory Interpretation*, 35 AKRON L. REV. 451, 459-

intent, the legislative history, especially of the Webb-Kenyon Act, reveals that the current application surpasses the drafters' intention.

### 1. Wilson Act

The Wilson Act, passed in 1891, states:

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 therefrom by reason of being introduced therein in original packages or otherwise.<sup>240</sup>

Effectively, this statute states that imported alcohol is subject to the same restrictions enacted under the state's police power<sup>241</sup> as domestic alcohol would be, regardless of the packaging. Congress thus intended to overrule the original package doctrine, which courts had previously held exempted imported alcohol in its original packaging from state regulation.<sup>242</sup> The Act mentions nothing of commerce or of states' ability to regulate the *importation* of alcohol.<sup>243</sup> Rather, the statute simply makes all alcohol equal, regardless of origin. Shortly after its passage, the Supreme Court noted that the Wilson Act was "not intended to confer upon any State the power to discriminate injuriously against the products of other States in articles whose manufacture and use are not forbidden, and which are therefore the subjects of legitimate commerce."<sup>244</sup> Thus, the Wilson Act did not expand States' commerce powers, but rather reinforced the States' internal police powers.

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60 (2002) ("Justice Scalia insisted upon a return to literalism as he argued against the use of legislative history, which he viewed as extraconstitutional and subject to manipulation by legislators and their committee staffs." (citing *Blanchard v. Bergeron*, 489 U.S. 87, 97-100 (1989) (Scalia, J., concurring) (discussing the ways in which committee reports and floor statements can be manipulated by those unable to secure consensus for their positions))).

240. 27 U.S.C. § 121 (2006) (emphasis added).

241. See BLACK'S LAW DICTIONARY (8th ed. 2004) (defining "state police power" as "power of a state to enforce laws for the health, welfare, morals, and safety of its citizens, if enacted so that the means are reasonably calculated to protect those legitimate state interests").

242. See *Leisy v. Hardin*, 135 U.S. 100 (1890) (holding that alcohol remained out of a state's regulatory reach as an article of interstate commerce, so long as it stayed in its original package).

243. 27 U.S.C. § 121.

244. *Scott v. Donald*, 165 U.S. 58, 100 (1897).

## 2. Webb-Kenyon Act

The Webb-Kenyon Act, passed in 1913, states:

The *shipment or transportation*, in any manner or by any means whatsoever, of any spirituous, 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, 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 spirituous, 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.<sup>245</sup>

One of the key assumptions to determining the scope of this statute is what “in violation” modifies. Current regulatory schemes seem to assume that “in violation” modifies “shipment or transportation.” In other words, the statute prohibits the shipment in violation of state laws, indicating that the states have the power to pass laws regulating shipment into their state. This interpretation posits that Congress intended for states to regulate the shipment or transportation of alcohol because these would be the laws which the statute prohibits violating.

A more logical interpretation asserts that “in violation” modifies “received, possessed, sold, or in any manner used.” Grammar dictates that prepositional phrases modify the verb to which they are closest.<sup>246</sup> Had the drafters intended for “in violation” to modify “shipment,” they would have likely placed the phrase after “shipment” and before “intended”: “The shipment or transportation . . . , of any . . . intoxicating liquor of any kind from one State . . . into any State . . . , *in violation of any law of Such State . . .* which said . . . intoxicating liquor is intended . . . to be received, possessed, sold, or in any manner used . . . is prohibited.” Because the verbs “intended . . . to be received, possessed, sold, or . . . used” separate “in violation” from “shipment,” the rational interpretation is “in violation” modifies the manner of use. Removing “in violation of” from modifying “to be used” makes the phrase “to be received, possessed, sold, or in any manner used” superfluous.

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245. 27 U.S.C. § 122 (2006) (emphasis added). Removing the “catchall” language, the statute says, “The shipment or transportation . . . of any . . . intoxicating liquor . . . from one State . . . into any State . . . , which . . . is intended . . . to be received, possessed, sold, or in any manner used . . . in violation of any law of such State . . . , is prohibited.” *Id.*

246. THE CHICAGO MANUAL OF STYLE ¶ 5.167 (15th ed. 2003).

Under this more reasonable interpretation, this statute prohibits the shipment of alcohol when any receiving party intends to use it in contravention of state law. The regulated action—receiving, possessing, selling, or otherwise using alcohol—occurs *within* the state. The statute thus does not give states the power to regulate interstate commerce. Instead, this interpretation allows states to exercise their police powers at the border, rather than having to wait until the recipient uses the alcohol in violation of its laws. For example, police could theoretically impound a large shipment of whisky at the state line if it is destined for a retailer in a dry county. (The burden would be on the state to prove the receiver’s intended use is in violation of state law.) Without this Act, the state would have to wait until after the shipment arrived at its final destination and then catch the retailer in the act of illegally selling alcohol in a dry county. Therefore, this interpretation is more attuned to the stated purpose of the statute—to prevent the shipment of alcohol into jurisdictions where the possession or sale of alcohol is illegal.<sup>247</sup>

The legislative history, though sparse, of the Webb-Kenyon Act supports this latter interpretation. The bill’s sponsor, Senator Kenyon, testified that the statute’s “purpose, and its only purpose, is to remove the impediment existing as to the states in the exercise of their police powers . . . .”<sup>248</sup> The Senator repeatedly insisted that the statute “would not be a law to stop personal use of intoxicating liquors, nor to prohibit the shipment of intoxicating liquors for personal use . . . .”<sup>249</sup> In fact, the drafters did not intend the statute to have effect in areas where state prohibition was not enacted. Senator Sanders, noting that, at the time, 71 percent of the country was under state prohibition laws and that the majority of U.S. citizens lived in dry territory, stated, “Parts of States where to which State prohibition laws do not apply, commonly known as ‘wet territory,’ are not affected by this bill.”<sup>250</sup> Further, Senator McCumber explicitly noted that

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247. See 49 CONG. REC. 695 (1912) (statement of Sen. Kenyon) (stating that the Act’s purpose was support state’s police power but not to limit interstate commerce).

248. *Id.*

249. *Id.*; see also *id.* at 699 (statement of Sen. Sanders) (“It does not relate to the personal use of liquor.”); *id.* at 701-02 (statement Sen. McCumber) (“prevents no man . . . from importing any liquors and consuming them in the home or elsewhere”).

250. *Id.* at 699 (statement of Sen. Sanders). Interestingly, the Distilled Spirits Council reported in 1984 that 97.6 percent of the American population lived in “wet” counties. John Frendreis & Raymond Tatalovich, Religion and the Demography of “Dry” Counties in the United States 12 (2009) (unpublished paper, on file with the author), available at [http://www.allacademic.com/meta/p317543\\_index.html](http://www.allacademic.com/meta/p317543_index.html). The National Alcohol Beverage Control

“[t]his bill is not a bill to prevent interstate commerce in intoxicating liquors,”<sup>251</sup> and Congress “does not delegate its power to a State.”<sup>252</sup>

Thus, the legislative history indicates that the statute’s purpose was to maintain alcohol as an article of interstate commerce *until* it was intended for use in violation of state law, at which point it lost its interstate commerce protection.

### 3. The Twenty-First Amendment

Section 2 of the Twenty-First Amendment, the foundation of most states’ arguments for regulatory authority, closely follows the wording of the Wilson and Webb-Kenyon Acts: “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.”<sup>253</sup> The text simplifies that of the Webb-Kenyon Act by omitting many of the “catch-all” repetitious language, such as “spirituous, vinous, malted, fermented or other intoxicating liquor.”<sup>254</sup> The Supreme Court, as well as several scholars, have noted that this similarity in text indicates Congress’s desire to return to a pre-Prohibition regulatory scheme.<sup>255</sup> Therefore, the interpretation of the Wilson and Webb-Kenyon Acts is important to a reading of § 2.<sup>256</sup> Reading this Amendment in light of previous regulation indicates a desire to leave the *prohibition* decision to the states, and no more.

The Supreme Court has recently remarked that “§ 2 restored to the States the powers they had under the Wilson and Webb-Kenyon Acts.”<sup>257</sup> However, this gloss reveals the tautological nature of § 2. Section 1, by repealing the Eighteenth Amendment, in effect wipes the

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Association reported in 2007 that there were only 425 dry or partially dry counties in nineteen states. *Id.* at 13.

251. 49 CONG. REC. 701 (statement Sen. McCumber).

252. *Id.* at 705 (statement Sen. McCumber).

253. U.S. CONST. amend. XXI, § 2.

254. 27 U.S.C. § 122 (2006).

255. *See, e.g., Craig v. Boren*, 429 U.S. 190, 205-06 (1976) (“The wording of § 2 of the Twenty-first Amendment closely follows the Webb-Kenyon and Wilson Acts, expressing the framers’ clear intention of constitutionalizing the Commerce Clause framework established under those statutes.”); Aaron Nielson, *Good History, Good Law (and by Coincidence Good Policy Too)*; Granholm v. Heald, 29 HARV. J.L. & PUB. POL’Y 743, 752-53 (2005). For a discussion of the pre-Prohibition regulatory scheme, see *supra* Part I.B.

256. *See, e.g., Craig*, 429 U.S. at 205-06; Nielson, *supra* note 255, at 753 (“[T]he judicial interpretations during the period after Webb-Kenyon’s enactment but prior to Section Two’s ratification are relevant to interpreting Section Two.”).

257. Granholm v. Heald, 544 U.S. 460, 484 (2005).

slate clean and returns the balance to pre-Prohibition standards. Had the Eighteenth Amendment never existed, states would have continued with the powers they had under the Wilson and Webb-Kenyon Acts. Section 2 is an enigma, then. It repeats the existing statutory language, and, according to the Supreme Court's interpretation, does not actually create new law. The most logical conclusion from this addition is that Congress intended to constitutionalize the Webb-Kenyon Act, especially since its constitutionality was dubious prior to the Eighteenth Amendment.<sup>258</sup>

The legislative history of the Twenty-First Amendment is sparse, likely because most members of Congress and state legislatures were more interested in repealing the Eighteenth Amendment than debating the finer points of the wording.<sup>259</sup> What little legislative history on § 2 there is focuses on preventing the "return of the saloon"<sup>260</sup> and protecting dry states against shipments from wet states intended for illegal resale in the dry state.<sup>261</sup>

One proposed section was omitted from the final Amendment. Proposed § 3 provided: "Congress shall have concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold."<sup>262</sup> Some have argued that Congress did not include this section "because it did not think that the federal government should retain a role in alcohol regulation."<sup>263</sup> However, to assume that the failure to include this language indicates an intention

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258. See 76 CONG. REC. 4170-72 (statement of Sen. Borah) (arguing that the uncertainty surrounding the Webb-Kenyon Act's constitutionality should encourage the inclusion of § 2, which would constitutionalize that Act).

259. 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, 1631-32 (2000); see also 76 CONG. REC. 4162 (1933) (statement of Sen. Norris) (arguing that Congress was wasting time debating the text of the amendment and that in the midst of the Great Depression, their time was better spend considering more important measures); *id.* at 4143 (statement of Sen. Blaine) ("[I]t is my paramount object in this struggle to take prohibition out of the Constitution."); *id.* at 4143-44 (statement of Sen. Blaine) (stating that he would support any proposal that would repeal prohibition, whether §§ 2 or 3 were included or not).

260. See, e.g., 76 CONG. REC. 4146 (1933) (statement of Sen. Wagner) ("I believe the overwhelming sentiment in this country is so definite in every State that we will have no return of the saloon.").

261. See, e.g., *id.* at 4141 (1933) (statement of Sen. Blaine) (encouraging his fellow senators to "guarantee to the so-called dry States the protection designed by section 2.").

262. *Id.* at 4138 (1933).

263. 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, 2512 (2001).

of Congress to relinquish all control over the interstate commerce of alcohol is quite a leap.<sup>264</sup>

A more logical interpretation is that Congress left out this section because it was an *extension* of the Commerce Clause power that it found unnecessary, or perhaps unconstitutional. This section would have allowed the federal government to regulate sales of alcohol that occurred entirely within a state's borders. Arguably, such power would violate principles of federalism.<sup>265</sup> The legislative history supports this latter interpretation.<sup>266</sup> The decision not to include this language indicates, if anything, that Congress believed the decision whether or not to allow the sale of alcohol in a state should be left to the state. It does not, however, imply that Congress intended to relinquish control over interstate commerce.

Seventy-five years of overly broad interpretation have led us back to a confederation of states rather than an economic union, at least where alcohol commerce is concerned. An examination of the text and the legislative history of the relevant laws, however, reveals that the drafters neither mandated nor intended this result. The federal government, through either Supreme Court interpretation or Congressional legislation, has the power to unify the patchwork of regulation and put an end to this trade war. States would still maintain domestic regulation of the sale of alcohol, such as the blue laws<sup>267</sup> prevalent in the Southern states prohibiting alcohol sales on Sunday. However, laws that prevent the direct shipment of alcohol to legal purchasers and that burden interstate commerce by mandating three-tier systems are unconstitutional, consumer unfriendly, and uneconomical.

#### IV. WIPING THE SLATE CLEAN

This Note advocates the deregulation of the interstate traffic in alcohol at the state level in favor of consistent, national regulation. There are several possibilities for achieving this, and they are of varying levels of anticipated effectiveness.

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264. The resolution to strike proposed § 3 barely passed, with 33 yeas, 32 nays, and 31 not voting—hardly a strong endorsement. 76 CONG. REC. 4179 (1933).

265. See *id.* at 4144-45 (statement of Sen. Wagner) (objecting to the reservation of federal police power under the Eighteenth Amendment effected by § 3).

266. See, e.g., *id.* at 4147 (statement of Sen. Wagner) (arguing that § 3 was an extension of Congressional power to regulate intrastate police matters that would fail just as the Eighteenth Amendment did).

267. See BLACK'S LAW DICTIONARY (8th ed. 2004) (defining "blue law" as "[a] statute regulating or prohibiting commercial activity on Sundays").

First, since another Supreme Court review is likely pending,<sup>268</sup> the Court has the opportunity to follow *Granholm* through to conclusion. To do so, the Court should specify that a regulatory scheme that is discriminatory in effect, not just on its face, violates the Commerce Clause. Moreover, an enumeration of state interests which can—and cannot—save state laws that burden interstate commerce would provide state legislatures with more definite boundaries. The Supreme Court could examine the text of the Twenty-First Amendment and reconsider whether the current interpretation is the correct reading of that text.<sup>269</sup> Additionally, it could take into account the legislative histories of both the Amendment and the federal acts underlying its foundation, which clearly indicate that the current regulatory landscape exceeds the intended scope.<sup>270</sup> Further, the Supreme Court could reflect on the cultural context of the passage of the Eighteenth and Twenty-First Amendments in comparison with the current climate, over seventy-five years later.<sup>271</sup> As the aftermath of *Granholm* demonstrates, however, both federal courts and state legislators have struggled, or have perhaps been unwilling, to implement that decision. Anticipating the effectiveness of judicial action is therefore difficult.

Second, consumer, producer, and retail advocates should continue the grassroots movement—litigating in federal court and lobbying state legislatures—to modernize the current system and allow greater direct access to legal consumers. Various consumer and winery advocacy groups have collaborated on a Model Direct Shipment Law, which would protect state interests while still allowing legal consumers access to the market.<sup>272</sup> The FTC staff has also recommended “allowing direct shipping from out-of-state wineries and retailers, as well as from in-state suppliers.”<sup>273</sup> This would be an ideal situation, since changing state laws would solve the problem at the source. However, the history of state resistance to this option demonstrates that it is unlikely that this effort will effect the change

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268. See discussion *supra* Part II.A.

269. See discussion *supra* Part III.B.

270. See discussion *supra* Part III.B.

271. What began as a well-meaning temperance movement has become an anti-consumer monopoly that abuses alleged state authority for profit. See discussion *supra* Part III.A.

272. See Free the Grapes!, Model Direct Shipping Bill, <http://www.freethethegrapes.org/model.html> (last visited Dec. 1, 2009). This Model Law was proposed by Family Winemakers of California, Coalition for Free Trade, The Wine Institute, and the American Vintners Association, and adopted by the National Conference of State Legislatures, Task Force on the Wine Industry. *Id.*

273. FTC REPORT, *supra* note 13, at 40.



in a timely or successful manner.<sup>274</sup> Alternatively, a proposed amendment repealing § 2 would prevent states from abusing their power thereunder. This solution would be less feasible, though, not only because of the effort required to change the Constitution, but also because it would remove protection for those few remaining dry municipalities who prefer not to have alcohol sold within their jurisdiction.

A third option would be for Congress to exercise its power under the Commerce Clause to create a system for interstate trade in alcohol. Congress has this authority, since “the determinative test of the exercise of power by the Congress under the Commerce Clause is simply whether the activity sought to be regulated is ‘commerce which concerns more States than one’ and has a real and substantial relation to the national interest.”<sup>275</sup> Additionally, unless the Constitution specifically limits congressional power, the federal legislative branch can regulate any area under its enumerated functions.<sup>276</sup> This federal law would preempt any overlapping state regulation<sup>277</sup> and would thus effectively overrule most of the discriminatory state legislation with a single act. Although this option would be difficult and would require careful construction, this route would be the most effective and would have the greatest impact on the industry.

The best solution is a combination of these options. The various branches of federal and state governments, along with the expressed will of the general public, would create the most effective system. As demonstrated, states would more likely than not benefit from increased interstate commerce in wine. States should facilitate this change by removing state-law barriers to direct shipping and preparing systems for reporting and collecting taxes. The Supreme Court can encourage this deregulation of interstate trade by restricting its prior interpretation of state power under the Twenty-First Amendment. Finally, Congress can facilitate this process by passing a law mandating, for example, that all alcohol shipped in interstate commerce must be clearly marked as containing alcohol and

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274. See discussion *supra* Part III.A.1.

275. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 255 (1964).

276. See *Veazie Bank v. Fenno*, 75 U.S. 533, 548 (1869) (“[T]he judicial cannot prescribe to the legislative departments of the government limitations upon the exercise of its acknowledged powers.”).

277. The Constitution states that the Constitution, and federal laws “made in Pursuance thereof” are the “supreme Law of the Land,” contrary state laws notwithstanding. U.S. CONST. art. VI, cl. 2. Because this law would be passed under Congress’s Commerce Clause power, see U.S. CONST. art. I, § 8, it would not be a power reserved to the states under the Tenth Amendment, see U.S. CONST., amend. 10.

requiring signature of an adult of twenty-one-years or older for delivery. This combination would allow states to continue to receive—and possibly increase—revenue and mitigate negative effects, such as access to alcohol by minors, all while increasing consumer choice.

## V. CONCLUSION

In 1919, when the states proposed an experiment with national Prohibition, they did not anticipate the disastrous effects it would have. In 1933, when they proposed to repeal Prohibition, they similarly could not predict either the growing acceptance of alcohol consumption or the rampant abuse of power under that Amendment. The current system, in addition to vastly exceeding the intended and express scope of § 2 of the Twenty-First Amendment, is an uneconomical system that does not represent national interests.<sup>278</sup>

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278. If any doubt exists that the Temperance movement is no longer the majority opinion, consider that more than ten times the number of people voted for James F. Hill (2,201), the 2006 “Pirate” candidate for U.S. House of Representatives from Iowa, than for Gene C. Amondson, 2008 presidential candidate from the Prohibition Party. *See* Atlas of U.S. Presidential Elections, <http://www.uselectionatlas.org/RESULTS/> (last visited Nov. 4, 2009); Clerk of the House of Reps., Statistics of the Congressional Election of Nov. 2006—Iowa, [http://clerk.house.gov/member\\_info/electionInfo/2006/2006Stat.htm#15](http://clerk.house.gov/member_info/electionInfo/2006/2006Stat.htm#15) (last visited Nov. 4, 2009). In the 2008 election, the Prohibition Party candidate was also out-voted by Charles Jay, of the Boston Tea Party, and the three candidates from socialist-affiliated parties. Atlas of U.S. Presidential Elections, *supra*.

Rather than the piecemeal, Sisyphean attempt to change state regulation by litigating and lobbying fruitlessly, decisive federal action must be taken to protect wine consumers and producers in the United States.

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