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Put a Cork in It: The Use of H.R. 161 to End Direct Wine Shipping Throughout the States Once and For All

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PUT A CORK IN IT: THE USE OF H.R. 1161 TO END DIRECT WINE SHIPPING THROUGHOUT THE STATES ONCE AND FOR ALL

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I. INTRODUCTION

Due to Congress' recent agenda, oenophiles[1] throughout the country are up in arms about the possible threat to their beloved wine. Wine lovers and other alcohol enthusiasts face the very real fear that access to their favorite products may soon be heavily restricted. This is in large part attributed to the fact that House Resolution 1161 would effectively change the ways in which states regulate alcohol shipment. The possible implications of this bill range from the forced shutdown of many wineries and distilleries due to lack of funding, to the smaller effects of regulation such as the inability of customers to order wine and other alcohol over the internet. This bill would also destroy the ability of many to join money-saving wine clubs. H.R. 1161 and other similar legislation, often referred to collectively as direct shipping laws, effectively mandate discussion concerning the shipment of alcohol, the regulatory place of the states in the scheme of alcohol distribution, the impact on individual consumers, and the industry's perspective as a whole. Direct shipping laws affect more than those in the wine industry; rather, they impact the entire economy.

These direct shipping laws exclusively apply to alcohol largely because of the alleged unique and special place that alcohol holds within the scheme of interstate commerce.[2] Alcohol holds such a hallowed place within the realm of commerce because of the existence of the Twenty-first Amendment.[3] The fact that the Twenty-first Amendment specifically states that transportation of alcohol in violation of state law is illegal[4] means that alcohol occupies a unique place in terms of the reach of the Commerce Clause. The basic premise "of the Twenty-first Amendment is to create an exception to the normal operation of the Commerce Clause with regard to a specific item of commerce – intoxicating liquors – and by virtue of the plain language . . . the states are totally unconfined by traditional Commerce Clause limitations when they restrict the importation of intoxicating liquors . . . within their borders."[5]

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1. "Oenophile" is defined as "a lover or connoisseur of wine." *See Oenophile*, MERRIAM-WEBSTER, http://merriam-webster.com/dictionary/oenophile (2012).

2. Robert L. Jones III, *Constitutional Law – Direct Shipment of Alcohol – Well-Aged and Finally Uncorked: The Supreme Court Decides Whether the Twenty-First Amendment Grants States the Power to Avoid the Dormant Commerce Clause. Granholm v. Heald, 125 S. Ct. 1885 (2005),* 28 U. ARK. LITTLE ROCK L. REV. 483, 483 (2006).

3. *See* Elizabeth D. Lauzon, *Interplay between Twenty-First Amendment and Commerce Clause concerning state regulation of intoxicating liquors,* 116 A.L.R.5th 149, §2[a] (2004).

4. U.S. CONST. amend. XXI, §2.

5. Lauzon, *supra* note 3, at §2[a].

While many aspects of the issue of direct wine shipping are encapsulated within the overall topic, this paper focuses on the implications that occur when direct shipment of wine from a manufacturer is sought by an individual consumer. The laws that are implicated within this discussion include the Twenty-first Amendment, the Commerce Clause, state laws, and judge-made law in the form of various United States Supreme Court opinions. Direct alcohol shipment laws have many forms and vary widely from state to state. Prior to 2005, many states allowed in-state direct shipment, but disallowed shipment from other states to their citizens.[6]

In *Granholm v. Heald*, the United States Supreme Court required that this type of discriminatory practice be stopped in holding that it is unconstitutional for states to discriminate in interstate commerce by favoring in-state wineries over out-of-state wineries for direct shipping purposes.[7] However, the *Granholm* ruling only went so far. While the dicta in the opinion touched on the three-tiered system, which will be discussed later in Part IV, the essential part of the holding was a broad anti-discrimination policy.[8] The Court struck down the practices that were blatantly discriminatory against other states, but also said that if the practices were viewed as even-handed, then their continuation was permitted.[9] However, in light of recent developments at the Congressional level, state bans on direct shipment may again become stricter and more abundant.

This paper discusses the newest potential threat to the direct shipment of wine, presently known as House Resolution 1161, the Comprehensive Alcohol Regulatory Effectiveness (CARE) Act of 2011,[10] and its nearly identical predecessor, House Resolution 5034 of 2010.[11] This paper will outline many topics surrounding the direct shipment of wine, the constitutional battle surrounding these laws, the potential effects on

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6. *See generally* Granholm v. Heald, 544 U.S. 460 (2005) (discussing the laws of New York and Michigan).

7. *Id.* at 493.

8. *See* Kevin C. Quigley, *Uncorking Granholm: Extending the Nondiscrimination Principle to all Interstate Commerce in Wine*, 52 B.C. L. REV. 1871,1895-96 (2011) (citing *Granholm*, 544 U.S. at 489, 465-66, 487-89 (The Court made the following statements concerning its holding about anti-discriminatory policies: "discrimination is neither authorized nor permitted by the Twenty-first Amendment," "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause," and "[d]iscrimination is contrary to the Commerce Clause and is not saved by the Twenty-first Amendment.")).

9. *See Granholm* at 493.

10. H.R. 1161, 112th Cong. (2011).

11. H.R. 5034, 111th Cong. (2010).

businesses and individuals throughout the nation dealing in wine and other alcohol, and the current debate in Congress. Part II overviews the alcohol and wine industry within the United States. Part III lays the foundation for the legal debate currently being discussed in Congress. Both the constitutional and judicial arguments of the implications of wine shipping are discussed as well. Part IV overviews H.R. 1161 and its predecessor, including their development, various stakeholders' arguments, and the overall impact of the bills. Part V analyzes the bills within the context of the constitutional and judicial issues, along with the social and political landscape of today's world. This paper concludes by recommending the proper place in society for wine regulation and offering an analysis of the implications, effects, and dangers that may result from the passage of H.R. 1161.

II. THE WINE INDUSTRY IN THE UNITED STATES

In order to understand and develop the intricacies of the constitutional and judicial concerns underlying the CARE Act, the wine industry as a whole within the United States must first be discussed. The commerce of the wine industry[12] and its permeation throughout the country is a key issue in fully understanding the possible effects and ramifications of the bill.

A. The Wine Industry – An Overview

Wine is considered to be "truly an economic catalyst with tremendous growth potential in all 50 states" since wineries not only work to "revitalize and support local economies in rural communities," but also generate tourism and other activities that impact the rest of the country.[13] Individual states have numerous powers to regulate wine and other alcoholic beverages and tend to do so quite heavy-handedly. The states possess such authority because of the unique character of alcohol, as specified by the Twenty-first Amendment, and because of the significant sums of money that can be generated from its sale. Many onerous regulations are present concerning the sale of alcohol, and thus the issue of states' autonomy and

12. Wine industry and alcohol industry are used interchangeably throughout this paper and are intended to have the same meaning.

13. Ivy Brooke Erin Grey, *Good Spirits or Sour Grapes?: Reaching a Tax Compromise for Direct-To-Consumer Wine Sellers under Quill, the 21st Amendment, and the Dormant Commerce Clause in Light of Granholm v. Heald*, 8 HOUS. BUS. & TAX L.J. 142, 148 (2007) (citing Press Release, National Study of Economic Impact of U.S. Wine Industry: Grapes and Grape Products Contribute $162 Billion to Economy, WINE BUSINESS (Jan. 17, 2007), *available at* http://www.winebusiness.com/news/dailynewsarticle.cfm?dataId=4623).

authority concerning the matter needs to be reviewed in light of the potential Congressional enactments.

The grape and grape products industry, of which wine is an integral part, is worth approximately $162 billion.[14] Wineries are present, ranging in type and size, in all fifty states.[15] The annual sales revenue of wine production totals approximately $11.4 billion.[16] The wine industry is ever-growing and continuously expanding throughout the country. In 2007, the total shipment of wine both to and within the United States from all types of production sources, increased at a rate of 4% over the previous year to a total of 745 million gallons of wine for a retail total of $30 billion.[17] The U.S. Department of Commerce estimates that of the entire composition of the wine in the United States, California wine makes up 61% of all wine sold in the United States market; imported, or foreign, wine is responsible for 26% of the market share; and the remaining 13% of the share is comprised of the wineries of other states within the United States.[18] With these percentages showing that a very unequal distribution of wine among the states in terms of production exists, it can be seen why this issue is so pervasive in discourse today.

Additionally, it was estimated in 2005 that over 3,000 wineries were present within the country and that this number had expanded three-fold in the course of the previous 30 years.[19] However, the number of wholesalers has decreased from approximately 1,600 to 600, which also decreased the ratio of wholesalers to small wineries.[20] Even though the total number of wineries has increased overall, the concentration of wine wholesalers and retailers has led to a severe consolidation of production, resulting in the industry becoming characterized by a relatively few number of large producers.[21] Therefore, many wineries are forced to rely heavily on direct

14. Press Release, National Study of Economic Impact of U.S. Wine Industry: Grapes and Grape Products Contribute $162 Billion to Economy, WINE BUSINESS (Jan. 17, 2007), *available at* http://www.winebusiness.com/news/dailynewsarticle.cfm?dataId=46237.

15. Gina M. Riekhof and Michael E. Sykuta, *Regulating Wine by Mail*, 27 REGULATION 30 (Fall 2004), *available at* http://www.cato.org/pubs/regulation/regv27n3/v27n3-3.pdf.

16. Press Release, National Study of Economic Impact of U.S. Wine Industry: Grapes and Grape Products Contribute $162 Billion to Economy, WINE BUSINESS (Jan. 17, 2007), *available at* http://www.winebusiness.com/news/dailynewsarticle.cfm?dataId=46237.

17. Donald A Hodgen, *U.S. Wine Industry 2008,* INTERNATIONAL TRADE ADMINISTRATION (June 20, 2008) www.ita.doc.gov/td/ocg/wine2008.pdf.

18. *Id.*

19. *Granholm* at 467.

20. *Id.* (citing Riekhof and Sykuta, *supra* note 15, at 31).

21. *See* Riekhof and Sykuta, *supra* note 15, at 31.

shipment to individual customers across the country and internationally for reaching new markets and customer bases when wholesalers do not select their brand for sale.[22]

B. Wine Shipping in the United States

Currently, 12 states completely ban out-of-state direct wine shipping and 38 states have either limited direct shipping or permit the allowance of limited shipments; presently, no state practices reciprocity.[23] The states that completely prohibit the direct shipment of wine within their borders include: Alabama, Arkansas, Delaware, Kentucky, Massachusetts, Mississippi, Montana, New Jersey, Oklahoma, Pennsylvania, South Dakota, and Utah.[24] Prohibited states completely ban shipment while those allowing limited shipments vary in their enforcement procedures and policies.[25] The concept of reciprocity arose from a 1986 California law that prohibited the direct shipment of wine from other states to California unless the other state allowed California to ship to their residents as well.[26] Reciprocity allows states to enter into agreements for wine shipping in which they recognize a two-way shipping privilege.[27] In the years leading up to the Supreme Court's landmark *Granholm* decision, there were more states that allowed some form of direct shipping than those that prohibited it.[28]

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22. Granholm, 544 U.S. at 467. "Picking up" a brand refers to carrying a brand at a liquor store or for distribution for sale. *See also* Gordon Eng, *Old Whine in a New Battle: Pragmatic Approaches to Balancing the Twenty-First Amendment, the Dormant Commerce Clause, and the Direct Shipping of Wine*, 30 FORDHAM URB. L. J. 1849, 1881 (2003).

23. *State Shipping Laws*, WINE INSTITUTE, http://wineinstitute.shipcompliant.com/Home.aspx? Sale TypeID=1 (last visited Feb. 22, 2012).

24. *See Who Ships Where*, WINE INSTITUTE, http://wineinstitute.shipcompliant.com/WhoShipsWhere.aspx (last visited Feb. 22, 2012).

25. *See id.*

26. *See* Riekhof & Sykuta, *supra* note 15, at 30.

27. *See State Shipping Laws FAQs,* WINE INSTITUTE, http://www.wineinstitute.org/initiatives/stateshippinglaws/faqs#10 (last visited Feb. 22, 2012). Additionally, "[i]n its simplest form, a reciprocal law says 'a winery in your state can ship to a consumer in my state, only if a winery in my state can ship to a consumer in your state.'" *Id.*

28. Granholm v. Heald, 544 U.S. 460, 467-68 (2005) (The Court cites that prior to its decision "[a]pproximately 26 States allow some direct shipping of wine, with various restrictions. Thirteen of these States have reciprocity laws, which allow the direct shipment from wineries outside the State, provided the State of origin affords similar nondiscriminatory treatment (footnotes omitted). In many parts of the county, however, state laws that prohibit or severely restrict direct shipments deprive consumers of access to the direct market.").

In *Granholm*, the Court held that state regulations disallowing certain wine shipping practices while allowing similar practices, for in-state producers were unconstitutional under the Dormant Commerce Clause for being overly discriminatory.[29] Since the *Granholm* holding, it has been deemed unlawful for any in-state winery to ship directly within the state when an out-of-state winery is subject to different wine shipping regulations.[30] While *Granholm* deals with the anti-discriminatory nature of laws regarding wine shipping and importation, direct wine shipping is the heart of this paper. The regulatory control over all aspects of shipping concerns the direct shipment of wine. Because alcohol regulations are considerably stringent in comparison to other products, it has been said that the states can "control alcohol in ways that it cannot control cheese."[31]

C. What is Direct Shipping?

Direct shipping bans limit the shipment of alcohol directly to an individual customer's residence. These laws "restrict the shipment of alcoholic beverages directly from out-of-state producers and retailers to in-state customers."[32] Their existence in many states dates back to the time of the repeal of Prohibition.[33] The limitation inherent to this ban is placed upon the customer, stores, vineyards, or other manufacturers that would be handling the shipment. While many states have some form of a limited permitting system for shipping wine, many have a strict direct shipment ban.[34] Within these distribution schemes, the stated purpose is that states are able to better promote certain interests, such as keeping alcohol away from minors and facilitating proper tax collection.[35]

States with direct shipment bans typically utilize a three-tiered shipment and purchasing scheme. Today, most wine is distributed through the three-tiered system.[36] The full details of this organization are discussed later, but the basis of the rationale behind such a scheme is that it requires

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29. *See* Jones, *supra* note 2, at 507-12 (discussing the Supreme Court's reasoning in *Granholm*).

30. *See id.* at 517-18.

31. Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 851 (7th Cir. 2000).

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

33. *Id.*

34. *See Direct Shipping Map*, WINE INSTITUTE, http:// wineinstitute.ship compliant.com/Home.aspx?SaleTypeID=1 (last visited Nov. 30, 2010).

35. Granholm v. Heald, 544 U.S. 460, 489 (2005).

36. FED. TRADE COMM'N, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE 5 (2003), *available at* http://www.ftc.gov/os/2003/07/winereport2.pdf [hereinafter *FTC Report*].

customers to follow a chain of production that is highly beneficial for the state. The three-tiered system begins with producers, then goes through wholesalers and distributors, and finally to retailers who pass the goods on to the customer through retail sales.[37] This system, utilized in conjunction with direct shipping laws, has three forms. First, the reciprocal form allows the shipment of alcohol from states that afford the same privilege to the shipping state.[38] Second, the limited form allows states to regulate to some degree the shipment of alcohol, but not to entirely outlaw it.[39] Third, the prohibited form expressly outlaws the direct shipment of alcohol into the state.[40]

While not all wineries will be affected, smaller wineries have a greater chance of being harmed by the CARE Act and by shipping bans in general. Large wineries have a broad base and are carried by wholesalers across the nation for distribution to thousands of retail stores.[41] However, smaller wineries may not be able to brand themselves sufficiently in order to be made widely available for sale, especially in large markets.[42] They are frustrated that their small businesses are essentially shut out by not being carried by wholesalers, preventing their sale to other outlets in many states.[43] The only chance that many of these small wineries have to sell their product and attract new customers is through the internet or through visits to the vineyard.

The internet has brought a great deal of change to the system of wine distribution because it is largely used by small wineries for sales and promotion, along with direct shipping.[44] The reasoning is that the demand for "individualistic, hand-crafted wine" has been steadily on the rise.[45] As small wineries have increased from 500-800 to 2,000 in the past 35 years, online sales have similarly increased.[46] Additionally, if a customer visits a vineyard in one state and lives in another that bans direct shipment, he is

37. Shanker, *supra* note 32, at 355.

38. *Direct Shipping Map, supra* note 34; Shanker, *supra* note 32, at 356.

39. *Direct Shipping Map, supra* note 34; Shanker, *supra* note 32, at 356-57.

40. *Direct Shipping Map, supra* note 34; Shanker, *supra* note 32, at 357.

41. *See generally F.A.Q.*, STOP H.R. 1161, http://www.stop1161.org/f-a-q—copy.html (last visited Mar. 4, 2012).

42. *See generally id.*

43. *See generally id.*

44. *See* Christopher G. Sparks, *Out-of-State Wine Retailers Corked: How the Illinois General Assembly Limits Direct Wine Shipments from Out-of-State Retailers to Illinois Oenophiles and Why the Commerce Clause Will Not Protect Them*, 30 N. ILL. U. L. REV. 481, 488 (2010).

45. *FTC Report, supra* note 36 at 6.

46. *Id.*

not permitted to ship wine home or order it online.[47] The marketing reach of these smaller vineyards and manufacturers is very limited if they are not permitted to use modern technology and standard practices to transcend jurisdictional bounds.

The smaller wineries that are not picked up for distribution by wholesalers are the ones that face the most harm.[48] Smaller wineries face serious issues if they are not permitted to ship because they are, in essence, prohibited from reaching an entirely new customer base if a wholesaler or a retail liquor store does not select them for sale.[49] The larger wineries will not face much harm unless a great deal of their business is online or through certain websites that market their brands for sale and shipment. These direct shipment bans have been deemed legal despite their obvious impact on certain segments of the wine producing population. The issue is whether such practices are discriminatory and if it matters in light of the constitutional issues. An issue that may be important in the near future is if the CARE Act of 2011 effectively limits the sales reach of these wineries and whether this limitation is constitutional.

III. LEGAL HISTORY

In order to connect the details of the United States wine industry to the overall topic of the CARE Act, the full legal issues surrounding this topic must be unraveled. Both the United States Constitution and the United States Supreme Court, through case law, detail the development of alcohol regulation within the United States. Acknowledging the legal attention paid to alcohol and alcohol regulation is imperative for the full discussion of the possible legal effects of the Act.

A. Constitutional Provisions

1. General Constitutional Overview

Virtually any product or initiative surrounding the wine industry tends to be very lucrative. However, along with these immense riches on one side, serious regulatory concerns come from the other. The legal framework is such that in modern times the states have very broad regulatory powers over alcohol within their borders. The concept of the

47. Dana Nigro, *Shipping Laws State-by-State,* WINE SPECTATOR (Aug. 12, 2005), http://www.winespectator.com/webfeature/show/id/Shipping-Laws-State-by-State_1049.

48. Eng, *supra* note 22, at 1881.

49. *See* Marcia Yablon, *The Prohibition Hangover: Why We Are Still Feeling the Effects of Prohibition*, 13 VA. J. SOC. POL'Y & L. 552, 588 (2006).

interrelation between the Commerce Clause and the Twenty-first Amendment can be very confusing and requires due analysis. This issue has been debated since the ratification of the Twenty-first Amendment, which resulted in this predicament of having two almost competing concepts in the Constitution.

Most items in interstate commerce fall within the commerce power of the federal government under the Commerce Clause, as Congress has the power and authority to "regulate Commerce . . . among the several states."[50] The laws of the several states may not be purposefully discriminatory against each other in interstate commerce.[51] Through a wide array of cases, it can be seen that alcohol has attained a special place within commerce through lengthy court and legislative developments.[52] Under the Twenty-first Amendment, wine and other alcohol are treated much differently than normal items in commerce because it granted states enhanced regulatory powers over alcohol.[53] Therefore, the processes involving the production, advertisement, shipping, and overall sale of wine and other alcohol throughout the states originally fell within the powers of the states because of the Twenty-first Amendment.[54] The history following the enactment of the Twenty-first Amendment is as varied as the history before it and thus, jurisprudential and legislative trends have been all over the board in terms of interpretation.[55] So long as the regulations promulgated by the states meet one of the core concerns of the Twenty-first Amendment – such as the inherently vague term of "temperance" – then the statute could potentially be saved by the Amendment.[56] Temperance, though used to mean many things, has been cited by the Court as "oftentimes mistaken as a synonym for 'abstinence,'" but defined as "moderation in or abstinence from the use of intoxicating drink."[57] The law at issue must also not serve as a "pretext for mere protectionism."[58] However, if the law is exclusionary or unduly discriminatory, it may be

50. U.S. CONST. art. 1, § 8, cl. 3.

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

52. *See* Quigley, *supra* note 8, at 1875-81.

53. U.S. CONST. amend. XXI, § 2 (Section 2 provides that "[t]he transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof [of the state], is hereby prohibited.").

54. *See* Lauzon, *supra* note 3, at § 2[a].

55. For a more detailed, yet succinct, analysis of the case law and legislation behind the development of Twenty-First Amendment policy, see Quigley, *supra* note 8, at 1878-80.

56. *See* Lauzon, *supra* note 3, at § 7.

57. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 491 (1996) (citing S&S Liquor Mart, Inc. v. Pastore, 497 A.2d 729, 733-4 (1985)).

58. Bainbridge v. Turner, 311 F.3d 1104, 1106 (11th Cir. 2002).

held invalid under the purview of the commerce power of the federal government.[59]

2. Introduction into Constitutional Provisions

Throughout history, wine has been both celebrated and shunned. Wine's existence, creation, and distribution have been heavily regulated through amendments, laws, and various social movements. Alcohol regulation is uniquely important as "[n]o other commodity has been the focus of not one, but two, constitutional amendments that have been ratified in the past 100 years" for the purpose of regulation within the American societal and economic scheme.[60] The Eighteenth and Twenty-first Amendments, along with many pieces of legislation, are responsible for regulating alcohol within the several states.[61] Since the manufacture, distribution, and sale of wine oftentimes is interstate, and because "[i]ntoxicating liquor occupies a unique position among items of commerce"[62] because of the Twenty-first Amendment, the provisions of the Commerce Clause are necessary to consider as well. However, an overlap of potential power occurs between the Twenty-first Amendment and the federal government's commerce power under the Commerce Clause. This is because the states have been given authority to regulate alcohol under the Twenty-first Amendment, but the federal government retains the power under the Commerce Clause to prevent discriminatory measures from occurring in commerce among the several states.

3. Social and Political History

During the 1880's, some regulation of alcohol was left to the powers of state and local governments.[63] A debate between the United States Supreme Court and the states arose over whether the state powers or the federal powers controlled the shipment and other aspects of intoxicating liquors.[64] In 1888, the Court held that states could only regulate alcohol in their borders after transportation has terminated.[65] Subsequently, in the

59. Beskind v. Easley, 325 F.3d 506, 516 (4th Cir. 2003).

60. Grey, *supra* note 13, at 145 (citing Alan E. Wiseman & Jerry Ellig, *Legislative Action and Market Responses: Results of Virginia's Natural Experiment with Direct Wine Shipment,* MERCATUS (Dec. 2005), http://www.mercatus.org/repository/docLib /MC_RSP_RP-DirectWineShipment_051224.pdf).

61. *See* Lauzon, supra note 2, at § 2[a].

62. *See id.*

63. *See* Matthew J. Patterson, *A Brewing Debate: Alcohol Direct Shipment Laws and the Twenty-First Amendment,* 2002 U. ILL. L. REV. 761, 766 (2002).

64. *See id.*

65. Bowman v. Chicago & Northwestern Railway Co., 125 U.S. 465, 499 (1888).

1890 *Leisy v. Hardin* decision, alcohol remained known as an article of interstate commerce when the Court held that the state lacked authority to regulate alcohol that remained in its original package.[66] In discussing the potential ramifications if the purview of the states in alcohol regulation were lessened, Justice Gray hypothesized in his dissent that the unrestricted use of alcohol could "produce idleness, disorder, disease, pauperism, and crime."[67] Additionally, he stated that "[t]he power of regulating or prohibiting the manufacture and sale of [alcohol] appropriately belongs. . .to the legislatures of the several states and can be judiciously and effectively exercised by them alone."[68]

However, some reprieve for those promoting the heightened state regulation of alcohol was granted with the 1890 enactment of the Wilson Act.[69] The Wilson Act sought to close a loophole created by the *Leisy* decision.[70] Pursuant to the Wilson Act, "liquor shipped into a state could be treated by that state in the same manner as locally produced liquor - without regard to whether the imported liquor remained in its original package."[71] While the Wilson Act enabled the states to regulate liquor within their own borders, it did not allow the states to discriminate against out-of-state liquor distributors, manufacturers, and sellers.[72]

A problem arose after the enactment of the Wilson Act, that being distributors circumvented the dry laws of certain states by directly shipping alcohol within the borders of such states.[73] In *Rhodes v. Iowa,* the Court dealt with the issue of mail-order liquor and held that the state's regulations were not applicable to mail-order liquor.[74] This decision showed that, at the time, the direct shipping laws in the dry states could be avoided to some extent.[75] In response to all of the appeals from various states and in the face of confusion about the regulation of alcohol, the Webb-Kenyon Act, passed in 1913,[76] permitted states to "regulate domestic and imported liquor on equal terms."[77] The Webb-Kenyon Act has been described by the Court as "incorporat[ing] state prohibitions into a federal rule . . . clos[ing]

66. Leisy v. Hardin, 135 U.S. 100, 124-25 (1890).
67. *Id.* at 159.
68. *Id.*
69. Wilson Act, 27 U.S.C. 121 (2010).
70. *See id.* (removing the *Leisy* original packaging exception).
71. Patterson, *supra* note 63, at 767; *see also* Wilson Act, 27 U.S.C. § 121 (2010).
72. *See* Granholm v. Heald, 544 U.S. 460, 461 (2005) (citing Scott v. Donald, 165 U.S. 58 (1897)).
73. *See* Patterson, *supra* note 63 at 767.
74. *See* Rhodes v. Iowa, 170 U.S. 412, 426 (1898).
75. *See* Patterson, *supra* note 63 at 767.
76. Webb-Kenyon Act, 27 U.S.C. § 122 (2010).
77. *Granholm*, 544 U.S. at 483; Webb-Kenyon Act, 27 U.S.C. § 122 (2010).

the loophole left by the [D]ormant [Co]mmerce [C]lause," and that the Dormant Commerce Clause may not be used to protect liquor from regulation.[78]

Prohibition began in 1919 when the Eighteenth Amendment was passed, which stated that the importation or exportation of intoxicating liquors within the United States and all territories subject to this jurisdiction was prohibited.[79] The Eighteenth Amendment temporarily ended state control over the regulation of liquor and ended the movement towards local regulation of alcohol for a while.[80] The Amendment prohibited the manufacture, sale, and transport of alcohol within the states.[81] Thus, this period was aptly named "Prohibition." Before Prohibition, the states had flexibility to make their own decisions in terms of liquor regulation without regard for the Commerce Clause, but they were unable to "enact alcohol regulations that ran counter to prohibition."[82]

In 1933, the Twenty-first Amendment was passed, which placed an end to Prohibition and stated that such transportation or importation is prohibited when in violation of state laws.[83] The Twenty-first Amendment reads as follows:

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

78. Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 853 (7th Cir. 2000) (J. Easterbrook explaining the effect of the Webb-Kenyon Act on the Twenty-First Amendment and on alcohol regulation in general).

79. U.S. CONST. amend. XVIII § 1.

80. *See* Sidney J. Spaeth, *The Twenty-First Amendment and State Control over Intoxicating Liquor: Accommodating the Federal Interest*, 79 CAL. L. REV. 161, 165 (1991).

81. U.S. CONST. amend. XVIII § 1.

82. Patterson, *supra* note 63, at 769; *see also* United States v. Lanza, 260 U.S. 377, 381 (1992).

83. See U.S. CONST. amend. XXI.

> date of the submission hereof to the State by the Congress.[84]

By reason of the enactment of the Twenty-first Amendment, the states were left untouched by the traditional commerce powers and are given broad regulatory power to control the import and export of alcohol within their borders.[85] Because of the prohibition of the transportation and importation of alcohol into the states in violation of each state's individual laws, the Twenty-first Amendment has generated debate over the power of the states to regulate.[86] If a state law is found to be in violation of the Commerce Clause, a determination may be made on whether it can be saved as long as a core concern of the Twenty-first Amendment is found as its purpose.[87]

A debate about the Twenty-first Amendment has taken place since its enactment. Some argue that the Amendment grants too much power to the states to regulate alcohol.[88] Additionally, the Amendment is seen as a grant to states that authorizes them to regulate alcohol exclusive of some important interstate commerce issues.[89] Proponents argue that, among other issues, the Amendment is a conditional grant of power that is to be used when core concerns such as temperance and preventing minors from drinking are at issue.[90]

B. Judicial Pronouncements

1. Development of the Court Doctrine

The courts were faced with the difficult job of interpreting all of these statutes and Amendments. While a rich history exists, the cases most implicitly related to the topic of this paper involve a standard of modern accommodation. After the passage of the Twenty-first Amendment, a great deal of legal controversy faced the Court. In 1936, the Court ruled in *State Board of Equalization v. Young's Market Company* that a difference in enforcement of import fees between imported beer and domestic beer was allowable and saved from the regulation of the Commerce Clause by the

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84. *Id.*

85. *See* Lauzon, *supra* note 3, at§ 2[a].

86. *See* Spaeth, *supra* note 80, at 180-81.

87. *See* Lauzon, *supra* note 3, at § 2[a].

88. *See* State Bd. Of Equalization v. Young's Mkt. Co., 299 U.S. 59, 62 (1936); *see also* Patterson, *supra* note 63, at 771.

89. *See State Bd. Of Equalization*, 299 U.S. at 62; *see also* Patterson, *supra* note 63, at 771.

90. *See* Bridenbaugh v. O'Bannon, 78 F. Supp. 2d 828, 831 (N.D. Ind. 1999); *see also* Patterson, *supra* note 51 at 771.

Twenty-first Amendment.[91] In *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, the Court made a point in stating that if the commodity in question were anything other than liquor, such as lumber or grain, then the Commerce Clause would disallow these practices.[92] Additionally, the *Idlewild* case marked an ideological shift in the liquor regulation debate. The Court held that the concept of the Twenty-first Amendment repealing the Commerce Clause as applied to liquor was "patently bizarre" and incorrect.[93]Additionally, the two provisions – the Commerce Clause and the Twenty-first Amendment – must be considered in light of one another.[94]

In 1980, years after the *Idlewild* decision, the Court held that while a state had substantial discretion to create regulations for liquor, the controls used "may be subject to the federal commerce power in appropriate situations" and competing interests may be reconciled only after scrutiny of concerns.[95] In keeping with this trend, the Court found an alcoholic beverage price-posting law in California to be invalid and subsequently struck it down.[96] This allowed for distributors to compete on price and therefore caused drastic consolidation among the smaller wineries.[97] The ruling not only caused more concentration for distribution systems and more competition, but it also did so in national retail systems, with a decrease in the number of available outlets.[98] Thus, the debate over distribution and retail of wine among the states began anew. States had broad regulatory powers over liquor under the Twenty-first Amendment, but such power still did not necessarily allow the arbitrary and unfair setting of regulations.

In interpreting the previous cases, the Court in the First Amendment case of *Capital Cities Cable v. Crisp* held that the issue in alcohol related cases is whether the interests of state regulations 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."[99] Finally, the result in *Bacchus Imports, Ltd v. Dias* was that the Twenty-first Amendment could not be used as a pretext

91. *See* 299 U.S. 59, 60-62 (1936).
92. 377 U.S. 324, 329 (1964).
93. *Id.* at 331-2.
94. *Id.* at 332.
95. California Retail Liquors Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 110 (1980).
96. *See id.* at 114.
97. Riekhof and Sykuta, *supra* note 15, at 31.
98. *See generally id.*
99. 467 U.S. 691, 714 (1984).

for mere protectionism and that it should not "empower states to favor local liquor industries by erecting barriers to competition."[100] The *Bacchus* Court moved away from the accommodation principle when it considered the principles underlying the Twenty-first Amendment.[101] The move was between the modern accommodation test and the core concerns test. The line of post-*Bacchus* cases has led to a "core concerns" test that makes certain that the law meets a "core concern" of the Twenty-first Amendment, most notably, temperance.[102]

2. The Granholm Decision

A change arose after the decision in *Granholm v. Heald* where the Court was faced with the important issue of whether a state can treat out-of-state wineries differently than it treats those located within its borders for determining whether the winery can ship to the state's residents. The issue in the case "deal[t] with the lengthy jurisprudence on the effect Section Two of the Twenty-first Amendment has on the anti-discriminatory mandate of the Commerce Clause."[103] The Court held that the Twenty-first Amendment gives the states broad power, but that it does not allow them to completely circumvent the Commerce Clause.[104] The Court then attempted to reconcile the differences between the Commerce Clause and the Twenty-first Amendment by acknowledging that, while the Twenty-first Amendment grants power to the states, such power does not necessarily overcome the need for fair commerce and "does not allow the states to ban, or severely limit, the direct shipment of out-of-state wine while simultaneously authorizing direct shipment by in-state producers."[105] Additionally, the Twenty-first Amendment does not automatically take precedence over the Commerce Clause, rather, the two must be considered in light of each other. Therefore, statutes of the various states may not treat in-state wineries preferentially when such treatment is not given to competitors from out of state.[106]

Justice Kennedy, in speaking for the *Granholm* court, held that "[t]he differential treatment between in-state and out-of-state wineries constitutes explicit discrimination"[107] that is "neither authorized nor permitted by the

100. 468 U.S. 263, 276 (1984).
101. *See id.* at 275-77.
102. *See* Shanker, *supra* note 32, at 375-6.
103. Sparks, *supra* note 44, at 491.
104. *See id.* at 482; Granholm v. Heald, 544 U.S. 460, 493 (2005).
105. *Granholm*, 544 U.S. at 493.
106. *See id.*
107. *Id.* at 461, 467.

Twenty-first Amendment."[108] Additionally, state laws concerning alcohol regulation pursuant to the authority granted by the Twenty-first Amendment "must still pass judicial scrutiny under the anti-discrimination mandate of the [D]ormant Commerce Clause."[109] States may not "indiscriminately abrogate the direct shipment abilities of in-state and out-of-state wineries."[110] While the majority of the opinion deals with the fair enforcement laws, it is important to note that the *Granholm* decision serves as a limitation on the power of states to make their own laws regarding alcohol. In essence, *Granholm* gives states authority to regulate alcohol, but it does not give them the power to sidestep the Commerce Clause and erect protectionist barriers.[111]

IV. THE CARE ACTS –H.R. 5034 AND H.R. 1161

A. The Predecessor of H.R. 1161 – H.R. 5034

The CARE Acts, in either form, may serve to shake the strength of the *Granholm* ruling to its core. The relevant text of H.R. 5034 is located within the purpose statement in section two and the support for state alcohol regulation in section three. The purpose of the CARE Act is to "(1) recognize that alcohol is different from other consumer products and that it should be regulated effectively by the States according to the laws thereof; and (2) reaffirm and protect the primary authority of State to regulate alcoholic beverages."[112] Additionally, the Webb-Kenyon Act would be amended by H.R. 5034 by adding the following text:

> (a) DECLARATION OF POLICY. – It is the policy of Congress that each State or territory shall continue to have the primary authority to regulate alcoholic beverages.
>
> (b) CONSTRUCTION OF CONGRESSIONAL SILENCE. – Silence on the part of Congress shall not be construed to impose any barrier under clause 3 of section 8 of article I of the Constitution (commonly referred to as the 'Commerce Clause') to the regulation by a State or territory of alcoholic beverages. However, State or territorial regulations may not facially discriminate, without justification, against out-of-state producers of alcoholic beverages in favor of in-state producers.

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108. *Id.* at 466.
109. Sparks, *supra* note 44, at 506.
110. *Id.* at 507.
111. *See Congress's Sour Grapes*, WALL STREET JOURNAL, Apr. 27, 2011, at A16.
112. H.R. 5034, 111th Cong. § 2 (2010).

> (c) PRESUMPTION OF VALIDITY AND BURDEN OF PROOF. – The following shall apply in any legal action challenging, under the Commerce Clause or an Act of Congress, a State or territory law regarding the regulation of alcoholic beverages:
>
> (1) The State or territorial law shall be accorded a strong presumption of validity.
>
> (2) The party challenging the State or territorial law shall in all places of any such legal action bear the burden of proving its invalidity by clear and convincing evidence.
>
> (3) Notwithstanding that the State or territorial law may burden interstate commerce or may be inconsistent with an Act of the Congress, the State law shall be upheld unless the party challenging the State or territorial law establishes by clear and convincing evidence that the law has no effect on the promotion of temperance, the establishment or maintenance of orderly alcoholic beverage markets, the collection of alcoholic beverage taxes, the structure of the state alcoholic beverage distribution system, or the restriction of access to alcoholic beverages by those under the legal drinking age.[113]

H.R. 5034 was introduced to the Second Session of the 111th Congress on April 15, 2010 and was referred to the Committee on the Judiciary and then to the Subcommittee on Courts and Competition Policy, which began hearings on September 29, 1010.[114] During these committee hearings, various Members of Congress and other interested parties discussed the bill to provide information on the future action that will be taken concerning the bill by supporters and opponents.[115] Arguments flared throughout the debate, yet the bill ultimately never made it out of the House, hence H.R. 1161.[116]

An issue that has received attention regarding this bill is something that is age old in politics – purchasing votes. According to one report, $1.3

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113. *Id.* at § 3.

114. *Bill Summary & Status - H.R. 5034*, LIBRARY OF CONGRESS, http://thomas.loc.gov/cgibin/bdquery/z?d111:HR05034:@@@L&summ2=m& (last visited Feb. 25, 2012).

115. *See* Robert Taylor, *Congress Holds Hearing on Bill Threatening Wine Direct Shipping,* WINE SPECTATOR (Sept. 30, 2010), http:www.winespectator.com/webfeature/show/id/43670.

116. Michael D. LaFaive, *Beer and Wine Wholesalers Deliver Themselves Regulatory Privileges*, MACKINAC CENTER FOR PUBLIC POLICY (July 20, 2011), https://www.mackinac.org/article.aspx?ID=15434&print=yes.

million was paid to members of Congress supporting H.R. 5034 and at least 32 members were given contributions from wholesalers of alcohol within months of signing their names to the legislation.[117] The Wine and Spirits Wholesalers of America and the lawmakers involved stated that no wrongdoing occurred.[118] However, the Distilled Spirits Council of the United States (DISCUS), which opposed the bill, felt that the money resulting from sponsorships was only to benefit the wholesalers and disadvantage the smaller distilleries and wineries.[119]

B. The New CARE Act – H.R. 1161

On March 17, 2011, The Community Alcohol Regulatory Effectiveness Act of 2011 was introduced to the 112th Congress.[120] Most of the language between H.R. 5034 and H.R. 1161 is nearly identical and the purpose behind the bills are the exact same.[121] While the language is mostly the same, some has changed in the new version and is noted in italics below:

> (a) DECLARATION OF POLICY. – It is the policy of Congress *to recognize and reaffirm that alcohol is different from other consumer products and that it should continue to be regulated by the States.*
>
> (b) CONSTRUCTION OF CONGRESSIONAL SILENCE. – Silence on the part of Congress shall not be construed to impose any barrier under clause 3 of section 8 of article I of the Constitution (commonly referred to as the 'Commerce Clause') to the regulation by a State or territory of alcoholic beverages. However, State or territorial regulations may not *intentionally or* facially discriminate against out-of-State or out-of-territory producers of alcoholic beverages in favor of in-State *or in-territory* producers *unless the State or territory can demonstrate that the challenged law advances a legitimate*

117. Chris Frates, *Liquid Gold: Donations Questioned,* POLITICO, (Dec. 21, 2010), http://www.politico.com/news/stories/1210/46653.html.

118. *See id.*

119. *Id.*

120. H.R. 1161, 112th Cong. (2011).

121. Lindsey A. Zahn, *H.R. 5034 is Now H.R. 1161,* ON RESERVE: A WINE LAW BLOG (Mar. 20, 2011), www.winelawonreserve.com/2011/03/20/h-r-5034-is-now-h-r-1161/.

> *local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.*[122]

H.R. 1161, while keeping most of the same language as the previous bill, adds to and subtracts from some very important places. First, the declaration of policy section is completely restated from the original version and provides more pointed language. In section (b), the language "without justification" was removed from the original bill, which was likely a concession that had to be made to gain supporters. Additionally, language was added in section (b) that grants more authority to the states, likely since the "without justification" language was removed. Now, states must merely show that their legitimate local purpose cannot be accomplished by nondiscriminatory alternatives in order for discriminatory legislation to be allowed. This is overly broad, as nearly anything could be construed as valid under this language.

C. Purpose of the CARE Act

H.R. 5034 was meant to support the alcohol regulation programs of the states and to ensure that, among other things, alcohol taxes would be collected.[123] The listed purpose was to first "recognize that alcohol is different from other consumer products and that it should be regulated effectively by the States according to the laws thereof" and secondly to "reaffirm and protect the primary authority of States to regulate alcoholic beverages."[124] Some of the language was seemingly in line with what was already in place. Namely, the recent history of the regulation of alcohol has shown that regulatory control has returned to the states so long as the Twenty-first Amendment goals are not violated and the Commerce Clause is not hampered unjustly. So, if the purpose of the bill is to give power to the states that they already have, what is the problem?

The main issue with H.R. 5034 came in the section that outlines the support for state alcohol regulation. The bill states that Congressional silence should not be used as an imposition of a barrier under the Commerce Clause but that state regulations "may not facially discriminate, without justification, against out-of-state producers of alcoholic beverages in favor of in-state producers."[125] H.R. 5034 expands the power of the states to the extent that the challenging party carries the burden of proving that the state law is not within the purview of the Twenty-first Amendment,

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122. *Compare* HR 1161 at § 3 *with* H.R. 5034.
123. H.R. 5034, 111th Cong. (2010).
124. *Id.* at § 2.
125. *Id.* at § 3(b).

but rather within the power of Congress' commerce power.[126] The issue with the language of "without justification" is that it could possibly place too "high [a] burden of proof on any legal challenge to a state's distribution laws" since it requires clear and convincing evidence.[127] Many in opposition worry that the addition of the "without justification" language implies that discrimination is permissible so long as those enacting the law can provide some faint sense of justification.

H.R. 1161 has identical motives and purposes, despite the slight changes in language between the two bills. Concerning the introduction of H.R. 1161, Congressman Mike Thompson stated that "[t]he federal government has no business picking winners and losers in the wine, beer, and distilled spirits industry. Yet the Comprehensive Alcohol Regulatory Effectiveness Act would do just that by banning the direct shipment of wine and other forms of alcohol in the U.S."[128] Additionally, Thompson opined that the impact of the CARE Act "would be devastating for brewers, vintners, distillers, importers, and consumers across our country" particularly because it "would allow states to replace federal standards with their own, making it harder for out-of-state producers in California and elsewhere to comply with other states' laws."[129]

D. Possible Effects of the CARE Act on State Regulation of Alcohol

All states in some way or another regulate the importation and distribution of alcohol.[130] The Federal Trade Commission has stated that "[s]tate bans on interstate direct shipping represent the single largest

126. *Id.* at § 3(c).

127. Dave McIntyre, *Bill in Congress would undo Va. vinter's victory over wine* shipping, WASHINGTON POST, (May 5, 2010), http://www.washingtonpost.com/wp-dyn/content/story/2010/05/04/ST2010050403163.html. *See also* H.R. 5034, 111th Cong. § 3(c) (2010) (The text of H.R. 5034 states that "[n]otwithstanding that the State or territorial law may burden interstate commerce or may be inconsistent with an Act of Congress, the State law shall be upheld unless the party challenging the State or territorial law establishes by clear and convincing evidence that the law has no effect on the promotion of temperance, the establishment or maintenance of orderly alcoholic beverage markets, the collection of alcoholic beverage taxes, the structure of the state alcoholic beverage distribution system, or the restriction of access to alcoholic beverages by those under the legal drinking age.").

128. Zahn, *supra* note 121.

129. *Id.*

130. Anne Faircloth, *Mail-order Wine Buyers, Beware!,* FORTUNE, 46 (Feb. 15, 1998).

regulatory barrier to expanded e-commerce in wine."[131] Direct wine shipping would help in getting wine out to as many persons as possible and thus would help stimulate the U.S. economy. However, with the possibility of the passage of H.R. 1161, many groups of wine lovers and winemakers are worried that their ability to ship will be even further stifled. The states will potentially be able to pass facially discriminatory laws if they can justify that the law has an effect on the promotion of temperance, or other core Twenty-first Amendment objectives.[132] However, whether it is temperance or an attempt to safeguard children from the dangers of alcohol, citizens of many states are not able to participate in the direct shipment of wine. Generally, states that do not participate in direct wine shipping are proponents of a three-tiered system of distribution.[133]

Through the three-tiered distribution system allowed by the Twenty-first Amendment, the Court enumerates these tiers as follows: in tier one are alcohol producers, tier two are wholesalers, and tier three are retailers.[134] The three-tiered system creates barriers between the different segments of the production, distribution, and retail portions of the alcohol business.[135] Tier one alcohol producers are permitted to sell products to licensed tier two wholesalers who may, in turn, sell to licensed tier three retailers in the state.[136] The wholesalers provide information about the producers and the alcohol that is imported as well as collect excise taxes from them.[137] Wholesalers then sell to licensed retailers within the state for profit by charging higher prices than they paid to the suppliers.[138] The retailers in a strict three-tier system are the tier that directly interacts with the individual customers.[139] The alcohol must pass through the wholesaler and the retailer, both collecting profits along the way, before it can reach the customer at a higher price through an established practice of vertical hierarchy.[140] Certain groups favor this hierarchical approach since it

131. Granholm v. Heald, 544 U.S. 460, 468(2005) (citing *Possible Anticompetitive Barriers to E-Commerce: Wine*, FEDERAL TRADE COMMISSION, 5-7 (July 2003), *available at* http:// www.ftc.gov/os/2003/07/winereport2.pdf).

132. *See F.A.Q., supra* note 41; *see also* H.R. 5034, 111th Cong. § 3(c) (2010).

133. *See* North Dakota v. United States, 495 U.S. 423, 428 (1990).

134. *See Granholm*, 544 U.S. at 466-67.

135. Aaron R. Gary, *Treating All Grapes Equally: Interstate Alcohol Shipping After Granholm*, 83 WIS. LAW. 6 (Mar. 2010).

136. *See id.*

137. Russell A. Miller, *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, 2497 (2002).

138. *Id.*

139. *Id.*

140. *See* Gary, *supra* note 135, at 8-9.

allegedly "facilitates efficient tax collection, aids in the enforcement of alcohol-beverage laws such as underage drinking prohibitions, and promotes orderly market conditions."[141] However, the flip side to this argument is that "[t]he three-tier system puts smaller producers or suppliers, particularly start-ups, at a disadvantage by narrowing the feasibly available distribution channels; in doing so, it limits the product selection available to consumers."[142] Any laws strengthening the three-tiered system and restricting individual distribution enhance the factors that disadvantage smaller businesses in the alcohol industry.

Many of the state laws disallowing direct shipment protect this type of tiered distribution system. Two ways to ship to those in states with direct shipping bans in place include utilizing either a tiered system or obtaining a permit through the state.[143] This is difficult because the different types of shipping laws throughout the states tend to vary greatly. For example, an express prohibition on the direct shipment of wine entirely eliminates the possibility of a supplier sending wine to a customer without a permit.[144] Additionally, limited direct shipping laws, which allow for direct shipment in small quantities, are sometimes allowed.[145] Finally, reciprocal states allow direct shipping if the state with which they direct ship will be able to ship to said state.[146]

Two distinct groups have formed on each side of this long-fought wine shipping debate. Many wineries and manufacturers run a risk of not getting picked up by wholesalers because of their small production volume, resulting in their not being marketed in states that ban shipping.[147] These laws make it difficult for a winery that is starting up to market and expand their product.[148] The fact that distribution and retail markets are consolidating means that direct shipping becomes the most efficient form of sale. The limitations on these small wineries by the states are, in essence, providing an obstacle "to increase[ing] volume, consumer base, and geographic market[s].[149] Another argument against the three-tiered system and for less regulation is that the wholesale markup of the products of smaller wineries makes their sales impractical.[150] Additionally, these

141. *Id.* at 8 (citing Granholm v. Heald, 544 U.S. 460, 489-93 (2005).
142. *Id.* at 8.
143. Miller, *supra* note 137, at 2497-98.
144. *Id.* at 2498.
145. *Id.*
146. *Id.* at 2498.
147. Shanker, *supra* note 32, at 362.
148. *FTC Report, supra* note 36.
149. Riekhof & Sykuta, *supra* note 15, at 32.
150. Sparks, *supra* note 44, at 489.

extra layers of passage and shipment raise the prices overall and make many small wineries unable to sell outside of their state of production.[151] Opponents of the CARE Act fear that, "if enacted by Congress, would give states the ability to pass discriminatory wine shipping bans and other anti-free market legislation without consequence of court challenge if the laws are discriminatory or protectionist."[152] The other group in this argument believes that retailers and wholesalers have a strong interest in preventing the direct shipment of wine, because competition is lessened and tax collection is facilitated by the taxation of all alcohol sold to state residents.[153]

V. ANALYSIS

Taking into account the thorough history of alcohol regulation both by Congress and the Courts, the enactment of H.R. 1161 should be treated similarly. The same standards applied in *Granholm* should be applied to the present issue. Because the Court has stated that discriminatory policies cannot supersede the Dormant Commerce Clause under the Twenty-first Amendment, the types of laws that could be enacted under H.R. 1161 deserve strict analysis. Because the bill states that laws cannot be intentionally or facially discriminatory without advancing a legitimate local purpose that cannot be reached by nondiscriminatory measures, [154] many worry that discriminatory laws will be passed and upheld so long as some faint sense of justification is present. This could possibly open the door further to discriminatory practices among the states. Possibly discriminatory laws should not be overlooked simply in deference to the state; but a stricter review would seem to be in conflict with the purpose of the CARE Act.

The arguments on both sides of the spectrum are strong and it appears that little middle ground exists. For the most part, wine, beer, and liquor wholesalers promote the enactment of H.R. 1161, as shown through their money trail of donations.[155] It is in their best business interest for the bill to be passed. However, many smaller wineries and manufacturers of wine and beer, who sell a majority of their product through direct sales, bring the counter-argument and opposition for the passage of the bill.[156] Under the

151. *See id.*; Granholm v. Heald, 544 U.S. 460, 474 (2005).
152. *State Shipping Laws FAQs*, *supra* note 25.
153. *See id.*
154. *See* H.R. 1161, 112th Cong. § 3(b) (2011).
155. *See H.R. 1161 – Community Alcohol Regulatory Effectiveness Act of 2011 Overview,* OPEN CONGRESS, http://www.opencongress.org/bill/112-h1161/show (last visited Feb. 22, 2012) [hereinafter *CARE Act 2011 Overview*].
156. *FTC Report*, *supra* note 36.

bill, if a wholesaler does not choose to carry a smaller enterprise's product, then their product will not be brought to stores across the country and, since they would no longer be able to use the mail, then their hands will become tied for sales.[157]

The largest group in favor of the adoption of the CARE Act into law is the Wine & Spirits Wholesalers of America, a giant in sales and distribution of wine and other alcohol throughout the country.[158] Another group that is financially backing the adoption of the bill is the National Beer Wholesalers Association.[159] Their outward reasoning behind their support is that they feel that court decisions against the states dismantle regulations that "inhibit illegal sales to minors[,] ensure that all intoxicating liquor is lawfully sold through licensed vendors[,] curb overly aggressive marketing and consumption[,] achieve the effective collection of taxes[,]and establish an orderly, accountable and transparent distribution and importation system."[160] Craig Wolf, president of the Wine & Spirits Wholesalers of America stated that the current three-tier system is the "best beverage alcohol distribution system in the world" and that "[i]t is important that states retain their constitutional power to regulate the distribution of beverage alcohol and are able to fend off litigation which serves to destabilize or destroy that authority."[161] The premise behind this issue is further seen by the line of reasoning that "[a]lthough all Americans are guaranteed inalienable rights such as life, liberty and the pursuit of happiness, access to wine is not one of them."[162]

Those most adamantly opposed to the adoption of H.R. 1161 consists of groups such as the Specialty Wine Retailers Association, the National Association of Manufacturers, Wine Institute, Wine America, the American Wine Society, the Distilled Spirits Council of the United States (DISCUS), Free the Grapes, and many other statewide wine growing and selling

157. *See generally F.A.Q, supra* note 41.

158. *See CARE Act 2011 Overview, supra* note 155; *see also About WSA,* WINE & SPIRITS WHOLESALERS OF AMERICA, http://www.wswa.org/about.php (last visited Mar. 1, 2012).

159. *H.R. 1161 – Community Alcohol Regulatory Effectiveness Act of 2011 Money,* OPEN CONGRESS, http://www.opencongress.org/bill/112-h1161/money (last visited Mar. 4, 2012) [hereinafter *CARE Act of 2011 Money*].

160. *Beer Distributor Advocacy Across the States*, NATIONAL BEER WHOLESALERS ASSOCIATION, http://nbwa.org/sites/default/files/annual-report-2010-11.pdf (last visited Feb. 22, 2012).

161. McIntyre, *supra* note 127.

162. Peter Sinton, *No Wine Across the Line: Vinters Confront States' Shipping Laws*, S.F. CHRONICLE, Jan. 29, 2001, at B1.

organizations.[163] The reasons behind their opposition range from the fact that the bill will give the authority to state governments "to pass discriminatory wine shipping bans and other anti-free market legislation without consequence" to the fact that this legislation could effectively shut down many currently-thriving and up-and-coming wineries doing their business through direct shipment and on-site sales.[164] Rep. Mike Thompson (D, CA), one of the loudest leaders against the enactment of the original CARE Act said "[w]ine is produced in all 50 states, including more than 6,000 wineries: a 500 percent increase in the past 30 years, . . . [and] [y]et the number of wine wholesalers has decreased by more than 50 percent, creating a distribution bottleneck."[165] Because of the reliance and dependence of many wineries on self-distribution and direct-to-consumer sales, Thompson stated that a new federal law such as H.R. 5034 (and its progeny) is not needed and that litigation will cease only "when states stop passing discriminatory laws promoted by the wholesalers."[166] Jeremy Benson, executive director of Free the Grapes, stated that the CARE Act is a threat to wineries and is important to consumers "because they see a monopolistic special interest trying to take away their ability to choose what wines to enjoy."[167] Perhaps these loud voices, coupled with an angered citizenry, are reaching the Members of Congress and are helping change minds. On January 17, 2012, Representative Kurt Schrader (D-OR) withdrew his co-sponsorship of H.R. 1161 and stated that after he spoke with Oregon wine growers, enthusiasts, and the rest of the wine community, he "no longer believe[s] the CARE Act is an appropriate vehicle for regulation of alcohol" and "look[s] forward to building on the relationship we have developed to further grow the success of Oregon's wine industry."[168]

Despite the arguments of those in favor of the passage of the CARE Act, it is a real possibility the bill could put many small wineries and distilleries out of business. As the title of this article states, H.R. 1161 would effectively "put a cork" in winery sales for many across the country and in their abilities to further their brand and product line through avenues

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163. *CARE Act 2011 Overview, supra* note 155. Similar groups also opposed H.R. 5034. *See Who opposes H.R. 1161?,* STOP H.R. 1161, http://www.stop1161.org/schedule.html (last visited Feb. 4, 2010).

164. *F.A.Q., supra* note 41.

165. McIntyre, *supra* note 127.

166. *Id.*

167. *Id.*

168. News Release, Congressman Kurt Schrader, Schrader withdraws co-sponsorship of H.R. 1161: Community Alcohol Regulatory Effectiveness (CARE) Act of 2011 (Jan. 17, 2012), *available at* http://schrader.house.gov/index.cfm?sectionid=24&itemid=488.

such as the internet. While it is true that the wholesalers make a case for the fact that laws concerning alcohol should be made and protected by the state legislatures and not by judges, the states already have a sweeping amount of this type of protection under the purview of the Twenty-first Amendment. With the current status of laws controlling alcohol regulation and of the constitutional protections of state regulation, there is no need to reaffirm and grant more power to the states. A delicate balance has been struck since the enactment of the Twenty-first Amendment to place it in harmony with the Commerce Clause. This balance, while a bit rocky at times, was given further meaning after the *Granholm* decision. This bill, if passed, could have the potential to nullify some of the important effects of the *Granholm* decision.

With the passage of H.R. 1161, the states would have more sweeping powers to adopt laws that are discriminatory through methods of justification concerning wine sales and shipping.

As long as the state can show that their law banning shipment "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives" and that the intent to discriminate was not present, then the Commerce Clause could possibly be nudged to the side.[169] Should the Twenty-first Amendment be used to save blatantly discriminatory laws from the reach of the Commerce Clause? It is doubtful that this is the proper way to utilize the Twenty-first Amendment within this day and age. Times have changed and with the various abilities of the state to protect the core concerns of the Twenty-first Amendment, aside from direct shipping bans, no real reason is present for laws that ban shipping alcohol. The Supreme Court has spoken on the matter to some extent and ruled that "the Twenty-first Amendment does not immunize all laws from Commerce Clause challenge."[170] Additionally, the Court held that the list of "Commerce Clause cases demand more than mere speculation to support discrimination against out of state goods."[171] Through the Supreme Court's analysis of what "more than mere speculation" would include, it appears that this burden is fairly high, as it was not met in *Granholm*.[172]

Another issue within this general argument is that the Twenty-first Amendment's goal of temperance is sometimes misused to mask a practice of economic protectionism. In *Pike v. Bruce Church, Inc.*, a case concerning laws directing the packing and storage facilities of cantaloupes, the Court held that state laws are subject to certain criteria when they affect

169. H.R. 1161, 112th Cong. § 3(b) (2011).
170. Granholm v. Heald, 544 U.S. 460, 488 (2005).
171. *Id.* at 492.
172. *Id.* at 490-92.

interstate commerce and that such laws will be upheld "unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[173] To even be subjected to this test and not immediately considered unduly discriminatory, the law must regulate "even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce [must be] only incidental."[174] Additionally, if a legitimate local purpose is found underneath the law then the court weighs the degree.[175] Then, "the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities."[176]

The economy of the United States is one of an integrated nature; to simply state that laws concerning certain articles of commerce are not subject to this same standard of immunity is perhaps misplaced and incorrect. Congress regulates wine, a legal item in commerce, far differently and more vigorously and intrusively than it regulates cheese.[177] If the goal of the laws of all of the states is simply to engage in economic protectionism and not to fulfill one of the goals of the Twenty-first Amendment, then the statute should be subject to a harsher review.

VI. CONCLUSION

In order for the states to be able to regulate alcohol, they must be engaging in the activity of protecting a "core concern" of the Twenty-first Amendment. However, since the modern "core concern" balancing test can be extended fairly far in favor of invoking the protection of the state law by the Twenty-first Amendment, it is likely that H.R. 1161 will only further enhance that power. Since direct shipment is already banned in many states without H.R. 1161, it is quite possible that more laws of this nature will be put into place. It is also possible that laws even more detrimental to small wineries and individual oenophiles will be enacted. With the text of the CARE Act, it appears that so long as state laws are not intentionally or facially discriminatory and can show some semblance of a legitimate local purpose, the law would be upheld by the Act.

Thus, because of the CARE Act, it is assumed that more discriminatory legislation will be sustained than before. The probable effect of this legislation will be lost revenue for many wineries and

173. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (citing Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960)).
174. *Id.*
175. *Id.* at 142.
176. *Id.*
177. *See* Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 851 (7th Cir. 2000).

distilleries throughout this country, likely those that are small or just starting, which will ultimately result in shut downs and a severe business downturn. This also lessens the amount of money going into the overall alcohol related economy, as individuals in states with direct shipment bans will not be able to order alcohol for shipment at all. It seems counter-intuitive for the economic prospects of the country that Congress may favor a provision that has the potential to cause great financial downfall for hardworking Americans in the wine industry simply to fatten the pockets of H.R. 1161-supporting Members of Congress and of the richest lobbyists for the wineries and wholesalers.

The issue is clearly one of great divide. The recent decisions of the Supreme Court show that the balance cannot solely be shifted towards protection of state interests. The federal government has both a right and an obligation to make sure that fair dealings are occurring throughout the nation concerning commerce. The Court has often alluded to the fact that wine and other forms of alcohol are treated in a certain way simply because of their nature. This is a very antiquated notion and it could very well be time for the court and the nation to review the need for any special treatment of alcohol. While this notion is a different debate in itself, it is important to note that the times have changed and the days of Prohibition are long gone. The sentiment within segments of the population that alcohol is inherently evil is very misplaced, at least in terms of the regulation of interstate commerce. Any good placed into commerce can be manipulated and used in such a way that would be harmful for someone in society. It is unlikely that Congress would ever give the states authority to regulate other legal products like they do with wine.[178] Therefore, the misplaced protectionist views of wine could be considered by many to be unfair and unduly burdensome.

States have broad power as it stands, and the reality is that if the CARE Act is enacted into law, more unjustified and unrestricted restraint on free trade could occur. States being able to provide faulty and scant justifications for their discrimination is beyond the scope of what the Twenty-first Amendment should protect. A risk of enhancement of economic protectionism is also present. The bill does not define what would be included in the umbrella of valid justification for discriminatory laws and what could be considered to "advance[e] a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory

178. *Congress's Sour Grapes*, *supra* note 111 ("It's hard to imagine Congress giving states the authority to prohibit Amazon or any other online retailer from shipping its products directly to consumers. Yet that's exactly what they're trying to do with wine. Sounds to us like a case of sour grapes that deserves to be stomped.").

alternatives."[179] While not all discrimination is bad and punishable, much of it is, and discriminatory laws should exist only when certain reasons are present. The original CARE Act, H.R. 5034, read that laws would be unconstitutional unless they worked towards "the promotion of temperance, the establishment or maintenance of orderly alcoholic beverage markets, the collection of alcoholic beverage taxes, the structure of the state alcoholic beverage distribution system, or the restriction of access to alcoholic beverages by those under the legal drinking age."[180] However, the drafters of H.R. 1161 have eliminated this section from the bill.[181] The Supreme Court has provided states with guidance that when states regulate even-handedly, advance a legitimate local public interest and the regulation's "effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[182] The drafters of the laws that effectively act to shut down wineries throughout the nation may be hard-pressed to be able to show that the effect on commerce is merely incidental.

The supporters of H.R. 1161 are in their position solely because of the colossal amounts of money involved, nothing more, nothing less. They have a great deal of money to gain through the exclusion of smaller wineries from the nationwide market and have spent hundreds of thousands of dollars just in garnering support for their position within Congress.[183] By forcing citizens of states with direct shipping laws to go through the traditional three-tiered regulatory scheme, the perpetuation of discriminatory practices is furthered. However, the main problem is what this bill ultimately seeks to do—make it virtually impossible to challenge discriminatory laws in court. At its core, H.R. 1161 is merely a piece of special interest legislation that limits free trade, competition, consumerism, and diminishes an industry at the heart of American commerce that has permeated the boundaries of all fifty states. Congress is attempting to circumvent the Court's authority in determining the constitutionality of alcohol related laws. The big wholesalers are bullying the small wineries and wine producers by trying to have as many states as possible impose

179. Granholm v. Heald, 544 U.S. 460, 489 (2005); H.R. 1161, 112th Cong. § (3)(c)(3) (2011).

180. H.R. 5034, 111th Cong. § 3(c)(3) (2010).

181. *Compare* H.R. 1161 *with* H.R. 5034.

182. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (The Court further stated that "[i]f a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.").

183. *See CARE Act of 2011 Money, supra* note 159.

direct shipment bans. This type of legislation would keep the strict three-tiered regulatory system firmly in place and money firmly in the pockets of the wholesale giants.

Plus, in the end, what oenophile doesn't get frustrated when they can't order their favorite wine that their local store does not carry? Requiring that a state merely show that their law advances some subjective legitimate local purpose that cannot be served by other means is possibly too minimal of a floor to set. While a few major super-wholesalers and others of the sort adamantly support the adoption of H.R. 1161, the majority of the American wine-drinking public will be outraged that someone is trying to halt their ability to purchase wine for shipment to their home. Those whose livelihood will be affected, namely small wineries and manufactures, will also be outraged. The potential grant of power to the states by H.R. 1161 to discriminate in regulation with only a scant amount of justification is directly in conflict with the principles for which this country stands. Ultimately, the heart of this argument is that no discriminatory practices should be tolerated under the Dormant Commerce Clause and the Twenty-first Amendment should not be twisted for use in such an abusive way. Direct shipment bans are, by their nature, discriminatory against an entire subset of completely legal products. Allowing states to pass laws that further discriminate against a subset of goods within the economy is wholly unjust. H.R. 1161 should not be permitted to "put a cork" in the availability of an alcohol manufacturer's cause of action in the courts and should not be able to eliminate important protections granted by the Commerce Clause.[184]

184. *See Congress's Sour Grapes*, *supra* note 111.