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CONSTITUTIONAL LAW—Challenging Anti-Commerce State Regulatory Schemes In Light of the Supreme Court’s Admonition of Protectionist Alcohol Regulations; *Granholm v. Heald*, 544 U.S. 460 (2005)

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CASE NOTE

CONSTITUTIONAL LAW—Challenging Anti-Commerce State Regulatory Schemes in Light of the Supreme Court’s Admonition of Protectionist Alcohol Regulations; *Granholm v. Heald*, 544 U.S. 460 (2005).

*Mike Figge**

INTRODUCTION

Not long ago, wine aficionados seeking an eclectic vintage or specialty wine were left with their thirst unquenched if the local wine shop did not carry the wine they sought.¹ But today, the advent of the Internet has given individuals access to wineries from across the nation.² From California to New York, nearly every vineyard operates a web site offering their wines for purchase.³ However, even with increased ease of access via the Internet, many wine lovers still cannot get their favorite wines because states restrict the sale and transportation of alcohol within their borders; a power they received upon the repeal of prohibition.⁴

Prohibition, the complete ban of manufacture and distribution of alcohol throughout the country, ended in 1933 with the Twenty-first Amendment to the United States Constitution.⁵ With ratification came the expansion of state regulatory powers under section two of the Amendment which states that “[t]he transportation or importation into any State, Territory, or possession of the United States for delivery or use there in of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.”⁶ Since then, states have created discriminatory regulatory schemes that protect in-state producers of alcohol from out-of-state competition.⁷ Some states allow all wineries to ship wines ordered online directly to

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¹ See generally Possible Anti-competitive Barriers to e-commerce: Wine, A Report from the Staff of the Federal Trade Commission, July 2003, <http://www.ftc.gov/os/2003/07/winereport2.pdf> (last visited September 7, 2007).

² *Id.* at 1.

³ See, e.g., Figge Cellars, <http://www.figgecellars.com/> (last visited November 27, 2007); Snowden Vineyards, <http://www.snowdenvineyards.com/ourWines-overview.htm> (last visited November 27, 2007); Atwater Estate Vineyards, <http://www.atwatervineyards.com/> (last visited November 27, 2007).

⁴ U.S. CONST. amend. XXI, § 2.

⁵ *Id.*

⁶ *Id.*

⁷ See, e.g., ARIZ. REV. STAT. ANN. § 4-205.04(c) (2006); MASS. GEN. LAWS ch. 138, § 19F (2006); OHIO REV. CODE ANN. § 4303.232 (West 2006).

consumers' homes.⁸ Others require the wineries to ship their wines to a distributor for pickup.⁹ Still others, like Utah, prohibit shipments of alcohol within its borders altogether.¹⁰ Further, some states allow direct-to-consumer shipping by in-state retailers but prohibit direct-to-consumer shipments by out-of-state retailers.¹¹

Granholm v. Heald

In 2003, Domaine Alfred, a small California winery, filed suit in the United States District Court for the Eastern District of Michigan.¹² The winery challenged Michigan's laws prohibiting the direct shipment of wine to consumers by out-of-state wineries while simultaneously allowing direct shipping by in-state wineries.¹³ The plaintiff argued that Michigan's shipping laws violated the dormant Commerce Clause of the United States Constitution.¹⁴ The State argued that section two of the Twenty-first Amendment abrogates the State's Commerce Clause responsibilities when regulations pertain to alcohol within the state's

⁸ See, e.g., WYO. STAT. ANN. § 12-2-204 (2006).

⁹ E.g., KAN. STAT. ANN. § 41-348(b)(3) (2006).

¹⁰ UTAH CODE ANN. § 32A-8-505 (2006).

¹¹ See, e.g., 235 ILL. COMP. STAT. 5/3-12 (2006).

¹² *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003) (holding that state regulations that benefit in-state interest and burden out-of-state interests unevenly violate the negative implications of the Commerce Clause and are not saved by section two of the Twenty-first Amendment).

¹³ *Id.* at 520-22.

¹⁴ *Id.* at 520. For an excellent description of the Court's Commerce Clause jurisprudence see, e.g., *Or. Waste Sys., Inc. v. Dep't of Env'tl. Quality of Ore.*, 511 U.S. 93 (1994).

The Commerce Clause provides that '[t]he Congress shall have power . . . [t]o regulate Commerce . . . among the several states.' Though phrased as a grant of regulatory power to Congress, the Clause has long been understood to have a 'negative' aspect that denies the states the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce. The Framers granted Congress plenary authority over interstate commerce in 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.

Id. at 99 (internal citations omitted).

Consistent with these principles . . . the first step in analyzing any law subject to judicial scrutiny under the negative Commerce Clause is to determine whether it regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce. As we use the term here, discrimination simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the later. If a restriction on commerce is discriminatory, it is virtually *per se* invalid. By contrast, nondiscriminatory regulations that have only incidental effects on interstate commerce are valid unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.

Id. at 100 (internal citations and quotations omitted).

borders.¹⁵ The United States Court of Appeals for the Sixth Circuit held that the Twenty-first Amendment does not immunize all liquor laws from the Commerce Clause.¹⁶ The court also held that the State's failure to prove it could not meet its regulatory objectives through a non-discriminatory alternative invalidated the state law.¹⁷ The State appealed.¹⁸

Similarly, in 2004, two small out-of-state wineries challenged New York laws regarding direct shipments of wine to consumers, again in federal court.¹⁹ The plaintiffs claimed a direct shipping exception in New York's laws, allowing only wineries whose wines are made from at least seventy-five percent of New York grown grapes to ship directly to consumers, impermissibly discriminated against interstate commerce.²⁰ The plaintiffs also claimed that to require out-of-state wineries to establish a physical presence in the state to qualify for the direct shipping license discriminated against interstate commerce.²¹ Like Michigan, New York argued that the Twenty-first Amendment affords the State broad authority to regulate alcohol as it sees fit even if to do so violates the Commerce Clause.²² The United States Court of Appeals for the Second Circuit held that were it regulating a commodity other than alcohol, the physical presence requirement could create significant dormant Commerce Clause problems.²³ However, the court held that section two of the Twenty-first Amendment affords the states the ability to

¹⁵ *Heald*, 342 F.3d at 520 (arguing that the Michigan direct shipment law is a permitted exercise of State power under section two of the Twenty-first Amendment because it is not mere economic protectionism).

¹⁶ *Id.* at 524 (concluding that Michigan did not provide sufficient evidence that discrimination between in-state and out-of-state wineries, furthers the state's goals of temperance, ensuring orderly market conditions, and raising revenue, much less that no reasonable nondiscriminatory means exist to achieve these goals).

¹⁷ *Id.* at 527.

¹⁸ *Granholt v. Heald*, 544 U.S. 460 (2005).

¹⁹ *Swedeburg v. Kelly*, 358 F.3d 223, 229 (2d Cir. 2004) (holding that section two of the Twenty-first Amendment affords states the ability to create alcohol regulations that violate the negative implications of the Commerce Clause).

²⁰ *Id.* at 229. New York's law required a licensed winery that sells directly-to-consumers, to maintain an in-state presence. *Id.* New York also allowed wineries that produce less than 150,000 gallons per year and use seventy-five percent New York grown grapes to obtain a farm winery license. *Id.* A licensed farm winery could, in addition to selling directly to consumers, sell and ship its wine to another licensed winery, wholesaler, or retailer. *Id.*

²¹ *Id.* The Second Circuit held that New York's requirement that licensed wineries maintain an in-state presence ensures accountability because it facilitates the State's compliance enforcement. *Id.* at 236. Further, the Second Circuit held that because all wineries must either utilize the three-tier system or obtain a physical presence to be eligible for direct shipping privileges, the law restricts both in-state and out-of-state interests evenhandedly. *Id.* at 238.

²² *Id.* at 229. New York argued its "regulatory scheme is exempted from dormant Commerce Clause scrutiny, as it is a proper exercise of the State's authority under the Twenty-first Amendment to regulate the importation and distribution of alcohol for delivery or use within its borders." *Id.*

²³ *Id.* at 238.

regulate alcohol in any manner they choose.²⁴ Thus, the Court of Appeals upheld the New York law.²⁵ The plaintiffs appealed.²⁶

In the landmark case *Granholm v. Heald*, the United States Supreme Court consolidated these two cases to answer the following question: “Does a state’s regulatory scheme that permits in-state wineries [to ship alcohol directly to consumers] but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of section two of the Twenty-first Amendment?”²⁷ The Court held, in a five-to-four decision, contrary to the States’ interpretation, that section two of the Twenty-first Amendment does not abrogate nondiscrimination principles of the Commerce Clause in alcohol regulations.²⁸ The Court held that the “Twenty-first Amendment did not give states the authority to pass non-uniform laws in order to discriminate against out-of-state goods, a privilege they had not enjoyed at any earlier time.”²⁹ To the contrary, the majority held that states have broad power to police alcohol within their borders but must do so on evenhanded terms.³⁰ Furthermore, the Court found that the failure to adequately demonstrate the need for discriminatory regulations by the states required those regulations be found invalid in the face of traditional Commerce Clause jurisprudence.³¹

This case note traces the development of alcohol regulations beginning with the nation’s inception, through prohibition and the current regulatory climate.³² It demonstrates that, with the exception of prohibition, the courts historically treat alcohol as a normal good in interstate commerce.³³ It also shows that section two of the Twenty-first Amendment gives states authority to regulate alcohol to further temperance goals, raise revenue, and restrict sales to minors, but does not authorize states to create laws that subject out-of-state interests to greater regulatory hurdles than in-state interests.³⁴ Further, this case note illustrates and focuses on the need for the U.S. Supreme Court to revisit its assertion that the three-tier system of alcohol distribution is “unquestionably legitimate.”³⁵

²⁴ *Swedenburg*, 358 F.3d at 238.

²⁵ *Id.*

²⁶ *Id.* at 229.

²⁷ *Granholm v. Heald*, 544 U.S. 460, 471 (2005) (internal quotations omitted).

²⁸ *Id.* at 484.

²⁹ *Id.* at 485-86. The Wilson Act was codified at 27 U.S.C. § 121 and the Webb-Kenyon Act was codified at 27 U.S.C. § 122. *Id.* at 482-83.

³⁰ *Id.* at 493.

³¹ *Id.*

³² See *infra* notes 39–100 and accompanying text.

³³ See *infra* notes 39–100 and accompanying text.

³⁴ See *infra* notes 147–219 and accompanying text.

³⁵ See *infra* notes 188–218 and accompanying text. See also *Granholm*, 544 U.S. at 489 (quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1990) (holding that the three-tier system of

BACKGROUND

The Dormant Commerce Clause

The United States Constitution states that Congress shall have power “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”³⁶ The United States Supreme Court has interpreted this clause to infer a negative implication on the states known as the dormant Commerce Clause.³⁷ The dormant Commerce Clause prohibits states from enacting laws that favor in-state interests over out-of-state interests.³⁸

The History of Alcohol Regulation and the Commerce Clause in the United States

The regulation of alcohol has always been subject to careful, albeit disparate, review.³⁹ “Since the founding of our republic, power over the regulation of liquor has ebbed and flowed between the federal government and the states.”⁴⁰ The disparity in regulation began with promulgation of the “Original Package Doctrine” by Chief Justice Marshall which allowed alcohol to be shipped directly to consumer’s homes.⁴¹ Later, the Supreme Court recognized the states’ broad authority to regulate alcohol free from traditional Commerce Clause principles thereby disbanding the practice of shipping alcohol directly to consumers.⁴²

alcohol distribution is “unquestionably legitimate”). “Under the . . . [three-tier] regulatory system, there are three levels of liquor distributors: out-of-state distillers/suppliers, state-licensed wholesalers, and state-licensed retailers. Distillers/suppliers may sell to only licensed wholesalers[, and] . . . [l]icensed wholesalers, in turn, may sell to licensed retailers, [and] other licensed wholesalers.” *Id.* at 428.

³⁶ U.S. CONST. art. I, § 8, cl. 3.

³⁷ See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 189 (1824). Justice Marshall wrote that the power to regulate interstate commerce “can never be exercised by the people themselves, but must be placed in the hands of agents, or lie dormant.” *Id.*

³⁸ See *Brown-Forman Distillers v. New York State Liquor Auth.*, 476 U.S. 573 (1986) (holding that New York ABC regulation mandating liquor producers post prices on a monthly basis and seek ABC Board approval before changing prices in other states first is a violation of the Commerce Clause); *Hunt v. Washington State Apple Advertising Comm.*, 432 U.S. 333 (1997) (holding the requirement that all apple producers use a state mandated grading system when the source state’s grading system indicates higher quality produce violates the Commerce Clause by benefiting in-state producers of apples at the expense of out-of-state producers).

³⁹ *Granholm*, 544 U.S. at 477. Justice Kennedy discusses the history of this nation’s alcohol regulations focusing on the changes in position the Court has taken over time. *Id.*

⁴⁰ *Castlewood Int’l Corp. v. Simon*, 596 F.2d 638, 641 (5th Cir. 1979).

⁴¹ *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1927) (holding that the delivery of wine directly to consumer was permissible so long as it remained in its original package for shipping).

⁴² *The License Cases*, 46 U.S. (5 How.) 504, 579 (1847) (upholding state statutes which tax in-state producers of alcohol more favorably than out-of-state producers of alcohol).

Allowing states unfettered regulatory power remained the trend until late in the nineteenth century when the Supreme Court decided *Leisy v. Harden*, a case dealing with the regulation of out-of-state produced liquor.⁴³ In *Leisy*, a brewery in Illinois shipped beer to Iowa.⁴⁴ Upon arrival the alcohol was offered for sale in its original packaging.⁴⁵ Iowa seized the beer on the ground that its sale violated the State's prohibition on shipments of alcohol for sale within the state.⁴⁶ *Leisy*, the seller, brought suit seeking return of his merchandise.⁴⁷ The Supreme Court struck down Iowa's prohibition of direct shipments as an impermissible regulation on interstate commerce so long as those shipments remain in their original packaging.⁴⁸ For the time being, direct shipping remained out of the states' regulatory ambit.⁴⁹

Shortly after the Supreme Court's decision in *Leisy*, Congress responded by enacting the Wilson Act with the intention of closing the original package loophole.⁵⁰ However, even in light of their recent victory in Congress, the states were still bound to the nondiscrimination principles of the dormant Commerce Clause.⁵¹ This reemphasis on the nondiscrimination principle arose through a series of decisions by the Supreme Court.⁵² Thus, the Court rejected Congress's mandate by holding that the Wilson Act did not authorize application of state regulatory laws to alcohol still in transit.⁵³ Further, the Court held that the Wilson Act did not prohibit individuals from ordering liquor for personal consumption from out-of-state vendors.⁵⁴

⁴³ *Leisy v. Harden*, 135 U.S. 100 (1890) (holding that Iowa statute affecting liquor being shipped from outside the state is in violation of anti-discrimination principles of the Commerce Clause).

⁴⁴ *Id.* at 124–25.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *See generally Leisy*, 135 U.S. 100 (1890).

⁴⁹ *See id.*

⁵⁰ The Wilson Act, Ch. 728, 26 Stat. 313 (codified at 27 U.S.C. § 121 (1890)). Congress responded to the effects of *Leisy v. Harden* which abrogated the ability of state alcohol regulation agencies to regulate out-of-state liquor in a manner that discriminated against interstate commerce. *See Leisy*, 135 U.S. at 123. Essentially, the Wilson Act gave states the power to regulate all liquor regardless of whether it is or remains in interstate commerce. *Id.*

⁵¹ *See, e.g., In re Rahrer*, 140 U.S. 545, 565 (1891) (holding that Congress has the power to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier time than would otherwise be the case).

⁵² *See Vance v. W.A. Vandercook Co.*, 170 U.S. 438, 456–57 (1898); *see also Rhodes v. Iowa*, 170 U.S. 412, 422–26 (1898) (holding the Wilson Act to allow direct-to-consumer shipping); *Scott v. Donald*, 165 U.S. 107, 110 (1897) (holding that the Wilson Act does not allow states to regulate liquor in a way that discriminates against out-of-state producers).

⁵³ *Id.*

⁵⁴ *See Scott v. Donald*, 165 U.S. 107 (1897).

Congress again responded to the Court's actions, this time by passing legislation that stripped liquor of its interstate characteristics.⁵⁵ In passing the Webb-Kenyon Act, Congress again returned to the states the ability to regulate alcohol within their borders.⁵⁶ This time the Supreme Court upheld the law by reasoning Congress was free to "divest" an article of commerce of its interstate characteristic through its commerce power.⁵⁷ The Court's new stance gave states complete control over alcohol, yet still did not abrogate their accountability to the Commerce Clause.⁵⁸

The temperance movement gained momentum in the late 1910s.⁵⁹ By 1921, Congress had passed and state legislatures had ratified the Eighteenth Amendment.⁶⁰ Although criticized by some individuals, the temperance movement continued to

⁵⁵ The Webb-Kenyon Act, 37 Stat. 699 (codified at 27 U.S.C. § 122 (1890)). "An act divesting intoxicating liquor of its interstate characteristics in certain cases." *Id.* The purpose of the Webb-Kenyon Act was to allow states to regulate alcohol as they see fit so long as those regulations do not discriminate against interstate commerce. *Id.*

⁵⁶ *Id.*

⁵⁷ See *James Clark Distilling Co. v. W. Md. Ry. Co.*, 242 U.S. 311, 324 (1917). "[The] purpose [of the Wilson Act] was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor though 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." *Id.*

⁵⁸ *Id.*

⁵⁹ See RICHARD F. HAMM, *SHAPING THE EIGHTEENTH AMENDMENT: TEMPERANCE, REFORM, LEGAL CULTURE, AND THE POLITY, 1880–1920*, 19 (Thomas A. Green & Hendrick Hartogs eds., 1995).

A radical temperance ideology with its allied mosaic legal culture predominated within the temperance crusade in the last two decades of the century. The dries' ideology and legal notions made it difficult for them to achieve much success in the American polity dominated by formal and informal rules administered by political parties and courts. Yet the popularity of temperance allowed dries to establish beach-head prohibition states. The liquor industry, after failing to block the adoption of prohibition in these states, challenged the policy in the federal courts. These legal confrontations set the parameters for the next three decades of liquor law struggles.

Id.

⁶⁰ U.S. CONST. amend. XVIII (repealed 1933). The text of the Eighteenth Amendment reads:

Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

Section 2. The Congress and the several States shall have concurrent power to enforce this article by appropriate legislation.

Section 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by the legislatures of the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.

Id.

gain the approval of the masses.⁶¹ From 1921 to 1933, Congress prohibited all production, transportation, and sale of alcohol.⁶²

By 1933, the temperance movement faltered.⁶³ What had once been called “the noble experiment” had failed.⁶⁴ In its stead remained a charge to repeal the Eighteenth Amendment.⁶⁵ The introduction of the Twenty-first Amendment into Congress and its subsequent ratification by state conventions ended prohibition.⁶⁶ In 1933, the mass production and sale of alcohol resumed.⁶⁷ With production also came the return of the controversy over states’ rights and the regulation of alcohol that dominated the judicial landscape prior to prohibition.⁶⁸

This controversy centered on the Twenty-first Amendment’s similar language to the Webb-Kenyon Act of 1913.⁶⁹ In fact, the Twenty-first Amendment codifies

⁶¹ ALBERT EINSTEIN, MY FIRST IMPRESSION OF THE U.S.A. (1921). *reprinted in* IDEAS AND OPINIONS 3-7 (Random House, New York, 1954).

The prestige of government has undoubtedly been lowered considerably by the prohibition law. For nothing is more destructive of respect for the government and the law of the land than passing laws which cannot be enforced. It is an open secret that the dangerous increase of crime in this country is closely connected with this.

Id.

⁶² See Hamm, *supra* note 59, at 19–21 (explaining the background of prohibition and legislative history leading up to the passage of the Eighteenth Amendment). Interestingly, the Eighteenth Amendment did not prohibit the production and sale of sacramental wine. See DOBYNS, F., THE AMAZING STORY OF REPEAL, AN EXPOSE OF THE POWER OF PROPAGANDA 297 (1940). During the prohibition years, the production and sale of sacramental wine increased dramatically perhaps saving what remained of an already tattered wine industry. See *id.* The exception for sacramental wine from protection under the Volstead Act invited abuse. See *id.* In 1925, the Department of Research and Education of the Federal Council of the Churches of Christ reported that:

The withdrawal of wine on permit from bonded warehouses for sacramental purposes amounted in round figures to 2,139,000 gallons in the fiscal year 1922; 2,503,500 gallons in 1923; and 2,944,700 gallons in 1924. There is no way of knowing what the legitimate consumption of fermented sacramental wine is but it is clear that the legitimate demand does not increase 800,000 gallons in two years.

Id.

⁶³ GUILLAUME FOURNIER, FROM ALCOHOL PROHIBITION TO REGULATION 5 (2002), http://www.senliscouncil.net/documents/from_alcohol_prohibition_to_regulation (last visited October 21, 2007).

⁶⁴ See HERBERT HOOVER, MEMOIRS OF HERBERT HOOVER-THE CABINET AND THE PRESIDENCY: 1920-1933 209 (1952).

⁶⁵ Battipaglia v. N.Y. State Liquor Auth., 745 F.2d 166, 169 (1987). In *Battipaglia*, Judge Friendly, writing for the majority of the Second Circuit Court of Appeals, noted that “[t]he Twenty-first Amendment was designed to end the noble experiment by which the federal government endeavored to control the drinking habits of all citizens and place control of alcoholic beverages in the states.” *Id.* at 168-69. (citations omitted).

⁶⁶ Fournier, *supra* note 63.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ See 45 AM. JUR. 2D *Intoxicating Liquors* § 34 (1964); U.S. CONST. amend. XXI, § 2.

the language of the Webb-Kenyon Act.⁷⁰ With this similarity in mind, the Supreme Court held that section two of the Twenty-first Amendment “reserves to the states power to impose burdens on interstate commerce in intoxicating liquor that, absent the Amendment, would clearly be invalid under the Commerce Clause.”⁷¹ The Court even went so far as to say that section two “represents the only express grant of power to the states, thereby creating a fundamental restructuring of the constitutional scheme as it relates to one product-intoxicating liquors.”⁷²

With the ability to regulate alcohol free from federal interference, many states enacted a three-tier system of alcohol distribution.⁷³ The three tiers are producers, wholesalers, and retailers.⁷⁴ The system purportedly aids in achieving the goals of temperance by increasing prices, raising revenue by remittance of taxes, and eliminating undesirable market influence from one level of the system over the others.⁷⁵ This is achieved by mandating that producers sell only to wholesalers, wholesalers to retailers, and retailers to consumers.⁷⁶ Finally, the three-tier system requires that all alcoholic beverages be distributed through licensed entities to ensure compliance with all state laws.⁷⁷

⁷⁰ Compare The Webb-Kenyon Act, 37 Stat. 699 (codified at 27 U.S.C. § 122 (1890)) (“The shipment or transportation . . . 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.”) with U.S. CONST. amend. XXI § 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.”).

⁷¹ *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984) (holding that a state law banning alcohol advertising did not directly relate to the core power of the Twenty-first Amendment to control whether to permit importation or sale of liquor and how to structure the liquor distribution or to regulate the times, places and manner under which liquor may be imported and sold in the state).

⁷² *Castlewood Int'l Corp.*, 596 F.2d at 642. A few years prior to the decision in *Castlewood*, the Court changed its position by holding that section two of the Twenty-first Amendment is not free from other aspects of the Constitution. See *Craig v. Boren*, 429 U.S. 190 (1976) (holding that section two of the Twenty-first Amendment must be read in light of other constitutional provisions including the first amendment and the privileges and immunities clause).

⁷³ *Granholm*, 544 U.S. at 489 (quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1990) (holding that the three-tier system of alcohol distribution is “unquestionably legitimate.”)). “Under the . . . [three-tier] regulatory system, there are three levels of liquor distributors: out-of-state distillers/suppliers, state-licensed wholesalers, and state-licensed retailers. Distillers/suppliers may sell to only licensed wholesalers[, and] . . . [l]icensed wholesalers, in turn, may sell to licensed retailers, [and] other licensed wholesalers.” *North Dakota*, 495 U.S. at 428.

⁷⁴ *North Dakota*, 495 U.S. at 428; see also 48 C.J.S. *Intoxicating Liquors* §§ 297-298 (1955).

⁷⁵ *North Dakota*, 495 U.S. at 431-32 (declaring that promoting temperance, ensuring orderly market conditions, and raising revenue are all core concerns of the Twenty-first Amendment).

⁷⁶ 48 C.J.S. *Intoxicating Liquors* §§ 297-298 (1955).

⁷⁷ *Id.*

The Granholm Effect

In *Granholm*, the Court struck down state regulatory laws favoring in-state producers over out-of-state producers.⁷⁸ Since the Court's decision, numerous actions have been filed in federal courts challenging state regulatory schemes in the wake of the Supreme Court's decision.⁷⁹ Some of the post-*Granholm* cases challenge clever attempts by legislatures to continue to discriminate against out-of-state wine producers.⁸⁰

Across the nation, wineries and consumers are challenging state laws that restrict direct-to-consumer shipping.⁸¹ Common challenges in some of the lawsuits are state code provisions which veil a protectionist economic barrier behind production capacity caps.⁸² These provisions allow direct-to-consumer shipping only to wineries producing less than a certain number of gallons per year.⁸³ Often these limits are set just above the largest in-state winery's annual production, but so low that many out-of-state wineries remain prohibited from participating in the direct-to-consumer market.⁸⁴ Even in the face of *Granholm* and pending litigation across the nation, state legislatures have continued to enact laws that, albeit increasingly crafty in design, continue to discriminate against

⁷⁸ *Granholm*, 544 U.S. at 493.

⁷⁹ See, e.g., *Family Winemakers of Cal. v. Jenkins*, No. 1:06-11682 (D. Mass. filed Sept. 18, 2006) (asserting that, in purpose and effect, the limits imposed by the capacity caps fall solely upon out-of-state wineries, while in-state wineries continue to enjoy unfettered access to the Massachusetts market); *BlackStar Farms, LLC v. Morrison*, No. 2:05-02620 (D. Ariz. filed Oct. 5, 2006) (charging discriminatory effects from the production volume cap for out-of-state wineries); *Beau v. Moore*, No. 4:05-903 (E.D. Ark. filed June 22, 2005) (alleging discrimination based on the right of Arkansas wineries producing less than 250,000 gallons to sell directly to local consumers at their premises while the plaintiff winery must sell to an Arkansas wholesaler or retailer).

⁸⁰ E.g., *BlackStar Farms, LLC v. Morrison*, No. 2:05-02620 (D. Ariz. filed Oct. 5, 2006).

⁸¹ E.g., *Family Winemakers of Cal. v. Jenkins*, No. 1:06-11682 (D. Mass. filed Sept. 18, 2006) (asserting that, in purpose and effect, the limits imposed by the capacity caps fall solely upon out-of-state wineries, while in-state wineries continue to enjoy unfettered access to the Massachusetts market); *BlackStar Farms, LLC v. Morrison*, No. 2:05-02620 (D. Ariz. filed Oct. 5, 2006) (charging discriminatory effects from the production volume cap for out-of-state wineries); *Beau v. Moore*, No. 4:05-903 (E.D. Ark. filed June 22, 2005) (alleging discrimination based on the right of Arkansas wineries producing less than 250,000 gallons to sell directly to local consumers at their premises while the plaintiff winery must sell to an Arkansas wholesaler or retailer).

⁸² E.g., *BlackStar Farms, LLC v. Morrison*, No. 2:05-02620 (D. Ariz. filed Oct. 5, 2006).

⁸³ E.g., MASS. GEN. LAWS ch. 138, § 19F (2006) (subjecting out-of-state wineries to a volume cap and to ineligibility if they also sell through wholesalers, while affording in-state wineries access to Massachusetts consumers).

⁸⁴ See *BlackStar Farms, LLC v. Morrison*, No. 2:05-02620 (D. Ariz. filed Oct. 5, 2006) (charging discriminatory effects from the production volume cap for out-of-state wineries); See also *infra* note 99.

interstate commerce.⁸⁵ The recent legislative activity in Ohio and Wisconsin are good examples of this trend.⁸⁶

The trend of legislatures enacting facially neutral yet practically burdensome regulations indicate that states have not heeded the Supreme Court's decision in *Granholm*.⁸⁷ In fact, some states have chosen to act in rogue fashion with complete disregard to *Granholm*.⁸⁸ In these states, these protectionist state regulations affect retailers as well as wineries.⁸⁹ While some argue the retail-to-consumer market

⁸⁵ See, e.g., H.B. 119, 127th Gen. Assem. § 4303.071(2) (Ohio 2007) (allowing wineries that produce less than 150,000 gallons annually to hold a permit to ship wine of its own production to resident consumers who have a household limit of twenty-four cases annually from all wineries); S.B. 40 §125.535, 2007-2008 Leg., (Wis. 2007) (replacing Wisconsin's reciprocal law with a Direct Shipper's Permit allowing shipment of up to twenty-seven liters per year directly to individual consumers subject to a twenty-seven liter annual limit on direct shipment purchases from all wineries).

⁸⁶ H.B. 119, 127th Gen. Assem. § 4303.071(2) (Ohio 2007). In Ohio, the General Assembly recently passed legislation that requires a direct shipping permit for wineries producing less than 150,000 gallons per year. *Id.* In addition to the production capacity restriction, the Ohio law also includes a customer volume limit of twenty-four cases per year. *Id.* This purchase limit applies to "family households," a term which remains undefined by the Ohio Legislature. See OHIO REV. CODE ANN. § 4303.232 (2006). In Wisconsin, an anti-commerce direct shipping provision was entered into the Biennial Budget Bill. S. B. 40 §125.535, 2007-2008 Leg., (Wis. 2007). If passed, the new law would remove reciprocal language from the current Wisconsin laws. See WIS. STAT. § 139.035 (2006). It would also limit direct shipments of wine to twenty-seven liters per year for all wineries. S.B. 40, 2007-2008 Leg., (Wis. 2007). This type of provision burdens producers to do the impossible and track all shipments of wine from across the nation to each individual consumer. See generally News, Free The Grapes!, <http://www.freethethegrapes.org/news.html#FTGUpdates> (last visited on August 19, 2007). The trend of including provisions like this into direct shipping legislation seems to be evenhanded at first glance since they apply to both in-state and out-of-state interests. *Id.* However, upon further examination, it is apparent that the bill is really meant as a means of protecting the interests of wholesalers who successfully lobby the legislature for preferential treatment. See, e.g., Jason Stein, *Proposed Law Alarms Wisconsin Vintners*, WISCONSIN STATE JOURNAL, June 29, 2007, at A1. In effect, the proposed amendment removes the ability of small in-state wineries to self-distribute to retailers and restaurants. *Id.* The removal of self-distribution will cause wineries to increase prices of products in order to retain some portion of their profit margin. *Id.*

⁸⁷ See, e.g., ARIZ. REV. STAT. § 4-205.04(c) (2006); MASS. GEN. LAWS ch. 138, § 19F (2006). See also Complaint 2, Family Winemakers of Cal. v. Jenkins, No. 1:06-11682 (D. Mass. filed Sept. 18, 2006) (asserting that, in purpose and effect, the limits imposed by the capacity caps fall solely upon out-of-state wineries, while in-state wineries continue to enjoy unfettered access to the Massachusetts market); BlackStar Farms, LLC v. Morrison, No. 2:05-02620 (D. Ariz. filed Oct. 5, 2006) (charging discriminatory effects from the production volume cap for out-of-state wineries).

⁸⁸ *Illinois Lawmakers Invite Lawsuit by Disregarding Supreme Court Ruling with Passage of HB 429* at 1, http://chicagoist.com/attachments/chicagoist_chuck/HB%20429%20Response%20by%20SWRA.pdf (last visited on October 17, 2007).

⁸⁹ See Judge Kenneth Starr, *Introduction*, http://www.specialtywineretailers.org/press-release/SWRA_Constituticacy_Letter.pdf (last visited on September 7, 2007). See also *Arnold's Wine's, Inc. v. Boyle*, No. 06-3357, slip op. at 2 (S.D.N.Y. Sept. 28, 2007) (holding that New York laws requiring all liquor sold, delivered, shipped, or transported to a New York consumer must first pass through an entity licensed by the state of New York (i.e. the three-tier system) are not subject to review under the Commerce Clause because the Supreme Court held in *Granholm* that the three-tier system is unquestionably legitimate).

is distinguishable from the winery-to-consumer market and thus not controlled by *Granholm*, they are mistaken.⁹⁰ Placing protectionist restrictions on retailers is the same sort of limitation on sale and delivery that *Granholm* forbids.⁹¹ The effects of these laws are similar to those ruled unconstitutional by the Court.⁹² They prohibit out-of-state retailers from selling their products while allowing in-state retailers to continue to enjoy the profits of selling and delivering directly to consumers.⁹³ Yet states continue to pass laws that violate the Commerce Clause even when those laws are analogous to laws currently being challenged.⁹⁴ The continued passage of laws like these illustrates the need for the Court to clarify the limits of the Twenty-first Amendment in relation to the negative implications of the Commerce Clause.⁹⁵

Summary

The history of alcohol regulation in the United States has evolved from treating alcohol as a normal article of commerce to an illicit substance subject to criminal penalties for possession.⁹⁶ Post prohibition, the regulatory pendulum is swinging, once again, in the pro-commerce direction.⁹⁷ Today, e-commerce affords consumers the ability to purchase almost anything for home delivery.⁹⁸

⁹⁰ Starr, *supra* note 89. “State laws discriminating against out-of-state retailers raise the same policy and constitutional concerns as state laws discriminating against out-of-state wineries.” *Id.* at 2.

⁹¹ *Id.*

⁹² *Granholm*, 544 U.S. at 460 (2005) (stating that laws that mandate differential treatment of in-state and out-of-state economic interest that benefits the former and burdens the latter discriminate against interstate commerce and face a virtually *per se* rule of invalidity).

⁹³ *Id.* at 468-70.

⁹⁴ Compare MASS. GEN. LAWS ch. 138, § 19F (2006) (permitting only wineries producing less than thirty-thousand gallons of wine per year) with OHIO REV. CODE ANN. § 4303.232(2) (permitting only wineries producing less than one-hundred-fifty-thousand gallons of wine per year); see also Family Winemakers of Cal. v. Jenkins, No. 1:06-11682 (D. Mass. filed Sept. 18, 2006) (asserting that, in purpose and effect, the limits imposed by the capacity caps fall solely upon out-of-state wineries, while in-state wineries continue to enjoy unfettered access to the Massachusetts market).

⁹⁵ See Starr, *supra* note 89, at 1; *Granholm* 544 U.S. at 493.

⁹⁶ See *Castlewood Int'l Corp.*, 596 F.2d at 642 (“Since the founding of our Republic, power over regulation of liquor has ebbed and flowed between the federal government and the states”); William Glunz, *Granholm v. Heald: The Twenty-first Amendment Takes Another Hit—Where Do States Go From Here?*, 40 J. MARSHALL L. REV. 651, 653–62 (2007) (discussing the history and trends of alcohol regulations).

⁹⁷ Compare *Castlewood Int'l Corp.*, 596 F.2d at 642 (“Since the founding of our Republic, power over regulation of liquor has ebbed and flowed between the federal government and the states”) with *Granholm*, 544 U.S. at 484-85 (“The [Twenty-first] Amendment did not give States authority to pass non-uniform laws in order to discriminate against out-of-state goods, a privilege they had not enjoyed at any earlier time.”).

⁹⁸ BLACK’S LAW DICTIONARY 551(8th ed. 2004). “E-commerce: The practice of buying and selling goods and services through online consumer services on the Internet.” *Id.*

State legislatures continue to address laws which violate *Granholm* and litigation in the lower courts is clarifying its outer limits.⁹⁹ Over time, the Court's traditional Commerce Clause analysis, combined with growing pressure from free-market economists, could cause the Court to clarify that retail-to-consumer laws must be evenhanded and reverse its position towards the three-tier system as being "unquestionably legitimate."¹⁰⁰

PRINCIPAL CASE

In the past several years, there have been significant challenges to state regulations that afford privileges to in-state producers and retailers that are not also extended to their out-of-state counterparts.¹⁰¹ The two most significant of these challenges occurred in Michigan and New York in 2003 and 2004 respectively.¹⁰² These cases were consolidated on appeal to United States Supreme Court.¹⁰³

⁹⁹ *E.g.*, *Family Winemakers of Cal. v. Jenkins*, No. 1:06-11682 (D. Mass. filed Sept. 18, 2006) (asserting that, in purpose and effect, the limits imposed by the capacity caps fall solely upon out-of-state wineries, while in-state wineries continue to enjoy unfettered access to the Massachusetts market); *BlackStar Farms, LLC v. Morrison*, No. 2:05-02620 (D. Ariz. filed Oct. 5, 2006) (charging discriminatory effects from the production volume cap for out-of-state wineries); *Beau v. Moore*, No. 4:05-903 (E.D. Ark. filed June 22, 2005) (alleging discrimination based on the right of Arkansas wineries producing less than 250,000 gallons to sell directly to local consumers at their premises while the plaintiff winery must sell to an Arkansas wholesaler or retailer).

¹⁰⁰ *Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Possible Anti-competitive Barriers to E-commerce: Wine, A Report from the Staff of the Federal Trade Commission*, July 2003, <http://www.ftc.gov/os/2003/07/winereport2.pdf> (last visited September 7, 2007) [hereinafter FTC Report].

¹⁰¹ *See Granholm v. Heald*, 544 U.S. 460, 468 (2005); *BlackStar Farms, LLC v. Morrison*, No. 2:05-02620 (D. Ariz. filed Oct. 5, 2006) (charging discriminatory effects from the production volume cap for out-of-state wineries). The Arizona law affords direct-to-consumer shipping privileges to wineries producing less than 25,000 gallons per calendar year. ARIZ. REV. STAT. ANN. § 4-205.04(c) (2006). Interestingly, the aggregate of wine produced by all wineries in Arizona was just 32,031 gallons from July of 2005 to June of 2006. *US Wine Production*, <http://www.wineamerica.org/newsroom/wine%20data%20center/Production%20of%20Wine%207-05%20to%206-06.pdf> (last visited August 18, 2007). Also, the largest producing winery in Arizona, Kokopelli Winery, produces approximately 25,000 gallons per year. *Id.* In contrast, California, which is responsible for eighty percent of all wine produced in the country, produced 713,540,740 gallons in the same time frame. *Id.* A very small number of California wineries produce amounts less than the limits imposed by the Arizona law. *Id.* Thus, the Arizona law, while facially neutral, in practical effects, allows in-state producers to ship their wines directly to consumers and prohibits out-of-state producers the same privilege, a clear cut case of discrimination against interstate commerce. *BlackStar Farms, LLC v. Morrison*, No. 2:05-02620 (D. Ariz. filed Oct. 5, 2006) (charging discriminatory effects from the production volume cap for out-of-state wineries).

¹⁰² *Heald v. Engler*, 342 F.3d 517, 525 (2d Cir. 2003) (holding the Twenty-first Amendment does not allow a state to discriminate against out-of-state producers in violation of the Commerce Clause.); *Swedenburg v. Kelly*, 358 F.3d 223, 238 (6th Cir. 2004) (holding that under section two of the Twenty-first Amendment, states are free to regulate alcohol in a way that discriminates against interstate commerce in violation of the Commerce Clause).

¹⁰³ *Granholm v. Heald*, 544 U.S. 460, 471 (2005). Justice Kennedy delivered the opinion of the Court in which Justice Scalia, Justice Souter, Justice Ginsburg, and Justice Breyer joined.

In *Granholm*, the plaintiffs argued that the Twenty-first Amendment must be read in light of other constitutional provisions.¹⁰⁴ In particular, the plaintiffs asserted that the Twenty-first Amendment does not abrogate the states' accountability to the dormant Commerce Clause's anti-discrimination principle.¹⁰⁵ Moreover, they argued that when a state chooses to regulate alcohol, it must do so on evenhanded terms for both in-state and out-of-state interests.¹⁰⁶

The States argued the opposite.¹⁰⁷ The States asserted that the Twenty-first Amendment of the Constitution removes any Commerce Clause concerns from state alcohol regulations.¹⁰⁸ They also contended that section two of the Twenty-first Amendment gives the states power to regulate the direct shipment of wine on terms that discriminate in favor of in-state producers.¹⁰⁹

Relying on the California Wine Institute's amicus curiae brief, the Supreme Court held that both New York and Michigan's regulatory goals could be achieved by less restrictive alternatives.¹¹⁰ The Wine Institute inventoried state laws that allow out-of-state wineries to ship directly to consumers and maintain the temperance goals of the states.¹¹¹ These examples, the Wine Institute argued, prove

Justice Stevens filed a dissenting opinion in which Justice O'Connor joined. Justice Thomas filed a dissenting opinion in which Chief Justice Rehnquist, Justice Stevens, and Justice O'Connor joined. *Id.*

¹⁰⁴ Pet. for Writ of Certiorari at 24, *Granholm v. Heald*, 544 U.S. 460 (2005) (No. 03-1120) (“[T]he [Twenty-first] Amendment was not designed to repeal, but only to modify, the precious liberties protected by the Commerce Clause.”); *Granholm*, 544 U.S. at 470. “Plaintiffs contend . . . that Michigan’s direct-shipment laws discriminate . . . against interstate commerce in violation of the Commerce Clause.” *Id.*

¹⁰⁵ *Granholm*, 544 U.S. at 470.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 476. “The two States, however, contend their statutes are saved by [section] 2 of the Twenty-first Amendment, [however], . . . section 2 does not allow States to regulate the direct shipment of wine on terms that discriminate in favor of in-state producers.” *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Brief of Amicus Curiae Wine Institute in Support of Resp’t at 1, 5, *Granholm v. Heald*, 544 U.S. 460 (2005) (No. 03-1120). The Wine Institute is a pro-commerce advocacy group. *Id.* at 1. Its membership of California wineries produce greater than eighty percent of all wine manufactured in the U.S. *Id.*

¹¹¹ *Id.* at 5. “In fact, 26 states now allow and regulate interstate direct shipments of wine to consumers.” *Id.* For example, at the time of submission of the Amicus Curiae Brief, “Alaska, Arizona, California . . . Wisconsin, West Virginia, and Wyoming” all allowed limited direct-to-consumer shipping of wine. *Id.* at n.3.

that allowing in-state producers to ship directly-to-consumers while prohibiting the same for out-of-state producers is merely a veil to protect in-state interests.¹¹² The Supreme Court agreed.¹¹³

Majority Opinion

Justice Kennedy authored the majority opinion in *Granholm v. Heald*.¹¹⁴ Justices Stevens and Thomas each wrote separate dissenting opinions.¹¹⁵ In *Granholm*, the Supreme Court engaged in a two-prong analysis.¹¹⁶ Under the first prong, the Court determined whether the state laws in question violated the nondiscrimination principle of the Commerce Clause.¹¹⁷ If the Court found a violation committed by the State then the Court, under the second prong, determined whether those laws “advance[d] a legitimate local purpose that [could not] be adequately served by reasonable nondiscriminatory alternatives.”¹¹⁸

Under the first prong, the Court held that Michigan’s law prohibiting direct shipments of wine by out-of-state wineries, but explicitly allowing in-state wineries direct shipping privileges was obvious discrimination.¹¹⁹ Conversely, the Court

¹¹² *Id.* Michigan’s laws prohibited direct-to consumer shipping by out-of-state producers while allowing intrastate shipments. *Id.* at 13. In contrast, reasonable alternatives exist, as indicated from the states that “allow and regulate direct shipment without discriminating against out-of-state wineries.” *Id.* For example, states can adopt reporting requirements to assist in enforcement. *Id.* at 11. In Wyoming, out-of-state shippers must maintain and submit shipping records upon request. WYO. STAT. ANN. § 12-2-204(d)(vi) (2006). They can also subject out-of-state shippers who violate state laws regulating direct shipments to fines. See Brief of Amicus Curiae Wine Institute, *supra* note 110, at 10. In New Hampshire, direct shipping permit holders who ship liquor, wine, or beer to a person under twenty-one years of age are subject to a class B felony and permanent permit revocation. N.H. REV. STAT. ANN. § 178.27(vii) (2006). Finally, statutes can provide that licensed out-of-state shippers are deemed to have consented to the State’s jurisdiction. See Brief of Amicus Curiae Wine Institute, *supra* note 110, at 9. In South Carolina, an out-of-state shipper licensee shall be deemed to have consented to the jurisdiction of the courts. See S.C. CODE ANN. § 61-4-747(c)(6) (2006).

¹¹³ *Granholm*, 544 U.S. at 491 (“States provide little concrete evidence for the sweeping assertion that they cannot police direct shipments by out-of-state wineries. Our Commerce Clause cases demand more than mere speculation to support discrimination against out-of-state goods.”).

¹¹⁴ See generally *Granholm*, 544 U.S. 460 (2005).

¹¹⁵ *Id.* at 493 (Stevens, J., dissenting).

¹¹⁶ *Id.* at 472-76, 489-93.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 489 (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988)).

¹¹⁹ *Granholm*, 544 U.S. at 474. “The discriminatory character of the Michigan system is obvious. Michigan allows in-state wineries to ship directly-to-consumers, subject only to a licensing requirement. Out-of-state wineries, whether licensed or not, face a complete ban on direct shipment.” *Id.* at 474-75.

found that New York's law was less openly restrictive.¹²⁰ New York permitted in-state wineries to direct ship to consumers whereas out-of-state wineries were permitted to ship direct-to-consumers only if they established a branch office and/or warehouse in-state.¹²¹ Looking to precedent, the Court noted that it had "viewed with particular suspicion state statutes requiring business operation to be performed in the home state that could more efficiently be performed elsewhere."¹²² Thus, both New York and Michigan's laws failed under the first prong of the Court's analysis.¹²³

Next, under the second prong, the Court examined the two state laws to determine if they advanced a legitimate local purpose that could not be adequately served by reasonable non-discriminatory alternatives.¹²⁴ The States offered two reasons for restricting direct-to-consumer shipments of wine: "[K]eeping alcohol out of the hands of minors and facilitating tax collection."¹²⁵ The Court rejected each of these arguments, finding there were less discriminatory means the states could employ to protect such interests.¹²⁶ Thus, the Court ruled that the Michigan and New York laws were unconstitutional and that the Twenty-first Amendment does not allow a State to discriminate against out-of-state producers of wine in violation of the Commerce Clause.¹²⁷ Nevertheless, the Court was careful to mention that "states [retain] broad power to regulate liquor under section two of the Twenty-first Amendment."¹²⁸ This power, however, "does not allow states to ban, or severely limit, the direct shipment of out-of-state wine while simultaneously authorizing direct shipment by in-state producers."¹²⁹

¹²⁰ *Id.* at 475 (quoting *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64 (1963)). "[I]n-state presence requirement[s] run . . . contrary to our admonition that States cannot require an out-of-state firm to become a resident in order to compete on equal terms." *Id.*

¹²¹ *Id.* at 476.

¹²² *Id.* at 475 (quoting *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 145 (1970)).

¹²³ *Granholm*, 544 U.S. at 476. "State laws that discriminate against interstate commerce face a virtually *per se* rule of invalidity. The Michigan and New York laws by their own terms violate this proscription." *Id.* (citation and quotations omitted).

¹²⁴ *Granholm*, 544 U.S. at 489 (quoting *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988)).

¹²⁵ *Granholm*, 544 U.S. at 489.

¹²⁶ *Id.* at 492. Justice Kennedy stated the potential loss of federal distilling permits as punishment for noncompliance of state laws combined with state licensing requirements adequately protect states from lost tax revenue. *Id.* Further, he noted that states have not shown that tax evasion and selling alcohol to minors by out-of-state wineries poses such a unique threat that it justifies discrimination. *Id.*

¹²⁷ *Id.* at 493.

¹²⁸ *Id.*

¹²⁹ *Granholm*, 544 U.S. at 493.

Writing for the majority, Justice Kennedy gave the three-tier system a cursory analysis in *Granholm*.¹³⁰ But, he mentioned it only to calm the concern the states expressed in their briefs that to hold direct shipment laws unconstitutional would logically result in finding the entire three-tier system unconstitutional.¹³¹ Justice Kennedy, in dictum, stated this result did not “follow from [the Court’s] holding.”¹³² The Court reasoned that the “Twenty-first Amendment grants states virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.”¹³³ Moreover, the Court has “previously recognized that the three-tier system itself is unquestionably legitimate.”¹³⁴

Justice Stevens, with whom Justice O’Connor Joined, Dissenting

Granholm was decided by a narrow five-to-four vote.¹³⁵ Two of the four dissenters chose to write their own opinions.¹³⁶ Justice Stevens wrote that the majority was acting contrary to the intent of the Twenty-first Amendment.¹³⁷ He argued that the Court should defer to justices like himself who were alive at the time of ratification and had lived through the beginning and end of prohibition.¹³⁸ Justice Stevens would have held that “intoxicating liquors” for “delivery or use

¹³⁰ *Id.* at 489-90. *See also* North Dakota v. United States, 495 U.S. 423, 428 (1990) (“Under the . . . [three-tier] regulatory system, there are three levels of liquor distributors: out-of-state distillers/suppliers, state-licensed wholesalers, and state-licensed retailers. Distillers/suppliers may sell to only licensed wholesalers[, and] . . . [l]icensed wholesalers, in turn, may sell to licensed retailers, [and] other licensed wholesalers.”).

¹³¹ *Granholm*, 544 U.S. at 488-89.

The States argue that any decision invalidating their direct-shipment laws would call into question the constitutionality of the three-tier system. The Twenty-first Amendment grants States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. States may . . . assume direct control of liquor distribution through state-run outlets or funnel sales through the three-tier system. We have previously held that the three-tier system itself is unquestionably legitimate.

Id. (citations and quotations omitted).

¹³² *Id.* at 488.

¹³³ *Id.*

¹³⁴ *Id.* (citing North Dakota v. United States, 495 U.S. 423, 432 (1990)).

¹³⁵ *Granholm*, 544 U.S. at 463.

¹³⁶ *Granholm*, 544 U.S. at 463.

¹³⁷ *Granholm v. Heald*, 540 U.S. 460, 495 n.2 (2005) (Stevens, J., dissenting). “According to Justice Black, who participated in the passage of the Twenty-first Amendment in the Senate, [section] 2 was intended to return ‘absolute control’ of liquor traffic to the States, free of all restrictions which the Commerce Clause might before that time have imposed.” *Id.* (quoting *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 338 (1964) (Black, J., dissenting)).

¹³⁸ *Granholm*, 544 U.S. at 495 (Stevens, J., dissenting). “The views of judges who lived through the debates that led to the ratification of those Amendments are entitled to special deference.” *Id.* (Stevens, J., dissenting).

therein” are exempt from dormant Commerce Clause scrutiny.¹³⁹ He reasoned that since “the Twenty-first Amendment is the only amendment to have been passed by the people in state conventions, rather than by state legislatures, provides further reason to give its terms their ordinary meaning.”¹⁴⁰

Justice Thomas, with whom Chief Justice Rehnquist, Justice Stevens, and Justice O’Connor Joined, Dissenting

Justice Thomas asserted that the dormant Commerce Clause does not invalidate the state laws in question.¹⁴¹ He argued the text of the Twenty-first Amendment combined with legislative history and text of the Webb-Kenyon Act clearly indicated that states are free to regulate alcohol as they choose.¹⁴² Moreover, he would have held that states have such broad authority under the Twenty-first Amendment that they may pass laws regulating alcohol in violation of nondiscrimination principles of the dormant Commerce Clause.¹⁴³

Summary

In *Granholm*, the Supreme Court ruled on the issue of whether states may regulate alcohol free from Commerce Clause principles.¹⁴⁴ The Court clarified that while states retain broad authority to regulate alcohol within their borders, they must do so in accordance with the negative implications of the Commerce Clause.¹⁴⁵ Thus, if a state chooses to allow intrastate direct-to-consumer shipments

¹³⁹ *Id.* at 496 (Stevens, J., dissenting).

¹⁴⁰ *Id.* at 497 (Stevens, J., dissenting).

¹⁴¹ *Granholm v. Heald*, 544 U.S. 460, 497 (2005) (Thomas, J., dissenting).

¹⁴² *Id.* (Thomas, J., dissenting). Justice Thomas relied on the decision in *State Board of Equalization of Cal. v. Young’s Market*, the language of the Webb-Kenyon Act, and the Twenty-first Amendment in support of his reasoning. *State Bd. of Equalization of Cal. v. Young’s Mkt. Co.*, 299 U.S. 59 (1936); 37 Stat. 699 (codified at 27 U.S.C. § 122); U.S. CONST. amend. XXI.

¹⁴³ *Granholm*, 544 U.S. at 498 (Thomas, J., dissenting).

¹⁴⁴ *Granholm*, 544 U.S. at 493.

States have broad power to regulate liquor under § 2 of the Twenty-first Amendment. This power, however, does not allow States to ban, or severely limit, the direct shipment of out-of-state wine while simultaneously authorizing direct shipment by in-state producers. If a State chooses to allow direct shipment of wine, it must do so on evenhanded terms.

Id. See also The National Pulse, States Mull the Wine Decision, Consumers Savor High Court’s Pleasing Delivery, But Some Are Left With a Bitter Aftertaste, Molly McDonough, 4 No. 20 A.B.A J. E-REPORT 2, 3 (May 20, 2005). “Merely the effort to protect entrenched special interest is not going to be [a] good enough reason to allow these regulations to stand.” *Id.* “As for the Twenty-first Amendment analysis, Zywicki says the majority ‘got it exactly right’” (quoting Professor Todd Zywicki, George Mason University School of Law). *Id.*

¹⁴⁵ *Granholm*, 544 U.S. at 493.

of wine, it also must allow interstate direct-to-consumer shipments of wine or find its regulations invalid.¹⁴⁶

ANALYSIS

In *Granholm v. Heald*, the United States Supreme Court clarified that the Twenty-first Amendment does not allow states to regulate alcohol in violation of the Commerce Clause's nondiscrimination principle.¹⁴⁷ The Court's ruling indicates a return to its pre-Eighteenth Amendment jurisprudence.¹⁴⁸ This decision reaffirms the proposition that even alcohol regulations must be drafted in compliance with other provisions of the United States Constitution.¹⁴⁹ While the Court correctly ruled on the direct-to-consumer wine shipping issue, its collateral approval of the three-tier system as "unquestionably legitimate" was cursorily inadequate and contradictory to its main holding.¹⁵⁰ Furthermore, the *Granholm* framework

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ Compare *Vance v. W. A. Vandercook Co.*, 170 U.S. 438 (1898) (holding that a state could not stop the interstate shipment of liquor for personal use) with *Granholm*, 544 U.S. 460 (2005) (holding the section two of the Twenty-first Amendment does allow states to allow in-state wineries to ship directly-to-consumers for personal consumption while simultaneously prohibiting the same privilege to out-of-state interests); see also Marcia Rablon, *The Prohibition Hangover: Why are we Still Feeling the Effects of Prohibition*, 13 VA. J. SOC. POL'Y & L 552, 582 (explaining the Court treated direct-shipping regulations, prior to passage of the Eighteenth Amendment, as if it were a normal article of interstate commerce).

¹⁴⁹ See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976) (holding state laws that regulate alcohol must accord with other provisions of the U.S. Constitution and that the Twenty-first Amendment's grant of authority does not abrogate this requirement); *Bacardi Corp. of Am. v. Domenech*, 311 U.S. 150 (1940) (holding the broad police power of the states over liquor traffic does not justify the disregard of constitutional guarantees or authorize the imposition of conditions requiring the relinquishment of constitutional rights).

¹⁵⁰ Reply Brief of Petitioner at 7-8, *Granholm v. Heald*, 544 U.S. 460 (2005) (No. 03-1120). As noted in greater detail below, *infra* note 152 and accompanying text, Michigan worried in its reply brief that to hold its direct-to-consumer wine shipping laws unconstitutional would also call into question the legitimacy of the three-tier system itself. *Id.* However, the majority disagreed. *Granholm*, 544 U.S. at 488. It found the state's conclusion does not follow from the Court's holding in *Granholm*. *Id.* Furthermore, the Court held it had "previously recognized that the three-tier system is 'unquestionably legitimate' . . . [and that] [s]tate policies are protected under the Twenty-first Amendment when they treat liquor produced out-of-state the same as its domestic equivalent." *Id.* at 489. See also *Costco Wholesale Corp. v. Hoen*, 407 F. Supp. 2d 1247, 1252 (W.D. Wash.) (2005) (holding that state laws that allow in-state wineries to "self-distribute" to retailers while simultaneously prohibiting out-of-state wineries to "self distribute" violates the negative implication of the Commerce Clause). In *Costco*, the United States District Court for Washington evaluated whether certain aspects of Washington State's three-tier system were valid. *Id.* Applying the *Granholm* framework, the court found that regulatory scheme in Washington, which allows in-state wineries to self-distribute but requires out-of-state wineries to channel their wines through the three-tier system was a violation of the Commerce Clause. *Id.* at 1256. Furthermore, the district court held Washington does not achieve its goals of ensuring orderly distribution by prohibiting out-of-state producers from self-distributing to in-state retailers. *Id.* at 1253. The district court noted these objectives can "be achieved through the alternative of an evenhanded licensing requirement." *Id.*

implies that alcohol regulations which allow in-state retailers to ship directly-to-consumers and prohibit out-of-state retailers to ship directly-to-consumers are invalid.¹⁵¹ With these results in mind, the Court must revisit these issues and apply its analytical framework to condemn residual discriminatory state alcohol regulations and clarify the acceptable role of the three-tier system in the twenty-first century.¹⁵²

Granholm's Implications

Many states mandate that alcohol producers channel their products through what is commonly known as the "three-tier system."¹⁵³ The three-tiers are producers, distributors, and retailers.¹⁵⁴ Under the three-tier system, a producer must sell to a licensed in-state distributor who, in turn, must sell to a licensed in-state retailer.¹⁵⁵ States that mandate the three-tier system for all wines argue the three-tiers facilitate temperance goals by increasing prices, raising revenue via taxes, and restricting access to alcohol for minors.¹⁵⁶ Moreover, some states allow in-state retailers to ship direct-to-consumers and prohibit out-of-state retailers from shipping direct-to-consumers.¹⁵⁷ The factual similarities of the three-tier

at 1253. Thus, *Costco* represents a glimpse of how courts may deal with challenges to the three-tier system. See also Starr, *supra* note 89, at 3.

¹⁵¹ See, e.g., Starr, *supra* note 89, at 3; *Costco Wholesale Corp. v. Hoen*, 407 F. Supp. 2d 1247, 1250 (W.D. Wash. 2005); *Brooks v. Vassar*, 462 F.3d 341, 352 (4th Cir. 2006).

¹⁵² Matthew B. Millis, Note, *Let History Be Our Guide: Using Historical Analogies to Analyze State Response to a Post-Granholm Era*, 81 IND. L.J. 1097, 1098 (2006).

[S]tates will not simply abandon their discriminatory alcohol regulations without a fight. Likely, states will respond by redrafting facially discriminatory laws to be facially neutral. These seemingly neutral laws will . . . perpetuate the discrimination that the Supreme Court sought to prohibit in *Granholm*. The Court will then be presented with a string of cases challenging the constitutionality of these new statutes.

Id.

¹⁵³ See 45 AM. JUR. 2D *Intoxicating Liquors* § 94 (1964).

¹⁵⁴ See, e.g., David H. Smith, *Consumer Protection or Veiled Protectionism? An Overview of Recent Challenges to State Restrictions on E-Commerce*, 15 LOY. CONSUMER L. REV. 359, 366 (2003).

¹⁵⁵ Duncan Baird Douglass, *Constitutional Crossroads: Reconciling the Twenty-First Amendment and the Commerce Clause to Evaluate Regulation of Interstate Commerce in Alcoholic Beverages*, 49 DUKE L.J. 1619, 1621 (2000).

¹⁵⁶ See e.g., *Beskind v. Easley*, 325 F.3d 506, 516 (4th Cir. 2003). The court in *Beskind*, stated that a number of valid state interests are served by North Carolina's three-tier structure, including regulating consumption of alcohol controlling distribution of alcohol and collecting taxes on alcohol. *Id.*; See also *North Dakota*, 495 U.S. at 432. "In the interest of promoting temperance, ensuring orderly market conditions, and raising revenue, the State has established a comprehensive system for the distribution of liquor within its borders. That system is unquestionably legitimate." *Beskind*, 325 F.3d at 516.

¹⁵⁷ See, e.g., 235 ILL. COMP. STAT. 5/3-12 (2006).

system and the retail-to-consumer market to those issues decided in *Granholm* intuitively indicate that laws of this nature are as unconstitutional as those the *Granholm* Court invalidated.¹⁵⁸

Although the constitutionality of the three-tier system, as a whole, was not directly at issue in *Granholm*, the Court gave it a cursory stamp of approval.¹⁵⁹ Michigan, in its brief, worried that finding laws prohibiting direct-to-consumer shipping unconstitutional in the face of the Commerce Clause would also result in the three-tier system being found unconstitutional.¹⁶⁰ More precisely, Michigan argued:

[I]f [it] cannot draw rational distinctions between out-of-state and in-state suppliers of alcoholic beverages, there is no obvious reason why it would not be required to allow any out-of-state wholesalers to ship wine . . . to in-state retailers and out-of-state retailers to ship . . . directly to consumers. [To do so] would largely mean the end of the three-tier system of regulation that this Court has called 'unquestionably legitimate.' This case is . . . about the viability of the entire system of alcohol regulation that the states have relied upon for seventy years.¹⁶¹

The States' concern is not misplaced.¹⁶² The prediction about retailers seeking to participate on equal terms in the direct-to-consumer market has come true.¹⁶³ For example, recent legislation in Illinois illustrates that some states continue to craft laws which disregard *Granholm*.¹⁶⁴ In these states, the effects of these

¹⁵⁸ See Starr, *supra* note 89.

¹⁵⁹ *Granholm*, 544 U.S. at 488-89.

¹⁶⁰ Reply Brief of Petitioner, at 7-8 n.6.

¹⁶¹ *Id.* at 2 (internal citations omitted).

¹⁶² Michael A. Pasahow, Note, *Granholm v. Heald: Shifting the Boundaries of Cal. Reciprocal Wine Shipping Laws*, 21 BERKELEY TECH L.J. 569, 583-84 (2006).

California's continued involvement in the internet wine market will boost the market's size and visibility and push states currently banning direct retail shipments to rethink their restrictions as consumers and voters get information about the greater value and range of choices available online. The 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.

Id.

¹⁶³ See generally *Specialty Wines Retailer Association*, <http://www.specialtywineretailers.org/> (last visited on October 1, 2007).

¹⁶⁴ Compare 235 ILL. COMP. STAT. 5/3-12 (2006) with H.B. 429, 95th Gen. Assem., Reg. Sess. (Ill. 2007). The newly amended law was recently signed by the governor and is scheduled to become effective on June 1, 2008. *Id.*

protectionist state regulations have not been felt by wineries alone.¹⁶⁵ Retailers have also fallen victim to the direct shipping trade war.¹⁶⁶ In Illinois, Governor Rod Blagojevich signed the recently passed House Bill 429 to become effective on June 1, 2008.¹⁶⁷ House Bill 429 removes reciprocal language that allows out-of-state wineries to ship directly to Illinois consumers free from taxes and reporting so long as Illinois wineries are able to enjoy the same privileges in that state.¹⁶⁸ House Bill 429 creates a limited direct shipping permit system in place of the old law.¹⁶⁹ The bill also removes direct-to-consumer shipping privileges by out-of-state retailers, a privilege they have enjoyed since 1980.¹⁷⁰ However, in-state retailers continue to enjoy the ability to ship direct.¹⁷¹

Granholm, *Out-of-State Retailers, and the Three-Tier System*

If *Granholm* is held to posit an analytical framework, it is as follows: First, the Court must determine whether a state law discriminates against interstate commerce.¹⁷² If the law does discriminate against interstate commerce, then the Court determines whether there are less discriminatory alternatives that might be employed to achieve the stated purpose of those laws.¹⁷³ If less burdensome alternatives exist, then the laws in question are struck down.¹⁷⁴ However, if no less restrictive alternatives exists then the law is saved, even in face of the Commerce Clause's nondiscrimination principles.¹⁷⁵

¹⁶⁵ See generally Starr, *supra* note 89.

¹⁶⁶ *Id.*

¹⁶⁷ H.B. 429, 95th Gen. Assem., Reg. Sess. (Ill. 2007).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* When House Bill 429 takes affect it will replace Illinois's current relevant laws. In particular, 235 ILL. COMP. STAT. 5/3-12(d) (2006) will remove the retailer-to-consumer shipping privilege and replace it with:

(d) A retailer license shall allow the licensee to sell and offer for sale at retail, only in the premises specified in the license, alcohol liquor for use or consumption, but not for resale in any form. Nothing in the Amendatory Act of the 95th General Assembly shall deny, limit, remove, or restrict *the ability of a holder of a retailer's license to transfer, deliver, or ship alcoholic liquor to the purchaser for use or consumption* subject to any applicable local law or ordinance.

Id. (emphasis added). This language is pertinent because only in-state retailers can qualify for a retail license in Illinois.

¹⁷² *Granholm*, 544 U.S. at 472.

¹⁷³ *Id.* at 492.

¹⁷⁴ *Id.*

¹⁷⁵ See *id.*; See also Brooks v. Vassar; Costco Wholesale Corp. v. Hoen, 407 F. Supp. 2d 1247, 1250 (W.D. Wash.) (2005).

Applying the Court's analytical framework from *Granholm* to the retailer-to-consumer market, using Illinois law as an example leads to the conclusion that laws prohibiting out-of-state retailers from shipping directly-to-consumers, while simultaneously allowing the same to in-state retailers, impermissibly burdens interstate commerce.¹⁷⁶ Similarly, while the Court has indicated that the three-tier system is a valid exercise of state authority, the rule from *Granholm* illuminates a contradiction in the Court's reasoning.¹⁷⁷ Allowing in-state wholesalers to participate in the distribution of wine while out-of-state wholesalers are completely prohibited from doing so impermissibly burdens interstate commerce under the *Granholm* holding.¹⁷⁸ Additionally, there are less burdensome alternatives to the system that meet the States' regulatory goals.¹⁷⁹

Out-of-State Retailers

Under the first prong of the *Granholm* analysis, laws that "mandate differential treatment of in-state and out-of-state economic interests that benefit the former and burden the latter" are virtually *per se* invalid.¹⁸⁰ The new Illinois law overtly discriminates against interstate commerce because it creates a regulatory scheme that is openly discriminatory.¹⁸¹ As such, the retailer aspect of Illinois's direct shipping laws, if challenged, should fail the first prong of the *Granholm* analytical framework.¹⁸² Wholesalers maintain that federally permitted wineries are subject to steep penalties should they violate the law, and thus are distinguishable from

¹⁷⁶ See *Granholm*, 544 U.S. at 489 (stating that although the three-tier system is legitimate, state regulations are only protected by the Twenty-first Amendment when they treat in-state and out-of-state interests evenhandedly); See also Starr, *supra* note 89, at 3.

¹⁷⁷ See *Granholm*, 544 U.S. at 489.

¹⁷⁸ See *id.*; See also Donna Walter, *Missouri Laws on Wine Shipping Challenged*, SAINT LOUIS DAILY RECORD, Nov. 29, 2006.

[A]lthough closing down the market in wine sounds a lot like going back to the 1950s, that's where states are going, at least in the short run, because if the market is closed down, then all the wine goes back to being handled by [wholesale distributors], and they get to mark it up and make a nice profit and continue to make money off of it.

Id.

¹⁷⁹ See FTC Report, *supra* note 100, at 27.

¹⁸⁰ *Granholm*, 544 U.S. at 472 (quoting *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality of Ore.*, 511 U.S. 93, 99 (1994)).

¹⁸¹ Compare H.B. 429, 95th Gen. Assem., Reg. Sess. (Ill. 2007) (allowing direct-to-consumer shipments by in-state retailers while simultaneously prohibiting the same privilege from out-of-state retailers) with MICH. COMP. LAWS § 436.1113(9) (allowing in-state wineries eligibility for a "wine maker" license that allow direct-to-consumer shipping prohibiting the same privilege to out-of-state wineries). The Michigan law was found to be an example of overt discrimination of the kind strictly forbidden by the dormant Commerce Clause. See also *Granholm*, 544 U.S. at 473 ("The discriminatory character of the Michigan system is obvious.")

¹⁸² See *Granholm*, 544 U.S. at 493 (holding laws that discriminatorily benefit in-state economic interests and burden similar out-of-state interests face a virtually *per se* rule of invalidity).

retailers and not subject to the *Granholm* rule.¹⁸³ However, this notion fails to take into account the fact that in those states that allow retailer-to-consumer shipping, retailers, like their winery counterparts, must agree to the jurisdiction and restrictions of the state as a condition of obtaining a permit.¹⁸⁴

For example, in Wyoming, both in-state and out-of-state retailers have the ability to ship up to two cases of wine per year directly to consumers as long as they obtain a permit and remit copies of invoices of all wine shipped throughout the state.¹⁸⁵ Wyoming is a good example of a reasonable alternative regulatory scheme which treats both in-state and out-of-state retailers equally and in compliance with the Commerce Clause.¹⁸⁶ Therefore, as was the case with Michigan's and

¹⁸³ See Trial Brief of Def., *Costco v. Hoen*, No. 04-0360 at 39 (2006) (stating that state laws that allow in-state wineries to "self-distribute" to retailers while simultaneously prohibiting out-of-state wineries to "self distribute" does not violate the *Granholm* decision because, in *Granholm*, the Court's holding was narrowly tailored only to apply to the winery-to-consumer factual scenario).

¹⁸⁴ See WYO. STAT. ANN. § 12-2-204(d)(vii) (2006). "Any out-of-state shippers licensed pursuant to this section shall: . . . (vii) Be deemed to have consented to the personal jurisdiction of the liquor division or any other state agency and the courts of this state concerning enforcement of this section and any related laws, rules or regulations." *Id.*; See also Starr, *supra* note 89, at 5.

¹⁸⁵ WYO. STAT. ANN. § 12-2-204 (2006). The relevant statutory language in Wyoming states:

(a) Notwithstanding any law, rule or regulation to the contrary, any person currently licensed in its state of domicile as an alcoholic liquor or malt beverage manufacturer, importer, wholesaler or retailer who obtains an out-of-state shipper's license, as provided in this section, may ship no more than a total of eighteen (18) liters of manufactured wine directly to any one (1) household in this state in any twelve (12) month period.

(b) Notwithstanding any law, rule or regulation to the contrary, any person currently licensed in its state of domicile as an alcoholic liquor or malt beverage manufacturer, importer, wholesaler or retailer who obtains an out-of-state shipper's license, as provided in this section, may ship to any Wyoming retail establishment which holds a liquor license in this state any manufactured wine which is not listed with the liquor division as part of its inventory and distribution operation.

(c) Before sending any shipment to a household or to a licensed retailer in this state, the out-of-state shipper shall:

- (i) File an application with the liquor division of the department of revenue;
- (ii) Pay a license fee of fifty dollars (\$50.00) to the liquor division;
- (iii) Provide a true copy of its current alcoholic liquor or malt beverage license issued in its state of domicile to the liquor division;
- (iv) Provide such other information as may be required by the liquor division; and
- (v) Obtain from the liquor division an out-of-state shipper's license, after the division conducts such investigation as it deems necessary.

Id.

¹⁸⁶ See, e.g., WYO. STAT. ANN. § 12-2-204(b) (2006); see also WYO. STAT. ANN. § 12-2-204(c) (2006); The Associated Press, *Committee Passes Wine Bill*, BILLINGS GAZETTE, Feb. 15, 2006, available at <http://www.billingsgazette.net/articles/2006/02/15/news/wyoming/60-wine-bill.txt>. ("A bill

New York's laws at issue in *Granholm*, where less restrictive means of achieving the States' intended goals exist (as is the case with Illinois House Bill 429) the law should be found unconstitutional.

The Three-Tier System

The three-tier system, which allows only in-state (domestic) wholesalers to sell wines to retailers, also violates the nondiscrimination principle of the Commerce Clause.¹⁸⁷ The first prong of *Granholm* is easily satisfied.¹⁸⁸ The practice of forcing out-of-state wineries to sell their products to domestic wholesalers, but forbidding out-of-state wholesalers a similar privilege is a clear case of discrimination.¹⁸⁹ In fact, no state employing the three-tier system affords the opportunity to participate in the sale and distribution of wine to out-of-state distributors.¹⁹⁰ Only in-state firms may distribute wine directly to retailers.¹⁹¹

As stated above, the Court acknowledged time and again that it has invalidated laws mandating differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter as virtually *per se* invalid.¹⁹² With this proclamation in mind, the Court should have taken steps to properly address the three-tier system and found it to be an unconstitutional burden on interstate commerce when the distribution of wine is permitted only by in-state distributors.

Under the second prong of the analysis, the Court determines whether the proposed state interest can be achieved by other, less burdensome regulations.¹⁹³ If there are sufficiently reasonable alternatives, discriminatory laws are struck down.¹⁹⁴ If the Court evaluated the three-tier system, it is reasonable to conclude

bringing Wyoming into compliance with a U.S. Supreme Court ruling on direct wine shipment to consumers unanimously passed."); *Wyoming Close to Compliance*, <http://www.shipcompliantblog.com/index.php?s=wyoming> (Feb. 16, 2006).

¹⁸⁷ See Vidram David Amar, *The Fight Over State Laws Favoring In-State Alcohol Purveyors: Do Such Laws Violate the Dormant Commerce Clause? A Federal District Court in New York Says No, But May Well Be Wrong*, <http://writ.news.findlaw.com/amar/20071012.html> (last visited on November 18, 2007).

¹⁸⁸ See *Granholm*, 544 U.S. at 472-76.

¹⁸⁹ See *id.* at 476 (holding Michigan's and New York's direct shipping regulatory schemes violate the Commerce Clause's nondiscrimination principle).

¹⁹⁰ See generally *Ship Compliant Blog*, <http://shipcompliantblog.com/> (last visited on November 15, 2007).

¹⁹¹ *Id.*

¹⁹² See *Granholm*, 544 U.S. at 489.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

it would have found that the evidence listed below indicates that less burdensome alternatives exist for the states to achieve their proposed goals of promoting temperance, raising revenue, and restricting access to alcohol for minors.¹⁹⁵

Less Restrictive Alternatives to the Three-Tier System

In July of 2003, the Federal Trade Commission published findings and recommendations from a workshop intended to discuss possible anti-competitive barriers to wine and other industries.¹⁹⁶ The commission heard testimony from state regulators, vintners, wholesalers, and consumers.¹⁹⁷ After review of testimony and its own studies, the commission found that states could “significantly enhance consumer welfare by allowing direct shipments of wine.”¹⁹⁸ Furthermore, the commission found that state mandated bans on e-commerce and direct shipping, increases prices, limits consumer selection, and does little to keep alcohol out of the hands of minors.¹⁹⁹

Proponents of the three-tier system argue the system furthers the goals of collecting taxes, reducing access to alcohol by minors, and preventing organized

¹⁹⁵ FTC Report, *supra* note 100, at 26. “In practice, many 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. These states generally report few, if any, problems with direct shipping to minors.” *Id.*

As an alternative to banning interstate direct shipment of wine, some states have adopted less restrictive means to satisfy their regulatory objectives. For example, some states register out-of-state suppliers and impose various civil and criminal penalties against violators. Several states, including Nebraska, New Hampshire, and Wyoming, require out-of-state suppliers to register and obtain permits (a permit can be conditioned on the out-of-state supplier’s consent to submit to the state’s jurisdiction). None of these states reported any problems with interstate direct shipping to minors.

Id. at 27.

Courts have suggested 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. One court concluded that “[t]here is no practical difference from requiring such a procedure and that required of store clerks or bartenders who regularly check customers for valid identification to verify age before allowing the sale of alcoholic beverages.” For instance, Michigan requires that retailers make a “diligent inquiry” to verify a customer’s age, such as by examining a picture identification. States could impose similar requirements on delivery personnel, including training requirements, along with appropriate penalties.

Id. at 29 (internal citations omitted).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 2.

¹⁹⁸ *Id.* at 3.

¹⁹⁹ *Id.*

crime from gaining control of alcohol distribution.²⁰⁰ Proponents also argue that disbanding the three-tier system in favor of direct shipping options for consumers is contrary to these goals.²⁰¹

The findings of the Federal Trade Commission indicate differently.²⁰² These findings indicate that the system does not further the goals it was designed for better than alternatives.²⁰³ For example, advocates of the three-tier system claim it is necessary to ensure revenue collection.²⁰⁴ According to the Federal Trade Commission, of those states that do allow direct-to-consumer shipping of alcohol, few report problems with the remittance of taxes.²⁰⁵ Likewise, many states allowing direct shipping report few problems restricting access to alcohol for minors.²⁰⁶ Finally, most, if not all producers, are willing to submit themselves to aggregate customer purchase limits in furtherance of temperance goals.²⁰⁷

The Three-Tier System Equals Higher Prices for Consumers

According to the Federal Trade Commission the three-tier system increases the price of wine for consumers.²⁰⁸ These findings indicate that when purchased over the Internet, wine is typically sixteen percent cheaper than when purchased at traditional brick-and-mortar retail establishments and this percentage of savings increases with the price of the wine.²⁰⁹ The study also suggests that by buying online, consumers can forgo the costs normally added on at the wholesale level which can be upwards of eighteen to twenty-five percent more than buying the same bottles online.²¹⁰ Even the Fourth Circuit recognized that “wine sold through the three-tiered system is more expensive than the same or comparable

²⁰⁰ Tr. Brief of Def. & Def.-Intervenor at 13. *Granholm v. Heald*, 544 U.S. 460 (2005) (No. 03-1120). “The evidence offered at trial will show not only that the State has clear and expressed interests in regulating the distribution and sale of alcoholic beverages but also that those interests relate directly to the core concerns of the [Twenty-first] Amendment.” *Id.* “One of the greatest concerns . . . has been how to moderate and control the consumption of alcoholic beverages.” *Id.* “[T]he goal of Washington’s . . . Act . . . is the generation of tax revenue.” *Id.* at 14. “One of the key purposes . . . of a system regulating alcoholic beverages [is] . . . to facilitate orderly market conditions.” *Id.*; see also FTC Report, *supra* note 100, at 6.

²⁰¹ Tr. Brief of Def. & Def.-Intervenor, *supra* note 200, at 13.

²⁰² FTC Report, *supra* note 100, at 26-40.

²⁰³ *Id.*

²⁰⁴ *Id.* at 5.

²⁰⁵ *Id.* at 38.

²⁰⁶ *Id.* at 26-38.

²⁰⁷ FTC Report, *supra* note 100, at 28.

²⁰⁸ *Id.* at 19, 26-38.

²⁰⁹ *Id.*

²¹⁰ *Id.*

wine sold in-state [directly to consumers] because wine distributed through the three-tiered structure is subjected to two ‘mark-ups’ in price”²¹¹

The findings of the Federal Trade Commission illustrate that the three-tier system is not, as many states contend, *necessary* to achieve effective regulation of alcohol.²¹² One thing apparent from these findings is that less restrictive alternatives exist to achieve these goals.²¹³ Additionally, these alternatives not only serve small start-up and boutique producers who would gain market access, they also serve consumers by lowering prices and increasing variety.²¹⁴

These alternatives also continue to ensure adequate tax revenue and maintain restrictions on minors.²¹⁵ If the findings of the Federal Trade Commission show anything, they show that the three-tier system is not *necessary*.²¹⁶ If states insist on maintaining the three-tier system, these findings are applicable to instances where the three-tier system prohibits market access by out-of-state wholesalers who, like retailers, will happily submit to each state’s jurisdiction and licensing requirements.²¹⁷ Therefore, the three-tier system is not the only manner that the “core concerns” of section two of the Twenty-first Amendment can be achieved.²¹⁸

CONCLUSION

In light of the Supreme Court’s decision in *Granholm*, proscriptions against out-of-state retailers and wholesalers should be found unconstitutional because they regulate in-state and out-of-state interests in an uneven manner.²¹⁹ The Court has held that the Twenty-first Amendment gives the states broad authority to regulate alcohol as long as it does so on evenhanded terms. Therefore, the Court needs to revisit its analysis of the three-tier system using the framework it has set forth in *Granholm* and revoke the rubber stamp it has mistakenly given to the system. The majority has already recognized that where reasonable alternatives exist, burdensome regulations will not be tolerated. As this note has shown, alternatives are easily implemented which practically achieve the States’ regulatory goals while simultaneously promoting the principles of economic unity that our republic was founded upon.

²¹¹ *Id.* at 22 (quoting *Beskind v. Easley*, 325 F.3d 506, 515 (4th Cir. 2003)).

²¹² FTC Report, *supra* note 100, at 41.

²¹³ *Id.* at 26-27, 38. *See also supra* note 181 and accompanying text.

²¹⁴ FTC Report, *supra* note 100, at 42.

²¹⁵ *Id.* at 41.

²¹⁶ *See id.*

²¹⁷ *Id.* at 28.

²¹⁸ *Id.*

²¹⁹ *See supra* notes 88-218 and accompanying text.