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Who's Selling the Next Round: Wines, State Lines, the Twenty-first Amendment and the Commerce Clause

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WHO'S SELLING THE NEXT ROUND: WINES, STATE LINES, THE TWENTY-FIRST AMENDMENT AND THE COMMERCE CLAUSE

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Once again the Supreme Court has waded into the bog that is the confluence of the Twenty-first Amendment and the Commerce Clause, and from there issued a forceful decision on the relationship of these two provisions, holding that the Twenty-first Amendment does not immunize from Commerce Clause scrutiny state action that discriminates against interstate trade in alcoholic beverages. Herein we review the workings of the "dormant" Commerce Clause, then turn our attention to a more detailed review of the Supreme Court's jurisprudence on the relationship of the Twenty-first Amendment to the balance of the Constitution. Our focus from there shifts to the various systems in place in the several states regulating interstate wine shipments, the various Commerce Clause challenges made to those laws, and the recent ruling in Granholm v. Heald. *We then consider the constitutionality of certain Kentucky statutes regulating wine sales, concluding they are constitutionally infirm.*

> [T]HERE ARE TWO WAYS, AND TWO WAYS ONLY, IN WHICH AN ORDINARY PRIVATE CITIZEN, ACTING UNDER HER OWN STEAM AND UNDER COLOR OF NO LAW, CAN VIOLATE THE UNITED STATES CONSTITUTION. ONE IS TO ENSLAVE SOMEBODY, A SUITABLY HELLISH ACT. THE OTHER IS TO BRING A BOTTLE OF BEER, WINE, OR BOURBON INTO A STATE IN VIOLATION OF ITS BEVERAGE CONTROL LAWS.[1]

I. INTRODUCTION

All wineries are concerned with the grape harvest: asking a winemaker if she is ready for the first crush of grapes is like asking a soldier if he is ready for

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1. Laurence H. Tribe, *How to Violate the Constitution Without Really Trying: Lessons from the Repeal of Prohibition to the Balanced Budget Amendment*, 12 CONST. COMMENT. 217, 219 (1995).

war.[2] However, in recent years all too many smaller wineries have had their focus redirected from the actual production of wine to the compliance with the varying state laws which affect direct-shipment.[3] For example, a California wine producer who ships a case of pinot noir[4] to a Kentucky consumer is concerned not only that the wine will travel poorly and suffer storage conditions either too hot or too cold, but is concerned as well about committing a felony.[5] Kentucky is one of several states that prohibit direct shipment of wine[6] from an out-of-state seller to an in-state consumer, and is one of six states that make the act a potential felony.[7] It is improper for an in-state vintner to ship to a Kentucky customer, but that offense is more likely to be a mere misdemeanor.[8] Other states allow intrastate shipment but either prohibit or impose significant restrictions upon interstate shipment.[9] Still other states had more permissive regimes allowing intra and interstate shipments.[10]

A recent survey of members of The Wine Institute[11] revealed that 37% of the wineries were excluded from selling their wine in some states because there is no

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2. Tim Tesconi, *Grape Harvest Set to Start*, THE PRESS DEMOCRAT, July 25, 2004.

3. *See generally.*, David P. Sloane, *Statement to House Committee on Energy and Commerce* (October 30, 2003) (noting that Congress should allow interstate wine commerce "in the absence of good, sufficient reasons to erect barriers.")

4. Fans of the 2004 movie *Sideways* will recall that Miles would wax poetically on pinot noir. His views on merlot were rather less poetic. *See* Nick Fauchald, *Sideways Wins One Oscar and Five Independent Spirit Awards*, WINE SPECTATOR , Feb. 28, 2005.

5. The seven felony states are Florida, Georgia, Indiana, Kentucky, Maryland, Tennessee, and Utah. July 2003 Federal Trade Commission *Report on Possible Anticompetitive Barriers to E-Commerce: Wine*, at 8 (hereinafter "FTC Anticompetitive Barriers").

6. Ky. Rev. Stat. ANN. § 244.165 (West 2004) provides:

> (1) It shall be unlawful for any person in the business of selling alcoholic beverages in another state or country to ship or cause to be shipped any alcoholic beverage directly to any Kentucky resident who does not hold a valid wholesaler or distributor license issued by the Commonwealth of Kentucky.
>
> (2) Any person who violates subsection (1) of this section shall, for the first offense, be mailed a certified letter by the department ordering that person to cease and desist any shipments of alcoholic beverages to Kentucky residents, *and for the second and each subsequent offense, be guilty of a Class D felony.*

(*emphasis* added).

7. *See supra* note 5.

8. *See infra* note 388.

9. *See* Clint Bolick and Deborah Simpson, *Uncorking Freedom: Challenging Protectionist Restraints on Direct Interstate Wine Shipments to Consumers*, Institute for Justice Litigation Backgrounder, *available at* http://www.ij.org/economic_liberty/ny_wine/backgrounder.html. (last visited 11/8/05).

10. *Id.*

11. The Wine Institute describes itself as a public policy advocacy association of California wineries made up of wineries and affiliated businesses which supports "legislative and regulatory advocacy, international market development, media relations, scientific research, and education programs that benefit the entire California wine industry." Wine Institute, *About Us*, at http://www.wineinstitute.org/who.htm (last visited Nov. 5, 2005).

wholesaler willing to distribute such small quantities of wine.[12] However, boutique wineries still seek to participate in the market, and given that the traditional wholesaler-retailer network does not include these wineries in the distribution scheme, the only other means available to the wineries to sell and directly ship the wine to the consumer.[13] This endeavor, however, is anything but easy given the varying manners in which state legislations have directed the regulation of the importation and distribution of alcohol.[14]

The Twenty-first Amendment[15] grants to the states the power to regulate the distribution and sale of alcoholic beverages within their respective borders, and the states have highly, although not consistently, regulated the industry.[16] The various regulatory schemes governing the interstate sale of wine fall into one of three general categories: reciprocity states, limited direct shipment and permit states, and anti-shipment states.[17]

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12. *See* Alix M. Freedman and John R. Emshwiller, *Big Liquor Wholesaler Finds Challenge Stalking Its Very Private World*, WALL STREET JOURNAL p. A1 (Oct. 4, 1999), (citing a Wine Institute survey).

13. *See, e.g.*, David P. Sloane, *Statement to House Committee on Energy and Commerce* (October 30, 2003) ("the three-tier system is simply not a viable method for distributing [the] products [of small wineries].") *See also* Statement of Rep. Woolsey, 145 Cong. Rec. H6856-02, H6863 (Aug. 3, 1999) (wholesalers will not carry the wines of small vineyards).

14. In a well-publicized incident, one state's direct shipping ban prevented a sitting governor from receiving a case of wine as payment for a bet. Two governors had bet on Super Bowl XXXVII. The losing governor had agreed to send the winning governor avocados, pistachios, fish tacos, and a case of 1999 Reserve Cabernet Sauvignon. Because the winning governor's state banned direct shipping, however, the losing governor could not ship the wine directly to him. The losing governor also could not personally deliver the wine to the winning governor because that state restricted personal transportation of wine to one gallon per resident, which is less than a case. Ultimately, the governors agreed that the losing governor would have to deliver the wine personally to the winning governor - at a governors' conference in Washington, D.C. FTC Anticompetitive Barriers, at 25, citing Carol Emert, Bush Can't Pop Davis' Bottle: Wine Delivery Snafu Screws up Governor's Super Bowl Bet, S.F. CHRON., Jan. 30, 2003, at A2; Peter Wallsten, No Kindred Spirits: Fight On over Wine-Shipping Rights, MIAMI HERALD, Apr. 9, 2003, at 3B.

15. U.S. CONST. amend. XXI.

16. For a detailed state-by-state analysis of regulatory provisions on direct interstate shipments, *see* Wine Institute, *Analysis of State Laws, at* http://www.wineinstitute.org/shipwine/ (last visited Nov. 8, 2005).

17. *See id.* While the recent judicial battles have been over interstate wine shipments, and this article is written in the context of that debate, the authors do not seek to imply that the same constitutional issues do not apply equally to liquor and beer. This issue was alluded to in the oral argument of *Granholm* where Justice Ginsburg asked of Mr. Bolick "What about alcoholic beverages other than wine?" Granholm v. Heald, 73 USLW 3350, 13 (2004). *See also Prepared Witness Testimony of Juanita D. Duggan* before The House Committee on Energy and Commerce (October 30, 2003) ("And this issue isn't just about wine, it's about all forms of alcohol - beer, liquor and wine."); Petitioner's (Michigan Beer & Wine Wholesalers Ass'n) Brief in *Granholm, available at* 2004 WL 1720079, at 3 ("If plaintiffs have a constitutional right to import "fine and rare wines," there is no obvious reason why they should not have a right to import cheap wines, or any other beverage that competes with local wineries for their beverage-alcohol dollars."). In fact, in light of the ever increasing production of specialty beers and liquors (*See, e.g.*, Melanie Warner and Stuart Elliott, *Frothier Than Ever: The Tall Cold One Bows to the Stylish One*, NEW YORK TIMES (August 15, 2005) at C1; Vanessa O'Connell, *Yo, Ho, Ho and a Fancy New Bottle of 'Superpremium' Rum*, WALL STREET JOURNAL (December 27, 2005) at A13), it must be anticipated

Of particular concern to vintners are the anti-shipment states, many of which regulate the distribution of alcohol through a mandatory three-tiered system combined with a statutory ban on direct-to-consumer shipment.[18] Typically, a three-tiered system involves an out-of-state manufacturer of alcohol who must sell product to a wholesaler who in turn sells product to a retailer.[19] In order to ensure that out-of-state manufacturers sell through the three-tiered system, the anti-shipment states, including Kentucky, strictly forbid direct-to-consumer shipments.[20] However, several of the states exempt in-state manufacturers from this distribution scheme and permit direct sales to the consumer.[21]

The disparity in treatment between out-of-state and in-state manufacturers amounts to state enforced economic protectionism, the very scourge the Commerce Clause was intended to prevent.[22] It has been repeatedly asserted that these protectionist laws are unconstitutional under the Commerce Clause. However, Section Two of the Twenty-first Amendment has created confusion about the extent to which the Commerce Clause applies to the Constitutionally unique article of commerce, alcoholic beverages, and in this instance wine.[23] Herein we review the history of the dormant Commerce Clause and the Twenty-first Amendment and how they have been viewed *vis-a-vis* one another generally and then in the context of lower court decisions on the propriety of direct shipping schemes leading to the recent decision *Granholm v. Heald.* We then consider the constitutionality of the existing system in Kentucky regulating intra and interstate wine shipments.

II. THE (DORMANT) COMMERCE CLAUSE

The Commerce Clause reserves to Congress the power "[t]o regulate Commerce . . . among the several States."[24] While the Commerce Clause speaks only of Congress's affirmative powers, "the [Supreme] Court long has recognized that it also limits the power of the States to erect barriers against interstate trade."[25] This alternative interpretation of the Commerce Clause is

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that there will further develop an interstate market for these products. The authors posit, but do not here seek to demonstrate, that under the Commerce Clause there exists no constitutional distinction between liquor, wine, and beer.

18. *See* FTC Anticompetitive Barriers at 7-8, 5.

19. *Id.* at 5.

20. *See supra* note 13.

21. *See* FTC Anticompetitive Barriers at 7 ("most states . . . permit intrastate direct shipping.")

22. U.S. CONST. art. I, § 8, cl. 3.

23. U.S. CONST. amend. XXI.

24. U.S. CONST. art. I, § 8, cl. 3. For a general review of the history of the Commerce Clause, especially as utilized with respect to social policy legislation, *see* Nicole Huberfeld, *The Commerce Clause Post-Lopez: It's Not Dead Yet*, 28 SETON HALL L. REV. 182 (1997).

25. Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 35 (1980). As Justice Johnson explained: "If there was any one object riding over every other in the adoption of the Constitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints." Gibbons v. Ogden, 22 U.S. 1, 231 (1824). *See also* JOHN E. NOWAK & RONALD D. ROTUNDA,

known as the "dormant" Commerce Clause.[26] The "dormant" aspect of the Commerce Clause arises from a negative inference of the constitutional grant to Congress under the Commerce Clause.[27] This negative command effectively "create[s] an area of trade free from interference by the States."[28] While in most areas the states are free to act as long as their actions do not conflict with an affirmative act of Congress in which the federal law controls by virtue of the Supremacy Clause,[29] the dormant Commerce Clause limits the actions of the states even when Congress has not chosen to affirmatively act, thereby preventing a state from "jeopardizing the welfare of the Nation as a whole" by "plac[ing] burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear."[30]

The U.S. Constitution was based on "the theory that the peoples of the several states must sink or swim together."[31] The central purpose of the Commerce Clause was to prevent economic "balkanization" among the states.[32] Trade barriers between the states could impede the stream of interstate

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CONSTITUTIONAL LAW 137-39 (5th ed. 1995); Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 571 (1997) (*citing* to *Gibbons*, 22 U.S. at 224) ("Because each State was free to adopt measures fostering its own local interests without regard to possible prejudice to nonresidents ... a 'conflict of commercial regulations, destructive to the harmony of the States' ensued."). This conflict of commercial regulations "was the immediate cause, that led to the forming of a [constitutional] convention." *Id.* "[T]he generating source of the Constitution lay in the rising volume of restraints upon commerce which the Confederation could not check." WILEY RUTLEDGE, A DECLARATION OF LEGAL FAITH 25 (1947).

26. *See, e.g.*, Quill Corp. v. North Dakota, 504 U.S. 298, 309 (1992) (referring to the negative implication of the Commerce Clause as the "dormant" Commerce Clause); Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 179 (1995).

27. The United States Supreme Court in Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 154-55 (1982), stated :

> we only engage in this review when Congress has not acted or purported to act. Once Congress acts, courts are not free to review . . . regulations under the dormant Commerce Clause. When Congress has struck the balance it deems appropriate, the courts are no longer needed to prevent States from burdening commerce, and it matters not that the courts would invalidate the state . . . regulation under the Commerce Clause in the absence of congressional action. Courts are final arbiters under the Commerce Clause only when Congress has not acted.

Id.

28. Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 328 (1977) (internal quotation omitted).

29. U.S. CONST. art. VI, §2.

30. *Jefferson Lines*, 514 U.S. at 180. *See also* Houlton Citizens' Coalition v. Town of Houlton, 175 F.3d 178, 184 (1st Cir. 1999), *citing* Southern Pac. Co. v. Arizona ex rel. Sulivan, 325 U.S. 761, 769 (1945), and *Camps Newfound/Owatonna, Inc.*, 520 U.S. at 571. Justice Scalia, as well as certain scholars, have been critical of the dormant Commerce Clause. *See, e.g.*, Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue, 483 U.S. 232, 261 (1987) (Scalia, J., concurring); Martin H. Redish and Shane V. Nugent, *The Dormant Commerce Clause and the Constitutional Balance of Federalism*, 1987 DUKE L.J. 569, 573 (1987).

31. Baldwin v. G/A/F/ Seelig, Inc., 294 U.S. 511, 523 (1935).

32. South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82, 91-92 (1984).

commerce between them.[33] Thus the framers of the Constitution, by the Commerce Clause, gave the federal government the power to regulate interstate commerce as a means of avoiding trade wars among the states.[34] The Commerce Clause was designed "to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation."[35] Implicitly, the Commerce Clause creates a national free market and restricts states from impeding the free flow of goods from one state to another.[36] Unrepresented out-of-state interests will frequently bear the brunt of regulations imposed by another state having a significant effect on persons or operations that state.[37] As such, even when a state law is not directly regulating commerce, if it discriminates against interstate commerce, the courts may strike it down.[38] Supreme Court jurisprudence utilizes a two-tiered approach to analyzing problems under the dormant Commerce Clause.[39] This approach requires classifying state statutes into one of two categories: (1) those that facially discriminate against out-of-state interests in favor in-state business, or (2) those that regulate evenhandedly and thereby only indirectly burden interstate commerce.[40]

The Supreme Court's two-tiered approach to analyzing state regulations that affect interstate commerce looks first at whether the law is discriminatory in nature or whether the law merely burdens interstate commerce.[41] When a law has incidental or "indirect effects on interstate commerce and regulates evenhandedly," the Court examines whether the State's interests are legitimate and whether the burden on interstate commerce exceeds the local benefits.[42] If a state law burdens, but does not discriminate against, interstate commerce, the standard of review is lower than strict scrutiny.[43] Rather a balancing test, weighing "the nature of the local interest involved, and . . . whether it could be

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33. H. P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 554 (1949).

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

35. *Id.*

36. Wyoming v. Oklahoma, 502 U.S. 437, 469-70 (1992); *Houlton*, 175 F.3d at 184.

37. "[W]hen the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state." South Carolina State Highway Dept. v. Barnwell Brothers, Inc., 303 U.S. 177, 185 n. 2 (1938). *See also* Southern Pacific Co. v. Arizona, 325 U.S. 761 (1945) at 767-768 n. 2.

38. *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

39. *Id.*

40. *Id.*

41. Under the Commerce Clause, "discrimination" means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." Oregon Waste Sys., Inc. v. Department of Envtl. Quality, 511 U.S. 93, 99 (1994).

42. Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986). *See also Pike*, 397 U.S. at 142.

43. *See id.* Courts review statutes that facially discriminate against an out-of-state industry in favor of an in-state industry with the highest level of scrutiny. *See* C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 392 (1994).

promoted as well with a lesser impact on interstate activities,"[44] is employed. Only when the burden imposed on interstate commerce is excessive compared to the in-state benefits will the non-discriminatory law be considered a Commerce Clause violation.[45]

On the other hand, when a state statute directly regulates or facially discriminates against interstate commerce, thereby favoring intrastate business interests over interstate commerce, the Court will hold the law invalid per se.[46] For example, in *City of Philadelphia v. New Jersey*, the Court held that where economic protectionism is effected by state legislation, the law is invalid.[47] In those situations, the Supreme Court applies strict scrutiny and will uphold the state statute only where it is found to advance a legitimate local purpose which cannot be served by a reasonable non-discriminatory alternative.[48] Therefore, a state law which facially discriminates against interstate commerce is constitutional only if the state can justify the legislation both in terms of the local benefits flowing from the statute and the unavailability of alternative legislation adequate to preserve the local interests.[49] Although the two tiers of analysis are not clearly distinguishable, "[i]n either situation the critical consideration is the overall effect of the statute on both local and interstate activity."[50]

Where the article of commerce is alcoholic beverages, a third tier of analysis taking into account state powers under the Twenty-first Amendment is applied.[51] This tier of analysis reviews whether the law at question promotes as core power afforded the state by the Amendment.[52] Where temperance, revenue, or orderly administration of the alcoholic industry are not at issue, the law will fail.[53] Where they are implicated, the law is further reviewed to ascertain whether it is minimally intrusive upon interstate commerce.[54] With the state bearing the burden, it must be demonstrated that less restrictive mechanisms are not available for achieving the state's objectives.[55] Then and only then will a state

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44. *Pike*, 397 U.S. at 142.

45. *See id.*

46. *See, e.g., C & A Carbone, Inc.*, 511 U.S. at 392 (holding that a law is "per se invalid, save in a narrow class of cases in which the municipality can demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest.")

47. City of Philadelphia v. New Jersey, 437 U.S. 617, 624.

48. New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 278 (1988).

49. *Id.*

50. *Brown-Forman Distillers Corp.*, 476 U.S. at 579. *See also* Raymond Motor Transportation, Inc. v. Rice, 434 U.S. 429, 440-41 (1978); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 n. 15 (1981); Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 270 (1984).

51. *See* Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 712-13 (1984).

52. *See id.* at 713.

53. *See Bacchus*, 468 U.S. at 276.

54. *See* Granholm v. Heald, 125 S.Ct. 1885, 1894 (2005).

55. *See id.* at 1895.

law impacting interstate commerce be permitted to stand against a Commerce Clause challenge.[56]

III. PROHIBITION & THE TWENTY-FIRST AMENDMENT

America's history is replete with conflicting views on the consumption of alcoholic beverages.[57] Prohibition, the "Noble Experiment,"[58] was an effort to nationalize, by enshrinement in the Constitution, state and local prohibition efforts that had been gaining ground over the preceding decades.[59] The

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56. *See id.*

57. The first control on liquor sales was a Massachusetts Bay Colony law of 1633 that forbade the sale of wine or strong water without the permission of the colony governor or his deputy. G. THOMANN, COLONIAL LIQUOR LAWS 4-5 (The United States Brewers Association 1887). The maximum price of beer was fixed at a penny a quart in 1634. *Id.* The earliest distillery was erected by New York Director Williaim Kieft on Staten Island in 1640. *Id.* at 86. Even as a Harvard master was stripped of his post for having left the school's students "wanting beer betwixt brewing a week and a week and a half together" (HENRY LEE, HOW DRY WE WERE: PROHIBITION REVISITED, 16 (Prentice Hall 1963)), Anthony Bezenet's pamphlet "The Mighty Destroyer Displayed and Some Account of the Dreadful Havoc Made by the Mistaken Use, As Well As the Abuse, of Distilled Spirituous Liquors" warned that such beverages are "liable to steal away a man's senses and render him foolish, irascible, uncontrollable, and dangerous." E. H. CHERRINGTON, THE EVOLUTION OF PROHIBITION IN THE UNITED STATES OF AMERICA, (American Issue Press 1920). Thomas Jefferson was a vintner (*Thomas Jefferson, Winemaker* (July 4, 2005), *at* http://www.gilroydispatch.com/printer/article.asp?c=162821 (last visited Nov. 8, 2005)), and George Washington built a distillery on Mount Vernon (*Mount Vernon Distills Historic George Washington Whiskey For First Time in 200 Years--Replica Smithsonian 18th Century Still and First President's Whiskey Recipe Featured*, Press Release, Distilled Industry Spirits Council of the United States, Oct. 22, 2003, *at* http://www.discus.org/mediaroom/print.asp?PRESSID=125 (last visited Nov. 8, 2005)).

58. The moniker the "Noble Experiment" has been long ascribed to President Herbert Hoover. *See* Loretto Winery Ltd. v. Gazzara, 601 F.Supp. 850, 856 n. 7 (S.D.N.Y. 1985) ("President Herbert Hoover, who had some difficulty in deciding whether he was a Wet or a Dry, coined this expression for National Prohibition.")

59. Maine had been dry since 1851 (Portland having gone dry in 1840), and seventeen other states were to become so by statute or state constitutional amendment through 1915. EDWARD BEHR, PROHIBITION: THIRTEEN YEARS THAT CHANGED AMERICA 28-29 (Arcade Publishing 1996); The capacity of Kansas (or any other state) to adopt prohibition was upheld in Mugler v. Kansas, 123 U.S. 623, 623 (1887). Kansas went so far as to impose a mandatory life sentence upon persons with three felony convictions for violation of state liquor laws. 1927 Kan. Sess. Laws 247. Prohibition had been in effect on all military bases since 1901. *See* An Act to Increase the Efficiency of the Permanent Military Establishment of the United States (the Anti-Canteen Act), ch. 192, § 38, 31 Stat. 748, 758 (1901). Organized temperance movements date back to well before the Civil War, but the Women's Christian Temperance Union and the Anti-Saloon League were the two organizations that are largely credited with the political success of Prohibition. RICHARD F. HAMM, SHAPING THE EIGHTEENTH AMENDMENT: TEMPERANCE REFORM, LEGAL CULTURE, AND THE POLITY, 1880-1920 227 -234 (Chapel Hill: University of North Carolina Press, 1995). By 1900, nearly one in three Americans lived in jurisdictions that prohibited alcohol consumption. Jane Lang McGrew, *The Report of the National Commission on Marihuana and Drug Abuse. Marihuana: A Signal of Misunderstanding*, commissioned by President Richard M. Nixon, March 1972, part 3, chap. 1, "History of Alcohol Prohibition," *available at* http://www.druglibrary.org/schaffer/Library/studies/nc/nc2a.htm (last visited Nov. 8, 2005). By

constitutionalization of Prohibition was viewed as necessary[60] to address earlier decisions striking down certain state efforts to effect prohibition within their borders.[61] Adopted in 1918, the Eighteenth Amendment and the related legislation[62] were at best ineffective; beverage alcohol remained available through home distillers,[63] "rum runners,"[64] physicians,[65] and its consumption was

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1913, nearly 50% of America was under prohibition; nine states were entirely dry, and an additional thirty-one states allowed for the local option to go dry. *Id.*

60. Kenneth C. Davis, Don't Know Much About History 328-29 (Harper Collins 2003):

> America's grandest attempt at a simple solution was also its grandest failure. The constitutional amendment halting drinking in America was supposed to be the answer to social instability and moral decline at the beginning of the twentieth century. It should stand forever as a massive memorial to the fact that complex problems demand complex responses, and Americans balk whenever somebody tries to legislate their private morality and personal habits.

61. *See, e.g.*, Leisy v. Hardin, 135 U.S. 100, 124 (1880) (discussing place of alcoholic beverages in interstate commerce and the since discarded Original Package Doctrine). Alcoholic beverages were removed from the scope of the Original Package Doctrine by the Wilson Act, ch. 728, 26 Stat. 313 (1880). Still, shipments into a dry state could take place as long as no sale took place in the dry state. *See* Rhodes v. Iowa, 170 U.S. 412 (1898). *See also* Bowman v. Chicago & Northwestern Ry. Co., 125 U.S. 465, 500 (1888). The Webb-Kenyan Act of 1913 (ch. 90, 37 Stat. 699 (1913)) followed, precluding sales into dry territories, and it was upheld in Clark Distilling Co. v. Western Maryland Railway Co., 242 U.S. 311, 312 (1917).

62. The Eighteenth Amendment was effected by the National Prohibition Act (a/k/a the Volstead Act), 27 U.S.C. § 1 et seq., repealed August 27, 1935. The Eighteenth Amendment provided:

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

U.S. CONST. amend. XVIII. Rhode Island had the good sense to not approve the amendment. *See* http://www.house.gov/Constitution/Amend.html (last visited Nov. 10, 2005).

63. *See generally* LEE, HOW DRY WE WERE, *supra* note 57 at 72-83.

64. *See* HUGH BARTY-KING AND ANTON MASSEL, RUM - YESTERDAY AND TODAY 57-60 (William Heimemann Ltd. 1983) noting that the product transported by the "rum runners" was typically Scotch whiskey. After Prohibition, notorious bootleggers such as Joseph Kennedy and Samuel Brofman opened legitimate liquor companies. *See* EDWARD BEHR, PROHIBITION - THIRTEEN YEARS THAT CHANGED AMERICA 240 (Arcade Publishing, Inc. 1996).

65. Distillers were still able to produce alcohol for industrial, sacramental, and, for those lucky few with a doctor who would prescribe it, medicinal use. *See* National Prohibition (Volstead) Act, 27 U.S.C. §§ 17-18 (1919), repealed August 27, 1935. *See also* Robert E. Dundon, *Kentucky is Ready to Turn Out Whisky*, NEW YORK TIMES (Nov. 24, 1929) at E6.

> A ... tragic result was the fact that large numbers of normally honest and law-abiding physicians and druggists felt that the [prohibition] law was so drawn that its violation was forced upon them. Their success depends not alone upon their skill, but also upon their good will. If a man asked for a liquor prescription, it was the duty of the physician to refuse it unless he honestly believed that the man was suffering from 'some known ailment' for which an alcoholic beverage was a proper remedy. He knew, however, that if he took

widely viewed as socially appropriate.[66] In the end, while Prohibition did not eliminate beverage alcohol from the nation,[67] it did foster official corruption[68] and assist in the creation of organized crime.[69]

> this course, the man would not only resent it but also go to some more accommodating physician for his liquor supply. He feared that he would not only lose the money which he would have received for the liquor prescription, which he was willing to do, but that he would also lose the man's legitimate patronage, which he was unwilling to do. So he said to himself, 'Well, he will get his liquor anyway, and I am not going to sacrifice my practice to a sentimental and futile obedience to a foolish law,' and he lapsed to the status of a bootlegger.

FLETCHER. DOBYNS, THE AMAZING STORY OF REPEAL 291 (Plimpton Press 1940). However, there was a limit on medicinal use to one pint in any ten day period to any one patient. *See* Lambert v. Yellowley, 272 U.S. 581, 584 (1926). Some eleven million bottles of "medicinal" spirits were prescribed annually by physicians. G. FORD'S ILLUSTRATED GUIDE TO WINES, BREWS, AND SPIRITS 59 (Brown 1983).

66. *See, e.g.*, JOHN D. HICKS, REPUBLICAN ASCENDENCY 178 (Harper & Row 1960) ("People who wished to drink had no notion of being deprived of their liquor…; indeed, it became the smart thing to drink, and many who had been temperate in their habits before were now moved to imbibe freely as a protest against the legal invasion of their 'personal liberty.'"); THORNTON, ALCOHOL PROHIBITION WAS A FAILURE: Second, consumption of alcohol actually rose steadily after an initial drop. Annual per capita consumption had been declining since 1910, reaching an all-time low during the depression of 1921, and then began to increase in 1922. Consumption would probably have surpassed pre-Prohibition levels even if Prohibition had not been repealed in 1933 (citing CLARK WARBURTON, THE ECONOMIC RESULTS OF PROHIBITION (New York, Columbia University Press, 1932)).

67. *See, e.g.*, Nat'l Comm'n on Law Observance and Enforcement, *Report on the Enforcement of Prohibition Law of the United States* 22 (1931) ("The Census Bureau figures for the year 1919 … indicate that after a brief period in the first years of the [Eighteenth] amendment there has been a steady increase in drinking.") As observed by Fiorella H. LaGuardia, "It is impossible to tell whether prohibition is a good thing or a bad thing. It has never been enforced in this country." The National Prohibition Law, *Testimony before Committee on the Judiciary*, U.S. Senate, 69th Cong., 1st Sess. (1926) at 649-52.

68. *See, e.g.*, EDWARD BEHR, PROHIBITION - THIRTEEN YEARS THAT CHANGED AMERICA 235 (Arcade Publishing, Inc. 1996) (asked how to enforce Prohibition in New York, "La Guardia replied that not only would this compel disbanding the existing force and recruiting 250,000 men but the raising of a separate force of 250,000 inspectors to monitor police activities.").

69. The thirteen years after the passage of the Eighteenth Amendment witnessed both the flourishing of a black market in alcohol and an increase of crimes associated with that illegal trade. Radley Balko, *Back Door to Prohibition: The New War on Social Drinking*, Cato Policy Analysis No. 501, http://www.cato.org/pubs/pas/pa-501es.html (last visited Nov. 8, 2005). *See also* Merck Thornton, *Alcohol Prohibition was a Failure*, Cato Policy Analysis No. 157 (July 17, 1991, at http://www.cato.org/pubs/pas/pa-157.html (last visited Nov. 8, 2005): National prohibition of alcohol (1920-33) – the "noble experiment" – was undertaken to reduce crime and corruption, solve social problems, reduce the tax burden created by prisons and poorhouses, and improve health and hygiene in America. The results of that experiment clearly indicate that it was a miserable failure on all counts. Still, there is evidence that there was a reduction during nationwide prohibition of some of the health consequences of abuse of alcoholic beverages. *See* Angela K. Dills and Jeffrey A. Miron, *Alcohol Prohibition and Cirrhosis*, 6 AMERICAN LAW AND ECONOMIC REVIEW 285 (Fall, 2004).

While the Twenty-first Amendment[70] clearly repealed the Eighteenth Amendment,[71] the status of alcoholic beverages in the federal system was unclear. Much of the debate has centered on the fact that there is no clear consensus on the intent behind Section 2 and its importance versus the balance of the Constitution.[72] There are two major competing interpretations of the Twenty-first Amendment: the "absolutist" view and the "federalist" view.[73] The

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70. U. S. CONST. amend. XXI provides:

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

The Twenty-first Amendment was proposed to the States on February 20, 1933, and was approved on December 5, 1933. Kentucky approved the Amendment on November 27, 1933. *See* EVERETT SOMERVILLE BROWN, RATIFICATION OF THE TWENTY-FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES 166-79 (1938, reprinted 1970) . *See also* Robert E. Dundon, *Kentucky Seeking High Whisky Taxes*, NEW YORK TIMES (Aug. 27, 1933) at E6. The Amendment was rejected and never subsequently approved by South Carolina. BROWN, RATIFICATION at 375-378.

71. Prohibition was to remain in force "thirteen years, ten months, eighteen days and a few hours." *Final Action by Utah*, N.Y. TIMES, Dec. 5, 1933, at 1, col. 8. As observed by H.L. Mencken:

> Prohibition went into effect on January 16, 1920, and blew up at last on December 5, 1933 -- an elapsed time of twelve years, ten months and nineteen days. It seemed almost a geologic epoch while it was going on, and the human suffering that it entailed must have been a fair match for that of the Black Death or the Thirty Years War.

H. L. MENCKEN, THE NOBLE EXPERIMENT, in A CHOICE OF DAYS: ESSAYS FROM HAPPY DAYS, NEWSPAPER DAYS AND HEATHEN DAYS 307 (Knopf, 1980). The twelve versus thirteen year issue depends on whether one counts the one year phase in period of Section 1 of the Eighteenth Amendment.

72. Susan Lorde Martin, *Wine Wars-Direct Shipment of Wine: The Twenty-first Amendment, the Commerce Clause, and Consumers' Rights* 14, 38 AM. BUS. L. J. 1 (2000) (noting that the meaning of Section 2 is not clear despite the fact that the purported purpose behind the provision was to constitutionalize the substance of the Webb-Kenyon Act, but that the "[r]ecords of the state conventions do not indicate a consensus on the meaning of Section 2."). *See also* Asheesh Agarwal and Todd Zywicki, *The Original Meaning of the 21st Amendment*, 8 GREEN BAG 137 (Winter, 2005). An earlier draft of the Twenty-first Amendment included an additional clause providing: "Congress shall have the concurrent power to regulate or prohibit the sale of intoxicating liquors to be drunk on the premises where sold." *Id.* at 140. The failure of Congress to adopt this provision has been relied upon by Justice Sandra Day O'Connor to support her view that the Twenty-first Amendment has worked as a repeal of the Commerce Clause as it relates to alcoholic beverages. *See* 324 Liquor Corp. v. Duffy, 479 U.S. 335, 354-56 (1987) (O'Connor, J., dissenting). *See also* Aaron Nielson, *No More 'Cherry-Picking': The Real History of the 21st Amendment's § 2*, 28 HARV. J.L. & PUB. POLICY 281 (Fall, 2004).

73. Sidney J. Spaeth, *The Twenty-first Amendment and State Control over Intoxicating Liquor: Accommodating the Federal Interest*, 79 CAL. L. REV. 161, 181 (1991). The identification of the "absolutist" and "federalist" schools of thought is traced to Michael E. Loomis, *Note, Federal District Court Exempts Interstate Rail Carrier from State Open Saloon Prohibition*, 6 CREIGHTON L. REV. 249, 252-253 (1972).

"absolutist" view takes the position that the plain language of the Twenty-first Amendment vests complete control over the regulation of alcohol in the states.[74] The second interpretation, the "federalist" view, takes a contextual approach to interpreting Section 2 and holds the position that the repeal of the Eighteenth Amendment does not grant the states new powers, but rather restores the powers in existence before Prohibition.[75]

State Board of Equalization v. Young's Market Co., decided only three years after the passage of the Twenty-first Amendment, called upon the Supreme Court to determine the validity of a state statute requiring a $500 license fee, upon those importing beer to any place within California state borders.[76] Acknowledging that apart from the Twenty-first Amendment it would "obviously have been unconstitutional to impose any fee for [the] privilege [of importing beer],"[77] the Supreme Court upheld the license fee against both Commerce and Equal Protection Clause challenges, with Justice Brandeis, writing for the Court, stating:

> The Amendment ... abrogated the right to import free, as far as concerns intoxicating liquors. The words [of Section 2 of the Twenty-first Amendment] are apt to confer upon the State the power to forbid all importations which do not comply with the conditions which it prescribes.[78]

Brandeis established the Court's early jurisprudence for the view of Section 2 of the Twenty-First Amendment, writing that the suggestion that the Constitution otherwise required equal treatment of in-state manufacturers and sellers with out-of-state exporters "would involve not only a construction of the

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74. *Id.*

75. It is undisputed that the Twenty-first Amendment returned the situation to the pre-Eighteenth Amendment situation with each state deciding if it wanted to be "wet" or "dry." Many states did not return immediately to "wet" following the passage of the Twenty-first amendment. *See Status of Liquor Around the Nation*, NEW YORK TIMES (Dec. 5, 1933) at p. 16 (observing, with respect to Kentucky, "No native drinking; distilleries operate for other States"). Tennessee did not begin to go wet until 1939. 1939 TENN. PUB. ACTS Ch. 49. *See also* City of Chattanooga v. Tennessee Alcoholic Beverage Comm'n, 525 S.W.2d 470, 472 (Tenn. 1975). Kansas, having adopted a prohibition amendment to its state constitution in 1879, did not repeal that provision until 1948. *See* Kevin Wendell Swain, *Liquor By the Book in Kansas: The Ghost of Temperance Past*, 35 WASHBURN L. J. 322 at 327-28, 331 (Spring 1996). Oklahoma did not repeal the prohibition clause of the state's original 1907 constitution until April 7, 1959, leading to Will Roger's statement that "Oklahomans will vote dry so long as they can stagger to the polls to vote." ROBERT WALKER & SAMUEL PATTERSON, OKLAHOMA GOES WET: THE REPEAL OF PROHIBITION 1 (McGraw-Hill 1960). Today Bridgewater, Connecticut remains the only city or town in that state to have not, since 1933, approved some level of sale of alcoholic beverages. William Yardley, *A State's Last Dry Town Asserts a Right to Hold on to Tradition*, NEW YORK TIMES A23 (December 26, 2005).

76. State Board of Equalization v. Young's Market Co., 299 U.S. 59, 60 (1936).

77. *Id.* at 62.

78. *Id.* at 60-61.

Amendment, but a rewriting of it."[79] *Mahoney v. Joseph Triner Corp.*, another opinion by Justice Brandeis, examined an Equal Protection challenge to a state requirement that imported liquors containing more than 25% alcohol be registered with the Patent Office.[80] Rejecting the challenge, and adopting the reasoning of the defendant state officials, the Court wrote that: "since the adoption of the Twenty-first Amendment, the equal protection clause is not applicable to imported intoxicating liquor."[81]

Indianapolis Brewing Co. v. Liquor Control Commission[82] involved Due Process, Equal Protection, and Commerce Clause challenges to those provisions of the then Michigan Liquor Control Act which prohibited Michigan dealers from selling beers manufactured in any state which discriminated against beer produced in Michigan.[83] In rejecting these challenges and citing the Court's prior decisions in *Young's Market* and *Mahoney*, this opinion clearly articulated Brandeis' absolutist view that: "since the Twenty-First Amendment, ... the right of a state to prohibit or regulate the importation of an intoxicating liquor is not limited by the commerce clause."[84]

Thereafter, in *Ziffrin, Inc. v. Reeves*,[85] the Court determined that the Commerce, Due Process and Equal Protection Clauses of the Constitution would not stand to defeat state regulation of the means of transporting whiskey where "regulation by the state might impose some burden on interstate commerce, this was permissible when 'an inseparable incident of the exercise of the legislative authority, which, under the Constitution, has been left to the States.'"[86]

Still, as these early decisions were being rendered, it was acknowledged that the Twenty-first Amendment did not entirely preclude federal interest from

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79. *Id.* at 62.

80. Mahoney v. Joseph Triner Corp., 304 U.S. 401, 402 (1938).

81. *Id.* at 403. This same sentiment was repeated in later cases. *See, e.g.*, Indianapolis Brewing v. Liquor Control Comm. et. al., 305 U.S. 391, 394 (1939); Ziffrin, Inc. v. Reeves, 308 U.S. 132, 138 (1939) (noting "The Twenty-first Amendment sanctions the right of a state to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause.")

82. *Indianapolis Brewing*, 305 U.S. at 391.

83. *See* Joseph F. Finch & Co. v. McKittrick, 304 U.S. 95 (1939); decided the same day as *Indianapolis Brewing Co.*, involved a similar challenge to a similar Missouri statute.

84. *Indianapolis Brewing Co.*, 305 U.S. at 394. The Equal Protection and Due Process challenges to the Michigan statute were similarly discarded. *Id.*

85. 308 U.S. 132 (1939).

86. *Id.* at 141, *quoting* South Corolina Hwy. Dept. v. Barnwell Brothers, 303 U.S. 177, 189 (1938). *See also* McCanless v. Klein, 188 S.W.2d 745, 748 (Tenn. 1945):

> It is difficult to conceive of a regulation of the sale and distribution of intoxicating liquor which could be said to be beyond the police powers of the State. Since the power of the State to prohibit such sales altogether is beyond question, no provision for its regulation is beyond the State's power . . . . The legislature has unlimited powers of regulation and restriction of the liquor traffic and may delegate these powers, as has been done to the commissioner. His exercise of such delegated discretion will not be lightly interfered with by the courts.

application to the alcohol beverage industry.[87] *Collins v. Yosemite Park & Curry Co.* reviewed California's ability to apply its Beverage Control Act to a corporation acting within the borders of Yosemite National Park.[88] The Park had been ceded to the Federal government by the state of California in 1919 with the state reserving taxing power over the territory.[89] California's efforts to apply the Beverage Control Act were rejected as the power to regulate the alcoholic beverage trade had not been reserved in the terms of the ceding of the territory to the Federal government.[90] "Where exclusive jurisdiction is in the United States, without power in the states to regulate alcoholic beverages, the XXI Amendment is not applicable."[91] The decisions rendered in *Jameson & Co. v. Morgenthau*[92] and *United States v. Frankfort Distillers, Inc.*[93] confirmed that the federal interest in the regulation of monopolistic conduct was sufficient for the application and enforcement of the Sherman Antitrust Act to the alcoholic beverage industry notwithstanding Section 2 of the Twenty-first Amendment.[94]

> The Federal Alcohol Administration Act was attacked upon the ground that the Twenty-first Amendment to the Federal Constitution gives to the States complete and exclusive control over commerce in intoxicating liquors, unlimited by the commerce clause, and hence that Congress has no longer authority to control the importation of these commodities into the United States. We see no substance in this contention.[95]

Then, in the 1944 decision of *Johnson v. Yellow Cab Transit Co.*,[96] the propriety of the seizure of a shipment of wine in transit to a Federal military reservation was rejected, and the state was ordered to return the seized product. Still, it was not until the 1946 decision rendered in *Nippert v. City of Richmond*[97] that it was clearly hinted that the power of the states to regulate the alcoholic beverage industry vis-à-vis one another was subject to the limitations of the Commerce Clause. The *Nippert* Court wrote that: "even the commerce in intoxicating liquors, over which the Twenty-first Amendment gives the States

87. *See* Collins v. Yosemite Park & Curry Co., 304 U.S. 518 (1938).
88. *Id.*
89. *Id.* at 519.
90. *Id.* at 520.
91. *Id.* at 538.
92. 307 U.S. 171 (1939).
93. 324 U.S. 293, 299 (1945).
94. The jurisdictional predicate of the Sherman Anti-Trust Act, 15 U.S.C.A. §§ 1-7, is the Commerce Clause. *See also* TFWS, Inc. v. Schaefer, 242 F.3d 198 (4th Cir. 2001).
95. Jameson & Co., 307 U.S. at 172-73. *See also* Arrow Distilleries, Inc. v. Alexander, 109 F.2d 397, 401 (7th Cir. 1940) (holding Federal Alcohol Administration Act, 27 U.S.C. § 201 et seq., is not an unconstitutional infringement of state authority over alcoholic beverages.), *cert. denied* 310 U.S. 646.
96. 321 U.S. 383, 392 (1944); *see also* Carter v. Virginia, 321 U.S. 131 (1944); United States v. Gudger, 249 U.S. 373 (1919).
97. 327 U.S. 416 (1946).

the greatest degree of control, is not altogether beyond the reach of the federal commerce power."[98] And there, quiescent, remained the question of reconciling the Twenty-first Amendment with the balance of the Constitution, a state of affairs that lasted some two decades.

The United States Supreme Court returned to Twenty-first Amendment jurisprudence in a pair of 1964 decisions rendered the same day under the authorship of Justice Stewart. *Hostetter v. Idlewild Bon Voyage Liquor Corp.*[99] and *Dept. of Revenue v. James B. Beam Distilling Co.*[100] each struck down state laws which claimed to be within the scope of the state's authority under the Twenty-first Amendment. *Hostetter* involved a New York statute that sought to preclude duty free sales from John F. Kennedy International Airport – the beverages in questions were transported outside of New York (indeed outside the United States) under the supervision of the U.S. Customs Service and there delivered to the customer.[101] The proponents of the statute argued since the statute in *Ziffrin* was protected by the Twenty-First Amendment, so should New York be protected in order to prevent the known evils associated with liquor and to secure revenue.[102] This view was soundly rejected: "To draw a conclusion from this line of decisions that the Twenty-first Amendment has somehow operated to "repeal" the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification."[103]

The *Beam* case involved a Kentucky tax levied on foreign whiskey importers.[104] Relying upon the Export-Import Clause, the statute was struck

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98. *Id.* at 425 n. 15. It may be argued that the Court's shift began even earlier, namely in the 1939 decision rendered in *Ziffrin*, 308 U.S. 132, in which the Court upheld a comprehensive Kentucky statute originally regulating the transportation and distribution of liquor in Kentucky. While upholding the statute, the decision may be read to apply a reasonableness test thereto. *Id.* at 139.

> Kentucky has seen fit to permit manufacture of whisky only upon [the] condition that it be sold to an indicated class of customers and transported in definitely specified ways. These conditions are *not unreasonable and are clearly appropriate* for effectuating the policy of limiting traffic in order to minimize well-known evils, and secure payment of revenue.

Id. (*emphasis* added).

99. 377 U.S. 324 (1964).

100. 377 U.S. 341 (1964).

101. *Hostetter*, 377 U.S. at 325.

102. The proponents argued that Collins v. Yosemite Park, 304 U.S. 518, 538 (1938), in which the Court held that the park was within the distinct sovereignty of the United States and that California is not permitted, considering the Twenty-first Amendment, to control liquor legislation within the park, should be read narrowly to apply only where liquor is en route to a federal reservation. Idlewild Bon-Voyage Liquor Co. v. Epstein, 212 F.Supp 376, 384 (D.C.N.Y. 1962). However, the proponents placed particular emphasis on *Ziffrin, Inc. v. Reeves* wherein the Court affirmed the state's decision to deny an out-of-state liquor carrier a special license which is available only to those holding a state common carrier's certificate. *Id.* at 384-385.

103. *Hostetter*, 377 U.S. at 331-32. *See also James Beam Distilling Co.*, 377 U.S. at 344-46.

104. *James Beam Distilling Co.*, 377 U.S. at 342.

down.[105] The Court refused to hold that the Twenty-first Amendment repealed the Export-Import Clause "so far as intoxicants are concerned."[106] The Court found nothing in the Twenty-first Amendment "freed the state from all restrictions upon the police power to be found in other provisions of the Constitution."[107]

June 1, 1964, was the turning point in Twenty-first Amendment jurisprudence – for the first time since Prohibition the omnipotence of the Amendment over the balance of the Constitution was soundly rejected by the Supreme Court, which clearly embraced the federalist view. The federalist view grew in acceptance through the 1960's and in the years since through this day.[108] *Wisconsin v. Constantineau*[109] saw the Court strike down on procedural due process grounds a statute allowing officials to post public notices stating that a particular person was prohibited from buying or receiving liquor because he has "expose[d] himself or his family to want" or somehow endangered himself or others.[110] The 1976 decision of *Craig v. Boren*[111] struck down an Oklahoma statute that permitted sales of low-alcohol beer to females over 18 years of age and to men over the age of 21 on Equal Protection grounds.[112] The Court noted the "Twenty-first Amendment does not save the invidious gender-based discrimination from invalidation as a denial of equal protection of the laws."[113]

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105. U.S. CONST. art I, § 10, cl. 2, which provides in relevant part: "No State shall, without the consent of the Congress, bring any imposts or duties on imports or exports."

106. *James Beam Distilling Co.*, 377 U.S. at 345.

107. *Id.*

108. A small and short lived retreat from the principles of *Hostetter* took place in Heublein, Inc. v. South Carolina Tax Commission, 409 U.S. 275, 283 (1972) ("by virtue of [the Twenty-first Amendment's] provisions a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders.")

109. 400 U.S. 433 (1971).

110. *Id.* at 434. Although beyond the scope of this article, based upon the ruling in *Constantineau*, it may be argued that KY. REV. STAT. ANN. § 244.070 (West 2005), which provides: No licensee shall sell or agree to sell any alcoholic beverages or cause of permit any alcoholic beverages to be sold to any person who has been reported to the licensee by any court or by any officer acting at the direction of a court as having failed to make proper provision for his family is unconstitutional.

111. 429 U.S. 190 (1976).

112. U.S. CONST. amend XIV, § 1 provides in part: "No state shall make or enforce any law which shall ... deny to any person within its jurisdiction the equal protection of the laws."

113. Craig v. Boren, 429 U.S. 190, 204-05 (1972). *See also* Commonwealth Alcoholic Control Board v. Burke, 481 S.W.2d 52 (Ky. 1972) (declaring unconstitutional under the Equal Protection Clause of the Fourteenth Amendment provisions of former KY. REV. STAT. ANN. § 244.100 (West 2005) relating to limitations on employment of women at retail licensees and limitations upon serving of female customers); Costa v. Bluegrass Turf Service, Inc., 406 F.Supp. 1003 (E.D. Ky. 1975) (Requirement that retail licensees employ only residents of Kentucky violates the Equal Protection Clause by infringing upon right of interstate travel); Cooper v. McBeath, 11 F.3d 547 (5th Cir. 1994) (Texas residency requirement for holders of retail permit violates Commerce Clause). On this basis, although certainly outside the scope of this article, it is questionable whether the requirement of Ky. Rev. Stat. § 243.100(1)(f), precluding the issuance of a license to a person who "has not had an actual, bona fide residence in this state for at least one (1) year before

1980 saw the decision rendered in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*[114] wherein on Sherman Anti-trust Act grounds state pricing laws were struck down, the Court writing:

> The [Twenty-first] Amendment primarily created an exception to the normal operation of the Commerce Clause. Even here, however, the Twenty-first Amendment does not pro tanto repeal the Commerce Clause, but merely requires that each provision "be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case."[115]

In *Larkin v. Grendel's Den*,[116] a Massachusetts statute that allowed a church to veto a liquor license proposed to be issued within five-hundred feet of the church was struck down as a violation of the Establishment Clause of the First Amendment.[117]

Then came the ruling in *Bacchus Imports, Ltd. v. Dias*,[118] a resounding affirmation of the need to reconcile the Twenty-first Amendment to the balance of the Constitution in a manner that limited the states' retained authority.[119] *Bacchus* involved a Hawaii statute that imposed a 20% wholesale level excise tax on liquors, but exempted from the tax liquors produced in Hawaii.[120] Hawaii maintained that the purpose of the tax was to raise revenue for general government functions while the exemption existed to "encourage development of the Hawaiian liquor industry."[121] The Court found that the exemption was both discriminatory and protectionist, and then considered whether, notwithstanding these flaws, it was nevertheless permitted under the Twenty-first Amendment.[122] In the end it was not; the Court finding that the tax exemption did not "promote temperance or . . . carry out any other purpose of the Twenty-first Amendment."[123] Furthermore, considering the intention that the exemption promote the local Hawaiian industry, the Court held that "[s]tate laws that constitute mere economic protectionism are therefore not entitled to the same

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the date on which his or her application for a license is made" is constitutional. A similar constitutionally suspect law exists in Tennessee. TENN. CODE ANN. §§ 57-3-204(b)(2), 57-3-204(b)(3)(A)-(C) (2002).

114. 445 U.S. 97 (1980).

115. *Craig*, 429 U.S. at 206 (*quoting Hostetter*, 377 U.S. at 322). Subsequently the *Midcal* standard would be utilized in 324 Liquor Corp. v. Duffy, 479 U.S. 335 (1987), to strike down New York's liquor pricing system as violative of section 1 of the Sherman Antitrust Act, 15 U.S.C.A. § 1.

116. 459 U.S. 116 (1982).

117. *Id.* at 120.

118. 468 U.S. 263 (1984).

119. *Id.* at 276.

120. *Id.* at 265.

121. *Id.* The excise tax was enacted in 1939 without the exemption for local products; the exemption provisions were added in 1971. *Id.*

122. *Bacchus*, 468 U.S. at 274-75.

123. *Id.* at 276.

deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor."[124]

It would be an error, however, to assume that all state laws impacting upon the interstate commerce in alcoholic beverages have, since *Hostetter v. Idlewild*, been struck down. In *Joseph E. Seagram & Sons, Inc. v. Hostetter*,[125] the Supreme Court allowed to stand a price affirmation statute put in place by the State of New York.[126] Although the statute had the effect of skewing the market due to the supplier's inability to respond to local conditions by the requirement to consider the impact of a local pricing decision upon distant sales, the Supreme Court allowed it to remain in place.[127] The tide began to turn on price affirmation in the 1983 affirmance, without comment, of the Second Circuit Court of Appeals in *U.S. Brewers Assn'n v. Healy*[128] holding that a Connecticut affirmation statute violated the Commerce Clause. Then, in 1986, the Supreme Court, in *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*,[129] considered whether price affirmation had an impermissible impact upon interstate commerce:

> By requiring distillers to affirm that they will make no sales anywhere in the United States at a price lower than the posted price in New York, . . . New York makes it illegal for a distiller to reduce its price in other States during the period that the posted New York price is in effect. Appellant contends that this constitutes direct regulation of interstate commerce.[130]

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124. *Id. See also* James Beam Distilling Co. v. Georgia, 501 U.S. 529 (1991) (confirming unconstitutionality under the Commerce Clause of Georgia tax statute similar to that struck down in *Bacchus*, determining that a distiller was entitled to a refund for taxes paid on prior years prior to determination of unconstitutionality); Div. of Alcoholic Bev. and Tobacco, Dept. of Bus. Reg. v. McKesson Corp., 524 So.2d 1000 (Fl. 1988) (Florida system providing tax exemption for alcoholic beverages made from Florida agriculture products held unconstitutional under Commerce Clause and finding that a tax scheme is not entitled to deference by virtue of the Twenty-first Amendment), *rev'd on other grounds* 496 U.S. 18 (1990).

125. 384 U.S. 35 (1966).

126. *See id.* at 43-44. Price affirmation involves a requirement by a state that a supplier sell into the state at a price that is no higher than then price charged in other states in either the month of the sale (prospective affirmation) or in the month prior to the sale (retrospective affirmation). *See generally* Thomas E. Rutledge, *The Questionable Viability of the Des Moines Warranty in Light of Brown-Forman Corp. v. New York*, 78 KY.L.J. 209 at 213-16 (1989-90).

127. *Id.* at 216-17; *Seagram & Sons*, 384 U.S. at 41.

128. 692 F.2d 275, 282-84 (2nd Cir. 1982), *aff'd without opinion*, 464 U.S. 909 [hereinafter *Healy I*].

129. 476 U.S. 573 (1986). Both authors have at various times been employees of what is today Brown-Forman Corporation, and one of them (Rutledge) serves as counsel to the company. The views expressed in this article are entirely those of the authors, and do not necessarily reflect the views of Brown-Forman Corporation.

130. *Id.* at 579-80. New York required that, on the 25th of each month, each supplier file a price schedule to be effective for the second succeeding month. *Id.* at 575. The supplier was barred from selling the products at a lower price anywhere else in the nation during that future month. *Id.* at 576, n. 1.

Brown-Forman lost in both the New York Supreme Court[131] and the New York Court of Appeals.[132] On appeal to the Supreme Court, the lower court decisions were reversed and the statute was struck down as violative of the Commerce Clause.[133] The Court identified a two-tier process to test for violations of the Commerce Clause.[134] The first tier looks at statutes that "directly regulate[] or discriminate[] against interstate commerce . . . [or that] favor in-state economic interests over out-of-state interests."[135] These are per se invalid.[136] The second tier looks at those statutes that are not per se invalid to see if the state's interest is legitimate and if the burden on interstate commerce exceeds the local benefits.[137] Under either level, the "critical consideration is the overall effect of the statute on both local and interstate activity."[138] Brown-Forman did not maintain that the statute was less than evenhanded; all suppliers were treated equally.[139] But this treatment did amount to "'simple economic protectionism' that th[e] Court has routinely forbidden."[140] In *Baldwin v. G.A.F. Seelig, Inc.*, the Court had struck down a New York law that specified a minimum wholesale price for milk, and banned from resale in New York foreign milk purchased at a lower price.[141] The *Brown-Forman* Court held that "a State may not 'establish . . . a scale of prices for use in other states, and . . . bar the sale of products . . . unless the scale has been observed.'"[142] With that

131. Brown-Forman Distillers Corp. v. State Liquor Auth., 473 N.Y.S.2d 420 (N.Y. App. Div. 1984).

132. Brown-Forman Distillers Corp. v. State Liquor Auth., 64 N.Y.2d 479 (N.Y. 1985).

133. *Brown-Forman*, 476 U.S. at 585.

134. *Id.* at 579.

135. *Id.*

136. *Id.*

137. *Brown-Forman*, 476 U.S. at 579. *See also Pike*, 397 U.S. 137. Arizona sought to compel a cantaloupe grower to pack the fruit in-state because the packaging carried the name of the state where the fruit was packed. *Id.* at 139. By contrast, the name of the state where the fruit was grown was not listed. *Id.* The cost of moving the packaging facility into Arizona, a move of thirty-one miles, was approximately $200,000. *Id* "Even where the State is pursuing a clearly legitimate local interest, this particular burden on commerce has been declared to be virtually *per se* illegal." *Id.* at 145 (*emphasis* in original).

138. *Brown-Forman*, 476 U.S. at 579.

139. *Id.*

140. *Id.* at 580. (*quoting* Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978)).

141. 294 U.S. 511. *See also* Buck v. Kuykendall, 267 U.S. 307, 315 (1925) (state action meant to prevent competition in supply of for-hire vehicles used in interstate commerce violates Commerce Clause); H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 539 (1949) (state prevention of expansion by a corporation on the grounds that it would reduce milk supplies in the local market and result in destructive competition burdens interstate commerce); New England Power Co. v. New Hampshire, 455 U.S. 331, 339 (1982) (state requirement that utility sell low cost, in-state generated power to state residents or adjust rates for power purchased elsewhere to the same price is protectionist and burdens interstate commerce).

142. *Brown-Forman*, 476 U.S. at 580 (*quoting* Baldwin v. G.A.F.Seelig, Inc., 294 U.S. 511, 528 (1935)). *See also DuMond*, 336 U.S. at 532 ("[T]he State may not promote its own economic advantages by curtailment or burdening of interstate commerce.").

background, the Court then was left to ascertain if the New York affirmation statute did regulate commerce in other states.[143]

The New York statute required that prices be posted each month,[144] in effect allowing changes to those postings only with the approval of the liquor board.[145] Were a supplier to raise or lower its prices in all other affirmation states during a particular posting period, the supplier could not change correspondingly its New York prices without regulatory approval.[146] But were it denied permission to modify its price schedule, the supplier would be in violation of the affirmation requirement.[147] The Court wrote: "Forcing a merchant to seek regulatory approval in one State before undertaking a transaction in another directly regulates interstate commerce."[148] The practical effect of the law was to regulate liquor prices in other states in direct violation of the Commerce Clause.[149]

New York maintained that the Twenty-first Amendment protected the affirmation law from Commerce Clause analysis.[150] However, the Court noted that the Twenty-first Amendment refers to the sale of alcoholic beverages within a state, and New York's law controlled the sale of alcoholic beverages in other states, thereby exceeding the authority granted by the Amendment even if it otherwise completely insulated the affirmation law from the Commerce Clause.[151] Also, by interfering with the alcoholic beverage industry in other states, New York invaded the authority granted to other states by the Twenty-first Amendment.[152]

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143. *Brown-Forman*, 476 U.S. at 582

144. *Id.* at 575-76.

145. *Id.*

146. *Id.*

147. *Id.* at 579-80.

148. *Brown-Forman*, 476 U.S. at 582-83. The Court did not believe the states would be willing to freely allow changes to these schedules, and pointed to New York's refusal to grant Brown-Forman such permission as an example. *Id.*

149. *Id.* at 583 ("That the ABC Law is addressed only to sales of liquor in New York is irrelevant if the *practical effect* of the law is to control liquor prices in other States.") (*emphasis* added).

150. *Id.* at 584.

151. *Id.* at 584-85.

152. *Brown-Forman*, 476 U.S. at 585. Subsequently numerous other affirmation statutes were struck down. *See, e.g.*, Brown-Forman Corp. v. South Carolina Alcoholic Beverage Control Commission, 643 F.Supp. 943 (D.S.C. 1986); Brown-Forman Corp. v. New Mexico Department of Alcoholic Beverage Control, 672 F.Supp. 1383 (D.N.M. 1987); Brown-Forman Corp. v. Delaware Alcoholic Beverage Control Commission, No. 87-20 LON, slip op. (D. Del. December 17, 1987); Brown-Forman Corp v. Tennessee Alcoholic Beverage Commission, No. 3-86-0926 (M.D. Tenn. June 30, 1987) 1987 WL 30303, *revd.*, 860 F.2d 1354 (6th Cir. 1988), *vacated and remanded* 492 U.S. 902 (1989); Brown-Forman Corp. v. Bosanko, No. 87-40321-MP, slip op. (N.D. Fla. Sept. 28, 1989). Numerous other price affirmation laws were declared unconstitutional in state attorneys general opinions or unilateral acts of various beverage control commissions. *See also* Rutledge, *supra* note 126. The matter again came to the Supreme Court in Healy v. Beer Institute, 491 U.S. 324 (1989) [hereinafter *Healy II*], wherein the Connecticut affirmation statute, amended by the legislature after having been struck down in *Healy I*, was again found to be unconstitutional. *Id.* at 343. In *Healy II*, the Supreme Court addressed a matter sadly not disposed of in Brown-Forman,

Shortly after deciding *Healy II*, the United States Supreme Court decided *North Dakota v. United States*, upholding a state law that implemented a labeling and reporting system for the sale of intoxicating liquor to two Air Force bases over which the state and the federal government shared concurrent jurisdiction.[153] Much of the Court's decision focused on issues of intergovernmental immunity, but the decision also dealt with the relationship between the Commerce Clause and the Twenty-first Amendment.[154] The Court held that the labeling and reporting regulations fell under the State's power to regulate distribution under the Twenty-first Amendment as there was no showing of a burden imposed on the federal government.[155] However, the Court did not reach the question of the extent of the states' powers to regulate the importation of intoxicating liquor.[156]

In *Capital Cities Cable, Inc. v. Crisp*,[157] Oklahoma's efforts to require cable broadcasters to strip from their signals advertisements for alcoholic beverages were struck down under the Supremacy Clause.[158] The Court held:

> a state regulation squarely conflicts with the accomplishment and execution of the full purposes of federal law, and the State's central power under the Twenty-first Amendment of regulating the times, places, and manner under which liquor may be imported and sold is not directly implicated, the balance between state and federal power tips decisively in favor of the federal law, and enforcement of the state statute is barred by the Supremacy Clause[159]

The Supreme Court's last consideration of the relationship of the Twenty-first Amendment to the balance of the Constitution before *Granholm* was *44 Liquormart, Inc. v. Rhode Island*.[160] The Court reviewed Rhode Island's prohibition of liquor price advertisements.[161] When challenged, Rhode Island

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namely the continued viability of the Seagram decision – the Court took this opportunity to declare it to be "no longer good law." *Id.*

153. 495 U.S. 423 (1990). As the jurisdiction was concurrent, and not exclusively federal, the rule of Collins v. Yosemite Park & Curry Co., 304 U.S. 518 (1938), reviewed *supra* note 87 and accompanying text, was not controlling.

154. *North Dakota*, 495 U.S. at 430-33.

155. *Id.* at 432.

156. *Id.* at 469 (Brennan, J., dissenting in part).

157. 467 U.S. 691 (1984).

158. The subordination of the Twenty-first Amendment and state laws purportedly enacted pursuant thereto to the Supremacy Clause was confirmed as well in Stawski Distributing Co., Inc. v. Browary Zywiec S.A., 349 F.3d 1023 (7th Cir. 2003), *cert. denied* 541 U.S. 1010, (2004).

159. *Capital Cities Cable, Inc.*, 467 U.S. at 716.

160. 517 U.S. 484 (1996).

161. *Id.* at 489.

asserted that it had the right to do so under the Twenty-first Amendment.[162] The statute was struck down for violation of the retailer's free speech rights.[163]

IV. THE WINE WARS AND THE MOTHER OF ALL BATTLES: *GRANHOLM V. HEALD*[164]

The repeal of Prohibition far from opened the door to unfettered commerce in alcohol. When structuring the repeal of Prohibition, Congress had considered demands that the Twenty-first Amendment secure states' power over alcohol.[165] As such, Section 2 of the Twenty-first Amendment granted the states certain powers to regulate intoxicating liquors.[166] As already reviewed, the Amendment did not delineate the relationship between itself and the Commerce Clause and any possible burden on interstate commerce.[167]

With the end of Prohibition, all states enacted a "three-tier" system in order to maximize their control over what had been the mob-run liquor empires.[168] Under the three-tier system, beverage alcohol producers sell exclusively to wholesaler distributors, who in turn sell to retailers, who then sell to the ultimate consumer.[169] Participants in the various levels are barred from having financial interests in one another.[170] The wholesalers who sell to retailers are barred from ownership at this level.[171] Manufacturers were further precluded from owning

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162. *Id.* at 515.

163. *Id.* at 489, 516. *See also Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995) (Federal Alcohol Administration Act (FAAA) subsection prohibiting beer labels from displaying alcohol content violated Brewer's First Amendment right to protected commercial speech); Pitt News v. Pappert, 379 F.3d 96 (2004) (state law prohibiting alcoholic beverage advertisements in educational institution newspapers violated paper's commercial free speech rights).

164. 125 S.Ct. 1885 (2005).

165. Brannon P. Denning, *Smokey and the Bandit in Cyberspace: The Dormant Commerce Clause, The Twenty-first Amendment, and State Regulation of Internet Alcohol Sales*, 19 CONST. COMMENT. 297, 309 (2002).

166. It is oft asserted that Section 2 of the Twenty-first Amendment constitutionalized the Webb-Kenyon Act and that its literal text suggests that it conferred unfettered constitutional authority upon the states to regulate commerce in alcohol., *See* Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 275 (1984). However, the text is silent on the relationship between Section 2 and the balance of the Constitution. *See id.* (J. White's opinion states that it is clear that "the [Twenty-first] Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause.").

167. *See supra* notes 99 through 163 and accompanying text.

168. See Kim Marcus, *When Winemakers Become Criminals*, WINE SPECTATOR, May 15, 1997, available at http://www.winespectatorschool.com/Wine/Archives/Show_Article/0,1275,1212,00.html.

169. *See North Dakota*, 495 U.S. at 428 (explaining the three-tier system as applied in North Dakota).

170. *See* Freedman and Emshwiller, *supra* note 12.

171. *Id.*

retailers.[172] Proponents of the three-tier system claimed that it would facilitate tax collection and also prevent underage alcohol purchases.[173]

The "Wine Wars"[174] have arisen out of the rise of small wineries,[175] the contraction of the ranks of wholesalers/distributors,[176] and the disparity that exist between the former's desire to reach customers and the latter's focus on larger brands. Smaller wineries, some producing only a few thousand cases per year,[177] simply are not represented by wholesalers.[178] Small wineries have traditionally "hand sold" their wine to vineyard visitors. Obviously, this sales strategy strictly limits the prospective customer base.[179] However, if a sale is made, the vineyard

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172. *Id.*

173. *See* Frank J. Prial, *Big Wine Sellers Enlist States in Fighting Tiny Foes*, N.Y. TIMES, Jan. 14, 1998, at F1 (explaining the three-tier system in the context of tax collection).

174. Litigation concerning the anti-direct shipment controversy generated, prior to the Supreme Court's decision in Granholm v. Heald, 125 S.Ct. 1885 (2005), yielded appellate decisions in six states. Indiana (Bridenbaugh v. Freeman-Wilson, 227 F.3d 848 (7th Cir. 2000)), Florida (Bainbridge v. Turner, 311 F.3d 1104 (11th Cir. 2002)), and New York (Sweedenburg v. Kelly, 358 F.3d 223 (2nd Cir. 2004)) authorized bans on direct shipment under the Twenty-first Amendment. Texas (Dickerson v. Bailey, 336 F.3d 388 (5th Cir. 2003)), North Carolina (Beskind v. Easley, 325 F.3d 506 (4th Cir. 2003)), and Michigan (Heald v. Engler, 342 F.3d 517 (6th Cir. 2003)), found bans violated the Commerce Clause and authorized direct shipment.

175. There are more than thirty-seven hundred wineries in the United States, with over seventeen hundred in California, six in Alaska and one in Delaware. Nick Fauchald, *Roster of American Wineries Booms*, THE WINE SPECTATOR 14 (Dec. 15, 2004). The advent of the successful American, and in particular, Californian wine industry *vis-à-vis* the international wine industry can be dated to May 24, 1976 and a wine tasting held in France where leading French oenophiles were invited to a blind tasting of California and French wines. George M. Taber, *Message in a Bottle*, WALL STREET JOURNAL at A16 (September 22, 2005). Surprising all in attendance, in several categories the California wines prevailed. *Id.*

> Up to that time, the wine world had a blunt hierarchy: France was in a class by itself; and then there was everyone else making interesting but inferior wines. The Spurrier event changed that. Wine makers realized that great wine could be made outside France. As wine critic Robert Parker told me, 'The Paris Tasting destroyed the myth of French supremacy and marked the democratization of the wine world. It was a water shed in the history of wine.'

Id.

176. As the number of wineries has increased nationwide, the ranks of distributors/wholesalers has shrunk from a high of 20,000 to fewer than 400. *See* Susan Lorde Martin, *Wine Wars - Direct Shipment of Wine: The Twenty-First Amendment, The Commerce Clause, and Consumer Rights*, 38 AMERICAN BUSINESS LAW JOURNAL 1, 4 (Fall 2000). The labels "distributor" and wholesaler" are used interchangeably herein.

177. Domaine Alfred, a plaintiff in the Michigan suit decided in *Granholm*, produces only 3,000 cases per year. *Granholm*, 125 S. Ct. at 1892. By comparison, Fetzer Vineyards produced 2.2 million cases in its fiscal 2005. Email, T.J. Graven, Brown-Forman Corp., to Thomas Rutledge, author (July 29, 2005) (on file with author). Assuming two hundred fifty work days in the year, Fetzer ships more wine each morning than did Domaine Alfred in a year.

178. *See* Freedman and Emshwiller, *supra* note 12. *See also* Interstate Alcohol Sales and the 21st Amendment: Hearings on S. 577 Before Senate Judiciary Comm., 106th Cong. (1999)(statement of John A. DeLuca, President and Chief Executive Officer, Wine Institute)(hereinafter DeLuca)(statement of Michael Ballard, President, Savannah-Chanel Vineyards) (hereinafter Ballard); R.W. Apple, Jr., *Zinfandel by Mail? Well, Yes and No; Strict Laws May Get Stricter*, NEW YORK TIMES (May 19, 1999), p. F1.

179. *See* FTC Anticompetitive Barriers at 24.

could hope for repeat sales to that customer.[180] At the same time, the customer may hope for future supplies of wine shipped to his or her home.[181] And here the conflict has arisen. Numerous states have adopted laws limiting or entirely precluding shipments, relying upon authority purportedly granted under Section 2 of the Twenty-first Amendment.[182] The effect of these laws is that if that winery visitor wants more wine upon returning home, in many states he or she may not legally order it from the winery.[183] A customer in such a state is no longer a potential market for the wineries' products, and that winery is no longer a possible supplier to that customer. It bears remembering that there is a willing seller and a willing buyer, and that the sole reason that the two will no longer deal is that the distributor, holding a state maintained monopoly or oligopoly position, has not chosen to carry the wineries' products.[184]

Wholesalers established an organization called Americans for Responsible Alcohol Access (ARAA) to push for strict prohibition laws which regulate sales and enforcement of those laws, all actions taken in order to protect their coveted monopoly.[185] Direct-shipment sales effectively bypass wholesalers and represent a direct challenge to their market position.[186] ARAA asserts the same two justifications as the defendants in the various Wine War cases for the prohibition

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180. *See* Clint Bolick and Deborah Simpson, *Uncorking Freedom: Challenging Protectionist Restraints on Direct Interstate Wine Shipments to Consumers*, Institute for Justice Litigation Backgrounder, *available at* http://www.ij.org/economic_liberty/ny_wine/backgrounder.html (last visited Nov. 8, 2005).

181. As observed by the Supreme Court, the disparity in the increase in the number of wineries and the decrease in distribution channels "has led many small wineries to rely on direct shipping to reach new markets." *Granholm*, 125 S. Ct. at 1892. *See also supra* note 17.

182. *See Granholm*, 125 S. Ct. at 1892.

183. *See, e.g.*, Michael Barbaro, *Small Wineries May Benefit From Court Ruling*, WASHINGTON POST (May 17, 2005), 2005 WLNR 7739459:

> Every year, tourists pour into the tasting room at Willowcroft Farm Vineyards in Leesburg, Va., sip a glass of the house Riesling, proceed to a cash register and learn that, no, they may not have a case sent to their homes in New York, Michigan, Maryland or other states with restrictive wine shipping laws.

It has further been observed that:

> [P]rohibitions on direct shipment to consumers across state lines effectively limit small wineries to on-site visitor sales and intrastate consumer markets. For small wineries seeking to increase their volume, consumer base, and geographic market, direct shipment prohibitions represent a significant obstacle to growth.

184. Distributors selfishly guard their position in the three tier system as evidenced by their involvement in the "wine war" cases cited herein. *See also* Jennifer Dixon, *Illegal Alcohol Imports: Northwest in Hot Water with Wholesalers*, DETROIT FREE PRESS (February 12, 2005) (2005 WLNR 1988739); Eric Arnold, *Ohio Bill Aims to Cut Mandatory Markups on Wine*, WINE SPECTATOR (July 7, 2005).

185. *See Apple, Jr., supra* note 178. As of July 29, 2005, it appears ARAA may no longer be functioning; its Internet domain name is available for purchase. *See* http://www.seeq.com/lander.jsp?referrer=http%3A%2F%2Fwww.tf.org%2Ftf%2Frelsites%2Frelalc.shtml&domain=araa.org&cm_mmc= (stating "ARAA.org is for Sale!") (last visited Nov. 10, 2005).

186. *See* Freedman and Emshwiller, *supra* note 12.

of direct sales: loss of state tax revenue and impermissible sales to minors.[187] These same concerns would apply to interstate direct shipments of wine as well as intrastate shipments, still some states with prohibition legislation allow intrastate shipments of wine to consumers. It is plain that the motivation behind these prohibition laws is protection of the wholesalers' monopoly.[188]

The Coalition for Free Trade, an advocacy group that coordinates lawsuits by volunteer lawyers to bring down barriers to interstate shipments, and an organization called "Free the Grapes"[189] represent both the small wineries and consumers interested in receiving those boutique wines available only though the small wineries themselves. Their efforts have met with some success as several states have adopted alternative legislation which has legalized direct interstate sale and shipment to consumers.[190]

States (and the allied wholesaler industry) generally offer two rationales for anti-direct shipment laws.[191] First, the states feel that the legislation will facilitate tax collection from alcohol sales.[192] Out-of-state suppliers are able to avoid the state sales tax by shipping directly to consumers, while in-state suppliers are not able to avoid those same taxes.[193] To the extent untaxed sales are restricted, the purchases that are made pass through the regular, and taxed, three-tier system, providing the basis for sometimes permitting in-state direct

187. *See* Apple, Jr., *supra* note 178.

188. *See, e.g.*, Kim Marcus, *Bizarre Coalition Opposes Direct Shipment of Wine*, WINE SPECTATOR (Feb. 14, 2005) ("Call it an unholy alliance, or just another example of how politics can make strange bedfellows, but the forces marshaled against the free movement of wine across state lines are truly diverse. The latest coalition unites monopolistic wine and spirits wholesalers with puritanical neo-Prohibitionists."). Mothers Against Drunk Driving withdrew from ARAA in 1999. *See Apple, Jr., supra* note 178. The group's president, Karolyn Nunnallee, said its efforts did not reflect a concern over sales to minors but "a battle between various elements within the alcohol beverages industry." *Id.*

189. *See Free the Grapes, About Us, at* http://www.freethegrapes.org /about_us.html. (last visited Nov. 8, 2005).

190. The vintner's efforts yielded three significant victories in 1999 when Nevada, New Hampshire, and North Dakota changed their laws to allow for direct shipment. *See* Freedman and Emshwiller, *supra* note 12; NEV. REV. STAT. § 369.490 (2003); N.H. REV. STAT. ANN. §175:6 (1999); N.D. CENT. CODE § 5-01-16 (1999). In 1997, Louisiana passed a law to permit direct shipment. *See* Garry Boulard, *A Toast to Compromise*, THE GREATER BATON ROUGE BUS. REP., Jan. 6, 1998, at 28, *available at* 1998 WL 1029795 (outlining the parameters of the new Louisiana law). On May 9, 2005, only days before *Granholm* was decided, Texas revised its Alcoholic Beverage Code by adding § 16.09 which still limits shipments to 3 gallons of wine within any 30 day period, but which now applies equally to in-state and out-of-state shippers. *See* TEX. ALCO. BEV. CODE ANN. §§ 16.09(e)(e), 54.02(3) (Vernon 2005). However, holders of an out-of state winery direct shipper's permit are limited to annual sales of 35,000 gallons of wine to the ultimate consumers. TEX. ALCO. BEV. CODE ANN. § 54.02(4) (Vernon 2005).

191. FTC Anticompetitive Barriers, at 4.

192. *Id.*

193. States collect $8.7 billion in alcohol excise taxes. *See* Anne Faircloth, *Mail-Order Wine Buyers, Beware! The Crackdown on Booze-of- the-Month Clubs*, FORTUNE, 46 Feb. 16, 1998. New York State Attorney General Dennis C. Vacco estimated that the state loses up to $100 million per year in state sales and excise tax losses due to direct shipments. *See NY Declares War on Online "Bootleggers,"* MEDIA DAILY, Dec. 15, 1997, available in 1997 WLNR 4931615.

shipment sales while forbidding sales involving shipment from out-of-state.[194] Second, it is claimed that restrictions on mail-order and Internet sales prevent minors from obtaining access to alcohol.[195]

Over the course of the Wine Wars, neither the tax revenue nor the access by minors rationales have been found persuasive.[196] As with other industries, wineries must comply with whatever tax laws are in effect, whether those laws are enacted on a state level or by Congress.[197] An argument has been made that legislation could authorize direct-shipment conditioned on whether suppliers collect and remit state sales taxes.[198] For example, the state of Louisiana limits out-of-state shipping to consumers only if the out-of-state winery does not have wholesaler representation in Louisiana[199] and further requires those wineries to file annual reports with the Louisiana Department of Revenue and Taxation and to remit taxes.[200]

Similarly, apprehensions about underage purchases of alcohol are unjustified. First, underage drinking has decreased since the early 1980s.[201] Second, according to National Academy of Sciences' Institute on Medicine report, young people today prefer beer to other alcoholic beverage choices

194. FTC Anticompetitive Barriers, at 4.

195. Recent sting operations were conducted by distributors in Massachusetts and Washington in an attempt to "conjure up the image of teens growing drunk on . . . chardonnays obtained through a few clicks of the mouse." *See* Clint Bolick and Deborah Simpson, *Uncorking Freedom: Challenging Protectionist Restraints on Direct Interstate Wine Shipments to Consumers*, Institute for Justice Litigation Backgrounder, *available at* http://www.ij.org/economic_liberty/ny_wine/backgrounder.html. Proponents of the laws also point to a poll sponsored by Americans for Responsible Alcohol Access that found that 85% of Americans believe direct shipment would give minors easier access to alcohol. *See Faircloth, supra* note 193. Conversely, independent analysis has discarded the notion that direct wine shipment is a realistic source of alcohol by minors. *See, e.g.*, Pacific Institute for Research and Evaluation, *Regulatory Strategies for Preventing Youth Access to Alcohol: Best Practices*, 13 (1999):

> No research has been published on the prevalence of young people ordering alcohol through the Internet or by mail order, however, and the risk appears smaller that that for home delivery for at least three reasons: (1) this method of purchase takes a long time (at least a week in most cases); (2) credit cards are usually required; and (3) the products being offered are more likely to be expensive.

See also FTC Anticompetitive Barriers, at 11.

196. *See* Vijay Shanker, *Alcohol Direct Shipment Laws, The Commerce Clause, and the Twenty-First Amendment*, 85 VA. L. REV. 353, 358 (Mar. 1999).

197. *See id.*

198. *See id.*

199. *See* LA. REV. STAT. ANN. § 359(C) (West 2004) (requires direct shippers to report to the state's Department of Revenue and Taxation.)

200. A state law allowing direct shipment can require sellers to collect sales tax and forward the revenues to the state. *See* Boulard, *supra* note 190.

201. National Institute on Alcohol and Alcoholism, *Trends in the Prevalence of Alcohol Use among High School Seniors: Monitoring the Future Study, 1975 – 2003*, updated March 2004, *available at* http://www.niaaa.nih.gov/databases/dkpat10.htm. (last visited Nov. 8, 2005).

because it is inexpensive.[202] Third, there is little evidence that a serious problem exists regarding mail purchases of wine.[203] In fact, few underage individuals have "the desire, sophistication, financial resources, access to credit cards, and patience necessary to order cases of wine by phone or over the Internet."[204] The Federal Trade Commission has received and published testimony from states which permit direct-shipping that there are few problems with direct-shipping to minors.[205] The FTC has yet to find a correlation between direct shipping and alcohol consumption by minors.[206]

Following is a review of the types of regulatory systems employed by the states governing inter-state wine shipments. From that background we review the "Wine War" cases leading to *Granholm v. Heald.*

A. *Types of Regulation*

All fifty states and the District of Columbia regulate interstate direct sale and shipment of alcohol in some manner.[207] They can be separated into three general categories: reciprocity states, limited direct shipping and permit states, and anti-shipment states.[208]

1. Reciprocity States

There are a total of thirteen reciprocity states.[209] Reciprocity states only allow shipments from other states that afford the same reciprocal privilege.[210] Reciprocal statutes also have the following commonalities: (1) sales are limited to persons over the age of 21, and shipping containers must be clearly marked to indicate that the package cannot be delivered to an individual who is under the legal drinking age or who is intoxicated; (2) shipments made between these states must be for personal consumption only and not for resale; (3) a case shipped cannot contain more than nine liters of product; and (4) reciprocal

202. Richard J. Bonnie and Mary Ellen O'Connell, eds., *Reducing Underage Drinking: A Collective Responsibility*, National Research Council, Board on Children, Youth, and Families, Committee on Developing a Strategy to Reduce and Prevent Underage Drinking 55-56 (Washington: National Academy Press, 2003).

203. *See, e.g.*, David P. Sloane, *Statement to House Committee on Energy and Commerce* (October 30, 2003) ("few, if any problems with interstate shipments of wine to minors.")

204. *Id.*

205. *See* FTC Anticompetitive Barriers, at Appendix B.

206. *See* Federal Trade Commission letter dated March 29, 2004 to Chairmen Magee and Kuhl, and Deputy Majority Leader Skelos regarding Assembly bill 9560-A, Senate bills 6060-A and 1192, at 9.

207. For a detailed state-by-state analysis of regulatory provisions on direct interstate shipments, *see* Wine Institute, *Analysis of State Laws at* http://www.wineinstitute.org/shipwine/ (last checked 11/8/05).

208. *Id.*

209. *Id.* The fourteen states are California, Colorado, Hawaii, Idaho, Illinois, Iowa, Minnesota, Missouri, New Mexico, North Dakota, Oregon, Washington, Wisconsin, and West Virginia.

210. *Id.*

legislation generally applies only to shipments by wineries and not retailers.[211] Although reciprocity legislation grants those reciprocity states certain privileges, the legislation does not prevent shipments from a reciprocity state to a limited shipment state.

2. Limited Direct Shipment States

A second category of states allow limited direct wine shipments though personal importation laws.[212] Generally, a personal importation law places some responsibility for compliance with the customer.[213] Many of these states restrict the quantity of wine available for importing, requiring the out-of-state producer to obtain special permits, or imposing other specific restrictions.[214] In Nebraska, for example, out-of-state shippers must submit an application fee of $500 to obtain a shipping license.[215] Generally, these states only allow one-way receipt of product from other states.[216] Direct shipments may be limited by the buyer's state by requiring the winery to have a local permit to ensure taxes are paid.[217] For example, in Wyoming, out-of-state shippers must remit a 12% tax on wine shipments.[218]

States may also limit shipment to wet-areas only,[219] or by requiring an initial visit by the consumer to the out-of-state winery.[220] While various requirements of limited shipment laws impose burdens on trade, such as the required physical visit to the shipping winery, the states still fall short of placing a direct ban on out-of-state shipments.

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211. Vijay Shanker, *Alcohol Direct Shipment Laws, The Commerce Clause, and the Twenty-First Amendment*, 85 VA. L. REV. 353, 356 (Mar. 1999).

212. *See* State Shipping Laws, *at* http://www.wineinstitute.org/shipwine. The states are Alaska, Arizona, Connecticut, Georgia, Louisiana, Nebraska, Nevada, New Hampshire, New York, North Carolina, North Dakota, Ohio, Rhode Island, South Carolina, Texas, Virginia, Washington D.C., and Wyoming. *Id.*

213. *See, e.g.*, NEV. REV. STAT. § 369.490 (2003) (Nevada residents 21 years of age or older permitted to import up to twelve cases of wine per year for household or personal use. Delivery must be accepted by an adult.)

214. FTC Anticompetitive Barriers, at 15.

215. NEB. REV. STAT. §§ 53-123.15, 53-124 (2001). *See also* MONT. CODE ANN. § 16-4-801 (2001) (requiring that a consumer obtain a state-issued "connoisseur's permit" for $50 to receive out-of-state shipments.)

216. *See* FTC Anticompetitive Barriers, at 15 - 16.

217. *See, e.g.*, WYO. STAT. ANN. § 12-2-204 (West 2001)

218. *Id.*.

219. *See, e.g.* ALASKA STAT. § 04.11.010 (West 2004). Alaska permits its communities to restrict sales/shipments of alcohol by way of local election. *Id.* It is illegal to ship to those dry communities. *Id.*

220. *See, e.g.*, R.I. GEN. LAWS § 3-4-8 (2004) (permitting out-of-state wineries to ship wine orders that are personally placed by the purchaser at the manufacture's premises, for shipment to an address in Rhode Island, for non-business purposes).

3. Anti-direct Shipment States

The remaining states fall into the category of expressly prohibiting direct shipment whereby direct-to-consumer wine shipments are outlawed.[221] Of these states, seven authorize felony punishment of suppliers who violate their direct shipment laws.[222] Most of these express prohibition states will not allow even consumers who visit wineries in other states to ship wine, purchased in that foreign state, to their home state.[223] To add insult to injury, most if not all of these states will allow in-state wineries to ship directly to consumers.[224]

Supposedly, all sales which occur in states with a "three-tier" system must go though the liquor wholesaler before reaching the retailer and final consumer.[225] The wholesaler's margin on wine sold to retailers is eighteen to twenty-five percent.[226] Needless to say, wholesaling is big business[227] and direct-shipment laws threaten to decrease their revenues.

B. *The Wine Shipment Cases Leading to* Granholm v. Heald

Before reviewing the Supreme Court's decision in *Granholm v. Heald,* a review of the recent Court of Appeals decisions on the types of questions presented to the Court is in order.[228] We say "types of questions" advisedly - state statutes in this area are unique, and it is upon those wording distinctions that Constitutional distinctions may be drawn.

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221. *See* State Shipping Laws, *at* http://www.wineinstitute.org/shipwine. There are currently twenty express prohibition states: Alabama, Arkansas, Delaware, Florida, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Mississippi, Montana, New Jersey, Oklahoma, Pennsylvania, South Dakota, Tennessee, Utah, and Vermont. *Id.*

222. *Id.* The seven felony states are Florida, Georgia, Indiana, Kentucky, Maryland, Tennessee, and Utah.

223. For example, Kansas does not permit unlicensed individuals to receive wine in or to bring wine into the state. *See* KANSAS STAT. ANN. § 41-306 (2004). *See also* Clint Bolick and Deborah Simpson, *Uncorking Freedom: Challenging Protectionist Restraints on Direct Interstate Wine Shipments to Consumers*, Institute for Justice Litigation Backgrounder, *available at* http://www.ij.org/economic_liberty/ny_wine/backgrounder.html.

224. *See id.*

225. *See id.*

226. Freedman and Emshwiller, *supra* note 12.

227. The largest wholesaler, Miami-based Southern Wine and Spirits, which does business in twelve states, generates about $2.3 billion in annual revenues, compared to the total amount of direct wine shipments valued at $300 million annually. *See* James W. Sweeney, *Winemakers, Wholesalers Go Head-to-Head*, DAILY PRESS, August 9, 1998, at E4. *See also* Associated Press, *Congress Eyes Curb on Online Wine Sales*, ATLANTA JOURNAL, October 12, 1999, at D7, R.W. Apple, Jr., *Order Wine on the Web? Check Laws*, SUN-SENTINEL (Ft. Lauderdale, Florida), May 27, 1999, at 9.

228. The cases are presented in chronological order by date of ruling.

1. Indiana (Seventh Circuit)

Indiana law provides that it is unlawful for a person who sells alcoholic beverages in another state to ship such product directly to consumers in Indiana, while Indiana sellers may do so.[229] The Seventh Circuit, in *Bridenbaugh v. Freeman-Wilson*, confronted the relationship between the Twenty-first Amendment and the dormant Commerce Clause to determine "how the combination of express grant and implied withdrawal of state power applies to [Indiana's code]."[230]

The challenged section of Indiana's code provides that it is "unlawful for a person in the business of selling alcoholic beverages in another state or country to ship or cause to be shipped an alcoholic beverage directly to an Indiana resident who does not hold a valid wholesaler permit."[231] Indiana, like most states, uses a three-tiered system of alcohol distribution which requires a different class of permit for each level of distribution.[232] This distribution system is meant to foster "orderly market conditions" that facilitate tax collection and reduce market competition.[233] Indiana permits local wineries, but not wineries from another state, to ship directly to Indiana consumers.[234]

The court acknowledged that states may not use their power under Section 2 of the Twenty-first Amendment to discriminate against out-of-state sellers in favor of in-state sellers.[235] Using cases such as *Brown-Forman* and *Bacchus* to see the "unconstitutional-conditions approach" use of the Twenty-first Amendment as "eliminating economic discrimination against in-state commerce, . . . without authorizing discrimination against out-of-state sellers,"[236] the court determined that the Twenty-first Amendment "enables a state to do to importation of liquor - including direct deliveries to consumers in original

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229. Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 849 (7th Cir. 2000); IND. CODE ANN. § 7.1-5-11-1.5 (2004) states that it is unlawful to ship an alcoholic beverage to an Indiana resident who does not hold a wholesaler permit:

> (a) It is unlawful for a person in the business of selling alcoholic beverages in another state or country to ship or cause to be shipped an alcoholic beverage directly to an Indiana resident who does not hold a valid wholesaler permit under this title. This includes the ordering and selling of alcoholic beverages over a computer network (as defined by IC 35-43-2-3 (a)).
>
> (b) Upon a determination by the commission that a person has violated subsection (a), a wholesaler may not accept a shipment of alcoholic beverages from the person for a period of up to one (1) year as determined by the commission.
>
> (c) The commission shall adopt rules under IC 4-22-2 to implement this section.

230. *Bridenbaugh*, 227 F.3d at 849.
231. IND. CODE ANN. § 7.1-5-11-1.5 (2005).
232. *Bridenbaugh*, 227 F.3d at 851.
233. *Id.*
234. *Id.*
235. *Id.* at 853.
236. *Bridenbaugh*, 227 F.3d at 853.

packages - what it chooses to do to internal sales of liquor, but nothing more."[237] Because Indiana's Code regulates importation of the sort which prompted the Webb-Kenyon Act, the predecessor of Section 2 of the Twenty-first Amendment, the challenged section therefore falls within the state's power.[238] The court determined that the section is constitutional unless Indiana has imposed a discriminatory condition on importation, such as in *Bacchus*, which would favor Indiana sources of alcohol over sources from out-of-state.[239] The court reasoned that all alcohol, wherever produced, must pass through the three-tiered system and be taxed, thus the law did not discriminate between in-state sellers and out-of-state sellers.[240] However, the court failed to explain how shipment from an in-state source passed through the three-tiered system; in fact direct shipment by definition would imply that the shipment bypasses the wholesaler and retailers.[241] Indeed, the court even recognized other anomalies in the Indiana Code.[242]

2. Florida (Eleventh Circuit)

Unlike the Indiana case, which did not involve an out-of-state seller complainant,[243] the Florida court in *Bainbridge v. Bush*[244] dealt with out-of-state wineries who challenged the constitutionality of Florida's direct shipment law[245] as violative of the Commerce Clause. Florida's direct shipment law provided that it is unlawful for any person in the business of selling alcoholic beverages to knowingly ship alcoholic beverages from an out-of-state location directly to any person in this state who does not hold a valid manufacturer's or wholesaler's license.[246]

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237. *Id.*
238. *Id.* at 853.
239. *Id.*
240. *Id.* at 854.
241. *Bridenbaugh*, 227 F.3d at 854.
242. *Id.* For example, a permitted Indiana wine retailer who is also in the business of selling alcohol in Illinois is permitted to ship directly to Indiana consumers under IND. CODE ANN. § 7.1-3-14-4(c) (2005), but at the same time is forbidden to ship directly to Indiana consumers under IND. CODE ANN. § 7.1-5-11-1.5 (2005). The *Bridenbaugh* court left it to Indiana's judiciary to reconcile the anomaly given that the plaintiffs are only concerned with direct shipments from out-of-state sources who do not have an Indiana permit, nor do they especially want one. *Id.*
243. Plaintiffs in *Bridenbaugh* were consumers not "in the business of selling alcoholic beverages" and therefore could not violate IND. CODE ANN. § 7.1-5-11-1.5(a) (2005). As such, the court first had to determine whether plaintiffs had standing to challenge the particular section. The court found injury in fact to the plaintiffs and granted them standing. *Id.* at 849-850.
244. Bainbridge v. Bush, 148 F.Supp.2d 1306 (M.D. Fla. 2001).
245. FLA. STAT. ANN. §§ 561.54(1)-(2), 561.545(1) (West 2005).
246. *See* FLA. STAT. ANN. §§ 561.54(1-2); 561.545(1) (West 2005). Section 561.545 specifically states:

> The Legislature finds that the direct shipment of alcoholic beverages by persons in the business of selling alcoholic beverages to residents of this state in violation of the Beverage Law poses a serious threat to the public health, safety, and welfare; to state revenue collections; and to the economy of the

Following the Supreme Court's two-tiered analysis,[247] the district court first determined whether the challenged statutes violated the Commerce Clause, and then, if it was found to violate the Commerce Clause, whether the statutes were saved by the Twenty-first Amendment.[248] The court found that Florida's direct shipment law discriminated against out-of-state wineries in favor of in-state wineries by expressly prohibiting out-of-state wineries from shipping their wine to non-licensed Florida residents.[249] Although the court concluded that the statutes violated the Commerce Clause,[250] the court went on to find that the statute is specifically within the ambit of the state's power to regulate alcoholic beverages under the Twenty-first Amendment.[251] Specifically, the court found Florida enacted the law to address perceived threats,[252] and therefore was upheld.[253] The court further reasoned that, although the Florida direct shipment law may have discriminatory overtones, the State would lose its ability to tax alcoholic beverages without the law in place.[254] The court therefore upheld the statutory scheme as permissible regulation under the Twenty-first Amendment.[255]

The Eleventh Circuit Court of Appeals applied the same analysis as the district court but concluded the record did not clearly demonstrate the ban on direct shipment was closely related to a core concern of the Twenty-first Amendment.[256] Like the district court, the Court of Appeals found the Florida law facially discriminatory because in-state wineries can ship directly to a

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> state. The Legislature further finds that the penalties for illegal direct shipment of alcoholic beverages to residents of this state should be made adequate to ensure compliance with the Beverage Law and that the measures provided for in this section are fully consistent with the powers conferred upon the state by the Twenty-first Amendment to the United States Constitution.

FLA. STAT. ANN. § 561.545 (West 2005).

247. *See* Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579 (1986).

248. *Bainbridge*, 148 F.Supp.2d at 1310.

249. *Id.* at 1311. The court additionally notes that Florida's statutory scheme has the "practical effect of preventing many small [out-of-state] wineries from selling their wine in Florida," because it is not cost-effective for the wineries to purchase a Florida wholesaler. *Id.* n.7.

250. *Id.* at 1312.

251. *Id.* at 1313.

252. *Bainbridge*, 147 F.Supp.2d at 1313-1314. The perceived threats were to the public health, safety, and welfare, to state revenue collections, and to preserve the economy of the state, all of which are legitimate concerns protected by the Twenty-first Amendment. *Compare, Bainbridge* with, Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 851 (7th Cir. 2000), where the court looked to North Dakota v. United States, 495 U.S. 423, 432 (1990), to find the expanded understanding of what are the "core concerns" of the Twenty-first Amendment. *Id.* The "core concerns" analysis used by the Florida court is drastically different from the Seventh Circuit's historical analysis application of Section 2 of the Twenty-first Amendment. *Bainbridge*, 147 F.Supp.2d at 1313.

253. *Id.*

254. *Id.*

255. *Id.* at 1315.

256. Bainbridge v. Turner, 311 F.3d 1104, 1106, 1115 (11th Cir. 2002).

consumer but out-of-state wineries are banned[257] and found that because Florida's legitimate interest in generating revenue could be served by a nondiscriminatory alternative, the district court had misapplied the two-tiered analysis.[258] The Court of Appeals next examined whether the law was saved by the Twenty-first Amendment under the *North Dakota* "core concern" test: "Before the State can successfully raise the Twenty-first Amendment as a shield, it must show that its statutory scheme is necessary to effectuate the proffered core concern in a way that justifies treating out-of-state firms differently from in-state-firms."[259] The Court of Appeals found that the state failed to show as a matter of law that the challenged statutes are sufficiently related to the core concern of raising revenue so as to survive the Commerce Clause analysis; the judgment of the district court was vacated and the case was remanded for further consideration.[260]

3. Texas (Fifth Circuit)

Texas, like Indiana and Florida, prohibits out-of-state wineries from directly shipping alcohol to consumers while Texas wineries are permitted to do so.[261] The trial court in *Dickerson v. Bailey*[262] tackled the constitutionality of the state law which prohibited Texans from importing for personal consumption more than three gallons of wine without a permit, unless that resident personally transported the wine into the state.[263] Initially, the district court held that the

257. *Id.* at 1109. The panel noted that, under Florida's law, domestic producers must ship by their own or by leased vehicles and cannot use common carriers. *Id.* Thus, even if Florida's law is unconstitutional, out-of-state producers could not ship by common carrier such as Federal Express. *Id.* It would seem impractical for distant producers to ship to Florida via their own or leased vehicles, so this is an meaningless victory for the consumer.

258. *Id.* at 1110. The Court of Appeals also noted that the state's concern about alcohol sales to minors could be achieve by an alternative, namely by imposing labeling requirements and enforcing criminal penalties.

259. *Id.* at 1114-1115.

260. *Bainbridge*, 311 F.3d at 1115-16.

261. TEX. ALCO. BEV. CODE ANN. § 107.12 (Vernon 2005). Unlike Indiana and Florida, Texas does not expressly prohibit all direct shipment to consumers. *See* TEX. ALCO. BEV. CODE ANN. §§ 16.09(e)(e), 54.02(3) (Vernon 2005). However, Texas residents are limited to three gallon shipments from out-of-state wineries. *Id.*

262. Dickerson v. Bailey, 87 F.Supp.2d 691 (S.D. Tex. 2000), *aff'd* 212 F.Supp.2d 673 (S.D. Tex. 2002).

263. TEX. ALCO. BEV. CODE ANN. § 107.07 (Vernon 2005). The relevant portions of § 107.07 provide:

> (a) A Texas resident may import for his own personal use not more than three gallons of wine without being required to hold a permit. . . . A person importing wine . . . under this subsection must personally accompany the wine . . . as it enters the state.
>
> (f) . . . Any person in the business of selling alcoholic beverages in another state or country who ships or causes to be shipped any alcoholic beverage directly to any Texas resident under this section is in violation of this code.

Any § 107.07 violation is punishable as crimes under § 1.05. TEX. ALCO. BEV. CODE ANN. § 1.05.

Texas law violated the Commerce Clause and was not saved by the Twenty-first Amendment because it failed to serve a core concern which the Amendment was intended to protect.[264] The court looked at the evolution of state liquor regulations, followed by an analysis of the relationship between the Commerce Clause and the Twenty-first Amendment, and found that there is "no bright line between federal and state powers over liquor."[265] Using the Supreme Court's two-tiered balancing test,[266] the court found that the statute facially discriminated against out-of-state wineries by requiring them to go through Texas retailers in order to reach consumers as direct shipments to consumers was prohibited.[267] The statutory scheme benefited Texas wholesalers and retailers while negatively impacting Texas consumers through a limited wine selection and higher prices for wines.[268] Because the statute protects in-state liquor wholesalers and retailers at the expense of interstate trade, the court applied the stricter rule of invalidity found in *Bacchus*.[269] The court found that the state of Texas did not provide a legitimate local interest that could not have been preserved by other non-discriminatory means.[270] Finally, the court looked to whether the statute was saved by the Twenty-first Amendment, and found that the statute served no particular temperance goal since "Texas residents can become as drunk on local wines or on wines of large out-of-state suppliers able to pass into the state through its distribution system."[271] Therefore, the Twenty-first Amendment did not save the statute from being declared unconstitutional under the dormant Commerce Clause.

However, when Indiana's decision was published, Texas was moved to reconsider its district court decision on appeal.[272] There were several facets of

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264. *Dickerson*, 87 F.Supp.2d at 710.

265. *Id.* at 706, *quoting* California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980).

266. *Id.*, *quoting* Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 714 (1984). The court is to determine "whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the state regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies." *Id.* The courts have increasingly stressed federal interests and scrutinized the actual purpose behind the state's law. Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 275 (1984).

267. *Dickerson*, 87 F.Supp.2d at 709-710.

268. *Id.* at 710.

269. *Id.* The court uses *Bacchus,* as opposed to the more flexible approach in *Pike*, in considering the practical effect and relative burden on interstate commerce, looks to whether legitimate state objectives are credibly advanced, whether there is patent discrimination against interstate commerce, and whether the effect on interstate commerce is direct or incidental. *Bacchus*, 468 U.S. at 270, *citing* Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978).

270. *Dickerson*, 87 F.Supp.2d at 710.

271. *Id.*

272. Dickerson v. Bailey, 212 F.Supp.2d 673, 675-77 (S.D. Tex. 2002). The Seventh Circuit reversed a district court case upon which the Texas district court relied in forming its judgment. Bridenbaugh v. O'Bannon 78 F.Supp.2d 828 (N.D.Ind. 1999) (holding that the statute violated the Commerce Clause because permits to distribute alcohol in Indiana were not given to out-of-state residents and that the statute's purpose was not temperance, the core concern of the Twenty-first

the Indiana decision about which the Texas court was skeptical. First, the Seventh Circuit's reliance upon the text and history of the Twenty-first Amendment and its relationship with the Commerce Clause was unreliable.[273] Second, the Seventh Circuit failed to follow Supreme Court precedent which requires that a facially discriminatory state regulation of alcohol must be closely related to a core concern of the Twenty-first Amendment.[274] The Seventh Circuit also failed to address the fact that in-state retailers could deliver wine directly to consumers, but that out-of-state wineries had to go through licensed Indiana wholesalers.[275] The Texas court found solace when noting that Florida's court went through the same analysis as the district court.[276]

The court noted that recent Supreme Court decisions interpreted the Twenty-first Amendment with the Commerce Clause, rather than literally interpreting the Twenty-first Amendment as not limited by the dormant Commerce Clause.[277] Further, the state of Texas failed to show either that the economic advantage given in-state producers served a core concern of the Twenty-first Amendment, or that there was no available non-discriminatory alternative regulation.[278] Once again, the district court, upon reconsideration, found that the Texas statute discriminated against interstate commerce and was not saved by the Twenty-first Amendment.[279] The defendants appealed to the

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Amendment). The Seventh Circuit concluded that statutes prohibiting direct shipments from out-of-state sellers to Indiana consumers were within the state's powers under the Twenty-first Amendment. Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 854 (7th Cir. 2000), *cert. denied sub nom.* Bridenbaugh v. Carter, 532 U.S. 1002 (2001).

273. *Dickerson*, 212 F.Supp.2d at 681-82. First, the court in *Bridenbaugh* recognized that the view of the Twenty-first Amendment has undergone modification in recognition of some significant limitations placed on the states' regulation of the importation and distribution of alcohol by the commerce clause, among other constitutional provisions. *See, e.g.*, *Bacchus*, 468 U.S. at 274 ("Despite broad language in some of the opinions of this Court written shortly after ratification of the Amendment, more recently we have recognized the obscurity of the legislative history of § 2 . . . . No clear consensus concerning the meaning of the provision is apparent.") (citations and footnotes omitted). Second, Judge Easterbrook did not discuss the last forty years of Supreme Court jurisprudence relating to the balancing and harmonizing of the dormant Commerce Clause and the Twenty-first Amendment, thereby rejecting the "core concerns" analysis under the Twenty-first Amendment. *Dickerson*, 212 F.Supp.2d at 682. Finally, the legislative history of the ratification debates fails to reveal clearly any unified Congressional intent in enacting the section. *Id.* at 680-81. The Seventh Circuit resolved this challenge by narrowly construing Section 2 of the Twenty-first Amendment and focusing on what he viewed as Indiana's absolute right under the Twenty-first Amendment to regulate the importation and distribution of liquor to establish its three-tier system in order to collect tax revenue. *Id.* at 695.

274. *Id.* at 682.

275. *Id.* at 685-686.

276. *Dickerson*, 212 F.Supp.2d at 687. The Florida court in Bainbridge v. Bush, 148 F.Supp.2d 1306, 1310 (M.D. Fla. 2001), *citing* Dickerson v. Bailey, 87 F.Supp.2d 691, 693 n.2 (S.D.Tex. 2000), applied the same analysis as the Texas district court did in examining (1) whether Florida's statute violated the Commerce Clause, and if so, (2) whether the statute was saved by the Twenty-first Amendment.

277. *Id.* at 694.

278. *Id.* at 695.

279. *Id.*

Fifth Circuit where Judge Weiner held that the challenged statute violated the Commerce Clause and that the Twenty-First Amendment did not save the "economically discriminatory provisions" of the Texas statutory scheme.[280] The Fifth Circuit therefore reaffirmed its district court decision that the Texas ban on direct-shipment from out-of-state wineries is in violation of the Commerce Clause.[281]

4. North Carolina (Fourth Circuit)

North Carolina is another state which prohibited direct shipment to consumers from an out-of-state winery while permitting in-state wineries to do so.[282] Eight North Carolina residents, a California winery, and a Michigan resident filed an action challenging the constitutionality of the North Carolina law.[283] North Carolina, like many other states, regulates the distribution of alcohol through a three-tiered system.[284] While most alcohol passes through the three tiers, local wine is exempted from this distribution protocol.[285] North Carolina's alcoholic beverage code states that it is unlawful to "manufacture, sell, transport, import, deliver, furnish, purchase, consume, or possess any alcoholic beverages except as authorized by the ABC law," and the direct shipment of alcohol from out-of-state sources to in-state residents is prohibited.[286] However, North Carolina wineries are exempted from this

280. Dickerson v. Bailey, 336 F.3d 388, 410 (5th Cir. 2003).

281. *Id.* at 398. "[T]hat which we call discrimination by any other name would still smell as foul." *Id.* The Fifth Circuit found it patently obvious that the Texas statute allows in-state wineries to circumvent the state's three-tiered distribution system, and both sell and ship directly to consumers, while preventing out-of-state wineries the same privileges. *Id.* The Fifth Circuit also noted that Judge Easterbrook in *Bridenbaugh* properly interpreted the relationship between the dormant Commerce Clause and the Twenty-first Amendment. *Id.* at 401. Unlike the Florida and Texas courts, the Seventh Circuit did not confront the issue of whether the statute discriminated against out-of-state wineries, rather the court confronted out-of-state wineries who were seeking the same "preferential benefits that Texas grants to its in-state wineries." *Id.* The exemptions sought in *Bridenbaugh* were not granted to in-state competition. *Id.* Therefore, had Judge Easterbrook granted the out-of-state wineries the ability to circumvent the three-tiered distribution system, out-of-state wineries would have had a trade advantage over in-state wineries. *Id.*

282. N.C. GEN. STAT. §§ 18B-102, 18B-102.1, 18B-109 (2005).

283. Beskind v. Easley, 197 F.Supp.2d 464, 475-76 (W.D. N.C. 2002) *aff'd in part, vacated in part*, 325 F.3d 506 (4th Cir. 2003) (upholding the district court's conclusion that North Carolina's ABC laws unconstitutionally discriminated against interstate commerce, but vacating its judgment insofar as it declared five statutes unconstitutional and enjoined their enforcement). Specifically, the California winery would violate N.C. GEN. STAT. §§ 18B-102(a) and 102.1(a) if they filled the shipping requests of a North Carolina resident, and the Michigan resident who would send gifts of wine to family in North Carolina would be in violation of N.C. GEN. STAT. §§ 18B-102(a) and 18B-109(a). *Id.* at 466 n.1 and n.2.

284. *Id.* at 466.

285. *Id.*

286. N.C. GEN. STAT. §§ 18B-102, 18B-102.1 (2005).

prohibition on direct shipment and may circumvent both the wholesalers and the retailers and sell direct to consumers.[287]

The court first concluded that the regulation was a "relatively cut and dry example" of direct discrimination on out-of-state wineries.[288] The court then applied the established Twenty-first Amendment core concern analysis and concluded that the state had not provided any reason for the favoritism provided to in-state wineries.[289] Although the state proffered numerous legitimate reasons for the existence of the alcohol beverage code, such as efficient administration of tax collection, safety, etc., the state failed to show sufficient reason for the exception of in-state wineries.[290] Therefore, the court reasoned that economic protectionism is the most likely explanation for the system, and held the law in violation of the Commerce Clause.[291]

Like the district court in Texas, this court also assessed the implications of Indiana's decision. However, rather than criticizing the decision, this court distinguished the Indiana case on the facts.[292] Indiana had determined its law was not discriminatory because, although it prohibited direct shipment from an out-of-state winery, the law applied equally to in-state sources; all alcohol must pass through Indiana's three-tiered system.[293] North Carolina law, on the other hand, favored in-state wineries over out-of-state wineries by allowing the former to ship directly to consumers, but not the latter.[294]

The Court of Appeals approached its review in the same analytical framework established by the Supreme Court.[295] The court agreed that a facial examination of North Carolina law leaves no doubt that in-state wineries are protected and in fact benefit from its existence, while out-of-state manufacturers are burdened.[296] The court agreed that such discrimination violates "a central

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287. N.C. GEN. STAT. §§ 18B-1001(4), 1101 (2005); *Beskind*, 197 F.Supp.2d at 467.

288. *Beskind*, 197 F.Supp.2d at 471. The district court noted that, in theory, the law permitted consumers to purchase wine directly from out-of-state producers. *Id.* However, since the process for doing so was so cumbersome, the law had a "chilling effect" on such purchases and thereby placed a "greater burden on goods produced out-of-state than on goods produced in-state." *Id.*

289. *Id.* at 472-74.

290. *Id.* at 474.

291. *Beskind*, 197 F.Supp.2d at 475-76.

292. *Id.* at 474.

293. *Id.* at 474-75.

294. *Id.* at 475.

295. Beskind v. Easley, 325 F.3d 506, 513-14 (4th Cir. 2003). In contrast, the analytical approach of the Seventh Circuit used the "text and history" to supply the context for § 2. *See* Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 851 (7th Cir. 2000).

296. *Id.* at 515. Out-of-state wineries shipping wine into North Carolina, although authorized to operate under a nonresident wine vendor permit, must still sell their products to a licensed wholesaler in the State and have that wine distributed only through North Carolina's three-tiered structure. N.C. GEN. STAT. §§ 18B-1114, 18B-102.1, 18B-1101(3) (2005). Also, North Carolina's ABC laws expressly forbid the direct shipment of wine from out-of-state sources to North Carolina residents who are not licensed wholesalers. N.C. GEN. STAT. §§ 18B-1114, 18B-102.1, 18B-1101(3) (2005). In contrast, licensed in-state wineries may sell directly to consumers without

tenet of the Commerce Clause."[297] Additionally, the court recognized that there were two non-discriminatory alternatives available: ban in-state direct shipment of wine, or permit direct shipment from an out-of-state winery to a particular location in order to ensure tax collection.[298] Thus, the question remained whether the discriminatory code served a core concern of the Twenty-first Amendment.[299] The State, "[w]hen pressed for an explanation for th[e] discriminatory treatment, other than the promotion of local industry and protectionism," only offered that it was possible to regulate in-state wineries without the three-tiered system, as opposed to out-of-state wineries.[300] The State posited that direct sales, albeit from in-state wineries, were as tightly regulated as the three-tiered system; the Fourth Circuit found that the State's rationale undercut the very purpose of the three-tiered system.[301] The Court then concluded that the statutes did not promote a Twenty-first Amendment core concern.[302]

The Court of Appeals decided that the appropriate remedy was to remove the provision creating a local preference, and leave in place the three-tiered system.[303] It reasoned that the State would wish for the court to take the least destructive course for the current regulatory scheme which had been put in place pursuant to its powers under the Twenty-first Amendment.[304] Although this decision frustrated the plaintiffs in their quest for boutique wine, the decision was soundly based on the plaintiff's right to challenge discriminatory interstate trade practices.[305]

5. Michigan (Sixth Circuit)

Michigan, like the other states thus far discussed, also prohibited out-of-state wineries from shipping directly to Michigan residents, but allowed Michigan

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distributing their wine through the three-tiered structure. N.C. GEN. STAT. §§ 18B-1114, 18B-102.1, 18B-1101(3) (2005).

297. *Beskind*, 325 F.3d at 515.

298. *Id.* at 515-16.

299. *Id.* at 516.

300. *Id.*

301. *Id.* at 516-17.

302. *Beskind*, 197 F.Supp.2d at 517.

303. *Id.* at 519.

304. *Id.* The decision put North Carolina's alcohol beverage code in the position it was in pre-1981, prior to the inclusion of the discriminatory provisions. *Id.*

305. *Beskind*, 197 F.Supp.2d at 519-20.

> While our conclusion to focus on the single provision, which when added to the State's laws created their discriminatory effect, frustrates the plaintiffs' efforts to purchase wine directly from out-of-state wineries and to ship wine directly into North Carolina, their right is not to void a law protected by the Twenty-first Amendment but rather to eliminate discrimination in interstate commerce.

Id.

wineries to do so with minimal regulatory oversight.[306] An out-of-state winery, wine connoisseurs, and wine journalists challenged Michigan's alcohol beverage regulations as violative of the dormant Commerce Clause because it discriminated against out-of-state wineries. The District Court for the Eastern District of Michigan entered a summary judgment in favor of the state, and plaintiffs appealed.[307]

The Sixth Circuit applied the "traditional" dormant Commerce Clause analysis,[308] and held that the State had both discriminated against out-of-state wineries in violation of the Commerce Clause, and failed to advance the Twenty-first Amendment through its regulatory scheme.[309] The court considered the following facts as suggestive that Michigan's laws were discriminatory. First, Michigan wineries could avoid the price mark-ups of wholesalers and retailers, whereas out-of-state wineries could not avoid the three-tiered distribution system and its inherent price mark-ups.[310] Second, licenses for out-of-state wineries to sell to wholesalers and retailers were substantially more expensive than licenses for Michigan wineries.[311] Finally, Michigan wineries had greater access to the

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306. *See* Heald v. Engler, 2001 U.S. Dist. LEXIS 24826, No. 00-CV-71438-DT (E.D. Mich. 2001)(unreported), *rev'd*, 342 F.3d 517, 521 (6th Cir. 2003). The district court noted that this distinction between in-state and out-of-state wineries could only be understood by reading a number of provisions in conjunction with each other. *Id.* at *4, n.1.

> [The distinction] can be gleaned from various Michigan Liquor Control Commission regulations, which are codified within the Michigan Administrative Code. [MCL §]436.1057 states that "[a] person shall not deliver, ship, or transport into this state beer, wine, or spirits without a license authorizing such action. . . ." The only applicable license, an "[out-of-state] seller of wine license," may according to [MCL §]436.1705(2)(d) be obtained by a "manufacturer which is located outside of this state, but in the United States, and which produces and bottles its own wine." However, under [MCL §]436.1719(4) the holder of such a license may ship wine "only to a licensed wholesaler at the address of the licensed premises except upon written order of the commission." In answers to interrogatories, a representative of the Michigan Liquor Control Commission indicates that "[a]t present, there is no procedure whereby an out-of-state retailer or winery can obtain a license or approval to deliver wine directly to Michigan residents. . . ."

In contrast, the Michigan Liquor Control Commission indicates that the

> ability to deliver wine to the consumer is available to winemakers licensed in Michigan, inasmuch as under the provisions of MCL §436.1113(9) these licensees are permitted to sell at retail the wines they manufacture. . . . A licensed Michigan winemaker may deliver their [sic] own products to customers without an SDM [specially designated merchant] license . . . .

Id.

307. Heald v. Engler, 342 F.3d 517, 521 (6th Cir. 2003).

308. *Id.* at 525. *See also* Bainbridge v. Turner, 311 F.3d 1104, 1108 (11th Cir. 2002); Dickerson v. Bailey, 336 F.3d 388, 400 (5th Cir. 2003); Beskind v. Easley, 325 F.3d 506, 514 (4th Cir. 2003).

309. *Heald*, 342 F.3d at 527.

310. *Id.* at 521, 525.

311. *Id.* at 521. The cost of a license to an out-of-state winery that enables it to sell to a Michigan wholesaler is $300, while an in-state winery need only purchase a $25 licensing fee that will enable the winery to ship directly to Michigan residents. *Id.*

Michigan consumer market via direct-to-consumer shipments.[312] The court further found that the State had provided no evidence that would show that the discrimination would advance the core state powers reserved by the Twenty-first Amendment.[313] As such, the Sixth Circuit reversed the district court's judgment and remanded the case with instructions to enter judgment for the plaintiff.[314]

6. New York (Second Circuit)

New York's district court also confronted a "Wine War" case, brought by both out-of-state wineries and in-state consumers, which challenged the constitutionality of the State's Alcohol Beverage Control Law §102(1)(a), which involved a First Amendment challenge, and §102(1)(c), which required that all shipment of wine into New York go through a licensed individual.[315] New York's alcohol beverage code also contains the following exceptions to the three-tiered distribution system: (i) a "farm-winery" exception that allows in-state farm wineries to ship directly to consumers;[316] (ii) an exception that allows in-state wineries to make a direct delivery to consumers for another in-state winery;[317] (iii) an exception for in-state commercial wineries to obtain an additional license of retail which permits direct sales and shipments to consumers;[318] and (iv) an exception which permits delivery in vehicles owned by a licensed in-state winery or hired from a trucking company registered with New York's liquor authority.[319] Using the two-step approach established by the Supreme Court to determine whether a law violates the dormant Commerce Clause, the court first determined that the law is facially discriminatory.[320] Then, the court determined whether the law was saved by the Twenty-first Amendment, and found that the law failed to satisfy the Twenty-first Amendment core temperance concern.[321] The court recognized the central concern of temperance (specifically, prohibiting alcohol sales to minors), but

312. *Id.*
313. *Heald*, 342 F.3d at 527.
314. *Id.* at 527-28. The Sixth Circuit absolved the district court by simply stating that the district court, in its analysis of Supreme Court jurisprudence, placed too much reliance on precedent that specifically upheld the three-tier distribution system as constitutional. *Id.* at 526; *see also* North Dakota v. United States, 495 U.S. 423, 431 (1990). Although the district court recognized that Michigan's distribution system discriminated against out-of-state wineries, the emphasis on *North Dakota* led the court to conclude that the distribution system was constitutional, and "cannot be characterized as 'mere economic protectionism,'" because the system furthered a Twenty-first Amendment "core concern." *Id.* at 527. Instead, the district court should have conducted the Supreme Court's more current two-tiered analysis. *Id.*
315. Sweedenburg v. Kelly, 232 F.Supp.2d 135 (S.D. N.Y. 2002).
316. N.Y. ALCO. BEV. CONT. LAW § 76-a (McKinney 2005).
317. *Id.*
318. N.Y. ALCO. BEV. CONT. LAW § 76 (McKinney 2005).
319. N.Y. ALCO. BEV. CONT. LAW § 105-9 (McKinney 2005).
320. *Sweedenburg*, 232 F.Supp.2d at 145.
321. *Id.* at 148.

concluded that there are non-discriminatory alternatives available, such as licensing and regulating out-of state wineries.[322] The court further found that the State failed to provide evidence that taxes on out-of-state sales could not be collected through a non-discriminatory alternative.[323] Summary judgment therefore was granted for the plaintiffs.[324]

On appeal, the Second Circuit reversed, holding that the direct shipment regulations fell within the authority afforded the state by the Twenty-first Amendment.[325] The court applied the same analytical approach the Seventh Circuit used in *Bridenbaugh,* in which the inquiry is based on the manner in which the Twenty-first Amendment impacts the dormant Commerce Clause.[326] The Second Circuit noted that their inquiry should be sensitive to the interaction of the Twenty-first Amendment and the Commerce Clause, specifically in light of the impact the Twenty-first has on the dormant Commerce Clause.[327] The Second Circuit court openly disagreed with the Supreme Court's precedent that the state power is limited to only the core concerns advanced by the Twenty-first Amendment and that the Twenty-first Amendment is subordinate to the dormant Commerce Clause when the two provisions conflict.[328] Taking the position that Section two of the Twenty-first Amendment specifically permits states to circumvent the dormant Commerce Clause providing that the authorities only regulate the "intrastate flow of alcohol," the court felt that New York's regulatory regime was well within the State's authority under the Twenty-first Amendment.[329] Additionally, the court could find no facts that suggested that New York's regulations favored local interests over out-of-state interests since all wineries are permitted to obtain a license to ship directly to consumers so

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322. *Id.* at 148-49.

323. *Id.* at 148. The court also expressed doubt that raising revenue was a central concern of the Twenty-first Amendment. *Id.*

324. *Sweedenburg*, 232 F.Supp.2d at 153.

325. Swedenburg v. Kelly, 358 F.3d 223, 239 (2nd Cir. 2004). The court also held that New York's regulatory scheme does not violate the Privileges and Immunities Clause. *Id.* at 240. However, section 102(1)(a) of N.Y. ALCO. BEV. CONT. LAW, insofar as it prohibits all commercial speech pertaining to the sale of alcoholic beverages directed to New York consumers by unlicensed entities, was held as violative of the First Amendment of the U.S. Constitution. *Id.* at 227.

326. *Id.* at 231.

327. *Id.* "This [Twenty-first Amendment] grant of authority should not, we think, be subordinated to the dormant Commerce Clause inquiry when the two provisions conflict." *Id.* at 233.

328. *Swedenburg*, 358 F.3d. at 233. The court felt that the Supreme Court's Twenty-first Amendment jurisprudence has only limited Section 2's authority to its plain language, meaning that "a state may regulate the importation of alcohol for distribution and use within its borders, but may not intrude upon federal authority to regulate beyond the state's borders or to preserve fundamental rights." *Id.* The court even goes so far as to say that "the drafters of the Twenty-first Amendment crafted section 2 to allow states . . . to circumvent dormant Commerce Clause protections, provided that that they were regulating the intrastate flow of alcohol." *Id.* at 237.

329. *Id.*

long as there is a physical presence in the state.[330] New York requires "that all wine be shipped through a New York warehouse" as a prerequisite to direct shipments to consumers.[331] Thus the court reversed part of the district court's decision which ruled the State's law as unconstitutional in light of the Commerce Clause.[332] The Supreme Court granted certiorari and the case was heard in the October 2004 term concurrently with the Michigan case.[333]

C. *The Supreme Court* - Granholm v. Heald

Granholm v. Heald[334] consolidated and decided challenges to the constitutionality of aspects of the Michigan and New York statutes governing intra and interstate wine shipment. Justice Kennedy, writing for five Justices,[335] summarized the issue as follows:

> These consolidated cases present challenges to state laws regulating the sale of wine from out-of-state wineries to consumers in Michigan and New York. The details and mechanics of the two regulatory schemes differ, but the object and effect of the laws are the same: to allow in-state wineries to sell wine directly to consumers in that State but to prohibit out-of-state wineries from doing so, or, at the least, to make direct sales impractical from an economic standpoint. It is evident that the object and design of the Michigan and New York statutes is to grant in-state wineries a competitive advantage over wineries located beyond the States' borders.[336]

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330. *Swedenburg*, 358 F.3d at 233. The court, however, recognized that the same "physical presence" regulatory scheme, as applied to any commodity other than alcohol, would generate a dormant Commerce Clause problem. *Id.*

331. *Id.* at 238. Even though out-of-state wineries will incur costs associated with establishing a presence in New York, a cost that an in-state winery can and does avoid, all wine must pass through a New York warehouse. *Id.* Therefore, the effect of these costs does not alter the legitimacy of the regulations under the Twenty-first Amendment. *Id.* The court recognizes this "presence" requirement merely as a safety net to which all wineries are held accountable. *Swedenburg*, 358 F.3d at 238.

332. *Id.* at 239.

333. Swedenburg v. Kelly, 541 U.S. 1062 (2004). *See also* http://www.supremecourtus.gov/orders/04grantednotedlist.pdf.

334. Granholm v. Heald, 125 S.Ct. 1885 (2005). The question under consideration was: "Does a state's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of § 2 of the Twenty-first Amendment?" *Id.* at 1891-2.

335. Justice Kennedy was joined by Justices Scalia, Souter, Ginsburg, and Breyer. Justice Stevens wrote a dissenting opinion that was joined by Justice O'Connor. Justice Thomas wrote a dissenting opinion that was joined by Justices Stevens and O'Connor and Chief Justice Rehnquist. This division of the Supreme Court's Justices, based upon a review of the decisions of 1993 to 2004, was unique. *See* Richard Saltalesa, *The Supreme Court Opens a Case of Vintage Arguments*, May 25, 2005, http://www.informit.com/articles/article.asp?p=169629&rl=1; *The Supreme Court, 2004 Term*, 119 Harv. L. Rev. 415, 424 (Nov. 2005).

336. *Granholm*, 125 S.Ct. at 1891-92 .

After reviewing the expansion of small wineries and the consolidation of the wholesaler ranks, a confluence that has kept small wineries out of the traditional three-tier distribution system, the opinion cited the Federal Trade Commission's conclusion that "[s]tate bans on interstate direct shipping represent the single largest regulatory barrier to expanded e-commerce in wine."[337]

The Michigan regulatory system permitted in-state wineries to acquire a license and thereafter make direct shipments to Michigan consumers.[338] Non-Michigan wineries were limited to a license that allowed sales only to wholesalers - it did not allow direct to consumer sales.[339] The New York scheme allowed New York wineries to direct ship wine made from New York grapes.[340] Non-New York wineries could be licensed to make direct sales to New York consumers if they opened a branch factory, office or storeroom in New York.[341]

Foreshadowing, albeit not subtlely, its ruling, the Court wrote:

> Time and again this Court has held that, in all but the narrowest circumstances, state laws violate the Commerce Clause if they mandate "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[342] This rule is essential to the foundations of the Union. The mere fact of nonresidence should not foreclose a producer in one State from access to markets in other States.[343]

Turning to the Michigan statute under review, Justice Kennedy wrote:

> 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. The differential treatment requires all out-of-state wine, but not all in-state wine, to pass through an in-state wholesaler and retailer before reaching consumers. These two extra layers of overhead increase the cost of out-of-state wines to Michigan consumers. The cost differential, and in some cases the inability to secure a wholesaler for small shipments, can effectively bar small wineries from the Michigan market.[344]

Discussing the discriminatory operations and effects of the New York statute, he wrote:

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337. *Id.* at 1893; *citing* FTC Anticompetitive Barriers.
338. *Granholm*, 125 S.Ct. at 1894.
339. *Id.*
340. *Id.*
341. *Id.*
342. *Id.* at 1895, *quoting* Oregon Waste Systems, Inc. v. Dept. of Environmental Quality of Oregon, 511 U.S. 93, 99 (1994).
343. *Id.*, *citing* H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539 (1949).
344. *Granholm*, 125 S.Ct. at 1896.

The New York regulatory scheme differs from Michigan's in that it does not ban direct shipments altogether. Out-of-state wineries are instead required to establish a distribution operation in New York in order to gain the privilege of direct shipment. This, though, is just an indirect way of subjecting out-of-state wineries, but not local ones, to the three-tier system. New York and those allied with its interests defend the scheme by arguing that an out-of-state winery has the same access to the State's consumers as in-state wineries: All wine must be sold through a licensee fully accountable to New York; it just so happens that in order to become a licensee, a winery must have a physical presence in the State. There is some confusion over the precise steps out-of-state wineries must take to gain access to the New York market, in part because no winery has run the State's regulatory gauntlet. New York's argument, in any event, is unconvincing.

The New York scheme grants in-state wineries access to the State's consumers on preferential terms. The suggestion of a limited exception for direct shipment from out-of-state wineries does nothing to eliminate the discriminatory nature of New York's regulations. In-state producers, with the applicable licenses, can ship directly to consumers from their wineries. Out-of-state wineries must open a branch office and warehouse in New York, additional steps that drive up the cost of their wine. For most wineries, the expense of establishing a bricks-and-mortar distribution operation in 1 State, let alone all 50, is prohibitive. It comes as no surprise that not a single out-of-state winery has availed itself of New York's direct-shipping privilege. We have "viewed with particular suspicion state statutes requiring business operations to be performed in the home State that could more efficiently be performed elsewhere." New York's in-state presence requirement runs contrary to our admonition that States cannot require an out-of-state firm "to become a resident in order to compete on equal terms."

In addition to its restrictive in-state presence requirement, New York discriminates against out-of-state wineries in other ways. Out-of-state wineries that establish the requisite branch office and warehouse in New York are still ineligible for a "farm winery" license, the license that provides the most direct means of shipping to New York consumers. ("No licensed farm winery shall manufacture or sell any wine not produced exclusively from grapes or other fruits or agricultural products grown or produced in New York state"). Out-of-state wineries may apply only for a commercial winery license. Unlike farm wineries, however, commercial wineries must obtain a separate certificate from the state liquor authority authorizing direct shipments to consumers and, of course, for out-of-state wineries there is the additional requirement of maintaining a distribution operation in New York. New York law also allows in-state wineries without direct-

> shipping licenses to distribute their wine through other wineries that have the applicable licenses. This is another privilege not afforded out-of-state wineries.[345]

Still, it was recognized that although the Twenty-first Amendment did not protect the statutes at question from Commerce Clause analysis,[346] they were assessed as to whether they "advance[d] a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."[347] Michigan and New York maintained that keeping alcoholic beverages out of the hands of minors and tax collection were sufficient justifications.[348] However, the access of minors to alcoholic beverages was rejected due to a lack of evidence that they sought alcoholic beverages through this channel.[349] Furthermore, the differentiation of intrastate direct shipments that were permitted, and interstate direct shipments that were forbidden, undercut the argument as to minors as they would need only to order home state products.[350] The tax collection justification was rejected as well for two reasons: there exist alternative means of collection, such as by permitting and self-reporting; and because federal laws allow federal permit revocation for violation of state law, by which to address the issue.[351]

With this ruling the various lower court decisions striking down discriminatory interstate shipment statutes are buttressed, those allowing such laws to stand are undercut, and the laws that have to date been unchallenged are open to assault.[352]

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345. *Id.* at 1896-97 (internal citations omitted).

346. The proponents of the Michigan and New York laws sought a determination that alcoholic beverages have been removed from the scope of the Commerce Clause by the Twenty-first Amendment. *Id.* at 1902. At the oral argument of *Granholm*, it was asserted that "The history of the Twenty-[f]irst Amendment in the Webb-Kenyon Act clearly demonstrate – the purpose of the Webb-Kenyon Act was to eliminate alcohol shipments from the Commerce Clause." *Granholm*, 125 S.Ct. 1885, Oral Argument, 2004 WL 2937830, 39 (U.S. Nov. 7, 2004).

347. *Granholm*, 125 S.Ct. at 1905, *quoting* New Energy Co. of Ind., 486 U.S. 269, 278 (1988).

348. *Id.*

349. *Id.* at 1905-06.

350. *Id.* at 1906.

351. *Id.* at 1906-07. The Court also observed: "These federal remedies, when combined with state licensing regimes, adequately protect States from lost tax revenue. The States have not shown that tax evasion from out-of-state wineries poses such a unique threat that it justifies their discriminatory regimes." *Granholm*, 125 S.Ct. at 1906-07.

352. Michigan and New York initially responded to the *Granholm* decision in diametrically opposed manners. Michigan liquor control authorities have stated their desire for, and legislation has been introduced, providing that all direct shipments will be prohibited. *See* Linda Greenhouse, *Court Lifts Ban on Wine Shipping*, NEW YORK TIMES, May 17, 2005 at A ("Hours after the ruling, the head of Michigan's Liquor Control Commission, Nida Samona, said at a telephone news conference that she would urge the state's Legislature to prohibit all direct sales."); Tara Q. Thomas, *Direct Shipping*, 24 WINE AND SPIRITS 12 (August, 2005) ("[S]hortly after the ruling was announced, Michigan Liquor Control Commissioner Nida Samona said she would pursue a ban on intrastate wine shipments."). New York has amended its laws and now allows inter and intrastate shipments, and that legislation has been approved by the Michigan House (H.B. 4959). Michigan's prohibitions on inter-state shipments have been struck down, it being ordered that foreign wineriese be permitted to participate in the market on the same terms as are inerstate wineries. *Heald v.*

V. THE VIABILITY (?) OF KENTUCKY'S REGULATION OF INTERSTATE WINE SHIPMENTS.

Kentucky's regulatory system for alcoholic beverages in general, and wine in particular, is largely typical of that seen in many other states, with the atypical degree to which the state has not entirely thrown off Prohibition.[353] A three-tier

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Granholm, Judgment entered November 3, 2005. Legislation proposing to open Michigan to interstate direct sales as well as proposals t eliminate all interstate and intrastate sales was proposed by Michigan legislature. Amy Lane, *Bottle Battle Hits Legislature,* CRAINS DETROIT BUSINESS (June 13, 2005) (2005 WLNR 9488161). The proponents of permitting both interstate and intrastate wine sales prevailed, and on December 15, 2005 the governor signed the legislation. Michigan Public Act 268 of 2005. *See also* Press Release, Governor Granholm Signs Wine Shipment Legislation, Supports Michigan's Wine Industry (December 15, 2005). New York has amended its laws and now allows inter and intrastate shipments. *See* Bob Tedeschi, *For New York Wineries and Consumers, the Floodgates are Open*, NEW YORK TIMES, July 25, 2005, at C6. Still, at least as of shortly before this article wen to press, bureaucratic impediments have prevented New Yorkers from enjoying the benefits of this new law. *See* Danny Hankin, *After its Time, Wine by Mail is Still Untried*, A29 NEW YORK TIMES (December 9, 2005).Other states have responded as well. Connecticut has amended its laws to permit interstate shipment (*New York, Connecticut Enact Laws To Allow Direct-To-Consumer Wine Sales*, http://www.internetretailer.com/dailyNews.asp?id=15494; Eric Arnold, *Connecticut Passes Direct-Shipping Legislation*, WINE SPECTATOR (June 17, 2005)) and limitations in Ohio have been struck down after liquor control authorities dropped efforts to protect the law. Stahl v. Taft, Case No. 2:03cv00597, (S.D. Ohio 2005), Agreed Order and Injunction entered July 2005. *See also Judge Approves Settlement Allowing Direct Wine Shipment in Ohio*, July 21, 2005, http://www.rednova.com/news/display/?id=182209&source=r_science; Howard G. Goldberg, *Ohio Opened to Out-Of-State Wine Shipments*, July 21, 2005, http://www.decanter.com/news/66351.html?aff=rss; Eric Arnold and Dana Nigro, *Court Orders Ohio to Allow Direct-to-Consumer Wine Shipments*, WINE SPECTATOR (July 20, 2005). Rhode Island has forbidden all direct shipments, as has Louisiana. *See* Scott Sternberg, *Wine Makers Decry New Law*, THE TIMES-PICAYUNE, July 15, 2005, *available at* http://www.nola.com/business/t-p/index.ssf?/base/money-2/1121403723198230.xml. A lawsuit has been filed challenging the Arizona law. *See* Dana Nigro, *New Lawsuit Challenges Arizona's Wine-Shipping Ban*, THE WINE SPECTATOR (September 20, 2005). The Massachusetts laws have been declared unconstitutional. *See* Eric Arnold and Dan Nigro, *Federal Judge Rules Massachusetts Direct-Shipping Laws Are Unconstitutional*, THE WINE SPECTATOR (October 11, 2005). In response, efforts are now underway in Massachusetts to adopt more stringent rules upon wine shipments. *See, e.g.*, Jenn Avelson, *Pass the Pinot: Buying Wine From Home May Get Harder*, THE BOSTON GLOBE / BOSTON.COM (September 18, 2005). In *Cutner v. Newman*, Pennsylvania laws precluding direct shipment by foreign wineries even as domestic wineries could engage in direct sales were struck down as unconstitutional under the guidance of *Granholm*, and enforcement of those laws against out of state wineries has been enjoined. *Cutner v. Newman*, Memorandum and Order, Judgment entered November 9, 2005 (E.D. Pa. Civ. Act. No. 05-03007-JF). In addition to the *Huber* lawsuit that challenges certain aspects of Kentucky law regulating wine shipments and sales (*see infra* note 381-395), there are currently pending challenges to certain statutes in Arizona (*Black Star Farms, L.L.C. v. Morrison*, 2:05cv02620 (D. Ariz.; amended complaint filed September 23, 2005)); Arkansas (*Beau v. Moore*, 4:05-cv-903 (E.D. Ark.; complaint filed June 22, 2005)); Delaware (*Hurley v. Minner*, 1:05-cv-0735 (S.D. Ind.; complaint filed May 18, 2005)); Maine (*Cherry Hill Vineyards v. Baldacci*, 1:05-cv-153 (D. Me.; complaint filed September 27, 2005)); and Maryland (*Bushnell v. Ehrlich*, 1:05-cv-03128-CCB (D. Md.; complaint filed November 18, 2005)).

353. Of Kentucky's one-hundred twenty counties, as of this writing, fifty-four are entirely dry (*see also* KY. REV. STAT. ANN. § 242.230 (West 2005), defining effect of dry territory), and another thirty-six are only partially wet (sometimes referred to as "moist" counties). *See* KY ABC,

system for the distribution and sale (as well as mark-ups[354]is mandated.[355] Liquor and wine may be sold in package stores (which are generally closed on Sunday[356]), while beer is sold in package stores as well as in grocery and convenience stores. Limited intrastate shipment of wine to consumers is permitted,[357] and certain in-state wineries are permitted to make limited sales to retailers.[358] Intrastate sales that do not meet the requirements of a permissible sale are treated as misdemeanors for the first two violations.[359] Interstate

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Licensing available at http://abc.ppr.ky.gov/licensing.html. Of the moist counties, three are so only because of the presence of a winery, and another eight restrict sales to restaurants with seating for at least one-hundred diners and with food sales being at least 70% of revenues. *Id.* The right of counties and localities to make wet/moist/dry determinations is enshrined in Section sixty-one of the Kentucky Constitution. Alcoholic beverages may be manufactured in dry territories as long as they are shipped from there to locations where they may be lawfully sold. KY. REV. STAT. ANN. § 242.300 (2005). *See also* KY. REV. STAT. ANN. § 242.290 (West 2005) (permitting shipment of alcoholic beverages through a dry territory to a place where they may be lawfully sold).

354Wholesale mark-ups are estimated to be typically 18-25%. FTC, Anticompetitive Barriers at n. 86 and accompanying text. Retailer markup is typically another 25%. Florida Wine Company Goes Online to Boost Sales, Miami Herald, December 17, 1999, available at 1999 WL 28718088. *See also*, Alan E. Wiseman and Jerry Ellig, Market and Nonmarket Barriers to Internet Wine Sales: The Case of Virginia, 6 Business and Politics 1 at 3 (2004):

> [T]he case of interstate wine sales and direct shipment bans could arguably be viewed as a textbook example of interest-group rent-seeking. Distributors, wholesales, and other private interests have arguably applied political pressure to general regulatory structures that benefit them. Riekhof and Sykuta (2003), for example, have analyzed the changes in direct shipment laws 1986 and found that private economic interests, ,more so than public welfare concerns, seem to have driven most of the changes in direct shipment bans.

(citations omitted).

355. For example, in the wine context, a licensed vintner may sell to other vintners and wholesalers (KY. REV. STAT. ANN. § 243.130(1) (West 2005)), while a licensed wholesaler may purchase only from licensed wineries and other licensed wholesalers and may sell only to other licensed wholesalers and to retailers. KY. REV. STAT. ANN. § 243.170 (West 2005). A licensed retailer may purchase only from a licensed wholesaler. KY. REV. STAT. ANN. § 244.167(1)(c) (West 2005). Vertical integration of the industry is prohibited by a variety of means including inconsistent license rules (*see, e.g.*, KY. REV. STAT. ANN. § 243.110(1) (West 2005); *see also* LESLIE W. ABRAMSON, 10 KENTUCKY PRACTICE (2nd Ed.) § 22.4) and prohibitions upon a producer or wholesaler holding an interest in a retailer, whether by equity ownership, ownership of the realty upon which a retailer operates, or financing facilities. 27 U.S.C. § 205(b) (2005); 27 C.F.R. § 6.1 et seq. (2005); 27 C.F.R. § 8.1 et seq. (2005); KY. REV. STAT. ANN. §§ 244.240, 244.270 (West 2005). *See also* Levers v. Berkshire, 151 F.2d 935 (10th Cir. 1945) (a purpose of 27 U.S.C. § 205 is to prevent integration of retail and wholesale outlets of alcoholic beverages).

356. KY. REV. STAT. ANN. § 244.290(3) (West 2005). Sunday package sales are a matter of local law, and as of this writing are permitted in certain Northern Kentucky counties and in most of Louisville/Jefferson County. *See* Joseph Gerth, *Council OKs Sunday Liquor Sales*, COURIER-JOURNAL, July 29, 2005, at A1; Matt Batcheldor, *Suburbs Might Allow Sunday Liquor Sales*, COURIER-JOURNAL, August 3, 2005, at A1; Matt Batcheldor, *J'town Keeps Sunday Liquor Ban*, COURIER-JOURNAL, August 18, 2005, at A1. While there are statutory fines for certain businesses being opened on Sunday, and there is no exception for package stores, there is an exemption for tackle and bait shops. KY. REV. STAT. ANN. § 436.160(3) (West 2005).

357. *See* KY. REV. STAT. ANN. § 243.156 (West 2005).

358. *Id.*

359. KY. REV. STAT. ANN. § 242.990(1) (West 2005).

shipments to either consumers or to retailers are forbidden, and the second violation of the interstate shipment statute is a felony.[360] Limited on-site sales are also permitted for distillers and micro-breweries.[361] A March 6, 1997 letter from the Kentucky Department of Alcoholic Beverage Control provides that shipments of wine purchased from and at out-of-state wineries to Kentucky consumers are permissible.[362]

As have many states, Kentucky has in recent years seen an increase in wineries, a development accelerated in part by efforts to diversify farm economies that had been previously dependent upon tobacco.[363] Certain Kentucky wineries may qualify for either a "small winery license" or for a "farm winery license."[364] In either instance, the license may be issued only to a winery located in Kentucky making wine from fruit grown in Kentucky.[365] Holders of either of these licenses may bypass the wholesaler and sell, ship, and deliver wine directly to retail package shops, retail drink license holders, and individual consumers.[366] A Kentucky winery not holding either a small winery or a farm winery license may not sell directly to consumers or retail licensees, and no winery located out of Kentucky may make direct sales to customers or retailers.[367]

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360. KY. REV. STAT. ANN. § 244.165 (West 2005). Kentucky was the first state to adopt such a felony statute. *See* Dana Nigro, *Direct Shipping Timeline*, WINE SPECTATOR (May 16, 2005).

361. A "souvenir package" (defined at KY. REV. STAT. ANN. § 241.010(43) (West 2005)) may be sold on site at a Kentucky licensed distillery, provided it be of "Kentucky straight bourbon whiskey." The transfer from the distillery to the retail outlet located thereat must be treated as made through a licensed wholesaler for purposes of collecting taxes. KY. REV. STAT. ANN. § 243.0305 (West 2005) On premise sales by micro-breweries are permitted, as are direct deliveries to package and retail licensees by micro-breweries. KY. REV. STAT. ANN. § 243.157(1)(b) (West 2005).

362. Letter from Pamela Carroll Farmer, General Counsel, Department of Alcoholic Beverage Control, to Mr. Jack Underwood on March 6, 1997 interpreting 804 KY. ADMIN. REGS. 4:330 (available at http://admin.shipcompliant.com/Documents/North%20America/US/Prohibited/Kentucky/kentucky.pdf). As this letter predates 27 U.S.C. § 124 by some five years, the statute is not cited.

363. *See* Marcus Green, *Kentucky Grapes Filling Vines*, COURIER-JOURNAL, June 24, 2005, at A1 ("Vice ran cattle, tried vegetables and even raised ginsing to diversify his farm, but he believes grapes will replace the income he once found with tobacco."); Susan Reigler, *Wineries Stir Up Business with Concerts*, COURIER-JOURNEL, June 24, 2005, at E1 ("Proprietor and Winemaker Chuck Smith of Smith-Berry Winery is tending grapevines where tobacco once grew.") Marcus Green, *Ruling Could Aid Region's Wineries*, COURIER-JOURNAL, May 30, 2005, at D1 ("Chuck Smith and his wife, Mary Berry, are Henry County, Ky., farmers who ventured into wine-making five years ago when they saw a bleak future for tobacco.") *See also* Jerry Nelson, *A Wine Grows on the Prairie*, FARM JOURNAL, (Jan. 2002), *available at* http://www.agweb.com/news_show_news_article.asp?articleid=83605&newsca=GN.

364. KY. REV. STAT. ANN. 243.031 (West 2005).

365. KY. REV. STAT. ANN. §§ 241.010(46), 243.155(2), 243.156(2) (West 2005).

366. *See* KY. REV. STAT. ANN. §§ 243.155(2), 243.156(2) (West 2005).

367. KY. REV. STAT. ANN. § 243.020 (West 2005).

An exception to the prohibition of wine shipments from outside the state are shipments made pursuant to federal law.[368] In a limited involvement in the matter of interstate wine shipments, Congress has provided that interstate shipments of wine are expressly permitted during a period in which the Federal Aviation Administration has in effect "restrictions on airline passengers to ensure safety"[369] where (a) the purchaser was physically present at the winery at which the wine was purchased, (b) the winery was provided proof of legal age to purchase alcohol, (c) the shipment was marked to require an adult signature upon receipt, (d) the wine was purchased for personal use and not for resale, and (e) the purchaser could have lawfully brought the wine into their home state into which it is shipped.[370] There exist as well civil sanctions for improperly handled wine shipments.[371] Wine packages must be clearly labeled with the name of the shipper, the nature of the contents, and the quantity.[372] Common carrier employees/agents are subject to federal criminal penalty for delivery of alcoholic beverages to anyone other than the addressee or to anyone acting under a fictitious name.[373]

Before turning to an analysis of the various Kentucky limitations upon wine imports, another federal involvement in the direct shipment debate should be reviewed. The "Twenty-first Amendment Enforcement Act"[374] empowers the various state attorneys general to bring suit in federal court[375] against a person for violations of the state's alcoholic beverage control laws.[376] While not

368. *Id.*

369. This language refers to the more stringent limitations placed upon carry-on luggage post September 11, 2001. Under those guidelines, passengers are often unable to carry wine into the passenger compartment. 27 U.S.C. 124(a) (2005). *See also* Rich Cartiere, *Congress Approves Limited Direct Shipping for Winery Visitors to More States*, WINE MARKET REPORT, October 4, 2002, at 1.

370. 27 U.S.C § 124 (2005). *See also* Dana Nigro, *Congress Passes Measure Temporarily Easing States' Wine-Shipping Restrictions*, WINE SPECTATOR (Oct. 4, 2002). KY. REV. STAT. ANN. § 242.260 (West 2005) provides that no public or private carrier may bring alcoholic beverages into a dry territory. *See also* KY. REV. STAT. ANN. § 242.280 (West 2005). However, a person of legal age is not prohibited, for personal use, from possessing alcoholic beverages in a dry territory; it is simply that alcoholic beverages may not be bought or sold in that territory. *See* KY. REV. STAT. ANN. § 242.230 (West 2005). As an individual could carry wine into a dry territory, and as 27 U.S.C. § 124 permits the delivery, under the Supremacy Clause, presumably neither KY. REV. STAT. ANN. §§ 242.260 nor 242.280 (West 2005) will apply to prohibit the delivery.

371. 27 U.S.C. § 124(b) (2005).

372. 18 U.S.C. § 1263 (2005).

373. 18 U.S.C. § 1264 (2005).

374. 27 U.S.C § 122a (2005).

375. This statute was precipitated by Fla. Dept. of Bus. Reg. v. Zachy's Wine & Liquor, Inc., 125 F.3d 1399, 1405 (11th Cir. 1997), in which it was held there was no federal cause of action for violations of 27 U.S.C. § 122.

376. 27 U.S.C. § 122a(b) (2005) provides:

If the attorney general [defined at 27 U.S.C. § 122a(1)] has reasonable cause to believe that a person is engaged in, or has engaged in, any act that would constitute a violation of a State [defined at 27 U.S.C. § 122a(4)] law regulating the importation or transportation of any intoxicating liquor, the attorney general may bring a civil action in accordance with this section for injunctive relief

extending to suits brought against a licensee in that state,[377] this statute provides a federal forum in which injunctive relief may be sought and, on the proper showing, had against the defendant.[378] As recognized by the Supreme Court in *Granholm*, the threat of a licensee losing a license to produce is an effective threat to improper conduct,[379] and the Twenty-first Amendment Enforcement Act provides a realistic threat of the loss of a license by those who stray from proper conduct.[380]

A. *Permissible and Prohibited Sales by Small & Farm Wineries*

Holders of a small winery license must produce wine from Kentucky produced grapes, fruits, grape or fruit juices, or honey.[381] In addition to the ability to sell to wholesalers, assuming they are located or acting in a wet territory, a small winery licensee may (a) serve complimentary samples of its wine;[382] (b) make on premise retail package and by the drink sales;[383] (c) make retail sales at fairs, festivals, and similar types of events;[384] (d) make sales directly to retail licensees;[385] and (e) ship wine to a consumer if (i) the wine was purchased at the winery, (ii) shipment is by a licensed common carrier, and (iii) the amount is limited to two cases per customer.[386]

Holders of a farm winery license, in addition to selling to wholesalers, and assuming they are located or acting in a wet territory, may: (a) serve complimentary samples;[387] (b) make on premise package and by-the-drink sales,[388] (c) make direct sales to retail package and by-the-drink licensees;[389] and

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(including a preliminary or permanent injunction) against the person, as the attorney general determines to be necessary to –
(1) restrain the person from engaging, or continuing to engage in the violation; and
(2) enforce compliance with the State law.

377. 27 U.S.C. § 122a(c)(1) (2005).

378. Only injunctive relief is available under this law. 27 U.S.C. §122a(c)(3) (2005).

379. *Granholm*, 125 S.Ct. at 1906.

380. *Id.* This act has been promoted as a means of limiting improper sales to minors by means of Internet purchases (*see* Statement of Senator Orin Hatch, 145 CONG. REC. S2509 (daily ed. Mar. 10, 1999)) and opened to criticism as a power play by the wholesale industry to enforce their state protected monopolies. *See* Statement of Senator Robert Byrd, 145 CONG. REC. S5344 (daily ed. May 14, 1999) (citing as supporters of the proposed act the Wine and Spirits Wholesalers of America, the National Beer Wholesalers Association, the National Licensed Beverage Control Association).

381. KY. REV. STAT. ANN. § 243.155(2) (West 2005). An exemption exists if the grapes, fruit, juice or honey is not available. *Id.*

382. KY. REV. STAT. ANN. § 243.155(1)(b) (West 2005).

383. KY. REV. STAT. ANN. § 243.155(1)(c), (e) (West 2005).

384. KY. REV. STAT. ANN. § 243.155(1)(c) (West 2005).

385. KY. REV. STAT. ANN. § 243.155(1)(d) (West 2005).

386. KY. REV. STAT. ANN. § 243.155(1)(f) (West 2005).

387. KY. REV. STAT. ANN. § 243.156(1)(b), (e) (West 2005).

388. KY. REV. STAT. ANN. § 243.156(1)(c) (West 2005).

389. KY. REV. STAT. ANN. § 243.156(1)(d) (West 2005).

(d) make by-the-drink and package sales at fairs, festivals, and similar events.[390] Furthermore, farm wineries may ship wine to customers provided (i) the wine was purchased at the winery, (ii) shipment is by a licensed common carrier, and (iii) the amount is licensed to two cases per customer.[391]

Kentucky based wineries not holding either a small or farm winery license and all wineries based in foreign states are subject to statutory sanction for shipping wine to Kentucky consumers. The sanction for a Kentucky based winery making such a sale is a misdemeanor for the first two offenses and a felony for the third offense.[392] For a winery in a foreign state, the sales are unlawful, with a cease and desist letter being issued on the first offense.[393] The second and each subsequent offense is a felony.[394] This penalty is not applicable to any Kentucky based winery.[395]

390. KY. REV. STAT. ANN. § 243.156(1)(g) (West 2005).
391. KY. REV. STAT. ANN. § 243.156(1)(h) (West 2005).
392. KY. REV. STAT. ANN. § 242.990(1) (West 2005).
393. KY. REV.STAT. ANN. §244.165 (West 2005). *See also* 804 KY. ADMIN. REGS. 4:330 § 1. Presumably, although it is not entirely clear, this initial improper sale, in addition to sanction under these provisions, would as well be a misdemeanor. KY. REV. STAT. ANN. § 242.990(1) (West 2005).
394. KY. REV. STAT. ANN. § 244.065(2) (West 2005). *See also* 804 KY. ADMIN. REGS. 4:330 § 3. The penalty for a Class D felony is a fine of $1,000 to $10,000 and a sentence of one to five years in prison. KY. REV. STAT. ANN. § 532.060 (West 2005).
395. KY. REV. STAT. ANN. § 244.165(1) (West 2005); ("any person in the business of selling alcoholic beverages *in another state or country*....") (*emphasis* added).

B. *Constitutional Issues*

The Commerce Clause issues raised by Kentucky's regulation of wineries and wine importation include: (i) benefits afforded small and farm winery licenses to by-pass the three-tier system to sell directly to retail licenses and consumers, benefits not provided foreign based wineries; (ii) limitations imposed on the fruit source for small and farm wineries; and (iii) the disparate (misdemeanor versus felony) treatment of impermissible intrastate versus interstate shipments.[396] These issues will be considered seratim.

It is incontrovertible that Kentucky wineries holding either a small winery or a farm winery license are afforded access to consumers that is denied to both of larger wineries based in Kentucky and to all wineries based outside of Kentucky as a consequence of the permission they are afforded to by-pass the three-tier system and directly access the consumer through samples,[397] direct sales to consumers at fairs, festivals and similar events,[398] direct sales to retailers,[399] and direct sales to consumers.[400] None of these franchise building activities are permitted a non-Kentucky based winery, even those that meet the size limitations imposed by the license requirements for farm wineries.[401] Rather, wineries based in other states may access Kentucky consumers only through the restrictive mechanism of the three-tier system.[402] For purposes of the Commerce Clause, what is most telling is that these benefits are limited to wineries based in

396. On May 16, 2005, the day the *Granholm* decision was handed down, suit was filed in Federal District Court for the Western District of Kentucky challenging the constitutionality of KY. REV. STAT. ANN §§ 244.165, 243.032, 243.155, and 243.156 (West 2005). This suit was styled Huber Winery, William G. Schneider, Jr. and John D. Reilly, Jr. v. Lajuana S. Wilcher and Lavoyed Hudgins. Neither author is counsel to any party to this suit, and as this article is drafted the suit is proceeding. According to Greg Troutman, counsel to the plaintiffs in this action, the filing date was fortuitous, with the plan having been to file the suit that day, even as the *Granholm* decision was anticipated before the end of the 2004-05 term of the Supreme Court. Wine and Spirits Wholesales of Kentucky, Inc., comprised of nine Kentucky wholesales, has intervened in the *Huber* action, asserting that the relief sought by the Plaintiffs, "if granted, will constitute a taking of the property of the members of Intervenor-Defendant without just compensation and in violation of their right to due process, in violation of federal and Kentucky constitutional provisions." Intervenor's Answer, ¶ 19. On July 21, 2005, the plaintiffs in the *Huber* action filed a motion for judgment on the pleadings. Efforts had been previously undertaken to reform Kentucky's direct wine shipment laws. *See* Patrick Crowley, *Wine Collector Irked by Shipping Ban*, THE CINCINNATI ENQUIRER, December 16, 1999, *available at* http://www.enquirer.com/columns/crowley/1999/12/16/pcr_wine_collector_irked.html; Dana Nigro, *Kentucky Collector Campaigns Against Home-Delivery Ban*, WINE SPECTATOR, March 31, 2000 at 12. SB 116, introduced to the 2003 Kentucky General Assembly by Senator Ernesto Scorsone, had it been adopted, would have provided a licensing system under which foreign wineries could ship directly to Kentucky consumers. The proposal was not only not adopted, but it never received a committee hearing.

397. KY. REV. STAT. ANN. §§ 243.155(1)(b); 243.156(1)(b), (e) (West 2005).

398. KY. REV. STAT. ANN. §§ 243.155(1)(c); 243.156(1)(g) (West 2005).

399. KY. REV. STAT. ANN. §§ 243.155(1)(d); 243.156(1)(d) (West 2005).

400. KY. REV. STAT. ANN. §§ 243.155(1)(f); 243.156(1)(g) (West 2005).

401. KY. REV. STAT. ANN. § 241.010(23) (West 2005).

402. KY. REV. STAT. ANN. §§ 243.680-690; 243.710; 243.720 (West 2005).

Kentucky. No farm winery based outside of Kentucky can qualify for these benefits, even one conceivably meeting all non-geographic requirements of such a license, for an example by meeting the maximum annual production limits.[403] This system has multiple implications. First, Kentucky wineries are afforded special access to consumers in Kentucky, be they citizens or visitors, access denied non-Kentucky wineries.[404] Second, Kentucky produced products are afforded benefits not afforded non-Kentucky produced products.[405] Third, non-Kentucky based wines and wineries are burdened by the obligation to reach Kentucky consumers exclusively through the three-tier system.[406] This obligation effectively precludes many small wineries from participation in the Kentucky market, in effect removing the Commonwealth from the national market for small wines.[407]

The Supreme Court has repeatedly held that benefits afforded by state law may not be tied to state residence or state of manufacture.[408] This line of authority has been applied in the context of the alcoholic beverage industry, and was recently affirmed in *Granholm* when the Court rejected the position of New

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403. KY. REV. STAT. ANN. §§ 241.010(23); 243.156(1)(a) (West 2005).

404. *See Granholm*, 125 S. Ct. at 1896 ("The . . . scheme grants in-state wineries access to the State's consumers on preferential terms.")

405. *See id.* at 1897 (prohibiting "wine not produced from grapes . . . produced in . . . state" also discriminates against out-of-state wineries because it is "another privilege not afforded out-of state wineries.")

406. *See id.* at 1896 (noting discriminatory character is "obvious" where out-of state wine, but not in-state wine, must pass through the three tier distribution system.)

407. *See id.* ("Laws of this type ... deprive citizens of their right to have access to the markets of other States on equal terms.") *See also* Dickerson v. Bailey, 87 F.Supp.2d 691, 695 (S.D. Tex. 2000); Bainbridge v. Bush, 148 F.Supp.2d at 1311 n. 7 (the inter-state shipping ban "has the practical effect of preventing many small wineries from selling their wine in Florida. This result occurs because it is not cost-effective for the smaller out-of-state wineries to acquire a Florida wholesaler."); *Heald v. Engler*, 342 F.3d 517, (6th Cir. 2003) ("In-state wineries can, for example, bypass the price mark-ups of a wholesaler and retailer, making in-state wines relatively cheaper to the consumer and allowing them to realize more profit per bottle."), ("Here, it is clear that the Michigan statutory and regulatory scheme treats out-of-state and in-state wineries differently, with the effect of benefitting the in-state wineries and burdening those from out of state. As discussed above, Michigan wineries enjoy ... greater profit through their exemption from the three-tier system. Out-of-state wineries, on the other hand, must participate in the costly three-tier system, to their economic detriment.").

408. *See, e.g.*, Cooper v. McBeath, 11 F.3d 547 (5th Cir. 1994); Hunt v. Washington State Apple Adver. Comm'n, 432 U.S. 333, 353 (1977); City of Philadelphia v. New Jersey, 437 U.S. 617, 626-27 (1978) (a state's objectives "may not be accomplished by discriminating against articles of commerce coming from outside the State unless there is some reason, apart from its origin, to treat them differently."); C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383, 392 (1994). In *Carbone*, the town of Clarkstown, New York, passed a "flow control ordinance," that required all non-recyclable solid waste be processed by a local contractor. *Id.* at 390-92. Because all waste was treated the same, the town argued that the ordinance was not discriminatory. *Id.* The Court rejected this argument, however, noting that the relevant article of commerce was not the garbage itself, but rather the service of processing it. *Id.* Because out-of-state garbage processors were not allowed to compete for the opportunity to process Clarkstown's garbage, this was an ordinance which protected the local processors. *Id. See also* H.P. Hood & Sons, Inc. v. DuMond, 336 U.S. 525, 529 (1949).

York that the benefits afforded in-state wineries were available to foreign wineries who would simply open a bricks and mortar facility in the state.[409] The courts have also rejected benefits afforded products based upon their state of manufacture, even in the context of the alcoholic beverage industry and protections claimed under the Twenty-first Amendment.[410] Such efforts at economic protectionism cannot be saved from being struck down under the dormant Commerce Clause by reference to the Twenty-first Amendment.[411] There is simply no core power afforded the states by Section 2 of the Twenty-first Amendment that will provide a justification for affording domestic producers greater access to consumers than that afforded foreign producers.[412]

For example, as to arguments of temperance,[413] the records of the various cases to date, as well as independent investigations,[414] have not shown that in-state wineries are more diligent in preventing diversion to minors[415] or that such sales are seen by minors as a viable means of procuring alcohol.[416] Strict

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409. *See Granholm*, 125 S. Ct. at 1897 ("New York's in-state presence requirement runs contrary to our admonition that States cannot require an out-of-state firm 'to become a resident in order to compete on equal terms.'") *quoting in part* Halliburton Oil Well Cementing Co. v. Reily, 373 U.S. 64, 72 (1963).

410. *See, e.g.*, Loretto Winery Ltd. v. Gazzara, 601 F.Supp. 850, 859 (C.C.S.D.N.Y. 1985), *aff'd sub. nom.* Loretto Winery, Ltd. v. Duffy, 761 F.2d 140 (2nd Cir. 1985) (invalidating New York law permitting sale of wine coolers in retail grocery stores only if made exclusively with grapes grown in New York); Beam Distilling v. Georgia, 501 U.S. 529 (1991).

411. *See* Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 276 (1984) ("The central purpose of [Section 2 of the Twenty-first] Amendment was not to empower States to favor local liquor industry by erecting barriers to competition.") *See also* Beskind v. Easley, 325 F.3d 506, 517 (4th Cir 2003)

> Against the backdrop of its general prohibition of direct shipment of alcoholic beverages, North Carolina's authorization of in-state direct shipment of wine - which has the effect of increasing access to wine produced only in North Carolina - cannot credibly be portrayed as anything other than local economic boosterism in the guise of a law aimed at alcoholic beverage control.

412. *Id.*

413. *See, e.g.*, Loretto Winery Ltd. v. Gazzara, 601 F.Supp. 850, 862-63 (S.D.N.Y. 1985).

414. *See* FTC, Anticompetitive Barriers 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."). *See also* Eric Arnold, *New Technology Aims to Prevent Online Wine Sales to Minors*, WINE SPECTATOR (July 27, 2005).

415. Indeed the studies show that minors are generally not interested in wine, preferring beer and spirits. *See* Federal Trade Commission, *Self-Regulation in the Alcohol Industry: A Review of Industry Efforts to Avoid Promoting Alcohol to Underage Consumers* at App. A, Fig. 2. http://www.ftc.gov/reports/alcohol/alcoholreport.htm; Pacific Institute for Research and Evaluation, *supra* note 195.

416. *See* K. Lloyd Billingsley, *Ship the Wine in its Time*, at 6 (August 2002), *available at* http://www.pacificresearch.org/pub/sab/techno/winedistribution_brief.pdf ("Juveniles who want to indulge in alcoholic beverages do not order premium wine over the Internet and then wait two or three days for it to arrive.") Notwithstanding assertions that:

> [T]hose legitimate concerns do not seem to resonate with the handful of wealthy oenophiles who are leading the battle to have limited edition chardonnay shipped directly to their homes. These self-proclaimed

regulation of wine produced out-of-state, and comparatively looser regulation of wine produced in-state, evidences a lack of concern with temperance.[417]

The tax revenues that might be lost are an infinitesimal portion of retail interstate commerce that goes untaxed in Kentucky,[418] and it has been concluded that other effective means of tax collection may be put in place.[419]

As for arguments that direct sales will diminish the effectiveness of the three-tier system, it must be kept in mind that while the three-tier system is Constitutionally permissible,[420] it is not Constitutionally mandated. By permitting limited sales of wine outside the three-tier system,[421] Kentucky has already indicated that the three-tier structure is not a mandatory condition to address the evils it is claimed to address.[422] Furthermore, the fact that the

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> connoisseurs appear to have their blinders firmly in place and want to ignore the fact that their actions would also open the door for a 15-year-old to buy tequila or grain alcohol over the Internet and have it delivered without question to his door.

Juanita Duggan Testimony, *supra* note 17. The independent FTC found "few, if any, problems with interstate shipment of wines to minors. . . . [N]one of them report more than isolated instances of minors buying or even attempting to buy wine online." FTC, Interstate Barriers at 31, 33.

417. Swedenburg v. Kelly, 232 F.Supp.2d 135, 149 (S.D.N.Y. 2002); Beskind v. Easley, 325 F.3d 506, 516-17 (4th Cir. 2003); Dickerson v. Bailey, 87 F.Supp.2d 691, 693 (S.D. Tex. 2000); *Loretto Winery*, 601 F.Supp. at 863 ("There is no temperance interest served in permitting the unlimited sale of 6% wine product with domestic grapes, while at the same time banning the sale of the same 6% wine product made with grapes grown out-of-state."). As observed in *Granholm*, 125 S. Ct. at 1906: "As the wineries point out, minors are just as likely to order wine from in-state producers as from out-of-state ones."

418. Kentucky does not impose its 6% sales tax on wine or other alcoholic beverages. *See generally* KY. REV. STAT. ANN. § 243.720 (West 2005); *see also* Maloney Davidson Co, v. Martin, 118 S.W.2d 708 (Ky. 1938). Rather, the products are taxed at the wholesale level. *Id.* The "Wine Consumption Tax" is paid by wholesalers in the month after title to the wine is transferred to retailers or consumers. KY. REV. STAT. ANN. § 243.730(1)(a) (West 2005). Farm Wineries are as well liable for this tax. KY. REV. STAT. ANN. § 243.730(1)(e) (West 2005). The tax rate is $.50 per gallon. KY. REV. STAT. ANN. § 243.720(2) (West 2005).

419. Various of the states have adopted, and the *Granholm* decisions endorses, systems requiring out-of-state wineries to register with state revenue authorities, to maintain records of shipments into the state, and to remit taxes due on those sales. Other systems require the consumer to remit taxes on their purchases. In this regard it is telling that 804 KY. ADMIN. REGS. 4:330 § 4 does not provide a tax collection mechanism. The weight afforded an assertion that broader direct wine shipments will cost the Commonwealth revenues is questionable when the state has not sought to impose an effective collection mechanism on those sales that are expressly permitted.

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

421. *See* KY. REV. STAT. ANN. §§ 243.155; 243.156 (West 2005); 804 KY. ADMIN. REGS. 4:330 § 4.

422. Post-Prohibition the three-tier system was claimed to prevent domination of the alcoholic beverage trade by organized crime. *See e.g., supra* note 62. Whether such concerns today have any validity is questionable, but even if valid do not have Constitutional weight. In recent years the trade in garbage has found protection under the Commerce Clause notwithstanding repeated allegations that the industry in certain portions of the country is dominated by organized crime (*See* Organized Crime Links to Waste Disposal Industry: Hearings Before the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, House of Representations, 97th Cong., 1st Sess., May 28, 1991.) the fact is that certain of the major players in the industry have been less than good corporate citizens. *See, e.g., Waste Management Founder,*

benefits are available to only certain, and not all, Kentucky based wineries, does not save the disparate treatment from condemnation under the Commerce Clause.[423] Rather, the discriminatory[424] treatment, benefiting some Kentucky wineries while providing no equal benefit to foreign based wineries, is clearly protectionist and as such is a violation of the Commerce Clause.[425]

In addition to the advantages afforded small and farm wineries by reason of their location in Kentucky, those advantages are conditioned upon the use of Kentucky grown grapes, other fruit, or honey in their production.[426] As such, products produced in Kentucky are granted benefits not available to products produced in other states.[427] This favoritism of Kentucky grown products precludes non-Kentucky wineries from competing evenhandedly for Kentucky consumers and discriminates against non-Kentucky sourced products.[428] It is not relevant to the analysis that the effect of this provision is to simply grant a benefit to Kentucky manufactured products without imposing any appreciable burden on the products of the other forty-nine states, the discrimination is none the less present.[429] Efforts by other states to afford commercial advantage to locally produced products have been repeatedly struck down as violations of the Commerce Clause;[430] the reason for such rulings is obvious – the Commerce Clause was intended to preclude an economic balkanization of the states in which local products would not compete on a level playing field with those of some or all of the other states.[431] Furthermore, in conditioning the license upon the use of Kentucky grown fruit and honey, Kentucky has sought to isolate a portion of the industry from interstate commerce in those same items.[432] Put

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Five Other Former Top Officers Sued for Massive Fraud, Securities & Exchange Commission Press Release 2002-44 (March 26, 2002).

423. *See, e.g.*, Dean Milk Co. v. City of Madison, 340 U.S. 349, 356 (1951) (Wisconsin statute requiring that milk have been pasteurized within five miles of the central square of Madison, while burdening milk produced within Wisconsin outside of five mile radius, imposed a greater burden on milk produced in other states, and as such violated the Commerce Clause).

424. Under the Commerce Clause, "discriminate" means "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." Oregon Waste Sys., Inc. v. Department of Envtl. Quality, 511 U.S. 93, 99 (1994).

425. *See, e.g.*, Loretto Winery Ltd. v. Gazzara, 601 F.Supp. 850, 858 (S.D.N.Y. 1985).

426. KY. REV. STAT. ANN. § 241.010(46); 243.155(2); 243.156(3) (West 2005).

427. *See supra* notes 401 through 404 and accompanying text.

428. As stated by Justice Kennedy in the course of the argument of *Granholm*, "Only the Congress can allow discrimination against out-of-state products." Granholm v. Heald, 2005 WL 1130571, Oral Argument, 2004 WL 2937830, 47 (U.S. Nov. 7, 2004).

429. Cuno v. DaimlerChrysler, Inc., 386 F.3d 738 (6th Cir. 2004) ("The [Supreme] Court has made clear, however, that a tax statute's "constitutionality does not depend upon whether one focuses upon the benefited or the burdened party."); *See also* Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 273 (1984). The fact that a statute "discriminates against business carried on outside the State by disallowing a tax credit rather than by imposing a higher tax" is therefore legally irrelevant. Westinghouse Elec. Corp. v. Tully, 466 U.S. 388, 404 (1984).

430. *See, e.g.*, *Bacchus*, 468 U.S. at 272.

431. *Id.*

432. *See Granholm*, 125 S. Ct. at 1895 ("States may not enact laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state business.").

another way, while wine may be produced at a small winery, it will not be made from grapes or honey produced in Indiana, Tennessee or any other state, even if industry in those states can produce them at lower cost.[433] Such efforts have been repeatedly found unconstitutional.[434] Again, looking at core Twenty-first Amendment issues of temperance, revenue, and alcoholic beverage industry regulation,[435] none are implicated in conditioning a distribution scheme upon the source of the grapes/fruit/honey used in making wine.[436] While there is certainly nothing inappropriate about Kentucky creating a class of license for small wineries and otherwise promoting the development of a wine industry in the Commonwealth,[437] it may not do so in a manner that creates an uneven playing field that discriminates against interstate commerce.[438] That, however, is just what the native fruit/honey requirement of the small winery category, when combined with the greater consumer access afforded by that license, accomplishes.

Another constitutionally suspect issue is the disparate treatment of improper intra versus interstate wine shipments.[439] A Kentucky based winery will have its first two improper shipments treated as misdemeanors; only upon the third shipment will the winery be liable for a felony.[440] In contrast, upon only its second impermissible sale, a foreign winery is subject to a felony charge.[441] As such, a domestic winery may make two impermissible sales before facing felony treatment while a foreign winery is subject to that level of sanction after only one similar sale. Economically, before reaching the felony threshold, the Kentucky winery gets to make twice as many impermissible sales, and to collect the proceeds thereof, than is a foreign winery.[442] Consequently, another unequal playing field is created between domestic and foreign wineries.[443] While less obvious than that created by the unequal treatment that penalizes foreign wineries versus domestic farm and small wineries as to access to Kentucky consumers and the market for grapes/honey in Kentucky, distinctions in penalties based exclusively upon the foreign versus domestic residence of the

433. *Id.*

434. *See Cuno*, 386 F.3d 738.

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

436. *See Bacchus*, 468 U.S. at 276 ("The central purpose of [section 2 of the Twenty-first] Amendment was not to empower States to favor local liquor industry by erecting barriers to competition."). *See also* Healy v. Beer Institute, 491 U.S. 324, 344 (1989) (Scalia, J., concurring).

437. It has been claimed that the first commercial vineyard in the United States was in Kentucky. Marcus Green, *Kentucky Grapes*, COURIER-JOURNAL, June 24, 2005.

438. To that end, property tax abatements on property employed in the state for oenological purposes may be permissible. *See Cuno*, 386 F.3d at 749.

439. *See* KY. REV. STAT. ANN. §§ 242.990(1), 244.065(2) (West 2005).

440. KY. REV. STAT. ANN. § 242.990(1) (West 2005).

441. KY. REV. STAT. ANN. § 244.065(2) (West 2005). *See also* 808 KY. ADMIN. REGS. 4:330 § 3.

442. An economic advantage that "benefits the former and burden's the latter" implicates the Commerce Clause. *See Granholm*, 125 S. Ct. at 1895.

443. *Id.*

perpetrator, distinctions advantageous to domestic concerns, constitute discrimination under the Commerce Clause.[444]

Kentucky has cited 804 KAR 4:330[445] as a defense to the constitutionality of its regulatory scheme on wine imports.[446] Presumably the argument will be that as a Kentucky resident may travel to a winery in a foreign state, there purchase wine and ship it to his or her home in Kentucky, interstate commerce is not improperly impacted. If this is the state's position, it lacks merit. The interstate commerce that is protected by the Commerce Clause must be just that - interstate. Requiring a Kentucky resident to travel to a foreign state and there complete a sales transaction is not allowing interstate commerce. Kentucky, by 804 KAR 4:330, is allowing a Kentucky resident to ship his or her property, namely wine produced and purchased in a foreign state, to his or her home in the Commonwealth.[447] The Kentucky resident is in effect shipping to himself/herself.[448] This accommodation is not responsive to the free trade concerns that animated the adoption of the Commerce Clause and the dictate that there should be a free flow of goods among the states.[449]

Curiously, Kentucky has cited as well "Twenty-first Amendment Preemption" as a defense to the challenge to its disparate treatment of domestic and foreign wineries.[450] This position, admittedly not yet fleshed out, appears specious. The Supreme Court's jurisprudence has been and has been recently

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444. There may be as well implications under the Equal Protection Clause.

445. 804 KY. ADMIN. REGS. 4:330 § 4 provides that a Kentucky resident may ship alcoholic beverages to his home from another state.

446. *See* Answer filed in Huber Winery v. Wilcher, June 30, 2005, ¶ 14.

447. 804 KY. ADMIN. REGS. 4:330 § 4

448. *Id.*

449. Wyoming v. Oklahoma, 502 U.S. 437, 469-70 (1992) (stating "Because the Act discriminates both on its face and in practical effect ...). It is clear from the *Granholm* ruling that both de jure and de facto discrimination are barred by Commerce Clause. *See Granholm*, 125 S.Ct. at 1891-92 ("the object and effect of the laws are the same ... to make direct [interstate] sales impractical from an economic standpoint.") *See Granholm*, 125 S.Ct. at 1897-98 (rejecting New York requirement of bricks and mortar facility for foreign wineries seeking to do business in New York as "additional steps that drive up the cost of their wine.") It is obvious that he cost of travel within the state of Kentucky in order to take advantage of the right of a small or farm winery to ship to the consumer. (KY. REV. STAT. §§ 243.155(1)(f), 243.156(1)(h)) is far less than the cost of travel to the Napa Valley of the Fingerlakes region in New York. Therefore, while it may appear there is no de jure discrimination (*i.e.*, regardless of whether the winery is in or out of state, all you need do is visit it in order to ship wine home), there is obvious de facto discrimination in that is may not be economically possible to visit the foreign winery. *See, e.g., Dean Milk Co. v. Madison*, 340 U.S. at 349, n. 4; *American Trucking Ass'n, Inc. v. Sheiner*, 438 U.S. 266 (1987) (striking down vehicle tax scheme that applied to intra and interstate trucks but disproportionately impacted intrastate commerce). Positing that Kentucky may require a physical visit to a Kentucky winery as a precondition to allowing the intrastate shipment of wine back to the Kentucky resident (a supposition the authors to do not here seek to support or disprove), it violates the Commerce Clause to require a similar visit to an out-of-state vineyard in order to initiate a sale transaction. Rather, a non-burdensome approach, such as by permitting interstate sales initiated by phone or Internet ordering, needs to be permitted.

450. *See* Answer filed in Huber Winery v. Wilcher, June 20, 2005, ¶ 26.

confirmed to be that the Twenty-first Amendment neither supersedes the other provisions of the Constitution nor does it diminish the rule against conduct that discriminates against interstate commerce.[451] Only if the regulatory system applied to interstate wine shipments is not discriminatory as contrasted with that applied to intrastate shipments, a proposition the authors reject, would the Twenty-first Amendment be implicated.[452]

VI. CONCLUSION

Alcoholic beverages hold a singular distinction in the Constitution; they are the only product to be expressly addressed in two amendments. Since the passage of the Twenty-first Amendment, the United States Supreme Court has found itself repeatedly called upon to address the relationship of the amendment to the balance of the Constitution. The last decades have seen a shift in the analysis to one in which state powers under the Twenty-first Amendment are permitted to control over the other provisions of the Constitution in only narrow circumstances. The Wine Wars and the *Granholm* decision have affirmed this manner of analysis and confirmed that states may not apply disparate regulatory systems to alcoholic beverages based upon whether produced domestically or in a foreign jurisdiction.

The Wine Wars are far from over; challenges to many state systems currently in place will be brought and resolved. Eventually the Wine Wars may morph into the Liquor Wars and the Beer Wars[453] as the application of *Granholm* to these products is considered. Such continuing conflict with ultimate reference to the Supreme Court appears for the foreseeable future to be the fate of the conflict between the neo-prohibitionist to control alcoholic beverages and the rights of those who seek to responsibly partake of a legal product.

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451. *See, e.g.*, *Granholm*, 125 S.Ct. at 1903.

452. *See Granholm*, 125 S.Ct at 1905 ("State policies are protected under the Twenty-first Amendment when they treat liquor produced out-of-state the same as its domestic equivalent.").

453. *See, e.g.*, KAN. STAT. ANN. §§ 41-102(i), 41-102(c) (2004) (defining "domestic beer" as being up to 8% alcohol and made from agricultural products grown in Kansas and defining "beer" as being more than 3.2% alcohol).