

The Twenty-first Amendment, *Granholm* and the Future of the Three-Tier System

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I. Introduction

Wine² occupies a unique position in American legal history, being the subject of two constitutional amendments.³ While the history of wine in the United States begins with its earliest settlers,⁴ wine's relevance today has only increased since the passage of the Twenty-first Amendment. While per capita consumption in the United States has not yet reached the level of its European peers,⁵ its continued growth since 1934⁶ is projected to make the United States the largest wine market in the world.⁷ America's love of wine is further exemplified by a 2005 Gallup Poll where, for the first time in history, wine was the alcoholic drink of choice.⁸

Granholm v. Heald, the Supreme Court's most recent case on the Twenty-first Amendment, addressed whether states must provide a level playing field between in-state and out-of-state wineries with regard to direct shipment of wine to consumers.⁹ However, *Granholm* did not address the multitude of other business relationships that exist in the three-tier system.

Given the importance of wine today and the questions left unanswered in *Granholm*, it is all too likely that the Court will once again be called upon to decide the future of this industry.

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² While this paper focuses on wine, most of the ramifications are also applicable to the beer and spirits industries.

³ U.S. CONST. amend. XVIII and U.S. CONST. amend. XXI.

⁴ See, Thomas Pinney, *A History of Wine in America From the Beginnings to Prohibition* (1989).

⁵ Wine Institute, *Per Capita Wine Consumption by Country*,

<http://www.wineinstitute.org/resources/worldstatistics/article44> (last visited Nov. 16, 2008).

⁶ Wine institute, *Wine Consumption in the U.S.*, <http://www.wineinstitute.org/resources/statistics/article86> (last visited November 16, 2008).

⁷ Gordon T. Anderson, *World's Biggest Wine Country: USA* (Feb. 18, 2005),

http://money.cnn.com/2005/02/18/pf/goodlife/america_wine/ (last visited Nov. 16, 2008).

⁸ Lydia Sadd, *Wine Gains Momentum as Americans' Favorite Adult Beverage* (July 18, 2005),

<http://www.gallup.com/poll/17335/Wine-Gains-Momentum-Americans-Favorite-Adult-Beverage.aspx> (last visited Nov. 16, 2008) (the 2006 survey results, however, place beer back in the number one position).

⁹ *Granholm v. Heald*, 544 U.S. 460 (2005).

This paper examines the historical, legal, and corporate structure of the wine industry in the United States, arguing that, post-*Granholm*, courts will continue to invalidate state alcohol statutes that discriminate against out-of-state businesses. This paper also discusses how states will likely respond to *Granholm*'s application on various other alcohol regulations concerning wineries, retailers and distributors.

Furthermore, this paper argues that the potential invalidation of state statutes prohibiting retailers from purchasing wine from out-of-state distributors will fundamentally alter the balance of power within the wine industry resulting in the demise of many wineries, a reduction in consumer choice and the permanent alteration of the business fundamentals of the wine industry.

The first part of this paper will provide a background into the structure and operation of the wine industry in the United States. The second part will focus on the regulatory and judicial environment that led to the passage of the Eighteenth and Twenty-first Amendments. Today, as in the nineteenth and early twentieth centuries, the Court is effectively impeding the states' ability to regulate alcohol pursuant to powers granted by the Constitution.

The third part will focus on the Supreme Court's interpretation of the powers granted to the states by the Twenty-first Amendment since its passage through *Granholm*. This section ultimately serves to chronicle the degradation of a state's broad power to regulate alcohol within its borders.

The fourth part will discuss the post-*Granholm* cases as well as other pivotal pre-*Granholm* cases that have the potential to disrupt the current implementation of alcohol regulations. This section is primarily concerned with *Granholm*'s application to other aspects of the wine industry such as retailer to consumer direct shipment, as well as its continued

application to direct shipments by wineries to consumers. This part will also detail how states can respond to this changing environment.

The final part of this paper will assess the potential impacts of *Granholm* and its progeny on the distributor tier of the wine industry. This section will draw comparisons to the wine markets in the United Kingdom and Germany to demonstrate the practical effects on the wine industry for both industry participants and consumers if *Granholm*'s application is extended to the distributor tier.

II. The Structure of the Wine Industry in the United States

The roots of today's alcohol regulations are directly linked to society's perceptions of alcohol in the decades leading to Prohibition. Temperance societies identified alcohol as a poison to society; causing crime, poverty, inefficiency and immorality.¹⁰ Thus, the states designed alcohol legislation¹¹ to either reduce or eliminate alcohol consumption. These regulations can dictate minimum mark-ups, limitations on days and times alcohol can be sold, what information must be displayed on labels,¹² and a myriad of other requirements.

However, the greatest concern, in the eyes of temperance societies, was the tied-house.¹³ Prior to the repeal of prohibition, the alcohol industry was composed almost entirely of suppliers and retailers.¹⁴ A wholesale tier did not exist.¹⁵ This led to the largest suppliers exercising tremendous control over retailers, either through outright ownership or by offering other

¹⁰ Temperance & Prohibition, *Richmond P. Hobson Argues for Prohibition*, <http://prohibition.osu.edu/content/hobson.cfm> (last visited Dec. 9, 2008).

¹¹ Both before and after prohibition.

¹² See, e.g., Borck Vergakis, *Utah's Endangered List: Fruity Alcoholic Beverages* (Sept. 30, 2008). <http://www.wtopnews.com/?nid=104&sid=1488403> (last visited Nov. 16, 2008) (Utah's new label requirements make it unlikely that Diageo's Smirnoff Ice will be available in the state).

¹³ *Social and Economic Control of Alcohol The Twenty-first Amendment in the Twenty-first Century* 32 (Carole L. Jurkiewicz & Murphy J. Painter eds., 2008).

¹⁴ *Id.*

¹⁵ *Id.*

inducements.¹⁶ This vertical integration resulted in significant competition that dramatically decreased prices and increased the consumption of alcohol.¹⁷

It was this concern that led to the development of the three-tier system after the passage of the Twenty-first Amendment. The three-tier system generally provides that wineries sell to distributors,¹⁸ who sell to retailers,¹⁹ who, in turn, sell to the consumer. This structure serves to eliminate the coercive control that suppliers exerted over retailers prior to prohibition.

After the passage of the Twenty-first Amendment, each state began implementing its own alcohol regulations. The result is a heavily fragmented marketplace more akin to operating in fifty separate countries than a unified national marketplace because each state has implemented its own unique set of alcohol regulations. One notable variation among the states is with regards to the privatization of the three-tier system. While some states have privatized the three tiers, allowing private enterprise to function and prosper, other states have exerted total ownership and operation over one or more of these tiers.²⁰

In Pennsylvania, for instance, wineries sell their product to the Pennsylvania Liquor Control Board (“PLCB”) who then sells the wine in state-owned and operated liquor stores. On-premise retailers must purchase their supply of wine from these same stores. This regulation effectively makes the PLCB one of the largest sellers of wine in the country, rivaling the largest

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ The terms distributor and wholesaler are often used interchangeably. *See, e.g.*, CAL. BUS. & PROF. CODE § 23021 (1997) (using the term wholesaler); *see also* 235 ILL. COMP. STAT. 5/1-3.15 (1984) (using the term distributor).

¹⁹ The term retailer, when used to define the third tier, includes both on-premise and off-premise retailers. On-premise retailers are those where the customer purchases and consumes the product on the premise of the licensee, i.e., a bar or restaurant. Off-premise retailers are those where the customer purchases the product on site but consumes it elsewhere. Grocery stores and liquor stores are examples of off-premise retailers. *See, e.g.*, CAL. BUS. & PROF. CODE § 23023 (1997) (defining retailer as “any on- or off-sale licensee”).

²⁰ These states are known as control states and include: Alabama; Idaho; Iowa; Maine; Maryland (select counties); Michigan; Mississippi; Montana; New Hampshire; North Carolina; Ohio; Oregon; Pennsylvania; Utah; Vermont; Virginia; Washington; West Virginia; and Wyoming. *See* National Alcoholic Beverage Control Association, *Control Systems*, <http://www.nabca.org/systems/index.php> (last visited Nov. 23, 2008).

retail chains including Wal-Mart and Costco.²¹ Conversely, in California, wineries are allowed to sell their product directly to retailers, bypassing the distributor tier entirely. However, a healthy distributor tier still prospers because not all wineries exercise this privilege.

The regulatory environment of the wine industry has remained relatively constant since the passage of the Twenty-first Amendment. Rather, the greatest effect on the wine industry has come from within. Similar to other industries, the wine industry has experienced consolidation across all three tiers. While the number of licensed wineries has grown rapidly,²² the market share has become increasingly concentrated in the largest wine companies.²³ Likewise, distributors have consolidated to the point that in the majority of non-control states only a handful of distributors still remain.²⁴

The retail tier has also experienced tremendous consolidation in both on-premise and off-premise retailers. Wal-Mart and Costco possess and exert tremendous market power over all consumer packaged goods companies and the wine industry is no different.²⁵ Likewise, the proliferation of sizeable, national on-premise chains has had a similar effect. This consolidation

²¹ See, e.g., Steve Twedt *Pa.'s Liquor Control System Lets States Keep a Tight Grip on the Bottle* (Jan. 27, 2008), <http://www.post-gazette.com/pg/08027/852212-389.stm> (last visited Nov. 16, 2008) (the PLCB generates more than \$1.5 billion in sales per year); see also, Virginie Boone, *Costco Works Size to Vintage Advantage* (May 16, 2007), <http://www1.pressdemocrat.com/apps/pbcs.dll/article?AID=/20070516/NEWS04/705160301/-1/SPECIAL&THEMES=FOODWINE> (last visited Nov. 16, 2008) (Costco is the largest retailer of wine in the United States).

²² See, e.g., Wine Business Monthly, *Number of U.S. Wineries Tops 5,300* (Feb. 15, 2006), <http://www.winebusiness.com/html/MonthlyArticle.cfm?dataId=42349> (last visited November 19, 2008) (in 2005, there were more than 5,300 wineries in the United States with at least one in every state); see also, Wine Institute, *Number of California Wineries*, <http://www.wineinstitute.org/resources/statistics/article124> (last visited November 19, 2008) (in 2007, there were 5,938 wineries in the United States). Wineries are licensed by the Alcohol and Tobacco Tax and Trade Bureau.

²³ See, e.g., *Review of the Industry: The Top 30 US Wine Companies* (Feb. 15, 2008), <http://www.winebusiness.com/ReferenceLibrary/webarticle.cfm?dataId=54411> (last visited November 19, 2008) (the top 30 wine companies in the United States account for more than 90% of the wine sold).

²⁴ See, e.g., Wine Business Insider, *Southern and Glazer's Form Southern/Glazer's Distributors of America* (Aug. 13, 2008), <http://www.winebusiness.com/referencelibrary/webarticle.cfm?dataId=57915> (last visited November 19, 2008) (the partnership between Southern Wine and Spirits and Glazer's will control roughly 20% of the United States wine market and operate in 38 states).

²⁵ See, e.g., Jeff Hwang, *A Wal-Mart Monopoly?* (Sept. 29, 2003), <http://www.fool.com/investing/general/2003/09/29/a-walmart-monopoly.aspx> (last visited November 19, 2008) (Wal-Mart makes up 30% of the U.S. consumer goods market).

in the retail tier has put tremendous pricing pressure on wineries and distributors as retailers negotiate to procure ever increasing profit margins. This pressure is further intensified by the competition amongst the wineries and distributors themselves to win the business of these accounts.

The designers of the three-tier system likely did not foresee this dramatic shift in the industry over the seventy-five years since the repeal of Prohibition. This change has reversed the original protections afforded by the three-tier system.²⁶ Originally, the three-tier system was designed to protect the small, local retailers from the size and clout of the large breweries and distilleries.²⁷ In today's evolving marketplace, the three-tier system facilitates the protection of wineries²⁸ from the size and clout of the largest retailers. This protection is afforded by the requirement that retailers negotiate and purchase wine on a state-by-state basis, effectively reducing the market power derived from their national scale.²⁹

The market has also evolved with new demand for increasingly hard to find wines. This demand, coupled with the increased revenues derived by wineries in these transactions, has fueled the somewhat arduous creation of the market for direct shipment of wine to consumers. This process has been dramatic, resulting in *Granholm*, a direct shipment case that has formed the basis of more litigation regarding the three-tier system.

III. The Path to Prohibition and Repeal

To fully appreciate the current structure and regulation of the wine industry, it is necessary to understand the historical backdrop leading to its formation. The path to prohibition

²⁶ See, e.g., Carolyn Smagalski, *Three Tier System of Alcohol Distribution – USA*, <http://www.bellaonline.com/articles/art56856.asp> (last visited Nov. 23, 2008).

²⁷ See, e.g., Sara Schorske & Alex Heckathorn, *Three Tier or Free Trade?*, <http://www.csa-compliance.com/html/Articles/ThreeTierFreeTrade.html> (last visited Nov. 23, 2008).

²⁸ It also facilitates the protection of breweries and distilleries as well.

²⁹ See, e.g., ARIZ. REV. STAT. § 4-244 (2007) (requiring Arizona retailers to purchase liquor from an Arizona wholesaler).

began well before the passage of the Eighteenth Amendment. In the mid-nineteenth century, states began experimenting with the concept of prohibition. Portland, Maine became the first American city to outlaw alcohol in 1843.³⁰ In 1844, the Oregon Territory banned the sale of spirits and, in 1851, Maine became the first state to prohibit all liquor.³¹ Other states and territories followed suit in the years before and after the U.S. Civil War.³²

In 1873, the Court was presented with the question of whether a state had the right to regulate traffic in intoxicating liquor.³³ The Court concluded that “[t]he weight of authority is overwhelming that no such immunity has heretofore existed as would prevent State legislatures from regulating and even *prohibiting* the traffic in intoxicating drinks.”³⁴ The Court confirmed this power in 1877, holding that “a State law prohibiting the manufacture and sale of intoxicating liquors is not repugnant to any clause of the Constitution of the United States.”³⁵ Finally, in 1887, the Court concluded that “the question as to the constitutional power of a state to prohibit the manufacture and sale of intoxicating liquors was no longer an open one in this court [sic].”³⁶

Despite these broad statements of a state’s powers to regulate liquor, the Court did not look favorably on laws inhibiting the sale of imported liquors.³⁷ In 1888, the Supreme Court invalidated an Iowa statute requiring permits for liquor importers.³⁸ The Court held that such a requirement was a direct exercise of jurisdiction on interstate commerce.³⁹ While reaching this conclusion, the Court held open the possibility that a state, operating under its police powers,

³⁰ See Pinney, *Beginnings*, supra n. 4, at 431.

³¹ *Id.* (all liquor comprises beer, spirits, and wine).

³² *Id.* at 431-34.

³³ *Bartemeyer v. Iowa*, 85 U.S. 129 (1873).

³⁴ *Id.* at 133 (emphasis in original).

³⁵ *Boston Beer Co. v. Massachusetts*, 97 U.S. 25, 33 (1877).

³⁶ *Mugler v. Kansas*, 123 U.S. 623, 659 (1887) (citing *Foster v. Kansas*, 112 U.S. 206 (1884)).

³⁷ See *Granholm*, 544 U.S. at 476.

³⁸ *Bowman v. Chi. & Nw. Ry. Co.*, 125 U.S. 465 (1888).

³⁹ *Id.* at 498.

could completely ban imported liquor.⁴⁰ In direct response, Iowa banned the importation of liquor.⁴¹ However, the Court ruled that a state cannot limit the importation of liquor and its sale so long as it “[had] not been mingled with the common mass of property therein.”⁴² These rulings left “states helpless to keep imported alcohol out of or even to prevent the sale of imported liquor so long as it remained in its original package.”⁴³

In an attempt to provide states the power to regulate imported liquor, Congress passed the Wilson Act in 1890 providing that any liquor transported into a state shall be treated as if the liquor had been produced in the state, subject to the same laws as domestically produced liquor.⁴⁴ Shortly after its passage, the Court upheld the constitutionality of the Wilson Act holding that it allowed the states to regulate imported liquor in its original package before sale.⁴⁵ However, the Court soon created a legal loophole allowing citizens to purchase liquor from outside their home state. In *Rhodes v. Iowa*, the Court held that the language of the Wilson Act only applied after the liquor’s “arrival at the point of destination and delivery there to the consignee.”⁴⁶ Then, in *Vance v. W.A. Vandercook Co.*, the Court expressly confirmed that “the right of persons in one

⁴⁰ *Id.* at 498-99.

⁴¹ *Lesiy v. Hardin*, 135 U.S. 100 (1890).

⁴² *Id.* at 124. “To exclude the power of the state from control over an article imported into it, it is necessary that the article be capable of being pointed out and identified, and the owner be able to say: ‘This came from another state, and had not yet become commingled with the mass of property in this state so as to make it a part of that property.’” *State v. Flannelly*, 152 P. 22 at 27 (Kan. 1915).

⁴³ Justin Lemaire, *Unmixing a Jurisprudential Cocktail: Reconciling the Twenty-First Amendment, the Dormant Commerce Clause, and Federal Appellate Jurisprudence to Judge the Constitutionality of State Laws Restricting Direct Shipment of Alcohol*, 79 NOTRE DAME L. REV. 1613, 1617 (2004).

⁴⁴ 27 U.S.C. § 121 (1890) (“All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.”).

⁴⁵ See *Wilkerson v. Rahrer*, 140 U.S. 545 (1891).

⁴⁶ *Rhodes v. Iowa*, 170 U.S. 412, 426 (1898).

state to ship liquor into another state to a resident for his own use is derived from the constitution [sic] of the United States, and does not rest on the grant of the state law.”⁴⁷

Congress passed the Webb-Kenyon Act in 1913 to counteract the Court’s limitations on the Wilson Act.⁴⁸ The goal of the Webb-Kenyon Act was “to grant states the power to regulate all imported alcohol, regardless of whether it was for personal or commercial use.”⁴⁹ Like the Wilson Act, the Supreme Court upheld the constitutionality of the Webb-Kenyon Act.⁵⁰ In the same case, the Court upheld a West Virginia statute prohibiting “all shipments, whether for personal use or otherwise, and whether from within or without the state.”⁵¹ Finally, states were in a position to implement prohibition within their borders however the need for them to do so was short lived as national prohibition was soon to arrive.

The Eighteenth Amendment was passed in 1919 and its effects on the wine industry were dramatic. In 1919, total wine production in the United States was over fifty-five million gallons.⁵² By 1930, only three million gallons were produced.⁵³ The number of federally licensed wineries also dropped sharply during Prohibition, from 917 in 1922 to 268 in 1933.⁵⁴ In 1933, Prohibition was repealed with the passage of the Twenty-first Amendment.⁵⁵

⁴⁷ *Vance v. W.A. Vandercook Co.*, 170 U.S. 438, 452 (1898).

⁴⁸ 27 U.S.C. § 122 (1913) (“The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is prohibited.”)

⁴⁹ *Social and Economic Control of Alcohol The Twenty-first Amendment in the Twenty-first Century* 44 (Carole L. Jurkiewicz & Murphy J. Painter eds., 2008).

⁵⁰ See *James Clark Distilling Co. v. W. Md. R. Co.*, 242 U.S. 311 (1917).

⁵¹ *Id.* at 318.

⁵² Pinney, *Beginnings*, supra n. 4, at 436.

⁵³ Thomas Pinney, *A History of Wine in America From Prohibition to the Present* 10 (2005).

⁵⁴ *Id.* at 33.

⁵⁵ See U.S. CONST. amend XXI.

IV. The Evolution of a State’s Powers Granted by the Twenty-first Amendment

Following the passage of the Twenty-first Amendment the states began implementing a diverse framework of alcohol regulation. These laws were passed pursuant to the power granted in § 2 of the Twenty-first Amendment forming the basic yet wide-ranging structure of the industry today.⁵⁶ The cases presented below focus on the limitations of the powers granted to the states by the Twenty-first Amendment.

A. The Early Cases: Establishing the States’ Broad Powers

In its first case involving the Twenty-first Amendment, the Court was faced with a California law requiring wholesalers of imported beer to pay an import license fee.⁵⁷ The plaintiffs argued that states did not have the authority to favor domestic alcohol over imported alcohol.⁵⁸ However, the Court expressly rejected this theory stating that plaintiff’s argument would be tantamount to a rewriting of the Amendment.⁵⁹ In effect, the Court gave credence to the notion that the Twenty-first Amendment had overturned the Commerce Clause.⁶⁰ Two years later the Court echoed this decision in *Mahoney v. Joseph Triner Corporation*, which upheld a Minnesota statute prohibiting imported liquors in excess of twenty-five percent alcohol without further processing or registration.⁶¹ The Court held that “under the amendment, discrimination against imported liquor is permissible.”⁶²

⁵⁶ *Id.* §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”).

⁵⁷ *Bd. of Equalization of Cal. v. Young’s Mkt. Co.*, 299 U.S. 59, 60 (1936).

⁵⁸ *Id.* at 63.

⁵⁹ *Id.* at 62.

⁶⁰ See Marc A. Melzer, *A Vintage Uncorked: The 21st Amendment, the Commerce Clause, and the Fully-Ripened Fight Over Interstate Wine and Liquor Sales*, 7 U. PA. J. CONST. L. 279, 287 (2004) (“The Court’s opinion, as expressed by Justice Brandeis, was that Section 2 of the Twenty-first Amendment rendered inactive with respect to alcohol the Commerce Clause’s proscription of discriminatory treatment between in-state and out-of-state parties.”).

⁶¹ *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401, 403 (1938).

⁶² *Id.*

The states' broad power to regulate liquor continued. In 1939, the Court upheld a Michigan statute prohibiting imported beer from being sold in Michigan if the state in which the beer was manufactured discriminated against Michigan beer.⁶³ The Court stated "as held in the *Young* case, the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause."⁶⁴ Encapsulating a state's power, in *Ziffrin, Inc. v. Reeves*, the Court again confirmed that "[t]he Twenty-first Amendment sanctions the right of a state to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause. Without doubt a state may absolutely prohibit the manufacture of intoxicants, their transportation, sale, or possession, irrespective of when or where produced or obtained, or the use to which they are to be put."⁶⁵

B. Diminishing Powers: The Lead-up to the Modern Legal Structure

Although the powers under the Twenty-first Amendment seemed absolute, weaknesses began to appear. In 1944, the Court upheld a statute prohibiting the transportation of liquor through Virginia, but indicated that a state regulation might be invalidated if it conflicted with a federal statute.⁶⁶

The potential for federal power over the regulation of alcohol was confirmed in *United States v. Frankfort Distilleries*, a case concerning violations of the Sherman Act and raising the question whether the Twenty-first Amendment barred prosecution.⁶⁷ The Court stated that the Twenty-first Amendment "has not given the states plenary and exclusive power to regulate the

⁶³ *Indianapolis Brewing Co. v. Liquor Control Comm'n of State of Mich.*, 305 U.S. 391, 392 (1939).

⁶⁴ *Id.* at 394 (emphasis added).

⁶⁵ *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939).

⁶⁶ *Carter v. Virginia*, 321 U.S. 131, 138-39 (1944) ("Whatever limited force the Commerce Clause may retain with regard to the liquor traffic, it should not require the invalidation of the Virginia statutes here involved, which do not conflict with any Act of Congress, and which are designed to enforce local liquor policies.").

⁶⁷ *United States v. Frankfort Distilleries*, 324 U.S. 293, 299 (1945).

conduct of persons doing an interstate liquor business outside their boundaries.”⁶⁸ The Court also noted that “[g]ranting the state’s full authority to determine the conditions upon which liquor can come into its territory and what will be done with it after it gets there, it does not follow from that fact that the United States is wholly without power to regulate the conduct of those who engage in interstate trade outside the jurisdiction.”⁶⁹ However, the Court pointed out that in this instance the enforcement of the Sherman Act was not in conflict with any state law; thus, no decision needed to be made on whether a conflicting federal law would supersede state law.⁷⁰

Twenty years after *Frankfort Distilleries*, the Court dramatically shifted away from its earlier interpretations of the Twenty-first Amendment.⁷¹ In *Hostetter v. Idlewild Bon Voyage Liquor Corporation*, the Court disallowed a New York statute’s application to a company selling liquor to international airline travelers departing New York.⁷² Referring to its previous decisions, the Court declared that “to draw a conclusion . . . 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.”⁷³ In *Idlewild*, the Court began paving the way for how future Twenty-first Amendment cases would be decided, saying “both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.”⁷⁴

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ See, e.g., Melzer, supra n. 60, at 290; see also Sidney J. Spaeth, *The Twenty-first Amendment and State Control Over Intoxicating Liquor: Accommodating the Federal Interest*, 79 CAL. L. REV. 161, 185 (1991) (“The Court consummated its full retreat from earlier broad readings of twenty-first amendment power, in a pair of decisions handed down in 1964.”).

⁷² *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964).

⁷³ *Id.* at 331-32.

⁷⁴ *Id.* at 332.

Shortly after *Idlewild*, the Court had the opportunity to address another New York statute. At issue in *Joseph E. Seagram & Sons, Inc. v. Hostetter* was a statute requiring the price of liquor charged in New York to be no less than the lowest price charged in any other state.⁷⁵ The Court upheld the statute as valid under the Twenty-first Amendment despite the potential discriminatory effects outside the state.⁷⁶ The distinguishing factor between this case and *Idlewild* was that in *Idlewild* the statute sought to curtail liquor that was not destined for New York while in *Hostetter*, the statute's effect was clearly directed at the New York marketplace.⁷⁷

C. The Modern Legal Structure: *Midcal* to *Granholm*

The Court began to crystallize how Twenty-first Amendment cases would be analyzed in the 1980 case of *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*⁷⁸ To reach its holding, the Court first recognized the shift away from earlier Twenty-first Amendment cases.⁷⁹ The focus now was on the idea first set forth in *Idlewild*: the harmonization of state and federal interests.⁸⁰ The Court weighed the state's interest of promoting temperance against the federal interest of competition and determined that the federal interests were more substantial.⁸¹ Consequently, the Court found that "the Twenty-first Amendment provides no shelter for the violation of the Sherman Act caused by the State's wine pricing program."⁸²

The balancing test in *Midcal* was further emphasized in *Capital Cities Cable, Inc. v. Crisp*.⁸³ Here, an Oklahoma statute banned the transmission of out-of-state wine commercials

⁷⁵ *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 39-40 (1966).

⁷⁶ *Id.* at 43 (appellants argued that the statute would directly lead to higher prices outside of New York because suppliers, under the statute, cannot sell liquor for less than the price charged in New York).

⁷⁷ *Id.* at 42.

⁷⁸ *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum Inc.*, 445 U.S. 97 (1980).

⁷⁹ *Id.* at 107 ("This Court's early decisions on the Twenty-first Amendment recognized that each State holds great powers over the importation of liquor from other jurisdictions.")

⁸⁰ *Id.* at 109.

⁸¹ *Id.* at 114.

⁸² *Id.*

⁸³ *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984).

while federal law prohibited any modification of these transmissions.⁸⁴ Thus, there was not a feasible option to comply with both the state and federal statutes.⁸⁵ Again, the Court looked to harmonize the federal and state laws by asking “whether the interests implicated by [the] state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail.”⁸⁶ In reaching its holding that the Oklahoma statute was not preserved by the Twenty-first Amendment, the Court recognized that restrictions on advertising were a valid means of furthering temperance.⁸⁷ However, the Court considered Oklahoma’s allowance of “print and broadcast commercials for beer, as well as advertisements for all alcoholic beverages contained in newspapers, magazines, and other publications printed outside of the State,” to find that “the application of Oklahoma’s [statute] . . . engages only indirectly the central power reserved by § 2 of the Twenty-first Amendment.”⁸⁸ The court concluded “that when, as here, 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, [then] the balance between state and federal power tips decisively in favor of the federal law, and enforcement of the state statute is barred.”⁸⁹

In *Bacchus Imports, Ltd. v. Dias*, wholesalers challenged the validity of an Hawaii law imposing a twenty percent excise tax on liquor while exempting locally produced okolehao and fruit wine.⁹⁰ Here, as in *Capital Cities Cable*, the Court sought to answer “whether the principles

⁸⁴ *Id.* at 694.

⁸⁵ *Id.* at 696.

⁸⁶ *Id.* at 693.

⁸⁷ *Id.* at 715.

⁸⁸ *Id.*

⁸⁹ *Id.* at 716.

⁹⁰ *Bacchus Imports v. Dias*, 468 U.S. 263, 265 (1984) (citations omitted) (“Okolehao is a brandy distilled from the root of the ti plant, an indigenous shrub of Hawaii. The only fruit wine manufactured in Hawaii during the relevant time was pineapple wine.”).

underlying the Twenty-first Amendment are sufficiently implicated by the exemption . . . to outweigh the Commerce Clause principles that would otherwise be offended.”⁹¹ The reason for the legislation was to foster the development of a fledgling industry.⁹² The Court invalidated the statute stating that “[t]he central purpose of the provision was not to empower States to favor local liquor industries by erecting barriers to competition.”⁹³ The Court also clarified how it would look at Twenty-first Amendment cases in the future. The Court would now assess whether the law in question was merely a means of economic protection and, if so, it would not be “entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor.”⁹⁴

The broad power granted by the Twenty-first Amendment as held in its earliest cases had been reduced over fifty years to only allowing those laws that were “designed to promote temperance or to carry out any other purpose of the Twenty-first Amendment.”⁹⁵

After *Bacchus*, two more cases demonstrated the limitations of the Twenty-first Amendment. *Brown-Forman Distillers Corporation v. New York State Liquor Authority*⁹⁶ and *Healy v. Beer Institute*⁹⁷ both concerned price affirmation statutes⁹⁸ in New York and Connecticut, respectively. The Court answered both cases by holding “unequivocally that to the extent that an affirmation statute has the practical effect of regulating out-of-state liquor prices, it cannot stand under the Commerce Clause irrespective of the Twenty-first Amendment.”⁹⁹ The Court found

⁹¹ *Id.* at 275.

⁹² *Id.* at 276.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573 (1986).

⁹⁷ *Healy v. Beer Institute*, 491 U.S. 324 (1989).

⁹⁸ A price affirmation statute requires that a supplier cannot sell liquor in another state for less than the price charged in the state with the price affirmation statute.

⁹⁹ *Id.* at 342 (citing *Brown-Forman Distillers Corp.*, 476 U.S. at 585).

that the Twenty-first Amendment offers no protection for discrimination under the Commerce Clause.¹⁰⁰

The Court's decisions on the Twenty-first Amendment have culminated in *Granholm v. Heald*.¹⁰¹ *Granholm* addressed two consolidated cases arising out of New York and Michigan that questioned the validity of state statutes allowing in-state wineries to ship their products directly to consumers while effectively prohibiting out-of-state wineries the same privilege.¹⁰² The Court concluded that these cases “involve straightforward attempts to discriminate in favor of local producers” and that this “discrimination is contrary to the Commerce Clause and is not saved by the Twenty-first Amendment.”¹⁰³ To reach this decision the Court determined that the Twenty-first Amendment did not authorize states to pass discriminatory laws¹⁰⁴ and “*Bacchus* forecloses any contention that § 2 of the Twenty-first Amendment immunizes discriminatory direct-shipment laws from Commerce Clause scrutiny.”¹⁰⁵ After concluding that the Twenty-first Amendment could not save either of the statutes, the Court applied its dormant Commerce Clause test.¹⁰⁶ While the states offered two primary justifications, preventing access to alcohol by minors and protecting states from loss of tax revenue, the Court found these insufficient as they were unsupported by any evidence.¹⁰⁷ The Court ruled that discriminatory state regulations

¹⁰⁰ *Id.* (“[The] finding of unconstitutional extraterritorial effects disposes of the Twenty-first Amendment issue.”).

¹⁰¹ *Granholm v. Heald*, 544 U.S. 460 (2005).

¹⁰² *Id.* at 465-66 (the New York statute required wineries to establish a physical presence within the state).

¹⁰³ *Id.* at 489.

¹⁰⁴ *Id.* at 484-85 (“The Amendment did not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods.”).

¹⁰⁵ *Id.* at 487-88.

¹⁰⁶ Harris Danow, *History Turned “Sideways”*: *Granholm v. Heald and the Twenty-first Amendment*, 23 *CARDOZO ARTS & ENT. L.J.* 761, 775 & n.91 (2006) (“Challenged statutes are typically subjected to a two-part analysis. The Court first considers whether the state statute ‘directly regulates or discriminates against interstate commerce, or ...[if] its effect is to favor in-state economic interests over out-of-state interests.’ *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986). Statutes that fit this description are presumed invalid. However, the Court must still determine whether the challenged statute serves a ‘legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.’ *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 353 (1977). If it does, the statute will be upheld. *Id.*”).

¹⁰⁷ *Granholm*, 544 U.S. at 489-91.

will be upheld “only after finding, based on concrete record evidence, that a State's nondiscriminatory alternatives will prove unworkable.”¹⁰⁸ The Court’s ultimate conclusion was succinct: “States have broad power to regulate liquor under § 2 of the Twenty-first Amendment. This power, however, does not allow States to ban, or severely limit, the direct shipment of out-of-state wine while simultaneously authorizing direct shipment by in-state producers. If a State chooses to allow direct shipment of wine, it must do so on evenhanded terms.”¹⁰⁹

V. The Aftermath of *Granholm*

While many rejoiced *Granholm*’s decision, the actual results have been mixed.¹¹⁰ In addition *Granholm* has brought a great deal of uncertainty. *Granholm* answered that states must provide a level playing field between in-state and out-of-state wineries with regard to direct shipment of wine to consumers,¹¹¹ but it did not address how the Court’s reasoning will affect the multitude of other business relationships that exist in the three-tier system. How does *Granholm* affect the winery to distributor transaction, winery to retailer, retailer to consumer and, most fundamentally, distributor to retailer?¹¹² The the future of the beverage alcohol industry in the United States may be decided in this quagmire of uncertainty. This section will address *Granholm*’s application to the various segments of the three-tier system.

¹⁰⁸ *Id.* at 493.

¹⁰⁹ *Id.*

¹¹⁰ See, e.g., Kevin McCallum, *Historic Ruling on Wine Shipments Receives Mixed Reviews* (May 16, 2006), <http://www.pressdemocrat.com/article/20060516/NEWS/605160302> (last visited Nov. 16, 2008) (While some wineries are finding the increased access to direct shipment profitable, other wineries find the regulatory requirements burdensome and make accessing those markets unprofitable).

¹¹¹ *Granholm*, 544 U.S. at 493.

¹¹² One question not addressed in this paper is: as *Granholm* applies to wineries, does it similarly apply to distilleries and breweries as well? It seems likely that *Granholm*’s analysis on discriminatory treatment would apply to distilleries and breweries because the analytical framework in *Granholm* is not concerned with to whom the discriminatory treatment is applied, but on the discriminatory treatment itself.

A. Regulation of Wineries

1. Discrimination on Direct Shipment

While *Granholm* may have seemingly concluded the question of direct shipment by wineries, many questions still remain and are fertile ground for further court cases. Both before and after *Granholm*, states have implemented a myriad of legislation designed to reduce the number of wineries allowed to ship wine directly to consumers. Three primary techniques have been utilized by states and examined by courts: (1) allowing only wineries that produce less than a certain volume of wine to ship; (2) limiting the amount of wine a winery can ship to an individual customer; and (3) requiring the customer to purchase the wine in-person prior to shipment, which has proved to be the most vexing requirement.¹¹³ The purpose of these regulations is to allow in-state wineries to access consumers directly, while preventing many out-of-state wineries from exercising this same privilege. These regulations also serve to appease local wineries who want direct access to consumers and local wholesalers who would prefer to eliminate access to all wine not sold through a wholesaler.

i. Production Limits

The general purpose of production limits is to only allow small wineries the privilege of shipping wine directly to consumers. Further, in determining the production limit itself, states will likely reach a production limit that is only as high as is necessary to allow all in-state wineries to ship directly to consumers.

In *Cherry Hill Vineyards, LLC v. Hudgins*, the Court upheld a Kentucky statute allowing wineries producing less than 50,000 gallons of wine annually to ship product directly to

¹¹³ See, e.g., *Cherry Hill Vineyards, LLC v. Hudgins*, 488 F. Supp. 2d 601 (W. D. Ky. 2006). This case concerned a production limit, a purchase limit and an in-person purchase requirement.

consumers.¹¹⁴ The Court held that “[n]o justification need be shown for the 50,000 gallon limit, as it simply does not give Kentucky wineries a competitive advantage over similarly situated out-of-state producers.”¹¹⁵ Essentially, the Court concluded that the statute is valid because it is not discriminatory.¹¹⁶

In *Black Star Farms LLC v. Oliver*, the Court upheld an Arizona statute implementing a production limitation for licensees allow to ship wine directly to consumers.¹¹⁷ The Court noted that “the number of out-of-state wineries that produce less than 20,000 gallons of wine per year and are thus able to take advantage of this direct shipment exception dwarf the number of in-state wineries that are able to take advantage of the exception.”¹¹⁸ Thus, the Court concluded that the production limit did not violate the Dormant Commerce Clause as it “in effect opens up the State's wine market to allow more out-of-state wineries than in-state wineries to take advantage of Arizona's gallonage cap exception and directly ship to Arizona consumers.”¹¹⁹

The analysis in *Black Star Farms* leaves open the possibility that if a state’s production limit is set at so low a point that only in-state wineries are allowed the privilege of direct shipment, a court may find this discriminatory and therefore unconstitutional. However, the likelihood of this occurring is miniscule at best. With the significant number of wineries, large and small, across the United States, any production limit would allow some, if not many, out-of-state wineries direct shipment privileges.

¹¹⁴ *Cherry Hill Vineyards, LLC v. Hudgins*, 488 F. Supp. 2d 601 (W. D. Ky. 2006). The case also concerned a limit on the amount of wine a consumer could purchase and an in-person purchase requirement.

¹¹⁵ *Id.* at 613.

¹¹⁶ *Id.*

¹¹⁷ *Black Star Farms LLC v. Oliver*, 544 F.Supp.2d 913 (D. Ariz. 2008). The case also concerned an in-person purchase requirement.

¹¹⁸ *Id.* at 926.

¹¹⁹ *Id.* at 928.

The holdings in *Cherry Hill Vineyards* and *Black Star Farms* pave the way for states to curtail the number of out-of-state wineries allowed to ship wine directly to consumers by means of production limits. Thus, states faced with the possibility, after *Granholm*, of opening direct shipment access to all out-of-state wineries will impose these production limitations. This solution allows in-state wineries the same direct-to-consumer access while preserving the business model of wholesalers, who will still traffic in the majority of wine sales in the state.

ii. Purchase Limits

Another alternative means of regulating direct shipments by wineries is to expressly limit the amount of wine a single consumer can purchase. Though there is little case law on the subject, regulating purchase limits appears to be another viable avenue for states to control the direct shipment of wine to consumers.

In *Cherry Hill Vineyards*, the Court upheld a Kentucky statute prohibiting wineries from shipping more than two cases of wine to a single customer per visit.¹²⁰ The Court held that “[t]here is no advantage afforded to in-state wineries over out-of-state wineries by the two-case limit. It applies to all shipments to Kentucky customers.”¹²¹ Similar to the Court’s holding on production limits, the Court reached its conclusion by determining that the statute was not discriminatory and therefore not subject to scrutiny.¹²²

Purchase limit regulations serve to prevent consumers from ordering large quantities of wine from wineries thus ensuring that the majority of wine sales still go through the entirety of the three-tier system. Another potential regulation states can use is to limit the amount of wine a customer can order in a single transaction. Such a regulation serves to prevent the customer

¹²⁰ *Cherry Hill Vineyards, LLC v. Hudgins*, 488 F. Supp. 2d 601 (W. D. Ky. 2006). The case also concerned a production limit on wineries and an in-person purchase requirement.

¹²¹ *Id.* at 614.

¹²² *Id.*

from enjoying the decreasing marginal costs of shipping an additional bottle of wine, thereby raising the average shipping cost per bottle.¹²³ Effectively, this raises the price of ordering wine directly from the winery, making it more likely that a consumer will choose to purchase wine from a retailer instead.

iii. In-Person Purchase Requirements

States have also implemented regulations requiring consumers to purchase wine in-person before the winery can ship the wine. These regulations effectively increase the transaction costs for consumers purchasing wine from out-of-state wineries, as the consumer is required to physically visit that winery before shipment can commence. Conversely, the costs for the consumer to visit in-state wineries are less because the wineries are geographically closer to the consumer. Thus, the effects of these regulations are to inhibit the availability of direct shipment for out-of-state wineries, while still providing a feasible means for in-state wineries to do so.

In *Cherry Hill Vineyards*, the Court upheld a Kentucky statute requiring that wine be purchased in-person by the consumer shipment.¹²⁴ In analyzing this requirement the Court first determined “that the in-person requirement discriminates in practical effect against out-of-state wineries.”¹²⁵ In “determin[ing] whether the provision should nevertheless be upheld as advancing a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives”¹²⁶ the Court looked to three arguments: preserving dry territories; decreasing underage drinking; and preservations of tax revenue.¹²⁷ The Court found

¹²³ For example: suppose the cost per shipment is \$12.00, regardless to the amount of wine being shipped, and the cost per bottle shipped is \$2.00. If a customer is allowed to purchase 12 bottles of wine, the customer’s total shipping costs are \$36.00 or \$3.00 per bottle. However, if the customer can only purchase 6 bottles of wine, the customer’s total shipping costs are \$24.00 or \$4.00 per bottle.

¹²⁴ *Cherry Hill Vineyards, LLC v. Hudgins*, 488 F. Supp. 2d 601 (W. D. Ky. 2006). The case also concerned a limit on the amount of wine a consumer could purchase and a production limit on wineries.

¹²⁵ *Id.* at 619.

¹²⁶ *Id.*

¹²⁷ *Id.* at 619-20.

that none of these arguments provided justification for the in-person purchasing requirement and that it was “unconstitutional as discriminating against interstate commerce.”¹²⁸

In contrast to *Cherry Hill Vineyards*, the Court in *Black Star Farms LLC v. Oliver* analyzed Arizona’s in-person purchase requirement.¹²⁹ The Court recognized “that Arizona wineries have a natural geographic advantage due to their proximity to Arizona consumers.”¹³⁰ However, “[t]he Dormant Commerce Clause does not require States to provide out-of-state businesses with additional rights to compensate for existing advantages that in-state businesses possess through geographic location.”¹³¹ The Court essentially found that a “natural geographic advantage” is not discriminatory.¹³²

Baude v. Heath also concerned an in-person purchase requirement.¹³³ Similar to *Black Star Farms*, the Court concluded that the law was constitutional.¹³⁴ In an intriguing analogy the Court stated that since the Supreme Court holds that verification of photo ID reducing voting fraud “has enough support to withstand a challenge under the first amendment, it would be awfully hard to take judicial notice that in-person verification with photo ID has no effect on wine fraud and therefore flunks the interstate commerce clause.”¹³⁵ The Court utilized another unique approach in reaching its holding as well. The Court hypothesized that while the costs for a consumer to visit California wineries are high, the marginal cost per winery visited in California might not be significantly higher than the marginal cost per winery visited in Indiana

¹²⁸ *Id.* at 622.

¹²⁹ *Black Star Farms LLC v. Oliver*, 544 F. Supp. 2d 913 (D. Ariz. 2008). The case also concerned a production limit for wineries allowed to ship direct to consumers.

¹³⁰ *Id.* at 925.

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Baude v. Heath*, 538 F.3d 608 (7th Cir. 2008). Additionally, the case concerned a clause in the statute limiting the availability of direct shipment to wineries that did not sell directly to retailers in any other state. The District Court found this statute invalid and the Court of Appeals affirmed. 538 F. 3d at 615.

¹³⁴ *Id.* at 615.

¹³⁵ *Id.* at 614.

due to the density of California wineries and the ability to more easily purchase at multiple locations during a single trip.¹³⁶ Finally, the Court paid credence to an oft-argued defense that allowing direct shipment will increase minors' access to alcohol stating "[a]nything that raises the cost of an activity will diminish the quantity-not to zero, but no law is or need be fully effective."¹³⁷

The validity of in-person purchase requirements is, at present, uncertain. States implementing in-person purchase requirements will continue to face legal challenges. Further, with a conflict in the courts,¹³⁸ it is all too likely that the Supreme Court will have to provide an answer. Should the Supreme Court validate the in-person purchase requirement, states, wishing to keep the direct shipment market open only for in-state wineries, will implement such regulations. Effectively, states will provide their constituents, the in-state wineries, with a market that is practically inaccessible by out-of-state wineries.

However, even if the Supreme Court finds that the in-person purchase requirement is invalid, states can still respond with regulation that effectively limits the number of out-of-state wineries able to ship directly to consumers, while still providing in-state wineries access to that market. States will simply implement production limitations at such a level as to allow all in-state wineries to ship direct, while minimizing the number of eligible out-of-state wineries. Either of these two solutions should appease the state's wholesalers and its wineries, as the majority of wine volume will still flow through the wholesaler, while the in-state wineries will have greater market access to the consumer. One thing seems clear given the attempts by states to implement non-discriminatory laws that reduce the number of wineries that can ship directly

¹³⁶ *Id.* at 613.

¹³⁷ *Id.* at 614.

¹³⁸ *See Cherry Hill Vineyards, LLC v. Hudgins*, 488 F. Supp. 2d 601 (finding in-person purchase requirements to be unconstitutional); *but see Black Star Farms LLC v. Oliver*, 544 F. Supp. 2d 913 (finding in-person purchase requirements to be constitutional).

to consumers. States, whatever their motivations, do not want to allow all wineries unfettered access that circumvents the three-tier system.

2. Relationships with Distributors

While no post-Granholm case law exists regarding discrimination against out-of-states wineries in their relationship with distributors, several pre-Granholm cases invalidated statutes that discriminated against out-of-state wineries.¹³⁹ For example, the Supreme Court of Washington invalidated a state statute requiring notice to a distributor prior to termination and providing for damages if notice was not given; however, in-state wineries were exempted from those same requirements.¹⁴⁰ Following the methodology set forth in *Brown-Forman*, the Court first analyzed whether there was a dormant commerce clause violation.¹⁴¹ The Court “[found] no justification for the exemption of in-state wine suppliers unrelated to economic protectionism. . . [t]herefore, the exemption of in-state wineries constitutes economic protection of in-state industry in violation of the commerce clause.”¹⁴²

The Court then examined whether this statute “sufficiently implicate[d] core principles of the Twenty-first Amendment.”¹⁴³ The Court found the state could develop alternative measures to serve the statute’s purpose while treating in-state and out-of-state wine suppliers equally.¹⁴⁴ Therefore, the Court held that the Washington statute “violates the commerce clause and is not sheltered by the Twenty-first Amendment.”¹⁴⁵

¹³⁹ See, e.g., *Kendall-Jackson Winery, Ltd. v. Branson*, 82 F. Supp. 2d 844 (N. D. Ill. 2000); see also *Mt. Hood Beverage Co. v. Constellation Brands, Inc.*, 63 P.3d 779 (Wash. 2003).

¹⁴⁰ *Mt. Hood Beverage Co. v. Constellation Brands, Inc.*, 63 P.3d 779 (Wash. 2003).

¹⁴¹ *Id.* at 786. (*Brown-Forman* provides for a two-step analysis: (1) determine if the statute discriminates against interstate commerce, and (2) determine whether the discrimination is justified).

¹⁴² *Id.* at 786-87.

¹⁴³ *Id.* at 787.

¹⁴⁴ *Id.* at 789.

¹⁴⁵ *Id.*

This case and other similar cases demonstrate that even before *Granholm*, discriminatory statutes were invalidated under the Commerce Clause.¹⁴⁶ Now that *Granholm* is being applied, it is even more likely that states will be unable to discriminate against out-of-state wineries in their relationships with distributors because of the consistent analytical approaches to discrimination.

3. Relationships with Retailers

Another key issue for the wine industry is self-distribution, whereby a state may authorize wineries to sell directly to a retailer, bypassing the distributor tier entirely. In *Costco Wholesaler Corp. v. Hoen*, Costco challenged the validity of allowing only in-state beer and wine suppliers to sell directly to retailers.¹⁴⁷ The District Court found it “readily apparent that Washington law discriminates against out-of-state beer and wine producers and prevents them from competing on equal terms with in-state producers” and that “such discrimination against out-of-state producers is not consistent with the Commerce Clause.”¹⁴⁸ The Court also dismissed the defendants’ argument that *Granholm* was only applicable to statutes involving wineries selling directly to consumers.¹⁴⁹ As such, following *Granholm*, the Court looked to the justifications for the discriminatory law.¹⁵⁰ As in previous cases, the justifications presented included tax collection and orderly distribution, which were both dismissed by the Court because the evidence was speculative and unsubstantiated.¹⁵¹

The Court concluded that “[u]nder the Commerce Clause of the United States Constitution, Washington's policies cannot stand.”¹⁵² In response, Washington modified its legislation to allow out-of-state wineries and breweries to ship directly to retailers; the issue was

¹⁴⁶ See, e.g., *Kendall-Jackson Winery, Ltd. v. Branson*, 82 F. Supp. 2d 844 (N. D. Ill. 2000); see also *Mt. Hood Beverage Co. v. Constellation Brands, Inc.*, 63 P.3d 779 (Wash. 2003).

¹⁴⁷ See *Costco Wholesale Corp. v. Hoen*, 407 F. Supp. 2d 1247 (W. D. Wash. 2005).

¹⁴⁸ *Id.* at 1251.

¹⁴⁹ *Id.* at 1251-52.

¹⁵⁰ *Id.* at 1252.

¹⁵¹ *Id.*

¹⁵² *Id.* at 1256.

not brought on appeal.¹⁵³ If anything, this case demonstrates that *Granholm*'s application extends beyond state laws discriminating against wineries.

The widely anticipated appellate case, *Costco Wholesale Corporation v. Maleng*, detailed the application of federal antitrust laws to Washington's Liquor Control Board.¹⁵⁴ While the Court upheld most of the statutes in question, finding them to be unilateral restraints imposed by the state, the Court did invalidate Washington's post and hold requirement demonstrating that a state's power is not beyond the scope of federal antitrust legislation.¹⁵⁵

An example that might indicate how states will reconcile *Granholm*'s application to direct shipment by wineries to retailers, is Oklahoma's recently approved state question allowing both in-state and out-of-state wineries to sell directly to retailers.¹⁵⁶ However, Oklahoma is requiring wineries to use their own vehicles to transport the wine to the retailers, significantly increasing the costs for out-of-state wineries to a point where few, if any, out-of-state wineries can profitably comply with the law.¹⁵⁷ Such a statute serves as a compromise between in-state wineries and distributors. In-state wineries will have direct access to the retail market, bypassing the distributor tier entirely, while out-of-state wineries will still secure distributors to reach the retail market. The Court's analysis of this statute would likely mirror prior court decisions on in-

¹⁵³ *Costco Wholesale Corp. v. Maleng*, 522 F. 3d 874 at 883 (9th Cir. 2008).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* (the post and hold requirement required wine and beer wholesalers to file their prices with the Washington State Liquor Control Board and adhere to them for at least thirty days).

¹⁵⁶ See Sean Murphy, *Oklahoma Voters Approve Four State Questions* (Nov. 5, 2008), http://findarticles.com/p/articles/mi_qn4182/is_20081105/ai_n30968700?tag=content;col1 (last visited November 19, 2008) (more than seventy percent of voters approved SQ 743).

¹⁵⁷ See Janice Francis-Smith, *Oklahoma's State Question 743: The Small Wineries Bill* (Oct. 31, 2008), http://findarticles.com/p/articles/mi_qn4182/is_20081031/ai_n30968407?tag=content;col1 (last visited November 19, 2008) ("The wineries would have to use their own vehicles to distribute their wine; use of private carriers like UPS or FedEx would be prohibited.").

person purchase requirements for wineries. Given the conflict on that issue,¹⁵⁸ the Court's eventual decision on this statute is uncertain.

B. Regulation of Retailers

While *Granholm* dealt with discriminatory regulations on direct shipment by wineries, many cases have been brought regarding *Granholm*'s application to discriminatory regulations on retailer direct shipment. As in the winery to consumer transactions discussed previously, various courts have reached different conclusions.

In *Siesta Village Market, LLC v. Granholm*, an out-of-state retailer brought suit challenging a Michigan statute prohibiting out-of-state retailers from shipping directly to consumers unless they maintained a physical location within the state.¹⁵⁹ The Court recognized the requirement of opening a physical location as “differential and discriminatory treatment of out-of-state interests.”¹⁶⁰ Michigan advanced three arguments why its discriminatory statute should be upheld: (1) out-of-state retailers will not follow labeling laws or pay taxes; (2) out-of-state retailers may violate Michigan laws and the state may not be able to enforce them; and (3) the state does not have the resources to regulate out-of-state retailers.¹⁶¹

The Court rejected the first argument because “no alternative is discussed or proved to be unworkable” regarding Michigan's labeling laws, “and on the tax-collection argument because it advances pure protectionism.”¹⁶² The Court rejected the second argument on the basis that a regulatory scheme was already in place for out-of-state wineries to ship directly to consumers.¹⁶³

¹⁵⁸ Compare *Cherry Hill Vineyards, LLC v. Hudgins*, 488 F. Supp. 2d 601 (invalidating the in-person purchase requirement) with *Black Star Farms LLC v. Oliver*, 544 F. Supp. 2d 913 (validating the in-person purchase requirement).

¹⁵⁹ *Siesta Vill. Mkt., LLC v. Granholm*, No. 06-CV-13041, 2008 WL 4427517 (E.D. Mich. 2008) (the judgment in this case was stayed pending appeal).

¹⁶⁰ *Id.* at *3.

¹⁶¹ *Id.* at *7.

¹⁶² *Id.*

¹⁶³ *Id.*

The Court also found that there was no justification for “why that method would not be effective in regulating wine shipped directly from out-of-state retailers.”¹⁶⁴ The Court rejected the third argument on similar grounds, thereby invalidating the Michigan statute as discriminatory and in violation of the Commerce Clause.¹⁶⁵

In contrast to *Siesta Village*, the Court, in *Arnold’s Wines, Inc. v. Boyle*, upheld a statute only allowing in-state retailers to ship directly to consumers.¹⁶⁶ The Court determined that “plaintiffs’ challenge to the ABC Law’s provisions blocking out-of-state entities from obtaining licenses to compete at this tier is clearly an attack on the three-tier system itself.”¹⁶⁷ The Court looked to *Granholm* and found that “the Supreme Court reaffirmed the constitutionality of the three-tier system.”¹⁶⁸ The Court further explained that “[i]n upholding the three-tier system, the Supreme Court acted intentionally to limit application of the nondiscrimination principle enunciated in *Granholm* to products and producers, as opposed to wholesalers and retailers.”¹⁶⁹ Given this reading and application of *Granholm*, the Court dismissed the complaint and found it “unnecessary to undertake a dormant Commerce Clause analysis.”¹⁷⁰

Finally, in *Siesta Village Market, LLC v. Perry*, the Court reviewed a Texas statute that prohibited out-of-state retailers from shipping wine directly to consumers while allowing in-state retailers to do so.¹⁷¹ As in other cases, the defendants offered justifications for why discrimination was necessary.¹⁷² The issue of purchases by minors was again raised, but the Court dismissed it for lack of any evidence showing that “the system is less effective at policing

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at *8.

¹⁶⁶ *Arnold’s Wines, Inc. v. Boyle*, 515 F. Supp. 2d 401 (S.D.N.Y. 2007).

¹⁶⁷ *Id.* at 411 (citation omitted).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 414.

¹⁷¹ *Siesta Village Market, LLC v. Perry*, 530 F. Supp. 2d 848 (N.D. Tex. 2008).

¹⁷² *Id.* at 866.

underage drinking than the other methods.”¹⁷³ The Court also dismissed the tax collection argument as unsupported.¹⁷⁴ Finally, the defendants argued that discrimination “is necessary to preserve Texas's three-tier system,” which was the justification in *Arnold's Wines's* holding.¹⁷⁵ As with the other arguments presented, the Court disagreed because Texas can still require all wine to be sold through the three-tier system.¹⁷⁶

After finding a violation of the Commerce Clause the Court addressed another issue presented in the case: the requirement that retail licenses are only granted after the recipient had been a Texas citizen for one year. The Court found this requirement unconstitutional because “[i]f Texas cannot constitutionally condition wine retailer direct-shipping rights on a physical presence within the state, it cannot condition qualification for TABC permits on establishing citizenship in Texas.”¹⁷⁷

The Court did introduce a new complexity to the mix. While Texas cannot discriminate based on location “Texas can constitutionally require that wine sold and shipped to Texas consumers be purchased from a Texas-licensed wholesaler.”¹⁷⁸ The practical application of this requirement is questionable. Many states prohibit their retailers from buying wine from anyone other than a licensed in-state wholesaler, thus out-of-retailers could not legally purchase wine from a Texas wholesaler in order to comply with this requirement if it became law.¹⁷⁹

Thus, as with regulations concerning wineries, Courts have been willing to apply *Granholm* to cases concerning discrimination against out-of-state retailers. Essentially, the Courts are in agreement that statutes allowing only in-state retailers to ship directly to consumers

¹⁷³ *Id.* at 867.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 870.

¹⁷⁷ *Id.* at 868.

¹⁷⁸ *Id.* at 867.

¹⁷⁹ *See, e.g.*, ARIZ. REV. STAT. § 4-244 (2007) (it is unlawful for a retailer to purchase liquor from anyone but a wholesaler licensed in the state of Arizona).

are discriminatory.¹⁸⁰ However, Courts have applied *Granholm* to both validate and invalidate these statutes, leaving states without specific guidelines to follow.¹⁸¹ This uncertainty is compounded by the notion that a state can require all retailers to make purchases from an in-state wholesaler.¹⁸²

A state can respond to these issues in several ways: (1) do not allow any retailer to ship directly; (2) allow only in-state retailers to ship directly to customers; (3) allow all retailers to ship directly provided that the retailer purchased the product from an in-state distributor; (4) allow all retailers to ship directly provided that the purchase was made in-person; and, (5) allow all retailers to ship directly. The first and fifth options are entirely valid because the state is providing a level playing field to both in-state and out-of-state retailers. The second option is clearly discriminatory; however, conflicting case law exists as to whether this would be valid.¹⁸³ The validity of the third option is entirely uncertain. At present, such a statute has not been analyzed in a single case. Further, this potential solution was only proposed in one case.¹⁸⁴ The fourth option would face similar analysis to in-person purchase requirements for wineries; therefore, the validity of this option is similarly questionable.¹⁸⁵

C. Regulation of Distributors

At present, no distributor has brought a lawsuit claiming a state discriminates against out-of-state distributors by only allowing in-state distributors to sell their products to retailers. One

¹⁸⁰ See, e.g., *Siesta Vill. Mkt., LLC v. Granholm*, supra n. 159; see also, *Arnold's Wines, Inc. v. Boyle*, 515 F. Supp. 2d 401; see also *Siesta Village Market, LLC v. Perry*, 530 F. Supp. 2d 848.

¹⁸¹ *Compare Siesta Vill. Mkt., LLC v. Granholm*, supra n. 159 (invalidating discriminatory treatment) with *Arnold's Wines, Inc. v. Boyle*, 515 F. Supp. 2d 401 (validating discriminatory treatment).

¹⁸² *Siesta Village Market, LLC v. Perry*, 530 F. Supp. 2d 848.

¹⁸³ *Compare Siesta Vill. Mkt., LLC v. Granholm*, supra n. 159 (invalidating discriminatory treatment) with *Arnold's Wines, Inc. v. Boyle*, 515 F. Supp. 2d 401 (validating discriminatory treatment).

¹⁸⁴ See *Siesta Village Market, LLC v. Perry*, 530 F. Supp. 2d 848.

¹⁸⁵ *Compare Cherry Hill Vineyards, LLC v. Hudgins*, 488 F. Supp. 2d 601 (invalidating in-person purchase requirement for wineries) with *Baude v. Heath*, 538 F. 3d 608 (validating in-person purchase requirements for wineries).

potential explanation for this is that distributors recognize that a decision invalidating such statutes is detrimental to their economic well-being; thus, distributors will not bring a case against these statutes. While no case law exists concerning discrimination against out-of-state distributors, alternative areas of regulation provide some insights into state regulations aimed at preventing out-of-state distributors from entering the state's market: (1) imposing citizenship or residency requirements on new distributor licensees, and, (2) requiring a warehouse within the state.

Two cases brought by distributors challenged statutes imposing citizenship and residency requirements on distributors.¹⁸⁶ In *Glazer's Wholesale Drug Company, Inc. v. Kansas*, the Court analyzed a statute requiring each officer of a wine distributor to have resided in Kansas for at least ten years prior to applying for a license.¹⁸⁷ The Court had no trouble finding that "there is no question that [the statute] discriminates against interstate commerce."¹⁸⁸ The Court reached this holding because residency requirements "erect[] a formidable barrier to entry of nonresident liquor distributors to the Kansas market."¹⁸⁹ The Court concluded that "rather than exercising a core concern of the Twenty-first Amendment, the challenged residency requirement constitutes nothing more than 'mere economic protectionism' and works only to insulate Kansas residents from outside competition."¹⁹⁰

As in *Glazer's*, plaintiffs in *Southern Wine and Spirits of Texas, Inc. v. Steen* sought an injunction from applying a Texas statute requiring one year of residency and citizenship.¹⁹¹ The Court found that the statute "has erected a statutory barrier against nonresidents who wish to

¹⁸⁶ See, e.g., *Glazer's Wholesale Drug Co., Inc. v. Kansas*, 145 F. Supp. 2d 1234, 1241 (D. Kan. 2001); see also, *Southern Wine and Spirits of Tex., Inc. v. Steen*, 486 F. Supp. 2d 626 (W.D. Tex. 2007).

¹⁸⁷ *Glazer's Wholesale Drug Co., Inc. v. Kansas*, 145 F. Supp. 2d 1234, 1237 (D. Kan. 2001).

¹⁸⁸ *Id.* at 1241.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 1247 (citation omitted).

¹⁹¹ *Southern Wine and Spirits of Tex., Inc. v. Steen*, 486 F. Supp. 2d 626 (W.D. Tex. 2007).

obtain wholesale, distributor, and importer permits and licenses, which shields Texas-resident wholesalers and distributors from the rigors of outside competition.”¹⁹² The Court applied *Granholm* and found that the “justification for [Texas’s] discriminatory policy is without evidentiary support or explanation.”¹⁹³ The Court concluded that “Texas has made no more a compelling case for banning out-of-state residents from holding permits and licenses for the wholesaling, distributing, or importing of alcoholic beverages in Texas than New York and Michigan did for restricting the shipment of wine into those states by out-of-state producers.”¹⁹⁴

Thus, a state cannot impose citizenship or residency requirements in its grant of distributor licenses because such requirements place an impermissible burden on interstate commerce. Another salient issue for distributors is the requirement to warehouse and store their products within the state. *Quality Brands, Inc. v. Barry* addressed this very issue.¹⁹⁵

In *Quality Brands*, a wholesaler sought to merge its separate warehousing operations in the District of Columbia and Maryland into Maryland alone and was impeded by legislation requiring product be stored within the District.¹⁹⁶ The Court found the legislation “clearly discriminatory on its face” as it “regulates liquor storage in a way which favors local industry and workers at the expense of out-of-state interests.”¹⁹⁷ The Court found the legislation in violation of the Commerce Clause and unsaved by the Twenty-first Amendment, concluding “[t]he Liquor Storage Act does not serve to promote temperance except incidentally,” because it effectively says “that residents of the District can drink as much as they want so long as they drink liquor stored inside the District.”¹⁹⁸ The Court held that the “[d]efendant’s argument is

¹⁹² *Id.* at 631.

¹⁹³ *Id.* at 632.

¹⁹⁴ *Id.*

¹⁹⁵ *Quality Brands, Inc. v. Barry*, 715 F. Supp 1138 (D.D.C. 1989).

¹⁹⁶ *Id.* at 1138-139.

¹⁹⁷ *Id.* at 1140.

¹⁹⁸ *Id.* at 1143.

nothing but a pretextual rationale: temperance is merely a pretext for economic protectionism.”¹⁹⁹ This case presents the potential that a distributor can locate its operations wherever is most economically feasible irrespective of the state of sale.

States cannot place extraneous burdens on noncitizens in the grant of distributor licenses. Rather, states must grant distributor licenses on the same terms to both citizens and noncitizens, thereby facilitating the rise of multi-state distributor organizations. Further, states cannot require distributors to physically locate a warehouse within a state, thus permitting distributors to operate with the most economically efficient process.

Courts will continue to invalidate state laws discriminating against out-of-state businesses, whether they are wineries, retailers, or distributors. This will lead to the continued growth in online ordering and direct shipment of wine as more states amend their legislation to allow access by out-of-state wineries and retailers.²⁰⁰ However this market only plays a small role in the total wine industry. Quite simply, the costs of shipping a bottle of wine are too prohibitive to be worthwhile for lower priced bottles of wine which represent the majority of the volume and revenue of the industry. Thus, the direct shipment market will predominantly be focused on premium and hard-to-find wines that are unavailable at local retailers. However, in bringing litigation to open direct shipment access to out-of-state businesses, wineries, retailers and consumers have not only opened some new markets for wine but have also laid the framework for how the three-tier system and the wine industry itself might be fundamentally altered.

¹⁹⁹ *Id.*

²⁰⁰ *See, e.g.,* Wine Business Insider, *Consumer-Direct Sales Continue to Grow*, <http://www.winebusiness.com/ReferenceLibrary/webarticle.cfm?dataId=54238> (last visited Nov. 23, 2008) (“Direct sales are an emerging category as wineries look to bypass the restrictive, costly and time-intensive three-tier system and reach out directly to consumers.”).

VI. Ramifications for the Wine Industry

The most pressing legal issue facing the wine industry today is how to rationalize the principle that a state cannot discriminate against out-of-state interests while recognizing the three-tier system as “unquestionably legitimate.”²⁰¹ More directly, how can a state allow in-state distributors to sell to retailers while prohibiting out-of-state distributors from exercising the same privilege? One potential rationale is that while states may require the distributor tier, states cannot limit access to in-state distributors alone but must also allow out-of-state distributors the same access.²⁰² Fundamentally, this would mean that states must provide a level playing field for both in-state and out-of-state distributors.

Such a ruling would allow for the creation of nationwide distributors servicing all states requiring a distributor as opposed to the current structure where large distributor organizations maintain distinctly separate businesses in each state in which they operate. Essentially, each distributor would acquire a license to operate in every state, allowing that distributor to sell to every retailer in the United States.²⁰³ Distributors would still maintain a large number of warehouses in nearly every state in order to adequately serve the market.²⁰⁴ Given the currently increasing consolidation of distributors into multi-state players with near nationwide distribution networks, this might not seem a fundamental change, but, for the wine industry, it would be inherently destructive.

Currently, large retailers cannot exercise the full power as should be attributable to their scale because they must negotiate with distributors on a state-by-state basis. The inability of

²⁰¹ *Granholm*, 544 U.S. at 489 (citations omitted).

²⁰² If such a ruling took place, states may also simply remove the distributor tier requirement altogether which would result in the same ultimate consequences to the industry.

²⁰³ Distributors would still not be able to sell into control states where there is no private distributor tier.

²⁰⁴ However, in the Northeast for instance, given the population density and small geographic size of states, it is plausible that multiple states could be served by far fewer distribution points with little to no physical presence in some states. Currently, in fact, some distributors service the New York metro market from warehouses located in New Jersey.

states to discriminate against out-of-state distributors would give retailers the full leverage of their market power. Quite literally, a major retailer could dictate that it is only going to purchase wine from a single distributor and at a significant discount, effectively requiring wineries to comply if they want the retailer's business.

Those small retailers and wineries that believe the removal of the legally mandatory distributor tier would result in increased product selection of wine and increased revenues for wineries are sorely mistaken. The largest retailers will only look after their own bottom-lines; seeking the lowest price possible for the products they carry. Those wineries willing and able to meet the retailers' demands will receive their business. While wineries that do not comply will find routes to market closed off and the sales they relied upon to sustain profitability will disappear. The most injured will be those smaller wineries that have some presence in the retail market because their products will be displaced by the products of the larger wineries meeting retailers' demands. Further, even those wineries that only sell directly to consumers will be injured as well. The lower prices in retail markets will reduce the perceived value of wine leading to the need for wineries to reduce their own prices, thus reducing their revenues.²⁰⁵ The effects on small retailers would be similar as they would become forced to compete with the large retailers's prices without the benefit of the leverage necessary to reduce their costs.

One need only look at the state of the wine industry in the United Kingdom and Germany to see the effects that retailer pricing pressure brings. The major retailers in those markets sell wine as cheaply as possible. There is no concern with variety and selection, only profit. Wine is, essentially, another commodity to drive customers into the stores. Even the largest wineries in

²⁰⁵ For example, if Wal-Mart offers a Napa Valley Cabernet Sauvignon for \$5.99, this becomes the price reference consumers will use when making purchases directly from wineries. Thus, a winery offering a similar wine will have to charge a relatively similar price otherwise consumers will buy the wine at Wal-Mart.

the world find it difficult, if not outright unprofitable, to operate in these markets.²⁰⁶ If the Supreme Court determines that states cannot discriminate against out-of-state distributors, then such a fate will befall the United States wine market as well.

The issue then becomes how states and the wine industry can effectively prevent this situation from occurring. There is one possible way that states may be able to circumvent this outcome. A state may statutorily limit the number of distributor licenses it will grant, independent of whether the distributors are in-state or out-of-state. This type of law would have the benefit of being facially neutral, thus raising the issue of whether *Granholm* is even applicable. Nevertheless, such a statute may present antitrust issues that could ultimately invalidate it. For instance, in *Costco Wholesale Corp. v. Maleng*, the Court found Washington's post and hold requirement to be an hybrid restraint of trade and a "per se violation [of the Sherman Act] without regard to its reasonableness."²⁰⁷ If nothing else, *Costco* confirms that state alcohol regulations are subject to federal antitrust laws.

In a hypothetical case presenting the issue of whether a state law prohibiting out-of-state distributors from selling to retailers is unconstitutional, the Court, following the analysis set forth in *Granholm*, will first determine that the state law in question is facially discriminatory; subjecting the statute to Commerce Clause analysis because the Twenty-first Amendment does not protect discriminatory treatment.²⁰⁸ The Court will then analyze the justifications for discrimination offered by the state and determine whether non-discriminatory alternatives are feasible.²⁰⁹ Here the state must provide concrete evidence, as opposed to mere speculation.²¹⁰

²⁰⁶ See, e.g., Beveragedaily.com, UK Wine Battle Hits Constellation Earnings (Jan. 5, 2007), <http://www.beveragedaily.com/Financial/UK-wine-battle-hits-Constellation-earnings> (last visited Nov. 23, 2008) (Constellation Brands's earnings have been adversely affected by the United Kingdom market).

²⁰⁷ *Costco Wholesale Corp. v. Maleng*, 522 F. 3d at 894-95. A post and hold requirement requires wholesalers wine and beer wholesalers to file their prices state and adhere to them for a period of time.

²⁰⁸ *Granholm*, 544 U.S. at 489.

²⁰⁹ *Id.* at 493.

This will prove difficult if not impossible. The Court has already looked unfavorably on a number of justifications, including: protecting states from lost tax revenues;²¹¹ ensuring orderly market conditions;²¹² policing underage drinking;²¹³ preserving the three-tier system;²¹⁴ lacking sufficient state resources to regulate the new licensees;²¹⁵ and preserving dry territories.²¹⁶

One potential new argument for states is that the discriminatory treatment of distributors artificially raises prices which, effectively promotes temperance by reducing demand. However, the non-discriminatory alternative of raising taxes or requiring minimum mark-ups produces the same effect on price without discrimination. Therefore the Court is unlikely to give this justification much weight.

Given the likelihood that a state will be unable to satisfy the Commerce Clause analysis, the only place the states and the wine industry can turn is Congress. The environment today is reminiscent of the environment prior to the passage of the Eighteenth Amendment. As in the nineteenth and early twentieth centuries, today's Court is impeding the ability of states to regulate alcohol as they see fit. Congress passed the Wilson and Webb-Kenyon Acts to counteract the Supreme Court's intervention. So too, it seems, Congress is needed now to once again preserve the power of the states to regulate alcohol within their borders thereby preserving the industry and consumer choice.

²¹⁰ *Id.*

²¹¹ *Id.* at 489-91

²¹² *See Costco Wholesale Corp. v. Hoen*, 407 F. Supp. 2d at 1252.

²¹³ *See Granholm*, 544 U.S. at 489-91

²¹⁴ *See Siesta Village Market, LLC v. Perry*, 530 F. Supp. 2d at 870.

²¹⁵ *See Siesta Vill. Mkt., LLC v. Granholm*, No. 06-CV-13041, 2008 WL 4427517 at *8.

²¹⁶ *See Cherry Hill Vineyards, LLC v. Hudgins*, 488 F. Supp. 2d at 622