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Articles

**Creating a Common Market for Wine:
Boutique Wines, Direct Shipment, and State Alcohol Regulation**

WILLIAM C. GREEN*

ABSTRACT

Boutique wineries are unable to ship directly to consumers nationwide because state laws continue to discriminate against out-of-state wineries even though the United States Supreme Court in *Granholm v. Heald* (2005) held that these laws violate the dormant Commerce Clause. This discrimination is rooted in a policy conflict between state alcohol beverage control systems and the boutique winery coalition which brought the direct shipment issue to the Supreme Court in *Granholm* and continues to shape the contested state-of-the-law in three ways. First, *Granholm* has led to the adoption of revised state direct shipment statutes, which only lessen the discrimination against out-of-state wineries. Second, these statutes have been challenged in the federal courts which disagree about applicability of *Granholm* to two key provisions in revised state statutes: winery production caps and in-person purchase requirements. Third, this litigation has led to the introduction of legislation in Congress which, if adopted, will undermine *Granholm* and permit the states to enact even more

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discriminatory direct shipment laws. In sum, this article concludes that *Granholm* has made boutique wines more available, but has not created a national common market for wine.

INTRODUCTION

The American wine industry has changed substantially with the establishment of several thousand boutique wineries.¹ These small wineries found it difficult to sell their limited production to customers in other states, in spite of the access provided by the Internet and package delivery services, because state governments were unwilling to permit out-of-state wineries to ship directly to consumers.² In response, these boutique wineries, their producer associations, and customers sued states in federal court.³ In 2005, the Supreme Court in *Granholm v. Heald*⁴ held unconstitutional state direct shipment laws, which discriminated against out-of-state wineries.⁵ Since *Granholm*, state legislatures have rewritten their direct shipment statutes, which boutique wineries have since challenged in federal court for their failure to eliminate discrimination.⁶ Conflicting court decisions and current legislation in Congress have, however, left the meaning of *Granholm* and the creation of a national common market for wine in doubt.⁷

To understand the development and current status of wine law and policy, Part I will examine the constitutional regime for the operation of the national wine marketplace and the state alcoholic beverage control systems, which has been defined by federal and state laws, the Commerce Clause,⁸ the Twenty-first Amendment,⁹ and decisions by the Supreme Court of the United States. Together they provide the legal setting for *Granholm* and its progeny.¹⁰

Part II will use the concept of policy domains to understand the alcohol beverage control systems, which states created using their Twenty-first Amendment authority and the Commerce Clause challenges to state direct

1. *Granholm v. Heald*, 544 U.S. 460, 467 (2005).

2. *Id.* at 467-68.

3. *Id.* at 469-70.

4. 544 U.S. 460 (2005).

5. *Id.* at 466.

6. See Maureen K. Ohlhausen & Gregory P. Luib, *Moving Sideways: Post Granholm Developments in Wine Direct Shipping and Their Implications for Competition*, 75 ANTITRUST L.J. 505, 514 nn. 64-67 (2008) (citing post-*Granholm* state statutes, which have been challenged for failure to eliminate discrimination; in particular those of Kentucky, Arizona, Massachusetts, and Indiana); discussion *infra* Part IV.A.

7. See *infra* Part IV.

8. U.S. CONST. art. I, § 8, cl. 3.

9. U.S. CONST. amend. XXI, § 2.

10. See discussion *infra* Part I. See generally *Granholm*, 544 U.S. 460.

shipment laws brought by the boutique winery coalition in the federal courts.

Part III will analyze *Granholm*, which held that two state direct shipment laws discriminated against direct-to-consumer sales by out-of-state wineries in violation of the Commerce Clause and were not protected by the Twenty-first Amendment.¹¹ The Court's decision did not, however, address the remedy for this constitutional violation except to give the states the choice of rewriting their laws to either permit all direct shipment of wine or prohibit all direct shipments.¹² Otherwise, the Court left the states free to decide how to comply.¹³

Part IV will continue to use the policy domain concept to explain three post-*Granholm* developments that have shaped direct shipment law. First, state legislatures revised their direct shipment laws, but these laws too often disregarded the Supreme Court's choice in *Granholm* because they neither permitted all wineries to ship directly to consumers on an equal basis, nor prohibited all direct shipping, but rather moved sideways to lessen the degree of discrimination against out-of-state wineries.¹⁴

Second, these revised state laws have been challenged in federal court by a boutique wine coalition and defended by state alcohol beverage agencies and state wholesalers organizations.¹⁵ Four federal courts of appeal have, however, disagreed about the applicability of *Granholm* to two key provisions in state direct shipment statutes, winery production caps and in-person purchase requirements, and have left unrealized the creation of a common market for wine.¹⁶

Third, state alcohol beverage wholesalers, who have been parties to this federal court litigation, and their national association have supported the introduction of legislation in the United States Congress.¹⁷ If enacted, the legislation would protect the wholesalers from future litigation challenging direct shipment laws, because it would amend two major federal alcohol beverage control statutes and overturn *Granholm* and recent federal court

11. See *Granholm*, 544 U.S. at 493.

12. See generally *id.* at 465-66, 493.

13. See generally *id.* at 492-93.

14. See *infra* Part IV.A; *infra* notes 223-26 and accompanying text.

15. See *infra* note 223 and accompanying text.

16. See *infra* notes 232-40 and accompanying text (citing the four federal cases: *Black Star Farms LLC v. Oliver (Black Star Farms II)*, 600 F.3d 1225 (9th Cir. 2010); *Family Winemakers of Cal. v. Jenkins (Family Winemakers II)*, 592 F.3d 1 (1st Cir. 2010); *Cherry Hill Vineyards, LLC v. Lilly (Cherry Hill Vineyards II)*, 553 F.3d 423 (6th Cir. 2008); *Baude v. Heath (Baude II)*, 538 F.3d 608 (7th Cir. 2008)).

17. See *infra* Part IV.C.

decisions holding that discriminatory state alcohol beverage laws violate the Commerce Clause.¹⁸

In sum, this Article will argue that the continuing dispute over *Granholm's* definition of a national wine marketplace and the constitutionality of state direct shipment laws can be understood in terms of the policy conflict waged in state legislatures, federal courts, and the United States Congress between state alcohol beverage control partisans and a boutique wine coalition.

I. THE CONSTITUTIONAL REGIME

The Supreme Court's decision in *Granholm* and post-*Granholm* federal court decisions have raised two fundamental constitutional questions about the relationship between the Commerce Clause and the Twenty-first Amendment.¹⁹ Does the Twenty-first Amendment grant states the authority to enact laws which discriminate against interstate commerce in wine? Alternatively, does the Commerce Clause place an affirmative limitation upon the states' Twenty-first Amendment authority to enact discriminatory state laws? Answering these two questions will require an examination of the constitutional regime which governs the manufacture, distribution, and consumption of alcoholic beverages.

The Commerce Clause has both affirmative and negative dimensions which affect government regulation of wine.²⁰ The Clause's affirmative dimension grants to Congress the power to enact laws which regulate the channels, instrumentalities, and activities substantially affecting interstate commerce.²¹ Prior to the ratification of the Eighteenth Amendment in 1919, Congress used its commerce power to enact two statutes regulating alcoholic beverages.²² The Wilson Act (1890) authorized states "to regulate imported liquor on the same terms as domestic liquor"²³ The Webb-Kenyon Act (1913) authorized states to regulate the direct interstate shipment of liquor for personal use within their states.²⁴ After the ratification of the Twenty-first Amendment in 1933, Congress reenacted the Webb-Kenyon Act in 1935 and in the same year passed the Federal Alcohol Administration Act, which requires producers of alcoholic beverages to

18. *See id.*

19. *See generally Granholm*, 544 U.S. 460.

20. *See generally* U.S. CONST. art. I, § 8, cl. 3; *see also* Intoxicating Liquors, 27 U.S.C. §§ 121-24 (2011).

21. *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). *See generally* 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 807-33 (3d ed. 2000).

22. U.S. CONST. amend. XVIII, § 1; *see also* 27 U.S.C. § 121-22.

23. *Granholm*, 544 U.S. at 482 (referencing Wilson Act of 1890, 27 U.S.C. § 121).

24. *Id.* (referencing Webb-Kenyon Act of 1935, 27 U.S.C. § 122).

obtain a federal permit from the Tax and Trade Bureau (“TTB”).²⁵ Congress has also assisted states in enforcing their alcohol tax laws against out-of-state wineries by enacting the Twenty-first Amendment Act of 2000, which grants states the right to sue alcoholic beverage producers in federal court in order to collect alcohol excise and sales taxes.²⁶

The affirmative Commerce Clause power was at issue in *Granholm*, and it continues to be an issue in its state-by-state implementation, because Congress may permit states to burden or discriminate against interstate commerce.²⁷ In *Granholm*, the states argued unsuccessfully that the Webb-Kenyon Act permits them to grant in-state wineries the right to direct ship their product to customers, but permits states to deny that right to out-of-state wineries.²⁸ Introduced in 111th Congress, the Community Alcohol Regulatory Effectiveness (“CARE”) Act of 2011, a wholesaler-backed bill, would eliminate the Wilson Act’s anti-discrimination language and amend the Webb-Kenyon Act to substantially limit the dormant Commerce Clause cases brought in the federal courts by boutique wineries.²⁹

The Commerce Clause has a negative dimension, the dormant Commerce Clause, which was the principal focus of attention in *Granholm* and post-*Granholm* federal court decisions.³⁰ In these cases, the issue has been whether state laws, based on the Twenty-first Amendment and the state’s police powers, may either burden or discriminate against the instrumentalities of interstate commerce or the goods which move in interstate commerce.³¹

If a state law burdens the instrumentalities or goods moving in interstate commerce, the Supreme Court will apply a balancing test, as it did in *Pike v. Bruce Church, Inc.*³² Using this test, which is deferential to state interests, the Court will uphold a state law if it pursues a legitimate governmental objective, is rationally related to that objective, and the burden on interstate commerce is outweighed by the interests promoted by the state law.³³ States have used their Twenty-first Amendment authority to enact liquor control statutes and regulations to promote temperance, to discourage

25. See 27 U.S.C. § 203(b) (2011); see also *Granholm*, 544 U.S. at 492.

26. Wilson Act of 1890, 27 U.S.C. § 122(a); see also *Granholm*, 544 U.S. at 485.

27. See *TRIBE*, *supra* note 21, at 1242-45. See generally *Granholm*, 544 U.S. 460.

28. *Granholm*, 544 U.S. at 482.

29. See Community Alcohol Regulatory Effectiveness Act, H.R. 1161, 112th Cong. (2011).

30. See *TRIBE*, *supra* note 21, at 1021-148. See generally *Granholm*, 544 U.S. 460.

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

32. 397 U.S. 137 (1970).

33. See *id.*

underage drinking, and to collect taxes on liquor sales.³⁴ All will be accepted as legitimate state interests. State laws which create distributor and retailer systems, require all wine producers to use these systems, and police these systems using alcohol beverage control agencies will also be accepted as means rationally related to these legitimate state interests.³⁵

The balancing test does not require that state laws be the ones best suited to achieve a state's interests, nor the ones that a court would prefer, but only one of many reasonable means which could be used to address legitimate state interests in alcoholic beverage control.³⁶ Judicial attention will, therefore, focus on balancing state interests in regulating the sale of alcoholic beverages against the economic burdens of these regulations on wine producers of directly selling to consumers in other states and then deciding whether the state has unconstitutionally burdened the movement of wine in the interstate marketplace.³⁷ Since the balancing test is deferential to state interests, states have used it to defend their alcohol control regulations, and the federal courts have used the *Pike* test to uphold these regulations as long as they impose only an incidental burden on interstate commerce and are not discriminatory.³⁸

States may also violate the dormant Commerce Clause by discriminating against interstate commerce in three ways: by regulating the means of transportation in a manner that prefers in-state economic interests over out-of-state interests,³⁹ by regulating incoming trade in a manner that prefers in-state economic interests over out-of-state interests,⁴⁰ and by requiring in-state businesses to perform their activities within the state.⁴¹ In *Granholm*, the boutique winery plaintiffs argued that the state's legal barriers to incoming trade in wine discriminated by preferring state

34. See, e.g., Brief for Petitioners at 7-10, *Granholm v. Heald*, 544 U.S. 460 (2005) (No. 03-1116), available at <http://www.law.indiana.edu/instruction/tanford/web/wine/HealdFINAL.pdf>.

35. See Ohlhausen & Luib, *supra* note 6, at 528.

36. See *Baude II*, 538 F.3d at 611-12.

37. See *id.* at 612-15 (upholding Indiana's in-person purchase requirement); *Cherry Hill Vineyards, LLC v. Hudgins (Cherry Hill Vineyards I)*, 488 F. Supp. 2d 601, 615 (W.D.Ky. 2006) (upholding Kentucky's two case limitation per winery visit).

38. Ohlhausen & Luib, *supra* note 6, at 525-27.

39. See *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 670-71 (1981) (quoting *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 441 (1978)); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 524 (1959) (quoting *S. Pac. Co. v. Arizona*, 325 U.S. 761, 775-76 (1945)); *S. Pac. Co.*, 325 U.S. at 775-76.

40. *City of Phila. v. N.J.*, 437 U.S. 617, 627-28 (1978) (quoting *Foster-Fountain Packing Co. v. Haydel*, 278 U.S. 1, 10 (1928)); *Hunt v. Wash. State Apple Adver. Comm'n.*, 432 U.S. 333, 350-51 (1977); *Dean Milk Co. v. City of Madison, Wis.*, 340 U.S. 349, 354 (1951); *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 521-22 (1935) (quoting U.S. CONST. art. 1, § 10, cl. 2).

41. *C & A Carbone, Inc. v. Town of Clarkston, N.Y.*, 511 U.S. 383, 386 (1994); *Hughes v. Oklahoma*, 441 U.S. 322, 337-38 (1979) (citing *OKL. STAT. ANN. tit. 29, § 4-115(B)* (1978)); *Pike*, 397 U.S. at 145; *H. P. Hood & Sons v. DuMond*, 336 U.S. 525, 539 (1949).

economic interests in two ways: first, by permitting only in-state wineries to direct ship to in-state consumers; and second, by allowing direct shipment by both in-state and out-of-state wineries, but imposing regulations on out-of-state wineries not imposed on in-state wineries.⁴² To these two arguments was added a third, raised not by the wineries and their customers, but indirectly by five amici states that had adopted reciprocity laws: whether their reciprocity agreements,⁴³ which expanded the direct shipment market to consumers in reciprocity states, discriminated by restricting direct shipment to consumers in non-reciprocity states.⁴⁴ All three types of state laws, the boutique wineries, their amici, and customers have argued, restrict the operation of an open national wine market as mandated by the Commerce Clause.⁴⁵

If a state law is claimed to discriminate against interstate commerce, the Supreme Court will apply a two-part test from *Maine v. Taylor*,⁴⁶ which is not deferential to the state.⁴⁷ First, the Court will require the wineries and their customers to provide evidence sufficient to establish that the state law discriminates “either on its face or practical effect.”⁴⁸ Second, if the Court finds that the wineries and their customers have met their burden of proving discrimination, then the burden falls to the state to demonstrate “that the statute ‘serves a legitimate local purpose’ and that this purpose could not be served as well by available nondiscriminatory means.”⁴⁹ The Supreme Court’s discrimination test is a very demanding standard for a state to meet; it is one which the states confronted in *Granholm* and in federal court cases

42. Brief for Respondents at 11, 16-17, *Granholm v. Heald*, 544 U.S. 460 (2005) (No. 03-1116), available at <http://www.law.indiana.edu/instruction/tanford/web/wine/HealdFINAL.pdf>.

43. Wine Institute defines wine reciprocity agreements in the following terms.

Reciprocity is a legislative concept whereby each state . . . enter[s] into an agreement . . . for shipping wine to consumers. Reciprocity requires the legislative cooperation of other states to recognize a two-way shipment privilege In its simplest form, a reciprocal law says “a winery in your state can ship to a consumer in my state, only if a winery in my state can ship to a consumer in your state.”

State Shipping Laws FAQs, WINE INST., <http://www.wineinstitute.org/initiatives/stateshippinglaws/faqs> (last visited Nov. 9, 2012).

44. Brief of Amici Curiae States of California, Washington, New Mexico, Oregon, and West Virginia in Support of Respondents at 1-2, *Granholm v. Heald*, 544 U.S. 460 (2005) (No. 03-116), available at <http://www.law.indiana.edu/instruction/tanford/web/wine/5AGs.pdf>.

45. *Granholm*, 544 U.S. at 468-69.

46. 477 U.S. 131 (1986).

47. *Id.* at 138 (quoting *Hughes*, 441 U.S. at 336).

48. *Id.* (quoting *Hughes*, 441 U.S. at 336); see also, e.g., TRIBE, *supra* note 21, at 1059 (quoting *Maine v. Taylor*, 477 U.S. at 138).

49. See also, e.g., TRIBE, *supra* note 21, at 1059 (quoting *Taylor*, 477 U.S. at 138).

involving out-of-state direct shipment of wine prior to *Granholm* and since the Court's 2005 decision.⁵⁰

In Commerce Clause alcoholic beverage cases, there is another constitutional issue: whether the Twenty-first Amendment is an affirmative limitation on the Commerce Clause.⁵¹ The Supreme Court's decisions have established that Congress's affirmative power to regulate interstate commerce in liquor is not overridden by the Twenty-first Amendment, but the dormant Commerce Clause does not always limit state regulation of alcohol.⁵² States may burden interstate commerce by prohibiting all direct shipment of alcohol and requiring that all incoming liquor comply with their laws.⁵³ A state's Twenty-first Amendment authority to burden interstate commerce was an issue in *Granholm* and in both pre- and post-*Granholm* federal court cases.⁵⁴ In these cases, the issue has been whether the Commerce Clause's non-discrimination principle limits the state's Twenty-first Amendment authority to regulate the direct shipment of wine or reduces the level of Commerce Clause scrutiny to *Pike*-based rational basis review.⁵⁵

In its early Twenty-first Amendment dormant Commerce Clause cases, the Supreme Court read the Amendment to grant the states broad power to regulate liquor, including the power to discriminate against out-of-state liquor.⁵⁶ In the 1960s, however, the Court began to develop its

50. *Granholm*, 544 U.S. at 466-67; *TRIBE*, *supra* note 21, at 1059-60. Laurence Tribe states that the discrimination test has become stricter since *C & A Carbone*, 511 U.S. at 392. *TRIBE*, *supra* note 21, at 1061-62.

51. *TRIBE*, *supra* note 21, at 1167-72.

52. *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 276 (1984) (holding that a state tax exemption available to locally produced alcoholic beverages, but not out-of-state liquor violated the Commerce Clause); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 713 (1984) (holding that an Oklahoma law prohibiting retransmitting out-of-state alcohol beverage advertisements was preempted by federal law under the Supremacy Clause and was not saved by the Twenty-first Amendment); *Cal. Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 114 (1980) (holding that California's fair trade wine pricing system was preempted by the federal Sherman Anti-Trust Act and was not saved by the Twenty-first Amendment); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 333-34 (1964) (quoting *Idlewild Bon-Voyage Liquor Corp. v. Epstein*, 212 F. Supp. 376, 386 (S.D.N.Y. 1962) (holding a New York law prohibiting duty-free sales to international travelers at JFK airport violated the Commerce Clause and was not saved by the Twenty-first Amendment).

53. See *Granholm*, 544 U.S. at 488-89 (quoting, in part, *Cal. Retail Liquor Dealers Ass'n*, 455 U.S. at 110).

54. *Ohlhausen & Luib*, *supra* note 6, at 505, 507-08, 518-19.

55. *Id.*; see also *TRIBE*, *supra* note 21, at 1067-72.

56. *Ziffirin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939) (upholding a Kentucky law banning transportation through the state and into Illinois by an Indiana corporation denied a Kentucky transportation license as a valid exercise of the Twenty-first Amendment); *Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395, 397 (1939) (upholding a Missouri law forbidding the importation of any alcoholic liquor manufactured in any state which discriminates against the importation of any alcoholic liquor manufactured in Missouri as a valid exercise of the Twenty-first Amendment); *Indianapolis Brewing Co. v. Liquor Control Comm'n.*, 305 U.S. 391, 394 (1939) (citing *Mahoney v. Joseph Triner Corp.*, 304 U.S.

contemporary view which narrowed the state's Twenty-first Amendment authority by holding that state laws which violate other constitutional provisions are not saved by the Twenty-first Amendment.⁵⁷ Of the Court's recent decisions, *Bacchus Imports v. Dias*⁵⁸ is the most important pre-*Granholm* case because *Bacchus* held that the Twenty-first Amendment did not protect Hawaii's excise tax exemption for in-state, but not for out-of-state, alcoholic beverages from a finding that the tax exemption violated the dormant Commerce Clause.⁵⁹ *Bacchus*, together with other Supreme Court decisions narrowing the states' Twenty-first Amendment authority, provided a favorable constitutional setting when boutique wineries, which had grown substantially in the 1990s, initiated legal challenges in the late 1990s to state alcohol beverage laws created in the years following the repeal of Prohibition.⁶⁰

II. FEDERAL ALCOHOL BEVERAGE CONTROL REGIME

Alcoholic beverages have been subject to four control regimes.⁶¹ State regimes, created prior to the Civil War, were transformed into a federal

401, 458 (1938)) (upholding a Michigan law forbidding the importation of beer manufactured in states discriminating against beer made in Michigan as a valid exercise of the Twenty-first Amendment); *Mahoney*, 304 U.S. at 403 (upholding a Minnesota statute forbidding importation of all non-patented liquors with specified alcoholic contents as a valid exercise of the Twenty-first Amendment); *State Bd. of Equalization of Cal. v. Young's Mkt. Co.*, 299 U.S. 59, 62 (1936) (upholding a California statute requiring a license and fee to import beer as a valid exercise of the Twenty-first Amendment). See generally RICHARD MENDELSON, *FROM DEMON TO DARLING: A LEGAL HISTORY OF WINE IN AMERICA* 121-24 (2009).

57. See, e.g., 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489 (1996) (holding a state statute banning advertising liquor prices violated the Free Speech Clause); *Healy v. Beer Inst.*, 491 U.S. 324, 343 (1989) (holding a Connecticut law requiring out-of-state shippers of beer to affirm that their posted prices were no higher than prices at which beer was sold in neighboring states violated the Commerce Clause); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 585 (1986) (holding the state law requiring sellers of liquor to affirm that the price of their liquor sold to New York wholesalers was not higher than the price of those products anywhere in the United States violated the Commerce Clause); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 117, 127 (1982) (holding a Massachusetts statute allowing a church to prevent issuance of a liquor license within 500 foot radius of a church's building violated the Establishment Clause); *Craig v. Boren*, 429 U.S. 190, 208-10 (1976) (holding an Oklahoma statute prohibiting the sale of 3.2% beer to men under the age of twenty-one and women under the age of eighteen violated the Equal Protection Clause); *Wisconsin v. Constantineau*, 400 U.S. 433, 436 (1971) (holding a Wisconsin law which authorized the posting of a notice in retail liquor stores forbidding sale of liquor for one year to persons who engaged in excessive drinking violated the Due Process Clause); *Dep't. of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341, 346 (1964) (holding a Kentucky tax on whiskey imported from Scotland violated the Import-Export Clause).

58. 468 U.S. 263 (1984).

59. *Id.* at 271, 275-76.

60. MENDELSON, *supra* note 56, at 178.

61. John Foust, *State Power to Regulate Alcohol Under the Twenty-First Amendment: The Constitutional Implications of the Twenty-First Amendment Enforcement Act*, 41 B.C. L. REV. 659, 662-65 (2000).

regime, based on state laws and the federal Wilson Act (1890) and Webb-Kenyon Act (1913), which was abandoned for a national regime (1919-1933) founded on the Eighteenth Amendment and implemented by the federal Volstead Act.⁶² The current federal regime, defined by the Twenty-first Amendment and the Commerce Clause, subjects all producers of alcoholic beverages—beer, wine, and spirits—to regulation by federal and state governments.⁶³

Congress has used its Commerce Clause power to regulate the interstate liquor market and assist states in implementing their Twenty-first Amendment authority. The Federal Alcohol Administration Act of 1935, which requires all alcohol beverage producers to obtain a federal license in order to legally ship their products in interstate commerce, conditions the receipt of the license “upon compliance . . . with the twenty-first amendment and laws relating to the enforcement thereof”⁶⁴ The Twenty-first Amendment Act of 2000, as explained above, grants states the right to sue alcoholic beverage producers in federal court in order to collect state alcohol taxes.⁶⁵ Congress also responded to federal court-initiated regime changes, discussed below, by including in the Department of Justice Appropriations Authorization Act of 2002, a provision which allows adult consumers, who could personally transport wine legally into a state, to have the wine shipped into that state in accordance with that state’s personal importation regulations as long as the customers are physically present at the out-of-state winery at the time of purchase, the wine is shipped in containers requiring an adult signature, and the wine is for personal use only.⁶⁶

States have used their Twenty-first Amendment authority, broadly interpreted by early Supreme Court decisions, to create two types of alcoholic beverage control regimes.⁶⁷ In the seventeen monopoly states, “the state serv[es] as the exclusive wholesaler and retailer of these beverages”⁶⁸ In practice, “control states have developed hybrid

62. Volstead Act (National Prohibition Act), 41 Stat. 305 (1919), *repealed by* U.S. CONST. amend. XXI (1933).

63. See TRIBE, *supra* note 21, at 1069-72.

64. 27 U.S.C. § 204(d) (2010).

65. 27 U.S.C. § 122(a) (2010); see Foust, *supra* note 61, at 669-70.

66. See 27 U.S.C. § 124(a) (2010).

67. MENDELSON, *supra* note 56, at 116-17; see also Fed. Trade Comm’n., Possible Anticompetitive Barriers to E-Commerce: Wine, 5, 7, 9 (2003) [hereinafter FTC Wine Report], available at <http://www.ftc.gov/os/2003/07/winereport2.pdf>.

68. MENDELSON, *supra* note 56, at 101 (indicating that there are eighteen control states); but see Kirk Johnson, *A Taste of Prohibition as Liquor Stores Go Private*, N.Y. TIMES, May 26, 2012, at 18 (indicating a change in the state of Washington from a control state to a three tier system, thereby reducing the number of control states to seventeen).

systems, generally with a public monopoly on package sales and private licensees handling on-premises sales.⁶⁹ In the thirty-three three-tier systems, states have created a system of public regulation of private wholesalers and retailers.⁷⁰ Producers of alcoholic beverages who have obtained a federal TTB permit are required to sell to state licensed wholesalers, who then deliver the alcohol to state licensed retailers who sell it to consumers.⁷¹ States have also used their Twenty-first Amendment authority to enact laws to tax alcohol sales and establish a minimum age for the sale of alcoholic beverages.⁷² Finally, states have enacted direct shipping laws and justified them as means to collect taxes, discourage underage drinking, and protect the integrity of their regulatory systems.⁷³

The structure, functioning, and policies of these state-based alcoholic beverage systems and the legal challenges which have been mounted against them may be understood as a policy conflict between two levels of politics: subsystem politics and macropolitics.⁷⁴ Political subsystems are also known as subgovernments, policy coalitions, and iron triangles.⁷⁵ These subsystems, such as the state-based alcohol beverage control systems, involve a pattern of stable relationships among state legislative committees, administrative agencies, and regulated entities which have a common interest in a specific policy.⁷⁶ Political subsystems can exist undisturbed for long periods of time and function with a high degree of autonomy, making

69. MENDELSON, *supra* note 56, at 106.

70. Ethan Davis, *Uncorking A Seventy-Four-Year-Old Bottle: A Toast to the Free Flow of Liquor Across State Borders*, 117 YALE L.J. POCKET PART 133, 134 (2007); See MENDELSON, *supra* note 56, at 117 (indicating that there are thirty-two three-tier states), but see Johnson, *supra* note 68 (indicating a change in the state of Washington from a control state to a three tier system, thereby increasing the number of three-tier states to thirty-three).

71. FTC Wine Report, *supra* note 67, at 5.

72. *Id.* at 6.

73. *Granholm*, 544 U.S. at 489-91.

74. JAMES ANDERSON, PUBLIC POLICYMAKING: AN INTRODUCTION 73 (4th ed. 2000). Anderson identifies three levels of politics “based on the scope of participation . . . and . . . the kind of issue involved: micropolitics, subsystem politics, and macropolitics.” *Id.* Anderson briefly defines each of these policy domains in the following terms:

Micropolitics involves efforts by individuals, companies, and communities to secure favorable governmental action Subsystem politics focuses on functional areas of activity . . . and involves relationships among congressional committees, administrative agencies . . . and interest groups. Macropolitics occurs when “the community at large and the leaders of government as a whole are brought into the discussion and determination of [public] policy.”

Id. (quoting EMMETTE S. REDFORD, DEMOCRACY IN THE ADMINISTRATIVE STATE 53 (1969)). This Article expands Anderson’s levels of politics framework, which focuses on national government institutions, by placing it in a federal setting and examining the conflict and interaction between state-based subsystems and national legislative and judicial macropolitical institutions.

75. *Id.* at 75.

76. *Id.*

routine decisions and “maintain[ing] a veto, if not a monopoly, on policy in the areas of concern.”⁷⁷

Subsystem policy-making autonomy may be disturbed by external events, including changing market conditions, which are different enough in character from the issues the subsystem usually confronts.⁷⁸ Individuals and private organizations affected by these external events and dissatisfied with policies controlled by a subsystem will broaden the scope of policy conflict by challenging subsystem policy in the more visible macro-political system of national politics, in which the central participants are the president, congressional leaders, executive departments, federal judges, and justices of the United States Supreme Court.⁷⁹

Alcoholic beverage subsystems developed in each state after states used their Twenty-first Amendment authority to enact alcohol beverage control laws.⁸⁰ These state-based subsystems are defined by a triad of legislative committees responsible for alcoholic beverage policy making, alcoholic beverage control agencies, and alcohol wholesaler organizations, which have a common vested interest in the regulation of alcoholic beverages in their state.⁸¹ The state-based alcoholic beverage control subsystems operated relatively undisturbed for over fifty years in regulating an industry that underwent significant structural changes in the production, distribution, and consumption of alcoholic beverages.⁸²

In the 1980s, state alcoholic beverage subsystems were disturbed by external market events, which included the growth of small wineries, package delivery services, the Internet, and wine tourism.⁸³ As explained below, states responded to these changing market conditions by authorizing their small in-state wineries to direct ship to in-state consumers and by negotiating reciprocity agreements with other states, which authorized wineries in those states to direct ship to consumers.⁸⁴ When these states were unwilling to open their markets to permit out-of-state wineries to direct ship on a non-discriminatory basis, boutique wineries, their trade organizations, and their customers challenged state alcohol beverage policies, not in in-state legislatures which were controlled by alcohol

77. A. LEE FRITSCHLER & CATHERINE E. RUDDER, *SMOKING AND POLITICS: BUREAUCRACY CENTERED POLICYMAKING* 18 (6th ed. 2007).

78. *Id.*

79. *Id.* at 18-19; *see also* E. E. SCHNATTSCHNEIDER, *THE SEMISOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA* 2-6, 10, 16-18 (1975).

80. MENDELSON, *supra* note 56, at 101-09, 116-17.

81. *Id.*

82. *See id.* at 173.

83. *See id.* at 181.

84. *Id.* *See also* *Granholm*, 544 U.S. at 467-68; FTC Wine Report, *supra* note 67, at 7-8.

beverage subsystem interests, but in the macropolitical arena of the federal courts.⁸⁵ In doing so, the boutique winery coalition increased the media visibility of the direct shipment issue and expanded the scope of the policy conflict by turning the issue into litigation and by granting federal judges the opportunity to decide the constitutionality of state statutes.⁸⁶

A. State Initiated Regime Change

The three-tier state system began to change in 1986 at the initiative of California, which produces ninety percent of all domestic wine and whose wineries had more than doubled from 330 in 1975 to 712 ten years later.⁸⁷ To open up new markets for its growing wine industry, California negotiated reciprocity agreements with other states.⁸⁸ These agreements permitted direct shipment from wineries to all consumers in the reciprocity states, subject to limits on the volume of wine shipped and the receipt of the wine by an adult.⁸⁹ By 2005, there were thirteen reciprocity states.⁹⁰

California's initiative was accompanied by changes in the production, distribution, and consumption of wine, which presented new challenges to the state alcoholic beverage control subsystems.⁹¹ From 1975 to 2002, the number of small wineries nationwide grew substantially from 800 to over 2,700.⁹² "Many of these new wineries produce relatively small amounts of wine, often less than 2000 cases annually, whereas large wineries can produce over 300,000 cases annually."⁹³ At the consumer level, there was also an increase in demand for premium or boutique wines with bottles priced at twenty dollars and often at forty dollars or more.⁹⁴

85. *Granholm*, 544 U.S. at 467-68; see also TYLER COLMAN, WINE POLITICS: HOW GOVERNMENTS, ENVIRONMENTALISTS, MOBSTERS, AND CRITICS INFLUENCE THE WINES WE DRINK 98-99 (2008).

86. COLMAN, *supra* note 85, at 98-99.

87. See Michael A. Pasahow, *Granholm v. Heald: Shifting the Boundaries of California's Reciprocal Wine Shipping Laws*, 21 BERKLEY TECH. L.J. 569, 575 (2006); see also *California Wine Profile 2011*, WINE INST., http://www.wineinstitute.org/files/CA_EIR_Flyer_Aug_2012_0.pdf (last visited Nov. 9, 2012) (stating California produces ninety percent of all domestic wine); *Number of California Wineries*, WINE INST., <http://www.wineinstitute.org/resources/statistics/article124> (last visited Nov. 9, 2012) (demonstrating the statistics of the wineries doubling in California within the ten year time period).

88. Pasahow, *supra* note 87, at 575.

89. FTC Wine Report, *supra* note 67, at 7-8.

90. *Id.*; see also Jessica R. Reese, *A Post-Granholm Analysis of Iowa's Regulatory Framework for Wine Distribution*, 94 IOWA L. REV. 665, 680 (2009).

91. See Pasahow, *supra* note 87, at 575.

92. See FTC Wine Report, *supra* note 67, at 6.

93. *Id.* at 7-8.

94. *Id.* at 3.

The increasing production and demand for these boutique wines confronted a bottleneck in the three-tier state system.⁹⁵ State-licensed distributors, committed to handling large volumes from major wineries, were unwilling to carry the labels of small wineries.⁹⁶ In its 2003 study of “Possible Anti-competitive Barriers to E-Commerce,” the Federal Trade Commission (“FTC”) found that small wineries were deprived of market access because of “[f]ixed costs that make it uneconomical for a wholesaler to carry lesser known wines that are available only in small quantities.”⁹⁷ At the same time, the number of state licensed distributors fell from several thousand in the 1950s to 1,600 in 1984, and to 600 in 2002.⁹⁸ As a result, the size and concentration of remaining distributors increased substantially, approaching monopoly status in some states.⁹⁹

Small wineries were also disadvantaged by the sale of their product at “brick and mortar” retail stores.¹⁰⁰ According to the FTC study, “most retailers simply do not have the shelf space to carry . . . ‘[the] more than 25,000 domestic wine labels—most of which are produced by small wineries.’”¹⁰¹ Consumers, able to find only a limited number of premium wines in brick and mortar retail stores, turned to the Internet.¹⁰² As small wineries created websites to advertise their wines, the Internet has increasingly provided consumers with a wider variety of wines from which to choose; but these consumers were often unable to purchase wines online because state regulations impeded or expressly prohibited these sales.¹⁰³

California’s reciprocity initiative and the demands of small wineries and consumers of boutique wines for a more open wine market produced a confusing patchwork of state laws as states, restricted by the vested interests of their state alcoholic beverage subsystems, responded to the increasing demand for boutique wines.¹⁰⁴ Twenty-four states loosened their restrictions and allowed a limited form of direct to consumer out-of-state shipments.¹⁰⁵ These limited direct-shipment states often required wineries to

95. *See id.* at 6.

96. *Id.*

97. FTC Wine Report, *supra* note 67, at 6.

98. *Id.*; *see also* Gina M. Riekhof & Michael E. Sykuta, *Regulating Wine by Mail*, Regulation, Fall 2004, at 30, 31, available at <http://www.cato.org/pubs/regulation/regv27n3/v27n3-3.pdf>.

99. *See* FTC Wine Report, *supra* note 67, at 6; *see also* Riekhof & Sykuta, *supra* note 98, at 31-32.

100. FTC Wine Report, *supra* note 67, at 1.

101. *Id.* at 24 (citing the written summary statement from American Vintners Association, David Sloane, FTC Workshop: Possible Anti-competitive Efforts to Restrict Competition on the Internet, 2 (Oct. 8, 2002), <http://www.ftc.gov/opp/e-commerce/anticompetitive/panel/sloane.pdf>).

102. *Id.* at 3, 14-15. *See also* MENDELSON, *supra* note 56, at 181.

103. FTC Wine Report, *supra* note 67, at 14-15.

104. *See* Reese, *supra* note 90, at 680-83; *see also* Pasahow, *supra* note 87, at 575.

105. FTC Wine Report, *supra* note 67, at 7-8.

obtain expensive permits, mandated consumers to purchase importation licenses, and restricted the volume of direct interstate wine shipments to consumers, but these regulations and others were not usually imposed on in-state wineries which shipped directly to in-state customers.¹⁰⁶ The remaining twenty-six states prohibited direct interstate shipment to consumers, but many of these “closed states” permitted out-of-state wineries to “ship wine indirectly to consumers through special order procedures,” which, in Pennsylvania, for example, required the customer to pick up the wine at a state licensed retailer.¹⁰⁷ In seven closed states, it was a felony for out-of-state wineries to direct ship while in others it was a misdemeanor.¹⁰⁸

B. Federal Court Initiated Regime Change

Small wineries and their customers, frustrated by the unwillingness of state legislatures to open their markets and eliminate their discriminatory practices, initiated nationwide litigation in federal courts.¹⁰⁹ This litigation was directed by a boutique wine coalition composed of two non-profit legal

106. *Id.*

107. *Id.* at 8-9. *See, e.g.*, Sloane, *supra* note 101, at 3.

108. FTC Wine Report, *supra* note 67, at 8.

109. The constitutional legal issues raised by this federal court litigation over state alcohol beverage control practices are addressed by the following law review articles: *See generally* Lloyd C. Anderson, *Direct Shipment of Wine, the Commerce Clause and the Twenty-First Amendment: A Call for Legislative Reform*, 37 AKRON L. REV. 1, 4-5 (2004); Susan Lorde Martin, *Wine Wars—Direct Shipment of Wine: The Twenty-First Amendment, the Commerce Clause, and Consumers’ Rights*, 38 AM. BUS. L.J. 1, 3 (2000); Alan E. Wiseman & Jerry Ellig, *Market and Non-Market Barriers to Internet Wine Sales: The Case of Virginia*, 6 BUS. & POL. 1, 1 (2004); Duncan Baird Douglass, Note, *Constitutional Crossroads: Reconciling the Twenty-First Amendment and the Commerce Clause to Evaluate State Regulation of Interstate Commerce in Alcoholic Beverages*, 49 DUKE L.J. 1619, 1623 (2000); Justin Lemaire, Note, *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, 1615 (2004); Lisa Lucas, Comment, *A New Approach to the Wine Wars: Reconciling the Twenty-First Amendment With the Commerce Clause*, 52 UCLA L. REV. 899, 904-05 (2005); Eric L. Martin, Note, *A Toast to the Dignity of States: What the Eleventh Amendment Jurisprudence Portends for Direct Shipment of Wine*, 31 HOFSTRA L. REV. 1303, 1304-305 (2003); Gerald B. McNamara, Comment, *Free the Grapes: The Commerce Clause versus the Twenty-First Amendment With Regard to Interstate Shipment of Wine in America*, 43 DUQ. L. REV. 113, 114-15 (2004); Marc Aaron Melzer, Comment, *A Vintage Conflict 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, 281-82 (2004); Russ Miller, Note, *The Wine is in the Mail: The Twenty-First Amendment and State Laws Against the Direct Shipment of Alcoholic Beverages*, 54 VAND. L. REV. 2495, 2499-50 (2001); Jason E. Prince, Note, *New Wine in Old Wineskins: Analyzing State Direct-Shipment Laws in the Context of Federalism, the Dormant Commerce Clause, and Twenty-first Amendment*, 79 NOTRE DAME L. REV. 1563, 1565 (2004); Timothy Schnabel, Case Note, *A Circuit-Splitting Headache: The Hangover of the Supreme Court’s Twenty-First Amendment Jurisprudence*, 21 YALE L. & POL’Y REV. 547, 547 (2003); Vijay Shanker, Note, *Alcohol Direct Shipping Laws, the Commerce Clause, and the Twenty-First Amendment*, 85 VA. L. REV. 353, 354 (1999).

foundations, the Coalition for Free Trade and the Institute for Justice, and four wine industry organizations: the Wine Institute, a San Francisco-based winery group; WineAmerica, a Washington, D.C.-based wine industry organization; the Family Winemakers of California, an organization of 300 small wineries; and Free the Grapes, a national grassroots coalition of consumers and wineries.¹¹⁰ Ranged against them were members of each state's alcohol beverage control subsystem.¹¹¹ These state alcohol beverage control officials and state wholesalers' and retailers' organizations were supported by national organizations representing their interests: National Conference of State Liquor Administrators, Wine and Spirits Wholesalers of America, and the National Alcohol Beverage Control Association.¹¹²

The Coalition for Free Trade, founded in 1997 to support litigation to legalize direct-to-consumer shipments by out-of-state wineries and retailers, created a Wine Industry Legal Team that supported and coordinated the federal litigation challenging the discriminatory practices in five states: Florida, Indiana, Michigan, North Carolina, and Texas.¹¹³ The Institute for Justice, a libertarian public interest law group, supported litigation in three states: Arizona, New York, and Virginia.¹¹⁴ In these cases, the Coalition for Free Trade and the Institute for Justice argued that discriminatory state laws violated the federal Commerce Clause.¹¹⁵

110. See generally Wiseman & Ellig, *supra* note 109, at 6-7. The web sites of the principal wine advocacy coalition members are the following: COALITION FOR FREE TRADE, <http://www.coalitionforfreetrade.com> (last visited Nov. 9, 2012); INST. FOR JUST., <http://www.ij.org> (last visited Nov. 9, 2012); FAMILY WINEMAKERS OF CAL., <http://www.familywinemakers.org> (last visited Nov. 9, 2012); FREE THE GRAPES, <http://www.freethegrapes.org> (last visited Nov. 9, 2012); WINE AM., <http://www.wineamerica.org> (last visited Nov. 9, 2012); WINE INST., www.wineinstitute.org (last visited Nov. 9, 2012).

111. Shanker, *supra* note 109, at 383.

112. The web sites of the principal alcohol beverage control subsystem members are the following: NAT'L ALCOHOL BEVERAGE CONTROL ASS'N, <http://www.nabca.org> (last visited Nov. 9, 2012); NAT'L CONF. OF STATE LIQUOR ADMIN., <http://www.ncsla.org> (last visited Nov. 9, 2012); WINE & SPIRITS WHOLESALERS OF AM., <http://www.wswa.org> (last visited Nov. 9, 2012).

113. See *Dickerson v. Bailey*, 336 F.3d 388, 392 (5th Cir. 2003) (holding a Texas statute permitting in-state wineries, but prohibiting out-of-state wineries to direct ship to Texas customers violated the Commerce Clause); *Beskind v. Easley*, 325 F.3d 506, 517 (4th Cir. 2003) (holding a North Carolina statute favoring in-state wineries violated the Commerce Clause); *Bainbridge v. Turner*, 311 F.3d 1104, 1106 (11th Cir. 2002) (remanding to district court to determine whether the Florida statute restricting direct shipment to in-state wineries effectuated the government's core concerns); *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 849 (7th Cir. 2000); COALITION FOR FREE TRADE, *supra* note 110.

114. *Swedenburg v. Kelly (Swedenburg I)*, 232 F. Supp. 2d 135, 136 (S.D.N.Y. 2002), *rev'd*, 358 F.3d 223, 226 (2d Cir. 2004); *Bolick v. Roberts*, 199 F. Supp. 2d 397 (E.D. Va. 2002), *vacated sub nom. Bolick v. Danielson*, 330 F.3d 274, 277 (4th Cir. 2003); *Arizona Wine: Parker v. Morrison*, THE INST. FOR JUST., <http://www.ij.org/economicliberty/856> (last visited Nov. 9, 2012) (discussing *Parker v. Morrison* being filed October 7, 2003, and suspended March 12, 2004 pending a decision of the Supreme Court decision in *Granholm v. Heald*).

115. See *Black Star Farms, LLC v. Oliver (Black Star Farms I)*, 544 F. Supp. 2d 913, 917-18 (D. Ariz. 2008); see, e.g., *Danielson*, 330 F.3d at 276; *Swedenburg I*, 232 F. Supp. 2d at 136, 138-39.

To remedy this constitutional violation, they proposed that states adopt legislation based on the National Conference of State Legislatures (“NCSL”) Model Direct Shipping Bill, which the boutique wine coalition members proposed and the Task Force on the Wine Industry adopted in 1997.¹¹⁶ The NCSL model bill requires out-of-state wineries to purchase a state direct-shipping license, limit their shipments to twenty-four bottles per month, mark their shipping containers as containing alcohol, and require package delivery services to obtain an adult signature.¹¹⁷ The model bill also requires out-of-state wineries to pay state excise and sales taxes, report their yearly total wine shipments into the state, permit a state audit of its shipping records, consent to the jurisdiction of the state to enforce its laws, and limit a state to imposing misdemeanor penalties for violation of its direct shipment laws.¹¹⁸

The Coalition for Free Trade’s first legal challenge met with failure. The Seventh Circuit upheld Indiana’s ban on out-of-state direct to consumer sales and the United States Supreme Court denied review in 2001.¹¹⁹ But by 2003, federal courts had held that discriminatory state restrictions on out-of-state, direct-to-consumer sales by Florida, Michigan, North Carolina, Texas, and Virginia violated the dormant Commerce Clause.¹²⁰ After the Eleventh Circuit’s decision in the Florida case, the Fourth Circuit’s decision in the North Carolina case, and the United States District Court’s decision in the Virginia case, the legislatures of these states enacted direct shipping bills based on the NCSL Model Direct Shipping Bill.¹²¹ In Texas, the state decided not to seek Supreme Court review of the Fifth Circuit’s decision¹²²

116. Shanker, *supra* note 109, at 365; *Model Direct Shipping Bill*, FREE THE GRAPES, <http://www.freethegrapes.org/?q=content/model> (last visited Nov. 9, 2012). The wine advocacy coalition members who promoted the adoption of the National Council of State Legislatures’ (“NCSL”) Model Direct Shipping Bill are: AM. WINERIES, <http://www.americanwineries.org> (last visited Nov. 9, 2012); COALITION FOR FREE TRADE, *supra* note 110; FAMILY WINEMAKERS OF CAL., *supra* note 110; WINE INST., *supra* note 110.

117. *Model Direct Shipping Bill*, *supra* note 116, at 1.

118. *Id.*

119. *Bridenbaugh*, 227 F.3d at 854.

120. *Wiseman & Ellig*, *supra* note 109, at 7.

121. *See* *Bainbridge v. Parmer*, No. 8:99-CV-2681-T-27TBM, 2005 WL 6142228, at *1 (M.D. Fla. Oct. 18, 2005); *Beskind v. Easley*, 197 F. Supp. 2d 464, 466 (W.D.N.C. 2002), *aff’d in part, vacated in part*, 325 F.3d 506, 520 (4th Cir. 2003); *Bolick v. Roberts*, 199 F. Supp. 2d 397, 450-51 (E.D. Va. 2002), *vacated*, 330 F.3d 274, 277 (4th Cir. 2003); *see also* *Bainbridge v. Turner*, 311 F.3d 1104 (11th Cir. 2002) (pending while *Granholm* was being decided, the district court, shortly thereafter, entered an agreed order that the statute was unconstitutional and required the state to allow direct shipping). *See generally* *Model Direct Shipping Bill*, *supra* note 116.

122. *Dickerson v. Bailey*, 212 F. Supp. 2d 673, 695-96 (S.D. Tex. 2002), *aff’d*, 336 F.3d 388, 392 (5th Cir. 2003); *Bill Analysis: C.S.S.B. 877 79(R)*, SENATE RESEARCH CENTER 1 (Tex. 2005), available at <ftp://ftp.legis.state.tx.us/bills/79R/analysis/pdf/.../SB00877S.PDF>.

and adopted legislation based on the NCSL model bill.¹²³ However, the Sixth Circuit's decision striking down the Michigan liquor laws was appealed to the Supreme Court, as was the Second Circuit decision upholding New York's restrictions on out-of-state direct shipments.¹²⁴ In sum, the boutique wine coalition's litigation had produced compliance in all but two cases involving state restrictions on incoming trade in wine: the New York statute, which imposed regulations on out-of-state wineries not imposed on in-state domestic wineries, and the Michigan statute, which permitted only in-state wineries to direct ship to the state's wineries.¹²⁵

Granholm v. Heald, the Michigan case, was brought by Eleanor Heald, Domaine Alfred, a small California winery, and the Coalition for Free Trade.¹²⁶ Domaine Alfred and other out-of-state wineries were required to "apply for a \$300 'outside seller of wine' license" and to sell to state licensed private wholesalers.¹²⁷ They challenged an exception which allowed the forty Michigan wineries to apply for a twenty-five dollar wine maker license and to bypass the state's three-tier system and ship their produce directly to in-state consumers.¹²⁸ The differential treatment, they claimed, discriminated against the interstate sale of wine in violation of the Commerce Clause.¹²⁹ Michigan officials and the Michigan Beer and Wine Wholesalers argued that the direct shipment ban was a valid exercise of the state's Twenty-first Amendment power.¹³⁰ The district court in *Heald v. Engler* ("*Granholm I*") (2001)¹³¹ upheld the direct shipment ban, but in *Heald v. Engler* ("*Granholm II*") (2003)¹³² the Court of Appeals for the Sixth Circuit reversed, holding that the Twenty-first Amendment does not immunize the state's liquor laws from Commerce Clause scrutiny, that the direct shipment ban facially discriminated against out-of-state producers,

123. Compare Model Direct Shipping Bill, *supra* note 116, with S.B. 877, 82d Leg. Reg. Sess. (Tex. 2006).

124. *Granholm*, 544 U.S. at 493. See also *Heald v. Engler* (*Granholm II*), 342 F.3d 517 (6th Cir. 2003); *Swedenburg v. Kelly* (*Swedenburg II*), 358 F.3d 223, 230 (2d Cir. 2004).

125. See Amanda C. Grafstrom, Case Comment, *Commerce-Intoxicating Liquors: Wine Lovers Rejoice! Why Vineyards Can Now Ship Directly To Consumers And Why Everyone Else Should Care Granholm v. Heald*, 544 U.S. 460 (2005), 82 N.D. L. REV. 557, 559 (2006).

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

127. *Id.* (citing MICH. COMP. LAWS ANN. §§ 436.1109(9), 436.1525(1)(e) (West Supp. 2004)).

128. *Id.* at 469-70 (citing MICH. COMP. LAWS ANN. §§ 436.1113(9), 436.1537(2)-(3), 436.1525(1)(d) (West 2001)).

129. *Id.* at 469.

130. *Id.*

131. No. 00-CV-71438-DT, 2001 U.S. Dist. LEXIS 24826 (E.D. Mich. Sept. 28, 2001).

132. 342 F.3d 517 (6th Cir. 2003).

and that Michigan could have achieved its temperance and taxing objectives by less burdensome, non-discriminatory means.¹³³

Swedenburg v. Kelly (“*Swedenburg I*”) (2001),¹³⁴ the New York case, was brought by Juanita Swedenburg, a small Virginia winery owner, David Lucas, a small California winery owner, New York consumers, and the Institute for Justice.¹³⁵ They challenged the New York law, which, unlike the Michigan liquor statute, imposed burdens on their direct sales to New York customers not shared by New York wineries.¹³⁶ New York wineries were permitted to bypass the state’s three-tier system and to ship directly to New York consumers if they obtained a farm winery license and if their wine was made from at least seventy-five percent New York grown grapes.¹³⁷ Out-of-state wineries were required to establish a branch facility in the state and to obtain first a commercial winery license and then a license to make direct-to-consumer shipments.¹³⁸ They argued that New York’s differential treatment placed them at a competitive disadvantage in violation of the Commerce Clause.¹³⁹ New York’s State Liquor Authority, supported by the state’s liquor wholesaler and retailer organizations, defended the law as a valid exercise of the state’s Twenty-first Amendment authority.¹⁴⁰ In *Swedenburg I*, the federal district court rejected the state’s Twenty-first Amendment arguments and held that its direct shipment requirements had the practical effect of discriminating against out-of-state wineries in violation of the Commerce Clause.¹⁴¹ On appeal, the Second Circuit in *Swedenburg v. Kelly* (“*Swedenburg II*”) (2004)¹⁴² reversed and held that the state’s interest in assuring accountability of wineries by requiring their physical presence in the state was directly tied to the state’s Twenty-first Amendment authority to control the importation and transportation of liquor in the state.¹⁴³

After five years of litigation, federal courts of appeal had decided seven direct shipment cases.¹⁴⁴ The Second and Seventh Circuits upheld two state

133. *Heald v. Engler*, 2001 U.S. Dist. LEXIS 24826, at *17-18, *rev’d sub nom*; *Granholt II*, 342 F.3d at 522-526.

134. 232 F. Supp. 2d 135, 136 (S.D.N.Y. 2002).

135. *Id.* at 136-37.

136. *Id.* at 137-38.

137. *Granholt*, 544 U.S. at 470 (citing N.Y. ALCO. BEV. CONT. LAWS ANN. §§ 76-a(3)-a(6)(a) (West Supp. 2005)).

138. *Id.* (citing N.Y. ALCO. BEV. CONT. LAWS ANN. § 3(7)).

139. *Swedenburg I*, 232 F. Supp. 2d at 137-39.

140. *Id.* at 139.

141. *Id.* at 147-48.

142. 358 F.3d 223 (2d Cir. 2004).

143. *Id.* at 239 (citing *Kronheim & Co., Inc. v. D.C.*, 91 F.3d 193, 203-04 (D.C. Cir. 1996)).

144. *See* FTC Wine Report, *supra* note 67, at 9.

statutes while the Fourth, Fifth, Sixth, and Eleventh Circuits struck down five statutes, and in three of these states, the legislatures adopted NCSL-based direct shipping statutes.¹⁴⁵ In the Michigan and New York cases, two federal courts of appeal reached opposite conclusions about whether the dormant Commerce Clause limited the Twenty-first Amendment power of state governments to regulate out-of-state wine sales to in-state customers.¹⁴⁶ To resolve this constitutional conflict, the Supreme Court of the United States granted certiorari in both cases.¹⁴⁷

III. SUPREME COURT AND STATE REGIME CHANGE: *GRANHOLM V. HEALD* (2005)

After the Supreme Court granted certiorari, boutique wineries and their customers were joined by eighteen amici representing reciprocity states, the wine industry, and conservative and libertarian policy groups.¹⁴⁸ Michigan and New York were joined by eight amici representing limited importation and closed states, state liquor administrators, and state alcoholic beverage wholesalers.¹⁴⁹ The parties and their amici were acutely aware that the Court's decision would provide the constitutional rationale for either expanding the free market in wine on equal terms or for furthering the states' temperance and tax interests and protecting the economic interests of their alcoholic beverage regimes.

145. See *supra* notes 115-41 and accompanying text.

146. *Swedenburg II*, 358 F.3d at 227; *Granholt II*, 342 F.3d at 526.

147. *Granholt II*, 342 F.3d 517, cert. granted, 541 U.S. 1062 (2004); Grafstrom, *supra* note 125, at 558.

148. The four principal *amicus curiae* briefs submitted were: Brief of Amici Curiae States of California et al. in Support of Respondents, *Granholt v. Heald*, 544 U.S. 460 (2005) (No. 03-1116); Brief of Amici Curiae Napa Valley Vintners, et al. in Support of Respondents, *Granholt v. Heald*, 544 U.S. 460 (2005) (Nos. 03-1116 & 03-1120); Brief for WineAmerica et al. as Amici Curiae in Support of Respondents, *Granholt v. Heald*, 544 U.S. 460 (2005) (Nos. 03-1116 & 03-1120); Brief for Wine Institute as Amicus Curiae in Support of Respondents, *Granholt v. Heald*, 544 U.S. 460 (2005) (No. 03-1116). Even more amicus briefs can be found at *Granholt v. Heald*, IND. UNIV. SCHOOL OF LAW, <http://www.law.indiana.edu/instruction/tanford/web/wine/mihome.html> (last visited Nov. 28, 2012).

149. The four principal *amicus curiae* briefs submitted were: Brief for The National Alcohol Beverage Control Association and The National Conference of State Liquor Administrators as Amici Curiae in Support of Petitioners, *Granholt v. Heald*, 544 U.S. 460 (2005) (Nos. 03-1160, 03-1120 and 03-1274); Brief for National Beer Wholesalers Association as Amicus Curiae in Support of Petitioners, *Granholt v. Heald*, 544 U.S. 460 (2005) (Nos. 03-1116 and 03-1120); Brief for Ohio and 32 Other States as Amici Curiae Supporting Petitioners, *Granholt v. Heald*, 540 U.S. 460 (2005) (No. 03-1116); Brief for the Wine and Spirit Wholesalers of America et al. as Amici Curiae Supporting Petitioners in Nos. 03-1116 & 1120 and Respondents in No. 03-1274, *Granholt v. Heald*, 544 U.S. 460 (2005) (Nos. 03-1116, 03-1120 and 03-1274).

A. Oral Argument

The Court consolidated the New York and Michigan cases and heard oral argument on December 7, 2004.¹⁵⁰ Thomas Casey, the Michigan solicitor general, and Caitlin Halligan, New York solicitor general, appeared to leave the justices unmoved by their arguments that the Twenty-first Amendment overrode the Commerce Clause and, if it did not, that their states' laws could be justified by the goals of preventing minors' access to alcohol and ensuring the collection of taxes from out-of-state wineries.¹⁵¹ Kathleen Sullivan, a Stanford University Professor of Law who represented the Michigan consumers and served as counsel to the Coalition for Free Trade, argued more persuasively that the Michigan law served neither the Twenty-first Amendment interest in protecting minors nor collecting taxes, but was mere economic protectionism.¹⁵² Clint Bolick, representing the New York consumers and Virginia and California wineries and serving as counsel for the Institute of Justice, focused on the dormant Commerce Clause and argued that it required a level playing field.¹⁵³ Small wineries, he said, cannot compete on equal terms if they are required "to set up offices around the country as the price of reaching customers in other states."¹⁵⁴

Throughout the oral argument, the Court was particularly interested in discussing *Bacchus*, which had invalidated on dormant Commerce Clause grounds an exemption to Hawaii's twenty percent excise tax for the state's liquor industry.¹⁵⁵ The justices were doubtful about Mr. Casey's and Ms. Halligan's arguments that *Bacchus* had been wrongly decided and should be overruled.¹⁵⁶ Justice O'Connor replied: "It's a little hard to plan on overruling it . . . because it has a lot of language that cuts against you."¹⁵⁷ Justice Stevens was even more emphatic about how *Bacchus* undermined the states' argument. "If you can't grant a tax exemption . . . it seems to me *a fortiori* that you can't prohibit importation."¹⁵⁸ In sum, the justices' close questioning strongly suggested that they favored the Commerce Clause arguments of the wine industry and its consumers and doubted the states'

150. *Granholm v. Heald: Oral Argument*, OYEZ, (Dec. 7, 2004), http://www.oyez.org/cases/2000-2009/2004/2004_03_1116 [hereinafter *Oral Argument*].

151. *Id.*; Linda Greenhouse, *Justices Pick Apart Ban on Wine Sales From State to State*, N.Y. TIMES, Dec. 8, 2004, <http://www.nytimes.com/2004/12/08/politics/08scotus.html>.

152. *Oral Argument*, *supra* note 150; *see also* Greenhouse, *supra* note 151, at 2-3.

153. Greenhouse, *supra* note 151.

154. *Id.*

155. *Bacchus Imports*, 468 U.S. at 265; Greenhouse, *supra* note 151.

156. Greenhouse, *supra* note 151.

157. *Id.*

158. *Id.* (emphasis added).

Twenty-first Amendment arguments.¹⁵⁹ Oral argument did not, however, turn out to be an entirely reliable predictor of how the Court would decide the case.

B. The Decision

On May 16, 2005, the Supreme Court decided by a mere five to four majority that the New York and Michigan alcoholic beverage laws violated the dormant Commerce Clause.¹⁶⁰ Justice Kennedy, writing for the Court, first addressed the issue of whether the state regulations offended the Commerce Clause by discriminating against out-of-state wineries.¹⁶¹ The Commerce Clause, he asserted, provides the constitutional foundation for a national common market and frowns upon state laws which mandate ‘differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter,’¹⁶² which create preferential trade zones and lead to economic balkanization.

Applying these principles, he quickly found that the Michigan and New York laws discriminated against out-of-state wineries because they “deprive[d] citizens of their right to have access to the markets of other States on equal terms.”¹⁶³ The reciprocal direct-to-consumer agreements initiated by California also violated the Commerce Clause because “[s]tates should not be compelled to negotiate with each other regarding favored or disfavored status for their own citizens.”¹⁶⁴ In sum, he found that “[t]he current patchwork of [state] laws . . . is essentially the product of an ongoing, low-level trade war . . . destructive of the very purpose of the Commerce Clause.”¹⁶⁵

Justice Kennedy rejected Michigan’s and New York’s argument that Congress, exercising its interstate commerce power, had passed the Wilson

159. *Id.*

160. *See generally Granholm*, 544 U.S. 460 (Justice Kennedy delivered the opinion of the Court in which Justices Scalia, Souter, Ginsberg, and Breyer joined. Justice Stevens wrote a dissenting opinion, in which Justice O’Connor joined. Justice Thomas wrote a dissenting opinion in which Chief Justice Rehnquist and Justices Stevens and O’Connor joined).

161. *Id.* at 472-73.

162. *Id.* at 472 (quoting *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality of Or.*, 511 U.S. 93, 99 (1994); citing *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 274 (1988)).

163. *Id.* at 473.

164. *Id.* at 472; *see Pasahow, supra* note 87, at 575 (for discussion of the California reciprocal direct-to-consumer agreements initiated.) In non-alcohol regulation cases, the Supreme Court has found that reciprocity agreements are facially discriminatory and violate the dormant Commerce Clause. *See Great Atl. & Pac. Tea Co. v. Cottrell*, 424 U.S. 366, 380 (1976) (holding that a Mississippi law which provided that milk from another State may be sold to in-state customers if the other State accepts milk produced and processed in Mississippi violated the Commerce Clause).

165. *Granholm*, 544 U.S. at 473 (quoting *Dean Milk*, 340 U.S. at 356; citing *Baldwin*, 294 U.S. at 521-23).

Act in 1890 and the Webb-Kenyon Act in 1913 to permit states to discriminate in favor of their domestic wineries.¹⁶⁶ Before the ratification of the Eighteenth Amendment in 1919, Justice Kennedy said the Court had relied upon the Commerce Clause to invalidate state liquor laws which burdened or discriminated against liquor imported into states.¹⁶⁷ Congress supported this view of the Commerce Clause when it passed the Wilson Act, which “allowed States to regulate imported liquor only ‘to the same extent and in the same manner’ as domestic liquor.”¹⁶⁸ “The Wilson Act did not, however, authorize states to prohibit the direct shipment of liquor for personal use.”¹⁶⁹ Congress closed that loophole with the Webb-Kenyon Act.¹⁷⁰ In *Clark Distilling Co. v. Western Maryland Railroad Co.*,¹⁷¹ the Court confirmed that Webb-Kenyon “was enacted simply to extend that which was done by the Wilson Act.”¹⁷²

After the passage of the Eighteenth Amendment and the country’s fourteen-year Noble Experiment with Prohibition, the ratification of the Twenty-first Amendment “restored to the States the powers they had under the Wilson and Webb-Kenyon Act.”¹⁷³ The Court’s decisions during the 1930s, including *State Board of Equalization of California v. Young’s Market, Inc.*,¹⁷⁴ did permit states to discriminate against out-of-state liquor, but Justice Kennedy concluded that they were inconsistent with the Court’s pre-1919 decisions and the Wilson Act and Webb-Kenyon Act.¹⁷⁵ The Court’s contemporary jurisprudence had also abandoned the 1930s’ decisions and confirmed that the Twenty-first Amendment is limited by Congress’s affirmative commerce power,¹⁷⁶ by the dormant Commerce Clause’s nondiscrimination principle,¹⁷⁷ and by other constitutional

166. *Id.* at 478, 482.

167. *Id.* at 476-77.

168. *Id.* at 478 (quoting Wilson Act of 1890, 27 U.S.C. § 121).

169. *Id.* at 479.

170. *Granholt*, 544 U.S. at 481.

171. 242 U.S. 311 (1917).

172. *Granholt*, 544 U.S. at 482 (quoting *Clark Distilling Co. v. W. Md. R.R. Co.*, 242 U.S. at 324).

173. *Id.* at 481.

174. 299 U.S. 59 (1936).

175. *State Bd. Of Equalization of Cal. v. Young’s Mkt. Co.*, 299 U.S. at 62. *See also Granholt*, 544 U.S. at 485-86; *Ziffrin*, 308 U.S. 132; *Joseph S. Finch & Co.*, 305 U.S. 395; *Indianapolis Brewing Co.*, 305 U.S. 391; *Mahoney*, 304 U.S. 401.

176. *Granholt*, 544 U.S. at 487 (citing *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); *Cal. Retail Liquor Dealers Ass’n*, 445 U.S. 97; *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 331-32 (1964)). *See also Bacchus Imports*, 468 U.S. 263; *supra* note 52 for the principal case holdings.

177. *Granholt*, 544 U.S. at 487 (citing *Bacchus Imports*, 468 U.S. at 276; *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573 (1986); *Healy v. Beer Inst.*, 491 U.S. 324 (1989)). *See supra* notes 52, 53 for the principal case holdings.

provisions, including the Free Speech Clause, the Establishment Clause, the Equal Protection Clause, the Due Process Clause, and the Import-Export Clause.¹⁷⁸

In this setting, *Bacchus* was the Commerce Clause case particularly relevant to the issue of discriminatory state liquor control laws because the Court had rejected the argument that the Hawaii liquor tax exemption for in-state liquor was protected by the Twenty-first Amendment.¹⁷⁹ Justice Kennedy was aware that *Bacchus* was fatal to Michigan and New York's argument, but he declined the states' invitation to overrule it or to distinguish it from the two cases before the Court.¹⁸⁰ "Bacchus," he declared, "forecloses any contention that § 2 of the Twenty-first Amendment immunizes discriminatory direct-shipment laws from Commerce Clause scrutiny."¹⁸¹

At the same time, Justice Kennedy also rejected the states' argument that the Court's decision in favor of direct shipment would imperil their three-tier system of alcohol regulation, which had been recognized as "unquestionably legitimate" in *North Dakota v. United States*.¹⁸² The Twenty-first Amendment, he assured the states, grants them plenary power over the structure and operation of their liquor control systems.¹⁸³ But, he added, if a state fails to "treat liquor produced out of state the same as its domestic equivalent . . . [this] discrimination is contrary to the Commerce Clause and is not saved by the Twenty-first Amendment."¹⁸⁴

Justice Kennedy, having disposed of the Twenty-first Amendment issue, then addressed the second part of the Court's discrimination analysis: whether the state alcohol beverage control regulations "advance[] a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."¹⁸⁵ Michigan and New York offered two

178. *Granholm*, 544 U.S. at 486-87 (citing 44 *Liquormart, Inc. v. R.I.*, 517 U.S. 484 (1996) (Free Speech Clause); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (Establishment Clause); *Craig v. Boren*, 429 U.S. 190 (1976) (Equal Protection Clause); *Wis. v. Constantineau*, 400 U.S. 433 (1971) (Due Process Clause); *Dept. of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964) (Import-Export Clause)). See *supra* note 56 for principal case holdings.

179. *Bacchus Imports*, 468 U.S. at 263-65. See Pamela R. Cote, Note, *Constitutional Law -- The 'Grape' March on Washington: The Twenty-First Amendment, the Dormant Commerce Clause, and Direct Alcohol Shipments*, 26 W. NEW ENG. L. REV. 343, 356-57 (2004).

180. *Granholm*, 544 U.S. at 488.

181. *Id.* at 487-88.

182. 495 U.S. 423 (1990). See *Granholm*, 544 U.S. at 489 (citing *North Dakota v. United States*, 495 U.S. at 432).

183. *Granholm*, 544 U.S. at 488 (citing *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980)).

184. *Id.* at 489.

185. *Id.* (quoting *Limbach*, 486 U.S. at 278).

justifications: controlling underage drinking and collecting taxes.¹⁸⁶ He found both means insufficient.¹⁸⁷

Michigan and New York argued that their alcohol beverage regulations prohibiting direct-to-consumer sales by out-of-state wineries were necessary because of minors' easy access to credit cards and because the Internet allowed them to purchase direct shipments of wine.¹⁸⁸ Justice Kennedy found that the states had provided "little evidence that the purchase of wine over the Internet by minors is a problem."¹⁸⁹ To the contrary, he cited the FTC's 2003 study on *Possible Anti-Competitive Barriers to E-Commerce*, which had found that "[s]tates currently allowing direct shipments report no problems with a minors' increased access to wine" and that minors were more likely to purchase beer or liquor more quickly and more easily from in-state sources.¹⁹⁰ Michigan and New York's underage drinking argument was also undercut by the availability of less burdensome non-discriminatory means.¹⁹¹ States could adopt the NCSL Model Direct Shipping Bill, which required adults to sign for the receipt of shipments from out-of-state wineries.¹⁹²

Michigan and New York also argued that their alcohol beverage regulations prohibiting direct-to-consumer sales by out-of-state wineries were necessary to check the opportunities for tax evasion.¹⁹³ Once again, Justice Kennedy found that there were less burdensome non-discriminatory means available to achieve the state's legitimate interest in collecting revenue.¹⁹⁴ Michigan and New York could adopt the provisions of the NCSL Model Direct Shipping Bill and require out-of-state wineries to obtain a direct shipping permit, to submit sales reports, and remit taxes.¹⁹⁵ Other states, he observed, "use this approach for taxing direct interstate wine shipments . . . and report no problems with tax collection."¹⁹⁶ Michigan and New York could also rely on the federal Twenty-first Amendment Act and sue wineries in federal court and request the federal

186. *Id.*

187. *Id.* at 489-492.

188. *Granholm*, 544 U.S. at 489.

189. *Id.* at 490.

190. *Id.* (citing FTC Wine Report, *supra* note 67, at 34).

191. *Id.* at 490-91.

192. *Id.* at 491.

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

194. *Id.*

195. *Id.* at 491-92.

196. *Id.* at 491.

TTB to revoke the winery's federal license for violating state law and, thereby, deny them the right to operate in any state.¹⁹⁷

In sum, Justice Kennedy held that Michigan and New York had not met "the exacting standard" of *Maine v. Taylor* because the states' alcohol beverage regulations, which imposed an economic burden only on out-of-state wineries, did not serve legitimate state interests in protecting minors and collecting taxes.¹⁹⁸ These interests could be served by means that treated out-of-state wineries evenhandedly, means which other states used and which were available under federal law.¹⁹⁹

IV. STATE IMPLEMENTATION, FEDERAL COURT LITIGATION, AND CONGRESSIONAL LEGISLATION

Granholm built upon nationwide changes in state and federal alcohol regulation regimes over the previous twenty years.²⁰⁰ In 1985, no state permitted direct shipping, but by the May 2005 decision, forty states allowed some form of in-state direct-to-consumer shipments of wine.²⁰¹ In this setting, the Court contributed to these developments by holding that state liquor control systems must comply with the dormant Commerce Clause and treat all direct shipments to consumers evenhandedly.²⁰² At the same time, *Granholm* left explicitly unaddressed the remedy for the constitutional violations committed by those states which denied equal access by out-of-state wineries to in-state consumers.²⁰³ Still, the Kennedy opinion implicitly endorsed a framework for state remedies based on the NCSL Model Direct Shipping Bill and the FTC's Report on *Possible Anticompetitive Barriers to E-Commerce*.²⁰⁴

When *Granholm* was decided, three states had enacted legislation which permitted the direct shipment of wine on equal terms.²⁰⁵ Ten closed states

197. *Id.* at 492 (citing Twenty-First Amendment Act of 2000, 27 U.S.C. § 122(b) (2010)); Bureau of Alcohol, Tobacco & Firearms, *Industry Circular No. 96-3: Direct Shipment Sales of Alcohol Beverages*, DEP'T OF THE TREASURY 2 (Feb. 11, 1996), http://www.ttb.gov/industry_circulars/archives/1996/96-03.html.

198. *Granholm*, 544 U.S. at 493 (referencing *Taylor*, 477 U.S. at 144).

199. *Id.*

200. *See generally Granholm*, 544 U.S. 460.

201. *Id.* at 473 (all but three states prohibited direct shipment prior to 1985).

202. *Id.* at 493.

203. *See Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28, 35 (1st Cir. 2007) (The First Circuit observed that *Granholm* "provides less than complete guidance, and virtually no new elaboration, with respect to what does—or what does not—constitute discrimination against interstate commerce.")

204. *Granholm*, 544 U.S. at 491-93.

205. The three states which enacted statutes based on the NCSL Model Direct Shipment Bill were North Carolina, South Carolina, and Virginia. *See* N.C. GEN. STAT. § 18B-1001.1(2012); S.C. CODE ANN. § 61-4-747 (2011); VA. CODE § 401-112.1 (2003).

prohibited all direct shipments of wine.²⁰⁶ They were unaffected by *Granholm*, but thirty-seven states were affected by *Granholm* because they discriminated. These included twenty-three limited direct shipment states, like Michigan, which permitted in-state direct shipment of wine, but prohibited direct-to-consumer out-of-state shipments, and states, like New York, which formally permitted both in-state and out-of-state shipment, but in practice placed a heavier economic burden on out-of-state wineries.²⁰⁷ Only Connecticut, a limited direct shipment state, engaged in reverse discrimination by allowing direct shipment by out-of-state wineries, but not by in-state wineries.²⁰⁸ *Granholm* also affected thirteen states, like California, which discriminated against the interstate marketplace, because they participated in reciprocity agreements for the direct shipment of wine with some, but not all, wineries nationwide.²⁰⁹

The states which denied equal access had two options after *Granholm*. First, these states could comply with *Granholm*'s interpretation of the dormant Commerce Clause and use the NCSL Model Direct Shipping Bill to "level up" their regulations by allowing both in-state and out-of-state wineries to direct ship on equal terms.²¹⁰ Second, the states which denied equal access could exercise their Twenty-first Amendment authority to

At the time of the Supreme Court's *Granholm* decision, there was no agreement on a direct shipment classification of states. Nor was the Court precise when it stated: "Approximately 26 States allow direct shipment of wine, with various restrictions." *Granholm*, 544 U.S. at 467. The Court did, however, acknowledge that "[t]hirteen of these States have reciprocity laws." *Id.* Aside from the three open states and thirteen reciprocity states, see *infra* note 209, there was no agreed upon list of states as limited distribution and closed. The categorization of states *supra* notes 206, 207, and 208 is based on a review of COALITION FOR FREE TRADE, *supra* note 110; FREE THE GRAPES, *supra* note 110; WINE INST., *supra* note 110.

206. The ten closed states prior to *Granholm* were Alabama, Kansas, Massachusetts, Mississippi, Montana, Oklahoma, South Dakota, Tennessee, Utah, and Vermont. See COALITION FOR FREE TRADE, *supra* note 110; FREE THE GRAPES, *supra* note 110; WINE INST., *supra* note 110. See generally FTC Wine Report, *supra* note 67.

207. The twenty-three limited distribution states prior to *Granholm* were Alaska, Arizona, Arkansas, Delaware, Florida, Georgia, Indiana, Kentucky, Louisiana, Maine, Maryland, Michigan, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, Texas, Wyoming. See Jerry Ellig & Alan E. Wiseman, *The Economics of Direct Wine Shipping*, 3 J.L. ECON & POL'Y 255, 257-59 (2007); see also FTC Wine Report, *supra* note 67, at 27-29. See generally *Granholm*, 544 U.S. 460.

208. Connecticut, a limited distribution state, was the only one to practice reverse discrimination by banning direct shipment sales by in-state wineries. See S.B. 122, 2005 Leg. Sess. (Conn. 2005) (amending CONN. GEN. STAT. § 30-18) (an in-state manufacturer may not sell directly to consumers), available at http://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=122&which_year=2005&SUBMIT1.x=14&SUBMIT1.y=17&SUBMIT1=Normal.

209. The thirteen reciprocity states prior to *Granholm* were California, Colorado, Hawaii, Idaho, Illinois, Iowa, Minnesota, Missouri, New Mexico, Oregon, Washington, West Virginia, and Wisconsin. See also FTC Wine Report, *supra* note 67, at 42, app. A. See generally *Granholm*, 544 U.S. 460.

210. Ohlhausen & Luib, *supra* note 6, at 506. See also MENDELSON, *supra* note 56, at 184.

“level down” their regulations and prohibit all direct shipping.²¹¹ Given that thirty-seven states had become committed to some form of direct shipment by only in-state wineries, by only out-of-state wineries on unequal terms, or only by other reciprocity states on equal terms, it was likely that only a few states would decide to ban all direct shipping.²¹² In light of these options, the question is: has the national landscape been altered to bring state liquor laws into compliance with *Granholm* and create a national market for wine?

Shortly after *Granholm* was decided, Florida, Pennsylvania, and Ohio, were opened by judicial order to out-of-state direct shipment.²¹³ Since then, states have moved at their own pace to respond to *Granholm*.²¹⁴ Within

211. Ohlhausen & Luib, *supra* note 6, at 506.

212. See COALITION FOR FREE TRADE, *supra* note 110; FREE THE GRAPES, *supra* note 110; WINE INST., *supra* note 110.

213. In Ohio, the complaint was filed in 2003 and Ohio conceded that its statute was unconstitutional. Agreed Order and Injunction at 1-2, *Stahl v. Taft*, Case No. 2:03cv00597 (S.D. Ohio July 19, 2005). An agreed order and injunction were entered July 19, 2005 allowing direct shipping by out-of-state wineries. *Id.*

In Florida, the complaint was filed in 1999. In *Bainbridge v. Turner*, the 11th Circuit ruled partly in favor of the winery plaintiffs and remanded the case. See *Bainbridge v. Turner*, 311 F.3d 1104, 1115-116 (11th Cir. 2002). *Granholm* was decided while the case was pending. See *id.*; see generally *Granholm* 544 U.S. 460. After *Granholm*, Florida agreed that its statute was unconstitutional. See *Bainbridge*, 311 F.3d at 1115-116. An agreed order was entered on August 5, 2005 requiring the state to allow direct shipment by out-of-state wineries. Order, *Bainbridge v. Turner*, Case No. 8:99-CV-2681-T-27TBM (M.D. Fla. Aug. 5, 2005).

In Pennsylvania, the complaint was filed on June 23, 2005. *Cutner v. Newman*, 398 F. Supp. 2d 389, 391 (E.D. Penn. 2005). Pennsylvania declined to defend its statute. *Id.* A memorandum and order were entered on November 9, 2005 declaring the statute unconstitutional and requiring the state to allow direct shipment by out-of-state wineries. *Id.*

214. The immediate post-*Granholm* literature which analyzed the Court’s decision and speculated about its impact includes Harris Danow, Recent Developments, *History Turned “Sideways:” Granholm v. Heald and the Twenty-First Amendment*, 23 CARDOZO ARTS & ENT. L.J. 761 (2006); Aaron Nielson, *Good History, Good Law (and by Coincidence Good Policy Too): Granholm v. Heald, 1255 S.Ct. 1885 (2005)*, 29 HARV. J. L. & PUB. POL’Y 743 (2006); Gregory E. Durkin, Note, *What Does Granholm v. Heald Mean for the Future of the Twenty-First Amendment, the Three-Tier System, and Efficient Alcohol Distribution?* 63 WASH. & LEE L. REV. 1095 (2006); William Glunz, Comment, *Granholm v. Heald: The Twenty-First Amendment Takes Another Hit -- Where Do The States Go From Here?*, 40 J. MARSHALL L. REV. 651 (2006-2007); Tania K.M. Lex, *Case Note: Of Wine and War: The Fall of State Twenty-First Amendment Power at the Hands of the Dormant Commerce Clause -- Granholm v. Heald*, 32 WM. MITCHELL L. REV. 1145 (2006); Elizabeth Norton, Note, *The Twenty-First Amendment in the Twenty-First Century: Reconsidering State Liquor Controls in Light of Granholm v. Heald*, 67 OHIO ST. L.J. 1465, 1483 (2006); Nancy Williams, *Constitutional Law – The Dormant Commerce Clause and the Twenty-First Amendment – Reconciling the Two Constitutional Provisions to Allow the Direct Shipment of Wine*, 75 MISS. L.J. 619 (2006).

The subsequent post-*Granholm* literature, which examines state legislative implementation of the Court’s decision, the constitutional legal issues raised by the revised state statutes, and their litigation in the federal court decisions, includes, see generally Ellig & Wiseman, *supra* note 207; Ohlhausen & Luis, *supra* note 6; Jonathan M. Rotter & Joshua S. Stambaugh, *What’s Left of the Twenty-First Amendment?*, 6 CARDOZO PUB. L. POL’Y & ETHICS J. 601 (2008); James Alexander Tanford, *E-Commerce in Wine*, 3 J. L. ECON. & POL’Y 275 (2007); Rachel M. Perkins, Note, *Wine Wars: How We Have Painted Ourselves into a Regulatory Corner*, 12 VAND. J. ENT. & TECH. L. 397, 414-18 (2010); Alexandra Thompson, *The Legacy of Granholm v. Heald: Questioning the Constitutionality of Facially Neutral*

months of the Supreme Court's decision, Michigan and New York enacted statutes based on the NCSL Model Direct Shipping Bill.²¹⁵ Other limited direct shipment states leveled up to create more open systems, while only two states, Louisiana and Rhode Island, eliminated their in-state direct shipment statutes and required all wineries to use their three-tier systems.²¹⁶ California and the twelve other states have eliminated their reciprocity provisions,²¹⁷ while Connecticut, the only state to practice reverse discrimination, has made direct shipment available to its in-state wineries.²¹⁸ Even three closed states, including Massachusetts, enacted legislation which created more open systems.²¹⁹

Direct Shipment Laws, 61 CASE W. RES. L. REV. 309 (2010); see also R. Corbin Houchins, *Notes on Wine Distribution*, CORBIN COUNSEL 13-14 (Feb. 2, 2010), http://www.corbincounsel.com/docs/dist_notes_current.pdf.

State specific literature, which examines Arkansas, Georgia, Iowa, and Kentucky responses to *Granholt*, includes Alan E. Wiseman & Jerry Ellig, *The Politics of Wine: Trade Barriers, Interest Groups, and the Commerce Clause*, 69 J. POL. 859 (2007); Shri M. Abhyankar, Notes and Comments, *Dude, Where's My Wine? The Potential Effect of Granholt v. Heald on Georgia Direct Wine Shipment Regulations*, 23 GA. ST. U. L. REV. 631 (2007); Michael A. Chichester, Jr., Note, *The Twenty-First Amendment Accommodates the Dormant Commerce Clause: Did the Supreme Court Awaken a Sleeping Giant with Its Decision in Granholt v. Heald?*, 84 U. DET. MERCY L. REV. 161, 179-182 (2007); Rebekah Jackson, *The Supreme Court and State Regulation of Interstate Wine Sales: Granholt v. Heald (2005) and the Kentucky Experience*, KY. POL. SCI. ASS'N. 2010 ANN. MTG., (March 5, 2010); Meredith B. Morgan, Comment, *Arkansas's Response to Granholt v. Heald: The Small Farm Winery Law Provides an Appropriate Remedy for Commerce Clause Violations*, 61 ARK. L. REV. 487 (2008); Jessica R. Reese, Note, *A Post-Granholt Analysis of Iowa's Regulatory Framework for Wine Distribution*, 94 IOWA L. REV. 665 (2009); Christian Hart Staples, Comment, *In Vino Veritas: Does the Twenty-First Amendment Really Protect a State's Right to Regulate Alcohol? An Overview of the North Carolina Wine Industry and the Continuing Wine Distribution Litigation*, 31 CAMPBELL L. REV. 123 (2008).

215. S.B. 600, 93rd Leg., Reg. Sess. (Mich. 2005) (amending MICH. COMP. LAWS § 436.1203); Assemb. B. 7379C, 2005 Leg., Reg. Sess. (N.Y. 2005) (amending N.Y. ALCO. BEV. CONT. LAW § 79-C).

216. See S.B. 452, 2008 Leg., Reg. Sess. (La. 2008) (amending LA. REV. STAT. § 26:359); H.B. 5815, 2005 Gen. Assemb., Jan. Sess. (R.I. 2005) (amending R.I. GEN. LAWS. § 3-6-1.1); Ohlhausen & Luis, *supra* note 6, at 515-17.

217. See S.B. 118, 2005-2006 Leg., Reg. Sess. (Cal. 2006) (amending CAL. BUS. & PROF. CODE § 23661.2); S.B. 6537, 59th Leg., Reg. Sess. (Wash. 2006) (amending WASH. REV. CODE. § 66.20.365); H.B. 454, 58th Leg., 2d Reg. Sess. (Idaho 2006) (amending IDAHO CODE § 23-1309A); H.B. 06-1120, 65th, Gen. Assemb., 2d Reg. Sess. (Colo. 2006) (repealed and reenacted with amendments COLO. REV. STAT. § 12-74-104); H.B. 1968, 23d Leg., Reg. Sess. (Haw. 2006) (amending HAW. REV. STAT. § 281-33.6); S.B. 712, 78th Leg., 1st Reg. Sess. (W.Va. 2007) (amending W. VA. CODE § 60-4-3); S.B. 127, 60th Leg., Reg. Sess. (Mont. 2007) (amending MONT. CODE. § 16-3-402); H.B. 2171, 74th Leg. Assemb., Reg. Sess. (Or. 2007) (amending OR. REV. STAT. § 471.229); H.B. 429, 95th Gen. Assemb., Reg. Sess. (Ill. 2007) (amending 235 ILL. COMP. STAT. 5/5-1); S.B. 485, 2007-2008 Leg., Reg. Sess. (Wis. 2007) (amending WIS. STAT. § 125.535); S.B. 2088, 83d Gen. Assemb. 2d Sess. (Iowa 2010) (amending IOWA CODE § 123.187); S.B. 445, 2011 Leg., Reg. Sess. (N.M. 2011) (amending N.M. STAT. § 60-6A-11.1); Ohlhausen & Luis, *supra* note 6, at 515-17.

218. S.B. 122, 2005 Leg. Sess. (Conn. 2005) (an in-state manufacturer may not sell directly to consumers).

219. See H.B. 4498, 184th Gen. Ct., 2d Ann. Sess. (Mass. 2006) (amending MASS. GEN. LAWS ch. 138 § 19F) (an in-state manufacturer may not sell directly to consumers); Ohlhausen & Luis, *supra* note 6, at 515-17.

In sum, state legislatures have made progress in creating a national marketplace for the direct shipment of wine, but they have not leveled up to create open systems. Instead, most revised state direct shipment statutes have neither leveled up and permitted all wineries to ship directly to consumers on equal terms nor leveled down and prohibited all direct shipping, but rather have moved sideways and lessened their degree of discrimination against out-of-state wineries, because the revised statutes have been largely designed by state alcohol control subsystems to protect their three-tier systems and the economic interests of their wholesalers and local wineries.²²⁰

A. Federal Court Litigation: Four Direct Shipment Cases

Boutique wineries, their customers, and the Coalition for Free Trade sued alcohol beverage control commissioners in Arizona, Indiana, Kentucky, Massachusetts, and six other states in the macropolitical venues of the federal courts, challenging their revised direct shipment statutes as dormant Commerce Clause violations.²²¹ Two provisions in these four state statutes have been the most significant examples of sideways movement and the most litigated.²²² The first grants a direct shipment license to all wineries with a yearly production below a specified gallon cap.²²³ The second grants all wineries the right to direct ship up to two cases per year to customers who have purchased the wine on the winery premises.²²⁴ Together they raise a common question: do these exceptions to states' three-tier distribution systems violate the dormant Commerce Clause or are they saved by the Twenty-first Amendment? The answer depends on who reads *Granholm*: the state alcohol beverage control subsystem members or the boutique winery coalition.

State alcohol beverage control agencies and state distributors' organizations, the defendants in these cases, have read *Granholm* narrowly, as limited to its facts, and have argued that it overrides Twenty-first Amendment immunity only for facially discriminatory laws.²²⁵ If state production caps and on-site purchase requirements are facially neutral (imposing the same requirements on in-state and out-of-state wineries), states agencies and alcohol distributors have argued that the federal courts

220. Ohlhausen & Luib, *supra* note 6, at 506, 515-17.

221. James A. Tanford, *Direct Interstate Wines Sales Litigation*, IND. UNIV. SCH. OF LAW, <http://law.indiana.edu/instruction/tanford/web/wine> (last visited Dec. 9, 2011).

222. Ohlhausen & Luib, *supra* note 6, at 514-15, 533-36.

223. *Id.* at 533-38, 541-43.

224. *Id.* at 512-16.

225. Houchins, *supra* note 212, at 13-14.

must use the *Pike* balancing test and uphold these statutory provisions because, first of all, they apply “evenhandedly” to in-state and out-of-state wineries, and second, any incidental burden on the out-of-state wine market is not “clearly excessive” in relationship to the state’s legitimate interests in collecting taxes, temperance, and insuring orderly market conditions.²²⁶

Boutique wineries, their producer associations and customers, and the Coalition for Free Trade have ignored the *Pike* balancing test, which was not at issue in *Granholm*, and have instead read the case broadly, as not limited to its facts, but as having repudiated Twenty-first Amendment immunity, not merely for facially-neutral state production caps, but also for those provisions that discriminate in purpose or in practical effect against out-of-state wineries and their customers.²²⁷ Using *Maine v. Taylor*’s discrimination test, the boutique wine advocacy coalition has argued that the production caps were discriminatory because they were set just above the output of the largest in-state winery to protect local wineries and, together with the in-person purchase requirement, they keep out-of-state boutique wineries from using the most efficient means to market their product: Internet sales and package delivery services.²²⁸ Instead, boutique wineries were left with the choice of relying on on-site purchases by local and out-of-state wine tourists or of establishing a physical presence in the state because it was unlikely that a distributor, if one could be found, would agree to distribute their small volume of wine.²²⁹

Four federal courts of appeal have not agreed on an answer as to whether state production caps and on-site purchase requirements, which apply to all wineries, violate the dormant Commerce Clause and, if they do, whether they are saved by the Twenty-first Amendment.²³⁰ In *Cherry Hill Vineyards v. Lilly* (“*Cherry Hill Vineyards II*”) (2008),²³¹ the Sixth Circuit upheld the Kentucky production cap,²³² but not the state’s in-person purchase provision, while the Seventh Circuit in *Baude v. Heath* (“*Baude II*”) (2008)²³³ upheld Indiana’s in-person purchase provision.²³⁴ In *Family*

226. *Id.*

227. *See, e.g.*, Opening Brief of Appellants Black Star Farms, et al. at 11-13, 14-45, Black Star Farms LCC v. Oliver, 600 F.3d 1225 (9th Cir. 2010) (No. 08-15738).

228. *Id.* at 14-45; *see also* *Cherry Hill Vineyards I*, 488 F. Supp. 2d at 613.

229. Opening Brief of Appellants at 66, Black Star Farms LLC v. Oliver, 600 F.3d 1225 (9th Cir. 2010) (No. 08-15738).

230. *Black Star Farms II*, 600 F.3d at 1226; *Family Winemakers II*, 592 F.3d at 2; *Cherry Hill Vineyards II*, 553 F.3d at 425; *Baude II*, 538 F.3d at 609.

231. 553 F.3d 423 (6th Cir. 2008).

232. *Id.* at 426-28.

233. 538 F.3d 608 (7th Cir. 2008).

234. *Id.* at 615.

Winemakers of California v. Jenkins (“*Family Winemakers II*”) (2010),²³⁵ the First Circuit struck down the Massachusetts production cap,²³⁶ while the Ninth Circuit reached the opposite decision in *Black Star Farms v. Oliver* (“*Black Star Farms II*”) (2010),²³⁷ upholding Arizona’s production cap and in-person purchase provisions.²³⁸ The disagreement of these federal courts, as we shall see, is rooted in their reading of state statutory language, their evaluation of boutique wine coalition’s evidence that these statutes discriminate in purpose and/or effect, their reading of *Granholm*, and their use of the *Maine v. Taylor* and *Pike* dormant Commerce Clause tests.²³⁹

1. *Indiana: Baude v. Heath*

Indiana had allowed in-state wineries in 2005 to direct ship to their customers, but required out-of-state wineries to use an Indiana wholesaler.²⁴⁰ After the *Granholm* decision, the Indiana legislature amended its direct shipment law to permit any winery, in-state or out-of-state, to direct ship to its each of its customers up to two cases of wine per year, subject to various restrictions, including a requirement that the customer make the purchase in person at the winery.²⁴¹ Patrick Baude, an Indiana wine connoisseur, and Chateau Grand Traverse, a Michigan winery, supported by the Coalition for Free Trade, challenged the two statutory exceptions, claiming that they discriminated against out-of-state wineries in violation of the dormant Commerce Clause.²⁴²

In *Baude v. Heath* (“*Baude I*”) (2007),²⁴³ the federal district court accepted the state’s position that “the terms of the face-to-face provision were neutral,” but then rejected the state’s argument that the in-person provision was an evenhanded regulation.²⁴⁴ The district court acknowledged that the regulation did burden in-state wineries, but in practical effect, the burden of the statute “falls significantly more heavily on out-of-state wineries,” because these wineries are given a choice forbidden

235. 592 F.3d 1 (1st Cir. 2010).

236. *Id.* at 5.

237. 600 F.3d 1225 (9th Cir. 2010).

238. *Id.* at 1227.

239. See *Cherry Hill Vineyards II*, 553 F.3d at 425; see also *Black Star Farms II*, 600 F.3d at 1226; *Family Winemakers II*, 592 F.3d at 2; *Baude II*, 538 F.3d at 609; *Granholm*, 544 U.S. at 541; *Taylor*, 477 U.S. at 151-52; *Pike*, 397 U.S. at 142; Jennifer L. Larsen, *Discrimination in the Dormant Commerce Clause*, 49 S.D. L. REV. 844, 845, 852, 855, 859 (2004).

240. IND. REV. CODE § 7.1-5-11-1.5 (2006).

241. *Id.* at §§ 7.1-3-26-6, 7.1-3-26-13, 7.1-3-26-9(2)(E).

242. *Baude v. Heath (Baude I)*, No. 1:05-CV-0735-JDT-TAB, 2007 WL 2479587, at *1-2 (S.D. Ind. Aug. 29, 2007).

243. No. 1:05-CV-0735-JDT-TAB, 2007 WL 2479587 (S.D. Ind. Aug. 29, 2007).

244. *Id.* at *16-22.

by *Granholm*.²⁴⁵ If these wineries choose not to accept reduced sales, given the costs of on-site visits and the distance of the wineries from Indiana, then they would have to establish a physical presence in the state.²⁴⁶ Since the in-person purchase provision was discriminatory, the burden fell on the state, but it did not attempt to show the unavailability of less discriminatory means to prevent the sale of alcohol to minors.²⁴⁷

The Indiana Alcohol and Tobacco Commission and the Wine and Spirits Wholesalers of Indiana appealed the decision.²⁴⁸ In *Baude II* (2008), the Seventh Circuit Court of Appeals rejected the district court's discrimination analysis, because the language of the in-person purchase provision applied evenhandedly to in-state and out-of-state wineries; then the court of appeals employed the balancing test of *Pike*, and placed upon the plaintiffs, not the state, the burden of proving with credible evidence that the burden of the in-person purchase provision on out-of-state wineries was "clearly excessive in relation to the putative local benefits."²⁴⁹ As the Seventh Circuit framed the issue: "[i]f it turns out to be more expensive (per winery) to sign up in California than in Indiana, is the extra cost justified by the wineries' ability to check the credentials of potential buyers?"²⁵⁰

The Seventh Circuit found that the out-of-state in-person purchases were not necessarily more expensive because it rejected the plaintiff's comparison of one trip to California to purchase wine at one winery with one trip to an Indiana winery, and then substituted its own hypothetical, which minimized *Pike's* burden element.²⁵¹ Given the growth of wine tourism, the court speculated that one trip to California would "not necessarily [be] substantially more expensive (per winery) to sign up at a larger number of west-coast wineries than at an equivalent number of Indiana wine producers."²⁵²

The Seventh Circuit, having used its hypothetical to find that the in-person purchase provision burdened small out-of-state wineries only incidentally, turned to the state's interest in prohibiting minors from purchasing and consuming wine.²⁵³ The winery plaintiffs agreed that it was a legitimate interest, but the court of appeals found that they did not establish by reliable evidence that the state's in-person age verification, as a

245. *Id.* at *23.

246. *Id.* at *23.

247. *Id.* at *24.

248. *Baude II*, 538 F.3d at 609.

249. *Id.* at 611-13, 615 (quoting *Pike*, 397 U.S. at 142).

250. *Id.* at 613.

251. *Id.* at 612-13.

252. *Id.* at 613.

253. *Baude II*, 538 F.3d at 613.

means rationally related to the state's interest in prohibiting underage drinking, was either ineffective or that Internet age verification services, proposed by the plaintiffs, were as effective as in-person verification.²⁵⁴ In sum, the Seventh Circuit concluded that “the marginal cost and the marginal benefit of Indiana’s face-to-face system may be modest. That is not enough to declare a law unconstitutional—not when the effect on interstate commerce is negligible.”²⁵⁵

2. *Kentucky: Cherry Hill Vineyards v. Hudgins and Cherry Hill Vineyards v. Lilly*

The Kentucky direct shipment statute, similar to Indiana’s, permitted in-state wineries to direct ship to their customers, but required out-of-state wineries to use a Kentucky distributor.²⁵⁶ After the *Granholm* decision, the Kentucky legislature amended its direct shipment statute to permit both in-state and out-of-state wineries that produced no more than 50,000 gallons annually²⁵⁷ to direct ship two cases of wine per visit if the customer purchased the wine on the winery premises.²⁵⁸ Cherry Hill Vineyards, an Oregon winery, supported by the Coalition for Free Trade, challenged the Kentucky statute.²⁵⁹

In *Cherry Hill Vineyards v. Hudgins* (“*Cherry Hill Vineyards I*”) (2006),²⁶⁰ the federal district court rejected the plaintiff’s argument that the facially neutral 50,000-gallon production cap was a protectionist measure, because “no Kentucky wineries produce in excess of 50,000 gallons per year . . . [and] many out-of-state wineries are excluded by this requirement.”²⁶¹ The district court held that *Granholm* did not forbid a state to create a class of wineries that produce 50,000 gallons, because “there has been no showing that the provision burdens ‘out-of-state producers or shippers simply to give a competitive advantage to in-state businesses.’”²⁶²

When the district court turned to the in-person purchase exception, however, it accepted the winery’s claim that the exception did not regulate evenhandedly, but discriminated in practical effect against out-of-state wineries.²⁶³ The requirement would impose an economic barrier, which

254. *Id.* at 614-15.

255. *Id.* at 615.

256. KY. REV. STAT. ANN. § 244.165(1) (West 2007).

257. *Id.* at §§ 243.155(1), 241.010(45).

258. *Id.* at §§ 243.155(2)(g), 244.165(2).

259. *Cherry Hill Vineyards I*, 488 F. Supp. 2d at 602.

260. 488 F. Supp. 2d 601.

261. *Id.* at 613.

262. *Id.* (quoting *Granholm*, 554 U.S. at 472).

263. *Id.* at 616-18.

would make it substantially more costly for small out-of-state wineries to sell to Kentucky residents and deny them access to the national small farm winery market and to “99% of the nation’s annual wine production, including 8 of the top 10 producing states.”²⁶⁴

Since the in-person purchase exception discriminated in practical effect, the district court addressed the question as to whether the exception served a legitimate local purpose.²⁶⁵ The state argued that the requirement promoted temperance, decreased underage drinking, and assured its receipt of tax revenues.²⁶⁶ The district court rejected all three asserted state interests because there were less burdensome reasonable alternatives available.²⁶⁷ Wine licensing could be used to promote temperance by prohibiting wine shipments to dry counties; and *Granholm* recognized that state licenses could require an adult signature for wine deliveries, the submission of sales receipts, and the payment of taxes.²⁶⁸

The Wine and Spirits Wholesalers of Kentucky appealed the in-person purchase exception.²⁶⁹ In *Cherry Hill Vineyards II* (2008), the Sixth Circuit Court of Appeals held that the winery plaintiffs had met their burden of showing that the in-person purchase exception discriminated in practical effect for two reasons.²⁷⁰ First, the in-person provision burdened out-of-state wineries because their customers had to travel, sometimes thousands of miles, to purchase wine.²⁷¹ Second, Kentucky wineries benefited from less competition from Cherry Hill Vineyards and other Oregon wineries, and Kentucky wholesalers benefited from increased sales.²⁷²

Then the Sixth Circuit rejected the wholesaler’s argument that the in-person purchase exception advanced the state’s legitimate interest in addressing the problems of underage drinking and reduced tax revenues.²⁷³ Almost identical arguments, the court observed, had been rejected in *Granholm* based on the FTC’s study on *Possible Anti-Competitive Barriers to E-Commerce*.²⁷⁴ A less restrictive means, as *Granholm* observed, was provided by the NCSL Model Direct Shipping Bill: require age verification when the wine is delivered and require out-of-state wineries, as a condition

264. *Id.* (quoting from Plaintiff’s Response to Defendant’s Supplementary Brief at 5, *Cherry Hill Vineyards, LLC v. Hudgins*, 488 F. Supp. 2d 601 (W.D. Ky. 2006) (No. 07-5128)).

265. *Cherry Hill Vineyards II*, 553 F.3d at 426.

266. *Cherry Hill Vineyards I*, 488 F. Supp. 2d at 618-21.

267. *Id.* at 620.

268. *Id.* at 617.

269. *Cherry Hill Vineyards II*, 553 F.2d at 434.

270. *Id.*

271. *Id.* at 433.

272. *Id.*

273. *Id.* at 434.

274. *Cherry Hill Vineyards II*, 553 F.3d at 432-33.

of their direct shipping license, to submit sales reports and remit taxes.²⁷⁵ Since the wholesalers had failed to establish that the in-person purchase exception failed to advance the state's two legitimate interests and that there were reasonable alternative, non-discriminatory means available to serve those interests, the Sixth Circuit affirmed the district court's decision.²⁷⁶

3. *Massachusetts: Family Winemakers of California v. Jenkins*

A Massachusetts lawsuit, pending at the time of the *Granholm* decision, challenged the constitutionality of the state's farm winery license, because it was available only to in-state wineries.²⁷⁷ In *Stonington Vineyards v. Jenkins* (2005),²⁷⁸ the Massachusetts federal district court declared the license provision unconstitutional as a facially discriminatory law.²⁷⁹ In response to the decision, the Massachusetts legislature amended the state's alcohol beverage control statute by enacting section 19F over the governor's veto.²⁸⁰ Section 19F created a facially neutral exception to the Massachusetts three-tier distribution system by permitting all small wineries, those which produce no more than 30,000 gallons yearly, to sell their wines in three ways: to wholesalers, retailers, and customers.²⁸¹ Large wineries, those that produce above 30,000 gallons, were not permitted to sell to retailers, but were required to make a choice between selling to distributors or applying for a large winery license and selling directly to consumers.²⁸²

Family Winemakers of California and the Wine Institute challenged the statute, claiming that it discriminated in purpose and effect to the benefit of Massachusetts wineries and wholesalers to the detriment of out-of-state wineries.²⁸³ In *Family Winemakers of California v. Jenkins* ("*Family Winemakers I*") (2008),²⁸⁴ a Massachusetts federal district court found that the 30,000-gallon production cap was discriminatory in purpose because the statute's legislative history documented that it "was designed to allow in-state wineries to continue direct shipping while forcing the majority of

275. *Id.* at 434.

276. *Id.*

277. MASS. GEN. LAWS, ch.138, § 19B (2006); *Stonington Vineyards v. Jenkins*, No. 1:05-CV-10982-JLT, at 1-2 (D. Mass., Oct. 5, 2005).

278. No. 1:05-CV-10982-JLT (D. Mass., Oct. 5, 2005).

279. *Id.* at 1-2.

280. MASS. GEN. LAWS, ch.138, § 19F(a)-(b); Complaint at 2, *Family Winemakers of Cal. v. Jenkins*, 2011 WL 2312534 (D. Mass. 2011) (No. 06-22682).

281. MASS. GEN. LAWS § 19F(b).

282. *Id.* § 19F(a).

283. *Family Winemakers of Cal. v. Jenkins (Family Winemakers I)*, No. 1:06-11682-RWZ, 2008 LEXIS 112074, at *27-28 (D. Mass., Nov. 19, 2008).

284. No. 1:06-11682-RWZ, 2008 LEXIS 112074 (D. Mass., Nov. 19, 2008).

interstate wine to go through the three-tier system, thereby preserving the economic interests of both Massachusetts wholesalers and Massachusetts wineries.”²⁸⁵ The production cap was also discriminatory in effect because “it prevents the direct shipment of 98% of out-of-state wine to consumers, but permits all wineries in Massachusetts to sell directly to consumers”²⁸⁶ The district court then rejected the state’s argument that the statute was protected by the unquestioned legitimacy of the state’s three-tier system, because it “cannot provide succor to a statute which allows exceptions . . . which benefit in-state interests.”²⁸⁷

Massachusetts appealed the decision to the First Circuit Court of Appeals.²⁸⁸ In *Family Winemakers II* (2010), the state argued that section 19F was not discriminatory in purpose “because its aim is to level the economic playing field for all ‘small’ wineries irrespective of where they are located,” nor was it discriminatory in effect, because any burden on interstate commerce under *Pike* “is surpassed by the local benefit of greater competition and consumer choice.”²⁸⁹ The First Circuit rejected these arguments and found that the winery plaintiffs had met their initial burden in establishing that the statute was discriminatory in purpose and effect.²⁹⁰

The First Circuit first turned its attention to section 19F’s discriminatory effect and asked whether the statute alters conditions of competition “in a way that [favors] Massachusetts’s wineries and significantly burdens out-of-state competitors.”²⁹¹ The court found that the practical effect of the statute’s distinction between small and large wineries was significant, because the 30,000-gallon production cap excluded 607 of the large out-of-state wineries, which accounted for ninety-eight percent of all nationwide wine production, but included all thirty-one Massachusetts wineries and 2,933 of the small out-of-state wineries, which amounted to two percent of all wineries nationwide.²⁹²

As a result, the First Circuit concluded that the state’s section 19F production cap “confers a clear competitive advantage to ‘small’ wineries, which include[s] all Massachusetts’s wineries, and creates a comparative disadvantage for ‘large’ wineries, none of which are in Massachusetts.”²⁹³

285. *Id.* at *27-28.

286. *Id.* at *39.

287. *Id.* at *40.

288. *Family Winemakers II*, 592 F.3d at 2.

289. *Id.* at 21.

290. *Family Winemakers I*, 2008 LEXIS 112074, at *25-26, 42-43 (citing *Cherry Hill Vineyards, LLC v. Baldacci*, 505 F.3d 28, 33 (1st Cir. 2007)).

291. *Family Winemakers II*, 592 F.3d at 5.

292. *Id.* at 8.

293. *Id.* at 11.

All 637 out-of-state large wineries did not have the small wineries' three distribution advantages, but had to choose between selling to a wholesaler or directly to consumers.²⁹⁴ This choice, the First Circuit found, "carries a significant loss of profits . . . because they cannot always distribute a given wine through the most cost-effective method."²⁹⁵ In fact, the smaller of the large out-of-state wineries, those between 30,000 and 680,000 gallons with a 60,000 gallon average, suffer a considerable competitive disadvantage.²⁹⁶ Massachusetts had argued, as Arizona and Kentucky had successfully argued, that the statute placed both in-state and out-of-state small wineries on an equal footing, but the First Circuit was unsympathetic.²⁹⁷ Just because the statute makes some of its benefits available to "both in-state and some out-of-state 'small' wineries does not prove that § 19F is non-discriminatory."²⁹⁸

The First Circuit, having found that section 19F discriminated in practical effect, addressed the question of its discriminatory purpose.²⁹⁹ The state had claimed that the statute's purposes were "to facilitate direct shipment, to further the three-tier system, to make all small wineries . . . better able to compete, and to thereby provide Massachusetts consumers with greater choice."³⁰⁰ The First Circuit found, however, that these objectives were undercut by several factors which "conferred a competitive advantage upon Massachusetts wineries by design."³⁰¹ The statute's language disclosed its discriminatory purpose. First, one of its licensing provisions created "special exceptions" to promote the state's alcohol industry.³⁰² Second, a section 19F sponsor was quite candid in stating that "the limitations that we are suggesting in the legislation . . . are really still giving an inherent advantage indirectly to the local wineries."³⁰³ Third, there was a "gap between Massachusetts's professed neutrality and § 19F's practical effects."³⁰⁴

In this regard, the First Circuit found that section 19F's definition of small and large wineries undermined its "professed neutrality," because it was at odds with the small, medium, and large winery categories developed

294. *Id.* at 11-12.

295. *Id.* at 12.

296. *Family Winemakers II*, 592 F.3d at 12.

297. *Id.* at 13; *see also supra* Part A.

298. *Family Winemakers II*, 592 F.3d at 13.

299. *Id.* at 4.

300. *Id.* at 15.

301. *Id.* at 13.

302. *Id.* at 14.

303. *Family Winemakers II*, 592 F.3d at 7.

304. *Id.* at 14.

by the wine industry and adopted by the FTC.³⁰⁵ The FTC classified small wineries as producing less than 120,000 gallons, medium wineries from 120,000 to 600,000 gallons, and large wineries more than 600,000 gallons.³⁰⁶ In sum, the statute's lack of correlation with these industry and national government standards and the fact that all the state's wineries were eligible for small winery licenses undercut Massachusetts's claim that the statute was enacted "to remedy the purported competitive disadvantage faced . . . by wineries producing 30,000 gallons or less"³⁰⁷

The First Circuit, having found that section 19F discriminated in its purpose and practical effect, shifted the burden to Massachusetts and found that the state had not provided any "concrete . . . evidence" showing that the statute advanced any legitimate local purpose that could not be advanced by means that were less burdensome to the interstate wine market, including the governor's version of the NCSL Model Direct Shipment Bill, "which would have allowed all wineries to ship directly to consumers, sell to retailers, and distribute through wholesalers."³⁰⁸ Nor did the Twenty-first Amendment save the statute.³⁰⁹ Massachusetts claimed that *Granholm* had only decided the effect of the Twenty-first Amendment on a facially discriminatory state statute, not a facially neutral statute that was discriminatory in purpose and effect, such as section 19F.³¹⁰ The First Circuit dismissed this argument on the basis of the historical evidence that the Wilson Act and Webb-Kenyon Act did not protect facially neutral but rather discriminatory state liquor laws from Commerce Clause scrutiny.³¹¹

4. Arizona: Black Star Farms v. Oliver

The Arizona legislature created two exceptions to its three-tier system in response to *Granholm*.³¹² One exception permits any winery that produces less than 20,000 gallons yearly to take orders by telephone, mail, or Internet and to ship to a customer any quantity of wine.³¹³ The second exception permits any winery to direct ship up to two cases of wine per year to a customer who was physically present at the winery when the wine was purchased.³¹⁴

305. *Id.* at 14-15.

306. *Id.* at 15.

307. *Id.*

308. *Family Winemakers II*, 592 F.3d at 17.

309. *See id.* at 21.

310. *See id.* at 18.

311. *See id.* at 19.

312. ARIZ. REV. STAT. §§ 4-203.04(J), 4-205.04(C)(9) (2006).

313. *Id.* § 4-205.04(C)(9).

314. *Id.* § 4-203.04(J) (2006).

Black Star Farms, a Michigan winery, supported by the Coalition for Free Trade, challenged the two exceptions claiming that they discriminated, not on their face or in purpose, but in their practical effect by preferring in-state wineries over out-of-state wineries.³¹⁵ The production cap exempted twenty-six of the twenty-seven Arizona wineries from using the state's three-tier system, which all out-of-state wineries producing in excess of the 20,000-gallon cap were required to use, unless Arizona customers purchased two cases of wine in person.³¹⁶ This exception, the winery claimed, disadvantaged "geographically distant" out-of-state wineries, which had no real opportunity to sell to Arizona customers because visits to them would be costlier.³¹⁷ As a consequence, their wines would only be available to Arizona customers if distributors and retailers were willing to stock them at an increased cost or if they operated an in-state physical location.³¹⁸

In *Black Star Farms v. Oliver* ("*Black Star Farms I*") (2008),³¹⁹ the Arizona federal district court rejected the winery's production cap and in-person purchase argument for two reasons.³²⁰ First, the winery's reliance on *Granholm* was misplaced, because "[t]he *Granholm* court merely invalidated two state laws that allowed all in-state, but no out-of-state, wineries to bypass the states' three-tiered distribution system and ship wine directly to in-state consumers."³²¹ Black Star Farms' reliance on *Granholm* was also misplaced because the Arizona exceptions, unlike those in the Michigan and New York statutes, were facially neutral: their language applied equally to both in-state and out-of-state wineries.³²² Finally, the winery's reliance on other leading United States Supreme Court dormant Commerce Clause discrimination decisions was misplaced because they, unlike Arizona's two exceptions, "manifestly discriminated against all out-of-state goods or products."³²³

The district court rejected Black Star Farms' discrimination argument for a second reason.³²⁴ The winery failed to meet its burden of proving that the production cap and in-person purchase exceptions discriminated against

315. *Black Star Farms I*, 544 F. Supp. 2d. at 913, 926.

316. *See id.* at 918.

317. *Id.*

318. *Id.*

319. 544 F. Supp. 2d 913 (D. Ariz. 2008).

320. *Id.* at 921-22.

321. *Black Star Farms I*, 544 F.Supp.2d at 921.

322. *Id.* at 922-23.

323. *Id.* at 922.

324. *Id.* at 920.

small out-of-state wineries in practical effect.³²⁵ Black Star Farms' argument disregarded the fact that the 20,000-gallon production cap, which opened the state's wine market to half of the wineries nationwide, did not provide preferential access to the state's wine market, allowing in-state wineries to gain market share at the expense of out-of-state wineries.³²⁶ Black Star Farms had also failed to provide evidence that the facially-neutral in-person purchase exception had any discriminatory effect which "create[d] a burden that alter[ed] the proportional share of the wine market in favor of in-state wineries, such that out-of-state wineries [were] unable to effectively compete."³²⁷ The district court recognized that "Arizona wineries have a natural geographic advantage due to their proximity to Arizona consumers," which might make it more difficult for Arizona residents to travel to out-of-state wineries to use the in-person exception, but Black Star Farms had failed to provide evidence that this exception burdened the ability of out-of-state wineries to compete in the Arizona marketplace.³²⁸

In *Black Star Farms II* (2010), the Ninth Circuit affirmed the district court's decision and agreed that neither *Granholm* nor the First Circuit's decision in *Family Winemakers II* supported Black Star Farms' discrimination arguments.³²⁹ The Ninth Circuit rejected the winery's argument that *Granholm* applied to Arizona's production cap exception for two reasons.³³⁰ First, unlike the Michigan statute, it did not place "a complete ban on direct shipment," nor did it "approach th[e] level of discriminatory effect" of New York's in-state physical presence requirement.³³¹ Second, *Granholm* did not require that states "equaliz[e] . . . the inherent marketing advantage which accrues to in-state wineries because of their close proximity to a state's consumers."³³²

The Ninth Circuit also rejected Black Star Farms' argument that *Granholm* condemned the Arizona in-person purchase requirement, because *Granholm* gave states the option of only leveling up or leveling down "without any restrictions that might incidentally burden out-of-state wineries, such as the in-person purchase requirement."³³³ The Ninth Circuit provided instead its own reading of *Granholm*, which "permit[s] States to

325. *Id.*

326. *See Black Star Farms I*, 544 F.Supp.2d at 925-26.

327. *Id.* at 925.

328. *Id.*

329. *See generally Black Star Farms II*, 600 F.3d 1225 (9th Cir. 2010).

330. *Id.* at 1233-234.

331. *Id.*

332. *Id.* at 1234.

333. *Black Star Farms II*, 600 F.3d at 1234 (italics in original).

limit direct shipment from wineries *so long as the limitations treat in-state and out-of-state wineries in the same manner . . .* and do not impose new burdens on out-of-state wineries.”³³⁴ Arizona’s in-person purchase requirements met the Ninth Circuit’s test.³³⁵ First, the statute permits all wineries which produce less than 20,000 gallons of wine annually to require an on-site purchase prior to shipment.³³⁶ Second, the in-person purchase requirement does not impose a new burden on out-of-state wineries, but expands their opportunities to sell wine, because Arizona had previously required all wine imported from out-of-state to use the state’s three-tier system.³³⁷

The Ninth Circuit also distinguished the First Circuit’s decision in *Family Winemakers II* on its facts and evidence.³³⁸ First, the Arizona statute, unlike that of Massachusetts, “does not force ‘large’ winemakers into a restrictive method of distribution in comparison with ‘small’ winemakers[,] . . . [but] freed all small wineries, whether located in-state or out-of-state, from that restrictive method of distribution.”³³⁹ Second, the *Family Winemakers II* plaintiffs, unlike those in *Black Star Farms II*, “had evidence to prove their contentions.”³⁴⁰ *Black Star Farms*, however, failed to provide substantial evidence of the small winery exception’s discriminatory effect.³⁴¹

B. Comparative Analysis

After *Granholm* was decided, Arizona, Indiana, Kentucky, and Massachusetts rewrote their direct shipment statutes to create two facially-neutral exceptions to their states’ three-tier distribution systems: the small winery production cap and the in-person purchase requirement.³⁴² When the boutique wine coalition challenged these statutes in federal courts, the courts produced conflicting decisions, which were rooted in the courts’ willingness to either read *Granholm* narrowly, as limited to its facts in cases involving facially-discriminatory statutes, or to read *Granholm* broadly in

334. *Id.* (italics in original).

335. *Id.* at 1234-35.

336. *Id.* at 1234.

337. *Id.*

338. *Black Star Farms II*, 600 F.3d at 1233.

339. *Id.*

340. *Id.* (referencing *Family Winemakers II*, 592 F.3d 1).

341. *Id.* at 1231.

342. ARIZ. REV. STAT. § 4-203.04; IND. CODE § 7.1-3-26-9; KY. REV. STAT. § 243.155; MASS. GEN. LAWS ch. 138 § 18.

addressing statutes, which, while facially neutral, discriminated in purpose and/or practical effect.³⁴³

The First Circuit in *Family Winemakers II* (2010), the Sixth Circuit in *Cherry Hill Vineyards II* (2008), and the Indiana federal district court in *Baude I* (2007) adopted a generous view of *Granholm* as prohibiting not only facially-discriminatory statutes, but also the facially-neutral Massachusetts production cap and the Indiana and Kentucky in-person purchase requirements.³⁴⁴ The Massachusetts production cap discriminated in purpose and practical effect against out-of-state wineries and served no legitimate state interests, while the Indiana and Kentucky in-person purchase requirement discriminated in practical effect, and the states' legitimate interests in age verification could be served by the less burdensome means identified in the NCSL Model Direct Shipping Bill.³⁴⁵

At the same time, the Ninth Circuit in *Black Star Farms II* (2010), the Seventh Circuit in *Baude II* (2008), and the Kentucky federal district court in *Cherry Hill Vineyards I* (2007) read *Granholm* narrowly as invalidating only two facially-discriminatory statutes and as inapplicable to the facially-neutral Arizona and Kentucky production caps and Arizona in-person purchase requirement.³⁴⁶ Rejecting the *Maine v. Taylor* discrimination test, these federal courts found that the plaintiffs had not provided sufficient evidence that the production caps and in-person purchase exceptions granted preferential access to the states' wine markets by in-state wineries.³⁴⁷ The Seventh Circuit rejected the district court's discrimination analysis of the Indiana in-person provision and created its own in-person purchase hypothetical.³⁴⁸ It then used the *Pike* balancing test to find that the plaintiffs had not met their burden of establishing that the burden on interstate market from lost wine sales outweighed the local benefit of having a buyer's age verified at the winery.³⁴⁹

In sum, when federal courts have read *Granholm* broadly and found that plaintiffs have provided evidence to establish discrimination in purpose or effect, state statutes have been found to violate the dormant Commerce

343. See discussion *supra* Parts IV.A(1)-(4).

344. See generally *Family Winemakers II*, 592 F.3d 1; *Cherry Hill Vineyards II*, 553 F.3d 423; *Baude II*, 538 F.3d 608.

345. See *supra* Part IV.A for discussion.

346. See generally *Black Star Farms II*, 600 F.3d 1225; *Baude II*, 538 F.3d 608; *Cherry Hill Vineyards I*, 488 F.Supp.2d 601.

347. See generally *Black Star Farms II*, 600 F.3d 1225; *Baude II*, 538 F.3d 608; *Cherry Hill Vineyards I*, 488 F.Supp.2d 601.

348. *Baude II*, 538 F.3d at 608, 614.

349. *Id.* at 611.

Clause.³⁵⁰ When, however, these courts have read *Granholm* narrowly, they have found that plaintiffs have either not met their burden of establishing discrimination or that they have used the *Pike* balancing test to find that the state production caps and in-person purchase exceptions have withstood dormant Commerce Clause scrutiny.³⁵¹

Together these federal court decisions mean that seven years after the Supreme Court decided *Granholm*, the constitutionality of two key state direct shipment license provisions, the winery production cap and in-person purchase exceptions, are still in doubt and the future of these two exceptions and the meaning of *Granholm* remain uncertain.

C. Congressional Direct Shipment Legislation

After *Granholm*, the boutique winery coalition had moved the direct shipment issue out of the alcohol beverage control subsystem arenas of state legislative politics and challenged the revised direct shipment statutes in the macropolitical arena of the federal courts. The Wine and Spirits Wholesalers (“WSWA”) and state wholesalers, who had been parties to the federal court litigation, moved the issue to another macropolitical arena.³⁵² On March 18, 2010, the House Judiciary Subcommittee on Courts and Competition Policy held a hearing. The principal issue was the Supreme Court’s decision in *Granholm* and the federal courts’ abuse of their power in declaring unconstitutional post-*Granholm* state alcohol beverage laws.³⁵³

A month after the hearings, the WSWA and the National Beer Wholesalers Association (“NBWA”) supported the introduction of H.R. 5034: The Comprehensive Alcohol Regulatory Effectiveness (“CARE”) Act of 2010.³⁵⁴ The bill proposed to amend the Wilson Act by striking its non-discrimination language and amend the Webb-Kenyon Act by adding two provisions.³⁵⁵ Section 3(b) would eliminate dormant Commerce Clause scrutiny of state alcoholic beverage laws that facially discriminate against out-of-state wineries.³⁵⁶ Section 3(c) would establish a strong presumption of validity for state alcoholic beverage statutes and require the party

350. See generally *supra* Part IV.A.

351. See generally *supra* Part VI.A.

352. See generally Legal Issues Concerning State Alcohol Regulation: Hearing Before the H. Sub. Comm. on the Judiciary, 111th Cong. (March 18, 2010).

353. *Id.* at 4-9 (statement of Hon. John Conyers, Jr.).

354. Comprehensive Alcohol Regulatory Effectiveness (CARE) Act of 2010, H.R. 5034, 111th Cong. (2nd Sess. 2010).

355. *Id.* § 4 (amending 27 U.S.C. § 121).

356. *Id.* § 3(b) (amending 27 U.S.C. § 122(b)).

challenging these laws to “bear the burden of proving its invalidity by clear and convincing evidence.”³⁵⁷

In September 2010, the bill’s sponsors removed section 3(c), the most controversial provision, and amended section 3(b).³⁵⁸ Section 3(b) was broadened to prohibit both intentional and facial discrimination against out-of-state wineries and strengthened to place a greater burden on states by substituting a weak discrimination “without justification” test for the stronger *Maine v. Taylor* test: “unless the state can demonstrate that the challenged law advances legitimate local purpose that cannot be served by reasonable non-discriminatory alternatives.”³⁵⁹

The House Judiciary Committee held a hearing on September 29, 2010, but tabled the bill because of constitutional concerns, and it died at the end of the 111th Congress.³⁶⁰ Retitled, it was introduced in the 112th Congress on March 17, 2011 as H.R. 1161: The Community Alcohol Regulation Effectiveness (“CARE”) Act of 2011.³⁶¹ H.R. 1161, like the amended H.R. 5034, has been the subject of intense debate between the wholesalers and the boutique winery coalition.³⁶² In this debate, the WSWA has argued that H.R. 1161 defends the Twenty-first Amendment authority of states to regulate alcohol and protect them from costly litigation.³⁶³ The bill also protects a subsystem forum in which wholesalers influence the writing of state direct shipment statutes which have been challenged in the macropolitical setting of the federal courts by the boutique wineries.³⁶⁴ “[T]he proper forum for resolving legitimate differences over these issues,” the WSWA argued, “is in the state legislatures—not the courts.”³⁶⁵ At the same time, The Wine Institute condemned H.R. 5034 (later 1161) as

357. *Id.* § 3(c) (amending 27 U.S.C. § 122(c)).

358. H.R. 5034 (for original language); Community Alcohol Regulatory Effectiveness (CARE) Act of 2011, H.R. 1161, 112th Cong. (1st Sess. 2011) (for new language of the same bill with the result of removing § 3(c), and the broadened language of § 3(b)). For a hearing to discuss this change, see Comprehensive Alcohol Regulatory Effectiveness (CARE) Act of 2010: Hearing Before the H. Comm. on the Judiciary, 111th Cong. (Sept. 29, 2010) [hereinafter CARE Act Judiciary Comm. Hearings].

359. H.R. 1161 (for the new language of the without § 3(c), and the broadened language of § 3(b) using quote from *Granholm*, 544 U.S. 460 and *Cherry Hill Vineyards II*, 553 F.3d 423). See generally CARE Act Judiciary Comm. Hearings, *supra* note 358; *Cherry Hill Vineyards II*, 553 F.3d at 432 (quoting *Granholm*, 544 U.S. at 489).

360. See CARE Act Judiciary Comm. Hearings, *supra* note 358.

361. H.R. 1161.

362. See, e.g., *Defeat H.R. 5034. Stop the Wholesaler Monopoly Protection Bill*, WINEINSTITUTE.ORG (July 9, 2010), <http://www.wineinstitute.org/resources/pressroom/07092010>; see also Stephanie Pagan, *WSWA Applauds Congressional Legislation to Halt Alcohol Deregulation*, WINE & SPIRITS WHOLESALERS OF AM. (April 16, 2010), <http://www.wswa.org/news.php?NewsID=21&ArticleID=15>.

363. Pagan, *supra* note 362.

364. H.R. 1161; see also Pagan, *supra* note 362.

365. Pagan, *supra* note 362.

special-interest legislation, labeling it as the “Wholesalers Monopoly Protection Bill,” viewing it as a “cynical attempt” to overrule *Granholm*, thereby allowing state legislatures to replace federal standards with their own, which will create a less open, more discriminatory national wine marketplace.³⁶⁶

The CARE Act of 2011 will have serious implications not only for the Supreme Court’s *Granholm* decision and the post-*Granholm* federal court decisions, which involve production caps and in-person purchase requirements, but also for the expansion of state power to regulate all alcoholic beverages and the limitation of federal courts to review state alcohol laws.³⁶⁷ To explore these implications, this analysis will examine the CARE Act’s section 3(b) amendment of the Webb-Kenyon Act and then turns to its section 4 amendment of the Wilson Act.

Section 3(b) will make boutique winery challenges to state laws much more difficult because it will eliminate federal court dormant Commerce Clause review of state alcohol beverage laws which discriminate in purpose and effect and permit federal courts to invalidate those laws only if they intentionally and facially discriminate against out-of-state wineries.³⁶⁸ No longer will federal courts be able to hear cases in which the evidence establishes that facially neutral laws have discriminatory effects.

As a result, section 3(b) will overrule the *Granholm* decision in the New York case, which involved a facially-neutral statute, but uphold the decision in the Michigan case, which involved a facially-discriminatory statute, unless discriminatory intent can be proven.³⁶⁹ In terms of post-*Granholm* cases, section 3(b) will not disturb the Seventh Circuit’s decision in *Baude II* (2008), the Ninth Circuit’s decision in *Black Star Farms II* (2010), and the Kentucky district court decision in *Cherry Hill Vineyards I* (2006), which all found that there was no evidence that the states’ facially-neutral, in-person purchase and production cap requirements discriminated in practical effect.³⁷⁰ At the same time, section 3(b) will undermine the Sixth Circuit decision in *Cherry Hill Vineyards II* (2008), because it held that the facially-neutral Kentucky in-person purchase requirement discriminated in practical effect, and the First Circuit in *Family Winemakers II* (2010),

366. *Id.*; Diane Katz, *Tales of the Red Tape #12: Regulatory Grapes of Wrath*, THE FOUNDRY (May 31, 2011, 10:58 AM), <http://blog.heritage.org/2011/05/31/tales-of-the-red-tape-12-regulatory-grapes-of-wrath/>.

367. See H.R. 1161.

368. H.R. 1161.

369. See *supra* Part IV.A.

370. See generally *Black Star Farms II*, 600 F.3d 1225; *Cherry Hill Vineyards II*, 553 F.3d 423; *Baude II*, 538 F.3d 608.

because it held that the Massachusetts production cap discriminated in purpose and effect.³⁷¹

Section 3(b), having forbidden the federal courts to strike down state court statutes which have the legislative purpose or the practical effect of discriminating against out-of-state wineries and their in-state consumers, provides a second means to strike down state statutes as violations of the dormant Commerce Clause: if they have a discriminatory intent.³⁷² Finding discriminatory intent, unlike legislative purpose, will, however, be difficult for federal courts. Legislative purpose is a broad inquiry which examines the statute's history, the relationship of its provisions to its purpose, and its place "in the development of the state's laws over time."³⁷³ Proof of legislative intent, by contrast, is a much narrower inquiry, which focuses on a legislator's state of mind when a statute is passed.³⁷⁴

Limiting the dormant Commerce Clause to discriminatory intent may not, however, be an insurmountable constitutional barrier.³⁷⁵ Even if section 3(b) eliminated the discriminatory effects test, federal courts, such as the First Circuit, could infer discriminatory intent from discriminatory effect.³⁷⁶ Other federal courts could, however, view discriminatory intent and discriminatory effects as two separate tests, and conclude that Congress, having eliminated the discriminatory effects test, "would not want courts to infer a discriminatory intent from discriminatory effects for state alcohol regulations."³⁷⁷

Section 4 of the CARE Act of 2011 amends the Wilson Act by eliminating its language prohibiting discriminatory state laws which require that liquor imported from other states be treated "to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory."³⁷⁸ In so doing, section 4 creates serious problems for boutique wineries and their customers in litigating state alcohol beverage laws in federal court.³⁷⁹

First, section 4, on its own, will undermine *Granholm* and its progeny, along with prior Supreme Court decisions holding that discriminatory state liquor laws violated the dormant Commerce Clause and may well allow

371. See *Family Winemakers II*, 592 F.3d at 4; *Cherry Hill Vineyards II*, 553 F.3d at 423.

372. See H.R. 1161.

373. CARE Act Judiciary Comm. Hearings, *supra* note 358, at 141 (statement of Tracy K. Gensen, Kirkland & Ellis LLP, on Behalf of The Wine Institute).

374. *Id.* at 124 (statement of Einer Elhauge, Petrie Professor of Law, Harvard Law School).

375. See, e.g., *id.* (statement of Einer Elhauge, Petrie Professor of Law, Harvard Law School).

376. *Id.* (statement of Einer Elhauge, Petrie Professor of Law, Harvard Law School).

377. *Id.* (statement of Einer Elhauge, Petrie Professor of Law, Harvard Law School).

378. 27 U.S.C. § 121 (2006); H.R. 1161.

379. See H.R. 5034 (for original language); see H.R. 1161 (for new language).

federal courts to rely instead on the Supreme Court's decision in *State Board of Equalization v. Young's Market, Inc.*³⁸⁰ and its other late-1930s decisions, which permitted states to discriminate against out-of-state alcohol producers.³⁸¹

Second, section 3(b) carves out a narrow exception to section 4's broad reach by prohibiting state alcohol beverage regulations, including winery production caps and in-person purchase requirements, which facially or intentionally discriminate.³⁸² This exception would be in jeopardy if a federal court interpreted section 4 "to allow discrimination without meeting the standards of 3(b)," or if H.R. 1161 were amended to eliminate Section 3(b).³⁸³ Either way, section 4 would pose a substantial threat to out-of-state wineries by exposing them to discriminatory state laws that are immune from dormant Commerce Clause scrutiny.³⁸⁴ At the same time, section 4 would favor state and wholesaler interests by limiting federal court review of state alcohol to *Pike's* rational basis review and placing upon out-of-state wineries and their in-state customers the difficult burden of proving, for example, that the state's winery production cap and in-person purchase requirements' burden on the interstate wine market was "clearly excessive in relation to the putative local benefits" in prohibiting underage drinking, collecting taxes, and maintaining the integrity of their alcohol regulatory systems.³⁸⁵

CONCLUSION

The United States Supreme Court's decision in *Granholm* altered the constitutional legal regime for alcoholic beverage control defined by the Twenty-first Amendment and the Commerce Clause, but it has not led to the creation of a common market for wine.³⁸⁶ This Article has offered an explanation, which first explored the constitutional setting of the national wine marketplace and state alcoholic beverage control systems. Then it provided a policy framework for understanding the nature of the alcohol beverage control systems, their resistance to changes in the interstate wine marketplace, and the boutique winery coalition's litigation in the federal courts and before the Supreme Court in *Granholm*.

380. 299 U.S. 59 (1936).

381. See *supra* note 56 and accompanying text.

382. H.R. 1161.

383. See CARE Act Judiciary Comm. Hearings, *supra* note 358, at 128.

384. See generally H.R. 1161.

385. *Id.*; *Pike*, 397 U.S. at 142.

386. See generally *Granholm*, 544 U.S. 460.

The *Granholm* opinion seemed to hand the boutique winery coalition a victory because it struck down two discriminatory state direct shipment laws as dormant Commerce Clause violations, but at the same time, it left the constitutional remedy in the hands of the states and their alcohol beverage subsystems.³⁸⁷ The revised state direct shipment laws did not treat all wineries on an equal basis, but lessened the degree of discrimination against out-of-state wineries and led the boutique winery coalition to challenge these laws in federal court.³⁸⁸ Their efforts, however, have not always been rewarded, because the federal courts have disagreed about the meaning of *Granholm*.³⁸⁹ Alcohol beverage wholesalers, who were parties to this litigation, have mounted the most recent challenge to a national boutique wine market by supporting congressional legislation that would amend the Wilson Act and Webb-Kenyon Act, and overturn United States Supreme Court decisions prohibiting discriminatory state alcohol beverage laws.³⁹⁰

In sum, this Article has argued that the continuing constitutional dispute over the creation of a national wine marketplace and the constitutionality of state direct shipment laws can be understood as a legal conflict and as a policy conflict. As a legal conflict, it has been defined by federal and state laws, the Commerce Clause and Twenty-first Amendment, and United States Supreme Court case law and federal court decisions. As a policy conflict, it has been fought in both subsystem and macropolitical policy domains—including state legislatures, federal courts, and the United States Congress—by state alcoholic beverage control partisans and a boutique wine coalition.

387. *See generally id.*

388. *See discussion supra* Part IV.A.

389. *See discussion supra* Part IV.A.

390. *See generally Granholm*, 544 U.S. 460; *see also* discussion Part IV(A)-(B).