

# UNCORKING *GRANHOLM*: EXTENDING THE NONDISCRIMINATION PRINCIPLE TO ALL INTERSTATE COMMERCE IN WINE

**Abstract:** In a landmark 2005 decision, *Granholm v. Heald*, the U.S. Supreme Court ruled that states could not constitutionally discriminate in interstate commerce by permitting in-state wineries to ship directly to customers while prohibiting the same for out-of-state wineries. States previously had argued, with some success historically, that the Twenty-first Amendment authorized them to regulate liquor as they pleased—without Commerce Clause interference. *Granholm* seemed to clearly establish, once and for all, that “the Twenty-first Amendment does not supersede other provisions of the Constitution.” Several recent federal courts of appeals, however, have refused to heed this clear message when confronted with challenges to laws discriminating against out-of-state wine *retailers*. This Note argues that a simple Commerce Clause analysis should apply to discrimination against all out-of-state business interests, regardless of their status with respect to the traditional three-tier regulatory system.

## INTRODUCTION

Chief Justice John Marshall, like many other Founding Fathers, was an oenophile.<sup>1</sup> He was particularly fond of Madeira, the fortified Portuguese wine, and reached many a judicial accord with his colleagues over after-dinner glasses—so well-known was the habit that Washington wine merchants took to labeling their best Madeira “The Supreme Court.”<sup>2</sup> Marshall was also, of course, the foremost architect of American constitutional law.<sup>3</sup> The decisions that flowed from his pen affirmed the authority of the Court, the supremacy of the federal government, and the importance of a free market unhindered by state protectionism.<sup>4</sup> In-

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<sup>1</sup> See JEAN EDWARD SMITH, JOHN MARSHALL: DEFINER OF A NATION 352 (1996). The first five presidents of the United States—George Washington, John Adams, Thomas Jefferson, James Madison, and James Monroe—were all noted wine connoisseurs. See RICHARD MENDELSON, FROM DEMON TO DARLING: A LEGAL HISTORY OF WINE IN AMERICA 11 (2009).

<sup>2</sup> See SMITH, *supra* note 1, at 352, 396.

<sup>3</sup> See *id.* at xi (quoting Marshall’s contemporary, Justice Joseph Story: “His proudest epitaph may be written in a single line— ‘Here lies the expounder of the Constitution’”).

<sup>4</sup> See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824) (Marshall, C.J.) (recognizing the dormant Commerce Clause) (“[Congress has] the power to regulate, that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested

deed, as a fellow jurist noted, Marshall was “brought up on Federalism and Madeira, and he was not a man to outgrow his early prejudices.”<sup>5</sup>

Imagine the Chief Justice’s frustration, then, were he somehow to be transported to the present day: in many states, he could not have his beloved Madeira shipped from Washington merchants without facing criminal penalties.<sup>6</sup> His dismay would only increase if he were to note that other states not only prohibit liquor shipments from out-of-state retailers, but discriminatorily benefit their own retailers by allowing *them* to ship directly to consumers.<sup>7</sup> Faced with these affronts to his palate and his jurisprudence, John Marshall would surely become an eloquent modern-day advocate for freer trade in wine.<sup>8</sup>

In a landmark 2005 decision, *Granholm v. Heald*, the U.S. Supreme Court ruled that states could not constitutionally discriminate in interstate commerce by permitting in-state wineries to ship directly to customers while prohibiting the same for out-of-state wineries.<sup>9</sup> Had any other product been at issue, such a ruling would be elementary under the Commerce Clause, but for liquor, the outcome was not inevitable.<sup>10</sup> States previously had argued, with some success historically, that the Twenty-first Amendment authorized them to regulate liquor as they pleased—without Commerce Clause interference.<sup>11</sup> *Granholm* seemed to clearly establish, once and for all, that “the Twenty-first Amendment does not supersede other provisions of the Constitution.”<sup>12</sup>

But the “wine wars” did not end with *Granholm*.<sup>13</sup> That case had its origins in the rise of e-commerce, coupled with the growing popularity

in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the [C]onstitution.”).

<sup>5</sup> SMITH, *supra* note 1, at 352 (quoting Justice Story).

<sup>6</sup> See, e.g., FLA. STAT. ANN. § 561.545 (West 2011) (criminalizing the direct shipment of alcoholic beverages into the state of Florida except by licensed manufacturers and wholesalers); *id.* §§ 562.15, 562.45 (criminalizing possession of illegally imported alcoholic beverages and elevating repeat offenses to third degree felonies); SMITH, *supra* note 1, at 352.

<sup>7</sup> See, e.g., N.Y. ALCO. BEV. CONT. LAW §§ 105.1, 105.9 (McKinney 2011) (permitting liquor retailers located in and licensed by the state of New York to ship directly to consumers, but prohibiting the same for out-of-state retailers); see also SMITH, *supra* note 1, at 352.

<sup>8</sup> See *supra* notes 1–7 and accompanying text.

<sup>9</sup> *Granholm v. Heald*, 544 U.S. 460, 476 (2005).

<sup>10</sup> See *id.* at 494 (Stevens, J., dissenting) (“The . . . laws challenged in these cases would be patently invalid under well-settled dormant Commerce Clause principles if they regulated sales of an ordinary article of commerce rather than wine.”).

<sup>11</sup> See, e.g., *State Bd. of Equalization v. Young’s Mkt. Co.*, 299 U.S. 59, 60, 64 (1936) (upholding discriminatory licensing fee).

<sup>12</sup> 544 U.S. at 486.

<sup>13</sup> See *id.* at 473 (characterizing conflicts over state wine regulation as an “ongoing, low-level trade war”).

of small wineries.<sup>14</sup> The traditional, state-implemented three-tier system, which funneled all alcohol from producers through wholesalers and eventually to retailers, kept many small wineries from accessing the market.<sup>15</sup> In response, state legislatures began to allow wineries to ship directly to consumers, including those who ordered online.<sup>16</sup> *Granholm* ruled that such statutes had to regulate evenhandedly with respect to in-state and out-of-state wineries.<sup>17</sup> Now, the battleground has shifted to direct shipping by *retailers*, and states are once again trying to benefit local economic interests by allowing direct shipping only by in-state businesses.<sup>18</sup> Predictably, such laws have been challenged in the court system.<sup>19</sup> Somewhat surprisingly, they have been upheld in two federal courts of appeals.<sup>20</sup>

This Note argues that such a result is contrary to the clear message of *Granholm*.<sup>21</sup> Part I traces the history of the Twenty-first Amendment, and surveys relevant jurisprudence concerning the Amendment's interplay with the Commerce Clause.<sup>22</sup> Part II places *Granholm* in the context of the direct shipping problem, and summarizes that decision.<sup>23</sup> Part III shifts the focus to discriminatory state laws regulating direct shipping by retailers and presents three recent federal court decisions on the issue.<sup>24</sup> Finally, Part IV analyzes those decisions in light of *Granholm* and argues that a simple Commerce Clause analysis should apply to discrimination against *all* out-of-state business interests, regardless of their status with respect to the traditional three-tier system.<sup>25</sup> This approach is clear, adaptable, and fully consistent with *Granholm*.<sup>26</sup>

## I. THE COMMERCE CLAUSE AND THE TWENTY-FIRST AMENDMENT

At the heart of legal battles over state liquor regulation is the tension between two constitutional provisions: the Commerce Clause and

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<sup>14</sup> See *infra* notes 108–121 and accompanying text.

<sup>15</sup> See *infra* notes 95–116 and accompanying text.

<sup>16</sup> See *infra* notes 122–128 and accompanying text.

<sup>17</sup> 544 U.S. at 493.

<sup>18</sup> See *infra* notes 159–163 and accompanying text.

<sup>19</sup> See *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 811 (5th Cir. 2010); *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 187 (2nd Cir. 2009); *Siesta Vill. Mkt. LLC v. Granholm*, 596 F. Supp. 2d 1035, 1038 (E.D. Mich. 2008).

<sup>20</sup> See *Wine Country*, 612 F.3d at 821; *Arnold's*, 571 F.3d at 186.

<sup>21</sup> See 544 U.S. at 493.

<sup>22</sup> See *infra* notes 27–87 and accompanying text.

<sup>23</sup> See *infra* notes 88–151 and accompanying text.

<sup>24</sup> See *infra* notes 152–193 and accompanying text.

<sup>25</sup> See *infra* notes 194–306 and accompanying text.

<sup>26</sup> See *infra* notes 194–307 and accompanying text.

the Twenty-first Amendment.<sup>27</sup> Section A of this Part briefly explains relevant Commerce Clause principles.<sup>28</sup> Section B explores the Supreme Court's application of the Commerce Clause to discriminatory state liquor laws in the pre-prohibition decades.<sup>29</sup> Section C then surveys the Supreme Court's pre-*Granholm* attempts to properly read the Twenty-first Amendment in light of the Commerce Clause.<sup>30</sup>

### A. *The Commerce Clause*

The U.S. Constitution vests in Congress the authority to "regulate Commerce . . . among the several states."<sup>31</sup> It is well established that this affirmative grant of federal power implies a negative, or "dormant," constraint on the power of states to enact legislation that interferes with or burdens interstate commerce.<sup>32</sup> Underlying the dormant Commerce Clause is the Framers' "conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation."<sup>33</sup> Thus, the Commerce Clause and its dormant counterpart stand for the principle that the "peoples of the several states must sink or swim" together in the currents of a single, national economy.<sup>34</sup>

That guiding philosophy has evolved into a jurisprudential framework for dormant Commerce Clause cases.<sup>35</sup> State laws may not purposefully discriminate against interstate commerce, whether on their face or by practical effect.<sup>36</sup> Such discriminatory laws, presumed to be

<sup>27</sup> See U.S. CONST. art. I, § 8, cl. 3; *id.* amend. XXI; *Granholm*, 544 U.S. at 471 (identifying the central issue of the case as whether liquor regulations "violate[d] the dormant Commerce Clause in light of § 2 of the Twenty-first Amendment").

<sup>28</sup> See *infra* notes 31–39 and accompanying text.

<sup>29</sup> See *infra* notes 40–60 and accompanying text.

<sup>30</sup> See *infra* notes 61–87 and accompanying text.

<sup>31</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>32</sup> See, e.g., *Or. Waste Sys. v. Dep't of Env'tl. Quality*, 511 U.S. 93, 98 (1994) ("[T]he [Commerce] Clause has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce.").

<sup>33</sup> *Hughes v. Oklahoma*, 441 U.S. 322, 325–26 (1979); see also *Gibbons*, 22 U.S. (9 Wheat.) at 231 (Johnson, J., concurring) (recognizing the dormant Commerce Clause) ("If there was any one object riding over every other in the adoption of the [C]onstitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints.").

<sup>34</sup> *Baldwin v. G.A.F. Seelig*, 294 U.S. 511, 523 (1935).

<sup>35</sup> See *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (summarizing the jurisprudential framework).

<sup>36</sup> *Id.* (citing *Hughes*, 441 U.S. at 336).

motivated by “simple economic protectionism,” face a “virtually per se” rule of invalidity.<sup>37</sup> At a minimum, they “invoke[] the strictest scrutiny,”<sup>38</sup> and the burden falls on the state to demonstrate that the statute “advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.”<sup>39</sup>

### B. *Pre-prohibition Liquor Regulation*

The dormant Commerce Clause was repeatedly invoked by the U.S. Supreme Court to strike down discriminatory state liquor laws in the late-nineteenth century.<sup>40</sup> As the temperance movement gained cultural and political influence in America, many states passed laws restricting or prohibiting the production and sale of alcohol.<sup>41</sup> In 1887, in *Mugler v. Kansas*, the Supreme Court recognized the state police power to regulate the in-state production and sale of alcoholic beverages.<sup>42</sup> Statutes that aimed to regulate *imported* alcohol, however, were met with a “less solicitous” Court.<sup>43</sup>

Laws that discriminated against imported liquor were consistently struck down.<sup>44</sup> In *Walling v. Michigan*, for example, the U.S. Supreme

<sup>37</sup> *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) (striking down discriminatory waste management rule); *see also* *W. Lynn Creamery v. Healy*, 512 U.S. 186, 207 (1994) (striking down discriminatory milk pricing law); *Or. Waste Sys., Inc.*, 511 U.S. at 108 (striking down discriminatory solid waste rule); *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988) (striking down discriminatory tax exemption).

<sup>38</sup> *Hughes*, 441 U.S. at 337.

<sup>39</sup> *New Energy*, 486 U.S. at 278; *see also* *Taylor*, 477 U.S. at 151–52 (holding that a state’s public health interest in keeping diseased fish out of its waters was a rare example of legitimate local purpose that could not be served by nondiscriminatory means).

Statutes that burden interstate commerce “only incidentally” face less exacting scrutiny, but the precise analysis to be applied in these cases is not as established as that applied to clearly discriminatory laws. *See Taylor*, 477 U.S. at 138. One commonly applied standard holds that such incidentally burdensome laws “violate the Commerce Clause only if the burdens they impose on interstate trade are ‘clearly excessive in relation to the putative local benefits.’” *Id.* (quoting *Pike v. Bruch Church, Inc.*, 397 U.S. 137, 142 (1970)).

<sup>40</sup> *See, e.g., Bowman v. Chi. & Nw. Ry. Co.*, 125 U.S. 465, 500 (1888) (holding Iowa law requiring permits for liquor importers unconstitutional); *Walling v. Michigan*, 116 U.S. 446, 461 (1886) (invalidating a Michigan tax that discriminated against imported liquor by exempting sales of local products); *Tiernan v. Rinker*, 102 U.S. 123, 128 (1880) (invalidating a similar Texas tax with exemption for local sellers).

<sup>41</sup> *See MENDELSON, supra* note 1, at 48–49 (noting that by 1913 more than 50 percent of the total population of the United States and more than 71 percent of the land mass were under prohibitory state alcohol laws). The temperance movement employed religious evangelism and, later, political action in advocating abstention from alcohol. *See id.* at 6–49.

<sup>42</sup> *See* 123 U.S. 623, 675 (1887) (upholding the Kansas state constitution’s prohibition on production of alcoholic beverages).

<sup>43</sup> *Granholm*, 544 U.S. at 476.

<sup>44</sup> *See, e.g., Walling*, 116 U.S. at 461; *Tiernan*, 102 U.S. at 128.

Court in 1886 held that a tax imposed on out-of-state liquor importers, but not on in-state sellers, violated the dormant Commerce Clause.<sup>45</sup> “If this is not a discriminating tax,” the Court opined, “it is difficult to conceive of a tax that would be discriminating.”<sup>46</sup> And in *Bowman v. Chicago & Northwestern Railway Co.*, the U.S. Supreme Court held in 1888 that an Iowa law requiring liquor importers to have a permit was unconstitutional—indeed, any law restricting or prohibiting the importation of liquor from one state into another would be invalid.<sup>47</sup>

The *Bowman* decision highlighted the problem resulting from the clash of jurisprudence and legislation: states could not effectively enforce their own dry laws.<sup>48</sup> The citizens of dry states could simply order their liquor to be delivered from wet states, and there was nothing the dry states’ legislatures could constitutionally do about it.<sup>49</sup> After the U.S. Supreme Court struck down another Iowa law that tested the limits of the *Bowman* decision, Congress attempted to empower state regulation of imported alcohol by passing the Wilson Act of 1890.<sup>50</sup> Under the Act, all alcohol sold in a state was subject to any laws enacted under the police power of that state.<sup>51</sup>

The Supreme Court, however, construed the Wilson Act narrowly, holding that the right to regulate did not attach until the alcohol was in

<sup>45</sup> 116 U.S. at 461.

<sup>46</sup> *Id.* at 454.

<sup>47</sup> 125 U.S. at 500 (“[T]he power to regulate or forbid the sale of a commodity, after it has been brought into the state, does not carry with it the right and power to prevent its introduction by transportation from another state.”).

<sup>48</sup> *See id.*; *see also* MENDELSON, *supra* note 1, at 36 (“From the perspective of frustrated temperance advocates, the [C]ourt’s robust defense of open state borders in *Bowman* meant that the very existence of wet states posed a constant and insidious threat . . . to the order and security of dry states.”) (internal quotation marks omitted) (alterations in original).

<sup>49</sup> *See Bowman*, 125 U.S. at 500.

<sup>50</sup> *Leisy v. Hardin*, 135 U.S. 100, 124–25 (1890) (holding that Iowa law banning the sale of imported liquor in its original package was unconstitutional because alcohol in its original package remained an article of interstate commerce beyond a state’s regulatory reach); *see* Wilson Act, ch. 728, 26 Stat. 313 (1890) (codified at 27 U.S.C. § 121 (2006)).

<sup>51</sup> *See* ch. 728, 26 Stat. at 313. The Act provided,

[All] intoxicating liquors . . . transported into any State or Territory . . . shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such . . . liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

the hands of the consumer.<sup>52</sup> The federal law did not “confer upon any State the power to discriminate injuriously against the products of other states in articles whose manufacture and use are not forbidden, and are therefore the subjects of legitimate commerce.”<sup>53</sup> As a result, the mail-order liquor trade continued to flourish.<sup>54</sup>

With the Webb-Kenyon Act of 1913, Congress finally succeeded in closing the direct-shipment loophole.<sup>55</sup> That Act provided that the importation of intoxicating liquor “intended . . . to be received, possessed, sold, or in any manner used . . . in violation of any law of such State . . . is hereby prohibited.”<sup>56</sup> In *James Clark Distilling Co. v. Western Maryland Railroad Co.*, the U.S. Supreme Court in 1917 upheld the Webb-Kenyon Act against a constitutional challenge.<sup>57</sup> The Court stressed, however, that the legislation’s “only purpose was to give effect to state prohibition” laws and eliminate the regulatory advantage afforded imported liquor under *Bowman*.<sup>58</sup> The Act did not give states the power to treat out-of-state liquor on unequal, discriminatory terms.<sup>59</sup> Thus, in the pre-prohibition decades, Supreme Court jurisprudence made clear that alcoholic beverages were not exempt from the strictures of the dormant Commerce Clause.<sup>60</sup>

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<sup>52</sup> See *Rhodes v. Iowa*, 170 U.S. 412, 423 (1898).

<sup>53</sup> *Scott v. Donald*, 165 U.S. 58, 100 (1897).

<sup>54</sup> See James Alexander Tanford, *E-Commerce in Wine*, 3 J.L. ECON. & POL'Y 275, 287 (2006) (noting that by 1912, an estimated 20 million gallons of liquor per year were shipped through interstate commerce in evasion of dry laws).

<sup>55</sup> Ch. 90, 37 Stat. 699 (codified at 27 U.S.C. § 122 (2006)).

<sup>56</sup> *Id.*

<sup>57</sup> 242 U.S. 311, 332 (1917) (upholding the Webb-Kenyon Act over challenge that it was an unconstitutional delegation of congressional power to the states).

<sup>58</sup> *Id.* at 322; *id.* at 324 (stating that the purpose of the Act “was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught”); see *Bowman*, 125 U.S. at 500 (“[T]he power to regulate or forbid the sale of a commodity, after it has been brought into the state, does not carry with it the right and power to prevent its introduction by transportation from another state.”).

<sup>59</sup> See *Clark Distilling*, 242 U.S. at 324; see also *Granholm*, 544 U.S. at 483 (“[T]he Webb-Kenyon Act did not displace . . . the Court’s line of Commerce Clause cases striking down state laws that discriminated against liquor produced out of state.”).

<sup>60</sup> See *supra* notes 40–59 and accompanying text.

### C. *Clashing Interpretations of the Twenty-first Amendment*

Nationwide prohibition, constitutionalized by the Eighteenth Amendment in 1919, was a failure.<sup>61</sup> Unchecked by a poorly funded and often corrupt enforcement effort, a sprawling illegal liquor industry slaked Americans' thirst for beer, wine, and spirits.<sup>62</sup> Public sentiment quickly turned against the Amendment and in favor of its repeal.<sup>63</sup>

On December 5, 1933, just thirteen years after prohibition began, the Twenty-first Amendment was ratified, and alcoholic beverages were once again legal commodities in the United States.<sup>64</sup> The precise meaning of Section 2 of the Amendment is, to this day, a matter of controversy.<sup>65</sup> That section provides, "The transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."<sup>66</sup> Section 2 fuels debate because it is susceptible of two polar interpretations.<sup>67</sup> On one hand, the plain language of the Twenty-first Amendment can be read to grant the states plenary power to regulate intoxicating liquors, regardless of other constitutional mandates such as the dormant Commerce Clause.<sup>68</sup> On the other hand, historical context suggests that repeal merely restored

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<sup>61</sup> See U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI. The Eighteenth Amendment provided, "[T]he manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited." *Id.* § 1. It also granted concurrent power to Congress and the states "to enforce this article by appropriate legislation." *Id.* § 2.

<sup>62</sup> See MENDELSON, *supra* note 1, at 81–85 (describing the prevalence of both large-scale criminal syndicates and small-scale bootleggers, and noting that "[c]orruption in the [federal] Bureau of Prohibition was irrefutable and so widespread that it became a national scandal").

<sup>63</sup> See *id.* at 85–89 (tracking momentum of the repeal movement and noting that by 1932, even John D. Rockefeller, Jr., a "staunch prohibitionist . . . and a lifelong teetotaler" publicly favored repeal).

<sup>64</sup> U.S. CONST. amend. XXI. The Twenty-first Amendment was ratified just ten months after its introduction to the states—a faster approval than any constitutional Amendment before or since. MENDELSON, *supra* note 1, at 93.

<sup>65</sup> See Sidney J. Spaeth, *The Twenty-First Amendment and State Control over Intoxicating Liquor: Accommodating the Federal Interest*, 79 CALIF. L. REV. 161, 180–81 (1991) (noting that the meaning of Section 2 is "incapable of precise divination" because congressional debate was ambiguous and there was no discussion at ratification conventions).

<sup>66</sup> U.S. CONST. amend. XXI, § 2.

<sup>67</sup> See *id.*; see also *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 276 (1984) (holding that state powers under Section 2 are limited by other express federal policies); *State Bd. of Equalization v. Young's Mkt. Co.*, 299 U.S. 59, 62–63 (1936) (holding that states have broad power under Section 2 to regulate intoxicating liquors).

<sup>68</sup> See Spaeth, *supra* note 65, at 181.

the status quo that existed prior to prohibition—that is, states gained no new regulatory powers under the Twenty-first Amendment.<sup>69</sup>

The former approach guided Supreme Court jurisprudence in the decade following the passage of the Twenty-first Amendment.<sup>70</sup> In a departure from its pre-prohibition decisions, the Court upheld protectionist liquor laws designed solely to insulate in-state businesses from out-of-state competition.<sup>71</sup> In 1936, the U.S. Supreme Court in *State Board of Equalization v. Young's Market Co.* considered a dormant Commerce Clause challenge for the first time since the end of Prohibition and upheld California's five-hundred-dollar license fee on importers of out-of-state beer.<sup>72</sup> Section 2 of the Twenty-first Amendment, Justice Brandeis wrote, "confer[s] upon the State the power to forbid all importations which do not comply with the conditions which it prescribes," regardless of whether the dormant Commerce Clause would otherwise bar such regulations and regardless of whether the conditions were reasonable.<sup>73</sup> Rejecting the plaintiffs' argument that a narrower reading of Section 2 was supported by the historical record, the Court countered, "As we think the language of the Amendment is clear, we do not discuss these matters."<sup>74</sup>

Two years later, in 1938, Justice Louis Brandeis reiterated the Court's position in three other decisions, which each sustained discriminatory state liquor laws over Commerce Clause challenges.<sup>75</sup>

<sup>69</sup> See *id.*; see also *Bacchus*, 468 U.S. at 276 (embracing the no-new-state-powers interpretation of Section 2).

<sup>70</sup> See *infra* notes 71–76 and accompanying text.

<sup>71</sup> See, e.g., *Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395, 398 (1939) (upholding retaliatory boycotts); *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391, 394 (1939) (upholding retaliatory boycotts); *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401, 404 (1938) (upholding a discriminatory patent registration requirement); *Young's Mkt.*, 299 U.S. 59, 64 (upholding discriminatory licensing fee).

<sup>72</sup> See 299 U.S. at 64.

<sup>73</sup> *Id.* at 62. Brandeis continued,

[The plaintiffs] request us to construe the Amendment as saying, in effect: The State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the Amendment, but a rewriting of it.

*Id.* To the extent that Brandeis was correct, the Amendment would indeed be "rewritten" in *Granholm*. See *Granholm*, 544 U.S. at 485, 493; *Young's Market*, 299 U.S. at 62.

<sup>74</sup> *Young's Mkt.*, 299 U.S. at 63–64.

<sup>75</sup> See *McKittrick*, 305 U.S. at 398 ("Since [the Twenty-first Amendment], the right of a State to prohibit or regulate the importation of intoxicating liquor is not limited by the [C]ommerce [C]ause."); *Indianapolis Brewing Co.*, 305 U.S. at 394 (stating that "whatever

Though the force of the Brandeis decisions drove Supreme Court interpretation of the Twenty-first Amendment for more than two decades after the Justice's retirement from the bench in 1939, there were several signals of a retreat from Brandeis' expansive reading of state power under the Amendment.<sup>76</sup>

With the U.S. Supreme Court's *Hostetter v. Idlewild Bon Voyage Liquor Corp.* decision in 1964, the pendulum decisively swung to a less permissive interpretation of the powers granted to states by the Twenty-first Amendment.<sup>77</sup> In *Idlewild*, the Court struck down New York's attempt to regulate duty-free liquor sold to international travelers at John F. Kennedy Airport.<sup>78</sup> The Court acknowledged the precedential weight of *Young's Market* and its progeny, but rejected as "an absurd oversimplification" the notion that states should be given full deference under the Twenty-first Amendment.<sup>79</sup> "Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution," the Court concluded.<sup>80</sup> Like other constitutional provisions, "each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case."<sup>81</sup>

After *Idlewild*, the U.S. Supreme Court struck down a series of state liquor laws that claimed safe harbor in the Twenty-first Amendment, finding that each unconstitutionally infringed on express federal policies.<sup>82</sup> The balancing analysis that determined whether a state liquor

the character" of a state law regulating intoxicating liquors, "the law is valid"); *Mahoney*, 304 U.S. at 403 (upholding law acknowledged to "clearly discriminat[e] in favor of liquor processed within the State").

<sup>76</sup> Compare, e.g., *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939) ("The Twenty-first Amendment sanctions the right of a state to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause."), with *United States v. Frankfort Distilleries*, 324 U.S. 293, 299 (1945) (holding that granting states full authority to regulate alcohol within their borders does not give them "plenary and exclusive power to regulate the conduct of persons doing an interstate liquor business outside their boundaries").

<sup>77</sup> See 377 U.S. 324, 333–34 (1964); see also Spaeth, *supra* note 65, at 185 ("The Court consummated its full retreat from earlier broad readings of [T]wenty-first [A]mendment power, in . . . [*Idlewild*].").

<sup>78</sup> See *Idlewild*, 377 U.S. at 334.

<sup>79</sup> *Id.* at 331–32; see also *Young's Mkt.*, 299 U.S. at 62.

<sup>80</sup> *Idlewild*, 377 U.S. at 332.

<sup>81</sup> *Id.*

<sup>82</sup> See, e.g., *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 114 (1980) (striking down California's wine pricing system as a violation of the Sherman Act); *Craig v. Boren*, 429 U.S. 190, 204–05 (1976) (invalidating, as a violation of the Equal Protection clause, an Oklahoma law that allowed for the sale of low-alcohol beer to 18-year-old women but not men); *United States v. State Tax Comm'n of Miss.*, 412 U.S. 363, 381 (1973) (striking down a Mississippi attempt to prevent a U.S. military base within its borders from obtaining cheaper alcohol out-of-state).

regulation was immune from the dormant Commerce Clause and other federal policies, however, was not substantially articulated until *Bacchus Imports, Ltd. v. Dias*, decided by the U.S. Supreme Court in 1984.<sup>83</sup> In *Bacchus*, the Court invalidated on dormant Commerce Clause grounds a Hawaii statute that levied a twenty-percent excise tax on liquor but exempted certain locally produced liquors.<sup>84</sup> Justice Byron White, writing for the Court, stated that in order to prevail against the dormant Commerce Clause, a discriminatory state law must be designed to promote a “central purpose” of the Twenty-first Amendment.<sup>85</sup> The *Bacchus* Court did not, however, indicate what such central purposes might be.<sup>86</sup>

Thus, when *Granholm* reached the Supreme Court in 2005, there was considerable jurisprudential weight behind the principle that the Twenty-first Amendment was to be applied in concert with, rather than apart from, other constitutional strictures.<sup>87</sup>

## II. *GRANHOLM V. HEALD*: DIRECT SHIPPING GETS ITS DAY IN COURT

*Granholm v. Heald*, decided by the U.S. Supreme Court in 2005, had its roots in the rise of e-commerce and the exploding popularity of wine.<sup>88</sup> These twin developments strained the rigid seventy-five-year-old system that nearly every state had operated since the end of Prohibition.<sup>89</sup> In response, some states passed laws allowing local wineries to bypass the system.<sup>90</sup> When those laws were implemented in a discriminatory manner, however, states opened themselves to the legal challenges that culminated in the Supreme Court’s 2005 consideration of *Granholm*.<sup>91</sup>

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<sup>83</sup> See 468 U.S. at 276; see also 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, 682 n.150 (2000) (characterizing *Bacchus* as “[p]erhaps the most important of the contemporary cases on the scope of the Twenty-first Amendment” (quoting LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* §§ 6–27, at 1170 (3rd ed. 2000))).

<sup>84</sup> *Bacchus*, 468 U.S. at 265, 276.

<sup>85</sup> *Id.* at 275–76. The terms “central power,” “central purpose,” and “core power” are used interchangeably throughout modern Twenty-first Amendment jurisprudence. Compare *id.* (“central purpose”), with *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 713 (“core § 2 power”), 715 (“central power”) (1983).

<sup>86</sup> See *Bacchus*, 468 U.S. at 275–76.

<sup>87</sup> See 544 U.S. at 486–89.

<sup>88</sup> See 544 U.S. 460, 467–68 (2005).

<sup>89</sup> See *infra* notes 95–105 and accompanying text.

<sup>90</sup> See *infra* notes 122–128 and accompanying text.

<sup>91</sup> See 544 U.S. at 465; *infra* notes 129–131 and accompanying text.

Section A of this Part briefly outlines the mechanics of three-tier distribution systems.<sup>92</sup> Section B explains the origins of the direct shipping problem,<sup>93</sup> and Section C recounts the *Granholm* decision.<sup>94</sup>

### A. Three-Tier Distribution Systems

After Prohibition was repealed, most states instituted the three-tier system for the regulation of alcohol and, seventy-five years later, it remains the most popular regulatory model.<sup>95</sup> Tier One consists of alcohol producers—wineries, distilleries, and breweries.<sup>96</sup> Tier Two is the wholesaler level: after receiving alcohol from the producer, the wholesaler pays excise taxes to the state, and then distributes the alcohol to in-state retailers.<sup>97</sup> Tier Three is made up of retail outlets licensed by the state.<sup>98</sup> Unless otherwise provided by the state, Tier Three is the only level permitted to sell directly to a consumer.<sup>99</sup> Vertical integration of the tiers (common ownership of businesses in multiple tiers) is prohibited.<sup>100</sup>

States offer several policy justifications for the three-tier system.<sup>101</sup> Funneling distribution through the relatively small number of wholesalers facilitates excise tax collection.<sup>102</sup> Prohibiting vertical integration theoretically helps “prevent organized crime from gaining control of alcohol distribution.”<sup>103</sup> By maximizing their oversight of distribution, states hope to limit illegal sales of alcohol to minors.<sup>104</sup> Finally, by forcing the resale of alcohol through several tiers, states keep the price of alcohol artificially high, allegedly promoting temperance.<sup>105</sup>

<sup>92</sup> See *infra* notes 95–105 and accompanying text.

<sup>93</sup> See *infra* notes 106–128 and accompanying text.

<sup>94</sup> See *infra* notes 129–151 and accompanying text.

<sup>95</sup> See FED. TRADE COMM’N, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE 5–6 (2003) [hereinafter FTC Report], available at <http://www.ftc.gov/os/2003/07/winereport2.pdf>.

<sup>96</sup> *Id.* at 5. Producers must have a basic permit from the federal Alcohol and Tobacco Tax and Trade Bureau in order to sell alcoholic beverages. *Id.*; 27 U.S.C. § 203 (2006).

<sup>97</sup> FTC REPORT, *supra* note 95, at 5.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 6.

<sup>102</sup> *Id.*

<sup>103</sup> FTC REPORT, *supra* note 95, at 6.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

## B. *Straining the System*

In the last several decades, many states have found a rigid three-tier system unable to accommodate the explosive growth in the wine industry and the rise of Internet commerce.<sup>106</sup> In an attempt to modernize the system, some states instituted laws that allowed local wineries to ship directly to consumers, bypassing the wholesaling and retailing tiers.<sup>107</sup>

### 1. America's Growing Love for Wine

Consumer demand for wine has steadily increased since the end of Prohibition.<sup>108</sup> In 2010, the average U.S. citizen consumed 2.60 gallons of wine—nearly thirty percent more than a decade earlier, and a ten-fold increase from 1934.<sup>109</sup> There are more than six thousand wineries operating in the United States, and the total value of their annual sales was thirty billion dollars in 2010.<sup>110</sup> The United States is now the world's largest wine-consuming nation.<sup>111</sup>

Despite the industry's unprecedented growth and prosperity, however, small wineries have struggled to stay afloat.<sup>112</sup> Under a strict three-tier system, wineries have no choice but to access the market through wholesalers.<sup>113</sup> As the number of wineries has skyrocketed, the number of wholesalers has dropped correspondingly as distributors consoli-

<sup>106</sup> See *infra* notes 108–128 and accompanying text.

<sup>107</sup> See *infra* notes 122–128 and accompanying text.

<sup>108</sup> See *Wine Consumption in the U.S.*, WINE INST. (Apr. 5, 2010), <http://www.wineinstitute.org/resources/statistics/article86>.

<sup>109</sup> See *id.* (using the 2010 figure found at *2010 California/U.S. Wine Sales*, WINE INST. (Mar. 17, 2011), <http://www.wineinstitute.org/resources/statistics/article584>).

<sup>110</sup> *2010 California/U.S. Wine Sales*, WINE INST. (Mar. 17, 2011), <http://www.wineinstitute.org/resources/statistics/article584>; *Number of U.S. Wineries Continues to Grow*, WINE BUS. MONTHLY (Jan. 16, 2010), <http://www.winebusiness.com/news/?go=getArticle&dataId=70601> [hereinafter *Number of U.S. Wineries*] (noting that there were 6223 wineries in the United States as of November 2009).

<sup>111</sup> *2010 California/U.S. Wine Sales*, WINE INST. (Mar. 17, 2011), <http://www.wineinstitute.org/resources/statistics/article584> (noting that in 2010, United States surpassed France as the world's largest consumer of wine).

<sup>112</sup> See MKF RESEARCH, LLC, *THE IMPACT OF WINE, GRAPES AND GRAPE PRODUCTS ON THE AMERICAN ECONOMY 2007*, at 15 (2007) [hereinafter *IMPACT ON THE ECONOMY*], available at [http://www.ngwi.org/files/documents/Economic\\_Impact\\_on\\_National\\_Economy\\_2007.pdf](http://www.ngwi.org/files/documents/Economic_Impact_on_National_Economy_2007.pdf) (“The continuing consolidation in the distribution sector makes it increasingly difficult for smaller wineries to gain access to the market, especially the national market”). Between 1984 and 2002, the number of licensed liquor wholesalers in the United States dropped from 1600 to fewer than 600. Gina M. Riekhof & Michael E. Sykuta, *Regulating Wine by Mail*, REGULATION, Fall 2004, at 30–31.

<sup>113</sup> See *IMPACT ON THE ECONOMY*, *supra* note 112, at 15.

date.<sup>114</sup> Large national wholesalers find it uneconomic to distribute the low-volume vintages of a small winery.<sup>115</sup> Therefore, without modifications to the three-tier system, small wineries have difficulty reaching the consumer and have difficulty staying in business.<sup>116</sup>

## 2. The Rise of E-Commerce

The increasing importance of Internet commerce to the United States economy as a whole appears to offer a way for small wineries to reach local and national markets by self-distribution.<sup>117</sup> According to the U.S. Census Bureau, 4.3 percent of all retail sales in the fourth quarter of 2010 took place online.<sup>118</sup> That figure represents an increase from 4.0 percent a year ago, and from less than one percent a decade ago.<sup>119</sup> E-commerce affords a wine producer or retailer not only access to a national market, but also the ability to avoid the price markups occasioned by wholesalers.<sup>120</sup> Indeed, the “defining characteristic of the decade-long rise of e-commerce” is the “phenomenon of eliminating the middleman through Internet sales.”<sup>121</sup>

## 3. Direct Shipping

The struggles of small wineries and the rise of e-commerce put states in a conundrum.<sup>122</sup> In order to allow small wineries to be competitive in the marketplace, states needed to exempt them from the mandatory three-tier system and allow them to ship directly to consumers.<sup>123</sup> But allowing direct shipping by *any* winery, no matter what size or where located, would open their markets, via the Internet, to thousands of wineries around the country—thereby reducing the competi-

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<sup>114</sup> See *id.*; see also *Number of U.S. Wineries*, *supra* note 110 (noting double-digit percentage increases in the number of wineries in 2006 and 2007, and five percent increase in 2009).

<sup>115</sup> See IMPACT ON THE ECONOMY, *supra* note 112, at 16 (“Distribution businesses are capital-intensive enterprises depending on scale and volume for profitability.”).

<sup>116</sup> See *id.* at 15–16.

<sup>117</sup> See *Granholm*, 544 U.S. at 467 (“Technological improvements, in particular the ability of wineries to sell wine over the Internet, have helped make direct shipments an attractive sales channel.”).

<sup>118</sup> U.S. CENSUS BUREAU, QUARTERLY RETAIL E-COMMERCE SALES: 4TH QUARTER 2010 (2011), available at [www.census.gov/retail/mrts/www/data/pdf/cc\\_current.pdf](http://www.census.gov/retail/mrts/www/data/pdf/cc_current.pdf).

<sup>119</sup> See *id.*

<sup>120</sup> See Michael A. Pasahow, *Granholm v. Heald: Shifting the Boundaries of California Reciprocal Wine Shipping Laws*, 21 BERKELEY TECH. L.J. 569, 574–75 (2006).

<sup>121</sup> *Id.*

<sup>122</sup> See *supra* notes 108–121 and accompanying text.

<sup>123</sup> See *supra* notes 112–116 and accompanying text.

tive advantage states wanted to give their own small wineries.<sup>124</sup> Moreover, states feared that they would not be able to collect taxes on out-of-state wine or exercise appropriate oversight of sales.<sup>125</sup> Faced with this dilemma, some states enacted laws that allowed in-state wineries to ship directly to consumers, but did not afford the same privilege to out-of-state wineries.<sup>126</sup> In 2003, the Federal Trade Commission observed that “[s]tate bans on interstate direct shipping represent[ed] the single largest barrier to expanded e-commerce in wine.”<sup>127</sup> The stage was set for *Granholm*.<sup>128</sup>

### C. *The Granholm Decision*

In its 2005 *Granholm* decision, the Supreme Court consolidated challenges to the constitutionality of Michigan and New York statutes governing intrastate and interstate wine shipment.<sup>129</sup> Michigan law permitted in-state wineries, but not those out-of-state, to acquire a “wine maker” license and thereafter make direct shipments to Michigan consumers, circumventing Michigan’s three-tier system.<sup>130</sup> New York law allowed in-state wineries to obtain a license to ship directly to consumers, while non-New York wineries could be licensed to make direct sales to New York consumers only if they opened a physical office or storeroom in New York.<sup>131</sup>

The Supreme Court, in a 5–4 decision authored by Justice Anthony Kennedy, held that the statutes in question violated the dormant Commerce Clause and were not saved by the Twenty-first Amendment.<sup>132</sup> The *Granholm* Court first emphatically reiterated the importance of the dormant Commerce Clause, stating that the rule is “essen-

<sup>124</sup> See *supra* notes 120–121 and accompanying text.

<sup>125</sup> See *supra* note 102–105 and accompanying text.

<sup>126</sup> See *Granholm*, 544 U.S. at 469, 470; FTC REPORT, *supra* note 95, at 3 (noting that “[m]any of [the states that prohibited interstate direct shipping] allow[ed] intrastate direct shipping”).

<sup>127</sup> FTC REPORT, *supra* note 95, at 3.

<sup>128</sup> 544 U.S. at 465.

<sup>129</sup> *Id.* The Sixth Circuit had invalidated the Michigan law, and the Second Circuit had upheld the New York law. *Id.* at 466.

<sup>130</sup> *Id.* at 468–69.

<sup>131</sup> *Id.* at 470.

<sup>132</sup> *Id.* at 466. Justice Kennedy was joined by Justices Antonin Scalia, David Souter, Ruth Bader Ginsburg, and Stephen Breyer. *Id.* at 465. Justice John Paul Stevens wrote a dissenting opinion that was joined by Justice Sandra Day O’Connor. *Id.* at 493 (Stevens, J., dissenting). Justice Clarence Thomas wrote a dissenting opinion that was joined by Justices Stevens and O’Connor and Chief Justice William Rehnquist. *Id.* at 497 (Thomas, J., dissenting).

tial to the foundations of the Union.”<sup>133</sup> Turning to the challenged Michigan and New York statutes, the Court summarily held that “[t]he differential treatment between in-state and out-of-state wineries constitute[d] explicit discrimination against interstate commerce” and was therefore a violation of the dormant Commerce Clause.<sup>134</sup>

The Court then held that the regulatory schemes could not be saved by the Twenty-first Amendment.<sup>135</sup> Tracing the legislative history of the Amendment, and noting that the language of Section 2 closely follows the Webb-Kenyon and Wilson Acts, Justice Kennedy reasoned that the Supreme Court’s interpretation of those Acts should guide the Court’s interpretation of Section 2.<sup>136</sup> Because discrimination was not a privilege that the states enjoyed under those pre-prohibition federal laws, it would not be read into the Twenty-first Amendment.<sup>137</sup> With that contextual reading of Section 2 as a foundation, the Court held that “section 2 [of the Twenty-first Amendment] does *not* allow States to regulate the direct shipment of wine on terms that discriminate in favor of in-state producers.”<sup>138</sup>

Though the Court cited its 1984 *Bacchus Imports, Ltd. v. Dias* decision as a “particularly telling example” of the proposition that the Twenty-first Amendment does not override the dormant Commerce Clause, it implicitly rejected the *Bacchus* framework that called for consideration of whether the challenged statutes served a “central purpose” of the Amendment.<sup>139</sup> The Court did not identify the central

<sup>133</sup> *Id.* at 472 (majority opinion).

<sup>134</sup> *Granholm*, 544 U.S. at 473–76. The Court analogized such discriminatory practices to “an ongoing, low-level trade war” that “invites a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause.” *Id.* at 473.

<sup>135</sup> *See id.* at 476.

<sup>136</sup> *See id.* at 484 (citing *Craig v. Boren*, 429 U.S. 190, 205–06 (1976)).

<sup>137</sup> *See id.* at 484–85. Justice Kennedy appeared to dismiss the *Young’s Market* line of cases: “Some of the cases decided soon after the Twenty-first Amendment’s ratification did not take account of the underlying history and were inconsistent with this view.” *Id.* at 485; *see also Young’s Market*, 299 U.S. at 63–64 (“As we think the language of the Amendment is clear, we do not discuss [its history].”).

<sup>138</sup> *Granholm*, 544 U.S. at 476 (emphasis added). Each of the dissenting justices disagreed with the majority’s understanding of the Amendment’s history. *Id.* at 493–97 (Stevens, J., dissenting); *id.* at 497–527 (Thomas, J., dissenting). Justice Thomas, in a thirty-page dissent, concluded that the Webb-Kenyon Act “cut off [the Supreme Court’s] intrusive review” of discriminatory state liquor laws. *Id.* at 497. Justice Stevens, relying in part on his own recollection of the historical context of the Amendment’s passage, argued that the majority’s decision was not consistent with the intent of “those who amended our Constitution in 1919 and 1933.” *Id.* at 496 (Stevens, J., dissenting).

<sup>139</sup> *Id.* at 487 (majority opinion); *see also id.* at 487–89; *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 275–76 (1984).

purposes of the Amendment, nor did it determine whether Michigan's and New York's stated policy goals qualified as central purposes.<sup>140</sup> Instead, the *Granholm* Court applied a traditional Commerce Clause analysis.<sup>141</sup> Like any other discriminatory law, the Court noted, state liquor laws may be saved if the state can show that the practices advance a legitimate local purpose that cannot be adequately served by reasonable non-discriminatory alternatives.<sup>142</sup> The states proffered two primary justifications for their discriminatory schemes: keeping alcohol out of the hands of minors and facilitating tax collection.<sup>143</sup> The Court rejected both arguments, observing that the states provided "little concrete evidence for the sweeping assertion" that they could not effectively police direct shipments by out-of-state wineries.<sup>144</sup>

*Granholm* thus seems to stand for the proposition that liquor should be treated like any other product for Commerce Clause purposes—that is, the Twenty-First Amendment does not authorize states to discriminate against out-of-state participants in the alcohol business.<sup>145</sup> If a state wishes to allow direct shipping, it must do so "on evenhanded terms."<sup>146</sup>

But one sentence in the *Granholm* opinion clouds this principle.<sup>147</sup> In response to the states' argument that invalidating their direct shipping laws would function as an attack on the constitutionality of the three-tier system itself, the Court favorably quoted an assertion from its 1990 case, *North Dakota v. United States*, that the model was "unquestionably legitimate."<sup>148</sup> In a citation, the Court also quoted Justice Antonin Scalia's *North Dakota* concurrence: "The Twenty-first Amendment . . . empowers North Dakota to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler."<sup>149</sup> By endorsing the latter statement, the *Granholm* Court appeared to condone discrimination at least at the wholesaler tier of the three-tier system.<sup>150</sup> As subsequent litigation demonstrates, the tension between the apparent approval of a discriminatory three-tier system and *Granholm's* broader

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<sup>140</sup> See *Granholm*, 544 U.S. at 487–89; *Bacchus*, 468 U.S. at 275–76.

<sup>141</sup> *Granholm*, 544 U.S. at 489.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 492.

<sup>145</sup> See Tanford, *supra* note 54, at 328; see *Granholm*, 544 U.S. at 476.

<sup>146</sup> *Granholm*, 544 U.S. at 493.

<sup>147</sup> See *id.* at 489.

<sup>148</sup> *Id.* In *North Dakota*, the Supreme Court upheld in a plurality opinion the state's liquor labeling and reporting regulations against a Supremacy Clause challenge. 495 U.S. 423, 444 (1990).

<sup>149</sup> *Granholm*, 544 U.S. at 489 (quoting *North Dakota*, 495 U.S. at 447).

<sup>150</sup> See *id.*; *North Dakota*, 495 U.S. at 447.

message of the Twenty-First Amendment's subservience to the Commerce Clause has become fertile ground for resistance to freer interstate commerce in wine.<sup>151</sup>

### III. POST-*GRANHOLM* CONFLICTS: THE BATTLEFIELD SHIFTS TO RETAILERS

In the years since the U.S. Supreme Court decided *Granholm v. Heald* in 2005, the "wine wars" have continued to rage.<sup>152</sup> State legislatures and wholesaler interests have fought to limit the effect of the *Granholm* decision.<sup>153</sup> Some states, for example, revised their direct shipping laws so that they discriminated in incidental effect, rather than in the "object and design" fashion explicitly declared unconstitutional by the Supreme Court.<sup>154</sup> In the resulting litigation, federal courts have been unable to reach a consistent interpretation of the *Granholm* mandate.<sup>155</sup> The wholesaler lobby has been an active and influential participant in these battles.<sup>156</sup> Beneficiaries of the enormously lucrative bottleneck of the traditional three-tier system, wholesalers have both the motivation and the economic clout to encourage the perpetuation of the system.<sup>157</sup> Thus, as a result of continued resistance to *Granholm* by

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<sup>151</sup> See *Granholm*, 544 U.S. at 489; see also *supra* notes 108–111 and accompanying text.

<sup>152</sup> See *Granholm v. Heald*, 544 U.S. 460, 473 (2005) ("The current patchwork of laws . . . is essentially the product of an ongoing, low-level trade war."). See generally Rachel M. Perkins, *Wine Wars: How We Have Painted Ourselves into a Regulatory Corner*, 12 VAND. J. ENT. & TECH. L. 397 (2010) (identifying the roots of, and proposing solutions to, the "wine wars").

<sup>153</sup> See Perkins, *supra* note 152, at 416–19, 421–23 (summarizing the resistance to *Granholm* by state legislatures and wholesaler interests).

<sup>154</sup> *Granholm*, 544 U.S. at 466; see, e.g., *Family Winemakers of Cal. v. Jenkins*, 592 F.3d 1, 5 (1st Cir. 2010) (addressing a Massachusetts "gallongage cap" that allowed direct shipment only by wineries producing below a certain threshold per year; all Massachusetts wineries fell below the threshold, but 98% of out-of-state producers did not qualify); *Black Star Farms LLC v. Oliver*, 600 F.3d 1225, 1227–28, 1235 (9th Cir. 2010) (addressing a similar Arizona statute).

<sup>155</sup> See *Granholm*, 544 U.S. at 493. Compare *Family Winemakers*, 592 F.3d at 5 (striking down the Massachusetts gallongage cap), with *Black Star*, 600 F.3d at 1227–28, 1235 (upholding a similar Arizona gallongage cap).

<sup>156</sup> See generally *Wholesale Protection*, SPECIALTY WINE RETAILERS ASS'N (Jan. 8, 2008), <http://www.specialtywineretailers.org/documents/WholesaleProtection-2008.pdf> (cataloguing political contributions by wholesaler interests, and noting that by targeting state legislatures when alcohol regulations are being considered, these organizations concentrate their influence where it will be most effective). On the national level, wholesaler groups such as the Wine & Spirits Wholesalers of America have been vocal proponents of H.R. 1161, a bill that would curtail dormant Commerce Clause challenges to state liquor regulations. See Community Alcohol Regulatory Effectiveness Act, H.R. 1161, 112th Cong. (2011); see also WSWA *Applauds Introduction of Legislation Affirming States' Rights*, WINE & SPIRITS WHOLESALERS OF AMERICA (Mar. 17, 2011), <http://www.wswa.org/news.php?NewsID=20&ArticleID=33>.

<sup>157</sup> See *supra* notes 114, 156 and accompanying text.

states and wholesalers, as well as inconsistent judicial interpretation of the Supreme Court's mandate, the Byzantine tangle of state liquor regulations persists.<sup>158</sup>

Across this post-*Granholm* landscape of legislative resistance and judicial confusion, one question has become of foremost importance: does *Granholm* protect retailers?<sup>159</sup> The Supreme Court made it clear that laws that facially discriminate against out-of-state *producers* are unconstitutional.<sup>160</sup> Some states have revised their laws to comply with *Granholm's* holding for producers, but have enacted regulations that are similarly discriminatory against *retailers*.<sup>161</sup> Critics of this approach argue that the *Granholm* principles should apply at all levels of the three-tier system, while defenders point to *Granholm's* dicta that the three-tier system is "unquestionably legitimate," and would limit that case to its facts.<sup>162</sup> Federal courts have reached opposite conclusions on the issue: a district court in Michigan held that *Granholm* applies to all tiers, while the Second and Fifth Circuits have each held that the Supreme Court intended to extend Commerce Clause protections to producers only.<sup>163</sup> Section A of this Part summarizes the Michigan decision protecting out-of-state retailers,<sup>164</sup> and Section B reviews the circuit courts' narrow readings of *Granholm*.<sup>165</sup>

#### A. Siesta Village Market: *Granholm* Protects Retailers, Too

In *Siesta Village Market v. Granholm*, decided in 2008, the United States District Court for the Eastern District of Michigan invalidated a Michigan regulatory scheme that permitted in-state retailers to ship

<sup>158</sup> See 544 U.S. at 473. For an excellent synopsis of state liquor laws, albeit neither "a complete summary of the relevant law [n]or a compliance handbook," see R. Corbin Houchins, *Notes on Wine Distribution*, CORBIN COUNS. (Feb. 2, 2010), [http://www.corbincounsel.com/docs/dist\\_notes\\_current.pdf](http://www.corbincounsel.com/docs/dist_notes_current.pdf).

<sup>159</sup> See *Granholm*, 544 U.S. at 465; *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 815 (5th Cir. 2010); *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 190 (2nd Cir. 2009); *Siesta Vill. Mkt. LLC v. Granholm*, 596 F. Supp. 2d 1035, 1039 (E.D. Mich. 2008).

<sup>160</sup> See *Granholm*, 544 U.S. at 465.

<sup>161</sup> See *Wine Country*, 612 F.3d 809, 812; *Arnold's*, 571 F.3d 185, 187–88; *Siesta Vill. Mkt.*, 596 F. Supp. 2d 1035, 1037–38.

<sup>162</sup> See *Granholm*, 544 U.S. at 489, 493. Compare *Arnold's*, 571 F.3d at 190–91 (stating that an attempt to extend *Granholm's* nondiscrimination principle beyond producers was "directly foreclosed by the *Granholm* Court's express affirmation of the legality of the three-tier system), with *Siesta Vill. Mkt.*, 596 F. Supp. 2d at 1039 (asserting that the *Granholm* Court "did not approve of a system that discriminates against out-of-state interests").

<sup>163</sup> See *Wine Country*, 612 F.3d at 821; *Arnold's*, 571 F.3d at 186; *Siesta Vill. Mkt.*, 596 F. Supp. 2d at 1044–45.

<sup>164</sup> See *infra* notes 166–174 and accompanying text.

<sup>165</sup> See *infra* notes 175–193 and accompanying text.

directly to in-state consumers while prohibiting the same for out-of-state retailers.<sup>166</sup> The state had pointed to the *Granholm* language recognizing the legitimacy of the three-tier system and argued that permitting out-of-state retailers to bypass the system and ship directly to Michigan consumers would encroach upon the state's Twenty-first Amendment right to regulate sales of alcohol.<sup>167</sup>

The court quickly dismissed the argument that *Granholm* applied only to producers, and not to the retailing and wholesaling tiers of the distribution system.<sup>168</sup> The Supreme Court's statement that the Twenty-first Amendment does not give states the authority to pass non-uniform laws in order to discriminate against out-of-state goods, the district court held, was absolute and unqualified by its acknowledgement of the three-tier system as an appropriate use of state power.<sup>169</sup> Therefore, there were no residual Twenty-first Amendment protections for the non-producing tiers, and that argument "alone, without an analysis of whether the Commerce Clause [was] implicated, [had] been rejected by the Supreme Court in [*Granholm*]." <sup>170</sup>

After holding that the statute was plainly discriminatory, the court turned to the second part of the Commerce Clause analysis: whether the law could be saved by a clear showing that it served a legitimate local purpose that could not be adequately served by reasonable nondiscriminatory means.<sup>171</sup> The court likened the state's justifications—namely, the collection of taxes, the enforcement of underage drinking laws, and the added administrative burden of regulating out-of-state retailers—to the "sweeping assertions" that were rejected by the *Granholm* Court.<sup>172</sup> In particular, the district court questioned why the state "entertain[ed] no discussion about how it regulate[d] wine shipped directly from out-of-state *wineries* and why the same procedures would be unworkable in regulating shipments from out-of-state *retailers*."<sup>173</sup>

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<sup>166</sup> 596 F. Supp. 2d at 1044–45.

<sup>167</sup> *Id.* at 1038; see *Granholm*, 544 U.S. at 489 (noting that the three-tier system is "unquestionably legitimate").

<sup>168</sup> *Siesta Vill. Mkt.*, 596 F. Supp. 2d at 1039; see *Granholm*, 544 U.S. at 493.

<sup>169</sup> *Siesta Vill. Mkt.*, 596 F. Supp. 2d at 1039; see *Granholm*, 544 U.S. at 489, 493.

<sup>170</sup> *Siesta Vill. Mkt.*, 596 F. Supp. 2d at 1039; see also *Granholm*, 544 U.S. at 486 ("[T]he Twenty-first Amendment . . . does not displace the rule that States may not give a discriminatory preference to their own [businesses].").

<sup>171</sup> *Siesta Vill. Mkt.*, 596 U.S. at 1040.

<sup>172</sup> *Id.* at 1041; see *Granholm*, 544 U.S. at 492.

<sup>173</sup> *Siesta Vill. Mkt.*, 596 U.S. at 1041. Michigan had revised its laws to allow direct shipping by both in- and out-of-state wineries after the *Granholm* decision. See *id.*

Thus, for the second time in three years, the state of Michigan had a discriminatory direct shipping law struck down in the federal courts.<sup>174</sup>

### B. Arnold's and Wine Country: A Narrow Reading of *Granholm*

Since *Siesta Village Market* was decided in 2008, two federal Circuit Courts of Appeals have reached the opposite conclusion: that *Granholm* afforded Commerce Clause protections to the producing tier only.<sup>175</sup> The U.S. Court of Appeals for the Second Circuit, in its 2009 *Arnold's Wines, Inc. v. Boyle* decision, upheld a statute that gave retailers located in New York the right to sell and deliver wine directly to New York consumers, but denied that right to retail businesses located outside of the state.<sup>176</sup> Similarly, the U.S. Court of Appeals for the Fifth Circuit, relying heavily on *Arnold's* in its 2010 *Wine Country Gift Baskets.com v. Steen* decision, upheld a Texas statute that allowed in-state liquor retailers to ship to local consumers but barred out-of-state retailers from shipping to Texas.<sup>177</sup> Each court concluded that the Twenty-first Amendment insulated the three-tier system, as it operated in the present cases, from Commerce Clause scrutiny.<sup>178</sup>

The Second and Fifth Circuits employed as a foundational premise the Supreme Court's statement of the "unquestionabl[e] legitima[cy]" of the three-tier system.<sup>179</sup> This language, as the Second and Fifth Circuits understood it, was an express affirmation of the system's constitu-

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<sup>174</sup> See *Granholm*, 544 U.S. at 466; *Siesta Vill. Mkt.*, 596 F. Supp. 2d at 1044–45. While the appeal to the *Siesta Village Market* case was pending, the Michigan legislature passed a statute allowing retailer direct shipment only if delivery was by the retailer's own employee—thus rendering the district court's injunction moot and effectively ending the case. See *id.*; see also 2008 Mich. Pub. Acts No. 474-08, available at <http://www.legislature.mi.gov/documents/2007-2008/publicact/pdf/2008-PA-0474.pdf>.

<sup>175</sup> See *Wine Country*, 612 F.3d at 821 (overruling the district court in holding that the Texas statute allowing local delivery by in-state retailers, but not by out-of-state retailers, was protected under the Twenty-first Amendment); *Arnold's*, 571 F.3d at 186 (upholding the district court in holding that the New York statute allowing delivery by in-state retailers, but not out-of-state retailers, was protected by the Twenty-first Amendment); *Siesta Vill. Mkt.*, 596 F. Supp. 2d at 1044–45 (holding that the Twenty-first Amendment did not protect the state law discriminating against out-of-state retailers).

<sup>176</sup> See 571 F.3d at 186.

<sup>177</sup> See 612 F.3d at 821.

<sup>178</sup> See *id.*; *Arnold's*, 571 F.3d at 186.

<sup>179</sup> *Granholm*, 544 U.S. at 489; see *Wine Country*, 612 F.3d at 819 ("Therefore, the foundation on which we build is that Texas may have a three-tier system."); *Arnold's*, 571 F.3d at 190–91 ("Appellants' argument is therefore directly foreclosed by the *Granholm* Court's express affirmation of the legality of the three-tier system.").

tionality under the Twenty-first Amendment.<sup>180</sup> “[I]f dicta this be, it is of the most persuasive kind,” the courts decided.<sup>181</sup> The three-tier system, in the courts’ view, was defined as goods physically moving through all three tiers, the lower two of which are located in the same state as the consumer that purchases the goods.<sup>182</sup> Thus, discrimination favoring in-state retailers is inherently part of the three-tier system.<sup>183</sup> To allow out-of-state retailers (or wholesalers, for that matter) equal access to the same consumers—bypassing the three tiers—would be a “frontal attack on the constitutionality of the three-tier system itself.”<sup>184</sup>

Building on that premise, the *Wine Country* court then addressed the question of “whether what Texas has allowed here is so substantially different from what retailing must include as to not be third-tier retailing at all.”<sup>185</sup> The court viewed the difference between traditional over-the-counter sales and deliveries to be a matter of semantics: “If Texas allowed a retailer to carry the beverages to a customer’s vehicle parked in its lot, or across the street, would that be a problem?” the court asked rhetorically.<sup>186</sup> Instead of attempting to define the reach of a “retailer,” the *Wine Country* court chose to “view local deliveries as a constitutionally benign incident of an acceptable three-tier system.”<sup>187</sup>

<sup>180</sup> See *Granholm*, 544 U.S. at 489; *Wine Country*, 612 F.3d at 818–19 (“The legitimizing is thus a caveat to the statement that the Commerce Clause is violated if state law authorizes ‘differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.’” (quoting *Granholm*, 544 U.S. at 472)); *Arnold’s*, 571 F.3d at 191 (referring to *Granholm’s* “express affirmation of the legality of the three-tier system”).

<sup>181</sup> *Arnold’s*, 571 F.3d at 191 (quoting *Arnold’s Wines, Inc. v. Boyle*, 515 F. Supp. 2d 401, 412 (S.D.N.Y. 2007), *aff’d* 571 F.3d 185); see also *Wine Country*, 612 F.3d at 816 (“That language may be dicta. If so, it is compelling dicta.”).

<sup>182</sup> See *Wine Country*, 612 F.3d at 815 (“The traditional three-tier system . . . has an opening at the top available to all. The wholesalers and retailers, though, are often required by a State’s law to be within that State.”); *Arnold’s*, 571 F.3d at 187.

<sup>183</sup> See *Wine Country*, 612 F.3d at 818 (accepting the State’s argument that “distinctions favoring in-state retailers are inherently part of the three-tier system”); see also *Arnold’s*, 571 F.3d at 191 (characterizing the laws favoring in-state retailers as “integral parts” of the three-tier system).

<sup>184</sup> *Arnold’s*, 571 F.3d at 190; see also *Wine Country*, 612 F.3d at 818 (holding that “[the three-tier] system has been given constitutional approval”).

<sup>185</sup> *Wine Country*, 612 F.3d at 819. The Second Circuit in *Arnold’s* implicitly assumed that direct shipping did not change the fundamental nature of retailers: “[T]he challenged regime is permissible under the Twenty-first Amendment insofar as it requires that all liquor sold within the state of New York pass through New York’s three-tier regulatory system.” See 571 F.3d at 186.

<sup>186</sup> *Wine Country*, 612 F.3d at 819.

<sup>187</sup> *Id.* at 820. The Fifth Circuit continued, “it seems to us that implementing consumer-friendly practices for in-state retailing of these products often has more to do with changing economic realities than with the Constitution.” *Id.* at 820–21.

Thus, the courts reasoned, the challenged state statutes were in sharp contrast to the regulations struck down in *Granholm*.<sup>188</sup> In *Granholm*, the invalidated producer direct-shipping laws were “discriminatory exceptions to, rather than *integral parts* of, the underlying three-tier systems.”<sup>189</sup> The statutes allowing direct shipping by retailers were merely applications of the constitutionally protected system, not exceptions to it.<sup>190</sup>

Because the challenged statutes in *Arnold’s* and *Wine Country* were held to be constitutional under the Twenty-first Amendment, the Second and Fifth Circuits did not need to apply a traditional Commerce Clause analysis.<sup>191</sup> Nor was it necessary to consider the states’ asserted policy justifications for distinguishing between in-state and out-of state businesses.<sup>192</sup> Summarizing the courts’ broader philosophical stance, the Fifth Circuit said, “Our read of *Granholm* is that the Twenty-first Amendment still gives each State quite broad discretion to regulate alcoholic beverages . . . Regulating alcoholic beverage retailing is largely a State’s prerogative.”<sup>193</sup>

#### IV. GRANHOLM MEANT WHAT IT SAID: THE TWENTY-FIRST AMENDMENT DOES NOT SUPERSEDE THE COMMERCE CLAUSE

The effect of *Arnold’s Wines, Inc. v. Boyle*, decided by the U.S. Court of Appeals for the Second Circuit in 2009, and *Wine Country Gift Baskets.com v. Steen*, decided by the U.S. Court of Appeals for the Fifth Circuit in 2010, is to elevate the Twenty-first Amendment above the Commerce Clause—precisely what the U.S. Supreme Court proscribed in *Granholm v. Heald* in 2005.<sup>194</sup> By adopting as a fundamental premise the

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<sup>188</sup> See *Granholm*, 544 U.S. at 465; *Wine Country*, 612 F.3d at 818; *Arnold’s*, 571 F.3d at 191.

<sup>189</sup> *Arnold’s*, 571 F.3d at 191 (emphasis added); see *Granholm*, 544 U.S. at 465–66.

<sup>190</sup> See *Wine Country*, 612 F.3d at 818; *Arnold’s*, 571 F.3d at 191.

<sup>191</sup> See *Wine Country*, 612 F.3d at 820; *Arnold’s*, 571 F.3d at 191. The Second Circuit did posit an alternative argument that, by treating *products* equally—allowing them all, regardless of origin, to pass through the three-tier system—the state satisfied its traditional Commerce Clause obligations. *Arnold’s*, 571 F.3d at 191. Under this view, the Commerce Clause protected only goods, not merchants. See *id.* The Fifth Circuit implicitly declined to adopt this unorthodox proposition. See *Wine Country*, 612 F.3d at 817 (noting that the Twenty-first Amendment analysis employed by *Arnold’s* court rendered dormant Commerce Clause analysis “all but irrelevant”).

<sup>192</sup> *Wine Country*, 612 F.3d at 813 (“We do not reach the policy justifications, as our reversal is for other reasons.”); see also *Arnold’s*, 571 F.3d at 191–92.

<sup>193</sup> *Wine Country*, 612 F.3d at 820.

<sup>194</sup> Compare *Granholm v. Heald*, 544 U.S. 460, 486 (2005) (“[T]he Twenty-first Amendment does not supersede other provisions of the Constitution and, in particular, does not

assertion that the traditional three-tier system is “unquestionably legitimate,” the Second and Fifth Circuits ignored the central message of *Granholm*.<sup>195</sup> Moreover, by granting the three-tier system constitutionally protected status, the courts left for future benches the near-impossible task of defining such a system.<sup>196</sup>

Ultimately, the correct approach is that of the Michigan federal district court in *Siesta Village Market v. Granholm*.<sup>197</sup> Instead of focusing on the alleged constitutional *nature* of a state regulatory system, courts should consider whether the system is constitutionally *operated*.<sup>198</sup> A dormant Commerce Clause analysis should apply to discrimination against *all* out-of-state business interests, regardless of their status with respect to the “traditional three-tier system.”<sup>199</sup> This approach is clear, adaptable, and fully consistent with *Granholm*.<sup>200</sup>

Section A of this Part identifies the central message of *Granholm* and argues that the Supreme Court did not intend that its holding be limited to producers only.<sup>201</sup> Section B posits a definition of the three-tier system that is consistent with *Granholm*'s central message, but concludes that, regardless of the label given to a state's regulatory scheme, the important consideration is the constitutional *operation* of that system.<sup>202</sup> Section C argues that *Granholm*'s use of a simple dormant Commerce Clause analysis can and should be extended to all challenges to

displace the rule that States may not give a discriminatory preference to their own [businesses].”), with *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 813 (5th Cir. 2010) (“[T]he dormant Commerce Clause . . . applies differently than it does to products whose regulation is not authorized by [the Twenty-first Amendment].”), and *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 188 (2nd Cir. 2009) (“[T]he Twenty-first Amendment alters dormant Commerce Clause analysis of state laws governing the importation of alcoholic beverages.”).

<sup>195</sup> *Granholm*, 544 U.S. at 489; see *Wine Country*, 612 F.3d at 819 (“[T]he foundation on which we build is that Texas may have a three-tier system.”); *Arnold's Wines*, 571 F.3d at 190–91 (holding that “appellants’ argument is . . . directly foreclosed by the *Granholm* Court’s express affirmation of the legality of the three-tier system”).

<sup>196</sup> See *infra* notes 258–264 and accompanying text.

<sup>197</sup> See 596 F. Supp. 2d 1035 (E.D. Mich. 2008).

<sup>198</sup> See *Granholm*, 544 U.S. at 489 (implying that legitimacy of the three-tier system is qualified by the requirement that such systems may not employ location discrimination unless it is necessity-justified by some purpose other than the perpetuation of the system itself); *Siesta Vill. Mkt.*, 596 F. Supp. 2d at 1039.

<sup>199</sup> See *Wine Country*, 612 F.3d at 815; *Arnold's Wines*, 571 F.3d at 191; *Siesta Vill. Mkt.*, 596 F. Supp. 2d at 1039; see also Desirée C. Slaybaugh, *A Twisted Vine: The Aftermath of Granholm v. Heald*, 17 TEX. WESLEYAN L. REV. 265, 276–285 (2011) (arguing that the *Granholm* holding should be extended to all three tiers).

<sup>200</sup> See *Granholm*, 544 U.S. at 486; *Siesta Vill. Mkt.*, 596 F. Supp. 2d at 1039.

<sup>201</sup> See *infra* notes 205–242 and accompanying text.

<sup>202</sup> See *infra* notes 243–266 and accompanying text.

discriminatory state liquor laws.<sup>203</sup> Finally, Section D calls on the Supreme Court to reaffirm what it said in *Granholm*—that the Twenty-first Amendment does not supersede the Commerce Clause.<sup>204</sup>

### A. *The Central Message of Granholm*

The Second and Fifth Circuits each rooted their inquiry in the Supreme Court's declaration of the "unquestionabl[e] legitima[cy]" of the three-tier regulatory model.<sup>205</sup> Although acknowledging that the language may have been dicta, the courts found it to be "most persuasive" and "compelling."<sup>206</sup> It is not, however, essential to the holding, and it cannot be understood to override the central message of *Granholm*—namely, that the Twenty-first Amendment does not authorize discrimination against out-of-state businesses in the interstate commerce of alcohol.<sup>207</sup>

#### 1. The Problematic Language is Dicta

*Granholm's* language concerning the legitimacy of the three-tier system was not essential to its holding.<sup>208</sup> Admittedly, there is loose language in that passage—particularly the statement that "[t]he Twenty-first Amendment . . . empowers [a state] to require that all liquor sold for use in the State be purchased from a licensed in-state wholesaler."<sup>209</sup> Nonetheless, it did not concern a dispositive fact; it was used instead to rebut misguided criticism of the potential consequences of the decision.<sup>210</sup> Moreover, the Supreme Court was quoting a one-justice concurrence from its 1990 decision in *North Dakota v. United States*.<sup>211</sup> Eight of the nine justices in that case disagreed with such unqualified deference to state liquor regulatory schemes.<sup>212</sup> Thus, this dictum-within-a-dictum

<sup>203</sup> See *infra* notes 267–291 and accompanying text.

<sup>204</sup> See *infra* notes 292–307 and accompanying text.

<sup>205</sup> *Granholm*, 544 U.S. at 489; see *Wine Country*, 612 F.3d at 819 ("[T]he foundation on which we build is that Texas may have a three-tier system."); *Arnold's Wines*, 571 F.3d at 190–91 (holding that "appellants' argument is . . . directly foreclosed by the *Granholm* Court's express affirmation of the legality of the three-tier system").

<sup>206</sup> *Wine Country*, 612 F.3d at 816; *Arnold's Wines*, 571 F.3d at 191.

<sup>207</sup> See 544 U.S. at 486.

<sup>208</sup> See *id.* at 489.

<sup>209</sup> *Id.* at 489, 493.

<sup>210</sup> See *id.* at 488–89.

<sup>211</sup> See *id.*; *North Dakota v. United States*, 495 U.S. 423; *id.* at 447 (Scalia, J., concurring).

<sup>212</sup> See *North Dakota*, 495 U.S. at 426 (majority opinion); *id.* at 447, 448 (Scalia, J., concurring).

could hardly be considered a statement of established law on its own.<sup>213</sup> The Second and Fifth Circuits were incorrect to rely on it as the bedrock of their decisions upholding plainly discriminatory state laws.<sup>214</sup>

## 2. *Granholm*: One Application of a Broad Anti-Discrimination Principle

Furthermore, to construe this endorsement of the three-tier model as limiting the application of the *Granholm* holding to producers only, as the Second and Fifth Circuits did, runs counter to the clear, overarching message of the Supreme Court.<sup>215</sup> The *Granholm* opinion repeatedly uses sweeping language to unambiguously state the principle that the Twenty-first Amendment is not a defense to a charge of discrimination and does not authorize states to discriminate in commerce:

- “[D]iscrimination is neither authorized nor permitted by the Twenty-first Amendment.”<sup>216</sup>
- “[S]tate regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause.”<sup>217</sup>
- “*Bacchus* forecloses any contention that § 2 of the Twenty-first Amendment immunizes discriminatory direct-shipment laws from Commerce Clause scrutiny.”<sup>218</sup>
- “Discrimination is contrary to the Commerce Clause and is not saved by the Twenty-first Amendment.”<sup>219</sup>

Nothing in these lofty statements of principle suggests that the Court intended to foreclose retailers and wholesalers from Commerce Clause protection.<sup>220</sup> To the extent that those tiers were not explicitly included, the Court was simply addressing the issue before it: discrimination against *producers*.<sup>221</sup>

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<sup>213</sup> See *Granholm*, 544 U.S. at 489; *North Dakota*, 495 U.S. at 432; *id.* at 447 (Scalia, J., concurring).

<sup>214</sup> See *Granholm*, 544 U.S. at 489; *Wine Country*, 612 F.3d at 815; *Arnold's*, 571 F.3d at 191.

<sup>215</sup> See *Wine Country*, 612 F.3d at 815; *Arnold's*, 571 F.3d at 191; see also *Granholm*, 544 U.S. at 465.

<sup>216</sup> *Granholm*, 544 U.S. at 465–66.

<sup>217</sup> *Id.* at 487.

<sup>218</sup> *Id.* at 487–88.

<sup>219</sup> *Id.* at 489.

<sup>220</sup> See *id.* at 465–66, 487–88, 489.

<sup>221</sup> See *id.* at 465 (noting that the case presented “challenges to state laws regulating the sale of wine from out-of-state wineries”).

In addition to its broad statements of constitutional law, the court also uses inclusive language when explaining why a physical-presence requirement for wine producers violated the Commerce Clause:

We have viewed with particular suspicion state statutes requiring *business operations* to be performed in the home State that could more efficiently be performed elsewhere. New York's in-state presence requirement runs contrary to our admonition that States cannot require an out of state *firm* to become a resident in order to compete on equal terms.<sup>222</sup>

Thus, when the Court denounced physical-presence requirements, it referred to all “business operations” and “firms”—not merely to producers.<sup>223</sup> *Granholm*, then, is just one application of a broader antidiscrimination principle that protects *all* participants in the interstate liquor trade.<sup>224</sup>

### 3. The Twenty-First Amendment After *Granholm*

Finally, neither the text nor the history of the Twenty-first Amendment supports the assertion that *Granholm*'s reading of the Amendment should be limited to the producing tier.<sup>225</sup> History shows, and *Granholm* emphatically affirmed, that the Amendment merely repealed prohibition and restored the powers that states enjoyed under the Wilson and Webb-Kenyon Acts.<sup>226</sup> Those state powers did not—and do not—include the right to discriminate in favor of in-state participants in the alcoholic beverage industry.<sup>227</sup>

Logic suggests that retailers should be treated no differently than producers under *Granholm* and the Constitution.<sup>228</sup> The text of the Twenty-first Amendment does not refer to different tiers of the liquor trade nor, for that matter, does it refer to a three-tier system at all.<sup>229</sup> The Amendment refers only to state regulatory power over “transportation”

<sup>222</sup> *Granholm*, 544 U.S. at 475 (emphasis added) (citations and internal quotation marks omitted).

<sup>223</sup> *See id.*

<sup>224</sup> *See id.*; *see also* Slaybaugh, *supra* note 199, at 278–79 (arguing that the Court's holding in *Granholm* “was intended to apply to more than just the producers alone”).

<sup>225</sup> *See* U.S. CONST. amend. XXI, § 2; *Granholm*, 544 U.S. at 466.

<sup>226</sup> *See Granholm*, 544 U.S. at 476–89; *see also supra* notes 40–60 and accompanying text.

<sup>227</sup> *See Granholm*, 544 U.S. at 486; *see also supra* notes 40–60 and accompanying text.

<sup>228</sup> *See* U.S. CONST. amend. XXI, § 2; *see Granholm*, 544 U.S. at 476–89.

<sup>229</sup> *See* U.S. CONST. amend. XXI, § 2 (“The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.”).

and “importation”); it does not draw any distinction based on *who* is doing the transporting or importing.<sup>230</sup> Under *Granholm’s* interpretation of the Twenty-first Amendment, states are not authorized to discriminate against importing producers.<sup>231</sup> As a matter of semantic logic and evenhandedness, an importing retailer should fare no differently.<sup>232</sup>

*Granholm* arrived at its interpretation of the Twenty-first Amendment based on an extensive evaluation of the history underlying the Amendment.<sup>233</sup> The Supreme Court decided that the Amendment constitutionalized the Wilson and Webb-Kenyon Acts, and that those Acts’ only purpose was to give effect to state prohibition laws and eliminate the regulatory advantage afforded imported liquor.<sup>234</sup> Thus, under the Twenty-first Amendment, if a state chooses to prohibit alcohol entirely, it may do so, secure in its constitutional ability to effectively enforce the law by banning out-of-state liquor imports.<sup>235</sup> A state may also regulate in-state liquor according to any system it wishes, so long as that system does not unconstitutionally discriminate against out-of-state businesses.<sup>236</sup>

Nothing in the language or judicial interpretation of the Wilson and Webb-Kenyon Acts suggests that the *Granholm* Court would have arrived at a different interpretation of the Twenty-first Amendment had it been presented with a challenge to state laws discriminating against out-of-state retailers rather than producers.<sup>237</sup> The language of those Acts, like that of the Amendment they prefigured, refers only to “transportation” and “shipment,” and draws no distinction based upon *who* is doing the transporting or shipping.<sup>238</sup>

To be sure, the Supreme Court’s reading of the Twenty-first Amendment in *Granholm* was, and remains, controversial—it subjected to constitutional scrutiny an area of law that many long believed was reserved to the states.<sup>239</sup> But *Granholm* was merely the latest in a dec-

<sup>230</sup> See *id.*

<sup>231</sup> 544 U.S. at 486; see also U.S. CONST. amend. XXI, § 2.

<sup>232</sup> See *Granholm*, 544 U.S. at 486; see also U.S. CONST. amend. XXI, § 2.

<sup>233</sup> See *Granholm*, 544 U.S. at 476–89 (summarizing and evaluating, in thirteen pages, the historical interpretation of the Twenty-first Amendment’s meaning).

<sup>234</sup> *Id.* at 482, 484.

<sup>235</sup> See U.S. CONST. amend. XXI § 2; *Granholm*, 544 U.S. at 484–85.

<sup>236</sup> See U.S. CONST. amend. XXI § 2; *Granholm*, 544 U.S. at 493.

<sup>237</sup> See Wilson Act, ch. 728, 26 Stat. 313, 313 (1890) (codified at 27 U.S.C. § 121 (2006)); Webb-Kenyon Act, ch. 90, 37 Stat. 699 (1913) (codified at 27 U.S.C. § 122 (2006)); *Granholm*, 544 U.S. at 483–84.

<sup>238</sup> See Wilson Act, 26 Stat. at 313; Webb-Kenyon Act, 37 Stat. at 699.

<sup>239</sup> See, e.g., *Granholm*, 544 U.S. at 497 (Thomas, J., dissenting) (declining to follow majority’s “questionable reading of history”).

ades-long progression of cases that limited the effect of the Twenty-first Amendment.<sup>240</sup> Indeed, the *Granholm* majority appears to be correct in this view.<sup>241</sup> Most importantly, however, the *Granholm* Court's reading of the Twenty-first Amendment is now the law of the land.<sup>242</sup>

### B. Identifying the "Unquestionably Legitimate" Three-Tier System

Even if one assigns precedential value to *Granholm*'s dicta regarding an "unquestionably legitimate" three-tier system, it does not necessarily follow that discrimination is "inherent" in, or an "essential element" of, the three-tier system, as the Second and Fifth Circuits assumed.<sup>243</sup> Put another way, it is not at all clear that the conceptual three-tier system underpinning the *Wine Country* and *Arnold*'s opinions is the same as the three-tier system declared legitimate in *Granholm*.<sup>244</sup> By conceiving of the three-tier system as rooted in, and governed by, rules concerning *ownership* rather than rules concerning *location*, it is possible to reconcile the legitimacy of the system with the nondiscrimination mandate of the Commerce Clause.<sup>245</sup> Indeed, the three-tier systems of a substantial minority of states already accommodate direct shipping by out-of-state retailers.<sup>246</sup> In any case, the difficulty of defin-

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<sup>240</sup> See, e.g., *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 276 (1984) (holding that state powers under Section 2 are limited by other express federal policies); *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332 (1964) (rejecting as an "absurd oversimplification" the notion that states should be granted full deference under Section 2).

<sup>241</sup> See *Perkins*, *supra* note 152, at 428–34 (exploring the legislative history of the Wilson and Webb-Kenyon Acts and the Twenty-first Amendment, and concluding that drafters of these laws "neither mandated nor intended" that states should assume unqualified control over the regulation of interstate commerce in liquor).

<sup>242</sup> See 544 U.S. at 476–89. One suspects that disagreement with the Supreme Court's interpretation of the Amendment's historical meaning is at the root of the Second and Fifth Circuits' embrace of a passing dictum, as well as their unwillingness to take "merely a small step beyond *Granholm*" and extend its protections to retailers. *Arnold's*, 571 F.3d at 200–01 (Calabresi, J., concurring) (lamenting the judicial "updating" of Amendment and noting that the "general direction of Supreme Court jurisprudence has been toward prohibiting any discriminatory state regulation," but declining "to say how far or fast we should move along that vector"); see also *Granholm*, 544 U.S. at 476–89; *Wine Country*, 612 F.3d at 819 (citing Judge Guido Calabresi's *Arnold's* concurrence with approval).

<sup>243</sup> See *Granholm*, 544 U.S. at 489; *Wine Country*, 612 F.3d at 818; *Arnold's*, 571 F.3d at 191; see also Andre Nance, *Don't Put a Cork in Granholm v. Heald: New York's Ban on Interstate Direct Shipments of Wine is Unconstitutional*, 16 J.L. & POL'Y 925, 949–51 (2008) (arguing that treating out-of-state wine retailers the same as those in-state is not inconsistent with New York having an "unquestionably legitimate" three-tier system).

<sup>244</sup> See *Granholm*, 544 U.S. at 489; *Wine Country*, 612 F.3d at 819; *Arnold's*, 571 F.3d at 190.

<sup>245</sup> See *infra* notes 248–257 and accompanying text.

<sup>246</sup> See *infra* note 250 and accompanying text.

ing a “constitutional” three-tier system only underscores the irrationality of granting it such a protected status in the first place.<sup>247</sup>

### 1. An Alternate Model

The courts in *Wine Country* and *Arnold's* operated on the theory that the traditional three-tier system was governed by *location*—that is, the courts assumed that only business entities located within the state could be licensed by the state.<sup>248</sup> Such a system necessarily entailed, of course, “distinctions favoring in-state retailers.”<sup>249</sup> But a substantial minority of states does not conceptualize the system this way.<sup>250</sup> These states view the meaningful distinctions as ones of *ownership*—that is, ensuring that the tiers remain distinct from one another so as to comply with the anti-tied-house policy of the three-tier system itself.<sup>251</sup> Such a view allows issuing direct shipping permits to out-of-state retailers, and at least eleven states, including California, have adopted legislation consistent with this principle.<sup>252</sup> Indeed, a task force of the National Conference of State Legislatures has endorsed a Model Direct Wine Shipment Bill that establishes a template for state statutes allowing nondiscriminatory sales and direct shipping by out-of-state retailers.<sup>253</sup> As with direct shipper permits for out-of-state wineries, retailer permits commonly require the holder to comply with a variety of conditions, ensuring that the state’s policy goals in regulating alcohol are protected.<sup>254</sup>

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<sup>247</sup> See *infra* notes 258–266 and accompanying text.

<sup>248</sup> See *Wine Country*, 612 F.3d at 815; *Arnold's*, 571 F.3d at 190.

<sup>249</sup> *Wine Country*, 612 F.3d at 818; see also *Arnold's*, 571 F.3d at 190 (noting that “in-state retailers make up the third tier in New York’s three-tier regulatory system”).

<sup>250</sup> See, e.g., CAL. BUS. & PROF. CODE § 23661.2 (West, Westlaw through 2011 Reg. Sess.); IDAHO CODE ANN. § 23-1309A (LexisNexis, LEXIS through 2011 Reg. Sess.); LA. REV. STAT. ANN. § 26:359 (LexisNexis, LEXIS through 2011 Sess.); MO. REV. STAT. § 311.462 (Vernon, Westlaw through 2011 Reg. Sess.); NEV. REV. STAT. § 369.490 (LexisNexis, LEXIS through 2010 Special Sess.); N.H. REV. STAT. ANN. § 178:27 (West, Westlaw through 2011 Reg. Sess.); N.M. STAT. ANN. § 60-7A-3 (West, Westlaw through 2011 Reg. Sess.); OR. REV. STAT. ANN. § 471.282 (West, Westlaw through 2011 Reg. Sess.); VA. CODE ANN. § 4.1-209.1 (LexisNexis, LEXIS through 2011 Reg. Sess.); W. VA. CODE ANN. § 60-8-6 (LexisNexis, LEXIS through 2011 Reg. Sess.); WYO. STAT. ANN. § 12-2-204 (LexisNexis, LEXIS through 2011 Reg. Sess.).

<sup>251</sup> CAL. BUS. & PROF. CODE § 23661.2; see *supra* note 250; *supra* note 100 and accompanying text (explaining anti-tied house policy of three-tier systems).

<sup>252</sup> See *supra* note 250.

<sup>253</sup> NAT’L CONFERENCE OF STATE LEGISLATURES, TASK FORCE ON THE WINE INDUS., MODEL DIRECT WINE SHIPMENT BILL (1997), available at <http://www.wineinstitute.org/files/ModelDirectShipmentBill.pdf>.

<sup>254</sup> See *supra* note 250. Requirements common to all of the above-cited statutes and the Model Bill include: having a retail license in the home state, limiting the quantity sold to a single consumer in a given year, paying taxes to the state into which the wine is being

There is some evidence that the *Granholm* Court had an ownership-based understanding of the three-tier system in mind when it noted that the system was “unquestionably legitimate.”<sup>255</sup> For example, the Court cited with approval the Model Direct Shipping Bill prepared by a wine industry task force of the National Conference of State Legislatures.<sup>256</sup> Perhaps more tellingly, it repeatedly cited a Federal Trade Commission report that endorsed direct shipment of wine by both out-of-state wineries *and retailers* without suggesting any inconsistency with the three-tier system.<sup>257</sup>

## 2. The Irrationality of Constitutionalizing the Three-Tier System

To be sure, the majority of states do not license out-of-state retailers or wholesalers, and there is no definitive indication that the *Granholm* Court had such a model in mind when it endorsed the three-tier system.<sup>258</sup> That the issue is arguable only highlights the irrationality of trying to define the “unquestionably legitimate” system *at all*.<sup>259</sup> The *Wine Country* court, for example, tasked itself with “analyzing ‘retailing’ for Twenty-first Amendment purposes,” but then “pull[ed] back from any effort to define the reach of a traditional three-tier retailer.”<sup>260</sup> Instead, the court simply held that “what Texas ha[d] allowed here” was not “so substantially different from what retailing must include as to not be third-tier retailing at all.”<sup>261</sup> The Fifth Circuit’s vague language shows the fundamental problem with such an approach.<sup>262</sup> The three-tier system is a creature of state law, not federal constitutional law.<sup>263</sup> The *Granholm* Court’s passing remark that the system is “unquestionably legitimate” should not be read as an invitation for lower federal courts to grapple with the definition of the “three-tier system.”<sup>264</sup>

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shipped, requiring the carrier to verify that the recipient is of legal drinking age, reporting all shipments to state authorities, and making records available to state authorities. See MODEL DIRECT WINE SHIPMENT BILL, *supra* note 253; *supra* note 250 and accompanying text.

<sup>255</sup> See 544 U.S. at 489.

<sup>256</sup> See *id.* at 491–92.

<sup>257</sup> See, e.g., *id.* at 466, 468 (citing FTC REPORT, *supra* note 95, at 3, 5–7 in defining the three-tier system and noting the economic burden of state bans on interstate direct shipping).

<sup>258</sup> See *id.* at 489; *supra* note 250 and accompanying text.

<sup>259</sup> See *Granholm*, 544 U.S. at 489; *Wine Country*, 612 F.3d at 819.

<sup>260</sup> 612 F.3d at 819.

<sup>261</sup> *Id.*

<sup>262</sup> See *id.*

<sup>263</sup> See FTC REPORT, *supra* note 95, at 6. Note, also, that the “three-tier system” is not referenced in the Twenty-first Amendment. See U.S. CONST. amend. XXI.

<sup>264</sup> See 544 U.S. at 489; *Wine Country*, 612 F.3d at 819.

Instead, when a state liquor regulation scheme is challenged—regardless of its status or lack thereof as a “traditional three-tier system”—the inquiry should be one of the system’s constitutional *operation*, not its alleged constitutional nature.<sup>265</sup> As the *Siesta Village Market* court noted, “While [*Granholm*] did state that the three-tier system was an appropriate use of state power, it did not approve of a system that discriminates against out-of-state interests.”<sup>266</sup>

### C. *In Sum: Just Another Dormant Commerce Clause Analysis*

Instead of wading into a murky new area of quasi-constitutional law, courts faced with challenges to laws discriminating against out-of-state liquor retailers should follow the approach of the *Siesta Village Market* district court and apply a simple dormant Commerce Clause analysis.<sup>267</sup> That is, liquor laws—like any other laws—that discriminate against business entities in interstate commerce can only be saved from invalidation by “proving that the law serves a legitimate local purpose and that the purpose cannot be adequately served by reasonable nondiscriminatory means.”<sup>268</sup> This approach is entirely consistent with the central message of *Granholm* and, contrary to the dire predictions of some, will not lead to the extinction of the traditional three-tier system.<sup>269</sup>

#### I. A Clear and Consistent Rule

Applying a simple dormant Commerce Clause analysis to laws discriminating against out-of-state liquor retailers honors the method and message of the *Granholm* Court.<sup>270</sup> The Supreme Court made it unmistakably clear that “the Twenty-first Amendment does not supersede other provisions of the Constitution and, in particular, does not displace the rule that States may not give a discriminatory preference to

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<sup>265</sup> See *Siesta Vill. Mkt.*, 596 F. Supp. 2d at 1039 (implying that regardless of how one defines the three-tier system under the Twenty-first Amendment, *Granholm* did not approve of any system that violates other constitutional provisions, including the Commerce Clause).

<sup>266</sup> *Id.*

<sup>267</sup> See 596 F. Supp. 2d at 1038–44 (applying a dormant Commerce Clause analysis to a discriminatory retailer direct shipping statute).

<sup>268</sup> *Id.* at 1040 (citing *Maine v. Taylor*, 477 U.S. 131, 140–43 (1986)).

<sup>269</sup> See *Granholm*, 544 U.S. at 486; see also *WSWA Applauds Introduction of Legislation Affirming States’ Rights*, *supra* note 156 (asserting that “America’s uniquely effective system of distribution is under attack in the courts”).

<sup>270</sup> See *Granholm*, 544 U.S. at 486.

their own [businesses].”<sup>271</sup> In order to give effect to that central message, the Supreme Court chose to apply a simple dormant Commerce Clause analysis.<sup>272</sup> State liquor laws—like any other laws—that discriminate against business entities in interstate commerce can only be saved from invalidation by “proving that the law serves a legitimate local purpose and that the purpose cannot be adequately served by reasonable nondiscriminatory means.”<sup>273</sup> By declining to consider, as the *Bacchus* Court did, whether the challenged law served a “central purpose” of the Twenty-first Amendment, the *Granholm* Court made doubly clear that the time-honored dormant Commerce Clause analysis is not altered by the Amendment.<sup>274</sup>

The approach is as adaptable as it is clear.<sup>275</sup> It can just as readily be applied to laws regulating the retailing and wholesaling tiers as it was to the producing tier in *Granholm*.<sup>276</sup> Because it considers only the *operation* of the system, not the *nature* of the system, courts need not task themselves with defining the “constitutional” three-tier system.<sup>277</sup> For that reason, in fact, the dormant Commerce Clause analysis can be applied to *any* state regulatory scheme.<sup>278</sup> “Hybrid” systems are already being implemented in several states, and future courts will benefit from having a clear rule when inevitable challenges to those systems arise.<sup>279</sup>

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<sup>271</sup> *Id.* The protections of that statement, as discussed *supra*, extend to all participants in the interstate commerce of alcoholic beverages. See *supra* notes 215–242 and accompanying text.

<sup>272</sup> See *Granholm*, 544 U.S. at 472–76, 489–93.

<sup>273</sup> *Siesta Vill. Mkt.*, 596 F. Supp. 2d at 1040; see also *Granholm*, 544 U.S. at 472–76, 489–93 (applying dormant Commerce Clause analysis).

<sup>274</sup> See *Granholm*, 544 U.S. at 487–89; *Bacchus*, 468 U.S. at 275–76; *supra* notes 139–140 and accompanying text; see also Jonathan M. Rotter & Joshua S. Stambaugh, *What’s Left of the Twenty-First Amendment?*, 6 CARDOZO PUB. L. POL’Y & ETHICS J. 601, 613 (2008) (noting that the *Granholm* Court “did not bother to examine” whether stated policy justifications were core Twenty-first Amendment purposes, and reasoning that “[t]he Court could skip that exercise because the standard for whether a discriminatory effect is permissible seems now to be exactly the same in the Twenty-first Amendment context as it is in all other areas of the law”). The only exception to this principle is that states may entirely prohibit alcohol and enforce that prohibition without running afoul of the Commerce Clause. See *supra* note 235 and accompanying text.

<sup>275</sup> See *supra* notes 265–266 and accompanying text.

<sup>276</sup> See 544 U.S. at 472–76, 489–93; *supra* notes 265–266 and accompanying text.

<sup>277</sup> See *supra* notes 258–266 and accompanying text.

<sup>278</sup> See *supra* notes 258–266 and accompanying text.

<sup>279</sup> See *Baude v. Heath*, 538 F.3d 608, 612 (7th Cir. 2008) (noting that California, Oregon, and Washington have each adopted a two-tier system in which wineries may sell directly to retailers, bypassing the wholesaler); *supra* notes 267–268 and accompanying text.

## 2. Implications of this Rule for State Liquor Regulations

Under this rule, states wishing to maintain a three-tier system would have several options in regulating direct shipping by retailers.<sup>280</sup> First, a state could simply choose not to allow direct shipping by *any* retailers, regardless of location.<sup>281</sup> Most states are already under this regime, and no constitutional issue is implicated.<sup>282</sup> Second, a state could allow out-of-state retailers to sell and directly ship wine and/or other alcoholic beverages on the same terms as in-state retailers.<sup>283</sup> At least eleven states already follow this approach, and the Model Direct Shipping Bill provides a template for others to join.<sup>284</sup> Such laws are sound under the Commerce Clause, and the conditions attached to permits ensure that states' regulatory interests are protected.<sup>285</sup> Finally, a state could choose to enact a discriminatory law, like that of New York or Texas, and attempt to defend it as necessary to serving some legitimate purpose other than merely perpetuating the three-tier system itself.<sup>286</sup> Ultimately, the important thing is that established Commerce Clause principles are honored.<sup>287</sup>

<sup>280</sup> See *infra* notes 281–286 and accompanying text.

<sup>281</sup> See *Granholm*, 544 U.S. at 493 (stating that states need not allow direct shipping, but they must regulate evenhandedly).

<sup>282</sup> See *id.*; see also Slaybaugh, *supra* note 199, at 283 (noting that “if a state finds its interests so great that it does not want [to allow direct shipping], it is free to prohibit direct shipping to its state’s consumers entirely”).

<sup>283</sup> See MODEL DIRECT WINE SHIPMENT BILL, *supra* note 253; *supra* note 250 and accompanying text.

<sup>284</sup> See MODEL DIRECT WINE SHIPMENT BILL, *supra* note 253; *supra* note 250 and accompanying text.

<sup>285</sup> See *Granholm*, 544 U.S. at 493; MODEL DIRECT WINE SHIPMENT BILL, *supra* note 253 and accompanying text; *supra* notes 250, 254 and accompanying text.

<sup>286</sup> See *Wine Country*, 612 F.3d at 813; *Arnolds*, 571 F.3d at 187; *Siesta Vill. Mkt.*, 596 F. Supp. 2d at 1040–45; *supra* note 268 and accompanying text. The most common justifications for discriminatory three-tier systems are concerns about tax evasion and consumption of alcohol by minors. See *supra* notes 101–105 and accompanying text (discussing state interests in the three-tier system). Because alternative regulatory schemes have been shown to be effective, an argument premised on the necessity of discrimination against out-of-state retailers to accomplish these objectives would likely fail. See *Granholm*, 544 U.S. at 492 (rejecting states’ argument that discrimination against out-of-state producers was necessary to accomplish stated objectives); FTC REPORT, *supra* note 95, at 26 (noting that “many states have decided that they can prevent direct shipping to minors through less restrictive means than a complete ban, such as by requiring an adult signature at the point of delivery.”).

<sup>287</sup> See *Granholm*, 544 U.S. at 493. Furthermore, just as discrimination against wine producers was the only issue before the *Granholm* court, so, too, was wine itself. *Id.* at 465. While this Note argues that the central message of *Granholm* should be extended to all interstate commerce in *wine*, the argument logically extends to all interstate commerce in *alcoholic beverages*. See *supra* note 268 and accompanying text. Craft breweries and small-

The application of this rule, therefore, will not result in a sea change in the regulatory landscape.<sup>288</sup> Only those systems that allow direct shipping in a discriminatory fashion will face invalidation.<sup>289</sup> The three-tier system itself will survive as long as states choose to preserve it.<sup>290</sup> Importantly, however, it will survive in conformity with the Constitution.<sup>291</sup>

#### D. Looking to the Future: The Supreme Court Must Reaffirm What It Said in *Granholm*

“[S]tate bans on interstate direct shipping represent the single largest regulatory barrier to expanded e-commerce in wine,” the Supreme Court noted in 2005.<sup>292</sup> Almost six years later, the truth of that statement has not changed.<sup>293</sup> Although many anticipated that *Granholm* would usher in a new era of free trade in wine, the reality is that states cannot be forced by the judiciary to change or discard their deeply entrenched three-tier systems if those systems are constitutionally operated.<sup>294</sup> Only sweeping federal regulation or the complete success of the grassroots movement for freer trade would accomplish

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batch producers of distilled spirits, like small wineries, have seen an explosion in popularity in the last several decades. See *ADI and the Growth of Craft Distilling in the U.S.*, AM. DISTILLING INST., <http://www.distilling.com/aboutadi.html> (last visited Oct. 23, 2011) (noting an increase in the number of craft distillers from sixty-nine in 2003 to 240 today); *Brewers Almanac 2010*, BEER INST., <http://www.beerinstitute.org/statistics.asp?bid=200> (follow hyperlink to spreadsheet; then follow “Breweries and Wholesalers in Operation”) (last updated Aug. 1, 2011) (showing an increase in number of U.S. breweries from forty-four in 1979 to over 1600 in 2010). As these alcohol producers grow in number and power, direct shipping legislation tailored to these products is likely to increase—and with it, litigation. See generally Andrew Tamayo, *What’s Brewing in the Old North State: An Analysis of the Beer Distribution Laws Regulating North Carolina’s Craft Breweries*, 88 N.C. L. REV. 2198 (2010) (advocating changes to North Carolina’s three-tier system that would specifically benefit craft brewers).

<sup>288</sup> See *supra* notes 280–287 and accompanying text.

<sup>289</sup> See *Siesta Vill. Mkt.*, 596 F. Supp. 2d at 1044–45 (invalidating a discriminatory direct shipping law); *supra* note 268 and accompanying text.

<sup>290</sup> See *supra* notes 280–287 and accompanying text.

<sup>291</sup> See U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. amend. XXI; *Granholm*, 544 U.S. at 476.

<sup>292</sup> *Granholm*, 544 U.S. at 468 (quoting FTC REPORT, *supra* note 95, at 3).

<sup>293</sup> See *id.*; *supra* notes 153–158 and accompanying text.

<sup>294</sup> See *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 209 (2008) (Stevens, J., concurring) (quoting Justice Thurgood Marshall) (“The Constitution does not prohibit legislatures from enacting stupid laws.”). See generally Eleanor Heald & Ray Heald, *Direct-to-Consumer Shipping: Not Quite the Green Light for Every State*, APPELLATION AM. (May 14, 2007), <http://wine.appellationamerica.com/wine-review/378/Wine-Direct-Shipping-Review.html> (explaining that *Granholm*, while a positive development for consumers, has not brought about sweeping change in state laws).

this.<sup>295</sup> Given the history of state resistance and the power of the wholesaler lobby, neither is likely to occur in the near future.<sup>296</sup> Thus, the “patchwork” of state laws will remain for some time to come.<sup>297</sup>

Distressingly, however, *Granholm* has not succeeded in ensuring even the constitutional *operation* of these uneconomic three-tier systems.<sup>298</sup> States continue to defy the clear message of the Supreme Court—that the Twenty-first Amendment does not override the anti-discrimination principle of the dormant Commerce Clause—and federal courts have been inconsistent in their treatment of such discriminatory laws.<sup>299</sup> The *Wine Country* and *Arnold’s* decisions, which held that *Granholm’s* protections did not extend to retailers, are particularly concerning.<sup>300</sup> In addition to perpetuating jurisprudential confusion, the fundamental principle advanced by the Second and Fifth Circuits may usher in a new era of protectionist state liquor regulations.<sup>301</sup> Such regulations would be insulated from Commerce Clause scrutiny so long as they were plausibly labeled as inherent in the traditional three-tier system.<sup>302</sup>

It is time for the Supreme Court to revisit alcohol regulation.<sup>303</sup> The Court must make explicit the principle that the time-honored

<sup>295</sup> See Perkins, *supra* note 152, at 435–36 (advocating, but acknowledging difficulty of accomplishing, sweeping change through grassroots movement and federal legislation).

<sup>296</sup> See *supra* notes 152–158 and accompanying text.

<sup>297</sup> See *Granholm*, 544 U.S. at 473.

<sup>298</sup> See *Wine Country*, 612 F.3d at 821; *Arnolds*, 571 F.3d at 192; *supra* notes 194–242 and accompanying text.

<sup>299</sup> See *Wine Country*, 612 F.3d at 821; *Arnolds*, 571 F.3d at 192; *Siesta Vill. Mkt.*, 596 F. Supp. 2d at 1044–45; *supra* notes 152–193 and accompanying text.

<sup>300</sup> See *supra* notes 175–193 and accompanying text.

<sup>301</sup> See *Wine Country*, 612 F.3d at 818; *Arnold’s*, 571 F.3d at 190–91; *infra* note 302 and accompanying text.

<sup>302</sup> See *Granholm*, 544 U.S. at 489 (noting, in dicta, that three-tier system is “unquestionably legitimate”); *Wine Country*, 612 F.3d at 818 (stating that the only “discrimination that would be questionable, then, is that which is not inherent in the three-tier system itself”); *Arnold’s*, 571 F.3d at 190–91 (stating that a challenge to discrimination inherent in three-tier system was “directly foreclosed by the *Granholm* Court’s express affirmation of the legality of the three-tier system”).

<sup>303</sup> Compare *Wine Country*, 612 F.3d at 821 (holding that *Granholm’s* nondiscrimination principle does not protect wine retailers), and *Arnold’s*, 571 F.3d at 190–91 (same), with *Siesta Vill. Mkt.*, 596 F. Supp. 2d at 1044–45 (holding that *Granholm’s* nondiscrimination principle extends to all interstate commerce in wine). The Supreme Court passed on an opportunity to revisit *Granholm* when it denied certiorari in *Wine Country*. 613 F.3d 809, *cert. denied*, 131 S.Ct. 1602 (2011). It is a long-standing jurisprudential principle that denials of certiorari have no meaning. See, e.g., *Brown v. Allen*, 344 U.S. 443, 543 (1953) (Jackson, J., concurring) (“A denial of certiorari should be given no significance whatever. It creates no precedent and approves no statement of principle entitled to weight in any other case.”).

dormant Commerce Clause analysis applies to *all* state regulatory schemes—that *all* participants in the interstate liquor trade are protected from unconstitutional discrimination.<sup>304</sup> Such a ruling would promote clarity and consistency in the current law of state liquor regulation.<sup>305</sup> It would also provide a clear and adaptable approach to future state laws as they inevitably change due to market pressures.<sup>306</sup> Finally, a Supreme Court ruling to this effect would facilitate a freer market, increase the availability of small wine labels, and, ultimately, benefit the American oenophile.<sup>307</sup>

#### CONCLUSION

*Granholm* established, once and for all, that the Twenty-first Amendment does not insulate liquor regulations from Commerce Clause scrutiny. Subsequent federal court decisions, however, have refused to apply that clear message to cases of discrimination against out-of-state wine retailers. This not only frustrates retailers and consumers, but it is contrary to the intent of the Founding Fathers to create a single economic union. The Supreme Court should affirm that *all* state liquor laws—like any other laws—are subject to the nondiscrimination principle of the Commerce Clause.

KEVIN C. QUIGLEY

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<sup>304</sup> See *supra* notes 267–279 and accompanying text.

<sup>305</sup> See *supra* notes 267–279 and accompanying text.

<sup>306</sup> See *supra* notes 267–279 and accompanying text.

<sup>307</sup> See FTC REPORT, *supra* note 95, at 14 (“[O]nline wine sales give consumers the opportunity to save money and to choose from a much greater variety of wines.”); see also Jerry Ellig & Alan E. Wiseman, Competitive Exclusion with Heterogeneous Sellers: The Case of State Wine Shipping Laws 16–20 (Mercatus Ctr., George Mason Univ., Working Paper No. 11-03, 2011) (finding that allowing direct shipping by online wine retailers affords consumers access to significant online price savings and increases competitive pressure on brick-and-mortar wine merchants to reduce their own prices).

