

Winter 2007

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### Recommended Citation

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# GRANHOLM V. HEALD: THE TWENTY-FIRST AMENDMENT TAKES ANOTHER HIT — WHERE DO STATES GO FROM HERE?

WILLIAM GLUNZ\*

## INTRODUCTION

Currently, thirty States and the District of Columbia allow direct shipment<sup>1</sup> of wine to consumers.<sup>2</sup> Some allow direct shipping with few restrictions. Other States offer reciprocity<sup>3</sup> for wine shipped from States that have laws that allow direct shipping to those States.<sup>4</sup> On the other end of the spectrum, twenty States prohibit the direct shipment of wine to consumers entirely.<sup>5</sup> During its most recent term, the United States Supreme Court struck down Michigan and New York laws prohibiting direct shipment, holding that they discriminated against interstate commerce in *Granholm v. Heald*.<sup>6</sup>

Despite passage of the Eighteenth Amendment, which created prohibition at the national level,<sup>7</sup> throughout much of the history of our Nation, state regulation of alcoholic beverages has been the standard.<sup>8</sup> The Twenty-first Amendment which passed in 1933,

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1. See FEDERAL TRADE COMMISSION STAFF REPORT, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE 7-9 (2003) [hereinafter FTC REPORT] (explaining that direct shipment means shipping of alcoholic beverages directly from either a producer or retailer to a consumer outside the usual system of distribution).

2. See WINE INSTITUTE, DIRECT SHIPMENT LAWS BY STATE FOR WINERIES (2005), available at <http://www.wineinstitute.org/shipwine/> (explaining that laws governing direct shipment of wine vary from state to state).

3. See FTC REPORT, *supra* note 1, at 7-9.

4. *Id.*

5. WINE INSTITUTE, *supra* note 2.

6. 125 S. Ct. 1885 (2005).

7. U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI.

8. See RICHARD F. HAMM, SHAPING THE EIGHTEENTH AMENDMENT: TEMPERANCE REFORM, LEGAL CULTURE, AND THE POLITY, 1880-1920 19-21

and in particular, Section Two, granted states wide latitude,<sup>9</sup> and some have argued almost exclusive power,<sup>10</sup> to regulate alcoholic beverages.

Over the past five decades however, the Supreme Court has consistently held that the Twenty-first Amendment does not operate to “trump” other sections of the Constitution and does not give states unbridled power to regulate alcoholic beverages.<sup>11</sup> As states begin to come to terms with the *Granholm* decision,<sup>12</sup> there are numerous options available that allow them to control the direct shipments of wine without running afoul of the Constitution.

Part I of this Comment discusses the history and background of state regulation of alcoholic beverages. This section will briefly touch on both the passage of the Twenty-first Amendment and the early interpretations by the Court as well as more recent decisions that brought the Twenty-first Amendment in line with the remainder of the Constitution. Part II of this Comment reviews the legislative landscape and regulatory schemes of several states leading up to *Granholm* and the importance of protecting the states’ interest and the “core concern” of the Twenty-first Amendment. This section will also discuss the implications of the Commerce Clause and its relationship with the Twenty-first

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(Thomas A. Green & Hendrick Hartog eds., 1995) (explaining the background leading up to the passage of the Eighteenth Amendment and noting that advocates of prohibition were primarily focused on reform at the state level and further stating that “between 1851 and 1855 thirteen states adopted prohibition”).

9. See *Granholm*, 125 S. Ct. at 1905 (stating that “the Twenty-first Amendment grants the states virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system” (citing *California Retail Liquor Dealers Assn. v. Midcal Aluminum*, 445 U.S. 97, 110 (1980))).

10. See Duncan Baird Douglass, *Constitutional Crossroads: Reconciling the Twenty-First Amendment and the Commerce Clause to Evaluate Regulation of Interstate Commerce in Alcoholic Beverages*, 49 DUKE L.J. 1619, 1628 (2000) (explaining that at one end of the spectrum of how the Twenty-first Amendment has been interpreted is the plain meaning of the text and, as the argument goes, that the Twenty-first Amendment grants states an exception from the rest of the constitution when it comes to regulating alcoholic beverages).

11. See *Granholm*, 125 S. Ct. at 1903 (noting the Court’s recent decisions holding that states’ legislative schemes are not per se protected by Section Two of the Twenty-first amendment whereby they would otherwise violate another provision of the constitution).

12. The State of New York has already enacted new direct shipment regulations which were signed into law in July 2005, see N.Y. ALCO. BEV. CONT. LAW § 79-c-d (McKinney 2005). Michigan enacted similar new legislation earlier this year, see MICH. COMP. LAWS SERV. § 436.1203 (LexisNexis 2005).

Amendment as well as regulatory efforts underway in both New York and Michigan following *Granholm*. Finally, Part III proposes effective solutions and key components for States that must rewrite their direct shipping laws highlighting the laws of New York and Michigan.

I. THE PENDULUM OF REGULATION SWINGS – FROM THE STATES  
AND BACK TO THE STATES

A. *The Early Cases*

As early as 1847, states began to regulate the importation, distribution, and sale of alcoholic beverages, and the Supreme Court held that states had authority to regulate liquor. In *The License Cases*,<sup>13</sup> the Court upheld the laws of three states — Massachusetts, New Hampshire, and Rhode Island — and protected the states' right to regulate liquor. The laws in question required licenses to sell liquor and limited the quantity that could be sold.<sup>14</sup>

While the decision in *The License Cases* was perceived as a victory for the states and for the Prohibition movement,<sup>15</sup> that victory would not last very long. Following the decision, as States continued to struggle to contain the ever-expanding liquor trade,<sup>16</sup> many states passed laws prohibiting the manufacture, importation, and sale of liquor.<sup>17</sup> Again, the Supreme Court had to decide if the Commerce Clause barred States from enforcing these laws.

In two cases over two years, the Court held the regulatory laws of Iowa unconstitutional. In the first case, *Bowman v. Chicago & N.W. Railway Co.*,<sup>18</sup> an Iowa brewer brought suit, not

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13. *Thurlow v. Massachusetts (The License Cases)*, 46 U.S. 504 (1847).

14. *Id.*; see also Brannon P. Denning, *Smokey and The Bandit in Cyberspace: The Dormant Commerce Clause, the Twenty-First Amendment, and State Regulation of Internet Alcohol Sales*, 19 CONST. COMMENT. 297, 300 n.12 (2002) (stating that in *The License Cases*, “[t]he Court upheld such regulations, even though they involved some regulation of interstate commerce”); John Foust, *State Power to Regulate Alcohol under the Twenty-First Amendment Enforcement Act*, 41 B.C. L. REV. 659, 662 n.22 (2000) (noting that while there were some differing opinions in the case (six Justices wrote separate opinions for the three different cases before the Court) the general idea was that the state laws were constitutional).

15. See HAMM, *supra* note 8, at 60 (noting that, following the Court's decision in *The License Cases*, the prohibition movement had just begun to take hold, and that, in fact, “the first wave of state prohibition laws swept the nation”).

16. See HAMM, *supra* note 8, at 62.

17. *Id.* at 61-63.

18. 125 U.S. 465 (1888).

against the State of Iowa but against the railroad which refused to ship the company's products.<sup>19</sup> In an apparent change of course from its decision in *The License Cases*, the Court struck down the Iowa law due to "its extraterritoriality and [because] it erected a barrier to commerce that Congress wished unrestrained."<sup>20</sup> The Court further stated, "It is only after the importation is completed, and the property imported has mingled with and become a part of the general property of the State, that [the State's] regulations can act upon it."<sup>21</sup>

In the second case, *Leisy v. Hardin*,<sup>22</sup> an Illinois brewer brought an action against the State of Iowa after its beer, sold in its original package, had been confiscated upon shipment into Iowa.<sup>23</sup> The Iowa law had been passed in response to *Bowman*, and made it illegal to sell alcohol produced either in Iowa or elsewhere.<sup>24</sup> Following *Bowman*, the Court declared the Iowa law unconstitutional as violating the Commerce Clause, and stated, "To concede to a state the power to exclude, directly or indirectly, articles so situated, without congressional permission, is to concede to a majority of the people of a state . . . the power to regulate commercial intercourse between the states."<sup>25</sup> This, the Court held, was contrary to the Constitution and was "essential to that more perfect Union which the Constitution was adopted to

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19. *Id.*; see also HAMM, *supra* note 8, at 63-64 (explaining the background of *Bowman* and noting that the Iowa law the plaintiffs sought to overturn prohibited shippers from carrying liquor within the State and barred them from bringing liquor into the State). In *Bowman* the producer sued the railroad for not violating the very shipping law in question. *Id.*

20. *Id.* at 64; see also Lloyd C. Anderson, *Direct Shipment of Wine, the Commerce Clause and the Twenty-First Amendment: A Call for Legislative Reform*, 37 AKRON L. REV. 1, 6 (2004) (noting that the Court in *Bowman* determined that its decision in *The License Cases* was based upon the idea that a person has the right to import alcohol from another state). "More importantly, the Court invoked dormant Commerce Clause jurisprudence: Congress' failure to regulate a particular area of interstate commerce necessarily implies that Congress intended that area to be free of regulation." *Id.* Further, Congress had not regulated imports, thus it intended them to be free from state regulation. *Id.*

21. *Bowman*, 125 U.S. at 508.

22. 135 U.S. 100 (1890).

23. *Id.* at 124-25.

24. See Jonathan W. Garlough, *Weighing in on the Wine Wars: What the European Union Can Teach Us About The Direct Shipment Controversy*, 46 WM. AND MARY L. REV. 1533, 1543 (2005) ("The Court ruled [in *Leisy* that] the police seizure of *Leisy's* alcohol invalid, holding that the beer remained an article of interstate commerce, and thus out of the state's reach as long as it remained in its original package."); see also Anderson, *supra* note 20, at 7 (noting that in *Leisy*, the Court held that liquor in its original and unbroken packages could not be barred from sale by states).

25. *Leisy*, 135 U.S. at 125.

create.”<sup>26</sup>

The immediate effect of the Court’s rulings was nothing short of a bonanza for liquor dealers<sup>27</sup> and the press reported the spread of “original package” stores,<sup>28</sup> which helped set off alarm bells throughout the Prohibition movement.<sup>29</sup> However, many believed that the Court’s opinion was a clear signal to Congress that if it wanted to authorize the states to regulate in this area, Congress could do so.<sup>30</sup> In fact, even the brewers’ trade association was upset with the ruling and those that were behind it;<sup>31</sup> one of its directors even accused the prohibitionists of lobbying the Court and described the ruling as “a blessing to [them] in disguise.”<sup>32</sup>

### B. Congress Enters the Fray

The pressure for Congress to act increased after *Bowman* and *Leisy*, and just four months after the *Leisy* decision,<sup>33</sup> Congress responded and passed The Wilson Act of 1890.<sup>34</sup> The Wilson Act

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26. *Id.*

27. See HAMM, *supra* note 8, at 69 (“Within a month of the ruling [in *Leisy*], ‘original package houses’ and ‘Supreme Court saloons’ had sprung up in every prohibition state.”); see also Anderson, *supra* note 20, at 7 (noting that prohibition states were also at a loss due to the fact that there were no in-state producers, as it was illegal, and thus these states proved very much to be highly sought after markets for the importing of alcohol); Garlough, *supra* note 24, at 1544 (quoting a recent holding by the Seventh Circuit interpreting the *Leisy* decision and its effect in *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 852 (7th Cir. 2000)). The Seventh Circuit ironically held that these decisions “meant that states could forbid domestic production of alcoholic beverages but could not stop imports; the Constitution effectively favored out-of-state sellers.” *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 852 (7th Cir. 2000).

28. See HAMM, *supra* note 8, at 73 (describing the time immediately following the *Bowman* and *Leisy* decisions as having “the air of crisis” and highlighting media accounts which escalated small incidents into the much feared “original package war” and stating that if no action was taken, warning of another “battle of states’ rights” and a pending “public uprising”).

29. See *id.* at 71 (noting that the prohibitionists were not at all happy with the decision and “refused to sit idle while ‘the liquorites’ set up shop. Church bells were rung to call the citizens together to fight this new menace”).

30. See *id.* at 70 (stating that “those [who were] unhappy with the results of [*Bowman*] had only to look at the decision itself to find the means to overturn it”).

31. *Id.*

32. *Id.*

33. *Id.* at 88.

34. 27 U.S.C. § 121 (2000). The text of the Act states:

All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same

allowed States to regulate the flow of liquor that crossed their borders regardless of whether it was in its original package,<sup>35</sup> thus closing the so called "Leisy loophole"<sup>36</sup> and putting an end to the original package business.<sup>37</sup> The constitutionality of the Wilson Act was confirmed by the Court one year after its passage in *In re Rahrer*.<sup>38</sup> The decision in *Rahrer* was seen as a major victory for the Prohibition movement<sup>39</sup> even though it had not pressed for passage of the Wilson Act.<sup>40</sup>

The constitutionality of the Wilson Act was again challenged in two companion cases, *Rhodes v. Iowa*<sup>41</sup> and *Vance v. W.A. Vandercook*,<sup>42</sup> both decided in 1898. While the Wilson Act withstood the frontal assault, its reach was slightly restricted.<sup>43</sup>

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extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

*Id.*

35. 27 U.S.C. § 121 (2000); see also Anderson, *supra* note 20, at 8; Denning, *supra* note 14, at 301.

36. See Garlough, *supra* note 24, at 1544.

37. See HAMM, *supra* note 8, at 88 (citation omitted).

38. 140 U.S. 545 (1891). In this case, Charles Rahrer had been arrested in Kansas for selling liquor the day after passage of the Wilson Act and sought to have the Kansas law declared unconstitutional. *Id.* The Court, in a unanimous opinion written by Chief Justice Fuller, disagreed and upheld the law and, thereafter, the constitutionality of the Wilson Act. *Id.* See Anderson, *supra* note 20, at 8 (noting the Court's interpretation of the Wilson Act in light of its very recent decision in *Leisy* and noting that the Court construed the Wilson Act as abrogating the decision in *Leisy* and also noting that the decision in *In re Rahrer* left *Bowman* unchanged).

39. HAMM, *supra* note 8, at 90.

40. See *id.* at 78-79 (noting that the prohibitionists had put their own agenda ahead of passage of the Wilson Act and in fact, "the author of the bill, James Wilson, was a regular Republican and no temperance fanatic").

41. 170 U.S. 412 (1898).

42. 170 U.S. 438 (1898).

43. Both of these cases dealt with the direct shipment of alcoholic beverages for personal use and the Court took a more restrictive view of the Wilson Act. In *Rhodes*, an Illinois producer shipped alcoholic beverages to an Iowa consumer and upon delivery, the goods were thereby confiscated and the State sought to charge the carrier with violation of its ban on the transportation of liquor. *Rhodes*, 170 U.S. at 413-14; see also Anderson, *supra* note 20, at 9 (noting that the alcohol was purchased in Illinois, a non-prohibition State and delivered to Iowa, and thus the sale was consummated in Illinois). The court held that goods did not arrive in the State until they were delivered to the consignee, and interpreting the Wilson Act to mean that a state's authority did not attach until after consummating but prior to any further in-state sale, "the one receiving merchandise of the character named should, whilst retaining the full right to use the same, no longer enjoy the right to sell free from the regulations as to sale created by the state." *Rhodes*, 170 U.S. at 423; see also Denning, *supra* note 14, at 302 n.19 (interpreting the holding in *Rhodes* as "effectively immunizing from state regulation liquor arriving by interstate

As a result of a narrower interpretation of the Act and strong words in *Vance*,<sup>44</sup> the years following these decisions saw the boom of the mail-order liquor business.<sup>45</sup> Again Congress was forced back into the dispute<sup>46</sup> and, in 1913, over the veto of President Taft,<sup>47</sup> passed the Webb-Kenyon Act.<sup>48</sup> The Webb-Kenyon Act

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carrier"). Similarly, in *Vance*, where a South Carolina inspection law was in question, the Court held that the State could not prohibit the shipment of liquor for personal use as its foundation was based on the Commerce Clause. *Vance*, 170 U.S. at 452-53; *see also* HAMM, *supra* note 8, at 177 (citing *Vance*, 170 U.S. 455) (stating that the "right of every citizen of another state to avail

himself of interstate commerce" could not be controlled by the State inspection regulations).

44. *See* Foust, *supra* note 14, at 663 (stating that in the majority opinion in *Vance*, "the Court even stated that 'the right of persons in one State to ship liquor into another State to a resident for his own use is derived from the Constitution of the United States'").

45. *See* HAMM, *supra* note 8, at 178 (stating that in the years following the Court's decisions, "Shippers, liberated from state hindrance by the *Rhodes* and *Vance* rulings deluged the prohibition states with intoxicating beverages").

46. *See* Foust, *supra* note 14, at 663 (noting that groups such as the Women's Christian Temperance Union (WCTU) and the Anti-Saloon League pressed Congress to act to ebb the flow of liquor through the direct shipment loophole opened up by the Court's holding in *Rhodes* and *Vance*); *see also* Anderson, *supra* note 20, at 9-10 (explaining further the role that both the WCTU and especially the Anti-Saloon League had on the prohibition movement during this time and their role in Congress' passage of the Webb-Kenyon Act).

47. *See* Foust, *supra* note 14, at 664 (taking note that President Taft had vetoed the bill due to his belief that it violated the Constitution); *see also* *Granholm*, 125 S. Ct at 1900 (noting that President Taft was acting under the advise of Attorney General Wickersham); Foust *supra* note 14, at 664 n.32, (making mention of the fact that Taft, who later would serve as Chief Justice of the Court, never had the opportunity to rule on the interstate commerce implications of state regulation of alcohol due to passage of the Eighteenth Amendment).

48. 27 U.S.C. § 122 (2000). The text of the Act states:

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

*Id.*; *see* Foust, *supra* note 14, at 663-64 (noting that the original title of the Webb-Kenyon Act was "an Act divesting intoxicating liquors of their interstate

essentially closed the mail-order, direct sale loophole. Four years later, the Court upheld the Webb-Kenyon Act in *Clark Distilling Co. v. Western Maryland Railway*.<sup>49</sup>

In December 1917, Congress passed the resolution for the ratification of the Eighteenth Amendment.<sup>50</sup> By January 1918, national prohibition had officially become part of the constitutional landscape;<sup>51</sup> one year later it became the law of the land.<sup>52</sup>

### C. Ratification of the Twenty-first Amendment and Early Interpretations

The era of national prohibition proved to be short lived. After the election of President Franklin D. Roosevelt, Congress passed and the states ratified the Twenty-first Amendment, and by December 1933 the Amendment became effective.<sup>53</sup> Although Section One of the Amendment has received more widespread acknowledgement due to its repeal of the Eighteenth Amendment,<sup>54</sup> it is the lesser known Section Two that has caused the most uncertainty in the courts.<sup>55</sup>

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character in certain cases”).

49. 242 U.S. 311 (1915). In *Clark Distilling*, the Court upheld the Webb-Kenyon Act against a challenge from a Maryland liquor producer seeking an injunction against enforcement of a West Virginia statute prohibiting the sale of liquor. *Id.*; see Anderson, *supra* note 20, at 10-11 (“Congress has power to prohibit all shipment of alcohol, and that all-encompassing power includes the lesser power to permit some prohibition, by those states that choose to do so,” and thus, through the Webb-Kenyon Act, Congress abrogated the decision in *Rhodes*); see also Foust, *supra* note 14, at 678 (noting that with the holding in *Clark Distilling*, the Webb-Kenyon Act took the transportation and importation of liquor out of the reach of the Commerce Clause).

50. See HAMM, *supra* note 8, at 245-47.

51. See *id.* at 247 (noting the debates and the drafting of the Amendment in Congress and the speed with which the Amendment was ratified by the states: “Drys overcame the wets with superior organization, preparation and generalship . . . ratification ‘came with a speed and an avalanche like irresistibility’ that surprised both wets and drys”). A mere month after the Amendment was sent to the states for ratification, on January 16, 1918, “Nebraska became the thirty-sixth state to ratify.” *Id.*

52. U.S. CONST. amend. XVIII, *repealed by* U.S. CONST. amend. XXI. Under Section One of the Amendment, national prohibition did not become effective until one year following ratification, thus when Nebraska ratified on January 16, 1918, the effective date of the Amendment was not until January 16, 1919. *Id.* § 1.

53. See Foust, *supra* note 14, at 665 (noting that during his campaign for the presidency, Franklin Roosevelt’s platform advocated the repeal of prohibition).

54. U.S. CONST. amend. XXI, § 1, which reads: “The eighteenth article of amendment to the Constitution of the United States is hereby repealed.”

55. U.S. CONST. amend. XXI, § 2, which reads: “The transportation or importation into any State, Territory, or Possession of the United States for

While there has been much debate and some confusion about the meaning and purpose of Section Two,<sup>56</sup> many scholars hold that it was an extension of Webb-Kenyon.<sup>57</sup> Regardless, as the Court pointed out in *Granholt*, “[There exists] strong support for the view that § 2 restored to the States the powers they had under the Wilson and Webb-Kenyon Acts.”<sup>58</sup>

Soon after ratification, as states began to develop mechanisms to regulate liquor, the Supreme Court was called upon to determine the parameters of the states’ authority under the Twenty-first Amendment. One of the first opportunities came in *State Board of Equalization v. Young’s Market Co.*<sup>59</sup> In *Young’s Market*, beer wholesalers challenged the State’s regulation imposing an import fee as violating the Commerce Clause.<sup>60</sup> In upholding the regulation, the unanimous Court acknowledged that prior to the Twenty-first Amendment the law would have been void.<sup>61</sup> However, after citing the text of Section Two of the

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delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.” See also Douglass, *supra* note 10, at 1620 (noting that without Section Two, the Amendment would have returned liquor to its “unfettered status” in the pre-prohibition era).

56. See *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 107 n.10 (1980) (pointing out that the source of some of the confusion is the statements of the framers of the Amendment themselves). The Senate sponsor of the Amendment, Senator Blaine, “said the purpose of § 2 was to restore to the States . . . absolute control in effect over interstate commerce affecting intoxicating liquors . . . . [H]e also made statements . . . that § 2 was designed only to ensure that ‘dry’ States could not be forced by the Federal Government to permit the sale of liquor.” *Id.* (citing 6 Cong. Rec. S4143 (1933) (statement of Sen. Blaine)); see also *Bacchus Imports v. Dias*, 468 U.S. 263, 274-75 (1984) (recognizing the obscure legislative history of Section Two and noting various interpretations apparently espoused by Senator Blaine himself).

57. See Anderson, *supra* note 20, at 13 (“Section Two of the Twenty-first Amendment constitutionalized the Webb-Kenyon Act.”); see also Foust, *supra* note 14, at 678 (citing GERALD GUNTHER & KATHLEEN SULLIVAN, *CONSTITUTIONAL LAW* 346 n.1 (13th ed. 1997)) (noting that the substance of the Webb-Kenyon Act became part of the text of the Twenty-first Amendment).

58. *Granholt*, 125 S. Ct at 1902. See generally Aaron Nielson, *Recent Development: No More ‘Cherry-Picking’: the Real History of the 21st Amendment’s § 2*, 28 HARV. J.L. & PUB. POL’Y 281 (2004) (discussing more in depth the debates in both Congress and the state conventions leading up to the authorization and ratification of the Twenty-first Amendment).

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

60. *Id.* at 60-61.

61. *Id.* at 62. The Court stated:

Prior to the Twenty-first Amendment, it would obviously have been unconstitutional to have imposed any fee for [the] privilege [of importing beer from a sister State]. The imposition would have been void, not because it resulted in discrimination, but because the fee would be a direct burden on interstate commerce.

Amendment, the Court held that the “words used are apt to confer upon the State the power to forbid all importations which do not comply” with the regulation.<sup>62</sup>

The Court was thus espousing, based on the text,<sup>63</sup> a broad view of the effect of the Twenty-first Amendment,<sup>64</sup> and held that it saved the law in question from a Commerce Clause challenge.<sup>65</sup> Two other cases came before the Court with similar challenges and, in both cases, the Court applied *Young’s Market* to uphold state laws on grounds that the Twenty-first Amendment saved the regulations from Equal Protection and Commerce Clause challenges.<sup>66</sup>

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*Id.*

62. *Id.* The Court further described the Amendment as a “broad command” and stated:

The plaintiffs ask us to limit this broad command. They 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.*

63. See Foust, *supra* note 14, at 679-80 (describing the Court’s approach in *Young’s Market* as the textual approach).

64. See also Douglass, *supra* note 10, at 1637-38 (describing the Twenty-first Amendment as creating a “complete Commerce Clause carve out” for states in the regulation of liquor); Ralph Wiser & Richard Arledge, *Does the Repeal Amendment Empower a State to Erect Tariff Barriers and Disregard the Equal Protection Clause in Legislating on Intoxicating Liquors in Interstate Commerce?*, 7 GEO. WASH. L. REV. 402, 403 (1939) (“[T]he decision [in *Young’s Market*] appears broad enough to serve as a guide to state legislatures desiring to enact legislation designed to discriminate against intoxicating liquors produced beyond the borders of the state and to favor home industry in this field.”).

65. See Vijay Shanker, *Alcohol Direct Shipment Laws, the Commerce Clause and the Twenty-First Amendment*, 85 VA. L. REV. 353, 370 (1999) (observing that the *Youngs Market* court construed the Twenty-first Amendment as an exception to the Commerce Clause).

66. See *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938) (upholding, unanimously, a Minnesota law in a suit alleging that the law, barring the importation of liquor containing more than twenty-five percent alcohol, violated the Equal Protection Clause). While the Court acknowledged that the law “clearly discriminates in favor of liquor processed within the State,” it held that based on the decision in *Young’s Market*, the law is settled, and the Twenty-first Amendment allows such regulation. *Id.* at 403; see also *Indianapolis Brewing Co. v. Liquor Control Comm’n.*, 305 U.S. 391 (1939) (upholding an equally discriminatory Michigan law which barred the sale of beer from any state that similarly discriminated against beer manufactured in Michigan).

#### *D. Modern Twenty-First Amendment Jurisprudence*

Following *Young's Market*, it would be reasonable to assume that the Twenty-first Amendment would also save state regulations from other provisions of the Constitution. However, beginning in 1964 with *Department of Revenue v. James B. Beam Distilling Co.*,<sup>67</sup> a case arising from a conflict between the Twenty-first Amendment and the Export-Import Clause,<sup>68</sup> the Court began to harmonize the Twenty-first Amendment with the rest of the Constitution.

The suggestion that the Twenty-first Amendment does not save every law adopted by the states in the regulation of liquor was also at issue in *Wisconsin v. Constantineau*.<sup>69</sup> That case involved a procedural due process challenge to a statute that allowed public notice to forbid the sale of liquor to an individual who "by excessive drinking produce[s] described conditions or exhibits specified traits."<sup>70</sup> The Court struck down the statute as it violated procedural due process and held that it was not saved by the Twenty-first Amendment.<sup>71</sup>

Similarly, in *Craig v. Boren*,<sup>72</sup> male plaintiffs and a liquor vendor sought an injunction against an Oklahoma statute that barred the sale of 3.2 percent beer to males under the age of twenty-two and females under the age of eighteen.<sup>73</sup> Voiding the statute on Equal Protection grounds, the court stated, "The Twenty-first Amendment does not save the invidious gender-based discrimination from invalidation as a denial of equal protection of the laws in violation of the Fourteenth Amendment."<sup>74</sup> The Court has also applied this rule in cases dealing with the First Amendment<sup>75</sup> and the Establishment Clause.<sup>76</sup>

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67. 377 U.S. 341 (1964) (holding that a Kentucky statute which imposed a tax on whiskey imported from Scotland was not valid due to the Export-Import Clause of the Constitution and was not saved by the Twenty-first Amendment). "To sustain the tax . . . would require nothing short of squarely holding that the Twenty-first Amendment has completely repealed the Export-Import Clause so far as intoxicants are concerned. Nothing in the language of the Amendment nor in its history leads to such an extraordinary conclusion." *Id.* at 345-46.

68. *Id.*; see U.S. CONST. art. I, § 10, cl. 2. ("No State shall, without the consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection laws.")

69. 400 U.S. 433 (1971).

70. *Id.* at 434 (internal quotation omitted).

71. *Id.* at 435-36.

72. 429 U.S. 190 (1976).

73. *Id.* at 192.

74. *Id.* at 204-05.

75. See 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (holding that Rhode Island's ban on advertising of liquor pricing which violated the First Amendment is not saved by the Twenty-first Amendment).

## II. THE CONSTITUTIONAL HIERARCHY — THE COMMERCE CLAUSE LEAPS AHEAD OF THE TWENTY-FIRST AMENDMENT

### A. *The Three-Tier System*

Shortly after ratification of the Twenty-first Amendment, states began to create regulatory mechanisms to control the liquor industry. The most common of these schemes,<sup>77</sup> which is still in effect today,<sup>78</sup> is the so-called “three-tier system.” Under this system, alcoholic beverages must pass from a producer to a wholesaler; from a wholesaler to a retailer; and from a retailer to the consumer.<sup>79</sup>

The three-tier system has withstood challenge,<sup>80</sup> and continues to be the key regulatory system among the states.<sup>81</sup> That said, the current direct shipment debate is the toughest challenge to the three-tier system.<sup>82</sup> Still, based on the Court’s recent statements in *Granholm*,<sup>83</sup> the three-tier system has, at a

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76. See *Larkin v. Grendel’s Den, Inc.*, 459 U.S. 116 (1982) (holding that a Massachusetts’ regulation that violated the Establishment Clause is not saved as a valid exercise of the state’s authority under the Twenty-first Amendment).

77. See Shanker, *supra* note 65, at 355-56 (noting that most states adopted the three-tier system after prohibition and that the system sought to end the pre-prohibition arrangement of producers also acting as retailers).

78. See FTC REPORT, *supra* note 1, at 5-6 (noting that most wine today is sold through the three-tier system).

79. See *id.* (explaining how the three-tier system works, the interaction of state and federal regulations within the system, and that its purpose was to collect taxes and keep liquor out of the hands of minors); see also Susan Lorde Martin, *Changing the Law: Update from the Wine War*, 17 J.L. & POL. 63-64 (2001) (noting that the purpose of the system was to ensure that organized crime would be kept out of the liquor business and that the system would promote temperance).

80. See *Healy v. Beer Institute*, 491 U.S. 324 (1989) (holding invalid a Connecticut statute mandating price affirmations); *North Dakota v. United States*, 495 U.S. 423, 466 (1990) (noting that the state regulatory scheme could require liquor to pass through the three-tier system).

81. See FTC REPORT, *supra* note 1, at 5-6.

82. See Transcript of Oral Arguments at 4-6, 14, *Granholm*, 125 S. Ct. 1885 (2005) (Nos. 03-1116, 03-1120, 03-1274) (discussing the three-tier system in light of direct shipment). Throughout the oral arguments the issue was raised by Justices Kennedy, Ginsburg and Stevens as to whether the holding in the case could apply to out of state distributors. See also Shanker, *supra* note 65, at 361-63 (explaining that the interests at stake as being wholesalers, distributors and retailers on one side and small wineries and consumers on the other).

83. See *Granholm*, 125 S. Ct. at 1892 (noting that the Court has held that under the Twenty-first Amendment, states can require liquor to pass through the three-tier system). It appears that in the Court’s decision in *Granholm* the Court went out of its way to affirm the legitimacy of the three-tier system when it stated:

minimum, survived, but more probably, the system has once again received the Court's approval.<sup>84</sup> It is important to note that states have a critical interest in seeing the three-tier system survive. The key interests at stake for the states are preventing minors from obtaining alcohol, maintaining orderly markets to prevent unlawful diversion of alcohol, and raising revenue through taxation.<sup>85</sup>

### *B. The Twenty-First Amendment Versus the Commerce Clause*

As discussed above, the modern Twenty-first Amendment cases brought the Amendment in line with the remainder of the Constitution. As the decisions in *Bacchus Imports Ltd. v. Dias*<sup>86</sup> and *Granholm*<sup>87</sup> illustrate, the Twenty-first Amendment will not save a state regulation that would otherwise violate the discrimination principle of the Commerce Clause.

Beginning in 1964, with the decision in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*,<sup>88</sup> the Court began to chip away at the states' unfettered right to regulate interstate liquor distribution under the Twenty-first Amendment,<sup>89</sup> and began to move away from the *Young's Market* line of cases.<sup>90</sup> In *Hostetter*, a liquor

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The States argue that any decision invalidating their direct-shipment laws would call into question the constitutionality of the three-tier system. This does not follow from our holding. "The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system". . . . We have previously recognized that the three-tier system itself is 'unquestionably legitimate.'

*Id.* at 1905-06 (citations omitted).

84. *Id.*; see also Press Release, Statement of David K. Rehr, President of the National Beer Wholesalers Association (May, 2005), available at [http://www.nbwa.org/public/news\\_room/press\\_releases/pr\\_05\\_16\\_05.aspx](http://www.nbwa.org/public/news_room/press_releases/pr_05_16_05.aspx); Press Release, Wine & Spirits Wholesalers of America, Inc., Supreme Court Upholds States' Broad Authority to Regulate Alcohol (May 16, 2005), available at <http://www.wswa.org/public/media/20050516.html> (highlighting the *Granholm* decision as an affirmation that the three-tier system is legitimate).

85. See Anderson, *supra* note 20, at 37-38 (explaining that the key interests for the states are closely related to the central concern of § 2 of the Twenty-first Amendment).

86. *Bacchus*, 468 U.S. 263 (1984).

87. *Granholm*, 125 S. Ct. 1885.

88. 377 U.S. 324 (1964).

89. See also Shanker, *supra* note 65, at 372 (explaining that *Young's Market* was the dominant theory of how the Twenty-first Amendment was to be interpreted for over twenty years and that *Hostetter* was the "key case" indicating the there may be some limits to the States' power to regulate intoxicating liquor).

90. See Anderson, *supra* note 20, at 14-15 (noting the Court's move away from the "sweeping dictum" in the case of *Indianapolis Brewing Co. v. Liquor Control Commission*, 305 U.S. 391 (1939), which followed the decision in *Young's Market*). In *Indianapolis Brewing*, an Indiana brewer brought suit

dealer operating at an international airport sold liquor to departing international travelers for delivery at their foreign destination.<sup>91</sup> After being notified by the state liquor authority that its operations were illegal, the dealer sought an injunction against enforcement.<sup>92</sup>

The issue before the Court was “whether the Twenty-first Amendment so far obliterates the Commerce Clause”<sup>93</sup> as to allow New York to bar that which was regulated by a federal agency acting under expressed federal law.<sup>94</sup> The Court rejected the view that the Twenty-first Amendment acted in such a fashion and described this approach as an “absurd oversimplification” of the Amendment.<sup>95</sup> The Court also said that “if the Commerce Clause had been *pro tanto* ‘repealed’ . . . Congress would [have] no regulatory power over interstate or foreign commerce in intoxicating liquor.”<sup>96</sup> The Court described this conclusion as “patently bizarre” and “demonstrably incorrect.”<sup>97</sup> Instead, the Court proposed that both the Twenty-first Amendment and the Commerce Clause “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>98</sup>

The Court relied upon this framework<sup>99</sup> sixteen years later in

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seeking to enjoin enforcement of a Michigan statute which prohibited Michigan vendors from selling products of any state, Indiana being one of them, which it deemed discriminating against Michigan products. *Indianapolis Brewing*, 305 U.S. at 392. In upholding the statute, the Court stated, “For whatever its character, the law is valid. Since the Twenty-first Amendment, as held in [*Young’s Market*], the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the Commerce Clause . . . .” *Id.* at 394; *see also* *Wiser & Arledge*, *supra* note 64, at 409 (stating that, following the decision in *Young’s Market*, “It is now not without the realm of possibility that we may see one state sending ambassadors into other states seeking to barter trade treaties in respect to intoxicating liquor”).

91. *Hostetter*, 377 U.S. at 324-25.

92. *Id.* at 327.

93. *Id.* at 329.

94. *Id.*

95. *Id.* at 331-32.

96. *Id.* at 332.

97. *Id.*; *see also* Denning, *supra* note 14, at 318 (noting that the way in which Justice Stewart framed the issue — (i) by discussing it not as an issue of importation but as through-shipment, (ii) applying preemption doctrine, and (iii) through the involvement of a federal agency, treating the airport as analogous to a federal enclave — enabled him to avoid following *Young’s Market*).

98. *Hostetter*, 377 U.S. at 332; *see also* Douglass, *supra* note 10, at 1638 (noting that the *Hostetter* decision was the first indication from the Court that the Commerce Clause could effectively be used to challenge state regulation of liquor).

99. *See* Russ Miller, *The Wine is in the Mail: The Twenty-first Amendment and State Laws Against the Direct Shipment of Alcoholic Beverages*, 54 VAND.

*California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*<sup>100</sup>

In that case, the Court struck down a California statute as violating the Sherman Act, and the Court held that the Twenty-first Amendment did not save the statute.<sup>101</sup> The Court relied upon the framework four years later in *Capital Cities Cable, Inc. v. Crisp*<sup>102</sup> when the court framed the issue as whether the interests behind the state regulation are “so closely related to the powers reserved by the Twenty-first Amendment” that they are allowed to trump “express federal policies.”<sup>103</sup> The unanimous Court struck down the Oklahoma regulation holding that federal law preempted the state regulation.<sup>104</sup>

While neither *Midcal* nor *Capital Cities* dealt directly with

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L. REV. 2495, 2523-24 (2001) (suggesting that while the Court has not established a bright line test, there is a framework following *Midcal*, *Capital Cities*, and *Bacchus* which helps analyze Twenty-first Amendment jurisprudence). This framework was also used by Garlough, *supra* note 24, at 1549, which was described as a “two-pronged test.”

100. 445 U.S. 97 (1980). In this case, a wine wholesaler sought an injunction against enforcement of a California wine pricing statute, claiming that it violated the Sherman Act. *Id.* at 100. The wholesaler was successful in the State courts and an appeal was brought, not by the State, but by the California Retail Liquor Dealers Association, an intervener. *Id.* at 101-02. The Association argued that even if the statute “is not protected state action, the Twenty-first Amendment bars application of the Sherman Act.” *Id.* at 106. The Court disagreed, and struck down the statute, holding that the Twenty-first Amendment “provides no shelter for the violation of the Sherman Act.” *Id.* at 114. More importantly for the discussion here, the Court relied upon Justice Stewart’s opinion in *Hostetter*, describing it as a “pragmatic effort to harmonize state and federal powers.” *Id.* at 109. The Court went on to say that, “[a]lthough States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a ‘concrete case.’” *Id.* at 110.

101. *Id.* at 114.

102. 467 U.S. 691 (1984). In this case, a group of cable television operators brought suit seeking an injunction against enforcement of an Oklahoma statute, which required the operators to delete advertisements for alcoholic beverages in the retransmission of out-of-state signals. *Id.* at 694-96. The conflict presented here was between a state statute and a federal policy expressed by the Federal Communications Commission (FCC), which required cable operators to retransmit signals located in neighboring states. *Id.* at 712. In a unanimous opinion for the Court, Justice Brennan described the ban as a “modest” and “selective approach,” and explained that the ban in question was not a complete advertising ban and was only directed at “wine commercials that occasionally appear in out-of-state signals.” *Id.* at 715. In striking down the statute, the Court used a balancing test and held that when “the State’s central power under the Twenty-first Amendment of regulating the times, places, and manner under which liquor may be imported and sold is not directly implicated” the balance favors the federal law. *Id.* at 716.

103. *Id.* at 714.

104. *Id.* at 716.

Commerce Clause challenges, they relied upon and solidified Justice Stewart's holding in *Hostetter*.<sup>105</sup> These three cases — *Hostetter*, *Midcal*, and *Capital Cities* — together, stand for the proposition that when there are conflicting state and federal regulations regarding regulation of intoxicating liquor, each must be looked at and harmonized in light of each other.<sup>106</sup>

In the same month that it ruled in *Capital Cities*, the Court again relied upon *Hostetter*, this time in a Commerce Clause challenge, in the seminal case of *Bacchus*.<sup>107</sup> Here, several liquor wholesalers challenged a Hawaii excise tax on liquor, specifically the provision in that statute that exempted certain domestically produced liquor from the twenty percent tax.<sup>108</sup> Basing its holding primarily on the three decisions discussed immediately above, the Court struck down the tax and analyzed the case through a two-step process.<sup>109</sup> First, the Court sought to determine if the challenged act did in fact discriminate against interstate commerce.<sup>110</sup> If it did, the second step called on the Court to decide whether the act, which would otherwise offend the Commerce Clause, could be saved by the Twenty-first Amendment.<sup>111</sup>

As to step one, the Court began its discussion by pointing out the basic rule under Commerce Clause jurisprudence<sup>112</sup> that a state may not “impose a tax which discriminates against interstate commerce . . . by providing a direct commercial advantage to local business.”<sup>113</sup> The Court went on to point out it was undisputed that the purpose of the act here was to favor local industry,<sup>114</sup> which the Court described as “economic protectionism.”<sup>115</sup> The Court thus held that the tax exemption did in fact violate the Commerce Clause as it discriminated in favor of domestic industry.<sup>116</sup>

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105. *Hostetter*, 377 U.S. at 332.

106. *Capital Cities*, 467 U.S. at 714.

107. 468 U.S. 263.

108. *Id.* at 265. The plaintiffs also brought challenges based upon the Equal Protection Clause and the Export-Import Clause. *Id.* at 276 n.11. The Court however did not address these claims due to its disposition of the Commerce Clause. *Id.*

109. See Garlough, *supra* note 24, at 1549 (discussing the two-pronged test used by the Supreme Court since its decision in *Hostetter*); see also *supra* note 99.

110. *Id.*

111. *Id.*

112. The Court described the federal interest behind the Commerce Clause as “preventing economic Balkanization.” *Bacchus*, 468 U.S. at 276.

113. *Id.* at 268 (citing *Boston Stock Exchange v. State Tax Comm’n*, 429 U.S. 318, 329 (1977)).

114. *Bacchus*, 468 U.S. at 271.

115. *Id.* at 272.

116. *Id.* at 273. The Court held that while one or the other would have been

As to the second step, determining whether the Twenty-first Amendment saves the challenged act, the Court rejected the State's argument<sup>117</sup> and held that the Amendment did not save the tax.<sup>118</sup> The Court stated that, "[t]he central purpose of the [Twenty-first Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition."<sup>119</sup> Taking it one step further, the Court went on to say that "[s]tate laws that constitute *mere economic protectionism* are therefore not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor."<sup>120</sup>

Along similar lines, in *Granholm*,<sup>121</sup> the Court recently returned to the issue of state regulation of intoxicating liquor and the conflict between the Twenty-first Amendment and the Commerce Clause. *Granholm* is a consolidation of two similar cases, one from the Sixth Circuit<sup>122</sup> and one from the Second Circuit,<sup>123</sup> the holdings of which are in direct conflict. Four other United States Courts of Appeals decided similar direct-shipment

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sufficient to violate the Commerce Clause, the act in question "had both the purpose and effect of discriminating in favor of local products." *Id.* (emphasis added).

117. The Court took notice of the fact that the State did not use the Twenty-first Amendment in the State courts below. *Id.* at 274 n.12. In fact, "the State expressly disclaimed any reliance upon [it] in the court below and did not cite it in its motion to dismiss or affirm." *Id.*

118. *Id.* at 275-76.

119. *Id.* at 276.

120. *Id.* (emphasis added). The Court further noted that the State solely defended the tax on the claim that it promoted local industry and made no attempt to defend it on the basis that it would promote temperance "or any other purpose of the Twenty-first Amendment." *Id.*; see also Shanker, *supra* note 65, at 373-74 (noting that the reasoning of *Bacchus* and *Capital Cities* was also relied on by the Court in two other decisions: *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986), and *Healy*, 491 U.S. 324 (1989), to invalidate price affirmation statutes which required out-of-state liquor dealers to post their pricing and affirm that the prices in the state were no higher than those in others states).

121. 125 S. Ct. 1885.

122. *Heald v. Engler*, 342 F.3d 517 (6th Cir. 2003). This case was an appeal from the district court which the plaintiffs, Michigan consumers and an out-of-state winery, brought against the State of Michigan arguing that the State's liquor laws violated the Commerce Clause. *Id.* at 519. On cross-motions for summary judgment, the district court upheld the regulation and granted summary judgment for the defendants. *Id.* at 520. The Court of Appeals for the Sixth Circuit reversed and struck down the regulation as violating the Commerce Clause. *Id.* at 527-28.

123. *Swedenburg v. Kelly*, 358 F.3d 223 (2d Cir. 2004). This was an appeal by the defendant, State of New York, from a decision granting summary judgment in favor of the plaintiffs, New York consumers and two out-of-state wineries. *Id.* at 229-30. The Court of Appeals for the Second Circuit reversed and held that the regulation was valid under the Twenty-first Amendment. *Id.* at 239.

cases, among them the Fourth,<sup>124</sup> Fifth,<sup>125</sup> Seventh,<sup>126</sup> and Eleventh<sup>127</sup> Circuits. Only the Second and Seventh Circuits have upheld a ban on the direct-shipment of wine in the face of a Commerce Clause challenge.<sup>128</sup>

It is clear from the outset of the Court's opinion in *Granholm* that neither Michigan, nor New York's regulation would withstand the Court's scrutiny.<sup>129</sup> The Court began its discussion by reviewing the current landscape of direct-shipment laws among the states,<sup>130</sup> as well as the economic impact<sup>131</sup> of direct-shipments of wine.<sup>132</sup> The Court took note of the current trends in the wine

124. *Beskind v. Easley*, 325 F.3d 506 (4th Cir. 2003).

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

126. *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (7th Cir. 2000).

127. *Bainbridge v. Turner*, 311 F.3d 1104 (11th Cir. 2002).

128. For an in-depth review of the separate federal district and circuit court decisions, see generally Anderson, *supra* note 20, at 21-30, Martin, *supra* note 79, at 66-81, and Garlough, *supra* note 24, at 1550-57.

129. *Granholm*, 125 S. Ct. at 1892. In the opening paragraph of a rather lengthy opinion, prior to any introduction of the parties or discussion of the issues, Justice Kennedy stated, "It is evident that the object and design of the Michigan and New York statutes is to grant in-state wineries a competitive advantage over wineries located beyond the State's borders." *Id.*

130. *Id.* at 1892-93; see also FTC REPORT, *supra* note 1, at 3-4 (discussing state bans on interstate direct shipping); WINE INSTITUTE, *supra* note 2 (discussing general state regulations on wine).

131. *Granholm*, 125 S. Ct. at 1893. Justice Kennedy quoted the FTC Report, stating that, "[s]tate bans on interstate direct shipping represent the single largest regulatory barrier to expanded e-commerce in wine." *Id.* (quoting FTC REPORT, *supra* note 1, at 3).

132. As an example of the current landscape, the opinion discusses the situation of one of the plaintiffs in the Michigan case, *Domaine Alfred*. *Id.* *Domaine Alfred* is a small California winery with annual production of three thousand cases. *Id.* The Court states that the winery cannot fulfill its orders from Michigan due to the ban on direct shipment and that the "wholesaler's markup would render shipment through the three-tier system economically infeasible." *Id.* The emphasis here appears to be misplaced. Reading only the Court's opinion, one might be left with the impression that the success or failure of *Domaine Alfred* depended solely on its tight profit margins. Such may not entirely be the case. A cursory view of the winery's website, <http://www.domainealfred.com/purchase.html>, shows that the price for a regular size bottle (750 ML) is between eighteen and ninety dollars, with a minimum order of six bottles required per shipment. It is also worth noting that the owner of *Domaine Alfred*, "made close to a gazillion dollars" before retiring from work in the Silicon Valley. Anne Schamberg, *Grape 'Farmer' Learning Craft from the Ground Up*, MILWAUKEE JOURNAL SENTINEL – JSONLINE, Jan. 17, 2004, <http://www.jsonline.com/entree/coll/jan04/200140.asp> (last visited Oct. 30, 2005). Finally, this author's family has been in the wholesale wine and beer business in Illinois for over one hundred and fifteen years and currently represents at least ten American wineries with production at or lower than three thousand cases; for a list, see Louis Glunz Wines, Inc., *Our Wines*, <http://www.louisglunzwines.com/page3.html> (last visited Jan. 10, 2006).

industry, which has experienced a consolidation in the wholesale business and a dramatic expansion in wineries.<sup>133</sup> The Court then explained that the issue before it was whether the states' regulations, which prohibited out-of-state wineries from shipping directly to consumers but allowed in-state wineries to do so, "violates the dormant Commerce Clause in light of § 2 of the Twenty-first Amendment."<sup>134</sup>

Using the analytical framework it utilized in *Bacchus*, the Court first determined whether the regulations in question violated the Commerce Clause. Explaining the nondiscrimination principle in traditional Commerce Clause jurisprudence, the Court stated that, state regulations "violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state economic interests' . . . . This rule is essential to the foundations of the Union . . . the mere fact of nonresidence should not foreclose a producer in one State from access to markets in other States."<sup>135</sup>

In determining whether the regulations discriminated against out-of-state interests, the Court first looked at the Michigan statute and stated that "the discriminatory character of the Michigan system is obvious."<sup>136</sup> The Court noted that the regulation required only out-of-state products to pass through the three-tier system, while in-state wineries could ship directly to consumers.<sup>137</sup> The Court held this to be unlawful differential treatment.<sup>138</sup>

The challenged New York regulation, on the other hand, did not completely prohibit the direct shipment of wine to consumers.<sup>139</sup> Instead, New York required that for out-of-state producers to ship directly, they must first establish a physical presence within the state.<sup>140</sup> This physical presence requirement,<sup>141</sup>

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133. *Granholt*, 125 S. Ct at 1895.

134. *Id.* In framing the issue, the Court directly used the framework in Justice Stewart's holding in *Hostetter*, that each be considered in light of the other. *Id.* at 487.

135. *Id.* at 1895 (citing *Oregon Waste System, Inc. v. Department of Environmental Quality of Ore.*, 511 U.S. 93, 99 (1994), and *H.P. Hood & Sons, Inc. v. Du Mond.*, 336 U.S. 525, 539 (1949)).

136. *Granholt*, 125 S. Ct. at 1896.

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* The Court describes this scheme as another way of forcing out-of-state producers into the three-tier system. *Id.* The Court also noted that while this option was available for out-of-state producers to establish a presence in the state in order to ship directly, "there is some confusion of the precise steps . . . in part because no winery has run the State's regulatory gauntlet." *Id.*

141. It is worth mentioning that in *Swedenburg*, the Second Circuit noted that a physical presence requirement was problematic, but nevertheless

the Court held, is "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>142</sup> The Court also held that the preferential terms of the licenses given to in-state wineries<sup>143</sup> under the New York statute discriminated against interstate commerce.<sup>144</sup>

The Court turned to the states' contention that their laws were saved by Section Two of the Twenty-first Amendment. In its discussion, the Court first outlined the history of the regulation of intoxicating liquor, much of which has been explained in Part I above, including the Wilson<sup>145</sup> and Webb-Kenyon Acts.<sup>146</sup> The Court then looked at the modern Section Two decisions, placing them into three categories: first, those where the Court held that state laws violated another portion of the Constitution and were not saved by Section Two;<sup>147</sup> second, those that "held that [Section Two] does not abrogate Congress' Commerce Clause powers;"<sup>148</sup> and finally, those that "held that state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause."<sup>149</sup> Refusing to overturn *Bacchus*,<sup>150</sup> the Court held that Section Two does not save the New York and Michigan statutes and stated, "State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same

upheld the regulation. 358 F.3d at 238.

142. *Granholm*, 125 S. Ct. at 1897 (citing *Halliburton Oil Well Cementing Co. v. Reily*, 737 U.S. 64, 72 (1963)).

143. *Id.* at 1897.

144. *Id.*

145. *Id.* at 1898-99. In its discussion on The Wilson Act, the Court stated that, "By its own terms, the Wilson Act did not allow States to discriminate against out-of-state liquor." *Id.* at 1899. The Court went on, quoting its prior decision in *Scott v. Donald*, 165 U.S. 58 (1897), and stated "the Wilson Act was 'not intended to confer upon any State the power to discriminate . . . ' the Wilson act mandated 'equality or uniformity of treatment under state laws.'" *Id.* The Court finally mentioned that the Wilson Act "remains in effect today." *Id.* at 1901.

146. The Court also explained that contrary to Michigan and New York's suggestion, Webb-Kenyon did not withdraw the Wilson Act's bar on discrimination and did not "repeal the Wilson Act, which expressly precludes States from discriminating." *Id.*

147. *Id.* at 1903, citing the decisions in this category: 44 *Liquormart*, 517 U.S. 484; *Larkin*, 459 U.S. 116; *Craig*, 429 U.S. 190; *Constantineau*, 400 U.S. 433; and, *Dep't. of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964).

148. *Id.* at 1903-04. Here the Court examined *Capital Cities*, *Midcal*, and *Hostetter*.

149. *See id.* at 1904 (discussing in depth, the holding in *Bacchus*).

150. *See id.* (mentioning that the States propose overturning or limiting *Bacchus* and retorting, "we decline their invitation").

as its domestic equivalent.”<sup>151</sup>

In striking the final blow to the States’ regulations, the *Granholm* Court, in essence, applied a strict scrutiny test under traditional Commerce Clause jurisprudence.<sup>152</sup> After holding that the regulations violated the nondiscrimination principle of the Commerce Clause and determining that they are not saved by Section Two, the Court stated that it must still determine whether the legislation “advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.”<sup>153</sup> The States’ justification for restricting out-of-state shipments from wineries was that the regulations would keep alcohol away from minors as well as provide a vehicle for efficient tax collection.<sup>154</sup> The Court, in striking down both statutes,<sup>155</sup> held that these arguments “have not satisfied this exacting standard.”<sup>156</sup>

### C. *Reciprocal States*

Currently, only seven states are considered reciprocal states in terms of their direct-shipment laws.<sup>157</sup> While some may believe that *Granholm* will have little effect on these laws, they should be aware of the strong dictum in Justice Kennedy’s opinion for the Court, and this is especially true for state legislatures that must rewrite their liquor laws.<sup>158</sup>

In laying out the Court’s Commerce Clause jurisprudence, Kennedy points out that “states should not be compelled to negotiate with each other regarding favored or disfavored status . . . . States do not need, and may not attempt, to negotiate with other States regarding their mutual economic interests.”<sup>159</sup> Justice Kennedy went further to add that the “perceived necessity for reciprocal sale privileges risks generating the trade rivalries and animosities . . . that the Constitution and, in particular, the

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151. *Id.* at 1905.

152. *Id.*

153. *Id.*

154. *Id.*

155. The Court affirmed the decision of the Sixth Circuit and reversed and remanded the decision of the Second Circuit. *Id.* at 1907.

156. *Id.*

157. See WINE INSTITUTE, *supra* note 2 (follow “State Shipping Laws” hyperlink) (indicating that Illinois, Iowa, Missouri, New Mexico, Oregon, West Virginia, and Wisconsin are reciprocal States).

158. The State of California changed its law following the decision in *Granholm*. The California Legislature passed S.B. 118. Governor Arnold Schwarzenegger signed it into law on August 31, 2005, and it became effective January 1, 2006. California now requires direct shippers to have a license, pay taxes, and verify proper age in order to ship into the State. Cal. S.B. 118, 2005 Reg. Sess. (Deering 2005).

159. *Granholm*, 125 S. Ct. at 1895.

Commerce Clause were designed to avoid.<sup>160</sup> Finally, it should be noted that the final test the Court applied in striking down the laws in *Granholm*, as explained above, came directly from *New Energy Company of Indiana v. Limbach*,<sup>161</sup> where the unanimous Court declared an Ohio reciprocity law unconstitutional.<sup>162</sup>

#### D. New York and Michigan Legislative Revisions

As *Granholm* makes clear, if a state allows the direct shipment of wine, it may not discriminate between in-state and out-of-state producers.<sup>163</sup> According to the Court, states are free to decide whether or not to prohibit direct shipment altogether, but in-state and out-of-state interests must be treated the same.<sup>164</sup> In the last year, both New York and Michigan amended their laws to comply with the Court's holding.

In New York, the legislature passed a bill<sup>165</sup> which Governor George Pataki signed into law that allows for the direct shipment of wine to consumers.<sup>166</sup> New York is now a reciprocal State and its residents can receive wine shipped from a state that affords New York wineries the same privilege.<sup>167</sup> More importantly for New York wineries,<sup>168</sup> the new law makes it possible for them to ship to other reciprocal states as well as those states with no ban at all.<sup>169</sup>

160. *Id.* at 1896.

161. 486 U.S. 269 (1988). In this case an energy company based in Indiana sought an injunction to bar enforcement of an Ohio statute which granted a tax credit for ethanol, but only if the ethanol was either produced within Ohio or in a state which granted Ohio produced ethanol the same advantage. *Id.* at 272. The Court declared the Ohio law unconstitutional under dormant Commerce Clause jurisprudence. *Id.* at 273-74.

162. *Id.* at 280.

163. *Granholm*, 125 S. Ct at 1907.

164. *Id.*

165. N.Y.S.B. 5731, 2005 Reg. Sess. (McKinney 2005). It is worth noting that the original sponsor of the legislation, State Senator George Winner, represents the Finger Lakes region in New York, which is one of the largest wine producing areas in New York.

166. N.Y. ALCO. BEV. CONT. LAW § 79-c to -d (McKinney 2006).

167. § 79-c(1).

168. See W. Blake Gray, *High court lets wine flow more freely; The Winners: Small wineries are 'popping corks and celebrating'*, SAN FRANCISCO CHRONICLE, May 17, 2005, at A1 (noting that New York has over two hundred wineries and that an attempt to ban all direct shipment of wine would, politically speaking, be difficult).

169. See Press Release, Office of Governor George Pataki, Governor, Senate Majority Leader, Speaker Announce Agreement on Legislation to Bolster New York's Wine Industry (June 24, 2005), available at <http://72.14.203.104/search?q=cache:eim8gg8mDgJ:www.state.ny.us/governor> (noting that the wine industry in New York is one of the fastest growing segments of agriculture in the state and that the new legislation will "open[] the doors to

In Michigan, Governor Jennifer Granholm signed legislation which also allows for the direct shipment of wine to consumers.<sup>170</sup> Governor Granholm described the legislation as a way to comply with the Court's decision in *Granholm* and protect jobs in the State.<sup>171</sup>

### III. LIFE AFTER *GRANHOLM* — POTENTIAL SOLUTIONS FOR STATES

While only the laws of New York and Michigan were struck down in *Granholm*, six other states have laws similar to those in question.<sup>172</sup> In *Granholm*, the states claimed that striking down these laws would remove the states' ability to tax,<sup>173</sup> and increase the risk of minors making underage purchases.<sup>174</sup> As noted above, both of the arguments were rejected by the Court.<sup>175</sup> That said, any proposed legislation must protect state interests in protecting minors and generating revenue. This section will propose the major tenants that must be included in new direct-shipment laws for states that are now forced to rewrite their laws, highlighting the recently enacted legislation in New York<sup>176</sup> and Michigan.<sup>177</sup>

#### A. *Licensing, Reporting, and Taxation*

Any direct-shipment legislation must include a requirement for both in-state and out-of-state shippers to apply for and receive a renewable license in order to ship wine directly to consumers.

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new markets across the nation that were previously closed" to New York wineries).

170. MICH. COMP. LAWS ANN. § 436.1203 (West 2006).

171. See Press Release, Office of Governor George Pataki, Governor Granholm Signs Wine Shipment Legislation, Supports Michigan's Wine Industry (December 15, 2005), available at [http://www.michigan.gov/gov/0,1607,7-168-23442\\_21974-132248—M\\_2005\\_12,00.html](http://www.michigan.gov/gov/0,1607,7-168-23442_21974-132248—M_2005_12,00.html) ("This legislation represents a compromise that will comply with the Supreme Court and, more importantly, protect our local economies.").

172. See Linda Greenhouse, *Court Lifts Ban on Wine Shipping*, N.Y. TIMES, May 16, 2005, at A1 (noting that Connecticut, Massachusetts, Florida, Ohio, Indiana and Vermont have laws similar to New York and Michigan which bar direct shipments from out-of-state but allow them for wineries in-state).

173. *Granholm*, 125 S. Ct. at 1906. Justice Kennedy, in the opinion for the Court, stated that while the taxation argument was not "wholly illusory," its purpose could be fulfilled by nondiscriminatory means. *Id.*

174. *Id.* at 1905.

175. *Id.* at 1905-06. Justice Kennedy pointed out that the States provided "little evidence" that underage purchases were at all a problem. *Id.* In fact, citing the FTC REPORT, *supra* note 1, the Court stated that "the staff of the FTC found that the 26 States currently allowing direct shipments report no problems with minors' increased access to wine." *Id.* Justice Kennedy also noted that even if the Court accepted the States' arguments, "this would not justify regulations limiting *only* out-of-state direct shipments." *Id.* at 1905-06.

176. N.Y. ALCO. BEV. CONT. LAW § 79-c-d (McKinney 2006).

177. MICH. COMP. LAWS ANN. § 436.1203 (West 2006).

Licensing helps ensure compliance with that state's laws by providing states with a vehicle to track who is selling wine into and within the state. Both New York and Michigan now require in-state and out-of-state wineries to apply for and receive a "direct shippers" license.<sup>178</sup>

Along with license applications, states often require so-called application fees, and the direct shipper's license should be no exception. That said, state's need to be mindful of the fact that if they exact exorbitant fees, small producers will be less likely to ship into that state for small orders as the costs can quickly become prohibitive, especially for small producers operating on tight margins. Finally, while a state may require separate licenses for in-state and out-of-state shippers, the key following *Granholtm* is to ensure that both licenses treat the wineries the same regardless of whether they are in-state or out-of-state shippers.<sup>179</sup>

Along with licensing, states should also require wineries to file reports with a liquor control agency within that state. The reports should include information about individual purchasers in the state, quantities shipped per shipment, and total quantities shipped into or within that state. This information will assist both as an audit mechanism and in enforcement of any restrictions as to quantities allowed. New York currently requires licensees to report on a semi-annual basis,<sup>180</sup> while Michigan requires quarterly reporting as to individual shipments made and total quantities shipped.<sup>181</sup> Again, keeping in mind that many of these wineries are small businesses, overly burdensome reporting may also stifle growth and therefore states should consider streamlining the process by utilizing new technology and web-based reporting.

The reporting requirements are essential for the next suggestion: requiring the wineries to pay taxes. Any direct-shipment law must require shippers to pay all applicable state or local taxes. As state and local governments struggle with tighter

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178. See N.Y. ALCO. BEV. CONT. LAW § 79-c(2), (6). (requiring wineries to submit an application for the license which, if granted, must be renewed by the winery annually); see also MICH. COMP. LAWS ANN. § 436.1203(3)(a), (9)(a) and (b), and (10) (requiring that winery shippers hold a license).

179. New York, for example, has separate licenses for in-state shippers and out of state, but the requirements are essentially the same. Compare N.Y. ALCO. BEV. CONT. LAW § 79-c (explaining requirements for direct shippers outside of New York), with § 79-d (explaining requirements for direct shippers in New York).

180. N.Y. ALCO. BEV. CONT. LAW § 79-c(3)(c). The law requires the licensee to report the name, address, and quantities shipped to each purchaser for that period. *Id.*

181. MICH. COMP. LAWS ANN. § 436.1203(3)(i).

budgets, any loss of tax revenue will be felt if consumers shift from buying wine at the local retailer to shopping on the internet. Therefore, it is essential that states require any direct shipper to pay taxes, and to do so as if the transaction occurred at the place of delivery. Both New York<sup>182</sup> and Michigan<sup>183</sup> currently require shippers to pay taxes to the State. It is also important to note that collecting taxes from out-of-state businesses is not new for states.<sup>184</sup>

While these requirements may seem cumbersome, wineries already are required to report much of this information to their home state regulatory agencies. Also, with the use of technology and the ability to file reports electronically, meeting these requirements can easily become routine.<sup>185</sup> That said, lawmakers should be cognizant of the fact that many of these producers and shippers are small operations and requirements that are overly burdensome may prohibit some wineries from shipping into or within states, or stifle their growth.

### *B. Sales to Minors*

Prohibiting alcohol from getting into the hands of minors has long been a centerpiece in the direct-shipment debate. With that in mind, one of the primary goals of any direct-shipment law should be to limit the availability of alcohol to minors. While there are a number of ways to address concerns about illegal sales to minors, the essential components must include: first, requiring a purchaser to represent his or her age at the time of purchase; second, supplementing that representation with physical verification upon delivery; and third, requiring that the delivery package be labeled as containing alcohol and stating that proof of age is required upon receipt.

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182. N.Y. ALCO. BEV. CONT. LAW § 79-c(3)(f). The law states that “the amount of such taxes to be determined on the basis that each sale in this state was at the location where delivery is made.” *Id.*

183. MICH. COMP. LAWS ANN. § 436.1203(3)(i). Earlier legislation in Michigan also required the placing of tax stamps on the outside of the shipping containers, that requirement was stricken from the final legislation. *Id.* at 3(f).

184. See Martin, *supra* note 79, at 94-97 (noting that while collecting taxes on direct shipments of wine can pose challenges for States, they are not new and not specific to wine). Martin further notes that the challenge here is the same as that for all internet sales, as well as catalogues and the mail-order business in general. *Id.*

185. It is worth noting that, as Justice Kennedy mentioned in *Granholm*, Michigan currently collects taxes directly from out-of-state wineries for all wine shipped into the State to wholesalers. *Granholm*, 125 S. Ct. at 1906. Justice Kennedy went on to state that “[i]f licensing and self-reporting provide adequate safeguards for wine distributed through the three-tier system, there is no reason to believe they will not suffice for direct shipments.” *Id.*

As to the first component, consumers should be required to verify their age at the time of purchase using an age verification service or agreeing to a statement that they represent they are of proper age. New York law mandates that the direct shipper require each purchaser to "represent that they are at least twenty-one years of age,"<sup>186</sup> while Michigan requires that the winery either verifies the age of the purchaser by obtaining a copy of their photo identification or utilizes an "identification verification service."<sup>187</sup>

As to the second component, verification upon delivery, whether the responsibility is on the winery or the common carrier, there must be a requirement for proof of age upon delivery. In cases of failure to provide proof, there must be a mandate that the shipment be returned. This second step is a necessary physical check to ensure that alcoholic beverages are ordered by and delivered only to adults. New York places the responsibility on the licensee to require the common carrier to obtain the recipient's proof of age,<sup>188</sup> and refuse delivery if the recipient appears underage or refuses to provide identification.<sup>189</sup> However, Michigan places the responsibility on the common carrier to verify age.<sup>190</sup>

Third, as to labeling, direct-shipment laws must require that a label be affixed to the outside of the delivery package stating that it contains alcohol and that proof of age is required upon delivery. This labeling makes it clear to both the person delivering the package and the person receiving it that the contents in the package are alcohol and proof of age is required. Both New York<sup>191</sup> and Michigan<sup>192</sup> require labeling as part of their direct-shipment law.

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186. N.Y. ALCO. BEV. CONT. LAW § 79-c(3)(d).

187. MICH. COMP. LAWS ANN. § 436.1203(3)(d). The Michigan legislation also requires that the order form used by the direct shipper be approved by the State liquor commission and contain the name, address, date of birth and telephone number of the person placing the order. A duplicate of this form must then be provided to the State. *Id.*

188. N.Y. ALCO. BEV. CONT. LAW § 79-c(3)(e)(i).

189. § 79-c(3)(e)(iii).

190. MICH. COMP. LAWS ANN. § 436.1203(5). If the common carrier determines that the person receiving delivery is not of age, the Michigan law requires the delivery person to return the liquor to the shipper. *Id.* To that end, if the shipment is in fact returned to the shipper due to the inability to verify age, the law holds the delivery person harmless for damages suffered by the purchaser or shipper. *Id.*

191. *See* N.Y. ALCO. BEV. CONT. LAW § 79-c(3)(b). The labeling requirement in New York also requires that the label read "NOT FOR RESALE." *Id.*

192. *See* MICH. COMP. LAWS ANN. § 436.1203(2)(f), (3)(f) (requiring a label that indicating the package contains alcohol).

### C. *Additional Key Components*

In addition to taxation and ensuring that minors are not allowed to purchase wine through direct shipment, there are additional features that direct-shipment legislation must include.

#### 1. *Jurisdiction*

In order to ensure enforcement of state statutes, it is critical to include a jurisdictional statement in any direct-shipment legislation. This requirement can be part of the license application and provide that any out-of-state licensee submits to the jurisdiction of that state in order to receive a license. This requirement makes it easier for the state to bring an out-of-state party before the courts and administrative agencies of that state.<sup>193</sup> New York and Michigan's regulatory schemes each require that the direct-shipper licensee submit to the jurisdiction of that State.<sup>194</sup>

#### 2. *Limits on Quantities Shipped*

States must establish limits on quantities allowed for shipment by direct shippers. By limiting the quantities, states are better able to control the amount of alcohol within their borders, enhance enforcement, and collect tax revenue.

Michigan limits a winery's shipment to no more than 1,500 nine-liter cases of wine into Michigan annually.<sup>195</sup> New York, however, limits a producer's shipment to no more than thirty-six nine-liter cases of wine per year to a resident of the State.<sup>196</sup>

The National Conference of State Legislatures, Task Force on the Wine Industry, adopted a model direct-shipment bill which sets the limit at twenty-four bottles, or two cases per month.<sup>197</sup>

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193. Congress has also passed the Twenty-first Amendment Enforcement Act, 27 U.S.C. § 122 (2000), which allows states' Attorneys General to bring an action in federal court to enforce a State's direct shipment laws. *See also* Foust, *supra* note 14, at 688-98 (discussing the Twenty-first Amendment Enforcement Act, its purpose, and the constitutional implications of the Act prior to its passage).

194. *See* MICH. COMP. LAWS ANN. § 436.1203(3)(k) (mandating that direct shipper licensees submit to the State's Jurisdiction); N.Y. ALCO. BEV. CONT. LAW § 79-c(3)(h) (requiring a written consent to the State's jurisdiction).

195. MICH. COMP. LAWS ANN. § 436.1203(3)(h).

196. *See* N.Y. ALCO. BEV. CONT. LAW § 79-c(3)(a).

197. This model bill was proposed by the Coalition for Free Trade, The Wine Institute, and the American Vintners Association, and adopted by the National Conference of State Legislatures. *See* Free the Grapes: To Ensure Consumer Choice in Fine Wine, Model Direct Shipment Bill, Section 1, available at <http://www.freethegrapes.org/wineries.html#model>. The language of section one of the model bill reads as follows:

Notwithstanding any law, rule or regulation to the contrary, any person

This approach, two cases a month or twenty-four cases a year per producer, is the most reasonable as it allows more consumers access to direct-shipment while, in effect, ensuring against any stockpiling, and limiting the development of a secondary market.

Finally, a provision limiting the amount allowed to be shipped may resolve the legislative battle that appears to be taking place in a number of states between wineries and liquor distributors. In Illinois for example, liquor distributors proposed to limit the sale to two cases per year while wineries sought to have the limit set at thirty-six cases.<sup>198</sup> Whether a state limits the amount of wine a resident of that state can receive or limits the total amount any single producer can ship into a state in a given year, some limit must be set.

### 3. *Limitation for Personal Use*

To further enhance enforcement efforts and ensure the payment of taxes, direct-shipment laws should limit purchases by direct shipment to individual or personal use only. Making it unlawful to resell wine purchased through direct shipment is critical to ensuring that a secondary market for wine does not develop. This would also ensure that all applicable taxes are paid, whether it is a state or local sales tax, and also that retailers are properly licensed and registered with the state or local government body. New York and Michigan both prohibit the resale of wine purchased through a direct shipper.<sup>199</sup>

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currently licensed in this or any other state as a wine producer, supplier, importer, wholesaler, distributor or retailer who obtains a Wine Direct Shipper license, as provided below, may ship up to twenty-four (24) 9-liter cases of wine annually directly to a resident of [State] who is at least 21 years of age for such resident's personal use and not for resale.

*Id.*

198. See Cheryl V. Jackson, *Wine, Beer Interests Agree to Sales Deals*, CHICAGO SUN TIMES, Mar. 8, 2006, at 61 (reporting on the legislative battle between wineries and wholesalers in the Illinois General Assembly as to the amount of wine allowed for direct shipment); see also Tresa Baldas, *Put Down Your Glasses: Suits Over Wine Shipments Continue*; News, THE RECORDER, Mar. 27, 2006, at 2 (noting that the battle between wholesalers and wineries is taking place in a number of states including Illinois).

199. N.Y. ALCO. BEV. CONT. LAW § 79-c(1). The New York law clearly states that a direct-shipper licensee can only ship wine "for such resident's personal use and not for resale." *Id.*; see also MICH. COMP. LAWS ANN. § 436.1203(11)(h). The Michigan law however states that a direct shipper can only sell to a consumer and defines a consumer as "an individual who purchases wine for personal consumption and not for resale." *Id.* at § 436.1203(11)(e).

## CONCLUSION

During this volatile time in the wine industry, as small wineries continue to grow and the wholesale wine business consolidates,<sup>200</sup> states must look at the numerous options available as they review their own laws following *Granholm*. States must be creative in developing these laws as they balance the promotion of fledgling domestic wine production against protecting the health and safety of their citizens.

More importantly, as *Granholm* makes clear, the key for any state is that the legislation must treat in-state and out-of-state wineries the same. Any difference between the way out-of-state interests and in-state interests are treated may provoke a constitutional challenge.<sup>201</sup> The best solution for states is to open their markets to direct shipment for private consumption, thereby promoting their own wine industry and protecting the health, welfare, and safety through the three-tier system.

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200. There is an outstanding question as to whether the holding in *Granholm* will be applied to beer, especially so called “micro brews” and liquor. States need to keep this in mind as the craft new legislation.

201. See *Costco Wholesale Corp. v. Hoen*, 407 F. Supp. 2d 1247, 1256 (W.D. Wash. 2005) (relying on *Granholm* to invalidate a Washington State statute which allowed only in-state wine and beer producers to bypass the three-tier system and ship directly to retailers); see also *Cherry Hill Vineyards v. Hudgins*, NO. 3:05CV-289-S, 2006 U.S. Dist. LEXIS 93266, at \*70 (W.D. Ky., Dec. 26, 2006) (relying on *Granholm* to strike down the “in person” requirement for direct shipment of wine). The statute required a purchaser to be present at the winery in order for the wine to be legally shipped into the state. *Id.* at \*17. The Court held that this requirement discriminates “in practical effect” against interstate commerce. *Id.* at \*70.

