PRUNING DIRECT SHIPPING BARRIERS FOR OPTIMAL YIELD: HOW THE DORMANT COMMERCE CLAUSE LIMITS THE TWENTY-FIRST AMENDMENT

I. INTRODUCTION

Prior to 2005, all wine connoisseurs told the same story at dinner.[1] While vacationing in Napa Valley, a couple from New York falls head-over-heels in love with a particular bottle of wine. The couple has never seen the bottle in New York retail stores, nor will they, because as it turns out, the winery is the exclusive distributor of this rare boutique wine. They buy the bottle, but it breaks in transit to New York. Attempting to re-purchase the bottle online, the couple learns that New York only permits wineries with in-state retail outlets to ship wine through the mail.[2] Certainly, New York promotes the direct shipment[3] of wine, just not from the many wineries residing outside its border.[4]

This particular statutory conundrum was not unique to New York, as many states[5] maintained similar regulatory systems designed to insulate

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[1] *See, e.g.,* Robert L. Jones III, Note, *Constitutional Law—Direct Shipment of Alcohol—Well-Aged And Finally Uncorked: The Supreme Court Decides Whether The Twenty-first Amendment Grants States The Power To Avoid The Dormant Commerce Clause*. Granholm v. Heald, *125 S.Ct. 1885 (2005),* 28 U.ARK LITTLE ROCK L.REV. 483, 483 (2006). See also, e.g., CAROL ROBERTSON, THE LITTLE RED BOOK OF WINE LAW: A CASE OF LEGAL STUDIES 105-07 (2008) (describing a common occurrence, with regard to shipping wine interstate, prior to 2005).

[2] *See* Granholm v. Heald, 544 U.S. 460, 470 (2005).

[3] "Direct shipping refers to wineries or retailers shipping wine directly to consumers . . . to their home or work via a package deliver company . . . ." FTC, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE 7 (July 2003), *available at* http://www.ftc.gov/0s/2003/07/winereport2.pdf.

[4] *See* Petitioner's Brief on the Merits at 3-4, Swedenburg v. Kelly, 358 F.3d 223 (2d Cir. 2004) (No. 03-1274), 2004 WL 1743939 (discussing the multiple exceptions to the direct shipping prohibition available exclusively to in-state wineries).

[5] *See* FTC, *supra* note 3, at 8-9.

in-state wineries from out-of-state competition.[6] These arbitrary regulations not only adversely affected out-of-state wineries, but consumers like the hypothetical couple above.[7] For this reason, the Supreme Court's decision to invalidate these discriminatory laws in *Granholm v. Heald*, 544 U.S. 460 (2005),[8] was widely celebrated among wine enthusiasts.[9] While the Court's ruling removed considerable barriers to interstate wine shipping, many regulatory obstacles still remain.[10] As a result, the last several years have seen a flood of related litigation and contradictory holdings as various courts attempt to apply the reasoning of the *Granholm* decision to new situations.[11]

This Comment will show how the Supreme Court's decision in *Granholm* has narrowly defined the scope of the states' authority under Section Two of the Twenty-first Amendment by tethering *all* regulation of wine to the nondiscriminatory principles of the dormant Commerce Clause. Part II of this Comment will discuss the fundamental principles of the dormant Commerce Clause, and describe the analytical framework used to evaluate such issues. Part III will develop key themes in alcohol policymaking as they arise through time, and establish two competing interpretations of Section Two of the Twenty-first Amendment. Part IV will introduce the major barriers limiting the proliferation of the United States' wine industry, and discuss how the dormant Commerce Clause has been utilized to overcome those barriers. Finally, Part V will discuss additional principles present in the *Granholm* decision that can be

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[6] *See* Gina M. Riekhof & Michael E. Sykuta, *Politics, Economics, and the Regulation of Direct Shipping in the Wine Industry*, 87 AM. J. OF AGRIC. ECON. 439, 447-51 (2005) (concluding that the results of their study of the states' purposes for enacting direct shipping restrictions suggested that the laws were *not* designed to achieve public interest objectives, i.e., temperance).

[7] *See* Alan E. Wiseman & Jerry Ellig, *The Politics of Wine: Trade Barriers, Interest Groups, and the Commerce Clause*, 69 THE J. OF POL. 859, 872 (2007) (concluding that consumers can find wine at lower prices online than in stores, and that in-store prices begin to decline after direct shipping is legalized in a given state).

[8] Granholm v. Heald, 544 U.S. 460, 493 (2005).

[9] Maureen K. Ohlhausen & Gregory P. Luib, Article, *Moving Sideways: Post-*Granholm *Developments In Wine Direct Shipping And Their Implications For Competition*, 75 ANTITRUST L.J. 505, 505 (2008); *see also*, GRAPE LIBERATION MONTH, http://www.freethegrapes.org/?q=content/Grape_Month_Toast (last visited Nov. 9, 2011) (encouraging wine enthusiasts to toast the anniversary of *Granholm*, and to continue celebrating the Court's latest decision involving wine law).

[10] *See generally* Deborah A. Skakel & Elizabeth I. Scher, *Variations on a Theme: Direct Shipping Litigation Post-*Granholm, 12 GOV'T, LAW & POL'Y J. 29, 29-30 (2010) (providing a brief overview of the state laws still obstructing direct shipping post-*Granholm*).

[11] *Id.* at 29.

gleaned from the analysis of a recent circuit court split, and consider how states can best proceed into a future defined by globalized markets and technological innovations.

II. THE DORMANT COMMERCE CLAUSE

A. General Doctrinal Principles

According to Erwin Chemerinsky, of the eighteen clauses enumerated in Article I, § 8 of the Constitution, detailing the powers specific to Congress, the most important is the Commerce Clause.[12] The Commerce Clause confers upon Congress, "the power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ."[13] Before the existence of the Commerce Clause there was an absence of any unifying federal regulation governing commerce between the States.[14] More specifically, under the Articles of Confederation the trade relations among the States were marked by pervasive "tendencies toward economic Balkanization."[15] In fact, the Framer's regarded the Commerce Clause as an element so vital to the development of a national economy that the clause served as a significant impetus for the drafting of the Constitution itself.[16]

Not surprisingly then, the Commerce Clause was initially used by courts to invalidate "the kind of discriminatory state legislation that had once been permissible" under the Articles of Confederation.[17] The prevailing interpretation is that by granting Congress the power to regulate commerce, the Commerce Clause impliedly limits the power of the states to interfere with Congress' authority.[18] This implied limitation applies

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[12] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 174 (Aspen Law & Business, 1st ed. 1997).

[13] U.S. CONST. art. I, § 8, cl. 3.

[14] Gonzales v. Raich, 545 U.S. 1, 16 (2005) (identifying the absence of federal commerce power under the Articles of Confederation as "the central problem giving rise to the Constitution itself").

[15] *See* Hughes v. Oklahoma, 411 U.S. 322, 325 (1979) (discussing the Commerce Clause as a reflection of the Framer's concern for the nation's economy under the Articles of Confederation); *see also, Gonzales*, 545 U.S. at 16 (stating that the Commerce Clause emerged in response to the absence of federal commerce power under the Articles of Confederation).

[16] *Gonzales*, 545 U.S. at 16.

[17] *Id.*

[18] *See generally* Gibbons v. Ogden 22 U.S. (1 Wheat.), 209 (1824) stating:

> That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole,

even in the absence of congressional action, and as a result, the doctrine is known as the dormant Commerce Clause.[19] Any discussion of the effects of state regulation on interstate commerce is incomplete without a full analysis of the doctrine.

Pursuant to the modern dormant Commerce Clause approach, the Supreme Court has "distinguished between state statutes that burden interstate transactions only incidentally, and those that affirmatively discriminate against such transactions."[20] Statutes that only burden interstate commerce as an incidental effect to achieving their intended purpose are subject to intermediate level scrutiny.[21] On the other hand, statutes that discriminate against interstate commerce are analyzed under strict scrutiny.[22] The analysis always begins with the same inquiry: whether or not the state law discriminates against interstate commerce.[23] The statute is then analyzed under strict or intermediate scrutiny, depending upon the court's conclusion as to whether the statute is discriminatory.[24]

B. Discrimination is the Crucial Inquiry

It is the challenger's initial burden of persuasion to demonstrate that the state law at issue is discriminatory.[25] In the context of the dormant Commerce Clause, discrimination is defined as "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[26] Two types of discrimination are recognized under dormant Commerce Clause precedent, facial discrimination and discrimination in practical effect.[27] A state law is facially discriminatory if it "expressly draws a distinction between [in-state actors and out-of-state

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which is as much disturbed and deranged by changing what the regulating power designs to leave untouched, as that on which it has operated.

[19] JESSE H. CHOPER ET AL., CONSTITUTIONAL LAW: CASES—COMMENTS—QUESTIONS 263 (West, 11th ed. 2011).

[20] Maine v. Taylor, 477 U.S. 131, 138 (1986).

[21] *See id*. (identifying that facially discriminatory statutes are subject to "more demanding scrutiny" than nondiscriminatory statutes).

[22] Hughes v. Oklahoma, 411 U.S. 322, 337 (1979).

[23] *See* Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of Oregon, 511 U.S. 93, 99 (1994) [hereinafter *Oregon Waste*].

[24] In other words, the second part of the analysis can be viewed as two distinct routes; one route receives strict scrutiny, while the other is subject to intermediate scrutiny. *See Oregon Waste*, 511 U.S. at 99 (describing the differences between a finding of nondiscrimination as opposed to discrimination); *see also*, C & A Carbone, Inc. v. Town of Clarkstown, N.Y., 511 U.S. 383, 390 (1994) (identifying "two lines of analysis" that have emerged in the context of the dormant Commerce Clause).

[25] *Hughes*, 411 U.S. at 336.

[26] *Oregon Waste*, 511 U.S. at 99.

[27] *Hughes*, 411 U.S. at 336.

actors]."[28] On the other hand, state laws that treat in-state and out-of-state actors the same, but nonetheless adversely impact out-of-state actors are deemed discriminatory in practical effect.[29] Whether facially discriminatory, or discriminatory in effect, state laws motivated by an economic protectionist purpose are subject to "a virtually per se rule of invalidity."[30] Finally, it is important to understand that there is no standard for determining whether a state law is discriminatory.[31] Instead, the determination is dependent on "the [c]ourt's appraisal of the particular facts."[32]

1. Those Statutes That Discriminate Against Interstate Transactions

If the challenger establishes discrimination, "the burden falls on the State to justify [the statute] both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives adequate to preserve the local interests at stake."[33] The state's burden requires a showing of a compelling state interest and "concrete record evidence, that a [s]tate's nondiscriminatory alternatives will prove unworkable."[34]

2. Those Statutes That Burden Interstate Transactions Only Incidentally

If the challenger is unable to establish discrimination, the burden shifts to the State to show that the statute does not impose burdens on interstate commerce that outweigh the local benefits flowing from the statute.[35] The *Pike* balancing test,[36] as it is commonly referred to, is analyzed under intermediate level scrutiny.[37]

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[28] CHEMERINSKY, *supra* note 12, at 317.
[29] Id. at 319.
[30] City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978); *see also*, Chem. Waste Mgmt., Inc. v. Hunt, 504 U.S. 334, 344 n.6 (1992).
[31] CHEMERINSKY, *supra* note 12, at 322.
[32] *Id.*
[33] *See* Hughes v. Oklahoma, 411 U.S. 322, 336 (1979); *see also*, Maine v. Taylor, 477 U.S. 131, 138 (1986).
[34] Granholm v. Heald, 544 U.S. 460, 492-93 (2005).
[35] *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) (discussing the balancing approach to be used when a statute is determined to be of a nondiscriminatory nature).
[36] *See* C & A Carbone, Inc. v. Town of Clarkstown, N.Y., 511 U.S. 383, 390 (1994).
[37] *See Taylor*, 477 U.S. at 138 (stating that facially discriminatory statutes are subject to "more demanding scrutiny" than nondiscriminatory statutes).

C. Agricultural Products & Discriminatory Themes

Agricultural products have played a pivotal role in the development of the dormant Commerce Clause.[38] Agricultural success is greatly influenced by physical factors such as climate, elevation, and length of growing season, which in turn, are determined by geographic location.[39] For this reason, some states have a natural advantage over others in agricultural markets.[40] Therefore, states can encourage the growth of their domestic agricultural industries simply by enacting restrictive trade barriers that discourage the growth of foreign industries.[41]

For example, Washington's geographic characteristics enabled the state to establish itself, in the minds of consumers, as a premier apple growing location.[42] Accordingly, the state sought to protect the goodwill of its apples by labeling them according to unique quality standards, more stringent than federal regulations.[43] North Carolina prohibited the display of state grading marks on all apples sold within the state.[44] In *Hunt v. Washington Apple State Advertising Commission*, 432 U.S. 333 (1970), the Supreme Court invalidated the North Carolina statute because it had an adverse effect on Washington apples, by neutralizing any competitive advantage the Washington apples may have earned in the marketplace.[45]

In *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951), the Supreme Court struck down an ordinance that required all milk sold in Madison, Wisconsin to be processed and bottled within five miles of the city's central

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[38] *Cf.* Baldwin v. G.A.F. Seelig, Inc. 294 U.S. 511, 516 (1935) (dairy products); *cf.* Dean Milk Co. v. Madison, 340 U.S. 349, 350 (1951) (dairy products); *cf. Pike*, 397 U.S. at 138 (cantaloupes); *cf.* Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 335 (1977) (apples); *cf.* Bacchus Imports, LTD. v. Dias, 468 U.S. 263, 265 (1984) (ti plants and pineapples).

[39] *See* J.L. HATFIELD ET AL., THE EFFECTS OF CLIMATE CHANGE ON AGRICULTURE, LAND RESOURCES, WATER RESOURCES, AND BIODIVERSITY IN THE UNITED STATES 21-22 (May 2008), *available at* http://www.climatescience.gov/Library/sap/sap4-3/final-report/sap4.3-final-all.pdf.

[40] *See id.* at 21-22.

[41] *See generally* Wiseman, *supra* note 7, at 870 (discussing how direct shipping functions to drive competition and "potentially harm distributors and wholesalers").

[42] *See* WASHINGTON APPLE HISTORY, http://www.bestapples.com/facts/facts_washington.aspx (last visited Dec. 27, 2011); *see also*, STATE FACT SHEETS: WASHINGTON, http://www.ers.usda.gov/StateFacts/WA.htm#TCEC (last visited Dec. 27, 2011) (providing data showing that Washington currently accounts for more than sixty percent of the value of U.S. apples).

[43] *Hunt*, 432 U.S. at 336.

[44] *Id.* at 337.

[45] *Id*. at 350-51.

square.[46] The discriminatory ordinance excluded Illinois milk sellers from the Madison market unless they processed their milk within the five mile range.[47] The Supreme Court invalidated the ordinance, stating that allowing states to enact these kinds of "discriminatory burden[s] on interstate commerce would invite a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause."[48]

However, while the dormant Commerce Clause prevents states from unduly burdening interstate commerce,[49] the Twenty-first Amendment gives the states broad authority over the regulation of alcohol beverages.[50] For that reason, regardless of wine's close relationship to agriculture, wine and other alcohol beverages have taken a dormant Commerce Clause route unlike that of any other article of commerce.[51] Comprehending the purpose of the Twenty-first Amendment requires an understanding of the historical factors that produced the Amendment.

III. DUELING CONSTITUTIONAL PROVISIONS

A. Historical Understanding of the Twenty-first Amendment

As Richard Mendelson notes, throughout history, the law has been a vehicle for groups to influence the alcohol consumption habits of the masses.[52] Social mores, religious beliefs, political aspirations, health concerns, financial objectives, and technological innovations have competed to produce the legal landscape governing wine.[53] However, temperance, more than any other factor, has moved people to rouse the legislature.[54] So, when the early champions of alcohol-abstinence failed to influence the nation's drinking habits through reason, they sought legal redress to carry out their crusade.[55] Temperance laws began on a local level as advocates persuaded many state legislatures to ban the produc-

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[46] Dean Milk Co. v. Madison, 340 U.S. 349, 350 (1951).
[47] *See id.* at 353.
[48] *Id.* at 356.
[49] CHEMERINSKY, *supra* note 12, at 306.
[50] Granholm v. Heald, 544 U.S. 460, 493 (2005).
[51] *See generally* PETER FRANCHOT, COMPTROLLER OF MD., DIRECT WINE SHIPMENT: REPORT 14 (Dec. 2010), *available at* http://www.comp.state.md.us/DWS_Complete.pdf (providing a brief historical account of the legality of alcohol in the United States).
[52] *See* RICHARD MENDELSON, FROM DEMON TO DARLING: A LEGAL HISTORY OF WINE IN AMERICA 6 (2009).
[53] *See generally id.* at 6-7 (briefly introducing the major influences affecting wine law).
[54] *Id.* at 6.
[55] *Id*. at 18-19 (discussing "local option" laws, "blue laws," and other legislative solutions designed to curb alcohol consumption among the masses).

tion and sale of alcohol beverages within their states.[56] To the disappointment of many teetotalers,[57] the Supreme Court upheld the states' power to ban the production of alcohol,[58] but used *since-rejected* dormant Commerce Clause principles[59] to withhold the power to ban the sale of imported alcohol.[60] In other words, states could ban the production of domestic alcohol, but the dormant Commerce Clause was interpreted to provide imported alcohol with immunity from state regulation.[61] One Senator would later describe these early Supreme Court decisions as leaving the states "powerless to protect themselves against the importation of liquor into the States."[62]

Congress responded by passing the Wilson Act.[63] The Act made all intoxicating liquors, regardless of where produced, subject to the effect of a state's laws.[64] However, soon after the Wilson Act was passed, the Supreme Court held that the "Act did not authorize States to prohibit direct shipments for personal use."[65] Now undermined by the right to transport alcohol interstate, temperance advocates lobbied Congress to pass an act that would allow dry states to stop alcohol shipments at their borders.[66] Congress answered with the Webb-Kenyon Act.[67]

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[56] *See* Granholm v. Heald, 544 U.S. 460, 476 (2005) (describing the early efforts of the temperance movement as a "one State at a time" approach).

[57] MENDELSON, *supra* note 52, at 18 (discussing the origins of the term, teetotaler, i.e., a person who never drinks alcohol).

[58] *Granholm*, 544 U.S. at 476 (discussing the Court's holding in Mugler v. Kansas, 123 U.S. 623 (1887)).

[59] *Id.* at 477 (stating that Bowman v. Chicago & Nw. Ry. Co., 125 U.S. 465 (1888), and its progeny, i.e., Leisy v. Hardin, 135 U.S. 100 (1890), "rested in part on the since-rejected original-package doctrine. Under this doctrine goods shipped in interstate commerce were immune from state regulation while in their original package.").

[60] *Id*. at 478 (discussing the Court's holding in *Leisy*).

[61] *Id*. (discussing the combined effects of the *Mugler* and *Leisy* holdings) (citations omitted).

[62] Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 340 (1964) (quoting Senator Borah of Idaho, 76 Cong.Rec. 4170-4171 (1933)).

[63] *Granholm*, 544 U.S. at 478.

[64] Wilson Act, 27 U.S.C.A. § 121 (West 2011) which states:

> All fermented, distilled, or other intoxicating liquors or liquids transported into any State . . . shall upon arrival in such State or Territory be subject to the operation and effect of the laws so such State or Territory . . . to the same extent and in the same manner as though such liquors or liquids 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.

[65] *Granholm*, 544 U.S. at 479.

[66] MENDELSON, *supra* note 52, at 47 (describing the Anti-Saloon League's campaign efforts aimed at securing the legal muscle necessary for statewide prohibition).

[67] *See* Webb-Kenyon Act, 27 U.S.C. § 122 (West 2011) (which prohibited the interstate "shipment or transportation . . . of . . . intoxicating liquor . . . [which] is intended, by any

The Webb-Kenyon Act was Congress' direct response to the shipping loopholes created by the Supreme Court in earlier decisions.[68] Despite the lack of explicit language discouraging discriminatory laws,[69] the Webb-Kenyon Act did nothing to reverse the nondiscrimination elements of the Wilson Act or the "line of Commerce Clause cases striking down state laws that discriminated against liquor produced out of state."[70] Rather, the language of *Clark Distilling Co. v. Western Maryland Railway Co*., 242 U.S. 311 (1917), indicated that the Webb-Kenyon Act was designed to supplement the Wilson Act, and closed the loopholes created by the Court's prior decisions.[71]

Although the Act provided states with the legal muscle necessary to go completely dry,[72] temperance lobbyists continued their pressure until January 16, 1919,[73] when the Eighteenth Amendment was ratified as an amendment to the Constitution, thus beginning Prohibition.[74] Nevertheless, the "noble experiment"[75] was a failure.[76] Soon, thoughts of furthering temperance were overshadowed by the stock market crash of 1929 and the accompanying Great Depression.[77] Economic hardship cast re-

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person . . . to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of" the state into which they are shipped).

[68] *Granholm*, 544 U.S. at 481.

[69] *Id.* at 501 (Thomas, J., dissenting) (contrasting the language of the Wilson Act and the Webb-Kenyon Act, and noting the lack of "comparable language [forbidding] discrimination" in the Webb-Kenyon Act).

[70] *Id.* at 483 (majority opinion).

[71] *See id*. at 481-82 (discussing how Clark Distilling Co. v. W. Md. Ry. Co., 242 U.S. 311, 321-24 (1917) interpreted the Webb-Kenyon Act as closing the regulatory loopholes created in Vance v. W.A. Vandercook Co., 170 U.S. 438 (1898) and Rhodes v. Iowa, 170 U.S. 412 (1898)).

[72] Editorial, "*U.S. Dry Within Ten Years*": *So Say Prohibitionists After Webb-Kenyon Decision—Liquor Dealers Say It Will React in Their Favor*, N.Y. TIMES, Jan. 14, 1917, *available at* http://query.nytimes.com/gst/abstract.html?res=F50A15F73D5E11738DDDAD0994D9405B878DF1D3 (last visited Dec. 27, 2011).

[73] MENDELSON, *supra* note 52, at 48 (discussing the Anti-Saloon League's efforts to secure national prohibition).

[74] THOMAS PINNEY, A HISTORY OF WINE IN AMERICA: FROM PROHIBITION TO THE PRESENT 1 (2009).

[75] TYLER COLEMAN, WINE POLITICS: HOW GOVERNMENTS, ENVIRONMENTALISTS, MOBSTERS, AND CRITICS INFLUENCE THE WINES WE DRINK 30 (2008) (stating that President Hoover referred to Prohibition in the United States as the "noble experiment").

[76] *See* PINNEY, *supra* note 74, at 5-6 (identifying the more popular view of Prohibition to be that it was a failure); *see also*, COLEMAN, *supra* note 75, at 31-32 (discussing the problem with enforcing Prohibition to be the lack of enforcement).

[77] *See* MENDELSON, *supra* note 52, at 88 (discussing how the stock market crack provided alternative arguments for the case of repeal); *see also*, PINNEY, *supra* note 74, at 7 (identifying the Great Depression as a kind of coupe de grâce to the case for continuing Prohibition); *see also*, COLEMAN, *supra* note 75, at 33 (stating that during the Great De-

peal of the Eighteenth Amendment in a new light,[78] and any qualms about the return of alcohol were outweighed by the fiscal sensibility of liquor taxes.[79] Congress proposed the Twenty-first Amendment,[80] formally repealing Prohibition, and it was ratified in record time.[81]

B. Two Interpretations of Section Two of the Twenty-first Amendment

Section Two of the Twenty-first Amendment prohibited "[t]he transportation or importation [of intoxicating liquors] into any State . . . for delivery or use therein . . . in violation of the laws thereof."[82] First and foremost, Section Two was a covenant between Congress and the dry states assuring those states that they would retain the legal power to implement statewide prohibition.[83] However, the section also allowed those States disavowing prohibition on both federal and state levels, to maintain a system for controlling the transportation, importation, and use of liquor in a *nondiscriminatory* manner.[84] Perhaps in light of the unpredictability of alcohol policy, lawmakers agreed to return to an amalgamation of the familiar language of the Webb-Kenyon and Wilson Acts.[85] Consequently, along with the adoption of language highly similar to

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pression, unions saw the repeal of Prohibition as an opportunity to put men back to work).

[78] *See* MENDELSON, *supra* note 52, at 88; *see also*, COLEMAN, supra note 75, at 33.

[79] *See* MENDELSON, *supra* note 52, at 88; *see also*, Carl W. Badenhausen, *Self-Regulation In The Brewing Industry*, 7 LAW & CONTEMP. PROBS. 689, 689-690 (1940) (describing the rapid economic proliferation of the American brewing industry as "a billion-dollar business less than eight years [after the repeal of prohibition]," and generating more than a million dollars per day in taxes).

[80] Section One of the Twenty-first Amendment repealed the Eighteenth Amendment. U.S. CONST. amend. XXI, § 1. Section Three gave the states seven years for ratification. U.S. CONST. amend. XXI, § 3.

[81] The XXI Amendment was ratified in 288 days, at that time it was the second fastest amendment to be ratified. Even today is stands as the fourth fastest amendment to be ratified; far from the 74,003 days it took to ratify the XXVII Amendment. (*See* CONGRESSIONAL RESEARCH SERVICES, RATIFICATION OF AMENDMENTS TO THE U.S. CONSTITUTION 4 (Sept. 1997), *available at* http://www.au.af.mil/au/awc/awcgate/crs/97-922.pdf.)

[82] U.S. CONST. amend. XXI, § 2.

[83] *See generally* MENDELSON, *supra* note 52, at 90 (stating that Section Two was intended "to remove all doubt about the dry states' legal authority to remain dry after Repeal"); *see also*, COLEMAN, *supra* note 75, at 34 (describing the dry states' political efforts to promote prohibition even in the midst of Repeal).

[84] *See* Granholm v. Heald, 544 U.S. 460, 484-85 (2005).

[85] *See* Craig v. Boren, 429 U.S. 190, 205-06 (1976) (noting that Section Two "closely follows the Webb-Kenyon and Wilson Acts").

those statutes, Congress constitutionalized the nondiscriminatory principles of both the Webb-Kenyon and Wilson Acts.[86]

While many states elected to use their Section Two authority to continue to remain dry even after Repeal, others voted to go wet.[87] Those states that totally repealed prohibition used their newly granted authority to strictly control the distribution of alcohol.[88] The preferred control mechanism was to require all alcohol to be sold through a three-tier distribution system[89] whereby the production, distribution, and retail tiers were completely separated by requiring a different license for each function.[90] Although the system could have been used to control distribution in a nondiscriminatory manner, states immediately began to provide in-state actors with preferential treatment.[91]

1. The Absolutist Interpretation Facilitated Low Level Trade Wars

The only thing more unfortunate than the states' tendencies toward discriminatory regulation, was that Supreme Court decisions following ratification ignored the history of alcohol regulation.[92] As a result, the Court left a line of precedent inconsistent with the evenhanded policies advanced by the Twenty-first Amendment and its predecessors.[93] By 1940, forty-three states had enacted alcohol regulation more akin to the trade barriers in place under the Articles of Confederation.[94] Pursuant to

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[86] *Id*. (identifying the wording of Section Two to be a congressional manifestation of a "clear intention of constitutionalizing the Commerce Clause framework established under [the Webb-Kenyon and Wilson Acts]").

[87] *See* COLEMAN, *supra* note 75, at 34 (discussing post-Repeal developments among the states).

[88] *Id*. at 35.

[89] Specifically the three-tier distribution system operates by requiring a separate license for each tier, i.e., production, distribution, and retail. Producers are then required to sell exclusively to distributors, who are required to sell exclusively to retailers, who may then sell to consumers. Vertical integration between tiers, e.g., one entity owning both production and distribution licenses, is prohibited. *See* MENDELSON, *supra* note 52, at 116.

[90] COLEMAN, *supra* note 75, at 35.

[91] *See generally* MENDELSON, *supra* note 52, at 121-22 (describing various protectionist measures taken by the states such as, "higher license fees or excise taxes on imported alcoholic beverages").

[92] Granholm v. Heald, 544 U.S. 460, 485 (2005).

[93] *See id*. (referring to State Bd. of Equalization of Cal. v. Young's Mkt. Co., 299 U.S. 59 (1936) and its progeny, i.e., Mahoney v. Joseph Triner Corp., 304 U.S. 401 (1938); Indianapolis Brewing Co. v. Liquor Control Comm'n, 305 U.S. 391 (1939); Ziffrin, Inc. v. Reeves, 308 U.S. 132 (1939); and Joseph S. Finch & Co. v. McKittrick, 305 U.S. 395 (1939)).

[94] *See* Thomas S. Green, Jr., *Interstate Barriers In The Alcoholic Beverage Field*, 7 LAW & CONTEMP. PROBS. 717, 717-18 (1940) (stating that one thousand four hundred

the Supreme Court's "absolutist interpretation"[95] of the Twenty-first Amendment, states were permitted to regulate the importation of alcohol free from any Commerce Clause restraints.[96] During this period of state regulatory carte blanche, states were permitted to completely insulate their domestic alcohol industries from out-of-state competition by means of discriminatory statutes.[97]

2. *The Federalist Period & The Reemergence of the Commerce Clause*

In 1964, New York alcohol regulatory agencies refused to grant a retailer a permit because the retailer refused to pay taxes on federally tax-exempted alcohol.[98] The constitutionality of the adverse treatment was challenged, and Justice Stewart held that the Twenty-first Amendment and the Commerce Clause "were to be considered in light of the other . . . ."[99] In *Hostetter v. Idlewild Bon Voyage Liquor Corp*., 377 U.S. 324 (1964), the Court called any conclusions that the Twenty-first Amendment repealed the Commerce Clause, "wherever regulation of intoxicating liquor is concerned," an "absurd oversimplification."[100] Accordingly, *Hostetter* marked the beginning of the Court's tendency to employ a federalist interpretation of the Twenty-first Amendment.[101]

If the shift in Twenty-first Amendment jurisprudence was not evident in *Hostetter*, it became obvious twenty years later in *Bacchus Imports, LTD. v. Dias*, 468 U.S. 263 (1984).[102] Beginning in 1939, Hawaii maintained a twenty-percent excise tax on sales of liquor at the wholesale level with no tax exemptions.[103] However, in 1971, Hawaii, attempting to encourage the development of their local liquor industry, designed tax

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restrictions were acting as a barrier to interstate trade, "so numerous that many look[ed] upon them as insurmountable obstacles to a return to economic prosperity").

[95] Barbara C. Beliveau & M. Elizabeth Rouse, *Prohibition and Repeal: A Short History of the Wine Industry's Regulation in the United States*, 5 J. OF WINE ECON. 53, 58 (2010).

[96] Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 330 (1964).

[97] *See* Green, *supra* note 94, at 722-23 (discussing early discriminatory tactics—such as beneficial licensing schemes and preferential tax treatment—that states used to confer an economic advantage on in-state actors).

[98] *See Hostetter*, 377 U.S. at 326 (a liquor retailer was located in a duty-free trade zone in JFK International Airport; thus, federal law did not require the retailer to pay taxes on the alcohol, however, New York argued their Twenty-first Amendment power gave them permission to circumvent the federal tax exemption).

[99] *Id.* at 332.

[100] *Id.* at 331-32.

[101] Beliveau, *supra* note 95, at 59.

[102] *See generally id.*

[103] Bacchus Imports, LTD. v. Dias, 468 U.S. 263, 265-66 (1984).

exemptions exclusively for local liquor producers.[104] The Supreme Court proclaimed a commitment to a modern approach based on a "pragmatic effort to harmonize state and federal powers."[105] Pursuant to this modern approach, the *Bacchus* Court held that the discriminatory tax exemption "violate[d] a central tenet of the Commerce Clause but [was] not supported by any clear concern" "in combat[ing] the perceived evils of an unrestricted traffic in liquor,"[106] and thus was not "saved by the Twenty-first Amendment."[107]

IV. THE GREAT CONVERGENCE OF POLITICS, INDUSTRY TRENDS, & TECHNOLOGY

A. The Internet and The Inversion of the Producer-Distributor Ratio

As *Bacchus* was being decided, a major trend in distributor consolidation was occurring amongst the wine industry's sixteen thousand distributors that would ultimately leave the industry with less than half that number by 2002.[108] Compounding the effects of this dramatic rearrangement, the number of wineries in the United States increased from eight hundred in 1975,[109] to over three thousand by 2005.[110] More specifically, the industry experienced a substantial increase in the number of small wineries;[111] confirmed by the fact that the top thirty companies accounted for more than ninety percent of the entire wine industry in the United States.[112] While each of the top thirty companies sold an average of almost one million cases annually,[113] many small wineries produced less than two thousand cases of wine per year.[114] Consequently, distribu-

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[104] *Id.* at 265.

[105] *Id.* at 275 (quoting Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 455 U.S. 97, 109 (1980)). In attempting to harmonize state and federal powers, the Court framed the question as: "[W]hether the principles underlying the Twenty-first Amendment are sufficiently implicated by the exemption for [local liquor] to outweigh the Commerce Clause principles that would otherwise be offended." *Id.*

[106] *Id.* at 276.

[107] *Id.* at 274.

[108] *See* Riekhof, *supra* note 6, at 441-42 (arguing that the distributor consolidation trend, which began around 1980, resulted from the Supreme Court's decision in Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 91 (1980)).

[109] FRANCHOT, *supra* note 51, at 12.

[110] Granholm v. Heald, 544 U.S. 460, 467 (2005).

[111] *Id.*

[112] Riekhof, *supra* note 6, at 441-42.

[113] *See The Top 30 U.S. Wine Companies of 2005*, WINE BUSINESS MONTHLY (Feb. 2006), http://www.winebusiness.com/wbm/?go=getArticle&dataId=42348 (for a list of the top thirty wineries in 2005) (lasted visited Dec. 27, 2011).

[114] FTC, *supra* note 3, at 6.

tors found carrying these "boutique"[115] wines economically impractical, as many small wineries neither produced enough wine, nor had adequate consumer demand for their products.[116]

Fortunately for small wineries, as the wine industry was reforming, many parts of the world simultaneously witnessed the revolution of e-commerce and the empowerment of consumers everywhere.[117] Wine connoisseurs, unsatisfied with the mass-produced wine carried by distributors and retailers,[118] had a means by which to locate lesser known boutique wines that were previously impossible to find.[119] However, while the Internet made finding premium wines from all over the country simpler, obtaining those wines was another matter entirely.[120] By 2005, it was common for a state to exempt in-state wineries from the three-tier system by providing them direct shipping rights, but deny these same privileges to out-of-state wineries.[121] As increasing numbers of individuals learned of the arbitrary regulations keeping premium wines out of reach,[122] the issue garnered more exposure[123] and disappointment turned into frustration with these rigid regulatory regimes.[124]

B. Placing Wine Within the Nondiscriminatory Tenets of the Dormant Commerce Clause

In 2005, in *Granholm v. Heald*, 544 U.S. 460 (2005), the Supreme Court consolidated a pair of cases that presented dormant Commerce Clause challenges to facially discriminatory state laws regulating the

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[115] COLEMAN, *supra* note 75, at 92 (specifically describing the small wineries that emerged during this period as "boutique" wineries).

[116] *Granholm*, 544 U.S. at 467.

[117] *See id.* (stating that technological improvements, like the internet, have provided small wineries with an additional sales channel).

[118] *See id.* at 468 (stating that without direct shipping New York wine consumers were unable to obtain the wines of their choice; arguably this was because the state's distributors refused to carry wine produced in smaller quantities).

[119] *See id.* (identifying the internet as a tool wineries used to reach new markets).

[120] *See* Riekhof, *supra* note 6, at 442 (identifying that direct shipping is the "only economically efficient form of distribution for many small wineries," but also the channel most obstructed by regulation).

[121] *See Granholm*, 544 U.S. at 465.

[122] *See* ROBERTSON, *supra* note 1, at 105-07 (discussing a common occurrence when a tourist, from a state other than California, visited a California winery and attempted to have that wine shipped to their residence).

[123] *See id.* at 107 (discussing the public interest generated by wine bloggers regarding the related Supreme Court case that followed).

[124] *See* Beliveau, *supra* note 95, at 53-54 (describing the consumers that found themselves in this direct shipping fiasco to be "sadly out of luck").

direct shipment of wine.[125] Michigan and New York consumers wished to purchase wines produced by small wineries located outside of the states they resided in.[126] Unfortunately, in-state retailers did not carry the out-of-state wines that the consumers desired.[127] Thus, the only way for the consumers to obtain the wines of their choice was through direct shipment.[128] However, both states maintained regulatory systems that withheld direct shipping privileges from out-of-state wineries.[129] Michigan afforded in-state wineries direct shipping privileges, but denied out-of-state wineries similar treatment,[130] while New York conditioned direct shipping privileges on the establishment of a "bricks-and-mortar distribution operation" within the state.[131] In-state wineries, having an operation within the state by default, were automatically afforded direct shipping privileges.[132] On the other hand, the New York statute forced out-of-state wineries to take an additional step before the State would extend them direct shipping privileges.[133]

The wine consumers challenged the facially discriminatory state laws as violations of the dormant Commerce Clause.[134] Both states argued the enactment of the discriminatory regulations to be firmly within their Twenty-first Amendment powers.[135] The Court stated that the issue called for an analysis of the "dormant Commerce Clause in light of . . . the Twenty-first Amendment."[136] While it is possible to interpret that statement as implying that the dormant Commerce Clause analysis is in some way altered by the Twenty-first Amendment,[137] the Court merely

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[125] *Granholm*, 544 U.S. at 465-66.
[126] *See id.* at 469-70.
[127] *See id.* at 468 (stating that the wineries were small which in turn means that they produce wines made in small quantities that render distribution economically impractical).
[128] *See id.* (noting that the wineries relied on direct shipping to reach markets).
[129] *Id*. at 466.
[130] *Id.* at 473-74.
[131] *Id.* at 474-75.
[132] *Id.* at 474.
[133] *See id.* at 474-75.
[134] *Id.* at 469-71.
[135] *Id.* at 476.
[136] *Id.* at 471.
[137] For example, the non-discriminatory principles of the dormant Commerce Clause might be diminished, or even displaced, by the Twenty-first Amendment. *See generally id.* at 470 (discussing a similar argument as an incorrect, but nonetheless possible, interpretation of the Twenty-first Amendment).

coupled a traditional dormant Commerce Clause analysis with considerations of modern Twenty-first Amendment jurisprudence.[138]

With regard to the dormant Commerce Clause analysis, discrimination was easily identifiable because both statutes expressly mandated differential treatment of in-state and out-of-state actors.[139] The Court had no trouble concluding that the statutes "grant[ed] in-state wineries access to the State's consumers on preferential terms,"[140] and at the least, rendered direct sales economically impracticable for out-of-state wineries.[141] Nonetheless, the States argued that Section Two of the Twenty-first Amendment saved the statutes regardless of their discriminatory nature.[142] The Court, disagreed with the states, holding:

> States have broad power to regulate liquor under [Section Two] of the Twenty-first Amendment. This power, however, does not allow States to ban, or severely limit, the direct shipment of out-of-state wine while simultaneously authorizing direct shipment by in-state producers. If a State chooses to allow direct shipment of wine, it must do so on evenhanded terms.[143]

The Court identified three principles by which the scope of Section Two is to be understood: "First, . . . state laws that violate other provisions of the Constitution are not saved by the Twenty-first Amendment."[144] "Second, . . . [Section Two] does not abrogate Congress' Commerce Clause powers with regard to liquor."[145] "Finally, . . . state regulation of alcohol is limited to the nondiscrimination principle of the Commerce Clause."[146]

Lastly, pursuant to the dormant Commerce Clause, the Court shifted the burden of persuasion to the States to show a compelling local interest and the absence of less discriminatory means.[147] The States argued that direct shipment restrictions were necessary to prevent underage access to alcohol and ensure tax collection.[148] However, the States were unable to show "that the purchase of wine over the Internet by minors [was] a

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[138] *See id*. at 487 (stating that with regard to wine shipping the Supreme Court will recognize both facial discrimination and discrimination in-effect).
[139] *Id*. at 476.
[140] *Id.* at 474.
[141] *Id*. at 466.
[142] *Id.* at 476.
[143] *Id*. at 493.
[144] *Id*. at 486.
[145] *Id.* at 487.
[146] *Id.*
[147] *Id.* at 489.
[148] *Id.*

problem."[149] Nonetheless, if minors obtaining directly shipped wine was actually a problem, the Court found that states could "require[] an adult signature on delivery and a label so instructing on each package."[150]

The States also argued that direct shipping would create a risk of tax evasion.[151] The Court found that many states that allow direct shipping report no problems with tax evasion.[152] Those states eliminate the risk of tax evasion by requiring a separate license for direct shipping and insisting wineries "submit regular sales reports and . . . remit taxes."[153] Additionally, the Court found that the effectiveness of both alternatives would be supplemented by the threat of revocation of federal licenses for those wineries failing to comply with state laws.[154] Ultimately, the Court concluded that the States "[could achieve their regulatory objectives] without discriminating against interstate commerce."[155] Thus, the Court invalidated the statutes at issue because their discriminatory nature was a clear violation of the dormant Commerce Clause.[156]

V. POST-*GRANHOLM* LITIGATION ILLUMINATES THE PURVIEW OF *GRANHOLM*'S HOLDING

A. Similar Facts, Similar Arguments, Contradictory Holdings

Granholm's conditional-command is straightforward: if states allow in-state wineries to engage in direct shipping, then they must allow out-of-state wineries to engage in direct shipping.[157] This obvious command for direct shipping privileges has been well heeded by the states.[158] Numerous states have amended their direct shipping laws to conform with

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[149] *Id.* at 490 (noting that minors obtaining wine through the mail is not a problem because wine is not the drink of choice among underage drinkers, and the direct shipping of wine does not satisfy impulsive desires of those adolescents willing to break the law).
[150] *Id.* at 490-91.
[151] *Id.* at 491.
[152] *Id.* at 491-92.
[153] *Id.* at 491.
[154] *Id.* at 492. "Without a federal license, a winery cannot operate in any State." Id.
[155] *Id.* at 491.
[156] *Id.* at 493.
[157] *Id.* at 493 (holding that states choosing to allow direct shipping of wine, must do so evenhandedly); *see also*, Ohlhausen, *supra* note 9, at 506 (arguing that *Granholm* demands that states choose to "level up" with direct shipping rights for all wineries in and out-of-state, or "level down" by abrogating direct shipping rights entirely).
[158] *See* Ohlhausen, *supra* note 9, at 512 (discussing the variations in direct shipping legislation in response to the *Granholm* decision).

Granholm's decision.[159] Unfortunately, some states have responded to *Granholm* with several legislative variations, which appear to be disguised attempts to insulate domestic producers.[160] In many cases, although the laws have changed, consumers still find it impossible to obtain wines produced by small, out-of-state wineries, with no similar experience resulting with regards to domestic wine.[161] The exemplar of these new variations is the in-person purchase requirement.[162] Cases analyzing this devious restriction on direct shipping have arisen out of a similar factual pattern.[163]

In both, *Cherry Hill Vineyards v. Lilly*, 553 F.3d 423 (6th Cir. 2008), and *Baude v. Heath*, 538 F.3d 608 (7th Cir. 2008), wine enthusiasts, living in states east of the Mississippi River, desired to obtain wines from small, west coast wineries.[164] However, their home states conditioned direct shipping rights on an in-person purchase.[165] In other words, no winery, wherever located, was permitted to ship wine directly to a consumer, until that consumer physically visited the winery. Despite the lack of facial discrimination, the consumers challenged the regulatory schemes as having the practical effects of discriminating against out-of-state actors by resulting in deferential treatment benefitting in-state actors.[166] The challengers provided strikingly similarly evidentiary accounts of how the statutes had the effects of treating out-of-state actors

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[159] *See id.* at 512-13 (identifying several states that decided to extend direct shipping privileges to out-of-state wineries).

[160] *See id.* at 506 (stating that some states have changed their laws in ways that are still more favorable to in-state wineries).

[161] *See* Brief for Plaintiffs-Appellees at 6, Baude v. Heath, 538 F.3d 608 (7th Cir. 2008) (No. 07-5128), 2007 WL 4454121, at *6 [hereinafter *Baude Brief*] (noting that many Indiana consumers are still unable to procure many wines that they desire, even after *Granholm*).

[162] Ohlhausen, *supra* note 9, at 514. In-person purchase requirements condition direct shipping privileges on an in-person sale whereby the purchaser is physically present at the winery. In other words, a winery is prohibited from shipping directly to a consumer until that consumer makes a physical visit to the winery. *Id.*

[163] *See, e.g.,* Baude v. Heath, 538 F.3d 608 (7th Cir. 2008) (Indiana in-person purchase requirement); Cherry Hill Vineyards v. Lilly, 553 F.3d 423, 425 (6th Cir. 2008) (Kentucky in-person purchase requirement).

[164] *Baude*, 538 F.3d at 611 (Indiana consumers seeking wine from small, California wineries); *see also Cherry Hill*, 553 F.3d at 432-33 (Kentucky consumers unable to obtain wine from a small, Oregon winery).

[165] *Baude*, 538 F.3d at 611 (Indiana wineries could ship directly to customers provided that the sale was consummated in a "face-to-face meeting"); *see also Cherry Hill*, 553 F.3d at 427-28 (Kentucky permitted wineries producing under fifty thousand gallons of wine per year to engage in direct shipping, but only if the wine was purchased by the customer, in-person, at the winery).

[166] *Baude*, 538 F.3d at 612; *see also Cherry Hill*, 553 F.3d at 432.

adversely.[167] Additionally, both challengers relied on *Granholm*'s rule against regulatory schemes that render out-of-state direct shipments economically impractical while leaving in-state actors unaffected.[168] Like the States in *Granholm*, both States argued that the regulatory schemes were created primarily to prevent underage access to alcohol and facilitate the collection of taxes.[169] Certainly, the only difference in the cases, was the manner in which each court appraised the facts and applied the principles of *Granholm*.

1. Recognizing the Discriminatory Nature of the In-Person Purchase Requirement

In *Cherry Hill*, the court determined that the challengers showed, "both how local economic actors [were] favored by the legislation, and how out-of-state actors [were] burdened by the legislation."[170] The challengers provided clear evidence of how out-of-state actors were burdened by the statute. The Kentucky statute required Oregon wineries to wait for Kentucky consumers to travel nearly five thousand miles to consummate a sale in-person, or forced Oregon wineries to work with Kentucky wholesalers, which increased the price of Oregon wine.[171] Additionally, of the approximately three hundred Oregon wineries, the majority being small, only thirteen sold wine in Kentucky.[172]

The court found the challenger's evidence of discrimination in practical effect persuasive; thus, in accordance with sound dormant Commerce Clause jurisprudence, the Court shifted the burden of persuasion to the

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[167] Brief for Plaintiffs-Appellees at 3-15, Cherry Hill Vineyards v. Lilly, 553 F.3d 423 (6th Cir. 2008) (No. 07-5128), 2008 WL 4521435 [hereinafter *Cherry Hill Brief*] (Kentucky wholesalers increase cost by fifty percent; without an in-state wholesaler, wineries left to wait for consumers to make 4800 mile round trip; not all wineries are open to the public, making in-person visit pointless; and in certain states, like Oregon, wineries are too spread out to make in-person visits practical). *See also Baude Brief*, *supra* note 161, at 4-10 (Indiana wholesalers increase cost by fifty percent and take away from profits; out-of-state wineries are forced to wait for consumers to travel 4500 miles, which is substantially further than comparative trips to in-state wineries; unlike many west coast wineries, all Indiana wineries are open to the public; and trips to Oregon wineries are especially prohibitive due to the dispersed nature of Oregon wineries).

[168] *Cherry Hill Brief*, *supra* note 167, at 3-15; *see also Baude Brief*, supra note 161, at 4-10.

[169] *See Cherry Hill*, 553 F.3d at 434.

[170] *Id.* at 433.

[171] *Id.* (discussing how Kentucky wholesalers required fifty percent of all profits as compensation for their services, i.e., distribution; thus, an Oregon winery could either lose fifty percent of their profit margins, or increase the price of their wine).

[172] *Id.* at 432-33 (the evidence showed that in-state Kentucky wineries benefitting from less competition from out-of-state wineries).

state to justify their statute.[173] The State[174] advanced an almost identical argument as the States in *Granholm v. Heald*: the statutory regime was designed to discourage underage drinking and ensure tax collection.[175]

The Sixth Circuit acknowledged that the *Granholm* Court determined that direct shipping did not pose a threat to the interest of the states in preventing underage drinking and tax evasion.[176] Thus, to avoid reweighing the adequacy of the available nondiscriminatory alternatives, the court required the State to demonstrate the ways in which their problems with underage drinking and tax evasion were more severe than those at issue in *Granholm*.[177] In other words, *Granholm* foreclosed the underage drinking and tax evasion arguments, unless a state can show the presence of a unique problem with those risks. However, Kentucky provided no evidence distinguishing their underage drinking and tax evasion problems from that of the states in *Granholm*.[178] Therefore, the Sixth Circuit followed *Granholm*'s findings and invalidated Kentucky's in-person purchase requirement as a violation of the dormant Commerce Clause.[179]

2. *Ignoring the Discriminatory Nature of the In-Person Purchase Requirement*

In *Baude*, the challengers presented a similar argument as the challengers in *Cherry Hill*.[180] They presented straightforward evidence establishing that a trip from Indiana to California to obtain wine from a single vintner would be far more expensive than a similar trip destined for a winery in Indiana.[181] However, the Seventh Circuit was unpersuaded.[182] The court concluded that it would be more expensive for an Indiana wine consumer to visit Indiana wineries, than to embark on a more than four thousand mile trip to visit California wineries.[183] As a result, the court upheld the Indiana statute because it was not shown to effectuate the

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[173] *Id.* at 433.
[174] The burden was actually shifted to a group of wholesalers that intervened. Kentucky did not appeal the lower court's ruling. *Id.* at 434.
[175] *Id.*
[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] *Id.* at 435.
[180] *See* Baude v. Heath, 538 F.3d 608, 612 (7th Cir. 2008) (noting that the challengers argued that the in-person purchase requirement constituted discrimination in-practical effect).
[181] *Id.* at 613.
[182] *Id.*
[183] *Id.* ("A connoisseur might well find it easier to visit and sign up at [thirty] California wineries than at [thirty] Indiana wineries.").

adverse treatment of out-of-state actors.[184] However, the Seventh Circuit made three gross mistakes in their application of *Granholm*.

First, the Seventh Circuit wrongfully applied the dormant Commerce Clause by relying on a case[185] that concerned First Amendment issues.[186] The court incorrectly required the *challengers* to show that there was not "any substantial possibility that [the statute would] be valid in operation."[187] Under the dormant Commerce Clause, the challenger only has the burden of persuasion with respect to demonstrating the discriminatory nature of a state law.[188] Furthermore, every burden of persuasion, beyond the challenger's initial burden, is placed firmly on the state; to hold otherwise is either a misapplication, or a perversion, of dormant Commerce Clause jurisprudence.[189] The in-person requirement was ultimately upheld because the challengers were unable to show that Indiana's regulatory system would not "be valid in operation."[190] The gravity of the court's error becomes even more apparent when considering that the court effectively required the challengers to persuade it of something it had already rejected. For example, requiring a showing that a statute is not "valid in operation" is simply an elaborate way of requiring a showing that the statute would have the practical effects of discriminating against interstate commerce. After all, for the statute to not be valid in operation, the statute would have to be shown to have the effect of discriminating against interstate commerce. Certainly, the challenger's evi-

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[184] *Id.* at 615.

[185] *See id.* at 613 (relying on Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442 (2008)).

[186] *See* Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 442-43 (2008) (introducing the main issue as whether a particular statute constituted an "unconstitutional burden on state political parties' First Amendment rights").

[187] *Baude*, 538 F.3d at 613 (citing *State Grange* as an example of this principle).

[188] Hughes v. Oklahoma, 411 U.S. 322, 336 (1979).

[189] *See id.* (describing the extent of the challenger's burden of persuasion).

[190] *See Baude*, 538 F.3d at 613

> Plaintiffs invite us to think of a trip to California for the sole purpose of signing up at a single vintner. Yet one winery per trip is not the only, or apt to be the usual, way to satisfy the face-to-face requirement. Many oenophiles vacation in wine country, and on a tour through Napa Valley to sample the vintners' wares a person could sign up for direct shipments from dozens of wineries. Wine tourism in Indiana is less common, and the state's vineyards . . . are scattered around the state, making it hard for anyone to sign up at more than a few of Indiana's wineries. . . . A connoisseur might well find it easier to visit and sign up at [thirty] California wineries than at [thirty] Indiana wineries. So although it may be more costly for a person living in Indianapolis to satisfy the face-to-face requirement at five Oregon wineries than at five Indiana wineries, it is not necessarily substantially more expensive (per winery) to sign up at a larger number of west-coast wineries than at an equivalent number of Indiana wine producers.

dence demonstrating that the statute would not be valid in operation was the same evidence showing discrimination in practical effect.[191] Not surprisingly then, the court was unpersuaded by the evidence the first time the challengers presented it, and equally unpersuaded the second.[192]

Second, the Seventh Circuit erroneously concluded that because the challenged provisions were not facially discriminatory, the *Pike* balancing test must therefore be applied.[193] This conclusion completely ignores the fact that in the context of the dormant Commerce Clause, discrimination can be facial, in practical effect, or motivated by protectionist purpose.[194] For example, a requirement that all apples sold within State A display only federal labels is not facially discriminatory.[195] Nevertheless, if State B's origin is of particular significance, then that law has the practical effect of discriminating against products of State B, by depriving only those products of their goodwill in the market.[196] Furthermore, the fact that State C is not deprived of any goodwill, does nothing to negate the adverse treatment of State B's interests for dormant Commerce Clause purposes.[197]

Third, even if the court properly found an absence of any discrimination, the court improperly placed the burden of persuasion on the challenger to show that the incidental burden on interstate commerce was "clearly excessive in relation to the putative local benefits."[198] Pursuant to the *Pike* balancing test, the burden of persuasion is traditionally placed on the state to show that the local interests outweigh the incidental burdens on interstate commerce.[199] The Seventh Circuit decided that the burden of persuasion rested on "whoever wants to upset the law."[200] This is plainly a misapplication of the dormant Commerce Clause analysis.

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[191] *See id.* (weighing the plaintiff's argument for discrimination in-practical effect and for why the statute would prove to not be valid in operation, i.e., that the statute would result in an increase in costs associated with obtaining the out-of-state wines in comparison to the in-state wines).

[192] *See id.*

[193] *See id.* at 611.

[194] Chem. Waste Mgmt., Inc. v. Hunt, 504 U.S. 334, 344 n.6 (1992).

[195] *See* Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 337 (1977).

[196] *See id.* at 350-51.

[197] *See id.* at 349 (indicating that there were seven other states that could have potentially been affected by the regulation).

[198] *See Baude*, 538 F.3d at 612-13.

[199] *See* Maine v. Taylor, 477 U.S. 131, 138 (1986).

[200] *Baude*, 538 F.3d at 613.

B. Concluding Analysis of the Cherry Hill and Baude Decisions

It is unclear what persuaded the *Cherry Hill* Court to find a discriminatory effect, and the *Baude* Court to find only an incidental burden. However, it is more than apparent that the *Cherry Hill* decision accords with *Granholm*'s holding, while the *Baude* decision does not. Despite *Granholm*'s proclamation that the available nondiscriminatory alternatives sufficiently safeguard the states' interests, the *Baude* decision stands for reweighing the validity of those alternatives and completely ignoring the Supreme Court's latest findings. Certainly, there is no doubt that the *Cherry Hill* approach, and not the *Baude* approach, more closely conforms with the reasoning of *Granholm*.

However, it is important to note that it was not only the *Baude* Court that had an opportunity to reweigh the merits of the nondiscriminatory alternatives. Both courts were presented with underage drinking and tax evasion arguments from the state.[201] Viewed another way, despite *Granholm*'s foreclosure of the underage drinking and tax evasion arguments, the States still attempted to justify their regulatory schemes on those grounds.[202] Furthermore, both States were unable to show a unique problem with minors consuming directly shipped wine, or that their states were uniquely affected by tax evasion.[203] It is these persistent attempts to rely on foreclosed arguments and illusory problems to justify state regulatory schemes that suggest that the laws are merely attempts to insulate in-state actors at the expense of interstate commerce. Therefore, a mistake made by both courts was to ignore the possibility that the in-person purchase requirements were simply economic protectionism.

VI. CONCLUSION

In many respects the dormant Commerce Clause promotes the most efficient use of land as a means of bettering our national economy.[204] The dormant Commerce Clause allows agricultural regions across the country to pursue the most efficient use of each region without the fear of being

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[201] *See* Cherry Hill Vineyards v. Lilly, 553 F.3d 423, 434.

[202] *See id.* (stating that *Granholm* had already "addressed and rejected" the state's underage drinking and tax evasion arguments).

[203] *See id.*

[204] "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." *See* Granholm v. Heald, 544 U.S. 460, 475 (2005) (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 145 (1970)) (quotations omitted)).

trapped inside an in-state market over-saturated by one type of good.[205] While the Supreme Court once permitted states to use the Twenty-first Amendment to conduct "low-level trade war[s]," the streamlined markets of today demand something more of state regulation.[206] *Granholm* more than answered that call by returning wine to its proper place under the full protection of the dormant Commerce Clause, and limiting Section Two of the Twenty-first Amendment to its intended function: to allow states to maintain a system for controlling the transportation, importation, and use of liquor in a nondiscriminatory manner.[207]

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[205] *See id.* at 473 (describing California's attempts at ensuring their domestic wine producers were able to sell their products in other states).

[206] *See id.* at 474.

[207] *Id.* at 484-85.

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