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Shirlene Love

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By Shirlene Love*

I. INTRODUCTION

Rich and Sally were married in a small ceremony on Valentine's Day. They took a two-week honeymoon in California's Napa Valley where they spent their time enjoying the beautiful scenery and visiting the numerous small wineries in the area. They discovered some wonderful local wines that they hoped to enjoy for many years to come.

When Rich and Sally returned home to Detroit, Michigan, however, they discovered a problem with their plan. They searched the local stores, but could not find their newly discovered wines. They even called the wineries in California to find out which stores carried their products. Rich and Sally were disappointed to learn that no stores in Michigan carried the wines. The wineries explained that Michigan regulations required that they sell their wines to a wholesaler who in turn would sell them to a retailer, but the small wineries did not produce enough wine to interest the wholesalers in their products.

Rich and Sally remembered that the wineries had a website, and they knew of some friends who had purchased wine from a Michigan winery through their website. They asked the California winery if

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* J.D. Candidate 2007 Pepperdine University School of Law, B.A. History, B.A. Political Science Knox College. This author wishes to thank her friends and family for always providing their love and support. Words cannot express the difference it has made. This article is dedicated to the teachers who gave me the skills to complete it, and my family gave me the faith in myself to utilize them.

they had similar capabilities. Again, they were disappointed to learn that they could not purchase the wine over the internet, or even order it over the phone. The winery explained that Michigan laws allowed wineries in Michigan to sell their wine directly to consumers, but wineries outside of Michigan could not - they had to go through wholesalers. Thus, Rich and Sally's plans were ultimately thwarted. Because of the Michigan regulations, the honeymooners could not enjoy their newly discovered favorite wines, and the small California wineries could not sell their wines to consumers in Michigan.

The situation described above has been encountered by many wine connoisseurs over the past several years. Michigan is not the only state with such a regulation. Eight states have laws that allow direct shipment of wine to consumers only if the wine comes from a winery within their state.[1] Much to the dissatisfaction of vacationers returning from the Napa Valley and the wineries that hosted them, these laws prevented consumers from acquiring their new found favorite vintages from small out-of-state wineries who could not afford to sell their goods to out-of-state wholesalers. Citing lost profits and disappointed customers, several small wineries eventually challenged such laws in Michigan and New York on the grounds that they were unconstitutional.[2]

In *Granholm v. Heald* the Supreme Court addressed this issue.[3] They consolidated two cases, the first challenging a Michigan law, the second challenging a New York law.[4] They held, in a five to four decision, that states maintain the right to mandate specific distribution schemes as they see fit under the authority of the Twenty-first Amendment. These regulations, however, may not

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1. Linda Greenhouse, *Court Lifts Ban on Wine Shipping*, N.Y. TIMES, May 17, 2005, at A1. The states are Michigan, New York, Connecticut, Massachusetts, Florida, Ohio, Indiana, and Vermont. Thirteen other states are reciprocity states which allow direct shipment only from states which also permit out-of-state direct shipment. These states are California, Colorado, Hawaii, Idaho, Illinois, Minnesota, Missouri, New Mexico, Oregon, Washington, Wisconsin and West Virginia. *Id.*

2. Granholm v. Heald, 125 S. Ct. 1885, 1892 (2005).

3. *Id.*

4. *Id.*

discriminate between in-state and out-of-state wineries.[5] This case note examines the Court's decision: Part II will explore the history of the Dormant Commerce Clause and Twenty-First Amendment; Part III will present the facts of the case; Part IV will discuss and analyze the majority and two dissenting opinions; Part V will speculate about the future impact of this decision; and Part VI will conclude.

II. HISTORY

A. Dormant Commerce Clause

1. Early Approach

In a series of cases dating back to the early 1800s the Supreme Court has interpreted Article Three Section Eight of the Constitution to prohibit states from regulating interstate commerce.[6] This concept is referred to as the Dormant Commerce Clause.[7] The Constitution states, "Congress shall have power . . . [t]o regulate commerce with foreign nations, and among the several States, and with the Indian tribes."[8] From this enumerated power, the Court has derived the rule that regulation of interstate commerce is a power reserved solely to the Federal government.[9] Thus, any State government regulation of interstate commerce is in violation of the Constitution and therefore void.[10]

The Court first interpreted the Constitution's Commerce Clause in *Gibbons v. Ogden.*[11] The case involved a state act authorizing a monopoly over the operation of steamships in New York waters.[12] The state act was challenged on the basis that it conflicted with an act

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5. *Id.* It is interesting to note that this is the first case where a five to four majority was formed by Justices Kennedy, Scalia, Souter, Ginsburg, and Breyer. *The Statistics*, 119 HARV. L. REV. 415, 424 (2005).

6. Gibbons v. Ogden, 22 U.S. 1 (1824).

7. *Id.*

8. U.S. CONST. art. 1, § 8, cl. 3.

9. *Gibbons*, 22 U.S. at 1.

10. *Id.*

11. *Id.*

12. *Id.*

of Congress.[13] The Court ruled that the act was indeed pre-empted.[14] However, in dicta the Court strongly indicated that if the act had not been invalid because of the superseding Federal law, it would nonetheless have been invalid because it had the effect of regulating interstate commerce, a power specifically granted to Congress.[15] "[W]hen a State proceeds to regulate commerce . . . among the several States, it is exercising the very power that is granted to Congress."[16]

The Court continued to develop the principle in *Cooley v. Board of Wardens*.[17] In that case it was determined that the power to regulate commerce between the states could be held concurrently by both the State and Federal governments.[18] The Court established the Subjects Test, looking to the subject of the regulation to determine whether it fell under the sole purview of the Federal government or if it could be regulated by both the State and Federal governments.[19] It said that where the subject in question requires uniformity of regulations, the power to regulate rests solely with the Federal government.[20] Where the subject requires diversity of regulations, the power to regulate is held by both the State and Federal governments.[21]

2. Modern Approach

a) Development of the Balancing Test

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13. *Id.* at 186.

14. *Id.* at 200-22.

15. *Id.* at 199-200.

16. *Id.* at 199.

17. Cooley v. Bd. of Wardens, 53 U.S. 299 (1851). The case involved a Pennsylvania law that required any ship entering into the port of Philadelphia to take on a local pilot to conduct the final leg of the voyage. *Id.* at 311-12.

18. *Id.* at 321.

19. *Id.* at 319.

20. *Id.*

21. *Id.*

The Court began to refine its modern approach to the Dormant Commerce Clause around the middle of the twentieth century.[22] In speaking about the Constitution the Court said, "[i]t was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division."[23] The case involved the New York Milk Control Act which regulated the price at which milk could be sold in the state of New York, regardless of its origin.[24] A challenge to the state's power to implement such regulations was raised by producers who wanted to purchase milk from Vermont, import it to New York, and sell it at a lower price.[25] The act prohibited such a practice, and offered as justification, that the prohibition was meant to secure the state's milk supply by helping to keep local dairy farmers in business.[26] The Court did not find this justification convincing, instead it held that the act was merely a method to protect the New York economy to the detriment of other states.[27] Thus, the act was invalid.

> What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation . . . [n]either the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state.[28]

b) The Balancing Test Defined

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22. *See* Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935) (holding that the state of New York could not institute price controls on milk because their primary purpose was economic protectionism.); *Id.* at 527; *see also* H.P. Hood & Sons v. Du Mond, 336 U.S. 525 (1949).

23. *Baldwin*, 294 U.S. at 523.

24. *Id.* at 519.

25. *Id.* at 522.

26. *Id.* at 523.

27. *Id.* at 524.

28. *Id.* at 527.

The next major development in the case law surrounding the Dormant Commerce Clause came in *Southern Pacific Co. v. Arizona*.[29] It was a challenge to the Arizona Train Limit Law, which set a limit on the length of trains that could pass through the state of Arizona.[30] This meant that trains entering Arizona from another state had to remove or exchange cars at the Arizona boarder at considerable expense to the train companies.[31] The Court determined that under the Subjects Test established in *Cooley* the railroads required uniformity of regulation, and thus the state regulation was in violation of the Commerce Clause.[32] However, the Court was not satisfied with that test; it established a new balancing test.[33] First, the Court looked at "the nature and extent of the burden which the state regulation . . . imposes on interstate commerce," and then they balanced the weight of the state and national interests to determine if the state regulation of interstate commerce should be permitted.[34]

In *Pike v. Bruce Church, Inc.* the Court further defined the elements of the balancing test.[35] The Court overturned an Arizona regulation requiring that cantaloupes grown in the state be processed there, rather then at an out of state facility.[36] First, the Court asked if "the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental."[37] When this question was answered in the affirmative, then the Court engaged in a three part balancing test.[38] First, the

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29. S. Pac. Co. v. Arizona, 325 U.S. 761 (1945).

30. *Id.* at 763.

31. *Id.* at 771-72. In 1939 the appellant train company showed that from 66%-85% of its freight trains and over 43% of its passenger trains on a route comparable to the one through Arizona were over the maximum length allowed in Arizona. *Id.* at 771. Over 90% of the train traffic in Arizona at this time was interstate in nature; thus, the regulation costs train companies approximately $1 million a year. *Id.*

32. *Id.* at 770.

33. *Id.* at 770-71.

34. *Id.* at 770. In this case the Court determined that the national interests in uniformity of the railway system outweighed the state interests, and thus the law was invalid. *Id.* at 783.

35. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

36. *Id.* at 140.

37. *Id.* at 142.

38. *Id.*

Court balanced the extent of the burden the statute created on interstate commerce; second, the legitimacy of the state interests involved; and third, whether there were any reasonable non discriminatory alternatives available to the state.[39]

The Court summarized its modern approach to Dormant Commerce Clause questions in *Philadelphia v. New Jersey.*[40] This case involved a New Jersey law that closed New Jersey landfills to all solid wastes from other states.[41] The Court began its analysis by looking at the purpose of the law, if the purpose of the law was mere economic protectionism, and then whether the law was discriminatory and virtually per se invalid.[42] Here, the Court held that there was no difference between the in-state and out-of-state waste other then geographic origin, thus the law was discriminatory.[43] However, if the law was not discriminatory then the court said it would be more appropriate to engage in the balancing test elucidated in *Pike.*[44]

c) Strict Scrutiny

In *Hughes v. Oklahoma* the Court added a final twist to its Dormant Commerce Clause approach.[45] The Court overruled a statute that prohibited the out-of-state shipment of minnows for commercial purposes.[46] The Court held that the law was discriminatory, but it did not stop the analysis at this point.[47] "At a minimum such facial discrimination invokes the strictest scrutiny of any purported legitimate local purpose and the absence of

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39. *Id.*

40. Philadelphia v. New Jersey, 437 U.S. 617 (1978).

41. *Id.* at 618.

42. *Id.* at 623-24. Discrimination against out of state products must be justified by a difference beyond geographic location of production. If the only difference between two products is that one was made in state and the other was made out of state, the out of state product may not be lawfully excluded or regulated. *Id.* at 627.

43. *Id.* at 623-624.

44. *Id.* at 624.

45. Hughes v. Oklahoma, 441 U.S. 322 (1979).

46. *Id.* at 338.

47. *Id.* at 337.

nondiscriminatory alternatives."[48] Thus, the Court proceeded to analyze the statute under the *Pike* balancing test.[49] The Court reached the conclusion that the law was also invalid under the balancing test, and thus overturned it.[50]

Ultimately, the modern approach to Dormant Commerce Clause questions can be summarized as follows. First, the Court determines whether the law in question is discriminatory.[51] If it is not, then the Court engages in the *Pike* balancing test to determine its validity.[52] If it is valid, then the Court examines the law with Strict Scrutiny, using the same elements as the *Pike* balancing test, but with less emphasis placed on the results of the test, to ensure that the law is certainly invalid.[53]

B. Twenty-first Amendment

1. Prohibition Prior to the Eighteenth Amendment

a) Early Common Law

When the national movement towards the prohibition of alcohol began the Court had to rule on a number of cases involving the authority of the states to regulate the sale of alcohol. One of the first such cases was *Mugler v. Kansas*.[54] This case involved a Kansas statute that prohibited selling or manufacturing intoxicating liquors within the state.[55] The Court held that this statute did not violate a constitutionally protected privilege or immunity, and thus it was valid.[56] A few years later in *Leisy v. Hardin*, a similar Iowa law was

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48. *Id.*
49. *Id.*
50. *Id.*
51. *See Hughes*, 441 U.S. 322 at 336.
52. *Id.*
53. *Id.*
54. Mugler v. Kansas, 123 U.S. 623 (1887).
55. *Id.* at 653.
56. *Id.* at 675. The Court held that the law was a valid exercise of the state's police powers to protect the health, morals, and safety of its citizens, and did not abridge a privilege and immunity protected by the Fourteenth Amendment. *Id.* at 669.

overturned when it was challenged by a citizen of another state who sought to import liquor into Iowa.[57] The Court drew a distinction between the two fact patterns because this case involved interstate commerce.[58] Following this ruling a state could prohibit the sale and manufacture of intoxicating liquors within its own borders, but not its importation from other states.[59]

b) The Wilson Act

Congress passed the Wilson Act in 1890, which allowed states to regulate liquor imported from out of state to the same extent and manner as liquor manufactured in the state.[60] Specifically, it exempted liquor from the Original Packages Doctrine which prohibited states from regulating imported goods sold in their original packages.[61]

The Court upheld a Kansas law that took advantage of the powers the Wilson Act granted to states in the case of *In re Rahrer*.[62] Kansas enacted legislation that prohibited the sale of liquor within the state.[63] A Kansas citizen challenged the enforcement of the law when he was

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57. Leisy v. Hardin, 135 U.S. 100, 124-25 (1890).

58. *Id.*

59. *Id.* at 123.

60. Wilson Act 27 U.S.C. §121 (2005).

> All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt there from by reason of being introduced therein in original packages or otherwise.

Id.

61. *Id.* The Original Packages doctrine was established in *Brown v. Maryland* where the Court declared that goods imported to a state and sold in their original packages were not subject to state regulation because to do so would interfere with interstate commerce by allowing states to in effect tax imported goods twice, upon importation and upon sale. Brown v. Maryland, 25 U.S. 419, 443 (1827).

62. In re Rahrer, 140 U.S. 545 (1891).

63. *Id.* at 564.

convicted under it because he had been selling liquor that was imported from another state.[64] The Court upheld the conviction in contrast to its decision in *Leisy* because now the Wilson Act granted states this type of authority.[65]

However, in *Scott v. Donald* the Court overturned a South Carolina law that only prohibited the sale and use of imported liquors, not liquors manufactured in the state.[66] The Court held that states cannot disallow out-of-state liquor while permitting in-state liquor.[67] This type of discriminatory law was not authorized by the Wilson Act.[68] Then, in *Vance v. W.A. Vandercook*, the Court limited the authority of the Wilson Act to resale liquor.[69] The Court held that South Carolina could not prohibit liquor from entering the state if it was shipped directly to the consumer for their personal consumption.[70]

c) The Webb Kenyon Act

In response to the Court's decision in *Vance* Congress passed the Webb Kenyon Act in 1913, which closed the direct shipment loophole.[71] The act divested liquor of its interstate commerce

64. *Id.*
65. *Id.* at 562-64.
66. Scott v. Donald, 165 U.S. 58 (1897).
67. *Id.* at 99.
68. *Id.* at 101.
69. Vance v. W.A. Vandercook Co., 170 U.S. 438 (1889).
70. *Id.* at 457.
71. Webb Kenyon Act, 27 U.S.C. § 122 (2005).

> 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

protections.[72] In a decision that generated much controversy at the time the Court upheld the Act and its purpose in *Clark Distilling Co. v. Western Michigan Railway Co.*[73] The case involved a West Virginia prohibition law that did not allow liquor to be shipped directly to consumers from out-of-state.[74] The Court upheld the authority of the state to pass such legislation under the Webb Kenyon Act.[75]

2. The Eighteenth Amendment

Two years later, in 1919 the Eighteenth Amendment was ratified.[76] It outlawed all intoxicating liquors throughout the country, "the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited."[77] In *McCormick v. Brown,* the Court affirmed that the amendment did not preclude states from introducing even stricter regulations on the sale of alcohol than those required by the Constitution.[78] It also noted that the amendment did not repeal the Webb Kenyon Act.[79]

> State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited.

Id.

72. *Id.*

73. Clark Distilling Co. v. W. Mich. Ry. Co., 242 U.S. 311 (1917). The Act had actually been vetoed by the President and then the veto was overruled by a super-majority of Congress, prior to its enactment and review by the Court. *Id.* at 325.

74. *Id.* at 316-17.

75. *Id.* at 331-32.

76. U.S. CONST. amend. XVIII.

77. *Id.*

78. McCormick v. Brown, 286 U.S. 131, 144 (1932).

79. *Id.* at 141.

3. Repeal of the Eighteenth Amendment and Ratification of the Twenty-first Amendment

In 1933 the Twenty-first Amendment was ratified.[80] Section One repealed the Eighteenth Amendment.[81] Section Two states, "[t]he transportation or importation into any State, Territory, or Possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."[82] The exact effect of Section Two has been a source of controversy since its ratification.[83]

a) Early Court Decisions: Broad State Power

In the years immediately following the ratification of the amendment the Court granted the states broad powers to regulate alcohol. In *State Board of Equalization v. Young's Market*, the Court upheld a law that imposed a license fee on companies seeking to import beer into the state.[84] The Court acknowledged that were it not for the amendment the law would be a discriminatory interference with interstate commerce.[85] The amendment also shielded the law from objections on the grounds that it violated the Equal Protection Clause of the Fourteenth Amendment.[86] In speaking about the amendment the Court said

> The words used are apt to confer upon the State the power to forbid all importations which do not comply with the conditions which it prescribes. The plaintiffs ask us to limit this broad command. They request us to construe the Amendment as saying, in effect: The

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80. U.S. CONST. amend. XXI.

81. *Id.* "[T]he eighteenth article of amendment to the Constitution of the United States is hereby repealed." *Id.*

82. *Id.*

83. *Id.*

84. State Bd. of Equalization v. Young's Mkt. Co., 299 U.S. 59 (1936).

85. *Id.* at 62.

86. *Id.* at 64.

> 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.[87]

The Court continued to grant the states broad powers of regulation. In *Mahoney v. Joseph Triner Corp.* the Court upheld a Minnesota law that required registration of imported liquor that was more than twenty-five percent alcohol by volume, but not domestic liquor.[88] The Court stated that such discrimination was permitted under the amendment because it was intended to grant the states broad powers, and their regulations need not be reasonable.[89] In *Indianapolis Brewing Co. v. Liquor Control Commission* the Court upheld a Michigan law which was retaliatory in nature.[90] The law prohibited Michigan dealers from selling beer produced in a state which discriminated against beer produced in Michigan.[91] The Court determined that the amendment granted states the power to regulate liquor traffic in such a way in spite of Commerce Clause limitations, and the Equal Protection Clause.[92]

In *Ziffrin Inc. v. Reeves* the Court upheld a law requiring licenses for common carriers transporting liquor within the state.[93] It drew an important distinction with this law, holding that it was an exercise of the police power by the state, and therefore the goods in question fell outside the realm of the Commerce Clause.[94] Thus, even liquor which was intended for an out of state destination was subject to the regulations.[95]

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87. *Id.* at 62.

88. Mahoney v. Joseph Triner Corp., 304 U.S. 401, 402 (1938).

89. *Id.* at 404.

90. Indianapolis Brewing Co. v. Liquor Control Comm'n., 305 U.S. 391 (1939).

91. *Id.* at 392-93.

92. *Id.* at 394.

93. Ziffrin Inc. v. Reeves, 308 U.S. 132 (1939).

94. *Id.* at 139.

95. *Id.* at 140.

Even during the early years following the ratification of the Twenty-First Amendment, the Court did not grant the states unlimited powers to regulate alcohol. In *Collins v. Yosemite Park & Curry Co.* the Court overturned a California regulation that required licenses to sell liquor in Yosemite National park.[96] In the grant of land to the federal government California retained the right to impose taxes on the activities therein.[97] The Court held that the license was not a tax, and was thus not permitted on lands that fell under exclusive federal jurisdiction.[98]

b) Later Court Decisions: Narrowing State Power

A little more than a decade after the ratification of the amendment the Court began to further restrict the states' powers to regulate alcohol. *US v. Frankfort Distilleries* limited the state to regulations which dealt with liquor entering the state and being used within the state, but prohibited regulations on liquor being exported for use in other states.[99] The law in question involved price fixing which was a clear violation of the federal Sherman Anti-trust Act.[100] The Court stated that the "Amendment bestowed upon the states broad regulatory power over the liquor traffic in their territories. It has not given the states plenary and exclusive power to regulate the conduct of persons doing an interstate liquor business outside their boundaries."[101]

In two cases handed down on the same day the Court reasserted federal power to control regulations of alcohol. In *Hostetter v. Idlewild Bon Voyage Liquor Corp.* the Court said that it would be "patently bizarre" to conclude that the Twenty-First Amendment repealed the Commerce Clause with regard to intoxicating liquor.[102] The case involved New York's regulation of liquor sold to international travelers, where the liquor was delivered directly to a

96. Collins v. Yosemite Park & Curry Co. 304 U.S. 518 (1938).

97. *Id.* at 530.

98. *Id.* at 533-34.

99. United States. v. Frankfort Distilleries, 324 U.S. 293 (1945).

100. *Id.* at 294.

101. *Id.* at 299.

102. Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 332 (1964).

departing airplane and was never intended to be consumed in the state.[103] Because the delivery is made to a foreign nation the Court said that New York did not have the power to regulate the liquor.[104] This was a clear example of commerce with foreign nations, and regulation of such commerce is expressly reserved for the Federal Government in the Commerce Clause.[105]

In *Dept. of Revenue v. James B. Beam Distilling* the Court held a Kentucky law that imposed a tax on liquor imported from Scotland to be a violation of the Import/Export Clause of the Constitution.[106]

To sustain the tax which Kentucky has imposed in this case 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 or in its history leads to such an extraordinary conclusion.[107]

> The Court stated that the Wilson Act and Webb-Kenyon Act were still in effect even after the ratification and repeal of the Eighteenth Amendment and ratification of the Twenty-first Amendment. However, neither of the acts nor the Twenty-first Amendment authorized taxation of liquor which was imported from abroad, as opposed to across state boarders.[108]

c. The Twenty-first Amendment Does Not Offer Salvation

In another series of cases the Court has held that the Twenty-First Amendment cannot save laws which violate other provisions of the Constitution or federal law.[109] The Court attempted to define the

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103. *Id.* at 326.

104. *Id.* at 333-34.

105. *Id.*

106. Dep't of Revenue v. James B. Beam Distilling, 377 U.S. 341 (1964).

107. *Id.* at 345-46.

108. *Id.* at 346.

109. Wisconsin v. Constantineau, 400 U.S. 433 (1971) (holding that a law that violates the Due Process Clause is not saved by the Twenty-first Amendment); Craig v. Boren, 429 U.S. 190 (1976) (holding that a law that violates the Equal

boundaries of state power in *California Retail Liquor Dealer Association v. Midcal Aluminum*, "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. Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations."[110] A subsequent case helped to elucidate what would constitute an "appropriate situation:"

> When . . . a state regulation squarely conflicts with the accomplishment and execution of the full purposes of federal law, and the State's central power under the Twenty-first Amendment of regulating the times, places, and manner under which liquor may be imported and sold is not directly implicated, the balance between state and federal power tips decisively in favor of the federal law.[111]

d. Regulations Closely Related to the Twenty-first Amendment

In *Capital Cities Cable, Inc. v. Crisp* the Court established that in order for the Twenty-first Amendment to permit state legislation that conflicts with federal law the regulations must be closely related to the concern of the amendment.[112] Thus, the Court limited the state's police powers with respect to alcohol to regulations which addressed things such as temperance and prevention of alcohol related violence, regulations which were a closely related to the intent and purpose of

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Protection Clause is not saved by the Twenty-first Amendment); California Retail Liquor Dealers Association v. Midcal Aluminum Inc., 445 U.S. 97 (1980) (holding that a law that violates the Sherman Act is not saved by the Twenty-first Amendment); Larin v. Grendel's Den, Inc., 459 U.S. 116 (1982) (holding that a law that violates the Establishment Clause is not saved by the Twenty-first Amendment); Capital Cities Cable v. Crisp, 467 U.S. 691 (1984) (holding that a law that violates the Supremacy Clause is not saved by the Twenty-first Amendment); Liquormart v. Rhode Island, 517 U.S. 484 (1996) (holding that a law that violates the First Amendment is not saved by the Twenty-First Amendment).

110. *Midcal*, 445 U.S. at 110.

111. *Capital Cities Cable*, 467 U.S. at 716.

112. *Id.* at 714.

the Twenty-first Amendment.[113] In *Bacchus Imports v. Dias* the Court squarely addressed a Hawaii law that violated the Commerce Clause.[114] The Court looked to the purpose of the law, a tax exemption for locally produced alcohol, and determined that it was mere economic protectionism.[115] "State laws that constitute mere economic protectionism are . . . not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor."[116] Because the law was not closely related to a core concern of the amendment the Court rejected Hawaii's claim that the law, which was in violation of the Commerce Clause, was protected by the Twenty-first Amendment.[117]

Thus, the Court explained its philosophy regarding states' use of the Twenty-first Amendment to justify laws which conflict with federal laws.[118] The Core Concerns test states that laws which have purposes that are closely related to the concerns of the Twenty-first Amendment, such as temperance, health and safety, may be permitted in spite of conflicts with other federal laws or the Constitution; however, laws which are not closely related cannot be justified.[119]

Thus, a state law regulating intoxicating liquor which conflicts with the Commerce Clause, if it is not closely related to a concern of the Twenty-First Amendment, must face the same scrutiny as a state law regulating any other item of commerce.[120] The Court again applied this rule in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*.[121] It overturned a New York law that required liquor producers to sell their goods to wholesalers in New York at a price equal to the lowest price that they sell their goods anywhere

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113. *Id.*

114. Bacchus Imports v. Dias, 468 U.S. 262 (1984).

115. *Id.* at 276

116. *Id.*

117. *Id.*

118. *Id.*

119. *Bacchus*, 468 U.S. at 276.

120. *Id.*

121. Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986); *see also* Healy v. Beer Institute, 491 U.S. 324 (1989) (holding that a Connecticut law had the effect of regulating liquor sales in other states, and thus violated the Commerce Clause).

else in the country.[122] Because this law was per se discriminatory, and its purpose was mere economic protectionism, which is not a core concern, the Court said that it was not a valid exercise of Twenty-First Amendment power.[123] Thus, under Commerce Clause scrutiny, the law was overturned.[124]

In contrast, in *North Dakota v. United States* the Court upheld a North Dakota law that required liquor shipped to federal military bases to have a special label indicating that it was meant for consumption only on base, and requiring that special records of the shipments be kept.[125] The Court decided that this law was closely related to the concerns of the Twenty-first Amendment because the law was intended to prevent unlawful diversion of the liquor off of the base.[126] "In the interest of promoting temperance, ensuring orderly market conditions, and raising revenue, the State has established a comprehensive system for the distribution of liquor within its boarders."[127] Thus, the Court upheld this state regulation, and would likely allow similar state regulatory schemes in the future.[128]

Thus, the modern test for the validity of state regulations under the Twenty-first Amendment allows for regulations of alcohol within the boarders of the state. When the states regulate the importation of liquor from other states or internationally, the regulations must meet the requirements of the Commerce Clause; namely they cannot be discriminatory. However, the Court allows for a limited exception to the Dormant Commerce Clause rule when the regulations address a core concern of the Twenty-first Amendment, such as temperance or health and safety.

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122. *Brown-Forman.* 476 U.S. at 575.
123. *Id.* at 585.
124. *Id.*
125. North Dakota v. United States, 495 U.S. 423, 429 (1990).
126. *Id.* at 432.
127. *Id.*
128. *Id.*

III. FACTS

This case is a consolidation of two appeals from lower court decisions.[129] One case challenged the constitutionality of state regulations governing the sale of wine from out-of-state wineries to consumers in Michigan; the other case challenged different state regulations, which ultimately had the same effect on consumers, in New York.[130]

A. The Three-Tier System

Both Michigan and New York regulate the sale of alcohol within their states using a three-tiered system.[131] The regulations require separate licenses for producers, wholesalers, and retailers.[132] In *North Dakota v. United States*, the Court upheld such three-tiered distribution regulations as a valid exercise of authority under the Twenty-first Amendment.[133] These types of distribution schemes are "preserved by a complex set of overlapping state and federal regulations."[134]

The issue in this case is that, broadly speaking, the Michigan and New York regulations create an environment where out-of-state wineries are subject to a three-tiered regulation scheme, but in-state wineries are not.[135] The objecting parties in these cases argued that this was a discriminatory violation of the dormant commerce clause.[136]

B. The Parties

In Michigan, the law was challenged by a small winery located in California who received orders for its wine by consumers in

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129. Granholm v. Heald, 125 S. Ct. 1885, 1891 (2005).
130. *Id.*
131. *Id.* at 1892.
132. *Id.*
133. *Id.*(citing North Dakota v. United States, 495 U.S. at 432).
134. *Granholm*, 125 S. Ct. at 1892.
135. *Id.*
136. *Id.*

Michigan.[137] The winery was unable to fill the orders because of the state regulations.[138]

The New York law was challenged by small wineries in Virginia and California who showed that they were regularly visited by tourists who often purchased bottles of wine during their visits.[139] If these visitors wanted to purchase more of the wineries' products after they returned home they would have been prevented from doing so if they were residents of New York.[140]

C. Michigan Regulations

The regulations in Michigan established a system where wineries or other producers of alcoholic beverages could only sell their products to licensed in-state wholesalers.[141] This rule applied to both in-state and out-of-state producers. The wholesalers could only sell to licensed retailers in Michigan.[142] Then the retailers could sell the alcoholic beverages to consumers via retail locations and direct home delivery.[143]

Wineries in Michigan, however, qualified for an exception to the three-tiered distribution scheme; they were eligible for a special "winemaker" license that allowed them to ship their product directly

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137. *Id.* at 1893.

138. *Id.* The winery was unable to fill the orders for a couple of reasons: (1) The regulations prohibit direct-shipment of wine to consumers from out of state; (2) Even if the winery could find a Michigan wholesaler willing to distribute their wine, the price increase created by requiring that the wine pass through the three-tiered scheme would make the sale of the wine "economically infeasible." *Id.*

139. *Id.*

140. *Granholm*, 125 S. Ct. at 1893. New York is of a particular concern to out of state wineries because it is the second largest wine market in the United States. *Id.*

141. *Id.* (citing MICH. COMP. LAWS ANN. §§ 436.1109(1), 436.1305, 436.1607(1) (West 2000); Mich Admin. Code r. 436.1705 (1990), 436, 1719 (2000)).

142. *Id.* (citing MICH. COMP. LAWS. ANN. §§ 436.1113(7), 436.1607(1) (West 2001)).

143. *Id.* (citing MICH. COMP LAWS ANN. §§ 436.1111(5), 436.1203(2)-(4) (West 2001)).

to in-state consumers, bypassing the wholesalers and retailers.[144] These licenses vary in price according to the size of the winery, but start at twenty-five dollars.[145] Out-of-state wineries do not qualify for the same special license.[146] They may apply for an "outside seller of wine" license; however, this only qualifies them to sell to wholesalers within Michigan, and costs three hundred dollars.[147]

The suit objecting to the regulations was originally brought in the United States District Court for the Eastern District of Michigan.[148] The District Court upheld the validity of the scheme. On appeal to the Court of Appeals for the Sixth Circuit the decision was reversed.[149] The decision was based on the grounds that the States did not adequately show that they could not meet the same policy objectives through non-discriminatory means.[150]

D. New York Regulations

New York regulations established a similar three-tiered distribution system, regulating the sale of alcohol by producers, wholesalers, and retailers.[151] The New York regulations also included limited exceptions to the general rule for wineries located in the state.[152]

The regulations contained one exception which allowed for a special license permitting direct shipment of wine to consumers; however, to qualify for this license the winery was required to produce their wine solely from grapes grown in New York.[153] Wineries with such a license could also ship wine produced by other wineries directly to consumers, but only if that wine was made from

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144. *Id.* (citing MICH. COMP LAWS ANN. § 436.1113(9) (West 2001), §§ 436.1537(2)-(3) (West Supp.2004); Mich. Admin Code r. 436.1011.(7)(b) (2003)).

145. *Id.* (citing MICH. COMP LAWS ANN. § 436.1525(1)(d) (West Supp. 2004)).

146. *Id.* citing MICH. COMP LAWS ANN. §§ 436.1109(9) (West 2001), 436.1525(1)(e) (West Supp. 2004); Mich. Admin. Code r. 436.1719(5) (2000).

147. *Id.*

148. *Id.* at 1894.

149. *Id.*

150. *Id.*; Heald v. Engler, 342 F.3d 517 (2003).

151. *Granholm*, 125 S. Ct. at 1894.

152. *Id.*

153. *Id.* (citing N.Y. ALCO. BEV. CONT. § 76-a(3) (McKinney 2005)).

at least seventy-five percent New York grown grapes.[154] Additionally, even if the content qualifications were met, for an out-of-state winery to ship directly to consumers in New York, they had to be a licensed New York winery.[155] This required that the winery would have to establish "a branch factory, office or storeroom" in New York solely at its own expense.[156]

The lawsuit that objected to the New York regulations was originally brought in the District Court for the Southern District of New York.[157] On summary judgment, the district court determined that the regulations were discriminatory against out-of-state wineries and thus unconstitutional because they violated the Commerce Clause and were not saved by the Twenty-first Amendment.[158] On appeal, the Court of Appeals for the Second Circuit reversed the decision and upheld the regulations.[159] They reasoned that the laws fell within the power permitted to states under the Twenty-first Amendment.[160]

IV. ANALYSIS

A. Majority Opinion

The Court addressed the following question: "[D]oes a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of out-of-state wineries to do so violate the dormant Commerce Clause in light of § 2 of the Twenty-first Amendment?"[161] The majority opinion was delivered by Justice Kennedy.[162] It held that "the laws in both States discriminate against interstate commerce in violation of the

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154. *Id.* (citing N.Y. ALCO. BEV. CONT. §§ 3(20-a), 76-a(6)(a) (McKinney 2005)).

155. *Id.* (citing N.Y. ALCO. BEV. CONT. § 3(37) (McKinney 2005)).

156. *Id.*

157. *Id.*

158. *Id.*: Swedenburg v. Kelly, 232 F. Supp. 2d 135 (S.D.N.Y. 2002).

159. *Id.*; Swedenburg v. Kelly, 358 F.3d 223 (2d Cir. 2004).

160. *Granholm*, 125 S. Ct. at 1894.

161. *Id.* at 1895.

162. *Id.* at 1892.

Commerce Clause," additionally, "the discrimination is neither authorized nor permitted by the Twenty-first Amendment."[163]

1. Dormant Commerce Clause Analysis

a) Virtually Per Se Invalid?

The Court, first, undertook to determine whether the regulations are per se discriminatory.[164] The Court quickly determined that the Michigan regulatory scheme was discriminatory.[165] It said that the effect of the regulations was to require out-of-state wine, but not in-state wine, to be sold through both a wholesaler and a retailer.[166] This extra step adds to the overhead costs of out-of-state wine.[167] "The cost differential, and in some cases the inability to secure a wholesaler for small shipments, can effectively bar small wineries from the Michigan market."[168]

This was an excellent example of economic protectionism. Regardless of the justification offered by Michigan, this regulation has the effect of protecting local wineries from competition.[169] Small out-of-state wineries were essentially barred from selling their goods in Michigan. There is no difference between wine that is imported from out-of-state and wine that is made in-state; thus, the Court's determination that the regulation is discriminatory and is likely per se invalid was well founded.

The Court next addressed the New York regulatory scheme.[170] Unlike the Michigan scheme, New York did not ban outright direct

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163. *Id.* Justice Kennedy's opinion was joined by Justices Scalia, Souter, Ginsburg, and Breyer.

164. *Id.* at 1896.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* Without explicitly stating so, the Court reached the conclusion that the Michigan regulations are a form of economic protectionism, which was established in Philadelphia v. New Jersey as a clear form of per se discrimination. *See* Philadelphia v. New Jersey, 437 U.S. 617 (1978).

169. *See Philadelphia*, 437 U.S. at 617.

170. *Granholm*, 125 S. Ct. at 1885.

shipments by out-of-state wineries.[171] However, in order to ship directly to consumers, wineries were required to establish a base of operations in New York.[172] The Court concluded that this was merely an indirect method to subject out-of-state wineries to the three-tiered distribution scheme while allowing in-state wineries to bypass it.[173]

In this instance the States refuted the notion that their regulations were discriminatory. They argued that an out-of-state winery, under the regulations, could earn the right to ship directly to consumers; however, the Court remained unconvinced of this argument.[174] The means to go about earning this privilege remained unclear and no winery has yet to do so.[175] It would likely be cost prohibitive for most wineries to establish the required presence in New York.[176] Unless an out out-of-state winery was able to both set up a distribution facility in New York and use grapes grown in New York, it would not qualify for the license required to ship directly to consumers.[177] Additionally, the regulations allowed New York wineries, but not out-of-state wineries, the privilege of direct shipment through another licensed winery.[178] In-state wineries were given this privilege even if they did not have the licenses which allowed direct shipment themselves.[179] The Court concluded by holding that the New York law, like the Michigan law, was per se discriminatory.[180]

Again, this was a good example of economic protectionism. The New York regulatory scheme was perhaps even more devious than the Michigan scheme. The Michigan scheme made no pretenses

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171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.* at 1897.
177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.* Again, the Court does not state it but the New York regulations also appear to have economic protectionism as one of their aims. Thus, it is not surprising that the Court concludes that they are per se discriminatory. *See* Philadelphia v. New Jersey, 437 U.S. 617 (1978).

about its discriminatory nature. Although the New York scheme purported to provide out-of-state wineries the same rights as in-state wineries, it put in place conditions that were impossible to satisfy. The New York regulatory requirement regarding the origin of the grapes was nothing more than economic protectionism at its worst. There was no difference between New York grapes and grapes grown in any other state in the country for the purposes of Constitutional analysis. The requirement that there be a physical presence in New York was, once again, nothing but mere economic protectionism as there was no practical difference between a distribution warehouse in New York and one located in any other state. Thus, the Court's determination that the New York laws were discriminatory and thus likely per se invalid was well founded.

b) Strict Scrutiny

The Court next examined whether the regulations would be saved by the Twenty-first Amendment. The Court ultimately determined that the Twenty-first Amendment could not rescue the regulations if they were invalid under the Dormant Commerce Clause.[181] The Court concluded its Dormant Commerce Clause analysis by completing the next step in its analysis: Strict Scrutiny.[182] The Court addressed two of the States' justifications for the law that attempted to explain that the laws were not per se discriminatory.

The first justification offered by the States was that the regulations which limited direct shipment were meant to help the states prevent underage drinking.[183] The Court rejected this justification as being merely superficial because there was little evidence of a problem with minors purchasing alcohol over the Internet.[184] Additionally, the Court reasoned that minors are more likely to consume alcoholic beverages other than wine.[185] Also, it was reasoned that minors who choose to consume alcoholic

181. *Granholm*, 125 S. Ct. at 1897.
182. *Id.* at 1905.
183. *Id.*
184. *Id.*
185. *Id.*

beverages have easier methods of accessing alcohol.[186] Finally, minors tend to seek instant gratification, and wine shipped to consumers from out-of-state does not satisfy this desire because of the time required for shipment and delivery of the goods.[187]

The Court concluded that if this truly was a legitimate concern, then states should ban all direct shipment of wine as minors are just as likely to purchase wine on the Internet from in-state wineries as they are from out-of-state wineries.[188] The Court also pointed out that states could certainly prevent wine from being delivered to minors simply by requiring an adult signature upon delivery.[189]

The Court decimated the States' argument. Its logical breakdown of the facts made the underage drinking justification seem almost laughable. The Court may have even been a bit flippant in its discussion regarding the types of alcohol preferred by minors, but ultimately it is difficult to fault their reasoning. The instant gratification argument is subject to the same criticism but appears accurate nonetheless.

The Court failed to mention the equally persuasive point that wine is likely much more expensive than many of the other types of alcohol accessible to minors, further making it unlikely that direct shipment of wine would pose an increased threat of underage drinking.

The Court's conclusion points to several reasonable non-discriminatory alternatives. First, if a state were to ban direct shipment altogether, it would truly and constitutionally address this concern. The Court's point is well taken that it is rather hypocritical and disingenuous to allow direct shipment from in-state wineries but not out-of-state wineries based on this justification. It would be just as easy, if not easier, for minors to purchase wine from in-state wineries as from out-of-state wineries. Second, the states could allow direct shipment across the board but require an adult signature for delivery. This simple safeguard would be as effective to prevent underage drinking as requiring a waitress to ask for identification before serving an alcoholic beverage in a restaurant.

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186. *Id.*
187. *Id.* at 1906.
188. *Id.*
189. *Id.*

The second justification offered by the States was that the regulations were necessary to facilitate accurate collection of taxes.[190] The Court also dismissed this argument, reasoning that the Michigan system does not make provisions for wholesalers to collect taxes, and the objectives of New York could be achieved by taxing out-of-state direct shippers in the same manner as in-state direct shippers.[191] The Court also noted that federal law requires that all wineries in every state comply with all federal and state tax regulations, thus rendering these regulations duplicative.[192]

The Court did not lend this argument much credence; however, Michigan's failure to provide for methods of taxation did not indicate that this was a legitimate concern for them. The Court also offered an extremely simple non-discriminatory alternative to New York: extend their already existing taxation policies to out-of-state direct shipments. This alternative in and of itself would make the law invalid even if this was a legitimate concern. The Court's final and most powerful method of dismissing this argument was to point out that failure to comply with any taxation laws enacted by the states is a violation of federal law. Thus, the States' concerns were unnecessary. It is even possible that state laws enacted to require compliance with such laws might face problems with preemption.

The Court concluded that the States' justifications were insufficient.[193] The regulations of both Michigan and New York failed the Balancing Test and Strict Scrutiny analysis.[194] Thus, the Court held that both laws are invalid under the authority of the Dormant Commerce Clause.[195]

2. Twenty-first Amendment Analysis

Both Michigan and New York argued in the alternative that should their laws be found to be discriminatory, such discrimination

190. *Id.*
191. *Id.*
192. *Id.* at 1907.
193. *Id.* at 1905.
194. *Id.*
195. *Id.*

was authorized by the passage of the Twenty-first Amendment.[196] Disagreeing with these arguments, the Court stated that "Section 2 [of the Twenty First Amendment] does not allow States to regulate the direct shipment of wine on terms that discriminate in favor of in-state producers."[197]

a) Congressional Authorization: Wilson Act and Webb-Kenyon Act

The Court undertook a lengthy discussion of the history of the Twenty First Amendment and the legislation surrounding it.[198] The States argued that the Webb-Kenyon Act overruled the Wilson Act.[199] Thus, the Wilson Act's prohibition of discrimination between states with respect to liquor regulations would also be overruled.[200] The Court discounted this contention.[201] First, it cited the Court's decision in *Clark Distilling Co. v. Western Maryland Railway Co.*, which described the Webb-Kenyon Act as an extension of the Wilson Act.[202] The Court also looked to the text of the Webb-Kenyon Act itself and determined that the Act does not authorize discriminatory regulations.[203] Finally, the Court pointed out that the Wilson Act,

196. *Id.* at 1897.

197. *Id.*

198. *Id.* at 1898-1901. The Court provides a good summary of the procedural history which led to the passage of the Wilson Act followed by the Webb-Kenyon Act. *Id.*; *see also* Part II, *supra.*

199. *Id.* at 1901; *see also* Part II, *supra.*

200. *Id.*

201. *Id.*

202. *Id.*; Clark Distilling Co. v. Western Maryland Railway Co., 242 U.S. 311, 324 (1917). The States' contention that the Webb-Kenyon Act overrules the Wilson Act would thus be completely contradictory to the Court's earlier interpretation of the Webb-Kenyon Act.

203. *Granholm*, 125 S. Ct. at 1901. "[T]he Webb-Kenyon Act expresses no clear congressional intent to depart from the principle, unexceptional at the time the Act was passed and still applicable today . . . that discrimination against out-of-state goods is disfavored." *Id.* (citation omitted).

which expressly prohibits discriminatory regulations, was not repealed by the passage of the Webb-Kenyon Act.[204]

This argument is also taken up by Justice Thomas in his dissent, but is quickly dismissed by the Majority. This is principally a matter of statutory interpretation. Although the Court in the instant case concluded that the Webb-Kenyon Act is an extension, not a rejection, of the Wilson Act, it would be possible for another court to find the opposite to be true. Thus, the Majority of the Court interpreted the Webb-Kenyon Act as an extension of the Wilson Act; however, it is possible that future courts could overrule this precedent if the circumstances were appropriate.

b) Congressional Authorization: The Twenty-first Amendment

The States argued in the alternative that § 2 of the Twenty-first Amendment grants them the authority to discriminate against providers of out-of-state alcoholic goods.[205] Rejecting this argument, the Court held that the Twenty-first Amendment did not authorize discriminatory regulations; rather it restored states to the position of power they held prior to the passage of the Eighteenth Amendment.[206] The Court discussed at length the precedents it had set in the years immediately following the passage of the Twenty-first Amendment, when it interpreted the Amendment in a very different manner.[207] It stated several reasons for overruling the

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204. *Id.* The Court cites several cases in which it held that the Wilson Act is still in effect today. *See* Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 333; Dep't of Revenue v. James B. Beam Distilling Co., 377 U.S. 341, 345 (1964).

205. *Granholm*, 125 S. Ct. at 1902.

206. *Id.* This means that the passage of the Twenty First Amendment did not authorize discrimination; rather it restored states to the status quo ante. The states currently possess powers to regulate as granted by the Wilson and Webb-Kenyon Acts.

207. *Id.* at 1902-03. Following the passage of the Twenty First Amendment, a series of cases quickly decided held that the Amendment was a Congressional authorization for the passage of discriminatory regulations. *Id.*; *see* State Bd. Of Equalization of Cal. v. Young's Mkt. Co., 299 U.S. 59 (1936); Mahoney v. Joseph Triner Corp., 304 U.S. 401 (1938); Indianapolis Brewing Co. v. Liquor Control Comm'n, 305 U.S. 401 (1939); Ziffrin, Inc. v. Reeves, 308 U.S. 132 (1939); Joseph S. Finch & Co. v. McKittrick, 305 U.S. 395 (1939).

precedent: first, the language of the decisions was too broad; second, the decisions failed to properly take into account the history underlying the amendment; and finally, the failure to address the history should not be interpreted to mean that the history is irrelevant or that discrimination is authorized.[208]

The Court also made a specific point of noting that more recent cases have been decided in a manner that is consistent with the instant holding.[209]

The Court divided its modern decisions into three broad categories.[210] The first set of cases held that state laws in violation of other parts of the Constitution are not "saved" by the Twenty-first Amendment.[211] The second set of cases held that the Twenty-first Amendment does not abrogate Congress' powers to regulate commerce with respect to alcohol.[212] Finally, the third set of cases held that state regulations of alcohol are limited by the Dormant Commerce Clause, and thus cannot be discriminatory amongst the states.[213] They also specifically rejected the States' position that *Bacchus*, one of the cases in the third set, should be overruled.[214]

The cases in this area of law are inconsistent. The precedents set in early cases have been completely overruled in the modern era of Supreme Court jurisprudence. The Court here has chosen to follow

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208. *Granholm*, 125 S. Ct. at 1903.

209. *Id.*

210. *Id.*

211. *Id.* *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 494 (1996) (addressing the First Amendment); Larkin v. Grendel's Den, Inc., 459 U.S. 116 (1982) (addressing the Establishment Clause); Craig v. Boren, 429 U.S. 190 (1976) (addressing the Equal Protection Clause); Wisconsin v. Constantineau, 400 U.S. 433 (1971) (addressing the Due Process Clause); Dep't of Revenue v. James B. Beam Distilling Co., 377 U.S. 341 (1964) (addressing the Import-Export Clause).

212. *Granholm*, 125 S. Ct. at 1903-04. *See* Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984); California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); Hostetter v. Idlewild, 377 U.S. at 331-32.

213. *Granholm*, at 1904. *See* Bacchus, 468 U.S. at 276; Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573 (1986); Healy v. Beer Inst., 491 U.S. 324 (1989).

214. *Granholm*, at 1904. In *Bacchus* the Court overturned a Hawaiian law exempting certain alcohol produced in the state from an excise tax imposed on all other alcohol. The Court in this case determined that the law violated the Dormant Commerce Clause because it was discriminatory against out-of-state liquor providers. *Bacchus*, 468 U.S. at 274-76.

the modern trend. However, if the Court had been inclined to rule in the other direction, there is precedent to support such a decision. The Court's modern cases, however, are clear: the Twenty-first amendment does not "save" laws that violate other portions of the constitution. Thus, this decision does not come as a surprise and it is certainly not without merit.

c) Problems with the Validity of the Three-Tier System

The final argument presented by the States was that the invalidation of the regulatory scheme would call into question the constitutionality of their three-tiered system regulating the distribution of alcohol in their states.[215] The Court explicitly rejected this as being unfounded, stating "[w]e have previously recognized that the three-tier system itself is 'unquestionably legitimate.'"[216]

This argument is at best weak. Even if the three-tiered regulatory scheme was questioned or made invalid by this decision, it would not make the regulations any more or less constitutional. Thus, the Court's discussion of this point is essentially dicta. However, the Court's expression of its confidence in the regulatory scheme does preserve a longstanding state practice. There does not seem to be any difficulty regarding the regulations so long as they are applied equally to in-state and out-of-state alcohol producers. The Court's confidence in the three-tiered scheme should be of some comfort to states, as it preserves most of their power to make regulations regarding alcohol, under the power granted by the Twenty-first Amendment.

d) Conclusion

The Court concluded that the results of the balancing test and strict scrutiny analysis did not justify the regulations under the Constitution's Dormant Commerce Clause.[217] According to the majority, while the states do have the power to regulate liquor in their states under their Twenty-first Amendment rights, "[t]his power . . .

215. Granholm, 125 S. Ct. at 1904-05.

216. *Id.* at 1905 (quoting North Dakota v. United States, 495 U.S. at 432 (1986)).

217. *Id.*

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."[218] Accordingly, the Michigan and New York regulations were held to be inconsistent with the Constitution, and thus they were declared invalid.[219]

B. Justice Stevens' Dissent

Justice Stevens centered his dissent around the principle that the Twenty-first Amendment authorizes states to make discriminatory laws regarding alcohol.[220] It is well established that Congress can authorize states to enact laws which discriminate against interstate commerce.[221] "If Congress may . . . authorize the States to enact such laws, surely the people may do so through the process of amending our Constitution."[222]

This statement is simple, and yet powerful. The idea that a constitutional amendment should be equivalent to congressional authorization for the purposes of the Dormant Commerce Clause seems logical. However, such a precedent has not been firmly set. If such an argument is made in the future, this dissent could appropriately be cited in support.

Justice Stevens conceded that if the Michigan and New York regulations concerned any product other than an alcoholic beverage, they would indeed be discriminatory, and thus invalid under the Dormant Commerce Clause.[223] However, he interpreted the meaning and purpose of the Twenty-first Amendment according to the intent

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218. *Id.* at 1907.

219. *Id.*

220. *Id.* (Stevens, J., dissenting). Justice Stevens' dissent is joined by Justice O'Connor. *Id.*

221. *Id. See generally* Pike v. Bruce Church Inc., 397 U.S. 137 (1970); Philadelphia v. New Jersey, 437 U.S. 617 (1978).

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

223. *Id.* at 1908.

of the people who ratified it.[224] "Today's decision may represent sound economic policy[;] . . . it is not, however, consistent with the policy choices made by those who amended our Constitution in 1919 and 1933."[225]

Justice Stevens' attachment to the interpretation intended by the amendment's framers is not fully justified. The Constitution is a living document, a product of the current time. His insistence on the antiquated interpretation does not seem to have a firm foundation in any of the Court's modern decisions.

Additionally, Justice Stevens attached special significance to the fact that the Twenty-first Amendment is the only amendment to have been ratified by the people in state conventions, rather than by the state legislatures.[226] This, in his mind, gave the amendment even greater importance, and he felt it should thus be interpreted to authorize the types of regulations enacted by Michigan and New York.[227]

Again, this is an idealistic principle. It has never been established that "the people" have the power to authorize laws which would otherwise violate the Dormant Commerce Clause. Additionally, there is no difference in the significance, importance, or enforcement between an amendment passed by state legislatures and an amendment passed by state conventions. They are simply alternative methods available to ratify changes to the Constitution. Thus, it does not seem appropriate that Justice Stevens should attach a special meaning to the fact that the Twenty-first Amendment was ratified by convention rather than by the legislatures.

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224. *Id.* Justice Stevens points out that the historical climate during the period of Prohibition was such that alcohol was *Seen* by many as a moral wrong, whereas today it is treated more like a generic good. *Id.* He quoted Justice Black's dissenting opinion in Hostetter v. Idlewild Bon Voyage Liquor Corp, 377 U.S. 324 (1964), in which the amendment was interpreted to mean that the states were given absolute power to regulate alcohol, even in ways that would violate the dormant commerce clause. *Granholm*, 125 S. Ct. at 1908.

225. *Id.* Justice Stevens refers to the Eighteenth and Twenty-first Amendments.

226. *Id.*

227. *Id.*

C. Justice Thomas' Dissent

Justice Thomas wrote a lengthy dissent, in which he objected to the majority's holding for a number of reasons.[228] His dissent shows a distinct attachment to the idea that the Twenty-first Amendment and the legislation pre-dating it should be interpreted with the same intent as the original abolitionists who sought their passage, as opposed to looking at the laws with a modern eye.

1. The Wilson Act and the Webb-Kenyon Act

First, Justice Thomas addressed the Webb-Kenyon Act, which he believes "immunizes from negative Commerce Clause review the state liquor laws that the Court holds are unconstitutional."[229] He argued that the majority misinterpreted the Webb-Kenyon Act in its decision,[230] and that the Webb-Kenyon Act authorizes states to make laws concerning the shipment and sale of liquor in their states, regardless of the discriminatory or non-discriminatory nature of those regulations.[231]

This is the broadest possible interpretation of the Webb-Kenyon Act, and as the case law in this area does not support this position, he can offer little in terms of precedent to back it up.[232]

Additionally, Justice Thomas pointed out that the Webb-Kenyon Act applies equally to manufactures and wholesalers, because

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228. *Id.* (Thomas, J., dissenting). Justice Thomas' dissent was joined by Chief Justice Rehnquist, Justice Stevens, and Justice O'Connor. *Id.*

229. *Id.* at 1910.

230. *Id.*

231. *Id.* at 1910-11. Justice Thomas pointed specifically to the decision in McCormick & Co. v. Brown, 286 U.S. 131 (1932), in which the Court decided that the Webb-Kenyon act did not invalidate a state regulation preventing both in-state and out-of-state manufacturers from shipping alcohol into the state without a license. *Id.* Justice Thomas argued that while this law was not discriminatory, the principle that the Webb-Kenyon Act applies to laws regarding shipment of alcohol into a state applies equally to discriminatory and non-discriminatory laws. *Id.* Thus, according to Justice Thomas, the Michigan and New York regulations here should be permissible because they are authorized by Congress in the Webb-Kenyon Act. *Granholm*, 125 S. Ct. at 1910-11.

232. *See Clark Distilling*, 242 U.S. at 324; *McCormick*, 286 U.S. at 140-41.

"[t]here is no warrant in the Act's text for treating regulated entities differently depending on their place in the distribution chain . . . ."[233]

Justice Thomas also examined the implications of the Wilson Act in interpreting the Webb-Kenyon Act, and reached a completely different conclusion than the majority.[234] He argued that "[t]he Webb-Kenyon Act 'extended' the Wilson Act by completely immunizing all state laws regulating liquor imports from negative commerce clause restraints."[235] He then provided a lengthy historical argument in support of his interpretation of the Webb-Kenyon Act.[236] This argument, while lengthy, is unpersuasive, and its ultimate message is not clearly presented.

2. Twenty-first Amendment

Additionally, Justice Thomas argued that the New York and Michigan regulations, even if they were not authorized by the Webb-Kenyon Act, were authorized by the Twenty-first Amendment.[237] The history of the passage of the Twenty-first Amendment parallels that of the Webb-Kenyon Act; however, the amendment's language, according to Justice Thomas, is even broader.[238] He believed that the Michigan and New York laws fell squarely within the bounds of the Twenty-first Amendment, and thus were authorized, and should have been allowed to stand.[239]

This second argument essentially rests on the same principles as the argument he made regarding the Webb-Kenyon Act. However, while Justice Thomas believed that the Twenty-first Amendment was broader than the Act, this argument is not supported by modern legal interpretations that recognize the Act's continued validity. If the Webb-Kenyon Act were swallowed by the Twenty-first Amendment,

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233. *Granholm*, 125 S. Ct. at 1912.

234. *Id.*

235. *Id.* at 1913.

236. *Id.* at 1913-19. Justice Thomas discusses the Supreme Court decisions that led to the passage of the Webb-Kenyon Act, and concludes on this basis that the intent of the Act was to authorize the states to enact discriminatory laws with respect to liquor. *Id.*

237. *Id.* at 1919.

238. *Id.*

239. *Id.* at 1920.

the Act's existence would be immaterial. As is evidenced by this case itself, however, Webb-Kenyon is alive and well.

Justice Thomas would also have decided this case based on the Court's early case law, which viewed the Twenty-first Amendment as creating an exception to the dormant commerce clause with regards to alcohol.[240] In further support of his interpretation of the Twenty-first Amendment, Justice Thomas offered evidence of a "lay consensus" among the states, many of which passed regulations on alcohol following the amendment's passage that were in some way discriminatory against interstate commerce.[241]

This "lay consensus" may or may not actually exist. There is evidence to show that states have interpreted the Twenty-first Amendment in such a way as to allow them to enact discriminatory legislation regarding alcohol.[242] However, the existence of such a consensus is immaterial. It would not matter if all fifty state legislatures had decided that it was within their power to enact certain legislation. If the legislation was contrary to the Constitution it would be invalid, no matter how many states believed it was not. Thus, this argument is extraneous and unconvincing.

Justice Thomas concluded his showing of support for this interpretation of the Twenty-first Amendment as follows: "[t]he Court's concession that the Twenty-first Amendment allowed States to require all liquor traffic to pass through in-state wholesalers and retailers shows that States may also have direct shipment laws that discriminate against out-of-state wineries."[243]

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240. *Id.* Here, Justice Thomas pointed to the cases dismissed by the majority; however, he addressed neither the more recent cases cited by the majority, nor the case law which has gone in the opposite direction, which does not interpret the Twenty-first Amendment as an exception to the other portions of the Constitution. *See Id.*

241. *Id.* at 1921-23. Justice Thomas summarizes, "[a]ll told, at least 41 States had some sort of law that discriminated against out-of-state products . . . ." *Id.* at 1922.

242. *See Greenhouse, supra* note 1 (discussing the numerous state regulations similar to the Michigan and New York regulations regarding direct shipment of wine to consumers in their states).

243. *Id.* at 1924. Here, Justice Thomas Seems to be stating that because the majority upholds the three tiered regulatory scheme, it should also authorize the regulations regarding direct shipment; however, the two do not necessarily follow one another. *Id.*

With this statement, Justice Thomas argued that the existence of the three-tier regulatory scheme provides evidence that the types of laws at issue are also constitutional. However, this argument is also flawed because it does not acknowledge the nuance emphasized in the majority opinion: that the three-tier regulatory scheme is constitutional as long as it is non-discriminatory.[244] Thus, per the majority's reasoning (which Justice Thomas fails to adopt), if a three-tier scheme were enacted in a discriminatory manner (much like the Michigan regulations at issue in this case) the scheme would not be constitutional.

3. *Bacchus*

Justice Thomas ultimately turned his attention to the more recent cases cited by the majority in support of its decision, specifically addressing *Bacchus*.[245] First, he pointed out that the majority failed to apply the "core concerns" test established by *Bacchus*.[246] Then he stated that the ruling in *Bacchus* and the use of the "core concerns" test itself should be overruled because it fails to conform with the original purpose of the Twenty-first Amendment.[247]

This tactic seems a bit unfair. Justice Thomas cannot insist that the majority was wrong to ignore the "core concerns" test, and then in his next breath declare that the test should be overruled. It seems with this argument, that Justice Thomas is trying to do too much: he cannot have his proverbial cake and eat it too.

Thomas concluded his dissent by reiterating his firmly-held beliefs that both the Webb-Kenyon Act and the Twenty-first Amendment authorized the regulations passed by Michigan and New

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244. *See supra* note 216 and accompanying text.

245. *Granholm*, 125 S. Ct. at 1924. *See also* Bacchus, 486 U.S. at 274-76.

246. *Granholm*, 125 S. Ct. at 1925. *See also* Bacchus, 486 U.S. at 274-76, *supra* note 119 and accompanying text.

247. *Id.* Justice Thomas, throughout his dissent, clings to the notion that the Twenty-first Amendment should be interpreted according to its original intent, and that allowances should not be made for societal change or advances in technology that would allow the states to achieve their stated aims by non-discriminatory means. *Id.*

York, and that they should not be found invalid, but instead be allowed to stand.[248]

V. IMPACT

A. Legal Impact

The legal impact of the decision in *Granholm* will most obviously be felt in Michigan and New York, whose regulatory Accordingly, these regulations can no longer be enforced in those states. State officials there must now decide what will be the most appropriate response to the decision.

However, the ramifications of the decision will be felt beyond Michigan and New York and throughout the rest of the country as well. In November 2005, merely five months after the *Granholm* decision, the U.S. District Court in the Eastern District of Pennsylvania declared a similar Pennsylvania statute regulating direct shipment of wine to consumers to be unconstitutional.[249] Following the decision in *Granholm*, the district court held that Pennsylvaniaregulations that allowed in-state wineries to sell directly to consumers, but did not afford the same privilege to out-of-state wineries, was unconstitutional.[250] The court enjoined the State and its administrative agencies from enforcing these regulations in the future.[251] Based on the Court's decision in *Granholm*, it is likely that other states may face similar challenges to their alcohol regulations.

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248. *Id.* at 1927.

249. Cutner v. Newman, 398 F.Supp. 2d 389, 390-91 (E.D. Pa. Nov. 9, 2005). The state statutes in question were 47 PA. STAT §§ 4-488, 4-404, 4-491, 5-505.2 (2005). *Id.* at 390. Certain sections of the state's code of regulations were also affected: 40 PA. CODE §§ 9.143, 11.111 (2005). *Id.* These combined statutes and regulations basically allow in-state wineries to sell wine on their premises, to other approved locations, and directly to consumers, hotels and restaurants, but only allowed out-of-state wineries to sell less than nine liters a month to Pennsylvania liquor stores. *Cutner*, 398 F. Supp. 2d at 90.

250. *Id.*

251. *Id.* at 391. The principle issue in the case was rather the court could impose the statutes' restrictions for out of state wineries on in state wineries as well, or if the court should enjoin the enforcement of the restrictions on all wineries. The court decided it was appropriate to do the latter. *Id.*

Granholm has also become a popular citation in new cases involving a dormant commerce clause issue.[252] The case's fairly clear enunciation of Dormant Commerce Clause principals makes it a very useful case to cite as an example of a successful Dormant Commerce Clause challenge.[253] *Granholm* has also already been cited in several cases to clarify the Court's interpretation of the Twenty-first Amendment.[254] It has been used to show that the Twenty-first Amendment allows the states to "maintain an effective and uniform system for controlling liquor by regulating its transportation, importation and use."[255]

The most important legal legacy of *Granholm* will likely to be the Court's reinvigoration of the Dormant Commerce Clause. While the Court left the long standing three-tiered regulatory system for alcohol intact, it firmly stated that the states may not enact regulations which discriminate against out-of-state alcohol.[256] Thus, states with regulations such as those in Michigan and New York, which do not allow out-of-state wineries or other producers of alcohol to ship their goods directly to consumers, are likely to face successful challenges to those laws. We will likely see either a rash of litigation in this area, or perhaps voluntary compliance by the affected states. However, state regulations which differentiate between producers, wholesalers, and retailers, as long as they regulate uniformly among

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252. *See* Gonzalez v. Raich, 125 S. Ct. 2195 (2005); N.H. Motor Transp. Ass'n v. Rowe, 377 F. Supp. 2d 197 (D. Me. 2005); Grand River Enters. Six Nations, Ltd. v. Pryor, 425 F.3d 158 (2d Cir. 2005); L.A.M. Recovery, Inc. v. Dep't of Consumer Affairs, 377 F. Supp. 2d 429 (S.D.N.Y. 2005); United Sates v. Greenwood, 405 F.Supp. 2d 673 (E.D. Va. Dec. 14, 2005); Empacadora De Carnes De Fresnillo, S.A. de C.V. v. Curry, 2005 U.S. Dist. LEXIS 18261 (N.D. Tex. Aug. 25, 2005); Stroman Reality, Inc. v. Antt, 2005 U.S. Dist. LEXIS 16048 (S.D. Tex. Jul. 28, 2005); Marcus & Millichap Real Estate Inv. Brokerage Co. v. Skeeters, 395 F. Supp. 2d 541 (W.D. Ky. 2005); Croplife Am., Inc. v. City of Madison, 373 F. Supp. 2d 905 (W.D. Wis. 2005); Jones v. Gale, 405 F.Supp. 2d 1066 (D. Neb. Dec. 15, 2005).

253. *Granholm*, 125 S. Ct. 1895-99.

254. *See* BPNC, Inc. v. Taft, 147 Fed. Appx. 525, 530 n.1 (2005); s*ee also* Decatur Liquors, Inc. v. Dist. of Columbia, 384 F. Supp. 2d 58, (D.D.C 2005) (citing *Granholm*, 125 S. Ct. at 1903).

255. BPNC, Inc., 147 Fed. Appx. at 525 (citing *Granholm*, 125 S. Ct. at 1902); *see* also Decatur Liquors, Inc. v. Dist. of Columbia, 384 F. Supp. 2d 58, (D.D.C. 2005) (citing *Granholm*, 125 S. Ct. at 1903).

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

the states, should remain untouched under this ruling.[257] In other words, the three-tier system lives on for now.

However, there is a case pending in federal district court in Seattle, *Costco Wholesale Corp. v. Hoen*, which might challenge even the three-tier system.[258] The case involves a challenge to the requirement that producers ship to wholesalers and then to retailers, which is designed to meet the ultimate goal of eliminating the wholesaler tier.[259] The case alleges that wineries in Washington are able to bypass the wholesaler tier, while out-of-state wineries are not.[260] The plaintiffs are relying on the precedent set in *Granholm* to argue that the law is discriminatory against out-of-state wineries.[261] This is a natural extension of the *Granholm* holding with regards to the Dormant Commerce Clause. The plaintiffs also argue that Washington's practices are anti-competitive and thus violate the Sherman Act.[262]

It is yet to be seen how the court system will react to this new challenge. It is likely, however, at least as far as the Dormant Commerce Clause issue is concerned, that the practice which gives in-state wineries an advantage over out-of-state wineries will be overturned. That part of the case is extremely similar to *Granholm*. The regulation is not likely to be saved by the Twenty-first Amendment, nor is the court likely to find that it is an exercise of power reserved to the states. Thus, the *Granholm* decision has the potential to impact the three-tier system. Even a successful challenge in this case, however, is unlikely to completely invalidate the three-tier system. It is much more likely that a successful challenge would reach essentially the same conclusion reached in *Granholm*: the three-tier system is constitutional, as long as it is applied in such a manner that in-state and out-of-state wineries are treated in the same way.

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257. *Granholm*, 125 S. Ct. at 1905.

258. R. Corbin Houchins, *What The Direct Shipment Ruling Means For Retailers, Wine Business Communications Inc.* , Jul. 15, 2005, *available at* http://www.winebusiness.com/html/MonthlyArticle.cfm?dataid=%2038950.

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

B. Societal Impact

The decision in *Granholm* may have a great impact in states with discriminatory laws preventing direct shipment of alcohol to consumers, or it may have no impact. The Court's ruling did not say that states must allow direct shipment; it merely said that they could not allow it for in-state wineries, while prohibiting it for out-of-state wineries. Thus, states face a choice: either allow direct shipment across the board, or ban it across the board.

In Michigan, immediately following the Court's decision, there was a movement by state legislators to ban direct shipment all together.[263] In New York, however, Governor Pataki came out in support of legislation swinging in the other direction, which would allow unfettered direct shipment in New York.[264] Furthermore, other states, such as Wisconsin, sought to correct discriminatory regulations on their books by allowing direct shipment in unlimited quantities from both in-state and out-of-state wineries.[265]

At the time this decision was handed down, six states (in addition to Michigan and New York) had on their books discriminatory laws regarding direct shipment, and thirteen states had reciprocal type regulations.[266] Each of these states must individually decide how they will react to the *Granholm* decision.[267] *Granholm* has the potential to open the doors to direct shipment of wine to consumers across the nation; however, ultimately the power to decide whether or not to allow it is left to states. The states are allowed to maintain their power to regulate alcohol, so long as it is done in a manner that does not discriminate.

Wine consumers and small wineries throughout the nation may potentially be greatly impacted by this decision. If states decide to allow direct shipment of wine to consumers, small wineries will likely see an immediate economic benefit. Consumers will also benefit because they will be able to buy the products they seek in a

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263. Brian Dickerson, *Follow Money on Wine Trail*, DETROIT FREE PRESS, Jul. 1, 2005,

264. Greenhouse, *supra* note 1.

265. Amy Rinard, *Getting a Bigger Glass for Out-of-state Wines*, MILWAUKEE JOURNAL SENTINEL, Jul. 17, 2005,

266. Greenhouse, *supra* note 1.

267. Greenhouse, *supra* note 1.

truly free market environment. However, if states decide to ban direct shipment of wine to consumers all together, then both consumers and wineries have the potential to be hurt by even more stringent regulations concerning direct shipment.

VI. CONCLUSION

The Supreme Court's decision in *Granholm v. Heald* has the potential to impact the wine industry greatly. However, the ultimate power to regulate how alcohol is treated is left in the hands of the states, provided that they do so in an equitable manner. Thus, the spirit of the Twenty-first Amendment remains intact, while the principles underlying the Dormant Commerce Clause likewise remain strong.

The ultimate legacy of this case is likely to be felt not by teetotalers, state's rights advocates, or federalists. The legacy of this case will be felt by small wineries nestled in our nation's farm lands, and honeymooners returned home, seeking to find a bit of that newlywed magic in the taste and aroma of a well-made bottle of wine.