

GRANHOLM V. HEALD (THE WINE CASE): CONSTITUTIONAL AND COMMERCIAL IMPLICATIONS

by

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I. INTRODUCTION

The last decade has seen a great deal of litigation and legislative activity about the shipment of wine directly to consumers' homes. The reasons for the widespread legal and political interest in a seemingly esoteric subject were a general increase in wine consumption in the United States,ⁱ an increase in the number of wineries in the United States,ⁱⁱ the existence of laws in almost half the states prohibiting the shipment of wine directly from producers to consumers' homes,ⁱⁱⁱ and an unsettled tug of war between two constitutional provisions, the Commerce Clause and the Twenty-first Amendment.

The U.S. Supreme Court finally settled the constitutional issue in *Granholm v. Heald*,^{iv} holding that the Michigan and New York statutes that permit in-state wineries to ship directly to consumers but restrict out-of-state wineries from doing likewise, are violations of the negative Commerce Clause and are not saved from unconstitutionality by the Twenty-first Amendment.^v This decision, although very important from a theoretical point of view, does not by itself resolve the underlying issues for wine consumers, wine producers, wine wholesale distributors, or state legislators. While there has been a significant amount of political wrangling on the state level regarding direct shipment, in the last year or so it has generally been less heated as legislators have waited to see what the Supreme Court was going to do. Had the Court upheld the restrictive Michigan and New York statutes, legislatures could have chosen to do nothing. Now legislatures in those states and at least six others^{vi} with similar restrictions have to decide whether to extend shipping privileges granted in-state producers to out-of-state producers or whether to eliminate entirely direct shipping to consumers. In addition, states that prohibit all direct shipment,^{vii} while not legally bound to change their rules, may feel increased political pressure from their own in-state wineries to do so.

This article will first briefly review the background of the dispute considering the historical and commercial issues. Then the article will discuss the *Granholm* majority opinion and the dissents. The next section will consider existing state laws and proposals for amending them so that they are in constitutional compliance and are responsive to legislators' constituents. Finally, the article concludes that, unpredictably and by the slimmest of margins, the Supreme Court made a decision that can withstand principled legal scrutiny, is a boon for small wineries and consumers, and probably will not be as negative an outcome as some wine industry participants might anticipate.

II. BACKGROUND: WHO CARES ABOUT THIS CASE AND WHY?

Every major newspaper in the country carried the story of the *Granholm* decision because there is such widespread interest in the subject of wine. There are, however, several specific groups represented by the parties in the case that have more than a mere passing interest in a currently sexy subject. A general understanding of how states regulate alcoholic beverages is necessary to understand the positions of these groups.

A. The Three-Tier System

Although states use a wide variation of regulatory schemes to control the production, distribution, and sale of alcoholic beverages, all use a three-tier system that prohibits economic relationships between producers and wholesale distributors (wholesalers), between wholesalers and retailers, and between producers and retailers. The system originated to eliminate perceived evils that arose following Prohibition.

During Prohibition the federal government gave a few distillers permits to manufacture whisky for medicinal purposes, and so they held a considerable competitive edge after repeal.^{viii} A few additional distillers had purchased trade names and supplies from old distillers in the event of a repeal.^{ix} Because good whiskey must be aged for four or more years, and even cheaper whiskey is blended with some aged whiskey, these few foresighted distillers controlled the industry.^x In 1934 the nation's nine largest distillers produced more than four fifths of the nation's whiskey.^{xi} Members of Congress called these distillers a "Whiskey Trust" and worried that the Trust had driven up alcohol prices to unreasonably high levels: twelve to twenty-four dollars wholesale for a gallon that cost one dollar to produce and store.^{xii}

The high prices led to bootlegging and illicit selling that some estimated were responsible for at least half of all consumption of alcoholic beverages.^{xiii} The dominance of a few distillers also led to "tied-house" arrangements or vertical

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integration whereby distillers and wholesalers would exert control over retail outlets, particularly saloons.^{xiv} Legislators were concerned that tied-house increased alcohol consumption because distillers would require retailers to buy certain quotas and then retailers, in turn, would encourage customers to drink more.^{xv} Thus, following Prohibition, state legislators enacted three-tier systems which required strict separation among participants in the alcoholic beverage industry to eliminate criminality, corruption, price-gouging, and intemperance.^{xvi}

B. Wholesale Distributors

The alcoholic beverage industry, particularly the wine segment, has changed dramatically in the last fifty years. There used to be few producers and many wholesalers, but just the opposite is true now. In 1950 there were approximately 5,000 liquor wholesalers nationwide, whereas by 2003 there were only about 170.^{xvii} The three-tier system creates market power and economic rents for these relatively few wholesalers.^{xviii} Thus, wholesalers can engage in product tying or bundling the way that Microsoft does. An advantage of the three-tier system is that it can save on transaction costs for both producers and consumers because producers do not have to incur costs finding and wooing retailers.^{xix} However, the Internet has decreased such costs by making it easy and cheap for producers to reach retailers and consumers on their own.^{xx} Thus, eliminating the three-tier structure would reduce prices for consumers and provide them with more choices, and it would expand markets for small producers.^{xxi} The problem is that wholesalers have had many years to develop their own market power and political power in order to maintain their position in the liquor industry. Every state's system for regulating the production, distribution, and sale of alcoholic beverages has rules for wholesalers, but state laws vary in the strength of their protection for the interests of wholesalers.

In Michigan the law makes it nearly impossible for a winery to fire a wholesaler unless a wholesaler commits fraud, breaches its contract with the winery, or loses its state license.^{xxii} Moreover, Michigan's franchise law permits wholesalers to pass ownership of their businesses to family members when they retire or die, guaranteeing family ownership in perpetuity.^{xxiii} The Michigan Beer and Wine Wholesalers Association is a trade group of seventy-five family-owned distributors^{xxiv} that controls the distribution of more than ninety percent of the wine sold in Michigan.^{xxv} In the last statewide election in Michigan, the Association was among the top ten contributors to the winners in a majority of the Michigan legislative races.^{xxvi} Its members also gave thousands of dollars in political contributions to the Michigan governor and attorney general.^{xxvii} It is one of the richest and most powerful trade groups in Michigan's capital.^{xxviii} An analysis of campaign finance records indicated that the Association's political action committee hosted at least eighty-three fundraisers for Michigan lawmakers in the last four years at which the lawmakers raised almost a half million dollars.^{xxix}

Judge & Dolph, Ltd. is a typical example of a powerful liquor wholesaler. It is the largest wine and spirits distributor in Illinois.^{xxx} It was started in 1890 as a pharmaceutical company and was acquired by the real estate entrepreneur Arthur Wirtz in 1945.^{xxxi} It is now run by his son, William Wirtz, the owner of the Chicago Blackhawks hockey team, and his grandchildren hold executive positions in the company.^{xxxii} It has expanded by buying other distributing companies and now has operations in every major Illinois market.^{xxxiii} It also has similar market power in Wisconsin.^{xxxiv} It is the exclusive distributor for the two largest wine and spirits suppliers in the world, Diageo and Allied Domecq.^{xxxv} It is a member of the Wine & Spirits Distributors of Illinois which is associated with the Illinois Wholesalers Association PAC, a political action committee. Between 1993 and 2003 the Wine & Spirits Distributors of Illinois contributed almost a million dollars to candidates for statewide office in Illinois.^{xxxvi} The Association PAC was a strong proponent of the Illinois Wine and Spirits Fair Dealing Act of 1999 that was known as the Wirtz Bill.^{xxxvii} The Act prohibited any wine or spirits producer from canceling a contract with a distributor with less than ninety days notice regardless of their contractual agreement, but it provided an exception for agreements between a distributor and an Illinois winery.^{xxxviii} The United States District Court for the Northern District of Illinois enjoined the State from implementing the Act because of Kendall-Jackson's likelihood of prevailing in its lawsuit alleging the unconstitutionality of the Act because the Act violated the Commerce and Contracts Clauses.^{xxxix} The Illinois Legislature repealed the Act in 2002.^{xl} After the *Granholm* decision, midwest newspapers reported that the Association PAC was suggesting that Illinois should consider banning direct shipment from all wineries, including Illinois wineries, rather than extending direct shipping privileges to out-of-state wineries.^{xli}

The largest distributor of wine and spirits in the United States is Southern Wine and Spirits of America, Inc.^{xlii} Chairman and CEO Harvey Chaplin and his family own more than fifty percent of the company.^{xliiii} Southern operates in twelve states and has more than seventeen percent of national wine and spirits wholesaler revenues.^{xliv} Its 2003 sales were about five and a half billion dollars with a one-year sales growth rate of almost twenty-three percent. Between 1993 and 2003 Southern gave \$454,000 to candidates for statewide office in Illinois.^{xlv} During the 2004 election cycle, Southern gave candidates for statewide office in Florida \$459,912; in Michigan, \$413,499; in New York, \$289,679; in Ohio, \$439,599; in California, \$1,465,392.^{xlvi} In anticipation of the *Granholm* decision, Wayne Chaplin, Southern's president, said that rule changes would not eliminate wholesalers from the alcoholic beverage industry.^{xlvii} He noted that in California where liberal rules allow wineries to ship directly to consumers and distilled spirit producers can sell directly to retailers, Southern still maintains a thirty percent market share.^{xlviii} Brown-Forman, another of the largest alcoholic beverage wholesalers, has taken a neutral position because it represents some of the largest and best known brands.^{xlix} Nevertheless, the heavy political spending indicates that the wholesalers are not going to accept any risk of diminution in their business without a political battle.

The wholesalers' strategic contribution to the *Granholm* litigation was to support the states in their rationales for having prohibitions on direct shipping.¹ The Michigan Beer and Wine Wholesalers Association's chief lobbyist asserted that Michigan's

prohibition on direct shipment of wine from out of state guaranteed accurate tax collection and kept minors from access to alcohol.^{li} The Association hired the former director of the Michigan Office of Highway Safety Planning to start the Coalition for a Safe and Responsible Michigan.^{lii} Arguing that a reversal of Michigan's prohibitory law could endanger young people, she convinced Central Michigan State University, Oakland University, Michigan Mothers Against Drunk Driving, the Michigan Association of Secondary School Principals, and the Michigan Sheriffs' Association to join the Coalition.^{liii}

C. Wineries

Wine consumption in the United States has grown sixty-three percent since 1991.^{liv} In 2004, wine sales in the United States grew four percent to \$668 million.^{lv} The estimated retail value of wine shipments in the United States is \$23.2 billion.^{lvi} There are now more than 3,500 wineries in the United States, but the fifty largest wineries account for almost ninety percent of all the wine produced in this country.^{lvii} The leading U.S. producer, E. & J. Gallo Winery, produced fifty-four million cases in 2003.^{lviii} The second largest producer, Constellation (with the acquisition of Mondavi), produced forty-nine million cases in 2003.^{lix} *Granholm* was not about these wineries because they have wholesalers who can distribute their products to every retail outlet in the country. Every consumer can have access to Gallo or Constellation brands, but not to the wines produced by the nation's small wineries (defined as those producing 100,000 cases or less) that average just 5,300 cases annually.^{lx}

Granholm was about wineries like those owned by the plaintiffs in the New York case, Juanita Swedenburg and David Lucas. Swedenburg opened Swedenburg Winery in Middleburg, Virginia on her family farm in 1987.^{lxi} She raises beef cattle and plants fifteen acres of grapes.^{lxii} She produces fewer than two thousand cases of wine a year and sells more than ninety percent of it at her winery.^{lxiii} David Lucas opened the Lucas Winery in Lodi, California in 1978.^{lxiv} He also produces fewer than two thousand cases of wine a year and sells most of it at the winery.^{lxv} Both would like to sell by direct shipping to tourists who have stopped at their wineries and to Internet customers.^{lxvi} They, and winery owners like them all over the country, do not have budgets for advertising or wholesale distributors.

A wholesaler's share of the retail price of a bottle of wine is typically eighteen to twenty-five percent (more than twice the cost of the distribution system in the food industry).^{lxvii} Retailers typically take another twenty-five percent as their gross profit.^{lxviii} In Ohio, state law guarantees wine distributors a minimum markup of thirty-three percent.^{lix} The vice president of Bedell Cellars on the North Fork of Long Island in New York has said that his winery receives only \$120 a case through its distributors, but if it sold directly to a consumer it could charge \$240 a case.^{lxx} Bedell produces about 8,000 cases of wine a year,^{lxxi} and it has distributors in only seven states.^{lxxii} Even if small wineries can make a profit after wholesalers and retailers take their share, they cannot find wholesalers willing to represent them.^{lxxiii} Of the more than 25,000 wine labels in the United States only about 500 of them are available even in an area with a robust wine market.^{lxxiv} Furthermore, national wine publications are not going to write about wines produced by small wineries if their readers cannot buy them, thereby imposing another market restriction.^{lxxv}

California producers account for ninety-three percent of total wine production in the United States.^{lxxvi} Washington State is the second-largest producer with three and a half percent, and New York State is the third with almost one and a half percent.^{lxxvii} But every state in the nation now has wineries. For example, twenty-five years ago Georgia did not have a wine industry. It now has about ten wineries.^{lxxviii} It has a trade association, the Winegrowers Association of Georgia, that is trying to overcome the state's reputation as a producer of moonshine.^{lxxix} In addition to being known for super-sweet wines made from native muscadine grapes, the growers want to be known for fine wines made from European variety grapes.^{lxxx} The growers are part of a fledgling industry looking to compete with California, Washington, and New York, but viewing the wine industries in North Carolina and Virginia as representing more attainable goals.^{lxxxi} Wineries can become members of the Association if they have five acres planted in grapes or they are producing at least 1000 cases of wine a year.^{lxxxii}

In Arizona there are thirteen active wineries growing more than 650 acres of grapes for wine production.^{lxxxiii} Colorado's first modern winery opened in 1968; ten years later there were two wineries in the state; today there are about fifty producing more than 856 tons of grapes for wine production.^{lxxxiv} An Internet search will reveal industry association and/or department of agriculture web sites for every state encouraging consumers to visit wineries. Most of the wineries are like the Florida Estates Winery that produces about 2,500 cases of wine on ten acres of land in Land O' Lakes, Florida^{lxxxv} or the Chamard Winery in Connecticut that produces 5,000 cases annually^{lxxxvi} or the Frenchman's Gulch Winery in Idaho that produced 900 cases in 2003.^{lxxxvii} They are part of a growing national industry that is not being served by state regulations devised in another century to combat problems that no longer are relevant.

D. Internet Business

The Federal Trade Commission (FTC) declared in a report on the direct shipment of wine that its prohibition by states was "the single largest regulatory barrier to expanded e-commerce in wine."^{lxxxviii} Although it is not clear what ramifications *Granholm* will have for e-commerce, many commentators have concluded that the decision is a good thing for Internet businesses as well as for free trade in general.^{lxxxix} One concluded that had *Granholm* been decided in favor of the states, there would have been "dramatic negative consequences for the development of interstate commerce," and that now Internet sellers of other products might be encouraged to challenge protectionist legislation.^{xc} The direct-shipment-of-wine issue illustrates how technological

change can cause shifting transaction costs.^{xcii} By using the Internet and eliminating the wholesaler-middleman to sell directly to consumers, small wine producers can increase their markets, and consumers can pay lower prices. This process of disintermediation is creating a revolution in the way products are bought and sold.^{xciii}

The Information Technology Association of America, the Internet Commerce Coalition, the Software and Information Industry Association and other groups interested in e-commerce filed an amicus curiae brief in *Granholm* supporting the wineries and consumers challenging state laws.^{xciii} Among the corporate members of the amici organizations are AT&T, BellSouth, eBay, MCI, Time Warner, and Verizon.^{xciv} They argued that a national common market envisioned by the nation's founders will be destroyed if states can enact statutes that discriminate against out-of-staters in favor of local economic interests.^{xcv} They urged respect for the importance of the negative Commerce Clause^{xcvi} "in preventing local protectionism from undermining th[e] national market and the benefits it brings to consumers and businesses throughout America."^{xcvii}

Small businesses have been able in recent times to participate in the national market by using mail order catalogues, 1-800 phone numbers, and the Internet, which has been the most successful method small businesses have ever had of reaching a world-wide market of customers.^{xcviii} Total e-commerce sales for 2004 were about \$69.2 billion, an increase of 23.5% from 2003, whereas total retail sales for 2004 increased only 7.8%.^{xcix} E-commerce sales in the first quarter of 2005 accounted for 2.3% of total sales;^c in 2004, 1.9%; in 2003, 1.6%.^{ci}

Prohibitions on direct shipment of wine are not the only barriers states have erected to thwart e-commerce competition for local businesses. For example, almost half the states have erected legal barriers for the purchase of replacement contact lenses over the Internet to insulate ophthalmologists from competition.^{cii} Similarly, Oklahoma and Tennessee as well as several other states have protected local funeral directors from Internet competition by forbidding anyone who is not a licensed funeral director from selling caskets.^{ciii} The success of the out-of-state wineries in *Granholm* might encourage states to forgo their protectionist arrangements for their bricks-and-mortar local businesses because for products other than wine, which do not have the Twenty-first Amendment as an alleged buffer from the negative Commerce Clause, there will be even less legal justification for discrimination.

E. Consumers

The increase in wine sales indicates the increase in consumer interest in wine. Consumers are affected by the ban on direct shipping not only in price, but also in the variety available to them. The FTC reported that consumers will have a better chance of finding lower prices on the Internet because they can search hundreds of retail outlets throughout the country.^{civ} On average, an online buyer could save as much as \$3.54 per bottle when buying a full case and shipping via standard ground service.^{cv} For more expensive wines (\$40 or more per bottle), a buyer could save, on average, \$18.45 per bottle or twenty-one percent including shipping.^{cvi} If, in fact, the three-tier system is very efficient as wholesalers claim and results in competitive prices, then, presumably, even if consumers had the opportunity to buy online, they would purchase their wine at their local store that uses wholesalers.^{cvi} The prevailing view of economists is that consumers benefit when there is only the minimum amount of government regulation that is necessary for consumer protection.^{cviii}

The FTC study also indicated that many wines that are not available in bricks-and-mortar stores are available on the Internet.^{ci} The Wine Institute, a trade organization of California wineries, reported that only seventeen percent of its members had distribution in all fifty states through the wholesaler system.^{cx} Moreover, even if a particular wine is available in a big city, it certainly may be unavailable in areas of a state with only a few, small retailers.^{cxii} Finally, the FTC study also noted that in addition to price and variety advantages, direct shipment also provided the most convenient method for consumers for purchasing cases of wine.^{cxii}

III. *GRANHOLM*: WHAT DOES IT MEAN?

The specific issue in *Granholm* was whether state laws in Michigan and New York (the states) that allowed in-state wineries to sell wine directly to consumers in the state but prohibited out-of-state wineries from doing likewise, or made it economically impractical for them to do so, were unconstitutional.^{cxiii} Specifically, while both states permit in-state wineries to obtain licenses to ship directly to consumers, they require out-of-state wineries to comply with their three-tier systems and sell only to licensed wholesalers.^{cxiv}

A. The Majority Opinion

Justice Kennedy, delivering the opinion of the Court, concluded at the very beginning that the states' differential treatment constitutes explicit discrimination against interstate commerce.^{cxv} He noted that the winery-plaintiffs were small wineries that relied on selling directly to consumers because they could not find wholesalers to represent them, and even if they could, the additional expense would not make the transactions economically viable for them.^{cxvi} He then described the laws and litigation in the states.

In Michigan, wineries must distribute their wine through wholesalers, but there is an exception that allows Michigan wineries to obtain wine maker licenses that authorize direct shipment to Michigan consumers.^{cxvii} The plaintiffs in the Michigan

suit are wine columnists Ray and Eleanor Heald of Troy, Michigan who were joined by Domaine Alfred, a San Luis Obispo, California winery. They contended that Michigan's laws violated the Commerce Clause. The Michigan Beer and Wine Wholesalers Association joined the State as a defendant, arguing that Michigan's regime was a valid exercise of power under the Twenty-first Amendment.^{cxxviii} The District Court found for the State, and the Court of Appeals for the Sixth Circuit reversed.^{cxxix}

In New York, too, wineries must distribute their wine through wholesalers, but there is an exception that allows New York wineries to obtain licenses that authorize direct shipment to New York consumers.^{cxx} The difference compared to Michigan is that New York provides a way for out-of-state wineries to ship directly to New York consumers: by establishing a physical presence in New York, out-of-state wineries can become licensed New York wineries.^{cxxi} The plaintiffs in the New York suit are Juanita Swedenburg and David Lucas and two New York consumers who are wine enthusiasts who attempted to buy out-of-state wines over the Internet but whose orders were declined by the wineries because of New York's prohibitory law. The plaintiffs won in the District Court, but the Court of Appeals for the Second Circuit reversed, holding for the State and wholesaler and retailer intervenors on Twenty-first Amendment grounds.^{cxxii} The Court concluded that, in effect, the New York law was as discriminatory as Michigan's because it would be prohibitive for a small winery to establish "a bricks-and-mortar" presence in another state, "let alone all 50."^{cxxiii}

After quickly concluding that "[s]tate laws that discriminate against interstate commerce face 'a virtually *per se* rule of invalidity,'" the Court then discussed the states' contentions that their direct shipment statutes are saved by Section 2 of the Twenty-first Amendment.^{cxxiv} The first part of the discussion was a lesson on the legislative and interpretive history of the Amendment which has been the subject of much conjecture. In 1890 the Supreme Court held in *Leisy v. Hardin*^{cxxv} that states may not regulate the importation of goods, including alcoholic beverages, into one state from another.^{cxxvi} This decision was an imprecation for the Prohibitionists, and later that year Congress enacted the Wilson Act^{cxxvii} which subjected alcoholic beverages being transported into a state to the laws of that state.^{cxxviii} Congress did what the Court said states could not do by themselves. In 1898 the Court again weakened the prohibitory effect of state laws by holding that the Wilson Act applied only when liquor arrived at its destination in the state, not merely at the state's border which would prohibit importation entirely.^{cxxix} With the mail-order liquor trade thriving once again, Congress acted to plug the direct-shipment loophole by enacting the Webb-Kenyon Act^{cxli} in 1913.^{cxlii} States could now prohibit shipments of alcohol to consumers for personal use as long as liquor from out of state was treated the same as liquor from within the state.^{cxliii} Justice Kennedy noted that President Taft, on the advice of his Attorney General, vetoed the Webb-Kenyon Act because of the suspicion that a law authorizing state regulation of direct shipments for personal use was "an unlawful delegation of Congress' Commerce Clause powers."^{cxliiii} Congress overrode the veto, and the Court, in *Clark Distilling Co. v. Western Maryland Railway Co.*,^{cxliiii} upheld the Act recognizing that its purpose was to eliminate the advantage that liquor traveling in interstate commerce would have over in-state liquor because of the "immunity characteristic [from compliance with state law] of interstate commerce."^{cxliiii}

Justice Kennedy expressed the Court's disagreement with the states' position that the Webb-Kenyon Act removed all barriers to discriminatory state liquor regulations.^{cxliiii} He emphasized that the Webb-Kenyon Act did not repeal the Wilson Act which expressly prohibited state discrimination, and if the congressional intention was to authorize state discrimination against out-of-state liquor, Congress would have repealed the Wilson Act.^{cxliiii} He then went on to discuss the wording of Section 2 of the Twenty-first Amendment which is similar to the wording in the Wilson and Webb-Kenyon Acts. He asserted that the Amendment did not allow states to discriminate against out-of-staters, "a privilege they had not enjoyed at any earlier time,"^{cxliiii} however, he then had to explain away *State Board of Equalization of California v. Young's Market Co.*,^{cxliiii} in which the Court construed the Amendment as allowing states to treat imported liquors differently from domestic liquors.^{cxli} He rationalized that difficulty by noting that *Young's Market* might not be a precedent for the present case because the opinion said that "the case [did] not present a question of discrimination prohibited by the commerce clause."^{cxli} Moreover, the *Young's Market* Court did not consider the background of the Twenty-first Amendment, said Justice Kennedy.^{cxliii} Finally, Justice Kennedy opined that more recent cases demonstrate that the Twenty-first Amendment does not overcome the anti-discriminatory requirements of the Commerce Clause.^{cxliii}

The most important precedent is *Bacchus Imports, Ltd. v. Dias*^{cxliiii} in which the Court specifically stated that the Twenty-first Amendment does not remove state regulation of alcoholic beverages from a Commerce Clause compliance requirement.^{cxliiii} In that case the Court described the appropriate method of reconciling the two parts of the Constitution as trying pragmatically to harmonize federal and state powers by asking whether state principles implicated in any specific case are sufficiently similar to those underlying the Twenty-first Amendment to outweigh Commerce Clause principles that might be offended.^{cxliiii} Using that method, the *Bacchus* Court held that a Hawaii liquor tax imposed on wholesale sales of liquor but exempting certain locally produced beverages was an unconstitutional violation of the Commerce Clause.^{cxliiii} Justice Kennedy concluded that *Bacchus* "forecloses any contention that § 2 of the Twenty-first Amendment immunizes discriminatory direct-shipping laws from Commerce Clause scrutiny."^{cxliiii}

The Court's final inquiry was into the two justifications advanced by the states for their discriminatory statutes: discouraging underage drinking and facilitating tax collection.^{cxliiii} On the underage drinking issue, the Court cited the lack of evidence of minors' buying wine over the Internet as alleged by the states, noting evidence to the contrary.^{cl} Furthermore, minors are just as likely to order from in-state producers as from out-of-state ones.^{cli} States can also use less restrictive means, such as requiring an adult signature for all wine deliveries, to achieve their purpose.^{clii} Similarly for the tax issue, the states did not provide evidence that a variety of non-discriminatory means available to them for tax collection would be inadequate.^{cliii}

Joining Justice Kennedy in the majority opinion were Justices Scalia, Breyer, Ginsburg, and Souter, quite an unlikely team. There were two dissents: Justice Stevens wrote one, joined by Justice O'Connor; and Justice Thomas wrote one, joined by Chief Justice Rehnquist, Justice Stevens, and Justice O'Connor, a similarly unusual lineup.

B. The Dissenting Opinions

Justice Stevens, like Justice Kennedy, invoked history in expressing his belief that states are within their constitutional rights when they choose to discriminate against wine produced out of state. He noted that although today alcoholic beverages are viewed “as an ordinary article of commerce,” when the Twenty-first Amendment was added to the Constitution in 1933 it was in the context of a society that was still condemning “the use of the ‘demon rum.’”^{cliv} Therefore, although the Court’s decision “may represent sound economic policy” and may support “the unwritten prohibition against balkanizing the American economy,” it is not consistent with the intentions of those who amended the Constitution in 1933.^{clv} In his opinion, the states’ laws that “regulate the ‘transportation or importation’ of ‘intoxicating liquors’ for ‘delivery or use therein,’ . . . are exempt from dormant Commerce Clause scrutiny.”^{clvi}

Justice Thomas, in his dissent, was much more specific in challenging the majority’s interpretation of prior cases. For example, he asserted that the majority misread *Clark Distilling*. He opined that *Clark Distilling* meant that the Webb-Kenyon Act took “‘the protection of interstate commerce away from *all receipt and possession of liquor prohibited by state law,*” not from only “‘nondiscriminatory’ state laws.”^{clvii} He concluded that the Webb-Kenyon Act authorizes the states’ discriminatory direct shipping laws and, therefore, it is not necessary to interpret the Twenty-first Amendment, although the statutes are lawful under its plain meaning.^{clviii} He also urged the overruling of *Bacchus* based on its unjustified “narrowing of the Twenty-first Amendment to its ‘core concerns,’”^{clix} (which did not include the imposition of an excise tax on imports that gave an advantage to domestic liqueurs according to the *Bacchus* Court). According to Thomas, without the authority of *Bacchus*, the majority has no case support because subsequent cases^{clx} were about the constitutionality of protectionist statutes that would, in effect, control liquor prices in other states, unlike the statutes in the current case that regulate only within the borders of the regulating state.^{clxi} Thomas concluded by acknowledging that the majority, relying heavily on the FTC report^{clxii} that predicted the enhancement of consumer welfare by the direct shipment of wine, believed “its decision serves this Nation well,” but the text of the “Twenty-first Amendment and the Webb-Kenyon Act displaced the negative Commerce clause as applied to regulation of liquor imports into a State.”^{clxiii}

This five-four decision would have been difficult to predict because, as described in the majority opinion and in the dissents, the constitutional language, the federal statutory language, and the Court precedents do not clearly explain the relationship between the Twenty-first Amendment and the negative implications of the Commerce Clause. Reasonable people can differ,^{clxiv} and the justices did. Five years ago, I wrote that if Justices Stevens, Rehnquist, and O'Connor maintained the position they held in dissent in *Bacchus* (none of the six Justices in the majority in *Bacchus* is on the Court any longer), “it is likely they would be joined by Justices Scalia, Kennedy, and Thomas [and] [t]hat could be the majority that would uphold . . . states’ prohibitions on direct shipment of wine.”^{clxv} In hindsight, that was not a bad prediction, but it did not work out that way. In *Bacchus*, Stevens, Rehnquist and O'Connor subscribed to the same argument, *inter alia*, that Thomas did in *Granholtm*, namely, that the majority was taking a “novel approach” to the Twenty-first Amendment by creating a question of “deference” for laws combating the evils of liquor but not for economic protectionism because the former is one of the “central purposes” of the Amendment and the latter is not.^{clxvi} An interesting question is why they were not joined by Justices Kennedy and, especially, Scalia.

C. Constitutional Implications

The decision in *Granholtm* may rest on Justice Scalia’s view of the negative implication of the Commerce Clause. In 1994, Justice Scalia wrote that the “purpose of the negative Commerce Clause . . . is to create a national market.”^{clxvii} He noted that although the negative implication does not appear in the Constitution, the Court recognized the doctrine in 1873 and has relied on it in many, many cases and, therefore, he will rely on it too, but only in two situations: “(1) against a state law that facially discriminates against interstate commerce, and (2) against a state law that is indistinguishable from a type of law previously held unconstitutional by this Court.”^{clxviii} In 1997, Justice Thomas wrote, and was joined by Justice Scalia, “The negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application.”^{clxix} Justice Thomas, writing only for himself, reiterated those words in a dissent in 2003.^{clxx}

It is possible that Justice Scalia, in spite of his dislike of the negative Commerce Clause, was persuaded to join the five-four majority opinion because to conclude that the Clause was trumped by the Twenty-first Amendment would have diminished the national market for the growing wine industry. The state statutes at issue facially (or, in the case of New York, realistically) discriminate against interstate commerce, one of the situations he, seemingly reluctantly, said would cause him to rely on the negative implication even though it is not based on the explicit language of the Constitution. In addition, Justice Scalia is probably more likely than Justice Thomas to give effect to the negative Commerce Clause on *stare decisis* grounds even if he would not rely on it were he starting with a clean slate. Justice Thomas has made it clear that he believes a case should be decided correctly even if it means reconsidering or overruling established precedents. He has authored a substantial number of opinions,

concurrences, and dissents in which he has urged such action.^{clxxi} Justice Scalia has, however, on a number of occasions expressed his respect for the principle of *stare decisis*.^{clxxii}

As a practical matter, states now know that they can regulate the transportation and importation of wine as long as they do not do it in a way that discriminates against out-of-state producers.

IV. STATES' ATTEMPTS TO CHANGE THEIR DIRECT SHIPMENT LAWS

Some states, like New Jersey, that do not permit direct shipping by out-of-state wineries will not have to change anything because they do not permit in-state wineries to ship to consumers.^{clxxiii} Other states that have discriminatory shipping regulations do not have to change anything immediately because the *Granholm* decision was only specifically about the Michigan and New York laws; however, if legislatures do not eliminate discrimination, when their regulations are challenged in court, they will certainly fall and then changes will have to be made. Like the *Granholm* decision itself, what those changes will be is unpredictable, but most states will probably liberalize their laws rather than further restricting them because of the numbers of constituents, wineries and consumers, that will take an interest in opposing the wholesalers' lobby. In recent years, most states that have total or partial bans on direct of shipment of wine have considered a variety of changes to their regulatory schemes, but most bills have died without being enacted. The only sure result of *Granholm* is that Michigan and New York can no longer enforce their prohibitions on out-of-state shipments unless they enact new bans that treat in-state shipments similarly. The following are examples of the changes states are considering.

In Pennsylvania, residents are allowed to purchase wine from Pennsylvania wineries, have it delivered to their homes, and not have to pay an eighteen percent tax levied on all other alcoholic beverages.^{clxxiv} On the other hand, Pennsylvania residents wanting to buy wine produced at out-of-state wineries have to order it at a Pennsylvania State Store, if it is not stocked there, pick it up at the State Store, and pay the full State Store markup and tax.^{clxxv} This arrangement is clearly unconstitutional under *Granholm*. Nevertheless, the solution Pennsylvania will choose is not clear at all. It is sure that there will be a lot of political wrangling. The Pennsylvania Liquor Control Board will work to maintain its power as wine aficionados attempt to eliminate the State Store system. Pennsylvania wineries will exert political pressure to expand shipping opportunities while wholesalers lobby for complete bans on direct shipping.

Connecticut's State Senator Thomas Colapietro introduced a bill that would require Connecticut consumers to order any out-of-state wine through their local liquor stores.^{clxxvi} He argued that such a system would prevent minors from purchasing wine from out of state, and it would be convenient for working consumers who are not home to receive packages during the day.^{clxxvii}

Florida's State Senator Steven Geller introduced a bill that would have permitted a licensed out-of-state shipper to ship wine directly to registered Floridians at least twenty-one years old for their personal use.^{clxxviii} To get a license the shipper would have to be licensed in another state and would have to pay an annual registration fee of \$100; the recipient's registration would be valid for five years, but the recipient could purchase wine and have it shipped only while physically present at the out-of-state winery and would be limited to two cases of wine per winery and a total of eight cases of wine per year.^{clxxix} The bill failed, but Geller anticipates a compromise bill next spring that would limit in-state shipping and would similarly limit but not prohibit shipments from out-of-state wineries.^{clxxx} The change in Florida law will probably come sooner than that, however, because a ruling was expected, within weeks of *Granholm*, in *Bainbridge v. Turner*,^{clxxxi} a case with facts very similar to *Granholm*.

In its last legislative session, the Kansas legislature referred to committee two bills concerning the shipment of wine from out of state. One would have allowed Kansans to order out-of-state wine either in person, by mail, by phone or on the Internet and have it delivered to a local retailer.^{clxxxii} The other would have made Kansas a reciprocal state by allowing any holder of a license authorizing the manufacture of wine in a state that affords Kansas licensees reciprocal shipping privileges to ship up to two cases of wine a year to any adult in Kansas.^{clxxxiii}

A Kentucky newspaper editorial noted that Kentucky's laws do not discriminate the way that Michigan's and New York's do, but admonished the Kentucky legislature not to be tempted to impose a "draconian ban on all direct wine shipments."^{clxxxiv} The editors argued for a liberalization of current laws as "a boon to the booming wine industry."^{clxxxv} A Maryland newspaper editorial urged Governor Robert Ehrlich to demonstrate his alleged love of free markets and promotion of Maryland products by giving Maryland winemakers a chance to market their products directly to consumers.^{clxxxvi}

The Mississippi legislature considered, but let die in committee this year, a bill to allow native wineries to sell directly to consumers.^{clxxxvii} Under current law both in-state and out-of-state wineries have to ship to the Mississippi Alcoholic Beverage Control warehouse, and from there shipments are distributed to package stores.^{clxxxviii} It is also illegal to buy wine over the Internet in Mississippi.^{clxxxix}

In Montana, Representative Stoker introduced a bill in 2003 to allow direct shipment of wine for personal consumption,^{cx} but it was tabled, and there has been no meaningful legislative action since. This year, the Vermont Senate Committee on Economic Development, Housing, and General Affairs recommended a bill that would permit direct shipping of wine and beer to Vermont consumers.^{cxci} In New York this year, Assemblyman Herman Farrell introduced a bill that is in committee that authorizes interstate direct shipment of wine to states with reciprocal statutes.^{cxcii} New York State Senator Kenneth LaValle's bill is not limited to reciprocal states but does limit interstate shipments to thirty-six liters [four cases] per year per recipient.^{cxci} Ten years ago, the New York legislature approved a bill that would have loosened New York's direct shipping restrictions, but Governor Pataki vetoed the measure.^{cxci} Now the governor says he would support such legislation^{cxcv} and, in fact, has introduced a bill that

would allow out-of-state wineries to ship up to two cases of wine a month to New York residents.^{cxvii}

After the *Granholm* decision was announced, Rhode Island Representative Kennedy introduced a bill to allow anyone who was licensed as a wine producer in any state to obtain a wine direct shipper license in Rhode Island.^{cxviii} Also after *Granholm*, Ohio's State Senator Fingerhut introduced a bill to allow direct shipment, but the head of the Ohio Division of Liquor Control said that none of Ohio's wine laws would change until the resolution of a direct shipment lawsuit against the state.^{cxix} Fingerhut asserted the unconscionability of spending taxpayer money to defend a law that is now clearly unconstitutional.^{cxix} This exchange is undoubtedly just one example of the political jockeying for position that will occur as the result of the *Granholm* decision.

The following is a Model Rule based on a proposal by the Coalition for Free Trade and other wine industry lobbying organizations.^{cc}

- I. Any person licensed in any state of the United States as a wine producer or retailer may obtain a shipper's license from the State Liquor Authority (SLA) after registering with the SLA and complying with its rules, regulations, and procedures, and after payment of an annual licensing fee of \$____. Licensees may ship up to ____ cases of nine liters each of wine per month to any person or member of that person's household in the state.
 - A. The rules will require, inter alia, the filing of an annual report that will include:
 1. Identification information for all purchasers and the total quantity and total price of wine purchased by each purchase during the last calendar year.
 2. The total amount of wine shipped into the state during the last calendar year.
 - B. The rules will require the licensee to consent to the jurisdiction of the SLA, any other state agency, and state courts for the enforcement of this Act and for resolving any disputes between the licensee and its state resident purchasers.
- II. All licensees will pay annually to the Taxation Authority all state and local taxes on sales to state residents. The amount of the taxes will be calculated as if sales had been made at the point of delivery. This provision is subject to any federal law limiting the imposition of taxes.^{cci}
- III. The state will make available to licensees an annual list, by zip code, of local areas that prohibit the sale of alcoholic beverages, and no licensee may ship to those zip codes.
- IV. All shipments made pursuant to this Act will be conspicuously labeled on the outside: "CONTAINS ALCOHOL-SIGNATURE OF A PERSON 21 YEARS OR OLDER REQUIRED FOR DELIVERY." All licensees will require their common carriers to obtain the signature of a person 21 years or older (requiring identification to ascertain same) at the delivery address and to represent that the person signing was not obviously intoxicated.
- V. All licensees will require their purchasers to represent that they are 21 years or older; that their purchases are for personal, social, or household use, not for commercial resale; that the purchase is not prohibited in their local area.
- VI. A licensee may renew its license by paying an annual renewal fee of \$____ and by complying with SLA regulations.
- VII. The SLA may enforce provisions of this Act by suspension or revocation of a license or by assessing a fine. If the SLA determines that a licensee has made an unlawful shipment, the SLA shall notify the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) that state law has been violated and shall request that ATF take appropriate action.^{ccii}

If states enacted such a rule or something similar, the interests of small wineries, consumers, state taxing authorities, and child advocates would be protected. Wholesalers and bricks-and-mortar retailers would probably feel little impact because direct shipping represents only about one to three percent of the wine market.^{cciii} A case of wine (twelve bottles) weighs about thirty pounds and costs about thirty-five dollars to ship.^{cciv} Most wine purchasers are not going to want to incur those costs or experience the delay for an everyday, inexpensive bottle of wine for dinner. It is the oenophiles looking for the esoteric small production wines who will be most interested in direct shipping. On the other hand, a growing, general interest wine may encourage new customers for everyone in the industry.

V. CONCLUSION: *GRANHOLM* CREATES NO LOSERS

The positions of the justices in *Granholm* will provide much fodder for discussion.^{ccv} The decision will also keep the political rhetoric in high gear as lobbyists for wholesalers, wineries, and consumers attempt to influence state legislators. Ultimately, wine producers will benefit by having broader markets available. Consumers will benefit because they will have lower prices and more variety to choose from when buying wine. There will be little change in consumption of alcohol by underage

drinkers because they have much easier and cheaper supplies than online wine. States will collect their taxes if they make reasonable attempts to do so because wineries will not jeopardize their federal and state licenses by refusing to collect it. And finally, wholesalers will not lose their businesses to direct sales because of the inconvenience to the majority of wine buyers.

Footnotes

ⁱAdams Beverage Group, *New Paradigm for Wine Market* (2005) (market research firm for beverage alcohol industry noting that total wine consumption in the United States rose 5.2% in 2004, capping a decade of gains) at www.adamsbevgroup.com/sw/2004/0409/0409btw.asp.

ⁱⁱMarvin R. Shanken & Thomas Matthews, *Visiting the Vineyards*, WINE SPECTATOR, June 15, 2005, at 11 (noting that every state now produces wine).

ⁱⁱⁱSee, e.g., Free the Grapes, *Know Your State Laws*, at freethegrapes.com/wine_lovers.html#laws (last visited April 28, 2005).

^{iv}125 S. Ct. 1885 (2005).

^v*Id.* at 1895-1907.

^{vi}Connecticut, CONN. GEN. STAT. § 30-18a (2004) (providing for out-of-state small winery shipper's permit that allows sale of wine to manufacturer and wholesaler permittees in the state); Florida, FLA. STAT. ch. 561.545 (2004) (prohibiting the shipment of alcoholic beverages from out-of-state directly to anyone who does hold a manufacturer's or wholesaler's license); Indiana, IND. CODE § 7.1-5-11-1.5 (2004) (making it unlawful for out-of-state sellers of alcoholic beverages to sip an alcoholic beverage to an Indiana resident who does not hold a wholesaler permit); Massachusetts, MASS. GEN. LAWS ch. 138, § 22 (2004) (allowing only Massachusetts licensees to deliver alcoholic beverages in the commonwealth); Ohio, OHIO REV. CODE ANN. § 4301.20(K) (allowing a resident to bring into the state for personal use up to one liter in a thirty-day period); Rhode Island, R.I. GEN. LAWS § 3-4-8 (2004) (protecting any out-of-state seller from shipping intoxicating beverages to anyone in Rhode Island who is not a licensed wholesaler with exception for purchase made at manufacturer's premises).

^{vii}Alabama, ALA. CODE § 28-7-4 (2004) (listing to whom wine manufacturers, importers, and wholesalers may sell wine and not including consumers); Arkansas, ARK. CODE ANN. § 3-5-411 (Michie 2004) (prohibiting shipment of wine by Arkansas winery to anyone in Arkansas but the holder of a retail permit and to anyone outside of Arkansas); Delaware, DEL. CODE ANN. Tit. 4, § 526 (2004) (stating that under no circumstances may wine be shipped directly to a resident, but must be shipped to a Delaware wholesaler who will ship to a licensed retailer); Kansas, KAN. STAT. ANN. §§ 41-331, 701, 709 (2003) (prohibiting manufacturers to deliver any alcoholic beverage to anyone except licensees and permittees under the Liquor Control Act); Kentucky, KY. REV. STAT. ANN. § 244.350 (2000) (prohibiting a Kentucky retailer from delivering wine), § 244.167 (1997) (prohibiting an out-of-state producer from shipping wine directly to a Kentucky consumer), 804 KY. ADMIN. REGS. 4:330 (1997) (authorizing Kentucky residents, during a visit and for personal use, to ship wine from another state); Maryland, MD. CODE ANN., Art. 2B § 7.5-106 (2004) (requiring wine delivered to a personal consumer to be shipped to a licensed wholesaler); Mississippi, MISS. CODE ANN. § 67-1-41 (2004) (prohibiting the shipment of any alcoholic beverage except by a wholesale distributor); Montana, MONT. CODE ANN. § 16-3-402 (2003) (requiring all wine shipped into Montana to be shipped to a licensed distributor), § 16-3-411 (2003) (requiring Montana wineries to sell wine to distributors or retailers or directly to consumers on the premises of the winery); New Jersey, N.J. Sen. Bill No. 1408, N.J. 211th Legis. (2004) (eliminating direct shipping for in-state wineries), N.J. STAT. ANN. § 16-3-411 (West 2004) (allowing consumers to buy and personally transport any amount of alcoholic beverages within the state for personal use and to do likewise for no more than one gallon of wine purchased out of state); Oklahoma, OKLA. STAT. Constitution, Art. 28, § 3 (2004) (allowing Oklahoma wineries to sell their wine on their premises to consumers and to ship wine to package stores), tit. 37 § 524 (2004) (requiring a non-resident winemaker to have a license to ship or deliver to in-state licensees); Pennsylvania, 47 PA. CONS. STAT. § 4-488 (2004) (allowing a licensee in another state to obtain a direct wine shipper license in Pennsylvania to ship up to nine liters a month of any wine not available in the Pennsylvania Liquor Stores and to ship it upon the Internet order of a Pennsylvania resident to a Pennsylvania Liquor Store selected by the resident); South Dakota, S.D. CODIFIED LAWS § 35-12A-1 (2004) (person must place wine order with a licensee who will order through a wholesaler; may be done only if the wine is unavailable in south Dakota and the wine comes from a state that affords south Dakota wineries a reciprocal shipping privilege); Tennessee, Utah, UTAH CODE ANN. § 32A-12-201 (2004) (unlawful for any person in liquor business to ship liquor from out of state or within the state to anyone except the Alcoholic Beverage Control Department, a military installation, a permittee, or a bonded warehouse).

Maine is sometimes listed as a prohibition state but, in fact, Maine permits a person to send wine into the state up to a limit of four quarts. ME. REV. STAT. ANN. tit. 28-A § 2077 (2003). Moreover, a person may apply for a permit to receive from another state for personal use up to 2.4 gallons of wine per month per individual. ME. REV. STAT. ANN. tit. 28-A §

2077-A (1997). Vermont is also sometimes listed as a prohibition state, but provides exceptions. VT. STAT. ANN. tit. 7, § 63(b) (2004) (requiring all wine sent into the state to be imported by a licensed wholesaler, but providing an exception for an individual obtaining a permit from the liquor control board to transport or import alcoholic beverages into or through the state).

^{viii}Nat'l Distributing Co., Inc. v. United States, 626 F.2d 997, 1006 (D.C. Cir. 1980).

^{ix}*Id.*

^x*Id.*

^{xi}79 CONG. REC. 11718-19 (1935).

^{xii}*Id.* at 11720.

^{xiii}*Nat'l Distributing Co., Inc.*, 626 F.2d at 1007.

^{xiv}*Id.* at 1008.

^{xv}*Id.* at 1009.

^{xvi}*See, e.g.,* Actmedia, Inc. v. Stroh, 830 F.2d 957, 960-61 (9th Cir. 1986) (describing reasons and attempts for eliminating tied-house arrangements).

^{xvii}Erik D. Price, *Time to Untie the House? Revisiting the Historical Justifications of Washington's Three-Tier System Challenged by Costco v. Washington State Liquor Control Board*, WASH. STATE BAR NEWS, June 2004. The estimates of the number of wholesalers varies. In the *Granholm* opinion Justice Kennedy cites the Cato Institute for the proposition that the number of wholesalers dropped from 1,600 to 600 between 1984 and 2002. 125 S. Ct. at 1892.

^{xviii}*See* Lynne Kiesling, *Victory for Liberty and Oenophiles*, Nov. 13, 2002, at 1, at www.knowledgeproblem.com/archives/000393.html (Kiesling is Senior Lecturer of Economics at Northwestern University).

^{xix}*Id.* at 2.

^{xx}*Id.*

^{xxi}*Id.*

^{xxii}Jennifer Dixon, *Three-Tier System: State Law Is at Root of Wholesale Power*, DETROIT FREE PRESS, Feb. 10, 2005, available at www.freep.com [hereinafter Dixon, *Three-Tier System*]. The director of enforcement for Michigan's Liquor Control Commission has said that Michigan has not revoked a wholesaler's license for at least twenty-seven years. *Id.*

^{xxiii}*Id.*

^{xxiv}Jennifer Dixon, *Wine Shipments Face Their Day in High Court*, DETROIT FREE PRESS, Dec. 7, 2004, available at www.freep.com [hereinafter Dixon, *Wine Shipments*].

^{xxv}Dixon, *Three-Tier System*, *supra* note 22.

^{xxvi}Brian Dickerson, *Don't Place an Order for Wine Just Yet*, DETROIT FREE PRESS, May 23, 2005, at www.freep.com.

^{xxvii}Dixon, *Wine Shipments*, *supra* note 24.

^{xxviii}Jennifer Dixon & Victoria Turk, *Under the Influence: Part 2 of 3: Beer, Wine Wholesalers Are Life of Politicians' Parties*, DETROIT FREE PRESS, Feb. 11, 2005, at www.freep.com.

^{xxix}*Id.*

^{xxx}Judge & Dolph, Ltd., *About the Company—History*, at www.judgedolph.com/newsite/AboutCo/AboutCo.asp (last visited May 1, 2005).

^{xxxi}*Id.*

^{xxxii}*Id.*

^{xxxiii}*Id.*

^{xxxiv}Lynne Kiesling, *Victory for Liberty and Oenophiles*, Nov. 13, 2002, at 3, at www.knowledgeproblem.com/archives/000393.html.

^{xxxv}The brands of those two companies include Smirnoff, Baileys, Jose Cuervo, Beaulieu Vineyards, Crown Royal, Sterling Vineyards, Kahlua, Stolichnaya, Beefeater, Canadian Club, Courvoisier, Midori, William Hill Wines, Clos du Bois, and Atlas Peak. *Id.*

^{xxxvi}Illinois Campaign for Political Reform, *Wine & Spirits Distributors of Illinois*, at www.ilcampaign.org/sunshine/patrons/profiles/WSDI.asp (last revised Aug. 2004).

^{xxxvii}*Id.*

^{xxxviii}815 ILL. COMP. STAT. 725/1 TO 725/99 (1999).

^{xxxix}*Kendall-Jackson, Ltd. v. Branson*, 82 F. Supp. 2d 844 (N.D. Ill. 2000).

^{xl}815 ILL. COMP. STAT. 725/1 to 725/99 (2004) (indicating repeal effective Aug. 5, 2002).

^{xli}*See, e.g.*, Kevin McDermott, *Illinois Might Still Restrict wine Shipments*, ST. LOUIS POST-DISPATCH, May 17, 2005, available at www.stltoday.com.

^{xlii}Southern Wine & Spirits, *A Record of Growth, a Tradition of Service, a Commitment to Excellence*, at www.southernwine.com (copyrighted 2004).

^{xliiii}Hoover's, A D&B Company, *Southern Wine & Spirits of America, Inc.*, at www.hoovers.com (last visited May 1, 2005).

^{xliv}*Id.*

^{xlv}Illinois Campaign for Political Reform, *Romano Brothers Beverage Company*, at www.ilcampaign.org/sunshine/patrons/profiles/WSDI.asp (last revised Aug. 2004) (Southern purchased Romano Brothers in 2003).

^{xlvi}Institute on Money in State Politics, *Follow the Money*, at www.followthemoney.org (last visited May 20, 2005).

^{xlvii}Jerry Hirsch, *Is Wholesale Change in Alcohol Pricing on Tap?* LOS ANGELES TIMES, Apr. 10, 2005, available at www.latimes.com.

^{xlviii}*Id.*

^{xlix}Wayne Tompkins, *Suit Targets Kentucky Wine Law*, THE COURIER-JOURNAL (Louisville, Ky), May 18, 2005, available at www.courier-journal.com.

^l*See, e.g.*, Brief for Wine and Spirits Wholesalers of America, et al., 2004 WL 1743943, at *4, *17, *Granholt v. Heald*, 125 S. Ct. 1885 (2005).

^{li}Dixon, *Wine Shipments*, *supra* note 24.

^{lii}*Id.*

^{liii}*Id.*

^{liv}Wine Institute, *Strong Sales Growth in 2004 for California Wine as Shipments Reached New High*, Apr. 5, 2005, at www.wineinstitute.org/communications/statistics/Sales2004-2.htm.

^{lv}*Id.*

^{lvi}*Id.*

^{lvii}Coalition for Free Trade, *Family Wineries, Consumers Triumph in U.S. Supreme Court Ruling Supporting Wine Direct Shipping*, May 16, 2005, at coalitionforfreetrade.com/litigation/index.html.

^{lviii}Liza B. Zimmerman, *Reinventing Gallo*, MARKET WATCH, Nov./Dec. 2004, at 36, 45.

^{lix}*Id.* *Kendall-Jackson*, the market leader in grocery store sales of premium wines (\$12 or more per bottle), produced more than 3.2 million cases of wine in 2001. Michael Wasem, *Kendall-Jackson Trucks on—Full-Service Truck Leasing*, Aug. 2001.

^{lx}Theresa Howard & Jerry Shriver, *Supreme Court: Let Those Wine Sales Flow*, USA TODAY, May 17, 2005, at 1B, 2B.

^{lxi}Institute for Justice, *Uncorking Freedom*, at www.ij.org (last visited May 20, 2005) (The Institute for Justice is a non-profit public interest law firm that litigated the *Granholtz* case on behalf of these plaintiffs.).

^{lxii}*Id.*

^{lxiii}*Id.*

^{lxiv}*Id.*

^{lxv}*Id.*

^{lxvi}*Id.*

^{lxvii}Alix M. Freedman & John R. Emshwiller, *Vintage System: Big Liquor Wholesaler Finds Change Stalking Its Very Private World*, WALL ST. J., Oct. 4, 1999, at A1.

^{lxviii}*Florida Wine Company Goes Online to Boost Sales*, MIAMI HERALD, Dec. 17, 1999, available at 1999 WL 28718088.

^{lxix}Jerry Hirsch, *Is Wholesale Change in Alcohol Pricing on Tap?* LOS ANGELES TIMES, Apr. 10, 2005, available at www.latimes.com.

^{lxx}Richard Galant, *Money and Power—Exec Eyes Bloom of Wine Online*, NEWSDAY, May 23, 2005, at A23.

^{lxxi}Caryn Eve Murray, *Cheers—The Toast of Our Towns*, NEWSDAY, Dec. 8, 2000, at G3.

^{lxxii}Richard Galant, *Money and Power—Exec Eyes Bloom of Wine Online*, NEWSDAY, May 23, 2005, at A23.

^{lxxiii}*See generally, Direct Shipping of Wine: Fostering Consumer Choice and Fair Competition: Hearing Before the U.S. Senate Comm. On the Judiciary*, 106th Cong. (1999), available at 1999 WL 130100 (statement of Hon. Mike Thompson).

^{lxxiv}Institute for Justice, *Uncorking Freedom*, at www.ij.org (last visited May 20, 2005).

^{lxxv}*Editorial: Good Wine Choice on Wine Sales*, NEWSDAY, May 18, 2005, at A36.

^{lxxvi}James Temple, *A Win for Wine—Producers Large, Small Raise Glass*, CONTRA COSTA (CAL.)TIMES, May 17, 2005, at A1, A23. Seventy-one percent of California's 1,049 wineries produced fewer than 25,000 cases of wine in 2004; about 80% of the state's wineries produced fewer than 50,000 cases of wine. *Id.* More than half of the 284 wineries in the Napa Valley produce 10,000 or fewer cases a year. *Id.*

^{lxxvii}*Id.*; *see also, Lawmakers Allow N.Y. to Ship Wine*, POUGHKEEPSIE J., May 20, 2005. In the past twenty years, New York's wine industry has ballooned from about thirty small wineries to more than two hundred. *NY Urged to Pass a Wine Bill*, NEWSDAY, May 20, 2005, at A59.

^{lxxviii}Scott Leith, *Inside Metro Business: Up Close: Steve Gibson: Selling State's Wine Industry Remains a Formidable Task*, ATLANTA J. & CONSTITUTION, May 22, 2005, at F2 (wineries, e.g., Chateau Elan, Habersham, Frogtown, Wolf Mountain, Tiger Mountain).

^{lxxix}*Id.*

^{lxxx}*Id.*

^{lxxxii}*Id.*

^{lxxxii}Wine Growers Association of Georgia, at www.georgiawine.com.

^{lxxxiii}Judy Hedding, *Arizona Wine Country*, at about.com.

^{lxxxiv}Colorado Wines, *Chronology of Events*, at www.coloradowine.com.

^{lxxxv}Kurt Loft, *Court Corks Laws against Out-of-State Wine Sales*, TAMPA TRIB., May 17, 2005, at news.tbo.com/news/MGB1ARELT8E.html.

^{lxxxvi}*Connecticut Wine Trail - Discover Connecticut Wines—The Vineyards—Chamard*, at www.ctwine.com/chamard.html.

^{lxxxvii}*Wineries of Idaho—Frenchman's Gulch Winery*, at www.idahowine.org.

^{lxxxviii}FTC, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE 14 (2003).

^{lxxxix}See, e.g., *Internet Wine Sales Ruling Victory for Trade*, FORT WAYNE [IND.] J. GAZETTE, May 17, 2005, at www.fortwayne.com (Scripps Howard editorial).

^{xc}Molly McDonough, *States Mull the Wine Decision*, ABA JOURNAL REPORT, May 20, 2005, at www.abanet.org/journal/ereport/my20wine.html (Statement by Todd J. Zywicki, professor at George Mason School of Law).

^{xcj}See Lynne Kiesling, *Victory for Liberty and Oenophiles*, Nov. 13, 2002, at 3, at www.knowledgeproblem.com/archives/000393.html

^{xcii}*Disintermediation*, Feb. 12, 2003, at www.webopedia.com/TERM/D/distermediation.html.

^{xciii}Brief Amicus Curiae of American Homeowners Alliance, et al., 2004 WL 2155306 (2004), *Granholt v. Heald*, 125 S. Ct. 1885 (2005).

^{xciv}*Id.*

^{xcv}*Id.* at *4.

^{xcvi}The Supreme Court has noted that despite the Constitution’s express grant to Congress of the power to “regulate Commerce . . . among the several states,” the Court has consistently held that the language contains a negative (or dormant) Commerce Clause that serves the

purpose of preventing a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear. The provision thus ‘reflects a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of confederation.’

Oklahoma Tax Comm’n v. Jefferson Lines, Inc., 514 U.S. 175 (1995).

Thus, the Commerce Clause not only grants power to Congress but it limits the power of states. The limitations carry out the basic purpose of the Commerce Clause: to create a “federal free trade unit” that would encourage the “material success . . . [and] the peace and safety of the Union.” *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 538, 533 (1949).

^{xcvii}Brief Amicus Curiae of American Homeowners Alliance, et al., 2004 WL 2155306 (2004), at *5.

^{xcviii}*Id.* at *6-*7.

^{xcix}U.S. DEP’T OF COMMERCE NEWS, Quarterly Retail E-Commerce Sales 4th Quarter 2004, Feb. 24, 2005, available at www.census.gov/mrts/data/html/04Q4.htm.

^cU.S. CENSUS BUREAU, Quarterly Retail E-Commerce Sales 1st Quarter 2005, May 20, 2005, available at www.census.gov/mrts/data/html/05Q1.htm.

^{ci}U.S. DEP’T OF COMMERCE NEWS, Quarterly Retail E-Commerce Sales 4th Quarter 2004, Feb. 24, 2005, available at www.census.gov/mrts/data/html/04Q4.htm.

^{cii}FTC, PUBLIC WORKSHOP: POSSIBLE ANTICOMPETITIVE EFFECTS TO RESTRICT COMPETITION ON THE INTERNET 328 (Oct. 9, 2002).

^{ciii}*Id.* at 468.

^{civ}FTC, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE 16 (2003).

^{cv}*Id.* at 19.

^{cvi}*Id.*

^{cvi}*Id.* at 22.

^{cviii}*Id.* at 23 (statement of Dr. Daniel L. McFadden to the FTC).

^{cix}*Id.* at 18.

^{cx}*Id.* at 24.

^{cx}*Id.*

^{cxii}*Id.* at 25.

^{cxiii}*Granholm v. Heald*, 125 S. Ct. 1885, 1892 (2005).

^{cxiv}*Id.*

^{cxv}*Id.*

^{cxvi}*Id.* at 1892-93.

^{cxvii}*Id.* at 1893.

^{cxviii}*Id.*

^{cxix}*Heald v. Engler*, 342 F.3d 517 (2003).

^{cxx}N.Y. BEV. CONT. LAW ANN. § 76-a(3) (West Supp. 2005).

^{cxxi}N.Y. BEV. CONT. LAW ANN. § 3(37) (West Supp. 2005).

^{cxxii}*Granholm*, 125 S. Ct. at 1892.

^{cxxiii}*Id.* at 1897.

^{cxxiv}*Id.* at 1897-98. Section 2 of the Twenty-first Amendment says: “The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.” U.S. CONST. Amend. XXI, § 2.

^{cxxv}10 S. Ct. 681 (1890).

^{cxxvi}*Id.* at 687-88.

^{cxxvii}Ch. 728, 26 Stat. 313 (1890) (codified at 27 U.S.C. § 121 (1898)) (also known as the Original Packages Act).

^{cxxviii}*Id.*

^{cxxix}*Rhodes v. Iowa*, 170 U.S. 412, 421-22 (1898).

^{cxxxx}Ch. 90, 37 Stat. 699 (1913) (reenacted without change at ch. 740 § 202(b), 49 stat. 877 (1935)0 (codified at 27 U.S.C. § 122 (1998)).

^{cxxxi}*Granholm*, 125 S. Ct. at 1900.

^{cxxxii}*Id.* at 1900-01.

^{cxxxiii}*Id.*

^{cxxxiv}242 U.S. 311 (1917).

^{cxxxv}*Id.* at 324-25.

^{cxxxvi}*Granholm*, 125 S. Ct. at 1900-01.

^{cxxxvii}*Id.* at 1901-02.

^{cxxxviii}*Id.* at 1902-03.

^{cxxxix}299 U.S. 59 (1936).

^{cxli}*Id.* at 62.

^{cxlii}*Granholm*, 125 S. Ct. at 1903 (quoting *Young’s Market*, 299 U.S. at 62.).

^{cxliii}*Id.*

^{cxliiii}*Id.* at 1903-04.

^{cxliv}468 U.S. 263 (1984).

^{cxlv}*Id.* at 275.

^{cxlvi}*Id.*

^{cxlvii}*Id.* at 276.

^{cxlviii}*Granholm*, 125 S. Ct. at 1904.

^{cxlix}*Id.* at 1905.

^{cl}*Id.* at 1905-06.

^{cli}*Id.*

^{clii}*Id.*

^{cliii}*Id.* at 1906-07.

^{cliv}*Id.* at 1909.

^{clv}*Id.*

^{clvi}*Id.*

^{clvii}*Id.* at 1912-13.

^{clviii}*Id.* at 1919-20

^{clix}*Id.* at 1924-25.

^{clx}*See, e.g.*, *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573 (1986); *Healy v. Beer Inst.*, 491 U.S. 324 (1989).

^{clxi}*Granholm*, 125 S. Ct. at 1926.

^{clxii}FTC, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE (2003).

^{clxiii}*Granholm*, 125 S. Ct. at 1927.

^{clxiv}*Compare* Todd Zywicki, *Uncorking the Dormant Commerce Clause: Statement at American Enterprise Institute Discussion on Federalism under the Influence: Dope, Booze, and the Commerce Clause*, Nov. 10, 2004, *with* Brannon Denning, *Uncorking the Dormant Commerce Clause: Statement at American Enterprise Institute Discussion on Federalism under the Influence: Dope, Booze, and the Commerce Clause*, Nov. 10, 2004 (Zywicki, professor at George Mason School of Law and visiting professor at the Georgetown Law Center, asserting the viability of the dormant Commerce Clause in the *Granholm* context, and Denning professor at Cumberland School of Law, asserting that the Twenty-first Amendment trumps the Dormant Commerce Clause), *available at* www.aei.org/events/filter.eventID.944/transcript.asp.

^{clxv}Susan Lorde Martin, *Wine Wars—Direct Shipment of Wine: The Twenty-first Amendment, the Commerce Clause, and Consumers' Rights*, 38 AM. BUS. L. J. 1 (2000); *see also* Denning, *supra* note (asserting before the *Granholm* decision that if you add up the votes based on the justices' prior opinions, the states should be in a good position to win).

^{clxvi}*Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 286-87 (1984).

^{clxvii}*West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 207 (1994) (concurring only in the judgment).

^{clxviii}*Id.* at 209-10.

^{clxix}*Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 610 (1997) (Thomas dissenting joined by Scalia and in pertinent part by Chief Justice Rehnquist).

^{clxx}*Hillside Dairy, Inc. v. Lyons*, 539 U.S. 59, 68 (2003).

^{clxxi}*See, e.g.*, *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004) (Thomas dissenting); *Sabri v. United States*, 541 U.S. 600 (2004) (Thomas concurring); *Locke v. Davey*, 540 U.S. 712 (2004) (Thomas dissenting); *McConnell v. Fed'l Election Comm'n*, 540 U.S. 93 (2003) (Thomas dissenting in part and concurring in part); *Hillside Dairy, Inc. v. Lyons*, 539 U.S. 59, 68 (2003) (Thomas dissenting in part and concurring in part).

^{clxxii} See, e.g., *Tennessee v. Lane*, 541 U.S. 509, 560, 564 (2004) (Scalia dissenting); *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 210 (1994) (Scalia concurring); *Intel Containers Int’l Corp. v. Huddleston*, 507 U.S. 60, 78 (1993) (Scalia concurring).

^{clxxiii} See, Larry Fish, *Pa. Will Have to Address Wine Rules; N.J. Already Complies with Decision*, PHILADELPHIA INQUIRER, May 17, 2005, available at www.philly.com.

^{clxxiv} *Id.*

^{clxxv} *Id.*

^{clxxvi} Conn. Sen. Bill No. 122, Conn. Gen’l Ass. Jan. Sess. (2005)

^{clxxvii} *State Weighs Wine Options*, HARTFORD COURANT, May 18, 2005, available at 2005 WL 7820618.

^{clxxviii} Fla. Sen. Bill No. 2552, Fla. 107th Reg. Sess. (2005).

^{clxxix} *Id.* at ¶¶ 1 & 2.

^{clxxx} Jamie Malernee, *Supreme Court Ruling Uncorks Hope You Can Import Out-of-state Wine*, SOUTH FLA. SUN-SENTINEL, May 17, 2005, available at 2005 WL 7801220.

^{clxxxi} 148 F. Supp. 2d 1306 (M.D. Fla. 2001), *vacated in part and remanded*, 311 F.3d 1104, 1115-16 (11th Cir. 2002).

^{clxxxii} Kan. House Bill No. 2292, Kan. 81st Legis. (2005).

^{clxxxiii} Kan. House Bill No. 2291, Kan. 81st Legis. (2005).

^{clxxxiv} *Send in the Wine*, THE COURIER-JOURNAL (Louisville, Ky), May 18, 2005, available at www.courier-journal.com .

^{clxxxv} *Id.*

^{clxxxvi} *Uncorking the Bottle*, BALTIMORE SUN, MAY 18, 2005, available at www.baltimoresun.com.

^{clxxxvii} Miss. Sen. Bill No. 2710, Miss. Legis. Reg. Sess. (2005).

^{clxxxviii} Jack Elliott Jr., *Wine Commerce Could Change*, CLARION-LEDGER (Jackson, Miss.), May 17, 2005, available at www.clarionledger.com.

^{clxxxix} *Id.*

^{cx} Mont. House Bill No. 606, Mont. 58th Reg. Sess (2003).

^{cxci} Vt. Sen. Bill No. 58, 68th Biennial Sess. (2005).

^{cxcii} N.Y. Ass. Bill No. 7379, 228th Annual Legis. Sess. (2005).

^{cxci} N.Y. Sen. Bill No. 2080, 228th Annual Legis. Sess. (2005).

^{cxci} *NY Urged to Pass a Wine Bill*, NEWSDAY, May 20, 2005, at A59.

^{cxv} *Id.*

^{cxvi} Al Baker, *Mixed Reaction to Web Wine Plan*, N.Y. TIMES, May 30, 2005, available at www.nytimes.com/2005/05/30/nyregion.

^{cxvii} R.I. House Bill No. 6517, 2005-06 Legis. Sess.

^{cxviii} John S. Long, *Fingerhut Wants Ohio to Go with the Flow—He Seeks Law Heeding Court Ruling on Wine*, CLEVELAND PLAIN DEALER, May 19, 2005, at B3.

^{cxix} *Id.*

^{cc} See Martin, *supra* note 165, at 37 (proposing a similar Model Rule).

^{cci} In 1998 Congress enacted the Internet Tax Freedom Act, Pub. L. No. 105-277, Div. C, Title XI, 112 Stat. 2681-2719 (1998), “to exercise Congressional jurisdiction over interstate commerce by establishing a moratorium on the imposition of exactions that would interfere with the free flow of commerce via the Internet.” 144 CONG. REC. D1126-02 (dail ed. Oct. 8,

1998). Section 1101(a) is a moratorium that prohibits states from imposing taxes in “Internet access” and “multiple or discriminatory taxes on electronic commerce.”

^{ccii}Aspects of these provisions have been incorporated in a variety of bills that have been introduced in state legislatures. *See, e.g.*, N.J. Sen. Bill No. 1389, 208th Legis. (1998); N.Y. Sen. Bill No. 4941, 222nd Ann. Legis. Sess. (1999).

^{cciii}Katy McLaughlin, *Will Buying Wine Get Easier?* WALL ST. J., May 17, 2005, at D1, D3.

^{cciv}Hope Yen, *Court Cancels State Wine Laws*, MOBILE [ALA.] REG., May 17, 2005, *available at* www.al.com.

^{ccv}*See, e.g.*, Wayne Tompkins, *Suit Targets Kentucky Wine Law*, THE COURIER-JOURNAL (Louisville, Ky), May 18, 2005, *available at* www.courier-journal.com (noting that the wine debate is so disruptive that conservative justices Scalia and Thomas disagreed in *Granholm*); George Will, *Wine and Judicial Activism*, INDIANAPOLIS STAR, May 22, 2005, *available at* www.indystar.com (pointing out that Antonin Scalia, perhaps the most conservative justice, joined the majority opinion with Ruth Bader Ginsburg and Stephen Breyer, two of the more liberal justices; that Clarence Thomas, the most conservative justice if Scalia is not, wrote a dissent and was joined by John Paul Stevens, perhaps the most liberal justice; that the liberal Stevens wrote a separate dissent joined by Sandra Day O’Connor arguing for the original intent of the authors of the Twenty-first Amendment).