COMMERCE—INTOXICATING LIQUORS: WINE LOVERS REJOICE! WHY VINEYARDS CAN NOW SHIP DIRECTLY TO CONSUMERS AND WHY EVERYONE ELSE SHOULD CARE

Granholm v. Heald, 544 U.S. 460 (2005)

I. FACTS

The early 2000s marked a new era in the jumbled maze of alcohol litigation, with vineyard owners and wine enthusiasts teaming up with online wine cellars and even Ebay to challenge state laws in almost every federal circuit.[1] These state laws prohibited the direct shipment of wine to customers and forced them to go through the traditional three-tier distribution systems that most states have in place.[2] The restrictive laws in some states, coupled with the decreased number of wholesalers, prevented wholesalers from carrying wines produced by small wineries, which forced small wineries to rely heavily on direct shipments of wine to reach new customers.[3] During this time, more than half of the states prohibited or restricted out-of-state vineyards from shipping wine to customers, while allowing in-state shipments from vineyards and retailers, creating "the single largest regulatory barrier to expanded e-commerce in wine."[4] In order to take advantage of the lower prices and expanded varieties that online ordering and direct shipment of out-of-state wines would bring, oenophiles[5] joined with vineyards to challenge laws prohibiting direct shipment of wine that limited smaller vineyards' market access.[6]

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1. *See, e.g.*, Heald v. Engler, 342 F.3d 517, 519 (6th Cir. 2003) (challenging Michigan's statute were three small vineyards, two located in California and one in Virginia); Swedenburg v. Kelly, 232 F. Supp. 2d 135, 136-37 (S.D.N.Y. 2002) (challenging New York's statute were two vineyard owners, one located in California and one in Virginia, and three oenophiles who wanted to order their wine); *see also* Brief for American Homeowners Alliance et al. as Amici Curiae Supporting Petitioners, Granholm v. Heald, 544 U.S. 460 (2005) (No. 03-1120) (joining in this amicus brief was Ebay, the online auction site).

2. FEDERAL TRADE COMMISSION, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE 3, 5-7 (2003), http://www.ftc.gov/os/2003/07/winereport2.pdf. [hereinafter FTC REPORT]. The three-tier distribution system refers to those systems which require vineyards (first tier) to sell their products to a wholesaler (second tier), who then sells them to a retailer (third tier), who then sells them to the final consumer. *Id.* At each stage, the price is increased so each person in the chain can make a profit on the transaction. *Id.*

3. *Granholm*, 544 U.S. at 467.

4. FTC REPORT, *supra* note 2, at 3.

5. A lover of wine. III SUPPLEMENT TO THE OXFORD ENGLISH DICTIONARY 22 (1982).

6. FTC REPORT, *supra* note 2, at 3.

As these cases worked their way through the courts, a split in the circuits developed.[7] The Second, Seventh, and Eleventh Circuits favored a strict interpretation of the Section Two powers of the Twenty-First Amendment, upholding the ability of states to control alcohol regulation through direct shipment bans.[8] The Third, Fourth, Fifth, and Sixth Circuits reached the opposite conclusion, relying on the Dormant Commerce Clause.[9] The United States Supreme Court granted certiorari on two combined cases to decide whether regulatory schemes that restrict out-of-state wineries from directly shipping to consumers, while allowing in-state wineries to do so, violate the Commerce Clause in light of Section Two of the Twenty-First Amendment.[10] The Michigan and New York statutes at issue differed in technicalities, but the object and effect of both regulatory schemes was "to allow in-state wineries to sell wine directly to consumers in that state but to prohibit out-of-state wineries from doing so, or at the least, to make direct [wine] sales impractical from an economic standpoint."[11]

The first of the two combined cases involved Michigan's regulatory scheme.[12] Michigan's statutes called for wine producers to distribute their wine through wholesalers, but provided an exception for in-state wineries to apply for "wine-maker" licenses, which allowed them to ship directly to in-state consumers.[13] The practical effects of these statutes protected the domestic wine market and led to a distinct advantage for in-state wineries.[14] Some Michigan residents, along with three small wineries, filed suit against state officials alleging that the direct-shipment laws constituted a violation

7. *Heald*, 342 F.3d at 519 n.1. Even those circuits that have reached the same decision used different analyses, leaving no clear standard. *Id.*

8. *See, e.g.*, Swedenburg v. Kelly, 358 F.3d 223, 227 (2d Cir. 2002) (holding that New York's regulatory scheme was within the ambit of the Twenty-First Amendment); Bainbridge v. Turner, 311 F.3d 1104, 1115 (11th Cir. 2002) (holding that Florida's statutes prohibiting out-of-state wineries from directly shipping, while allowing in-state wineries to do so, could be upheld if they were closely related to a core concern of raising revenue); Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 851 (7th Cir. 2000) (holding that an Indiana statute prohibiting direct shipment of alcohol was authorized by the Twenty-First Amendment).

9. *See, e.g.*, *Heald*, 342 F.3d at 520 (holding that Michigan's regulatory scheme for shipping alcohol violated the Commerce Clause); Dickerson v. Bailey, 336 F.3d 388, 409 (5th Cir. 2003) (holding that Texas' prohibition of out-of-state shipments of wine violated the Commerce Clause); Beskind v. Easley, 325 F.3d 506, 509 (4th Cir. 2003) (holding that North Carolina's alcoholic beverage control laws, as applied to direct shipment of wine, violated the Commerce Clause).

10. Granholm v. Heald, 544 U.S. 460, 471 (2005).

11. *Id.* at 465-66.

12. *Heald*, 342 F.3d at 520.

13. MICH. COMP. LAWS §§ 436.1537, .1525, .1305 (2001).

14. *Heald*, 342 F.3d at 521. The cost of the license varied with the size of the winery, but a small domestic winery had to pay a licensing fee of $25, compared to the $300 fee for an "outside seller of wine" license that only allowed out-of-state wineries to sell their wine to a wholesaler. *Id.*

of the Commerce Clause.[15] The district court held the Michigan scheme valid, but the Sixth Circuit reversed, and found the scheme unconstitutional because the State failed to prove the lack of nondiscriminatory methods of meeting the "proffered policy objectives."[16]

The New York suit was based on a somewhat different regulatory scheme, but one that still provided distinct advantages to in-state wineries.[17] New York allowed wineries that produced wine "only from New York State grapes" to apply for a license permitting them to ship directly to in-state consumers.[18] By contrast, an out-of-state winery could only ship directly to New York consumers if it became a licensed New York winery.[19] This process required establishing a branch office and warehouse located in and staffed by people living in New York, securing a commercial winery license, securing a retailer license, and purchasing registered vehicles to deliver the wine to customers.[20] The process was so complicated and cost-prohibitive that no one had even attempted it; in fact, the first time New York even had to contemplate the required steps was for this litigation.[21]

Two out-of-state vineyard owners and their New York customers filed suit, seeking a declaration that the New York laws violated the Commerce Clause.[22] The district court held that New York's ban on direct shipments violated the Commerce Clause.[23] The Second Circuit reversed, stating that "the physical presence requirement could create substantial dormant Commerce Clause problems if this licensing scheme regulated a commodity other than alcohol," but reasoning that the Twenty-First Amendment allowed for such measures to be implemented at the State's discretion.[24]

The United States Supreme Court granted certiorari to resolve the circuit split.[25] The Court held that both regulatory schemes violated the Commerce Clause, and moreover, that the Twenty-First Amendment did not immunize the challenged laws from scrutiny under the Commerce Clause.[26]

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15. *Id.* at 520.
16. *Id.* at 527.
17. Swedenburg v. Kelly, 232 F. Supp. 2d 135, 144-45 (S.D.N.Y. 2002).
18. *Id.* at 143 n.18.
19. Petition for Writ of Certiorari at 3, Swedenburg v. Kelly, 544 U.S. 460 (2005) (No. 03-1274).
20. *Id.*
21. *Id.*
22. Swedenburg v. Kelly, 358 F.3d 223, 229 (2d Cir. 2004).
23. *Id.* at 241.
24. *Id.* at 238.
25. Granholm v. Heald, 544 U.S. 460, 471 (2005).
26. *Id.* at 1892.

II. LEGAL BACKGROUND

A. COMMERCE CLAUSE

The Commerce Clause grants Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[27] The Supreme Court has long held that "this affirmative grant of authority to Congress also encompasses an implicit or 'dormant' limitation on the authority of the States to enact legislation affecting interstate commerce."[28]

Under traditional Commerce Clause analysis, courts apply a two-prong test.[29] The first prong requires a determination of whether the state statute facially discriminates against interstate commerce or has an effect to favor in-state interests to the detriment of out-of-state interests.[30] If the statute fails this first prong, it is virtually per se invalid.[31] In the second prong, the courts consider if the state's interest is legitimate.[32] The "critical consideration" is whether the benefits greatly exceed the burden on commerce.[33]

One cause of the circuit split over wine shipment regulation was some circuits' interpretation that the Twenty-First Amendment somehow limits or abrogates Congress' Commerce Clause power; particularly, the Second and Seventh Circuits read precedent as exempting liquor from Commerce Clause analysis.[34] According to the logic of these circuits, because the object being regulated was liquor and not an "ordinary widget," the statutory scheme could be upheld even if it violates the Commerce Clause as long as it "is closely related to a core concern of the Twenty-first Amendment."[35]

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27. U.S. CONST. art. 1, § 8, cl. 3.

28. Healy v. Beer Inst., 491 U.S. 324, 326 n.1 (1989) (citing Hughes v. Oklahoma, 441 U.S. 322, 322, 326 n.1 (1979)).

29. Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 579 (1986).

30. *Id.*

31. Pike v. Bruce Church, 397 U.S. 137, 145 (1970).

32. *Brown-Forman*, 476 U.S. at 579.

33. *Id.*

34. *See, e.g.*, Swedenburg v. Kelly, 358 F.3d 223, 237 (2d Cir. 2004) (stating that "the drafters of the Twenty-first Amendment crafted section 2 to allow states the authority to circumvent dormant Commerce Clause protections, provided that they were regulating the intrastate flow of alcohol"); Bainbridge v. Turner, 311 F.3d 1104, 1106 (11th Cir. 2002) (holding that if Florida could demonstrate that its statutory scheme was closely related to a core concern of the Twenty-First Amendment, then the scheme could be upheld).

35. *Bainbridge*, 311 F.3d at 1106. These circuits seemed to hold the view that the Twenty-First Amendment trumps the Commerce Clause, a position that the Supreme Court flatly rejected in *Granholm.* Granholm v. Heald, 544 U.S. 460, 486 (2005).

B. CONFLICTING CONSTITUTIONAL PROVISIONS

The Supreme Court has held that whenever two provisions of the Constitution are in conflict, they must be read as two parts of the same document, considering the context of the issues and the interests at stake in any particular case, with neither provision automatically trumping.[36] The Court has found that Section Two of the Twenty-First Amendment does not abrogate other constitutional provisions, but rather it must be balanced with any other provision.[37] For example, the "extremely broad" powers given to the states "even prior to the Twenty-first Amendment" will not defeat a Due Process claim under the Fourteenth Amendment.[38] The Court has also held that the Twenty-First Amendment does not trump the Equal Protection Clause of the Fourteenth Amendment,[39] the Establishment Clause of the First Amendment,[40] or even the First Amendment generally.[41] In the context of the Import-Export Clause and Section Two, the Court has held that it "has never so much as intimated that the Twenty-first Amendment has operated to permit what the Export-Import Clause precisely and explicitly forbids."[42]

The only area of jurisprudence where this balancing approach has ever been called into question is in regard to alcohol regulation under the Commerce Clause.[43] There has been perennial debate about whether Section Two of the Twenty-First Amendment trumps the Commerce Clause by enabling states to freely regulate alcohol within their borders.[44]

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

37. Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 108-09 (1980).

38. *See* Wisconsin v. Constantineau, 400 U.S. 433, 436 (1971) (providing that a posted warning from the chief of police in all retail liquor outlets forbidding all sales or gifts of liquor to Constantineau, with no notice or hearing, was a violation of her Due Process rights and not saved by the state's Section Two powers).

39. Craig v. Boren, 429 U.S. 190, 204-05, 208-09 (1976) (holding "that the Twenty-first Amendment does not save the invidious gender-based discrimination from invalidation as a denial of equal protection of the laws in violation of the Fourteenth Amendment").

40. Larkin v. Grendel's Den Inc., 459 U.S. 116, 122 n.5 (1982) (holding that "[t]he State may not exercise its power under the Twenty-first Amendment in a way which impinges upon the Establishment Clause of the First Amendment").

41. 44 Liquormart v. Rhode Island, 517 U.S. 484, 484 (1996) (recognizing that the Twenty-First Amendment "limits the dormant Commerce Clause's effect on a State's regulatory power over the delivery or use of liquor within its borders, [but] the Amendment does not license the States to ignore their obligations under other constitutional provisions").

42. Dep't of Revenue v. James B. Beam Distilling Co., 377 U.S. 341, 344 (1964).

43. *See* discussion *infra* Part II.C. (discussing why there have been questions about alcohol regulation and the Commerce Clause).

44. *Id.*

C. HISTORY OF ALCOHOL LITIGATION

Direct shipment of wine to consumers is not a new issue; in fact, the courts have been struggling with it since the 1800s.[45] The current state of alcohol legislation is ad hoc, with some states imposing outright bans on all shipments,[46] others allowing limited direct shipment,[47] and still others allowing reciprocity agreements for direct shipment,[48] leaving consumers and vineyards to sort through a complicated and jumbled mess of regulations and state laws.[49] The Supreme Court has characterized this jumble of regulations as the result of "an ongoing, low-level trade war."[50] The disparity among the state regulations is marked; some states allow unlimited direct shipments of wine, while other states penalize those who ship a bottle of wine to a person over the age of twenty-one with a felony conviction.[51] While this is exactly the sort of situation the Commerce Clause was meant to rectify, there have been historical problems with alcohol as a commodity due to its unique nature as an item in commerce.[52]

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45. Bowman v. Chi. & Nw. R.R. Co., 125 U.S. 465, 466 (1888). Direct shipment "refers to wineries or retailers shipping wine directly to consumers outside the three-tier system, usually to their home or work via a package delivery company," such as FedEx or UPS. FTC REPORT, *supra* note 2, at 7.

46. FTC REPORT, *supra* note 2, at 7-8. States that impose an outright ban include Alabama, Arkansas, Delaware, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Mississippi, Montana, New Jersey, Oklahoma, Pennsylvania, South Dakota, Tennessee, Utah, and Vermont. Map available at http://www.wineinstitute.org/shipwine/ (last visited July 17, 2006).

47. FTC REPORT, *supra* note 2, at 7-8. States that allow limited direct shipment include Alaska, Arizona, California, Connecticut, Florida, Georgia, Louisiana, Michigan, Minnesota, Nebraska, Nevada, New Hampshire, New York, North Carolina, North Dakota, Ohio, Rhode Island, South Carolina, Texas, Virginia, and Wyoming. Map available at http://www.wineinstitute.org/shipwine/ (last visited July 17, 2006).

48. FTC REPORT, *supra* note 2, at 12. Reciprocity states allow their consumers to receive wine directly from suppliers in other reciprocity states, and they typically restrict or prohibit direct shipments from non-reciprocity states. *Id.* States that allow reciprocity include Colorado, Hawaii, Idaho, Illinois, Iowa, Missouri, New Mexico, Oregon, Washington, West Virginia, and Wisconsin. Map available at http://www.wineinstitute.org/shipwine/ (last visited July 17, 2006).

49. 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, 5 (2000).

50. Granholm v. Heald, 544 U.S. 460, 473 (2005).

51. Free the Grapes, http://www.freethegrapes.com (last visited July 17, 2006).

52. *See* Hughes v. Oklahoma, 441 U.S. 322, 325-26 (1979) (citing H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 533-34 (1949)) (holding that the statute was the most discriminatory choice against interstate commerce, and therefore, was a Commerce Clause violation). In *Hughes*, the Court stated that the Commerce Clause:

> reflect[s] 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.

Id.

The jurisprudence in this area has shifted several times in the course of history, and issue has become even more complicated.[53]

1. *Pre-Prohibition*

Before the Eighteenth Amendment was passed, temperance organizations fought a state-by-state battle to curb alcohol production and consumption.[54] As a result of this campaigning, many states passed laws that prohibited or restricted the production and sale of alcohol.[55] The Supreme Court upheld state laws banning the sale of alcohol as a valid exercise of police powers,[56] but invalidated a number of state laws prohibiting the importation of alcohol into a state by relying on the Commerce Clause.[57]

The Court's pre-Prohibition cases generally support the argument that the Commerce Clause prevents individual states from discriminating against imported liquor.[58] This principle is directly stated in *Vance v. W.A. Vandercook Co.*:[59]

> [I]f all alcoholic liquors, by whomever held, are declared contraband, they cease to belong to commerce and are within the jurisdiction of the police power; but so long as their manufacture, purchase, or sale, and their use as a beverage in any form or by any person are recognized, they belong to commerce, and are without the domain of the police power.[60]

In *Walling v. Michigan*,[61] the Court found that states were not free to pass laws that burdened only out-of-state products, and that doing so was "a usurpation of the power conferred by the Constitution upon the Congress of the United States."[62]

Additionally, the pre-Prohibition cases support the idea that even laws which seem facially neutral are prohibited by the Commerce Clause if they

53. Heald v. Engler, 342 F.3d at 517, 522-24 (6th Cir. 2003).

54. *Granholm*, 544 U.S. at 476.

55. *Id.*

56. Mugler v. Kansas, 123 U.S. 623, 663 (1887).

57. *E.g.*, Walling v. Michigan, 116 U.S. 446, 460 (1886) (invalidating a Michigan law that imposed a tax on wholesale liquor sellers shipping from out-of-state, but did not impose a similar tax on in-state wholesalers); Tiernan v. Rinker, 102 U.S. 123, 123, 127 (1880) (invalidating a statute that levied a tax of at least $100 on any firm or person selling intoxicating liquor, with an exception for any wines or beer manufactured within the state).

58. *See* discussion *infra* notes 58-64 and accompanying text.

59. 170 U.S. 438 (1898).

60. *Vance*, 170 U.S. at 447-48.

61. 116 U.S. 446 (1886).

62. *Walling*, 116 U.S. at 455.

impermissibly burden interstate commerce.[63] In *Leisy v. Hardin*,[64] the Court held that an Iowa law prohibiting the importation of alcohol was unconstitutional because commodities transportation between states should be free, "except where it is positively restricted by Congress itself" or if the state were to get explicit permission from Congress.[65] Decisions such as *Leisy* put states in the awkward position of being able to regulate within their borders, but having little or no control over what was being imported.[66]

In response, Congress passed the Wilson Act,[67] which gave states the right to regulate imported liquor on the same terms as domestic liquor.[68] However, in *Vance*, the Court held that the Wilson Act did not authorize the states to act in a way that would prohibit direct shipments of imported alcohol for personal use.[69]

Congress passed the Webb-Kenyon Act[70] in response to this loophole concerning direct shipment of alcohol.[71] The states were now left with the guideline that as long as in-state and out-of-state liquor were treated the same way, they were free to enact any legislation they saw fit.[72] According to Senator Kenyon, the only purpose of the Webb-Kenyon Act was "to

63. *See, e.g.*, Vance v. W.A. Vandercook Co., 170 U.S. 438, 449 (1898) (holding that the right to ship liquor to a resident for his own use falls under the Commerce Clause and cannot be prohibited by state law); Rhodes v. Iowa, 170 U.S. 412, 419 (1898) (holding that an Iowa law prohibiting alcohol was unconstitutional in regards to an Illinois shipment that had crossed state lines into Iowa but had not yet been delivered); Bowman v. Chi. & Nw. RR. Co., 125 U.S. 465, 493 (1888) (holding that an Iowa statute which prohibited all common carriers from bringing any liquor into the state exceeded Iowa's police powers).

64. 135 U.S. 100 (1890).

65. *Leisy*, 135 U.S. at 113. The relevant section of the law prohibited the manufacture or sale of any intoxicating liquor within the state, whether that person lived in-state or out-of-state. *Id.* at 100.

66. *Id.* at 113.

67. Wilson Act, ch. 728, Stat. 313 (1890) (codified at 27 U.S.C. § 121 (2000)).

68. *Id.* By its own terms, the Wilson Act does not allow states to discriminate against out-of-state liquor; it only allows them to regulate imports in "the same extent and manner" as domestic liquors. *Id.*

69. Vance v. W.A. Vandercook Co., 170 U.S. 438, 452-53 (1898).

70. Webb-Kenyon Act, ch. 90, Stat. 699 (1913) (codified at 27 U.S.C. § 122 (2000)).

71. Brief for Members of the United States Congress as Amici Curiae Supporting Respondents at 14, Granholm v. Heald, 544 U.S. 460 (2005) (No. 03-1116). Initially, the constitutionality of the Webb-Kenyon Act was in doubt. *Id.* President Taft vetoed the Act based on the Attorney General's advice that it was a violation of Congress's Commerce Clause powers. 30 Op. Att'y. Gen. 88 (1913). Congress overrode the veto, and in *Clark Distilling Co. v. W. Md. R.R. Co.*, 242 U.S. 311, 324 (1917), the Court interpreted the Act as closing the direct shipment loophole which the Wilson Act had left and declared the Webb-Kenyon Act to be constitutional.

72. Brief for Members of the United States Congress as Amici Curiae Supporting Respondents at 14, *Granholm*, 544 U.S. 460 (No. 03-1116). "In passing the Webb-Kenyon Act, therefore, Congress sought only to assist the states in exercising their local police power to ensure compliance with state laws proscribing the sale of liquor," and there was "no indication that Congress intended to allow states to discriminate economically against interstate alcohol." *Id.*

remove the impediment existing as to the States in the exercise of their police powers regarding the traffic and control of intoxicating liquors within their borders."[73]

2. *Prohibition*

The passage of the Eighteenth Amendment in 1919 provided a brief period of silence in alcohol jurisprudence, as no new state legislation was passed in liquor regulation during the fourteen years of Prohibition.[74] The unintended consequences of Prohibition began to show early in "the Noble Experiment."[75] The illegal bootlegging and speakeasies that sprung up to fill the demand for alcohol proved to be most problematic.[76] Gangsters became rich, organized crime became institutionalized, and law-abiding citizens were engaging in illegal activity and openly scorning Prohibition laws.[77] Lawmakers realized something needed to be done; they hastily created the language of the Twenty-First Amendment to repeal Prohibition and sent it to state ratification conventions.[78] Section Two of the Amendment states that the transportation of liquor into a state in violation of its laws remains prohibited.[79]

3. *Post-Prohibition—Section Two of the Twenty-First Amendment*

Almost immediately after the passage of the Twenty-First Amendment, most states implemented a three-tier distribution system as a way to regulate alcohol after the end of Prohibition.[80] The three-tier system was a reaction to the overarching concern of keeping the criminal element, which was so prevalent in the bootlegging industry, out of the legal distribution system.[81] While the three-tier system is still prevalent, technological

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73. *Id.* at 13 (citing 49 CONG. REC. 707 (1913)).

74. *Granholm*, 544 U.S. at 484.

75. Gordon Eng, *Old Whine in A New Battle: Pragmatic Approach to Balancing the Twenty-First Amendment, the Dormant Commerce Clause, and the Direct Shipping of Wine*, 30 FORDHAM URB. L.J. 1849, 1861 (2003).

76. Geoffrey C. Ward & Ken Burns, JAZZ: A HISTORY OF AMERICA'S MUSIC 76 (Alfred A. Knopf 2000). "Intended to close down the corner saloon . . . [Prohibition] spawned tens of thousands of speakeasies and roadhouses instead, to which both men and women flocked. Alcohol never went away; it just went underground." *Id.*

77. 22 ENCYCLOPEDIA AMERICANA 646-48 (Grolier 2000) (1829).

78. U.S. CONST. amend. XXI.

79. *Id.*

80. FTC REPORT, *supra* note 2, at 6.

81. *Id.* Other reasons included collecting taxes more efficiently and limiting sales to minors. *Id.* Additionally, some states used the three-tier system as a way to promote temperance by keeping alcohol prices artificially high. *Id.*

improvements, especially the advent of the Internet and e-commerce, have helped to make the traditional wholesale approach much less palatable to many small wineries and consumers.[82]

Section Two of the Twenty-First Amendment has caused lingering debates over what powers belong to the states and Congress regarding alcohol regulation.[83] Soon after ratification of the Twenty-First Amendment, the Supreme Court read Section Two as giving the states broader powers than they had ever enjoyed before Prohibition in alcohol regulation.[84] In *State Board of Equalization of California v. Young's Market Co.*,[85] the Court even said that states could discriminate against imported liquors under their Section Two powers.[86] The Court reaffirmed this view in subsequent cases, but the modern Court has shifted away from that broad state power to a more balanced approach.[87]

As early as the 1960s, the Court signaled a shift in case law and held that state laws violating other provisions of the Constitution were not saved by the Twenty-First Amendment.[88] Furthermore, the Court held that Section Two does not abrogate the Commerce Clause powers that Congress has in regard to alcohol.[89] In *Hostetter v. Idlewind Bon Voyage Liquor Corp.*,[90] the Court said that to draw the conclusion "that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would . . . be an absurd oversimplification."[91] The *Hostetter* Court also used phrases like

82. *Id.* In 1975, there were between 500 to 800 wineries in the United States. *Id.* Today, that number has grown to over 2,000, with many of these wineries producing fewer than 2,000 cases of wine annually. *Id.* "While the number of wineries has increased, the number of wholesalers has [decreased] from several thousand in the 1950s to a few hundred today." *Id.*

83. U.S. CONST. amend. XXI, § 2. Section Two provides, "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." *Id.*

84. State Bd. of Equalization of Cal. v. Young's Mkt. Co., 299 U.S. 59, 62 (1936).

85. 299 U.S. 59 (1936).

86. *Young's Market*, 299 U.S. at 63.

87. *See, e.g.*, Ziffrin, Inc. v. Reeves, 308 U.S. 132, 140 (1939) (refusing a claim by an established liquor carrier that Kentucky's Alcoholic Beverage Control Act was unconstitutional); Mahoney v. Joseph Triner Corp., 304 U.S. 401, 404 (1938) (upholding a Minnesota statute that discriminated in favor of in-state liquor under the Twenty-First Amendment).

88. *See, e.g.*, Hostetter v. Idlewind Bon Voyage Liquor Corp., 377 U.S. 324, 330-32 (1964) (determining whether New York could rely on the Twenty-first Amendment to prohibit the passage of liquor through its territory for delivery to consumers in foreign countries). "Both the Twenty-First Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in light of the other." *Id.*

89. *Id.* at 331-32

90. 377 U.S. 324 (1964).

91. *Hostetter*, 377 U.S. at 331-32.

"patently bizarre" and "demonstrably incorrect" to describe the view that Section Two had somehow repealed the Commerce Clause.[92]

In *Bacchus Imports, Ltd. v. Dias*,[93] the Court found that state regulation of alcohol could be limited by the nondiscrimination principle of the Commerce Clause.[94] The Court noted that states can enact laws under their police powers with the purpose and effect of encouraging a domestic industry, but that the Commerce Clause limits the means a state can pursue to achieve that goal.[95] Concerning the Section Two argument, the Court stated, "The central purpose of the provision was not to empower States to favor local liquor industries by erecting barriers to competition."[96]

In 1990, the Supreme Court decided *North Dakota v. United States*,[97] a case which showcases the most successful arguments that a state has advanced for its alcohol regulatory scheme.[98] The State of North Dakota wanted to regulate alcohol being shipped to federal air force bases to ensure that it did not get into the normal flow of commerce within the State.[99] North Dakota required that suppliers affix a label on the alcohol destined for the bases and also established reporting requirements.[100] North Dakota offered three primary justifications for its rule: (1) promoting temperance; (2) ensuring orderly market conditions; and (3) raising revenue.[101] The Court found that those interests fell within the center of power delegated to the State under the Twenty-First Amendment.[102] Since this decision, most states have used these justifications for their alcohol regulatory schemes with varying degrees of success.[103]

92. *Id.*

93. 468 U.S. 263 (1984).

94. *Bacchus Imports*, 468 U.S. at 276.

95. *Id.* at 271.

96. *Id.* at 276. The Court further stated, "State laws that constitute mere economic protectionism are therefore not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor." *Id.*

97. 495 U.S. 423 (1990).

98. *North Dakota*, 495 U.S. at 432.

99. *Id.* at 432-33.

100. *Id.* at 432.

101. *Id.*

102. *Id.*

103. *Compare North Dakota*, 495 U.S. at 423 (finding the justifications for the regulatory scheme enough to overcome constitutional barriers) *with* Granholm v. Heald, 544 U.S. 460, 492-93 (2005) (finding the same justifications for the regulatory schemes at issue were not enough to overcome constitutional barriers, as there were other nondiscriminatory ways to accomplish the same goals).

III. ANALYSIS

In *Granholm v. Heald*,[104] the United States Supreme Court held that Michigan and New York's regulatory schemes "discriminate against interstate commerce through [their] direct-shipping laws."[105] Furthermore, Section Two 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."[106] Justice Kennedy wrote the opinion of the Court, in which Justice Scalia, Justice Souter, Justice Ginsberg, and Justice Breyer joined.[107] Justice Stevens filed a dissenting opinion, in which Justice O'Connor joined.[108] Justice Thomas also filed a dissenting opinion, in which Chief Justice Rehnquist, Justice Stevens, and Justice O'Connor joined.[109]

A. MAJORITY OPINION

In *Granholm*, the Court discussed the controversy surrounding direct shipment of wine, including why direct shipment is more economically feasible for vineyards and consumers, and also addressed the current jumbled state of alcohol regulation.[110] It then upheld the constitutionality of the three-tier alcoholic beverage distribution system, a question that has been decidedly answered but still raised in every case involving alcohol.[111] Shifting its focus to the challenged Michigan and New York regulatory schemes, the Court held that both States' laws violated the Commerce Clause because they failed the second prong of the test, and that the discrimination was "neither authorized nor permitted" by the Twenty-First Amendment.[112]

1. *Three-Tier Alcoholic Beverage Distribution System*

The Court reaffirmed that a state may establish a three-tier distribution system or any other comprehensive system of alcohol regulation "in the exercise of [its] authority under the Twenty-first Amendment."[113] States created the three-tier distribution system almost immediately after the passage of the Twenty-First Amendment as a way to regulate alcohol after

104. 544 U.S. 460 (2005).
105. *Granholm*, 544 U.S. at 476.
106. *Id.*
107. *Id.* at 464.
108. *Id.* at 493 (Stevens, J., dissenting).
109. *Id.* at 497 (Thomas, J., dissenting).
110. *Id.* at 467-68 (majority opinion).
111. *Id.* at 466.
112. *Id.*
113. *Id.* (citing North Dakota v. United States, 495 U.S. 423, 432 (1990)).

the end of Prohibition.[114] While the Supreme Court clearly stated that the three-tier system itself is constitutional,[115] it pointed out that "differential treatment between in-state and out-of-state wineries constitutes explicit discrimination against interstate commerce."[116]

The Michigan system's discriminatory character was obvious to the *Granholm* Court because it provided for two additional layers of wholesale and retail for out-of-state wineries, while allowing in-state wineries to ship directly to consumers.[117] New York's system was less obviously discriminatory, but still indirectly subjected out-of-state wineries to the three-tier system, while allowing in-state wineries to bypass that system.[118] Michigan and New York argued that the entire three-tier system would be weakened and possibly deemed unconstitutional if the Court found these regulatory schemes unconstitutional.[119] The Court rejected this notion, recognizing that it had already declared the system itself was legitimate.[120] The Court recognized the legitimacy of state policies and allowed states broad discretion in applying whatever rules they want, as long as they do not discriminate in favor of local producers.[121]

2. *State Laws Violate the Commerce Clause If They Mandate "Differential Treatment" of In-State and Out-of-State Economic Interests*

The Court pointed out that time after time, state laws will violate the Commerce Clause if they mandate "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."[122] The Commerce Clause was adopted so states would not have to negotiate among themselves for favored status for the citizens of their state.[123] The traditional Commerce Clause test has nearly always

114. *Id.*
115. *Granholm*, 544 U.S. at 466.
116. *Id.* at 467.
117. *Id.* at 473-74.
118. *Id.*
119. Brief for Petitioners at 10, *Granholm*, 544 U.S. 460 (No. 03-1116). The States argued that "[t]aken to its logical conclusion . . . any one of the hundreds of thousands of out-of-state retailers in alcoholic beverages should also be able to directly ship alcoholic beverages to Michigan residents." *Id. But see* Brief for Respondent at 36-37, *Granholm*, 544 U.S. 460 (Nos. 03-1116, 3-1120). The vineyards, by contrast, argued that "[t]he relevant inquiry here is not whether Michigan's three-tier system as a whole promotes the goals of 'temperance, ensuring an orderly market, and raising revenue,' but whether the discriminatory scheme challenged in this case—the direct shipment ban for out-of-state wineries—does so." *Id.*
120. *Granholm*, 544 U.S. at 466.
121. *Id.*
122. *Id.* at 472 (internal quotations omitted).
123. *Id.*

invalidated legislation enacted purely for economic protectionism.[124] Additionally, the Court has held that "facially neutral laws that place[] an impermissible burden on interstate commerce" will not pass Commerce Clause scrutiny.[125]

a. State Laws That Discriminate Against Interstate Commerce Are "Virtually Per Se" Invalid

Michigan asserted that it did not discriminate against out-of-state wineries and tried to prove that by showing that the Michigan market was open to out-of-state wineries, and that most of its retail wine market was made up of imported wines.[126] New York also contended that it did not discriminate against out-of-state wineries because there was a way for them to ship directly if they chose to go through the process.[127] New York claimed that even though no vineyard had tried it, the option remained available, and therefore, there was no discrimination.[128] The Court held that the laws of Michigan and New York both violated the Commerce Clause by the terms of their statutes.[129]

The States further contended that even if the statutes were discriminatory, Section Two of the Twenty-First Amendment saved their statutes.[130] Both Michigan and New York advocated that the Court should follow the strict construction approach that the Second and Seventh Circuits applied, rather than the approach adopted by the majority of circuits.[131] At oral argument, the States advanced the idea that the Twenty-First Amendment allows such expansive powers that a state may require a complete ban on importation of alcohol.[132] Justice Kennedy inquired if New York could force its residents to drink only New York-grown wines in the State of New York.[133] The States relied on the Court's immediate post-Prohibition cases to argue for an interpretation of broad state powers with little or no

124. *Id.* at 487. "The central purpose of the [Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition." *Id.* (quoting Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 276 (1984)).

125. *Id.* at 477.

126. Brief for Petitioners at 10, *Granholm*, 544 U.S. 460 (No. 03-1116).

127. Brief for Respondent at 21, Swedenburg v. Kelly, 544 U.S. 460 (2005) (No. 03-1274).

128. *Id.*

129. *Granholm*, 544 U.S. at 476.

130. *Id.*

131. *Id.*

132. Transcript of Oral Argument at 4, *Granholm*, 544 U.S. 460 (No. 03-1274).

133. *Id.*

government control, such that New York could implement Justice Kennedy's hypothetical.[134]

The Court found the States' dependence on the immediate post-Prohibition cases, especially *Young's Market*, misplaced.[135] The *Young's Market* Court itself pointed out that the case did "not present a question of discrimination prohibited by the commerce clause."[136] Furthermore, the *Young's Market* Court, unlike the *Granholm* Court, did not consider the history underlying the Twenty-First Amendment.[137] The *Granholm* Court noted that case law prior to the *Young's Market* decision supported the idea that the Twenty-First Amendment did not "authorize discrimination against out-of-state liquors."[138]

b. Legitimate Purpose Not Adequately Served by Nondiscriminatory Means

After determining that these statutes were discriminatory on their face, the Court considered whether the statutes "advance[d] a legitimate local purpose that [could not] be adequately served by reasonable nondiscriminatory alternatives."[139] Patterned after the successful arguments made in *North Dakota*, Michigan and New York offered two primary justifications for restricting direct shipments from wineries.[140] First, the direct shipments made it easier for minors to get access to alcohol, and second, allowing the direct shipments would hinder tax collection.[141]

As to the first justification, Michigan and New York argued that because minors have access to credit cards and the Internet, they would be able to obtain alcohol more easily with direct shipment available.[142] The Court found this argument to be flawed because both States allowed direct shipments to consumers from in-state wineries.[143] Minors can order from in-state vineyards online just as easily as from out-of-state vineyards.[144] Even if the Court were to accept the justification, less restrictive means

134. *Id.*
135. *Granholm,* 544 U.S. at 485-86.
136. *Id.* at 485 (citing State Bd. of Equalization of Cal. v. Young's Mkt Co., 299 U.S. 59, 62 (1938)).
137. *Id.*
138. *Id.* at 486.
139. *Id.* at 489 (quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 278 (1988)).
140. *Id. See also* discussion *infra* notes 96-102 and accompanying text.
141. *Id.*
142. *Id.*
143. *Id.* at 490.
144. *Id.*

existed to achieve the same goal of limiting access to minors, thus rendering this blanket prohibition unconstitutional.[145]

The second justification, tax collection to ensure that vineyards do not shirk tax rates, was equally insufficient to the Court.[146] Michigan and New York argued that the increase in direct shipment would also increase the likelihood of tax evasion.[147] The Court did not give this argument much weight, particularly in regard to Michigan, since Michigan relied on licensing and self-reporting to suffice for tax collection on all alcohol distributed through the three-tier system.[148] Because Michigan did not rely on wholesalers to collect the taxes on imported wines, instead choosing to collect the revenue itself, the Court saw little reason why the same would not suffice for direct shipments into the State.[149] While New York advanced a different tax-collection justification that was not "wholly illusory" to the Court, it was ultimately not enough to justify the system that was in place.[150] New York could ameliorate itself from tax evasion by requiring a permit for direct shipping, much like the system it already had in place for in-state vineyards.[151] New York's objectives could have been achieved in a way that would not discriminate against interstate commerce, and therefore, the discriminatory regulatory scheme could not stand.[152]

The Court also pointed to the additional federal protections and incentives for a winery to comply with all state regulations, including taxes.[153] The Federal Tax and Trade Bureau has the power to revoke an operating license if a winery violates state law.[154] Also, the Twenty-First Amendment Enforcement Act, passed in 2000, gives states the general power to sue a winery in federal court for violations of state law.[155] These additional federal safeguards further weakened the States' argument about potential tax evasion if direct shipments of wine were allowed.[156]

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145. *Id.* at 490-91. The Court pointed to the Direct Shipment Model Rule developed by the National Conference of State Legislatures as a nondiscriminatory way to prevent minors from obtaining wine. *Id.* The Model Rule requires commercial shipping companies to affix a label on the package showing that it contains alcohol and to make the signers for the package verify that they are over twenty-one. *Id.* For full text of the Direct Shipment Model Rule, see Free the Grapes!, http://www.freethegrapes.org/wineries.html#model (last visited July 17, 2006).

146. *Granholm*, 544 U.S. at 491.

147. Brief for Petitioners at 10, *Granholm*, 544 U.S. 460 (No. 03-1116).

148. *Granholm,* 544 U.S. at 491.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 492.

153. *Id.*

154. *Id.*

155. *Id.* (citing 27 U.S.C. § 122a (2000)).

156. *Id.*

Finally, Michigan and New York offered additional justifications for their laws, such as facilitating orderly market conditions, protecting public health and safety, and ensuring regulatory accountability.[157] The Court found that these justifications were not a legitimate concern, because all of the justifications could be achieved in a nondiscriminatory way.[158] Because the Court found that both Michigan and New York could accomplish their stated goals through nondiscriminatory policies, the laws prohibiting direct shipments of wine could not withstand the Commerce Clause challenge.[159]

B. JUSTICE STEVENS' DISSENT, JOINED BY JUSTICE O'CONNOR

Justice Stevens, joined by Justice O'Connor, argued that these regulations would be "patently invalid" under dormant Commerce Clause principles if they dealt with any commodity other than wine, but the Constitution has placed alcoholic beverages in "a special category."[160] He pointed out that while most Americans today regard alcohol as an ordinary article of commerce, this was not the case when the Eighteenth and Twenty-First Amendments were passed.[161] Therefore, Justice Stevens afforded more weight to contemporary decisions and warned the majority that its decision "may represent sound economic policy and may be consistent with the policy choices of [those] . . . who drafted our original Constitution; [but] it is not . . . consistent with the policy choices made by those who amended our Constitution in 1919 and 1933."[162]

Because the Twenty-First Amendment was the only amendment in United States history to have been ratified in state conventions rather than in legislatures, Justice Stevens reasoned that the amendment should be given its plain and ordinary meaning.[163] Because the laws at issue regulated "transportation or importation" of "intoxicating liquors" for "delivery or use therein," the regulations should have been exempt from dormant Commerce Clause scrutiny.[164]

157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.* at 494 (Stevens, J., dissenting).
161. *Id.*
162. *Id.* at 496.
163. *Id.* at 497.
164. *Id.* (citations omitted).

C. JUSTICE THOMAS'S DISSENT, JOINED BY CHIEF JUSTICE REHNQUIST, JUSTICE STEVENS, AND JUSTICE O'CONNOR

Justice Thomas also argued that the statute which Congress enacted and the language of the Twenty-First Amendment should be what the Court looked at to decide this issue, instead of relying on "a historical argument that this Court decisively rejected long ago."[165] Justice Thomas saw the Webb-Kenyon Act as a tool that displaced all dormant Commerce Clause arguments in regard to state regulations of liquor sales within a state.[166] Also, he accorded much more weight to the *Young's Market* decision than the majority, and argued that the *Young's Market* decision should be followed rather than the majority's "questionable reading" of history and dormant Commerce Clause cases.[167]

Justice Thomas found that the Twenty-First Amendment's "clear concern" is in allowing the states to regulate the direct shipment of liquor, and this was exactly what the Michigan and New York statutes did.[168] They "simply allow[ed] some in-state wineries to act as their own wholesalers and retailers in limited circumstances."[169] Justice Thomas also pointed out that the Commerce Clause is the only area of the law where the Twenty-First Amendment can trump another constitutional provision, and thus rejected the analysis of the majority.[170] Justice Thomas alluded to judicial activism, stating that only in the case of liquor did Congress take "policy choices" away from judges and return them to the states.[171]

IV. IMPACT

A. IMPACT NATIONWIDE

1. *Wine Lovers*

One major impact of this decision is that wine lovers should have the ability to purchase wine from all over the United States and have it shipped

165. *Id.* at 497(Thomas, J., dissenting). Here Justice Thomas discussed the line of cases that was rejected in *Young's Market* and its progeny. *Id.*

166. *Id.* at 498.

167. *Id.* at 497.

168. *Id.* at 523.

169. *Id.* at 524.

170. *Id.* at 526-27. Justice Thomas stated, "[T]he text and history of the Twenty-first Amendment demonstrate that it displaces liquor's negative Commerce Clause immunity, not other constitutional provisions." *Id.* (citing Craig v. Boren, 429 U.S. 190, 205-07 (1976)).

171. *Id.* at 527.

directly to their homes.[172] Smaller and more specialized vineyards will likely see increased numbers of orders from states to which they were previously unable to ship.[173] Additionally, more productive wine areas in the United States, like Napa Valley and Sonoma Valley in California, will now be able to dispose of the practice of asking people which state they are from before explaining how their wine clubs and shipping programs work.[174]

Price is another factor to consider, and one that will make many oenophiles extremely happy.[175] One study found that even excluding transportation costs, the bottles are on average $5.84 less if ordered online.[176] Buying online will also reduce costs associated with distributing alcohol through the three-tier system.[177] This could be a substantial savings, since according to some estimates, wholesalers mark up prices by eighteen to twenty-five percent.[178]

In July 2005, governors from New York and Connecticut signed bills into law to correct discriminatory state statutes and to allow direct shipment of wine to consumers, becoming the first states to do so after *Granholm*.[179] However, not all states are complying amiably, as there are still twenty states that have restrictions on the direct shipment of wine to consumers.[180] In October 2005, Pennsylvania's Liquor Control Board issued an interim rule prohibiting direct shipment of wine into the state, and instead requiring wineries to ship the wine to one of 638 state liquor stores for the consumer to pick up and pay all applicable taxes.[181] The Pennsylvania Wine Association sued over the prohibition, leading a judge to issue a temporary restraining order to block enforcement of the Board's decision.[182]

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172. FTC REPORT, *supra* note 2, at 16.

173. Martin, *supra* note 49, at 4-5.

174. *E.g.*, Robert Mondavi, http://www.robertmondavi.com (last visited July 17, 2006) Visitors to the website are required to verify that they are twenty-one before entering the site and then further warned that wine can only be shipped to certain states that allow direct shipment of wine. *Id.*

175. FTC Report, *supra* note 2, at 23.

176. *Id.*

177. *Id.*

178. *Id.* at 26.

179. Free the Grapes Press Release, *New York and Connecticut Governors Sign Wine Direct Shipping Bills* (July 15, 2005), http://www.freethegrapes.org/news.html#NYSigned.

180. FTC REPORT, *supra* note 2, at 7-8. States that currently forbid direct shipment include Alabama, Arkansas, Delaware, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Mississippi, Montana, New Jersey, Oklahoma, Pennsylvania, South Dakota, Tennessee, and Utah. Map available at http://www.wineinstitute.org/shipwine (last visited July 17, 2006).

181. Pamela Gaynor, *Wine Law Sours Cellars; Bars Wineries from Shipping Direct*, PITTSBURGH POST-GAZETTE, Oct. 23, 2005, at B1.

182. *Judge Allows Pa. Wineries to Ship Directly to State Residents*, PITTSBURGH POST GAZETTE, Nov. 13, 2005, at B3.

Even Minnesota, a reciprocity state, is still dealing with the ramifications of the *Granholm* decision.[183] Although it is legal for consumers to order wine directly from a vineyard, it is illegal for the vineyards to advertise that fact.[184] It is also illegal for Minnesotans to order wine from an online out-of-state winery, but consumers are allowed to place online orders from Minnesota liquor stores.[185] Vineyards in Minnesota and Wisconsin, joined by a wine enthusiast, filed suit on October 12, 2005, challenging these laws for violating free speech based on the alleged disparate impact on small wineries.[186]

2. *Broader Effects in E-Commerce*

The *Granholm* decision has a much broader impact than just direct shipments of wine; it affects the entire e-commerce industry.[187] The Internet allows customers to purchase an amazing array of goods from all over the world, offering them access to goods that were previously unavailable.[188] The advent of e-commerce posed a tempting new way for wine connoisseurs to get varieties and vintages of wine from smaller vineyards, while posing a new set of problems for state regulation of alcohol.[189] The FTC has found that prohibitions on direct interstate shipping of wine are the single largest regulatory barrier to expanded e-commerce in the wine industry, and the same could be said for any other commodity if restrictions such as these were to apply.[190]

E-commerce is the newest incarnation of the national market that the Framers of the Constitution imagined when they gave Congress the Commerce Clause power.[191] By ensuring that consumers in all fifty states have access to goods purchased over the Internet, the entire United States economy will benefit.[192] Amici, siding with the vineyards and their

183. Tom Webb, *Judge says 'Cheers' to Online Wine*, ST. PAUL PIONEER PRESS, April 6, 2006, at A1.

184. John Reinan, *Oenophiles Toast Internet Sales Ruling*, MINNEAPOLIS STAR TRIB., April 7, 2006, at A1.

185. *Id.*

186. Tom Webb, *Judge says 'Cheers' to Online Wine*, ST. PAUL PIONEER PRESS, April 6, 2006, at A1.

187. Lisa Lucas, *A New Approach to the Wine Wars: Reconciling the Twenty-First Amendment with the Commerce Clause*, 52 UCLA L. REV. 899, 901 (2005).

188. *Id.*

189. *See, e.g.*, The Wine Web, http://www.wineweb.com/scripts/wineryCount.cfm (last visited July 17, 2005). This one website has wine from over 32,638 wineries worldwide, with 4,343 from the United States alone. *Id.*

190. FTC REPORT, *supra* note 2, at 3.

191. THE FEDERALIST NO. 42 (James Madison).

192. Brief for American Homeowners Alliance et. al. as Amici Curiae Supporting Respondent at 5, Granholm v. Heald, 544 U.S. 460 (2005) (Nos. 03-1116, 03-1120).

consumers in *Granholm*, pointed out that the e-commerce market in general will be destroyed "if states are permitted to enact measures that discriminate against interstate commerce in favor of local economic interests."[193] The *Granholm* decision lends support to the idea that Internet commerce is the same as other types of commerce, which could lead to further congressional limitations on protectionist measures that states have enacted or could enact in the future.[194]

B. IMPACT IN NORTH DAKOTA

North Dakota Century Code section 5-01-16 was enacted in 1999 to regulate direct sales and shipments of any alcoholic beverage from out-of-state sellers to North Dakota consumers.[195] It provides an exception for residents over the age of twenty-one to import or transport alcohol into the state for personal use.[196] The Attorney General has construed this exception to apply to individuals who place an order in North Dakota with an out-of-state supplier, theoretically meaning through Internet or phone orders.[197]

In the 2005 legislative session, North Dakota amended its statute relating to the interstate sale of wine.[198] The biggest change was the addition of subsection six, creating an exemption from the general rule of no direct shipment of wine for those states that allow the direct shipment of wine from North Dakota vineyards, which in effect made North Dakota a reciprocity state.[199] Additionally, the legislature updated its domestic winery licensing statute, but kept the $100 licensing fee in lieu of any other licensing fees required by the state.[200] Since the *Granholm* decision, North Dakota will have to re-evaluate its statutes even further, especially the disparities between domestic and out-of-state licensing fees.[201]

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193. *Id.*

194. *Id.* Congress has already exercised its Commerce Clause power in passing the Fairness to Contact Lens Consumers Act, which prohibits protectionist activities surrounding the sale of contact lenses. 15 U.S.C. § 7601 (2000).

195. N.D. CENT. CODE § 5-01-16 (Supp. 2005).

196. *Id.*

197. 10 N.D. Op. Att'y. Gen. 57 (2000).

198. N.D. CENT. CODE § 5-01-16.

199. *Id.* In so doing, North Dakota became one of thirty states allowing for direct shipment of wine in some way. *Id.*

200. N.D. CENT. CODE § 5-01-17 (Supp. 2005).

201. *Id.*

V. CONCLUSION

In *Granholm*, the Supreme Court ruled that Michigan and New York statutes prohibiting direct shipment of wine from out-of-state wineries, while allowing direct shipment of wine to consumers from in-state wineries, violated the Commerce Clause.[202] Because there were other nondiscriminatory ways to protect the States' legitimate interests, and because Section Two of the Twenty-First Amendment does not trump the Commerce Clause, the Court found the Michigan and New York statutes were unconstitutional. [203]

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202. Granholm v. Heald, 544 U.S. 460, 476 (2005).

203. *Id.*

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