The Twenty-First Amendment in the Twenty-First Century: Reconsidering State Liquor Controls in Light of *Granholm v. Heald*

ELIZABETH NORTON*

In 2005, the Supreme Court decided *Granholm v. Heald*, known popularly as the "interstate wine shipping case." The case was the Court's most recent decision considering the interplay between the Twenty-First Amendment, which repealed national Prohibition, and the rest of the Constitution. *Granholm* addressed New York and Michigan laws that allowed in-state wineries to ship wine directly to consumers, but effectively prohibited out-of-state wineries from doing so, by forcing the out-of-state wineries to make sales through state-approved retailers and wholesalers. In a five to four decision, the Court invalidated the state laws, holding that the laws discriminated against interstate commerce in violation of the Commerce Clause. Heralded by wine connoisseurs who eagerly anticipated legally purchasing a wider variety of wine by mail, the *Granholm* decision affected more than twenty states with similarly restrictive laws; however, the decision did not specify precisely how these states should resolve the unconstitutionality of their direct-shipping laws. This Note briefly reviews the history of state liquor controls, Prohibition and its repeal, and the progression of the Court's Twenty-First Amendment jurisprudence. This Note then considers the *Granholm* decision itself and the legislative response to the decision in several states. Finally, this Note proposes that in the aftermath of *Granholm*, and in the interest of consumer choice and interstate commerce, Congress and state legislatures should take action to further restrict state liquor controls.

I. INTRODUCTION

Until mid-2005, a consumer living in Michigan—or New York, or the more than twenty other states with similar laws—could purchase wines only from state-authorized retailers or from in-state wineries. If the state-authorized retailers could not, or did not, carry the particular variety of wine

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* J.D., The Ohio State University Moritz College of Law, 2007 (expected); M.A. in International Affairs, Ohio University, 1997; B.A. in Anthropology, Bard College, 1995.


the consumer wanted, the only (legal) option was to travel out of state to purchase the wine in person—remote sales from an out-of-state retailer or winery to a consumer were strictly forbidden by Michigan law, although in-state wineries were allowed to ship directly to consumers.\(^3\) Despite pressure from interest groups representing both consumers and wineries from outside the states with such direct-shipment bans, Michigan, New York, and the other states held firm to their restrictions, often claiming that the state interest in preventing minors from ordering wine directly from out-of-state wineries was sufficient to overcome the dormant Commerce Clause concerns raised by such apparently discriminatory shipping bans.\(^4\) But in May of 2005, the Supreme Court issued its opinion in a case popularly known as the "interstate wine shipping case," *Granholm v. Heald*,\(^5\) which represented a significant battle in the "wine wars."\(^6\)

Liquor is a multi-billion dollar industry in the United States.\(^7\) The control of alcoholic beverages has long been an issue of contention within the United States, and not one but two constitutional amendments address the manufacture and sale of alcoholic beverages.\(^8\) The fight over the control of alcoholic beverages has raged from the early Twentieth Century well into the


\(^5\) In *Granholm v. Heald*, 544 U.S. 460, 466 (2005), the Court found that Michigan's and New York's regulatory systems for alcoholic beverages, which allowed in-state alcohol producers to ship alcohol directly to consumers but prohibited out-of-state producers from doing the same, were discriminatory and in violation of the Commerce Clause. See extended discussion *infra* Part III.


\(^8\) The Eighteenth Amendment, ratified in 1919, established national Prohibition, outlawing the "manufacture, sale, or transportation of intoxicating liquors" within the United States. U.S. Const. amend. XVIII, § 1. The Twenty-First Amendment, ratified in 1933, repealed the Eighteenth Amendment, and with it Prohibition, but left the states with the ability to regulate alcoholic beverages, via its Section 2 powers. U.S. Const. amend. XXI, § 2.
Twenty-First century. Although the Twenty-First Amendment repealed national Prohibition as established by the Eighteenth Amendment, it also set up a tension between Congress’s authority to control interstate commerce and states’ rights to control liquor distribution. The Supreme Court has heard dozens of cases involving state regulation of alcoholic beverages, particularly with regard to this tension between the Twenty-First Amendment and the rest of the Constitution.\textsuperscript{9} Granholm, as the most recent of these decisions, continues the Court’s trend toward a more limited interpretation of the Twenty-First Amendment, but does not render the Amendment completely powerless. This Note argues that although Granholm was a good start toward modernizing state liquor controls, the Twenty-First Amendment should be even further curtailed in order to modernize liquor controls.

In Part II, this Note briefly reviews the history of state liquor controls, the passage of the Eighteenth Amendment, and the era of Prohibition. Additionally, several key Supreme Court decisions regarding the Twenty-First Amendment are discussed. The history of these decisions reveals the progression of the Court’s Twenty-First Amendment jurisprudence, from an extremely hands-off approach to a more restrictive, less deferential approach to state liquor controls. Importantly, this is a progression that the Supreme Court could continue into the future via future decisions, or one that could be forestalled by congressional and state action. In Part III, this Note considers the lower court cases leading to the Granholm decision, and the reasoning of the Granholm decision itself.

In Part IV, this Note addresses the aftermath of the Granholm decision, particularly in Michigan and New York, and also in Ohio. Then, in light of Granholm and the Court’s interpretation of the interplay of the Twenty-First Amendment and the Commerce Clause, this Note considers the next steps in the approach to the regulation of alcoholic beverages. This Note acknowledges that under the Granholm reasoning, states may continue to regulate the alcoholic beverage industry in a way unlike the state regulation of most other ordinary articles of commerce, and suggests several paths for both Congress and state legislatures that are considering action in the aftermath of Granholm. Finally, Part V summarizes and concludes the Note.

\textbf{II. BACKGROUND: PROHIBITION AND STATES’ ABILITY TO CONTROL DISTRIBUTION OF LIQUOR}

The passage of national Prohibition via the Eighteenth Amendment, and its repeal thirteen years later via the Twenty-First Amendment, would set the course for numerous Supreme Court decisions regarding the control of

\textsuperscript{9} See discussion \textit{infra} Part II.B.
alcoholic beverages during the last half of the Twentieth Century. A brief review of the passage and repeal of Prohibition, and the Supreme Court's post-Prohibition jurisprudence follow.

A. Prohibition and Its Repeal: The Eighteenth and Twenty-First Amendments

The Eighteenth Amendment to the Constitution prohibited "the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof." Although the Amendment was fully ratified by the required three-fourths of the states on January 16, 1919, and national Prohibition took effect one year later, Prohibition had been many years in the making.

The temperance movement began in the early 1800's, mostly as an outgrowth of evangelical religion. After the Civil War, the movement gained momentum, resulting in several important pieces of pre-Prohibition temperance legislation that attempted to allow individual states to control the sale and distribution of liquor, essentially allowing for prohibition on a state-
Two critical pieces of legislation included the Wilson Act (also known as the “Original Packages Act”), passed in 1890, and the Webb-Kenyon Act, passed in 1913. The Wilson Act authorized states to regulate imported liquor in the same manner as domestically-produced liquor; however, it did not authorize states to prohibit all direct shipments to state residents. The Webb-Kenyon Act solved this oversight issue by prohibiting the transportation of liquor into states that wanted to keep liquor out and to stay dry altogether. Both acts are still in force today.

The Eighteenth Amendment was first proposed in Congress in the summer of 1917, and by December 18, 1917, the Amendment was proposed to the legislatures of the several states. The Amendment moved quickly toward ratification in the state legislatures, with the required three-fourths of states ratifying it by January 1919. National Prohibition went into effect one year later, at midnight, on January 16, 1920.

One of Congress’s earliest actions with regard to liquor control after the ratification of the Eighteenth Amendment was to enact legislation that would help enforce Prohibition. However, during the thirteen years of national

13 SZYMANSKI, supra note 11, at 122–52.
18 U.S. Const. amend. XVIII; see also DAVID E. KYVIG, REPEALING NATIONAL PROHIBITION 11–12 (2d ed. 2000).
19 KYVIG, supra note 18, at 11–14.
20 Id. at 19. That day, the New York Times reported, “John Barleycorn Died Peacefully At the Toll of 12.” KYVIG, supra note 18, at 19. This turned out to be an extreme understatement, as “John Barleycorn”—a popular slang term for liquor—remained quite lively for the thirteen years of Prohibition, as discussed infra, notes 21–23 and accompanying text.

The effectiveness of the Eighteenth Amendment’s ratification was briefly challenged by a November 1919 referendum in Ohio, in which voters rejected the national Amendment by a narrow margin. The referendum passed despite the fact that the Ohio legislature ratified the Amendment in January 1919. KYVIG, supra note 18, at 14–15. In considering the issue, the Supreme Court held that the Ohio General Assembly had properly ratified the Amendment, and that no referendum was either authorized or permitted by Congress. Hawke v. Smith, 253 U.S. 221, 230–31 (1920).

21 After Prohibition was ratified, Congress passed the National Prohibition Act and the Supplemental Prohibition Act, also known as the Willis-Campbell Act, in order to enforce Prohibition. National Prohibition Act, ch. 85, 41 Stat. 305 (1919); Supplemental to National Prohibition Act, ch. 134, 42 Stat. 222 (1921) (both repealed by Twenty-First Amendment). The first act essentially codified into statute the same prohibitions against alcohol found in the Eighteenth Amendment, but did allow for the medicinal use of
Prohibition, the federal government's many attempts to enforce Prohibition and to regulate alcoholic beverages were generally unsuccessful.\textsuperscript{22}

Deteriorating social conditions brought on by the unsuccessful enforcement of Prohibition helped to bring momentum to the repeal movement.\textsuperscript{23} Economic factors caused by the Great Depression were similarly influential.\textsuperscript{24} On December 5, 1932—just a month after Franklin Roosevelt's defeat of Herbert Hoover in a presidential election that made an issue of Prohibition—a resolution proposing a repeal of the Eighteenth Amendment was introduced in the House.\textsuperscript{25} By February of 1933, the Senate passed a revised resolution that not only repealed Prohibition, but also turned over control of liquor to the states via Section Two of the revised resolution ("the transportation or importation into any State . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited"\textsuperscript{26}); the House quickly passed the resolution as well.\textsuperscript{27} Over seventy-two percent of voters in thirty-seven states favored the repeal of Prohibition;\textsuperscript{28} by December 1933, ratification by the required three-fourths of the states was completed.\textsuperscript{29}

The Twenty-First Amendment not only ended Prohibition, but also created a critical \textit{constitutional} power for the states: the ability to regulate alcoholic beverages entering their borders. Section Two of the Twenty-First Amendment states: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of alcoholic beverages. 41 Stat. 305 (1919). The second act limited the medicinal exception to vinous and spirituous liquors, excluding malt liquors such as beer. 42 Stat. 222, § 2. Some physicians objected to these prescribing limits as infringing on their ability to practice medicine. \textit{KYVIG, supra} note 18, at 33–34. However, the Court upheld the restrictions on medicinal use of alcoholic beverages in two cases, finding that the Eighteenth Amendment gave Congress the power to regulate alcohol, including with regard to medicinal uses. James Everard's Breweries \textit{v.} Day, 265 U.S. 545, 562–63 (1924); Lambert \textit{v.} Yellowley, 272 U.S. 581, 604–05 (1926).

\textsuperscript{22} \textit{See} Spaeth, \textit{supra} note 12, at 176–78. In particular, whiskey was imported from Canada with near impunity, and industrial-grade alcohol—poisonous, but apparently better than nothing—was popular among bootleggers. \textit{Id}.

\textsuperscript{23} \textit{See generally} \textit{KYVIG, supra} note 18, at 98–136.

\textsuperscript{24} \textit{See} Donald J. Boudreaux, \textit{The Price of Prohibition}, 36 \textit{ARIZ. L. REV.} 1, 2 (1994) (arguing that economic factors—especially decreased federal government revenues brought on by the lost customs duties and liquor taxes—were the primary force behind the repeal of Prohibition).

\textsuperscript{25} \textit{See} \textit{KYVIG, supra} note 18, at 160–69.

\textsuperscript{26} \textit{U.S. CONST. amend. XXI}, § 2.

\textsuperscript{27} \textit{KYVIG, supra} note 18, at 171–72.

\textsuperscript{28} \textit{Id.} at 178–79.

\textsuperscript{29} \textit{U.S. CONST. amend. XXI}.
intoxicating liquors, in violation of the laws thereof, is hereby prohibited."  

Prior to the passage of the Twenty-First Amendment, the states' abilities to regulate liquor in interstate commerce arose from a grant of Congress, via the Webb-Kenyon Act; after the Amendment's passage, the Constitution itself granted states this authority.

B. Post-Prohibition: Cases and Legislation

Because the Twenty-First Amendment seemed to conflict directly with Congress's power to regulate interstate commerce via the Commerce Clause, almost from its passage it was the subject of litigation and dispute. Where Congress retained the ability to regulate other items of interstate commerce, the regulation of alcohol seemed to hover in a nebulous and ill-defined position between state and federal control.

In the late 1930s, the Supreme Court decided a series of cases that established extremely broad state powers under the Twenty-First Amendment with regard to the regulation of alcoholic beverages. These cases, which would lay the foundation for nearly forty years of unimpeded state control of the sale of alcoholic beverages, almost uniformly found that under the Twenty-First Amendment states were "unfettered by the Commerce Clause" in their regulation of liquor.

In the first case of its kind, the Court found that a Minnesota statute that "clearly discriminate[d] in favor of liquor processed within the State as against liquor... processed elsewhere" was nevertheless protected by the Twenty-First Amendment, which superseded the Equal Protection Clause of the Fourteenth Amendment. In another case, a Michigan law that prohibited in-state beer dealers from selling beer brewed in other states that

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30 U.S. CONST. amend. XXI, § 2.
31 The Commerce Clause states: "The Congress shall have Power...[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, § 8, cl. 3.
32 But see Aaron Nielson, No More 'Cherry Picking': The Real History of the 21st Amendment's § 2, 28 HARV. J.L. & PUB. POL'Y 281, 293 (2004) (arguing that although confusingly written, the Twenty-First Amendment's Section Two, upon a close reading, clearly did not repeal the anti-discrimination principle of the Commerce Clause).
34 Ziffrin, 308 U.S. at 138.
35 Mahoney, 304 U.S. at 403.
discriminated against Michigan-brewed beer was also upheld.\(^{36}\) Again, the Court found that under the Twenty-First Amendment "the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause."\(^{37}\) The Court similarly upheld a Kentucky statute that required motor carriers of alcoholic beverages to have a state-issued transporter's license, even though the effect was to prevent authorized interstate carriers from continuing their established business of transporting liquor.\(^{38}\) The Twenty-First Amendment was viewed as "sanction[ing] the right of a state to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause."\(^{39}\)

As decades passed, the rawness of Prohibition and its repeal began to wear away. Beginning in the 1970s, the Supreme Court decided a series of cases that took a markedly less deferential approach to the Twenty-First Amendment.\(^ {40}\) No longer did the Twenty-First Amendment act as an automatic bar to enforcement of other constitutional provisions.

\(^{36}\) *Indianapolis Brewing*, 305 U.S. at 392–94.

\(^{37}\) *Id.* at 394.

\(^{38}\) *Ziffrin*, 308 U.S. at 137, 141.

\(^{39}\) *Id.* at 138.

\(^{40}\) Although the Court in *Granholm* and the series of cases that preceded the decision addressed the interplay between the Twenty-First Amendment and the Commerce Clause, the Court has also addressed other constitutional provisions as they relate to the Twenty-First Amendment. Specifically, the Court has also addressed the relationship of the Twenty-First Amendment to the First Amendment, and accompanying freedom of speech issues. See, e.g., *44 Liquormart*, Inc. v. Rhode Island, 517 U.S. 484, 489–92 (1996). In *44 Liquormart*, two licensed alcoholic beverage retailers—one in Rhode Island and the other in Massachusetts, although patronized by Rhode Island residents—brought suit against the State of Rhode Island, alleging that the State's prohibition against advertising liquor prices was a violation of the First Amendment. *Id.* at 492–93. The Court found that the advertising bans did violate the First Amendment's prohibition against laws abridging the freedom of speech, and further, that although the dormant Commerce Clause may have been limited by the Twenty-First Amendment (a position that would be reversed in *Granholm*), with regard to the First Amendment, the Twenty-First Amendment could not save the State's advertising bans. *Id.* at 516. In an earlier case, the Court also found that the Twenty-First Amendment did "not license the States to ignore their obligations under other provisions of the Constitution." *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 712 (1984) (holding that Oklahoma's law prohibiting in-state cable television systems from retransmitting out-of-state alcoholic beverage advertisements was preempted by federal law, and that the Twenty-First Amendment does not diminish the Supremacy Clause); see also *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 112–14 (1980) (holding that California's wine pricing system constituted resale price management and violated the antitrust provisions of the Sherman Act, and that the Twenty-First Amendment did not bar application of the Sherman Act); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 n.5 (1982) (stating that the Twenty-First
In one of the most critical of these cases, *Bacchus Imports, Ltd. v. Dias*, the Supreme Court held that a Hawaii law exempting Hawaiian-manufactured brandy and wine from a twenty percent excise tax was unconstitutional under the Commerce Clause, because it impermissibly discriminated against interstate commerce in an effort "to promote a local industry." This decision represented one of a series of Supreme Court cases that recognized that the Twenty-First Amendment "did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause." It should be noted that there were several Supreme Court decisions that did indicate that the Court was not willing to entirely eliminate state or local control of alcoholic beverages; however, these cases mostly dealt with very specific instances of local control, such as prohibitions against alcohol consumption at clubs where nude dancing took place.

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Amendment did not diminish or supercede the Establishment Clause); Craig v. Boren, 429 U.S. 190, 209–10 (1976) (holding that an Oklahoma statute prohibiting the sale of 3.2% beer to males under the age of twenty-one and females under the age of eighteen amounted to gender-based discrimination, and that the Twenty-First Amendment did not save the invidious discrimination from invalidation as denial of equal protection).

42 Id. at 276.
43 Id. at 275; see also Healy v. Beer Institute, 491 U.S. 324, 326, 342 (1989) (holding that a Connecticut statute that required "out-of-state shippers of beer to affirm that their posted prices for products sold to Connecticut wholesalers [were], as of the moment of posting, no higher than the prices at which those products are sold in ... bordering [s]tates" was in violation of the Commerce Clause because it discriminated against interstate commerce and imposed impermissible price controls outside of the state, and that the Twenty-First Amendment did not authorize such Commerce Clause violations); 324 Liquor Corp. v. Duffy, 479 U.S. 335, 346 (1987) (holding that New York’s liquor pricing system was inconsistent with the Sherman Act, and that the Twenty-First Amendment does not "operate[] to ‘repeal’ the Commerce Clause wherever [state] regulation of intoxicating liquors is concerned") (quoting Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 331–32 (1964); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 582–85 (1986) (holding that New York’s Alcoholic Beverage Control law’s “affirmation provision”—requiring sellers of liquor to affirm that the price at which liquor was sold to New York wholesalers was no higher than the price at which the seller sold those products in the same month anywhere else in the United States—violated the Commerce Clause and was not saved by the Twenty-First Amendment); Hostetter, 377 U.S. at 331–32 (holding that “[t]o draw a conclusion ... that the Twenty-first Amendment has somehow operated to ‘repeal’ the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification”).

44 See, e.g., City of Newport, KY. v. Iacobucci, 479 U.S. 92, 96–97 (1986) (holding that a local ordinance prohibiting the sale of alcohol in nude dancing establishments was a permissible exercise of the state’s Twenty-First Amendment powers); N.Y. State Liquor Authority v. Bellanca, 452 U.S. 714, 715, 718 (1981) (holding that a New York law prohibiting the sale of alcohol in nude dancing establishments was constitutional
Still, the Twenty-First Amendment was not completely eviscerated by these decisions. In *North Dakota v. United States* the Supreme Court recognized as "unquestionably legitimate" states' so-called "three-tier" schemes for liquor regulation, in which all alcohol had to be funneled from producer to wholesaler to retailer before it could be sold to a consumer. Under the Court's reasoning, the Twenty-First Amendment allowed states to control alcohol within their own borders, as long as the controls were applied equally.

Even as the Court moved to restrict the Twenty-First Amendment's reach Congress was moving in the opposite direction. Specifically, the Twenty-First Amendment Enforcement Act was signed into law in October 2000. The Act modifies the Webb-Kenyon Act, providing an avenue for enforcing the Twenty-First Amendment that was previously unavailable to states. It allows a state to bring a civil action in United States district court to obtain an injunction against an entity that has violated a state law relating to the interstate shipment of alcohol. More importantly, the Act eliminates the need for states to win extradition orders in order to prosecute out-of-state violators of state liquor laws.

Thus, while the Supreme Court has repeatedly considered the issue of the Twenty-First Amendment's relationship to the rest of the Constitution, by the end of the Twentieth Century the issue was left unresolved. The Court had ruled that the Twenty-First Amendment did not trump the First Amendment, or the Commerce Clause in certain circumstances, but many other circumstances remained unexplored.

### III. Granholm v. Heald

The interstate wine shipping case ultimately heard by the Supreme Court in 2004 began years earlier as two distinct cases arising out of consumers' under the state's Twenty-First Amendment powers, noting that "a State has absolute power under the Twenty-first Amendment to prohibit totally the sale of liquor within its boundaries").

46 Id. at 432.
47 Id.
49 See discussion of Webb-Kenyon Act supra notes 14–17 and accompanying text.
51 Id.
and wineries’ frustrations with two states’ wine shipping regulations. With the specific Twenty-First Amendment and Commerce Clause issues raised by the suits not yet considered by the Supreme Court, and an impending circuit split, the issue would soon become ripe for consideration by the Court.

A. Granholm v. Heald: Background

In 2000, several Michigan wine connoisseurs, collectors, and journalists joined with a small California winery to file a suit challenging the portion of Michigan’s alcohol distribution system that prohibited out-of-state alcohol manufacturers from shipping alcohol directly to Michigan consumers. The initial suit was brought against the Governor and Attorney General of Michigan, and the chair of Michigan’s Liquor Control Commission; however, the Michigan Beer and Wine Wholesalers Association, a trade association representing liquor wholesalers, also later intervened as a defendant.

Michigan utilizes a “three-tier system” to control the distribution of alcoholic beverages. In the first tier, producers of alcoholic beverages may generally sell their products only to licensed in-state wholesalers. In the second tier, wholesalers may sell alcoholic beverages to licensed in-state

54 For ease and clarity of discussion of the procedural history, I will adopt the same nomenclature used by the Supreme Court: the original plaintiffs (comprising consumers and wineries alike who sought to overturn the states’ regulatory schemes) from both Michigan and New York will be referred to collectively as the wineries, and the original defendants (comprising the states of Michigan and New York, as well as the wine wholesalers, who sought to maintain the regulatory schemes) will be referred to as the States. Granholm v. Heald, 544 U.S. 460, 471–72 (2005).


56 Id. at *3. Amicus briefs also were filed in support of the state by a collection of nine state universities and the Michigan Interfaith Counsel on Alcohol Problems. Id. at *2–3.

57 Although the Court would ultimately find portions of the system unconstitutional, the general three-tier structure of Michigan’s alcoholic beverage distribution system remains in place. Granholm v. Heald, 544 U.S. 460, 466–67 (2005); MICH. COMP. LAWS ANN. §§ 436.1111, 436.1203 (West 2001). The Court had previously recognized that three-tier alcoholic beverage distribution systems are legitimate. See North Dakota v. United States, 495 U.S. 423, 423 (1990). See also discussion of North Dakota v. United States supra notes 45–47 and accompanying text.

In the third tier, licensed in-state retailers may sell alcoholic beverages to consumers at retail stores and through limited home delivery. Michigan wineries were granted an exception under this three-tier system, and upon procurement of “wine maker” licenses, these in-state wineries were allowed to ship directly to in-state consumers, bypassing both the wholesaler and retailer transactions. Under this scheme, out-of-state wineries could ship only to in-state wholesalers.

The plaintiffs claimed that the portion of Michigan’s regulatory system prohibiting direct shipments of wine from wineries to consumers “discriminates against out-of-state wineries, and interferes with the free flow of commerce, in violation of the dormant Commerce Clause.” The plaintiffs claimed the scheme harmed both the in-state consumers and the out-of-state wineries, and sought a declaratory judgment that Michigan’s regulatory scheme was unconstitutional to the extent that it prohibited out-of-state wineries from shipping directly to Michigan residents.

The district court granted the State’s motion for summary judgment on the merits, upholding Michigan’s regulatory scheme, despite finding it discriminatory toward out-of-state wineries. Relying on several district court decisions that upheld other states’ Commerce Clause violations as

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59 Id. at 469 (citing MICH. COMP. LAWS ANN. §§ 436.1113(7), 436.1607(1) (West 2001)).
60 Id. at 469 (citing MICH. COMP. LAWS ANN. §§ 436.1111(5), 436.1203(2)-(4) (West 2001)).
61 Id. at 469 (citing MICH. COMP. LAWS ANN. § 436.1113(9) (West 2001); §§ 436.1537(2)-(3) (West Supp. 2004); MICH. ADMIN. CODE r. 436.1011(7)(b) (2003)).
62 Id. at 469 (citing MICH. COMP. LAWS ANN. § 436.1109(9) (West 2001); § 436.1525(1)(e) (West Supp. 2004); MICH. ADMIN. CODE r. 436.1719(5) (2000)).
63 Heald v. Engler, No. 00-CV-71338-DT, 2001 U.S. Dist. LEXIS 24826, at *4 (E.D. Mich. Sept. 28, 2001). The “dormant Commerce Clause” is inferred from the power granted to Congress in Article I, § 8, of the Constitution, and refers to “the principle that state and local laws are unconstitutional if they place an undue burden on interstate commerce. There is no constitutional provision that expressly declares that states may not burden interstate commerce.” ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 401 (2d ed. 2002).
65 Id. at *15, 17–18.
66 House of York, Ltd. v. Ring, 322 F. Supp. 530, 535 (S.D.N.Y. 1970) (holding that while the Twenty-First Amendment “does not abrogate the Commerce Clause, the states have wide latitude in regulating liquors coming into... the state”); Bainbridge v. Bush, 148 F. Supp. 2d 1306, 1314 (M.D. Fla. 2001) (holding that a Florida regulatory scheme in violation of the dormant Commerce Clause was nonetheless permissible under the Twenty-First Amendment), vacated and remanded sub nom. Bainbridge v. Turner, 311
valid in light of Section 2 of the Twenty-First Amendment, the court held that "[w]hile the dormant Commerce Clause would prohibit states from burdening interstate commerce by applying such laws to any other products, the Twenty-First Amendment directly authorizes the states ‘to control alcohol in ways that it cannot control cheese.’" By this reasoning, the Twenty-First Amendment provided a unique exception to the protections offered to most other items of commerce by the dormant Commerce Clause.

On appeal, the Court of Appeals for the Sixth Circuit reversed the district court decision, finding that Michigan’s regulatory scheme was both facially discriminatory and in violation of the dormant Commerce Clause. Relying on Bacchus Imports v. Dias, the court held that the state’s powers to regulate alcoholic beverages under the Twenty-First Amendment could not protect the regulatory scheme that allowed in-state wineries to ship directly to consumers within Michigan, but prohibited out-of-state wineries from doing the same.

In 2000, the same year that the Michigan suit was filed, a similar suit was filed in the Southern District of New York challenging New York State’s prohibition on direct shipments from wineries to consumers. The plaintiffs in this case were two owners of out-of-state wineries and three New York consumers of wine. The initial suit was brought against the New York State Liquor Authority; however, much as in Michigan, several liquor importers and retailers, among others, intervened as defendants.

New York law required the same “three-tier” producer-to-wholesaler, wholesaler-to-retailer, and retailer-to-consumer system for alcoholic

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70 Heald, 342 F.3d at 524. The Supreme Court noted that the Sixth Circuit Court of Appeals “rejected the argument that the Twenty-First Amendment immunizes all state liquor laws from the strictures of the Commerce Clause.” Granholm v. Heald, 544 U.S. 460, 470 (2005).
72 Id.
73 Id. at 137. The intervenors included Charmer Industries, Inc., Peerless Importers, Inc., Eber Brothers Wine & Liquor Corp., Premier Beverage Company LLC, Metropolitan Package Store Association, Inc., Local 2d of The Allied Food and Commercial Workers International Union, and Dr. Calvin O. Butts, a New York City pastor. Amicus briefs were filed on behalf of the plaintiffs by the Coalition to Preserve Consumer Access to Wine, Arcadian Estate Vineyards, Cascata Winery at the Professor’s Inn, and Consumer Alert. Id.
beverage sales as that found in Michigan. Although the New York regulatory scheme was also a "three-tier" system of alcohol sale regulation, the New York system did vary somewhat from that of Michigan. Specifically, "farm wineries" that produced wine using only grapes grown in New York were allowed to apply for a license allowing direct shipment to consumers within New York State, as could other in-state wineries, thus bypassing both wholesalers and retailers. Out-of-state wineries could ship directly to in-state consumers only if they established a physical presence within the state and obtained a license to distribute as a wholesaler or retailer—effectively becoming New York wineries.

The district court found that these "significant 'exceptions' to the three-tier regulatory scheme...clearly benefits in-state wineries." This "impermissible economic benefit and (protection) to only in-state interests" led the court to grant summary judgment in favor of the wineries.

On appeal, however, the Court of Appeals for the Second Circuit reversed the district court decision. While acknowledging that the Sixth Circuit had reached the opposite conclusion in Heald v. Engler, the Second Circuit nevertheless ruled that the New York regulatory scheme was not discriminatory under the powers granted to the states under the Twenty-First Amendment. The court reasoned that New York's requirement for wineries to maintain a physical presence in the state in order to sell directly to consumers was motivated by legitimate state interests, not protectionism.

B. The Granholm Decision Itself

With the two circuit courts divided about the interplay of the Commerce Clause and the Twenty-First Amendment, the issue was ripe for consideration by the Supreme Court. On May 24, 2004, the Supreme Court consolidated the Michigan and New York cases and granted certiorari to determine the question: "Does a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers but restricts the ability of

74 See id.
76 Swedenburg, 232 F. Supp. 2d at 146.
77 Id. at 143.
78 Id. at 146, 153.
80 Id. at 230–31.
81 Id. at 227.
82 Id. at 239.
out-of-state wineries to do so violate the dormant Commerce Clause in light of Sec. 2 of the Twenty First Amendment?" \(^8\)

Both sides of the case attracted a wide range of supporters. In support of the wineries, amicus briefs were filed by obvious supporters such as other wineries \(^8\) and wine trade associations, \(^8\) but also by leading economic scholars, \(^8\) a cargo airline association, \(^8\) and groups representing Internet commerce proponents, including the online auction site eBay. \(^8\) In a case of

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\(^8\) Brief of Amici Curiae Napa Valley Vintners et al. in Support of Respondents, Granholm v. Heald, 544 U.S. 460 (2005) (Nos. 03-1116, 03-1120), 2004 WL 2190377; Brief for WineAmerica et al. as Amici Curiae in Support of Respondents, Granholm v. Heald, 544 U.S. 460 (2005) (Nos. 03-1116, 03-1120), 2004 WL 2190369. WineAmerica, Inc., the National Association of American Wineries, joined in the brief with trade associations and other organizations representing wineries and grape growers from over twenty states. Brief for WineAmerica, \(supra\), at 1. The brief argued that Michigan’s discriminatory regulatory scheme imposed “daunting economic constraints” on (mostly small, out-of-state) wineries, thus effectively limiting access to the Michigan wine market to the few large producers able to overcome the economic constraints; further, the brief argued that Michigan consumers were prevented from buying most of the different wines produced outside of Michigan. \(Id.\) at 2–3. Unsurprisingly, the brief urged the Supreme Court to affirm the Sixth Circuit’s decision. \(Id.\) at 3; see also Brief of the Va. Wineries Ass’n as Amicus Curiae in Support of Petitioners, Granholm v. Heald, 544 U.S. 460 (2005) (No. 03-1274), 2004 WL 1731153.

\(^8\) Brief of George A. Akerlof et al. as Amici Curiae in Support of Respondent, Granholm v. Heald, 544 U.S. 460 (2005) (Nos. 03-1116, 03-1120), 2004 WL 2190368. This group of leading economists—including three Nobel Laureates—argued that “the principles of open state borders and non-discrimination . . . are consistent with the economic profession’s well-accepted views on the benefits of free trade and competitive markets,” and urged the Court to invalidate the states’ discriminatory regulations. \(Id.\) at 3.

\(^8\) Brief for the Cargo Airline Ass’n as Amicus Curiae in Support of Respondents, Granholm v. Heald, 544 U.S. 460 (2005) (Nos. 03-1116, 03-1120), 2004 WL 2190376. The association argued that cargo transportation is “critically important to the economy,” and that the discriminatory state laws could “impede the flow of interstate commerce because they disrupt carriers’ operations, increase costs, and slow service.” \(Id.\) at 1, 5.

\(^8\) Brief Amicus Curiae of Am. Homeowners Alliance et al. in Support of Respondents, Granholm v. Heald, 544 U.S. 460 (2005) (Nos. 03-1116, 03-1120), 2004 WL 2155306. This group of amici was comprised of entities involved in electronic commerce, who were interested in the case not only as it related to wine shipping, but to other consumer goods and services as well. \(Id.\) at 1. They argued that the multi-billion dollar interstate electronic commerce industry would be destroyed if individual states were “permitted to enact measures that discriminate against interstate commerce in favor
politics making strange bedfellows, alcoholic beverage wholesalers\textsuperscript{89} and anti-alcohol organizations\textsuperscript{90} alike filed amicus briefs supporting the States. The case was eagerly anticipated by wine enthusiasts and free market proponents alike for its potential to open new markets; this anticipation only grew after the Justices’ questions in oral arguments seemed to point toward a ruling favorable to the wineries.\textsuperscript{91}

of local economic interests," as Michigan had done with its wine shipping restrictions. \textit{Id.} at 4.

\textsuperscript{89} Brief of Nat'l Beer Wholesalers Ass'n. as Amicus Curiae in Support of Petitioners, Granholm v. Heald, 544 U.S. 460 (2005) (Nos. 03-1116, 03-1120), 2004 WL 1731150. This brief argued that the economically important beer distribution industry had invested large sums in creating a distribution system, which could be "jeopardized if the regulatory playing field is tipped against in-state licensees and out-of-state entities are permitted to ship directly to consumers." \textit{Id.} at 3. \textit{See also}, e.g., Brief for the Wine and Spirits Wholesalers of Am. et al. as Amici Curiae supporting Petitioners, Granholm v. Heald, 544 U.S. 460 (2005) (Nos. 03-1116, 03-1120, 03-1274), 2004 WL 1743943; Brief of Amicus Curiae The Beer Inst. in Support of Respondents, Granholm v. Heald, 544 U.S. 460 (2005) (No. 03-1274), 2004 WL 2190370.

\textsuperscript{90} \textit{See, e.g.}, Brief Amicus Curiae of Ill. Alcoholism and Drug Dependence Ass'n in Support of Petitioners in Granholm and Respondents in Swedenberg, Granholm v. Heald, 544 U.S. 460 (2005) (Nos. 03-1116, 03-1120), 2004 WL 1731240. This group argued that the Sixth Circuit's treatment of liquor as an ordinary commodity protected by the Commerce Clause was in opposition to the Twenty-First Amendment. \textit{Id.} at 2. Further, the "untrammeled trade" of liquor—a "dangerous drug... that imposes the highest social and economic costs on American society"—would "wreak havoc on a state's abilities to regulate and control access to this dangerous drug." \textit{Id.} at 2. \textit{See also} Brief of Mich. Ass'n of Secondary Sch. Principals et al. as Amici Curiae in Support of Petitioners, Granholm v. Heald, 544 U.S. 460 (2005) (No. 03-1116, 03-1120), 2004 WL 1731151. The group of amici included not only the principals' association, but also the Traffic Safety Association of Michigan, Concerned Women for America, and the National Association of Evangelists, among others. \textit{Id.} at 1–3. The groups were concerned about "this threat of deregulation, the concomitant expansion of alcohol access by underage persons, and the catastrophic consequences of this increased access" if the Court were to uphold the Sixth Circuit's decision. \textit{Id.} at 4.

\textsuperscript{91} \textit{See, e.g.}, Walter Nicholls, \textit{A Virginia Vintner's Full Court Press; The Case of Juanita Swedenburg Could Change the Nation's Wine Trade}, \textit{WASH. POST}, Apr. 6, 2005, at F1 ("The stakes are huge. The case has been described as potentially the most significant test of states' constitutional power to regulate the alcohol trade since Prohibition. Over time, a victory for Swedenburg could revolutionize the way wine is sold."); Linda Greenhouse, \textit{Justices Pick Apart Ban on Wine Sales from State to State}, \textit{N.Y. TIMES}, Dec. 8, 2004, at A1 ("If the Supreme Court argument Tuesday on interstate wine sales proves to be a reliable roadmap to the eventual decision, consumers who want to order wine directly from out-of-state wineries will soon be able to do so with the court's blessing."); David G. Savage, \textit{Justices May Favor Direct Wine Sales; U.S. Supreme Court Hints It is Leaning Toward Overturning State Laws that Bar Residents from Buying Straight from Out-of-State Producers}, \textit{L.A. TIMES}, Dec. 8, 2004, at C1 ("A narrow ruling would knock down only the state laws that give special protection to in-
With the stage set for a potentially sweeping ruling, the Supreme Court issued its decision in *Granholm* on May 16, 2005. Neither as wide-ranging as the wineries had desired nor as limited as the states had hoped, the five-to-four decision essentially held that the Twenty-First Amendment does not permit the states' discriminatory regulatory schemes to violate the Commerce Clause.

The Court noted that the decision continued the string of cases interpreting and limiting the Twenty-First Amendment. Finding that "Bacchus forecloses any contention that §2 of the Twenty-first Amendment immunizes discriminatory direct-shipment laws from Commerce Clause scrutiny," the Court ruled that the Michigan and New York regulations could not stand in their current form. But while the Court could have chosen to further curtail the Twenty-First Amendment, moving the power to regulate alcohol more clearly to the federal government, it did not do so. In fact, writing for the majority, Justice Scalia noted: "A State which chooses to ban the sale and consumption of alcohol altogether could bar its importation; and . . . it would have to do so to make its laws effective." Under this

Law review articles both before and after the Court's grant of certiorari had also, for the most part, anticipated the Court's decision to take up the issue, and also had noted with some enthusiasm the potential for a groundbreaking decision. See, e.g., Lisa Lucas, Comment, *A New Approach to the Wine Wars: Reconciling the Twenty-first Amendment With the Commerce Clause*, 52 UCLA L. Rev. 899, 934–35 (2005) (arguing for a moderate approach to state liquor controls authorized by the Twenty-First Amendment but that conflict with the Commerce Clause); Marc Aaron Melzer, Comment, *A Vintage Conflict Uncorked: The 21st Amendment, the Commerce Clause, and the Fully-Ripened Fight Over Interstate Wine and Liquor Sales*, 7 U. Pa. J. Const. L. 279, 305–08 (2004) (arguing that the Court should find the Michigan and New York laws in violation of the Commerce Clause, and that states should voluntarily revise their laws to be less restrictive); Tracey Shimer Garman, Comment, *These Grapes Are Ripe For Pickin': A Respectful Limit on State Power to Regulate Importation of Wine Under the Twenty-First Amendment*, 57 SMU L. Rev. 1555, 1578–80, 1584–85 (2004) (proposing that the Court limit the Twenty-First Amendment such that it does not overrule the Commerce Clause and also that states voluntarily limit their more restrictive liquor laws).

93 *Id.* at 488–89.
94 See discussion *supra* notes 40–47 and accompanying text.
96 *Id.* at 488–89.
decision, the regulation of alcohol even as an item of interstate commerce was left to the states.\textsuperscript{97}

IV. AFTER GRANHOLM: ANALYSIS AND OUTLOOK

Although media outlets and wine advocacy organizations hailed the Granholm decision as a boon to wine-loving consumers across the United States,\textsuperscript{98} the true result was less than purely positive for the oenophiles.

\textsuperscript{97} The dissents of Justices Stevens and Thomas provide an interesting counterpoint to the majority's decision. Stevens conceded that the New York and Michigan laws "would be patently invalid under well settled dormant Commerce Clause principles if they regulated sales of an ordinary article of commerce rather than wine." Granholm, 544 U.S. at 494 (Stevens, J., dissenting). Nevertheless, Stevens argued that alcoholic beverages are not ordinary articles of commerce: "[E]ver since the adoption of the Eighteenth Amendment and the Twenty-first Amendment, our Constitution has placed commerce in alcoholic beverages in a special category." Id. Stevens' dissent was particularly interesting because he noted that he personally recollected the historical context of Prohibition, in contrast to the "many Americans, particularly those members of the younger generations who make policy decisions [and who] regard alcohol as an ordinary article of commerce." Id.

Stevens also argued that the differences in the state laws condemned by the majority were explicitly authorized by the ratification of the Twenty-First Amendment: "The notion that discriminatory state laws violated the unwritten prohibition against balkanizing the American economy... would have seemed strange indeed to the millions of Americans who condemned the use of the 'demon rum' in the 1920's and 1930's." Id. at 496. Although the majority's decision "may represent sound economic policy" Stevens argued that it is not "consistent with the policy choices made by those who amended our Constitution in 1919 and 1933." Id. Stevens would have interpreted the Twenty-First Amendment more broadly and would have exempted the New York and Michigan laws from Commerce Clause scrutiny. Id. at 496–97.

Justice Thomas's dissent offered an alternative view of the legislative history and the textual interpretation of the Webb-Kenyon Act and of the Twenty-First Amendment. Granholm, 544 U.S. at 497–98 (Thomas, J., dissenting). Thomas would have followed more closely the Webb-Kenyon Act's language that he said "immunizes from negative Commerce Clause review the state liquor laws that the Court holds are unconstitutional." Id. at 498.

Because both Chief Justice Rehnquist and Justice O'Connor voted with the minority, the newly reformulated Court (with Chief Justice Roberts and Justice Alito) would likely have reached the same result, even if the new members sided with the dissent. However, depending on the next change to the Court's membership, another challenge to the Twenty-First Amendment could have a substantially different result.

The *Granholm* decision left Michigan and New York with laws on the books that appeared to violate the Commerce Clause protections against discriminatory regulation of alcoholic beverages. But, the decision did not instruct these states on how to resolve the unconstitutionality. With so many diverse constituent groups interested in the initial case as observers and amici, it is unsurprising that the aftermath attracted similarly rapt attention. And further, given the massive role that direct shipments of wine specifically (and alcoholic beverages generally) play and are anticipated to play in the United States economy, a close focus was not only expected, but economically necessary. This Section will review the immediate aftermath of the decision, and make proposals for future action by both Congress and state legislatures.

**A. The Immediate Aftermath**

Again, although the Supreme Court ruled Michigan's and New York's discriminatory regulatory systems unconstitutional, the Court failed to give specific guidance about how the states should change their laws and regulations to conform with the Commerce Clause's prohibition on discrimination against interstate shipping.

In July 2005, soon after the Supreme Court issued its *Granholm* opinion, the New York State Assembly acted to revise existing New York law to allow for direct shipments of wine to consumers from out-of-state wineries. The legislature also enacted a new law requiring out-of-state wineries to register with the state and use approved carriers for direct-to-consumer sales in the aftermath of the *Granholm* decision, noting a "disturbing trend" of minors obtaining alcohol via Internet sales).

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*Judges Strike Down Limits on Out-of-State Wineries; 'Just the Tip of the Iceberg,'* WALL ST. J., May 17, 2005, at A1 (speculating that the decision could "embolden consumer demands for changes in fields ranging from beer to mortgage brokerages to contact lenses"); *Editorial, Wine War II,* WALL ST. J., May 27, 2005, at A12 (arguing against "liquor cartels that just lost their sinecure as distribution middlemen . . . trying their best to undercut the High Court's intentions" via protectionist state laws); Jerry Shriver, *Mail-Order Wines Set to Flow Across the USA,* USA TODAY, June 3, 2005, at 4D (inviting wine lovers "to pour a glass and daydream about how your palate could be in for the ride of its life someday soon."). *But see* Gene Wrigglesworth, *Ban on Remote Alcohol Sales Is Needed,* LANSING ST. J., July 14, 2005, at 13A (calling for Michigan to ban direct-to-consumer sales in the aftermath of the *Granholm* decision, noting a "disturbing trend" of minors obtaining alcohol via Internet sales).


100 Again, the wholesale trade of beer, wine, and distilled spirits in the United States is a multi-billion dollar industry. *See* 2002 CENSUS REPORT, *supra* note 7.

101 N.Y. ALCO. BEV. CONT. LAW §§ 17, 76, 102 (McKinney Supp. 2006).
consumer shipments.\textsuperscript{102} Although the law went into effect in August 2005, recent reports indicate that the transition to direct-to-consumer wine shipments has not been entirely smooth. Specifically, although out-of-state wineries obtained licenses to ship wines to New York consumers, by November 2005 no common carriers had yet been approved to deliver the wine to those consumers.\textsuperscript{103} Although UPS was approved in December 2005,\textsuperscript{104} questions remained about whether the law required carriers to file hard copies of the registration forms with the State Liquor Authority or whether carriers could file the forms electronically.\textsuperscript{105} In February 2006, FedEx became the second common carrier approved to deliver wine directly to consumers.\textsuperscript{106}

In Michigan, there were efforts to curb all direct-to-consumer shipments of alcohol\textsuperscript{107} before a bill allowing direct shipments was finally passed and signed into law in December 2005.\textsuperscript{108} Although the law allows direct shipment of wine to Michigan consumers regardless of the location of the producer, producers still will be required to register with the state and pay a fee.\textsuperscript{109}


\textsuperscript{103} Danny Hakim, Still No Wine in the Mail, Months After a New Law, N.Y. TIMES, Dec. 9, 2005, at B1.

\textsuperscript{104} Press Release, State of N.Y. Div. of Alcoholic Beverage Control, State Liquor Authority Announces Approval of UPS to Make Direct Wine Shipments to New Yorkers (Dec. 9, 2005), available at http://abc.state.ny.us/announcements/mediaadvisory120905.pdf.

\textsuperscript{105} Hakim, supra note 103, at B1. The law itself appears to allow for electronic signatures: "The holder of an out-of-state direct shipper's license shall ... require a recipient to sign an electronic or paper form or other acknowledgement of receipt as approved by the authority." N.Y. ALCO. BEV. CONT. LAW § 79-c(3)(e)(ii) (McKinney Supp. 2006). However, according to the New York Times article, "[t]he form requires the delivery person to fill out by hand the name and address of the shipping company," and a State Liquor Authority spokeswoman "would not comment on the form, other than to say, 'we have to adhere to the law.'" Hakim, supra note 103, at B1.


\textsuperscript{107} MICH. COMP. LAWS ANN. § 436.1113(9) (West 2001); §§ 436.1537(2)–(3) (West Supp. 2004).

\textsuperscript{108} MICH. COMP. LAWS § 436.1203 (2006).

\textsuperscript{109} Id.
Ohio's regulatory scheme closely resembled Michigan's, with exceptions to the three-tier system allowing direct-to-consumer shipments of alcohol by in-state producers.\textsuperscript{110} It was clear that the \textit{Granholm} decision would affect Ohio as well.\textsuperscript{111} Just one month after the \textit{Granholm} decision, State Representative John Domenick introduced a bill in the Ohio House that would outlaw \textit{any} direct shipment of alcohol by a producer to a consumer.\textsuperscript{112} This was a valid option under the \textit{Granholm} reasoning, but the bill has not progressed.\textsuperscript{113} In September 2005, State Senator Eric Fingerhut introduced a bill (S.B. 179) in the Ohio Senate that would allow consumers to order wine directly from any producer within or outside Ohio.\textsuperscript{114}

Thus, although the Supreme Court ruled that Michigan's and New York's discriminatory laws were unconstitutional even under the formerly broad umbrella of the Twenty-First Amendment, the proper state response was not specified. The \textit{Granholm} decision left wineries and consumers in only a marginally better position than they had been before the decision.

\textsuperscript{110} \textit{Ohio Rev. Code Ann.} §§ 4303.25, 4303.29 (West 2004).

\textsuperscript{111} In fact, shortly after the \textit{Granholm} decision, the state of Ohio entered into an agreed order for a pending case challenging the constitutionality of Ohio's direct shipment law. Agreed Order, Stahl v. Taft, No. 2:03-CV-597 (S.D. Ohio Jul. 19, 2005). The agreed order conceded that the Ohio law was unconstitutional in light of the Supreme Court's decision in \textit{Granholm}. \textit{Id.} at 1. Although the order enjoined the state from enforcing its direct shipment ban, it did not specify how shipments were to be made, other than by the use of a form attached to the order. \textit{Id.} at 1–2. An interim measure requiring consumers to file paperwork with the state Department of Taxation upon receipt of out-of-state alcoholic beverages was put in place, but it is unclear how long that method will be used. Division of Liquor Control, State of Ohio, Direct Shipping (Consumer), http://www.liquorcontrol.ohio.gov/DirectShipping.htm (last visited Mar. 13, 2006).

\textsuperscript{112} H. B. 300, 126th Gen. Assem. (Ohio 2005).

\textsuperscript{113} The bill was referred to the House State Government Committee, but as of September 30, 2006, the bill has not come out of committee. Ohio Legislative Services Commission, House Bill Status Report of Legislation, 126th General Assembly, available at http://lsc.state.oh.us/coderev/hou126.nsf/0c096e356174b94d85256c1000663ff6/a30b3813ad2289a9852570230053ea08?OpenDocument (last visited Sept. 30, 2006).

B. Future Courses

Clearly, the Court’s decision in Granholm did not go as far as some in the wine and alcohol industry had hoped. For many consumers, the promise of improved access to out-of-state wines largely has gone unfulfilled.\(^{115}\) Although the states’ powers under the Twenty-First Amendment now must clearly operate within the framework of the dormant Commerce Clause, the states’ powers to regulate alcohol still exist—despite the fact that similar regulation of other items of interstate commerce would be a direct violation of the Commerce Clause.

This issue matters not just because of a small contingent of wine lovers, but also because of the vast economic importance of the national wine and alcoholic beverage industry. In the United States, the trade of alcoholic beverages, including beer, wine, and distilled spirits, is a massive industry.\(^{116}\) A study completed prior to the Granholm decision showed that bans on direct shipments of wine to consumers not only reduced consumer choice, but also increased retail prices.\(^{117}\) Another study, also completed prior to the Granholm decision, suggested that state restrictions on direct alcohol shipments “are largely consistent with an economic interest theory of regulation and show little evidence of public interest factors playing a

\(^{115}\) See, e.g., Hakim, supra note 103, at B1.

\(^{116}\) In 2002, the wholesale trade of beer, wine, and distilled spirits in the United States had sales of over $85 billion, and employed over 161,000 people, with an annual payroll of over $7 billion. 2002 Census Report, supra note 7, at I. In 2002, retail beer, wine, and liquor stores in the United States accounted for over $27 billion in sales, and employed over 133,000 people, with an annual payroll of over $2 billion. U.S. Census Bureau, U.S. Dep’t of Com., Food and Beverage Stores: 2002, 2002 Economic Census, Retail Trade Industry Series 1-9 (2004), available at http://www.census.gov/epcd/ec97/industry/E44531.HTM. As a point of comparison, for the same time period, convenience stores accounted for over $20 billion in sales (of which a portion was alcohol), and employed over 141,000 people with an annual payroll of over $1.8 billion. Id.

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significant role.” 118 Clearly, the benefits of consumer choice would outweigh the supposed public interest factors cited by the restrictive states. 119

The patchwork of inconsistent state laws seems to cry out for action. The Supreme Court has demonstrated an increasing willingness over the last seventy years to curtail the reach of the Twenty-First Amendment. Yet the Amendment as interpreted by the Granholm Court still serves to limit interstate commerce, by allowing—to some degree—states to regulate alcohol in a way unlike other articles of commerce. Three options for creating consistency across states emerge: first, a repeal of the Twenty-First Amendment’s Section 2; second, Congressional action to force—or at least strongly encourage—states to treat liquor as an ordinary article of commerce; or third, individual state legislative action.

Given the Court’s decision in Granholm, repealing Section 2 of the Twenty-First Amendment would be the ideal course of action. Such a repeal would create consistency among states, and would be the most effective way of guaranteeing that alcohol stands on equal footing with other items of commerce. But this is likely unrealistic, even if the ideal solution. As Justice Stevens noted in his Granholm dissent, amending the Constitution is a “rare exercise,” 120 although attempts to amend the Constitution are not uncommon. 121 While a constitutional amendment would present perhaps the

118 Gina M. Riekhof & Michael E. Sykuta, Regulating Wine by Mail, Regulation, Fall 2004, at 30, 36. The “economic interest” at issue is often that of wine wholesalers and distributors, anxious to restrict access to their market. Id. at 31–32.

119 The Supreme Court also viewed with skepticism the States’ claims that to prohibit discrimination against out-of-state wineries would undermine their regulatory authority:

The States provide little evidence that the purchase of wine over the Internet by minors is a problem . . .

Even were we to credit the States’ largely unsupported claim that direct shipping of wine increases the risk of underage drinking, this would not justify regulations limiting only out-of-state direct shipments . . .

....

In summary, the States provide little concrete evidence for the sweeping assertion that they cannot police direct shipments by out-of-state wineries.


120 Granholm, 544 U.S. at 495 (Stevens, J., dissenting).

121 Nevertheless, successful attempts to amend the Constitution are uncommon: At least 856 constitutional amendments were proposed in Congress from 1989 to 1999 alone; over 10,000 amendments have been proposed in Congress since 1789. C-SPAN.org, Capitol Questions—Congress, http://www.c-span.org/questions/weekly54.asp (last visited Sept. 30, 2006).
cleanest and most certain result, realistically, other avenues must be sought.\textsuperscript{122}

Beyond a repeal of Section 2 of the Twenty-First Amendment or a new court fight over the amendment, possible solutions to the problem of restricted interstate alcohol shipments include congressional action. Congressional action would likely be the most broadly effective, but could draw court challenges from states seeking to maintain control under the Twenty-First Amendment. Federal agency action, under congressional authorization, would also likely be broadly effective, but could draw similar court challenges.

Congressional action could include first the repeal—or severe limitation—of the Twenty-First Amendment Enforcement Act.\textsuperscript{123} Without

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The most recent amendment to the Constitution was the Twenty-Seventh Amendment, ratified in 1992. U.S. CONST. amend. XXVII. The Twenty-Seventh Amendment requires an intervening election of Representatives before a change in the compensation for members of Congress may take effect. \textit{Id.} First proposed in 1789, the amendment had the longest ratification period—202 years—of any amendment to the Constitution, and its resurgence after two centuries raised some questions of its legitimacy and the process by which amendments may be ratified. Michael Stokes Paulsen, \textit{A General Theory of Article V: The Constitutional Lessons of the Twenty-Seventh Amendment}, 103 YALE L.J. 677, 678 (1993). See also Richard B. Bernstein, \textit{The Sleeper Wakes: The History and Legacy of the Twenty-Seventh Amendment}, 61 FORDHAM L. REV. 497 (1992). Since the Eighteenth Amendment, limits on the ratification period typically have been included in the text of the amendments. United States House of Representatives—Constitutional Amendments Not Ratified, http://www.house.gov/house/Amendnotrat.shtml (last visited Sept. 30, 2006).

Since 1789, six other amendments have been submitted to the states for ratification, but have not been ratified by the required three-fourths of the states. United States House of Representatives—Constitutional Amendments Not Ratified, http://www.house.gov/house/Amendnotrat.shtml (last visited Sept. 30, 2006). The most recent of these amendments that failed to receive the required three-fourths ratification by the states was the amendment proposed in 1978 relating to voting rights for the District of Columbia; prior to that was the 1972 Equal Rights Amendment. \textit{Id.}

\textsuperscript{122} Related to this option is the possibility that another Supreme Court decision further limiting the Twenty-First Amendment could have a similar effect to the outright repeal of Section 2; that is, the Court could decide that the Commerce Clause applies, period, regardless of the states' intents. Again, though, this is a course of action that is far from certain, and given that the Court has so recently heard a case regarding the Twenty-First Amendment, it seems unlikely—even more so now that the circuit courts have the \textit{Granholm} decision on which to rely.

\textsuperscript{123} 27 U.S.C. \textsection 122a (2000); see discussion \textit{supra} notes 48–51 and accompanying text. However, lower courts—for example the Second Circuit, which upheld discriminatory state liquor regulations prior to \textit{Granholm}—might rule that, regardless of the existence of the Twenty-First Amendment Enforcement Act, states do have access to federal courts for enforcement of state alcohol laws. In the same vein, at least one court has already ruled that \textit{Granholm} does not prohibit equally-applied state liquor
direct access to federal courts for enforcement of violations of state laws on alcohol distribution, states would be forced to find other avenues of enforcement. State legislatures might even decide to forgo attempts to regulate the interstate shipment of alcohol. The Bureau of Alcohol, Tobacco and Firearms already regulates the alcoholic beverage industry on a federal level, in many cases supplementing existing state regulations.\textsuperscript{124} If states remove themselves from the business of regulating alcohol, no vacuum of enforcement will exist.

Congress may have other options as well, including asserting more vigorously its affirmative Commerce Clause powers to regulate interstate commerce. Although the same powerful interest groups that supported the states in \textit{Granholm} would likely oppose such actions,\textsuperscript{125} there were similarly powerful interest groups supporting the wineries.\textsuperscript{126} Further, there was congressional support for the wineries’ position in \textit{Granholm}.\textsuperscript{127}

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\footnotesize
\textsuperscript{124} FTC \textit{Report}, \textit{supra} note 1, at 11–12.

\textsuperscript{125} See citations to amici briefs supporting states \textit{supra} notes 89–90.

\textsuperscript{126} See citations to amici briefs supporting wineries \textit{supra} notes 84–88.

\textsuperscript{127} Brief of Members of the United States Congress as Amici Curiae in Support of Respondents, \textit{Granholm} v. Heald, 544 U.S. 460 (2005) (Nos. 03-1116, 03-1120), 2004 WL 2190365. The twenty senators and representatives who signed on to the brief argued that Congress, in passing the Twenty-First Amendment, “did not seek to depart from the uniformity between in-state and out-of-state interests that it had mandated in . . . earlier statutes.” \textit{Id.} at 3. It is not unimaginable that these same members of Congress could seek to create uniformity among states through a congressional exercise.
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Congress could choose to exercise its spending power\(^{128}\) to force states into allowing direct shipments of alcohol to consumers, or even to reduce in-state restrictions on alcoholic beverages.\(^{129}\) That is, Congress could condition

\(^{128}\) Congress’s “spending power” is derived from Article I, Section 8, Clause 1 of the Constitution, which states that “Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States.” U.S. CONST. art. I, § 8, cl.1. The Supreme Court has held that Congress has broad authority under this clause. See United States v. Butler, 297 U.S. 1, 66 (1936). That authority includes the power to place conditions on grants of federal funds to the states. See, e.g., Oklahoma v. Civil Serv. Comm’n, 330 U.S. 127, 143 (1947); South Dakota v. Dole, 483 U.S. 203 (1987); see also discussion of the Court’s reasoning in South Dakota v. Dole, infra, note 128–30 and accompanying text. For additional discussion of the spending power, see CHEMERINSKY, supra note 63, at 268–75.

\(^{129}\) Appropriately, Congress has previously successfully exercised its spending power with regard to alcoholic beverages. See South Dakota v. Dole, 483 U.S. 203, 212 (1987). In 1984, Congress passed the National Minimum Drinking Age Amendment, which required the Secretary of Transportation to withhold five percent of otherwise obtainable federal highway funds from states in which the purchase or possession of any alcoholic beverage by a person less than twenty-one years of age was lawful. 23 U.S.C. § 158 (West 1984). (The current version of the law requires the Secretary of Transportation to withhold ten percent of funds. 23 U.S.C. § 158 (Supp. 1985) (current version at 23 U.S.C. § 158 (2000))).

At the time the law was enacted, South Dakota permitted persons nineteen years of age or older to purchase beer containing up to 3.2% alcohol. South Dakota v. Dole, 483 U.S. 203, 205 (1987). Claiming that Congress had exceeded its authority to exercise its spending power and that the Twenty-First Amendment granted certain “core powers” with regard to the control of alcoholic beverages to the states, South Dakota sought a declaratory judgment that the National Minimum Drinking Age Amendment was unconstitutional. Id. at 205. In response, the Secretary of Transportation argued that the Twenty-First Amendment gave states the “broad power to impose restrictions on the sale and distribution of alcoholic beverages but does not confer on them any power to permit sales that Congress seeks to prohibit.” Id. at 206 (quoting Brief for Respondent at 25–26).

The Court noted that Congress’s spending power is not unlimited and that its exercise is subject to several restrictions articulated in several cases. Id. at 207. First, “the exercise of the spending power must be in pursuit of ‘the general welfare.’” Id. (citing Helvering v. Davis, 301 U.S. 619, 640-41 (1937); United States v. Butler, 301 U.S. 1, 65 (1937)). Second, the Court requires that “if Congress desires to condition the States’ receipt of federal funds, it ‘must do so unambiguously.’” Id. (quoting Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1, 17 (1981)). Third, conditions on federal grants of funds may exceed Congress’s authority under the spending power “if they are unrelated ‘to the federal interest in particular national projects or programs.’” Id. (quoting
the receipt of federal funds on states making their laws less restrictive in the interest of promoting interstate commerce and generally improving the national economy. As the Court made clear in *South Dakota v. Dole*, the Twenty-First Amendment does not act as a bar to Congress’s exercise of its spending power, and as long as the condition attached to the funds is sufficiently related to Congress’s goal, the exercise would likely be constitutional.

As an example, Congress could model a law after the one upheld in *Dole*. If federal funds were conditioned on states revising their liquor-control laws, state legislatures might finally have incentive to begin to loosen these laws. Congress could even try to tie highway funding to updated—meaning less restrictive—liquor laws. Because interstate commerce utilizes highways, the goal would not be entirely unrelated to the means of coercion, as required by *Dole*.

The third and final option for modernizing liquor laws and providing consistency across states is state legislative action. Such state action is not as desirable because it would depend on individual legislative efforts, would be less likely to be consistent across states, and would thus be less effective at reducing the general scope of the Twenty-First Amendment. Clearly though, state action would have the advantage of avoiding a court fight—at least one brought by the states.

The key to state action is that states may be allowed under the Twenty-First Amendment to regulate alcohol, but perhaps the *Granholm* decision provides a way to gracefully eliminate some states’ more frivolous

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132 If the nexus between highway funds and interstate commerce were not sufficient to uphold the constitutionality of the coercion, surely another means could be used—for example, economic growth incentive packages.
133 As was made clear by the amici briefs in *Granholm*, there is no shortage of interested parties who would be willing to take up a fight in order to maintain stricter controls of alcoholic beverages. *See* discussion *supra* notes 125–27 and accompanying text.
regulations. That is, state legislatures, which are subject to pressures from many varying constituent groups, could use *Granholm* as an “excuse” of sorts to relinquish some power that they may no longer be comfortable holding. To some degree, this has already happened in Michigan, New York, Ohio, and other states, despite complaints from liquor wholesalers and anti-alcohol groups that would prefer to maintain the status quo. However, thirty-two states’ governors joined an amicus brief supporting the states in *Granholm*, indicating that at the very least, such an effort by the legislatures could be met by resistance from the executive branch.

Well before the *Granholm* case reached the Supreme Court, the National Conference of State Legislatures endorsed a model direct shipment law proposed by wine industry lobbying organizations. Martin, *Wine Wars*, supranote 4, at 37–38. Martin proposed that states adopt this model law, which would allow both in-state and out-of-state wineries to ship a limited number of cases of wine directly to consumers. Id. at 38–40.

Within states, alcohol wholesalers (and retailers, to a degree) are hiding behind the shield of the Twenty-First Amendment to retain their stranglehold over the distribution system. To use the argument that federalism and state interests are being served by allowing states to sanction monopolies is antithetical to many free-market proponents. Nevertheless, state legislators may feel constrained because of the great political and economic power wielded by liquor wholesalers. See statistics on the magnitude of the wholesale liquor trade *supra* notes 116.

See citations to amici briefs *supra* notes 84–90. A recent example of the influence of interest groups can be found in Illinois, where the state legislature recently enacted legislation allowing for limited direct-to-consumer alcoholic beverage shipments; this legislation reflected a compromise between bills proposed by beer and wine distributors and bills proposed by smaller Illinois winemakers, “each seeking to protect their business interests.” Cheryl V. Jackson, *Wine, Beer Interests Agree to Sales Deals*, CHI. SUN-TIMES, Mar. 8, 2006, at 61. In Ohio, the Wholesale Beer and Wine Association of Ohio has contributed about $1.16 million to Ohio politicians and political parties during the past five years. Bill Bush, *Out-of-State Wine Prices Could Double*, the COLUMBUS DISPATCH, June 25, 2006, at 1A. One recipient of a $2500 contribution from the Association was State Representative Matthew Dolan, who in June 2006 released a draft of a bill that would prohibit out-of-state wineries that produce more than 150,000 gallons of wine annually from shipping directly to retail stores—thus protecting the territory of the wholesalers. Id.

Brief of Ohio and 32 Other States as Amici Curiae Supporting Petitioners, *Granholm v. Heald*, 544 U.S. 460 (2005) (No. 03-1116), 2004 WL 1743941. The thirty-two states’ attorneys general argued that their states “have a strong interest in maintaining appropriate control over the distribution of alcohol within their borders,” and asked the Court to allow states to prevent out-of-state wineries from shipping into the states. Id. at 1-2. The Court effectively dismissed the states’ claims of regulatory concerns. *Granholm v. Heald*, 544 U.S. 460, 488–93 (2005); see discussion *supra* note 119 and accompanying text.
V. Conclusion

Far from being the sweeping decision that some in the wine industry had hoped for, *Granholm v. Heald* eliminated discriminatory state alcohol regulations, but raised nearly as many questions as it answered. Ideally, the Court would have gone further and more severely—or completely—limited the scope of the Twenty-First Amendment. But because it did not, the repeal of Section 2 of the Twenty-First Amendment could accomplish what the Court did not. Nevertheless, the repeal of an amendment is an extremely unlikely scenario, so Congress and state legislatures now have the opportunity to revise antiquated alcohol distribution laws themselves. To bring liquor controls into the modern era would benefit individual consumers and bolster the economy. Although liquor was once thought of as unique, it is now widely perceived to be an ordinary item of commerce, and should be treated as such. Doing so would modernize the Twenty-First Amendment for the Twenty-First Century.