What Does Granholm v. Heald Mean for the Future of the Twenty-First Amendment, the Three-Tier System, and Efficient Alcohol Distribution?

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1. Introduction

In recent years, several courts have evaluated the constitutionality of various state regulatory schemes governing the sale and distribution of alcohol. These cases have forced courts to examine the extent to which the Commerce Clause limits a state's ability to regulate alcohol under Section 2 of the Twenty-first Amendment. Although the Supreme Court has previously addressed the tension between the Twenty-first Amendment and the Commerce Clause, the rise of a national wine industry over the past three decades and the increasing use of Internet commerce have forced courts to address the conflict under new factual circumstances.

Over the past twenty-five years, the number of wineries in the United States has increased over 400%, with wineries now located in all fifty states.

1. See Dickerson v. Bailey, 336 F.3d 388, 410 (5th Cir. 2003) (concluding that a Texas law was "exactly the type of geographical discrimination that is prohibited by the Commerce Clause and, as applied, is a patent violation of Plaintiffs' constitutional rights"); Heald v. Engler, 342 F.3d 517, 520 (6th Cir. 2003) (stating that a Michigan law was "discriminatory in [its] application to out-of-state wineries, in violation of the dormant Commerce Clause, and [could not] be justified as advancing the traditional 'core concerns' of the Twenty-first Amendment"); Bainbridge v. Turner, 311 F.3d 1104, 1115 (11th Cir. 2002) (stating that unless Florida could "show that its statutory scheme [was] necessary to effectuate . . . [a] core concern . . . [of the Twenty-first Amendment] in a way that justifies treating out-of-state firms differently from in-state firms," the Twenty-first Amendment would not protect state law from traditional Commerce Clause analysis); Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 853 (7th Cir. 2000) (concluding that an Indiana law prohibiting direct shipment of out-of-state alcohol to Indiana consumers did not discriminate against out-of-state producers and, therefore, did not violate the Commerce Clause); Mt. Hood Beverage Co. v. Constellation Brands, Inc., 63 F.3d 779, 789 (Wash. 2003) (finding a Washington law unconstitutional on the grounds that it "discriminate[ed] against interstate commerce in violation of the commerce clause" and was not "justified by core concerns of the Twenty-first Amendment").

2. See U.S. CONST. amend. XXI, § 2 ("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."); supra note 1 (listing cases dealing with the interaction between the Commerce Clause and Section 2 of the Twenty-first Amendment).


4. See E-Commerce: The Case of Online Wine Sales and Direct Shipment, Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the H. Comm. on Energy and Commerce, 108th Cong. 27 (2003) (prepared statement of David P. Sloane, President, WineAmerica) (stating that between 1975 and 2002, the number of wineries in the United States increased from approximately 600 to over 3,000, and noting that wineries now
Annual wine sales in the United States now total approximately $18 billion. Similarly, wine consumption in the United States increased from 113 million cases in 1970 to 250 million cases by 2002, and some predict that the United States "will almost certainly become the largest [wine consuming nation] by the end of this decade." Since the end of Prohibition, most states have regulated the alcohol industry through the use of a three-tier distribution system. This system typically permits manufacturers (tier one) to sell only to licensed wholesalers (tier two), who in turn can only sell to licensed retailers (tier three). Moreover, states generally prohibit "investment in more than one tier of the distribution system" by any one individual or corporation. These "tied house" restrictions prevent manufacturers from distributing their products at retail or wholesale.
The original goal of this structured system was to "prevent organized crime—which had run illegal liquor empires during Prohibition—from dominating the legalized liquor industry." Additional justifications for the three-tier system included "ensuring orderly markets" and "facilitating state collection of tax revenues." 

As the American wine industry began to grow, however, states also began granting in-state wineries preferences under the three-tier system to encourage increased industry growth, employment, and tax revenue. Many states began permitting direct shipment to private customers by in-state wineries, while preventing out-of-state wineries from doing the same. Wholesalers largely opposed these direct shipment laws and viewed them as a threat to their industry. In contrast, private consumers and out-of-state wineries, which were forbidden from transacting business directly with one another, argued that restrictions on an out-of-state winery’s ability to sell directly to in-state consumers violated the dormant Commerce Clause.

In Granholm v. Heald, the Supreme Court concluded that states were free to regulate the direct shipment of wine as long as they treated in-state and

11. Douglass, supra note 9, at 1621.
13. See, e.g., R.I. GEN. LAWS § 3-6-1.1(a) (1998) (noting that a "farmer-winery" license, which grants license-holders privileges not available to out-of-state wineries, was established "[f]or the purpose of encouraging the development of domestic vineyards"); I.A. REV. STAT. ANN. § 26:322(b) (2001) (recognizing "the vital contribution of the tourist industry to the economy of this state" and expressing the intent to "enhance such industry by encouraging the planting and development of native vineyards, the construction of native wineries, and the production and sale of native wines so that tourists traveling through Louisiana may visit vineyards, wineries, and wine cellars, and purchase Louisiana domestic wines").
14. See, e.g., Bainbridge v. Turner, 311 F.3d 1104, 1106 (11th Cir. 2002) (addressing whether "the State of Florida may prohibit out-of-state wineries from shipping their products directly to Florida consumers while permitting in-state wineries to do so").
15. See Greenhouse, supra note 3, at A22 (mentioning that wholesalers oppose direct shipment laws because they allow wineries to “avoid sharing their profits” with them).
16. See id. (reporting a Virginia winery’s challenge to New York’s direct shipment law).
17. See Granholm v. Heald, 544 U.S. 460, 466 (2005) (holding unconstitutional New York and Michigan laws that discriminated against interstate commerce). In Granholm, the Supreme Court considered whether state laws prohibiting out-of-state wineries from shipping their products directly to in-state consumers or making direct sales economically impractical violated the Commerce Clause. Id. at 465–66. Additionally, the Court examined whether any possible Commerce Clause violation was authorized by the Twenty-first Amendment. Id. at 484–89. The Court began by explaining that state laws providing preferential treatment to in-state products at the expense of out-of-state producers nearly always violate the Commerce
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out-of-state wineries equally. Despite Granholm, however, the Court did not entirely resolve the question of how much power the Twenty-first Amendment gives states to regulate alcohol within their borders. This Note focuses on the implications of Granholm for state regulatory systems currently under attack and for other state systems that are vulnerable to attack. This Note argues that despite language in Granholm suggesting that state alcohol regulations are subject to the same Commerce Clause limitations as state laws regulating other articles of commerce, the Twenty-first Amendment still insulates some nondiscriminatory state laws from Commerce Clause invalidation.

Part II briefly discusses the history of state alcohol regulation and examines the Supreme Court's decisions prior to Granholm. Part III examines how Granholm conflicts with the Court's previous decisions involving state power under the Commerce Clause. Id. at 472. The Court proceeded to note that the discriminatory nature and effect of the Michigan and New York laws were clear. Id. at 476. The Court next analyzed whether or not this form of discrimination—ordinarily a violation of the Commerce Clause—was permitted by the Twenty-first Amendment. Id. at 476–98. While noting that certain Supreme Court cases had reached contrary results, the Court emphasized more recent decisions, stating that "state laws that violate other provisions of the Constitution are not saved by the Twenty-first Amendment." Id. at 486. Additionally, the Court stated that the Twenty-first Amendment "does not abrogate Congress' Commerce Clause powers with regard to liquor" and "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause." Id. at 487. Consequently, the Court concluded that such "discrimination is contrary to the Commerce Clause and is not saved by the Twenty-first Amendment." Id. at 489. After reaching this conclusion, the Court proceeded to evaluate whether the discriminatory laws at issue nonetheless satisfied traditional Commerce Clause scrutiny. Id. at 489–93. The Court dismissed the arguments made in support of the laws, concluding that there was a lack of evidence that the laws were necessary to advance legitimate local purposes, and even if they were necessary, the local purposes could be equally advanced by nondiscriminatory laws. Id. As a result, the Court concluded that the laws violated the Commerce Clause and were unconstitutional. Id. at 493.

18. See id. at 493 (concluding that a state may not, under the Twenty-first Amendment, "ban, or severely limit, the direct shipment of out-of-state wine [to private consumers] while simultaneously authorizing direct shipment by in-state producers").

19. See, e.g., Complaint at 1–2, Costco Wholesale Corp. v. Hoen, 407 F. Supp. 2d 1247 (W.D. Wa. 2005) (No. CV04-0360) [hereinafter Costco Complaint] (filing suit to force a change in Washington state law in order to permit "warehouse clubs and retailers . . . to buy directly from all wineries and brewers where that makes economic sense, and to supply their stores through their own distribution systems"). On December 21, 2005, the United States District Court for the Western District of Washington ruled in favor of Costco's motion for partial summary judgment, concluding that "[i]n light of the Supreme Court's decision in Granholm, Washington may not permit in-state beer and wine producers to distribute their products directly to retailers while withholding that privilege from out-of-state producers." Costco Wholesale Corp. v. Hoen, 407 F. Supp. 2d 1247, 1256 (W.D. Wa. 2005).

20. See infra Part III (arguing that the Twenty-first Amendment can still insulate nondiscriminatory state laws from Commerce Clause invalidation if they have a strong connection with a core concern of the Twenty-first Amendment).
the Twenty-first Amendment and argues that a literal interpretation of the language in *Granholm* will strip much of the meaning from the Twenty-first Amendment. Consequently, this Note suggests that the language of *Granholm* must be read in light of the Court’s previous decisions and with awareness of the implications of a literal following of *Granholm*. Part IV determines whether current discriminatory state alcohol regulations can survive this interpretation of *Granholm*. Finally, Part V examines *Granholm*’s impact on specific state regulatory schemes currently existing throughout the United States that are vulnerable to attack. Part V argues that, although the Twenty-first Amendment still potentially insulates nondiscriminatory state laws from Commerce Clause invalidation, these protections are not universally available. This Note concludes that while *Granholm* further erodes the states’ ability to regulate alcohol independent of other constitutional constraints, states still retain a small degree of power to use nondiscriminatory regulations that otherwise violate the Commerce Clause.

II. Background on State Regulation of Alcohol

Supreme Court decisions have firmly established that, in the absence of federal legislation, the "negative" or "dormant" Commerce Clause limits a state’s ability to regulate interstate commerce. The Court has stated that a lack of federal

21. See infra Part III (suggesting that a literal interpretation of *Granholm* would strip Section 2 of the Twenty-first Amendment of its significance).

22. See infra Part VI (concluding that the Twenty-first Amendment can insulate nondiscriminatory state laws from Commerce Clause invalidation if their purpose and effect are closely related to an original Twenty-first Amendment core concern).


legislation is the "equivalent to a declaration that inter-State commerce shall be free and untrammelled."25 As the Court explained:

This mandate "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."26

This principle does not entirely forbid states from regulating interstate commerce; however, they may do so only within certain limits.27

Although dormant Commerce Clause jurisprudence was firmly established, prior to Granholm, some debate remained as to whether the Twenty-first Amendment could insulate state laws from Commerce Clause invalidation.28 Facially, Section 2 of the Twenty-first Amendment appears to provide states with sweeping power to regulate alcohol in a variety of contexts.29 Nevertheless, the Supreme Court’s view of state power under the Twenty-first

aspect of the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interest by burdening out-of-state competitors.); Raymond Motor Trans. Inc. v. Rice, 434 U.S. 429, 440 (1978) ("Long ago it was settled that even in the absence of a congressional exercise of this power, the Commerce Clause prevents the States from erecting barriers to the free flow of interstate commerce.").


27. See Maine v. Taylor, 477 U.S. 131, 138 (1986) (explaining the limits the Commerce Clause imposes on a state’s ability to regulate interstate commerce); Kassel v. Consolidated Freightways Corp., 450 U.S. 662, 669 (1981) (stating that “[t]he Commerce Clause does not, of course, invalidate all state restrictions on commerce”); S. Pac. Co. v. Arizona, 325 U.S. 761, 766 (1945) (“Although the commerce clause conferred on the national government power to regulate commerce, its possession of the power does not exclude all state power of regulation.”). As the Taylor Court explained:

[S]tatutes ... [that burden interstate commerce only incidentally] violate the Commerce Clause only if the burdens they impose on interstate trade are "clearly excessive in relation to the putative local benefits," [while] statutes ... [that affirmatively discriminate against interstate commerce require] the State to demonstrate both that the statute "serves a legitimate local purpose," and that this purpose could not be served as well by available nondiscriminatory means.

Taylor, 477 U.S. at 138 (quoting Pike v. Bruce Church, Inc. 397 U.S. 137, 142 (1970)).

28. See Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 275 (1984) (suggesting that if the state law in question had a sufficiently close connection with a core concern of the Twenty-first Amendment, the law would be valid despite any dormant Commerce Clause violations).

29. See U.S. Const. amend. XXI, § 2 (“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.”).
Amendment has evolved considerably since the Amendment was ratified in 1933.  

A. Early Twenty-First Amendment Interpretation

In the years immediately following ratification, the Court interpreted the Twenty-first Amendment as authorizing states to regulate alcohol in any manner they desired. State Board of Equalization of California v. Young's Market Co. and Indianapolis Brewing Co. v. Liquor Control Commission of State of Michigan most clearly demonstrated this interpretation. In both cases, the Court concluded that the Twenty-first Amendment granted states broad power to regulate alcohol, including the power to discriminate against out-of-state alcohol. Absent the Twenty-

30. See Veatch, supra note 23, at 122 (noting that "[a]pproximately ten years after the Supreme Court's decision in Young's Market Co., the Supreme Court began to move away from interpreting the Twenty-first Amendment as giving total control of alcohol importation and regulation to the states").

31. See Jason E. Prince, Note, New Wine in Old Wineskins: Analyzing State Direct-Shipment Laws in the Context of Federalism, the Dormant Commerce Clause, and the Twenty-First Amendment, 79 NOTRE DAME L. REV. 1563, 1581 (2004) (stating that the Supreme Court originally interpreted the Twenty-first Amendment as "grant[ing] states sweeping powers over alcohol importations").

32. See State Bd. of Equalization of Cal. v. Young's Market Co., 299 U.S. 59, 62 (1936) (upholding a discriminatory California State law as a valid exercise of state power under the Twenty-first Amendment). In Young's Market, the Supreme Court considered a challenge to a California State law that required all importers to pay a $500 fee "for the privilege of importing beer to any place within its borders." Id. at 60. In rejecting the plaintiff's Commerce Clause argument, the Court stated that an interpretation of the Twenty-first Amendment that would require states to "let imported liquors compete with the domestic on equal terms" would "involve not a construction of the amendment, but a rewriting of it." Id. at 62. Consequently, the Court upheld the state law as authorized by the Twenty-first Amendment. Id. at 63–64.

33. See Indianapolis Brewing Co. v. Liquor Control Comm'n, 305 U.S. 391, 394 (1939) (concluding that the right of a state to regulate alcohol under the Twenty-first Amendment was not limited by the Commerce Clause). In Indianapolis Brewing, the Court considered whether a Michigan law forbidding the importation of beer manufactured in states discriminating against beer made in Michigan violated the Commerce Clause. Id. at 393. The Court dismissed the plaintiff's Commerce Clause claim, concluding that "the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause." Id. at 394.

34. See id. at 394 (upholding a Michigan law that prohibited the sale of beer manufactured in states that discriminated against beer produced in Michigan); Young's Market, 299 U.S. at 64 (upholding a $500 license required in order to lawfully import beer into the state).

35. See Indianapolis Brewing, 305 U.S. at 394 (explaining that states have broad power to regulate alcohol under the Twenty-first Amendment); Young's Market, 299 U.S. at 62 (rejecting the plaintiff's request to limit state power under the Twenty-first Amendment).
first Amendment, this type of discriminatory regulation would have clearly violated the dormant Commerce Clause.\textsuperscript{36}

\textit{B. Contemporary Twenty-First Amendment Interpretation}

The Supreme Court sustained this reading of the Twenty-first Amendment for several decades, but ultimately began to take a more restrictive approach to Twenty-first Amendment state power.\textsuperscript{37} The Court's decision in \textit{Hostetter v. Idlewild Bon Voyage Liquor Corp.}\textsuperscript{38} clearly indicates this change.\textsuperscript{39} A series of cases over the next twenty-five years were consistent with the Court's interpretation of the Twenty-first Amendment in \textit{Hostetter}.\textsuperscript{40} A balancing test ultimately emerged, whereby courts to

\textsuperscript{36} See \textit{Indianapolis Brewing}, 305 U.S. at 394 (concluding that the Commerce Clause did not prevent states from discriminating between imported and domestic liquor); \textit{Young's Market}, 299 U.S. at 62 (stating that the Twenty-first Amendment authorized states to treat imported and domestically produced alcohol on unequal terms).

\textsuperscript{37} See \textit{Gerald B. McNamara, Free the Grapes: The Commerce Clause Versus the Twenty-First Amendment With Regard to Interstate Shipment of Wine in America}, 43 DUQ. L. REV. 113, 135 (2004) (stating that "[t]he sweeping proposition that the Commerce Clause did not limit state regulation of alcohol stood for a quarter of a century").

\textsuperscript{38} See \textit{Hostetter v. Idlewild Bon Voyage Liquor Corp.}, 377 U.S. 324, 334 (1964) (striking down as unconstitutional a New York law that conflicted with Congressional power under the Commerce Clause). In \textit{Hostetter}, the Court examined whether a New York state law preventing the importation and transportation of alcoholic beverages through the state to John F. Kennedy Airport for ultimate delivery to departing airline passengers upon arrival in foreign countries violated the Commerce Clause. \textit{Id.} at 333–34. The Court explained that the Twenty-first Amendment did not rob Congress of complete ability to regulate alcohol under the Commerce Clause. \textit{Id.} at 332. After mentioning that the ultimate delivery and use of the alcohol in question was intended to be in a foreign country, the Court concluded that the State law conflicted with Congress' ability to "regulate commerce with foreign nations" and was not saved by the Twenty-first Amendment. \textit{Id.} at 334.

\textsuperscript{39} See \textit{id.} at 334 (striking down a New York state law regulating the import and transportation (but not consumption) of alcohol within the state's borders).

\textsuperscript{40} See Healy v. Beer Inst., 491 U.S. 324, 342 (1989) (striking down a Connecticut state law and affirming that "the Twenty-first Amendment does not immunize state laws from invalidation under the Commerce Clause"); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 584 (1986) (concluding that "It is well settled that the Twenty-first Amendment did not entirely remove state regulation of alcohol from the reach of the Commerce Clause"); Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 275 (1984) (stating that the Twenty-first Amendment "did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause"); Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 713 (1984) (declaring that "the Federal Government plainly retains authority under the Commerce Clause to regulate even interstate commerce in liquor"); Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 110 (1980) (mentioning, in an antitrust challenge to a California alcohol pricing law, that "[a]lthough States retain substantial discretion to establish other... regulations, those controls may be subject to the federal commerce power in appropriate situations").
determine "whether the principles underlying the Twenty-first Amendment [were] sufficiently implicated by the [laws being challenged] to outweigh the Commerce Clause principles that would otherwise be offended."41 Before Granholm, courts commonly referred to this as the "core concerns" test.42

Although there is considerable confusion as to what the original purpose of the Twenty-first Amendment was, the Court has provided some level of certainty to the core concerns underlying the Twenty-first Amendment's purpose.43 The Court has previously mentioned collecting taxes and ensuring orderly market conditions as core concerns behind the Amendment.44 The Court has also clearly stated that economic protectionism was not a core principle underlying the Twenty-first Amendment.45

III. Where Does Granholm Take the Court's Twenty-First Amendment Jurisprudence?

The Supreme Court most recently entered the conflict between the Twenty-first Amendment and the Commerce Clause in Granholm v. Heald.46 Instead of utilizing

41. Bacchus, 468 U.S. at 275. In Bacchus, the Court concluded that:

The central purpose of the provision was not to empower States to favor local liquor industries by erecting barriers to competition. It is also beyond doubt that the Commerce Clause itself furthers strong federal interests in preventing economic Balkanization. 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. at 276 (citations omitted).

42. See, e.g., Heald v. Engler, 342 F.3d 517, 524 (6th Cir. 2003) (mentioning that a state law must advance the "core concerns" of the Twenty-first Amendment); Dickerson v. Bailey, 336 F.3d 388, 404 (5th Cir. 2003) (stating that the analysis used in Bacchus "is commonly referred to as the 'core concerns' test"); Bainbridge v. Turner, 311 F.3d 1104, 1112 (11th Cir. 2002) ("All components of the dormant Commerce Clause doctrine remain in force unless a 'core concern' of the Twenty-first Amendment is implicated.").

43. See Granholm v. Heald, 544 U.S. 460, 484–85 (2005) ("The Amendment did not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods . . . ."); North Dakota v. United States, 495 U.S. 423, 432 (1990) (stating that core concerns of the Twenty-first Amendment included "promoting temperance, ensuring orderly market conditions, and raising revenue"); Bacchus Imports Ltd. v. Dias, 468 U.S. 263, 276 (1984) (explaining that "[t]he central purpose of the provision was not to empower States to favor local liquor industries by erecting barriers to competition"); Douglass, supra note 9, at 1631 (asserting that "[t]he legislative history of the Twenty-first Amendment supports three distinct interpretations of section two").

44. See North Dakota, 495 U.S. at 432 (stating that ensuring orderly market conditions and raising revenue were core concerns behind the Twenty-first Amendment).

45. See Bacchus, 468 U.S. at 276 (stating that economic protectionism was not a core concern behind the Twenty-first Amendment).

46. See Granholm, 544 U.S. at 489–93 (concluding that discriminatory laws that
the core concerns test it had previously adopted, however, the Court explained that its modern Twenty-first Amendment cases have established three principles: (1) "state laws that violate other provisions of the Constitution are not saved by the Twenty-first Amendment"; (2) Section 2 "does not abrogate Congress’ Commerce Clause powers with regard to liquor"; and (3) "state regulation of alcohol is limited by the nondiscriminatory principle of the Commerce Clause." The Court then analyzed whether the discriminatory laws in question violated the Commerce Clause, but it did not investigate any connection between the laws and the core concerns of the Twenty-first Amendment. This departure from the Court’s previous approach left unresolved whether the core concerns test is still a viable approach for lower courts to take in resolving conflicts between the Twenty-first Amendment and the Commerce Clause.

In theory, the core concerns test left open the possibility that a discriminatory state law that otherwise violated the Commerce Clause could be upheld. If a law implicated the principles underlying the Twenty-first Amendment sufficiently to outweigh the Commerce Clause concerns for an unburdened national economy, the law would not be subject to invalidation on Commerce Clause grounds. The Court’s language in Granholm, however, is not consistent with that approach. Instead, Granholm forecloses the possibility that the Twenty-first Amendment can justify discriminatory state laws that otherwise violate the Commerce Clause. Consequently, Granholm dictates that discriminatory state laws regulating alcohol must survive the same otherwise violate the Commerce Clause were not authorized by the Twenty-first Amendment, and that New York and Michigan had not shown that their laws advanced a legitimate local purpose by the least discriminatory means possible).

47. Id. at 486–87.
48. See id. at 489 (explaining that the Court had to determine if the laws survived traditional dormant Commerce Clause scrutiny).
49. See Stuart Banner, Granholm v. Heald: A Case of Wine and a Prohibition Hangover, 2005 CATO SUP. CT. REV. 263, 286 (stating that "[i]n resolving one question [Granholm] opened up others that may prove to be even more important").
50. See Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 275 (1984) (suggesting that if the state law in question had a sufficiently close connection with a core concern of the Twenty-first Amendment, the law would be valid despite any conflicts with the dormant Commerce Clause).
51. Id.
52. Compare id. (suggesting that state laws that otherwise violate the Commerce Clause would nevertheless be valid if they "sufficiently implicate[] the core concerns underlying the Twenty-first Amendment") with Granholm v. Heald, 544 U.S. 460, 486 (2005) (stating that "state laws that violate other provisions of the Constitution are not saved by the Twenty-first Amendment").
53. See Granholm, 544 U.S. at 486 (2005) (stating that the Twenty-first Amendment does not authorize laws that otherwise violate the Constitution).
Commerce Clause scrutiny as discriminatory state laws regulating other articles of commerce.  

A. Complete Elimination of the Core Concerns Test

Based on the conflict between Granholm's holding and prior precedent, two conclusions appear possible. First, one might conclude that Granholm completely eliminated the core concerns test and that the Twenty-first Amendment no longer allows states to regulate alcohol beyond their ability to regulate other items of interstate commerce. This interpretation extends Granholm's conclusion that discriminatory state laws violating the Commerce Clause are not authorized by the Twenty-first Amendment to nondiscriminatory state laws. Based on this understanding of Granholm, courts would not analyze the connection between state laws regulating alcohol and the core concerns behind the Twenty-first Amendment. Instead, courts would only evaluate them under existing dormant Commerce Clause principles.

This conclusion is doctrinally problematic in two ways. First, it would strip Section 2 of the Twenty-first Amendment of much of its meaning. As mentioned in Part II, states may regulate interstate commerce subject to dormant Commerce Clause limitations. Complete elimination of the core concerns test, however, implies that the Twenty-first Amendment does not provide states with the ability to regulate alcohol beyond their ability to regulate other articles of commerce. Consequently, the Twenty-first Amendment's

54. Id.
55. See infra Part III.A–B (discussing possible conclusions that could be drawn from the conflict between the core concerns test and the language in Granholm).
56. See Granholm, 544 U.S. at 487 (stating that Section 2 of the Twenty-first Amendment "does not abrogate Congress' Commerce Clause powers with regard to liquor").
57. See id. (stating that discriminatory state laws are "limited by the nondiscrimination principle of the Commerce Clause").
58. See id. at 489 (mentioning that discriminatory state laws might be valid if they pass traditional Commerce Clause scrutiny).
59. Id.
60. See Prince, supra note 31, at 1609–10 (suggesting that reducing states' ability to regulate alcohol free from dormant Commerce Clause restraints erodes the significance of Section 2 of the Twenty-first Amendment).
61. See supra notes 24–27 and accompanying text (discussing the ability of states to regulate interstate commerce).
62. See Granholm v. Heald, 544 U.S. 460, 487 (2005) (suggesting that a state's ability to regulate alcohol under the Twenty-first Amendment is equivalent to their ability to regulate other articles of commerce).
only remaining function would be to end Prohibition.\textsuperscript{63} That the Court would have interpreted Section 2 as to make it meaningless seems highly unlikely.\textsuperscript{64}

The second problem with this interpretation of \textit{Granholm} is that it conflicts with the understanding that promoting temperance was a primary goal of the Twenty-first Amendment.\textsuperscript{65} For example, if a state completely forbids the sale, possession, and consumption of all alcohol by private individuals within its borders for the purpose of promoting temperance, absent the core concerns test, a court would analyze this law under traditional Commerce Clause analysis.\textsuperscript{66} Presumably, a court would not apply a strict scrutiny standard given the lack of discrimination in favor of in-state interests.\textsuperscript{67} Instead, a court would determine whether the burdens imposed on interstate commerce were "clearly excessive in relation" to the local benefits derived from the law.\textsuperscript{68} If a court concluded that the burdens on interstate commerce

\textsuperscript{63} See Lisa Lucas, \textit{A New Approach to the Wine Wars: Reconciling the Twenty-First Amendment with the Commerce Clause}, 52 UCLA L. REV. 899, 901 (2005) (stating that the Twenty-first Amendment's two primary purposes were to end Prohibition and give states control over the transportation or importation of alcohol).

\textsuperscript{64} See TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001) (stating that "[i]t is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant'" (quoting Duncan v. Walker, 523 U.S. 167, 174 (2001))).

\textsuperscript{65} See North Dakota v. United States, 495 U.S. 423, 432 (1990) (mentioning that North Dakota's three-tier system, aimed in part at promoting temperance, was "unquestionably legitimate"); Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 276 (1984) (stating that promoting temperance was an original goal of the Twenty-first Amendment); Quality Brand, Inc. v. Barry, 715 F. Supp. 1138, 1142 (D.D.C. 1989) (noting that the Twenty-first Amendment was "designed . . . to allow States to legislate against the evils of alcohol"); aff'd 901 F.2d 1130 (D.C. Cir. 1990); Loretto Winery, Ltd. v. Gazzara, 601 F. Supp. 850, 861 (S.D.N.Y. 1985) ("Only those state restrictions which directly promote temperance may now be said to be permissible under Section 2 of the Twenty-first Amendment.").

\textsuperscript{66} Most states permit local municipalities to decide whether to permit the sale of alcohol within their borders. See, e.g., N.C. GEN STAT. §§ 18B-600 to 18B-605 (2005) (permitting local elections whereby voters may choose to forbid the issuance of state permits allowing the sale of alcoholic beverages).

\textsuperscript{67} See Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978) (stating that state laws that advance legislative objectives in a nondiscriminatory manner are subject to greater deference than laws whose primary purpose is economic protectionism).

\textsuperscript{68} See Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) ("Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.").
significantly outweighed the local benefits, the law would be invalidated. This result, however, would conflict with the widespread understanding that the promotion of temperance was one of the original goals of the Twenty-first Amendment. Nevertheless, based on this interpretation of *Granholm*, courts would require discriminatory and nondiscriminatory state laws regulating alcohol to pass traditional Commerce Clause scrutiny in order to be valid.

**B. Partial Elimination of the Core Concerns Test**

The alternative, and more likely, result of the conflict between the Court's conclusion in *Granholm* and the core concerns test is that the Twenty-first Amendment now only insulates certain nondiscriminatory state laws from dormant Commerce Clause scrutiny. The core concerns test cannot, however, insulate discriminatory laws from Commerce Clause invalidation. This interpretation is a compromise between applying the core concerns test to all state laws regulating alcohol, and the Court's conclusion that the Twenty-first Amendment cannot protect state laws that would otherwise violate the Commerce Clause.

Returning to the previous example, if a state outlawed the sale, possession, and consumption of all alcoholic beverages by private individuals for the purpose of promoting temperance, first, a court would likely conclude that, under established Commerce Clause principles, the law was nondiscriminatory. Next, a court would analyze whether the burdens imposed

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69. *Id.*

70. *See supra* note 65 (listing cases stating that the promotion of temperance was an original goal of the Twenty-first Amendment).

71. *See Granholm*, 544 U.S. at 487 ("[S]tate regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause.").

72. All state laws imposing burdens on interstate commerce are subject to possible invalidation on dormant Commerce Clause grounds. *See Pike*, 397 U.S. at 142 (explaining "the criteria for determining the validity of state statutes affecting interstate commerce"). In evaluating the constitutionality of nondiscriminatory state laws, the Court has explained that such laws will be upheld unless the burdens they impose on interstate commerce are "clearly excessive in relation to the putative local benefits" they create. *Id.* This Note argues that *Granholm* should be interpreted as eliminating the possibility that nondiscriminatory state laws regulating alcohol and closely advancing a core concern of the Twenty-first Amendment can be invalidated on dormant Commerce Clause grounds.

73. *See Granholm*, 544 U.S. at 487 (stating that the Twenty-first Amendment does not protect discriminatory state laws from invalidation).

74. *Id.*

75. *See Pike v. Bruce Church, Inc.*, 397 U.S. 137, 144–46 (1970) (analyzing an Arizona law that did not discriminate in favor of in-state interests under the established standard for
by such a law were clearly excessive in relation to the local benefits.\textsuperscript{76} If a court concluded that the burdens did significantly exceed the local benefits, the court would not invalidate the law, but would instead examine whether it sufficiently implicated a core concern underlying the Twenty-first Amendment to outweigh any Commerce Clause concerns.\textsuperscript{77} In this situation, a court would most likely conclude that the core concerns test protects the law from Commerce Clause invalidation because of its strong connection with the core concern of promoting temperance.\textsuperscript{78}

If, however, a state passed a law outlawing the possession of alcohol by all interstate shippers for purposes of transport through the state, in addition to the sale, possession, and consumption of alcohol by private individuals, a court would likely reach a different result.\textsuperscript{50} Again, the law would not be subject to strict scrutiny review because it regulates in-state and out-of-state interests equally.\textsuperscript{80} In dealing with a challenge to the prohibition on interstate transport of alcohol, a court would first look at whether the law survives traditional Commerce Clause scrutiny.\textsuperscript{81} In this example, the local benefits would be minimal—possibly limited to eliminating the risk that alcohol from a truck could be stolen and illegally consumed by in-state residents. The burdens on interstate commerce, in contrast, would be significant.\textsuperscript{82}

\textsuperscript{76} See id. at 142 (stating that nondiscriminatory state laws that affect interstate commerce will be upheld unless the burdens they impose are "clearly excessive in relation to" the local benefits).


\textsuperscript{78} See id. at 276 (listing the promotion of temperance as an original purpose of the Twenty-first Amendment).


\textsuperscript{80} See Pike, 397 U.S. at 144–46 (analyzing a nondiscriminatory Arizona law for compliance with dormant Commerce Clause principles under a lesser standard of scrutiny).

\textsuperscript{81} See Bacchus, 468 U.S. at 268–77 (applying dormant Commerce Clause review before employing the core concerns test).

\textsuperscript{82} Such a law would require any truck transporting alcohol to travel around the state. The Court has struck down laws with a similar effect on interstate commerce. See, e.g., Kassel v. Consol. Freightways Corp., 450 U.S. 662, 674 (1981) (striking down an Iowa law prohibiting the use of truck and trailer combinations sixty-five feet in length after noting that "[t]rucking companies that wish to continue to use 65-foot doubles must route them around Iowa or detach the trailers of the doubles and ship them through separately"); Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520, 529–30 (1959) ("A State which insists on a design out of line with the requirements of almost all the other States may sometimes place a great burden of delay and inconvenience on those interstate motor carriers entering or crossing its territory."); S. Pac. Co. v. Arizona, 325 U.S. 761, 774 (1945) (striking down a law that resulted in "freight trains being broken up and reformed at the California border and . . . as far east as El Paso, Texas").
Consequently, this law would likely not pass traditional Commerce Clause scrutiny. But because of the nondiscriminatory nature of the law, a court would still have to evaluate its connection with the core concerns behind the Twenty-first Amendment. Unlike the previous example, where a state has a strong interest in promoting temperance, the state’s interest in preventing alcohol from passing through the state for delivery elsewhere likely does not have a strong enough connection with the Twenty-first Amendment’s core concerns to outweigh the Commerce Clause interest in a national, unburdened economy. As a result, the Twenty-first Amendment would not save the law from invalidation on Commerce Clause grounds.

Based on the above analysis, two conclusions may be reasonably drawn from *Granholm*. First, the Twenty-first Amendment can insulate a nondiscriminatory state law from invalidation on Commerce Clause grounds if its connection with the core concerns of the Twenty-first Amendment outweighs the Commerce Clause interest in a national, unified economy. Nondiscriminatory state laws that do not advance a Twenty-first Amendment core concern are not protected by the Twenty-first Amendment from dormant Commerce Clause invalidation. Second, the Twenty-first Amendment does not authorize states to use discriminatory regulations that would otherwise violate the Commerce Clause. This Note will proceed under the assumption that challenges to current state laws governing alcohol must be evaluated under this framework.

### IV. Can Direct Shipment to Retailers Be Differentiated from Direct Shipment to Consumers?

Although the Court’s decision in *Granholm* resolved the dispute over direct shipment of wine to private consumers, it did not address whether states may discriminate against out-of-state wineries with respect to direct shipment to consumers.

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84. See *Hostetter*, 377 U.S. at 333–34 (striking down a New York law prohibiting the transportation of alcohol through the state for ultimate delivery in foreign countries and explaining that the law was not aimed at promoting in-state temperance).
85. See *Bacchus*, 468 U.S. at 275 (suggesting that if the state law in question had a sufficiently close connection with a core concern of the Twenty-first Amendment, the law would be valid despite any conflicts with the Commerce Clause).
86. Id.
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retailers. 88 Similar to the direct shipment laws challenged in Granholm, many states require out-of-state wineries to sell their products to in-state wholesalers, while in-state producers are free to bypass the wholesaler’s markup and sell their products directly to retailers. 89 In some states, out-of-state products passing through the three-tier system face statutorily mandated price markups, further enhancing the benefits that in-state wineries receive from shipping directly to consumers. 90

Discriminatory laws prevent large in-state retailers from obtaining bulk discounts directly from out-of-state wineries. 91 Mandatory markup laws also prohibit large retailers from negotiating bulk discounts with wholesalers. 92 Without these limitations, large retailers argue that they could provide lower prices to consumers by purchasing out-of-state products directly from the producer at a discount, thereby avoiding the wholesaler’s markup. 93

Arkansas’ direct shipment laws are representative of this type of discrimination. 94 Arkansas permits in-state wineries to sell directly to retail

88. See id. at 471 (stating that the issue in the case involved direct shipment of alcohol to consumers). For purposes of this Note, the term “retailers” will refer both to locations selling wine for on-premises consumption such as bars and restaurants, as well as locations selling wine for off-premises consumption such as grocery stores and specialty wine shops.

89. See, e.g., OKLA. STAT. ANN. tit. 37, § 521(C) (2006) (“A winemaker license shall authorize the holder thereof . . . to sell wine in this state to licensed wholesalers and manufacturers, provided, an Oklahoma winemaker may sell and ship wine produced at a winery in this state directly to retail package store and restaurants in this state . . . .”).

90. See, e.g., WASH. REV. CODE ANN. § 66.28.180(3)(b) (2005) (requiring wineries to sell their products to wholesalers at a price not less than “acquisition/production cost plus ten percent”); id. § 66.28.180(2)(d) (mandating that “[n]o price may be posted [by a wholesaler, importer, or domestic winery] that is below acquisition cost plus ten percent of acquisition cost”). In April 2006, the United States District Court for the Western District of Washington concluded that this aspect of Washington law was preempted by the federal Sherman Act and was not protected by the Twenty-first Amendment. See Costco Wholesale Corp. v. Hoen, No. C04-360P, 2006 WL 1075218, at *1 (W.D. Wash. Apr. 21, 2006).

91. See Costco Complaint, supra note 19, at 1–2 (arguing that Washington’s discriminatory system is inefficient and penalizes consumers by preventing Costco from negotiating discounts directly with wineries).

92. See, e.g., WASH. REV. CODE ANN. § 66.28.180(2)(d) (2005) (requiring wholesalers to mark their products up at least ten percent before selling them to retailers); see also supra note 90 (mentioning that in April 2006, the United States District Court for the Western District of Washington concluded that the federal Sherman Act preempted this law).

93. See Costco Complaint, supra note 19, at 1–2 (stating that “[w]arehouse clubs and retailers would lower their costs and thus offer better prices and selection to consumers if permitted to negotiate discounts based on their efficient buying and distribution practices and good credit, to buy directly from all wineries and brewers where that makes economic sense”).

94. See ARK. CODE ANN. §§ 3-2-403, 3-5-410 (1996) (requiring all non-native wine manufacturers to distribute their products through a licensed wholesaler, but permitting native wine manufacturers to sell their products at wholesale and retail).
license holders but requires that all other wineries sell their products to a licensed in-state wholesaler (thereby forbidding direct sales to retailers).

Arkansas also prohibits wineries from obtaining a wholesaler’s license in an attempt to evade this restriction. 95

Some states limit the discriminatory impact of their laws by restricting the ability of large in-state wineries to qualify for a self-distribution license. 97 These distinctions provide favorable treatment for small in-state wineries that may not be able to secure a wholesaler’s services due to their small size. 98 The Court has stated, however, that the degree of discrimination is irrelevant in analyzing whether a state law violates the Commerce Clause. 99 Consequently, state laws that permit only a small sub-category of in-state wineries to ship directly to retailers are still subject to the same Commerce Clause analysis as laws that allow all in-state wineries to ship their products directly to retailers. 100

In the wake of Granholm, opponents of discriminatory laws have challenged the constitutionality of these exceptions for in-state wineries, arguing that the Court’s decision in Granholm requires their invalidation. 101

95. See id. § 3-2-403 (requiring manufacturers other than licensed farm-wineries to sell to in-state wholesalers); id. § 3-5-410 ("The manufacturer [of native wine] may sell to ... either wholesale or retail dealers . . . .")

96. See id. § 3-4-605 (prohibiting licensed manufacturers from applying for wholesale licenses).

97. See, e.g., MONT. CODE ANN. § 16-3-411(2)(a) (2005) (permitting a table wine vintner that produces wine in Montana to sell directly to retailers only if they produce less than 25,000 gallons of wine per year).

98. See Angela Woodford, Could Williams’ Case Choke VA Wine Sales?, VA. WINE GAZETTE, Harvest 2005, at 3 (noting that "most small and mid-sized wineries do not produce enough wine to interest an outside distributor") (article on file with the Washington and Lee Law Review).

99. See Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 272 (1984) (rejecting the argument that discriminatory state laws are authorized when their aim is to assist new industries, noting that "we perceive no principle of Commerce Clause jurisprudence supporting a distinction between thriving and struggling enterprises").

100. Id.

Proponents of the laws contend that direct shipment between producers and retailers is sufficiently different from direct shipment between producers and consumers to distinguish Granholm.\(^{102}\) Based on the discriminatory nature of the laws in question and the Court's conclusion in Granholm, however, it is unlikely that these laws will survive judicial scrutiny.\(^{103}\)

There is little doubt that laws permitting in-state wineries to sell directly to in-state retailers, but preventing out-of-state wineries from making the same sales, are the types of discriminatory laws that the Court identified in Granholm.\(^{104}\) Similar to the laws at issue in Granholm, these laws discriminate against out-of-state wineries by denying them privileges available to in-state wineries.\(^{105}\) Moreover, in addition to their discriminatory impact on out-of-state wineries, some of these laws also express a discriminatory purpose.\(^{106}\) Based on this Note's conclusions regarding the extent of state power under the Twenty-first Amendment following Granholm, these discriminatory laws are valid only if they survive standard Commerce Clause scrutiny.\(^{107}\)
The Court has previously explained that state laws whose primary goal is economic protectionism face "a virtually per se rule of invalidity." Nevertheless, if a state can show that its law advances a legitimate state interest that could not be furthered by any less discriminatory means, a court will not invalidate the law. In Granholm, the Court rejected several arguments put forward by the states to justify their laws, including their assertions that the discriminatory laws furthered their ability to collect taxes, prevent underage drinking, ensure orderly market conditions, protect public health and safety, and ensure regulatory accountability. In doing so, the Court concluded that there was a lack of evidence that nondiscriminatory alternatives would not advance these interests as well as the existing discriminatory laws.

Similar reasoning in the context of direct shipment to retailers leads to the same conclusion. A court would likely not dispute that states have a legitimate interest in preventing underage drinking and ensuring orderly market conditions. Moreover, those in favor of restrictions on an out-of-state producer’s ability to sell directly to retailers correctly point out that permitting direct shipment to in-state retailers by in-state and out-of-state producers could result in "thousands of new out-of-state farm winery permit holders, with no practical way for the state's... excuse officers to verify their financial reporting or police their sales and deliveries to retailers." Nevertheless, this argument does not address how the current discriminatory laws are consistent with the Commerce Clause’s requirement that states advance their legitimate interest by


110. See Granholm, 544 U.S. at 489-93 (rejecting the argument that concerns over tax collection, preventing underage drinking, ensuring orderly market conditions, protecting public health and safety, and ensuring regulatory accountability justified discriminatory treatment of out-of-state wineries).
111. See id. (concluding that the Commerce Clause prevents states from enacting discriminatory regulations without a valid reason).
112. See North Dakota v. United States, 495 U.S. 423, 432 (1986) (stating that North Dakota’s three-tier system aimed at "promoting temperance, ensuring orderly market conditions, and raising revenue" was "unquestionably legitimate").
113. Wine and Spirits Brief, supra note 102, at 16 (arguing that invalidation of discriminatory direct shipment laws will impede a state’s ability to advance its legitimate interests).
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the least discriminatory means possible.\footnote{114 See \textit{Granholm} v. \textit{Heald}, 544 U.S. 460, 492 (2005) (dismissing arguments in favor of discriminatory direct shipment laws by stating that the state’s objectives could “also be achieved through the alternative of an evenhanded licensing requirement”).} Although permitting in-state and out-of-state wineries to sell directly to retailers would hinder a state’s ability to accomplish its goals, the alternative of eliminating exceptions for in-state wineries provides a less discriminatory means of advancing these goals.\footnote{115 See \textit{id.} at 490–91 (suggesting that prohibiting direct shipments by in-state wineries would more effectively advance the state’s interest in preventing underage drinking than allowing direct shipments by in-state wineries).} Consequently, it seems likely that a court would find that exceptions for in-state wineries represent a more discriminatory means of achieving the legitimate state purpose than the available alternative of a complete prohibition on direct sales to retailers.\footnote{116 \textit{Id.}}

Supporters of discriminatory laws also argue, however, that \textit{Granholm} does not require invalidation of these laws because of the historical difference between direct shipments to consumers and direct shipments to retailers.\footnote{117 \textit{Wine and Spirits Brief, supra note} 102, at 18 (arguing that the Court has historically distinguished between "producer-to-consumer direct shipments on the one hand, and wholesale and retail transactions on the other").} In two cases decided before the beginning of Prohibition in 1919, the Court concluded that the Wilson Act—passed to allow states to regulate imported liquor on the same terms that they regulated domestic liquor—only permitted states to prohibit direct shipments at the wholesale and retail levels but did not permit states to prohibit direct shipment of alcohol for personal use.\footnote{118 See \textit{Granholm}, 544 U.S. at 479 (stating that \textit{Vance} v. \textit{W.A. Vandercook}, 170 U.S. 438 (1898), and \textit{Rhodes} v. \textit{Iowa}, 170 U.S. 412 (1898), "made clear that the Wilson Act did not authorize states to prohibit direct shipments for personal use").} The Court’s distinction between direct shipments to consumers and direct shipments at the wholesale and retail levels ultimately led to the passage of the Webb-Kenyon Act in 1913, permitting states to regulate all forms of direct shipments of alcohol.\footnote{119 See \textit{id.} at 481 (explaining that Congress passed the Webb-Kenyon Act in order to permit states to "forbid shipments of alcohol to consumers for personal use").} Proponents of discriminatory direct shipment laws contend that this distinction indicates that direct shipments to consumers were not part of the three-tier system.\footnote{120 \textit{Wine and Spirits Brief, supra note} 102, at 18 (asserting that "shipments from out-of-state suppliers to consumers were historically treated as beyond the purview of a state’s regulatory power").} By implication, these supporters argue that shipments directly to retailers are part of the "unquestionably legitimate"\footnote{121 \textit{North Dakota} v. \textit{United States}, 495 U.S. 423, 432 (1990).} three-tier
system and are not bound by decisions such as *Granholm* striking down state regulations outside the three-tier system.\(^{122}\)

Despite the historical distinction between shipments from producers to consumers and shipments to retailers and wholesalers, the Court's language in *Granholm* is still likely to lead lower courts to invalidate current discriminatory laws.\(^{123}\) In reaching its ultimate conclusion, the Court emphasized that the three-tier system represents a valid exercise of state regulatory power, but it did not distinguish between state regulations that are part of the three-tier system and those that are not.\(^{124}\) Instead, the Court simply stated that "[s]tate policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent."\(^{125}\) Because the Court did not draw a distinction between state regulations that are part of the three-tier system and those that are not, it is unlikely that arguments based on such a distinction would succeed.\(^{126}\) Moreover, resolutions of this conflict in several states also strongly suggest that *Granholm*'s conclusions apply with equal force to laws that discriminate against direct shipments to retailers.\(^{127}\) As a result, laws permitting direct sales between in-state wineries and retailers, but denying out-of-state wineries that option, are unlikely to survive judicial scrutiny after *Granholm*.

**V. The Future of Other Forms of State Alcohol Regulation**

Although the controversy surrounding direct shipment laws has been the highest profile conflict regarding the extent of state power under the

\(^{122}\) See Wine and Spirits Brief, *supra* note 102, at 18 (arguing that "shipments from producers to consumers for personal use ... are uniquely outside the three-tier system").

\(^{123}\) See *Granholm v. Heald*, 544 U.S. 460, 489 (2005) (stating that, although the three-tier system is legitimate, state regulations are only protected by the Twenty-first Amendment when they treat in-state and out-of-state liquor equally).

\(^{124}\) Id.

\(^{125}\) Id.

\(^{126}\) Id.

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Twenty-first Amendment, other state alcohol regulations also warrant examination. State alcohol regulations come in a variety of forms and most states employ a combination of these laws. This multitude of state regulations creates significant burdens on the efficient sale and distribution of alcoholic beverages. While these laws are not currently under attack, advocates of increased competition in interstate wine sales argue that "[t]here remain some aspects of the state alcohol regulatory systems that . . . create unnecessary hurdles for those trying to sell wine in the states and, therefore, should be repealed." In light of the Court's decision in Granholm and the modifications it made to the standard by which courts analyze state alcohol regulations, an examination of the validity of these laws is appropriate. The limited scope of this Note, however, prevents examination of all varieties of state alcohol regulations. Instead, it will focus on state franchise laws, one of the most

128. See Banner, supra note 49, at 286 (stating that "Granholm is . . . unlikely to be the Supreme Court's last Twenty-first Amendment case" and that "[i]n resolving one question it opened up others that may prove to be even more important"). State regulations that burden interstate commerce and arguably violate the Commerce Clause come in many forms. For example, "primary source" laws require in-state wholesalers to purchase all out-of-state alcohol from the "primary source," which is typically the manufacturer of the product. See, e.g., FLA. STAT. § 564.045(2) (2003) (requiring all wine imported into the state to come from the primary American source of supply). Frequently, this limits the ability of a wholesaler to purchase alcohol at the best price from sources on the open market, such as out-of-state retailers, specialty collectors selling through wine auctions, or distributors in other markets. See Greg Lucas, Small Wine Merchants Uncork Anger: Plan to Restrict Imports Into State Would Ruin Them, They Say, S.F. CHRON. Apr. 16, 2002, at Al3 (stating that small importers in California were able to "purchase special vintages or hard-to-find labels on the open market and bring them into California" because the state did not have a primary source law).

129. See, e.g., WIS. STAT. § 125.69 (2001) ("No wholesaler may purchase intoxicating liquor for resale unless he or she purchases it either from the primary source of supply for the brand of intoxicating liquor sought to be sold or from a wholesaler within this state who holds a permit issued under this chapter."); DEL. CODE ANN. tit. 4, § 501(f) (requiring all imported alcohol to be physically stored in the importer's warehouse before it can be sold); ADMIN. RULES OF THE DEL. ALCOHOLIC BEVERAGE CONTROL COMM'R, Rule 46 (governing the relationship between manufacturers and distributors of alcohol), available at http://dabcte.state.de.us/dabcpublic/Rules_Laws/rules_laws.doc.

130. See JOHN A. HINMAN & ROBERT T. WRIGHT JR., FREE COMMERCE IN WINE: TRAPPED IN A TANGLED LEGAL WEB 3 (2000) (noting that "[t]he tangled restrictions that have built up since the 1933 repeal of Prohibition have evolved into substantial state-erected barriers to normal commerce") (on file with Washington and Lee Law Review).


132. See HINMAN & WRIGHT, supra note 130, at 4 (suggesting that state regulations that cannot be justified by "truly legitimate state interests" may be vulnerable to attack).
common examples of state regulations that arguably violate the Commerce Clause in light of *Granholm*.

### A. Franchise Laws

"Franchise laws" are one of the most common regulations states currently employ as part of the three-tier system. Franchise laws govern the relationship between alcohol producers and wholesalers, and generally prohibit termination of distribution contracts by either party unless certain conditions have been met. It can be extremely difficult to satisfy the conditions required to terminate a contract governed by franchise laws.

Franchise law advocates explain that these laws help maintain the overall stability of the three-tier system and promote "public health, safety and welfare." Additionally, supporters argue that franchise laws protect wholesalers, who are largely responsible for promoting the manufacturer's brand to retailers. Absent franchise laws, wholesalers

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133. See, e.g., N.J. STAT. ANN. § 56:10-5 (2001) ("It shall be a violation of this act for a franchisor to terminate, cancel or fail to renew a franchise without good cause."). But see W. VA. CODE ANN. § 60-8-30 (2002) ("It shall be illegal for any manufacturer to enter into any exclusive franchise agreement with any distributor whereby any such distributor is given the exclusive right within this State or in any given territory within this State to distribute the products or products of such manufacturer . . . .").

134. See, e.g., WIS. STAT. §§ 135.03-04 (2001) (providing that a manufacturer cannot terminate its relationship with a wholesaler unless the manufacturer makes a showing of "good cause").

135. In order to terminate a relationship with a wholesaler under Wisconsin law, a manufacturer bears the burden of showing a:

(a) Failure by a dealer to comply substantially with essential and reasonable requirements imposed upon the dealer by the grantor, or sought to be imposed by the grantor, which requirements are not discriminatory as compared with requirements imposed on other similarly situated dealers either by their terms or in the manner of their enforcement; or
(b) Bad faith by the dealer in carrying out the terms of the dealership.

*Id.* § 135.02(4). Even if the manufacturer is able to satisfy these requirements, the manufacturer is still not permitted to terminate the relationship if the wholesaler is able to remedy any deficiencies in their performance within sixty days of receiving notice from the manufacturer of their intent to end the relationship. *Id.* § 135.04; see also Sims Wholesale Co. v. Brown-Forman Corp., 468 S.E.2d 905, 910 (Va. 1996) (concluding that a winery's good faith exercise of business judgment did not constitute a valid reason for termination of distribution contracts protected by Virginia's franchise law).


137. See Keith Russell, *Retailers Navigate Complex Liquor Laws*, THE TENNESSEAN, July 28, 2002, at 1E (stating that "wholesalers have said the franchise laws are needed to keep a
claim that manufacturers would be free to terminate distribution agreements before the wholesaler has been able to recover its financial investment.\textsuperscript{138} Whether these laws impermissibly burden interstate commerce in violation of the dormant Commerce Clause or are a valid exercise of state power under the Twenty-first Amendment remains unresolved by the Court.\textsuperscript{139}

1. Discriminatory Franchise Laws

States that have created specific exceptions to their franchise laws for domestic manufacturers have a difficult task in proving that their laws do not violate the Commerce Clause.\textsuperscript{140} Under the framework established in Granholm, the Twenty-first Amendment has no impact on the validity of these laws.\textsuperscript{141} Instead, these kinds of discriminatory laws presumptively violate the dormant Commerce Clause unless they advance a legitimate state interest by the least discriminatory means possible.\textsuperscript{142}

The Washington State Supreme Court dealt with a challenge to a discriminatory franchise law in Mt. Hood Beverage Co. v. Constellation Brands, Inc.\textsuperscript{143} In Mt. Hood, the court concluded that the franchise law’s supplier from jumping to a competing distributor after its existing wholesaler has already worked to build up the supplier’s brand in the market”).

\textsuperscript{138} Id.

\textsuperscript{139} See Sims Wholesale, 468 S.E.2d at 906 (ruling on whether a wholesaler had violated the state franchise law, but not addressing the constitutionality of the law itself).

\textsuperscript{140} See, e.g., N.C. GEN. STAT. § 18B-1200(d) (2005) (exempting in-state wineries possessing valid wholesaler permits from North Carolina’s franchise law requirements); see also Todd Armbruster, The Proposed Domestic Charity Exception: An Unwise Addition to the Dormant Commerce Clause Family, 53 U. MIAMI L. REV. 333, 342 (1999) (stating that Maine v. Taylor “is the only case to date in which a facially discriminatory statute has satisfied ‘strict scrutiny’ muster”).

\textsuperscript{141} See Granholm v. Heald, 544 U.S. 460, 487 (2005) (noting that Section 2 of the Twenty-first Amendment “does not abrogate Congress’ Commerce Clause power with regard to liquor” and that “state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause”).

\textsuperscript{142} See id. at 489 (mentioning that the Court “must still consider whether either State regime ‘advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory means.’” (quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 278 (1988))).

\textsuperscript{143} See Mt. Hood Beverage Co. v. Constellation Brands Inc., 63 P.3d 779, 792 (Wash. 2003) (striking down a discriminatory Washington State franchise law on the grounds that it was not protected by the Twenty-first Amendment and that it violated the dormant Commerce Clause). In a decision pre-dating Granholm, the court in Mt. Hood considered whether Washington State’s discriminatory franchise law violated the Commerce Clause, and if so,
purpose could be equally advanced through nondiscriminatory means and, therefore, was in violation of the dormant Commerce Clause. A federal district court reached a similar conclusion in *Kendall-Jackson Winery, Ltd. v. Branson* when granting a preliminary injunction against the enforcement of a discriminatory Illinois franchise law. Consequently, it is unlikely that the current discriminatory franchise laws would survive judicial scrutiny.

2. Nondiscriminatory Franchise Laws

Although facially discriminatory franchise laws are likely to be struck down, many states have also enacted franchise laws that apply equally to in-state as well as out-of-state manufacturers. The court in *Kendall-Jackson*...
suggested in dictum that franchise laws would probably "pass constitutional muster if [they] treated in-state and out-of-state suppliers without discrimination." Moreover, the Supreme Court has previously stated that the Twenty-first Amendment gives the states "virtually complete control over . . . how to structure the liquor distribution system." Nevertheless, no court has ever evaluated the constitutionality of nondiscriminatory franchise laws.

In a challenge to a nondiscriminatory franchise law proceeding under the method of analysis proposed in Part III of this Note, a court would initially determine if the law survives traditional dormant Commerce Clause analysis. The Court has previously stated that facially neutral laws that do not discriminate against out-of-state interests in purpose or effect are valid unless the burdens they impose on interstate commerce significantly outweigh the local benefits they create.

Advocates of state franchise laws argue that these laws protect alcohol wholesalers, who in many instances are responsible for marketing the brands that they carry, from being abandoned by a producer before the wholesaler has been able to recover the investment costs incurred in marketing the manufacturer's brand. Moreover, wholesalers argue that franchise laws preserve orderly market conditions and create local benefits by ensuring tax collection and "helping maintain quality for suppliers, retailers and revenue.

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149. Kendall-Jackson, 82 F. Supp. 2d at 865.
153. See Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970) ("Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.").
154. See, e.g., R.I. GEN. LAWS § 3-13-2(b)(2) (1998) (noting that one purpose of the section is to "protect wholesalers substantial initial and continuing investments of money, time and effort in their distributorships and to stimulate greater investment of those resources in these small businesses by assuring their continuation on a fair, equitable and nondiscriminatory basis"); Russell, supra note 137, at 1E (stating that wholesalers favor franchise laws because they prevent manufacturers from arbitrarily terminating distribution contracts).
consumers." Advocates of franchise laws also claim that franchise laws help "promote and maintain a sound, stable, and viable 3-tier distribution system."

Despite the arguments showing the benefits of franchise laws, there is considerable evidence suggesting that these laws place a significant burden on interstate commerce. These burdens are exacerbated by exclusive territory laws, which require producers to grant wholesalers exclusive distribution rights to specific geographic territories within a state. The increased consolidation of the wholesale industry in recent years creates further burdens on interstate commerce by reducing the number of wholesalers with which manufacturers have to work.

155. Russell, supra note 137, at 1E (reporting that supporters of franchise laws claim that "wholesalers play an important role in collecting taxes on alcohol for the state and helping to maintain quality for suppliers, retailers and consumers"); see also Mt. Hood Beverage Co. v. Constellation Brands Inc., 63 P.3d 779, 786 (Wash. 2003) (summarizing the argument of advocates of a Washington State franchise law, who claimed that it helped maintain orderly market conditions).

156. MICH. COMP. LAWS § 436.1305(1)(b) (2001); see also R.I. GEN. LAWS § 3-13-2(b)(3)(ii) (1998) (stating that Rhode Island's franchise law is aimed at "[a]ssuring the public and supplier that wholesalers will price competitively, devote reasonable efforts and resources to sales of all supplier's products marketed in this state and maintain satisfactory sales levels").

157. See, e.g., TENN. CODE ANN. § 57-3-301(e)(1) (2002) (requiring manufacturers to designate exclusive distribution territories for wholesalers carrying their products). This code section states:

No brand may be introduced into the state except pursuant to a written contract to sell such brand in this state between the manufacturer or importer of such brand and the Tennessee wholesaler who is to sell such brand in the state. Every contract shall contain the specified area in which such wholesaler will sell such brand and no more than one wholesaler may sell such brand in any specified area.

Id. Exclusive territory laws have the potential to reduce competition and create exemptions to existing antitrust laws. The validity of exclusive territory laws largely involves considerations of antitrust law that are beyond the scope of this Note. See Letter from Andrea Foster, Acting Dir., & Harold E. Kirtz, Senior Litigator, Atlanta Reg'l Office, Fed. Trade Comm'n, to Hamilton C. Horton, Jr., N.C. State Senator, & George W. Miller, Jr., N.C. State Representative (Mar. 22, 1999) (providing comments on North Carolina's proposed exclusive territory law and concluding that the law "should be scrutinized under rigorous standards requiring clear evidence that potentially anticompetitive conduct should be permitted in order to achieve some fundamental social objective or to correct some otherwise-uncorrectable market failure"), available at http://www.ftc.gov/be/v990003.htm. For purposes of this Note, exclusive territory laws will only be examined to the extent that they work with franchise laws to affect interstate commerce.

158. See Gina M. Reikhof & Michael E. Sykuta, Politics, Economics, and the Regulation of Direct Interstate Shipping in the Wine Industry, 87 AM. J. AGRIC. ECON. 439, 441 (2005) (noting that "the number of licensed wine and spirits distributors in the United States dramatically decreased, from over 1,600 in 1984 to less than 600 in 2002").
Moreover, franchise laws can make entry into and exit from markets difficult. They also impose significant obstacles on manufacturers who want to terminate distribution agreements. Wholesalers in some states can pass their distribution rights on to successors, creating the risk that manufacturers may lock themselves into a nearly perpetual contract with a single wholesaler once distribution begins. In the case of one manufacturer acquiring another, franchise laws also frequently bind the successor to the original contract.

Manufacturers also point out that franchise laws make it more difficult for them to sell their products efficiently. Franchise laws restrict a manufacturer’s ability to react to changing market conditions and to work with wholesalers who offer the most competitive prices. Additionally, manufacturers argue that franchise laws result in less competition among wholesalers. Small manufacturers are particularly vulnerable to reduced


160. See Jennifer Dixon, Three-Tier System: State Law is at Root of Wholesale Power, DETROIT FREE PRESS, Feb. 10, 2005 (reporting on the effects of Michigan’s franchise law and noting that the franchise law "makes it nearly impossible for a . . . winery to fire a wholesaler, unless a wholesaler commits fraud in its dealings with a supplier, fails to comply with its agreement with its supplier, sell outside designated territories or loses its state license"). "The franchise law also allows the owners of . . . [wholesale] businesses to pass ownership of the company to family member when they die or retire, and the . . . wineries cannot stop these transfers." Id.

161. See HINMAN & WRIGHT, supra note 130, at 3 (stating that "[o]ut-of-state producers risk locking the future of their brand into one distributor in a ‘franchise’ state if even one consensual sale is made through that distributor"). Ohio law subjects producers to its franchise law even if the producer has not entered into a franchise agreement with a wholesaler, as long as the wholesaler has distributed the manufacturer’s product for at least ninety days. OHIO REV. CODE ANN. § 1333.83 (1999). States generally provide for exceptions to their franchise laws in a small number of situations, however, such as where one party declares bankruptcy. See, e.g., id. § 1333.86(A)(1) (permitting termination of a franchise agreement in the case of bankruptcy).

162. See, e.g., R.I. GEN. LAWS § 3-13-8 (1998) ("[A]ny person who purchases a supplier becomes obligated to all the terms of any agreement in effect on the date of purchase.").

163. See Russell, supra note 137, at 1E (reporting that "[s]uppliers say the franchise law effectively binds them to a wholesaler, whether the relationship is working or not"); FTC Letter, supra note 159 (commenting on a proposed Illinois franchise law and stating that "the Bill’s restrictions are likely to make it difficult for suppliers to distribute their products efficiently").

164. See Deroy Murdock, Prohibition, Alive in Virginia, WASH. TIMES, Feb. 26, 1996, at A21 (reporting on the difficulties one alcohol manufacturer had when it tried to consolidate the number of wholesalers distributing its product and noting that the manufacturer’s desire for "lower costs and higher efficiency were insufficient" grounds to permit them to terminate existing wholesaler contracts under a Virginia franchise law).

165. See Lee Murphy, Liquor Dealers Face Tough Time: Large Rivals Give Small Wholesalers a Big Hangover, CRAIN’S CHI. BUS., Apr. 8, 2002, at SB2 (discussing a recently
competition because they frequently have a difficult time attracting wholesalers willing to market their products effectively.  

When combined with exclusive territory laws, franchise laws also have the potential to penalize retailers, who must rely on wholesalers for their products. If a retailer falls out of favor with an important wholesaler, who is no longer willing to supply the retailer with all of its needs, the retailer will have no other source from which to obtain certain products. Reduced wholesaler competition also ultimately results in higher prices for consumers.

The burdens imposed by franchise laws on the ability of manufacturers to enter and exit markets and to sell their products efficiently would appear to outweigh any local benefits these laws create. In *Pike v. Bruce Church, Inc.*, the Court addressed the burdens that a law prohibiting Arizona-grown cantaloupes from being packaged outside Arizona imposed on interstate commerce. Arizona justified its law, not as a means of protecting its in-state agricultural industry, but on the grounds that strict packing standards were required in order to protect the reputation of Arizona cantaloupe growers. The Court concluded that the law violated the dormant Commerce Clause.

invalidated Illinois franchise law and mentioning that it reduced competition among wholesalers by making it "nearly impossible for wholesalers to steal away brands from competitors".

166. See Frank James, *Middlemen Seek Curbs on E-Sales: Sellers See Net as Major Threat*, Chi. Trib., Mar. 4, 2001, at C1 (noting that "distributors often don't do a good job marketing the wines of small boutique wineries . . . because they prefer to deal with larger wineries serving the mass market").

167. See Russell, *supra* note 137, at 1E ("Since the law allows only one wholesaler to distribute a brand in a given territory, . . . a small retailer can be placed at the mercy of wholesalers."). "Fall out of favor with a distributor and a store could be kept from selling prized 'allocated' brands that are available in limited quantities." *Id.*

168. *Id.*

169. See FTC Letter, *supra* note 159 (stating that "[t]he likely result of such a static distribution system will be increased consumer prices").

170. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 146 (1970) (concluding that an Arizona State law violated the dormant Commerce Clause). In *Pike*, the Court addressed whether the burdens imposed on interstate commerce from a nondiscriminatory Arizona law significantly outweighed the local benefits it produced. *Id.* at 145. The Court found that the burdens stemming from the law were significant because it required a grower to "build and operate an unneeded $200,000 packing plant in the State." *Id.* The Court also recognized that the benefits of protecting the reputation of in-state growers were comparatively minor. *Id.* As a result of this disparity, the Court found the law in violation of the dormant Commerce Clause. *Id.* at 146.

171. See *id.* at 146 (concluding that an Arizona law violated the dormant Commerce Clause because the burdens it imposed on interstate commerce significantly exceeded the local benefits that the law produced).

172. See *id.* at 143 (explaining that the law's "purpose and design [were] simply to protect and enhance the reputation of growers within the State").
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noting that "it . . . impose[d] . . . a straitjacket on the appellee company with respect to the allocation of its interstate resources." 

Just as the law in *Pike* limited the ability of the California-based packer to participate efficiently in the Arizona cantaloupe market, state franchise laws restrict manufacturers' flexibility to participate in a given state’s alcohol market. Moreover, it is unclear whether state franchise laws are actually necessary to prevent manufacturers from arbitrarily terminating distribution contracts. Given the uncertainty surrounding the necessity of franchise laws and the extensive burdens they appear to impose on interstate commerce, a court likely would find these laws to be in violation of the dormant Commerce Clause.

If nondiscriminatory franchise laws sufficiently advance a core concern of the Twenty-first Amendment to outweigh the Commerce Clause interests, however, a court might still uphold them. The initial step in this analysis is to identify any connection between the state laws and the Twenty-first Amendment core principles. A court would then weigh these connections against the Commerce Clause interest in promoting a national economy unencumbered by state regulation.

In determining the proper scope of the inquiry into whether the franchise laws advance a core concern of the Twenty-first Amendment, proponents of franchise laws have argued that courts must "look to whether the statute as a whole furthers a core concern of the Twenty-first Amendment," as opposed to "whether the . . . [specific] clause furthers a core concern of the Twenty-first Amendment." The courts in both *Kendall-Jackson* and *Mt. Hood*, however, concluded that the proper inquiry must be limited to the specific clause, and that the purpose and effect of the overall scheme could not justify an otherwise

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173. *Id.* at 146.
174. See *FTC Letter*, *supra* note 159 (stating that the FTC was "unaware of any evidence establishing the need for this type of legislation").
175. See *id.* ("We have seen no evidence suggesting that wine and liquor wholesalers are different from wholesalers in other industries, thus requiring special treatment under state commercial law.").
176. See *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 275 (1984) ("The question . . . is thus whether the principles underlying the Twenty-first Amendment are sufficiently implicated by . . . [the state law in question] to outweigh the Commerce Clause principles that would otherwise be offended.").
177. See *id.* at 276 (analyzing a state law's connection with the core concerns of the Twenty-first Amendment before weighing those connections against any Commerce Clause principles that were affected).
178. *Id.*
invalid clause.\footnote{180} Moreover, in \textit{Granholm}, the Court also limited its analysis to the discriminatory clause, rather than evaluating it in light of the overall three-tier structure.\footnote{181} As a result, it appears reasonable to conclude that the correct analysis would involve an examination of the particular clause, not of the larger statutory scheme.\footnote{182}

Although, the original purpose behind Section 2 of the Twenty-first Amendment is unclear, the Court has offered several explanations for what it considers to be core concerns behind the Twenty-first Amendment.\footnote{183} In analyzing a state franchise law, a court must compare these core concerns with the purpose and effect of the laws.\footnote{184} Some states offer economic protectionism justifications for their franchise laws.\footnote{185} For example, Wisconsin states that one purpose of its franchise law is to "protect dealers against unfair treatment by . . . [manufacturers], who inherently have superior economic power and superior bargaining power in the negotiation of dealerships."\footnote{186} The Court has stated that economic protectionism of in-state industries is not one of the core concerns behind the Twenty-first Amendment.\footnote{187} Wholesalers who benefit from franchise laws, however, are not exclusively in-state businesses.\footnote{188} Nevertheless, it seems reasonable to conclude that economic protectionism of

\textsuperscript{180} See Kendall-Jackson Winery, Ltd. v. Branson, 82 F. Supp. 2d 844, 866–67 (N.D. Ill. 2000) (noting that the Fair Dealing Act as a whole furthered the Twenty-first Amendment goals of market regulation, but ultimately analyzing the constitutionality of the discriminatory provision in isolation from the rest of the Act); \textit{Mt. Hood}, 63 P.3d at 788 (concluding that this approach is "in accord with the United States Supreme Court's requirement that the commerce clause and the Twenty-first Amendment be analyzed in light of one another and that the interests served by the economic discrimination be closely related to the powers reserved to the states by the 'Twenty-first Amendment'").


\textsuperscript{182} See supra notes 180–81 and accompanying text (noting that several other courts have restricted their analysis to a specific clause rather than inquiring into the larger overall scheme).

\textsuperscript{183} See supra notes 43–45 and accompanying text (discussing the confusion surrounding the original purpose of Section 2 and the Court's explanation of the core concerns behind the Twenty-first Amendment).

\textsuperscript{184} See Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 270 (1984) (comparing the purpose and effect of a discriminatory Hawaii law with the core concerns of the Twenty-first Amendment).

\textsuperscript{185} See infra note 186 and accompanying text (discussing Wisconsin's franchise law).

\textsuperscript{186} \textsc{Wis. Stat.} § 135.025(2)(b) (2001).

\textsuperscript{187} See \textit{Bacchus}, 468 U.S. at 276 (stating that economic protectionism was not a core concern of the Twenty-first Amendment).

\textsuperscript{188} See FTC Report, supra note 4, at 6 (stating that the number of wholesalers has decreased from "several thousand in the 1950s to a few hundred today").
any kind is not a core concern of the Twenty-first Amendment. Consequently, courts are not likely to conclude that franchise laws solely justified by providing economic protectionism for a certain class of business are sufficiently related to a core concern of the Twenty-first Amendment to outweigh the Commerce Clause interests in a national, unburdened economy.

But, most states, such as South Dakota, also offer public health and market control justifications for their franchise laws:

This chapter's purpose is to provide a three-tier structure, consisting of licensed manufacturers or suppliers, licensed wholesalers, and licensed retailers, for the fair, efficient, and competitive importation, sale and distribution of malt beverages; to provide for and facilitate the regulation of the importation, distribution, use and control of sale of malt beverages; and to facilitate the lawful and orderly marketing of malt beverages pursuant to the police powers of this state, and the taxation of and proper collection of taxes with respect to malt beverages by this state; and to provide a structure for the business relations between a wholesaler and a supplier.

This stated purpose has a strong connection with the Court's previous descriptions of Twenty-first Amendment core concerns, though that connection is tempered by the possibility that franchise laws may not actually be necessary to further these ends. Consequently, if state franchise laws are not necessary to ensure market stability and protect public health, they ultimately burden interstate commerce without any strong connection with Twenty-first Amendment core concerns.

And given the significant degree to which franchise laws burden interstate commerce, a court likely would not conclude that the small role these laws play in advancing Twenty-first Amendment core concerns outweighs the Commerce Clause interests in an unrestricted national economy. As a result, franchise laws are likely to be found invalid because

189. See Bacchus, 468 U.S. at 276 (stating that economic protectionism was not a Twenty-first Amendment core concern).
191. See FTC Letter, supra note 159 (responding to a request for comment on a proposed state franchise law and explaining that the FTC did not believe that a franchise law was necessary); see also supra notes 43-45 and accompanying text (discussing the core concerns of the Twenty-first Amendment).
192. Id. A 1996 Minnesota study stated that "there is no reason to believe that there is any significant liquor tax evasion in the state." JOHN WILLIAMS, PATRICK J. MCCORMACK & DAN MUELLER, PRIMARY SOURCE: DISTILLED SPIRITS, LIQUOR IMPORTATION AND MINNESOTA'S LACK OF A PRIMARY SOURCE LAW 11 (1996) (on file with the Washington and Lee Law Review). Although the study focused on Minnesota's lack of a primary source law, Minnesota also does not have a franchise law, suggesting that in the absence of a franchise law, ensuring collection of alcohol taxes is not a significant problem.
193. See supra notes 157-69 and accompanying text (discussing the substantial burdens
the Commerce Clause interests sufficiently outweigh any connection that the
state laws have with the core concerns behind the Twenty-first Amendment. 194

VI. Conclusion

The Supreme Court's decision in Granholm v. Heald continues the
erosion of unrestrained state power under the Twenty-first Amendment. In
Granholm, the Court asserted that the Twenty-first Amendment does not permit
states to regulate alcohol in ways that violate other provisions of the
Constitution. A literal reading of this assertion, however, largely eliminates the
meaning of Section 2 of the Twenty-first Amendment and conflicts with
established definitions of Twenty-first Amendment core concerns. If states may
not regulate alcohol beyond their ability to regulate other articles of commerce,
Section 2 becomes redundant because it no longer empowers states to enact
alcohol regulations beyond the regulatory power they already possess.
Moreover, Granholm suggests that nondiscriminatory state laws that violate the
Commerce Clause are not justified by the Twenty-first Amendment, even if
their primary goal is to advance temperance. This conclusion conflicts with the
Court's previous statements regarding states' power under the Twenty-first
Amendment.

Based on this conflict, it is appropriate to interpret Granholm in a way that
does not conflict with established definitions of Twenty-first Amendment core
concerns or reduce Section 2 to a nullity. Consequently, the most logical way
to interpret Granholm is to conclude that the Twenty-first Amendment cannot
insulate discriminatory state laws from Commerce Clause invalidation, but that
it can insulate nondiscriminatory state laws if their purpose and effect are
closely related to an original Twenty-first Amendment core concern. This

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that state franchise laws impose on interstate commerce). In Granholm, the Court emphasized
the importance of preserving a national economy, unencumbered by onerous state regulations:

This mandate "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." Granholm v. Heald, 544 U.S. 460, 472 (2005) (quoting Hughes v. Oklahoma, 441 U.S. 322, 325-26 (1979)). This language suggests that in order to outweigh the strong interest Congress
has in a national, unified economy, a law must have something more than a tangential
connection with a Twenty-first Amendment core concern.

194. See Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 276 (1984) ("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.").
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interpretation of Granholm leads to invalidation of existing state laws that permit in-state wineries to sell directly to in-state retailers but do not grant out-of-state wineries the same privileges.

Although states retain some degree of power under this view of Granholm, nondiscriminatory state alcohol regulations are only protected from dormant Commerce Clause invalidation if they advance a core concern of the Twenty-first Amendment. Franchise laws, a common state regulation governing the terms of distribution contracts between manufacturers and wholesalers, demonstrate the extent to which Twenty-first Amendment protections apply to existing state laws. Most franchise laws are designed to promote market stability and protect public welfare. Nevertheless, the degree to which franchise laws actually advance these goals is questionable. Moreover, in light of the considerable burdens franchise laws impose on interstate commerce, it is unlikely that these laws would survive Commerce Clause scrutiny.

Nevertheless, nondiscriminatory franchise laws that violate the dormant Commerce Clause may still survive if they sufficiently advance a core concern of the Twenty-first Amendment. Once again, although the majority of franchise laws are designed to promote market regularity and other Twenty-first Amendment core concerns, available evidence suggests that franchise laws are not necessary to achieve these goals. As a result, a court is likely to conclude that franchise laws violate the dormant Commerce Clause and do not sufficiently advance Twenty-first Amendment core concerns to outweigh Commerce Clause interests in an unburdened national economy.

Franchise laws are only one of many regulations that states currently employ to regulate in-state alcohol sales. Other state regulations, such as primary source laws and at-rest laws, also impose significant burdens on the efficient sale and distribution of alcoholic beverages while purporting to advance core concerns of the Twenty-first Amendment. Consequently, many existing state laws, with their variety of preferences for in-state manufacturers and their web of complicated regulations, may be subject to increased attacks as manufacturers, retailers, and consumers seek more efficiency, more variety, and lower prices from the long-standing three-tier system.