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Wait or Discriminate? Implications of Tennessee Wine & Spirits Retailers Ass'n v. Thomas on the Alcohol Market

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TABLE OF CONTENTS

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INTRODUCTION

"Luckily for all of us, I think we are five years away from never leaving our homes again. . . . You can sit on your couch, pull up your phone, and if you want to, just be like, 'I want bananas. And I want hammers. And I want an eagle's beak.'" – Tom Segura[1]

Famed stand-up comic Tom Segura effectively articulates the sordid thoughts concerning market globalization through e-commerce in a manner that many consumers choose to ignore for the sake of convenience.[2] Although it may be difficult to obtain an eagle's beak through e-commerce, it is now increasingly easier to obtain intoxicating liquors—even across state lines—via e-commerce.[3] Following Congress's ratification of the Twenty-First Amendment,[4] many states swiftly utilized their constitutionally granted power of regulation over alcohol to adopt varying regulatory schemes.[5] The most common of these regulatory schemes is the three-tier system of alcohol distribution, which separates retailers and manufacturers of intoxicating spirits from wholesalers.[6]

1. TOM SEGURA: DISGRACEFUL (Netflix 2018).

2. *See generally* Beverly Bird & Carol Kopp, *Globalization*, INVESTOPEDIA (May 9, 2019), https://www.investopedia.com/terms/g/globalization.asp [https://perma.cc/DV6M-FVWH].

3. Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449 (2019).

4. U.S. CONST. amend. XXI.

5. Desireé C. Slaybaugh, *A Twisted Vine: The Aftermath of* Granholm v. Heald, 17 TEX. WESLEYAN L. REV. 265 (2011).

6. *Id.* at 266 n.6. In the three-tier regulatory distribution scheme, the manufacturer represents the first tier, the wholesaler represents the second tier, and the retailer represents the third tier. *Id.* For the purposes of this Comment,

Those fighting for a foothold in an oversaturated alcohol market, such as micro-wineries, micro-breweries, and micro-distilleries, tend to view the three-tier system as a "politically effective restraint on trade" that limits their potential to ship their products directly to out-of-state consumers.[7] Wine law scholars have argued that requiring a manufacturer to go through a wholesaler is fiscally impracticable for small businesses, such as a micro-winery that only generates 3,000 cases of wine per year.[8] In recent years, the U.S. Supreme Court has attempted to remove the regulatory barriers to entry into the alcohol market for the under-represented micro-manufacturers of intoxicating liquors by preventing the states from imposing regulatory limitations on the importation and transportation of such liquors.[9] In an increasingly universal market where the ordinary consumer acquires products without much difficulty, the Supreme Court has, in effect, allowed the free market to flourish in a way that appears beneficial to both the avid alcohol consumer and the eager micro-manufacturer of alcohol.[10]

Scholarly doubt remains as to whether a free market, absent regulation, is most beneficial to the alcohol industry, the micro-manufacturer of alcohol, and, ultimately, consumers.[11] The question of whether a free market is beneficial to the alcohol industry arises out of the Supreme Court's contention in *Tennessee Wine & Spirits Retailers Ass'n v. Thomas* that the jurisprudentially developed Dormant Commerce Clause supersedes the explicit powers that the text of the Twenty-First Amendment reserves to the states.[12] Although a free market approach to alcohol distribution may be beneficial to the average consumer of alcohol, it is likely to be harmful to the alcohol industry.[13] First and foremost, the absence of a mandate for a three-tier model may lead to the demise of the

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"producer" and "manufacturer" are used interchangeably in reference to the same tier.

7. *Id.* at 266 n.9. Micro-manufacturers of alcohol encounter regulatory and competitive barriers to entry into the alcohol market. *Id.*

8. JOHN M. CHURCH, WINE LAW: CASES AND MATERIALS 2–76 (2d ed. 2014).

9. *See generally* Cal. Retail Liquor Dealers v. Midcal Aluminum, 445 U.S. 97 (1980); Granholm v. Heald, 544 U.S. 460 (2005); Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449 (2019).

10. Brief for Open Markets Institute as Amicus Curiae Supporting Petitioner, Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S.Ct. 2449 (2019) (No. 18-96), 2018 WL 6168785.

11. *Id.*

12. *See Tenn. Wine*, 139 S. Ct. 2449.

13. *See infra* Section III.B.

three-tier model—or at the very least the wholesaler tier.[14] An unaltered three-tier model allows for state taxation on each individual tier.[15] The elimination of one of these tiers results in the elimination of an entire level of state revenue.[16] Second, state action creates and structures markets.[17] Indeed, Prohibition demonstrated that the United States is not a single community where the federal government can enforce a uniform policy of liquor control.[18] Third, the role of the states as laboratories has remained a consistent rationale for independent state regulation, and the state imposition of varied regulations will be more beneficial to the alcohol market than a uniform attempt at regulation from the federal government.[19] Finally, the rapid over-saturation of an industry without regulatory barriers may create a destructive market, which may lead to a decline in the quality of alcohol and a decline in the working conditions of those employed in the alcohol industry.[20] These long-term detrimental effects on the alcohol industry, local economies, and, ultimately, the consumer can be avoided through carefully drafted legislation that preserves the status quo present in the three-tier system prior to *Granholm*.[21]

Part I of this Comment will explore the early development of the Court's interpretation of the Commerce Clause, the implied Dormant Commerce Clause, the Twenty-First Amendment, and the existing state regulatory schemes governing alcohol.[22] Part II will introduce *Tennessee Wine & Spirits Retailers Ass'n v. Thomas*[23] and discuss the problems with the *Tennessee Wine* Court's interpretation in both practice and effect.[24] Part III will demonstrate *Tennessee Wine*'s implications on the constitutional interpretation of the Twenty-First Amendment, alcohol

14. *See infra* Section II.C.2.

15. Slaybaugh, *supra* note 5, at 266.

16. *Id.*

17. Brief for Open Markets Institute, *supra* note 10, at *4.

18. RAYMOND B. FOSDICK & ALBERT L. SCOTT, TOWARD LIQUOR CONTROL 6 (2011).

19. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("There must be power in the states and the nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs."). One of the virtues of U.S. federalism is the ability of states to enact experimental policies that other states, or even the federal government, can learn from and later adopt. *Id.*

20. JEFFREY L. HARRISON, LAW AND ECONOMICS IN A NUTSHELL 332–34 (6th ed. 2016).

21. *See infra* Part IV.

22. U.S. CONST. art. I, § 8, cl. 3; *id.* amend. XXI.

23. Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449 (2019).

24. U.S. CONST. amend. XXI; *see infra* Part II.

regulation, and market function.[25] Part IV will provide a legislative remedy to the result of the Court's application and will address the viability of the market result the Court achieved in *Tennessee Wine*.[26]

I. A WALK THROUGH THE LEGISLATIVE HISTORY: AT LEAST WE HAVE LIQUOR

On December 5, 1933, Congress ratified the Twenty-First Amendment, which repealed the Eighteenth Amendment concerning federal Prohibition of intoxicating liquors.[27] The Twenty-First Amendment's proposed third provision, which Congress deleted prior to ratification, sought to preserve a federal role in regulatory enforcement of local liquor.[28] Congress's deletion of this provision demonstrated its desire to preserve intrastate control of intoxicating liquors for the states.[29] The divisive provision, which has presented the courts with nearly a century of cases concerning state regulatory schemes, is the enacted Section 2 of the Twenty-First Amendment.[30] Section 2 of the Twenty-First Amendment explicitly authorizes the states to regulate intoxicating liquors within their borders.[31] Section 2 of the Twenty-First Amendment reads: "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."[32] Over time, two divergent interpretations of Section 2 emerged among courts, leading to

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25. *Tenn. Wine*, 139 S. Ct. at 2449; *see also* Kerana Todorov, *"Son of* Granholm*" – Reactions to Ruling in Tennessee Case*, WINE BUSINESS.COM (June 27, 2019), https://www.winebusiness.com/news/?go=getArticle&dataId=215974 [https://perma.cc/M27D-K9W7]; *see infra* Part III.

26. *See Tenn. Wine*, 139 S. Ct. at 2449; *see also* Comprehensive Alcohol Regulatory Effectiveness Act, H.R. 5034, 111th Cong. (2010).

27. CHURCH, *supra* note 8, at 2–12.

28. Sydney Spaeth, *The Twenty-First Amendment and State Control Over Intoxicating Liquor: Accommodating the Federal Interest*, 79 CAL. L. REV. 161 (1991).

29. *Id*.

30. *See* State Bd. of Equalization of Cal. v. Young's Market Co., 299 U.S. 59 (1936); Indianapolis Brewing Co. v. Liquor Control Comm., 305 U.S. 391 (1938); Ziffrin, Inc. v. Reeves, 308 U.S. 132 (1939). *But cf.* Cal. Retail Liquor Dealers v. Midcal Aluminum, 445 U.S. 97 (1980); Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 268 (1984); Granholm v. Heald, 544 U.S. 460 (2005); *Tenn. Wine*, 139 S. Ct. 2449.

31. Spaeth, *supra* note 28, at 14.

32. *Compare* U.S CONST. amend. XXI, *with* Webb-Kenyon Act, 37 Stat. 699 (1913) (codified at 27 U.S.C. § 122).

contradictory stances on whether the states have gained new powers from Section 2.[33] The different interpretations of Section 2 further complicate the textual conflict that this provision holds with the Commerce Clause of Article I, Section 8 of the Constitution.[34]

A. Stretching Out the Commerce Clause

Article I, Section 8 of the U.S. Constitution reads, in relevant part, that Congress shall have the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[35] On numerous occasions, the Supreme Court has scrutinized the text of Article I, Section 8 of the Constitution and, accordingly, has crafted a nuanced jurisprudence surrounding it.[36] The scope of the commerce power extends to the regulation of the channels of interstate commerce, the regulation of instrumentalities of interstate commerce, and the regulation of intrastate activities that "substantially affect" interstate commerce.[37] The Supreme Court has articulated that the ability of Congress to regulate under the federal commerce power is vast, extending even to the regulation of wheat grown by a farmer for wholly intrastate, personal use.[38] For example, in *Wickard v. Filburn*, the Supreme Court held that Congress may regulate activities, such as wheat growing, within a single state under the Commerce Clause, provided that the activity exerts a substantial economic effect on interstate commerce.[39] This expansive holding does not suggest

33. Spaeth, *supra* note 28, at 161 (discussing the differences between the "Federalist" view and the "Absolutist" view of Section 2 of the Twenty-First Amendment).

34. U.S. CONST. art. I, § 8, cl. 3.

35. *Id.*

36. THOMAS E. BAKER, CONSTITUTIONAL ANALYSIS IN A NUTSHELL 226 (3d ed. 2019).

37. *Id.* at 228 (citing United States v. Darby, 312 U.S. 100 (1941)).

38. Wickard v. Filburn, 317 U.S. 111 (1942); *see also* Gonzales v. Raich, 545 U.S. 1 (2005) (holding Congress's intrastate prohibitory power extended to local cultivation of marijuana).

39. *Wickard*, 317 U.S. 111. In *Wickard v. Filburn*, an Ohio farmer, Filburn, harvested approximately 12 acres of wheat from his crop for personal use—in excess of the Agricultural Adjustment Act of 1938's limitation. In *Wickard*, the Supreme Court reasoned that an aggregate of home-grown products would result in a "reduction in market demand" for the aforementioned products. Filburn argued that because the wheat was for wholly personal use and would never see the market, it had no effect on interstate commerce. The Court held the regulation of a wholly intrastate product for personal use was necessary, otherwise the wheat

that the Commerce Clause is plenary and without limit.[40] The broad power that the Commerce Clause granted to Congress is subject to outer limits, such as the requirement that the regulated activity be commercial or economic in nature[41] and the caveat that the provisional ability to regulate commerce does not include the ability to create or mandate commerce.[42] Congress's power to regulate wholly intrastate activity as demonstrated in *Wickard* remains increasingly relevant as the Court continues to analyze state liquor laws under the Dormant Commerce Clause.[43]

B. Don't Sleep on the Dormant Commerce Clause

Though the powers delegated to Congress are finite and expressly provided—subject to generous expansion through the Supreme Court's power of constitutional review[44]—the powers reserved to the state governments are "numerous and indefinite."[45] The Tenth Amendment further substantiates this principle of expansive state power: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[46] Additionally, the Constitution reserves some powers explicitly to the states, such as the power to conduct elections, the power to ratify constitutional amendments, and the power to regulate intoxicating liquors.[47] The federal commerce power and the reserved police power over alcohol that Section 2 granted to the states inevitably came into conflict with one another.[48] The existence of concurrent powers among both the states and the federal government necessitated reconciliation.[49] The

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would cause a reduction in market demand and would then substantially affect interstate commerce. *Id.*

40. *See generally* United States v. Lopez, 514 U.S. 549 (1995); United States v. Morrison, 529 U.S. 598 (2000).

41. *See Lopez*, 514 U.S. at 549; *Morrison*, 529 U.S. at 598.

42. NFIB v. Sebelius, 567 U.S. 519 (2012) (holding that while possessing the authority to regulate interstate Commerce, Congress did not possess the authority to coerce individuals into purchasing health insurance under the federal Commerce power).

43. *Wickard*, 317 U.S. at 111; *see infra* Section I.B.

44. Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

45. BAKER, *supra* note 36, at 249 (quoting THE FEDERALIST NO. 45 (Alexander Hamilton)).

46. U.S. CONST. amend. X.

47. *Id.* art. I, § 4, cl. 1; *id.* art. V; *id.* amend. XXI.

48. *Id.* art. I, § 8, cl. 3. *But cf. id.* amend. XXI.

49. BAKER, *supra* note 36, at 253.

Supreme Court reached a solution that effectuated an "implied prohibition" on the states where, even when the federal commerce power was not active, the Commerce Clause allowed the Court to strike down any state legislation that was found to discriminate against interstate commerce.[50] This implied prohibition on the states, creating judicial power to regulate state law eventually, was termed the Dormant Commerce Clause.[51] The Dormant Commerce Clause provides that states cannot enact laws that discriminate against out-of-state actors in interstate commerce or that unduly burden interstate commerce.[52]

The federal government's power to regulate state law has its early roots in *Gibbons v. Ogden*.[53] In *Gibbons*, a New York state law authorized a monopoly over steamboat navigation of New York waters.[54] The Supreme Court struck down the New York state law, holding that the regulation of navigation for the purposes of conducting interstate commerce was a power that the Commerce Clause reserved to Congress.[55] The first examination of the Dormant Commerce Clause appears in Justice Johnson's concurrence.[56] There, Johnson stated that the national government's exclusive power to regulate interstate commerce would thus negate any state laws interfering with this power.[57] The *Gibbons* decision expanded the power of Congress to regulate any commercial activity that moved between two states.[58] Importantly, *Gibbons* raised the question of whether the authority that this congressional action had over state law was absolute or subject to limitation.[59]

Twenty-seven years after *Gibbons*, the Supreme Court recognized such a limitation of the Dormant Commerce Clause power in *Cooley v. Board of Wardens*.[60] In *Cooley*, the Court analyzed the legitimacy of a

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50. *Id.* at 254–55.

51. *Id.* at 253.

52. *See* Pike v. Bruce Church, Inc., 397 U.S. 137 (1970); Maine v. Taylor, 477 U.S. 131 (1986); Dean Milk Co. v. Madison, 340 U.S. 349 (1951). Although the Dormant Commerce Clause is neither enumerated in the Constitution, nor codified in a Congressional statute, 200 years of Supreme Court jurisprudence support its existence. *See* Gibbons v. Ogden, 22 U.S. 1 (1824); Cooley v. Bd. of Wardens, 53 U.S. 299 (1851); *Dean Milk Co.*, 340 U.S. 349.

53. *Gibbons*, 22 U.S. at 1 (demonstrating that *intrastate* commerce could also be regulated under the Commerce Clause).

54. *Id.* at 1–2.

55. *Id.* at 86.

56. *Id.* at 87 (Johnson, J., concurring).

57. *Id.* at 89–90 (Johnson, J., concurring).

58. *Id.* at 1.

59. *Id.*

60. Cooley v. Bd. of Wardens, 53 U.S. 299 (1851).

Pennsylvania law that required all ships entering the port of Philadelphia to hire a local pilot for in-port navigation.[61] The *Cooley* Court upheld the Pennsylvania law and recognized that commerce embraces an extensive field of diverse subjects, some requiring a single national rule that only Congress can make, and others best that state regulations based on local needs serve best. This idea became formally known as the rule of "selective exclusivity."[62] Importantly, the *Cooley* Court did not articulate a framework to effectively make this distinction, which still allowed for significant judicial discretion in invalidating state laws.[63]

This unfettered judicial discretion went largely unaddressed for the next century, until the Court decided *Pike v. Bruce Church, Inc*.[64] In *Pike*, Arizona passed the Arizona Fruit and Vegetable Standardization Act (AFVSA), which required all Arizona-grown cantaloupes to be packaged in standard closed containers.[65] Lacking the proper packing facilities, Bruce Church, Inc., a cantaloupe grower, shipped all of its cantaloupes to California for packing.[66] Bruce Church's shipment to California violated the AFVSA, but the burden this state law placed on Bruce Church and interstate commerce led the Court to create a new test to determine state law legitimacy.[67] The *Pike* Court articulated that there were two levels of analysis to determine the whether the nature of the state regulation in question was of a local or national interest.[68] The two level analysis manifested as a two-part balancing test that courts continue to utilize in Dormant Commerce Clause analysis today.[69] The *Pike* balancing test provides that a statute that (1) advances a legitimate local interest and (2) only incidentally affects interstate commerce will be upheld unless the burden imposed on interstate commerce outweighs the benefits of the statute.[70] Even a state law that serves a legitimate local purpose can be considered discriminatory, but under some circumstances a state regulation that is discriminatory in its means can survive a Dormant Commerce Clause challenge.[71]

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61. *Id.* at 299–300.
62. *Id*. at 299; *see also* BAKER, *supra* note 36, at 257.
63. *Cooley*, 53 U.S. at 299.
64. Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).
65. *Id.* at 138.
66. *Id.* at 139–40.
67. *Id.* at 145.
68. *Id.* at 142; *see also* BAKER, *supra* note 36, at 261.
69. *Pike*, 397 U.S. at 142.
70. *Id.*; *see also* BAKER, *supra* note 36, at 261.
71. JEROME A. BARRON & C. THOMAS DIENES, CONSTITUTIONAL LAW IN A NUTSHELL 143 (9th ed. 2017).

In its analysis of *Maine v. Taylor*, the Supreme Court upheld a Maine prohibition on the importation of live baitfish due to a concern over an infestation of non-native parasites in Maine fisheries.[72] This law was not facially discriminatory, but was discriminatory in effect against fisheries outside of Maine that exported baitfish.[73] Under the Court's analysis, a state is entitled to use discriminatory means to serve a legitimate local end provided that there is no other non-discriminatory manner to achieve this end.[74] The Court reasoned that the Dormant Commerce Clause promotes a national market and deters states from restricting this market without a legitimate purpose.[75] This opposition to state restriction conflicted with the text of the Twenty-First Amendment, which authorizes to the states a regulatory—and therefore potentially restrictive—authority over alcohol.[76]

Applying the Dormant Commerce Clause analysis from *Maine v. Taylor*, the Supreme Court in *Bacchus Imports, Ltd. v. Dias* analyzed the constitutionality of a state alcohol regulation.[77] In *Bacchus,* the Court analyzed a Hawaiian liquor tax imposed on sales of liquor at wholesale and a liquor tax exemption offered for local fruit wines.[78] The Court struck down the Hawaiian liquor tax exemption specifically for okolehao and pineapple wine, finding the tax exemption discriminated against the importation of out-of-state products.[79] The State mounted an argument that Section 2 of the Twenty-First Amendment to the Constitution saved the exemption even in light of a Dormant Commerce Clause violation.[80] At the time of the *Bacchus* decision, the Supreme Court had significantly abated the scope of Section 2 of the Twenty-First Amendment from its breadth at the time of ratification.[81] The Court did so by abandoning a textualist reading of the Twenty-First Amendment in its analysis of multiple cases concerning state regulation of alcohol and tapered back the

72. Maine v. Taylor, 477 U.S. 131 (1986).
73. *Id.* at 132–33.
74. *Id.* at 131; BARRON & DIENES, *supra* note 71, at 143.
75. *Maine*, 477 U.S. at 132.
76. *See* U.S. CONST. amend. XXI.
77. Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984).
78. *Id.*
79. *Id.* at 273. Okolehao is a native Hawaiian intoxicating spirit comparable to whiskey.
80. *Id.* at 268.
81. *See* State Bd. of Equalization of Cal. v. Young's Market Co., 299 U.S. 59 (1936); *see also* Cal. Retail Liquor Dealers v. Midcal Aluminum, 445 U.S. 97 (1980).

initial plenary authority that Section 2 granted to the states.[82] Under the *Bacchus* interpretation of the Twenty-First Amendment, the principles underlying the Amendment had to be "sufficiently implicated by the exemption" such that they outweighed the offended Commerce Clause principles.[83] Specifically, the exemption must implicate the Twenty-First Amendment's underlying principles of temperance in order to pass the Dormant Commerce Clause test.[84] Although this abatement of the scope of Section 2 was a recent development with the *Bacchus* decision, early Twenty-First Amendment jurisprudence and legislation predating the Eighteenth Amendment set the foundation for Section 2's interpretation.[85] To better understand the Court's various interpretations of the scope of Section 2, it is necessary to analyze the entire development of jurisprudence and legislative history pertaining to alcohol.[86]

C. From Early Prohibition to Lowered Inhibitions

Before the Twenty-First Amendment, and even before the Eighteenth Amendment's prohibition of alcohol, each state enacted its own legislation concerning alcohol regulation.[87] The most prominent early legislation spurring the prohibitionist sentiment was the Maine Law of 1851, which prohibited all intoxicating liquors in Maine because of legislative fear regarding the dangers alcohol posed to society.[88] This law served as the model that several states to followed to eliminate the consumption and manufacture of intoxicating liquors.[89] Eventually a number of other states enacted their own variant of the Maine Law, setting a prohibitionist tone in state legislatures.[90] These prohibitionist state laws did not achieve their intended purpose; instead, the United States saw a sharp increase in the

82. *Bacchus Imports, Ltd.*, 468 U.S. at 277.

83. *Id*.

84. *See generally Cal. Retail Liquor Dealers*, 445 U.S. at 97; Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449 (2019).

85. *See generally Cal. Retail Liquor Dealers*, 445 U.S. at 97; *Tenn. Wine*, 139 S. Ct. 2449; *see also* 27 U.S.C. §§ 121–22.

86. *See infra* Section I.C.

87. THOMAS PINNEY, A HISTORY OF WINE IN AMERICA: FROM THE BEGINNING TO PROHIBITION 431 (1989).

88. *Id*.

89. *Id*. "The Maine Law was quickly followed by similar laws all over the Union—Rhode Island, Massachusetts, Vermont, Connecticut, Delaware, Pennsylvania, New York, New Hampshire, Indiana, Michigan, Minnesota, and Nebraska Territory all followed suit in the next four years." *Id*.

90. *Id.* at 431; *see* Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984).

consumption of intoxicating spirits.[91] Scholars have suggested that the pugnacious nature of these attempts at regulation and the ensuing effects of increased alcohol consumption sparked the push toward nationwide prohibition of alcohol through federal constitutional amendment.[92] Even in light of this renewed social vigor toward constitutional prohibition, both the state and federal legislatures continued their attempts to permit state regulation of alcohol, contrary to the apparent will of the judiciary.[93]

A series of cases followed in which the Supreme Court invalidated various restrictive state liquor regulations, contrary to the social outcry against Prohibition, the most problematic being *Leisy v. Hardin*.[94] In *Leisy*, Illinois citizens imported intoxicating spirits into Illinois contrary to an Illinois statute that restricted the importation of alcohol into the state, subject to pharmaceutical or religious exceptions.[95] The *Leisy* Court held that states could not ban the sale of imported liquor in its original package.[96] In effect, this holding rendered out-of-state liquor immune from local regulation—even the regulation of dry states—provided the liquor remained in its original packing.[97] This holding was problematic because even if the states sought to heavily regulate or ban in-state alcohol products, there existed an immunity to out-of-state alcohol products provided they remained in their original packaging.[98] This defeated the purpose of any heavy state regulation and proved to be a glaring loophole.[99] Congress attempted to close this loophole and establish regulatory uniformity through legislation.[100]

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91. PINNEY, *supra* note 87, at 431.

92. *Id.*; RAYMOND B. FOSDICK & ALBERT L. SCOTT, TOWARD LIQUOR CONTROL 4 (2011) (discussing the difficulties in enforcing both state and federal prohibitionist laws without local law enforcement in the absence of a larger agency).

93. *See* 27 U.S.C. §§ 121–22.

94. Leisy v. Hardin, 135 U.S. 100 (1890).

95. *Id*. at 105.

96. *Id*. at 124–25. The containment of the liquor in its original packaging upon arrival to its final destination implied that the shipment was for personal use as opposed to resale distribution. *Id.*

97. *Leisy*, 135 U.S. 100.

98. *See* CHURCH, *supra* note 8, at 2–8.

99. *See id.* (discussing the loophole left behind by *Leisy v. Hardin*). For the purposes of this Comment, the loophole from *Leisy* will be referred to as the "*Leisy* loophole."

100. Wilson Act, 26 Stat. 313 (1890) (codified at 27 U.S.C. § 121). The Wilson Act provides:

> That all fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use,

The first legislation Congress passed to meet this end was the Wilson Act of 1890.[101] The Wilson Act sought to close this loophole by allowing states to regulate imported liquor "to the same extent and in the same manner" as domestic liquor.[102] Seven years after the legislature's attempt to remedy the *Leisy* loophole with the Wilson Act, the Court heard *Scott v. Donald*, a case involving a constitutional challenge to a South Carolina law that required all liquor sales to go through the state liquor commissioner.[103] The Court found that two sections of South Carolina's law were discriminatory.[104] The Court interpreted the Wilson Act not as an authorization for this discriminatory conduct, but rather as a mandate for "uniformity of treatment" between in-state and out-of-state products.[105] After *Scott*, the federal government required states to adhere to the nondiscrimination principle of "uniformity of treatment" when enacting legislation concerning in-state and out-of-state liquor.[106] The Court further demonstrated its limitation on the authority of states to regulate liquor imports in another pre-Prohibition case, *Rhodes v. Iowa*.[107]

In *Rhodes,* the Court affirmed the nondiscrimination principle of the Wilson Act, but carefully hedged its second holding to provide that consumers possessed the right to receive intoxicating liquors shipped in interstate commerce for personal use free from state regulation.[108] This interpretation of the Wilson Act thus only allowed for state regulation of the resale of intoxicating liquors, not the direct shipment to consumers for

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> consumption, sale or storage therein, shall *upon arrival* in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, *to the same extent and in the same manner* as though such liquids had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

27 U.S.C. § 121 (emphasis added).

101. *Id.*

102. Granholm v. Heald, 544 U.S. 460 (2005) (quoting 27 U.S.C. § 121).

103. Scott v. Donald, 165 U.S. 58 (1897).

104. *Id*.

105. *Id*. Section 15 of South Carolina's dispensary law required the state liquor commissioner to purchase his supplies from in-state brewers and distillers. Section 23 limited markup for profit on locally produced wines to 10%, whereas there was no such limitation in place for out-of-state wines, allowing them to be marked up indefinitely and likely be inaccessible to many consumers. *Id*.

106. 27 U.S.C. § 121.

107. Rhodes v. Iowa, 170 U.S. 412 (1898).

108. *Id*. (emphasis added).

personal use.[109] Congress intended to close the *Leisy* loophole with the Wilson Act; however, it remained open because of the *Rhodes* Court's reading of the Act's language, "*upon arrival* in such State or Territory."[110] Such language, according to the Court, meant upon arrival to the actual consignee and not the arrival within state lines.[111] According to *Rhodes*, the state did not obtain the right to regulate the intoxicating liquors under the text of the Wilson Act until the product reached the hands of the customer, at which point it was too late for the states to enforce any regulation.[112]

Congress next attempted to close the *Leisy* loophole with the Webb-Kenyon Act of 1913.[113] The Webb-Kenyon Act prohibited the shipment or transportation of any alcohol from one state into another if such transportation would violate the recipient state's laws.[114] The Webb-Kenyon Act's intended effect directly conflicted with the Court's second holding in *Rhodes*, which subjected the Act to careful examination regarding its constitutionality.[115] The Court in *Clark Distilling Co. v. Western Maryland Railway* interpreted the Webb-Kenyon Act's purpose—as well as the Wilson Act's purpose—to be the prevention of the receipt of intoxicating liquors into a state through the *Leisy* loophole.[116] In doing so, the Court acknowledged both Acts' intended goal: to eliminate any regulatory advantage provided to imported liquor over domestic liquor under the *Rhodes* approach.[117] As such, the *Clark* Court's interpretation of the Webb-Kenyon Act provided deference to the state regulatory authority and closed the *Leisy* loophole.[118]

The success of the Webb-Kenyon Act providing deference to state regulation merely motivated the leading prohibitionist political party, the Anti-Saloon League (ASL), to pursue a constitutional amendment in its

109. Granholm v. Heald, 544 U.S. 460, 480 (2005) (discussing the two holdings in *Rhodes*).

110. *Rhodes*, 170 U.S. 412.

111. *Id.*

112. *See generally id.*

113. 27 U.S.C. § 122.

114. *Id.* ("The shipment or transportation . . . of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind from one State . . . into any other State . . . which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State . . . is prohibited.").

115. Clark Distilling Co. v. W. Md. Ry., 242 U.S. 311 (1917).

116. *Id.*

117. *See generally Rhodes*, 170 U.S. 412.

118. *See* CHURCH, *supra* note 8, at 2–8.

march toward nationwide prohibition.[119] The ASL's pursuit of a constitutional amendment was so effective that, at the time the states ratified the Eighteenth Amendment, the vast majority of the states were already effectively prohibitionist, dubbed "Dry."[120] The ASL's final push toward Prohibition was successful in 1919 with the ratification of the Eighteenth Amendment.[121]

A mere 13 years after the Eighteenth Amendment's ratification, the Twenty-First Amendment repealed the Eighteenth Amendment.[122] Section 1 of the Twenty-First Amendment repealed Prohibition; however, Section 2 of the amendment served as a textual grant of state authority to regulate alcohol.[123] The Supreme Court began its judicial analysis of the extent of state power under Section 2 of the Twenty-First Amendment within three years of its ratification.[124] The Court's analysis in early cases focused on the text of Section 2 and concluded that the states held an "extremely broad power" with respect to the regulation of alcohol.[125] The seminal case that conducted a textual analysis of Section 2 was *California Board of Equalization v. Young's Market Co*.[126] In *Young's*, the Supreme Court declined to strike down a California statute imposing a license fee of $500 for importation of beer within its borders.[127] The Court reasoned that the broad grant of state power under Section 2 of the Twenty-First Amendment was clearly plenary; thus, the California law did not implicate the Dormant Commerce Clause in any discriminatory manner.[128]

The Court further expounded upon the broad scope of Section 2 two years later in *Indianapolis Brewing Co. v. Liquor Control Commission*.[129] In *Indianapolis Brewing*, the Court stated that the Commerce Clause does not limit the right of a state to regulate the importation of intoxicating

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119. *Id.* The Anti-Saloon League was a federation of churches and temperance societies that spearheaded the movement toward prohibition and would grow to become a powerful political organization. *Id.* at 2–4.

120. PINNEY, *supra* note 87, at 431. Thirty-three of the then 48 states were dry at the time of ratification. *Id*.

121. U.S. CONST. amend. XVIII.

122. *Id.* amends. XVIII, XXI.

123. *Id.* amend. XXI, §§ 1–2.

124. CHURCH, *supra* note 8, at 2–30.

125. *Id*.

126. State Bd. of Equalization of Cal. v. Young's Market Co., 299 U.S. 59 (1936).

127. *Id.* at 60.

128. *Id.* at 63–64.

129. Indianapolis Brewing Co. v. Liquor Control Comm., 305 U.S. 391 (1938).

liquor.[130] *Indianapolis Brewing* involved the analysis of a Michigan reciprocity statute, which prohibited Michigan retailers from selling beer manufactured in Indiana.[131] The Michigan statute prohibited Michigan manufacturers from selling to Indiana purchasers because Indiana had a statute discriminating against beer manufactured in Michigan.[132] The Court held that the Michigan statute was valid regardless of its punitive nature against Indiana, stating that the Twenty-First Amendment authorized this form of protectionism.[133]

One year later in *Ziffrin, Inc. v. Reeves*,[134] the Supreme Court re-emphasized the states' police power to regulate intoxicating liquor.[135] The Court in *Ziffrin* analyzed Kentucky shipping regulations that prevented an Indiana transportation company from engaging in the transportation of Kentucky whiskey directly to consignees in Chicago.[136] Kentucky enacted these transportation restrictions on the Indiana transportation company because of a disdain for the Indiana company's direct-to-consignee shipment.[137] This regulation served no purpose for the state of Kentucky other than to limit alcohol traffic to "minimize well known evils."[138] Even in light of this clear discriminatory intent, the Court opined that the states possessed a full police authority to regulate the manufacture, sale, transportation, and possession of intoxicating spirits under the Twenty-First Amendment.[139]

These early cases interpreted Section 2 as granting the states complete discretion over the regulation of intoxicating liquors.[140] In 1945, 12 years after the ratification of the Twenty-First Amendment, the Supreme Court laid a new foundation for permitting federal commerce power over alcohol

130. *Id.*

131. *Id*. at 392–93.

132. *Id.*; *see also* CHURCH, *supra* note 8, at 2–33.

133. *Indianapolis Brewing*, 305 U.S. at 391 ("[T]he right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause . . . and discrimination between domestic and imported intoxicating liquors, is not prohibited by the equal protection clause."); *see also* CHURCH, *supra* note 8, at 2–33.

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

135. *Id*.

136. *Id.* at 133.

137. *Id*. at 134.

138. *Id*. at 139.

139. *Id.* at 132.

140. *See* State Bd. of Equalization of Cal. v. Young's Market Co., 299 U.S. 59 (1936); Indianapolis Brewing Co. v. Liquor Control Comm., 305 U.S. 391 (1938); *Ziffrin*, 308 U.S. 132.

in *United States v. Frankfort Distilleries*.[141] In *Frankfort*, Colorado wholesalers, retailers, and producers were conspiring to artificially fix the prices of out-of-state imported alcohol through "fair trade" contracts.[142] The Court analyzed whether the three-tier conspirators' actions violated the Sherman Anti-Trust Act.[143] The Court held that the Twenty-First Amendment only gave states plenary authority when regulating *intrastate* liquor traffic, whereas the conspirators sought to regulate *interstate* liquor traffic.[144] This holding was not groundbreaking, as Article I, Section 8, Clause 3 of the U.S. Constitution already explicitly reserves to Congress the power to regulate interstate commerce.[145] Justice Frankfurter's concurrence in *Frankfort* distinguished its rule of law from that of *Ziffrin*.[146] Justice Frankfurter adopted and expounded upon the early post-ratification Court's textualist view that the Twenty-First Amendment authorized states to enact "insurmountable" barriers against the entry of intoxicating liquors.[147] Frankfurter stated that under Section 2 of the Twenty-First Amendment, a state has the authority to treat alcohol products differently than all other products subject to Commerce Clause analysis.[148] According to Frankfurter, if a state does not avail itself of the alternative treatment of alcohol products, then alcohol would be subject to the same Commerce Clause scrutiny as all other products.[149] Thus, even after *Frankfort*, if a state treated alcohol as an alternative product through intrastate regulation, it remained immune from Commerce Clause scrutiny.[150] The next critical case analyzed in the context of the Twenty-First Amendment's regulatory authority also dealt with "fair trade" contracts.[151]

In 1980, in its analysis of *California Retail Liquor Dealers v. Midcal Aluminum*, the Court chose to analyze the history behind, as opposed to

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

142. *Id*. at 295. A "fair-trade" contract is a contract with which an industry-set mandatory price minimum on certain products is enforced. Adam Hayes, *Fair Trade Price*, INVESTOPEDIA (July 3, 2019), https://www.investopedia.com/terms/f/fair-trade-price.asp [https://perma.cc/UA7A-8D5N].

143. *Frankfort*, 324 U.S. at 294.

144. *Id.* at 299.

145. U.S. CONST. art. I, § 8, cl. 3.

146. *Frankfort*, 324 U.S. at 300 (Frankfurter, J., concurring).

147. *Id*. at 300 (Frankfurter, J., concurring) (suggesting that there are circumstances where alcohol is not given complete immunity to Commerce Clause analysis).

148. *Id*. at 300–01 (Frankfurter, J., concurring).

149. *Id*. (Frankfurter, J., concurring).

150. *Id*. (Frankfurter, J., concurring).

151. Cal. Retail Liquor Dealers v. Midcal Aluminum, 445 U.S. 97 (1980).

the text contained within, the Twenty-First Amendment.[152] In *Midcal*, a California statute required all wine producers and wholesalers to file fair trade contracts or price schedules with the state.[153] If a wine producer failed to file a fair trade contract, the wholesaler was required to set a price schedule and would face fines or suspension for selling to a retailer below the price in the price schedule.[154] The respondent, wine wholesaler Midcal Aluminum, faced fines for selling wine below the price set out in the price schedule and sought injunctive relief from the state's fines.[155] The Court acknowledged the Twenty-First Amendment's textual grant of authority for states to regulate liquor, yet sought to define the state regulatory authority under the federal commerce power.[156] Citing *Hostetter v. Idlewild Liquor Corp.*, the *Midcal* Court viewed a strictly textual analysis of the Twenty-First Amendment as an "oversimplification" and instead considered the Commerce Clause and the Twenty-First Amendment in light of one another.[157] The *Midcal* Court held that the Twenty-First Amendment granted states broad authority over "whether to permit importation or sale of liquor *and* how to structure the liquor distribution system," but acknowledged that any other state-enforced liquor regulations may, under certain circumstances, be subject to the Commerce Clause.[158] The holding from *Midcal* signifies the Court's first steps toward limiting the broad scope of Section 2 of the Twenty-First Amendment.[159]

D. Three Tiers for Several Years: Emerging Regulatory Schemes

The Court's acknowledgment of the continued existence of state regulatory authority over intoxicating liquors after *Midcal* also narrowed the extent of that authority under the federal commerce power.[160] This reduced regulatory authority resulted in a diversification of the liquor

152. *Id*.

153. *Id*. at 99. A price schedule is a collection of all the items a vendor may offer to a consumer for purchase at a specific standardized price. *Price Schedule*, BUS. DICTIONARY, http://www.businessdictionary.com/definition/price-schedule.html [https://perma.cc/LZA4-SKV7] (last visited Nov. 10, 2019).

154. *Cal. Retail Liquor Dealers*, 445 U.S. at 99.

155. *Id*. at 100.

156. *Id*.

157. *Id*. at 109 (quoting Hostetter v. Idlewild Liquor Corp., 377 U.S. 324, 332 (1964)).

158. *Id.* at 110 (emphasis added).

159. *Id.* at 97.

160. *Id*. at 110.

regulatory schemes from state to state.[161] These regulatory schemes existed long before the Court analyzed *Midcal*, beginning nearly immediately after ratification of the Twenty-First Amendment.[162] Following the end of Prohibition with the Twenty-First Amendment, the states split largely into two different groups based on their approaches to the regulation of alcohol—the control states and the license states.[163] In control states the state possesses a monopoly over the alcohol industry and its regulation.[164] Conversely, in license states there is no government monopolization over the industry, but rather regulation of the industry participants.[165] Since the *Midcal* decision, the primary issues that courts have faced lie with the license states' regulatory actions.[166]

1. The Three-Tier Model

Most license states adopted the three-tier model shortly after ratification of the Twenty-First Amendment as their method of regulating alcohol distribution.[167] The three-tier model divides the alcohol market into three tiers: (1) alcohol producers, (2) wholesalers, and (3) alcohol retailers.[168] In a traditional three-tier scheme, the wholesaler is a necessary middleman to distribute the alcohol from the producer to the retailer.[169] Although there are several underlying policy considerations embodied within the three-tier model, the three-tier model was originally adopted in response to illegal bootleg activities persisting from Prohibition.[170] The rationale behind the implementation of a systematic regulatory scheme was to eliminate the utility of bootlegging by restricting access from criminal liquor manufacturers to the retailers.[171] Originally, states implemented the three-tier system for three reasons: (1) to discourage overconsumption, (2) to deter monopolies, and (3) to prevent organized

161. CHURCH, *supra* note 8, at 2–29.
162. *Id.*
163. *See* DOUGLAS GLEN WHITMAN, STRANGE BREW: ALCOHOL AND GOVERNMENT MONOPOLY (2003).
164. *Id*.
165. *See id.* Some control states also monopolized the retail aspect of intoxicating liquors. *Id*.
166. *See generally* Cal. Retail Liquor Dealers v. Midcal Aluminum, 445 U.S. 97 (1980); Granholm v. Heald, 544 U.S. 460 (2005); Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449 (2019).
167. Slaybaugh, *supra* note 5, at 266.
168. *Id.*; *see* U.S. CONST. amend. XXI.
169. Slaybaugh, *supra* note 5, at 266.
170. *Id*.
171. *Id*.

crime from permeating the industry as it did prior to and through Prohibition.[172] Members of both the production tier and the retail tier have expressed grievances regarding the increase in both production costs and costs to the consumer that accompanies membership in the wholesaler tier.[173] Conversely, some retailers find the system beneficial for diversity of inventory and circulation of spirits.[174] For example, in a direct-shipment scheme—a regulatory scheme which features no middle wholesaler tier—a retailer is limited to ordering within its general sphere of known alcohol producers.[175] Through a wholesaler in a three-tier scheme, however, a retailer may be introduced to new alcohol producers and products outside of what is readily accessible.[176] This is because of the difference in purpose behind a retailer and a wholesaler.[177] A wholesaler exists to acquire a diverse inventory of alcohol products and distribute these alcohol products to as many retailers as feasible.[178]

The three-tier regulatory scheme has multiple variants.[179] The traditional three-tier scheme sees equal treatment for both in-state and out-of-state manufacturers of spirits.[180] The limited three-tier system sees states allowing in-state manufacturers to circumvent the three-tiered system by adopting protectionist laws.[181] *Granholm v. Heald* addressed two examples of protectionist statutes that allowed in-state producers of alcohol to bypass multiple tiers.[182] The regulatory schemes addressed in *Granholm* allowed in-state alcohol manufacturers to circumvent the three-tiered system and sell directly to retailers, while not offering the same incentive to out-of-state alcohol manufacturers.[183]

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172. Daniel Glynn, Granholm*'s Ends Do Not Justify the Means: The Twenty-First Amendment's Temperance Goals Trump Free Market Idealism*, 8 J. L. ECON. & POL'Y 113, 126 (2011).

173. Slaybaugh, *supra* note 5, at 266.

174. *Id*.

175. *Id*. at 267.

176. *Id*.

177. *Id*.

178. *Id.*

179. *Id*.

180. *Id*.

181. *See* Granholm v. Heald, 544 U.S. 460 (2005). The Court in *Granholm* analyzed the constitutionality of New York and Michigan regulatory schemes discriminating against out-of-state alcohol manufacturers. *Id*.

182. *Id.* at 460.

183. *Id.* at 493; Cal. Retail Liquor Dealers v. Midcal Aluminum, 445 U.S. 97 (1980).

2. Granholm v. Heald

In *Granholm*, the Court analyzed the validity of both New York and Michigan statutes to determine whether they were discriminatory.[184] The Michigan statute featured a "wine-maker" exception, which allowed in-state wineries to bypass the wholesaler and retailer tiers and directly ship their wine to consumers, whereas out-of-state wineries still had to go through the wholesaler and retailer tiers of the traditional three-tier model.[185] The New York statute authorized in-state wineries to obtain a license that allowed them to similarly bypass the wholesaler and retailer tiers for direct shipment; however, the statute did not explicitly prevent in-state wineries from selling out-of-state wine to the consumers.[186] The New York statute's carefully hedged provision that allowed the sale of out-of-state wines was facially non-discriminatory.[187] There was, however, another provision that rendered this direct-shipment statute discriminatory.[188] The *Granholm* Court analyzed an additional discriminatory provision that required any out-of-state wine bound for direct shipment to a consumer by an in-state winery to consist of 75% New York grapes.[189]

The Court ruled that a "wine-maker" license that provides an exception to the three-tier distribution system for in-state wineries, but does not provide the same exception for out-of-state wineries, violated the Dormant Commerce Clause.[190] The *Granholm* Court's rationale in reaching this holding was not only predicated upon an analysis of the legislative intent of the Twenty-First Amendment, but also upon the legislative intent of the Webb-Kenyon Act .[191] The Court in *Granholm* demonstrated that the language from Section 2 of the Twenty-First Amendment was nearly identical to the language utilized in Section 2 of the pre-Prohibition Webb-Kenyon Act.[192] The Court interpreted this

184. *Granholm*, 544 U.S. at 465.
185. *Id*. at 469.
186. *Id.* at 470.
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.* at 460. The three-tier distribution system is a regulatory scheme that select states exercise over alcohol and that mandates that a manufacturer of intoxicating spirits must sell to a wholesaler and that that wholesaler must then sell to a retailer before the alcoholic product reaches the consumer. *See* Slaybaugh, *supra* note 5, at 265.
191. *Granholm*, 544 U.S. at 460.
192. *Id.*; 27 U.S.C. § 122.

textual similarity to mean that the legislative intent behind the Webb-Kenyon Act applied to the legislative intent of Section 2 of the Twenty-First Amendment.[193] Under this analysis, the intent behind both of these legislative provisions was to promote temperance through a grant of state regulatory authority over alcohol while also "constitutionalizing the Commerce Clause framework established under [the Webb-Kenyon Act.]"[194] From here, the Court opined that the "broad power to regulate liquor" was limited to whether to permit or ban the sale of alcohol.[195]

The Court's limitation of state authority under Section 2 of the Twenty-First Amendment in *Granholm* was the most significant narrowing of the scope of Section 2 post-*Midcal.*[196] After the Court's decision in *Midcal*, the Twenty-First Amendment continued to grant states broad authority over structuring their liquor distribution systems.[197] Ultimately, the *Granholm* decision further limited the states' grant of authority under Section 2 of the Twenty-First Amendment from the already diminished scope the states held after the *Midcal* decision.[198]

3. The Effects of Granholm

As the Court continued to analyze state regulation of alcohol under Dormant Commerce Clause principles, many of the state-imposed regulatory barriers began to fall, particularly the bans on direct-to-consumer shipment.[199] As of 1985, no state permitted the direct shipment of alcohol.[200] More than a decade after the *Granholm* decision, however, 42 states allowed some form direct-to-consumer shipments of wine from in-state manufacturers.[201] In response to *Granholm*, three states enacted legislation that permitted the direct shipment of wine on equal terms.[202]

193. *Granholm*, 544 U.S. at 460; Matthew Mann, *A Decade After* Granholm*: Have the Tectonic Plates of DTC Shifted?*, WINE DIRECT (July 7, 2015), https://www.winedirect.com/resources/knowledge-center/a-decade-after-granholm-have-the-tectonic-plates-of-dtc-shifted [https://perma.cc/ZEZ4-3MX3].

194. *Granholm*, 544 U.S. at 484; Mann, *supra* note 193.

195. *Granholm*, 544 U.S. at 493; Cal. Retail Liquor Dealers v. Midcal Aluminum, 445 U.S. 97 (1980).

196. *Granholm*, 544 U.S. at 460; *Cal. Retail Liquor Dealers*, 445 U.S. 97.

197. *Cal. Retail Liquor Dealers*, 445 U.S. at 97.

198. *Granholm*, 544 U.S. at 493; *Cal. Retail Liquor Dealers*, 445 U.S. at 97.

199. *See* William C. Green, *Creating a Common Market for Wine: Boutique Wines, Direct Shipment, and State Alcohol Regulation*, 39 OHIO N.U. L. REV. 13 (2012).

200. *Id.* at 38; *Cal. Retail Liquor Dealers*, 445 U.S. at 97.

201. Green, *supra* note 199, at 38.

202. *Id.*

These equal-terms shipments depended on whether the states had reciprocity laws,[203] or laws governing importation and distribution of alcohols similar enough to one another to justify the same practices between the two states as were allowed within the one state.[204] Courts found that 13 states' reciprocity laws, including California's, discriminated against interstate commerce because a reciprocity agreement with some states and not others was, in effect, discriminatory to the states without a reciprocity agreement.[205] As an alternative to expanding the capabilities of direct shipments to out-of-state alcohol manufacturers, 10 "closed" states prohibited all direct shipments of wine.[206] *Granholm* did not affect these states as they did not discriminate against out-of-state manufacturers of intoxicating spirits in any manner.[207]

Granholm directly affected 37 states because those states had enacted laws and regulations that discriminated against out-of-state alcohol manufacturers.[208] Twenty-three states adopted either the limited direct-shipment regulatory scheme, which was consistent with the Michigan law in *Granholm*, or the New York regulatory scheme, which was on its face less discriminatory but in effect placed a heavier economic burden on out-of-state manufacturers.[209] Interestingly enough, Connecticut practiced reverse discrimination by allowing out-of-state wineries to practice direct shipment but prohibiting as much for in-state wineries.[210] After *Granholm*, Connecticut began allowing direct shipment for in-state wineries as well.[211]

Granholm set the stage for state legislatures by creating a national marketplace for the direct shipment of wine from manufacturer to consumer, but *Granholm* did not completely open the door to free

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203. *See, e.g.*, Indianapolis Brewing Co. v. Liquor Control Comm., 305 U.S. 391 (1938). The Michigan statute under analysis in *Indianapolis Brewing* is an example of a reciprocity law. *Id*.; *see* State Bd. of Equalization of Cal. v. Young's Market Co., 299 U.S. 59 (1936).

204. *See generally* Indianapolis Brewing, 305 U.S. 391; *see* WHITMAN, *supra* note 164.

205. Green, *supra* note 199, at 39 n.209 (listing the "thirteen reciprocity states prior to *Granholm*" as "California, Colorado, Hawaii, Idaho, Illinois, Iowa, Minnesota, Missouri, New Mexico, Oregon, Washington, West Virginia, and Wisconsin").

206. *Id.* at 39.

207. *Id.*

208. *Id*.

209. *Id*.

210. *Id.*

211. *Id*.

consumer shipment.[212] *Granholm* only called for the equal treatment of both in-state and out-of-state wineries and did not explicitly address the conduct of alcohol retailers.[213] The *Granholm* Court's failure to address the states' regulatory power over retailers left the door open for discriminatory state regulation on the retailer tier.[214] Justice Alito's focus on the durational-residency requirement in crafting a narrow holding is responsible for such lack of discussion.[215] Sympathizers of the three-tier model utilized the absence of retailer-centric language in *Granholm* and bolstered it with the language of the *Granholm* Court, which described the three-tier system, existing as a state regulatory mechanism over alcohol, as "unquestionably legitimate."[216]

After *Granholm*, most states' alcohol markets did not develop into open systems.[217] An open system is a particular variant of economic system that possesses no regulatory barriers to free market activity.[218] A key characteristic of an open system is that it has competitive barriers to entry but no regulatory barriers to entry.[219] The delayed development toward an open system is a result of existing state legislation preserving the three-tier system.[220] Even after *Granholm*, most states' revised statutes were designed to preserve the usefulness of the three-tier system and to protect the economic interests of states' wholesalers and local wineries.[221] It remains unclear as to whether the absence of regulatory barriers to entry

212. Granholm v. Heald, 544 U.S. 460 (2005); *see also* Emma Balter, *Will the Supreme Court's* Tennessee *Decision Dramatically Change the U.S. Wine Market?*, WINE SPECTATOR (July 12, 2019), https://www.winespectator.com/articles/will-the-supreme-court-wine-decision-reshape-the-u-s-wine-market [https://perma.cc/9FB6-2M9V].

213. Balter, *supra* note 212.

214. *Id.*; *cf. Granholm*, 544 U.S. at 460; Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449 (2019).

215. Mitch Frank, *What the Supreme Court Said—and Didn't Say—About Wine*, WINE SPECTATOR (July 22, 2019), https://www.winespectator.com/articles/what-the-supreme-court-said-and-didn-t-say-about-wine [https://perma.cc/462K-PB2A].

216. *Granholm*, 544 U.S. at 489 (2005) (quoting North Dakota v. United States, 495 U.S. 423, 432 (1990)).

217. Troy Segal, *Open Market*, INVESTOPEDIA (Apr. 19, 2019), https://www.investopedia.com/terms/o/open-market.asp [https://perma.cc/REB6-SKLY].

218. *Id.* The terms "open system" and "open market" are utilized interchangeably.

219. *Id.*

220. Green, *supra* note 199, at 42.

221. *Id.*

into the alcohol market will be beneficial to the alcohol market in the long term.[222]

Under the regulatory three-tier scheme there exists a number of regulatory barriers that modern cases analyzing Section 2 of the Twenty-First Amendment have attempted to eliminate.[223] One potential reason for the judicial elimination of regulatory barriers is that both producers and retailers of alcohol complained about the increased cost of distributing through a wholesaler and about the elevated pricing of alcohol distributed through wholesalers, respectively.[224] These are examples of market regulations creating an increase in cost to both manufacturers and consumers by mandating the use of the wholesaler as a middleman, as opposed to the market freely enabling these parties.[225] The significance of an open-market scheme is apparent in its defining characteristic.[226] Possessing only competitive barriers and no regulatory barriers to trade, products circulating on an open system are priced and purchased at their true value to the consumer.[227] The absence of regulatory barriers allows traditional supply and demand to rule the market, effectively leveling the playing field between the struggling micro-manufacturer of alcohol and the large manufacturing conglomerates.[228] An open market produces the same effect as a free market system: the reduction and elimination of any discriminatory effects that regulatory barriers may place on imports and exports.[229] The elimination of regulatory barriers allows for a diversification of alcoholic products in the market and a potential revitalization of the business models of obscure producers of alcohol.[230] The modern cases analyzing Section 2 of the Twenty-First Amendment have thus far resulted in a gradual elimination of the regulatory barriers, which, until now, have prevented an oversaturation of the alcohol market.[231]

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222. *See infra* Section III.B.

223. *See generally* Cal. Retail Liquor Dealers v. Midcal Aluminum, 445 U.S. 97 (1980); Granholm v. Heald, 544 U.S. 460 (2005); Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449 (2019).

224. Slaybaugh, *supra* note 5, at 266.

225. *See, e.g.*, *id*. at 266 n.6.

226. Segal, *supra* note 217.

227. *Id*.

228. HARRISON, *supra* note 20, at 13–16; *see also* Green, *supra* note 199, at 42.

229. Segal, *supra* note 217.

230. *See generally* Slaybaugh, *supra* note 5, at 266.

231. *See generally* Cal. Retail Liquor Dealers v. Midcal Aluminum, 445 U.S. 97 (1980); Granholm v. Heald, 544 U.S. 460 (2005); Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449 (2019).

II. *TENNESSEE WINE*: *GRANHOLM*'S SUCCESSOR

Tennessee Wine & Spirits Retailers Ass'n v. Thomas stands apart from its predecessor *Granholm* because it directly addresses the retailer of intoxicating liquors, as opposed to the manufacturer.[232] After *Granholm*, participants in the alcohol industry were concerned with the ambiguity surrounding whether the holding in *Granholm* applied only to products and producers or also encompassed retailers.[233] Proponents of the aforementioned open economic system for alcohol distribution hoped for the latter outcome, as the Supreme Court had not yet addressed the ambiguity surrounding the ability of states to discriminate as to direct shipments from retailers prior to *Tennessee Wine*.[234]

A. Wait or Find Another State

The Court in *Tennessee Wine* analyzed the durational-residency requirements imposed on persons and companies wishing to operate liquor retail stores in Tennessee.[235] Prior to reaching the Supreme Court, there were three residency requirements under scrutiny: (1) that an applicant for an initial liquor license must have resided in Tennessee for the immediately preceding two years; (2) that an applicant seeking to renew this liquor license, where annual renewal was mandatory, must have resided in Tennessee for ten years consecutively; and (3) that a corporation's stockholders must all be Tennessee residents for the corporation to obtain a liquor license.[236] While the Sixth Circuit invalidated two of these requirements, the Supreme Court determined the validity of the two-year residency requirement for initial applicants.[237]

1. The Sixth Circuit Does Two-Thirds of the Job

In the *Byrd v. Tennessee Wine & Spirits Retailers Ass'n*, a divided panel of the Sixth Circuit Court of Appeals affirmed the invalidity of Tennessee's ten-year residency renewal requirement, the corporation stockholder residency requirement, and the two-year durational residency.[238] Ultimately, the Sixth Circuit held that the two-year residency

232. *Compare Tenn. Wine*, 139 S. Ct. at 2449, *with Granholm*, 544 U.S. at 460.
233. Balter, *supra* note 212.
234. *See Tenn. Wine*, 139 S. Ct. at 2449.
235. *Id.*
236. *Id.*
237. *Id.*; Byrd v. Tenn. Wine & Spirits Retailers Ass'n, 883 F.3d 608 (2018).
238. *Tenn. Wine*, 139 S. Ct. at 2454–55 (citing *Byrd*, 883 F.3d 608).

requirement violated the principles of the Dormant Commerce Clause and acknowledged the "complicated history" surrounding the doctrine.[239] The Sixth Circuit allied with the Tennessee attorney general's stance that the residency requirements discriminated against out-of-state economic interests.[240] The Tennessee Wine & Spirits Retailers Association (TWSRA) filed a petition for writ of certiorari with respect to the Sixth Circuit's invalidation of only the two-year durational residency requirement.[241]

2. An Extension of Granholm*: Retailers Not Excluded*

The Supreme Court held that the power to regulate in-state alcohol distribution did not extend to discrimination against out-of-state alcohol products.[242] In doing so, Justice Alito stated in the majority opinion that *Granholm* never limited the Commerce Clause analysis to discrimination against the products or producers, but rather that the Commerce Clause prohibits state discrimination against *all* out-of-state economic interests.[243] The *Tennessee Wine* decision prohibited states from discriminating against other states through regulation of alcohol manufacturers and retailers within the three-tier regulatory model.[244] This prohibition firmly eliminated the states' last untailored regulatory discretion over alcohol, subject only to the *Pike v. Bruce Church* balancing test and the *Maine v. Taylor* exception, which would only apply in the event of regulation under the legitimate state interest of promoting temperance and market growth.[245]

In its interpretation of the legislative intent behind Section 2 of the Twenty-First Amendment, the Court looked to the informative pre-Prohibition Act that the Twenty-First Amendment inherited its text from:

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239. *Id.* The "complicated history" referenced by the Sixth Circuit refers to the complicated history between how the Twenty-First Amendment and the Dormant Commerce Clause have traditionally interacted with each other and the impositions the courts have recognized of one upon the other. Specifically, since ratification of the Twenty-First Amendment, the courts have deviated greatly from the initial plenary regulatory authority they initially perceived the amendment to grant states, because of the discriminatory effects certain regulations might have. *See supra* Section I.B., I.C.

240. *Tenn. Wine*, 139 S. Ct. at 2457–58; *see also Byrd*, 883 F.3d 608.

241. *Tenn. Wine*, 139 S. Ct. at 2452.

242. *Id*. at 2475.

243. *Id.*

244. *See, e.g.*, Balter, *supra* note 212.

245. *Tenn. Wine*, 139 S. Ct. at 2459; *see also* Pike v. Bruce Church, Inc., 397 U.S. 137 (1970); Maine v. Taylor, 477 U.S. 131 (1986).

the Webb-Kenyon Act.[246] There is a significant inconsistency among interpretations of Section 2 from the early post-ratification cases to the modern cases of *Granholm* and *Tennessee Wine*.[247] The early Court interpreted the state power to regulate alcohol under Section 2 as plenary.[248] The modern Court interpreted the state power over alcohol under Section 2 as subject to Dormant Commerce Clause limitations.[249] The *Tennessee Wine* Court reconciled the discrepancy in interpretation between the early and modern cases by stating that the earlier Court's failure to account for the history embodied in the Wilson and Webb-Kenyon Acts led the Court to render an improper interpretation.[250]

The *Tennessee Wine* Court first interpreted the Wilson Act's goal as leaving the decision of whether to allow alcohol within a state's borders.[251] Further, the Court stated that the Wilson Act mandated equal treatment for alcohol regulation, whether produced within or outside a state, as opposed to favorable regulation for local alcoholic products.[252] The Court then stated that the purpose behind the Webb-Kenyon Act was to afford each state a measure of regulatory authority over the importation of alcohol.[253] The majority referred to this as a "drafting problem" and stated that the Webb-Kenyon Act was not meant to grant states authority to regulate alcohol in interstate commerce, but to prohibit illegal conduct, such as the importation of liquor into "dry" states.[254] It is significant that the equal treatment provision from the Wilson Act is absent in the text of the Webb-Kenyon Act.[255] The Court reasoned that the Webb-Kenyon Act was meant

246. 27 U.S.C. § 122.

247. *See* State Bd. of Equalization of Cal. v. Young's Market Co., 299 U.S. 59 (1936); Indianapolis Brewing Co. v. Liquor Control Comm., 305 U.S. 391 (1938); Ziffrin, Inc. v. Reeves, 308 U.S. 132 (1939). *But cf.* Cal. Retail Liquor Dealers v. Midcal Aluminum, 445 U.S. 97 (1980); Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 268 (1984); Granholm v. Heald, 544 U.S. 460 (2005); *Tenn. Wine*, 139 S. Ct. at 2449.

248. *See Young's*, 299 U.S. at 59; *Indianapolis Brewing*, 305 U.S. at 391; *Ziffrin*, 308 U.S. at 132.

249. *See Cal. Retail Liquor Dealers*, 445 U.S. at 97; *Bacchus*, 468 U.S. at 268; *Granholm*, 544 U.S. at 460; *Tenn. Wine*, 139 S. Ct. at 2449.

250. *See generally Young's*, 299 U.S. at 59; *Indianapolis Brewing*, 305 U.S. at 391; *Ziffrin*, 308 U.S. at 132 .

251. *Tenn. Wine*, 139 S. Ct. at 2465–66.

252. *Id*. at 2466.

253. *Id*.

254. *Id*.

255. *Compare* 21 U.S.C. § 121, *with id.* § 122.

to correct the *Leisy* loophole[256] that the Wilson Act failed to correct.[257] Thus, the Court held that the two Acts should be read together to suggest that the Webb-Kenyon Act was meant to mandate equal treatment.[258] Since the text of the Webb-Kenyon Act was the model for Section 2 of the Twenty-First Amendment, the Court contended that the equal treatment mandate from the Wilson and Webb-Kenyon Acts should be imputed to the legislative intent behind Section 2 of the Twenty-First Amendment.[259]

3. A Dissent against the Dormant Commerce Clause

Authoring the dissent in *Tennessee Wine*, Justice Gorsuch referred to the Dormant Commerce Clause as "peculiar" and pointed out that the doctrine is absent in the text of the Constitution.[260] Justice Gorsuch began his dissent with a number of concessions, the first of which was that Section 2 of the Twenty-First Amendment does not immunize state laws from all constitutional claims.[261] As an immediate counter, however, Justice Gorsuch asserted that a challenge under the Dormant Commerce Clause is not based on any constitutional provision, but rather that it is implied from Article I, Section 8 of the Constitution.[262] Under this analysis, the dissent contended that in the event a doctrine implied from a constitutional provision conflicted with another express constitutional provision, the textually authorized provision should take precedence.[263] Justice Gorsuch's argument challenged the validity of the Dormant Commerce Clause as a whole.[264] The dissent criticized the majority for relying on the sparse legislative history of the Amendment as opposed to

256. *See supra* Section I.C (discussing the loophole from the Court's interpretation of *Leisy v. Hardin*).

257. *Tenn. Wine*, 139 S. Ct. at 2466.

258. *Id*.

259. U.S. CONST. amend. XXI; *see also Tenn. Wine*, 139 S. Ct. at 2469.

260. *Tenn. Wine*, 139 S. Ct. at 2477 (Gorsuch, J., dissenting) ("Unlike most constitutional rights, the [D]ormant Commerce Clause doctrine cannot be found in the text of any constitutional provision but is (at best) an implication from one.").

261. *Id.* at 2477 (Gorsuch, J., dissenting).

262. *Id.* at 2478 (Gorsuch, J., dissenting).

263. *See, e.g.*, *id*. at 2477 (Gorsuch, J., dissenting). This principle is prevalent in constitutional interpretation and fundamental to the textualist interpretive method as the Court espoused in *Alexander v. Sandoval*. 532 U.S. 275, 288–89 (2001).

264. *Tenn. Wine*, 139 S. Ct. at 2478 (Gorsuch, J., dissenting).

the text of the Amendment, state practices, and early post-ratification precedent.[265]

Where previously *Granholm* authorized protectionist in-state regulation of the three-tiered system provided that there existed a demonstrable connection to some legitimate state interest, the *Tennessee Wine* Court instead suggested that the durational-residency requirements that Tennessee prescribed were inherently discriminatory, with only a heavily attenuated connection to the legitimate state interest of bona fide health and safety measures.[266] The dissent countered that the ratification of the Twenty-First Amendment constitutionalized an exception to the Dormant Commerce Clause and should not be rendered superfluous through the imposition of a jurisprudentially mandated Dormant Commerce Clause limitation.[267] The dissent also rejected the majority's proposition that the legitimate state purpose of the regulatory scheme must be predicated upon the temperance principles of the Twenty-First Amendment, instead stating that Tennessee should be exempted from Dormant Commerce Clause scrutiny because the legitimate state purpose was increasing the price of alcohol and moderating its use under Section 2 of the Twenty-First Amendment.[268]

The dissent's decision to criticize the existence of the Dormant Commerce Clause rather than to criticize the majority's application of it likely stemmed from the impossibility of successfully meeting the *Maine v. Taylor* exception.[269] Admittedly, under the *Maine v. Taylor* test, there must be *no* other nondiscriminatory means to achieve the end of moderating the use of alcohol for the public health.[270] When dealing with an inherently dangerous product like alcohol, there is always another nondiscriminatory means to benefit the public health: effect a state-wide ban on both in-state and out-of-state alcohol.[271]

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265. *Id*.

266. Granholm v. Heald, 544 U.S. 460 (2005); *Tenn. Wine*, 139 S. Ct. at 2449. The health and safety measures in *Tennessee Wine* were the state's interest in the ability to conduct inspections of the premises; hence the desire to have the owners reside within the state.

267. *Tenn. Wine*, 139 S. Ct. at 2478 (Gorsuch, J., dissenting).

268. *Id.* (Gorsuch, J., dissenting).

269. *Id.* (Gorsuch, J., dissenting); Maine v. Taylor, 477 U.S. 131 (1986).

270. *Maine*, 477 U.S. at 131.

271. *See generally* North Dakota v. United States, 495 U.S. 423, 432 (1990) ("[The] core purposes [of the Twenty-First Amendment] . . . [include] promoting temperance, ensuring orderly market conditions, and raising revenue."); *see also Granholm*, 544 U.S. at 460.

B. An Inquiry into the Inadequacy of the Immediate Interpretation

The dissent in *Tennessee Wine* did not accurately portray the argument of petitioner Tennessee Wine and Spirits Retailers Association; instead, the dissent opted for the more radical anti-Dormant Commerce Clause argument.[272] The argument proffered by the Association in its reply brief accurately frames the analysis that the majority took, albeit with a more favorable outcome than that rendered by the Court.[273] The Association contended that even if Tennessee's durational-residency requirement was discriminatory, it was not invalidated under the Dormant Commerce Clause, as there was a legitimate local purpose that could not otherwise be served with nondiscriminatory means.[274] The Association argued that the durational-residency requirement furthered the twin goals of restricting the availability of alcohol and ensuring that the sellers were tied to the communities in which they did business.[275] At the presentation of these twin goals, the majority's analysis shifted to whether these goals advanced any of the Twenty-First Amendment's principles, an analysis unaddressed by the dissent.[276] The comprehensive list of the principles underlying the Twenty-First Amendment are as follows: (1) the promotion of temperance; (2) the establishment or maintenance of orderly markets for alcoholic beverage; (3) the restriction of access to alcoholic beverages by those under the legal drinking age; and (4) raising state revenue.[277] The first principle of temperance is "closely allied" with the preservation of public health.[278] Unfortunately for the Association, even if the dissenting Justices had opted to argue against the *Maine v. Taylor* exception instead of against the existence of the Dormant Commerce Clause as a whole, the exception would not have been met.[279]

The first step of the *Maine v. Taylor* analysis is the judicial determination of whether there exists some legitimate local purpose for

272. Reply Brief for Petitioner, Tenn. Wine & Spirits Retailers Ass'n v. Blair, 139 S.Ct. 2449 (2019) (No. 18-96), 2019 WL 118041.

273. *Id*.

274. *Id.*

275. *Id*.; *see also North Dakota*, 495 U.S. at 432.

276. *North Dakota*, 495 U.S. at 432; *see* Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2478 (2019) (Gorsuch, J., dissenting).

277. *North Dakota*, 495 U.S. at 432; *see also* Comprehensive Alcohol Regulatory Effectiveness Act, H.R. 5034, 111th Cong. (2010).

278. Lamar Outdoor Adver., Inc. v. Miss. St. Tax Comm'n, 701 F.2d 314, 331 (5th Cir. 1983).

279. Maine v. Taylor, 477 U.S. 131(1986).

the state law.[280] In the present case, there is no question that a state has a legitimate purpose in preserving the public health of its citizens.[281] This legitimate local purpose is an implied principle of the Twenty-First Amendment.[282] The reduction of mass availability of liquor by restricting the total number of available distributors and by making these distributors entirely present within the state promotes both the public health of a community and the accountability of distributors.[283] First, the decreased, but not eliminated, public access to intoxicating spirits will statistically reduce the amount of consumption through sheer supply limitation principles.[284] Second, state monitoring and regulation are far more feasible when the retailer transporting alcohol within a state is physically located within that state.[285] A resident retailer is inherently more invested in its community and likely to possesses a greater incentive to comply with alcohol laws and responsible business practices.[286] Furthermore, the resident retailer is also subject to physical inspection, whereas it would be impracticable to adequately regulate an out-of-state entity.[287] Both of the Association's proffered purposes advance the legitimate local purpose of protecting the public health of the community from the dangers of alcohol.[288]

The second step of the *Maine v. Taylor* analysis looks to the existence of non-discriminatory alternatives to achieve the same end.[289] Unfortunately for the Association, this element is difficult to satisfy, as even an unfeasible nondiscriminatory alternative will bar the exception. In every case concerning alcohol in which a party claims that discriminating against an out-of-state alcohol industry participant is the only method to advance a legitimate public health interest, this claim will fail.[290] This is

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280. *Id*.

281. *Tenn. Wine*, 139 S. Ct. at 2449.

282. *North Dakota*, 495 U.S. at 432; *see also* Comprehensive Alcohol Regulatory Effectiveness Act, H.R. 5034, 111th Cong. (2010).

283. Reply Brief for Petitioner, *supra* note 272, at *14–15.

284. HARRISON, *supra* note 20, at 13.

285. Reply Brief for Petitioner, *supra* note 272, at *14–15 (demonstrating the Tennessee legislature's interest in "maintain[ing] a higher degree of oversight").

286. *Id*.

287. *Id*. The Sixth Circuit rejected this argument, referencing the accessibility modern technological advancement lends to off-site regulation. *See* Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2475 (2019).

288. *Tenn. Wine*, 139 S. Ct. at 2475 (recognizing promotion of responsible sales and consumption practices as "legitimate" state interests).

289. Maine v. Taylor, 477 U.S. 131 (1986).

290. *Tenn. Wine*, 139 S. Ct. at 2475 ("[T]here are obvious alternatives that better serve that goal without discriminating against nonresidents.").

because all states, even after *Tennessee Wine*, still possess the power to ban both in-state and out-of-state liquor.[291] The ban of all liquor is a nondiscriminatory means to achieve the beneficial end of improving public health. As a result, even if it would be unfeasible and counter-productive to a state's finances to prohibit all in-state and out-of-state alcohol products, this is still a non-discriminatory manner in which the public health will ultimately benefit.[292] Although this Dormant Commerce Clause analysis is logically sound, *Granholm*'s and *Tennessee Wine*'s bright-line limitation on state discriminatory authority over alcohol will produce far-reaching effects on the three-tier system and the alcohol industry.

III. CONSTITUTIONAL AND MARKET IMPACTS OF *TENNESSEE WINE*

The *Granholm* and *Tennessee Wine* Courts' narrow view of Section 2 of the Twenty-First Amendment represent the most pivotal shift in interpretation since the *Frankfort* Court's deviation from the *Young*'s plenary view of Section 2.[293] The interpretation provided in *Young* and the cases that immediately followed reflected a strictly textual analysis of Section 2.[294] Utilizing this textual analysis, the early post-ratification Court recognized Section 2 as an exception to the Commerce Clause that granted the states plenary authority to regulate alcohol within their borders, free of federal interference.[295] The Court in *Tennessee Wine* suggests that this textual interpretation was inaccurate and that those courts did not consider the legislative intent of the pre-Prohibition acts that informed Section 2.[296] Since this early interpretation, a jurisprudential abatement of the broad scope of Section 2's grant of power has occurred concurrently with the growth of e-commerce.[297] Though the modern[298]

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291. *Id.* at 2467.

292. *Id.* at 2475.

293. State Bd. of Equalization of Cal. v. Young's Market Co., 299 U.S. 59 (1936); United States v. Frankfort Distilleries, Inc., 324 U.S. 293 (1945).

294. *See Young's*, 299 U.S. at 59; Indianapolis Brewing Co. v. Liquor Control Comm., 305 U.S. 391 (1938); Ziffrin, Inc. v. Reeves, 308 U.S. 132 (1939).

295. *Young's*, 299 U.S. at 59; U.S. CONST. art I, § 8, cl. 3.

296. *Tenn. Wine*, 139 S. Ct. 2449.

297. *See generally* Granholm v. Heald, 544 U.S. 460 (2005); CHURCH, *supra* note 8, at 2–12.

298. For the purposes of this Comment, the "modern Court" refers to the *Granholm* and *Tennessee Wine* Courts' interpretations, whereas "early Court" and "post-ratification Court" refer to the interpretations from *Young's*, *Indianapolis Brewing*, and *Ziffrin*.

Court's narrow interpretation of Section 2 of the Twenty-First Amendment is certainly correlative to market globalization through the increase of e-commerce, a question arises as to whether there is some causation between the growth of e-commerce and the Court's diminishing of the scope of the Twenty-First Amendment.[299] If this relationship is more than mere correlation, the question then becomes whether large-scale regulatory reform is an appropriate task for the Court to undertake.[300]

From an economic perspective, a uniform federal regulatory scheme, in light of the increased opportunities for direct-to-buyer shipments, may be more beneficial to the alcohol market than varied state-run schemes.[301] If the motivation behind the Court's decision in *Tennessee Wine* was to enact such a scheme, or even to eliminate state regulation and open the market, the means used to achieve this result may have constituted a judicial overreach.[302]

The interpretation that the implied Dormant Commerce Clause doctrine supersedes the express legislative intent of Section 2 of the Twenty-First Amendment severely diminishes the scope of Section 2 and will carry with it a shift toward nationalization of state liquor laws.[303] The result of nationally uniform laws could yield positive market results, as the three-tier liquor distribution model that many states employed imposed an undue burden on the e-commerce expansion of micro-manufacturers of alcohol and retailers wishing to ship directly to buyers located in states without reciprocity laws.[304]

After the *Granholm* decision, lower courts were unsure of whether to limit the Court's ruling to producers of wine or whether the ruling would extend to wholesalers and retailers.[305] There was a split in application between a narrow scope and an expanded scope of *Granholm*.[306] The

299. Bird & Kopp, *supra* note 2.

300. *Id.*

301. *See* Jan Kregel, *Diversity and Uniformity in Economic Theory as an Explanation of the Recent Economic Crisis*, Working Paper No. 730, Levy Economics Institute of Bard College, Aug. 2012. ("Thus, while the benefits of free markets depend on diversity, the operation of these markets depends on uniformity.").

302. Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449 (2019).

303. U.S. CONST. amend. XXI.

304. *See, e.g.*, Indianapolis Brewing Co. v. Liquor Control Comm., 305 U.S. 391 (1938). The Michigan statute analyzed in *Indianapolis Brewing* is an example of a reciprocity law. *See supra* note 132.

305. Slaybaugh, *supra* note 5, at 271.

306. *Id*. at 283. The split rests on which provision, between the Dormant Commerce Clause and the Twenty-First Amendment, takes precedence over the other. *Id*.

narrow scope provided that the ruling from *Granholm* applied only to the production tier.[307] The expanded scope suggested that *Granholm* applied to all three levels of the three-tier distribution system.[308] The emphasis of these courts' rulings focuses not on discrimination against the out-of-state product itself, but against any and all interstate commerce, regardless of the origin of the product.[309] A number of problems arose from the split, the most pressing of which was whether a state could still pass discriminatory laws and regulations governing direct shipment from retailer to consumer, as the *Granholm* court only explicitly addressed direct shipment from producer to consumer.[310] The holding in *Tennessee Wine* addressed this split and resolved it.[311] The *Tennessee Wine* Court took the expanded approach, which may hold fatal consequences for the three-tier system.[312] *Tennessee Wine*'s application will, in effect, resolve the split in application that emerged from *Granholm*, either by forcing states to "level-down" their regulatory laws concerning alcohol, or by forcing states to open their borders for all direct-to-consumer shipping.[313]

A. The Three-Tier Model: Unquestionably Illegitimate?[314]

Tennessee Wine, applying the expanded scope of *Granholm*'s holding, built upon the groundwork that *Granholm* laid toward a free-market.[315] This suggests that the *Granholm* Court intended *Granholm* to apply to all

307. *See* Granholm v. Heald, 544 U.S. 460 (2005) ("[T]he three-tier system itself is unquestionably legitimate.") (internal quotations omitted). The Second and Fifth Circuits took the narrow view of the holding of *Granholm*, stating that the three-tier system is the exception to the Dormant Commerce Clause. Slaybaugh, *supra* note 5, at 283.

308. Slaybaugh, *supra* note 5, at 283. The Seventh Circuit took the expanded view of the holding of *Granholm*, stating that the three-tier system, while legitimate, is subject to the limitation of the Dormant Commerce power.

309. *Id.* at 276.

310. *See, e.g.*, Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449 (2019); *see also* Granholm v. Heald, 544 U.S. 460 (2005).

311. *Tenn. Wine*, 139 S. Ct. at 2449.

312. *See, e.g.*, *id.*

313. *See* Glynn, *supra* note 172, at 126. Leveling down is when state laws "create very strict controls over the sale of alcohol but apply them to both intrastate and interstate producers, a move that does not further consumer interests." *Id.*

314. *Granholm*, 544 U.S. at 489. The Court in *Granholm* referred to the three-tier regulatory model as "unquestionably legitimate" while simultaneously limiting the breadth of its applicability. *Id.*

315. *See id.* at 460; *Tenn. Wine*, 139 S. Ct. at 2449.

three levels of the three-tier distribution system.[316] In the period following *Granholm*, prior to *Tennessee Wine*, there was an abundance of academic speculation on what result the limitation on regulation would have on the market.[317] Scholars originally speculated that there would be a "leveling-down," or a universal application of strict liquor regulation both in-state and out-of-state.[318] The alternative is that rather than a "leveling down," state governments would withdraw from the regulatory sphere, allowing the market to regulate itself.[319] *Granholm* alone did not result in a state withdrawal from the regulatory sphere because of the narrow and carefully hedged nature of its holding.[320] Since *Granholm* only directly addressed producers, state regulatory authorities did not entirely withdraw, as a legitimate question remained over whether the retailer aspect of the alcohol industry was still susceptible to discriminatory regulation.[321] This withdrawal of state regulatory authority, while it previously may have been gradual, is now more certain to occur because of the Court taking *Granholm*'s expanded approach in *Tennessee Wine*.[322] The expanded approach from *Granholm* that the *Tennessee Wine* Court applied eliminates the state's ability to regulate discriminatorily.[323] Considering that states primarily utilized the three-tier model as a means to effectuate discriminatory regulation, rendering the three-tier model ineffective in this respect will eliminate its usefulness in modern society.[324] Rather than keep a model that is both illegitimate and useless, it is realistic that many, if not all, states will either abandon the three-tier model entirely or enact universal prohibitions that apply both to in-state and out-of-state participants.[325] The abandonment of the very scheme by which states regulated alcohol brings with it the abandonment of state regulation over

316. Slaybaugh, *supra* note 5, at 276.

317. *See, e.g.*, *id.* at 265; Glynn, *supra* note 172, at 126.

318. Glynn, *supra* note 172, at 126.

319. Removal of regulatory barriers to allow market regulation is characteristic of an open system in economics. *See infra* Section III.B.

320. *Granholm*, 544 U.S. 460.

321. Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449 (2019); *see also* Slaybaugh, *supra* note 5, at 271–72.

322. *Tenn. Wine*, 139 S. Ct. at 2474.

323. Slaybaugh, *supra* note 5, at 283.

324. *See, e.g.*, Todorov, *supra* note 25.

325. *See id. See generally* Kevin Koeninger, *Direct-to-Consumer Wine Shipments Debated at Sixth Circuit*, COURTHOUSE NEWS SERV. (Mar. 12, 2020), https://www.courthousenews.com/direct-to-consumer-wine-shipments-debated-at-sixth-circuit/ [https://perma.cc/WE87-8LMU].

alcohol.[326] Regulation over this industry, if any, will be limited to federal regulation under the Commerce Clause.[327]

1. After Granholm*: Direct Impacts of Direct Shipment*

Without the evolution of direct shipping following the Court's decision in *Granholm*, many smaller producers would no longer be participants in the alcohol industry.[328] The evolution of direct shipping—the alcohol producer shipping directly to retailers or consumers—is important because larger wineries and other producers of alcohol are able to more easily attract wholesalers, whereas the smaller producers are fiscally unable to do so.[329] Although direct shipping may not be a pivotal part of the sales strategy of larger producers, direct-to-consumer sales are a "critical component" of the smaller producers' sales strategy.[330] To reference back to the micro-winery that produced only 3,000 cases of wine per year,[331] in 2014 direct shipment sales would have made up over 60% of that micro-winery's total sales, set to increase to over 70% by 2017.[332] For larger manufacturers of alcohol, such as wineries producing over 250,000 cases of wine per year, by 2017 approximately 5% of their total sales was attributed to direct shipment.[333] Nonetheless, several states still retained their draconian anti-direct shipment laws.[334] *Granholm*'s allowance of manufacturers to utilize direct-to-consumer shipping initially

326. *See* Todorov, *supra* note 25.

327. U.S. CONST. art. I, § 8, cl. 3.

328. Rob McMillan, *State of the Wine Industry Report 2018*, SILICON VALLEY BANK (Feb. 15, 2018), https://www.svb.com/globalassets/library/images/svb-2018-wine-report.pdf [https://perma.cc/E254-Q5UX].

329. Slaybaugh, *supra* note 5, at 277.

330. McMillan, *supra* note 328.

331. *Id.*

332. *Id.*; *see* Slaybaugh, *supra* note 5, at 266 n.9. The numbers for 2017 were predicted from the *State of the Wine Industry Report 2018*; however, the 2019 edition demonstrated numbers to the contrary. Direct-to-consumers as of the end of 2018 made up 61% of the average family winery's revenue.

333. McMillan, *supra* note 328.

334. *Id.* After *Granholm*, Alabama, Delaware, Kentucky, Mississippi, Oklahoma, and Utah continued to enforce anti-shipment laws for producers of wine, with Utah and Kentucky retaining felony anti-shipping laws. It is important to recall that "leveling down" still allows for such anti-shipping laws, provided they apply to both in-state and out-of-state producers. *See supra* note 271. Glynn, *supra* note 172, at 126. Leveling down is when state laws "create very strict controls over the sale of alcohol but apply them to both intrastate and interstate producers, a move that does not further consumer interests." *Id.*

resulted in a growth of manufacturers' sales of alcohol, which is to be expected.[335] Following *Tennessee Wine*, the unpredictability of an open system coupled with direct-to-consumer shipping from retailers may detrimentally affect the alcohol industry as a whole.[336]

2. Grasping at Straws: Is State Regulation Feasible Anywhere?

The ultimate takeaway from *Tennessee Wine* is that states can no longer discriminatorily regulate against out-of-state retailers, analogous to the situation after *Granholm* when states could no longer discriminatorily regulate against out-of-state producers.[337] The three-tier regulatory system was the primary avenue that states utilized to enact discriminatory laws following the Court's decisions in *Midcal* and *Bacchus Imports*—cases that both emphasized the importance of the Dormant Commerce Clause when analyzing laws enacted under Section 2 of the Twenty-First Amendment.[338] With *Granholm* and *Tennessee Wine*, the states are no longer afforded discriminatory regulatory authority under Section 2 of the Twenty-First Amendment over the first and third tiers.[339] The Court in *Granholm* stated that the three-tier system was "unquestionably legitimate" under the Constitution.[340] After *Tennessee Wine* the inquiry is no longer a question of the three-tier system's constitutional legitimacy, but whether it serves any legitimately useful purpose.[341]

After *Granholm*, many of the states preserved the three-tier system with the hope that, in *Granholm,* the Court intended to adopt the narrow view, which did not apply the Dormant Commerce Clause analysis to retailers.[342] However, the *Tennessee Wine* Court has expressly stated that the expanded view applies; therefore, there is no legitimate purpose for preserving the three-tier model beyond preserving the jobs of the wholesalers.[343] In the absence of the wholesaler tier, the wholesaler's specialization in the procurement of varietal alcohol would become the

335. *See* Granholm v. Heald, 544 U.S. 460 (2005); Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449 (2019).

336. *Granholm*, 544 U.S. at 460; *Tenn. Wine*, 139 S. Ct. at 2448.

337. *See Granholm*, 544 U.S. at 460; *Tenn. Wine*, 139 S. Ct. at 2449.

338. *See* Cal. Retail Liquor Dealers v. Midcal Aluminum, 445 U.S. 97 (1980); Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 268 (1984).

339. *See Granholm*, 544 U.S. at 460; *Tenn. Wine*, 139 S. Ct. at 2449.

340. *See Granholm*, 544 U.S. at 489; *Tenn. Wine*, 139 S. Ct. at 2449.

341. *See Granholm*, 544 U.S. at 460; *Tenn. Wine*, 139 S. Ct. at 2449.

342. *See Tenn. Wine*, 139 S. Ct. at 2449.

343. *See generally* Todorov, *supra* note 25.

burden of the manufacturers and retailers.[344] The elimination of the three-tier system simply means the elimination of the mandate that some manufacturers *must* go through a wholesaler, but does not necessarily mean the market will do away with the functional wholesaler.[345] With no other legitimate purpose for preservation of the three-tier model requirement, it is plausible to suggest that the three-tier model may very well be facing its demise.[346] States will likely continue to search for ways to regulate the alcohol industry to maintain the status quo of the market despite the recidivation of the three-tier model; however, while the states search, the market will still develop.[347]

B. Market Implications

The Court's gradual elimination of the regulatory barriers to participants in the alcohol market is a form of trade liberalization.[348] Trade liberalization is the removal or reduction of regulatory barriers to the free exchange of goods.[349] Occurring concurrently with this trade liberalization for participants in the alcohol industry, rapid technological and communications advancements have made products more accessible worldwide.[350] This phenomenon is called globalization, which is defined in the context of economics as the interdependence of different markets fostered through free trade.[351] As a result of significant technological advancements, globalization has accelerated at a rapid pace since the 1990s.[352] This globalization, coupled with the shift toward trade liberalization of the alcohol market, standardized the free trade market and rendered widespread direct-shipment more accessible to both the consumer and burgeoning business models.[353] Trade liberalization and

344. *See generally* Slaybaugh, *supra* note 5, at 266–67.

345. *Id*.

346. Todorov, *supra* note 25. *But cf.* Slaybaugh, *supra* note 5, at 284.

347. *See* Todorov, *supra* note 25 (speculating on the advancement of the market after the *Tennessee Wine* decision.); *see infra* Section III.B.

348. Caroline Banton & Will Kenton, *Trade Liberalization*, INVESTOPEDIA (Sept. 10, 2019), https://www.investopedia.com/terms/t/trade-liberalization.asp [https://perma.cc/MT6Z-XXJC].

349. *Id*.

350. Hiroshi Inose, *Technological Advances and Challenges in the Telecommunications Sector*, *in* GLOBALIZATION OF TECHNOLOGY: INTERNATIONAL PERSPECTIVES 62 (Janet H. Muroyama & H. Guyford eds., 1988).

351. Bird & Kopp, *supra* note 2.

352. *Id*.

353. *Id.*

globalization are two economic phenomena that are both indicative of and beneficial for the development of a free trade policy in the alcohol market.[354]

The Court's utilization of the Dormant Commerce Clause to eliminate discriminatory state laws and policies concerning the importation and transportation of alcohol could potentially effectuate a free trade policy. A free trade policy, a favorite of the active consumer, could ultimately yield negative economic results for the alcohol market as a whole, such as an over-saturation of the market for direct shipment of alcohol, thereby creating excessive or "destructive" competition.[355]The prevalence of the three-tier system has long served as a barrier to alcohol's entry into an open market, even after *Granholm*.[356] The three-tier system's original mission statement on discouraging overconsumption resurfaces in the Court's analysis of the pivotal *Tennessee Wine* case, where Justice Alito contemplated whether the nuances of Tennessee's regulatory scheme furthered Tennessee's interest in promoting temperance for the public health.[357] In light of the public's widespread acceptance of liquor consumption and distribution, the public's need for bootleggers and smugglers has decreased.[358] As a result of this industry shift, organized crime in the liquor industry has significantly declined, and free-market supporters have echoed criticism of the three-tier system as "outdated" and "inefficient."[359] Thus, the only policy interests supporting the three-tier system are the principles of temperance and preservation of the market as embodied within the legislative intent of the Twenty-First Amendment—policy interests that the Court addressed in *Granholm* and *Tennessee Wine*.[360]

This drastic shift from three-tier regulation toward an open market in the alcohol industry may yield unintended consequences for participants in the industry—on both sides of the sale.[361] Although discriminatory regulation may not be feasible through the three-tier system, it may be

354. *See, e.g.*, *id.*; *see also* Banton & Kenton, *supra* note 348.

355. Brief for Open Markets Institute, *supra* note 10, at *4. An oversaturated industry can create intense competition that results in a decrease in the quality of service or product. HARRISON, *supra* note 20, at 332–34.

356. Green, *supra* note 199, at 39.

357. Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449 (2019).

358. *See generally* Slaybaugh, *supra* note 5, at 266.

359. Glynn, *supra* note 172, at 126.

360. Granholm v. Heald, 544 U.S. 460 (2005); Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449 (2019).

361. *See* Slaybaugh, *supra* note 5, at 266– 69.

feasible through other means of regulating importation.[362] For example, the market may soon see regulation of the importation of wine through a state's authorized importation quantity.[363] Perhaps states with a vested interest in alcohol production, such as Oregon or California, will soon regulate gallonage importation, limiting out-of-state wineries from direct-to-consumer importation of over 25 gallons of wine under the guise of promoting temperance principles.[364] The possibilities are endless with how states may enact discriminatory regulations in the absence of the three-tier system avenue, and there is not much the states or the federal government can do preventatively in the meantime.[365] With the discussion of the implications of the Court's decision in *Tennessee Wine* complete, this Comment's discussion of remedying the negative implications may begin.

Unfortunately, absent legislation, there is not a feasible remedy under the *Maine v. Taylor* exception to the Dormant Commerce Clause.[366] There is no feasible remedy because despite any legitimate local purpose a state may have to enact a law, there will always be another nondiscriminatory alternative.[367] For example, the ban of all liquor is a nondiscriminatory means to achieve the beneficial end of improving public health. As a result, even if it would be unfeasible and counterproductive to a state's finances to prohibit all in-state and out-of-state alcohol products, an outright ban is still a non-discriminatory manner in which the public health will ultimately benefit.[368] With the existence of this alternative nondiscriminatory means to preserve the public health, it is unlikely there will ever be a judicial re-expansion of Section 2 of the Commerce Clause; however, there exists a legislative remedy to the Court's restriction of state regulation.[369]

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362. *See, e.g.*, Segal, *supra* note 217.

363. Green, *supra* note 199, at 39.

364. Allowing this kind of importation may prove discriminatory to an in-state winery as it may deprive in-state wineries with limited shipment possibilities of their natural advantage. Additionally, allowing the direct importation of a large quantity of wine directly to a consumer and not a retailer may prove to be violative of the temperance principle of promoting the public health of the community. The point is, there are numerous ways to mask discriminatory effects, and the three-tier system was not the exclusive avenue to do so. *See* McMillan, *supra* note 328.

365. *See Granholm*, 544 U.S. at 489

366. *See* Maine v. Taylor, 477 U.S. 131 (1986).

367. *See infra* Part IV.

368. *See* Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2475 (2019).

369. *See* U.S. CONST. art. I, § 8, cl. 3; *see infra* Part IV.

IV. IF YOU CAN'T BEAT THEM, JOIN THEM: UTILIZING THE COMMERCE CLAUSE

Effectively, under the Dormant Commerce Clause analysis, the *Maine v. Taylor* analysis will never apply to alcohol, as the complete absence of alcohol is always going to advance a public health interest more than discriminatorily regulated alcohol because alcohol is an inherently dangerous substance.[370] Alcohol regulation, however, still may serve the legitimate local purpose of maintaining an orderly alcoholic beverage market.[371] The implications of *Tennessee Wine* suggest that the previously regulated alcohol market will develop into an open market in the absence of state regulation.[372] Notably, this absence of regulation may lead to a diversification of the alcohol market and an ease of accessibility for the consumer, but what seems best for the consumer now may not actually be best for the consumer—or the market—in the long term.[373]

A state's power to discriminatorily regulate alcohol may prove most beneficial for the alcohol industry as a whole.[374] Encouraging competition between states and allowing states to act as experimental laboratories for economic practices, specifically regarding the distribution and production of alcohol, fosters industry growth.[375] Although the micro-manufacturer of alcohol may continue to struggle to grow in the alcohol industry under discriminatory regulation, under a free market model, the alcohol industry may no longer be a lucrative industry to enter.

Despite the absence of any feasible judicial remedy, there exists a legislative remedy that embraces the Commerce Clause.[376] Under Article I, Section 8, Clause 3 of the U.S. Constitution, Congress has the plenary authority to regulate interstate commerce.[377] Congress should utilize its plenary authority under the Commerce Clause to permit states to enact discriminatory legislation over alcohol, thus rendering the Court's abatement of Section 2 of the Constitution meaningless.[378] Such legislation

370. *See Maine*, 477 U.S. at 131.
371. North Dakota v. United States, 495 U.S. 423, 432 (1990).
372. *See supra* Section III.B.
373. *See generally* Brief for Open Markets Institute, *supra* note 10.
374. *Id.*
375. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("There must be power in the states and the nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs.").
376. U.S. CONST. art. I, § 8, cl. 3.
377. *Id.*
378. *See id.*

would need careful drafting with clear outer bounds to prevent discriminatory mayhem. The House of Representatives provided a framework for new legislation with the Comprehensive Alcohol Regulatory Effectiveness (CARE) Act of 2010.[379]

In 2010, the House of Representatives attempted to pass the CARE Act in support of state-based alcohol regulation.[380] Members of Congress introduced the CARE Act to amend both the Wilson and Webb-Kenyon Acts to make clear what states could regulate alcohol. Thus, the CARE Act proves informative in attempting to devise limitations to a statutory solution.[381] The CARE Act provides a positive framework, informing potential new legislation on the subject of state alcohol regulation.[382]

The purpose of the CARE Act was to formally recognize that alcohol differed from other consumer products and to establish that the states should possess the primary authority to regulate alcohol.[383] The CARE Act treated state alcohol laws with a strong presumption of validity.[384] Further, the CARE Act stated that a state law regulating alcohol shall be upheld unless the challenging party proves the law's invalidity by clear and convincing evidence.[385] The CARE Act possessed such a high burden because the drafters did not want any discriminatory legislation to be overturned.[386] To prove invalidity under the CARE Act, a party had to establish by clear and convincing evidence that the law had no effect on promoting temperance, establishing or maintaining orderly alcoholic beverage markets, collecting alcoholic beverage taxes, structuring the alcohol distribution system, or preventing underage drinking.[387]

The CARE Act's failure to pass was due in part to flaws arising from difficulty of application.[388] One such flaw was the strong presumption of validity given to state alcohol laws.[389] The burden was on the moving party to prove a negative—that the Twenty-First Amendment's principles are

379. Comprehensive Alcohol Regulatory Effectiveness Act, H.R. 5034, 111th Cong. (2d Sess. 2010).
380. *Id.*
381. *Id*
382. *Id.*
383. *Id.*
384. *Id.*
385. *Id.*
386. *See* Robert Taylor, *An End to Wine Direct Shipping?*, WINE SPECTATOR (Apr. 16, 2011), https://www.winespectator.com/articles/an-end-to-wine-direct-shipping-42526 [https://perma.cc/R7YC-6Q6N].
387. H.R. 5034, 111th Cong. (2d. Sess. 2010).
388. *Id.*
389. *Id.*

not implicated—with an extremely high burden of proof.[390] While a clear and convincing standard is already a difficult burden to surmount, it is made more difficult when applied to a negative burden.[391] Even placing the burden on the non-moving party does not completely eliminate the overly burdensome nature of the clear and convincing standard of proof.[392] Despite this considerable flaw, the CARE Act still provides a valuable framework to develop new legislation.[393]

Once manipulated, the CARE Act's evidentiary standard may be utilized in a new statute authorizing the state enactment of discriminatory laws concerning the regulation of alcohol.[394] The clear and convincing burden of proof should be lowered, and the burden of proof should shift to the non-moving party.[395] Under this new legislative scheme, the burden should be on the state to establish some degree of proof that one of the principles inherent in the Twenty-First Amendment is furthered through the challenged state law.[396] Additionally, instead of requiring that there be no other nondiscriminatory means to further the implicated Twenty-First Amendment principle, the word "feasible" should be added.[397] Altering the second prong of the *Maine v. Taylor* test renders the test less immediately dispositive concerning inherently dangerous products such as alcohol.[398] This would prevent the authorization of meaningless discriminatory laws and adjust downward the insurmountable hurdle that is the second element of the *Maine v. Taylor* exception to the Dormant Commerce Clause. Preserving the legitimate local purpose prong while weakening the nondiscriminatory alternative prong present in *Maine v. Taylor* will return the power to the states, creating a scenario comparable to the state of affairs pre-*Granholm*.[399] Consumers should not fear this solution to be the end of *Granholm*'s direct-to-consumer shipment because

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390. 2 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 301:5 (Westlaw, 8th ed. 2019) ("Clear and convincing evidence is 'the quantum of proof that leaves no reasonable doubt in the mind of the fact finder as to the truth of the proposition in question,' i.e., more than a preponderance while not quite approaching the degree of proof necessary for a criminal conviction.").

391. *See id.*

392. *Id.*

393. H.R. 5034, 111th Cong. (2d. Sess. 2010).

394. *Id.*

395. *Id.*

396. *Id.*

397. *See* Maine v. Taylor, 477 U.S. 131 (1986).

398. *Id.*

399. *See id. Compare* Granholm v. Heald, 544 U.S. 460 (2005), *with* Cal. Retail Liquor Dealers v. Midcal Aluminum, 445 U.S. 97 (1980).

direct shipment has become so ingrained in the consumer expectation that it will likely remain in place.[400] Under the proposed statutory scheme, direct-shipment statutes would still be susceptible to challenge, but parties are unlikely to challenge any law that would negatively affect the alcohol market and be detrimental to a state economy.[401] It is in the best interest of each state economically, as well as consumers within alcohol market socially, to re-authorize state discriminatory authority over alcohol.

CONCLUSION

There is no longer a need for judicial involvement concerning state regulation of alcohol.[402] Though the Supreme Court has judicially diminished the scope of Section 2 of the Twenty-First Amendment, this does not preclude Congress from authorizing state discriminatory regulation via statute.[403] The congressional enactment of a carefully drafted statute allowing for the state regulatory discrimination of alcohol will return the states to a pre-*Granholm* regulatory authority.[404] A free market, while appealing to the consumer, may bring with it potentially fatal consequences for the alcohol industry and its participants.[405] Although the Court's analyses in *Granholm* and *Tennessee Wine* were correct under the Dormant Commerce Clause, Congress should enact a statute authorizing the kind of discrimination that the early post-ratification Court sought to allow to foster growth within the alcohol market.[406] For the reasons discussed herein, the negative implications of a rapid free market shift on such a diverse and developing market outweigh the temporary benefits that the avid consumer or micro-manufacturer may experience.[407]

Ultimately, while an avid consumer may be thrilled initially at the option to direct ship their favorite California vintage, that same consumer may not be as excited when they order the same vintage three years later, only to learn its quality has decreased substantially due to a destructive

400. McMillan, *supra* note 328.
401. *Id*.
402. *See supra* Part IV.
403. *See* U.S. CONST. art. I, § 8, cl. 3.
404. *See, e.g.*, Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984).
405. *See infra* Section III.B.
406. *See* State Bd. of Equalization of Cal. v. Young's Market Co., 299 U.S. 59 (1936); Indianapolis Brewing Co. v. Liquor Control Comm., 305 U.S. 391 (1938); Ziffrin, Inc. v. Reeves, 308 U.S. 132 (1939).
407. *See supra* Part III.

market.[408] Realistically, in a growing industry susceptible to destructive market conditions, a decline in quality is the least of a consumer's worries.[409] A free market is by no means a negative market condition; however, the volatile alcohol industry's rapid shift to free market status will result in a decline in alcohol quality, unhealthy industry competition, and potentially destructive market conditions for the alcohol industry.[410] A grant of discriminatory authority, subject to congressionally determined outer limits, will result in the preservation and growth of an orderly national alcohol market.

408. HARRISON, *supra* note 20, at 332–34.
409. *See id*.
410. *See supra* Section III.B.