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Comments: "Quaffable, but Far from Transcendent": Maryland's Twenty-First Century Prohibition

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“QUAFFABLE, BUT FAR FROM TRANSCENDENT”¹:
MARYLAND’S TWENTY-FIRST CENTURY PROHIBITION

“Anyone who has held a bottle of Grange
Hermitage in one hand and a broken corkscrew in
the other knows this to be a palpable injury.”

-*Bridenbaugh v. Freeman-Wilson*²

I. INTRODUCTION

It’s happened to every wine aficionado, both casual and serious, in Maryland—she sits at her computer trying to locate on the Internet the balanced Pinot Noir she enjoyed at a restaurant the previous evening; locates the vineyard’s website; clicks “purchase now;” and, suddenly, her purchase is brought to a surprising halt. Maryland consumers cannot legally purchase wine on the Internet, eliminating from their purchase thousands of varietals manufactured by small wineries, not carried in retail stores.³ Maryland’s Byzantine liquor laws, the products of 1930’s post-Prohibition legislation, do not permit direct shipment of wines to Maryland consumers.⁴

Following Prohibition and the adoption of the Twenty-first Amendment, most states adopted a similar statutory scheme to effectuate tax collection and to regain control over liquor from organized crime.⁵ The statutes consisted of a three-tiered system, dominated by wholesale distributors.⁶ The result is that wholesalers determine what wines will be offered for sale in retail stores.⁷ Further, it is economically logical that wholesalers choose wineries with a larger production over smaller wineries.⁸

Smaller wineries, therefore, have turned to alternative markets such as the Internet to sell their wines.⁹ Ironically, it is the same statutory scheme that drives smaller wineries into the direct shipment market that forbids them from partaking in it—

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1. *SIDEWAYS* (Fox Searchlight Pictures 2004); see Internet Movie Database, Memorable Quotes from *Sideways* (2004), <http://www.imdb.com/title/tt0375063/quotes> (“Quaffable, but uh . . . far from transcendent.”).
 2. 227 F.3d 848 (7th Cir. 2000).
 3. See *infra* Part II(C).
 4. See *infra* Parts II(B)-(C).
 5. See *infra* Part II(B)(1) .
 6. See *infra* Part II(A)(1).
 7. See *infra* Part II(A)(3).
 8. Larger wineries, due to mass production, have more bottles available, larger advertising budgets, and lower prices, giving them a better chance of survival in the marketplace. See *infra* Part II(A)(3).
 9. See *infra* Part II(A)(4).

approximately half of all states forbid the direct shipment of wine to consumers.¹⁰

This conflict, the so-called “Wine Wars,”¹¹ has ushered several industry members into litigation. The Supreme Court, in its 2005 term, decided that states permitting direct shipment for in-state wineries, but forbidding it for out-of-state wineries, violate the Dormant Commerce Clause and are not justified by the Twenty-first Amendment.¹²

Following this decision, the Maryland Comptroller’s initial review of Maryland’s direct shipment laws determined that the statutes passed constitutional muster.¹³ However, a lawsuit filed in the United States District Court of Maryland at the end of 2005 raises several legal issues that call the regulations into question.¹⁴ Specifically, Maryland law permits local wineries to circumvent the three-tiered system by selling their wines to restaurants and retailers, while not permitting out-of-state wineries selling more than 27,500 gallons a year to do the same.¹⁵

This Comment first examines the history and development of direct shipment laws following Prohibition.¹⁶ Next, it assesses their validity under the Dormant Commerce Clause and determines whether they are saved by the Twenty-first Amendment.¹⁷

This Comment posits that Maryland’s direct shipment laws are an antiquated result of post-Prohibition legislation, causing a detrimental impact to interstate commerce, and, therefore, violate the Dormant Commerce Clause.¹⁸ Justifications permitted by the Twenty-first Amendment, such as promotion of temperance, tax collection, and prevention of sales to minors, do not justify the direct shipment laws.¹⁹ As such, Maryland’s laws unconstitutionally restrict the consumer and the out-of-state wine producer.²⁰

10. *See infra* Part II(A).

11. “Wine Wars” refers to the conflict of interests between boutique wineries, the wholesale and retail lobby, state legislators, and the courts. *See* Lisa Lucas, Comment, *A New Approach to the Wine Wars: Reconciling the Twenty-First Amendment with the Commerce Clause*, 52 UCLA L. REV. 899 (2005).

12. *See infra* Part II(A)(5).

13. Michael Dresser, *Maryland Wineries Are Told to Halt Direct Sales*, BALT. SUN, Feb. 8, 2006, at 1A.

14. *See infra* Part II(C)(3).

15. *See infra* Part II(C)(3).

16. *See infra* Parts II(A)-(B).

17. *See infra* Part III.

18. *See infra* Parts III(A)-(C).

19. *See infra* Part III(D).

20. *See infra* Part III.

II. BACKGROUND

A. Direct Shipment Bans

“Here's to the corkscrew—a useful key to unlock the storehouse of wit, the treasury of laughter, the front door of fellowship, and the gate of pleasant folly.”

-W.E.P. French²¹

1. Structure of Three-Tiered Distribution Schemes

Most states in the U.S. distribute wine and other alcoholic beverages through a three-tiered distribution system, a by-product of the post-Prohibition legislative flurry where states attempted to reign-in and maintain rigid control over alcohol sales.²² The first tier in the system requires a wine producer to obtain a permit from the Alcohol and Tobacco Tax and Trade Bureau in order to sell wine.²³ Next, the producer may sell wine to a licensed wholesaler, responsible for paying applicable taxes.²⁴ Finally, the wholesaler delivers wine to the licensed retailer, who may sell to the consumer, and collects sales taxes.²⁵ Direct shipment laws, which prevent an out-of-state retailer from selling liquor directly to the consumer, are integral to maintaining centralized control over alcohol sales.²⁶

The three-tiered system developed after the ratification of the Twenty-first Amendment in order to advance a number of the states' goals in regulating alcohol.²⁷ First, the top-level tier consisting of the wholesaler was intended to promote efficient collection of taxes and prevent sales to minors.²⁸ Second, by

21. *From the wine list of Commander's Palace in New Orleans, LA, courtesy of John McDonald, Dallas, TX, available at The Wrath of Grapes, Quotable Quotes, <http://www.wrathofgrapes.com/winequot.html> (last visited Mar. 24, 2007).*

22. Federal Trade Commission, Possible Anti-Competitive Barriers to E-Commerce: Wine 5-6 (2003), <http://www.ftc.gov/os/2003/07/winereport2.pdf>.

23. *Id.* at 5.

24. *Id.*

25. *Id.*

26. *See Dickerson v. Bailey*, 212 F. Supp. 2d 673, 679-80 (So. D. Tex. 2002).

27. Federal Trade Commission, *supra* note 22, at 6.

28. *Id.* According to the Wine and Spirits Wholesalers of America (“WSWA”):

Part of the reason that the three-tiered system works so well is that the federal government, through the Federal Alcohol Administration Act, and the states through related laws, require that there be an intermediary between the supplier and retail tiers designed to ensure that large suppliers with market power do not dominate individual retailers to the exclusion of other suppliers who might try to break into the market. In other words, the wholesale tier actually serves to blunt monopolistic supplier tendencies that had

gaining control of alcohol distribution, states hoped to wrestle control of alcohol sales from the tight hold that organized crime gained during Prohibition.²⁹ Third, some states may have intended to keep alcohol prices unnecessarily high to promote temperance.³⁰

2. Direct Shipment Bans

“Direct shipping refers to wineries or retailers shipping wine directly to consumers outside the three-tiered system, usually to their home or work via a package delivery company such as FedEx [Corporation] (‘FedEx’) or United Parcel Service of America, Inc. (‘UPS’).”³¹ Most states have banned direct shipment of all alcoholic beverages, including wine, in order to maintain centralized state control over liquor sales through the three-tiered system.³² Approximately twenty-four states permit direct shipment of wine;³³ thirteen of these states have reciprocity laws permitting direct shipment from wineries outside the state if the

prevailed prior to Prohibition A supplier must obtain approval for the label from the [Alcohol and Tobacco Tax and Trade Bureau] and state authorities to ensure that it contains truthful and non-misleading information and mandatory health warnings. That bottle must then be sold to a state and federally licensed wholesaler who is responsible for maintaining records and filing detailed reports tracking each bottle brought into the state, paying the excise taxes due on the alcohol, and delivering the alcohol to a state licensed retail establishment. The retailer is responsible for paying over to the state the sales taxes generated by each sale, and is directly responsible for ensuring that alcohol does not fall into the hands of minors or other prohibited individuals. Since both the wholesaler and the retailer must be licensed by the state, they are fully accountable for any dereliction of their duties. They are subject to on-site inspections, auditing and compliance checks, and any violation can result in the loss of license, fines and other potentially more severe penalties.

Wine and Spirits Wholesalers of America, *Position Paper 2* (Oct. 8, 2002), available at <http://www.ftc.gov/opp/ecommerce/anticompetitive/panel/gray.pdf>.

29. Federal Trade Commission, *supra* note 22, at 6. According to the WSWA:

By channeling the physical distribution of beverage alcohol through licensed in-state wholesalers and retailers, the state can effectively enforce its sales and tax policies (including barring sales to minors, protecting dry areas, limiting strength, controlling labels and advertising and the like) because it can license, inspect, and hold responsible these local firms.

Position Paper, supra note 28, at 2-3.

30. Federal Trade Commission, *supra* note 22, at 6.

31. *Id.* at 7.

32. *See id.*

33. *Id.* at 7; see Wine Institute, *Who Ships Where*, <http://wi.shipcompliant.com/WhoShipsWhere.aspx> (last visited Mar. 24, 2007). States that permit shipment include Alaska, Arizona, California, Connecticut, Florida, Georgia, Louisiana, Michigan, Nebraska, Nevada, New Hampshire, New York, North Carolina, North Dakota, Ohio, South Carolina, Texas, Washington, D.C., and Wyoming. *Id.*

“[s]tate of origin affords similar nondiscriminatory treatment.”³⁴ Most interstate direct shipments are prohibited in the remaining twenty-six states.³⁵

3. Dynamics of the Wholesale and Direct Shipping Markets

a. Wholesalers' Interests

The Wine and Spirits Wholesalers of America, Inc. (“WSWA”) represents 450 wholesaler companies in forty-two states; its wholesalers distribute more than 90 percent of all wine and spirits sold in the U.S.³⁶ Wholesale distributing is a multi-billion dollar industry.³⁷ The wholesaler industry has successfully lobbied to make direct shipping a felony.³⁸ At least eight states have passed felony legislation,³⁹ including Maryland.⁴⁰

The number of licensed wholesalers has declined, “from several thousand in the 1950s to a few hundred today.”⁴¹ “The top five wholesalers now account for a third of the total market.”⁴² As the wholesalers' market share increases, the industry can exert its influence over suppliers for price reductions while demanding higher prices from retailers.⁴³ The wholesaler industry also lobbies state and federal governments for protectionist state liquor laws, which enable the wholesalers' domination of the market.⁴⁴

34. *Granholm v. Heald*, 544 U.S. 460, 468 (2005). States that permit reciprocal shipping include Hawaii, Idaho, Illinois, Missouri, New Mexico, Oregon, Washington, West Virginia, and Wisconsin. Wine Institute, *Who Ships Where*, *supra* note 33.

35. Federal Trade Commission, *supra* note 22, at 8. States that prohibit shipment include Alabama, Arkansas, Delaware, Kansas, Kentucky, Maine, Maryland, Massachusetts, Mississippi, Montana, New Jersey, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Tennessee and Utah. Wine Institute, *Who Ships Where*, *supra* note 33.

36. Wine and Spirits Wholesalers of America, Inc., About Us, <http://www.wswa.org/public/about/who.html> (last visited Mar. 25, 2007).

37. James Molnar, Comment, *Under the Influence: Why Alcohol Direct Shipment Laws Are a Violation of the Commerce Clause*, 9 U. MIAMI BUS. L. REV. 169, 173 (2001).

38. *Id.*

39. *Id.*

40. See Wine Institute, *Who Ships Where*, *supra* note 33. Maryland officials cited the difficulty in pursuing out-of-state violators on misdemeanor charges. Patrick Thibodeau, *State Liquor Law a Backlash Against Internet Merchants*, COMPUTERWORLD, Oct. 4, 1999, at 24.

41. Federal Trade Commission, *supra* note 22, at 8.

42. Molnar, *supra* note 37, at 173.

43. *Id.*

44. *Id.* at 173-74.

b. *The Direct Shipping Wine Market*

The Federal Trade Commission (“FTC”) asserts that the number of wineries has increased dramatically from 1975 to 2003: from 500–800 to well over 2,000.⁴⁵ Many of these new wineries are small operations producing approximately 3,500 cases of wine annually.⁴⁶ While the number of small wineries has increased, the number of available wholesalers has decreased.⁴⁷ This places pressure on wholesalers to select wines with the best chance of survival on the market: those with large marketing budgets and large quantities of wines.⁴⁸ Smaller wineries do not produce sufficient quantities of product to accommodate distributors.⁴⁹ Even if wholesalers distributed smaller wineries’ products, the additional cost of the wholesaler middleman would substantially reduce the small wineries’ profits.⁵⁰ Many industry experts, including the FTC, have concluded that direct shipment could substantially increase profits for smaller wineries through the opening of additional markets, such as Internet sales.⁵¹

4. Direct Shipment Laws are a Barrier to Electronic Commerce

“The value of the direct sale of wine is estimated at \$500 million with some estimates as high as \$1 billion.”⁵² A 2003 FTC study determined that state laws banning interstate direct shipping are the single largest impediment to expanded electronic commerce in wine.⁵³ The FTC conducted a study in Virginia, a state that banned direct shipping at the time of the study, to determine the scope of wine availability and pricing issues.⁵⁴ Of the wines surveyed, fifteen of the eighty-three wines were unavailable in the searched Virginia outlet stores, while seventy-nine of the eighty-three wines were available through online retail outlets.⁵⁵ The study also found that a Virginia consumer could save money by

45. Federal Trade Commission, *supra* note 22, at 8.

46. Molnar, *supra* note 37, at 174.

47. Kevin Atticks, *Oh the Times, They Are a Changing*, THE MARYLAND WINERIES, <http://www.marylandwine.com/mwa/laws/deliverys.html>.

48. *Id.*

49. Molnar, *supra* note 37, at 174.

50. *Id.* Boutique wineries produce a small supply, requiring that they sell their product at a higher price. *See id.* The wholesaler markup would cut into this profit margin, making a middleman less feasible. *Id.* However, large wineries make their profit from selling in bulk, which is more conducive to a wholesaler middleman relationship. *See* Federal Trade Commission, *supra* note 22, at 6.

51. *See* Atticks, *supra* note 47; Federal Trade Commission, *supra* note 22, at 14.

52. Molnar, *supra* note 37, at 173.

53. Federal Trade Commission, *supra* note 22, at 14.

54. *Id.* at 17-18.

55. *Id.* at 18.

purchasing online; consumers could save an average of \$4.40 to \$7.19 per bottle for wines priced at \$20.00 or more.⁵⁶

The FTC concluded:

[T]he quantitative findings likely understate the impact of the direct shipment ban on variety. Since the entire 83-bottle sample consisted of the more popular wines, it excluded thousands of lesser-known labels that bricks-and-mortar retailers may not have carried, and that consumers may not have known. In addition, to the extent that individuals had heterogeneous and strongly-held preferences, consumers who sought to purchase these wines may have been significantly worse off if they settled for less-preferred substitutes.⁵⁷

While it is clear that economically speaking, direct shipment bans have a negative impact on consumer choice and the development of niche markets, the question of their constitutionality remains unanswered. The Supreme Court began to broach the question in *Granholm v. Heald*.

5. *Granholm v. Heald*⁵⁸

The Supreme Court held in two consolidated cases that it is a violation of the Dormant Commerce Clause “to allow in-state wineries to sell wine directly to consumers in that State but to prohibit out-of-state wineries from doing so, or, at least, to make direct sales impractical from an economic standpoint.”⁵⁹ The Court invalidated New York and Michigan laws restricting out-of-state direct wine sales.⁶⁰ Both Michigan’s and New York’s regulatory schemes imposed three-tiered distribution systems requiring separate licenses for producers, wholesalers, and retailers.⁶¹ The Court reaffirmed the principle that three-tiered distribution schemes are constitutional under the Twenty-first Amendment.⁶² However, Michigan’s and New York’s three-tiered systems were applicable only to out-of-state wineries; in-state wineries were able to obtain direct-sale licenses.⁶³ The Court noted that the “discrimination substantially limits the direct sale of

56. *Id.* at 19.

57. *Id.* at 22.

58. 544 U.S. 460 (2005).

59. *Id.* at 465-66.

60. *Id.*

61. *Id.* at 466.

62. *Id.*

63. *Id.* at 467.

wine to consumers, an otherwise emerging and significant business.”⁶⁴

The plaintiffs in the suits represented small wineries unable to fulfill requests from consumers in Michigan and New York due to the states’ bans on direct sales.⁶⁵ In order to ship to consumers in these states, the wineries were required to find a wholesaler to complete the “direct” sales; however, the wholesaler’s markup would “render shipment . . . economically infeasible.”⁶⁶ In Michigan, out-of-state wineries may purchase a \$300 “outside seller of wine” license while a small in-state winery may purchase a “wine maker” license for \$25.⁶⁷

The Court has long maintained that laws burdening out-of-state economic interests and benefiting in-state economic interests violate the Commerce Clause.⁶⁸ “State laws that discriminate against interstate commerce face ‘a virtually *per se* rule of invalidity.’”⁶⁹

Michigan and New York argued that their laws were permitted under the Webb-Kenyon Act.⁷⁰ The Court rejected this reading of the Webb-Kenyon Act, arguing that the Act cannot be construed as “removing any barrier to discriminatory state liquor regulations” or favoring discrimination of out-of-state liquors.⁷¹

Michigan and New York further argued that Section 2 of the Twenty-first Amendment grants the states “the authority to discriminate against out-of-state goods.”⁷² The Court disagreed, holding that the cited history provides support for the argument that Section 2 “restored to the states the powers they had under the [pre-Prohibition] Wilson and Webb-Kenyon Acts.”⁷³ The Court opined that the goal of the Twenty-first Amendment was to give the states a framework to control liquor “by regulating its transportation, importation, and use,”⁷⁴ but it does not permit the states to discriminate against out-of-state products by giving

64. *Id.*

65. *Id.* at 468.

66. *See id.*

67. *Id.* at 469.

68. *Id.* at 472 (citing *Or. Waste Sys., Inc. v. Dep’t of Env’tl. Quality*, 511 U.S. 93, 99 (1994)).

69. *Id.* at 476 (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)).

70. *See id.* at 481-83; *see supra* Part II(B)(1).

71. *Granholtz*, 544 U.S. at 462. “The Webb-Kenyon Act readily can be construed as forbidding ‘shipment or transportation’ only where it runs afoul of the State’s generally applicable laws governing receipt, possession, sale, or use.” *Id.* at 482 (citing *McCormick & Co. v. Brown*, 286 U.S. 131, 141 (1932)).

72. *Id.* at 484.

73. *Id.*; *see infra* Part II(B)(1).

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

preference to their own, contrary to the Dormant Commerce Clause.⁷⁵

Michigan and New York argued that the regulations advance legitimate state purposes that cannot be served without nondiscriminatory means: first, prevention of minors from obtaining alcohol and second, “facilitating tax collection.”⁷⁶ The Court relied on a FTC study stating that the purchase of wine over the Internet by minors is not a problem.⁷⁷ In addition, the Court believed states could impose less restrictive preventative measures such as requiring an adult signature upon delivery.⁷⁸

The Court did recognize that permitting direct shipping carries the risk of tax evasion.⁷⁹ However, the Court pointed to Michigan’s “licensing and self-reporting” regulations utilized within the three-tiered system and reasoned that those schemes would also suffice for direct shipments.⁸⁰ The Court concluded that Michigan’s and New York’s stated legislative goals cannot adequately justify a need for discrimination consistent with the Twenty-first Amendment or the Commerce Clause.⁸¹

To properly understand the evolution of the Dormant Commerce Clause–Twenty-first Amendment interplay, it is necessary to examine how alcohol regulations came to exist on the federal level, beginning with pre-Prohibition legislation.

B. History of Federal Alcohol Regulation

“If God forbade drinking, would He have made wine so good?”

–Cardinal Richeleu⁸²

1. Wilson Act and Webb-Kenyon Act

Prior to the ratification of the Eighteenth Amendment and the prohibition of all alcoholic beverages, the temperance movement sought to reduce sales of alcoholic beverages through a state by state approach.⁸³ “[M]any states passed laws restricting or

75. *See id.* at 486.

76. *Id.* at 489.

77. *Id.* at 490. Some argue that minors would prefer beer or liquor to wine and a “quick fix” in lieu of waiting several days for a shipment. Further, teenagers generally consume cheaper wines, not higher priced boutique wines. Federal Trade Commission, *supra* note 22, at 12.

78. *See Granholm*, 544 U.S. at 490-91.

79. *Id.* at 491.

80. *Id.*

81. *Id.* at 493.

82. The Wrath of Grapes, Quotable Quotes, *supra* note 21.

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

prohibiting the sale of alcohol.”⁸⁴ The Supreme Court was amenable to upholding laws restricting sales and production, but unwilling to uphold laws related to imports.⁸⁵

The Court invalidated a number of such state liquor laws based on the Commerce Clause and “advanced two distinct principles.”⁸⁶ First, states were not permitted to discriminate against imported liquor under the Dormant Commerce Clause.⁸⁷ Second, states could not constitutionally pass “facially neutral laws that placed an impermissible burden on interstate commerce.”⁸⁸ Prior to Prohibition, states struggled to regulate the importation, transportation, and manufacture of liquor, while Congress, under its Commerce Clause powers, attempted to maintain control over the issue.⁸⁹ Following a series of cases invalidating state laws, Congress passed the Wilson Act,⁹⁰ which enabled the states to regulate out-of-state liquor “to the same extent and in the same manner” as liquor produced in-state.⁹¹ The Court’s reading of the Wilson Act affirmed the line of cases “striking down state laws that discriminated against liquor produced out of state.”⁹² The text of the Wilson Act reads as follows:

All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, 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 or liquors 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.⁹³

84. *Id.*

85. *Id.*

86. *Id.*

87. *Granholtz*, 544 U.S. at 476-77 (citing *Scott v. Donald*, 165 U.S. 58, 91 (1897); *Walling v. Michigan*, 116 U.S. 446, 461 (1886); *Tiernan v. Rinker*, 102 U.S. 123, 126 (1880)). The Dormant Commerce Clause is “[t]he constitutional principle that the Commerce Clause prevents state regulation of interstate commercial activity even when Congress has not acted under its Commerce Clause power to regulate that activity.” BLACK’S LAW DICTIONARY 285 (8th ed. 2004).

88. *Id.* at 477 (citing *Rhodes v. Iowa*, 170 U.S. 412, 414-16 (1898); *Vance v. W.A. Vandercook Co.*, 170 U.S. 438, 444 (1898); *Leisy v. Hardin*, 135 U.S. 100, 108-09 (1890); *Bowan v. Chi. & Nw. Ry. Co.*, 125 U.S. 465, 486-87 (1888)).

89. *Id.* at 476-78.

90. 27 U.S.C. § 121 (2000).

91. *Granholtz*, 544 U.S. at 478 (quoting 27 U.S.C. § 121).

92. *Id.* at 483.

93. 27 U.S.C. § 121.

The Court, interpreting the Wilson Act, determined that states were permitted to regulate the resale of imported liquor, leaving consumers the ability to receive direct shipment of liquors for personal use.⁹⁴ Thus, liquor sales by mail order flourished.⁹⁵

In response, Congress enacted the Webb-Kenyon Act.⁹⁶ The text of the Act provides:

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.⁹⁷

The constitutionality of the Webb-Kenyon Act under the Commerce Clause was called into question but a divided Court upheld the law.⁹⁸ The Court determined that the Webb-Kenyon Act permitted states to forbid direct shipments of liquor to consumers so long as the states treated in-state and out-of-state products similarly.⁹⁹

The Court interpreted the Webb-Kenyon Act as extending that which was intended under the Wilson Act—specifically, to eliminate the “regulatory advantage” of immunity under the Commerce Clause granted to imported liquor under *Bowman* and *Rhodes*.¹⁰⁰

In 1919, the passage of the Eighteenth Amendment prohibited all liquor and rendered all legal questions regarding the Webb-Kenyon Act moot; however, Prohibition ended fourteen years later with the ratification of the Twenty-first Amendment.¹⁰¹

94. See *Granholtm*, 544 U.S. at 480 (citing *Rhodes v. Iowa*, 170 U.S. 412, 421-26 (1898)).

95. *Id.*

96. 27 U.S.C. § 122 (2000); see *Granholtm*, 544 U.S. at 481.

97. 27 U.S.C. § 122.

98. See *Clark Distilling Co. v. W. Md. Ry. Co.*, 242 U.S. 311, 325-32 (1917).

99. *Id.* at 321-22.

100. *Granholtm*, 544 U.S. at 482 (citing *Clark Distilling*, 242 U.S. at 324).

101. *Granholtm*, 544 U.S. at 484.

2. Twenty-first Amendment, Section 2

“For when the wine is in, the wit is out”

-Thomas Becon, *The Catechism* 375¹⁰²

The speedy and unprecedented ratification of the Twenty-first Amendment served two primary purposes: it repealed prohibition under the Eighteenth Amendment and gave states the power to control interstate transportation and importation of intoxicating liquors.¹⁰³ The corresponding wording of the latter provision is contained in Section 2 of the Twenty-first Amendment: “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.”¹⁰⁴ However, this clause applied literally appears to conflict with the Dormant Commerce Clause, thus raising the question, which clause controls?

The legislative intent behind the Twenty-first Amendment has been intensely debated since its enactment, especially because of its complex relationship with the Dormant Commerce Clause.¹⁰⁵ Some legal scholars argue that Section 2 provided the states full control over liquor, unrestricted “by other constitutional provisions or the earlier nondiscrimination principle in the Wilson Act;” other scholars argue that Section 2 merely granted states the same powers they had prior to Prohibition.¹⁰⁶ Cases decided soon after Congress passed the Twenty-first Amendment interpreted the Amendment as giving states absolute authority over liquor control, favoring the Twenty-first Amendment over other constitutional provisions.¹⁰⁷ However, modern Twenty-first Amendment jurisprudence has rejected this approach and instead utilizes a theory that balances the Twenty-first Amendment with other constitutional provisions, including the Dormant Commerce Clause.¹⁰⁸

102. The Wrath of Grapes, *Quotable Quotes*, *supra* note 21.

103. Lucas, *supra* note 11, at 901.

104. U.S. CONST. amend. XXI, § 2.

105. See, e.g., *Dickerson v. Bailey*, 212 F. Supp. 2d 673, 678 (S.D. Tex. 2002), *aff'd*, 336 F.3d 388 (5th Cir. 2003).

106. *Dickerson*, 212 F. Supp. 2d at 680.

107. See, e.g., *State Bd. of Equalization of Cal. v. Young's Mkt. Co.*, 299 U.S. 59, 62 (1936); *Indianapolis Brewing Co. v. Liquor Control Comm'n of Mich.*, 305 U.S. 391, 394 (1939) (referring to the “substantive power of the State to prevent the sale of intoxicating liquor”).

108. See *Granholt v. Heald*, 544 U.S. 460, 486-87 (2005) (noting that “[t]he Court has applied this rule in the context of the First Amendment . . . ; the Establishment Clause . . . ; the Equal Protection Clause . . . ; the Due Process Clause, . . . ; and the Import-Export Clause . . .”). See also *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (First Amendment); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (Establishment Clause); *Craig v. Boren*, 429 U.S.

In recent years, court opinions on the issue run the gamut, depending on:

(1) [W]hether the judge interprets the amendment as providing nearly absolute plenary power to the states under § 2 of the twenty-first amendment . . . or (2) whether the judge applies more recent Supreme Court developments in dormant commerce clause analysis and balancing tests and gives prominence to economic discrimination resulting from a state's disparate application of its regulatory scheme to favor local producers¹⁰⁹

For example, in 1986, the Supreme Court stated, "the Twenty-first Amendment did not entirely remove state regulation of alcohol from the reach of the Commerce Clause."¹¹⁰ The Court's most recent iteration of the interplay between the Dormant Commerce Clause and the Twenty-first Amendment is detailed in the landmark case of *Granholm v. Heald*:

The aim of the Twenty-First Amendment was to allow States to maintain an effective and uniform system for controlling liquor by regulating the transportation, importation, and use. The Amendment did not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods, a privilege they had not enjoyed at any earlier time.¹¹¹

In *Granholm*, the Court determined that a "State which chooses to ban the sale . . . of alcohol altogether could bar its importation; and . . . it would have to do so to make its laws effective State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent."¹¹²

190 (1976) (Equal Protection Clause); *Wisconsin v. Constantineau*, 400 U.S. 433 (1971) (Due Process Clause); *Dep't of Revenue v. James B. Beam Distilling Co.*, 377 U.S. 341 (1964) (Import-Export Clause).

109. *Dickerson*, 212 F. Supp. 2d at 678-79.

110. *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 584 (1986).

111. *Granholm*, 544 U.S. at 484-85.

112. *Id.* at 488-89.

C. *Maryland's Wine Industry*

1. Maryland Makes Wine?

Maryland's wine industry began in the 1600s, when Governor Charles Calvert planted 200 acres of European grapes on the east bank of the St. Mary's river.¹¹³ In 1984, the Maryland wineries formed the Maryland Wineries Association and with it, the first Maryland Wine Festival.¹¹⁴ The Association launched its first cooperative marketing campaign in 2001, and, in 2004, Governor Robert L. Ehrlich, Jr. formed the Maryland Wine and Grape Advisory Committee to investigate growth in the industry.¹¹⁵

Currently, there are twenty wineries operating in Maryland.¹¹⁶ Two thousand and four was a record-breaking year for the industry—sales were estimated at over \$7 million, a 22.5 percent increase from 2003.¹¹⁷

2. Maryland Law Grants Benefits to Maryland Wineries

Maryland law bans direct shipments from producers to consumers and applies to both out-of-state and in-state wineries.¹¹⁸ While Maryland wineries may not ship wines directly to resident consumers, state law, until recently, permitted local wineries to sell and deliver wine directly to individuals and retailers outside of the wholesale scheme.¹¹⁹ In-state wineries were eligible for licenses that permitted them to sell their wines directly to licensed retail wine dealers, including restaurants.¹²⁰ Out-of-state wineries were not eligible for these licenses; instead, they were forced to

113. The Maryland Wineries, *History of Maryland Wine*, <http://www.marylandwine.com/mwa/learnmore/history.shtml> (last visited Mar. 24, 2007).

114. *Id.*

115. *Id.*

116. The Maryland Wineries, *Maryland Wine Industry Statistics*, <http://www.marylandwine.com/mwa/learnmore/stats.shtml> (last visited Mar. 24, 2007).

117. *Id.*

118. MD. ANN. CODE art. 2B, § 16-506.1 (2005). The law provides:

A person in the business of selling or distributing alcoholic beverages in or from another state may not ship, cause to be shipped, or deliver alcoholic beverages directly to a recipient in this State if the seller, distributor, shipper, transporter, or recipient does not hold the requisite license of permit under this article [This prohibition] . . . includes alcoholic beverages that are ordered or purchased through a computer network A person who violates this section is guilty of a felony and on conviction is subject to a fine not exceeding \$1,000 or imprisonment not exceeding 2 years or both.

Id.

119. See Complaint at 14, *Bushnell v. Ehrlich*, 2005 WL 3673790 (D. Md. Nov. 18, 2005).

120. *Id.* at 15. See also MD. CODE REGS. 03.02.01.03 (2006); MD. ANN. CODE art. 2B, §§ 1-201, 7-101, 12-107, 16-506.1.

negotiate the wholesale system to sell their products in Maryland.¹²¹

3. *Bushnell v. Ehrlich's* Threat to Maryland Law¹²²

Following the *Granholm* decision, a Pennsylvania vintner in *Bushnell v. Ehrlich* challenged Maryland's regulations alleging that the State gives preferential and unconstitutional treatment to local wineries by permitting them to sell their wines directly to restaurants and retailers.¹²³ Recognizing the viability of this claim, the Maryland Comptroller attempted to preserve Maryland law. He reinterpreted the statute that gave local wineries the ability to sell their wines to local restaurants and retailers. By nulling the statute, the Comptroller forced local wineries, in sixty days, to find wholesalers to sell their wines.¹²⁴ Under advice of the Maryland Attorney General's Office, the Comptroller believed that reinterpreting the regulation was the only option to prevent Maryland's anti-direct shipment laws from being struck down on Dormant Commerce Clause grounds.¹²⁵ The unfortunate result of this action was an uncertain future for Maryland wineries, most of whom produce too little wine to attract wholesaler interest.¹²⁶

The Maryland Legislature could have responded to the *Bushnell* threat in three possible ways: First, legislators might have repealed the benefits to local wineries so that out-of-state wineries were on par; second, legislators could have altered the three-tiered system to permit direct shipping for both in-state and out-of-state wineries; third, legislators may have continued to disallow direct shipment but permit in-state and out-of-state wineries to deal directly with retailers and restaurateurs.¹²⁷

Responding to public outcry in defense of Maryland's wineries, the Maryland Legislature struck a last minute compromise with then Governor Ehrlich and the competing industries.¹²⁸ The new legislation permits "wineries that produce less than 27,500 gallons annually" to apply "for a limited wholesaler's license."¹²⁹ The wholesaler's license permits these smaller wineries to sell directly to retailers and restaurants.¹³⁰ By permitting smaller wineries to

121. See Complaint, *supra* note 119, at 16. See also MD. CODE REGS. 03.02.01.03 (2006); MD. CODE ANN. art. 2B, §§ 1-201, 7-101, 12-107, 16-506.1.

122. Complaint, *supra* note 119.

123. *Id.* at 14-16.

124. Dresser, *supra* note 13, at 6A.

125. *Id.*

126. *Id.* at 1A.

127. *Id.*

128. Andrew Green, *Wine Bill Compromise Struck*, BALT. SUN, Apr. 7, 2006, at 5B.

129. *Id.* See MD. ANN. CODE art. 2B, § 2-201 (Supp. 2006).

130. Green, *supra* note 128. See MD. ANN. CODE art. 2B, § 2-201.

act as their own wholesalers, state officials sidestepped litigation that would likely have forced Maryland to permit direct shipment.

III. ANALYSIS

“Wine is bottled poetry.”

-Robert Louis Stevenson¹³¹

To date, no Supreme Court case has directly addressed the constitutionality of direct shipment laws in general.¹³² However, the Court did determine in *Granholm* that New York and Michigan’s direct shipping regulations, treating in-state and out-of-state shippers differently, violate the Dormant Commerce Clause.¹³³ This Comment posits that under modern Dormant Commerce Clause analysis, direct shipping laws are unconstitutional—specifically, Maryland’s direct shipping laws are unconstitutional.

A. Commerce Clause Analysis

The Supreme Court in *Brown-Forman Distillers Corp. v. New York State Liquor Authority* articulated a two-tiered approach to analyze state economic interests under the Commerce Clause.¹³⁴ The Court explained that if a state statute facially

regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry When, however, a statute only has indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State’s interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.¹³⁵

The Court has consistently held that strict scrutiny must be applied when examining Dormant Commerce Clause cases.¹³⁶ Thus, when its direct shipping regulations are challenged, a state must prove that its laws are “closely related to its powers reserved by the twenty-first amendment and that the statutes promote core concerns of that amendment.”¹³⁷

131. The Wrath of Grapes, Quotable Quotes, *supra* note 21.

132. Molnar, *supra* note 37, at 178.

133. *Granholm v. Heald*, 544 U.S. 460, 466 (2005).

134. 476 U.S. 573, 578-79 (1986).

135. *Id.* at 579.

136. *Dickerson v. Bailey*, 212 F. Supp. 2d 673, 682 n.16 (S.D. Tex. 2002).

137. *Id.*

B. Core Concerns of the Twenty-first Amendment

Bacchus v. Dias directs us to weigh the core concerns of the Twenty-first Amendment against policies that seemingly violate the Dormant Commerce Clause.¹³⁸ However, the core concerns of the Twenty-first Amendment's drafters are controverted.

Legal scholars have debated the issue but have not formed a solid conclusion. Duncan Baird Douglass conducted a detailed review of the legislative history of the Twenty-first Amendment, utilizing "comments of various senators during the ratification debates to support three different interpretations of § 2:" First, the provision did not exempt states from any part of the Constitution and returned authority to regulate liquors to the states; second, that states wanting to remain dry after the Eighteenth Amendment was repealed would have the authority to do so; or third, the Amendment exempted state liquor regulation from Commerce Clause limitations.¹³⁹

After reviewing the debates, Douglass concluded:

The Twenty-first Amendment garnered the requisite two-thirds vote . . . probably because most members of Congress saw section one, the simple repeal of constitutional Prohibition, as the bulk of the Amendment's purpose and substance. It seems that sections two and three of the Amendment were seen as being primarily procedural sections, necessary to support and implement section one [S]ubstantive debate . . . focused principally on two subjects: whether the text should explicitly prohibit saloons and the means of ratifying the Amendment. The meaning of . . . section two . . . was subjected to limited scrutiny.¹⁴⁰

Douglass concluded "[t]he plain meaning of the text and the legislative history, taken together, do not reveal a single, correct interpretation of the effect the Amendment ha[s] on state authority

138. *Bacchus Imps. v. Dias*, 468 U.S. 263 (1984). "State laws that constitute mere economic protectionism are therefore not entitled to the same deference as laws enacted to combat the perceived evils of unrestricted traffic in liquor." *Id.* at 276.

139. *Dickerson*, 212 F. Supp. 2d at 681 (citing Duncan Baird Douglass, Note, *Constitutional Crossroads: Reconciling the Twenty-First Amendment and the Commerce Clause to Evaluate State Regulation of Interstate Commerce in Alcoholic Beverages*, 49 DUKE L.J. 1619, 1628-36 (2000)).

140. Duncan Baird Douglass, Note, *Constitutional Crossroads: Reconciling the Twenty-First Amendment and the Commerce Clause to Evaluate State Regulation of Interstate Commerce in Alcoholic Beverages*, 49 DUKE L.J. 1619, 1631-32 (2000).

...”¹⁴¹ Thus, the varying approaches that district court judges have taken range from an expansive analysis to a more narrow approach.¹⁴²

Without a clear historical approach, the Supreme Court has determined that the core concerns of the Twenty-first Amendment include “promoting temperance, ensuring orderly market conditions, and raising revenue”¹⁴³ It is important to note that economic protectionism is not a core concern of the Twenty-first Amendment; “[t]he central purpose of the provision was not to empower states to favor local liquor industries by erecting barriers to competition.”¹⁴⁴ Further, “[s]tate laws that constitute mere economic protectionism are therefore not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor.”¹⁴⁵

The proper recourse, then, is to first apply traditional Dormant Commerce Clause analysis.¹⁴⁶ If the law does not pass strict scrutiny under the Dormant Commerce Clause, the court must determine whether the state has demonstrated that there are no reasonable nondiscriminatory means of advancing the Twenty-first Amendment’s core concerns.¹⁴⁷

C. *Applying Dormant Commerce Clause Analysis to Maryland’s Direct Shipment Laws*

“The wines that one best remembers are not necessarily the finest that one has ever tasted, and the highest quality may fail to delight so much as some far more humble beverage drunk in more favorable surroundings.”

-H. Warner Allen¹⁴⁸

Unlike the statutes at issue in *Granholtm*, Maryland’s direct shipment laws treat in-state and out-of-state wineries similarly—neither are permitted to ship wine directly to Maryland consumers; the regulations at issue are thus facially neutral.¹⁴⁹ Until April

141. *Id.* at 1636.

142. *Compare Dickerson*, 212 F. Supp. 2d 673 (ruling Texas ban on direct shipment from out-of-state suppliers was unconstitutional), *with Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848 (2000) (holding Indiana ban on direct shipment from out-of-state suppliers was authorized by the Twenty-first Amendment).

143. *North Dakota v. U.S.*, 495 U.S. 423, 432 (1990).

144. *Bacchus Imp. v. Dias*, 468 U.S. 263, 276 (1984).

145. *Id.*

146. *Heald v. Engler*, 342 F.3d 517, 524 (6th Cir. 2003), *aff’d by Granholtm v. Heald*, 544 U.S. 460 (2005).

147. *Engler*, 342 F.3d 517.

148. *The Wrath of Grapes*, Quotable Quotes, *supra* note 21.

149. *See supra* text accompanying note 118.

2006, Maryland law permitted local wineries to circumvent the wholesale system, granting local wineries unconstitutional preferential treatment over out-of-state wineries.¹⁵⁰ Under the *Brown-Forman* analysis, these regulations do not pass constitutional scrutiny.¹⁵¹

The intended result of the *Bushnell* litigation—legalizing direct shipment—was not achieved. Instead, Maryland residents may see a slight increase in the availability of wines produced by very small wineries in local liquor stores.¹⁵² The April 2006 compromise permits small vintners to serve as their own wholesalers, but does not permit direct shipment to consumers.¹⁵³ Moreover, the regulations only permit out-of-state wineries producing 27,500 gallons of wine per year to sell to retailers.¹⁵⁴ Wineries producing more than 27,500 gallons per year must attract wholesaler attention to carry their product. Initially, wine industry advocates proposed a 250,000 gallon limit but the wholesale lobby resisted, settling on the 27,500 gallon compromise.¹⁵⁵ Wholesale industry advocates also rejected a 40,000 gallon proposal.¹⁵⁶ The 27,500 gallon compromise is a contrived measure designed to permit only the smallest wineries entry to the Maryland market, enabling the legislature to avoid the direct shipment issue altogether.

Instead of permitting *Bushnell* litigation to proceed, the Maryland Legislature paid lip service to the out-of-state wine industry by placing a legislative band-aid on the direct shipment issue. This Comment posits that under *Brown-Forman* analysis,¹⁵⁷ any legislative result short of permitting direct shipment for both in-state and out-of-state wineries is unconstitutional.

Under the first half of the *Brown-Forman* analysis, Maryland's facially neutral direct shipping laws pass Dormant Commerce Clause strict scrutiny.¹⁵⁸ However, *Brown-Forman* next mandates that "when . . . a statute . . . has only indirect effects on interstate commerce and regulates evenhandedly, we . . . [examine] whether

150. See Complaint, *supra* note 119, at 14-28.

151. See *supra* text accompanying notes 134-135.

152. See David Dishneau, *Small Wineries Raise a Glass*, WASH. TIMES, July 31, 2006, at C14.

153. See MD. ANN. CODE art. 2B, § 2-201(v)(1)-(3) (Supp. 2006).

154. *Id.*

155. Dishneau, *supra* note 152, at C15.

156. Julekha Dash, *Compromise Will Allow Md.'s Wine Makers to Continue Selling to Restaurants*, WASH. BUS. J., April 5, 2006, available at <http://phoenix.bizjournals.com/washington/stories/2006/04/03/daily17.html>.

157. See *supra* text accompanying notes 134-135.

158. See *supra* text accompanying notes 134-135.

the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits."¹⁵⁹

Maryland's anti-direct shipment law, while facially neutral, has a prejudicial effect on out-of-state wineries and thus constitutes functional discrimination. This Comment will further examine the benefits that local wineries enjoy.

1. Market for Maryland Wines

The local market for Maryland wines is booming; in 2004, sales were estimated at over \$7 million, a 22.5 percent increase from 2003.¹⁶⁰ The Maryland Wineries Association's "Ask for Maryland Wine" campaign¹⁶¹ and Maryland laws permitting local vintners to circumvent the three-tiered system have enabled Maryland retailers and restaurants to carry Maryland wines.¹⁶² One local wholesaler and one multi-national wholesaler carry four Maryland wines.¹⁶³ The Maryland Wineries Association hosts six annual wine festivals serving Maryland wines exclusively.¹⁶⁴ Currently, there are twenty Maryland wineries located across the state.¹⁶⁵ In short, Maryland consumers have numerous options when purchasing local wines. Consumers may attend a wine festival, visit a local winery, or even purchase local wines in their neighborhood liquor store, enabled by Maryland laws permitting manufacturers to circumvent the wholesale system to sell to restaurants, retailers, and consumers.

Further, while Maryland wineries may not ship products directly to in-state consumers, they may ship directly to consumers living in states that permit direct shipment of wines.¹⁶⁶ The Maryland Wineries Association is unaware of any Maryland wineries that currently ship out-of-state.¹⁶⁷ If Maryland's direct

159. *Supra* text accompanying notes 134-135.

160. *See* The Maryland Wineries, *Maryland Wine Industry Statistics*, *supra* note 116.

161. *See* Maryland Wineries Association, <http://marylandwine.com> (last visited Mar. 24, 2007).

162. *See* Complaint, *supra* note 119.

163. E-mail from Kevin Atticks, Executive Director, Maryland Wineries Association to Lauren Dunnock, University of Baltimore School of Law Student and University of Baltimore Law Review Production Editor, (March 10, 2006, 21:27:00 EST) (on file with author).

164. Maryland Wineries Association, 2007 Wine Festivals, <http://www.marylandwine.com/mwa/events/festivals.shtml> (last visited Mar. 24, 2007).

165. Maryland Wineries Association, 2007 Wine Festivals, <http://www.marylandwine.com/mwa/events/festivals.shtml> (last visited Mar. 24, 2007).

166. *See* Md. ANN. CODE art. 2B, § 2-205(a)(3)(i) (2002 & Supp. 2006).

167. E-mail from Kevin Atticks, *supra* note 163.

shipping laws were amended to permit direct shipping on a reciprocal basis, sales by direct shipments would increase.¹⁶⁸

2. Wholesaler Market's Prejudicial Effect on Out-of-state Small Wineries

Maryland consumers wishing to purchase a moderately priced Oregon Pinot Noir listed in Wine Enthusiast's Top 100 Wines have two choices—search for the wine in their local liquor store, where a Maryland wholesaler may or may not distribute the wine, or board a plane to Portland.

“The value of the direct sale of wine is estimated at \$500 million with some estimates as high as \$1 billion.”¹⁶⁹ Small out-of-state wineries rely on direct shipping to sell their products because production is too small for wholesalers to carry their wines, while many consumers rely on the Internet to purchase wines unavailable in their local liquor store.¹⁷⁰ While in some circumstances wine may be considered a substitute good, it is not for many consumers. Compare the following scenario: a consumer on her way to a party stops at her local liquor store for a bottle of wine—any bottle will do (substitute), versus a wine enthusiast intrigued by Robert Parker's online rave review of a California Syrah who will be content only with this California Syrah. For the latter consumer, no other Syrah will do (not a substitute). In this situation, Maryland's direct shipment laws harm the consumer and the out-of-state retailer. The laws restrict competition, inflate prices, and decrease consumer access to goods, which are not carried by the wholesaler.

The out-of-state winery, unlike the Maryland winery, is effectively shut out of the Maryland market unless the winery is small enough to qualify for Maryland's limited wholesaler permit. The Maryland winery is advantaged by location and legislative benefit.¹⁷¹ Thus, Maryland's direct shipment laws constitute functional discrimination and are unconstitutional under the Dormant Commerce Clause unless the State may demonstrate that there are no reasonable nondiscriminatory means of advancing the Twenty-first Amendment's core concerns.¹⁷²

168. Thirteen states permit direct shipment only if the state of origin also permits direct shipment. Federal Trade Commission, *supra* note 22, at 7.

169. Molnar, *supra* note 37, at 173.

170. *Id.* at 184-85.

171. See Complaint, *supra* note 119, at 14-16.

172. See *Heald v. Engler*, 342 F.3d 517, 524 (6th Cir. 2003).

D. Do Maryland's Laws Satisfy the Twenty-first Amendment's Core Concerns?

Violations of the Dormant Commerce Clause pass constitutional scrutiny if justified by a core concern of the Twenty-first Amendment.¹⁷³ Core concerns include "promoting temperance, ensuring orderly market conditions, and raising revenue."¹⁷⁴ This Comment will base assumptions of the State's arguments on those used by other states in legal challenges.

1. Promoting Temperance

While perhaps a legitimate concern in the nineteenth century, it is clear that promoting temperance is no longer a primary objective of legislators in this State. While promotion of temperance remains a cited goal in Maryland's statement of policy regarding liquor laws,¹⁷⁵ several of the State's licensing schemes contradict this statement. The State issues permits to sell beer, wine, and liquor across the State.¹⁷⁶ Permits may be obtained for sales of beer, wine, or liquor at wine festivals,¹⁷⁷ golf courses,¹⁷⁸ racetracks,¹⁷⁹ and beer festivals.¹⁸⁰ Further, Maryland wineries have been permitted to bypass the wholesaler system to sell directly to restaurants and retailers since 1951.¹⁸¹ Considering the widespread means in place to sell and purchase alcohol, it does not follow that promotion of temperance is a legitimate goal of Maryland's anti-direct shipment laws.

2. Collection of Taxes

Taxation on liquor sales is a significant source of revenue for the State.¹⁸² "Increased direct shipping . . . brings with it the potential for tax evasion."¹⁸³ In *Granholm*, Michigan and New York state officials cited fear of tax evasion as a primary reason for

173. *See, e.g.,* North Dakota v. U.S., 495 U.S. 423 (1990).

174. *Id.* at 432.

175. MD. ANN. CODE art. 2B, § 1-101 (2005).

176. *Id.* at §§ 3-101, 3-201, 3-301, 6-101, 6-201.

177. *Id.* at §§ 8-301 to -314.

178. *Id.* at §§ 8-501 to -507.

179. *Id.* at §§ 8-601 to -603.

180. *Id.* at §§ 8-801 to -805.

181. *See* Ted Rouse, *Decision on Wineries Hurts Economy, Environment*, BALT. SUN, Feb. 26, 2006, at 17A.

182. U.S. Census Bureau, *State and Local Government Finances by Level of Government and by State, 2001-2002*, http://www.census.gov/govs/estimate/0221mdsl_1.html (last visited Mar. 24, 2007). General revenue for state and local government totaled \$32,318,019 in fiscal year 2001-2002. Of that total, taxes on alcoholic beverages equaled \$25,754 and liquor store revenue equaled \$162,437. *Id.*

183. *Granholm v. Heald*, 544 U.S. 469, 491 (2005).

not permitting direct shipments from out-of-state.¹⁸⁴ New York required permits for in-state wineries to ship to consumers.¹⁸⁵ The Supreme Court noted “[i]f licensing and self-reporting provide adequate safeguards for wine distributed through the three-tiered system, there is no reason to believe they will not suffice for direct shipments.”¹⁸⁶ For example, “licensees could be required to submit regular sales reports and to remit taxes.”¹⁸⁷

The Court noted several provisions of federal law that provide incentives for compliance with state tax collection regimes.¹⁸⁸ For example, if a winery violates state law, the Federal Tax and Trade Bureau has the authority to revoke the winery’s federal license, thus preventing the winery from operating in any state.¹⁸⁹ In addition, the Twenty-first Amendment Enforcement Act granted state attorney generals the authority to sue wineries in federal court for violating state direct shipment laws.¹⁹⁰ The Court stated that these federal tools, combined with state licenses, “adequately protect States from lost tax revenue.”¹⁹¹

The FTC’s report on wine and barriers to e-commerce observed that several states permitting direct shipments of wine¹⁹² have tax collection mechanisms in place and report “few, if any, problems.”¹⁹³ One such state, New Hampshire, outlined its procedures when a shipper is discovered violating the state’s tax collection laws: “When the N.H. Liquor Commission discovers an improper shipment we contact the company and inform them of the laws in [New Hampshire]. Once the company learns of [New Hampshire] laws they normally get a permit or stop shipping in [New Hampshire].”¹⁹⁴

184. *Id.* at 463.

185. *Id.* at 491.

186. *Id.*

187. *Id.*

188. *Id.* at 492.

189. *Id.*

190. *Id.*

191. *Id.*

192. One such state is Louisiana:

[W]ine may be sold and shipped directly to a consumer in Louisiana . . . , provided both that all taxes levied in R.S. 26:341(B) have been paid in full and that all of the following apply: . . . Any manufacturer . . . of wine[,] engaging in the direct shipment of such beverages under the provisions of Subsection B of this Section shall make an annual application to the secretary of the Department of Revenue for authority to make such shipments and shall pay the annual tax of one hundred fifty dollars levied by R.S. 26:341(B)(2) prior to selling or shipping any sparkling wine or still wine into the state of Louisiana.

LA. REV. STAT. ANN. § 26:359 (2001 & Supp. 2006).

193. Federal Trade Commission, *supra* note 22, at 4.

194. *Id.* at 38.

Furthermore, in all likelihood many out-of-state wine shippers would voluntarily comply with state tax requirements.¹⁹⁵ For example, the Wine Institute, a winery trade association, “indicated that ‘wineries will embrace any kind of scheme that would require the payment of taxation if [they] can simply get access to the markets.’”¹⁹⁶

Finally, there is evidence that some out-of-state shippers illegally ship wine to states that do not allow direct shipment.¹⁹⁷ These shippers are already breaking the law. It is unlikely that creating a tax collection regulation will increase the amount of illegal shipment; rather, it seems that states would increase tax collection by permitting business from honest retailers that already abide by the law.¹⁹⁸

Tax collection, while a legitimate purpose under the Twenty-first Amendment, could be easily facilitated through non-discriminatory means. It is a farcical reason to disallow direct shipment under Dormant Commerce Clause analysis.

3. Preventing Sales to Minors

In *Granholm*, Michigan and New York argue that prevention of alcohol sales to minors is a legitimate reason for denial of direct shipment.¹⁹⁹ The Supreme Court cites as evidence the FTC’s report that the twenty-six states currently permitting direct shipment “report no problems with minors’ increased access to wine.”²⁰⁰ The Court lists several reasons why this is not surprising: “First, minors are less likely to consume wine, as opposed to beer, wine coolers, and hard liquor. Second, minors who decide to disobey the law have more direct means of doing so. Third, direct shipping is an imperfect avenue of obtaining alcohol for minors who . . . ‘want instant gratification.’”²⁰¹ In *Granholm*, Michigan and New York were unable to provide concrete evidence that direct shipment would increase sales to minors. In short, preventing sales to minors does not justify the regulation in the face of Dormant Commerce Clause scrutiny.²⁰²

195. *Id.* at 39.

196. *Id.*

197. *Id.*

198. *See id.*

199. *Granholm v. Heald*, 544 U.S. 460, 489 (2005).

200. *Id.* at 490 (citing Federal Trade Commission, Possible Anti-Competitive Barriers to E-Commerce: Wine 34 (2003), <http://www.ftc.gov/os/2003/07/winereport2.pdf>).

201. *Id.* (citations omitted).

202. *Id.*

Furthermore, “the Model Direct Shipping Bill developed by the National Conference of State Legislatures requires an adult signature on delivery”²⁰³ FedEx’s delivery policy demands several requirements for shipping wine: First, all packages must have an “Adult Signature” sticker; second, recipients must show identification proving they are at least twenty-one years of age; and finally, signature releases are not permitted, nor are indirect deliveries (deliveries made to a location other than the recipient’s address).²⁰⁴

The Court noted that wineries not in compliance with state law restricting sales to minors face loss of federal and state licenses, providing a strong incentive not to sell to minors.²⁰⁵ States can take less restrictive steps to ensure that minors may not purchase wine than banning direct shipment altogether.²⁰⁶ Thus, in Maryland too, prevention of sales to minors is not a legitimate reason to discriminate against out-of-state wineries.

E. Protectionism

Without additional evidence that Maryland’s direct shipping laws are intended to promote the core concerns of the Twenty-first Amendment, it appears that they are rather intended as protectionist policies to aid local winemaking industries at the expense of consumer choice, free trade, and the benefits that accompany trade, such as lower prices. This conclusion is further substantiated by the existence of Maryland laws that benefit local wineries.²⁰⁷ Permitting the smallest out-of-state wineries to sell directly to retailers does not negate the effects of protectionist policies or solve the problem. Statutes that permit Maryland wineries to directly sell their products to retailers and restaurants clearly benefit development of the local wine industry. While this is a noble goal, regulations cannot promote the interests of in-state sellers while unfairly inhibiting the interests of out-of-state wineries.²⁰⁸ Those that do, constitute economic protectionism and are forbidden by the Dormant Commerce Clause.²⁰⁹

203. *Id.*

204. Federal Trade Commission, *supra* note 22, at 36-37.

205. *Granholt*, 544 U.S. at 490.

206. *Id.* at 490-91.

207. *See* Complaint, *supra* note 119.

208. *See* *Bacchus Imps. v. Dias*, 468 U.S. 263, 276 (1984). “State laws that constitute mere economic protectionism are therefore not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor.” *Id.*

209. *Id.*

IV. CONCLUSION

If Maryland enacted anti-direct shipping regulations for other consumer goods, those regulations would be struck down as an unconstitutional violation of the Dormant Commerce Clause.²¹⁰ Boutique wine is a product with enormous industry potential; it should be treated similarly to other consumer goods. The reasons cited by the Supreme Court in justifying discriminatory or protectionist policies under the Twenty-first Amendment—promotion of temperance, tax collection, and preventing sales to minors—are not substantial enough to justify the discriminatory impact that anti-direct shipping laws have on out-of-state wineries and consumers alike.²¹¹

The regulations harm local wineries, out-of-state wineries, and interfere with consumer choice, enabled by the monopolistic interests and political clout of wholesalers and retailers. Courts shaping decisions in these cases should consider the interests of the consumer and those of free trade and weigh these interests against those of the wholesalers and distributors.

In reforming Maryland policy, legislators should craft sound regulations that advance the interests of local Maryland wineries while opening the market to both out-of-state wineries and local consumers. Maryland should shape its policy based on that of states that currently permit direct shipment, such as Louisiana and New Hampshire.²¹² These states provide a statutory framework that permits direct shipping while effectuating simple tax collection mechanisms and providing penalties for sellers that do not have adequate safeguards for preventing sales to minors.²¹³ Catering to and working within a system created in an era of mobsters and teetotalers is simply not sound policy for the twenty-first century.

Supreme Court jurisprudence directs states to demonstrate that policies discriminating against interstate commerce must be struck down unless the state's interest is legitimate and the local benefit outweighs the harm to interstate commerce.²¹⁴ State laws that constitute mere economic protectionism are not saved by the Twenty-first Amendment.²¹⁵ Maryland's standard tax collection and temperance justifications should not override laws that interfere with interstate commerce. Such a policy merely protects

210. Molnar, *supra* note 37, at 173.

211. *See supra* Part III(D).

212. *See supra* note 33.

213. *See supra* Part III(D).

214. *See supra* Part III(A).

215. *See supra* Part III(B).

the wholesale and retail industry to the detriment of Maryland consumers, local wineries, out-of-state wineries, and the wine industry. Thus, courts should apply the Dormant Commerce Clause analysis posited in *Granholm* and this Comment and conclude that anti-direct shipment laws are unconstitutional.

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