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The Dormant Commerce Clause, the Twenty-First Amendment, and a Freer Wine Market: Why Kentucky Must Wine-down Its Protectionist Laws Restricting the Direct Shipment of Wine from Out-of-State Wineries

Aubrey K. Vaughan

I. Introduction: Cheers to a More Open Wine Industry

The United States is the largest wine market in the world.¹ Prior to Prohibition, Kentucky was the third largest grape and wine producing state in the country.² Following decades of harm to Kentucky’s agricultural industry through restrictions on the growth of major cash crops like hemp and tobacco, Kentucky farmers have returned to viticulture in hopes of redeveloping a viable and profitable industry for Kentucky farmers.

Unfortunately for consumers, the Kentucky legislature has gone too far in attempting to foster the wine industry of the Commonwealth. Kentucky wineries have been legally allowed to operate since 1976,³ and due to legislation enacted in 1996, they have also been protected from out-of-state competition.⁴ KRS § 244.165, as written in 1996, prohibited out-of-state wineries from direct sales and shipments of wine to Kentucky consumers.⁵ This law showed signs of collusion between big government and big business, severely limiting the individual consumer’s access to the wine market. The first red flag was that the law only applied to private individuals; alcohol wholesalers were exempt from restrictions on importation of out-of-state wine. The second was that an individual could

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⁴ Id.
only import out-of-state wine after jumping through various hoops. Specifically, a consumer had to go in person to the out-of-state winery, purchase the wine on-site, ship the wine back to Kentucky through a licensed common carrier, and ship no more than two cases per visit. Out-of-state wineries that violated this law, upon their first offenses, would receive cease and desist letters, and upon their second and subsequent offenses, would be guilty of Class D felonies.7 Wine wholesalers faced no risk of criminal, let alone civil, penalties for receiving wine shipments.

Kentucky wine wholesalers favored the continued existence of this law because it protected their ability to act as middlemen between the vineyards and the consumers since wholesalers could legally import the wine and sell it at a markup. Kentucky wineries also enjoyed protection from virtually no out-of-state competition. This law, however, harmed consumers and prevented a free and open wine market throughout the country; a market in which the direct shipment of wine is a $1.35 billion industry today.8 According to a report by the Federal Trade Commission, "state bans on internet direct shipping represent the single largest regulatory barrier to expanded e-commerce in wine."9 The report found that if these consumers had been allowed to purchase the wine online instead of in a store, they would have paid "8-13% less than the store price" for a $20 to $40 bottle of wine and "20-21% less than the store price for wine that cost more than $40 per bottle."10 Wineries across the country have distinctive products, and many of the most desirable wines come from states like California, Oregon, and Washington, which are all thousands of miles away from Kentucky.11

Since the Supreme Court's decision in Granholm v. Heald,12 many states' wine-shipping laws have come under close scrutiny, review, and

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6 Id.
7 Id.
10 Id.
litigation. Granholm arose from out-of-state wineries coming into conflict with Michigan and New York statutes, both of which had the same effect of severely limiting wine shipments into their states. Michigan allowed Michigan wineries to ship to Michigan consumers, but out-of-state wineries could only ship to Michigan wine wholesalers. New York technically allowed out-of-state wineries to ship to New York consumers, but the state "required [wineries] first to establish a factory, office, or storeroom in New York," creating a heavy burden on out-of-state wineries to which in-state wineries were not subject. The Supreme Court struck down these laws because they violated the Dormant Commerce Clause. A number of subsequent cases reached similar results. One such case was Cherry Hill Vineyards, LLC v. Lilly, a Sixth Circuit decision. As this Note will later discuss, Cherry Hill held a portion of Kentucky's law to be an unconstitutional violation of the Dormant Commerce Clause. Yet, the law partially remains in effect in Kentucky. The remaining part, which prohibits a winery from shipping more than two cases of wine to a consumer, also appears to conflict with the Dormant Commerce Clause as a burden on interstate commerce. Another hurdle for out-of-state wineries to overcome is navigating the laws of the dry, moist, and wet counties in Kentucky. KRS § 242.260 makes each package of alcohol a common carrier ships into Kentucky a separate offense. Rather than face potential violations, many common carriers have refused to ship wine to any Kentucky county at all.

This note will seek to encourage the Kentucky General Assembly to clarify the law in light of Granholm and Cherry Hill to open the wine market in Kentucky for the benefit of consumers, increase competition for the benefit of better agricultural products in Kentucky, end the

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13 Id. at 466-67.  
15 Id.  
16 Granholm, 544 U.S. at 492-93.  
17 Cherry Hill Vineyards, LLC v. Lilly, 553 F.3d 423 (6th Cir. 2008).  
unconstitutional protection of Kentucky's vineyards from out-of-state competition, and eliminate liability for common carriers shipping wine into the Commonwealth. The General Assembly should either draft a resolution to clarify the current law in the state, or amend prior statutes to clarify the current state of law for out-of-state wineries. Doing so will work against the protectionist interests of Kentucky wineries and wholesalers, but will benefit Kentucky consumers by providing a free and open market.

II. A PERFECT PAIRING: USING THE DORMANT COMMERCE CLAUSE AND A HISTORICAL INTERPRETATION OF THE TWENTY-FIRST AMENDMENT TO HELP FREE THE WINE MARKET

The Commerce Clause gives Congress the power to "regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes." The counterpart to the Commerce Clause is the Dormant Commerce Clause. While not textually expressed in the Constitution, it is "the principle that state and local laws are unconstitutional if they place an undue burden on interstate commerce." There is no constitutional provision that explicitly lays out the Dormant Commerce Clause; rather, it derives from two sources: an inverse inference from the Commerce Clause and Chief Justice John Marshall's opinion in Gibbons v. Ogden. Chief Justice Marshall wrote, "when a state proceeds to regulate commerce... among the several States, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do." Essentially, the power serves as a barrier from "jurisdictional overreaching by the states," limiting "the ability of states to impede the flow of interstate commerce." The Court adopted the Dormant Commerce Clause in order to prevent a reversion to the economic protectionism that was rampant under the Articles of Confederation, which reduced

21 U.S. Const. art. I, § 8, cl. 3.
23 Gibbons v. Ogden, 22 U.S. 1, 199-200 (1824).
competition and drove up prices. The Dormant Commerce Clause does not entirely prevent states from regulating commerce, but it does prevent states from discriminating against commerce "solely on the basis of the [object's] geographic origin."

The Dormant Commerce Clause prohibits two categories of laws: facially neutral laws (also called facially non-discriminatory laws) and facially discriminatory laws. Facially neutral laws are laws that do not appear to discriminate based on the text, or "face" of the law. They do, however, discriminate when applied. Facially discriminatory laws, conversely, are laws that expressly differentiate between in-state and out-of-state commerce, such as laws placing "out-of-state businesses at a disadvantage compared to in-state businesses or act[ing] to help in-state businesses at the expense of out-of-state businesses." The Dormant Commerce Clause blocks such discriminatory regulation "by its nearly per se rule prohibiting even facially nondiscriminatory regulation that is overly burdensome to interstate commerce."

The Dormant Commerce Clause can be justified in three major ways: historically, economically, and politically. The historical justification for the Dormant Commerce Clause lies in the fact that the "framers intended to prevent state laws that interfered with interstate commerce." According to constitutional scholar Erwin Chemerinsky, it can be "inferred from this history that the framers meant to prevent such protectionist state legislation." As Justice Robert Jackson explained in his opinion in *H.P. Hood & Sons, Inc. v. DuMond*,

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25 Id.
26 See, e.g., *Maine v. Taylor*, 447 U.S. 131 (1986) (holding states can exclude commerce if there is a legitimate environmental purpose and there are no available non-discriminatory means to pursue that end); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) (holding states can prohibit certain commerce, even if it has a discriminatory effect against out-of-state producers and favorable effects on in-state producers, if the discriminatory effects are only incidental to the law's purpose to protect environmental interests).
31 Id. at 432-33.
[our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation . . . . Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.32

The economic justification for the Dormant Commerce Clause, as Professor Chemerinsky explained, is that “[t]he economy is better off if state . . . laws impeding interstate commerce are invalidated.”33 The logic behind this statement is that if “a state acts to help itself at the expense of other states, the other states are sure to retaliate with protectionist legislation of their own.”34 Furthermore, protectionist laws stifle production, retard innovation, and harm the overall economy.

The political justification for the Dormant Commerce Clause is that the American system does not desire to punish citizens of one state with the laws of another state in which those citizens lack political representation.35 Therefore, the Court has the power to invalidate laws that impede the political process for those without representation in that state. As Justice Marshall wrote in McCulloch v. Maryland:

[s]tates have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. This is, we think, the unavoidable consequence of that supremacy which the constitution has declared.36

33 Chemerinsky, supra note 23, at 433.
34 Id.
35 Id.
36 McCulloch v. Maryland, 17 U.S. 316, 436 (1819).
As Justice Harlan Stone wrote over a century later in *South Carolina Highway Department v. Barnwell Brothers, Inc.*, "when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state."

**A. Le Vin-dication of the Wine Market Through the Dormant Commerce Clause**

In applying the Dormant Commerce Clause to state statutes, it logically follows that a protectionist state law may be "challenged on the ground that it excessively burdens commerce among the states." States should not have the power to impede commerce across their state lines, especially through such discriminatory means as discouraging commerce from outside states. Specifically, as the Dormant Commerce Clause applies to alcohol laws, some argue that laws restricting the sale of alcohol are not actually a burden on commerce, but rather, a constitutional police power regulation of the health, safety, and welfare of the citizens of that state. This tension between the Dormant Commerce Clause and state police powers is confusing, since *Gibbons* does not provide a clear answer as to what to do when a state law enacted through the use of the state's police power violates the Dormant Commerce Clause.

Most would agree that, despite mixed views on the effectiveness of the law itself, a law preventing underage drinking is a valid exercise of police power. If we assume that the prevention of underage drinking is a legitimate state interest, then the issue becomes whether banning the shipment of wine into a state is the least restrictive means by which this interest can be achieved. Whether the burden will be tolerated depends on the "nature of the local interest involved" and on "whether [that interest] could be promoted [just] as well with a lesser impact on interstate

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37 S.C. Highway Dep't v. Barnwell Bros., Inc., 303 U.S. 177, 185 n.2 (1938).
39 *Id.* at 436.
activities.” There is a presumption of unconstitutionality for state laws that discriminate against out-of-staters. The discriminatory law will only be upheld if the state can show that “the law is necessary – the least restrictive means – to achieve a nonprotectionist purpose.” Laws that facially “discriminate against interstate commerce face a virtually per se rule of invalidity.” In other words, the Court will balance “whether the benefits of the state law outweigh its burdens on interstate commerce.” A court’s determination that a particular law discriminates against interstate commerce, however, does not end the inquiry into the constitutionality of the law.

B. The Hangover Effect of Prohibition: Protectionist Laws and the Eighteenth and Twenty-first Amendments

Historically, alcohol prohibitions have not had much success. With the temperance movement gaining steam in the nineteenth century, individual states began banning alcohol. The states, however, could not ban the importation of alcohol into their states through legislation because courts would strike such bans down as violations of the Dormant Commerce Clause. Congress reacted to this issue by using its Commerce Clause powers to first enact the Wilson Act in 1890, which was meant to treat imported alcohol the same as in-state alcohol. The Court’s loose interpretation of this law allowed consumers to easily circumvent it. Consequently, Congress enacted the Webb-Kenyon Act in 1913. Many correctly predicted that this law would herald a dry country within ten years. The Act stated that the “shipment or transportation, in any manner or by any means whatsoever, of any ... intoxicating liquor of any kind from

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41 Chemerinsky, supra note 23, at 460.
42 Granholm, 544 U.S. at 476.
43 Chemerinsky, supra note 23, at 439.
44 Huber Winery, 488 F.Supp.2d at 596.
45 Banner, supra note 15, at 271-72.
one State . . . into any other State . . . in violation of any law of such State . . . is prohibited.47 This permitted states to outright prohibit alcohol, and read literally, the Webb-Kenyon Act "did indeed authorize . . . discrimination: liquor imported into a state, contrary to the state's protectionist legislation, would literally have been imported 'in violation of the law of such State.'48 Again, however, this act was only meant to apply to states that had elected to become dry—not to allow for distinctions between in-state and out-of-state alcohol. In fact, the South Carolina Supreme Court held in 1916 that the Webb-Kenyon Act "was not intended to confer, and did not confer upon any State, the power to make injurious discriminations against the products of other States."49 In short, the Act was not intended to authorize states to discriminate against out-of-state alcohol importation.

In 1920, the Prohibition era officially began with the ratification of the Eighteenth Amendment. Section One of the Eighteenth Amendment prohibited the "manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes.50 The Eighteenth Amendment was rather short lived, as it was repealed thirteen years later with the ratification of the Twenty-first Amendment in 1933. Despite the Twenty-first Amendment's repeal of Prohibition, the United States still feels the effects of the era today.

Section One of the Twenty-first Amendment repealed the prohibition on the manufacture and sale of alcohol, but went on to state in Section Two that 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."51 Section Two's ambiguous grant of power has "generated a steady flow of litigation."52 Many states have interpreted this provision as a loophole

50 U.S. Const. amend. XVIII, § 1.
51 U.S. Const. amend. XXI, § 2.
52 Banner, supra note 15, at 263.
through which they have enacted state laws pertaining to the transportation or importation of alcohol into their states. Section Two does indeed seem to textually allow states to constitutionally prohibit "whatever [actions] relating to liquor importation the states already forbid, even [actions] protected by federal statutes or other parts of the Constitution."\(^{53}\) For approximately fifty years after the ratification of the Twenty-first Amendment, that reading prevailed.\(^{54}\)

Since 1980, the Court has focused on the history of the Twenty-first Amendment rather than the language of the provision itself.\(^{55}\) The Court now posits that "Section [Two does] not authorize a state to favor local interests by erecting trade barriers."\(^{56}\) In the context of regulations on alcohol, this means that laws that are mere economic protections are "not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor."\(^{57}\) Section Two was not meant to permit "[s]tates to regulate the direct shipment of wine on terms that discriminate in favor of in-state producers."\(^{58}\) Rather, Section Two was meant to give states the authority to design and implement uniform systems of regulation to handle the transportation and importation of alcohol through their states.\(^{59}\) History suggests the Twenty-first Amendment was meant to "supersede some specific . . . Supreme Court cases interpreting the Commerce Clause, not to supersede the entire Constitution."\(^{60}\) Its legislative history never mentioned that the Twenty-first Amendment was intended to "go beyond the Webb-Kenyon Act and allow states to discriminate against out-of-state liquor."\(^{61}\) The states had no such power prior to prohibition, and no legislative history suggests Congress intended for states to have that power following the Twenty-first Amendment.\(^{62}\)
Based on the Amendment's historical context, courts should read Section Two to mean that states may restrict out-of-state liquor just as they restrict their own, but states may not regulate out-of-state liquor more strictly than they regulate their own without violating the Dormant Commerce Clause.

Non-uniform laws discriminating against out-of-state wineries are therefore now not allowed under Section Two, even though such differential treatment has been common since the adoption of the Twenty-first Amendment. Case law beginning in the 1980s returned to this contextual interpretation of the Amendment, explaining that "the Twenty-first Amendment does not supersede other provisions of the Constitution and, in particular, does not displace the rule that [s]tates may not give a discriminatory preference to their own producers." A state could choose to ban the sale and consumption of alcohol altogether, in which case, that state could ban the importation of all alcohol. States also may use state-run alcohol stores or tiered systems to sell alcohol to consumers. However, a law that merely discriminates against out-of-state commerce to benefit in-state commerce is not constitutional and is not protected under Section Two of the Twenty-first Amendment.

In Granholm v. Heald, the petitioners challenged Michigan and New York laws that allowed in-state wineries to directly ship to consumers, but did not extend this privilege to out-of-state wineries. Petitioners argued that this was a violation of the Dormant Commerce Clause. This directly pitted "a literal, textualist reading of the Twenty-first Amendment against a contextual, originalist reading." The Justices had to decide between adhering to old case law and a textualist reading of Section Two, or following new case law and adopting a contextual reading of Section Two. Everyone concurred that "the statutes at issue would have been unconstitutional if the regulated commodity [had been] anything other

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63 Granholm, 544 U.S. at 485.
64 Banner, supra note 15, at 282.
65 Granholm, 544 U.S. at 486.
66 Id. at 488-89.
67 Id. at 489.
68 Banner, supra note 15, at 282.
69 Id. at 284.
than alcohol."\textsuperscript{70} For example, "[i]f the product were cheese rather than wine, [a state] would not be able either to close its borders to imports or to insist that the shippers collect its taxes."\textsuperscript{71} However, the issue at hand was "whether the Twenty-first Amendment create[d] an exception allowing states to discriminate where the product involved is liquor,"\textsuperscript{72} allowing the states to "permit in-state wineries to ship directly to customers but forbid out-of-state wineries from doing so."\textsuperscript{73}

Under a textualist reading of Section Two, the out-of-state shipment of wine into Michigan and New York was very clearly an "importation into [the] State . . . for . . . use therein of intoxicating liquors, in violation of the laws thereof."\textsuperscript{74} On the other hand, when Section Two is read in its historical context, "it is apparent that Section Two was not intended to authorize states to discriminate against out-of-state producers,"\textsuperscript{75} if the state was not equally discriminating against its own producers. By a five-to-four vote, the Supreme Court ruled these laws unconstitutional, explaining that the "straightforward attempt to discriminate in favor of local producers . . . [was] contrary to the Commerce Clause."\textsuperscript{76} If a state allows its in-state wineries to ship to in-state consumers, then it must also "allow out-of-state wineries to do the same."\textsuperscript{77} The Twenty-first Amendment "was intended to level the playing field between in-state and out-of-state liquor, not [to] authorize states to discriminate against out-of-state liquor producers."\textsuperscript{78} After \textit{Granholm}, a state's only obligation is "to treat in-state and out-of-state wineries equally."\textsuperscript{79} Following this case, many states with laws similar to those of Michigan and New York extended direct shipping of wine to both in-state and out-of-state shippers.\textsuperscript{80} States can also either forbid any direct shipping from in-state and out-of-state wineries entirely or apply

\textsuperscript{70} Id. at 264.
\textsuperscript{71} Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 851 (7th Cir. 2000).
\textsuperscript{72} Banner, supra note 15, at 264.
\textsuperscript{73} Id. at 263.
\textsuperscript{74} U.S. Const. amend. XXI, § 2.
\textsuperscript{75} Banner, supra note 15, at 269.
\textsuperscript{76} Granholm, 544 U.S. at 489.
\textsuperscript{77} Banner, supra note 15, at 264.
\textsuperscript{78} Id. at 282.
\textsuperscript{79} Id. at 284.
less-restrictive regulations to them equally, though neither of these seems to be a politically popular option.

C. Refining the Palette: Applying Strict Scrutiny

While Granholm appears to have clarified the Section Two issue, a state’s direct shipment laws could still be constitutional if they “advance a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.” One of the systems that states have implemented to allegedly advance these legitimate local interests is a three-tiered distribution system. This system is structured so that alcohol producers can only sell to wholesalers, wholesalers can only sell to retailers, and only retailers can sell directly to the consumer. States argue this makes it easier to prevent underage drinking, facilitate tax collection, and promote temperance.

Rather than promoting any of these interests, it seems the three-tiered system is another example of a protectionist state government colluding with business. The only interest it might accomplish with this three-tiered model is to “promote temperance indirectly, by raising prices” and “reduc[ing] the consumer’s range of choice” as a result of having two middlemen between the producer and the consumer, who both mark up prices and maintain limited inventories. It seems like a strange combination to have temperance supporters and liquor wholesalers on the same side of the fight, but both stand to benefit from state insulation resulting in higher liquor prices—respectively, fewer people will be willing to spend that money to drink alcohol and liquor stores can sell the same product for a higher price. The real purpose behind the three-tiered system appears to be for states to be able to protect their wholesalers and retailers from competition, two groups that “stand to lose revenue if out-of-state wineries can bypass

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81 Banner, supra note 15, at 284.
83 Banner, supra note 15, at 264.
84 Id.
85 Id.
86 Id.
87 Id. at 265.
them and sell directly to in-state customers.”87 As Judge Frank Easterbrook explained, the tiered system seems to be a euphemistic mechanism “for reducing competition.”88 Granholm, however, does not invalidate the three-tiered system, though this might be a major issue in future litigation, as Granholm relied on the same “late-1930s cases repudiated in Granholm” to justify the continuance of the tiered-system.89

There has long been an exception to the three-tiered system, though, which is the subject of this note: small wineries have long been able to sell on-site directly to consumers. Prior to the Internet, this did not create much more than a niche market. With the growth of online shopping, however, this exception has allowed “small sellers and small buyers of wine to find one another despite being physically far apart.”90 Regardless of this potential market, Kentucky, Michigan, and New York all set up protectionist legislation against it. The aforementioned states articulated three main interests in their protectionist statutes: (1) preventing underage drinking, (2) facilitating tax collection, and (3) maintaining the integrity of dry counties.

1. Interest One: Preventing Underage Drinking

The primary interest identified by both Michigan and New York in Granholm, and Kentucky in its statute, is to prevent minors from purchasing wine online. The Supreme Court rejected this interest for a number of reasons. First, the Court found that minors are less likely to purchase wine over beer or liquor.91 Second, minors have several more direct means of obtaining alcohol than through shipment.92 According to a Federal Trade Commission study, states that allow direct wine shipments “reported no problems with minors’ increased access to wine . . . [as] minors are less

87 Id. at 267.
88 Bridenbaugh, 227 F.3d at 851.
89 Banner, supra note 15, at 284-85.
90 Id. at 266.
92 Id.
likely to consume wine, as opposed to wine coolers, beer, and hard liquor." As explained in *Cherry Hill Vineyards*, the market targeted by KRS § 244.165 is the small farm winery market. There simply is not evidence that "the youth of Kentucky will seek out shipment of wines in this boutique market." Even if the direct shipment of wine could somewhat increase the risk of underage drinking, the Court held that there were less restrictive means to advance that state interest, such as requiring adult signatures for delivery and labeling of the product. In fact, the National Conference of State Legislatures' Model Direct Shipping Bill for wine "requires an adult signature on delivery and a label so instructing on each package." It would be no more difficult for courier to check a customer's identification than it is for a liquor store or bar to do the same. Besides, a ban on only out-of-state wine sales would not prevent an underage drinker from simply ordering from an in-state winery instead, which clearly undermines the logic of the articulated state interest. It seems much more likely that "preventing underage drinking" is merely a façade for protectionism. With less restrictive means available, and a complete lack of evidence that the law succeeds in preventing underage drinking, these laws will not survive strict scrutiny under this interest.

2. Interest Two: Facilitating Tax Collection

A second major interest advanced by Michigan, New York, and Kentucky is that the restrictions on imported wines facilitate tax collection and prevent tax evasion in their states. In *Granholm*, however, Justice Anthony Kennedy explained that the Tax and Trade Bureau has the

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93 FTC Report, supra note 10, at 12.
94 Author note: A small farm winery is defined as a winery producing no more than 50,000 gallons of wine (or about 21,000 cases) annually. See R. Corbin Houchins, Results from Federal District Court in Kentucky, *Ship Compliant Blog* (Dec. 27, 2006), http://shipcompliantblog.com/blog/2006/12/27/results-from-federal-district-court-in-kentucky.
95 *Cherry Hill Vineyards*, LLC, 488 F. Supp. 2d at 621.
96 See id. (quoting *Granholm*, 544 U.S. at 490).
97 *Granholm*, 544 U.S. at 491.
98 See Banner, supra note 15, at 267.
99 Id.
authority to issue and revoke a winery's federal license for tax violations. Furthermore, the Twenty-first Amendment Enforcement Act allows a state attorney general to sue a winery for tax violations. States can also use their regulatory authority to build state licensing bureaus to further prevent tax evasion and use online technology to track wineries and run background checks. There is simply not enough evidence to show that the legitimate state interest in tax collection must be achieved through prohibitions on out-of-state direct shipments, and less restrictive means likely exist. For example, "[l]icensees could be required to submit regular sales reports and to remit taxes," as sanctioned by the National Conference of State Legislatures in the Model Direct Shipping Bill.

3. *Interest Three: Maintaining the Integrity of Dry Counties*

Another state interest that Kentucky identified in restricting direct shipments from out-of-state wineries is protecting the integrity of its dry counties. It is true that "the Twenty-First Amendment allows the states to 'address the moral concerns that underlay Prohibition, freeing them to impose temperance in the consumption of alcoholic beverages.' Furthermore, the Kentucky General Assembly freely permits counties to participate in elections to determine whether a county will be dry. There seems to be no legitimate reason for restricting out-of-state shipments of wine, but not in-state shipments of wine. For a state to allow "in-state wineries to ship directly to consumers . . . while prohibiting out-of-state wineries from doing the same has no differential effect on the shipment of wine into dry territories" because the Kentucky statute "discriminates based upon where the wine originates, not upon where it ends up." While maintaining the integrity of dry counties is a legitimate interest, there is no reason to discriminate against a shipment of wine because it came from out

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100 *Granholm*, 544 U.S. at 492.
101 *Id.*
102 *Id.*
103 *Id.* at 491-92.
104 *Huber Winery*, 488 F. Supp. 2d at 596 (quoting Beskind v. Easley, 325 F.3d 506, 513 (4th Cir. 2003)).
105 *Id.* at 596-97.
of state and not apply the same rule to a shipment of wine that came from inside the state. In other words, "the in-state eligibility requirements are not narrowly tailored towards achieving temperance in dry territories." It seems certain that a more relaxed direct shipping law can easily coexist with local option laws.

III. KENTUCKY CANNOT HAVE ITS WINE AND DRINK IT TOO: STATUTORY APPLICATION

Though the statute has improved since its inception in 1996, there are still several issues with KRS § 244.165. The statute reads:

(1) Except as provided in subsection (2) of this section, it shall be unlawful for any person in the business of selling alcoholic beverages in another state or country to ship or cause to be shipped any alcoholic beverage directly to any Kentucky resident who does not hold a valid wholesaler or distributor license issued by the Commonwealth of Kentucky.

(2) A small farm winery located in another state may ship wine to a customer in Kentucky if:

(a) The wine is purchased by the customer in person at the winery;
(b) The wine is shipped by licensed common carrier; and

(c) The amount of wine shipped is limited to two (2) cases per customer per visit.

(3) Any person who violates subsection (1) of this section shall, for the first offense, be mailed a certified letter by the department ordering that person to cease and desist any shipments of alcoholic beverages to Kentucky residents.

\[106\] Id. at 597.

and for the second and each subsequent offense, be guilty of a Class D felony.

All of this statute is still valid except for section (2)(a), which Cherry Hill Vineyards, LLC v. Hudgins struck down. The District Court applied strict scrutiny to the in-person requirement and found that it discriminated against small, out-of-state wineries without adequately advancing a legitimate state interest that could not be served by less restrictive means. The requirement burdened out-of-state wineries because Kentucky customers would have to travel dozens, hundreds, or even thousands of miles to purchase the wine, while simultaneously protecting Kentucky wineries from outside competition, and it clearly benefitted Kentucky wine wholesalers since they could charge higher markups as a result.

A. Should Cherry Hill Have Gone Farther?

While Kentucky purported to evenhandedly apply its law to all small wineries, the law imposed an often unfeasible in-person requirement to small, out-of-state wineries. As Judge Charles Simpson explained in Cherry Hill Vineyards, the largest concentration of small wineries is along the West Coast of the United States. Conditioning wine purchases on personally going to the wineries essentially deprives Kentucky consumers of access to the small winery market because most people would be unable or unwilling to make the trip. While “[i]t is true that the Commerce Clause does not require that out-of-state wineries be granted the exact same economic advantages as in-state wineries . . . the in-person requirement as it operates here is protectionist and cannot stand . . . [and t]he court rejects the contention that this is a matter of mere geographic happenstance.”\(^{108}\) Therefore, section (2)(a) could not stand because it violated the Dormant Commerce Clause.

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\(^{108}\) Cherry Hill Vineyards, LLC, 488 F. Supp. 2d at 619.
The District Court, though, did not strike down sections (2)(b) or (2)(c).\textsuperscript{109} It would be prudent to consider section (2)(c) in further detail because it appears that there may be facially neutral discrimination present. The Twenty-first Amendment does not allow states to "ban, or severely limit, the direct shipment of out-of-state wine while simultaneously authorizing direct shipment by [in-state] producers."\textsuperscript{110} Many out-of-state wineries are hurt by the two-case per order limit. Wine is not easy to ship, and it is expensive and tedious to ship small orders across the country. It is unfair to give wholesalers a protectionist advantage over private consumers. To truly open up the wine shipping market, this statutory limitation should also be struck down as a burden on commerce in violation of the Dormant Commerce Clause.

States might retort that this situation is analogous to cigarette sales. In Brown \& Williamson Tobacco Corp. v. Pataki, the Second Circuit Court of Appeals upheld a law that eliminated "all sales of cigarettes to New York consumers that do not involve face-to-face sales or the transportation of fewer than four cartons of cigarettes to any one consumer."\textsuperscript{111} The Second Circuit explained that this law was constitutional because it only prohibited "one manner in which cigarettes could . . . be sold to New York consumers."\textsuperscript{112} That is not applicable here. Wines are distinguishable from cigarettes in that cigarettes are a much more fungible and easily transferable product. Most wines are produced outside of Kentucky, and while Kentucky has a variety of grape crops that can be successfully grown in its climate, most varieties either cannot even be grown in the state or have a different taste due to local factors like soil and weather. Regardless of the merits of New York’s law, a good like cigarettes is much different from artisan wines, a product that likely incorporates the work of several farmers, sommeliers, and scientists. In simpler terms, "no two wines are created equal."\textsuperscript{113}


\textsuperscript{110} Granholm, 544 U.S. at 493.

\textsuperscript{111} Brown \& Williamson Tobacco Corp. v. Pataki, 320 F.3d 200, 213 (2d Cir. 2005).

\textsuperscript{112} Id.

\textsuperscript{113} Huber Winery, 488 F.Supp.2d at 599 (quoting Plaintiff’s Response to Defendants’ Supplemental Brief (DN 95), at 7).
While *Cherry Hill* left section (2)(c) alone, holding that a two-case maximum was not a substantial burden on interstate commerce, it plainly appears to be differential treatment toward an out-of-state winery. State laws are considered to violate the Dormant Commerce Clause when the state economically benefits an in-state interest and burdens an out-of-state interest.\textsuperscript{114} In this light, it seems impossible to look at a statute severely limiting the number of cases a Kentucky resident can import from out of state, while placing no equal limitation on the number of cases a Kentucky resident can import from inside the state, and still find that no differential treatment exists. KRS Chapter 244 contains no restriction on the number of cases a Kentucky winery can ship to a consumer. There are also no restrictions on the number of cases any winery can ship to a wholesaler. The power of a state to regulate under Section Two of the Twenty-first Amendment “does not allow States to ban, or severely limit, the direct shipment of out-of-state wine while simultaneously authorizing direct shipment by in-state producers.”\textsuperscript{115} If Kentucky wants to limit the number of cases a winery can ship to a customer, it must place an equal limitation on in-state wineries as well, or else not apply the limitation to any winery at all. For Kentucky to move away from protectionism and toward consumer interests and demand, then KRS § 244.165(2)(c) must be struck down.

**B. How Should Kentucky and Common Carriers Deal With Dry and Moist Counties?**

Assuming, arguendo, that Kentucky becomes friendlier toward allowing importation of out-of-state wine, the Kentucky legislature will also have to address KRS § 242.260 and KRS § 242.280. KRS § 242.260 makes it illegal for any private or public carrier to deliver alcohol into any dry or moist country,\textsuperscript{116} and each package of alcohol constitutes a separate offense.

\textsuperscript{115} Id. at 493.
Furthermore, under KRS § 242.280, it is illegal for a person in a dry country to receive an alcoholic beverage from a common carrier. Additionally, both of these statutes again exempt liquor wholesalers from the rules, so long as the wholesaler is not distributing the alcohol in the dry county.

Kentucky has dry, wet, moist (i.e., a dry county that allows alcohol on its golf course), and combination dry/wet (i.e., some voting precincts are wet and some are dry) counties. Many common carriers refuse to ship wine into Kentucky at all because of the complicated system this creates. If Kentucky does begin to allow out-of-state wine shipments, then the Kentucky General Assembly should act to ease or eliminate the penalties for common carriers that deliver alcohol to dry counties. If the General Assembly does not choose to act on this, a regulatory solution also exists. One potential method would be that during the process of licensing farms and small wineries, the licensing agency could “specifically identify the counties, cities, and/or zip codes in [the state] to which shipments cannot be made.”

There is also some pre-Prohibition case law suggesting that private consumers in dry counties may have alcohol for their own consumption, and common carriers will not be penalized for delivering it, so long as the sale of the alcohol does not occur in that county. One of the main purposes of having a dry county is to protect the social morality against drinking—but just because a county is dry does not mean alcohol cannot be consumed there, merely that alcohol cannot be sold there. If a private consumer is allowed to imbibe his out-of-county alcohol in a dry county, then why not allow the shipment of alcohol into that county? The sales

117 Author note: The offense for which a person will be guilty is that of nuisance, and the penalty is the property used to deliver the alcohol must be forfeited to the state. Ky. Rev. Stat. Ann. § 242.310 (West 1942).
120 Huber Winery, 488 F.Supp.2d at 600 (quoting Plaintiff’s Supplemental Brief (DN 92), at 9, fn 6).
121 See Barber v. Commonwealth, 182 Ky. 200 (Ky. 1918); Jacksonville v. Chicago & A. R. Co., 274 Ill. 152 (Ill. 1916); Carthage v. Munsell, 203 Ill. 474 (Ill. 1903).
transaction does not occur in the county; rather, the sale occurs in the locale of the winery. It seems that there should be no difference between (1) a private consumer leaving the county, buying alcohol outside the county, and bringing the alcohol back to his home and (2) a private consumer purchasing wine from a winery outside the county, perhaps online, and a common carrier instead being the one to bring the alcohol to the consumer’s home. Perhaps a solution that respects a county’s right to be dry, wet, or moist, the common carrier’s business in those counties, and a private consumer’s protection to open commerce, is to ask the state legislature to amend the statute to remove common carriers’ liability.

IV. DIGESTIF: KENTUCKY MUST END ITS PROHIBITION HANGOVER

The Twenty-first Amendment applies to more than just wine. There are many other artisan companies in the alcohol industry that are too small for wholesalers and retailers to carry. From those developing craft beers to those making small-batch bourbons, there are a number of companies with interests across state lines. As demand for artisan products like these skyrockets, so will online demand for these products, and these industries, too, might face similar battles in courts. There will also likely be further challenges to state alcohol sales systems, including the three-tiered model and state-run liquor stores, though these challenges have yet to find much success, usually finding these bureaucratic systems serve “legitimate regulatory purposes beyond protectionism.” However, if there can be a change of tide in the courts’ views on protectionist state interests like there was on Section Two of the Twenty-first Amendment, then there could potentially be a restructuring of the entire alcohol direct-shipping industry in this country.

122 See Banner, supra note 15, at 284.
123 See Arnold’s Wines Inc. v. Boyle, 571 F.3d 185 (2d Cir. 2009); see also Siesta Village Market LLC v. Steen, 595 F.3d 249 (5th Cir. 2010).
As a result, consumers would see a greater variety and lower prices for alcohol. Wholesalers and retailers would lose protection from the state, but this would give them the incentive to compete for customers' business, giving them an opportunity to draw in more business for delivering better products to customers. Dry counties would still be able to limit alcohol sales within their county lines, and if states want to discourage any effect of increased drinking, then they have the ability to impose a non-discriminatory sin tax on the increased alcohol consumption. However, even though the Internet has created the engine necessary for the small winery market to flourish, it seems as though it will still take years for state regulation of the liquor industry to catch up. The industry will also have to fend off further attacks, like Congress's attempt in 2010 with the CARE Act (Comprehensive Alcohol Regulatory Effectiveness Act) to end direct shipping of wine and other types of alcohol and put restrictions on consumer and winery lawsuits attempting to reduce these protectionist policies. Essentially, such legislation would revert back to the idea that Section Two of the Twenty-first Amendment is superior to the Constitution's Commerce Clause and would not require a showing that a state's discrimination of out-of-state liquor serves a legitimate government interest.

Kentucky has a confusing web of statutes, case law, and regulations that impede out-of-state wineries and common carriers from even wanting to try to do business in Kentucky. The Kentucky General Assembly must act immediately to clarify or amend Kentucky law to free the Kentucky wine market. Kentucky has been a leader in the wine industry before and has the potential to become a leader again. If the General Assembly acts now, then Kentucky can rise to the top of the American wine industry and serve as a model of direct shipping success to other states, rather than try to play catch up in the future.

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