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CRAFT BEER DRINKERS REIGNITE THE WINE WARS

*Shirley Chen**

INTRODUCTION

The rise of craft beers draws attention back to the longstanding debate surrounding state law regulations on the direct shipment of alcohol to consumers across state lines.¹ At the forefront of this debate is the ever-existing tension between the Twenty-first Amendment and the Commerce Clause of the United States Constitution.² Specifically, the issue was pronounced during what was known as the wine wars of the 1990s and 2000s.³ Although the United States Supreme Court seemingly settled the matter in the seminal case of *Granholm v. Heald*,⁴ subsequent case holdings have illustrated that confusion surrounding the extent of the states' power in alcohol regulation still exists and that the courts' decisions are dependent upon a narrow or broad interpretation of *Granholm*.⁵ For example, state regulations that do not forbid, but rather limit the scope of producers' ability to directly ship wine have been questioned on the same constitu-

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¹ Daniel Fromson, *Beer's Black Market*, THE WASH. POST (Sept. 6, 2011), http://www.washingtonpost.com/lifestyle/food/beers-black-market/2011/09/01/gIQAsL0D7J_story.html.

² See U.S. CONST. art. I, § 8, cl. 3; U.S. CONST. amend. XXI; See also *Granholm v. Heald*, 544 U.S. 460, 466 (2005); Kevin C. Quigley, Note, *Uncorking Granholm: Extending The Nondiscrimination Principle To All Interstate Commerce In Wine*, 52 B.C. L. REV. 1871, 1873-74 (2011).

³ William Echikson et al., *Wine War*, BLOOMBERG BUSINESSWEEK (Sept. 2, 2001), <http://www.businessweek.com/stories/2001-09-02/wine-war>.

⁴ See *Granholm*, 544 U.S. at 466 (holding that the Twenty-first Amendment does not authorize or permit laws that violate the Commerce Clause).

⁵ Quigley, *supra* note 2, at 1888-93; William C. Green, *Creating A Common Market For Wine: Boutique Wines, Direct Shipment, And State Alcohol Regulation*, 39 OHIO N.U. L. REV. 13, 42 (2012).

tional grounds, resulting in a circuit split.⁶ In addition, wine retailers continue to advocate that the Supreme Court's holding in *Granholtm* likewise extends to them, not just to wine producers.⁷ These ambiguities in the law, which have yet to be resolved following the wine wars, illustrate the uphill battle that the craft beer industry has to look forward to in addition to some unique nuances of beer regulation.

This Article not only discusses the still present debate regarding direct shipment of alcohol to consumers, but also why the trend in the popularity of craft beers, coupled with the ever-growing strength of e-commerce, has made it imperative to settle this dispute. In particular, this Article highlights the consumer impact of state alcohol regulations and the dangers posed by the efforts to diminish or even eliminate the effects of *Granholtm's* original holding.

Part One of this Article will discuss a brief history of alcohol regulation in the United States, beginning with the passage of the Twenty-first Amendment and the states' creation of the three-tier regulatory system following the Amendment's enactment. It then explores the system's contention with the Commerce Clause in determining the extent to which states can regulate alcohol across interstate boundaries in the context of the wine industry. Next, it explains the culmination of the wine wars in *Granholtm*. And lastly, this part highlights subsequent interpretations of the case to show how *Granholtm* has not been the peace treaty for which consumers, producers, retailers, and wholesalers had hoped.⁸

Part Two addresses the history and growth of the craft beer industry and culture.⁹ Particularly, it draws parallels to the growth of boutique wineries in the late 1990s and early 2000s in conjunction with the rise of e-commerce.

Part Three explains the regulations that currently exist in the shipment of craft beers and how it differs from present regu-

⁶ See Green, *supra* note 5, at 43.

⁷ Quigley, *supra* note 2, at 1904; See also Desireé C. Slaybaugh, *A Twisted Vine: The Aftermath Of Granholtm v. Heald*, 17 TEX. WESLEYAN L. REV. 265, 278-82 (2011) (arguing that the Supreme Court's use of "shippers" in its opinion showed its intent to apply the holding beyond the producer level of the three-tier system).

⁸ Green, *supra* note 5, at 60.

⁹ See BREWERS ASS'N, *History of Craft Brewing*, <http://www.brewersassociation.com/pages/about-us/history-of-craft-brewing> (last visited Feb. 11, 2014).

lations surrounding wine shipments. In addition, it introduces another barrier to state regulation and consumer protection through the phenomenon of a black market for beer through Internet purchases. Thus, this section identifies precisely why changes in state regulations matter in the context of consumer choice and consumer protection.

Finally, Part Four proposes a settlement between the longstanding dispute and the overall benefits this settlement would provide consumers.

I. BACKGROUND: BRIEF HISTORY OF ALCOHOL REGULATION SINCE PROHIBITION

A. *Twenty-first Amendment and the Three-tier System*

Prohibition officially ended with the repeal of the Eighteenth Amendment through the passage of the Twenty-first Amendment.¹⁰ As such, the future of regulation had to address the issues that Prohibition had attempted but failed to attack. For example, while Prohibition sought to conform to social and moral attitudes towards the evils of excessive alcohol consumption, it not only failed in its original goals but also sparked a complex and expansive crime network throughout the country.¹¹ Accordingly, the Twenty-first Amendment left control to the states to determine a regulatory system with the idea that the state could better tackle the concerns that prompted Prohibition in the first place as well as the unfortunate by-products of that era.¹² States were now charged with the task of reducing, if not eliminating the abuse of alcohol consumption, eradicating all forms of lawlessness associated with the sale of alcohol that dominated the Prohibition era, and regulating alcohol within the state in an appropriate, efficient, and effective manner.¹³

¹⁰ See U.S. CONST. amend. XXI; See also Carole L. Jurkiewicz & Murphy J. Painter, *Why We Control Alcohol the Way We Do*, in SOCIAL AND ECONOMIC CONTROL OF ALCOHOL: THE 21ST AMENDMENT IN THE 21ST CENTURY 1, 8 (Carole J. Jurkiewicz & Murphy J. Painter eds., 2008).

¹¹ *Id.*

¹² See U.S. CONST. amend. XXI; See also WINE AND SPIRITS DISTRIB. OF ILL., REGULATION OF BEVERAGE ALCOHOL IN ILLINOIS: UNDERSTANDING THE THREE-TIER SYSTEM (2011).

¹³ Evan T. Lawson, *The Future of the Three-Tiered System as a Control of Marketing Alcoholic Beverages*, in SOCIAL AND ECONOMIC CONTROL OF ALCOHOL: THE 21ST AMENDMENT IN THE 21ST CENTURY 31, 104 (Carole J.

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Thus emerged the three-tier system. Prior to Prohibition, vertical integration often occurred in which producers of alcohol were either the retailers themselves or yielded significant control over them.¹⁴ In fact, many of the moral evils that Prohibition sought to combat were attributed to this vertically integrated system because there was a perception that producer-retailers in a free market system encouraged large amounts of alcohol consumption and indulgence to increase profits at whatever social costs.¹⁵ After the passage of the Twenty-first Amendment, states implemented a three-tier system, adding a wholesaler level to insulate producers from retailers. Not only did the three-tier system address the concerns of excessive alcohol consumption, but it also attacked Prohibition's criminal networks that arose.¹⁶ By separating the production end from the retail end, the system aimed to curtail bootleg sales of wine¹⁷ and reinforce a state controlled regulatory scheme to keep alcohol distribution out of the hands of organized crime.¹⁸ Currently, states like Illinois propose in its informational pamphlet, "Wine and Spirits Distrib. of Ill., Regulation of Beverage Alcohol in Illinois: Understanding the Three-Tier System" that the three-tier system accomplishes a variety of goals: "To ensure and maximize verifiable tax revenues that can be collected efficiently from the beverage alcohol industry. To facilitate state and local control of alcoholic beverages. To encourage moderate, legal consumption. [And] [t]o provide an orderly, effective market."¹⁹

In practice, the producer sells the alcohol to the wholesaler, which in turn distributes and sells it to the retailer. Finally, the retailer markets and sells the alcohol to the consumer. The sale and purchase of the alcohol is taxed at each level, increasing the price of the final product that the consumer eventually purchases.²⁰

Jurkiewicz & Murphy J. Painter eds., 2008).

¹⁴ Jurkiewicz, *supra* note 10, at 6.

¹⁵ *Id.* at 6-7.

¹⁶ Slaybaugh, *supra* note 7, at 265-66.

¹⁷ *Id.*

¹⁸ FED. TRADE COMM'N, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE 6 (2003) [hereinafter FTC REPORT], available at http://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-report-concerning-possible-anticompetitive-barriers-e-commerce-wine/winereport2.pdf.

¹⁹ WINE AND SPIRITS DISTRIB. OF ILL., *supra* note 12.

²⁰ Slaybaugh, *supra* note 7, at 266.



B. Intersection with the Commerce Clause: The Wine Wars

Under the traditional three-tier system, all wine produced must go through the several different layers and pass through several hands to finally reach the consumer. As the number of wineries began to expand exponentially in the 1990s and early 2000s, the number of wholesalers decreased to only one-sixth of that number in the 1960s.²¹ The three-tier system thus became more burdensome on new wineries entering the market. Because of the limited number of wholesalers, smaller wineries had a much harder time adhering to the regulatory system, since many wholesalers found it costly and uneconomical to carry some of the smaller wineries' labels.²² Furthermore, there was no guarantee that retailers would likewise make room for those labels on their shelves.²³

While the situation seemed to be a lost cause for emerging boutique wineries, the increasing trend of the Internet sale of commodities, or e-commerce, provided new possibilities for both producers and consumers.²⁴ Additionally, some states began allowing interstate direct shipment to consumers beginning in 1986²⁵ with certain limitations. For instance, most states that allowed direct shipment did so with the requirement of reciprocity, which allowed out-of-state direct shipment of wines into their state only if the exporting states reciprocated by allowing the former states' direct shipments as well.²⁶ For example, beginning in 1986, California had a reciprocity arrangement with several states.²⁷ In essence, California allowed direct shipment from these states while these states would afford the same privilege of direct shipments from California. However, most of these states put caps on the volume of wine shipments that a consumer could receive from anywhere.²⁸ Conversely, some states chose not to allow any form of interstate direct shipments – few even making it a felony to do so.²⁹

²¹ James A. Tanford, *E-Commerce In Wine*, 3 J.L. ECON. & POL'Y 275, 303 (2006).

²² FTC REPORT, *supra* note 18, at 6.

²³ *Id.*

²⁴ *Id.*

²⁵ Tanford, *supra* note 21, at 303-04.

²⁶ FTC REPORT, *supra* note 18, at 7-8.

²⁷ *Granholt*, 544 U.S. at 473.

²⁸ *Id.* at 8.

²⁹ *Id.*

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Many of the states' logic behind regulating wine markets was to protect the competitive advantage of the local wineries.³⁰ By allowing direct shipment of out-of-state wine to consumers, states also feared the potential difficulty of collecting taxes in addition to the potential loss of tax revenue through bypassing the three-tier system.³¹ Some states made an exception by allowing direct shipments only from wineries within their borders but prohibiting out-of-state direct shipment.³² This discrepancy brought a series of court cases challenging these regulations, which culminated in the Supreme Court case of *Granholm v. Heald*.

C. *Granholm: Analysis of the Court's Decision & Subsequent Interpretations*

1. *Granholm*

The Supreme Court determined the validity of two state laws regulating direct shipment of alcohol that treated local wineries differently from out-of-state wineries.³³ In Michigan, the direct-shipment law at issue specifically required wine producers to go through wholesalers with the exception of Michigan's in-state wineries.³⁴ In particular, only in-state producers could obtain a license to directly ship to consumers within the state.³⁵ Furthermore, while a small winery could obtain a license for \$25, an out-of-state producer had to apply and pay \$300 for a license to sell, and even then it could only sell to in-state wholesalers rather than consumers.³⁶ New York's licensing scheme also followed a three-tier regulatory system but did not explicitly forbid an out-of-state wine producer from direct shipment to in-state consumers. Instead, it required an out-of-state winery to become a licensed New York winery first.³⁷ In practice, an out-of-state winery would have to establish a separate branch or some sort of legal

³⁰ Quigley, *supra* note 2, at 1184-85.

³¹ *Id.* at 1185; FTC REPORT, *supra* note 18, at 8.

³² FTC REPORT, *supra* note 18, at 3 (stating that in 2003, "more than half the states prohibit or severely restrict out-of-state suppliers from shipping wine directly to consumers" but "many of these same states, however, allow intrastate direct shipping, such as from in-state wineries and retailers").

³³ *Granholm*, 544 U.S. at 468-72 (discussing the background and procedural history of the suit in Michigan and the suit in New York).

³⁴ *Id.* at 469.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 470.

entity within the state of New York.³⁸ The Court recognized from the outset that New York's law was an "indirect way of subjecting out-of-state wineries, but not local ones, to the three-tier system."³⁹

Ultimately, the Court had to decide whether "a State's regulatory scheme that permits in-state wineries directly to ship alcohol to consumers, but restricts the ability of out-of-state wineries to do so, violates the dormant Commerce Clause in light of § 2 of the Twenty-first Amendment?"⁴⁰ The Commerce Clause had historical roots in the Framers' desire to ensure that the division and disconnected relationships that troubled the Colonies and States under the Articles of Confederation would not continue in the creation of the Union.⁴¹ Thus, the Commerce Clause served a purpose of preventing states from discriminating against one another in order to favor their own citizens or benefit their own economic interests at the expense of that of another state.⁴² Ordinarily, any state law that violated this principle was *per se* invalid.⁴³ However, the Supreme Court had to confront the existence of the Twenty-first Amendment to inform its understanding of the application of the Commerce Clause in the context of alcohol regulation.

§ 2 of the Twenty-first Amendment explicitly states: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in the violation of laws thereof, is hereby prohibited."⁴⁴ States argued that because the Amendment gave them power to regulate alcohol, delivery into the state in violation of the states' regulatory laws would be an explicit violation of the Amendment, ultimately calling into question whether the three-tier regulatory system was constitutional.⁴⁵ In addition, the Court had previously recognized in *North Dakota v. United States* that the three-tier system was "unquestionably legitimate."⁴⁶ However, the Supreme

³⁸ *Id.*; Quigley, *supra* note 2, at 1885.

³⁹ *Granholm*, 544 U.S. at 474.

⁴⁰ *Id.* at 471.

⁴¹ *Id.* at 472; *Hughes v. Oklahoma*, 441 U.S. 322, 325-326 (1979).

⁴² *Granholm*, 544 U.S. at 473; *C & A Carbone, Inc. v. Clarkstown*, 511 U.S. 383, 390 (1994).

⁴³ *Granholm*, 544 U.S. at 473; *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

⁴⁴ U.S. CONST. amend. XXI.

⁴⁵ *Granholm*, 544 U.S. at 489.

⁴⁶ *Id.*; *North Dakota v. United States*, 495 U.S. 423, 432 (1986).

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Court in *Granholm* held that while the three-tier system was legitimate, it still could not violate the Commerce Clause; instead, it would only be respected and protected by § 2 when it treated alcohol the same across the board, whether it was produced out-of-state or domestically.⁴⁷

Thus, the Court then turned its analysis to whether the laws did in fact violate the Commerce Clause by determining whether the state, through its regulations, “advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.”⁴⁸ Otherwise, the discriminatory law is invalid due to its motivation of “simple economic protectionism.”⁴⁹ Among the legitimate reasons that the state proffered that its laws directly addressed were concerns regarding (1) sale to minors and (2) tax collection from out-of-state shippers.⁵⁰

The Court found unpersuasive the states’ argument that the laws at issue aimed to prevent the sale of alcohol to minors. The states contended that direct shipment would provide an easier method for minors to access alcohol by just needing a credit card and the Internet.⁵¹ Primarily, the Court took issue with the idea that a law that prevented an out-of-state producer from directly shipping to consumers would better prevent minors from accessing alcohol when the law still allowed in-state direct shipment.⁵² Furthermore, the Court noted that even in states that allowed direct shipment, there were no reports that minors were able to access alcohol more easily.⁵³ Minors, in general, were not likely to consume wine or wait several days for it to arrive.⁵⁴ Finally, there were many less restrictive means to minimize the problem including requiring an adult signature upon delivery.⁵⁵

The states’ second contention that the law addressed the

⁴⁷ *Granholm*, 544 U.S. at 489.

⁴⁸ *Id.*; *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988).

⁴⁹ *United Haulers Ass’n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 331 (2007); Slaybaugh, *supra* note 7, at 270.

⁵⁰ *Granholm*, 544 U.S. at 489; Slaybaugh, *supra* note 7, at 270.

⁵¹ *Granholm*, 544 U.S. at 489.

⁵² *Id.* at 490.

⁵³ *Id.*

⁵⁴ *Id.*; FTC REPORT, *supra* note 18, at 12.

⁵⁵ *Granholm*, 544 U.S. at 490-91. *See also* FTC REPORT, *supra* note 18, at 38-40 (recommending safeguards against direct shipment of alcohol to minors, including requiring adult signature and presentation of valid identification upon delivery, providing adequate training to delivery companies, and increasing penalties for any shippers that violate regulations set forth to further this interest such as revocation of a license).

states' legitimate interest in tax collection was likewise insufficient. This argument fell flat on its face in the Michigan case, primarily because tax collection occurs directly when out-of-state alcohol enters the state rather than relying on wholesalers to collect the tax.⁵⁶ Thus, the court suggested that safeguards through licensing and self-reporting should be adequate for tax collection on direct shipments from out-of-state.⁵⁷ While New York's tax collection practices may have more justification, the Court found that there were less restrictive means to achieve their regulatory objective.⁵⁸ For example, New York could implement a requirement of a permit for direct shipment and recuperate any potential lost tax revenue.⁵⁹ Furthermore, studies have shown that most of the states that have allowed direct shipment from out-of-state suppliers have had little to no problems with the collection of excise taxes.⁶⁰ Ultimately, the Court respected the states' interests in regulating distribution of alcohol in the interest of "facilitating orderly market conditions, protecting public health and safety, and ensuring regulatory accountability" but by less restrictive means that were not discriminatory to out-of-state businesses.⁶¹

2. Subsequent Confusion

a. *Granholm*'s reach – inclusive or exclusive?

Granholm was a victory in some sense for boutique wineries that wished to directly ship to some states that had allowed in-state direct shipment and forbidden out-of-state direct shipment. However, there was still confusion as to whether the nondiscriminatory ideals that *Granholm* set forth were limited to wineries or whether all levels of the three-tier system, specifically retailers, deserved the same protection.⁶²

A view of an expanded scope of *Granholm* would allow retailers the same protection that producers received from the Supreme Court's ruling. The Eastern District Court of Michigan followed the same reasoning and analysis that the Supreme Court applied in *Granholm* and found discriminatory the statute that

⁵⁶ *Granholm*, 544 U.S. at 491.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ FTC REPORT, *supra* note 18, at 38.

⁶¹ *Granholm*, 544 U.S. at 491.

⁶² Quigley, *supra* note 2, at 1890.

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prohibited out-of-state retailers from direct shipment while allowing in-state direct shipment. Furthermore, it also found that the state's proffered justifications were not sufficient.⁶³

However, the proponents of a narrow reading of *Granholm*, primarily wholesalers and state regulatory bodies,⁶⁴ argued that the Supreme Court's emphasis on the "unquestionabl[e] legitima[cy]"⁶⁵ of the three-tier system intended to limit the scope of the holding to producers.⁶⁶ Thus, while direct shipment by producers was an exception to that system, the same exception could not be afforded to retailers.⁶⁷ The Second and Fifth Circuits adopted this narrow reading of *Granholm* that statutes allowing in-state retailers to directly ship to consumers while preventing out-of-state retailers from doing so were constitutional.⁶⁸

b. Regulatory loopholes

Subsequent to the decision in *Granholm*, some states were directly affected by its ruling and had to make immediate changes in their laws while some states that had banned all direct shipment (both in and out-of-state) were unaffected.⁶⁹ The states that were affected had three options in modifying their laws: leveling up, leveling down, or leveling sideways.⁷⁰ With such a process, the next issue of confusion centered on laws that were nondiscriminatory on their face but were potentially discriminatory in effect.

In order to level up, states that had previously allowed in-state direct shipment and prohibited out-of-state direct shipment now allowed any wine producer to obtain a state direct shipping permit.⁷¹ In such cases, state concerns regarding sale of alcohol to minors, as expressed in *Granholm*,⁷² were addressed through less restrictive means, primarily through requirements of the permit.⁷³

⁶³ See *Siesta Vill. Mkt. v. Granholm*, 596 F. Supp. 2d 1035, 1037 (E.D. Mich. 2008); Slaybaugh, *supra* note 7, at 275.

⁶⁴ Slaybaugh, *supra* note 7, at 281.

⁶⁵ *Granholm*, 544 U.S. at 489.

⁶⁶ Quigley, *supra* note 2, at 1892-93; Slaybaugh, *supra* note 7, at 273.

⁶⁷ Quigley, *supra* note 2, at 1893.

⁶⁸ See *Arnold's Wine, Inc. v. Boyle*, 571 F.3d 185, 192 (2nd Cir. 2009); *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 821 (5th Cir. 2010).

⁶⁹ Green, *supra* note 5, at 39-42.

⁷⁰ Tanford, *supra* note 21, at 322.

⁷¹ *Id.*; Green, *supra* note 5, at 39.

⁷² *Granholm*, 544 U.S. at 489.

⁷³ Tanford, *supra* note 21, at 323.

For example, New Hampshire and California statutes stated that any direct shipments of wine required the presentation of identification to the shipper in order to verify the age of the adult signatory receiving the package and filing periodic reports with the regulatory agency of the state.⁷⁴

Other states that had not explicitly prohibited out-of-state direct shipment leveled up in the way that they regulated out-of-state direct shipment because the implementations of some of the laws that were not discriminatory on their face were so in practice.⁷⁵ These included permit costs, case limits and production limits.⁷⁶ In essence, if a state that had regulations that made the process for an out-of-state winery to obtain a permit so burdensome or expensive to the point where it realistically excluded them from the market, *Granholtm* held that this was a violation of the dormant Commerce Clause.⁷⁷

In order to level down, states prohibited *all* direct-shipments so that none of their state consumers could order any alcohol on the Internet.⁷⁸ Thus, wine drinkers were left to only purchase wines face to face at a retail store. In order to obtain out-of-state wine, they were essentially required to travel to the actual state that the wine was sold. Furthermore, because this was not a likely situation in which a consumer would travel thousands of miles just to obtain a bottle or even a case of wine,⁷⁹ this still discriminated against out-of-state wineries.⁸⁰

The third phenomenon was a sort of leveling sideways. Some states began allowing direct shipment but required that the purchase order was face-to-face, typically at the physical winery's premises.⁸¹ Again, this allowed access to out-of-state wines only to those who had the means to travel to the actual wineries. As a result, local markets were still essentially closed off except for those

⁷⁴ N.H. Rev. Stat. Ann. § 178:14-a (2006); Cal. Bus. & Prof. Code § 23661.3 (2006).

⁷⁵ Tanford, *supra* note 21, at 323.

⁷⁶ *Id.*

⁷⁷ *Granholtm*, 544 U.S. at 474-75 (finding New York's requirement that an out-of-state winery have a branch office in the state as effectively barring that winery from the market); Tanford, *supra* note 21, at 323.

⁷⁸ Tanford, *supra* note 21, at 324.

⁷⁹ Although theoretically, a consumer can save some costs by ordering in large quantities to bring back, some states have limits upon how much an individual is allowed to bring back across the state's boundaries. *E.g.* Ind. Code § 7.1-5-11-15 (2006).

⁸⁰ Tanford, *supra* note 21, at 324.

⁸¹ *Id.* at 325.

few that traveled.

These changes in laws after *Granholm* created confusion as to whether the Supreme Court truly resolved the tension between the Twenty-first Amendment and the Commerce Clause. Not surprisingly, cases were filed to test whether revised direct shipment legislation adhered to *Granholm* and the Commerce Clause.⁸² Specifically at issue were the case limits, production caps, and on-site purchase requirements, which circuits have analyzed differently, coming to opposing conclusions.⁸³ The Seventh Circuit in *Baude II* (2008)⁸⁴ applied the *Pike* balancing test used in Dormant Commerce Clause cases⁸⁵ to determine the constitutionality of the on-site purchase requirement.⁸⁶ The Seventh Circuit found that the requirement was only an incidental burden to small out-of-state wineries and that the interest of the state was greater in ensuring age verification for alcohol purchases.⁸⁷ Thus, the provision requiring face-to-face onsite purchase as a prerequisite to direct shipment was constitutional.

The Sixth Circuit, however, determined that on-site purchase provisions did in fact burden out-of-state wineries in *Cherry Hill Vineyards II* (2008).⁸⁸ The court pointed to the fact that customers had to travel far distances just to purchase the wine of another state.⁸⁹ Furthermore, while in-state wineries would benefit from direct shipment, wholesalers also benefitted because out-of-state wineries were likely to only sell wine through the three-tier system.⁹⁰ The court further found unpersuasive the state's interest in combating underage purchases when there were less restrictive means to do so such as delivery requirements of age verification.⁹¹

⁸² See Green, *supra* note 5, at 42-54 (discussing the following cases in greater detail).

⁸³ *Id.* at 42.

⁸⁴ See Baude v. Heath (*Baude II*), 538 F.3d 608, 612 (7th Cir. 2008).

⁸⁵ See *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (establishing the test that “[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits”).

⁸⁶ Green, *supra* note 5, at 45.

⁸⁷ *Id.* at 46.

⁸⁸ *Id.*; *Cherry Hill Vineyards, LLC v. Lilly (Cherry Hill Vineyards II)*, 553 F.3d 423, 433 (6th Cir. 2008); Quigley, *supra* note 2, at 46.

⁸⁹ Green, *supra* note 5, at 46-47.

⁹⁰ *Id.*

⁹¹ *Id.*

The First Circuit addressed the provisions dealing with production caps in *Family Winemakers II* (2010).⁹² Some states like Massachusetts had production caps that allowed direct shipment only from *small* wineries.⁹³ For instance, in Massachusetts, where the majority of wineries were relatively small, the legislature passed a statute that was facially neutral to both out-of-state and in-state wineries.⁹⁴ The First Circuit determined that it was discriminatory in effect when looking at the facts specific to the wine industry of Massachusetts.⁹⁵ The law included all of the Massachusetts wineries while excluding 607 out-of-state wineries that did not meet the threshold (which was 98% of the nationwide production).⁹⁶

Lastly, the Ninth Circuit in *Black Star Farms II* (2010)⁹⁷ found that production caps as laid out by an Arizona statute were not unconstitutional.⁹⁸ The court focused on the fact that small wineries across the board benefited from a less restrictive method of distribution while large wineries were incidentally affected.⁹⁹ Furthermore, the court found that the plaintiffs had not substantially proven the posited discriminatory effects.¹⁰⁰

With all of these inconsistencies throughout the different circuits regarding whether retailers are extended the same protections that producers received, and whether facially nondiscriminatory laws are sufficient to surpass constitutional muster, it is not hard to see that wine drinkers today are still not afforded all of the benefits that direct shipment can provide. Furthermore, it is a telling tale of the uphill battle that craft breweries, that have not necessarily been explicitly afforded *Granholm* protections as wine makers, have in the realm of state regulation in alcohol.

II. CRAFT BEER TAKES CENTER STAGE

While craft beers are abundant today, light lager beers

⁹² See *Family Winemakers of Cal. v. Jenkins (Family Winemakers II)*, 592 F.3d 1, 12 (1st Cir. 2010); Green, *supra* note 5, at 49-51.

⁹³ Green, *supra* note 5, at 49-51.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See *Black Star Farms LLC v. Oliver (Black Star Farms II)*, 600 F.3d 1225, 1227 (9th Cir. 2010).

⁹⁸ Green, *supra* note 5, at 54.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

dominated the beer scene until the late 1970s.¹⁰¹ Many of these breweries consolidated to roughly 44 brewing companies.¹⁰² However, as early as 1976, American craft brewing began emerging, creating unique flavors and character.¹⁰³ The first recognized microbrewery, specifically by the Brewer's Association, was the New Albion brewery in Sonoma, California.¹⁰⁴ Three specific characteristics that distinguished a brewery like New Albion from the large breweries already in the industry were its size (produced six million barrels of beer or less annually), its independence (more than 75% of the brewery was owned by the craft brewer himself), and its commitment to tradition (used techniques to enhance rather than lighten flavors).¹⁰⁵ Although microbreweries did not establish a forceful entry into the market during the 1980s, they did lay a solid foundation and blueprint for other craft breweries to gain traction in the 1990s.¹⁰⁶ In fact, during the first half of the 1990s, craft brewing increased in "annual volume growth increasing from 35% in 1991 increasing each year to a high of 58% in 1995."¹⁰⁷ The craft brewing industry momentarily decelerated between 1997 and 2003 but saw growth again through today.¹⁰⁸

Most recently, the industry saw a growth of 15% by volume and 17% by dollars in 2012 as compared to the previous year; nearly 409 breweries (310 microbreweries and 99 brewpubs) opened in 2012 alone.¹⁰⁹ Several trends in popular culture may contribute to the increasing popularity of craft beers among beer aficionados. While home brewing of craft beers began as early as the 1980s, the "do-it-yourself" mentality that has been heavily prevalent in today's society has encouraged it as a hobby, increas-

¹⁰¹ See BREWERS ASS'N, *American Craft Brewer Modern History*, <http://www.brewersassociation.com/pages/about-us/history-of-craft-brewing> (last visited Feb. 11, 2014) [hereinafter *Craft Brewer Mod. Hist.*].

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*; See also MAREEN OGLE, *AMBITIOUS BREW: THE STORY OF AMERICAN BEER* 291-99 (2006).

¹⁰⁵ BREWERS ASS'N, *Craft Brewer Defined*, <http://www.brewersassociation.com/pages/business-tools/craft-brewing-statistics/craft-brewer-defined> (last visited Feb. 12, 2014).

¹⁰⁶ *Craft Brewer Mod. Hist.*, *supra* note 101.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ See BREWERS ASS'N, *Craft Brewing Facts*, <https://www.brewersassociation.org/pages/business-tools/craft-brewing-statistics/facts> (last visited Feb. 14, 2014) [hereinafter *Craft Brewing Facts*].

ing the presence of craft beers in popular culture.¹¹⁰ Furthermore, current campaigns to “buy local” whether to support local businesses or for reasons of sustainability have also encouraged the attractiveness of craft beer.¹¹¹ There is some speculation that the phenomenon of hipsters among the millennial generation could also be another factor in the growing industry of craft brews.¹¹²

III. CONSUMERS’ NEED FOR PROTECTION

The landscape of the beer industry has changed significantly over the past half-century. After a process of consolidation, 44 large brewing companies dominated the industry by the late 1970s.¹¹³ As a result, many states passed franchise laws as a check on supplier’s power over wholesalers within the three-tier system.¹¹⁴ Franchise laws dictate the agreements in which a wholesaler obtains a right to offer and sell the brewer’s product and often require permission from the state to terminate the relationship.¹¹⁵ While franchise laws were important when macro-breweries dominated the beer scene and wholesale distributors were mostly family owned businesses, the consolidation of players on the distribution level has reduced the need for protection.¹¹⁶ For example, only five main wholesalers control nearly half of all business done on this level.¹¹⁷ Thus, the power dynamic has turned the tide in favor of wholesalers who support and benefit from the three-tier regulatory system¹¹⁸ and franchise laws.¹¹⁹

¹¹⁰ Kathryn Tuggle, *Boomers, Hipsters Brew Up New Hobby*, FOXBusiness (April 6, 2012), <http://www.foxbusiness.com/personal-finance/2012/04/06/boomers-hipsters-brew-up-new-hobby/>.

¹¹¹ *Id.*

¹¹² Jeff Glazer, *Hipsters and Craft Beer*, MADISON BEER REVIEW, April (Apr. 19, 2012), <http://www.madisonbeerreview.com/2012/04/hipsters-and-craft-beer.html>.

¹¹³ *Craft Brewer Mod. Hist.*, *supra* note 101.

¹¹⁴ SUSAN C. CAGANN, *Contents Under Pressure: Regulating the Sales and Marketing of Alcoholic Beverages*, in SOCIAL AND ECONOMIC CONTROL OF ALCOHOL, 69 (Carole J. Jurkiewicz & Murphy J. Painter eds., 2008).

¹¹⁵ *Id.*

¹¹⁶ Andrew Tamayo, Comment, *What’s Brewing In The Old North State: An Analysis Of The Beer Distribution Laws Regulating North Carolina’s Craft Breweries*, 88 N.C. L. REV. 2198, 2217-18 (2010).

¹¹⁷ Alia Akkam & Kristen Wolfe Bieler, *Decade in Review 2000-2009: A Transformation of the Industry Recapping Ten Extraordinary Years*, BEVERAGE MEDIA GROUP (Jan. 2010), http://www.bevnetwork.com/pdf/jan10_decade.pdf.

¹¹⁸ Susan L. Martin, *Wine Wars – Consumers and Mom-And-Pop Winer-*

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Taking into account the fact that laws governing alcohol vary from state to state in general, the laws regarding the sale and direct shipment of beer is distinct from that of wine. Unless otherwise specified by state law, the principle held in *Granholm* only extends to the wine industry while beer shipments are still illegal.¹²⁰ Furthermore, as more and more breweries are getting licenses to self-distribute, the issues raised in *Granholm* regarding in-state and out-of-state direct shipment are likely to arise again.

Similar concerns among consumers exist as a result of state restrictions on direct shipment of beer that had existed in the wine industry prior to *Granholm*. Here, craft breweries are experiencing the same difficulties in having some wholesale distributors pick up their label, especially when the distributor is a “main brand” distributor and is likely to be selective in choosing which brands to carry.¹²¹ Thus, when a state completely bans direct shipment, both in and out-of-state, craft breweries that cannot be picked up by wholesalers are unable to continue their business. Even when craft brews are picked up by wholesale distributors and are forced to proceed through the three-tier system, three specific issues concerning consumer rights are still implicated. First, studies show that consumers denied the option for direct shipment through online purchases will generally pay higher prices on alcohol due to the multiple layers of tax as well as wholesaler or retailer mark up.¹²² Second, when states prohibit direct shipment through e-commerce, consumer choice greatly diminishes. Not all retailers will be able to carry a large variety of craft brews, especially if brewed out-of-state. In studying wines, the Federal Trade Commission (“FTC”) found that the Internet offers consumers more variety of boutique wines that were not available in retail stores like brick-and-mortar stores.¹²³ In prac-

ies vs. Big Business Wholesalers: A Citizens United Example, 21 KAN. J.L. & PUB. POL’Y 1, 5 (2011) (discussing how the three-tier regulatory system allows wholesalers to maintain their position in the alcoholic beverage industry by exercising their market power and political power).

¹¹⁹ Tamayo, *supra* note 116, at 2218.

¹²⁰ Lisa Rathke, *Vermont bill would allow direct shipment of craft brews*, BURLINGTONFREEPRESS.COM (April 24, 2013), <http://www.burlingtonfreepress.com/viewart/20130424/NEWS07/304240005/Vermont-bill-would-allow-direct-shipment-craft-brews>.

¹²¹ Tom McCormick, *Distribution 101: A short course in distribution basics*, PROBREWER.COM, <http://www.probrewer.com/resources/library/distribution101.php>

¹²² FTC REPORT, *supra* note 18, at 18-19.

¹²³ *Id.* at 18.

tice, allowing out-of-state direct shipment to consumers opens the geographic market to the consumer.¹²⁴ Lastly, consumers have an interest in the convenience of obtaining products that they have a legal right to purchase.¹²⁵

The traditional issues that affected wine drinkers are not the only concern that craft beer consumers have to confront. The rapidly expanding popularity of craft beers has created another phenomenon as a result of the illegality of direct shipment. In particular, the heavy use and norm of e-commerce has bred an underground black market for craft brews.¹²⁶ As a result of some state laws that outright forbid direct shipment of craft beers, consumers have no other alternative but to turn to illegal Internet commerce as a result of the restriction as well as the impracticality of traveling to other states just to purchase the beverage.¹²⁷ Additionally, when the distributors elect to not carry a small label from out-of-state, consumers are likewise out of luck in obtaining the brew legally.

The black market circumvents the states' legitimate right to regulate alcohol within its borders.¹²⁸ Furthermore, it implicates significant consumer rights issues. In general, because no enforceable legal relationship exists between seller and buyer in an illegal exchange, consumers become vulnerable.¹²⁹ First and most alarmingly, the price for which many of these brews are sold drastically exceed the market price had direct shipment from out-of-state brewers been legal.¹³⁰ For example, some craft beers are routinely resold on eBay for hundreds of dollars.¹³¹ Russian River Brewing in Santa Rosa, California, produces its flagship Pliny the Elder for five dollars a bottle; on the black market, it can go for between \$15 to \$50 per bottle.¹³² Specifically, in late 2013, a

¹²⁴ *Id.* at 17.

¹²⁵ *Id.* at 40.

¹²⁶ THE ASSOCIATED PRESS, *Beer black market exploits enthusiasts, ignores law*, TRIB TOTAL MEDIA (Dec. 6, 2013, 6:18 PM), <http://triblive.com/usworld/nation/5209598-74/beer-brewery-beers#axzz2uLylCMAy>.

¹²⁷ *Id.*

¹²⁸ Daniel Fromson, *Beer's Black Market*, THE WASH. POST (Sept. 6, 2011), http://www.washingtonpost.com/lifestyle/food/beers-black-market/2011/09/01/gIQAsL0D7J_story.html.

¹²⁹ KATALIN J. CSERES, COMPETITION LAW AND CONSUMER PROTECTION 169 (2005).

¹³⁰ *Id.*

¹³¹ THE ASSOCIATED PRESS, *supra* note 126.

¹³² *Id.*

woman in Vermont was charged with selling on Craigslist five cases of Heady Topper beer at a whopping price of \$825.¹³³

Although in general, breweries have attempted to discourage such practices by threatening to withhold sales to individuals that violate these laws,¹³⁴ actual enforcement is not likely to occur and people running makeshift liquor stores on eBay are likely to continue without any accountability.¹³⁵ Brewers that take pride in their craft brews often do not wish the consumer to suffer from the inflated costs of their product as a result of a black market exchange.¹³⁶ Furthermore, there are serious concerns regarding the integrity of the product when a third party, who has no expertise in quality control and the nuances of specific brews, resells it on the black market.¹³⁷ For instance, some beers like hoppy India pale ales are sensitive to light and heat exposure, which may cause them to go rancid.¹³⁸ Thus, it is in the best interest of all parties that regulations better attack the root causes of this growing black market.

CONCLUSION

As the Supreme Court stated in *Granholm*, the three-tier system is “unquestionably legitimate.”¹³⁹ This Article does not suggest that there needs to be an overhaul of the three-tier system, especially when there hasn’t been widespread support of an absolutely deregulated system.¹⁴⁰ However, the traditional system, coupled with modified regulations after *Granholm* still present problems for alcohol consumers. This Article argues that the three-tier regulatory system should be modified in a way that adopts the interests of the consumers, not necessarily as its only goal, but definitely at the forefront. As discussed *supra* in Part III, opening up direct shipment as an option for craft breweries, allowing them to self-distribute will ultimately give consumers more choice, better prices, and convenience.

This does *not* mean, however, that the three-tier regulatory system is useless or counterproductive. In fact, while some

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*; Fromson, *supra* note 128.

¹³⁸ *Id.*

¹³⁹ *Granholm*, 544 U.S. at 489.

¹⁴⁰ Tamayo, *supra* note 116, at 2226.

craft breweries would benefit from direct shipment, other breweries greatly benefit from their partnerships with wholesale distributors, especially when the distributor is experienced in the industry and has the resources to distribute at levels that some small craft breweries are incapable of doing.¹⁴¹ Instead, especially in states that forbid self-distribution and direct shipment, states need to recognize whether statutes that put significant limitations on a craft brewery's ability to sell directly to the consumer actually furthers their state goals.

Specifically in the context of direct shipment, the Supreme Court has already found that there are safeguards against directly shipping to minors. Producers can require that delivery services obtain an adult signature with presentation of valid identification. The FTC has recommended training for all delivery services to identify labels that require such procedures. In addition, states can impose and enforce strict penalties when a producer violates any of these requirements. Furthermore, states that have allowed out-of-state direct shipment have reported little to no problems with tax collection. Lastly, a state's interest should be in line with the interests of the consumer. Allowing self-distribution as well as direct shipment for small breweries would directly tackle this phenomenon of the craft beer black market. Such existence jeopardizes the consumer's right to reasonable prices as well as the assurance of quality. As such, state regulations should likewise reflect a desire and need to protect the consumer.

¹⁴¹ Chris Crowell, *Craft beer distribution: Study the market, distributors and your own operations*, CRAFT BREWING BUSINESS (Sept. 10, 2013).