

DIRECT INTERSTATE WINE SHIPMENTS: COMMERCE CLAUSE AND REGULATORY CHAOS FOR SMALL WINERIES

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I. INTRODUCTION

Imagine that you're out with friends or that special someone on a Saturday enjoying a glass of wine at the new local winery. You see an interesting flavor and decide to give it a try. It tastes wonderful and you know it'll make the perfect holiday gift for friends. You're dreams of an easy Christmas shopping season have come true until you go talk to the owner about shipping. He pulls out a chart and starts to talk about which state and or town they're in, as well as the volume to be shipped and if your friends have visited the winery before. If you're puzzled and confused, you're not alone. As an attorney I wondered, how can such a varied regulatory structure exist under the commerce clause? You can ship to one state, but not another. You can even ship only to certain zip codes or towns within a state. Then, you have to worry about taxes, licenses and volume limitations on a state by state basis. One writer summed up the situation perfectly saying that "when it comes to buying wine, or any other alcoholic beverage, Americans may as well live in 50 different countries -- some relatively free and open, some so closed they resemble old-style dictatorships."¹ Though the focus of this paper is on the commerce clause and regulatory chaos that wineries, especially small ones, are forced to navigate, interstate shipping issues can arise with other products, such as tobacco, firearms, food and wildlife. The direct interstate shipment of wine is different from these in the fact that the major regulatory hurdles are state based, whereas the others are largely federally driven.²

Taking a deep look into the regulatory difficulties the wine industry faces has become increasingly relevant due to the rapid growth of small

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¹ Dana Nigro, *Shipping Laws State-By-State*, WINE SPECTATOR (Aug. 12, 2005), http://www.winespectator.com/webfeature/show/id/Shipping-Laws-State-by-State_1049.

² For tobacco *see* the PACT ACT, 15 U.S.C § 10(A) (2010). For firearms *see* the GUN CONTROL ACT, 18 U.S.C. §922 (2010). For an example of restrictions on food *see* the MEAT INSPECTION ACT, 21 U.S.C. §601-610 (2010). For a recent ban on the interstate shipment of certain snakes, *see* 50 C.F.R. § 16.15 (effective Mar. 23, 2012).

wineries and increasing wine consumption in the United States.³ Nationally, the total number of wineries in the United States has more than doubled in the last 10 years, from 3,469 in 2002 to 7,881 as of early January, 2012.⁴ Even in California, a state already renowned for its wineries, the growth rate is nearly the same, growing from 1,704 wineries in 2002 to 3,364 in 2010. Perhaps the most explosive growth in the number of wineries is in my home state of Texas. In researching potential date night activities last fall, my wife and I were amazed to discover that there were now three wineries right in our “backyard” in the small village of Salado, Texas.⁵ According to Texas Alcoholic Beverage Commission (TABC) statistics, there were forty-six wineries operating in the state in 2001.⁶ As of March 2012, there are 247 wineries; approximately a 500% growth rate over eleven years.⁷

As the numbers of wineries have grown nationally, the quantities produced have grown as well. In 2002, the United States produced roughly 551.7 million gallons of wine. By 2010, that number had grown to 677.5

³ In 2010, the United States surpassed France as the largest wine consuming nation in the world, consuming nearly 330 million cases in 2010. With that said, on a per capita basis the United States is not even close at only 2.6 gallons per person. Thus, the wine industry, already a big business with an estimated 30 billion dollars in 2010 wine sales, has substantial room for growth compared to other nations. *Record High 2010 Wine Shipments Make U.S. the World's Largest Wine-Consuming Nation*, WINE INSTITUTE (Mar. 15, 2011), <http://www.wineinstitute.org/resources/pressroom/03152011>.

⁴ Wineries for our purposes are those that possess federal bonded winery permits issued by the U.S. Tax and Trade Bureau (TTB). The historical data comes from the Wine Institute based on TTB numbers. *Press Room and Statistics, Number of California Wineries*, WINE INSTITUTE, <http://www.wineinstitute.org/resources/statistics/article124> (last visited Mar. 18, 2012). The 2012 data comes from the TTB website. *List of Permittees, Frequently Requested Listings*, ALCOHOL AND TOBACCO TAX AND TRADE BUREAU, <http://www.ttb.gov/foia/frl.shtml> (last visited Jan. 24, 2012).

⁵ Salado, with a population of approximately 4,000, is located off of I-35 between Austin and Waco. The three wineries in Salado are the Salado Creek Winery (saladoswirlandsip.com), the Salado Winery (saladowinery.com) and a Rising Star Vineyards tasting room (risingstartvineyards.com). In addition to these, there are three more wineries with a twenty-five mile radius, including The Vineyard at Florence (www.thevineyardatflorence.com), the Georgetown Winery (www.georgetownwinery.com) and the Dancing Bee Winery (www.dancingbeewinery.com).

⁶ *Wine Facts*, GO TEXAN WINE, <http://www.gotexanwine.org/winefacts/> (last visited Mar. 18, 2012). In addition to the facts on Texas wine industry growth, there is an interesting historical timeline available for viewing as well. The timeline shows that the wine industry growth was in part supported by state resources and highlights the economic impact of the wine industry in Texas, which was 1.35 billion dollars in 2010. *Id.*

⁷ The 2012 number was calculated using the Texas Alcohol and Beverage Commission public inquiry system, available at <http://www.tabc.state.tx.us/PublicInquiry/RosterLicense.aspx>. The search parameters used were (1) all current active licenses and (2) those holding a “Class G- Winery Permit.”

million gallons equating to an increase of 23%.⁸ Taking California out of the equation, the rest of the United States has seen an increase of production from 60.4 million gallons of wine in 2002 to 71 million gallons in 2010. This increase of 17.5% over eight years is still substantial, but behind California's growth. It should be noted, however, that 2010 was not the record production year for the United States, as environmental conditions and other variables can impact the annual production.⁹ Taking into account these variables, general trends are most relevant versus single year snapshots. When you contrast nearly a 100% growth rate for wineries in the United States against a 23% growth in wine production, the conclusion can be drawn that many of the new wineries are "small wineries" most impacted by the current chaotic regulatory environment discussed below.¹⁰

II. FEDERAL IMPACTS – THE CONSTITUTION, THE COURTS AND CONGRESS

The starting point for the current regulatory framework in the direct shipment of wine is the commerce clause of the Constitution. Article I, Section 8 states, "Congress shall have power...to regulate Commerce with foreign Nations, and among the several states, and with Indian Tribes." The interpretation of what this clause meant for states and businesses began with the 1824 decision of *Gibbons v. Ogden*, where, in a dispute over the regulation of who had ultimate authority with regards to ship licensing, the Supreme Court stated that the commerce power extends to issues of navigation where the activities occur between the states.¹¹ Through the years, this power has been used widely to go so far as to regulate wheat on a

⁸ *US/California Wine Production*, WINE INSTITUTE, <http://www.wineinstitute.org/resources/statistics/article83>(last visited Mar. 18, 2012). Note the asterisk beneath the chart from numbers found on the TTB site. *Wine Statistics*, ALCOHOL AND TOBACCO TAX AND TRADE BUREAU, <http://www.ttb.gov/wine/wine-stats.shtml> (last visited Mar. 18, 2012). At the time of writing, full 2011 numbers were not available, as there appears to be a lag time of multiple months.

⁹The record production year for the U.S. occurred in 2009. *Id.*

¹⁰ For the purposes of this paper, I do not and need not create a formal definition for a as to small winery, as the term does not yet have a generally accepted definition. Generally, these are operations with a single or a few small locations, likely family owned, have relatively few employees and are not widely distributed by wholesalers if at all. Federal statutes and regulations do somewhat define "small wineries" for excise tax purposes as those producing 250,000 gallons or less. See *Family Winemakers of Cal. v. Jenkins*, 592 F.3d. 1, 21, n. 18 (1st Cir. 2010).

¹¹ 22 U.S. (9 Wheat.) 211 (1824).

single farmer's farm and to grant citizens equal access to seemingly intrastate businesses that have discriminated on the basis of race.¹²

The other piece of the Constitutional puzzle related to direct interstate wine shipments is the twenty-first amendment. The amendment is most known for ending prohibition, but it also seemingly turned over control of alcohol regulation to the states.¹³ Section 2 provides 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.*" The emphasis added in italics led to the belief that alcohol regulation was purely a state matter. The interpretation of Section 2 of the twenty-first amendment, in light of the Commerce Clause, has become the center of recent judicial decisions and congressional actions with regards to the direct shipment of wine.

A. *Granholm – The Game Changer*

The explosive growth in the wine industry was a major factor in bringing about the consolidated 2005 case, *Granholm v. Heald*.¹⁴ In the majority opinion, Justice Kennedy cited a Federal Trade Commission (FTC) report that direct wine shipments had doubled in five years, from 1994 to 1999, "reaching \$500 million per year, or three percent of all wine sales."¹⁵ Although three percent is a relatively small number, if sales continue to advance at that rate, we could presently be looking at direct wine sales accounting for more than 10% of all current sales. As new wineries came on line, or existing ones decided to branch out, they encountered regulatory difficulties in shipping to Michigan and New York. The problem was exacerbated by the fact that the small winery's other outlet of reaching

¹² *Wickard v. Filburn* 317 U.S. 111 (1942). In this instance, the court held that "the wheat marketing quota and attendant penalty provisions of the Agricultural Adjustment Act of 1938, as amended by the Act of May 26, 1941, when applied to wheat *not intended in any part for commerce* but wholly for consumption on the farm, are within the commerce power of Congress." *Id.* at 118. (Whenever this case is discussed in class, I have yet to have a student that has agreed with the court's rationale.) In *Heart of Atlanta Motel, Inc. v. U.S.*, the court held the Title II of the Civil Rights Act of 1964 would apply to the hotel, as 75% of the hotels guests were interstate travelers. 379 U.S. 241, 274 (1964).

¹³ "The eighteenth amendment of the Constitution of the United States is hereby repealed." U.S. CONST. amend. XXI, § 1.

¹⁴ *Granholm v. Heald*, 544 U.S. 460 (2005). This is an interesting decision in some ways because many justices broke with some of their traditional voting pacts. In the 5-4 decision, Scalia, Souter, Ginsburg and Breyer joined the majority opinion written by Kennedy, leaving Thomas, O'Connor, Rehnquist and Stevens together in the minority. Both Justice Stevens and Thomas wrote dissenting opinions. *Id.* at 493, 497.

¹⁵ *Id.* at 467.

customers, the wholesalers, had shrunk in number from 1,600 to just 600 from 1994 to 2002.¹⁶

Both New York and Michigan employed a popular three-tier distribution system, with separate licenses required for producers, wholesalers and retailers.¹⁷ Though this three-tier system itself had been court tested and approved, each state allowed for an exception to the normal distribution pattern for in-state wineries.¹⁸ In Michigan, wineries could apply for a “wine maker” license that would allow direct shipments intrastate for a fee of \$25. A winery located in another state would have to pay \$300 for a license that would only allow them to sell to wholesalers.¹⁹ Michigan residents brought suit alleging that the statute allowing only intrastate direct shipments violated the Commerce Clause. The District Court held for the state based on its argument that the statute was a valid exercise of its powers under the twenty-first amendment, but the Sixth Circuit reversed, finding that the scheme “was unconstitutional because the defendants failed to demonstrate that the state could not meet its proffered policy objectives through non-discriminatory means.”²⁰

In the case of New York, a winery could ship directly to consumers if the wine was produced from at least 75% of New York grown grapes. Further, an out-of-state winery could only ship to New York residents if it became a licensed New York winery, which carried with it the burden of basically having to maintain a physical presence within the state.²¹ Two Virginia wineries and three of their customers brought suit for the same reasons as in Michigan. In this instance, the District court ruled for the plaintiffs and the Second Circuit reversed based on the general premise that the statute was valid as it regulated alcohol and not some other commodity.²² With this circuit split, the Supreme Court granted certiorari to answer the question of whether these preferential statutes violate the dormant Commerce Clause in light of the section two of the twenty-first amendment.²³

¹⁶ *Id.*

¹⁷ See *Possible Anticompetitive Barriers to E-Commerce: Wine*, FTC (July 2003), <http://www.ftc.gov/os/2003/07/winereport2.pdf>. The traditional three-tier system emerged after the Twenty-first amendment to regulate and control alcohol sales. Strict regulations that vary state by state mandate what can and cannot be done at each level. *Id.* at 5-7.

¹⁸ See *North Dakota v. U.S.*, 495 U.S. 423, 432 (1990), calling the three-tier system “unquestionably legitimate.”

¹⁹ *Granholm*, 544 U.S. at 469 (discussing Mich. Comp. Laws Ann. §§ 436.1109(9) (West 2011), 436.1525(1) (e) (West supp. 2004); Mich. Admin. Code Rule 436.1719(5) (2000)).

²⁰ *Granholm*, 544 U.S. at 470.

²¹ *Id.*

²² *Id.* at 471.

²³ 541 U.S. 1062 (2004).

From the outset, Justice Kennedy made it clear that differential treatment was a difficult hurdle to overcome.²⁴ Furthermore, the existing measures by the states in this suit and the reciprocity arrangements of others amounted to “an ongoing, low level trade war” in violation of the Commerce Clause.²⁵ In short, “the discriminatory character of the Michigan system is obvious, as the difficulties in securing a wholesaler and the additional costs required to be absorbed at each layer can effectively bar small wineries from the Michigan market.”²⁶ The biggest problem with the New York scheme was that “out of state wineries must open a branch office and Warehouse, [creating] additional costs that drive up the cost of wine.” Due to this constraint, no wineries had established an in-state facility in order to directly ship to New York residents, which effectively foreclosed for small wineries the number two market for wine consumption in the United States.²⁷

Since both states discriminated, the question became whether the statutes could be saved under the twenty-first amendment. The Supreme Court, in short, said no.²⁸ The debate ultimately looked at two different arguments, the history before the Twenty-first amendment and the history after. Justice Kennedy relied heavily on the history before 1933 to shape the proper meshing of the Commerce Clause, the twenty-first amendment and our present situation.

Part of the historical argument involved the complex interpretation and applicability of two pre-prohibition acts, the Webb-Kenyon Act and the Wilson Act. The Wilson Act was passed in response to a series of decisions, most notably *Leisy v. Hardin*, which allowed the states to ban the production of liquor within its borders, but not necessarily imported liquor.²⁹ The Wilson Act allowed States to regulate imported liquor only “to the same extent and in the same manner” as domestic liquor, thus providing for non-discriminatory treatment.³⁰ The Webb-Kenyon Act opened the door for

²⁴ *Granholm*, 544 U.S. at 472. Kennedy quoted language from *Or. Waste Sys., Inc v. Dep’t of Envtl. Quality of Or.*, 511 U.S. 93, 99 (1994), that state laws violate the Commerce Clause where they apply “differential treatment of in-state and out-of-state economic interests the benefits the former and burdens the latter.”

²⁵ *Id.* at 473. For more discussion on reciprocity, see *State Shipping Law FAQ’s*, WINE INSTITUTE, <http://www.wineinstitute.org/initiatives/stateshippinglaws/faqs> (last visited Mar. 18, 2012).

²⁶ *Id.* at 474.

²⁷ *Id.* at 468, 475.

²⁸ “The States’ position is inconsistent with our precedents and with the Twenty-first Amendment’s history. Section 2 does not allow States to regulate the direct shipment of wine on terms that favor in-state producers.” *Id.* at 476.

²⁹ *Id.* at 478. See also *Leisy v. Hardin*, 135 U.S. 100 (1890).

³⁰ 27 U.S.C. § 121 (1890).

states to finally ban direct shipments for personal use.³¹ The premise of New York and Michigan's argument was that the Webb-Kenyon Act repealed Wilson and its non-discrimination mandate, an argument that Justice Kennedy did not buy.³² With regard to the twenty-first amendment itself, he further stated that it "did not give States the authority to pass non-uniform laws in order to discriminate against out-of-state goods, a privilege they had not enjoyed at any earlier time."³³

Since the statutes were not saved by the twenty-first amendment, the states' last hope was the argument that their system "advances a legitimate local purpose that cannot be adequately served by reasonable non-discriminatory alternatives."³⁴ Their stated purposes were to keep alcohol out of the hands of minors and to facilitate the collection of taxes. The Supreme Court was not persuaded. First, the States could not provide much evidence that sales to minors were an issue in the first place.³⁵ Second, minors could already access wine in the exact same way through an in-state winery presently. Also, there were less restrictive means, such as over twenty-one signature requirements.³⁶ With regard to the tax collection argument in Michigan, taxes were already being collected from out-of-state producers for products entering the state to wholesalers, thus giving little weight to their argument about tax collection difficulties for direct shipment to consumers.³⁷ For New York, Kennedy suggested going to a permit system like those used by many other states to track shippers and quantities.³⁸ Further, the case for compliance with a state's law was also already strong in light of the fact that a winery risks the loss of their federal license if they violate state laws.³⁹ Ultimately, the court invalidated the state schemes,

³¹ "The shipment or transportation...of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State... into any other State...which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is prohibited." 27 U.S.C § 122 (1935).

³² *Id.* at 482-83. Justice Kennedy believes that Webb extended Wilson and certainly did not repeal it, due to lack of any Congressional language on that point.

³³ *Id.* at 484-85.

³⁴ *Id.* at 489.

³⁵ *Id.* at 490. In fact, Kennedy cites the same FTC report cited in footnote 17, as providing evidence that the states' reasons are without basis in evidence.

³⁶ *Id.* at 491.

³⁷ *Id.*

³⁸ *Id.*

³⁹ The federal permit and its requirements will be discussed more in part III (A), but Justice Kennedy is referencing the Bureau of Alcohol, Tobacco and Firearms Industry Circular number 96-3 (amended in 2000), available at <http://tbt.gov/rulings/2000-1.htm>, which states that "the Federal Alcohol Administration Act provides that basic permits are conditioned

reversing and remanding the Second Circuit decision and affirming the Sixth Circuit decision.⁴⁰

In Justice Stevens's dissent, he stated that these laws would be "patently invalid" if they regulated something other than alcohol, but the twenty-first amendment puts alcohol in a unique place because of its express terms.⁴¹ Justice Thomas's main contention in his dissent was that the language of the Webb-Kenyon Act was explicit and reaffirmed by the twenty-first Amendment. To him, the phrase "in violation of any law of such state" includes a discriminatory one.⁴² Rather than extending Wilson, as Kennedy believed, Thomas believed Webb-Kenyon narrowed it and the language quoted in the previous sentence is the evidence thereof. Both justices also cited the early post-twenty-first amendment decision from *California v. Young's Market* in their dissents.⁴³ Basically, their argument was that this case presents a *stare decisis* issue decided in *Young's Market* that the majority was now ignoring.⁴⁴

B. Recent Major Court of Appeals Decisions On Direct Shipping

In the wake of the *Granholm* decision, some states were forced to rewrite their laws to come into compliance. Massachusetts made one such creative attempt in 2006.⁴⁵ This statute allowed "small" wineries, defined as those producing 30,000 gallons or less of grape wine a year, to obtain a "small winery shipping license," which would allow for direct sales, as well as wholesaler and retail distribution. Though the law was neutral on its face, it had a not-so-neutral impact. All of Massachusetts's wineries qualified under this provision, as would many out of state wineries.⁴⁶ Due to the fact that most of the wine produced in the United States comes from "large"

upon, among other things, compliance with the Twenty-first amendment and other Federal laws relating to its enforcement." 27 U.S.C §204(d). The bulletin further states that the Webb-Kenyon Act "is a law relating to the enforcement of the Twenty-first Amendment." Thus, a violation of Webb-Kenyon, meaning any shipment in violation of a state alcohol law puts ones federal permit at risk.

⁴⁰ *Granholm*, 544 U.S. at 493.

⁴¹ *Id.* at 494, 497.

⁴² *Id.* at 500.

⁴³ See *State Bd. of Equalization of Cal. v. Young's Mkt. Co.*, 299 U.S. 59, 64 (1936).

⁴⁴ *Id.* at 62, 63. "The plaintiffs ask us to limit [§2's] broad command. They request us to construe the Amendment as saying, in effect: The State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the amendment, but a rewriting of it."

⁴⁵ Mass Gen. Laws ch. 138 § 19F (2006).

⁴⁶ *Family Winemakers of Cal. v. Jenkins*, 592 F.3d. 1, 4 (1st Cir. 2010).

wineries, this statute would pose a hurdle for 98% of the country's wine. Wineries that did not meet the "small" classification were forced to choose between wholesale distribution or direct shipment, but not both.⁴⁷ Thus, a group of California Winemakers and Massachusetts residents brought suit claiming that Section 19F violated the Commerce Clause.⁴⁸ The District Court enjoined the enforcement of 19F and the State appealed.⁴⁹ The First Circuit then held that "§ 19F violates the Commerce Clause because the effect of its particular gallonage cap is to change the competitive balance between in-state and out-of-state wineries in a way that benefits Massachusetts's wineries and significantly burdens out-of-state competitors."⁵⁰ This decision effectively broadens the reach of *Granholm*, in allowing a quasi disparate impact case. In reaching their decision, the court cited a floor debate that indicated the gallonage requirement that made life easier on all Massachusetts wineries was not an accident.⁵¹ They also noted the fact that the nation's thirty largest wineries produce 92% of the U.S. market and that only fifty to one hundred of the largest wineries have consistently secured wholesale representation due to cost and volume factors. The option to choose one's distribution channel for small wineries allows them to best control profitability for a given order versus being forced to have only the single option that "large" wineries faced.⁵²

In a twist on the direct shipment issue in *Granholm*, Texas laws came under fire in 2010, except instead of producers, the challenge was from retailers. There were multiple issues involved, but the main issue on appeal to the Fifth Circuit dealt with a provision that allowed Texas retailers to deliver direct to their consumer, but did not allow the same treatment for out-of-state retailers.⁵³ Both parties actually appealed the District Court's

⁴⁷ *Id.* at 4.

⁴⁸ *Id.* at 1. It should be noted that this litigation appears to be highly planned. In looking at the Family Winemakers website, <http://www.familywinemakers.org/buyingWine/directShipping.cfm>, they discuss enlisting the aid of Judge Kenneth Starr, then in private practice, to help them prepare for this endeavor as early as 2002 and he was involved in the appellate brief. *Jenkins*, 592 F.3d at 3.

⁴⁹ Family Winemakers of Cal., 592 F.3d. at 4.

⁵⁰ *Id.* at 5.

⁵¹ *Id.* at 7.

⁵² *Id.* at 11, 12.

⁵³ *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 812 (5th Cir. 2010). The initial case also included a challenge to the Texas limits on personal import quantities from out of state. The district court held it unconstitutional in part stating that "Texas cannot prohibit consumers from purchasing wine from out-of-state retailers who comply with the Code and TABC regulations." *Siesta Vill. Mkt. v. Perry*, 530 F.Supp.2d 848, 868 (N.D. Tex. 2008). Basically, if the out-of-state retailer had a Texas permit, there would be no limit. *Id.* Another provision challenged was a requirement that holders of TABC retailer permits have been Texas citizens for one year. Due to a previous decision on wholesalers in *S. Wine & Spirits of Tex., Inc. v. Steen*, 486 F. Supp.2d 626, 633 (W.D. Tex. 2007), the court also held this

decision, as even though the code provisions were held to be discriminatory, the retailers were forced to abide by Texas rules, which meant that their retail shipments to Texas consumers would have to be purchased from Texas wholesalers.⁵⁴ The crux of the decision turned on how to treat retailers versus producers. The Fifth Circuit took the stance that retailers were an integral part of the three-tier system that the Supreme Court had held as “unquestionably legitimate” in two previous occasions.⁵⁵ As such, the court held that retailers could be required to have a physical presence in Texas before directly shipping to Texas residents.⁵⁶ The Supreme Court denied certiorari.⁵⁷

In the third major 2010 opinion, the Third Circuit was faced with three major challenges by consumers and wineries of New Jersey statutes that seemingly mirrored many *Granholm* issues.⁵⁸ In the first challenge, the court held that the New Jersey’s law that allowed in-state wineries to sell direct to retailers and consumers was discriminatory.⁵⁹ The State’s main contention that these were really only on-premise sales, which could be done in the same manner by out of state wineries, was unpersuasive.⁶⁰ Secondly, New Jersey’s cap on importing one gallon of wine without a special permit and its reciprocity provisions, N.J. Stat. Ann. § 33:1-2(a), were held to violate the dormant Commerce Clause.⁶¹ The State offered the explanation that the permit requirement was “for the purposes of taxation and, to a much lesser extent, to prohibit illegal activity,” but offered no evidence in support of that purpose.⁶² In the final and most noteworthy challenge for wineries that like to direct ship, the Court held that New Jersey’s ban on direct shipments of wine, whether in-state or out-of-state was permissible, as the law was non-

provision unconstitutional. *Wine Country*, 612 F.3d at 812. In total, 23 TABC provisions were held unconstitutional by the District Court. *Siesta*, 530 F.Supp.2d at 873.

⁵⁴ *Wine Country*, 612 F.3d at 812, 813. *Wine Country* was the first to appeal, as they did not like the remedy, and Texas cross-appealed to argue that the laws did not violate the dormant Commerce Clause in the first place.

⁵⁵ *Supra* note 18; *Granholm*, 544 U.S. at 467-68.

⁵⁶ *Wine Country*, 612 F.3d at 821. Previously, Texas retailers were allowed to ship directly to consumers, which was challenged as discriminatory to out of state interests. Ultimately, the Legislature changed the law to limit delivery to within the county. *Id.* at 812. The court held that this distinction between allowing direct deliveries within a county versus out of state direct deliveries for retailers as a “benign” incident/effect. *Id.* at 820.

⁵⁷ *Wine Country Gift Baskets.com v. Steen*, 131 S.Ct. 1602 (2011).

⁵⁸ *Freeman v. Corzine*, 629 F.3d 146 (3rd Cir. 2010). It should be noted that this case did begin before *Granholm* was decided.

⁵⁹ *Id.* at 159.

⁶⁰ *Freeman*, 629 F.3d at 159. N.J. Stat. §§ 33:1-10(2a) &(2b) allows sales “in six salesrooms apart from the winery premises.” Interestingly, the State never offered any legitimate local purposes, solely relying on the law being saved by it being non-discriminatory. *Id.* at 160.

⁶¹ *Id.* at 162.

⁶² *Id.* at 161 (citing *Freeman v. Fisher*, 563 F. Supp2d 493 (D.N.J. 2008)).

discriminatory. Though plaintiffs advanced three arguments in support of their position, all were held to fall short of causing a definitive extraterritorial impact.⁶³

The most recent decision regarding a state's liquor laws was issued early in 2012 out of the Seventh Circuit.⁶⁴ In this case, an Indiana based retail company, Cap N' Cork, challenged an Indiana law that forbade deliveries by anyone other than the seller or an employee of the seller.⁶⁵ The company's aim was to be able to serve a wider wine market in state via sales through motor carriers, such as UPS. The carriers, like UPS, were permitted to deliver wine to consumers if the purchases were done where a winery employee had verified the purchaser's age.⁶⁶ If a customer could not visit a winery, they were forced to buy from a retailer, who had purchased it from a wholesaler, and then the personal delivery law kicked in. As we have seen in the previous cases, Cap N' Cork made the argument that these requirements also violated the Commerce Clause.⁶⁷ Ultimately, the court held that the Indiana statutes did not violate the Commerce Clause, as these effects were largely intrastate. Any incidental effects were made pursuant to their powers under the twenty-first amendment and out of state wineries and retailers received the same treatment as in state ones.⁶⁸

C. Recent Legislative Attempts to Overrule *Granholm*

In the wake of *Granholm*, there has now been an attempt in each of the last two years to overturn the decision via Congressional legislation in a seemingly bi-partisan effort. H.R. 5034, known as the CARE Act, was introduced on April 14, 2010 by Representative Bill Delahunt, a Democrat from 10th District of Massachusetts.⁶⁹ The Act's stated purpose in Section 2 was to:

- (1) Recognize that alcohol is different from other consumer products and the it should be regulated effectively by the States according to the laws thereof; and

⁶³ *Id.* at 164. Plaintiffs argued that some wineries only sell their goods via direct shipments, the law has a disparate impact on out-of-state wineries, as they must use the three tier system, and that consumers won't go to out-of-state wineries to purchase the wine directly. *Id.* at 162,163.

⁶⁴ *Lebamoff Enters. Inc. v. Huskey*, No. 11-1362, (7th Cir. Jan. 17, 2012).

⁶⁵ Ind. Code § 7.1-3-15-3(d).

⁶⁶ *Lebamoff Enters. Inc. v. Huskey*, No. 11-1362, slip op. at 2 (7th Cir. Jan. 17, 2012).

⁶⁷ *Id.* at 7.

⁶⁸ *Id.* at 13.

⁶⁹ COMPREHENSIVE ALCOHOL REGULATORY EFFECTIVENESS (CARE) ACT OF 2010, H.R. 5024, 111th Cong. (2010).

- (2) Reaffirm and protect the primary authority of States to regulate alcoholic beverages.

Section 3 of the Act meant was to strike directly at the reasoning of Justice Kennedy in *Granholm* by specifically amending the Webb- Kenyon Act (27 U.S.C. 122 et seq.) of 1913 to establish that States have the primary authority to regulate alcoholic beverages, removing the dormant commerce clause as a stumbling block, and creating a presumption of validity with regards to state laws in the regulation of alcoholic beverages that must be defeated with clear and convincing evidence. Section 4 of the CARE Act would amend the Wilson Act to eliminate the “to the same extent” language, thus removing some of the non-discrimination language from the Wilson Act that Kennedy emphasized in *Granholm*. Despite garnering 152 co-sponsors, the bill was relatively short-lived. After bouncing from the Judiciary Committee to the sub-committee on Courts and Competition Policy and back, hearings were held on September 29, 2010. However, that was the last action on the bill.⁷⁰

In 2011, the same basic bill was resurrected in the form of H.R. 1161, and was titled the Community Alcohol Regulatory Effectiveness (also CARE) Act of 2011.⁷¹ This time, the bill was introduced on March 17, 2011, by Jason Cheffetz, Republican from the 3rd District of Utah. Representative Cheffetz was major co-sponsor of the previous CARE Act of 2010 and hails from a state with complete liquor control and which allows no direct shipments to consumers.⁷² The biggest change from the 2010 version was the elimination of Section 3(c), which discussed the presumption of validity of a state regulation and the clear and convincing evidentiary standard required to rebut that presumption. This bill did not make it as far as its predecessor, as it was referred to the Subcommittee on Courts, Commercial and Administrative Law on June 1, 2011, but no further action was taken.⁷³

These proposed acts triggered an interesting marketing and public relations battle between the interested parties. As one can imagine, these were not very popular pieces of legislation to those involved in the direct

⁷⁰ Library of Congress Thomas, Bill Summary and Status 111th Congress H.R. 5034 All Information, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR05034:@@L&summ2=m&> (last visited Mar. 18, 2012).

⁷¹ COMMUNITY ALCOHOL REGULATORY EFFECTIVENESS ACT OF 2011, H.R. 1161, 112th Cong. (2011).

⁷² For a description of Utah policies and those of “control states,” see, *Beverage Control States*, UTAH DEPARTMENT OF ALCOHOLIC AND BEVERAGE CONTROL, http://abc.utah.gov/about/control_states.html (last visited Mar. 18, 2012).

⁷³ Library of Congress Thomas, Bill Summary and Status 112th Congress H.R. 1161 All Information, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR01161:@@L&summ2=m&> (last visited Mar. 18, 2012).

shipment of alcohol, especially the wine industry. Many in the wine industry have been vocal in their criticism of the National Beer Wholesalers Association (NBWA) and their attempts to continue to “monopolize” the alcohol.⁷⁴ One article went so far as to track and post the campaign contributions from the wholesale industry, including showing that federal campaign contributions were up 33% in the four years post *Granholtz*, as compared to the four previous.⁷⁵ In one of the largest collective complaints against H.R. 1161, The Brewers Association, WineAmerica, Distilled Spirits Council of the United States, Wine Institute, Beer Institute and the National Association of Beverage Importers wrote a joint letter urging Congress to reject the CARE Act.⁷⁶ The letter stated that the CARE Act “would harm consumers and the marketplace, limit consumer choice, and allow states to enact protectionist and anti-competitive laws. If this bill became law, it would make it much harder for brewers, vintners, distillers and importers to get their products to market.”⁷⁷

Supporters of the CARE Act also went on the offensive by launching their own website to educate the public and Congress about the Act.⁷⁸ In contacting the NBWA about the CARE Act, their main message was that the “language in the legislation does not support claims and fears that it would alter a state’s law permitting direct-to-consumer shipments of wine from wineries.”⁷⁹ Facially, this is indeed a true statement. However, by the CARE Acts’ own terms in giving control to the states, they could go back to their previous licensing structures, of which some were some held discriminatory by the courts.⁸⁰ Ultimately, the CARE Act does benefit the

⁷⁴ In an article for the *WINE SPECTATOR* by Robert Taylor, April 16, 2010, Tracy Genesen, a lead plaintiff’s attorney, states that “the wholesalers have done so well in exacting a monopoly for so long that they are now trying to pull out all the stops to make sure that we don’t make any more progress.” In addition to Robert and Tracy’s voices, the specialty Wine Retailers association has set up its own website to state their position on the subject and its name is aptly titled www.stop1161.org. Multiple sources have credited the National Beer Wholesalers Association (NBWA), who potentially stands to benefit from the Act, with crafting and pushing the legislation.

⁷⁵ Robert Taylor and Ben O’Donnell, *Support for Direct Shipping Builds in Congress*, *WINE SPECTATOR* (May 27, 2010), <http://www.winespectator.com/webfeature/show/id/42823>.

⁷⁶ *Beer, Wine and Spirits Producers urge Congress to Reject the (CARE) Act of 2011*, WINE INSTITUTE, http://www.wineinstitute.org/files/Joint_Supplier_Statement_HR_1161_3-17-11_HR.pdf (last visited Mar. 18, 2012).

⁷⁷ *Id.* Another interesting statement in this letter was that “Congress should (not) spend valuable time wading into an intra-industry squabble, nor should it favor one segment of an industry at the expense of other industry members and American consumers.”

⁷⁸ See <http://thecareact.org/> (last visited Mar. 18, 2012).

⁷⁹ Email Correspondence with Kathleen Joyce, Communications Director, NBWA (Jan. 30, 2012).

⁸⁰ See *Granholtz v. Heald*, 544 U.S. 460, 468, 474, 475 (2005) and *Family Winemakers of Cal. v. Jenkins*, 592 F.3d. 1, 5 (1st Cir. 2010).

wholesalers, as it protects the three-tier system and would likely funnel more sales through the wholesale chain if out of state direct shipments were eliminated or burdened.⁸¹

III. CURRENT REGULATORY AND COMMERCIAL BARRIERS IMPACTING SMALL WINERIES

As was discussed in several of the cases cited above, small wineries face substantial economic challenges to expansion under the traditional three-tier system, as wholesale distribution may either be not economically feasible or even available.⁸² Thus, a small winery's best hope of expansion is to ship directly to consumers. Even then they are faced with three main obstacles to economic success. First, they must be federally compliant, then they must abide by state laws and regulations, which of course vary widely and is the most onerous of the three obstacles, and finally, they must face the economic hurdles of shipping the product.

A. Federal Requirements

Both the Federal Regulation and the Alcohol and Tobacco Tax and Trade Bureau (TTB) website are explicit in stating that a winery may not operate until the Federal permit is approved and not just filed.⁸³ The TTB is very helpful in laying out exactly what is needed for the application for a permit, which includes a substantial amount of paperwork.⁸⁴ One economic hurdle in the process of getting and maintaining one's federal permit are the bonding requirements for taxes that vary based on production, but are \$1,000 at a minimum.⁸⁵ Once an application is approved (qualified), which may take a while, there are continuing burdens on the winery, including

⁸¹ The benefit to wholesalers was alluded to by Justice Kennedy in *Granholm*, 544 U.S. at 468 and 474. It is seemingly a matter of simple economics that if you eliminate a level in the distribution system, then either the end cost to the consumer is less, the profit to the producer is higher, or a little of both, as one level of costs are eliminated.

⁸² See *Granholm* at 468, 474; *Freeman v. Corzine*, 629 F.3d 146, 165, n. 4 (2010).

⁸³ 27 C.F.R. § 24.106 (2005). "Any person intending to engage in the business of producing or blending wine...is required under the Federal Alcohol Administration Act to obtain a basic permit." See also <http://www.ttb.gov/wine/wine-permits.shtml>. For our purposes, we will look at the requirements for a bonded winery, though there are other types of wine operations that have their own procedures. We previously used the number of bonded winery permits when discussing the explosive growth of wineries in the Introduction. Definitions of what a bonded winery is and the other ways one can enter the wine industry may be found at http://www.ttb.gov/wine/entering_wine_industry.shtml (last visited Mar. 18, 2012).

⁸⁴ See chart at http://www.ttb.gov/applications/winery_packet.shtml (last visited Mar. 18, 2012).

⁸⁵ See <http://www.ttb.gov/forms/f512036worksheet.pdf> (last visited Mar. 18, 2012).

complying with extensive record keeping (27 CFR 24.300-.3232), labeling and advertising (27 CFR Part 4), and excise tax regulations (27 CFR 24.270-.279). Compliance with all of the rules is essential for any operation because, as discussed previously, one could not operate at all without the license, which would make worrying about the multitude of state regulations below a non-issue.

B. *Current and Future State Regulations*

As the quote in the introductory paragraph alluded to, it is very difficult to find two states that operate the same way when it comes to wine regulations. Some states have relatively loose regulations, while others are very controlled.⁸⁶ The state regulations mainly vary by the manner of the purchase, the quantity, including whether shipping is allowed at all, and the permit requirements. The first two are very much interrelated and are discussed together. Also, included in this section is a potential model law to harmonize the wide ranging state regulations.

1. Manner of Purchase and Quantity Limitations

Wine purchases for direct shipment from the winery to consumer can be broadly classified in two ways, onsite and offsite. An onsite purchase is one that is made on the premises of the winery, but instead of taking the wine out the door, it is shipped to the customer. There is also a secondary onsite purchase category called “Federal On-site.” This category was created by the 21st Century Department of Justice Appropriations Authorization Act of 2002 and basically allows for the direct shipment of wine if purchased onsite and in compliance with the laws of their state of importation.⁸⁷ Off-site shipments are those not made on the premises, such as by phone, fax or the internet.⁸⁸ The quantity that may be shipped, if any, depends on which of these three classifications the shipment falls under.

Presently, forty-two states and Washington D.C. allow some manner of onsite purchases to be shipped back to their state, though quantities vary greatly and will be discussed shortly. Of those forty-two, shipments to Delaware, New Jersey, Oklahoma and South Dakota are allowed only under

⁸⁶ *Supra* note 72. See also the NAT’L ALCOHOL BEVERAGE CONTROL ASS’N, <http://www.nabca.org/States/States.aspx> (last visited Mar. 18, 2012).

⁸⁷ 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No 107-273, 116 Stat. Ann. 1759 §11022 (2002).

⁸⁸ *Who Ships Where*, WINE INSTITUTE (Aug. 15, 2011), http://www.wineinstitute.org/files/shipping_statutes.pdf.

the Federal On-site method.⁸⁹ This leaves Massachusetts, Pennsylvania, Kentucky, Alabama, Mississippi, Arkansas, Montana and Utah as states that are generally considered as prohibiting onsite shipments of any kind.⁹⁰ Off-site sales are prohibited in Massachusetts, Pennsylvania, Kentucky, Alabama, Mississippi, Arkansas, Montana, Utah, Delaware, Oklahoma, and South Dakota.⁹¹ Before January 17, 2012, New Jersey was also on that list, but with the signing of Senate Bill 3172, the direct shipment of wine is now an option in New Jersey.⁹²

In the other thirty nine states and D.C. that presently allow direct wine shipping, the quantity allowed varies greatly. On the liberal end of the spectrum, seven states allow for shipments in unlimited quantities in certain situations, while the most restrictive limit is Minnesota's two cases per year. In between you have a myriad of other amounts, including the vague "reasonable quantity" in Rhode Island and Alaska. Arizona, Georgia and Kansas even further complicate life by placing different quantity limits for onsite and offsite purchases.⁹³ Also, several states, including Alaska and New Hampshire, have certain zip code, county, or town restrictions within the state.⁹⁴

⁸⁹ Delaware is the most liberal state with no limit, New Jersey and North Dakota allow one gallon and Oklahoma allows just one liter. *Supra* note 88.

⁹⁰ Though wineries may technically ship to consumers in Massachusetts, there is an annual aggregate limit that one would not want to run the risk of being the one to break. *See State Shipping Laws: Massachusetts*, WINE INSTITUTE, <http://wineinstitute.shipcompliant.com/StateDetail.aspx?StateID=53> (last visited Mar. 18, 2012). In Montana, individuals can apply for a connoisseurs license to receive direct shipments. *See* Mon. Code Ann. Ch. 3 § 16-4-901 (2011). In Kentucky, direct shipments from small wineries are allowed to "wet" zip codes. *See State Shipping Laws: Kentucky*, WINE INSTITUTE, <http://wineinstitute.shipcompliant.com/StateDetail.aspx?StateID=50> (last visited Mar. 18, 2012). Despite some leeway for shipments by law, Fed Ex and UPS will not ship wine to these three states, thus making them inaccessible presently. *Id.*; *Supra* note 88.

⁹¹ Though the Wine Institute does not, I would add Rhode Island to the list not allowing off-site purchases, as the permissible shipments are limited and UPS and FedEx do not ship directly to the state. *See, State Shipping Laws: Rhode Island*, WINE INSTITUTE, <http://wineinstitute.shipcompliant.com/StateDetail.aspx?StateId=38> (last visited Mar. 18, 2012); *supra* note 88.

⁹² *See* S.B. 3172, http://www.njleg.state.nj.us/2010/Bills/S3500/3172_I1.HTM. Under this bill, out-of-state wineries that produce less than 250,000 gallons annually are able to ship 12 cases of wine per year per person under an annual license that costs \$938. It will be interesting to see if this law is challenged; as a gallon max of 30,000 was held invalid under the previously discussed *Family Winemakers* case. *Supra* note 49. In a December 22, 2011, article by Robert Taylor in the WINE SPECTATOR, the Bill's sponsor, Senator Stephen Sweeney, was not concerned with the cap being an issue, as it will later be removed by either legislation or the courts if need be.

⁹³ *Supra* note 88.

⁹⁴ *See* Federal Express Approved Zip Code in note 1 to the Chart, Jul. 29, 2009, <https://www.fedex.com/cgi-bin/wineShipping.cgi?State=TX>. (last visited Mar. 18, 2012). *See* also New Hampshire Liquor Commission Direct Ship Permit,

2. Permit Requirements

States also vary greatly based on whether a state permit is required and, if so, how much it costs.⁹⁵ Alaska, The District of Columbia, Florida and Minnesota don't require a permit for any manner of shipping and Arizona, Kansas, Georgia, and Rhode Island don't require one for onsite shipments. Obviously, there is no permit for those states that prohibit direct shipments. So, permits for offsite sales are required in thirty-six states. As seen in previous cases, in Arizona and Ohio there are also production caps that make one eligible for a permit or not.⁹⁶

Just like the quantity of shipments allowed varies greatly, so do the permit fees. The seemingly easiest situations for permitting are in Missouri and North Carolina, where there is no fee. Otherwise, the cost ranges from \$10 in California to up to \$1,000 in Illinois. Since California produces more wine than any other state, it is not surprising that it wants to attempt to set the bar low for other states to gain access, in hopes that the bar will be lowered in other states as well. On a fixed rate basis, the New Jersey fee of \$938 is the highest. Assuming a given winery is eligible for a permit and they choose to apply for one in all states, they would be looking at an initial annual cost of approximately \$5,316.⁹⁷

3. Model Direct Shipping Bill

In an effort to harmonize state laws with regards to the direct shipment of wine, The National Conference of State Legislatures (NCSL), Task Force on the Wine Industry, approved the Model Direct Shipping Bill (Model Bill) endorsed by several major wine trade groups on November 5, 1997.⁹⁸ With regards to NCSL, not much else happened. Though it was adopted by the task force, it was not reviewed by the Executive Committee or passed by the NCSL, thus the bill is not an official position or policy of the NCSL. This

http://www.nh.gov/liquor/direct_ship_permit.shtml (last visited Mar. 18, 2012), stating that “no direct shipper shall ship to a dry town (Ellsworth, Millsfield, Monroe, and Sharon).

⁹⁵ For the purposes of this paper, I did not review how extensive the paperwork and time investment to receive a permit would vary from state to state. This too is an added burden on a winery, when you consider thirty-eight different applications to fill out and submit should you choose to ship to all states beyond your own.

⁹⁶ *Supra* notes 46 and 92.

⁹⁷ *Supra* note 88. If it was not indicated, I assumed this was a first time application and used the lowest possible permit fee, as it varies in two states. A separate fee is also required in each county in Hawaii and the lowest fee was included, instead of all islands/counties. Oregon's fee of \$250 is found at http://www.oregon.gov/OLCC/LIC/winery_license.shtml (last visited Mar. 18, 2012).

⁹⁸ *Model Direct Shipping Bill*, FREE THE GRAPES,

<http://www.freethegrapes.org/?q=content/model> (last visited Mar. 18, 2012).

situation has actually needed to be clarified twice in the last couple of years, including one response that was essentially a cease and desist letter to a group claiming NCSL support.⁹⁹

Some of the Model Bill's major provisions are as follows:

1. A 24 case annual limit to a state resident from a single winery for personal use.¹⁰⁰
2. A \$100 registration fee per winery and a \$50 annual renewal in each state that they ship to.
3. A label requirement for the signature of someone over 21.
4. Requirements to pay any due sales and excise taxes on consumer sales.
5. Violations of this bill are misdemeanors.

In surveying the previously cited shipment table from the Wine Institute, Idaho appears to be the only state that exactly mirrors the permit fee and quantity limitation of the Model Bill presently. Several others vary slightly in terms of either the permit fee or quantity allowed.¹⁰¹

C. Shipping Hurdles

Even if a winery wants, and is legally allowed, to ship direct to a customer in another state, they may be met with a transportation hurdle as well. First, the United States Postal Service is not an option, as it does not ship alcohol.¹⁰² From there, the two most likely options are Federal Express (FedEx) and the United Parcel Service (UPS), but both have their own shipping regulations and requirements.¹⁰³

For FedEx shipments, the shipper must have a valid FedEx account number, comply with the company's shipping requirements, and sign the wine shipping agreement.¹⁰⁴ The most onerous of these three is complying with the shipping requirements, particularly the adult signature service

⁹⁹ See Letter from William Pound, Executive Director NCSL, to Tracy Genesen, Wine Industry Plaintiffs Attorney (Feb. 22, 2010), <http://www.alcoholawreview.com/wp-content/uploads/2009/08/Wine-TF-Position-Letter-to-Genesen-2-10.pdf>.

¹⁰⁰ This generous amount equals 288 -750mL bottles per winery per person or 576 bottles per married household. For a single resident, that's consuming a full bottle 3 out of every 4 days.

¹⁰¹ *Supra* note 88.

¹⁰² 18 U.S.C. § 1716(f) (2011). Violations are fineable and punishable by up to one year in prison. 18 U.S.C. ch. 83 § 1716(j) (2011).

¹⁰³ Both FedEx and UPS will only accept shipments from licensed shippers. Consumer to consumer shipments will not be accepted. See *UPS Shipping Wine*, <http://www.ups.com/wine> (last visited Mar. 18, 2012), and *Fed Ex Wine Getting Started*, <http://www.fedex.com/us/international/wine-shipping/get-started/index.html> (last visited Mar. 18, 2012).

¹⁰⁴ Get Started Shipping, FEDEX, <http://www.fedex.com/us/international/wine-shipping/get-started/authorization.html> (last visited Mar. 18, 2012).

option, which “requires an adult signature at the time of delivery for every U.S. package containing wine. It is your responsibility to ensure an adult is available to sign for the shipment at delivery and to select the appropriate signature service so that FedEx is aware of the adult signature requirement.”¹⁰⁵ The additional charge for this is between \$3.75 and \$4.50.¹⁰⁶ If one were to ship a single bottle of wine, the regular shipping cost plus this fee may very well equal the cost of the wine itself.¹⁰⁷ Thus, it is most advantageous to ship as large of a quantity as possible. As noted above, however, quantities may be limited by state, thus further restricting potential sales for wineries by making shipping more expensive on a per bottle basis. This discussion centered on general public rates, but FedEx does offer discounts to members of certain wine organizations.¹⁰⁸

For UPS shipments, the requirements are very similar to FedEx’s in that they will only “accept packages containing wine from shippers who are licensed under applicable law and who have signed and entered into a contract with UPS for the transportation of wine.”¹⁰⁹ The requirements for packaging, labeling and an adult signature are roughly the same as FedEx,

¹⁰⁵ *Id.* There are also potential issues in rerouting the product to find an eligible adult and being also that your product is shipped in approved packaging.

¹⁰⁶ *Id.* The section of FedEx’s website that discusses the requirements for wine lists the fee at \$3.75. However, other portions of FedEx’s website also list the fee at \$4.50. *See* http://images.fedex.com/us/services/pdf/Fees_Shipping_Information.pdf. (last visited Mar. 18, 2012).

¹⁰⁷ As an example, a 750mL bottle of wine from Salado Creek Winery, *supra* note 4, weighed in at just less than three pounds. So, a hypothetical three pound shipment from Salado, TX, to Los Angeles, CA, paying standard rates based for FedEx Home delivery (cheapest), would cost \$13.44, plus the \$3.75 signature fee. Thus making the total shipping cost \$17.19 based on lowest published general rates. For the calculator, see <https://www.fedex.com/ratefinder/home>. A popular Sweet Blush from that winery costs \$14.95 a bottle, thus the shipping cost is more than two dollars higher than the cost of the bottle of wine itself.

¹⁰⁸ *See The Benefits of Wine Association Membership*, FEDEX, <http://www.fedex.com/us/international/wine-shipping/get-started/benefits-membership.html> (last visited Mar. 18, 2012). For Wine Institute benefits, *see FedEx Benefits*, WINE INSTITUTE, <http://www.wineinstitute.org/node/604> (last visited Mar. 18, 2012). In addition to shipping rate discounts, the signature fee is waived. Texas wineries would have to be members of WineAmerica. *See Wine America Membership Application*, <http://www.wineamerica.org/membership/docs/2012%20WA%20Membership%20Application.pdf> (last visited Mar. 18, 2012). The shipping discounts appear to be less than those for the Wine Institute and there is no mentioning of waiving the signature fee. The cost of membership is based on volume produced, but the minimum membership fee is \$250.

¹⁰⁹ *Shipping Wine*, UPS, <http://www.ups.com/wine> (last visited Mar. 18, 2012). This contract can either be the UPS Agreement for Approved Wine Shippers or the UPS Wine Industry Fulfillment House Agreement For Approved Wine Shippers.

including the fee.¹¹⁰ One new requirement not seen with FedEx is that the shipment must be processed with a UPS-compatible shipping solution.¹¹¹ In addition to the home delivery option, UPS advertises the availability of a Hold for Pickup Service, which is available at no additional charge. In this instance, the party picks up their wine from a UPS Customer Center with proper ID validating their age as twenty-one or over.¹¹²

IV. CONCLUSION

Obviously, the explosive growth in the number of U.S. wineries means that the regulatory environment will continue to have a substantial impact on the economic viability of this burgeoning industry, particularly as the numerous new small wineries attempt to establish themselves in the market. In a quick look at how the myriad of individual regulations discussed above affect small wineries, I found different approaches to sales in looking at some of my favorite Texas wineries. First, I took a look at the winery that made my wedding wine, McPherson Cellars, in Lubbock, Texas.¹¹³ Its online store specifically states that it will only ship to addresses in Texas. In a discussion with Krystin Herrera, McPherson's Wine Operations Manager, she confirmed that the "paperwork and various laws involved in shipping to customers out-of-state has made us hesitant to ship outside of Texas."¹¹⁴ A winery of its size, like many in Texas, struggles with the cost and manpower necessary to be fully compliant with the law, when one considers licensing, tracking quantities limits and paying sales tax.¹¹⁵ The legal risk is one that many are not willing to take, as a violation of another state's laws could result in the loss of a federal license and, in some states, the violation could

¹¹⁰ Value-Added Service Pricing for Daily Rates, UPS, http://www.ups.com/content/us/en/shipping/time/service/value_added/daily.html (last visited Mar. 18, 2012). Under delivery confirmation, the rate is \$4.50.

¹¹¹ This is a technology based requirement for processing and tracking and not necessarily cheap and easy. See *UPS WorldShip*, http://www.ups.com/content/us/en/bussol/offering/technology/automated_shipping/worldship.html (last visited Mar. 18, 2012).

¹¹² *Supra* note 109.

¹¹³ See MCPHERSON CELLARS, www.mcphersoncellars.com (last visited Mar. 18, 2012). This winery is also part of the new Texas growth, as it opened its doors in 2008, though the family had been making wine for years, including starting the first post-prohibition Texas winery. *Id.*

¹¹⁴ Email Correspondence with Krystin Herrera, Wine Operations Manager, McPherson Cellars, (Jan. 25, 2012).

This same reasoning was cited in two previously discussed cases. *Supra* note 79.

¹¹⁵ In addition to previously discussed requirements for shipping permits, sales tax collection is also another issue and may require its own permit. See *Winery Shipping Laws*, TABC, http://www.tabc.state.tx.us/laws/texas_wine.asp#shipLawOut (last visited Mar. 18, 2012).

result in a felony.¹¹⁶ Ms. Herrera also stated that she definitely believed out-of-state direct shipments would make them more profitable if not for the regulations, as their wine has won several awards and they have declined potential wine club members in other states.¹¹⁷ Georgetown Winery, referenced earlier in note four, presently ships to just seventeen states per the company's website.¹¹⁸ When I asked the owner about wine shipping, he proceeded to pull out a shipping chart to show the "can and can't states." This is obviously a major difficulty that most other businesses do not have to worry about on a daily basis.

With all of the permit costs, it is generally not cost effective for small wineries to attempt to ship to all of the states that they legally can, as accepting an order or two from even the states with the cheapest permits and easiest regulations will not make shipping cost effective on an annual basis. Thus, despite being technically open to interstate shipping, the paperwork and economic barriers still make these states closed for many wineries.

It will be interesting to see what the future holds for small wineries, as there appears to be no slowing in actual growth or the desire for growth by both the wineries themselves and consumer demands. *Granholm* and several of the cases that followed have helped open more doors for small wineries to expand their businesses.¹¹⁹ With such active lobbies on both sides of the direct shipment debate, more legal and legislative challenges are sure to come, which could change the landscape significantly. The balance definitely

¹¹⁶ See Federal license issue discussion *supra* note 38. Ken. Rev. Stat. §244.165 (3) (2011). It is a class D felony in Kentucky for the second offense. In a Utah case, *Utah v. Amoroso*, 975 P.2d 505, 1999 UT App. 60 (1999), the defendant was charged with a second degree felony under Utah Code Ann. § 76-10-1601 and 1603.5 (1995) for repeated violations as a "pattern of unlawful activity" for multiple shipments to Utah residents.

¹¹⁷ Most wineries offer a wine club package as an option to connoisseurs of their products. They vary greatly in requirements and benefits based on the half dozen or so I have looked at. Generally, in return for a quarterly obligation of \$50-75, you get so many bottles of wine (two per quarter is the most common number I have seen) and other benefits. With most, you have the option of picking it up; otherwise you have to pay shipping costs on top of your quarterly payments. As an example, my wife and I recently joined the wine club from the Georgetown Winery (www.georgetownwinery.com) after tasting some exceptional flavors. For a quarterly membership fee of \$50, we receive two bottles each quarter, generally vintner's choice, a 20% discount on wine purchases, a 15% discount on merchandise, a free tasting per month, and free admission to club special events. We pass the area frequently enough to pick up our wine, otherwise it would be \$14 per shipment.

¹¹⁸ See GEORGETOWN WINERY STORE, <http://www.georgetownwinery.com/WineStore.html> (last visited Mar. 18, 2012).

¹¹⁹ See W. Blake Gray, *Shipping Wine? Don't Ask, Don't Tell*, SAN FRANCISCO CHRON. (Dec. 1, 2005), <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/12/01/WIGU5G06VN1.DTL&ao=all>. Commenting on the *Granholm* case, he stated the U.S. Supreme Court didn't exactly force open a door for direct shipping of wine with its May ruling on the issue. Instead, it nudged 50 different doors: some swung open, some slammed shut and many remain confusingly ajar."

seems to be tilting in favor of small wineries, but the battle is not over and the present state regulatory structure is still a major stumbling block for the growth and expansion of small wineries.¹²⁰ Much progress was made in the last year alone and that certainly bodes well for the future of these burgeoning businesses.¹²¹

¹²⁰ See *Granholm* 544 U.S. at 473 (stating that in 1986 only three states allowed direct shipments). As of the writing of the opinion “26 states allow some direct shipping.” *Id.* at 468. Today, that number stands at thirty nine or forty-two depending on whether it’s on-site or off-site as discussed previously. *Supra* note 86.

¹²¹ Just in the last calendar year, we have seen New Jersey (*supra* note 89), Maryland (*see Maryland Opens for Direct Shipping*, WINE INSTITUTE (May 10, 2011), <http://www.wineinstitute.org/initiatives/stateshippinglaws/currentevents/05102011>) and New Mexico open their doors to direct shipping. Robert Taylor, *Wine Laws Changing in up to 7 States*, WINE SPECTATOR (Apr. 29, 2011), <http://www.winespectator.co/webfeature/show/id/44924>.