

SELLING WINE: SHOULD CORPORATIONS HAVE FIRST AMENDMENT HELP?

By

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I. INTRODUCTION

Legal wrangling about who may sell wine and to whom they may sell it, is not about the special status and history alcoholic beverages have had in the United States, although the “special” argument is often used to support legal positions. Like fights about most regulation, those about wine rules are about economic interests. And, as in fights about most product regulation, the overlooked constituencies are consumers and mom-and-pop businesses because the members of both groups do not have the wherewithal to mount expensive political battles against wealthy corporations.¹ In today’s political debates about Wall Street versus Main Street, quintessential examples of Main Streeters are small wineries producing expensive wines in small quantities.

The United States Supreme Court decision in *Citizens United v. Federal Election Commission*² created a tsunami of criticism because it overturned precedent to expand the grant of First Amendment free speech rights to corporations.³ This article uses the ongoing battle between small wineries and consumers on the one hand, and wholesale distributors of wine, beer, and spirits on the other, to illustrate the wrong direction that *Citizens United* takes the country.⁴

This article briefly reviews the history of alcoholic beverage regulation and the status of the wine industry in the United States.⁵ Then the article discusses proposed federal regulation to “undo” the effects of the United States Supreme Court’s 2005 decision in *Granholm v. Heald*.⁶ The issue in *Granholm* was whether state laws in Michigan and New York that allowed in-state wineries to ship wine directly to consumers in the state but required out-of-state wineries to use wholesale distributors, were unconstitutional.⁷ The Supreme Court answered that question in the affirmative. The article also discusses some of the cases that came after *Granholm* in which courts have had to interpret the extent of limitations on states to regulate alcoholic beverage sales. Finally, the article puts these political battles in the context of *Citizens United*, concluding that corporations can unfairly sway political decisions because of their greater wealth and, therefore, natural persons who are consumers and small business owners should keep constitutional advantages unless it is clearly and convincingly true that the framers intended artificial, legally-created entities to enjoy the same rights as natural persons.

II. A BRIEF HISTORY

It is common for people to associate the history of alcoholic beverages in the United States with a Puritanism of rigid austerity and, later on, with a Prohibition that required abstinence. In fact, the Puritans’ extreme strictness did not extend to drinking alcohol.⁸ The early settlers were very heavy consumers of wine, beer, and rum.⁹ In the early nineteenth century, the average American was drinking three times the average today. By the second half of the nineteenth century the most popular alcoholic beverage was beer.¹⁰ In 1862 brewers got together to form the United States Brewers’ Association to protect their economic interests¹¹ by opposing excise taxes and the growing temperance movement.¹² As the temperance movement became more successful and taxes on alcohol became the largest single domestic contributor to the federal treasury, the brewers changed course and became supporters of alcohol taxes.¹³ By 1915 there were 1,345 breweries in the United States.¹⁴ After the Eighteenth Amendment was repealed, there were only thirty-one brewers left, and their numbers continued to decline.¹⁵ With repeal came the change from Prohibition (which as a practical matter did not prohibit much), to a myriad of regulations imposed by individual states.¹⁶ While the crime industry, like legitimate businesses, began to be more centralized and commercialized in the beginning of the twentieth century, Prohibition encouraged organized crime to become national.¹⁷

A. The Three-Tier System

Although states use a wide variation of regulatory schemes to control the production, distribution, and sale of alcoholic beverages, all use a three-tier system that prohibits economic relationships between producers and wholesale distributors (wholesalers), between wholesalers and retailers, and between producers and retailers. The system originated to eliminate the evils that arose during Prohibition.¹⁸

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During Prohibition, the federal government gave a few distillers permits to manufacture whisky for medicinal purposes, and so they held a considerable competitive edge after repeal.¹⁹ A few additional distillers had purchased trade names and supplies from old distillers in the event of a repeal.²⁰ Because good whiskey must be aged for four or more years, and even cheaper whiskey is blended with some aged whiskey, these few foresighted distillers controlled the industry.²¹ In 1934 the nation's nine largest distillers produced more than four-fifths of the nation's whiskey.²² Members of Congress called these distillers a "Whiskey Trust" and worried that the Trust had driven up alcohol prices to unreasonably high levels: twelve to twenty-four dollars wholesale for a gallon that cost one dollar to produce and store.²³

The high prices led to bootlegging and illicit selling that some estimated were responsible for at least half of all consumption of alcoholic beverages.²⁴ The dominance of a few distillers and brewers also led to "tied-house" arrangements or vertical integration whereby distillers, brewers, and wholesalers would exert control over retail outlets, particularly saloons.²⁵ If a saloon keeper agreed to serve only one brewer's beer, for example, the brewer would provide furnishings for the bar, pay for food for customers, pay licensing fees and bribes.²⁶ Legislators were concerned that tied-house increased alcohol consumption because distillers would require retailers to buy certain quotas and then retailers, in turn, would encourage customers to drink more.²⁷ Thus, following Prohibition, state legislators enacted three-tier systems which required strict separation among participants in the alcoholic beverage industry to eliminate criminality, corruption, price-gouging, and intemperance.²⁸ In fact, organized crime's control of the alcoholic beverage industry did not continue after Prohibition.²⁹

B. Wholesalers

The alcoholic beverage industry, particularly the wine segment, has changed dramatically in the last fifty years. There used to be few producers and many wholesalers, but just the opposite is true now. In 1950 there were approximately 5,000 liquor wholesalers nationwide, whereas by 2003 there were well under 1,000, resulting in some retailers being serviced by only two wholesalers.³⁰ About ninety-seven percent of all wine sales in the United States pass through wholesalers.³¹ The five largest U.S. wholesalers control almost fifty percent of the wine market.³² The three-tier system creates market power and economic rents for these relatively few wholesalers.³³ The more than 6,000 wineries in the United States produce about 7,000 wine brands that have to squeeze through the distribution bottleneck.³⁴ Thus, wholesalers can engage in product tying or bundling the way that Microsoft does. Were it not for the mandated three-tier system, small wineries could use the Internet which has made it easy and cheap for producers to reach retailers and consumers on their own.³⁵ Thus, eliminating the three-tier structure would reduce prices for consumers³⁶ and provide them with more choices, and it would expand markets for small producers.³⁷ The problem is that wholesalers have had many years to develop their own market power and political power in order to maintain their position in the alcoholic beverage industry. In the last twenty years, the National Beer Wholesalers Association (NBWA), for example, has contributed more than \$21 million to federal candidates and political parties, placing it among the top thirty donors.³⁸ Since the *Granholm* decision in 2005, the NBWA and the Wine and Spirits Wholesalers of America Inc. (WSWA) and their political action committees (PACs) donated more than \$11.55 million to federal campaigns, an increase of thirty-three percent compared to their contributions during a similar period before the decision.³⁹

Every state's system for regulating the production, distribution, and sale of alcoholic beverages has rules for wholesalers, but state laws vary in the strength of their protection for the interests of wholesalers. The large amount of money at stake makes wholesalers big players in both national and state politics. Some examples of state regulations and the roles of specific wholesalers follow.

1. Wholesalers in Michigan

In Michigan the law makes it nearly impossible for a winery to fire a wholesaler unless a wholesaler commits fraud, breaches its contract with the winery, or loses its state license.⁴⁰ Moreover, Michigan's franchise law permits wholesalers to pass ownership of their businesses to family members when they retire or die, guaranteeing family ownership in perpetuity.⁴¹ The Michigan Beer and Wine Wholesalers Association (MBWWA) is a trade group of seventy⁴² family-owned distributors⁴³ that controls the distribution of more than ninety percent of the wine sold in Michigan.⁴⁴ It is one of the richest and most powerful trade groups in Michigan's capital.⁴⁵ In the 2004 statewide election in Michigan, the MBWWA was among the top ten contributors to the winners in a majority of the Michigan legislative races.⁴⁶ Its members also gave thousands of dollars in political contributions to the Michigan governor and attorney general.⁴⁷ An analysis of campaign finance records indicated that from 2000 through 2004 the MBWWA's PAC hosted at least eighty-three fundraisers for Michigan lawmakers at which the lawmakers raised almost \$500,000.⁴⁸ The MBWWA PAC donated over \$700,000 to candidates in the 2006 election cycle, making it the fourteenth largest PAC in Michigan.⁴⁹ All but eleven of the 148 members of the Michigan legislature serving in 2008 and voting on a bill to prohibit all direct shipment of wine to consumers received contributions from the MBWWA as did Michigan's then governor, attorney general, and secretary of state.⁵⁰

2. Wholesalers in Illinois

The reputation of alcoholic beverage wholesalers in Illinois is similar to that of Illinois' politicians. In 2009 the federal Alcohol and Tobacco Tax and Trade Bureau (TTB)⁵¹ fined ten Illinois wholesalers for giving executives in a large wine and spirits retail business money and free cases in exchange for favored product placements on store shelves, a practice that is illegal in Illinois.⁵² The wholesalers also illegally gave the same retailer lower prices that were not available to other retailers.⁵³ The TTB fined Southern Wine & Spirits of Illinois, Inc., the largest wholesaler in the state, \$225,000; the second largest wholesaler in the state, Judge & Dolph, Ltd., part of the Wirtz Beverage Group (WBI), \$130,000; and eight other wholesalers for a total of \$803,000 in fines.⁵⁴ Illinois retailers also allege that wholesalers engage in another illegal practice by paying for expensive leather portfolios for wine lists in exchange for having their wines included in the list.⁵⁵ Compared to the size of the wholesalers' businesses, the fines could not be much of a deterrent. WBI is the sixth largest wine and spirits distributor in the United States with more than \$1.5 billion in revenue.⁵⁶ It has expanded by buying other distributing companies and now has operations in Iowa,⁵⁷ Minnesota,⁵⁸ Nevada,⁵⁹ and Wisconsin.⁶⁰ WBI is the distributor in Illinois for Diageo,⁶¹ the world's largest producer of alcoholic beverages.⁶²

The family business was started by Arthur M. Wirtz in 1922, and he acquired his first wholesale liquor distributorship, Edison Liquor, in Wisconsin in 1945.⁶³ His decades-long expansion of the business started three years later when he acquired Judge & Dolph in Chicago from Walgreen's Drug.⁶⁴ Arthur's son, William Wirtz, the owner of the Chicago Blackhawks hockey team, ran the business until his death in 2007 when he was succeeded as chairman and chief executive officer by his son, W. Rockwell "Rocky" Wirtz.⁶⁵ Other family members are also company executives.⁶⁶ Rocky is the chairman of the WSWA, the Washington, D.C.-based industry trade group.⁶⁷ WBI is a member of the Wine & Spirits Distributors of Illinois which is associated with the Illinois Wholesalers Association PAC.⁶⁸

Between 1993 and 2004 the Wine & Spirits Distributors of Illinois contributed almost a million dollars to Illinois candidates for state office.⁶⁹ Its PAC was a strong proponent of the Illinois Wine and Spirits Industry Fair Dealing Act of 1999⁷⁰ that was known as the Wirtz Bill.⁷¹ WBI hired twenty-four lobbying firms using ninety-two registered lobbyists to promote the bill.⁷² The Act prohibited any wine or spirits producer from canceling a contract with a wholesaler with less than ninety days notice regardless of their contractual agreement, but it provided an exception for agreements between a wholesaler and an Illinois winery.⁷³ Then-Governor George Ryan signed the Act into law on May 21, 1999, and it became effective immediately.⁷⁴ By September, Wirtz companies, which then controlled one-third of alcoholic beverage sales in Illinois, notified their retailers that they would be raising prices.⁷⁵ An alcoholic beverage retailers' group estimated that wholesalers earned an additional \$26 million in profits during the first six months the Act was in effect, an annual return of 7,000 percent on their political contributions.⁷⁶

In mid-1999, three California wineries notified their Illinois wholesalers that they would be terminating their distribution contracts.⁷⁷ In response, the wholesalers filed petitions with the Illinois Liquor Control Commission requesting a finding that the wineries violated the Act because the termination was in retaliation for supporting passage of the Act.⁷⁸ The United States District Court for the Northern District of Illinois enjoined the State from implementing the Act because of the Kendall-Jackson winery's likelihood of prevailing in its lawsuit alleging the unconstitutionality of the Act because the Act violated the Commerce and Contracts Clauses.⁷⁹ The Illinois Legislature repealed the Act in 2002.⁸⁰ After the *Granholm* decision, midwest newspapers reported that the wholesalers' PAC was suggesting that Illinois should consider banning direct shipment from all wineries, including Illinois wineries, rather than extending direct shipping privileges to out-of-state wineries.⁸¹ The legislature did not do that, but achieved a compromise between the wholesalers and local wineries by allowing all wineries, both in-state and out-of-state, to direct-ship only twelve cases of wine per year for consumers' personal use.⁸²

3. Southern Wine and Spirits of America, Inc.

The largest distributor of wine and spirits in the United States is Southern Wine and Spirits of America, Inc.⁸³ Chairman and CEO Harvey Chaplin and his son Wayne Chaplin, the president and COO, own more than fifty percent of the company.⁸⁴ On its 2006 list of the world's billionaires, Forbes magazine listed Harvey Chaplin as the 645th wealthiest person in the world with assets of \$1.2 billion.⁸⁵ Southern ships more than 90 million cases of wine, beer, and spirits in thirty states.⁸⁶ Between 2003 and 2010, Southern, its subsidiaries, and employees gave almost \$3 million to political candidates.⁸⁷ In anticipation of the *Granholm* decision, Wayne Chaplin, Southern's president, said that rule changes would not eliminate wholesalers from the alcoholic beverage industry.⁸⁸ He noted that in California where liberal rules allow wineries to ship directly to consumers and distilled spirit producers can sell directly to retailers, Southern had still maintained a thirty percent market share.⁸⁹

Heavy political spending indicates that wholesalers are not going to accept any risk of diminution in their business without a political battle. The wholesalers' strategic contribution to the *Granholm* litigation was to support the states in their rationales for having prohibitions on direct shipping.⁹⁰ The MBWA's chief lobbyist asserted that Michigan's prohibition on direct shipment of wine from out of state guaranteed accurate tax collection and kept minors from access to alcohol.⁹¹ The MBWA hired the former director of the Michigan Office of Highway Safety Planning to start the Coalition for a Safe and Responsible Michigan.⁹² Arguing that a reversal of Michigan's prohibitory law could endanger young people, she convinced

Central Michigan State University, Oakland University, Michigan Mothers Against Drunk Driving, the Michigan Association of Secondary School Principals, and the Michigan Sheriffs' Association to join the Coalition.⁹³

C. Wineries

The estimated retail value of wine sales in the United States is about \$30 billion.⁹⁴ There are now more than 6,700 wineries in the United States,⁹⁵ but the thirty largest wineries account for more than ninety percent of all the wine produced in this country.⁹⁶ The leading U.S. producer, E. & J. Gallo Winery, produced 67 million cases in 2008.⁹⁷ The second largest producer, The Wine Group, produced 56 million cases in 2008.⁹⁸ *Granholm* was not about these wineries because they have wholesalers who can distribute their products to every retail outlet in the country. Every consumer can have access to Gallo or Wine Group brands but not to the wines produced by the nation's small wineries, often defined as those producing fewer than 5,000 to 10,000 cases a year.⁹⁹ In fact, most wineries in the United States produce fewer than 5,000 cases annually.¹⁰⁰ Together these small wineries constitute less than two percent of all the wine produced in the United States but a large share of the wine that costs more than thirty dollars a bottle.¹⁰¹

Granholm was about wineries like those owned by the plaintiffs in the New York case, Juanita Swedenburg and David Lucas. Swedenburg opened Swedenburg Winery in Middleburg, Virginia on her family farm in 1987.¹⁰² She raised beef cattle and planted fifteen acres of grapes.¹⁰³ She produced fewer than 2,000 cases of wine a year and sold more than ninety percent of it at her winery.¹⁰⁴ David Lucas opened the Lucas Winery in Lodi, California in 1978.¹⁰⁵ He also produced fewer than 2,000 cases of wine a year and sold most of it at the winery.¹⁰⁶ Both wanted to sell by direct shipping to tourists who stopped at their wineries and to Internet customers.¹⁰⁷ They, and winery owners like them all over the country, do not have budgets for advertising or wholesale distributors.

A wholesaler's share of the retail price of a bottle of wine is typically eighteen to twenty-five percent (more than twice the cost of the distribution system in the food industry).¹⁰⁸ Retailers typically take another twenty-five percent as their gross profit.¹⁰⁹ In Ohio, for example, state law, "to prevent abuses caused by the disorderly and unregulated sale of wine," mandates that wine wholesalers charge a minimum markup of thirty-three and a third percent and retailers add a minimum markup of fifty percent.¹¹⁰ Shortly after the *Granholm* decision, the vice president of Bedell Cellars on the North Fork of Long Island in New York noted that his winery received only \$120 a case through its wholesalers, but if it sold directly to a consumer it could charge \$240 a case.¹¹¹ Bedell was then producing about 8,000 cases of wine a year,¹¹² and it had wholesalers in only seven states.¹¹³ Even if small wineries can make a profit after wholesalers and retailers take their shares, they cannot find wholesalers willing to represent them.¹¹⁴ The general manager of Peconic Bay Winery, another small business on the North Fork of Long Island, has said that the biggest challenge facing the New York wine industry is distribution limiting profitability.¹¹⁵ He complained that the larger wholesalers drop small brands even if they represent them initially, and small wineries cannot survive on the profit margin dictated by wholesalers.¹¹⁶

Only seventeen percent of wineries in the United States have national distribution and fifty-four percent of wineries attempting to get wholesaler representation in specific states were unable to do so.¹¹⁷ Moreover, national wine publications are not going to write about wines produced by small wineries if their readers cannot buy them, thereby imposing another market restriction.¹¹⁸

California producers account for about ninety percent of total wine production in the United States¹¹⁹ with more than 3,000 wineries, about forty-nine percent of all the wineries in the United States.¹²⁰ Washington State is the second-largest producer¹²¹ with more than 500 wineries.¹²² New York State is the third largest wine producer¹²³ with about 300 wineries,¹²⁴ but Oregon has the third most wineries with about 400.¹²⁵ Five other states have more than 100 wineries: Texas, Virginia, Pennsylvania, Ohio, and Michigan.¹²⁶ But every state in the nation now has wineries.¹²⁷ For example, Missouri, which had no wineries after Prohibition, now has about seventy-five wineries in seven distinct wine regions.¹²⁸ About seventy percent of those wineries produces fewer than 5,000 gallons or 2,100 cases annually.¹²⁹ Iowa has seventy-two wineries that produce an average of about 500 cases of wine a year, an increase of about seventy-four percent between 2007 and 2009.¹³⁰

Colorado's first modern winery opened in 1968.¹³¹ In 1983 twenty acres of grapes were being cultivated in Colorado.¹³² Today there are about eighty wineries with 650 acres of grapes.¹³³ In Indiana, wineries were producing about 15,000 cases of wine in 1989; by 2006 thirty-three wineries in Indiana were producing more than 315,000 cases.¹³⁴ Between 2001 and 2006 those wineries donated about \$2,000 to Indiana politicians, most of it in 2006 from one of the larger wineries in the state.¹³⁵ Between 1997 and 2006, the largest wholesalers in Indiana contributed about \$313,000 to Indiana politicians.¹³⁶

An Internet search will reveal industry association and/or department of agriculture web sites for every state encouraging consumers to visit wineries. Most of the wineries are like Melville Vineyards in Lompoc, California which produces between 1,500 and 5,000 cases annually¹³⁷ or Chamard Vineyards in Connecticut that produces 6,000 cases annually on its twenty acres.¹³⁸ These small businesses are part of a growing national industry that is not being served by state regulations devised in another century to combat problems that are no longer relevant.

D. Internet Business

The Federal Trade Commission (FTC) declared in a report on the direct shipment of wine that its prohibition by states was “the single largest regulatory barrier to expanded e-commerce in wine.”¹³⁹ Although it is not clear what ramifications *Granholm* has had for e-commerce in general, many commentators have concluded that the decision is a good thing for Internet businesses as well as for free trade in general.¹⁴⁰ One concluded that had *Granholm* been decided in favor of the states, there would have been “dramatic negative consequences for the development of interstate commerce,” and that now Internet sellers of other products might be encouraged to challenge protectionist legislation.¹⁴¹ The direct-shipment-of-wine issue illustrates how technological change can cause shifting transaction costs.¹⁴² By using the Internet and eliminating the wholesaler-middleman to sell directly to consumers, small wine producers can increase their markets, and consumers can pay lower prices. This process of disintermediation is creating a revolution in the way products are bought and sold.¹⁴³

Although many small wineries rely primarily on sales at their physical locations to maintain their businesses, it is their interest in selling and shipping via the Internet that has allowed them to receive some financial support from large corporations. The Information Technology Association of America, the Internet Commerce Coalition, the Software and Information Industry Association and other groups interested in e-commerce filed an amicus curiae brief in *Granholm* supporting the wineries and consumers challenging state laws.¹⁴⁴ Among the corporate members of the amici organizations were AT&T, BellSouth, eBay, MCI, Time Warner, and Verizon.¹⁴⁵ They argued that a national common market envisioned by the nation’s founders would be destroyed if states enacted statutes that discriminated against out-of-staters in favor of local economic interests.¹⁴⁶ They urged respect for the importance of the negative Commerce Clause¹⁴⁷ “in preventing local protectionism from undermining th[e] national market and the benefits it brings to consumers and businesses throughout America.”¹⁴⁸

Small businesses have been able in recent times to participate in the national market by using mail order catalogues, 1-800 phone numbers, and the Internet, which has been the most successful method small businesses have ever had of reaching a world-wide market of customers.¹⁴⁹ As for the wine business, Internet sales have been less than ten percent of direct sales to consumers.¹⁵⁰ At least half of wineries’ direct sales take place in winery tasting rooms, and the two other main sources of direct sales are wine clubs and mailing lists, most of which are developed in tasting rooms.¹⁵¹

III. THE CARE ACTS OF 2010 AND 2011

In April 2010 then-Representative Bill Delahunt, Democrat of Massachusetts, introduced in the House of Representatives, for himself and Howard Coble, Republican of North Carolina, Jason Chaffetz, Republican of Utah, and Mike Quigley, Democrat of Illinois, a bill that would create the Comprehensive Alcohol Regulatory Effectiveness (CARE) Act.¹⁵² The bill had 136 co-sponsors.¹⁵³ Of the 136, thirty-six percent were from Florida, Texas, Illinois, and Pennsylvania, although representatives from those states make up only twenty-two percent of the House membership.¹⁵⁴ Southern Wine and Spirits, the largest wholesaler of wine and spirits in the nation, has its corporate headquarters in Florida.¹⁵⁵ In Texas, wholesalers distributed \$1.5 trillion worth of beer in 2008; in Pennsylvania, wholesalers distributed \$920 billion worth of beer in 2008.¹⁵⁶

The bill was drafted by NBWA staff.¹⁵⁷ Its purpose was to undo the implications of the United States Supreme Court’s 2005 decision in *Granholm v. Heald*¹⁵⁸ by exempting discriminatory state alcohol laws from Commerce Clause restrictions.

A. *The Granholm Decision*

The issue in *Granholm* was whether state laws in Michigan and New York that allowed in-state wineries to sell wine directly to consumers in the state but prohibited out-of-state wineries from doing likewise, or made it economically impractical for them to do so, were unconstitutional.¹⁵⁹ Specifically, while both states permitted in-state wineries to obtain licenses to ship directly to consumers, they required out-of-state wineries to comply with their three-tier systems and sell only to licensed wholesalers.¹⁶⁰

Justice Kennedy, delivering the opinion of the Court, concluded at the very beginning that the states’ differential treatment constitutes explicit discrimination against interstate commerce.¹⁶¹ He noted that the winery-plaintiffs were small wineries that relied on selling directly to consumers because they could not find wholesalers to represent them, and even if they could, the additional expense would not make the transactions economically viable for them.¹⁶² He then described the laws and litigation in the states.

In Michigan, wineries had to distribute their wine through wholesalers, but there was an exception that allowed Michigan wineries to obtain wine maker licenses that authorized direct shipment to Michigan consumers.¹⁶³ The plaintiffs in the Michigan suit were wine columnists Ray and Eleanor Heald of Troy, Michigan who were joined by Domaine Alfred, a San Luis Obispo, California winery. They contended that Michigan’s laws violated the Commerce Clause. The Michigan Beer and Wine Wholesalers Association joined the State as a defendant, arguing that Michigan’s regime was a valid exercise of power under the Twenty-First Amendment.¹⁶⁴ The District Court found for the State, and the Court of Appeals for the Sixth Circuit reversed.¹⁶⁵

In New York, too, wineries had to distribute their wine through wholesalers, but there was an exception that allowed New York wineries to obtain licenses that authorized direct shipment to New York consumers.¹⁶⁶ The difference compared to Michigan is that New York provided a way for out-of-state wineries to ship directly to New York consumers: by establishing a physical presence in New York, out-of-state wineries could have become licensed New York wineries.¹⁶⁷ The plaintiffs in the New York suit were Juanita Swedenburg and David Lucas and two New York consumers who were wine enthusiasts who attempted to buy out-of-state wines over the Internet but whose orders were declined by the wineries because of New York's prohibitory law. The plaintiffs won in the District Court, but the Court of Appeals for the Second Circuit reversed, holding for the State and wholesaler and retailer intervenors on Twenty-First Amendment grounds.¹⁶⁸ The Supreme Court concluded that, in effect, the New York law was as discriminatory as Michigan's because it would be prohibitive for a small winery to establish "a bricks-and-mortar" presence in another state, "let alone all 50."¹⁶⁹

After quickly concluding that "[s]tate laws that discriminate against interstate commerce face 'a virtually *per se* rule of invalidity,'" the Court then discussed the states' contentions that their direct shipment statutes are saved by section two of the Twenty-First Amendment.¹⁷⁰ The first part of the discussion was a lesson on the legislative and interpretive history of the Amendment which has been the subject of much conjecture. In 1890 the Supreme Court held in *Leisy v. Hardin*¹⁷¹ that states may not regulate the importation of goods, including alcoholic beverages, into one state from another.¹⁷² This decision was an imprecation for the Prohibitionists, and later that year Congress enacted the Wilson Act¹⁷³ which subjected alcoholic beverages being transported into a state to the laws of that state.¹⁷⁴ Congress did what the Court said states could not do by themselves. In 1898 the Court again weakened the prohibitory effect of state laws by holding that the Wilson Act applied only when liquor arrived at its destination in the state, not merely at the state's border which would prohibit importation entirely.¹⁷⁵ With the mail-order liquor trade thriving once again, Congress acted to plug the direct-shipment loophole by enacting the Webb-Kenyon Act¹⁷⁶ in 1913.¹⁷⁷ States could now prohibit shipments of alcohol to consumers for personal use as long as alcohol from out of state was treated the same as alcohol from within the state.¹⁷⁸ Justice Kennedy noted that President Taft, on the advice of his Attorney General, vetoed the Webb-Kenyon Act because of the suspicion that a law authorizing state regulation of direct shipments for personal use was "an unlawful delegation of Congress' Commerce Clause powers."¹⁷⁹ Congress overrode the veto, and the Court, in *Clark Distilling Co. v. Western Maryland Railway Co.*,¹⁸⁰ upheld the Act recognizing that its purpose was to eliminate the advantage that liquor traveling in interstate commerce would have over in-state liquor because of the "immunity characteristic [from compliance with state law] of interstate commerce."¹⁸¹

Justice Kennedy expressed the Court's disagreement with New York's and Michigan's position that the Webb-Kenyon Act removed all barriers to discriminatory state liquor regulations.¹⁸² He emphasized that the Webb-Kenyon Act did not repeal the Wilson Act which expressly prohibited state discrimination, and if the congressional intention was to authorize state discrimination against out-of-state liquor, Congress would have repealed the Wilson Act.¹⁸³ He then went on to discuss the wording of section two of the Twenty-First Amendment which is similar to the wording in the Wilson and Webb-Kenyon Acts. He asserted that the Amendment did not allow states to discriminate against out-of-staters, "a privilege they had not enjoyed at any earlier time,"¹⁸⁴ however, he then had to explain away *State Board of Equalization of California v. Young's Market Co.*,¹⁸⁵ in which the Court construed the Amendment as allowing states to treat imported liquors differently from domestic liquors.¹⁸⁶ He rationalized that difficulty by noting that *Young's Market* might not be a precedent for the present case because the opinion said that "'the case [did] not present a question of discrimination prohibited by the [C]ommerce [C]ause."¹⁸⁷ Moreover, the *Young's Market* Court did not consider the background of the Twenty-First Amendment, said Justice Kennedy.¹⁸⁸ Finally, Justice Kennedy opined that more recent cases demonstrate that the Twenty-First Amendment does not overcome the anti-discriminatory requirements of the Commerce Clause.¹⁸⁹

The most important precedent is *Bacchus Imports, Ltd. v. Dias*¹⁹⁰ in which the Court specifically stated that the Twenty-First Amendment does not remove state regulation of alcoholic beverages from a Commerce Clause compliance requirement.¹⁹¹ In that case the Court described the appropriate method of reconciling the two parts of the Constitution as trying pragmatically to harmonize federal and state powers by asking whether state principles implicated in any specific case are sufficiently similar to those underlying the Twenty-First Amendment to outweigh Commerce Clause principles that might be offended.¹⁹² Using that method, the *Bacchus* Court held that a Hawaii liquor tax imposed on wholesale sales of liquor but exempting certain locally produced beverages was an unconstitutional violation of the Commerce Clause.¹⁹³ Justice Kennedy concluded that *Bacchus* "forecloses any contention that section two of the Twenty-First Amendment immunizes discriminatory direct-shipping laws from Commerce Clause scrutiny."¹⁹⁴

B. CARE's Mechanisms for Avoiding Commerce Clause Prohibitions on Discrimination

Immediately after the *Granholm* decision, twenty-seven states permitted out-of-state wineries to ship directly to consumers.¹⁹⁵

Congress' purpose in the CARE bill was, once again, to provide a means for state regulators of alcoholic beverages to avoid the Commerce Clause's non-discrimination requirement so that in-state producers can ship directly to consumers, but out-of-state producers have to use wholesalers. The bill itself asserted that among its purposes were ensuring "the collection of all alcohol taxes,"¹⁹⁶ recognizing "that alcohol is different from other consumer products," and "reaffirm[ing] and protect[ing] the primary authority of States to regulate alcoholic beverages."¹⁹⁷ Its language amending the Wilson and

Webb-Kenyon Acts made it clear that its real purpose was to allow states to give rights to in-state producers of alcoholic beverages and then to deny those rights to out-of-state producers in order to protect wholesalers who make large contributions to their elected representatives.¹⁹⁸

Because Justice Kennedy emphasized Congress' failure to repeal the Wilson Act, CARE added to Webb-Kenyon the admonition that congressional silence does not mean Congress is imposing any Commerce Clause barriers on state regulation of alcohol.¹⁹⁹ CARE then permitted even facial discrimination against out-of-state producers as long as states could justify it.²⁰⁰ That means, of course, that if states trotted out the old stop-teen-drinking mantra, for example, they would be allowed to discriminate. To make it as hard as possible for out-of-state producers to attack discrimination, CARE accorded state law "a strong presumption of validity"²⁰¹ and imposed on out-of-staters "the burden of proving its invalidity by clear and convincing evidence."²⁰² Furthermore, state law that "burden[ed] interstate commerce" would be enforced unless out-of-state challengers could prove

by clear and convincing evidence that the law has *no* effect on the promotion of temperance, the establishment or maintenance of orderly alcoholic beverage markets, the collection of alcoholic beverage taxes, the structure of the state alcoholic beverage distribution system, or the restriction of access to alcoholic beverages by those under the legal drinking age.²⁰³

That is an almost impossible burden for challengers to overcome, especially when the potential challengers are small, individually-owned wineries and consumers who do not have big-business resources.

Finally, CARE amended the Wilson Act by maintaining the language subjecting out-of-state alcoholic beverages to the laws of a state into which it is imported, but eliminating the qualifier that allowed regulation only "to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory."²⁰⁴

C. The CARE Act of 2011

The CARE Act of 2010 bill died, without being voted out of the House Judiciary Committee, when the 111th Congress adjourned on December 22, 2010. On March 17, 2011 Representative Jason Chaffetz, Republican of Utah and a CARE sponsor, introduced a revised version of the bill called the Community Alcohol Regulatory Effectiveness Act of 2011 (CARE 2011).²⁰⁵

The purpose of the new bill is the same as the old one, to exempt discriminatory state alcohol laws from Commerce Clause restrictions so that states can prohibit the direct shipment of wine and other alcoholic beverages from out-of-state producers directly to consumers, bypassing wholesalers. The new bill, however, takes a more nuanced approach starting with the name of the bill that substitutes "Community" for "Comprehensive." For example, CARE 2011 continues to assert that "alcohol is different from other consumer products"²⁰⁶ and that "it should continue to be regulated by the States,"²⁰⁷ but it omits language proclaiming "the primary authority of States to regulate alcoholic beverages."²⁰⁸

CARE 2011, in addition to prohibiting facial discrimination against out-of-staters, also prohibits intentional discrimination, but changes the qualifier from "without justification"²⁰⁹ to "unless the State . . . can demonstrate that the challenged law advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."²¹⁰ Finally, CARE 2011 eliminated the burden of proof requiring anyone challenging a state alcoholic beverage law to prove by *clear and convincing evidence* that the law has *no* effect on temperance, collecting taxes, underage drinking, or the alcoholic beverage distribution system.²¹¹

D. CARE Acts - Pro and Con

Thirty-eight states allow, with varying rules and restrictions, wine producers to ship directly to consumers.²¹² Those are the states targeted by the CARE Acts, supported by wine and beer wholesalers and politicians who have received financial support from those groups.²¹³ In her testimony in congressional hearings supporting enactment of CARE, Nida Samona, the chairperson of the Michigan Liquor Control Commission trotted out the old under-age-drinking and intemperance arguments for state regulation of alcoholic beverages.²¹⁴ In fact, there is no evidence that ordering wine from out of state exacerbates either problem. Teenagers and alcoholics do not want to order expensive wine on the Internet and wait several weeks for it to arrive. Furthermore, the *Granholm* decision does nothing to limit state regulation of alcoholic beverages except to require that the Commerce Clause prohibition on discrimination against out-of-staters be followed.²¹⁵ States can be as restrictive as they like in regulating the sale and distribution of alcoholic beverages as long as they treat out-of-state producers the same way they treat in-state producers. It is hard to imagine why ordering wine on the Internet from an out-of-state winery would be any more harmful to teenagers than ordering wine on the Internet from an in-state winery.

Ms. Samona also invoked the inability of a state to ensure that out-of-staters are paying state taxes and following other state laws.²¹⁶ In fact, the tax-collection problem is no worse for wine than it is for any other out-of-state product purchased on the Internet. States actually have federal help in collecting taxes from, and having all state laws followed by, out-of-state wine producers because all wine producers are required to obtain a basic federal permit²¹⁷ which will be denied or revoked if a producer violates state law.²¹⁸ If that occurred, the winery would be out of business, so there is a strong incentive to obey state laws.

The new, post-*Granholm* argument that Ms. Samona emphasized was that state regulatory systems are “under siege” by lawsuits designed “to gut effective state regulation of alcoholic beverages.”²¹⁹ She complained that Michigan has spent several million dollars to defend such lawsuits.²²⁰ The expense argument could be made about every law that prohibits any kind of discrimination, but few would conclude that, therefore, states should be permitted to discriminate in impermissible ways. Her real argument is that the Twenty-First Amendment trumps the negative implications of the Commerce Clause, and Justice Kennedy made that argument clearly untenable.

If the too-much-litigation argument prevailed, states would have no limits on promulgating regulations that gave commercial advantages to in-state wineries and wholesalers, by requiring, for example, out-of-state wineries to pay special fees, provide state-mandated labels, reformulate their wines, and set consumer-unfriendly prices.²²¹ Multiply such controls by fifty, and it becomes clear that many small and medium-size wineries would be forced out of business. It is litigation or the threat of litigation that pressures state legislators to follow the law. The CARE Acts represents the epitome of state protectionism encouraged by political pressure of wholesalers’ political contributions. CARE 2011 would create a situation that is bad for consumers, bad for the thousands of small wineries across the country, and bad for the national economy.

E. Litigation Following *Granholm*

Wine regulation cases arising from the *Granholm* decision, of which there have been about two dozen reported, have demonstrated that courts are allowing states considerable leeway in regulating alcoholic beverages (as required by the Twenty-First Amendment), but are judging the real-world effect of regulations to strike down those that violate the negative implications of the Commerce Clause by discriminating against out-of-state producers.²²²

The most recent cases suggest that states are still trying to regulate in ways that favor their own wine producers and wholesalers. It is only through pursuing their rights through the courts that small wineries will be protected under the law. They certainly cannot match wholesalers in political contributions to legislators. In *Family Winemakers of California v. Jenkins*,²²³ for example, the United States Court of Appeals for the First Circuit had to decide if a Massachusetts statute enacted in 2006, in response to an existing statute being found unconstitutional following *Granholm*,²²⁴ violated the Commerce Clause.

Before *Granholm*, a Massachusetts’ statute permitted only in-state wineries to obtain farmer-winery licenses that allowed them to use a combination of distribution methods: through wholesalers, retailers, and shipping directly to consumers.²²⁵ After its invalidation for discriminating against out-of-state wineries, the Massachusetts legislature enacted a new statute that allows “small” wineries, defined as those producing no more than 30,000 gallons (about 12,000 cases) of wine annually, to get a small winery shipping license enabling them to distribute their wines in any of the three ways.²²⁶ “Large” wineries, on the other hand, must choose between using wholesalers or shipping directly to consumers; they cannot do both.²²⁷ Although the statute is not discriminatory on its face, the First Circuit’s detailed analysis made it clear that the statute was, in fact, protectionist and could not pass constitutional muster. First, there are no “large” wineries in Massachusetts although ninety-eight percent of the wine produced in the United States is produced by “large” wineries.²²⁸

The court concluded that the 30,000 gallon limit was chosen very purposefully to include all Massachusetts wineries and exclude others.²²⁹ The court was also convinced of the legislature’s bad intent because of a concern expressed in debates for a Massachusetts producer of fruit wine that would soon exceed the 30,000 limit for “small” wineries.²³⁰ To eliminate that problem the law that legislators passed exempted producers of non-grape fruit wine from the cap.²³¹ The court concluded that the new statute clearly gave a competitive advantage to all Massachusetts wineries (all of which are “small”), disadvantaging “large” wineries (none of which are in Massachusetts).²³² The court looked carefully into the realities of the three-tier system and noted that only the largest fifty to one hundred wineries have access to wholesalers because of the distribution “bottleneck.”²³³ In particular, the small “large” wineries (as defined by Massachusetts) would have a great deal of difficulty competing because many of them produce higher priced low-volume wines which are not favored by wholesalers.²³⁴ Because wholesalers have fixed costs for transportation, storage, and handling that do not depend on the price of the wine, they make a higher profit on lower-priced high-volume wines.²³⁵ If the small “large” wineries choose to ship directly to consumers, then under the Massachusetts law they would be prohibited from using a wholesaler, giving up any possible access to retailers and restaurants.²³⁶ The court concluded that the statute was designed to give a competitive advantage to Massachusetts wineries.²³⁷ In fact, then-Governor Romney vetoed the law and suggested, instead, that all wineries should be allowed to choose any combination of the three methods of distributing their wines, but the legislature overrode his veto.²³⁸ The First Circuit also held that the Twenty-First Amendment does not protect discriminatory statutes that are facially neutral, nor does it reduce the level of scrutiny given to such statutes.²³⁹

In a similar case in the Sixth Circuit,²⁴⁰ the Kentucky legislature revised its statutes regulating wine sales in response to *Granholm*.²⁴¹ The new statutes explicitly permitted both in-state and out-of-state wineries to apply for a “small farm winery” (defined as those producing no more than 50,000 gallons, or about 21,000 cases, of wine annually) license which would allow a winery to ship directly to a consumer if the consumer bought the wine in person at the winery, had it shipped by licensed common carrier, and limited the amount to two cases per customer per visit.²⁴² The new law also contained criminal penalties for a violation of these conditions by out-of-state wineries.²⁴³ The Sixth Circuit concluded that the in-person-purchase requirement made it financially and logistically impractical for Kentucky consumers to buy wine from out-

of-state small farm wineries that may be thousands of miles away, giving a clear competitive advantage to Kentucky wineries.²⁴⁴ Moreover, the Cherry Hill plaintiff averred that it cost fifty percent of its profit, or ten to fifteen dollars a bottle, to use a wholesaler which would give a significant advantage to Kentucky small farm wineries.²⁴⁵ The defendant wholesalers used the same old underage drinking and tax collection arguments to defend the discriminatory regulations, and the court, referencing *Granholm*, noted little evidence that minors ordering wine on the Internet was a problem or that states could not have non-discriminatory regulations to ensure the collection of taxes.²⁴⁶ The court noted that potential problems could be addressed in non-discriminatory ways by requiring age-verification upon delivery of wine and by requiring a permit and self-reporting, and utilizing federal remedies.²⁴⁷

On the other hand, while to the Sixth Circuit it was obvious that as a practical matter wineries within the state of Kentucky had an advantage over out-of-state wineries if the law required an in-person purchase before wineries could directly ship to consumers, the Ninth Circuit did not see that practical effect at all.²⁴⁸ In deciding whether Arizona's small winery and in-person exceptions to its three-tier requirement was discriminatory, the Ninth Circuit was impressed that plaintiff Black Starr Farms, a Michigan winery, offered no evidence that the exceptions created "an actual adverse effect."²⁴⁹ The court refused "to speculate" and take a "leap of faith" to infer such an effect.²⁵⁰ The court cited "the evidence" in the First Circuit's *Family Winemakers of California* decision²⁵¹ and the evidence presented by plaintiffs in the Sixth Circuit's *Cherry Hill Vineyards* decision.²⁵² The evidence as reported in *Cherry Hill Vineyards* seems very minimal and one of the lawyers for the plaintiffs was the same in both the Kentucky and Arizona cases, nevertheless, the difference in outcomes might be explained by a difference in the way the respective plaintiffs put on their cases. Perhaps having Kentucky consumers aver that they would have bought out-of-state wine but for the in-person requirement²⁵³ was particularly persuasive to the Sixth Circuit and there was no similar testimony in the Arizona case. Nevertheless, it is somewhat peculiar that the Ninth Circuit discussed and distinguished *Family Winemakers of California*, a case with a different statutory scheme at issue, in some detail, but merely cited *Cherry Hill Vineyards*, a case with the same in-person requirement at issue but the opposite result.²⁵⁴

The United States Court of Appeals for the Third Circuit decided the last relevant case of 2010, holding large portions of New Jersey's Alcoholic Beverage Control (ABC) Law unconstitutional.²⁵⁵ The plaintiffs in the case, *Freeman v. Corzine*,²⁵⁶ were New Jersey wine consumers and a California winery that produces about 12,000 cases of wine a year.²⁵⁷ The plaintiffs alleged that five parts of the New Jersey law were impermissibly discriminatory.²⁵⁸ First, the court concluded that customers of a class that is being discriminated against can suffer an injury in fact.²⁵⁹ The first statutes at issue allowed New Jersey's small wineries to sell directly to consumers at their wineries and at six salesrooms in other locations.²⁶⁰ Out-of-state wineries had to use New Jersey's three-tier system, selling only to wholesalers.²⁶¹ The court noted evidence that many out-of-state wineries tried but were unsuccessful in getting wholesalers to carry their wines, and that others did not try because they could not afford the cost of using a wholesaler.²⁶² There was also evidence of out-of-state wineries not trying to get their own wholesaler licenses because it was so expensive.²⁶³ The plaintiffs presented evidence that they attempted to order wine from a number of out-of-state wineries that refused to ship to them because of the ABC Law restrictions.²⁶⁴ The court held that the plaintiffs came within the "'zone of interests'" protected by the negative implications of the Commerce Clause even though they were not directly regulated by the ABC Laws.²⁶⁵ Their interests were to protect interstate commerce, a primary purpose of the Commerce Clause.²⁶⁶

The *Freeman* court cited *Granholm* for the proposition that the three-tier-system is legitimate but that the Twenty-First Amendment does not trump the Commerce Clause: states may not discriminate in favor of in-state producers in regulating the direct shipment of wine.²⁶⁷ The Third Circuit also held that New Jersey's law allowing in-state wineries, but not out-of-state wineries, to sell directly to retailers, bypassing wholesalers, was unconstitutional.²⁶⁸ The court also held that the provision putting a one-gallon cap on the amount of wine that a consumer could bring into New Jersey or requiring a consumer to get a special permit and pay a fee to bring in larger amounts, was an impermissible burden on interstate commerce when there was no corresponding burden on intrastate commerce.²⁶⁹ Finally, the court found the ABC reciprocity provision prohibiting the importation of wine from any state that did not allow the importation of New Jersey wine to be unconstitutional because it encourages just the kind of interstate rivalries the Commerce Clause was intended to avoid.²⁷⁰

Before the *Granholm* decision, New Jersey's ABC Law allowed in-state but not out-of-state wineries to ship directly to consumers.²⁷¹ Anticipating the *Granholm* decision, the New Jersey legislature changed the law to ban all direct shipment.²⁷² The *Freeman* plaintiffs challenged this complete ban, and the court rejected their challenge because the ban was not discriminatory.²⁷³ These cases and the CARE bill indicate that the "war" between small wineries and large wine wholesalers is far from over. It is therefore interesting to consider what the implications of the very controversial *Citizens United v. Federal Election Commission*²⁷⁴ decision may mean for this battle.

IV. THE WINE WARS AS AN EXAMPLE OF THE *CITIZENS UNITED* MISTAKE

Although the specific facts of *Citizens United*²⁷⁵ have nothing to do with the political battles between small wineries and large wine wholesalers,²⁷⁶ these battles suggest why the broad implications of the *Citizens United* decision are so dangerous for the democratic process. If the First Amendment requires that the political speech (which includes expenditures

for political ads) of large corporations must be treated the same as the political speech of natural persons, then what chance do “little guys” with few financial resources have in mounting successful campaigns supporting their positions?

A. *The Citizens United Case*

The issue in the case was whether section 441b of the Bipartisan Campaign Reform Act of 2002,²⁷⁷ making it a felony for corporations to expressly advocate for or against a candidate or to broadcast such communications within thirty days of a primary or sixty days of a general election, was unconstitutional for violating corporations’ First Amendment free speech rights.²⁷⁸ The issue arose notwithstanding the Act’s exemption for corporations’ PACs which could speak for the corporations about candidates within the prohibited period.²⁷⁹

Justice Kennedy, writing for the Court, held that section 441b’s restrictions on corporate independent expenditures were unconstitutional.²⁸⁰ To arrive at his conclusion, Justice Kennedy had to overturn the Court’s decision in *Austin v. Michigan Chamber of Commerce*,²⁸¹ a decision from which he had dissented.²⁸² In that case the issue was the constitutionality of a Michigan law that prohibited corporate independent expenditures for or against candidates for state office.²⁸³ Justice Marshall, writing for the Court in *Austin*, “found a compelling governmental interest in preventing ‘the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and have little or no correlation to the public’s support for the corporation’s political ideas.’”²⁸⁴

Justice Kennedy was not persuaded at all by the anti-distortion argument asserting that “[t]he First Amendment’s protections do not depend on the speaker’s ‘financial ability to engage in public discussion.’”²⁸⁵ He also refused to distinguish, for the purpose of determining First Amendment speech rights, between wealthy individuals and legally created corporations that under state law had limited liability, perpetual life, tax advantages, the right to disappear in bankruptcy, and other kinds of special treatment that natural persons do not receive.²⁸⁶ He argued that limiting the political speech of corporations would cause the “dangerous” result of limiting the political speech of media corporations,²⁸⁷ refusing to accept the legitimacy of a media exemption based on the special status the Constitution grants to the press. He further bemoaned the law’s banning of the “political speech of millions of associations of citizens,”²⁸⁸ when it is clear that corporate shareholders have no say at all in which political candidates corporate insiders decide to support or attack.²⁸⁹ He also invoked the small corporations that would lose rights under the law²⁹⁰ even though their shareholders can easily speak as individuals and are not likely to be mounting significant political ad campaigns.

Justice Stevens, writing for Justices Ginsburg, Breyer, and Sotomayor in dissent, asserted that it was wrong to insist that corporations be treated identically to natural persons, noting that corporations cannot vote or run for office.²⁹¹ Moreover, regulating speech according to the categorical identity of the speaker, e.g., students, prisoners, military personnel, government employees, has been accepted as justifiable to protect a legitimate governmental interest.²⁹²

Justice Stevens reminded that “the distinctive potential of corporations to corrupt the electoral process [has] long been recognized.”²⁹³ He expanded that idea by noting that the framers and their contemporaries thought that legislatures had to watch corporations closely and regulate them comprehensively to insure that they used their legal privileges “consistent with the public welfare.”²⁹⁴ As William Jennings Bryan stated to the Ohio 1912 Constitutional Convention,

The first thing to understand is the difference between the natural person and the fictitious person called a corporation. ... [T]he corporation is the handiwork of man and created to carry out a money-making policy... A corporation has no soul and cares nothing about the hereafter... A corporation has no rights except those given it by law. It can exercise no power except that conferred upon it by the people through legislation, and the people should be as free to withhold as to give, public interest and not private advantage being the end view.²⁹⁵

Congress has distinguished between corporate and individual spending on elections for more than a century.²⁹⁶ Furthermore, the Court has repeatedly supported the idea that corporations and unions have protected political speech when it is financed by PAC funds from the voluntary contributions of shareholders or members or employees rather than from general treasury funds over which shareholders and members have little or no real control.²⁹⁷

In addition to limiting the distorting effect of corporate spending on campaign ads, section 441b addressed “the governmental interest in preventing [corruption through the creation of political debts].”²⁹⁸ Justice Stevens noted “the myriad ways in which outside parties may induce an officeholder to confer a legislative benefit in direct response to, or anticipation of, some outlay of money the parties have made or will make on behalf of the officeholder.”²⁹⁹ Corporations have vast resources compared to individuals, and there is a substantial body of evidence that when they paid for ads supporting political candidates, they were given special access after their candidates prevailed in elections.³⁰⁰ In his 1837 State of the Union address, President Martin Van Buren said,

I am more than ever convinced of the dangers to which the free and unbiased exercise of political opinion—the only sure foundation and safeguard of republican government—would be exposed by any further increase of the already overgrown influence of corporate authorities.³⁰¹

B. Implications for Small Wineries, Large Wholesalers, and Consumers

The wine wars continue because they involve two groups, small winery owners and consumers, that are relatively large collectively but whose members individually have low economic and political resources. The third group, the alcoholic beverage wholesaler corporations, has relatively few members, but they are wealthy with substantial economic, organizational, and political resources to promote their agenda. As the first two groups have become more numerous and better organized, they have chipped away at economic disadvantages the three-tier regime has imposed on them, most notably by bringing and winning the *Granholm* case expanding opportunities for direct shipping to consumers. The result, however, was quite predictable: the wholesalers got widespread political support for the CARE Act bill that undoes *Granholm* and benefits no one but them.

Congress' attempts to regulate corporate spending on elections are a recognition that the political playing field cannot be level when the adversaries are corporations, on the one hand, and on the other, individuals acting as consumers or as proprietors of small businesses. The Supreme Court has made it clear over the last thirty-five years that there is some First Amendment protection for corporate speech,³⁰² but the Court's current path indicates that its majority now believes that fictitious corporate "persons" really are the equivalent of natural persons and, therefore, the speech of corporations cannot be regulated any more strictly than that of real people. The CARE Act bill illustrates why that is an unfortunate interpretation of First Amendment protection against government control. Corporations have the wherewithal to buy elections for officials who will support corporate interests against those of all other persons. Corporate political speech represents decisions made by and the interests of a small group of managers, not their shareholders necessarily. It is corporate PACs that collect money from employees, shareholders, and others that can actually represent the views of a wide range of willing persons.

Former Chief Justice Rehnquist, clearly a conservative but one who could not be counted on to be mindlessly pro-business, noted that the "Court drew a distinction between the First Amendment rights of corporations and those of natural persons."³⁰³ He reminded his colleagues that the Court did not grant corporations "'the full measure of rights that individuals enjoy under the First Amendment.' . . . The insistence on treating identically for constitutional purposes entities that are demonstrably different is as great a jurisprudential sin as treating differently those entities which are the same."³⁰⁴

The original case granting some First Amendment speech protection to businesses, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*³⁰⁵ was a consumer protection case, not a corporation protection case.³⁰⁶ The reason the Supreme Court in that case saw fit to find some constitutional rights for commercial speech was not because corporations have rights as "persons," but because the speech at issue, advertising the prices of prescription drugs, was valuable to consumers.³⁰⁷

What the *Citizens United* opinion suggests for the wine wars is that the position valuable to society is alcoholic beverage wholesalers' being able to use their great financial resources to influence elections so that they can maintain the three-tier system of distribution even though its purpose no longer makes sense and benefits no one but wholesalers. In fact, the position that benefits the nation's economy is the one offered by small winery owners who cannot afford distributors and the three-tier system. All states now provide funding for wineries because they create jobs in rural areas, they keep families on their farms, they attract tourists, and they raise revenue through alcohol taxes.³⁰⁸ It can take decades for new wineries to turn a profit, nevertheless, their owners are usually very committed to their businesses, and states see them as a smart investment.³⁰⁹ While soybean farmers will typically realize \$200 an acre, grape growers can expect \$4,200 an acre.³¹⁰ The former will result in a lost farm; the latter may pay for the farm's upkeep. It is difficult to rationalize requiring these winemakers to use distributors who may not even be willing to represent them and, if they are, will retain such a large proportion of the price. The only rationale is the wealth and resulting political power of the distributors to maintain the status quo.

V. CONCLUSION

The decades-old battle between consumers and small wineries on the one hand, and alcoholic beverage wholesalers on the other should have been winding to a close with the Supreme Court's clear decision in *Granholm* holding that the Commerce Clause is not completely defeated by the Twenty-First Amendment. States should be deciding that it is good business and good policy for their consumers, their small wineries, and their own tax revenue to amend the three-tier system in order to allow small wineries, both in-state and out-of-state, to ship directly to consumers. The under-age-drinking and difficulty-in-collecting-taxes arguments against direct shipment have no evidentiary support. The only reasons the battle continues are the economic interests and the political power of alcoholic beverage wholesale distributors. *Citizens United* gives wholesalers another tool to maintain a system that no longer makes sense. In fact, they can pursue their purpose with their PACs. To give these corporations the same First Amendment protection as natural persons is to start believing legal fictions created for wholly different purposes. A *Slate* editor has dubbed this opinion "The Pinocchio Project," "as the Supreme Court turns a corporation into a real live boy."³¹¹

FOOTNOTES

¹See, e.g., James Surowiecki, *The Financial Page: Masters of Main Street*, THE NEW YORKER, July 12 & 19, 2010, at 33 (noting that 2010 congressional financial-reform bill does nothing for consumer, “the littlest guy of all;” although Congress claimed to be helping “Main Street,” its bill helped very large and powerful interest group of businesspeople to detriment of consumers who have no equivalent lobby).

²130 S. Ct. 876 (2010).

³See, e.g., Joy Arnold, *Corporate Personhood: A Danger to Democracy*, NORTH OF CENTER, Feb. 13, 2010, available at noclexington.com/?p=74; *Bill Moyers' Journal* (PBS television broadcast, Jan. 29, 2010) (interviewing Zephyr Teachout and Monica Youn); *Editorial: The Court's Blow to Democracy*, N.Y. TIMES, Jan. 22, 2010, at A30; Rick Ungar, *What Did the Founding Fathers Really Think about Corporations and Their Rights?*, TRUE/SLANT, JAN. 22, 2010, at trueslant.co/rickungar/2010/01/22/what-did-the-founding-fathers-really-think-about-corporations-and-their-rights/.

⁴Although this article is focusing on the boutique wine industry, problems, regulations, and large wholesalers are often the same for alcoholic beverages in general.

⁵Many articles have recounted this information, so the purpose here is to provide just enough of a background for an understanding of the importance of not allowing large corporations to overwhelm small businesses and consumers in the political process. See, e.g., Susan Lorde Martin, *Changing the Law: Update from the Wine War*, 17 J. L. & POLITICS 63 (2001); Susan Lorde Martin, *Wine Wars—Direct Shipment of Wine: The Twenty-First Amendment, the Commerce Clause, and Consumers' Rights*, 38 AMER. BUS. L. J. 1 (2000); Rachel M. Perkins, *Notes, Wine Wars: How We Have Painted Ourselves into a Regulatory Corner*, 12 VAND. J. ENT. & TECH. L. 397 (2010); Christopher G. Sparks, *Comment, Out-of-State Wine Retailers Corked: How the Illinois General Assembly Limits Direct Wine Shipments from Out-of-State Retailers to Illinois Oenophiles and Why the Commerce Clause Will Not Protect Them*, 30 N. ILL. U.L. REV. 481 (2010).

⁶544 U.S. 460 (2005).

⁷*Id.* at 465-66.

⁸Daniel Okrent, *LAST CALL - THE RISE AND FALL OF PROHIBITION* 7 (2010).

⁹*Id.*

¹⁰*Id.* at 25-26.

¹¹*Id.* at 26.

¹²*Id.* at 30.

¹³*Id.* at 54.

¹⁴*Id.* at 358.

¹⁵*Id.*

¹⁶*Id.* 17 374.

¹⁷*Id.* at 272-73.

¹⁸FTC, *POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE* 6 (2003).

²⁰*Id.*

²¹*Id.*

²²79 CONG. REC. 11718-19 (1935).

²³*Id.* at 11720.

²⁴*Nat'l Distributing Co., Inc.*, 626 F.2d at 1007.

²⁵*Id.* at 1008.

²⁶Okrent, *supra* note 8, at 358.

²⁷*Nat'l Distributing Co., Inc.*, 626 F.2d at 1009.

²⁸See, e.g., *Actmedia, Inc. v. Stroh*, 830 F.2d 957, 960-61 (9th Cir. 1986) (describing reasons and attempts for eliminating tied-house arrangements).

²⁹Kenneth M. Braun *Grapes of Wrath*, MICHIGAN CAPITOL CONFIDENTIAL, Jan./Feb. 2009, at 6.

³⁰Erik D. Price, *Time to Untie the House? Revisiting the Historical Justifications of Washington's Three-Tier System Challenged by Costco v. Washington State Liquor Control Board*, WASH. STATE BAR NEWS, June 2004. Estimates of the number of wholesalers varies. In the *Granholm* opinion Justice Kennedy cites the Cato Institute for the proposition that the number of wholesalers dropped from 1,600 to 600 between 1984 and 2002. 544 U.S. at 467.

³¹Arthur E. Foulkes, *Hoosier Wineries, Wholesalers Locked in Legal, Legislative Battle*, at tribstar.com/local/x1155676612/Hoosier-winerries-wholesalers-locked-in-legal-legislative-battle (Mar. 3, 2007).

³²Alia Akkam & Kristen Wolfe Bieler, *Decade in Review 2000-2009: A Transformation of the Industry*, BEVERAGE MEDIA, Jan. 2010, available at www.bevnetwork.com/monthly_issue_article.asp?ID=396. The five are Southern Wine & Spirits, Republic National Distributing Company, Charmer Sunbelt Group, Glazer's, and Young's Market. *Id.*

³³See Lynne Kiesling, *Victory for Liberty and Oenophiles*, Nov. 13, 2002, at 1, at www.knowledgeproblem.com/archives/000393.html (Kiesling is Senior Lecturer of Economics at Northwestern University).

³⁴Veseth, *supra* note 30. See also Megan Headley, *Kill Bill: Vol. 5034*, CHARLOTTESVILLE NEWS & ARTS, May 11-17, 2010, available at www.c-ville.com/index.php?cat=11431101084614805&ShowAResponseToHR5034 (noting that in last 30 years wine production has increased 500 percent while wine distribution has decreased by 50 percent). By 2011 there are more than 6,000 wineries producing more than 7,000 brands in the United States. See, e.g., *Number of California Wineries*, THE WINE INSTITUTE, Apr. 1, 2010, available at wineinstitute.org/resources/statistics/article124 (mentioning 6,700 wineries in 2010).

³⁵Veseth, *supra* note 30.

³⁶For example, Bronco Wines can sell its Charles Shaw brand (Two-Buck-Chuck) directly to Trader Joe's in California so California consumers pay \$1.99 for it; whereas, in Washington State where Bronco has to sell to a wholesaler, the same wine costs \$2.99, the extra dollar paying for the distribution tier. Veseth, *supra* note 30.

³⁷Kiesling, *supra* note 33.

³⁸Center for Responsive Politics, *Heavy Hitters: Top All-Time Donors, 1989-2010*, at www.opensecrets.org/orgs/list.php?order=A (last visited July 11, 2010). During that period, it gave more than Microsoft, JP Morgan Chase & Co., and Time Warner. *Id.*

³⁹Robert Taylor and Ben O'Donnell, *Support for Direct Shipping Restrictions Builds in Congress*, at winespectator.com/webfeature/show/id/42823 (May 27, 2010).

⁴⁰Jennifer Dixon, *Three-Tier System: State Law Is at Root of Wholesale Power*, DETROIT FREE PRESS, Feb. 10, 2005, available at www.freep.com [hereinafter Dixon, *Three-Tier System*]. The director of enforcement for Michigan's Liquor Control Commission has said that Michigan has not revoked a wholesaler's license for at least twenty-seven years. *Id.*

⁴¹*Id.*

⁴²About MBWWA, MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION, at www.mbawwa.org/AboutUs.aspx (last visited July 27, 2010).

⁴³Our Core Issues, MICHIGAN BEER & WINE WHOLESALERS ASSOCIATION, at www.mbawwa.org/CoreIssues.aspx (last visited July 27, 2010).

⁴⁴Braun, *supra* note 29.

⁴⁵Jennifer Dixon & Victoria Turk, *Under the Influence: Part 2 of 3: Beer, Wine Wholesalers Are Life of Politicians' Parties*, DETROIT FREE PRESS, Feb. 11, 2005, at www.freep.com.

⁴⁶Brian Dickerson, *Don't Place an Order for Wine Just Yet*, DETROIT FREE PRESS, May 23, 2005, at www.freep.com.

⁴⁷Jennifer Dixon, *Wine Shipments Face Their Day in High Court*, DETROIT FREE PRESS, Dec. 7, 2004, available at www.freep.com [hereinafter Dixon, *Wine Shipments*].

⁴⁸*Id.*

⁴⁹Braun, *supra* note 29, at 7.

⁵⁰Braun, *supra* note 29, at 7.

⁵¹The TTB is a bureau in the Department of the Treasury. Alcohol & Tobacco Tax & Trade Bureau, *About TTB*, at www.ttb.gov/about/index.shtml (last visited Sept. 1, 2010). It has two main purposes: collecting excise taxes and protecting the public by seeing that sellers of alcohol, tobacco, firearms, and ammunition follow the law in labeling, advertising, and marketing. *Id.*

⁵²H. Lee Murphy, *Feds Settle Wine Kickback Case in Illinois*, at www.winespectator.com/webfeature/show/id/Feds-Settle-Wine-Kickback-Case-in-Illinois/ (Jan. 21 2009).

⁵³*Id.*

⁵⁴*Id.*

⁵⁵*Id.*

⁵⁶*Generations: Wholesale Legends Pass the Torch*, THE FREE LIBRARY, July 1, 2008, at thefreelibrary.com/_/print/PrintArticle.aspx?id=182467837; *About WBG*, at www.wirtzbeveragegroup.com (last visited July 26, 2010).

⁵⁷*Wirtz Beverage Iowa*, at www.wirtzbeveragegroup.com/iowa.asp (last visited July 26, 2010).

⁵⁸*About Wirtz Beverage Minnesota*, at www.wirtzbeveragegroup.com/minnesota.asp (last visited July 26, 2010).

⁵⁹*About Wirtz Beverage Nevada*, at www.wirtzbeveragegroup.com/nevada.asp (last visited July 26, 2010).

⁶⁰*Wirtz Beverage Nevada*, at www.wirtzbeveragegroup.com/wisconsin.asp (last visited July 26, 2010).

- ⁶¹ *Diageo and Wirtz Beverage Group Renew Distribution Agreement*, MODERN DISTILLERY AGE, Dec. 7, 2009, at 1, available at www.distilleryage.com/MDA_12_07_09.pdf. Among Diageo's brands are Sterling Vineyard, Beaulieu Vineyards, Smirnoff, Johnnie Walker, Baileys, Crown Royal, Jose Cuervo, and Tanqueray. *Id.*
- ⁶² *Diageo Plans to Launch Local Brands in India*, ECON. TIMES, July 15, 2010, available at economictimes.indiatimes.com/articleshow/6169598.cms?prtpage=1.
- ⁶³ *Generations*, *supra* note 56.
- ⁶⁴ *Generations*, *supra* note 56.
- ⁶⁵ *Generations*, *supra* note 56.
- ⁶⁶ *Generations*, *supra* note 56.
- ⁶⁷ David Sterrett, *Rocky's Next Power Play*, CRAIN'S CHICAGO BUSINESS, Dec. 7, 2009, at www.chicagobusiness.com/apps/pbcs.dll/article?AID=9999100032741.
- ⁶⁸ Illinois Campaign for Political Reform, *Wine and Spirits Distributors*, at ilcampaign.org/patrons/wine-and-spirits (last revised June 2009).
- ⁶⁹ Illinois Campaign for Political Reform, *Wine & Spirits Distributors of Illinois*, at www.ilcampaign.org/sunshine/patrons/profiles/WSDI.asp (last revised Aug. 2004).
- ⁷⁰ 1999 Ill. Laws 91-2.
- ⁷¹ Steve Bruesewitz, *Commentary: Frango Logic*, CHI. TRIB., Nov. 28, 1999, at 18.
- ⁷² Illinois Campaign for Political Reform, *Tip the Bar: Liquor Bill Draws Continuing Surge in Campaign Contributions*, at ilcampaign.org/tip-the-bar (last visited July 29, 2010).
- ⁷³ 815 ILL. COMP. STAT. 725/1 to 725/99 (1999).
- ⁷⁴ *Kendall-Jackson Winery, Ltd. v. Branson*, 82 F. Supp. 2d 844, 848 (N.D. Ill. 2000).
- ⁷⁵ Douglas Holt, *New Round of Liquor Price Hikes Announced*, CHI. TRIB., Sept. 25, 1999, at 1.
- ⁷⁶ Illinois Campaign for Political Reform, *Tip the Bar: Liquor Bill Draws Continuing Surge in Campaign Contributions*, at ilcampaign.org/tip-the-bar (last visited July 29, 2010).
- ⁷⁷ *Kendall-Jackson Winery, Ltd. v. Branson*, 82 F. Supp. 2d 844, 848-49 (N.D. Ill. 2000).
- ⁷⁸ *Id.*
- ⁷⁹ *Kendall-Jackson Winery, Ltd. v. Branson*, 82 F. Supp. 2d 844 (N.D. Ill. 2000).
- ⁸⁰ 815 ILL. COMP. STAT. 725/1 to 725/99 (2004) (indicating repeal effective Aug. 5, 2002).
- ⁸¹ See, e.g., Kevin McDermott, *Illinois Might Still Restrict Wine Shipments*, ST. LOUIS POST-DISPATCH, May 17, 2005, available at www.stltoday.com.
- ⁸² 235 ILL. COMP. STAT. ANN. 5/6-29 (West 2010) (effective June 1, 2008).
- ⁸³ Southern Wine & Spirits, *A Tradition of Service, a Commitment to Excellence, a Record of Growth* at www.southernwine.com (July 26, 2010).
- ⁸⁴ Kristen Wolfe Bieler, *Inside Southern*, BEVERAGE MEDIA, Oct. 2008, available at www.bevnetwork.com/pdf/Oct08_inside.pdf.
- ⁸⁵ *The World's Richest People 2006*, FORBES, at 27, available at http://pdf.forbes.com/lists/2006/10/Rank_27.html.
- ⁸⁶ Southern Wine & Spirits, *A Tradition*, *supra* note 83.
- ⁸⁷ Institute on Money in State Politics, *Follow the Money*, at [www.followthemoney.org/database/search.phtml?searchbox="SOUTHERN+WINE+%26+SPIRITS"](http://www.followthemoney.org/database/search.phtml?searchbox=) (last visited Sept. 7, 2010).
- ⁸⁸ Jerry Hirsch, *Is Wholesale Change in Alcohol Pricing on Tap?* LOS ANGELES TIMES, Apr. 10, 2005, available at www.latimes.com.
- ⁸⁹ *Id.*
- ⁹⁰ See, e.g., Brief for Wine and Spirits Wholesalers of America, et al., 2004 WL 1743943, at *4, *17, *Granholt v. Heald*, 125 S. Ct. 1885 (2005).
- ⁹¹ Dixon, *Wine Shipments*, *supra* note 47.
- ⁹² Dixon, *Wine Shipments*, *supra* note 47.
- ⁹³ Dixon, *Wine Shipments*, *supra* note 47.
- ⁹⁴ *2009 California Wine Sales*, THE WINE INSTITUTE, 2010, available at wineinstitute.org/resources/statistics/article122.
- ⁹⁵ *Number of California Wineries*, THE WINE INSTITUTE, Apr. 1, 2010, available at wineinstitute.org/resources/statistics/article124.

- ⁹⁶*The Top 30 U.S. Wine Companies*, WINE BUS. MONTHLY, Feb. 15, 2009, available at winebusiness.com/wbm/?go=getArticle&dataId=62891.
- ⁹⁷*Id.*
- ⁹⁸*Id.*
- ⁹⁹Rachael E. Goodhue et al., *California Wine Industry Evolving to Compete in 21st Century*, 62 CAL. AGRIC. 12 (Jan.-Mar. 2008). Some industry sources consider wineries to be “small” if they produce 50,000 or fewer cases. *Family Winemakers of Cal. v. Jenkins*, 592 F.3d 1, 15 (1st Cir. 2010).
- ¹⁰⁰Barbara Insel, *Inside the U.S. Wine Industry*, BUS. ECON., Jan. 1, 2008, available at www.allbusiness.com/banking-finance/banking-institutions-systems/11408494-1.html.
- ¹⁰¹*Id.*
- ¹⁰²Institute for Justice, *Litigation Background - Uncorking Freedom: Challenging Protectionist Restraints on Direct Interstate Wine Shipments to Consumers*, at www.ij.org/index.php?option=com_content&task=view&id=803&Itemid=165 (last visited Aug. 12, 2010) (The Institute for Justice is a non-profit public interest law firm that litigated the *Granholm* case on behalf of these plaintiffs.).
- ¹⁰³*Id.*
- ¹⁰⁴*Id.*
- ¹⁰⁵*Id.*
- ¹⁰⁶*Id.*
- ¹⁰⁷*Id.*
- ¹⁰⁸Alix M. Freedman & John R. Emshwiller, *Vintage System: Big Liquor Wholesaler Finds Change Stalking Its Very Private World*, WALL ST. J., Oct. 4, 1999, at A1. See also Jason Haas, *Wine Markups at the Wholesale, Restaurant and Retail Level*, at tablascreek.typepad.com/tablas/2009/02/wine-markups-at-the-wholesale-restaurant-and-retail-level.html (Feb. 16, 2009) (explaining how system guarantees wholesalers substantial profit while wineries and retailers struggle).
- ¹⁰⁹*Florida Wine Company Goes Online to Boost Sales*, MIAMI HERALD, Dec. 17, 1999, available at 1999 WL 28718088.
- ¹¹⁰OHIO ADMIN. CODE § 4301:1-1-03(C) (2007).
- ¹¹¹Richard Galant, *Money and Power—Exec Eyes Bloom of Wine Online*, NEWSDAY, May 23, 2005, at A23.
- ¹¹²Caryn Eve Murray, *Cheers—The Toast of Our Towns*, NEWSDAY, Dec. 8, 2000, at G3. Now Bedell’s annual production is about 10,000 to 12,000 cases. *Bedell Cellars, Cutchogue*, at www.easternwinereview.com/2010/03/06/bedell-cellars-cutchogue (Mar. 6, 2010).
- ¹¹³Galant, *supra* note 111.
- ¹¹⁴See generally, *Direct Shipping of Wine: Fostering Consumer Choice and Fair Competition: Hearing Before the U.S. Senate Comm. On the Judiciary*, 106th Cong. (1999), available at 1999 WL 130100 (statement of Hon. Mike Thompson).
- ¹¹⁵Carlo DeVito, *East Coast Wineries Interview with James Silver of Peconic Bay Winery*, at eastcoastwineries.blogspot.com/2010/08/east-coast-wineeries-interview-with.html [sic] (Aug. 30, 2010).
- ¹¹⁶*Id.*
- ¹¹⁷*Protect Consumer Choice: Voice Your Opposition to HR 5034*, at www.freethegrapes.org/index.php?q=5034 (last visited Sept. 10, 2010)
- ¹¹⁸*Editorial: Good Wine Choice on Wine Sales*, NEWSDAY, May 18, 2005, at A36.
- ¹¹⁹*US/California Wine Production*, at www.wineinstitute.org/resources/statistics/article83 (Mar. 25, 2010). Seventy-one percent of California’s 1,049 wineries produced fewer than 25,000 cases of wine in 2004; about 80% of the state’s wineries produced fewer than 50,000 cases of wine. James Temple, *A Win for Wine—Producers Large, Small Raise Glass*, CONTRA COSTA (CAL.)TIMES, May 17, 2005, at A1, A23. More than half of the 284 wineries in the Napa Valley produce 10,000 or fewer cases a year. *Id.*
- ¹²⁰Amber McKenny, *Number of U. S. Wineries Tops 6,100*, WINE BUS. MONTHLY, Feb. 15, 2009, available at www.winebusiness.com/wbm/?go=getArticle&dataId=62895.
- ¹²¹*Washington Wine*, at www.washingtonwine.org/washington-wine (last visited Sept. 9, 2010).
- ¹²²McKenny, *supra* note 120.
- ¹²³*U.S. Wine Producing Regions*, at www.savvywino.com/guide_wine-us_wine_producing_regions.aspx (2010).
- ¹²⁴*Search/Winery*, at www.newyorkwines.org/Winery/index.ashx (last visited Sept. 10, 2010). In the past twenty-five years, New York’s wine industry has grown about tenfold from about thirty small wineries. *NY Urged to Pass a Wine Bill*, NEWSDAY, May 20, 2005, at A59.
- ¹²⁵McKenny, *supra* note 120.

¹²⁶McKenny, *supra* note 120.

¹²⁷*U.S. Wine Producing Regions*, *supra* note 123.

¹²⁸*Missouri Wineries*, at www.missouriwinecountry.com/wineries/ (last visited Sept. 10, 2010).

¹²⁹*Winery Case Study*, at www.slideshare.net/spopova/final-presentation-1995825 (2009).

¹³⁰*Wineries Strive to Hit 'Right Notes,'* DES MOINES REGISTER, May 23, 2010, at E1.

¹³¹*Chronology of Events*, at www.coloradowine.com (2007).

¹³²*Grape Growing in Colorado*, at www.coloradowine.com/grape_growing.html (2007).

¹³³*Id.*

¹³⁴Arthur E. Foulkes, *Hoosier Wineries, Wholesalers Locked in Legal, Legislative Battle*, at tribstar.com/local/x1155676612/Hoosier-wineries-wholesalers-locked-in-legal-legislative-battle (Mar. 3, 2007).

¹³⁵*Id.*

¹³⁶*Id.*

¹³⁷*Wine Tasting in Santa Barbara*, at www.cabrillo-inn.com/Wine-Tasting-Santa-Barbara-County.shtml (Sept. 13, 2010).

¹³⁸*Chamard Vineyards*, at www.chamard.com (2006).

¹³⁹FTC, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE 14 (2003).

¹⁴⁰*See, e.g., Internet Wine Sales Ruling Victory for Trade*, FORT WAYNE [IND.] J. GAZETTE, May 17, 2005, at www.fortwayne.com (Scripps Howard editorial).

¹⁴¹Molly McDonough, *States Mull the Wine Decision*, ABA JOURNAL REPORT, May 20, 2005, at www.abanet.org/journal/ereport/my20wine.html (Statement by Todd J. Zywicki, professor at George Mason School of Law).

¹⁴²*See Lynne Kiesling, Victory for Liberty and Oenophiles*, Nov. 13, 2002, at 3, at www.knowledgeproblem.com/archives/000393.html

¹⁴³*Disintermediation*, Feb. 12, 2003, at www.webopedia.com/TERM/D/distermediation.html.

¹⁴⁴Brief Amicus Curiae of American Homeowners Alliance, et al., 2004 WL 2155306 (2004), *Granholm v. Heald*, 125 S. Ct. 1885 (2005).

¹⁴⁵*Id.*

¹⁴⁶*Id.* at *4.

¹⁴⁷The Supreme Court has noted that despite the Constitution's express grant to Congress of the power to "regulate Commerce . . . among the several states," the Court has consistently held that the language contains a negative (or dormant) Commerce Clause that serves the

purpose of preventing a State from retreating into economic isolation or jeopardizing the welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear. The provision thus 'reflects a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of confederation.'

Oklahoma Tax Comm'n v. Jefferson Lines, Inc., 514 U.S. 175 (1995).

Thus, the Commerce Clause not only grants power to Congress but it limits the power of states. The limitations carry out the basic purpose of the Commerce Clause: to create a "federal free trade unit" that would encourage the "material success . . . [and] the peace and safety of the Union." *H.P. Hood & Sons, Inc. v. DuMond*, 336 U.S. 525, 538, 533 (1949).

¹⁴⁸Brief Amicus Curiae of American Homeowners Alliance, et al., 2004 WL 2155306 (2004), at *5.

¹⁴⁹

Id. at *6-7.

¹⁵⁰Barbara Insel, *Inside the U.S. Wine Industry*, BUS. ECON., Jan. 1, 2008, available at www.allbusiness.com/banking-finance/banking-institutions-systems/11408494-1.html.

¹⁵¹*Id.*

¹⁵²H.R. 5034, 111th Cong. (2010). The bill died when the 111th Congress adjourned. It was reintroduced, with changes, as the Community Alcohol Regulatory Effectiveness Act of 2011 in H.R. 1161, 112th Cong. (2011). See text at section III, C for details about the new bill.

¹⁵³

Id., available at thomas.loc.gov/cgi-bin/bdquery/z?d111:HR05034:@@P.

¹⁵⁴*Id.*

¹⁵⁵Robert Taylor and Ben O'Donnell, *Support for Direct Shipping Restrictions Builds in Congress*, at winespectator.com/webfeature/show/id/42823 (May 27, 2010).

¹⁵⁶*Id.*

¹⁵⁷Jennifer Youssef and Jaclyn Trop, *Congress Plan May Dry Up Flow of Direct Wine Shipments*, DETROIT NEWS, May 15, 2010, available at detnews.com/article/20100515/BIZ/5150308&template=printart; Robert Taylor and Ben O'Donnell, *Support for Direct Shipping Restrictions Builds in Congress*, at winespectator.com/webfeature/show/id/42823 (May 27, 2010).

¹⁵⁸544 U.S. 460 (2005).

¹⁵⁹*Id.* at 465-66.

¹⁶⁰*Id.*

¹⁶¹*Id.*

¹⁶²*Id.* at 466-67.

¹⁶³*Id.* at 467-68.

¹⁶⁴*Id.*

¹⁶⁵*Heald v. Engler*, 342 F.3d 517 (2003).

¹⁶⁶N.Y. BEV. CONT. LAW ANN. § 76-a(3) (West Supp. 2005).

¹⁶⁷N.Y. BEV. CONT. LAW ANN. § 3(37) (West Supp. 2005).

¹⁶⁸*Granholm*, 544 U.S. at 466.

¹⁶⁹*Id.* at 475.

¹⁷⁰*Id.* at 476-77. Section 2 of the Twenty-First Amendment says: “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.” U.S. CONST. Amend. XXI, § 2.

¹⁷¹10 S. Ct. 681 (1890).

¹⁷²*Id.* at 687-88.

¹⁷³Ch. 728, 26 Stat. 313 (1890) (codified at 27 U.S.C. § 121 (1898)) (also known as the Original Packages Act).

¹⁷⁴*Id.*

¹⁷⁵*Rhodes v. Iowa*, 170 U.S. 412, 421-22 (1898).

¹⁷⁶Ch. 90, 37 Stat. 699 (1913) (reenacted without change at ch. 740 § 202(b), 49 stat. 877 (1935) (codified at 27 U.S.C. § 122 (1998))).

¹⁷⁷*Granholm*, 544 U.S. at 481.

¹⁷⁸*Id.* at 482-83.

¹⁷⁹*Id.*

¹⁸⁰242 U.S. 311 (1917).

¹⁸¹*Id.* at 324-25.

¹⁸²*Granholm*, 544 U.S. at 482.

¹⁸³*Id.* at 483.

¹⁸⁴*Id.* at 484-85.

¹⁸⁵299 U.S. 59 (1936).

¹⁸⁶*Id.* at 62.

¹⁸⁷*Granholm*, 544 U.S. at 485 (quoting *Young's Market*, 299 U.S. at 62.).

¹⁸⁸*Id.*

¹⁸⁹*Id.* at 487.

¹⁹⁰468 U.S. 263 (1984).

¹⁹¹*Id.* at 275.

¹⁹²*Id.*

¹⁹³*Id.* at 276.

¹⁹⁴*Granholm*, 544 U.S. at 487-88.

¹⁹⁵Megan Headley, *Kill Bill: Vol. 5034*, CHARLOTTESVILLE NEWS & ARTS, May 11-17, 2010, available at www.c-ville.com/index.php?cat=11431101084614805&ShowAResponsetoHR5034.

¹⁹⁶H.R. 5034, 111th Cong. (2010).

¹⁹⁷*Id.* § 2.

¹⁹⁸For example, United Liquors, the largest wholesaler of alcoholic beverages in Massachusetts, was among Rep. Delahunt's top fifteen contributors, donating \$39,500 to his campaigns between 1996 and 2010. During that period, the Wine & Spirits

Wholesalers of America donated \$29,500 to his campaigns. Center for Responsive Politics, *Top Contributors: Bill Delahunt*, at opensecrets.org/politicians/contrib.php?cycle=Career&cid=N00000280&type=I. In the twenty-year period between 1990 and 2010, the National Beer Wholesalers Association has contributed more than \$21 million to federal candidates and political parties. Center for Responsive Politics, *Heavy Hitters: National Beer Wholesalers Assn*, at opensecrets.org/orgs/summary.php?id=D000000101.

¹⁹⁹*Id.* § 3(b).

²⁰⁰*Id.* (“State or territorial regulations may not facially discriminate, without justification, against out-of-state producers of alcoholic beverages in favor of in-state producers.”)

²⁰¹*Id.* § 3 (c) (1).

²⁰²*Id.* § 3 (c) (2).

²⁰³*Id.* § 3 (c) (3) (italics added).

²⁰⁴*Id.* § 4.

²⁰⁵H.R. 1161, 112th Cong. (2011). There are eight other sponsors: Bruce Braley, Democrat of Iowa, Howard Coble, Republican of North Carolina, John Conyers Democrat of Michigan, Ted Deutch, Democrat of Florida, Jim Jordan, Republican of Ohio, Gary Miller, Republican of California, Dennis Ross, Republican of Florida, and Debbie Wasserman Schultz, Democrat of Florida.

²⁰⁶*Id.* at § 2; H.R. 5034, 111th Cong. (2010) at § 2(1).

²⁰⁷H.R. 1161, at § 2.

²⁰⁸H.R. 5034, at § 2(2).

²⁰⁹*Id.* at § 3(b).

²¹⁰H.R. 1161, at § 3(b).

²¹¹H.R. 5034, at § 3(c)(3).

²¹²Jennifer Youssef and Jaclyn Trop, *Congress Plan May Dry Up Flow of Direct Wine Shipments*, DETROIT NEWS, May 15, 2010, available at detnews.com/article/20100515/BIZ/5150308&template=printart. The states that prohibit direct shipment are Alabama, Arkansas, Delaware, Kentucky, Maryland, Massachusetts, Mississippi, New Jersey, Oklahoma, Pennsylvania, South Dakota, and Utah. The Wine Institute, *State Shipping Laws*, at wi.shipcompliant.com/Home.aspx? (last visited July 29, 2010). Montana law allows direct shipment, but no carrier will currently ship there, so the effect is the same as a prohibition. *Id.*

²¹³Jacob Grier, *Beware of CARE*, WASH. EXAMINER, Aug. 19, 2010, at www.washingtonexaminer.com/opinion/blogs/Examiner-Opinion-Zone/Beware-of-CARE-the-Comprehensive-Alcohol-Regulatory-Effectiveness-Act-101092874.html.

²¹⁴*Hearing on Legal Issues Concerning State Alcohol Regulation Before the Subcomm. On Courts & Competition Policy of the Comm. Of the Judiciary*, 111th Cong. 2 (Mar. 18, 2010) (statement of Nida Samona).

²¹⁵*Hearing on Legal Issues Concerning State Alcohol Regulation Before the Subcomm. On Courts & Competition Policy of the Comm. Of the Judiciary*, 111th Cong. 2 (Mar. 18, 2010) (joint statement by Wine Institute and WineAmerica).

²¹⁶*Id.* at 5.

²¹⁷27 U.S.C. §203(b)(1) (2010).

²¹⁸27 U.S.C. §204(a)(2)© (2010).

²¹⁹Samona statement, *supra* note 214, at 4.

²²⁰Samona statement, *supra* note 214, at 6.

²²¹*See Hearing on Legal Issues Concerning State Alcohol Regulation Before the Subcomm. On Courts & Competition Policy of the Comm. Of the Judiciary*, 111th Cong. 2 (Mar. 18, 2010) (joint statement by Wine Institute and WineAmerica).

²²²*See* Jonathan M. Rotter & Joshua S. Stambaugh, *What’s Left of the Twenty-First Amendment?*, 6 CARDOZO L. POL’Y & ETHICS J. 601 (2008) (concluding that the law operates in a middle ground between the Twenty-First Amendment and the Commerce Clause and analyzing early cases following *Granholm* including *Brooks v. Vassar*, 462 F.3d 341 (4th Cir. 2006), *Huber Winery v. Wilcher*, 488 F. Supp. 2d 592 (W.D. Ky. 2006), *Cherry Hill Vineyard, LLC v. Baldacci*, 505 F.3d 28 (1st Cir. 2007), *Beau v. Moore*, 2007 WL 3231890 (E.D. Ark. Nov. 1, 2007), *Jelovsek v. Bredesen*, 545 F.3d 431 (6th Cir. 2008)).

²²³592 F.3d 1 (1st Cir. 2010).

²²⁴*Stonington Vineyards v. Jenkins*, No. 05-10982-JLT (D. Mass. Oct. 5, 2005) (cited in *Family Winemakers*, 592 F.3d at 7).

²²⁵MASS. GEN. LAWS ch. 138, § 19B (2002).

²²⁶MASS. GEN. LAWS ch. 138, § 19F (2006).

²²⁷*Id.*

²²⁸*Family Winemakers*, 592 F.3d at 4.

²²⁹ *Id.* at 5.
²³⁰ *Id.* at 7.
²³¹ *Id.*
²³² *Id.* at 11.
²³³ *Id.* at 5-7.
²³⁴ *Id.* at 5-7, 12.
²³⁵ *Id.*
²³⁶ *Id.* at 12.
²³⁷ *Id.* at 13.
²³⁸ *Id.* at 17.
²³⁹ *Id.* at 20-21.
²⁴⁰ *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423 (6th Cir. 2008).
²⁴¹ *Id.* at 427.
²⁴² KY. REV. STAT. ANN. §§ 241.010(46), 243.155(1), 243.155(2)(g), 244.165(2) (Michie 2006).
²⁴³ KY. REV. STAT. ANN. § 244.165 (Michie 2006).
²⁴⁴ *Cherry Hill Vineyards*, 553 F.3d at 433.
²⁴⁵ *Id.*
²⁴⁶ *Id.* at 434.
²⁴⁷ *Id.*
²⁴⁸ *Black Star Farms LLC v. Oliver*, 600 F.3d 1225, 1227 (9th Cir. 2010).
²⁴⁹ *Id.* at 1231.
²⁵⁰ *Id.* at 1232.
²⁵¹ *Id.* at 1233.
²⁵² *Id.* at 1235.
²⁵³ *Cherry Hill Vineyards*, 553 F.3d at 433.
²⁵⁴ *Black Star Farms*, 600 F.3d at 1233-35.
²⁵⁵ *Freeman v. Corzine*, 629 F.3d 146 (3d Cir. 2010).
²⁵⁶ *Id.*
²⁵⁷ About Walter Hansel Winery & Vineyard, at walterhanselwinery.com/about_walter_hansel_winery.htm.
²⁵⁸ *Freeman*, 629 F.3d at 151.
²⁵⁹ *Id.* at 154-55.
²⁶⁰ *Id.* at 152.
²⁶¹ *Id.*
²⁶² *Id.* at 155.
²⁶³ *Id.*
²⁶⁴ *Id.* at 156.
²⁶⁵ *Id.* at 156-57.
²⁶⁶ *Id.* at 157.
²⁶⁷ *Id.* at 158-9.
²⁶⁸ *Id.* at 160.
²⁶⁹ *Id.* 160-61.
²⁷⁰ *Id.* at 161.
²⁷¹ *Id.* at 152.
²⁷² *Id.* at 152-53.
²⁷³ *Id.* at 162-4.
²⁷⁴ 130 S. Ct. 876 (2010).
²⁷⁵ *Id.*
²⁷⁶ The large wine wholesalers are generally family-owned businesses that are not publicly traded. *See, e.g.*, notes 43-84 and accompanying text.

²⁷⁷2 U.S.C. § 441b (2002) (commonly known as the McCain-Feingold campaign finance law).

²⁷⁸*Citizens United*, 130 S. Ct. at 897. The case involved a nonprofit corporation, Citizens United, that had made a critical movie about Hillary Clinton and wanted to run it on video-on-demand and ads for it on broadcast and cable television within thirty days of the 2008 presidential primary elections. *Id.* at 887-88. Citizens United, fearing civil and criminal penalties under Section 441b, sought declaratory and injunctive relief against the Federal Election Commission which the district court denied. *Id.* at 888.

²⁷⁹2 U.S.C. § 441b(b)(2) (2002). The opinion stated that because PACs are separate from corporations, the PAC exemption does not allow corporations to speak. *Citizens United*, 130 S. Ct. at 897. It justified that conclusion by noting that “PACs are burdensome alternatives; they are expensive to administer and subject to extensive regulations,” and therefore if corporations cannot make independent expenditures, they are being prohibited from speaking. *Id.* at 897-98.

²⁸⁰*Citizens United*, 130 S. Ct. at 917.

²⁸¹494 U.S. 652 (1990).

²⁸²*Id.* at 695.

²⁸³*Id.* at 655.

²⁸⁴*Citizens United*, 130 S. Ct. at 903 (citing *Austin*, 494 U.S. at 660).

²⁸⁵*Id.* at 904.

²⁸⁶*Id.* at 905.

²⁸⁷*Id.*

²⁸⁸*Id.* at 907.

²⁸⁹Some commentators have noted evidence that shareholders overwhelmingly do not want the companies in which they are invested to pay for political ads. See, e.g., David G. Savage, *Corporate Campaign Ads Haven't Followed Supreme Court's Prediction*, L.A. TIMES, Oct. 27, 2010.

²⁹⁰*Citizens United*, 130 S. Ct. at 907.

²⁹¹*Id.* at 930. Justice Stevens also noted that, in fact, Citizens United never raised the issue of free speech rights based on corporate status; it was the Court's majority that changed the case so that they could change the law. *Id.* at 932.

²⁹²*Id.* at 945.

²⁹³*Id.* at 947.

²⁹⁴*Id.* at 949-50.

²⁹⁵Brief of Nat'l Assoc. of Consumer Advocates & Foundation for Taxpayer & Consumer Rights as *Amici Curiae* in Support of Plaintiffs-Appellants at 9, *St. Louis v. Sprint Spectrum, LP*, 203 S.W. 3d 199 (Mo. 2006) (citing Bryan).

²⁹⁶*Id.* at 952 (citing the Tillman Act, ch. 420, 34 Stat. 864 passed in 1907).

²⁹⁷*Id.* at 954, 972.

²⁹⁸*Id.* at 964 (Justice Stevens citing *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 788 (1978)) (brackets in original).

²⁹⁹*Id.*

³⁰⁰*Id.* at 965.

³⁰¹*Available at* presidentialrhetoric.com; *also quoted in* THOM HARTMANN, *UNEQUAL PROTECTION – THE RISE OF CORPORATE DOMINANCE AND THE THEFT OF HUMAN RIGHTS* (2002) (Kindle Books Location 1654).

³⁰²See, e.g., *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

³⁰³*Pacific Gas & Elec. Co. V. Pub. Utilities Comm'n of Cal.*, 475 U.S. 1, 32 (1986).

³⁰⁴*Id.* at 34-35.

³⁰⁵425 U.S. 765 (1978).

³⁰⁶*Id.* at 753, 763 (noting consumer's interest in free flow of information and consumers' attack on statute that prohibits them from receiving information about prices of prescription drugs).

³⁰⁷*Id.*; see also Tamara R. Piety, Commentary, *Citizens United and the Threat to the Regulatory State*, 109 MICH. L. REV. FIRST IMPRESSIONS 16 (2010), at www.michiganlawreview.org/assets/fi/109/piety.pdf (noting that *Citizens United* illustrates Court's use of its power for powerful businesses rather than for consumers and public interest).

³⁰⁸Keith F. Girard, *States Pour Government Money into Wine*, BLOOMBERG BUSINESSWEEK, Oct. 21, 2010, at www.businessweek.com/print/smallbiz/content/oct2010/sb20101020_349721.htm.

³⁰⁹*Id.*

³¹⁰*Id.*

³¹¹Dahlia Lithwick, *Supreme Court Dispatches: The Pinocchio Project*, Jan.21, 2010, at www.slate.com/toolbar.aspx?action=print&id=2242208.