Federalism and Alcohol: A Resurgence of State Power to Regulate Alcohol in E-Commerce on *Granholm*'s Twentieth Anniversary

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Twenty years ago, the U.S. Supreme Court invoked a muscular approach to the Commerce Clause and overpowered state laws regulating marijuana and alcohol. Although the cases involved entirely different products in entirely different markets the net result was that irrespective of traditional state police power to regulate intoxicating products, including the threshold legality of such products, the Court was able to conclude if there is any economic market in these products at all it was a federally protected market. Fast forward to the present and, at least with respect to state power to regulate alcohol sales at retail, the federal circuit courts are validating the state (and not the federal) power to preemptively regulate alcohol pursuant to a three-tier system mandating both in-state wholesaler purchase and physical presence requirements. This Article considers the

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legacy of Granholm v. Heald*, including subsequent U.S. Supreme Court and lower federal court decisions, and reflects upon what is at stake for the federal-state balance of alcohol beverage regulation moving forward.*

In 2021, the United States Supreme Court denied a petition for a writ of certiorari for a case challenging a public policy provision of the Internal Revenue Code that was particularly onerous to the operators of lawful state cannabis businesses. With respect to quixotic nature of federal cannabis regulation in the United States generally, Justice Thomas wrote: "Once comprehensive, the Federal Government's current approach is a half-in, half-out regime that simultaneously tolerates and forbids local use of marijuana. This contradictory and unstable state of affairs strains basic principles of federalism and conceals traps for the unwary."[1]

Standing Akimbo, LLC v. United States was a marijuana case. However, the federal-state tension involving marijuana regulation currently resonates for another intoxicating product: alcohol. Alcohol is the only commodity that is the subject of a constitutional amendment, and there is not just one but, rather, two amendments governing the legality of alcohol in the United States.[2] The tradeoff for legal alcohol is perhaps an easy bargain to see more than ninety years after the end of Prohibition. On the state government's balance sheet, alcohol is not a black-market liability. Instead, a state uses excise taxation, an asset, to underwrite the negative externalities of an intoxicating product, drugged driving, addiction, and counterfeit

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[1] Standing Akimbo, LLC v. United States, 141 S. Ct. 2236, 2236–37 (2021) (Thomas, J., respecting the denial of certiorari).

[2] The Eighteenth Amendment, ratified on January 18, 1919, and effective on January 17, 1920, implemented Prohibition. *See* U.S. CONST. amend. XVIII. It prohibited the commercialization of intoxicating liquor in the United States. The Twenty-First Amendment, ratified and effective on December 5, 1933, repealed the Eighteenth Amendment and prohibited the transportation or importation of intoxicating liquors in contravention of state law. *See* U.S. CONST. amend. XXI; *see also* Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 588 U.S. 504, 544 (2019) ("Over time, the people have adopted two separate constitutional Amendments to adjust and then readjust alcohol's role in our society." (Gorsuch, J., dissenting)); B-21 Wines, Inc. v. Bauer, 36 F.4th 214, 222 (4th Cir. 2022) (noting that alcoholic beverages are "the only consumer product actually mentioned in the Constitution.").

products, to name a few.[3] In return, the regulated market screens participants and creates a uniform and presumably reliable marketplace from the consumer's point of view. A state's choice to legalize an intoxicating product and thereby reallocate its criminal enforcement resources to illegal markets for other such products is unequivocally an exercise of police power.[4]

Standing Akimbo was ostensibly a test of the ongoing validity of a 2005 Supreme Court decision, *Gonzales v. Raich*, and perhaps a distant hope for revisiting state power in the context of marijuana. In *Raich*, the Supreme Court affirmed the validity of congressional authority under the Commerce Clause to pass laws that restrict the personal cultivation, possession, and use of marijuana for medical purposes, even if such activities were done in conformity with California's Compassionate Use Act, a permissive law authorizing marijuana for medical use within an exclusive intrastate market.[5] While *Raich* was perhaps an early twenty-first century marker of the ongoing federal prohibition of marijuana, it was another case on the Supreme Court's 2005 docket that tested the Commerce Clause's authority with respect to state regulation of alcohol following the adoption and ratification of the Twenty-First Amendment. Not only did the Twenty-First Amendment repeal the Eighteenth Amendment, ending Prohibition, but it also erected a clear barrier against the importation or possession of alcoholic beverages in violation of a state's law.[6]

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[3] Jason P. Brown et al., *Economic Benefits and Social Costs of Legalizing Marijuana* 6–7 (Fed. Rsrv. Bank of Kan. City, Working Paper No. 23-10, 2023).

[4] Gonzales v. Raich, 545 U.S. 1, 42–43 (2005) (O'Connor, J., dissenting).

[5] *Id.* at 32–33.

[6] U.S. CONST. amend. XXI. Under section 2 of the Twenty-First Amendment, it is the negative, inverse implication of that section's prohibition that affirms the states' authority to regulate alcoholic beverages within their borders. *Id.* § 2. ("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."). And the choice of this language was no accident. The intention was for the language to match the language used in the Webb-Kenyon Act and accordingly incorporate prior interpretations of that law. Granholm v. Heald, 544 U.S. 460, 484 (2005); *Tenn. Wine & Spirits Retailers Ass'n*, 588 U.S. at 506. Notably, dissenting opinions in both *Granholm* and *Tennessee Wine* concluded that the Web-Kenyon Act, as an affirmative act of Congress adopted prior to Prohibition, was intended to confer authority upon the states to regulate against interstate shipments of alcoholic beverages without dormant

Twenty years ago, in *Granholm v. Heald*, the Supreme Court issued a seminal decision regarding the interplay of section 2 of the Twenty-First Amendment and the dormant Commerce Clause.[7] In spite of the Twenty-First Amendment's express deference to the authority of the states to regulate alcoholic beverages and with a nod towards the burgeoning direct to consumer wine shipment market, *Granholm* held that no state may regulate the importation of alcoholic beverages in a manner that discriminates against interstate commerce.[8] In striking down laws in Michigan and New York that regulated direct to consumer wine shipments by wineries, the Supreme Court again recognized the three-tier system, a hallmark of and perhaps the most significant regulatory underpinning of alcohol beverage law, as "unquestionably legitimate."[9] Nevertheless, the *Granholm* Court was able to navigate past three-tier justifications to conclude the Michigan and New York laws discriminated in favor

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Commerce Clause scrutiny. *Granholm*, 544 U.S. at 498 ("The Webb–Kenyon Act immunizes from negative Commerce Clause review the state liquor laws that the Court holds are unconstitutional." (Thomas, J., dissenting)); *Tenn. Wine & Spirits Retailers Ass'n*, 588 U.S. at 545–46 ("In the Webb-Kenyon Act of 1913, Congress gave the States wide latitude to restrict the sale of alcohol within their borders." (Gorsuch, J., dissenting)). Justice Gorsuch's *Tennessee Wine* dissent continued by concluding that the use of nearly identical language from the Webb-Kenyon Act in section 2 of the Twenty-First Amendment indicated that "the people who adopted the Amendment naturally would have understood it to constitutionalize an 'exception to the normal operation of the [dormant] Commerce Clause.'" *Id.* at 546.

[7] *Granholm*, 544 U.S. at 466 (majority opinion). "In its modern incarnation, the dormant [C]ommerce [C]lause is meant to prohibit states from facially discriminating against interstate commerce as well as placing undue burdens on interstate commerce through extraterritorial regulation." Comment, *The Supreme Court—Leading Cases*: National Pork Producers Council v. Ross, 137 HARV. L. REV. 330, 331 (2023).

[8] *Granholm*, 544 U.S. at 466. Each of the laws at issue in *Granholm* restricted direct to consumer wine shipments from out-of-state wineries to citizens of the states of Michigan and New York. The Michigan law allowed Michigan wineries to ship directly to Michigan consumers while requiring out-of-state wineries to ship to in-state wholesalers. With this requirement in place, Michigan consumers could only acquire the out-of-state wineries products through Michigan's three-tier system. *Id.* at 468–69. The New York law at issue allowed for direct shipments to consumers by certain New York wineries but prevented sales by out-of-state wineries unless such wineries submitted to New York's licensing scheme and invested in a physical storefront in New York. *Id.* at 470.

[9] *Id.* at 489.

of local wineries in violation of the dormant Commerce Clause and, as such, the laws could only be justified upon further findings of a legitimate state purpose.[10] Ultimately, the Court rejected the State policy justifications for the laws, including the critical need to limit access to minors and to facilitate tax collection.[11]

At the time *Granholm* was decided, it may have been more easily characterized as the byproduct of free market ideology and fawning over nascent e-commerce innovation than it was a decision that would fundamentally alter the manner by which alcoholic beverages are regulated by the states.[12] Nevertheless, the basic tenants of the

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[10] *See id.* The Supreme Court rebuffed section 2 of the Twenty-First Amendment in *Granholm*, and subsequently in *Tennessee Wine*, as a unique source of unfettered state power to regulate beverage alcohol as each state chooses. Alcohol beverage laws that are discriminatory will only survive scrutiny under the dormant Commerce Clause if such laws are demonstrably justifiable on a legitimate nonprotectionist basis, including for public health or safety reasons (and which basis cannot be served by reasonable nondiscriminatory alternatives). *See id.*; *see also Tenn. Wine & Spirits Retailers Ass'n*, 588 U.S. at 539 ("Recognizing that § 2 [of the Twenty-First Amendment] was adopted to give each state the authority to address alcohol-related public health and safety issues in accordance with the preferences of its citizens, we ask whether the challenged requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground."); Daniel J. Croxall, *Delirium of Disorder: Tension Between the Dormant Commerce Clause and the Twenty-First Amendment Stunts Independent Craft Brewery Growth*, 126 PENN ST. L. REV. 435, 457 (2022) ("If the state actually proves the law is not protectionist, but instead is seeking to further a legitimate purpose with no alternative nondiscriminatory means, then the law is valid under the Commerce Clause, as *Granholm* stated plainly.").

[11] *Granholm*, 544 U.S. at 492–93. *Granholm* was a 5-4 decision and elicited a forceful dissent by Justice Thomas. Justice Stevens also dissented, writing:

> Indeed, the fact that the Twenty-first Amendment was the only Amendment in our history to have been ratified by the people in state conventions, rather than by state legislatures, provides further reason to give its terms their ordinary meaning. Because the New York and Michigan laws regulate the "transportation or importation" of "intoxicating liquors" for "delivery or use therein," they are exempt from dormant Commerce Clause scrutiny.

Id. at 496–97 (Stevens, J., dissenting).

[12] In 2005, e-commerce was very much becoming a new frontier of the global free market economy, as well as an unbridled source of capitalism in the United States. In February of that year a first of its kind delivery subscription service was launched under the name Amazon Prime. Colby Hopkins, *The History of Amazon and Its Rise to Success*, MICH. J. ECON. (May 1, 2023), https://sites.lsa.

three-tier system are very much at stake on *Granholm*'s twentieth birthday. On the other hand, two decades later and with federal circuit court decisions continuing to limit *Granholm*'s reach, is *Granholm* better characterized as novelty case exploring the economic virtues of cheaper wine in e-commerce than as a pervasive obstacle for state three-tier regulation under the Commerce Clause?

The modern three-tier system and its precursors (probably more easily understood as anti-"tied house" laws) were eventually adopted by the majority of the states in the years following Prohibition in attempt to correct the "tied house" evils associated with alcohol consumption immediately prior to Prohibition.[13] The rationale for a tiered system was that "tied houses"—vertically integrated alcohol beverage companies (or, alternatively, a supplier's tying of retailers to its brands exclusively through contract)—fostered an

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umich.edu/mje/2023/05/01/the-history-of-amazon-and-its-rise-to-success/ [https://perma.cc/V7PW-P2LE]. Tellingly, the *Granholm* Court noted: "Technological improvements, in particular the ability of wineries to sell wine over the Internet, have helped make direct shipments an attractive sales channel." *Granholm*, 544 U.S. at 467. *See also id.* at 496 ("Today's decision may represent sound economic policy and may be consistent with the policy choices of the contemporaries of Adam Smith who drafted our original Constitution; it is not, however, consistent with the policy choices made by those who amended our Constitution in 1919 and 1933." (Stevens, J., dissenting)).

[13] "In historical terms, the three-tier system is a product of attempts at reforming the regulation of alcohol sales around the time of the Twenty-First Amendment, which ended Prohibition." Roni A. Elias, *Three Cheers for Three Tiers: Why the Three-Tier System Maintains Its Legal Validity and Social Benefits After Granholm*, 14 DEPAUL BUS. & COM. L.J. 209, 214 (2016); *see also* Cal. Beer Wholesalers Ass'n v. Alcoholic Beverage Control Appeals Bd., 487 P.2d 745, 748 (Cal. 1971) ("Following repeal of the Eighteenth Amendment, the vast majority of states, including California, enacted alcoholic beverage control laws. These statutes sought to forestall the generation of such evils and excesses as intemperance and disorderly marketing conditions that had plagued the public and the alcoholic beverage industry prior to prohibition."). The Oregon legislature stated the following purposes as the basis for its liquor control law enacted in the immediately aftermath of Prohibition: "(a) To prevent the recurrence of abuses associated with saloons or resorts for the consumption of alcoholic beverages. (b) To eliminate the evils of unlicensed and unlawful manufacture, selling and disposing of such beverages and to promote temperance in the use and consumption of alcoholic beverages. (c) To protect the safety, welfare, health, peace and morals of the people of the state." OR. REV. STAT. § 471.030(1) (2023).

intemperate drinking culture at the point of sale.[14] Moreover, the cost savings and point of sale influence engendered by the vertically-owned or exclusively tied operation was corruptive to the consumer due to cheaper booze and unchecked sales tactics.[15] Over time, the structure became clearer, and to break up the tied-houses the states implemented a three-tier system requiring legal and financial separation between the three different aspects of the alcohol beverage product cycle: (1) the manufacture, production, and foreign importation of the product—the supplier tier; (2) the wholesale purchase and distribution of the product—the wholesaler tier; and (3) the retail sale of the product to consumers—the retailer tier.[16] A

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[14] "By the end of the nineteenth century, the U.S. alcohol industry had evolved into a vertically integrated enterprise where most retailers were tied to one of a few suppliers who wielded their significant financial strength and political influence to proceed virtually unrepressed in pressuring their own retailers to increase alcohol sales, and consequently, alcohol consumption, through whatever means and at whatever the social cost." Starns, Jessica C., *The Dangers of Common Ownership in an Uncommon Industry: Alcohol Policy in America and the Timeless Relevance of Tied-House Restrictions*, CENTER FOR ALCOHOL POLICY 4 (2017), https://www.centerforalcoholpolicy.org/wp-content/uploads/2017/03/The-Dangers-of-Common-Ownership-in-an-Uncommon-Industry.pdf [https://perma.cc/D6XD-ZPKR]. Texas describes the purpose of its three-tier system as follows: "[T]he public policy of this state and . . . purpose of this section [is] to maintain and enforce the three tier system (strict separation between the manufacturing, wholesaling, and retailing levels of the industry) and thereby to prevent the creation or maintenance of a 'tied house' as described and prohibited in Section 102.01 of this code." TEX. ALCO. BEV. CODE ANN. § 102.01(a) (West 2023). According to the Oregon Liquor and Cannabis Commission, the "tied house" concept requires that "suppliers and retailer cannot be 'tied' to each other through financial interests or create incentives that could allow suppliers to exert undue influence on the products that retailers sell." Or. Liquor & Cannabis Comm'n, *Supplier – Retailer Guidelines: A Guide to Oregon's Financial Assistance Laws* 2 (June 21, 2022), https://www.oregon.gov/olcc/docs/publications/supplierretailerguidelines.pdf [https://perma.cc/ED35-EM7F].

[15] Allied Props. v. Dep't of Alcoholic Beverage Control, 346 P.2d 737, 740 (Cal. 1959) (noting that "[m]any states ha[d] adopted price regulating measures intended to prevent retail price cutting and bargain sales of alcoholic beverages and the evils considered to follow from those practices, namely, excessive purchase and use of liquor and disruption of orderly marketing conditions.").

[16] For example, under Texas law, "'tied house' means any overlapping ownership or other prohibited relationship between those engaged in the alcoholic beverage industry at different levels, that is, between a manufacturer and a wholesaler or retailer, or between a wholesaler and a retailer, as the words 'wholesaler,'

separate permit and license became a requirement to operate in each tier, and through the state's application and vetting process, an applicant's preexisting ownership interest in the various tiers is disclosed.[17] Beyond overlapping ownership restrictions, modern tied house laws also seek to prohibit the provision of any money or other thing of value (by either the supplier tier or the wholesaler tier to the retailer tier) as a means to induce a favorable if not exclusionary relationship between the retailer and the industry tier member offering such inducement.[18]

From the supply-demand standpoint then, the three-tier system operates, at least in part, to create buoyancy in product pricing and the costs of operation through introduction of assuredly independent business operators at different points in the chain of production, distribution, and retail sale of alcohol beverages.[19] As such, the three-tier system is, at its core, an intentional burden on commerce in alcohol beverages because it curbs cost efficiencies associated with vertical integration in the industry and moderates overly aggressive sales tactics and market dominance at the point of sale.[20] A further, and perhaps defining, public policy for tied house laws was that out-of-state ownership resulted in a pervasive lack of local accountability—that is, with no connection to the local neighborhood, an

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'retailer,' and 'manufacturer' are ordinarily used and understood . . . ." TEX. ALCO. BEV. CODE ANN. § 102.01(a) (West 2023).

[17] *See, e.g.*, OR. REV. STAT. § 471.757 (2021).

[18] Michael B. Newman & Jason H. Barker, *Retying the House: How the Evolution of Prohibition Era Alcohol Laws Has Facilitated a Generation of Independent Craft Brewers*, 12 BUFF. INTELL. PROP. L.J. 159, 163 (2018).

[19] *See* Lebamoff Enters. Inc. v. Whitmer, 956 F.3d 863, 868 (6th Cir. 2020) (noting critical importance of wholesaler tier in three-tier system as it "allows [s]tates, if they wish, to control the amount of alcohol sold through price controls, taxation, and other regulations"); *see also* Elias, *supra* note 13, at 224 ("Establishing a minimum price helps control the free-riding incentive, and each distributor competes with other distributors by adding value to its product.").

[20] *See* Sarasota Wine Mkt., LLC v. Schmitt, 987 F.3d 1171, 1176 (8th Cir. 2021) (noting primary purpose of three-tier model as prevention of monopolized distribution from producer to consumer); B-21 Wines, Inc. v. Bauer, 36 F.4th 214, 227 (4th Cir. 2022) ("The three-tier system—the regime that limits the importation of alcoholic beverages by requiring that they flow first from manufacturers to in-state wholesalers, then to in-state retailers, and only thereafter to consumers—by its nature discriminates to some extent against interstate commerce.").

absentee owner could easily overlook concern for vice for profit.[21] And history teaches us that the repeal of Prohibition was as much about getting good people into the alcohol beverage industry as it was about getting the bad people out.[22] To address absentee ownership concerns, states imposed laws aimed at requiring a physical presence or even a durational residency requirement for putative applicants for alcohol beverage licenses.[23]

It was precisely this type of law the Supreme Court considered in *Tennessee Wine and Spirits Retailers Association v. Thomas*.[24] *Tennessee Wine* was the Supreme Court's first opportunity to examine *Granholm*'s rationale in depth, albeit in a much different context.[25] The Supreme Court held Tennessee's durational residency requirement for off-premises retail liquor licenses violated the

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[21] "'Tied houses,' that is, establishments under contract to sell exclusively the product of one manufacturer, were, in many cases, responsible for the bad name of the saloon. The 'tied house' system had all the vices of absentee ownership. The manufacturer knew nothing and cared nothing about the community. All he wanted was increased sales." RAYMOND FOSDICK & ALBERT SCOTT, TOWARD LIQUOR CONTROL 29, 43 (1933).

[22] "Accordingly, in response to the end of Prohibition, [s]tates that made liquor legal imposed either state monopoly systems, or licensing schemes strictly circumscribing the ability of private interests to sell and distribute liquor within state borders." Granholm v. Heald, 544 U.S. 460, 517 (2005) (Thomas, J., dissenting).

[23] "A residency requirement may not be the only way to ensure retailers will be amenable to state regulatory oversight, but it is surely one reasonable way of accomplishing that admittedly legitimate goal. Residency also increases the odds that retailers will have a stake in the communities they serve." Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 588 U.S. 504, 533–34 (Gorsuch, J., dissenting).

[24] *Id.* at 509 (majority opinion). With Justice Alito writing for the majority, the Supreme Court again eschewed a pragmatic approach to the interplay between section 2 of the Twenty-First Amendment and the dormant Commerce Clause in favor of a free-trade paradigm whereby an alcohol beverage law characterizable as protectionist of in-state economic interests and merely police power in disguise is subject to invalidation. *Id.* at 527. This was a 7-2 decision met with a vigorous dissent from Justice Gorsuch with whom Justice Thomas joined. *Id.* at 544–57 (Gorsuch J., dissenting).

[25] The challenged law in *Tennessee Wine* required an individual applicant for a retail package store license in Tennessee to reside as a bona fide resident of the state for a minimum of two years prior to application. For a corporate applicant for the same Tennessee license, each officer, director and stockholder also had to individually satisfy the two-year residency requirement. *Id.* at 510 (majority opinion).

dormant Commerce Clause.[26] A state-based retailer trade association argued, even if the law was deemed discriminatory, it was justifiable on public health and safety grounds, including as means by which potential applicants for in-state liquor license may be surveilled.[27] Writing for the majority, Justice Alito concluded, without any direct authority, that "[s]uch a requirement is not an essential feature of a three-tiered scheme."[28] The opinion continued by noting that only a plurality of states impose such residency requirements as a kind of a straw poll in support of the Supreme Court's newly-minted "essential feature" logic.[29] However, as has been laid bare by subsequent federal court decisions interpreting *Granholm* and *Tennessee Wine*, the missing ingredient from the Supreme Court's premise is that, arguably, it is the integrity of the three-tier system itself that is essential to its purpose.[30]

In upholding a North Carolina law barring direct to consumer wine deliveries by out-of-state retailers, the Fourth Circuit concluded in a 2022 decision that "North Carolina's interest in preserving its three-tier system is itself a legitimate nonprotectionist ground that constitutes a sufficient justification."[31] Furthermore, implicit in any legal ecosystem with interdependent participants like the three-tier system is the principle that: unless all industry participants, including state-licensed wholesalers and retailers, are required to comply, there is no integrity to the three-tier system at all.[32] Finally, if

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[26] *Id.*

[27] *Id.* at 541.

[28] *Id.* at 535.

[29] *Tenn. Wine & Spirits Retailers Ass'n*, 588 U.S. at 535.

[30] Jean-Paul Weg, LLC v. Graziano, No. 23-2922, slip op. at 22 (3d Cir. Apr. 2, 2025). "Perhaps the most foundational element of a three-tier system is a state's ability to prohibit the sale of alcohol that has not passed through its three-tier system. As several other circuits have recently held, permitting out-of-state retailers to sell alcohol from outside of a state's three-tier system creates a regulatory hole large enough to shake the foundations of the three-tier model." *Id.* at 21–22.

[31] B-21 Wines, Inc. v. Bauer, 36 F.4th 214, 227 (4th Cir. 2022).

[32] Elias, *supra* note 13, at 217 (noting that three-tier uncertainty under the Twenty-First Amendment "creates a question about the preservation of the entire system because the system can continue to function only if there are essentially exclusive relationships between producers and wholesale distributors and between wholesalers and retailers."). Similar to the Fourth Circuit's decision in *B-21 Wines*, each of the Third Circuit, Sixth Circuit, Eighth Circuit, and Ninth Circuit considered post-*Tennessee Wine* dormant Commerce Clause challenges to

the licensing requirements burden an out-of-state person in the same manner as they burden an unlicensed in-state person, such requirements are not discriminating against the out-of-state person any more than they are discriminating against all persons who are unlicensed.[33] And, of course, it is inherent to any licensing scheme that a party who wishes to bear the benefits of the requisite license must

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laws and state licensing schemes permitting direct to consumer wine deliveries by in-state retailers or their agents but not affording similar delivery privileges to out-of-state retailers. *See* Lebamoff Enters. Inc. v. Whitmer, 956 F.3d 863, 867 (6th Cir. 2020) (considering Michigan law); Sarasota Wine Mkt., LLC v. Schmitt, 987 F.3d 1171, 1184 (8th Cir. 2021) (considering Missouri law); Day v. Henry, 129 F.4th 1197, 1197 (9th Cir. 2025) (considering Arizona law); *see also* Jean-Paul Weg, LLC v. Graziano, No. 23-2922 (3d Cir. Apr. 2, 2025) (considering New Jersey law). In upholding the laws in question, the critical function of three-tier control and the importance of maintaining compliance by each tier was often discussed and determinative to the court's reasoning. *Whitmer*, 956 F.3d at 872; *Sarasota Wine*, 987 F.3d at 1184; *Jean-Paul Weg, LLC*, slip op. at 18–19; *see also B-21 Wines*, 36 F.4th at 228 ("In these circumstances, the differential treatment with respect to wine shipping by retailers is an essential aspect of North Carolina's three-tier system."). With respect to the critical importance of wholesalers in the three-tier system, the *Whitmer* court concluded that "[o]pening up the State to direct deliveries from out-of-state retailers necessarily means opening it up to alcohol that passes through out-of-state wholesalers or for that matter no wholesaler at all." *Whitmer*, 956 F.3d at 872. Professor Croxall analyzed the impacts of the *Granholm* uncertainty on direct to consumer (DtC) shipping in the U.S. and the unintended consequences of a deregulated wholesaler market: "[B]ecause of the vague circumstances surrounding the interplay between the dormant Commerce Clause and the Twenty-first Amendment, as well as the circuit courts' disagreements, companies have sprung up and expanded rapidly to fill the unmet need for DtC shipping." Croxall, *supra* note 10, at 462. Croxall also noted: "Like traditional distributors, these companies, such as Drizly, Instacart, Bevv.com, and Saucey exist to get alcohol in the hands of the consumers. But unlike traditional distributors, these companies are often unlicensed and operate simply as 'middlemen' without regulatory oversight." *Id.*

[33] As part of the Eighth Circuit's conclusion that Missouri's laws limiting direct to consumer delivery to in-state licensed retailers were an essential feature of Missouri's three-tiered scheme, the court noted "the rules governing direct shipments of wine to Missouri consumers apply evenhandedly to all who qualify for a Missouri retailers license." *Sarasota Wine*, 987 F.3d at 1184. The Fifth Circuit employed similar logic in concluding that a Texas bar against a public company holding a package store "P" permit to sell liquor did not have a discriminatory effect on interstate commerce. Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n, 945 F.3d 206, 220 (5th Cir. 2019). The requirement "treats in-state and out-of-state public corporations the same. Neither in-state nor out-of-state public corporations may obtain a P permit or own a package store." *Id.*

simultaneously bear the burdens of licensure.[34] Finally, if the integrity of the three-tier system alone is not sufficient to overcome dormant Commerce Clause scrutiny, in spite of the Supreme Court's continued characterization of such system as unquestionably legitimate, what level of proof is required to sustain a discriminatory alcohol beverage law as a legitimate and non-protectionist?[35]

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[34] "[Licensed Michigan] retailers all live with the bitter and sweet of Michigan's three-tier system—the bitter of being able to buy only from Michigan wholesalers (and the price and volume regulations that go with it) and the sweet of being subject only to intrastate competition." *Whitmer*, 956 F.3d at 873. *See also* Day v. Henry, 686 F. Supp. 3d 887, 895 (D. Ariz. 2023) ("The fact that licensed entities have privileges that unlicensed entities do not is the very purpose of a licensing scheme; a party must comply with the burden of getting a license to obtain the benefits of having a license.").

[35] As part of its dormant Commerce Clause analysis in *Tennessee Wine*, the Court layered in the examination of whether the "predominant effect" of Tennessee's durational residency requirement was protectionism. Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 588 U.S. 504, 539–40 (2019). Ultimately, the Court concluded the predominant effect of the residency requirement was to protect in-state retailers against putative out-of-state competitors. *See id.* at 540. Protectionism thus becomes the flip side of the legitimacy coin with respect to a liquor law's validity, and this analysis does not always lead to simple outcomes. In assessing a Rhode Island licensing and regulatory scheme that prevented out-of-state retailers from shipping direct to in-state consumers, the First Circuit vacated and remanded the district court's determination that the law was constitutional. *See* Anvar v. Dwyer, 82 F.4th 1, 12 (1st Cir. 2023). The *Anvar* court noted that "[a]t no point did the court engage with any 'concrete evidence' as to how the in-state-presence requirement furthers the legitimate aims of the Twenty-first Amendment." *Id.* at 10. In addition, a second Sixth Circuit case considered an Ohio law analogous to the Michigan law in *Whitmer*. *See generally* Block v. Canepa, 74 F.4th 400 (6th Cir. 2023). Although the *Block* court endorsed *Whitmer's* constitutional analysis of the dormant Commerce Clause in the context of alcohol beverage regulation, it remanded the case to the district court for further evidentiary findings with respect to the underlying public health and safety justifications in support of the challenged law. *Id.* at 414. Notably, however, on remand, the district court was able to make conclusive findings in support of Ohio's three-tier system and Ohio's challenged restrictions, including prohibitions (a) on direct shipments by out-of-state retailers to Ohio residents and (b) the importation by Ohio residents of more than six bottles of wine in any 30-day period. Block v. Canepa, No. 2:20-cv-3686, 2025 WL 872962, at *23 (S.D. Ohio Mar. 20, 2025). Among other rationale, the district court reasoned that the three-tier system buttressed the state's surveillance function by tracking the movement and sale of wine throughout the state, including the promotion of accountability and transparency in the sale of wine and related policies of prevention of underage driving and product safety. *Id.* at *18. Price controls were also cited favorably by the district

As federal and state prohibitions come and go, so do new opportunities for the Supreme Court to refine the outer reaches of its dormant Commerce Clause authority. And the Supreme Court's latest installment might instill a modicum of hope for strict three-tier adherents. In *National Pork Producers Council v. Ross*, the Supreme Court upheld a California law restricting certain animal confinement and animal cruelty practices applicable to pork production.[36] Authored by Justice Gorsuch, the lead dissenter in *Tennessee Wine*, *Ross* may signal a shift towards increasing deference to state regulation under the dormant Commerce Clause framework or, at the very least, a more cautionary approach to laws that are facially neutral.[37] A further upshot of *Ross* is that four of the Justices cited approvingly to the Supreme Court's prior opinion in *Exxon Corp. v. Governor of Maryland*[38] for the proposition that "the dormant Commerce Clause does not protect a 'particular structure or metho[d] of operation.'"[39] On this basis, the plurality rejected the pork producers' argument that operational changes necessary to accommodate the California law were anything more than a business decision

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court in support of Ohio's three-tier system. "Keeping the price of alcohol high promotes temperance, and tax proceeds are used to offset the societal costs of alcohol consumption." *Id.* at *19.

[36] Nat'l Pork Producers Council v. Ross, 598 U.S. 356, 364 (2023). Two farmer advocacy organizations filed a lawsuit against California on behalf of their members who raise and process pigs, alleging that the California law violated the dormant Commerce Clause. *Id.* at 367.

[37] *See id.* at 390 ("Preventing state officials from enforcing a democratically adopted state law in the name of the dormant Commerce Clause is a matter of 'extreme delicacy,' something courts should do only 'where the infraction is clear.'" (quoting Conway v. Taylor's Ex'r, 66 U.S. (1 Black) 603, 634 (1861))). Although it is beyond the scope of this Article there is some debate as to whether the so-called *Pike* balancing test applies to alcohol beverage laws that are facially-neutral or whether such test is displaced by the Twenty-First Amendment. For commodities other than alcohol, the *Pike* test has been typically employed by as part of the judiciary's dormant Commerce Clause framework to detect nondiscriminatory regulations that incidentally burden interstate commerce. *See, e.g.* Notes, *Does the Twenty-First Amendment Displace Pike Balancing?*, 138 HARV. L. REV. 1363 (2025). Under *Pike* balancing, neutral laws are presumptively valid "unless the plaintiff shows the burden on interstate commerce is 'clearly excessive in relation to the putative local benefits.'" *Id*. (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).

[38] Exxon Corp. v. Governor of Md., 437 U.S. 117, 127 (1978).

[39] *Ross*, 598 U.S. at 385 (plurality opinion) (quoting *Exxon*, 437 U.S. at 127).

based upon the cost-benefit of doing business in California, rather than as the result of an impermissible burden on interstate commerce.[40] *Exxon* involved a Maryland statute that prohibited a petroleum producer or refiner from (1) vertical integration via operation of a gas station within the state and (2) discrimination between service stations with respect to voluntary allowances (including temporary price reductions).[41] *Exxon* upheld the Maryland laws and determined that banning one method of operation in a retail market, in that case a vertically-integrated operation whereby producers or refiners operate gas stations, did not impermissibly burden interstate commerce.[42]

In 2025, this twentieth year of *Granholm*, two federal circuit courts have rejected challenges to retail direct-to-consumer bans under the dormant Commerce Clause and have further limited *Granholm*'s putative reach to these types of laws. Since *Tennessee Wine* was decided, a number of cases applying the *Granholm*-inspired framework have tested the constitutionality of state laws restricting sales by out-of-state retailers directly to in-state consumers.[43] These cases further highlight and underscore the important policy considerations underlying the three-tier system and the

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[40] *Id.* at 385–87; *see also Exxon*, 437 U.S. at 127 (noting that source of customer's supply may shift due to legal requirements, "but interstate commerce is not subjected to an impermissible burden simply because an otherwise valid regulation causes some business to shift from one interstate supplier to another."). By analogy, the direct-to-consumer sales channel for alcohol beverages looks very much like one method of operation in the retail market for alcohol, and an out-of-state retailer's election to comply with the law in such market, including to make an investment in a physical premises, is a business decision and added cost of doing business in that particular market.

[41] *See Exxon*, 437 U.S. at 119–20. This case was brought by Exxon as a declaratory judgment action, as the law at issue would force Exxon to close thirty-six retail gas stations in Maryland. *Id.* at 121.

[42] *Id.* at 127–28 (noting that "the [Commerce] Clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations."). *Exxon* was also cited approvingly by the Fifth Circuit in upholding a Texas alcohol beverage law that barred all public companies both within and outside of Texas from holding a package store permit. *See* Wal-Mart Stores, Inc. v. Tex. Alcoholic Beverage Comm'n, 945 F.3d 206, 220 (5th Cir. 2019).

[43] A full study of the various federal circuit court decisions interpreting *Granholm* in the context of direct-to-consumer shipping laws is beyond the scope of this article. Suffice to say it has been chaotic with several different trends emerging. *See generally* Croxall, *supra* note 10, at 451–61.

counterweight of these policies against the burden of increased cost of doing business in alcohol. In *Day v. Henry*, the Ninth Circuit upheld Arizona's physical presence requirement—a requirement that limits direct to consumer wine shipment privileges within Arizona to Arizona-licensed retailers with an actual physical location in the State.[44] Arizona wine drinkers challenged the law on the basis that it discriminated against their choice to access wine sold by out-of-state retailers under the dormant Commerce Clause. They argued that the law was tantamount to economic protectionism by the State in disallowing their access to a valuable sales channel for Arizona wine drinkers.[45] The Ninth Circuit dismissed the argument the Arizona law was presumptively burdensome upon interstate commerce and instead recast the financial aspects associated with acquiring an Arizona retailer license and related storefront location as the costs of doing business in Arizona for an out-of-state retailer. The court further concluded that such storefront requirement and related DTC privileges were contingent upon "a company's resources and business model, not its citizenship or residency."[46] And unlike the problematic New York storefront condition in *Granholm* that only applied to out-of-state wineries, the Arizona requirements "apply to all retailers, not just those based in another state."[47] The Ninth Circuit cited favorably to other Supreme Court jurisprudence under the dormant Commerce Clause, including *Ross*, for the proposition that a certain level of regulatory burden is expected for businesses selling goods in interstate commerce. Any business operating in various states expects to comply with divergent state-level operating requirements and, as such, compliance with an in-state law that is applicable to all market participants is not uniquely burdensome to the out-of-state resident any more than it is a threshold condition for all participants who want enjoy the privileges associated with access to that market at all.[48] Moreover, the Ninth Circuit dismissed the plaintiff-wine drinkers' argument that the direct to consumer market for

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[44] Day v. Henry, 129 F.4th 1197, 1197 (9th Cir. 2025).

[45] *Id.*

[46] *Id.* at 1205.

[47] In short, *Granholm* was limited to its facts as "a New York statutory scheme that created a discriminatory *exception* to the three-tier scheme." *Id.* at 1206.

[48] *Id.* at 1207.

out-of-state retailers merited special consideration as an available sales channel. For the Ninth Circuit, this channel is a mere method of operation that is not guaranteed by the dormant Commerce Clause.[49] Notably, the *Day* Court was able to distance its rationale from *Granholm*'s laudatory language regarding the value of the DTC sales channel in spite of the fact the market has likely quadrupled since 2005.[50] Twenty years later perhaps the glimmer of e-commerce, which is now ubiquitous with all retail commerce, has finally worn off. Or, does this fourfold increase in e-commerce in wine merit even greater regulatory oversight by the states?

The Third Circuit was able to conclude that it was precisely the demand for that type of heightened oversight that supports New Jersey's own storefront requirement for in-state retailers who ship to New Jersey residents and the requirement that all wine sold via the retailer direct to consumer sales channel be first purchased from New Jersey wholesalers. In *Jean-Paul Weg, LLC v. Graziano* the Third Circuit considered a challenge by a New York wine retailer to New Jersey laws requiring an in-state presence in New Jersey for direct to consumer wine shipment sales to New Jersey residents and that all wine be sourced from New Jersey wholesalers.[51] Although the Third Circuit upheld the challenged laws it was unable to conclude as did the Ninth Circuit in *Day* that the laws were non-discriminatory. "New Jersey's physical presence requirement forces existing out-of-state retailers to bear the expense of opening a New Jersey location, while New Jersey's wholesaler purchase requirement compels existing retailers to bear the expense of reconfiguring their product-sourcing process."[52] Per the Supreme Court's current

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[49] *Id.* at 1208.

[50] *Compare Granholm*, 544 U.S. at 467 (noting that "[f]rom 1994 to 1999, consumer spending on direct wine shipments doubled, reaching $500 million per year, or three percent of all wine sales") *with Day*, 129 F.4th at 1205 (noting "that e-commerce constitutes twenty percent of all retail sales").

[51] Jean-Paul Weg, LLC v. Graziano, No. 23-2922, slip op. at 5–6 (3d Cir. Apr. 2, 2025).

[52] *Id.* at 15. Although the Third Circuit cited to *Granholm* for the proposition that these incremental cost of compliance burdens were discriminatory against out-of-state retailers the Court ultimately limited *Granholm* to its facts. *See id.* at 19 ("New Jersey's regulations sharply diverge from those challenged in *Granholm*. *Granholm* concerned a limited loophole created for in-state wineries that was denied without basis to out-of-state equivalents.").

test under *Tennessee Wine* for challenges to alcohol beverage laws under the dormant Commerce Clause the Third Circuit then turned to whether the challenged laws could be justified as legitimate health and safety measures.[53] Ultimately, the Third Circuit held the challenged New Jersey requirements were each justifiable "on public health and safety grounds and as an essential feature of New Jersey's three-tier system."[54]

The *Day* and *Jean-Paul Weg* decisions each conclude that a physical presence requirement and the adjacent three-tier policies are constitutional under *Granholm* and its progeny but it remains to be seen whether the Supreme Court will endorse either of these approaches in any future determination regarding so-called "essential" three-tier system policy features that apply with equal force to both in-state and out-of-state participants. In perhaps a nod to the outer reaching logic of the Supreme Court in *Ross*, with its deference to state police power and rejection of a *per se* rule that invalidates any state laws that "have the 'practical effect' of 'controlling' extraterritorial commerce," *Day* concluded no discrimination occurred under the first prong of *Tennessee Wine*'s test for evaluating the constitutionally of an alcohol beverage law under the dormant Commerce Clause because the challenged alcohol beverage laws applied to all market participants, not just those based in another state.[55] This conclusion not only follows logically but it is also easily distinguishable from *Granholm*. In that case, the challenged requirements only applied to out-of-state participants.[56] *Day*'s approach to and conclusion with respect to *Tennessee Wine*'s discrimination prong also affords the alcohol beverage industry with structural certainty

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[53] *Id.* at 15–16. The district court concluded the laws were justified on state public health grounds with the physical presence requirement aiding in local visibility and three-tier accountability and the wholesaler purchase requirement supporting product integrity.

[54] *Id.* at 18.

[55] *Supra* note 48 and accompanying text. *Day*'s rationale was recently applied by the Eastern District of Washington to uphold a Washington State law permitting only in-state distilleries to exercise retailer direct-to-consumer shipment privileges within Washington. Order Granting Defendant's Motion for Summary Judgment at 12, No. 1:23-CV-3093 (E.D. Wash. Apr. 17, 2025). "Washington's licensing requirements for distilleries functioning as retailers applies evenhandedly to in-state and out-of-state actors." *Id.* at 11.

[56] *Supra* note 8.

regarding the integrity of three-tier systems and their related legal requirements provided such requirements apply uniformly to market participants located both within and without of the state. In contrast, the Third Circuit in *Jean-Paul Weg* refused to conclude that challenged physical premise and wholesaler purchase requirements were not discriminatory even though they applied with equal force to retailers located both within and without of New Jersey as the applicability of such requirements would arguably cause the out-of-state retailer to incur additional compliance expense.[57] This conclusion is deeply flawed for various reasons, especially when considered in light of the vice tax strategy of regulating an intoxicating commodity like alcohol. First, why does the Third Circuit assume that the retailer's price from wholesalers will go up in New Jersey? Was a comparative analysis between wholesaler pricing in New Jersey and New York presented to the court? Second, if this assumption is taken to its logical extreme and all in-state wholesaler purchase requirements are eliminated will it not be the states with the cheapest wholesalers that ultimately dominate the market? Ironically, this would lead to the exact Balkanization of interstate markets the Supreme Court is so desperate to prevent. And is it not also fair to assume the inevitable result of this kind of state deregulation via the preemptive reach of the dormant Commerce Clause will lead to a forum shopping exercise for the states selling the cheapest alcohol?

As noted above, the Third Circuit was able to conclude that the second prong of the *Tennessee Wine* test was met: The challenged requirements were justifiable on public health and safety grounds. In an interesting twist of the *Tennessee Wine* logic these requirements were also justifiable as essential features of the "unquestionably legitimate" three-tier system and, as such, constitutional.[58] In

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[57] *Supra* note 53 and accompanying text.

[58] *Jean-Paul Weg, LLC*, slip op. at 22–23. *Jean-Paul Weg* can be read to bifurcate the second step under *Tennessee Wine* for a state law determined to be facially discriminatory. In short, a discriminatory state policy can be separately justified under *Tennessee Wine* if it is, in fact, essential to the state's three tier system of alcohol regulation and irrespective of whether there is a separate showing by the state that it advances legitimate health or safety interest. *See* Day v. Henry, 129 F.4th 1197, 1211 (9th Cir. 2025) (Forrest, C.J., concurring in part and dissenting in part). Notably, this indirectly aligns with the view of at least two, current Supreme Court justices that the Twenty-First Amendment authorizes, or

reaching these conclusions the Third Circuit spelled out important policy justifications for these requirements, including an in-state wholesaler's role as a critical intermediary in the chain of commerce in identifying product tampering and contamination. And the physical presence requirement was lauded as essential to conducting on-site inspections and the related licensing and vetting process.[59] The Third Circuit also noted a critical feature of all in-state three-tier requirements: A state does not have any direct authority or jurisdiction for the regulation of market participants in other states or to require the regulatory authorities of such other states to enforce another state's laws.[60] For a product that can be physically harmful to a state's residents it is of paramount importance that all distributors of such products be accountable throughout the chain of commerce and through the retail point of sale. While these rationales are certainly replicable for other features or requirements of a three-tier system the introduction of fact-finding implies an evidentiary standard, the required threshold of which may be difficult to quantify. Furthermore, because the *Tennessee Wine* case did not involve an essential feature of the three-tier system it seems possible the Supreme Court could subsequently view that characterization as mere dicta rather than a determinative feature under the analytic framework for dormant Commerce Clause cases involving alcohol beverage law moving forward. Finally, not all recent precedent has been favorable to the three-tier system.

A recent outlier in terms of the nature of the law considered and the result was a case called *Buckel Family Wine LLC v. Mosiman*.[61] In *Buckel*, the Southern District of Iowa held that a law prohibiting out-of-state wineries from shipping directly to in-state retailers (as opposed to consumers) violated the dormant Commerce Clause.[62] In

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immunizes from Commerce Clause challenge, discriminatory state laws regulating alcohol. *Supra* note 6.

[59] *Jean-Paul Weg, LLC*, slip op. at 18–19.

[60] *Id.* at 19.

[61] No. 4:23-cv-00256, 2024 WL 4513039, at *1 (S.D. Iowa, Sept. 30, 2024).

[62] *Id.* ("Because Iowa law allows in-state wineries to receive class "A" wine permits and sell directly to Iowa retailers but prevents out-of-state wineries from doing so, the Court finds Iowa law violates the dormant Commerce Clause of the Constitution of the United States."). The plaintiff in *Buckel* was a Colorado winery desiring to sell its wine directly to Iowa retailers, but it did not hold the

order for a winery to have the privilege of selling directly to consumers under Iowa's state licensing scheme, the winery must hold a class "A" wine permit. In turn, to be eligible for a class "A" wine permit, the applicant must have a physical premises in the state of Iowa.[63]

Buckel concluded the laws at issue were discriminatory, and Iowa failed to provide "concrete evidence" that such laws were justifiable as a legitimate, non-protectionist safety measure. While the holding is an important outlier in the jurisprudence following *Tennessee Wine*, it is the tenuous logic employed by the Southern District of Iowa in reaching the holding that sounds alarm bells for the industry. The issues stem from the judicial branch's apparent inability to recognize the relative importance and subtleties of the distinctive tiers within the three-tier structure or to concede that the market for alcohol beverages is intentionally more burdensome than markets for more generic, non-intoxicating commodities.[64] This precise issue was underscored by the court's flawed minor premise in *Buckel*. Tellingly, only by assuming that "Iowa's wine licensing laws resemble the Michigan and New York laws struck down by the Supreme Court in *Granholm*" could the *Buckel* court apply *Granholm*'s logic.[65] However, neither of the laws at issue in *Granholm* gave the Supreme Court the opportunity to consider the policy underpinnings of a requirement that in-state retailers must purchase from in-state wholesalers or whether such feature might be "essential" to a state's three-tier system under *Tennessee Wine* or otherwise justifiable as a non-protectionist health and safety measure.[66] Put simply, nothing about *Granholm* prevents a state from

requisite permit for doing so. *See id.* In its complaint, the plaintiff was seeking, in part, a declaratory judgment that the operative Iowa laws were unconstitutional. *Id.*

[63] *Id.*

[64] *See Tennessee Wine*, 588 U.S. at 551 ("The of point of § 2 [of the Twenty-First Amendment] was to allow each State the opportunity to assess for itself the costs and benefits of free trade in alcohol. Reduced competition and increased prices were foreseeable consequences of allowing such unfettered state regulation, but they were consequences the people willingly accepted with the compromise of the Twenty-First Amendment." (Gorsuch, J., dissenting) (quoting Carter v. Virginia, 321 U.S. 131, 139 (1944) (Frankfurter, J., concurring))).

[65] *Buckel*, 2024 WL 4513039, at *6.

[66] As the *Buckel* court even noted, the laws at issue in *Granholm* involved in-state wineries selling directly to consumers while requiring out-of-state wineries

requiring its in-state retailers to purchase alcohol beverages exclusively from in-state wholesalers. As noted in *Day v. Henry*, a District of Arizona case involving a retailer direct-to-consumer law, "*Granholm* . . . requires only that an exemption from the three-tier system granted to in-state producers must also be granted to out-of-state producers, because none of them will have been funneled through the three-tier system."[67]

The *Buckel* court's reasoning was also flawed in attempting to distinguish conflicting (and binding) Eighth Circuit precedent, *Sarasota Wine Market, LLC v. Schmitt*, by framing *Granholm* and *Tennessee Wine* as decisions requiring nearly *per se* invalidation of tied-house restrictions impacting products of out-of-state suppliers.[68] To the contrary, *Tennessee Wine* expressly rejected that precise distinction,[69] and perhaps even more notably, it did not consider specific restrictions against suppliers or their products at all.[70] Similar to *Jean-Paul Weg*, *Sarasota Wine* considered the constitutionality of various conditions upon a retailer's privilege to sell directly to Missouri consumers, including requirements that the retailer be physically located in Missouri and that all alcohol beverages be purchased exclusively from Missouri wholesalers.[71] *Sarasota Wine* upheld the

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to first sell through in-state wholesalers or establish bricks and mortar storefronts. *See id.* at *6–7. The inclusion of wholesalers between the supplier tier and the retailer is in many ways the crux of the three-tier system. The interposition of a "middle man" in the alcohol distribution process has been determined to be of such importance to certain states that the state itself acts as the distributor of alcoholic beverage products. *See* Elias, *supra* note 13, at 216; *see also* Sarasota Wine Mkt., LLC v. Schmitt, 987 F.3d 1171, 1176 (8th Cir. 2021) (noting that "some [s]tates severely limit liquor sales and distribution by private individuals and companies. In Utah, for example, the [s]tate is the sole importer and main retailer of all alcoholic products other than light beer; in Michigan, the [s]tate is the only wholesaler for liquor but not for wine and beer.").

[67] 686 F. Supp. 3d 887, 896 (D. Ariz. 2023) *aff'd*, Day v. Henry, 129 F.4th 1197 (9th Cir. 2025).

[68] *Buckel*, 2024 WL 4513039, at *4–5.

[69] *Tennessee Wine*, 588 U.S. at 534 ("*Granholm* never said that its reading of history or its Commerce Clause analysis was limited to discrimination against products or producers.").

[70] *Id.* at 535 ("At issue in the present case is not the basic three-tiered model of separating producers, wholesalers, and retailers, but the durational-residency requirement that Tennessee has chosen to impose on new applicants for liquor store licenses.").

[71] *Sarasota Wine*, 987 F.3d at 1176.

challenged retailer requirements, concluding that discrimination under section 2 of the Twenty-First Amendment requires something more than the threshold burden imposed upon a non-resident for having to comply with a state's three-tier system or being licensed at all.[72]

The discontent of existing industry members and regulators who are heavily invested in the *status quo* of alcohol regulation, including the three-tier system, is not only about inconsistencies in current federal circuit precedent or even a rogue district court decision. Given the heavy reliance on the overall licensing-privilege model for regulation of alcohol beverages, including the need to manage marketplace dominance, there is a certain fragility of the entire system if creative lawyers can contrive a *Granholm* problem with respect to any privilege requiring an in-state license or bounded by a geographic limitation.

Take, for example, a relatively obscure 2016 decision where a state court located in Ada County, Idaho determined there was no issue with the largest beer company in the world, Anheuser-Busch InBev SA/NV ("A-B InBev"), indirectly acquiring and being interested in a small Idaho brewery with wholesaler and retailer privileges ("10 Barrel").[73] Anheuser-Busch, LLC ("A-B Missouri"), a Missouri-domiciled subsidiary of A-B InBev, acquired all of the limited liability company membership interests of 10 Barrel. A-B Missouri was not licensed as an Idaho brewery but did hold a certificate of approval to sell beer to Idaho wholesalers. Similar to many other states, Idaho exempts breweries of a certain size from its tied-house restrictions (in Idaho, breweries producing less than 30,000 barrels of beer annually) and allows such breweries to operate or become separately licensed as a wholesaler, for self-distribution of its own products, and as a retailer, for operation of a brewpub (collectively, "small brewery exemptions").[74] These type of small brewery exemptions have become somewhat commonplace and represent a tradeoff between a strict three-tier system and the opportunity to

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[72] *See id.* at 1184.

[73] *In re* Small Brewer Exemptions, No. CV-OT-2015-12762 (Idaho Dist. Sept. 14, 2016).

[74] IDAHO CODE ANN. § 23-1003(d)(e) (West 2024).

incubate smaller, craft brewery businesses.[75] In turn, the wholesalers are willing to concede their exclusive right to distribute beer within the state given that the qualifying breweries are typically capped with respect to the total amount of beer they can distribute.

Small Brewer Exemptions involved the appeal of a declaratory ruling by the Idaho State Police in response to a petition of an industry trade association of Idaho beer and wine wholesalers.[76] The petition sought, in part, a declaratory ruling that the location of production of the 30,000 barrel limitation applicable to the small brewery exemptions be deemed irrelevant in determining the "global" qualification for such exemptions.[77] The Bureau Chief of Alcohol Beverage Control, Idaho State Police, refused to accede to such characterization and determined that Idaho law does not prohibit the holder of a certificate of approval from having a financial interest in a small brewer's business, even if it is affiliated with one of the largest brewing companies in the world.[78] In affirming the Idaho State Police's latter determination, the district court added "[i]f the Idaho Legislature had intended to prohibit a holder of a certificate of approval from having a financial interest in 'a licensed brewer's business,' it could have expressly said so."[79]

On appeal, the district court considered the trade association's argument that in applying the 30,000-barrel limitation for small brewer exemptions, A-B InBev's global production should be

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[75] For all of its folksy attributions, including sun-drenched patios filled with kids, dogs and piney hop aroma, craft beer is a creature of something much less Utopian, state statute. In the late 1970s and early 1980s, legislatures in several Western states, including California, Oregon and Washington determined that the policy underpinnings of historical tied house laws—laws preventing the vertical integration of alcohol beverage businesses—were misplaced in the context of local, artisanal brewers. *See* Newman and Barker, *supra* note 18, at 165–73. At this point in the history of alcohol regulation, there is little doubt a state can now create for itself what Prohibition once took away: a legalized in-state market for the commercialization of alcohol beverages by its citizens, including the creation of vertically-integrated brewpubs. *See id.* at 163–73.

[76] In Idaho, the Idaho State Police has the responsibility to administer the alcoholic beverage laws. *In re Small Brewer Exemptions*, No. CV-OT-2015-12762, at *2.

[77] 10 Barrel Brewing Idaho, LLC, the holder of the smaller brewer license and associated privileges in Idaho intervened. *Id.*

[78] *Id.* at *4.

[79] *Id.* at *13.

counted. Otherwise, the world's largest beer company could indirectly bypass tied-house restrictions in Idaho.[80] In contrast, 10-Barrel's production in Idaho was less than 30,000 barrels annually. In reviewing the relevant definitions, including Idaho's definition of brewer, the district court concluded that there was no indication such a definition was intended to regulate brewers or their production outside of Idaho.[81]

Perhaps in anticipation of the Idaho State Police's determination that only Idaho beer production would count for the purposes of determining the applicability of the small brewer exemptions, the trade association made an additional *Granholm*-type argument. Cleverly, the trade association asserted that if only Idaho small brewers could benefit from the small brewer exemptions due to the Idaho-production limitation, then similarly situated brewers with production outside of Idaho would be impermissibly discriminated against under the dormant Commerce Clause unless they are also entitled to the small brewer exemptions.[82] The district court was able to invoke a standing determination to evade a decision on the merits of the dormant Commerce Clause argument. However, it is exactly this type of argument that has the potential to unwind any number of alcohol beverage laws that specifically restrict or afford privileges to in-state licensees based upon in-state activities or geographic location. Beyond the trade association's *Granholm* position, the very mechanics of the 10-Barrel transaction and operation of Idaho's licensing scheme could be characterized as an impermissible discrimination against interstate commerce by requiring a certificate of approval holder to acquire an in-state brewer in order to enjoy certain

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[80] Under the Idaho tied-house statute, a brewery producing 30,000 barrels or more annually is prohibited from holding any interest in an Idaho wholesaler or retailer. *See* IDAHO CODE ANN. §§ 23-1032(1)(a), 1033(1) (West 2024). There is no Idaho restriction prohibiting a certificate of approval holder from holding an interest in an Idaho brewery. *Id.* § 1032(2).

[81] *See In re Small Brewer Exemptions*, No. CV-OT-2015-12762, at *14–15 ("Whatever the legislature intended, it did not preclude an international giant in the industry from buying out the local competition of small brewers so long as the local entity operates within the statutory parameters for its own product."). The term brewer means "a person licensed to manufacture beer." IDAHO CODE ANN. § 23-1001(b) (West 2024). Only 10-Barrel located in Boise, Idaho, with production of less than 30,000 barrels annually, was licensed as a brewer during the relevant period.

[82] *See In re Small Brewer Exemptions*, No. CV-OT-2015-12762, at *15.

wholesaler and retailer privileges within Idaho. Put differently, without an investment in an Idaho brewer with small brewer exemptions, as was the case with 10-Barrel, a certificate of approval holder would not otherwise be entitled to directly wholesale or retail its beer in Idaho. *Granholm* clearly held that the imposition of a "bricks and mortar" requirement by New York for an out-of-state winery as a condition to exercise a privilege enjoyed by an in-state winery was violative of the dormant Commerce Clause.[83]

On its face, this Idaho decision was perhaps unexceptional from the Commerce Clause standpoint. However, it is not hard to envision continued litigation and future invalidations of tied-house laws and exemptions under this rubric.[84] This, in turn, could severely undermine the states' power to control the negative aspects of a legal market for intoxicating products that tied-house laws have been designed to solve.[85] *Granholm* and its progeny have thus left us with a palpable tension twenty years later. Where exactly does the dormant Commerce Clause's zero tolerance for discriminatory state liquor laws begin and the legitimacy of the three-tier system end?[86] Is there

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[83] *See* Granholm v. Heald, 544 U.S. 460, 475–76 (2005).

[84] And these types of challenges are not limited to beer and wine. On April 16, 2025, a complaint was filed in the Southern District of New York by an out-of-state craft distillery against various New York officials and the New York State Liquor Authority alleging that New York's reciprocity requirement for direct to consumer shipping of distilled spirits by out-of-state distillers violates the dormant Commerce Clause. Specifically, the complaint argues the reciprocity requirement is facially discriminatory by only allowing direct to consumer shipments of distilled spirits by out-of-state distillers if the home state of such out-of-state distillers also allows direct to consumer shipments of distilled spirits from New York distillers. *See* Complaint at 9, AD Obscura, LLC v. Fan, No. 1:25-cv-3151, (S.D.N.Y. Apr. 16, 2025).

[85] As the Sixth Circuit noted in its decision to uphold a bar against out-of-state shipments by retailers: "Once out-of-state delivery opens, the least regulated (and thus the cheapest) alcohol will win. That's good news for people who like a drink or two. But it's not great news for the people responsible for dealing with those who have trouble stopping." Lebamoff Enters. Inc. v. Whitmer, 956 F.3d 863, 872 (6th Cir. 2020). It should be noted that the three-tier system in its current form is the result of "eight decades of continuous tinkering by state legislatures and alcohol beverage control agencies." Brewers Ass'n, *Explanation of "Tied House" Laws*, https://cdn.brewersassociation.org/wp-content/uploads/2019/02/Tied-House-Laws.pdf [https://perma.cc/EAB2-XQ25] (last visited Jan. 25, 2025).

[86] It is important to note that the rationale underlying the three-tier system has been tested by other constitutional provisions as well. In 2017, the Ninth Circuit

an offramp for federal courts in this continuing drama? Why should the states, who bear the brunt of the negative externalities of legal alcohol (or any other intoxicating product) have to navigate the judicially-created chaos of regulation via nondiscriminatory alternatives? These types of regulatory conundrums are precisely the kind that have caused a near majority of states to enact adult-use marijuana laws in spite of an ongoing federal prohibition.[87]

In closing, the dormant Commerce Clause under *Granholm*, together with the continued evolution of lower-cost and technology-backed distribution and sales solutions, continue to threaten the integrity of the three-tier system for alcoholic beverages. However, as

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concluded that the State of California could no longer rely upon a temperance justification alone in support of certain tied-house restrictions relating to advertising. *See* Retail Digit. Network, LLC v. Prieto, 861 F.3d 839, 851 (9th Cir. 2017). *Retail Digital Network* involved a First Amendment commercial speech challenge to a California law that prohibited certain advertising payments by alcohol beverage suppliers to retailers. *Id.* at 841. Ultimately, the Ninth Circuit upheld the law on an alternative rationale advanced by the State of California: marketplace dominance. *Id.* at 851. As the California Supreme Court had previously acknowledged, "tied-houses pose two particular dangers: 'the ability and potentiality of large firms to dominate local markets through vertical and horizontal integration and the excessive sales of alcoholic beverages produced by the overly aggressive marketing techniques of larger alcoholic beverage concerns.'" *Id.* at 843 (quoting Cal. Beer Wholesalers Ass'n v. Alcoholic Beverage Control Appeals Bd., 487 P.2d 745, 748 (Cal. 1971)). The most cynical view of greater regulatory freedom in alcohol beverage markets posits that incrementalism in the size of the businesses participating in the industry (in terms of economic power and horizontal integration) in any tier will ultimately result in consumer dissatisfaction. Take, for example, the proliferation of big box retailers in the marketplace. Product pricing for widely available brands may drop, "but the market as a whole will have less variety, poorer information exchanges between consumers and suppliers, and less popular brands will likely increase in price and be sold in fewer outlets." Elias, *supra* note 13, at 227.

[87] "The ongoing clash over marijuana laws raises questions of tension and cooperation between state and federal governments and forces policymakers and courts to address the preemptive power of federal drug laws. Divergent federal and state laws also create debilitating instability and uncertainty on the ground in those states that are pioneering new approaches to marijuana control." Erwin Chemerinsky et al., *Cooperative Federalism and Marijuana Regulation*, 62 UCLA L. REV. 74, 77 (2015). Notably, for at least one federal circuit, the federal ban on marijuana is not enough to escape the reach of the dormant Commerce Clause. *See* Ne. Patients Grp. v. United Cannabis Patients and Caregivers for Me., 45 F.4th 542, 544, 556–57 (1st Cir. 2022) (invalidating residency requirements for medical marijuana dispensary license in Maine).

history continues to teach us about prohibitions of intoxicating products and addictions, the cheapest solutions and untethered retail markets rarely win. And given that the states are the front line of health and safety protection for commercial traffic in and use of alcohol by their citizenry traditional notions of federal-state comity persuasively support deference to state authority in this context and, as the Supreme Court has acknowledged, the Constitution requires nothing less.[88]

[88] Gonzales v. Raich, 545 U.S. 1, 45 (2005) ("The Constitution, we said, does not tolerate reasoning that would 'convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.'" (O'Connor, J., dissenting) (quoting United States v. Lopez, 514 U.S. 549, 567 (1995))).