

Whatever Happened to *Toward Liquor Control?* Access, Abuse, and the Problem of Direct Shipment

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In nearly forty states and the District of Columbia, it is legal to have wine directly shipped to your door from an out-of-state alcohol “e-tailer.”¹ Twenty-five years ago, California, Rhode Island and Alaska were the only states to permit this practice. Most others branded it a misdemeanor.² What caused this sea change in public policy? Initially it was mom-and-pop wineries that championed direct wine shipment. They argued, sometimes successfully, that direct shipment’s elimination of wholesaler costs would give their businesses a fairer chance to thrive.³ Today, increasingly large and organized business interests pursue the cause of direct shipment, ostensibly in the name of consumer choice and free enterprise. A lobbying campaign mounted by the Wine Institute, representing over one thousand California wineries, for example, proclaims that “[c]onsumers expect to be able to purchase the wines they want... by telephone, fax and Internet.”⁴

The rise of direct shipment is a dramatic departure from the three-tier distribution system that, since the end of Prohibition and across the United States, has channeled alcohol trade through manufacturers, in-state wholesalers, and in-state brick-and-mortar retailers.

¹ Desireé C. Slaybaugh, *A Twisted Vine: The Aftermath of Granholm v. Heald*, 17 TEX. WESLEYAN L. REV. 265, 269 (Winter 2011).

² Gina M. Riekhof and Michael E. Sykuta, *Politics, Economics, and the Regulation of Direct Interstate Shipping in the Wine Industry*, CORI WORKING PAPER NO. 03-04 (May 13, 2003), available at <http://ageconsearch.umn.edu/bitstream/22136/1/sp03ri05.pdf> (last accessed Dec. 18, 2011).

³ *Granholm v. Heald*, 544 U.S. 460, 475 (2005) (“For most wineries, the expense of establishing a bricks-and-mortar distribution operation in 1 state, let alone all 50, is prohibitive...”); see also Federal Trade Commission, *Possible Anticompetitive Barriers to E-Commerce: Wine* 14 (July 2003), available at <http://www.ftc.gov/os/2003/07/winereport2.pdf> (last accessed Dec. 18, 2011).

⁴ *Issue Summary*, Free The Grapes, available at <http://www.freethegrapes.org/?q=content/research> (last accessed Dec. 18, 2011).

The three-tier model was proposed in *Toward Liquor Control* (1933), Raymond Fosdick and Albert Scott's landmark blueprint for alcohol distribution policy.⁵ Published the same year that the Twenty-First Amendment abolished Prohibition, *Toward Liquor Control* reasoned from the still-indisputable premise that there is a direct correlation between alcohol abuse and unfettered access.⁶ Relying on empirical and historical studies of international and domestic alcohol regulation, which show that excessive availability lead to a host of social problems (including accidents, unemployment, family dysfunction, crime, illness and death), Fosdick and Scott argued that the government should control alcohol access through alcohol distribution.⁷

This paper looks at the direct-shipment trend of recent years, and argues that *Toward Liquor Control* continues to provide the soundest guiding principles for regulation in this field: public health and responsible consumption.⁸ The paper contends that direct shipment does not further those aims. Fosdick and Scott's book predicted what more than a half-century of subsequent experience affirmed—namely, that a three-tier system dependent on brick-and-mortar retailers allows state authorities to monitor and restrict the amount of alcohol available in a community at any given moment.⁹ Direct shipment creates a

⁵ Raymond B. Fosdick and Albert L. Scott, *Toward Liquor Control* (1933).

⁶ Fosdick and Scott, *Toward Liquor Control* at 18-19, 44-45; U.S. Const. Amend. XXI, § 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.").

⁷ Fosdick and Scott, *Toward Liquor Control* at xiii, 89 (1933); see also *Alcohol-Attributable Deaths and Years of Potential Life Lost – United States, 2001*, MORBIDITY AND MORTALITY WEEKLY REPORT (Centers for Disease Control), Sept. 24, 2004, available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5337a2.htm> (last accessed Dec. 18, 2011); Kate Fox, *Viewpoint: Is the Alcohol Message All Wrong?*, BBC NEWS MAGAZINE, Oct. 11, 2011 (discussing that a correlation between alcohol and aggression may be an American cultural construct, as Mediterranean nations do not observe this phenomenon) available at <http://www.bbc.co.uk/news/magazine-15265317> last accessed (Dec. 18, 2011).

⁸ Fosdick and Scott, *Toward Liquor Control* at 1 (Over the course of American history, "law has remained our chief weapon in trying to curb the social consequences of excess" alcohol consumption.).

⁹ *Id.* at 16, 43.

dangerous and unprincipled exception to this system, undermining regulatory control by invisibilizing an important sector of alcohol commerce. When alcohol must pass through in-state distributors and brick-and-mortar retailers before reaching individual households, state regulators “can track it, where it came from, who it came through, where it can go,” and they can work to reduce the total amount available.¹⁰

Direct wine shipment, which most states originally made available only to in-state wineries, became something of a runaway train in 2005, when the Supreme Court held in *Granholm v. Heald* that state laws permitting only local wineries to direct-ship unconstitutionally interfered with interstate commerce.¹¹ The *Granholm* Court ruled that states would either have to permit – or prohibit – direct wine shipment from all wineries, regardless of their state of origin.¹² Though *Granholm* came under heavy fire for undermining states’ plenary power to regulate alcohol under the Twenty-First Amendment, and though the decision’s consequences have been substantial—all the states affected by it opted for across-the-board permission rather than across-the-board prohibition—this paper warns against scapegoating the Court for the political branches’ sins. Consternation over *Granholm* should not obscure the larger problem of state complicity in alcohol deregulation.

As Nida Samona of the Michigan Liquor Control Commission told the U.S. House Subcommittee on Courts and Competition Policy, “[w]e are not talking about milk here.”¹³

¹⁰ *Legal Issues Concerning State Alcohol Regulation: Hearing Before the United States House of Representatives Subcommittee on Courts and Competition of the Committee on the Judiciary*, 111th Cong. 145 (Mar. 18, 2010)(hereinafter “March 18, 2010 Hearing before the House Courts and Competition Subcommittee”)(statement of Nida Samona, then-Chairperson, Michigan Liquor Control Commission), available at http://judiciary.house.gov/hearings/printers/111th/111-125_55481.PDF (last accessed Dec. 18, 2011).

¹¹ *Granholm v. Heald*, 544 U.S. 460 (2005).

¹² *Id.* at 493 (“If a State chooses to allow direct shipment of wine, it must do so on evenhanded terms.”).

¹³ March 18, 2010 Hearing before the House Courts and Competition Subcommittee, *supra*, note 10, at 153 (statements of Nida Samona, then-Chairperson, Michigan Liquor Control Commission, and Texas Solicitor

Michele Simon of the non-profit Marin Institute (now Alcohol Justice) argued in her own Congressional testimony that states' growing laxity toward wine lubricates the slippery slope of deregulation. "[I]f you let wine be shipped all over the country, what's next?"¹⁴ No doubt some of the public's easy acquiescence in this case reflects a sense that wine is somehow special; it evokes romance and fine living and gourmet palates. But wine is something of a wolf in sheep's clothing. Its alcohol content averages about 14 percent,¹⁵ which is more than beer and close to some liquors. No doubt regulators will be reminded of this fact when breweries and distilleries seek to gain direct shipment rights for themselves.¹⁶

I. Why Alcohol is in State Control—Danger to the Community and the Need for Quick Local Reponse

The Twenty-First Amendment gave the states control over alcohol regulation for various reasons, the most cited being that there is significant local variation in attitudes towards drinking.¹⁷ "[T]his nation is not a social unit with uniform ideas and habits... in a country as large as this,... heterogeneous in most aspects of its life and comprising a

General James C. Ho)(Ho: "As a constitutional matter... there is a huge difference between... every other product... and alcohol.").

¹⁴ *The Comprehensive Alcohol Regulatory Effectiveness (CARE) Act of 2010: Hearing on H.R. 5034 Before the United States House of Representatives Committee on the Judiciary*, 111th Cong. 164 (Sept. 29, 2010)(hereinafter "September 29, 2010 Hearing before the House Judiciary Committee")(statement of Michele Simon, then-Research and Policy Director, Marin Institute), available at http://judiciary.house.gov/hearings/printers/111th/111-152_58477.PDF (last accessed Dec. 18, 2011).

¹⁵ *Id.* at 164 (statement of Michele Simon, then-Research and Policy Director, Marin Institute).

¹⁶ "How can you call me an alcoholic? I only drink red wine,' said John Schwarzlose, quoting patients at the Betty Ford Center, the drug and alcohol rehabilitation center in Rancho Mirage, Calif. But 'this hard stuff' is a myth, said Mr. Schwarzlose, who is the center's chief executive. 'Alcohol is alcohol.'" Mireya Navarro, *Is a Wine-Soaked Film too, er, Rose?*, N.Y. TIMES, Feb. 20, 2005.

¹⁷ Del I. Hawkins, Don Roupe, and Kenneth A. Coney, *The Influence of Geographic Subcultures in the United States*, ADVANCES IN CONSUMER RESEARCH, Volume 8, pp. 713-17 (1981)(discussing how consumptive behaviors are dictated by American geographic subcultures), available at <http://www.acrwebsite.org/volumes/display.asp?id=5879> (last accessed Dec. 18, 2011); see also March 18, 2010 Hearing before the House Subcommittee on Courts and Competition, *supra*, note 10, at 143 (statements of U.S. Representative Steve Cohen (D-TN), and Pamela Erickson, Chief Executive Officer, Public Action Management).

patchwork of urban and rural areas, no common rule of conduct in regard to [the] powerful human appetite [for alcohol] could possibly be enforced.”¹⁸

Another reason that alcohol control was left to the states is because symptoms revealing abuse manifest first on a community and individual scale. The state, a smaller political unit than the nation, is thus more equipped to observe and address local alcohol problems as they arise.¹⁹ The public health costs caused by alcohol are well known. It is often warned, and statistics amply show, that alcohol is “no ordinary commodity.”²⁰ A 2011 report by the Centers for Disease Control reveals that, in the United States, approximately 79,000 deaths per year are caused by excessive alcohol consumption, while more than four million people visit the emergency room for alcohol-related conditions and 1.6 million are hospitalized.²¹ Communities plagued by alcohol abuse also suffer increased crime and divorce rates, reduced workforce productivity, and other social ills.²²

State authority over alcohol regulation allows for swift and effective correction of such problems as they arise. In September 2011, for example, the Nebraska Liquor Control Commission moved decisively to combat the chronic alcoholism taking root among the citizens of a remote part of the state. It designated the region an “alcohol impact zone.” On

¹⁸ Fosdick and Scott, *Toward Liquor Control* at 10.

¹⁹ *Id.* at 11.

²⁰ Thomas Babor et al.; *Alcohol: No Ordinary Commodity* (2003); see also Letter from Robert S. Pezzolesi, Founder and President, New York Center for Alcohol Policy Solution, to the United States House of Representatives Subcommittee on Courts and Competition Policy of the Committee on the Judiciary (Mar. 18, 2010)(“Alcohol is not a typical consumer product. It is the 3rd leading root cause of death in the U.S. and is responsible for over 4,500 underage deaths per year. . . Strong regulatory policies have been shown to reduce alcohol misuse and its consequences.”).

²¹ Letter from Harry Teter, Executive Director of the American Trauma Society, to the U.S. Congress regarding the CARE Act of 2011 (Apr. 7, 2011), available at http://thecareact.org/wp-content/uploads/2011/04/ATS_CARE_Act_Letter_to_Congress.pdf (last accessed Dec. 18, 2011).

²² *Alcohol-Attributable Deaths and Years of Potential Life Lost – United States, 2001*, MORBIDITY AND MORTALITY WEEKLY REPORT (Centers for Disease Control), Sept. 24, 2004, available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5337a2.htm> (last accessed Dec. 18, 2011).

the Commission's recommendation, legislators worked to tighten alcohol controls in the area.²³ In spite of the federal government's substantial resources, it is hard to imagine that it could be as quick to extinguish such local flames before they develop into bigger fires. In recognition of these benefits, the Twenty-First Amendment placed alcohol regulation within the jurisdiction of the states.

II. *Toward Liquor Control: Regulating for Public Health*

Toward Liquor Control stressed that, above all, states' regulatory efforts should promote public health.²⁴ Cautioning against an opportunistic view of the alcohol industry as a mere economic driver or a way to increase tax revenue, *Toward Liquor Control* made responsible consumption the lodestar of modern alcohol policy.²⁵ It outlined two regulatory frameworks a state could adopt for this purpose.

Under the Authority Plan, a state owns and operates alcohol retail outlets staffed by salaried government employees.²⁶ Today, eighteen States employ some variation of an Authority Plan, although these state retail monopolies tend to focus on liquors with relatively high alcoholic content.²⁷ Under the License System, which most states adopted, licensed private wholesalers and retailers are subject to extensive regulatory oversight.

²³ Grant Schulte, *Nebraska Lawmakers Mull Alcohol Problems in Whiteclay*, HOUSTON CHRONICLE, Sept. 16, 2011, available at <http://www.chron.com/news/article/Neb-lawmakers-mull-alcohol-problems-in-Whiteclay-2174626.php> (last accessed Dec. 18, 2011); see also March 18, 2010 Hearing before the House Subcommittee on Courts and Competition, *supra*, note 10, at 145 (Mar. 18, 2010)(statement of U.S. Representative Bobby Rush (D-IL)("Indeed, an effective tool of local neighborhoods in Chicago has been the ability to vote, through ballot referendum, an area 'dry.'").

²⁴ Fosdick and Scott, *Toward Liquor Control* at 16, 49.

²⁵ *Id.* at 107-8 (1933)("The fundamental objective [of alcohol regulation] should be not revenue but rational and effective social control.").

²⁶ These stores are commonly called ABC Stores, for "Alcohol Beverage Control" or "Alcohol Beverage Commission."

²⁷ Marin Institute, *State Control of Alcohol: Protecting the Public's Health 1*, available at https://www.marininstitute.org/site/images/stories/pdfs/controlstates_factsheet.pdf (last accessed Dec. 18, 2011).

Toward Liquor Control proposed “a single state licensing board, with state-wide authority and responsibility” for overseeing all aspects of alcohol access.²⁸

Upon adopting an Authority Plan or a License System, a state’s next step was to closely monitor alcohol sales in order to temper the amount of alcohol in its communities.²⁹ *Toward Liquor Control* listed various regulatory devices in this respect, including: (1) limiting the location and density of retail outlets to reduce geographical facility of purchase; (2) fixing retailers’ hours and days of permissible operation to reduce temporal facility of purchase; and (3) setting a price floor on alcoholic beverages.³⁰ States were urged to adopt strict bans against the sale of alcohol to minors, who are particularly vulnerable to alcohol abuse.³¹

Perhaps most innovatively, *Toward Liquor Control* insisted on three-tier alcohol distribution systems and a strict prohibition against “tied house” sales.³² A tied house is the vertical integration that occurs when a manufacturer sells its alcohol directly to consumers through a retailer that it either owns or controls. The centrality of the three-tier system to *Toward Liquor Control*’s program for curbing excessive access cannot be overstated. Prior to Prohibition, tied-house saloons were a widely-noted social problem, criticized for abetting drunkenness, alcoholism, gambling, and public disturbances.³³ As Fosdick and Scott put it,

²⁸ Fosdick and Scott, *Toward Liquor Control* at 41.

²⁹ *Id.* at 42.

³⁰ *Id.* at 81 (“The retail price level of alcoholic beverages not only determines profits, but also has a direct bearing on the amount of consumption... [accordingly, a state] “can use its price-making power as one of its most effective instruments of control.”).

³¹ *Id.* at 49 (“Rules are also necessary forbidding sales to minors, habitual alcoholics, paupers, mental defectives and to anyone who is drunk.”).

³² *Id.* at 43.

³³ March 18, 2010 Hearing before House Subcommittee on Courts and Competition, *supra*, note 10, at 22 (“Retail outlets were often owned by out-of-town people or out-of-state people who really didn’t care too much about the community values, they only were concerned about selling alcohol.”); *see also* Fosdick and Scott, *Toward Liquor Control* at 16 (“The saloon, as it existed in pre-prohibition days, was a menace to society

“[t]he manufacturer knew nothing and cared nothing about the community. All he wanted was increased sales.”³⁴ Under the three-tier system, by contrast, there would be sharp distinctions between (1) manufacturers that produce the beer, wine, or liquor; (2) distributors that buy alcoholic beverages from a manufacturer, and which must have an in-state presence; and (3) retailers that then buy alcoholic beverages from a distributor and market the product to end-use consumers, and which also must have an in-state presence.³⁵ Most states even prohibit manufacturers from “furnishing... buildings, bars, equipment or loans of money to a retailer.” lest the retailer feel beholden to its benefactor.³⁶

The three-tier system provides practical benefits to state regulators in their efforts to control communities’ alcohol levels. In her subcommittee testimony, Michigan Liquor Control Commissioner Nida Samona explained that the physical presence of distributors and retailers within state borders allows commission staff and local law enforcement officers “to ensure that in-state retailers and wholesalers are physically inspected and checked to verify that [the] regulatory system is being followed, that only approved alcoholic beverages are being sold, that alcoholic beverages are not being sold to underage persons, and that taxes are being paid.”³⁷ This oversight assures that distributors and retailers, whose licenses depend on compliance with the letter and spirit of the law, remain accountable to the public. As Samona explains, the three-tier system gives states “the ability and that power to bring [noncompliant] licensees in, to suspend them for a few days... , take away the license, to go

and must never be allowed to return. Behind its blinds degradation and crime were fostered, and under its principle of stimulated sales poverty and drunkenness, big profits and political graft, found a secure foothold. Public opinion has not forgotten the evils symbolized by this disreputable institution and it does not intend that it shall worm its way back into our social life.”).

³⁴ Fosdick and Scott, *Toward Liquor Control* at 43.

³⁵ *Manuel v. State of Louisiana*, 982 So. 2d 316, 330 (La. Ct. App. 2008).

³⁶ *Ted Sharpenter, Inc. v. Illinois Liquor Control Comm’n*, 518 N.E.2d 128, 175 (Ill. App. Dist. 1988).

³⁷ March 18, 2010 Hearing before House Subcommittee on Courts and Competition, *supra*, note 10, at 43 (statement of Nida Samona, then-Chairperson, Michigan Liquor Control Commission).

onsite...,” either through state or local police.³⁸ The three-tier framework thus injects transparency and accountability into the alcohol trade.

III. Access and Abuse: Toward Liquor Control Today

Nearly eight decades since the publication of *Toward Liquor Control*, it has become evident that strategic restrictions on a community’s access to alcohol promotes more responsible consumption. As epidemiologist Alexander Wagenaar concludes, “[i]f you make it easier to drink, people drink more. And if people drink more, we have more alcohol-related problems. It’s as simple as that.”³⁹ Indeed, in recent years, map technology called Geographic Information Systems (GIS) confirms correlations between locations of alcohol retailers and alcohol-related traumas like car accidents and violent crimes.⁴⁰ For example, researchers from Indiana University used such methods to predict that adding one off-premise alcohol sales site per square mile would cause 2.3 more simple assaults and 0.6 more aggravated assaults per square mile.⁴¹

Studies have similarly found that limiting *when* alcohol can be sold promotes responsible consumption. A study published in the *American Journal of Preventive Medicine* found a direct relationship between the number of hours when alcohol is available

³⁸ *Id.* at 46.

³⁹ Richard Mendelson, *Wine in America* 363 (2011)(citing articles written by the Marin Institute).

⁴⁰ Paul J. Gruenewald, Lillian Remer, and Rob Lipton, *Evaluating the Alcohol Environment: Community Geography and Alcohol Problems*, National Institute on Alcohol Abuse and Alcoholism (Aug. 2002), available at <http://pubs.niaaa.nih.gov/publications/arh26-1/42-48.htm> (last accessed Dec. 18, 2011); see also Campbell CA, Hahn RA, Elder R, et al., *The Effectiveness of Limiting Alcohol Outlet Density as a Means of Reducing Excessive Alcohol*, AMERICAN JOURNAL OF PREVENTIVE MEDICINE (Dec. 2009), available at <http://www.thecommunityguide.org/alcohol/EffectivenessLimitingAlcoholOutletDensityMeansReducingExcessiveAlcoholConsumptionAlcohol-RelatedHarms.pdf> (last accessed Dec. 18, 2011).

⁴¹ Lab Spaces, *More Alcohol Sales Sites Mean More Neighborhood Violence* (Feb. 2010), available at http://www.labspaces.net/102120/More_alcohol_sales_sites_mean_more_neighborhood_violence (last accessed Dec. 18, 2011); see also Martin Snapp, *City Rolls Out Virtual Images*, CONTRA COSTA TIMES, Aug. 11, 2006 (Berkeley, California’s Planning Department has used GIS to study crime data and existing liquor stores in assessing whether to grant additional retail licenses in a particular area.).

and the rate of car crashes, violence, assault and injuries.⁴² An outback population in Australia suffering high rates of alcoholism and family neglect established a “Feed the Children First” program, shutting down liquor stores on the day paychecks were typically issued. Statistics from the ensuing two-year period showed a 19.4% decrease in consumption, fewer arrests and hospitalizations, and a dramatic decrease in domestic violence rates.⁴³

The regulation of underage drinking is a major aspect of alcohol aspect policy.⁴⁴ The dangers of alcohol use by minors include poor school attendance and grades; development issues; unplanned and unprotected sexual activity; and alcohol-related car crashes.⁴⁵ Underage drinking also sets the stage for alcohol abuse later in life. The 2004 National Survey on Drug Use and Health revealed that people who first used alcohol before age fifteen were five times more likely to develop alcohol dependence in later years.⁴⁶ Some researchers attribute this effect to alcohol’s influence on neurodevelopment during a critical moment in an adolescent’s maturation process.⁴⁷

⁴² Hahn RA, Kuzara JL, Elder R, et al., *The Effectiveness of Policies Restricting Hours of Alcohol Sales in Preventing Excessive Alcohol Consumption and Related Harms*, AMERICAN JOURNAL OF PREVENTIVE MEDICINE (Dec. 2010), available at <http://www.ncbi.nlm.nih.gov/pubmed/21084080> (last accessed Dec. 18, 2011).

⁴³ Thomas Babor, et al., *Alcohol: No Ordinary Commodity* 123 (2003).

⁴⁴ The Substance Abuse and Mental Health Services Administration, *National Survey on Drug Use and Health: State Estimates of Underage Alcohol Use and Self-Purchase of Alcohol* (April 2010), available at <http://www.samhsa.gov/data/2k10/180/180UAD.htm> (last accessed Dec. 18, 2011).

⁴⁵ National Institute on Alcohol Abuse and Alcoholism, *Why Do Adolescents Drink, What are the Risks, and How Can Underage Drinking Be Prevented?* (Jan. 2006), available at <http://pubs.niaaa.nih.gov/publications/AA67/AA67.htm> (last accessed Dec. 18, 2011); Centers for Disease Control and Prevention, *Underage Driving Fact Sheet* (July 2010), available at <http://www.cdc.gov/alcohol/fact-sheets/underage-drinking.htm> (last accessed Dec. 18, 2011).

⁴⁶ The Substance Abuse and Mental Health Services Administration, *National Survey on Drug Use and Health: Alcohol Dependence or Abuse and Age at First Use* (Oct. 22, 2004), available at <http://www.oas.samhsa.gov/2k4/ageDependence/ageDependence.htm> (last accessed Dec. 18, 2011).

⁴⁷ National Institute on Alcohol Abuse and Alcoholism, *The Effects of Alcohol on Physiological Processes and Biological Development* (2004), available at <http://pubs.niaaa.nih.gov/publications/arh283/125-132.htm> (last accessed Dec. 18, 2011).

The three-tier system, which allows states to easily regulate access by policing the in-state operations of wholesalers and retailers, remains important in modern America. *Toward Liquor Control's* complaint that manufacturers had little investment in the communities where they market rings even truer in 2012. Most of the alcohol sold in contemporary America is manufactured by foreign multinational companies.⁴⁸ This makes the requirement that various elements of alcohol distribution have an in-state presence, and in the case of retailers a physical one, more crucial than ever. As Michele Simon recently observed, “[a]s this industry becomes more and more consolidated, more and more globalized, it is critical to be able to regulate as much as we can at the local level. And not just retailers, but wholesalers,” are instrumental to this project.⁴⁹ Again, the fact that distributors and retailers can lose their licenses if they fail to comply with state law assures their accountability. Distributors also serve a powerful *de facto* police function with respect to merchants operating farther down the retail line. Distributors “understand that overconsumption [and] serving to minors” hurts the entire industry and implicates their own livelihoods, inspiring industry self-regulation.⁵⁰

In sum, *Toward Liquor Control's* regulatory suggestions remain extremely relevant in 2012. There is voluminous anecdotal and empirical evidence that states can effectively regulate alcohol consumption by continually adjusting the number, location and hours of alcohol retail outlets, imposing strict bans on alcohol sales to underage consumers, and

⁴⁸ September 29, 2010 Hearing before the House Judiciary Committee, *supra*, note 14, at 159 (statement of Michele Simon, then-Research and Policy Director, Marin Institute).

⁴⁹ *Id.* at 159 (Sept. 29, 2010)(statement of Michele Simon, then-Research and Policy Director, Marin Institute).

⁵⁰ March 18, 2010 Hearing before the House Subcommittee on Courts and Competition, *supra*, note 10, at 145 (statements of Nida Samona, then-Chairperson, Michigan Liquor Control Commission).

adopting a three-tier framework to assure that in-state businesses responsibly adhere to the regulatory scheme.

IV. Direct Wine Shipment Laws: What is Gained and What is Lost

From 1986 to 2011, the number of States permitting direct shipment of wine to end-use consumers leapt from three to thirty-eight plus the District of Columbia.⁵¹ Some of the holdout states are likely to pass direct shipment laws soon. In particular, bills in Pennsylvania and New Jersey are poised to succeed.⁵² The direct shipment distribution model – whereby wine manufacturers leapfrog over wholesalers and retailers and sell directly to consumers – represents an obvious break from the three-tier system. The rise of direct wine shipment laws owes largely to the Internet and two related arguments: (1) that “consumer rights” entitle Americans to use e-commerce to gain expanded choices and lower prices when buying wine; and (2) that “fair competition” demands that small wineries be permitted to sell beverages online where they avoid wholesaler costs.⁵³

In a much-cited 2003 report, the Federal Trade Commission concluded that direct wine shipment increases consumers’ choices insofar as “retailers simply do not have the shelf space to carry thousands of different wine brands.”⁵⁴ This physical limitation on brick-and-mortar stores, combined with Americans’ increasing tendency for buying goods on the

⁵¹ Free the Grapes!, *Maryland Wine Lovers Rejoice as Governor to Sign Bill Allowing Wine Direct Shipments: 38th State to Allow Winery Direct Shipping*, May 5, 2011, available at <http://freethegrapes.com/sites/default/files/Maryland%20to%20be%2038th%20State.pdf> (last accessed Dec. 18, 2011).

⁵² Pennsylvania and New Jersey are among the most desirable holdout States to the winery lobby, as they are populous and therefore represent great market potential. Wine industry organizations have targeted Pennsylvania and New Jersey, as the two most populous remaining States with bans, in order to reach their constituents’ market reach from approximately 85% of the U.S. population to over 90%.

⁵³ Federal Trade Commission, *Possible Anticompetitive Barriers to E-Commerce: Wine 22-24* (July 2003)(hereinafter “FTC Report”), available at <http://www.ftc.gov/os/2003/07/winereport2.pdf> (last accessed Dec. 18, 2011).

⁵⁴ *Id.* at 24.

Internet, leads Desiree Slaybaugh to argue that, while the three-tier system may have been necessary in the past, “[t]imes have changed... [and] the expectations, as well as the rights, of the American consumer are different.”⁵⁵

The Wine Institute insists that direct shipment is indispensable to fair competition. The lobbying group calls self-distribution laws vital to “the continued growth of our industry. [These] methods are what many of our members have turned to in response to the economic downturn that has faced many businesses, large and small...”⁵⁶ U.S. Representative Mike Thompson (D-CA), a known champion of wineries’ rights, likewise asserts that the traditional system “unfairly hurts producers... [and] discriminat[es] against business...” Invoking the free market ethos that has made “our great country,”⁵⁷ Thompson predicts that “[i]f any other type of business found ways to provide consumers with better choices in a more efficient manner, we’d applaud them!”⁵⁸

Such rhetoric may have popular appeal, but alcohol regulation cannot be solely “left up to the desires of thirsty drinkers and profit-maximizing [manufacturers].”⁵⁹ Indeed, when it comes to advertising, the federal Bureau of Alcohol, Tobacco and Firearms actively polices statements by alcohol producers for failure to mention “any of the possible harmful

⁵⁵ Desiree C. Slaybaugh, *A Twisted Vine: The Aftermath of Granholm v. Heald*, 17 TEX. WESLEYAN L. REV. 265, 284 (Winter 2011); see also Specialty Wine Retailers Association, *What We Stand For*, (commenting that any adult consumer “should be allowed to legally purchase and have shipped to them any wine from any retailer in America”), available at <http://www.specialtywineretailers.org/standfor.html> (last accessed Dec. 18, 2011).

⁵⁶ Joint Letter from the Wine Institute and WineAmerica, to the U.S. Congress regarding the CARE Act of 2011 at 2 (March 24, 2010), available at <http://www.wineamerica.org/issuepolicy/docs/Wine%20Institute%20Wine%20America%20Comments%20Final%20on%20Letterhead.pdf> (last accessed Dec. 18, 2011).

⁵⁷ March 18, 2010 Hearing before the House Subcommittee on Courts and Competition, *supra*, note 10, at 17 (statement of U.S. Representative Mike Thompson (D-CA)).

⁵⁸ *Id.* at 20 (statement of U.S. Representative Mike Thompson (D-CA)).

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societal effects arising from the consumption of wine.”⁶⁰ And while wine advocates complain of regulators “tarring” their beverage of choice “with the same brush” as beer and liquor,⁶¹ wine’s alcohol content actually hovers between the two, and studies show that it is increasingly drunk apart from meals as a cocktail.⁶²

Toward Liquor Control warned States not to abdicate their duty to promote the public good by letting economic concerns drive alcohol regulation. Low alcohol prices and vigorous sales may please wine aficionados and businesspeople, but these are not responsible policy goals for society as a whole. U.S. Representative Bobby L. Rush (D-IL) insists, “[while] regulation or deregulation [is] viewed by many through the lenses of what is in the best ‘competitive interests’ of industry... [the] objective is not to protect wholesalers or hurt producers, but rather to protect the people of [the] community.”⁶³ In the sphere of alcohol regulation, public health should be a state’s primary concern, yet direct shipment unabashedly pits the “public interest versus the private sector.”⁶⁴

⁶⁰ In 1991, to present one memorable example, the federal Bureau of Alcohol, Tobacco and Firearms rebuked Mondavi Winery among others for labeling their bottles with the following text: “Wine has been with us since the beginning of civilization. It is the temperate, civilized, sacred, romantic mealtime beverage recommended in the Bible. Wine has been praised for centuries by statesmen, philosophers, poets and scholars. Wine in moderation is an integral part of our culture, heritage and gracious way of life.” The government called the prose misleading. Dan Berger, Wording of “Mission Statement” Disapproved, L.A. Times, Feb. 7, 1991, available at http://articles.latimes.com/1991-02-07/food/fo-700_1_mission-statement (last accessed Dec. 18, 2011).

⁶¹ Richard Mendelson, *From Demon to Darling* 3 (2009).

⁶² Paul Franson, *Survey Finds Most Wine Not Drunk With Meals*, NAPA VALLEY REGISTER, Mar. 24, 2011, available at http://napavalleyregister.com/lifestyles/food-and-cooking/wine/columnists/paul-franson/article_af77e26c-5692-11e0-9722-001cc4c03286.html (last accessed Dec. 18, 2011).

⁶³ March 18, 2010 Hearing before the House Subcommittee on Courts and Competition, *supra*, note 10, at 12 (statement of U.S. Representative Bobby L. Rush (D-IL)).

⁶⁴ September 29, 2010 Hearing before the House Judiciary Committee, *supra*, note 14, at 155 (statement of Nida Samona, then-Chairperson, Michigan Liquor Commission); see also Gina M. Riekhof and Michael E. Sykuta, *Politics, Economics, and the Regulation of Direct Interstate Shipping in the Wine Industry*, CORI WORKING PAPER NO. 03-04 (May 13, 2003)(discussing the politics of regulation, noting that public interests, described as maximizing social welfare, and private interests, described as private actors’ competition to gain or protect economic rents, are the two general rationales), available at <http://ageconsearch.umn.edu/bitstream/22136/1/sp03ri05.pdf> (last accessed Dec. 18, 2011).

Direct shipment clearly undermines the regulation of alcohol access. In effect, it reduces alcohol trade to an “honor system,” leaving states unable to determine with any certainty the volume of alcohol in a given locale.⁶⁵ Classic modes of access regulation, such as limiting retailer locations and hours of operation, lose tremendous force under a direct shipment regime. The possibility of closing retailers’ brick-and-mortar doors carries much less promise if Internet windows are wide open.

The problem of mailed alcohol’s invisibility may be especially grave for underage drinkers. How can direct shippers know that their customers are over twenty-one? Online sellers’ age-verification procedures “are easy to foil by simply saying one was born in 1900 or thereabouts.”⁶⁶ The real responsibility for verifying age, then, falls to the men and women who deliver alcohol as FedEx or UPS employees. In 2010, Maryland’s Comptroller proposed the following “best practices”:

- (1) Requir[ing] a permit for a common carrier delivering wine directly shipped to a consumer;
- (2) Requir[ing] both the direct wine shipper and common carrier to affix a shipping label to the package with the following statement: “CONTAINS ALCOHOL; SIGNATURE OF PERSON AGE 21 OR OLDER REQUIRED FOR DELIVERY.”;
- and (3) Requir[ing] a common carrier to obtain an adult signature using age verification procedures.⁶⁷

David A. Kessler, former Food and Drug Administration Commissioner, has little faith that such best practices will be carried out. “It defies credibility to suggest alcohol retailed

⁶⁵ March 18, 2010 Hearing before the House Subcommittee on Courts and Competition, *supra*, note 10, at 141 (Mar. 18, 2010)(statement of Nida Samona, then-Chairperson, Michigan Liquor Control Commission).

⁶⁶ Richard Mendelson, *Wine in America* 143 (2011).

⁶⁷ Comptroller of Maryland, *Direct Wine Shipment Report, Submitted to the Maryland General Assembly* 66-69 (Dec. 31, 2010)(hereinafter “Maryland Comptroller Report”), available at http://www.comp.state.md.us/DWS_Complete.pdf (last accessed Dec. 18, 2011).

online... , beyond the reach of local regulators, and often left on doorsteps, does not significantly increase the risk of underage consumption.”⁶⁸

The FTC’s report noted that direct shipment states report no underage abuse,⁶⁹ but this finding only “begs the question: How is this known?”⁷⁰ The answer, unfortunately, is that when alcohol is trafficked under cover of mail, states *cannot* know.⁷¹ In New York, according to State Liquor Authority Chairman Dennis Rosen, “[o]ther than issuing [delivery permits to common carriers] and having the threat of revoking the permit, there is no way we’re monitoring” delivery of direct wine shipments.⁷² Michigan’s Nida Samona confirms that states simply do “not have the ability or financial resources to effectively regulate hundreds of thousands of out-of-state retailers.”⁷³

Direct shipment’s exception to the three-tier distribution system threatens to swallow the rule. Breweries and distilleries may seek to replicate the same distribution model for their products using the same arguments. Alaska, Virginia, New Hampshire, North Dakota and Washington, D.C. all already have some kind of direct beer shipment law on their books. Once consumers get used to buying wine on the Internet, they will also expect the “right” to buy other kinds of alcohol in the same way.⁷⁴ The Beer Institute has insisted that

⁶⁸ Letter from David A. Kessler, MD, former FDA Commissioner and Professor of Pediatrics, to United States Representative Jason Chaffetz (R-UT)(June 13, 2011)(on file with author).

⁶⁹ FTC Report, *supra*, note 53, at 3-4.

⁷⁰ Maryland Comptroller Report, *supra*, note 67, at 68.

⁷¹ September 29, 2010 Hearing before the House Judiciary Committee, *supra*, note 14, at 152 (statement by Michele Simon, Marin Institute: Direct shipment of alcohol “undermines the ability of states to fully account for the sale of alcohol within its borders”.)

⁷² *Economic Development Oversight: Hearing before the New York General Assembly Committee on Oversight, Analysis and Investigation*, 31 (Oct. 25, 2011)(hereinafter “October 25, 2011 Hearing before N.Y. General Assembly Oversight Committee”)(transcript on file with author).

⁷³ March 18, 2010 Hearing before the House Subcommittee on Courts and Competition, *supra*, note 10, at 145 (statement of Nida Samona, then-Chairperson, Michigan Liquor Control Commission).

⁷⁴ Desireé C. Slaybaugh, *A Twisted Vine: The Aftermath of Granholm v. Heald*, 17 TEX. WESLEYAN L. REV. 265, 284 (Winter 2011); see also Specialty Wine Retailers Association, *What We Stand For*, (commenting that any

its member breweries are not interested in direct shipment rights, but one doubts that smaller craft breweries will not make the same fair competition argument as small wineries, or that craft beer drinkers will not make the same varietal demands as wine aficionados.⁷⁵

V. Granholm Makes Matters Worse

Early on, many states passed direct shipment laws in order to benefit only local wineries. Michigan and New York were two such states, and eventually they were sued in federal court for violating Congress' plenary power to regulate interstate commerce.⁷⁶ The litigation eventually found its way to the U.S. Supreme Court in *Granholm v. Heald* in 2005. Though the Court acknowledged that Section 2 of the Twenty-first Amendment vests the states with broad powers to regulate alcohol within their borders, it held that this authority cannot be wielded simply "to discriminate against out-of-state goods."⁷⁷

Granholm wrought a seismic change in state alcohol regulation. Most states complied with the decision by expanding direct wine shipment permissions, punching an even bigger hole in their three-tier systems than they had originally intended. Moreover, *Granholm* also provoked one of the heaviest outbreaks of alcohol-related litigation since Prohibition, inspiring a wave of industry players to challenge other state alcohol regulations

adult consumer "should be allowed to legally purchase and have shipped to them any wine from any retailer in America."), available at <http://www.specialtywineretailers.org/standfor.html> (last accessed Dec. 18, 2011).

⁷⁵ Legal Libations, *Direct Shipment and Beer*, available at <http://www.legalibations.com/2010/03/direct-shipping-beer.html> (last accessed Dec. 18, 2011).

⁷⁶ The Commerce Clause holds that "Congress shall have Power... [t]o regulate Commerce among the several States." U.S. Cons. Art. I §, cl. 3. The Supreme Court has held that the Commerce Clause has a negative aspect, called the "dormant Commerce Clause," which effectively means that Congress' authority over interstate commerce is so plenary that even when it has not acted in some related arena, the States still may not unjustifiably burden the interstate flow of articles of commerce. *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996) ("In its negative aspect, the Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors.") (internal quotations omitted).

⁷⁷ *Granholm v. Heald*, 544 U.S. 460 (2005).

on similar constitutional grounds.⁷⁸ This placed a colossal burden on state resources. Costco's extended litigation against Washington, for instance, cost the state approximately \$1.5 million despite the fact that Costco lost on the majority of its claims.⁷⁹ Such expenditures have made states hesitant to defend challenged regulations.⁸⁰ Michigan became a prime example of this phenomenon when, in *Siesta Village Market, LLC v. Granholm*, a Florida wine retailer attacked a law allowing only in-state retailers the right to deliver wine to customers.⁸¹ At first blush, the law's "in-state requirement to deliver" suggests similarities to the law struck down in *Granholm*, but there is a critical difference between the cases. In *Granholm*, which involved out-of-state *producers*, the Supreme Court found that the "unquestionably legitimate" three-tier system has never required producers to have an in-state presence. *Siesta Village*, by contrast, involved out-of-state *retailers*, whose in-state presence has always been a *sine qua non* of the three-tier system. Without regard to this important distinction, the district court in *Siesta Village* held Michigan's in-state presence requirement for retailer deliveries unconstitutional.

⁷⁸ March 18, 2010 Hearing before the House Judiciary Committee, *supra*, note 10, at 160 (Mar. 18, 2010)(statement of Stephen M. Diamond, Professor of Law, University of Miami).

⁷⁹ *Id.* at appendix (open letter from Jim Petro, former Ohio Attorney General, and Tom Reilly, former Massachusetts Attorney General, entitled *The Need for Congress to Support State Alcohol Regulation with H.R. 5034*)(stating the chilling effect threat posed by a federal district court's decision that Washington State owed big-box store Costco \$1.5 million in attorney's fees after Costco was named the "prevailing party" in a litigation it initiated, and in which it had only won 2 out of 9 arguments).

⁸⁰ Letter from thirty-nine State Attorneys General to U.S. Representative Hank Johnson (D-GA), Chairman of the House Subcommittee on Courts and Competition Policy (Mar. 29, 2010)(on file with the author)(observing that "[w]ith states around the country experiencing massive budget shortfalls, [this tends to] have a chilling effect on states' ability and willingness to defend their alcohol laws").

⁸¹ *Siesta Village Market, LLC v. Granholm*, 596 F. Supp. 2d 1035 (E.D.Mich. 2008).

Siesta Village probably would not be upheld on appeal.⁸² In two later cases, U.S. Courts of Appeal upheld similar in-state retailer delivery statutes. In *Arnold's Wines, Inc. v. Boyle*, the Second Circuit held that New York's law made "no distinction between liquor produced in New York and liquor produced out of the state: both may be shipped directly to New York consumers by licensed in-state retailers."⁸³ The Fifth Circuit similarly upheld a Texas law in *Wine Country Gift Baskets.com v. Steen*, noting that "[t]he traditional three-tier system, seen as one that funnels the product, has an opening at the top available to all."⁸⁴ Despite the apparent strength of Michigan's case in *Siesta Village*, the state chose to repeal its law and save litigation costs rather than fight the decision.⁸⁵

Businesses have also raised constitutional claims against facially neutral direct wine shipment regulations like gallonage caps, with conflicting results. States have set gallonage caps in order to focus direct shipment laws' benefits on their originally intended recipients – small wineries without sufficient resources to participate in more traditional markets. Massachusetts, for example, had granted small wineries – statutorily defined as producers of under 30,000 gallons of wine each year – the right to ship more wine than large wineries. Then the First Circuit held in *Family Winemakers of California v. Jenkins* that this restriction unduly burdened interstate commerce because the gallonage cap conferred a competitive advantage on Massachusetts wineries, all of which qualified as small wineries

⁸² September 29, 2010 Hearing before the House Judiciary Committee, *supra*, note 14, at 157 (statement of Einer Elhauge, Professor of Law, Harvard University)("I have some sympathy [for Michigan], because [it] suffered from the *Siesta Village* district court case, which I think was wrongly decided.").

⁸³ *Arnold's Wines, Inc. v. Boyle*, 571 F.3d 185, 190 (2nd Cir. 2009)(citing *Granholm*, 544 U.S. at 493).

⁸⁴ *Wine Country Gift Baskets.com v. Steen*, 612 F.3d 809, 815 (5th Cir. 2010).

⁸⁵ September 29, 2010 Hearing before the House Judiciary Committee, *supra*, note 14, at 73-74 (statement of Nida Samona, then-Chairperson of Michigan Liquor Control Commission).

under the law.⁸⁶ By contrast, the Ninth Circuit upheld an Arizona gallonage cap law in *Black Star Farms LLC v. Oliver*, where the plaintiff could not prove an “actual discriminatory effect” on interstate commerce.⁸⁷ In fact, the court observed that more out-of-state wineries had acquired direct shipment licenses than in-state wineries under the challenged law.⁸⁸

Face-to-face age verification laws have also confronted legal challenges, again with mixed results. In *Baude v. Heath*, the Seventh Circuit upheld an Indiana requirement that in-state and out-of-state wineries conduct one face-to-face age verification with a customer before directly shipping wine to his or her home.⁸⁹ The Seventh Circuit conceded that Indianans could more easily visit an Indiana winery in person than a California one, but ultimately found that Indiana wineries did not accrue any meaningful benefit. For many Indianans, the Court observed, the closest winery to their home would be in Michigan, Illinois, Kentucky or Ohio.⁹⁰ When Kentucky enacted a similar law, however, the Sixth Circuit struck it down in *Cherry Hill Vineyards, LLC v. Lilly*.⁹¹ The Court found that the requirement “[made] it economically and logistically infeasible for most consumers to purchase wine from out-of-state small farm wineries.”⁹²

This array of post-*Granholm* litigation shows how nearly identical state alcohol regulations – whether they deal with in-state retailer deliveries, gallonage caps, or face-to-face age verifications – have met with very different fates. Faced with unpredictability,

⁸⁶ *Family Winemakers of California v. Jenkins*, 592 F.3d 1, 11 (1st Cir. 2010).

⁸⁷ *Black Star Farms LLC v. Oliver*, 600 F.3d 1225 (9th Cir. 2010).

⁸⁸ *Id.* at 1232.

⁸⁹ *Baude v. Heath*, 538 F.3d 608 (7th Cir. 2008).

⁹⁰ *Id.* at 613.

⁹¹ *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 424 (6th Cir. 2008).

⁹² *Id.* at 433.

states become hesitant to regulate alcohol trade and to defend those regulations they have already adopted. In ways that go beyond its specific holding, *Granholm* continues to be a major tool of alcohol deregulation.

VI. The CARE Act: Restoring State Regulatory Authority Over Alcohol

To date, approximately thirty-five challenges to state alcohol regulation have been brought under *Granholm*.⁹³ In an effort to curb this disturbing record, U.S. Representative Bill Delahunt (D-MA) introduced the Comprehensive Alcohol Regulatory Act of 2010 (the CARE Act). Reintroduced by Representative Jason Chaffetz (R-UT) in 2011, the law would allow the states to avoid the Commerce Clause's non-discrimination requirement. States would be able to allow in-state producers to do things that out-of-state producers cannot, provided:

[they] can demonstrate that the challenged law advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.⁹⁴

In other words, the CARE Act of 2011 seeks “to recognize and reaffirm that alcohol is different from other consumer products and that it should continue to be regulated by the [s]tates” in the absence of a specific federal law on an alcohol-related issue.⁹⁵ The Act has widespread support. At this writing, the current version of the bill has 116 co-sponsors in the House of Representatives.⁹⁶

⁹³ September 29, 2010 Hearing before the House Judiciary Committee, *supra*, note 14, at 63 (statement of the Hon. Mark L. Shurtleff, Utah Attorney General).

⁹⁴ H.R. 1161, 112th Cong. (2011), available at <http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.5034>: (last accessed Dec. 18, 2011); see also Susan Lorde Martin, *Wine Wars: Consumers and Mom-and-Pop Wineries vs. Big Business Wholesalers: A Citizens United Example*, 21-FAL Kan. J.L. & Pub. Pol'y 1, 20 (2011).

⁹⁵ H.R. 1161, 112th Cong. (2011), available at <http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.5034>: (last accessed Dec. 18, 2011).

⁹⁶ *Id.*

VII. Public Health's Dwindling Role in the Alcohol Regulation Debate

The CARE Act, however great its benefits, will not cure all that ails contemporary state alcohol regulation. *Granholm* certainly weakened states' regulatory armor and galvanized wine industry players to attack the alcohol laws on a rarely-seen scale. But there is another threat to meaningful alcohol regulation that has nothing to do with *Granholm*: States' complicity in deregulation. This complicity is evident in the absence of public health considerations from political debate on these laws.

Again, *Granholm* gave states a choice.⁹⁷ They could either “terminat[e] all direct-to-consumer wine shipments, whether in- or out-of-state,” or “open up the market to all out-of-state wine shipments.”⁹⁸ The vast majority of the states chose the latter path, a decisive move toward a different alcohol distribution model than traditional brick-and-mortar retail outlets.

The shift reflects the increasing centrality of consumer choice, product affordability, and small-business growth as driving arguments in alcohol regulation. Gina Riekhof and Michael Sykuta's much-cited 2003 study on legislative motivations behind direct shipment laws concluded that “private economic interests appear to play a dominant role.”⁹⁹ They found that “[n]o evidence supports general public interest motivation.”¹⁰⁰ This research was actually a boon to wineries challenging discriminatory direct shipment laws, as it stood for

⁹⁷ Maryland Comptroller Report, *supra*, note 67, at 27 (“It is important to keep in mind that *Granholm* does not require states to enact direct wine shipment laws, but it does prohibit states who have enacted direct wine shipment laws from discriminating between in-state and out-of-state wine producers unless legitimate State justifications can be demonstrated.”).

⁹⁸ Garrett Peck, *The Prohibition Hangover* 151 (2009); see also *Granholm*, 544 U.S. at 493.

⁹⁹ Gina M. Riekhof and Michael E. Sykuta, *Politics, Economics, and the Regulation of Direct Interstate Shipping in the Wine Industry*, CORI WORKING PAPER NO. 03-04 (May 13, 2003), available at <http://ageconsearch.umn.edu/bitstream/22136/1/sp03ri05.pdf> (last accessed Dec. 18, 2011).

¹⁰⁰ *Id.* at 4.

the proposition that the burden they imposed on interstate commerce could not be justified by anything other than bias against out-of-state goods.¹⁰¹

Maryland is now the most recent state to pass a direct shipment law, and serves as an example of how secondary public health has become in debate surrounding such legislation.¹⁰² Prior to the law's enactment in May 2011, the Maryland Comptroller published a 237-page report that, making perfunctory mention of the costs of alcohol-related injury and illness, does not assess the regulatory impact of mailed alcohol's invisibility.¹⁰³ Its only in-depth access discussion deals with direct shipment's age-verification problem.

New York is another case where public health was an afterthought in the direct wine shipment debate. New York convened an October 2011 hearing to examine the effects of its existing direct shipment law. State Liquor Authority Chairman Dennis Rosen acknowledged that his state conducts no sting operations to police Internet alcohol sales. Instead, law enforcement is complaint-driven, but "[t]here haven't been a lot of complaints."¹⁰⁴ Nonetheless, Rosen expressed "no doubt... that there are violations being committed" far beyond what the few complaints suggest.¹⁰⁵ The inadequacy of complaint-based enforcement is unsurprising. As Assemblyman Andrew Hevesi observed, "if you're the underage drinker... you're not going to complain," and the common carrier isn't going to

¹⁰¹ *Granholm*, 544 U.S. at 489-91.

¹⁰² Free the Grapes!, *Maryland Wine Lovers Rejoice as Governor to Sign Bill Allowing Wine Direct Shipments: 38th State to Allow Winery Direct Shipping*, May 5, 2011, available at <http://freethegrapes.com/sites/default/files/Maryland%20to%20be%2038th%20State.pdf> (last accessed Dec. 18, 2011).

¹⁰³ Richard Mendelson, *Wine in America* 386 (2011)(When weighing a change to alcohol regulation, "[t]he guiding principle should be to assess the full set of effects before adopting the measure, lest it have unintended consequences...").

¹⁰⁴ October 25, 2011 Hearing before N.Y. General Assembly Oversight Committee, *supra*, note 72, at 20.

¹⁰⁵ *Id.*

complain either.¹⁰⁶ The problem extends beyond New York. When the Federal Trade Commission studied the issue in 2003, it submitted a questionnaire to the states on age verification.¹⁰⁷ Of the ten states that responded, all confessed that they do not conduct sting operations, and have no reliable data on purchases by minors.¹⁰⁸

VIII. Conclusion

The movement to allow direct wine shipment has enjoyed success in nearly all of the United States. Most remaining states are likely to follow suit. They sit in the crosshairs of a sophisticated lobbying campaign whose mantras are consumer entitlement and free enterprise. Proponents of direct shipment play down wine's potential for abuse and capitalize on wine's deceptively rosy reputation relative to beer and liquor. The state's paramount interests in public health and responsible consumption are thus minimized in debates over direct shipment, and have been compromised by the laws themselves. With the political stage set for further efforts toward deregulation, and particularly direct shipment of beer and liquor, it is all the more important to learn from history and experience. *Toward Liquor Control* is a major repository of that wisdom. Emphasizing the relationship between access and abuse, Fosdick and Scott set the framework for decades of effective regulation. That framework should be preserved.

¹⁰⁶ *Id.* at 32.

¹⁰⁷ FTC Report, *supra*, note 53, at appendix (Colorado: "We do not have any specifics of shippers shipping directly to minors. Our enforcement posture has been to respond to complaints and not take proactive actions such as stings."; Hawaii: "No, at least not to our knowledge. No we do not conduct stings.").

¹⁰⁸ *Id.*

