Wine Retailers Lobby to Put a Cork in Discriminatory State Liquor Laws and Proposed CARE Act

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I. Introduction

“You, with a little bit of me, we are changing the wine world,” says Gary Vaynerchuk, online wine retailer and connoisseur. Through the internet and social media, Gary has transformed the wine world from a stuffy, aristocratic luxury into an accessible and fun hobby for even the average Joe. Gary is the owner of Wine Library, a wine retail establishment in New Jersey, which focuses primarily on generating online wine sales. Gary has established a significant fan following, referred to as “Vayniacs”, who watch his daily online television show, Wine Library TV, listen to his radio show on Sirius XM Radio, Wine & Web with Gary Vaynerchuk, and tweet for his recommendations on great wine pairings via Twitter. Unfortunately, many “Vayniacs” do not have the opportunity to purchase Gary’s picks through Wine
Library’s website because of state liquor legislation discriminating against out-of-state wine retailers.\

Since the enactment of the Twenty-First Amendment, many states use their legislative authority to enact legislation limiting the direct shipment of wine to consumers from out-of-state organizations.\

Such laws are consistently challenged by purporting that the Twenty-First Amendment does not give the states the ability to legislate without regards to the Commerce Clause. Under Section Two of the Twenty-First Amendment, states have the power to regulate the transportation, importation, and possession of intoxicating liquors within their state. State governments argue that they are merely protecting the interests afforded to them under the Twenty-First Amendment when enacting legislation prohibiting out-of-state organizations from directly shipping into the state. Conversely, challengers that argue such legislation directly violates the Commerce Clause.

The Supreme Court ruled that states may not enact direct-shipment legislation that discriminates against out-of-state producers. Recent confusion in the lower courts stemmed from attempting to apply the Supreme Court’s decision in Granholm v. Heald to
state legislation discriminating against out-of-state retailers. In response to the confusion in this area of law, the proposed Comprehensive Alcohol Regulatory Effectiveness Act ("CARE Act"), which is being heavily debated in Congress’s current session, would give states complete control over liquor regulation and would permit states to discriminate against out-of-state organizations without regard for the Commerce Clause.

Because the wine production and distribution industries have substantially expanded with the introduction of online wine sales, the impact of the CARE Act on the industries would be devastating. In Part II, this note will discuss the history of liquor legislation prior to prohibition, the Supreme Court’s interpretation of state liquor laws after the Eighteenth and Twenty-First Amendments, and the Supreme Court’s most recent decision on state liquor laws in Heald. This note will then evaluate several lower court applications of the Heald decision in Part III. Part IV will describe the recently proposed CARE Act. In Part V, this note will argue that state laws permitting in-state retailers to ship wine locally while prohibiting out-of-state retailers from
doing the same are discriminatory in effect as they offer an advantage to in-state business while hindering out-of-state business. Further, this note will argue in Part VI that the CARE Act, permitting states to discriminate against out-of-state organizations dealing in liquor, is not an acceptable means of settling the confusion in applying the Heald decision.

II. The Swirling History of Liquor Legislation Interpretation

Before prohibition, state liquor legislation was subject to the confines of the federal government’s Wilson and Webb-Kenyon Acts. After the end of prohibition, the Supreme Court heard a plethora of cases in an attempt to interpret the Commerce Clause in light of the Twenty-First Amendment. While the issue is still not completely settled, the most recent decision from the Supreme Court in Heald has provided the most guidance on the comingling of the Commerce Clause and the Twenty-First Amendment.

Prior to prohibition, through the Wilson and Webb-Kenyon Acts, enacted in 1890 and 1913 respectively, Congress introduced the first legislations prohibiting states from discriminating against out-of-state intoxicating liquors. The Court interpreted the Wilson Act to require states to either entirely forbid the sale and manufacture of liquor or to provide equal regulations for sale and inspection of in-state and out-of-state liquors. The Court reasoned that to interpret otherwise would permit discrimination between interstate and domestic commerce in violation of the Constitution. Later, the Court declared the Webb-Kenyon Act a constitutionally permissible extension of the Wilson Act, formally permitting states to prohibit all alcohol importation, despite its intended use, from entering the state.

B. Effect of 18th and 21st Amendments on Supreme Court Interpretation of State Liquor Laws

Discrimination by states against out-of-state intoxicating liquor was not a pressing issue in the
courts from 1919, when the Eighteenth Amendment was enacted, until the Eighteenth Amendment was repealed by the Twenty-First Amendment in 1933. Following the enactment of the Twenty-First Amendment, the Court struggled to determine whether the new Amendment removed the protection of the Commerce Clause from state laws discriminating against out-of-state intoxicating liquor or if the Amendment was a means of reaffirming the purpose of the Wilson and Webb-Kenyon Acts to prohibit discrimination by the states against out-of-state liquor.

1. The Supreme Court’s Immediate Reaction to The Twenty-First Amendment

Shortly after the introduction of the Twenty-First Amendment, in 1936, the Court held the Twenty-First Amendment gave the states the power to impose regulations that discriminated against out-of-state liquor. The Court specifically noted that prior to the Twenty-First Amendment, the Commerce Clause prohibited states from imposing unequal regulations on out-of-state intoxicating liquors. Over the next several years the Court reaffirmed its position by
upholding several state discriminatory regulations against out-of-state liquor.\textsuperscript{xxxiii}

2. The Supreme Court Reevaluates Jurisprudence on State Liquor Laws

Gradually the Court began to reassess its understanding of the interplay between the Twenty-First Amendment and the Commerce Clause.\textsuperscript{xxxiv} The Court, in the 1964 case of \textit{Hostetter v. Idlewild Bon Voyage Liquor Corp.}\textsuperscript{xxxv}, instructed that, “Both the Twenty-First Amendment and the Commerce Clause are parts of the same Constitution.\textsuperscript{xxxvi} Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case.”\textsuperscript{xxxvii} The Court emphasized that the Twenty-First Amendment was not enacted to repeal the Commerce Clause when liquor was involved.\textsuperscript{xxxviii}

Later, in 1984, the Court revisited the issue in \textit{Bacchus Imports v. Dias}\textsuperscript{xxxix} and emphasized the purpose of the Twenty-First Amendment was not to empower the states to favor in-state products.\textsuperscript{xl} The Court finally narrowed its understanding by holding that
discriminatory state laws involving the sale or transportation of intoxicating liquors are subject to Commerce Clause scrutiny, and will be deemed unconstitutional unless the implicated law is narrowly tailored to implement a purpose of the Twenty-First Amendment.\textsuperscript{xli}

3. The Supreme Court Examines the Three-Tier Structure

After the end of prohibition, many states developed a three-tier system to distribute alcohol within the state.\textsuperscript{xlii} The Court addressed the constitutionality of the three-tier system in a conflict between the state of North Dakota and the federal government involving shipping liquor from out-of-state to federal military bases within the state.\textsuperscript{xliii} North Dakota implemented a three-tier system composed of out-of-state suppliers, state-licensed wholesalers, and state-licensed retailers.\textsuperscript{xliv} The three-tier system mandated that suppliers only sell to licensed wholesalers or federal enclaves, and the licensed wholesalers only sell to licensed retailers, other licensed wholesalers, or federal
enclaves. The Court held the North Dakota three-tier system was, “unquestionably legitimate.” In ruling the out-of-state organizations shipping to the federal enclaves within North Dakota must adhere to North Dakota’s liquor laws, the Court emphasized the state liquor law should be given a presumption of validity under the Twenty-First Amendment.

C. Granholm v. Heald: The Supreme Court Decides the Proper Way to Evaluate State Liquor Law is to Scrutinize it Against a Pairing of the Twenty-First Amendment and the Commerce Clause

Over the next twenty years, the emergence of the internet created a heightened tension between state rights under the Twenty-First Amendment and the Dormant Commerce Clause’s limitations on those rights. In 2005, the Supreme Court explored the issue yet again in its most recent decision on the issue in Granholm v. Heald. The Heald case explored the constitutionality of Michigan and New York wine laws which generally followed the three-tier system, but carved out certain exceptions for in-state or local producers by allowing them to ship directly to
in-state consumers. The Court interpreted the history of case law on the issue as supporting the view that Section Two of the Twenty-First Amendment returned to states the power they originally possessed under the Wilson and Webb-Kenyon Acts, which did not include the authority to discriminate against out-of-state goods. The Court reaffirmed its position that the three-tier system employed by many states, including New York and Michigan, is a constitutionally permissible method for controlling the importation and sale of intoxicating liquors within a state. Nonetheless, the Court found that only state systems that treat in-state and out-of-state produced liquor equally are entitled to protection under the Twenty-First Amendment.

If the Twenty-First Amendment were to allow states to discriminate against out-of-state produced wine, unequal trade markets would emerge in violation of the Commerce Clause. Michigan’s law was found to be discriminatory because an out-of-state wine producer could not obtain a license to ship directly to consumers in Michigan. The Court found New York’s law to be discriminatory as well because it placed the prohibitive measure of requiring an out-of-state winery to establish a branch in the State of New York.
in order to be eligible to directly ship to New York consumers. Because both the Michigan and New York wine laws did not treat in-state and out-of-state produced wine equally, the laws were deemed unconstitutional in violation of the Commerce Clause.

III. Lower Courts Consider a Flight of Cases

Attempting to Apply Granholm v. Heald

Lower courts have difficulty in applying the decision in Heald to cases involving facially neutral state liquor laws. Recently, the lower courts are faced with a more difficult challenge in applying the Supreme Court’s decision in Heald to other organizations within a state’s three-tier structure, particularly with wine retailers.

A. Family Winemakers of California v. Massachusetts:

Applying Heald to a Facially Neutral State Statute

The First Circuit applied the Heald decision to state laws discriminatory in effect in Family Winemakers of California v. Massachusetts. A
Massachusetts law allowed small wineries to obtain a license permitting them to ship directly to consumers and to sell to retailers and wholesalers, but mandated that large wineries either use wholesalers to distribute their products or directly ship to consumers.\textsuperscript{lxii} The Massachusetts law defined a small winery in a manner that permitted all in-state wineries to be classified as small.\textsuperscript{lxiii} The court held the Massachusetts law was discriminatory in effect and therefore unconstitutional under the Commerce Clause because it gave an advantage to all in-state wineries, while creating substantial costs for large out-of-state wineries to distribute their products within Massachusetts.\textsuperscript{lxiv}

B. Brooks v. Vassar: Applying Heald to State Law’s Personal Importation Exception

The Fourth Circuit was first forced to interpret the Supreme Court’s Heald decision in 2006 in Brooks v. Vassar.\textsuperscript{lxiv} Virginia’s liquor law generally followed a three-tier system, but allowed an exception for consumers who personally carried no more than one gallon of liquor into the state for personal
consumption. Challengers argued the Virginia exception was discriminatory both on its face and in effect because the law limited the amount of wine a consumer could bring in from out-of-state yet allowed a consumer to buy an unlimited amount of wine from an in-state retailer. The court interpreted the Heald holding as a two part test involving: 1) a determination if the Virginia law discriminated against interstate commerce in violation of the Commerce Clause; and 2) if the law did violate the Commerce Clause determining if the law advanced legitimate state interests which could not be achieved by other nondiscriminatory measures.

Ultimately, the court reasoned that because the challengers were asserting that in-state retailers received preferential treatment over out-of-state retailers, the challengers were actually questioning the legitimacy of Virginia’s three-tier system. The court rejected the challengers’ discrimination argument finding that the Virginia Law regulated all sales of liquor within the state, and emphasizing that a consumer could purchase an unlimited amount of wine from any source, so long as the wine went through the state’s three-tier system. Further, the court found
that the purpose of the challenged sections of the Virginia liquor law were not aimed at economic protectionism of the local wine industry.\textsuperscript{lx}

C. Interpreting Heald as Applied to Wine Retailers

Three lower courts have had the opportunity to interpret the Supreme Court’s Heald decision in evaluating state liquor laws allegedly discriminating against out-of-state wine retailers.\textsuperscript{lxxi} The lower courts have evaluated such state laws differently, and have come to different conclusions based on different reasoning.\textsuperscript{lxxii}


The Second Circuit upheld the decision of the district court, finding that New York’s challenged liquor laws to be constitutional.\textsuperscript{lxiii} New York’s liquor control system mandated most alcoholic beverages pass through a three-tier structure before reaching consumers in the state.\textsuperscript{lxiv} An exception to
the law allowed in-state retailers to obtain a special license permitting them to ship directly to consumers.\textsuperscript{lxxv} New York argued that the three-tier system was deemed a legitimate structure in \textit{Heald}, and advanced the state’s need to collect taxes and prevent the sale of liquor to minors.\textsuperscript{lxxvi} The court found the challengers’ argument of unequal treatment of in-state and out-of-state retailers as a discriminatory measure in violation of the Commerce Clause, was actually a challenge to the validity of the three-tier structure.\textsuperscript{lxxvii}

The court interpreted \textit{Heald} to hold, “It is only where states create discriminatory exceptions to the three-tier system, allowing in-state, but not out-of-state, liquor to bypass the three regulatory tiers, that their laws are subject to invalidation based on the Commerce Clause.”\textsuperscript{lxxviii} While in \textit{Heald}, the Court ruled on a provision involving discrimination against out-of-state produced goods, here, the appellate court distinguished the case because it was deliberating a provision that treated both out-of-state and in-state produced goods equally.\textsuperscript{lxxix} Both in-state and out-of-state produced liquor are required to pass through New York’s three-tier system, leading the court to
determine the provisions were constitutional as there was no discrimination against out-of-state goods.\textsuperscript{lxxx}

Once the court determined New York’s regulation was not discriminatory, it declined to delve into the second part of the Dormant Commerce Clause test.\textsuperscript{lxxxi} The court concluded that the challenged portion of New York’s liquor laws was an integral part of the three-tier system, and to rule in favor of the challengers would result in a destruction of New York’s alcohol regulation system.\textsuperscript{lxxxii}


The Fifth Circuit considered a case involving a challenge to Texas’ liquor laws pertaining to retailers.\textsuperscript{lxxxi} Texas law, which generally used a three-tier system to regulate the flow of liquors within the state, permitted in-state retailers to ship directly to consumers within the county where the retail establishment was located, but prohibited out-of-state retailers from doing the same.\textsuperscript{lxxxiv} The district court ruled that the Texas law was
discriminatory against out-of-state retailers and found the state had failed to establish a sufficient reason for such discrimination.\textsuperscript{lxxxv} The court of appeals came to the opposite conclusion holding the Texas law was constitutional under the power given to the states in the Twenty-First Amendment.\textsuperscript{lxxxvi}

The court interpreted Heald as providing, “the Twenty-first Amendment still gives each State quite broad discretion to regulate alcoholic beverages.”\textsuperscript{lxxxvii} Based on this interpretation, the court reasoned that the Texas law permitting in-state retailers to ship directly to consumers within the county was the equivalent of making local deliveries.\textsuperscript{lxxxviii} The court found that allowing local deliveries to be, “a constitutionally benign incident of an acceptable three-tier system.”\textsuperscript{lxxxix} Because the three-tier system was found to be a legitimate structure in Heald, the court reasoned the Texas ‘constitutionally benign incident’ of the three-tier system must too be legitimate.\textsuperscript{xc} The court concluded Texas’ liquor law pertaining to in-state retailers’ ability to directly ship within the county of their retail establishment was not a violation of the Dormant Commerce Clause,
but was a constitutional use of state power under the Twenty-First Amendment.


The eastern district of Michigan came to the opposite conclusion when faced with a similar Michigan liquor law involving retailers in Siesta Vill. Mkt. v. Granholm. Michigan liquor law allows in-state retailers, which are a part of its three-tier system, to obtain a special license to ship directly to consumers while prohibiting out-of-state retailers from directly shipping into the state. Out-of-state retailers may obtain the special license only by establishing a place of business in Michigan, thus becoming part of Michigan’s three-tier system. The state argued that the challengers were questioning the legitimacy of the three-tier system, and under Heald that system was upheld as ‘unquestionably legitimate’. The challengers contended that Michigan’s liquor laws are discriminatory against out-of-state retailers, violate the Commerce Clause, and
are inconsistent with the Supreme Courts Heald decision.xcvi

The district court asserted that a Dormant Commerce Clause analysis was necessary by interpreting the decision in Heald: “While the Heald court did state that the three-tier system was an appropriate use of state power, it did not approve of a system that discriminates against out-of-state interests.”xcvii By forcing out-of-state retailers to open a location in Michigan in order to directly ship to consumers, the court ruled that Michigan was placing an additional burden on out-of-state retailers while providing a benefit to in-state retailers.xcvi

Because the Michigan law was discriminatory against out-of-state retailers, the court found it was a violation of the Commerce Clause.xcix In performing the second step of the Dormant Commerce Clause analysis, the court determined Michigan’s state interests advanced by the liquor law for retailers could be achieved in a non-discriminatory manner. Because the Michigan law failed both parts of the Dormant Commerce Clause test, the court found the law to be an unconstitutional use of state power.xci
IV. Wine Wholesalers Attempt to Barrel the CARE Act Through Congress

In response to recent jurisprudence in favor of direct shipping, wholesalers mobilized to formulate a more beneficial result for themselves by lobbying for legislation to pass through Congress.\textsuperscript{ci}\textsuperscript{i} The Comprehensive Alcohol Regulatory Effectiveness ("CARE") Act, written by large wholesaler associations, was introduced to the House of Representatives in April of 2010.\textsuperscript{cii}\textsuperscript{i} The CARE Act’s stated purpose is to reaffirm the right and power of the states to regulate liquor within their state.\textsuperscript{civ}\textsuperscript{i} Opponents argue the listed purposes of the bill conceal the true purposes which are, “to remove federal oversight and eliminate consumer challenges to discriminatory laws for their [wholesalers] own financial benefit.”\textsuperscript{cv}\textsuperscript{i}

The CARE Act would amend the Wilson and Webb-Kenyon Acts to provide states with broader authority to regulate alcoholic beverages, causing state liquor legislation to avoid Commerce Clause challenge in most circumstances.\textsuperscript{cvi}\textsuperscript{i} The proposed Wilson Act amendment removes the text which mandates that states treat in
and out-of-state intoxicating liquors in the same manner.\textsuperscript{cvii} The Webb-Kenyon Act amendment would be an addition to the Act as it stands currently.\textsuperscript{cviii}

The Webb-Kenyon addition proposed in the CARE Act provides that while states may not facially discriminate against out-of-state products without justification, the challenger, not the state, will have the burden of proving by clear and convincing evidence that the state law is invalid under the Commerce Clause.\textsuperscript{cix} Further, the CARE Act provides that a challenger must also prove by clear and convincing evidence that the state legislation challenged, “Has no effect on the promotion of temperance, the establishment or maintenance of orderly alcoholic beverage markets, the collection of alcoholic beverage taxes, the structure of the state alcoholic beverage distribution system, or the restriction of access to alcoholic beverages by those under the legal drinking age.” \textsuperscript{cx} This language significantly reduces the amount of state liquor legislation open for challenge because a challenger must prove the law has no impact on any of the listed purposes, most of which are the more common purposes
provided by state governments for enacting liquor legislation.\textsuperscript{cxi}

On September 13, 2010, the original sponsor of the CARE Act, Bill Delahunt, submitted a request to the House Committee on the Judiciary seeking an amendment to the CARE Act as originally submitted.\textsuperscript{cxii} The proposed amendment would eliminate the burden of proof requirement for challengers.\textsuperscript{cxiii} The proposed amendment also removes the list of valid purposes for state liquor legislation that were not subject to judicial review in the original proposed CARE Act.\textsuperscript{cxiv}

The amended CARE Act provides:

\begin{quote}
State or territorial regulations may not intentionally or facially discriminate against out-of-State or out-of-territory producers of alcoholic beverages in favor of in-State or in-territory producers unless the State or territory can demonstrate that the challenged law advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.\textsuperscript{cxv}
\end{quote}

While the amended version of the CARE Act is less discriminatory than the original bill, the amendment is only beneficial to producers, and still leaves states free to facially discriminate against out-of-state retailers.\textsuperscript{cxvi}

The CARE Act is strongly supported by liquor wholesalers who lost a share of their profits when the
courts began allowing wineries to bypass the wholesaler level in the three-tier system by permitting wineries to ship directly to consumers.\textsuperscript{cxvii}

Meanwhile the CARE Act is vehemently opposed by most small wineries, consumers, and retailers who would no longer be protected from discriminatory state liquor laws.\textsuperscript{cxviii}

V. Lower Court Decisions Leave a Tannic Taste for Wine Retailers

Applying the \textit{Heald} decision to state liquor legislation discriminating against out-of-state retailers created confusion for lower courts.\textsuperscript{cxix} While the Court in \textit{Heald} unquestionably reaffirmed the three-tier structure as a constitutional use of state authority to regulate the flow of alcoholic beverages within their state, it also stands for the principle that states cannot create legislation that discriminates against out-of-state organizations.\textsuperscript{cxx}

The most convincing reading of the \textit{Heald} Court’s understanding comes from the court in \textit{Siesta Village} which emphasized that while the Court in \textit{Heald} noted that the three-tier system was a legitimate use of
state authority, it did not expressly approve of a system that discriminates against out-of-state organizations.\textsuperscript{cxxi}

Several statements made by the Heald Court support the inference made by the court in Siesta Village.\textsuperscript{cxxii} In determining that the Commerce Clause must be applied to state liquor legislation, the Heald Court emphasized that the purpose of the Commerce Clause was to allow citizens the right to have access to markets of all states on equal terms.\textsuperscript{cxxiii} Certainly the same purpose should be emphasized when evaluating the discriminatory aspects of a state’s three-tier structure.\textsuperscript{cxxiv}

State laws allowing in-state retailers to ship directly to consumers while prohibiting out-of-state retailers from doing the same are facially and in effect discriminatory.\textsuperscript{cxxv} State laws that place a burden on out-of-state retailers while providing in-state retailers an advantage are discriminatory under the Commerce Clause.\textsuperscript{cxxvi} Out-of-state retailers have no viable option allowing them to compete on the same level as in-state retailers except by establishing a place of business within the state in which they wish to compete.\textsuperscript{cxxvii} The Heald Court concluded that this
option was not an acceptable alternative to allow out-of-state organizations to compete with similar, in-state organizations as many other alternatives are available to achieve state interests.\textsuperscript{cxxviii}

VI. The CARE Act Creates a Bad Aroma with Both Wine Retailers and Producers

Outside the judicial response to the rising conflict, the recent proposal of the CARE Act has presented a less than acceptable legislative solution.\textsuperscript{cxxix} The CARE Act will completely destroy the well-established framework of Commerce Clause analysis.\textsuperscript{cxxx} The potential bill, "would undermine federal authority over alcohol pricing, taxation, product formulation, advertising, labeling, and product safety, which have been essential in protecting the public for years."\textsuperscript{cxxxi} The CARE Act will allow a state to discriminate without challenge against out-of-state liquor businesses so long as the challenger could not prove by clear and convincing evidence that the law in question did not attempt to achieve one of the CARE Act’s listed purposes.\textsuperscript{cxxxii}
As most state liquor legislation supports one of the listed purposes, the CARE Act greatly reduces the amount of legislation that will be deemed discriminatory.\textsuperscript{cxxxiii} Moreover, the listed purposes the CARE Act declares as legitimate, unchallengeable state purposes for liquor legislation, were specifically denounced by the Heald Court which found that such state purposes could be achieved through non-discriminatory measures.\textsuperscript{cxxxiv} While the proposed amendment to the CARE Act would eliminate the heavy burden for challengers, mostly by removing the language providing unchallengeable listed purposes, the amendment only provides protection for wine producers, not for wine retailers.\textsuperscript{cxxxv} Wine retailers expressed their dissatisfaction in written testimony for consideration by the House Judiciary Committee providing that the amended CARE Act, "Leads to the radical dismantling of Commerce Clause protection for America’s wine retailers, but also disregards the fact that wine producers receive protection in the bill for carrying out exactly the type of transactions that wine merchants undertake every day."\textsuperscript{cxxxvi}

Further, the CARE Act would eliminate the second portion of a typical Commerce Clause analysis which
requires the state to prove that the discriminatory
law is protecting a legitimate state interest and that
reasonable, alternative, non-discriminatory approaches
would not achieve the same purpose. Conversely, the
text of the CARE Act states that state liquor
legislation should be presumed valid. Even with
the proposed amendment, states will still have
authority to enact discriminatory liquor legislation,
which directly conflicts with the Commerce Clause and
the rationale of the Court in Heald. In Heald, the
Court stated, “in all but the narrowest
circumstances, state laws violate the Commerce Clause
if they mandate ‘differential treatment of in-state
and out-of-state economic interest that benefits the
former and burdens the latter.’

Finally, the CARE Act is not merely an attempt to
return the power of regulating liquor to the states. Rather the CARE Act is an attempt by the politically influential wholesaler groups to earn back the profits they lost when the courts began to force states to either permit direct shipping from out-of-state organizations or to ban direct shipping altogether. By allowing states to pass laws that are blatantly discriminatory while restricting the ability to
challenge those laws, states will be given the freedom to legislate for the purpose of protecting their economic interests creating a burden on interstate commerce.\textsuperscript{cxliii} Wine producers and retailers are already at a disadvantage in out-of-state markets due to the varying liquor laws, including tax structures, standards of production, and other regulations, that differ significantly among the fifty states.\textsuperscript{cxliv} Because the CARE Act will allow wholesalers to reap the benefits of out-of-state retailers and producers’ hardships, many legislators have taken a proactive approach to opposing the proposed CARE Act.\textsuperscript{cxlv}

VII. Conclusion

As the law is currently written, wine and other liquor retailers are in a difficult position to run a successful business.\textsuperscript{cxlv} While out-of-state wineries are currently enjoying the ability to ship directly to thirty-seven states, many out-of-state retailers, like Gary Vaynerchuk’s Wine Library, are prohibited from participating in the growing market that is embracing direct shipping.\textsuperscript{cxlvii} Without the Supreme Court’s interpretation of the decision in \textsc{Heald} as applied to
retailers, out-of-state retailers are forced to bring action in court when states legislate to prohibit such retailers from directly shipping into their states.\textsuperscript{cxlviii} With district and circuit courts reasoning and concluding inconsistently on the issue, it would seem likely that the Supreme Court would address the issue in the near future.\textsuperscript{cxlix}

The looming possibility of the enactment of the CARE Act has led to speculation of what, if any, applicability prior court decisions will have on state liquor laws.\textsuperscript{cl} If the CARE Act is enacted, wine retailers will be without a venue to express their dissatisfaction with state liquor laws that discriminate against out-of-state retailers.\textsuperscript{ccl} The CARE Act will not be passed without a vehement fight from wine retailers and producers.\textsuperscript{ccli} With the growing number of wine enthusiasts emphatically set on purchasing wine from the retailers with the most affordable prices and the widest selections which are frequently located on the internet, the politically influential wine wholesalers will face vigorous opposition in their quest to pass the CARE Act through Congress.\textsuperscript{ccli}


iii Id. (noting half of Wine Library’s wine sales are generated from online).

iv Id. (listing Gary’s various ventures to increase and encourage participation from his followers).

v See Interview by bigthink with Gary Vaynerchuk, Host, Wine Library TV (Sept. 15, 2009), available at

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http://bigthink.com/ideas/16393 (noting viewers in Boston unable to purchase Gary’s wine picks due to state liquor laws).


vii See, e.g., Heald, 544 U.S. at 460; North Dakota, 495 U.S. at 423; Young’s Mkt. Co., 299 U.S. at 59; Wine Country Gift Baskets.com 612 F.3d at 809; Arnold’s Wines, 571 F.3d at 185; Brooks, 462 F.3d at 341; Siesta Vill. Mkt., 596 F.Supp.2d at 1035.

viii U.S. Const. amend. XXI. The text of Section two of the Twenty-First Amendment provides: “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.”

Id.

ix See e.g. Heald, 544 U.S. at 489-92 (evaluating state argument that such laws advance state interests of tax collection and restricting minors access to liquor). See also Free the Grapes!, http://www.freethegrapes.com/index.php?q=HR5034 (last visited Sept. 12, 2010) (commenting that in 2007 state and local tax revenue from grape products in United States alone amounted to almost eight billion dollars). For a further discussion of articulated state interests in preventing out-of-state organizations from shipping in-state, see infra notes 57, 76, 85, 95 and accompanying text.

x See, e.g., Heald, 544 U.S. at 474-76, 92 (analyzing challenger argument that such laws discriminate against interstate commerce and nondiscriminatory alternatives would achieve state interests advanced by such laws).
See id. at 493 (concluding state liquor laws must meet Commerce Clause scrutiny to be held Constitutional).

Id.

See Wine Country Gift Baskets.com v. Steen, 612 F.3d 809 (5th Cir. 2010), vacating sub nom. Siesta Vill. Mkt. v. Steen, 595 F.3d 249 (5th Cir. 2010), vacating sub nom. Siesta Vill. Mkt. v. Perry, 530 F. Supp. 2d 848 (N.D. Tex. 2008) (holding Texas law allowing local wine retailers to ship locally within state while prohibiting out-of-state retailers from shipping into Texas was not violation of Commerce Clause); Arnold’s Wines v. Boyle, 571 F.3d 185 (2d Cir. 2009) (concluding New York law allowing in-state retailers to obtain permit to ship in-state while not permitting out-of-state retailers same opportunity was not violation of Commerce Clause); Brooks v. Vassar, 462 F.3d 341 (4th Cir. 2006) (finding Virginia’s personal import exception allowing consumers to bring only one gallon of wine into state was not violation of Commerce Clause). But see Siesta Vill. Mkt. v.

xiv For a discussion of the proposed CARE Act, see infra notes 102-118 and accompanying text.

xv See Free the Grapes!, supra note 9 (providing statistics on wine industry. America’s wine industry has also generated about 1.1 million jobs. Id.; see also Wine Institute, Wine Consumption In The U.S., http://www.wineinstitute.org/resources/statistics/article86 (last visited Sept. 25, 2010) (providing that about 767 million gallons of wine was consumed in United States in 2009). There are about 6,700 wineries in the United States alone generating more than twenty billion dollars of retail sales annually. See id. (providing statistics related to wine industry in United States).
For a discussion of pre-prohibition liquor law, see infra notes 24-27 and accompanying text. For a discussion of Supreme Court interpretation of post-prohibition liquor law, see infra notes 28-47 and accompanying text. For a discussion of the Supreme Court’s Heald decision, see infra notes 48-57 and accompanying text.

For a discussion of lower court interpretation of Heald, see infra notes 58-101 and accompanying text.

For a discussion of the proposed CARE Act, see infra notes 102-18 and accompanying text.

For an argument that state laws discriminating against out-of-state retailers are unconstitutional, see infra notes 119-28 and accompanying text.

For a discussion of the unconstitutionality of the proposed CARE Act, see infra notes 129-45 and accompanying text.
xxi For a discussion of pre-prohibition liquor law, see infra notes 24-27 and accompanying text.

xxii For a discussion of Supreme Court interpretation of post-prohibition liquor law, see infra notes 28-47 and accompanying text.

xxiii For a discussion of the Supreme Court’s Heald decision, see infra notes 48-57 and accompanying text.


xxv See Scott v. Donald, 165 U.S. 58, 90-101 (1897) (evaluating South Carolina’s dispensary laws for Commerce Clause violation). South Carolina enacted dispensary laws in 1895 to regulate intoxicating liquors within the state. Id. at 66. The Court focused its discussion on the constitutionality of Section Fifteen and Section Twenty-Three. Id. at 92-93. Section Fifteen mandated that all sales of intoxicating liquors to in-state consumers go through a Commissioner. Id. at 92 (explaining detail of South

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Carolina dispensary law). The law provided that the Commissioner was to purchase liquor from in-state sources first if practicable before purchasing from out-of-state sources. *Id.* (same). Section Twenty-Three introduced a limit on the mark-up allowed on the price of in-state wine, while placing no limitation on the mark-up of out-of-state wine for the purpose of encouraging use of local grapes. *Id.* at 93 (same). The Court held that these particular Sections of South Carolina’s dispensary law did not provide equal regulation of in-state and out-of-state intoxicating liquors. *Id.* at 100. The Court held that the dispensary laws which discriminated against interstate commerce were unconstitutional and unlawful under the Wilson Act. *Id.* at 101. (concluding in accordance with Wilson Act, state laws regulating intoxicating liquors must not be discriminatory against out-of-state products). *See also* Rhodes v. Iowa, 170 U.S. 412, 421 (1898) (finding Wilson Act did not authorize Iowa to regulate intoxicating liquors shipped directly to consumers in-state for personal use); Vance v. W.A. Vandercook Co., 170 U.S. 438, 449 (1898) (reaffirming holding in *Scott* that Wilson Act does not permit state
liquor laws to discriminate against interstate commerce).

Scott, 165 U.S. at 101. The Court held:

When a state recognizes the manufacture, sale and use of intoxicating liquors as lawful, it cannot discriminate against the bringing of such articles in, and importing them from other States; that such legislation is void as a hindrance to interstate commerce and an unjust preference of the products of the enacting State against similar products of the other States.

Id.

See Clark Distilling Co. v. W, Maryland Ry. Co., 242 U.S. 311, 321-25 (1917) (considering constitutionality of West Virginia’s prohibition law). West Virginia enacted a prohibition law in 1913 which was ultimately construed as forbidding all shipments of intoxicating liquor into the state, no matter if the intended use was personal or non-personal. Id. at 318 (explaining West Virginia prohibition law). The Court held that Congress possessed the necessary power to enact the Webb-Kenyon Act. Id. at 340 (reasoning because Congress has power to prohibit movement of all intoxicating liquors through interstate commerce, Webb-Kenyon Act was within Congress’s power because it
was less drastic exercising of its full power). Because West Virginia’s law prohibited against all shipments of intoxicating liquors, the Court deemed the law a Constitutional use of state power under the Webb-Kenyon Act. Id. at 324 (concluding complete prohibitions by state are Constitutional under the Webb-Kenyon Act). See also Granholm v. Heald, 544 U.S. 460, 481-82 (2005) (noting Court’s decision in Clark Distilling closed gap left open in Wilson Act as interpreted in Rhodes). The Court found the Webb-Kenyon Act allowed states to regulate direct shipments to consumers for personal use, so long as the state treated in-state and out-of-state intoxicating liquor equally. Id. at 483, 489 (applying Webb-Kenyon Act to modern liquor laws).

xxviii U.S. Const. amend. XVIII (prohibiting sale, manufacture, and transportation of intoxicating liquor into or out of the United States). The text of Section one of the Eighteenth Amendment provides: “After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof

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into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.”

Id.

xxix U.S. Const. amend. XXI (returning to states authority to regulate transportation and importation of alcohol). The text of Section one of the Twenty-First Amendment provides: “The eighteenth article of amendment to the Constitution of the United States is hereby repealed.” Id. For the text of Section two of the Twenty-First Amendment, see infra note 8.

*** See Ziffrin v. Reeves, 308 U.S. 132 (1939) (holding under Twenty-First Amendment states have power to enact discriminatory laws for regulation of intoxicating liquors without regard for the Commerce Clause); Indianapolis Brewing Co. v. Liquor Control Comm’n, 305 U.S. 391 (1939) (same); Joseph S. Finch & Co. v. McKittrick, 305 U.S. 395 (1939) (same); Bd. of Equalization v. Young’s Mkt. Co., 299 U.S. 59 (1936) (same). But see Bacchus Imps. V. Dias, 468 U.S. 263 (1984) (holding Twenty-First Amendment still subjects

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xxxiii Young’s Mkt. Co., 299 U.S. at 60-62 (holding California law imposing fifty dollar license fee to import beer into state was Constitutional under Twenty-First Amendment).

xxxii Id. (noting prior to Twenty-First Amendment, California law would have been violation of Commerce Clause unless equal fee was imposed on transportation of in-state intoxicating liquors).

xxxiii See Ziffrin, 308 U.S. at 132 (holding under Twenty-First Amendment states have power to enact discriminatory laws for regulation of intoxicating liquors without regard for the Commerce Clause); Indianapolis Brewing Co., 305 U.S. at 391 (same); Joseph S. Finch & Co. v. McKittrick, 305 U.S. 395 (1939) (same); Young’s Mkt. Co., 299 U.S. at 59

See Hostetter, 377 U.S. at 330 (holding state power to regulate alcohol is limited by Commerce Clause). See also Lloyd C. Anderson, Article, Direct Shipment of Wine, the Commerce Clause and the Twenty-first Amendment: A Call for Legislative Reform, 37 Akron L. Rev. 1, 2, 13-17 (2004) (analyzing Supreme Court precedents involving interpretation of Twenty-First Amendment with regards to Commerce Clause).

Hostetter, 377 U.S. at 324.

Id. at 332 (concluding that Twenty-First Amendment should be read with consideration for Commerce Clause).
A New York state law, in effect, prohibited an airport vendor controlled by the United States Bureau of Customs from selling intoxicating liquors to passengers about to board international flights. Id. at 327-29 (explaining applicable New York Law and conflict between federal vendor and state law). The Court held when considered with regards to the Commerce Clause, the state law was unconstitutional. Id. at 334 (reasoning that New York law preventing vendors working under United States Bureau of Customs from selling intoxicating liquor was discriminatory under Commerce Clause and therefore unconstitutional).

The court noted that, “if the commodity involved here were not liquor, but grain or lumber, the Commerce Clause would clearly deprive New York of any such power.” Id. (reasoning that liquor regulations should still be subject to Commerce Clause scrutiny).

Id. at 265 (evaluating constitutionality of Hawaiian alcohol regulation). Hawaii enacted a liquor tax of twenty percent in 1939. Id. at 265. Hawaii later created exemptions for several locally produced liquors. Id. (detailing history of Hawaii’s liquor law exemptions).

Id. at 273, 276 (holding Hawaii’s law discriminatory in purpose based on legislative intent, discriminatory in effect as its exceptions applied only to locally produced liquors, and was not narrowly tailored to purpose of Twenty-First Amendment). The Hawaiian law was found to be discriminatory in purpose because the legislative intent of the exemptions was to promote local business. Id. at 270-71 (discussing legislature’s reasoning for creating exemptions). Because the exemption only applied to locally produced liquors, and not out-of-state liquors, the Court also found the Hawaiian law to be discriminatory in effect. Id. at 271 (explaining discriminatory effect of liquor tax exemptions). The Court held the purpose of the Hawaii liquor tax exemptions was to promote local
business rather than carry out the purposes of the Twenty-First Amendment, so was therefore not narrowly tailored to withstand Commerce Clause scrutiny. Id. at 276 (applying Commerce Clause analysis to law enacted under state powers deriving from Twenty-First Amendment).

xlii For a discussion of how a typical three-tier structure of liquor regulation operates, see infra notes 42-47 and accompanying text.

xliii North Dakota v. United States, 495 U.S. 423 (1990) (holding out-of-state shippers must follow North Dakota liquor laws when shipping to federal enclave within North Dakota). By federal statute, the Department of Defense was to purchase alcohol in bulk at the most competitive prices for use in club and package stores on military bases. Id. at 427 (discussing particulars of federal statute). The state of North Dakota regulated the importation and distribution of intoxicating liquors using a three-tier system. Id. at 428 (describing North Dakota’s three-tier structure). The United States operated two
military bases within North Dakota, giving the state and federal governments concurrent jurisdiction over these bases. *Id.* at 429 (providing location of military bases in North Dakota). North Dakota imposed its liquor regulations on out-of-state liquor suppliers shipping to the military basis, requiring the out-of-state shippers to, “File monthly reports and to affix a label to each bottle of liquor sold to a federal enclave for domestic consumption.” *Id.* at 426 (explaining particulars of North Dakota liquor laws). North Dakota imposed reporting requirements on all persons or organizations bringing liquor into the state, but only imposed the labeling requirement on liquor shipped to a federal enclave. *Id.* at 428-29 (same). Several out-of-state suppliers used regularly by the federal government refused to ship to North Dakota because of the stringent state regulations. *Id.* at 429 (describing federal government shippers reaction to North Dakota laws). The United States then brought action seeking to remove the state requirements for out-of-state organizations shipping to the federal military bases. *Id.* at 430 (discussing procedural history of case).
xliv Id. at 428 (describing operation of three-tier system).

xlv Id. (explaining North Dakota’s three-tier structure).

xlvi Id. at 432 (finding North Dakota developed system serving state interests of, “promoting temperance, ensuring orderly market conditions, and raising revenue”).

xlvii Id. at 433 (upholding North Dakota’s liquor regulation structure).

xlviii For a discussion of recent challenges to state liquor laws preventing out-of-state wineries and retailers from shipping in-state, see infra notes 49-57, 71-101 and accompanying text.

Id. (holding state exceptions causing unequal treatment for in-state and out-of-state produced wine were unconstitutional). Both the New York and Michigan laws mandated that most wine go through their three-tier systems. Id. at 470 (discussing Michigan and New York’s three-tier system structure). Both in-state and out-of-state producers were to sell to licensed in-state wholesalers, who in turn sold to licensed in-state retailers. Id. at 468-470 (same). Michigan wine law had an exception that allowed in-state wineries to obtain a wine maker license which would allow that in-state winery to ship directly to in-state consumers. Id. at 469 (explaining particulars of Michigan wine law). New York wine law created an exception for wineries that used only New York grapes in their wine. Id. at 470 (detailing particulars of New York wine law). Such wineries could apply for a license that allowed direct shipment to in-state consumers. Id. (same). Further, New York permitted a winery with a direct shipment license to also ship wine that was produced by other wineries using at least 75% New York grapes directly to
consumers.  *Id.* (same). The New York law did permit an out-of-state winery to ship directly to consumers in New York if they established a branch within the state.  *Id.* (same).

11 *Id.* at 484 (discussing history of case law involving state power to regulate importation, sale, and consumption of intoxicating liquors). The Court found the purpose of the Twenty-First Amendment was to, "allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use."  *Id.* (interpreting Twenty-First Amendment). Further, the Court ruled that because states had never had the power to discriminate against out-of-state goods, the Twenty-First Amendment did not give the states such power.  *Id.* at 484-85 (same).

111 *Id.* at 489 (concluding three-tier system of liquor regulation is constitutional). The court recognized under the Twenty-First Amendment states have the ability to decide to ban liquor importation, sale, and consumption within the state or to implement a liquor
distribution system to control the importation and sale of liquor. *Id.* at 488-89 (reaffirming decision in *North Dakota* that three-tier system is “unquestionably legitimate” use of state authority).

*Id.* at 489 (holding state liquor laws discriminating in favor of local producers violate Commerce Clause, and therefore are not entitled to Twenty-First Amendment protection).

*Id.* at 473 (theorizing effects of unequal treatment of in-state and out-of-state produced liquors). The Court noted state laws similar to Michigan and New York caused other states to enact reciprocity laws which only allow direct shipment into their state if the other state permitted direct shipping into their state. *Id.* (detailing state responses to unequal treatment of out-of-state produced wine by other states). The Court noted these state laws have ultimately created a situation where citizens do not have equal access to the markets of other states. *Id.* (describing market effects of unequal treatment of out-of-state goods). The Court states that such a
situation, “invites(s) a multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause.” *Id.* (quoting Dean Milk Co. v. Madison) (citation omitted).

*lv* *Id.* at 474 (holding Michigan’s wine law exceptions for in-state producers were unconstitutional).

*lv*i *Id.* at 474-75 (concluding New York’s wine law exceptions for in-state producers were unconstitutional).

*lvii* *Id.* at 493 (finding Michigan and New York’s stated interest in creating exceptions for in-state producers did not justify discrimination caused against out-of-state producers). The Court found the state justification of preventing minors from obtaining intoxicating liquor lacked evidentiary support. *Id.* at 490 (exploring state justifications for prohibiting out-of-state producers from direct shipping to consumers within state). Further, the Court reasoned the state justification of tax-collection could be met
through other non-discriminatory measures. \textit{Id.} at 491-92 (same).

\textsuperscript{lviii} For a discussion of the lower courts application of \textit{Heald} to facially neutral state liquor laws, see \textit{infra} notes 60-63 and accompanying text. For a discussion of the lower courts application of \textit{Heald} to a state’s personal import exception, see \textit{infra} notes 64-70 and accompanying text.

\textsuperscript{lxix} For a discussion of the lower courts application of \textit{Heald} to state laws discriminating against wine retailers, see \textit{infra} notes 71-101 and accompanying text.

\textsuperscript{lx} See \textit{Family Winemakers of Cal. v. Jenkins}, 592 F.3d 1 (1st Cir. 2010) (holding Massachusetts state law, that was discriminatory in effect, unconstitutional under Commerce Clause).

\textsuperscript{lxii} \textit{Id.} at 4 (noting particulars of Massachusetts law). The Massachusetts law allowed small wineries to obtain a small winery license allowing them to distribute
their wine within the state by selling to in-state retailers, wholesalers, or by shipping directly to consumers. *Id.* (same). Under the Massachusetts law, large wineries were required to choose between distributing their wines using wholesalers or through direct shipment to in-state consumers. *Id.* (same). Large wineries could not sell directly to in-state retailers. *Id.* (same). The court noted wholesalers typically only distribute the most sellable wines from each winery. *Id.* at 6 (discussing disadvantages and difficulties of competing as small winery). Further, the court noted that smaller wineries have a difficult time gaining wholesaler representation. *Id.* at 7 (same).

A small winery was defined as a winery producing 30,000 gallons or less of grape wine per year. *Id.* at 4 (same). A large winery was defined as a winery producing more than 30,000 gallons of grape wine per year. See *id.* (same). The court referenced the wine industry standard definition of a small winery as a winery producing less than 120,000 gallons of wine per year. 

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year and the federal tax law which categorizes a small winery as one producing less than 250,000 gallons per year. \textit{Id.} at 15-16 (emphasizing in comparison to industry standards and federal policies, Massachusetts categorization of small wineries was considerably different).

\textsuperscript{lxiii} \textit{Id.} at 22 (concluding Massachusetts law caused discriminatory effect against out-of-state goods). The court stated, “A state law is discriminatory in effect when, in practice, if affects similarly situated entities in a market by imposing disproportionate burdens on out-of-state interests and conferring advantages upon in-state interests.” \textit{Id.} (describing standard court applied in Commerce Clause analysis). Moreover, the court found the Massachusetts law would in effect cause in-state goods to constitute a larger share, and out-of-state goods to constitute a smaller share of the total sales in the market, and therefore be discriminatory. \textit{Id.} (concluding state law did not pass Commerce Clause analysis). Further, the court noted one legislator had spoken to the indirect advantages the in-state
wineries would receive under the Massachusetts law. Id. at 7-9 (providing that statements of legislative intent may provide evidence of discriminatory purpose or effect). The court reasoned the Massachusetts law would disadvantage large, out-of-state wineries by potentially causing comparatively greater costs and loss of access to consumers. Id. at 12 (summarizing potential discriminatory effects of Massachusetts law).

lxiv Brooks v. Vassar, 463 F.3d 341 (4th Cir. 2006) (concluding Virginia liquor law was constitutional under Commerce Clause analysis).

lxv Id. at 344 (explaining details of challenged Virginia code sections). The Virginia liquor law included an exception to the three-tier system which allowed a consumer to carry into the state no more than one gallon of alcoholic beverages so long as the alcohol would be used for personal consumption. Id. (citing Virginia Alcoholic Beverage Control Act).
Id. at 349 (detailing plaintiff’s arguments that personal import exception is violation of Commerce Clause). In the original suit, the plaintiffs also challenged several other provisions of the Virginia Alcoholic Beverage Control Act, specifically the provisions favoring in-state over out-of-state producers involved in distribution, delivery, and shipping. Id. at 346 (listing challenged provisions of Virginia code). The district court decision holding the provisions favoring in-state producers in distribution, delivery, and shipping were unconstitutional in violation of the Dormant Commerce Clause, was handed down prior to the announcement of the Supreme Court decision in Heald. Id. at 346-47 (noting status of suit before Heald decision). The district court then issued a Memorandum Opinion noting that its decision was consistent with Heald and its decision would not be amended. Id. (describing district court proceedings involving suit after Heald decision). The Virginia legislature then amended its Alcoholic Beverage Control Act eliminating the privileges it had before given to in-state producers. Id. at 347-48 (outlining Virginia legislature’s
amendment to provisions at issue). The appellate court decided the appeals involving the distribution, delivery, and shipping provisions of the Virginia law were essentially moot, and declined to consider these provisions further. Id. at 348-49 (explaining decision to dismiss parts of appeal as moot). The court also rendered judgment upholding a provision involving a requirement that state run stores only sell wine produced by Virginia farm wines, as constitutional. Id. at 360 (holding Virginia market is competitive and Virginia law is constitutional). This argument involves the market participant theory of the Dormant Commerce Clause which is beyond the scope of this note. See id. at 355-60 (analyzing plaintiffs market participant challenge to Virginia law).

Id. at 351 (recognizing Twenty-First Amendment does not give states right to regulate without regards to Commerce Clause). The court noted it should follow the same Dormant Commerce Clause analysis involving intoxicating liquors as it would for other goods. Id. at 352 (same).
Id. at 352 (analyzing challengers argument). The court infers that because in-state retailers can sell directly to consumers with a few exceptions, the only logical argument from the challengers can be that in-state retailers are being treated more favorably than out-of-state retailers. Id. (same). This is a challenge to the Constitutionality of the three-tier system. Id. (same). Further, the court reasoned the challengers were arguing that limiting consumers to importing one gallon through the personal import exception was equivalent to restricting the purchase of out-of-state liquor to one gallon. Id. at 352 (same).

Id. at 352-54 (concluding Virginia personal import exception was not violation of Commerce Clause). The court emphasized that the Supreme Court in Heald reaffirmed the constitutionality of the three-tier system. Id. at 352 (holding three-tier system is constitutional). The court found importation regulations were not the same as purchase regulations. Id. at 353 (rejecting challengers’ argument).
Emphasizing that consumers had the ability to import an unlimited amount of wine as long as the wine went through Virginia’s three-tier system, the court found the challengers’ argument unpersuasive. *Id.* (reiterating legitimacy of Virginia’s three-tier system). Further, the court recognized the Twenty-First Amendment gave states the authority to regulate the importation of liquor. *Id.* at 354 (noting state’s authority in enacting liquor legislation). Therefore, liquor regulations without a discriminatory effect against interstate commerce such regulations must be upheld. *Id.* at 354 (holding personal import exception is within state authority given in Twenty-First Amendment and is not violation of Commerce Clause).

*1xx* *Id.* at 355 (finding Virginia’s personal import exception actually disadvantaged local producers while advantaging out-of-state producers).

*1xxi* For a discussion of the lower courts application of *Heald* to state laws discriminating against wine retailers, see infra notes 73-101 and accompanying text.
lxxii For a discussion of the lower courts application of *Heald* to state laws discriminating against wine retailers, see *infra* notes 73-101 and accompanying text.

lxxiii *Arnold’s Wines v. Boyle*, 561 F.3d 185, 186 (2d Cir. 2009) (holding New York’s regulatory liquor laws were within state power under Twenty-First Amendment and were not in violation of Dormant Commerce Clause). The district court held the New York provisions were a constitutional application of New York’s authority under the Twenty-First Amendment. *Id.* at 187 (citing district court opinion).

lxxiv *Id.* at 187-88 (explaining New York’s liquor regulatory scheme). New York generally uses the three-tier system to regulate the importation, transportation, and sale of liquor within the state. *Id.* (same). New York’s three-tier system involved producers who had to sell to licensed in-state wholesalers, who then in turn had to sell to licensed in-state retailers, who then could sell directly to
consumers. **Id.** (same). New York liquor law did provide an exception for both in-state and out-of-state wineries which allowed such wineries to obtain a license to directly ship to in-state consumers. **Id.** (same).

**lxxv** **Id.** at 188 (detailing New York’s law for obtaining off-premises license). The relevant New York law allowed an in-state licensed retailer to obtain an off-premises license which allowed licensed organizations to deliver alcohol directly to consumers. **Id.** (citing New York code). An out-of-state retailer cannot obtain an off-premises license. **Id.** (explaining challengers’ discrimination claim).

**lxxvi** **Id.** at 188 (noting state’s arguments for constitutionality of three-tier system). The court also listed ability of the state to inspect retail locations and ability to oversee the pricing scheme of licensed in-state retailers and wholesalers as additional reasons for upholding the legitimacy of the three-tier system. **Id.** at 187-88 (same).
Id. (addressing Challengers’ reasoning for bringing suit).

Id. at 190 (interpreting Heald decision). “The Granholm Court noted that the challenged regulations were discriminatory exceptions to, rather than integral parts of, the underlying three-tier systems.” Id. at 191 (same). The court also noted even the dissenters in Heald reaffirmed the constitutionality of a three-tier structure. Id. at 191 (citing Heald).

Id. at 191 (distinguishing case from Heald).

Id. (detailing how liquor must go through three-tier system). The court noted that in-state retailers cannot deliver alcohol directly to consumers until the alcohol has gone through the first two tiers of the New York system. Id. (same). Both in-state and out-of-state produced goods must go through all three tiers before ultimately reaching the consumers. Id. (same).
(concluding state interests were not protectionist in nature nor discriminatory; therefore second prong of Commerce Clause analysis not necessary).}

(holding challenged New York liquor law provisions constitutional under Commerce Clause). Even if the court were to rule the provisions unconstitutional, the court noted it would be, “demonstrably impossible for out-of-state retailers like Arnold’s Wines to comply with New York’s existing three-tier system, granting them the relief they seek would require us to invalidate New York’s three-tier system altogether.” (addressing “absurdity” of result sought by challengers).

Texas’ three-tier system is composed of producers who sell to in-state licensed wholesalers, who then sell to in-state licensed retailers, who then sell to consumers. Id. (describing Texas liquor law). The primary law in question in the case was the legitimacy of the provision that allowed in-state retailers to ship directly to consumers. Id. (noting provision in question originally permitted in-state retailers to ship statewide, but due to amendment had been changed to only permit in-state retailers to ship within county of their retail establishment). The case also involved challenges to the provision providing for a personal import exception and the provision requiring holders of retail permits to be citizens of Texas for at least one year. Id. at 811-12 (discussing other challenged provisions). The court held the personal import exception was constitutional based on its finding that Texas could require retailers to sell from an in-state location. Id. at 821 (holding personal import exception constitutional). The court did not address the citizenship requirement because
the state agreed to not enforce the requirement. \textit{Id.} at 812 (discussing district court finding).

\footnote{Siesta Vill Mkt. v. Perry, 530 F.Supp.2d 848, 868 (N.D. Tex. 2008), vacated sub nom. Wine Country Gift Baskets.com v. Steen, 612 F.3d 809 (5th Cir. 2010) (holding challenged retailer provision unconstitutional).} The district court began its inquiry by first determining that in-state and out-of-state retailers were similarly situated enterprises because both were engaged in the same business and competing for that business in the same market. \textit{Id.} at 863 (applying Dormant Commerce Clause analysis). Next, the district court found the Texas law to be discriminatory on its face as it permitted additional access to the market to in-state retailers, while preventing out-of-state retailers from competing in the same market. \textit{See id.} at 864 (same). Texas argued the law was a legitimate use of state authority because the law only created a small advantage for in-state retailers, made on-site inspections easier, prevented minors from accessing alcohol, was an easy method to raise revenues from the sale of liquor, and
preserved the three-tier system. \textit{Id.} at 864-87 (describing Texas’ purpose of challenged liquor laws). The district court found the state’s reasons for discrimination to be insufficient to warrant discrimination. \textit{Id.} (applying Dormant Commerce Clause Analysis). The District Court of Texas specifically referenced the \textit{Arnold’s Wines} case considered by the District Court of New York. \textit{Id.} at 867 (citing district court decision in \textit{Arnold’s Wines}); see \textit{Arnold’s Wines v. Boyle}, 515 F.Supp.2d 401, \textit{aff’d}, 561 F.3d 185 (2d Cir. 2009) (considering constitutionality of New York liquor law). The District Court of Texas voiced its disagreement with the District Court of New York stating, “The court respectfully disagrees with \textit{Arnold’s Wines}, concluding, inter alia, that it is based on a misreading of \textit{Granholm}, and that it elevates a state’s rights under the Twenty-First Amendment to a level that improperly supersedes the Dormant Commerce Clause.” \textit{Perry}, 530 F.Supp.2d at 867 (disagreeing with other courts). To grant equal opportunity to out-of-state retailers, the court ruled out-of-state retailers could gain equal access through direct shipment to consumers by purchasing alcohol
from licensed in-state wholesalers or state licensed wineries. *Id.* at 869 (holding out-of-state retailers must still participate in Texas’ three-tier structure in order to gain equal access through direct shipping to consumers).

lxxxvi Wine Country Gift Baskets.com, 612 F.3d at 811 (holding Texas law is not contrary to Dormant Commerce Clause).

lxxxvii *Id.* at 820 (interpreting Heald).

lxxxviii *Id.* at 819-20 (noting Texas law did not discriminate against in-state and out-of-state products, but merely allowed in-state retailers to ship to local consumers, not those far away).

lxxxix *Id.* at 820 (deciding small local advantage resulting from three-tier structure did not amount to discrimination under Commerce Clause). The court noted not all state permitted retail practices would necessarily meet the standards required by the Dormant Commerce Clause, but in this case, Texas’ law was a
consumer-friendly mechanism in line with changing societal demands and needs. \textit{Id.} at 820-21 (discussing current state retail practices).

\textit{xc} \textit{Id.} at 820-21 (declining to undergo complete Dormant Commerce Clause analysis for laws involving alcohol). The court noted the challengers urged the court to use the typical methodology which generally requires the court to address if the state law violated the Dormant Commerce Clause, and then determine if the Twenty-First Amendment validates the discrimination. \textit{Id.} (describing typical Dormant Commerce Clause analysis). The court deemed the Supreme Court’s statements in \textit{Heald} as upholding the three-tier system, therefore precluding the need for the full analysis. \textit{Id.} (applying \textit{Heald} decision).

\textit{xci} \textit{Id.} at 821 (concluding Texas law is constitutional under Commerce Clause and Twenty-First Amendment).


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Id. at 1038 (exploring Michigan’s liquor law). Michigan’s three-tier system includes both out-of-state and in-state producers, licensed in-state wholesalers, and in-state retailers. Id. at 1037-38 (detailing Michigan’s three-tier system). In-state retailers can obtain a license to become a ‘specially designated merchant’ which allows licensed retailers to directly ship to consumers. Id. at 1038 (describing Michigan’s special licensing exception for retailers).

Id. at 1038 (detailing Michigan’s liquor law). Out-of-state retailers must establish a place of business within the state of Michigan in order to be eligible to apply for the ‘specially designated merchant’ license. Id. (noting that out-of-state retailers must establish location in Michigan in order to legally directly ship to Michigan consumers).

Id. at 1038 (listing state interests of tax collection, enforcing underage drinking law, ability to inspect retailers on-site, and enforcing labor laws
as affirming three-tier system in Michigan legitimate use of state power under Twenty-First Amendment).

xcvi **Id.** at 1037 (outlining challenger’s arguments against constitutionality of Michigan liquor laws concerning retailers).

xcvii **Id.** at 1039 (recognizing Twenty-First Amendment does not give states authority to discriminate against interstate commerce). The court reasoned the Michigan law would fail a Dormant Commerce Clause analysis if the law mandated, “differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.” **Id.** (quoting Oregon Waste Systems Inc. v. Dept. of Environmental Quality of Oregon) (citation omitted).

xcviii **Id.** (performing Dormant Commerce Clause analysis of Michigan liquor law). The court found in-state retailers were given the advantage of access to more customers by obtaining a ‘specially designated merchant’ license without any additional costs. **Id.** (same). Conversely, the court reasoned out-of-state
retailers were burdened with additional costs of opening a new business within the state of Michigan in order to gain the same access available to in-state retailers. \textit{Id.} (same).

\textsuperscript{xci} \textit{Id.} (holding Michigan law did not pass Commerce Clause scrutiny).

\textsuperscript{c} \textit{Id.} at 1041 (concluding Michigan did not meet its burden of showing non-discriminatory alternatives would be unworkable). Michigan advanced three main arguments to support its liquor law. \textit{Id.} at 1042 (commenting on Michigan’s reasoning for enacting the liquor legislation at issue). First, Michigan argued its law allowed for efficient enforcement of tax and labeling laws by forcing retailers from buying from in-state licensed wholesalers. \textit{Id.} at 1042-43 (finding Michigan’s argument had protectionist purpose in violation of Dormant Commerce Clause). Second, Michigan argued in-state inspections of retailers allow the state to better enforce underage drinking laws among other laws. \textit{Id.} (rejecting Michigan’s argument because Michigan allows out-of-state wineries
to ship directly to consumers and suggesting alternative of requiring adult signature upon delivery from out-of-state retailer). Finally, Michigan argues that by allowing all out-of-state retailers to obtain the ‘specially designated merchant’ license, it will be impossible for the state to regulate such a large number of organizations. Id. at 1042-44 (dismissing State’s argument due to lack of evidence showing regulatory impossibility). The court noted the state of Michigan made many of the same arguments for advancing state interests that the Supreme Court rejected in Heald. Id. (emphasizing interests rejected in Heald will not be upheld without evidence showing alternatives are unworkable).

\[\text{ci}\] Id. at 1045 (deciding Michigan law was unconstitutional).


\[\text{ciii}\] Id. (noting procedural history of CARE Act). The CARE Act was written by the National Beer and
Wholesalers Association with the support of the Wine & Spirits Wholesalers Associations. See Id. (emphasizing bill was not written by state actors, but by private interest groups). The bill was introduced in April 2010 by Representative Delahunt of Massachusetts on behalf of himself, Representative Coble of North Carolina, Representative Chaffetz of Utah, and Representative Quigley of Illinois. See H.R. 5034, 111th Cong (2010) (listing original sponsors of CARE Act). As of the date of this note, the CARE Act has 139 congressional co-sponsors. See Library of Congress, Thomas: Cosponsors: 111th Congress H.R. 5034 (2010), http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR05034:@@P (listing names and districts of congressional representatives currently supporting CARE Act). The bill has bi-partisan support with a significant number of both Republican and Democratic sponsors. See Ben O’Donnell & Robert Taylor, Battle Over Direct Shipping Heats Up, Wine Spectator, Aug. 31, 2010, at 19 (noting political composition of bill’s co-sponsors).


See id. (noting phrase to be removed from Wilson Act). With the proposed amendment, the Wilson Act
would merely state that out-of-state liquor being transported into a state is subject to that state’s liquor laws. See 27 U.S.C. § 121 (providing text of Wilson Act without proposed CARE Act changes).

See H.R. 5034 (stating full text of addition).

H.R. 5034 (imposing strong presumption of validity for state liquor legislation when challenged in court).

Id. (listing purposes and interests for liquor legislation that will be deemed valid and not open for challenge under CARE Act).

See Jacob Grier, Beware of CARE, Examiner Opinion Zone (Aug. 19, 2010, 2:33 PM), http://www.washingtonexaminer.com/opinion/blogs/Examiner-Opinion-Zone/Beware-of-CARE-the-Comprehensive-Alcohol-Regulatory-Effectiveness-Act-101092874.html (declaring “just about any law could be said to have some effect on these goals”).

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Id. (noting purpose of amendment is to compromise against strong opposition).

Id. (allowing more state liquor laws to be challenged than the original CARE Act).

Id. (providing text of proposed amendment).

For a discussion of wine retailer dissatisfaction with proposed amendment to CARE Act, see supra notes and accompanying text.

“The cumulative effect of all these lawsuits, and the confusion . . . we’re asking to make sure that states aren’t having their hands tied when they’re trying to defend their alcohol laws.” \textit{Id.} (quoting Paul Pisano, Vice President of National Beer Wholesalers Association, in support of CARE Act).

\textsuperscript{cxviii} \textit{See} \textsuperscript{STOP HR 5034, supra} note 102 (acknowledging various arguments against CARE Act). “It’s very important for small wineries, especially, to be able to have these wine clubs because it’s our best vehicle for dealing direct with the public. We sell more wine through our wine club than we sell in the wholesale market.” \textit{See Geiger, supra} note 117 (quoting Jim Carter, owner of South Coast Winery, expressing dissatisfaction with proposed CARE Act). The proposed legislation is also opposed by many liquor makers. \textit{See id.} (noting possibility that law could extend and apply to taxation, advertising, and labeling of liquor products in addition to stated applications of transportation, importation, and sale of liquor). \textit{See also} Jones, \textit{supra} note 104 (explaining negative effects CARE Act would have on consumer choice and

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market access for wineries). See also Heidig, supra note 105 (emphasizing effect of CARE Act on job markets and economies of states with large wine markets).

cxix For a discussion of various interpretations of Heald in the lower courts, see supra notes 58-101 and accompanying text.


cxxii For a discussion of the Heald Court’s reasoning which supports the Siesta Vill. Mkt court’s conclusion, see infra notes 122-28 and accompanying text.
See Heald, 544 U.S. at 473 (2005) (reasoning that Commerce Clause analysis must be performed on discriminatory state liquor laws). For a discussion of the Heald Court’s Commerce Clause analysis, see supra notes 50-57 and accompanying text.


See Siesta Vill Mkt., 530 F.Supp.2d at 1040 (holding burden of forcing out-of-state retailers to establish in-state location was discriminatory under Commerce Clause analysis).
See id. (concluding additional burden on out-of-state retailers creates disadvantage in market and is discriminatory under Commerce Clause).

See e.g. id. at 1039 (explaining out-of-state retailers would need to establish operation within Michigan to be eligible for direct-shipping to in-state consumers).

Heald, 544 U.S. at 474-75 (listing available alternatives for states to achieve their stated objectives for enacting discriminatory legislation).

See H.R. 5034, 111th Cong (2010) (providing text of proposed legislation). See also STOP HR 5034, supra note 102 (detailing proposed legislation’s negative consequences). For a discussion of the potential effects of the CARE Act, see infra notes 129-45 and accompanying text.

See Heidig, supra note 105 (noting CARE Act would exempt alcohol from Commerce Clause scrutiny).
Id. (noting potential effects of CARE Act).

See H.R. 5034 (providing exact burden of proof requirements of proposed CARE Act). See also STOP HR 5034, supra note 102 (predicting CARE Act would preclude protectionist direct shipping bans from challenge in court). For a discussion of the added burden for challengers of state liquor laws proposed by the CARE Act, see supra notes 109-11 and accompanying text.

See Grier, supra note 111 (recognizing listed purposes in CARE Act are broad sweeping). For a discussion of the protected state interests and purposes under the CARE Act, see supra note 110 and accompanying text.

See Letter from Bill Delahunt, Rep., Cong. of the United States, to The Honorable John Conyers, Jr., Chairman, H. Comm. on the Judiciary (Sept. 13, 2010), available at http://www.stophr5034.com/ (providing text and reasoning for proposed amendment). For a further discussion of the proposed amendment to the CARE Act, see infra note 112-16 and accompanying text.

See Hearing on H.R. 5034, the “Comprehensive Alcohol Regulatory Effectiveness Act of 2010” Before the H. Comm. on the Judiciary, 111th Cong. (2010) (statement submitted for record by the Specialty Wine Retailers Association) (noting retailer dissatisfaction with proposed CARE Act). The House Judiciary Committee held a hearing on the Care Act on September 29, 2010. Id. (providing date and committee of hearing). While wine retailers were not invited to testify at the hearings, the Specialty Wine Retailers Association submitted written testimony. Id. (asserting purpose of statement).

See Heald, 544 U.S. at 489 (stating once law is found as discriminatory it must serve legitimate state
interest that cannot be reasonably served by
nondiscriminatory alternatives to be Constitutional
under Commerce Clause analysis).

\textsuperscript{cxxxviii} See H.R. 5034 (providing text of CARE Act that
creates presumption of validity for state liquor
laws).

\textsuperscript{cxxxix} See Letter from Charlie Papzian, President,
Brewers Assoc., Cary M. Greene, Chief Operating
Officer & General Counsel, Wine America, Peter Cressy,
President & Chief Executive Officer, Distilled Spirits
Council of the United States, Robert P. Koch,
President & Chief Executive Officer, Wine Inst.,
Joseph S. McClain, President, Beer Inst., William T.
Earle, President, National Association of Beverage
Importers, to Members, United States Cong. (Sept. 20,
(responding formally to proposed CARE Act and
amendment).

\textsuperscript{cxl} See Heald, 544 U.S. at 472 (quoting Oregon Waste
Systems Inc. v. Dept. of Environmental Quality of
Ore.) (citation omitted). Further “State laws that discriminate against interstate commerce face ‘a virtually per se rule of invalidity.’” Id. at 476 (quoting Philadelphia v. New Jersey) (citation omitted). “The current rule, announced in Granholm v. Heald, is that only the least discriminatory measures consistent with a state’s ‘core’ Twenty-first Amendment purposes – promoting temperance, ensuring orderly market conditions, and raising revenue – or certain other legitimate local purposes, are permissible.” Jonathan M. Rotter & Joshua S. Stambaugh, Article, What’s Left of the Twenty-First Amendment?, 6 Cardozo L. Pub. Pol’y & Ethics J. 601,601 (2008) (reasoning rule developed in Heald commands states to narrowly tailor liquor legislation to fulfill Commerce Clause requirements).

cxlii For a discussion of the ulterior motives for the CARE Act, see infra notes 142-45 and accompanying text.

cxliii See Geiger, supra note 117 (illustrating political influence of wholesaler groups). The amount
wholesalers have contributed at least $922,000 to House Representatives who sponsored the bill. See id. (reporting extensive wholesaler contributions to political campaigns). “National Beer Wholesalers Assn. made contributions to at least 53 of the bill’s co-sponsors within one to 30 days of the lawmakers’ signing on.” Id. (same). Opponents of the bill have also contributed to House Representatives, but not nearly as much as the bill’s supporters. See id. (admitting opponents to CARE Act have also contributed to political campaigns). Since the Supreme Court’s 2005 decision in Heald, wholesaler groups have donated more than 11.55 million dollars. See O’Donnell, supra note 103 (recognizing political influence of wholesaler groups). Further, since the Supreme Court decision in Heald, “the National Beer Wholesalers Association (NBWA) and the Wine and Spirits Wholesalers of America (WSWA)- each increased federal campaign contributions by 33% compared with the previous four years.” Id. (same). Moreover, some representatives received contributions exceeding limits and were forced to return money to the NBWA or the WSWA. Id. (same).

See Rotter, *supra* note 140, at 644-45 (discussing difficulty of competing as small wine producer).

See Jones, *supra* note 104 (explaining Senator Wiggins’ Resolution). California state Senator Pat Wiggins of California, recently drafted a Resolution to urge Congress to vote against the CARE Act. See *id.* (same). The resolution was passed in both the California Senate and Assembly, and will now be sent to “the president, vice president, United States senate president pro tempore, speaker of the House of Representatives, and senators and representatives from California.” *Id.* (describing potential impact of resolution).
See Reidelbach, supra note 143 (noting difficulty of operating and competing as wine producing organization). “Wine is produced in all 50 states, including more than 6,000 wineries, a 500% increase in the past 30 years. Yet the number of wine wholesalers has decreased by more than 50%, creating a distribution bottleneck. Id. (quoting Representative Mike Thompson describing hardships of wine producers forced to use three-tier system). “This wholesaler protection bill, could severely hamper our [Napa Valley] local wine industry.” Jones, supra note 104 (quoting Rex Stultus, Napa Valley Vintners Industry Relations Director, speaking on impact of CARE Act on California’s expansive wine industry).

See Jones, supra note 104 (providing that thirty seven states and District of Columbia allow wine producers to ship directly to consumers).

See e.g. Wine Country Gift Baskets.com v. Steen, 612 F.3d 809 (5th Cir. 2010), vacating sub nom. Siesta Vill. Mkt. v. Steen, 595 F.3d 249 (5th Cir. 2010), vacating sub nom. Siesta Vill. Mkt. v. Perry, 530 F.

cxlix For a discussion of the lower courts’ conflicting applications of Heald to state laws discriminating against wine retailers, see infra notes 71-101 and accompanying text.

c1 See STOP HR 5034, supra note 102 (theorizing that CARE Act would render Supreme Court’s decision in Heald valueless).

c1 For a further discussion of the increased burden of proof for challengers of discriminatory state liquor laws proposed by the CARE Act, see supra notes 109-11 and accompanying text. The Specialty Wine Retailers
Association detailed six types of laws states would be able to pass under the CARE Act:

1. Facially discriminate against out-of-state wine merchants
2. Impose huge fees on non-resident retailers doing business in states
3. Prohibit retailers from purchasing goods from out of state producers
4. Prohibit non-resident retailers from opening more than one store in a state while allowing resident retailers to open many
5. Place much higher taxes on wines purchased from out-of-state retailers
6. Allow in-state retailers to advertise, but ban out-of-state retailers from advertising in the state


\cite{FN-61} For a discussion of the severe opposition to the CARE Act, see supra notes 118, 136-37 and accompanying text. For a discussion of the proposed amendment to the CARE Act, see supra notes 112-16, 135 and accompanying text. One commentator suggested that at the recent hearings held by the House Judiciary
Committee, the members of the Committee were not in a rush to get the CARE Act to the House floor for a full vote before the end of this Congressional session. See Robert Taylor, Congress Holds Hearing on Bill Threatening Wine Direct Shipping, Wine Spectator, Sept. 30, 2010, available at http://www.winespectator.com/webfeature/show/id/43670 (noting political composition of bill’s co-sponsors).

For a discussion of the severe opposition to the CARE Act, see supra notes 118, 136-37 and accompanying text.