"Over-Stressed" Vines Produce No Wines, Whereas "Under-Stressed" Vines Mass Produce: Consolidation, Anti-Competition, and the Fall of the Family Winery

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Introduction

THERE IS A THEORY IN WINEMAKING THAT "STRESSED" vines produce better wines because, when given the option, the vine will choose the path of least resistance where it can focus on growing and producing leaves, rather than concentrate on grape production.[1] However, there is a stress threshold over which the vines will shut down completely, unable to survive in their environment.[2] The "struggling vine" strategy, interestingly, parallels with regulation of the wine industry in the United States.[3] Stemming from fear of industry consolidation and criminal activity that sprouted during Prohibition, emerged a demanding trellis of federal, state, and local regulation. At first, the regulatory scheme helped smaller local producers emerge and thrive, and consumers had access to a quality of wine not previously available in the U.S. market.[4] However, a system that once supported diversification of wine production has become an overwhelming barrier to entry for small and mid-size vintners; due to its complexity and the impediments to entry created by its inherent anti-competitive spirit and layer of self-regulation. The result is a heav-

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1. *See generally Struggling Vines Produce Better Wines*, WINE ANORAK, http://www.wineanorak.com/struggle.htm [https://perma.cc/42JX-BXMN].

2. *Id.*

3. *See infra* Part I.

4. CAROL ROBERTSON, THE LITTLE RED BOOK OF WINE LAW: A CASE OF LEGAL ISSUES 63 (2008).

ily consolidated industry dominated by a few distributors favoring mass production and market capitalization over consumer choice, product quality, and diversity.

First, it is important to understand the history of current wine regulations and the policies driving them. In addition to individual state regulation, two Constitutional Amendments, and local government oversight, there are several federal agencies and industry organizations that ensure that virtually every aspect of wine production, distribution, and retail is policed.[5] The complex web of "arcane and often counter-intuitive"[6] laws mystify the most apt legal minds, requiring even experienced vintners to have an annual legal budget to help navigate the laws.[7] Falling under the "alcohol" umbrella has caused wine to be included (arguably improperly) in a highly-regulated category of "immoral," "unhealthy," and "abused" substances regulated by the Alcohol and Tobacco Tax and Trade Bureau ("TTB").[8] The ratification of the Twenty-First Amendment provides the States with greater power to regulate the sale and distribution of alcoholic beverages than any other consumer product. Notably, California (amongst other states) supplements the federal laws with its own stricter standards.[9] Additionally, most states have adopted restrictive regulations on production, distribution, and retail of wine, justified by a concern for public health and safety.[10] However, the current laws are highly attenuated from their original intent and debilitating to, in particular, small to mid-level wine producers.

Furthermore, wine is unique as an alcoholic beverage because it is an agricultural product, unlike distilled spirits. Its status as an agricultural product brings additional regulation relating to land use and environmental law. Most importantly, it creates another costly layer of

5. *See generally* RICHARD MENDELSON, WINE IN AMERICA: LAW AND POLICY xxix, 3 (2011).

6. *Id.*

7. MARK E. PISONI & GERALD B. WHITE, WRITING A BUSINESS PLAN: AN EXAMPLE FOR A SMALL PREMIUM WINERY 9, 34–36 (Cornell Univ. 2002) http://publications.dyson.cornell.edu/outreach/extensionpdf/2002/Cornell_AEM_eb0207.pdf [https://perma.cc/DW28-PTFB].

8. *See* MENDELSON, *supra* note 5, at 2–3.

9. *See id.* at 26.

10. Michelle Lee Mullins, Regulation and Distribution of Wine in the United States 7–8, 11–12 (May 2009) (Ph.D. dissertation, University of Missouri-Columbia) (on file with author).

competition for land, particularly in defined American Viticultural Areas ("AVAs").[11]

The TTB adopted the formal appellation system to further a fundamental tenet of the Federal Alcohol Administration Act of 1935 ("FAA Act")—consumer protection.[12] Interestingly, the TTB also claimed that the creation of a formal framework for wine appellations would prevent unfair competition among wine producers by placing a requirement that the appellation may be used on the wine label if "the prescribed percentage of grapes from that area is used to make the particular wine."[13] While the creation of the AVAs may have been successful in supporting the developing wine industry of the 1970s, the AVA's labeling requirements and associated costs, coupled with the rapid consolidation of the wine industry of the last decade,[14] have created another barrier to entry—one that promotes rather than protects against anti-competitive practices.

On their face, the current federal, state, and local regulations may not be inherently anti-competitive or detrimental to the consumer. Nevertheless, when addressed as a legal scheme, the current wine laws are not successful at addressing their underlying policies of health, safety, and consumer protection. Rather, the regulations create a framework that disproportionately empowers the high-volume producers and distributors, enabling them to collapse the wine industry and dominate the consumer markets.

11. MENDELSON, *supra* note 5, at 250 (explaining that American vinicultural areas are defined as "delimited grape growing regions distinguished by geographical features, the boundaries of which have been recognized and defined by the TTB"); Donovan Trone, *American Viticultural Area Valuations Offer Potential Tax Savings for Wineries*, MOSS ADAMS (Aug. 24, 2020), https://www.mossadams.com/articles/2019/june/ava-valuations-and-tax-benefits-for-wineries [https://perma.cc/X5B3-LJ9Y] (noting as of June 3, 2020, there are 248 established AVAs in the United States, with 139 in California); David Ashcraft, *The Bustling Napa and Sonoma County Real Estate Market Continues to Thrive into Summer 2016*, VINTROUX (2020), https://vineyardandwinerysales.com/newsletter/napa-and-sonoma-county-real-estate-market-elements-vineyard-values-and-wine-grape-prices/ [https://perma.cc/KNE9-JYZV] (explaining the cost of open plantable land in a Prime Napa Valley Appellation can cost upwards of $370,000 per acre).

12. Federal Alcohol Administration Act of 1935, 27 U.S.C. § 201 *et seq.*

13. MENDELSON, *supra* note 5, at 249.

14. *A Game Changer for Wine & Spirits Distribution*, WINE INDUS. NETWORK ADVISOR (July 29, 2020), https://wineindustryadvisor.com/2020/07/29/a-game-changer-for-wine-spirits-distribution [https://perma.cc/MKJ9-NH3W] ("[T]he top 10 wine and spirits distributors account for roughly 75% of the national market . . . . According to Wines Vines Analytics, there were approximately 3,000 distributors in 1995, but only 1,200 remained by 2017. The top two distributors now account for . . . more than half of the nearly $50 billion in U.S." [domestic wine sales]).

Part I of this Comment presents the tangled web of wine law as it stands today, addressing both federal and state regulations and their relative powers. As the top U.S. producer and exporter, California law will be used to illustrate regulations related to land use (including the oversight of AVAs), production, and export.[15] Additionally, New York law will be referenced to address import, distribution, and retail regulation. This part will expound upon the underlying policy motivations for the various regulations and discuss how each regulation was intended to address the pertinent issues when it was enacted.

Next, Part II examines recent cases to address how the current framework effectuates industry consolidation and the subsequent challenges for emergent and boutique wineries. On the contrary, it benefits the more established and market dominating producers and distributors. Additionally, this part explains how the current state of the wine industry limits consumer choice and access, allowing the top players to effectively price fix and gouge by pushing volume over quality through consumer deception.

Finally, Part III proposes a progressive scheme for wine regulation to address the current framework's inherent anti-competitiveness and propel the wine industry beyond the era of the Twenty-First Amendment into the Twenty-First Century. This part recommends changes (mostly reinterpretations) to both individual laws and their administration to recalibrate the current imbalance of power in both the governance of wine and within the wine industry itself, while attempting to avoid unnecessary disruption.

I. The Tangled Web of Wine Law

The first step to propose a solution to the wine industry's complicated regulatory environment is to unravel the current regulations and understand the policy drivers behind those laws. Any discussion about the modern regulation of alcoholic beverages starts with Prohibition, the proverbial "big bang" for the U.S. "Wine Revolution,"[16] beginning with the ratification of the Eighteenth Amendment in 1919[17]

15. *California & US Wine Production*, WINE INST., https://wineinstitute.org/our-industry/statistics/california-us-wine-production/ [https://perma.cc/YA84-HRT8] ("California produces an average of 81% of total U.S. wine production.").

16. MENDELSON, *supra* note 5, at 12.

17. U.S. CONST. amend. XVIII, §1 (defining Prohibition of Liquor as "[a]fter one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited").

and ending with its subsequent repeal by the Twenty-First Amendment in 1933.[18] The Twenty-First Amendment repealed the Eighteenth Amendment's blanket prohibition of alcohol, and it simultaneously (and critically) vested the states with broad power to regulate the import and consumption of intoxicating beverages within their borders (intrastate commerce). Thus, the Twenty-First Amendment effectively created fifty separate markets with their own regulatory schemes.[19] Though the states were aligned in their goals,[20] their approaches varied—with some states adopting a "local option" in addition to state level regulation with either "control" or "license" mechanisms.[21] Furthermore, some states, such as California, created complex and vigorously enforceable state-level tied-house[22] schemes and supplemented federal labeling laws to provide for stricter state standards with regard to trade practice and consumer protection. Recently, in response to the emergence of direct-to-consumer online sales, states (including New York) adopted distribution schemes to regulate interstate commerce (the shipment and selling of out-of-state wine).[23] Despite their variation, the state and local regulation post-Prohibition effectively created a legal fortress around wine production, distribution, and consumption, with very few pro-industry laws to offset the challenges and even fewer that benefit the smaller productions.

18. U.S. CONST. amend. XXI, §2 (defining Repeal of Prohibition as "[t]he eighteenth article of amendment to the Constitution of the United States is hereby repealed").

19. MENDELSON, *supra* note 5, at 13–19.

20. *Id.* at 11 (explaining the common goals of post-Prohibition regulation were temperance (avoiding excess of alcohol) and establishing an orderly market to collect taxes and fees—an important revenue source for the States).

21. *Id.* (explaining the States' uses of tied-house laws, free good laws, and the Sherman Antitrust Act).

22. *Id.* at 50–59 (explaining that the California ABC Act, including tied-house laws, is codified in the Business and Professions Code). Furthermore,

> [t]he California tied-house laws are both more comprehensive and more exception-filled than their federal counterparts but still represent one of the strictest tied-house regulatory schemes in the country. Most significantly, while the federal laws require exclusion of a competitor's product to find a violation, the California law requires only an unlawful interest or inducement leading to an unlawful act. California ABC enforcement is therefore much easier and more vigorous than TTB activities against similar alleged abuses.

Id.

23. *Id.* at 13.

A. The Twenty-First Amendment: Providing Power to Regulate Liquor Beyond the Reach of the Commerce Clause

To understand the power of the Twenty-First Amendment, it is important to point out that there are only two ways in which the Constitution can be directly violated by a private citizen, either through the Twenty-First Amendment, which prohibits the violation of a state law regarding alcoholic beverages, or through the Thirteenth Amendment, which prohibits the enslavement of an individual.[24] After Prohibition failed, the federal government and states feared the "social evils" that came with excessive consumption of alcohol and the "gangster" business practices, fueled by crime and corruption, that emerged during Prohibition would reemerge.[25]

In addition to the Twenty-First Amendment, states derive power from the Wilson Act and the Webb-Kenyon Act.[26] Both Acts have been interpreted to further protect a state's power to regulate intrastate commerce, despite being passed before the enactment of the Twenty-First Amendment in 1890 and 1913, respectively.[27] In the pre-Prohibition cases *Vance v. W.A. Vandercook Co.*, and *Clark Distilling Co. v. Western Maryland Railroad Co.*, both Acts were found constitutional despite Commerce Clause challenges, but their interpretations were narrowly applied.[28] Justice White delivered both opinions for the Supreme

24. Rachel M. Perkins, *Wine Wars: How We Have Painted Ourselves into a Regulatory Corner*, 12 VAND. J. ENT. & TECH. L. 397, 398 (2010).

25. Jay L. Zagorsky, *How Prohibition Changed the Way Americans Drink, 100 Years Ago*, THE CONVERSATION (Jan. 14, 2020, 8:48 AM), https://theconversation.com/how-prohibition-changed-the-way-americans-drink-100-years-ago-129854 [https://perma.cc/4E4P-FW7H] ("From 1900 until 1915 . . . the average adult drank 2.5 gallons of pure alcohol a year, which is about 13 standard drinks per week."); Mark Thornton, *Alcohol Prohibition Was a Failure*, CATO INST. (July 17, 1991), https://www.cato.org/policy-analysis/alcohol-prohibition-was-failure [https://perma.cc/BG24-55ER].

26. 27 U.S.C. § 121 (1890); 27 U.S.C. § 122 (1935).

27. Mullins, *supra* note 10, at 403, 430.

28. Vance v. W.A. Vandercook Co., 170 U.S. 438, 444 (1898) (explaining the interplay of the Wilson Act and the Commerce Clause). In the opinion, Justice White wrote:

> Beyond dispute, the respective states have plenary power to regulate the sale of intoxicating liquors within their borders, and the scope and extent of such regulations depend solely on the judgment of the law-making power of the states, provided, always, they do not transcend the limits of state authority by invading rights which are secured by the Constitution of the United States, and provided, further, that the regulations as adopted do not operate a discrimination against the rights of residents or citizens of other states of the Union . . . however, while generically true, is no longer applicable to intoxicating liquors, since congress, in the exercise of its lawful authority, has recognized the power of the several states to control the incidental right of sale, in the original packages, of intoxicating liquors, shipped into one state from another, so as to enable the states to prevent the exercise by the receiver of the accessory right of selling intoxicating liquors in

Court and clarified that, in effect, the two Acts create an exclusion for dry states[29] from Congress's power under the Commerce Clause. The exclusion prevents alcoholic beverages from entering the state's borders and prohibits their resale if it had "arrived" within the state.[30] However, what was once a specialized exception to the Commerce Clause became effectively a blanket carve out for the Twenty-First Amendment from the entire Constitution. In *Indianapolis Brewing Co. v. Liquor Control*, Justice Brandeis clarified that, "the substantive power of the State to prevent the sale of intoxicating liquor is undoubted."[31] Despite its reinterpretation in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*,[32] in 1964, the court continued to find that the state laws resulting from their power under the Twenty-First Amendment were not unconfined by either other constitutional provisions or other federal laws.[33] Despite recent successful challenges and congressional acts to limit states' power under the Twenty-First Amendment,[34] the movement was too late. The foundation for wine law and the wine industry,

> original packages except in conformity to lawful state regulations. In other words, by virtue of the act of Congress, the receiver of intoxicating liquors in one state, sent from another, can no longer assert a right to sell in defiance of the state law in the original packages, because Congress has recognized to the contrary.

Id.; Clark Distilling Co. v. W. Md. Ry. Co., 242 U.S. 311, 332 (1917). Opinion by Justice White limiting the application of the exception to the Commerce Clause. *Id.* In the opinion Justice White wrote:

> In other words, the exceptional nature of the subject here regulated is the basis upon which the exceptional power exerted must rest, and affords no ground for any fear that such power may be constitutionally extended to things which it may not, consistently with the guaranties of the Constitution, embrace.

Id.

29. *Dry States 2021*, World Population Rev., https://worldpopulationreview.com/state-rankings/dry-states [https://perma.cc/ZY44-MM87] (defining dry states as "a state where the manufacturing, distribution, importation, and sale of alcohol is illegal or very restricted").

30. Perkins, *supra* note 23, at 404.

31. Indianapolis Brewing Co. v. Liquor Control Comm'n., 305 U.S. 391, 394 (1939) (clarifying that the Twenty-First Amendment is not limited by the Commerce Clause, the Equal Protection Clause, nor the Due Process Clause).

32. Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 330, 332 (1964) (Despite being "made clear in the early years following adoption of the Twenty-first Amendment that by virtue of its provisions, a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders . . . . Both the Twenty-First Amendment and the Commerce Clause are parts of the same Constitution. 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").

33. *Id.* at 330.

34. *See infra* Part III.

as we know it, was firmly established during the post-Prohibition "Wine Revolution."[35]

B. Production: Excise Tax and the FAA Act

Federal regulations may not be inherently debilitating; however, their requirements are fairly extensive and not exclusive since many states further supplement the federal laws to impose their own tax and production requirements.[36] The two pillars of federal authority over wine—the Internal Revenue Code ("IRC") and the FAA Act—are administered by the TTB and were put in place to establish efficient tax administration and business practices post-Prohibition.[37]

Like other "vice" products, the stated justification for a tax on wine is to influence citizen behavior (away from the "socially disfavored" product). In addition to the general sales tax charged to consumers, the IRC provides for a Federal Excise Tax that is determined based on the alcohol content of the wine product.[38] Such tax ranges from $1.07 per wine gallon for a wine with less than fourteen percent alcohol content to $3.40 per wine gallon for "[c]hampagne and other naturally sparkling wines."[39] This is in addition to any state wine tax, which could be as high as $2.50 per gallon.[40] To protect the tax revenue, the TTB places additional administrative and legal requirements, including qualifying as a "bonded" winery, a bond (a guarantee from an insurance company) on the potential tax liability itself, substantial recordkeeping obligations, and TTB's authority to enter the winery premise to account for all taxable products.[41] The excise tax is not likely to be reduced or terminated due to its historical momentum and administrative convenience—in addition to political motivations. Thus, the excise tax is a driver for producer decisions with the goal of

35. MENDELSON, *supra* note 5, at 12.

36. *Id.* at 24–29.

37. *Id.* at 25, 27.

38. *Id.* at 24.

39. *Id.*

40. *State Tax Rates on Wine*, FED'N TAX ADM'RS (Jan. 1, 2021), https://www.taxadmin.org/assets/docs/Research/Rates/wine.pdf [https://perma.cc/747R-BH6E] (discussing state alcoholic beverage excise tax with Alaska ranked the highest, at $2.50, and California ranked as one of the lowest, at $0.20).

41. MENDELSON, *supra* note 5, at 25 (explaining "bonded winery" as before commencing operations of a "premise for the production, blending, cellar treatment, storage, bottling, packaging or repackaging of non-tax-paid wine . . . [t]he applicant must file [a] permit application with the TTB . . . [i]n that application . . . she provides the location of the wine premises and describes the land, buildings, and equipment").

finding ways to avoid the incremental tax cost, either via production location or strategic adjustments to the product itself.[42]

On the other hand, the FAA Act provides for the Secretary of the Treasury's authority to regulate the packaging, bottling, and labeling of wine and other alcoholic beverages, to address the unfair and deceptive trade practices harming both competitors and consumers.[43] The Secretary of the Treasury assigned exclusive authority to the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") to administer and provide for further administrative regulations in accordance with the intent of the FAA Act—to ensure that the consumer received what they thought they were getting by requiring the label to include factors that were of interest to them.[44] The FAA Act's general principles created a flexible structure, where the ATF could enact or change regulations, as necessary.[45] However, in many states, this flexibility is lost due to state laws, which supplement the federal regulations with more restrictive requirements for labeling and winemaking practices.[46] For instance, where federal regulations require, in pertinent part, "if a winery chooses to label by appellation of origin, the wine must be (i) at least 75 percent . . . derived (by volume) from fruit . . . grown in the appellation area indicated . . . [and] (ii) fully finished . . . within the State in which the labeled county is located," California requires that one-hundred percent of wine labeled as "California" wine be grown in the state.[47] Today, under this example, a wine of eighty-five percent California grown grapes would not qualify under the California standard, and thus be unable to include "California" on the label as the place of origin. This simple concept becomes much more complicated with the emergence of AVAs and the FAA Act Section 4.39(i)(2).[48]

42. *See generally Why Vice Taxes Continue to Persist*, REASON FOUND., https://reason.org/why-vice-taxes-continue-to-persist/ [https://perma.cc/5KA5-MR3Q]; Dan Berger, *Beating the Bubble Tax*, L.A. TIMES (June 30, 1994, 12:00 AM), https://www.latimes.com/archives/la-xpm-1994-06-30-fo-10080-story.html [https://perma.cc/G5HB-SS5D] (explaining how producers of sparkling wine could avoid the luxury tax by reducing the amount of bubbles).

43. Jay Kiiha, *Trade Protectionism of Wine Brand Names at the Expense of American Viticultural Areas: Arbitrary Protection of "Big Liquor" at the Expense of Small Vineyards*, 9 DRAKE J. AGRIC. L. 157, 160 (2004).

44. *Id.* at 160–61; MENDELSON, *supra* note 5, at 28.

45. MENDELSON, *supra* note 5, at 28.

46. *See generally id.*

47. 27 C.F.R. § 4.25(e)(3) (2012); CAL. CODE REGS. tit. 17, § 17015 (2021).

48. 27 C.F.R. § 4.39(i)(2) (2016).

C. Terroir in Labeling: AVAs and the "Grandfather Clause"

Terroir, borrowed from the French Appellation D'origine Controle ("AOC") system,[49] is the idea that grapes will reflect the environment in which they are grown, giving the wine a unique taste identifiable with the location of the grapes from which it was made.[50] In the United States, AVAs are legally defined geographies with distinguishable features that can be established if a petitioner demonstrates to the ATF that five requirements are satisfied, including evidence of geographical features that separate the viticultural features of the proposed AVA from surrounding areas and evidence that the viticultural areas is locally or nationally known—a recognized and unique area for growing wine.[51] With an AVA designation, there is not only the expectation of a distinct flavor, but also a perceived quality and associated value, especially in sought-after AVAs.[52]

Interestingly, the FAA formerly allowed a wine label to circumvent the origin requirement if the word "brand" followed the geographic indicator to avoid misleading the consumer.[53] Producers eventually took advantage of this loophole and named their wineries using desirable appellations of origin, such as "Napa" and "Rutherford" when the wines had been produced from grapes from other (usually less expensive and undistinguished) appellations.[54] These labels were valid under the FAA Act until 1986 when section 4.39(i) was enacted, effectively removing the "brand" exception to the appellation of origin requirements for labeling.[55] But one important loophole remained—the infamous grandfather clause of the FAA Act,

49. *See Terrior: What It Is and Why Is It Controversial?*, VIVINO, https://www.vivino.com/wine-news/terroir-what-is-it-and-why-is-it-controversial [https://perma.cc/5HLL-4PLF] (defining AOC as a model for wine appellation and regulation in France).

50. *Id.*

51. Jeff Ikejiri, *The Grape Debate: Geographical Indicators vs. Trademarks,* 35 SW. U. L. REV. 603, 607–08 (2007).

52. *See* ROBERTSON, *supra* note 4, at 138–44.

53. Ikejiri, *supra* note 51, at 608 ("The federal regulations do not apply to brand names that the Bureau approved prior to July 7, 1986. This clause, commonly referred to as the 'grandfather clause,' allows labels to use AVA names as brand names if the label also includes 'some other statement which [the Bureau] finds to be sufficient to dispel the impression that the geographic area suggested by the brand name is indicative of the origin of the wine.'").

54. Kiiha, *supra* note 43, at 166.

55. 27 C.F.R. § 4.39(i)(1) (2006) (defining geographic brand names as "[e]xcept as provided in subparagraph 2, a brand name of viticultural significance may not be used unless the wine meets the appellation of origin requirements for the geographic area named").

section 4.39(i)(2).[56] The grandfather clause allowed for any wineries whose labels qualified under the original FAA Act parameters prior to July 7,1986 to continue the use of what would be violative appellation of origin labeling under section 4.39(i) and continue to reap the benefits thereof.[57] The intent of the clause was to protect brand names that existed prior to the AVA program; despite the high likelihood of consumer confusion that would come from applying different standards to the same consumer product.[58]

Once again, the states took control of wine regulation, armed by the power of the Twenty-First Amendment. In 2000, after successful lobbying by the Napa Valley Vintners Association ("NVVA"), California enacted its own law which stated, in pertinent part that "no wine . . . in California . . . shall use . . . Napa [or] . . . Napa County . . . [or] any similar name . . . that is likely to cause confusion as to the origin of the wine."[59] In a strange turn of events (sending shockwaves through the wine industry), in *Bronco Wine Co. v. Espinoza*, the California Court of Appeals found that the grandfather clause of the FAA Act preempted California's more restrictive regulation because brand names are exclusively governed by federal regulation.[60] The result, at the time, was that Bronco Wine Company ("Bronco"), having purchased the brand names "Rutherford Vintners" and "Napa Creek Winery" could continue to sell its "Napa" Chardonnay from "vineyards blessed by the warm days and cool nights of California's famed Lodi vinicultural area" to customers unable to distinguish the exceptional fruits of Napa from the lower cost (and quality) grapes Bronco shipped in from Lodi.[61]

Had it not been for the Supreme Court of California overturning the lower court's decision,[62] Bronco's $40 million investment[63] in grandfathered labels would have been a launching point for what the

56. 27 C.F.R. § 4.39(i)(2) (2006).

57. *Id.* (Brand names used in existing certificates of label approval issued prior to July 7, 1986 must meet the following requirements: "(i) The wine shall meet the appellation of origin requirements for the geographic area named; or (ii) The wine shall be labeled with an appellation of origin in accordance with § 4.34(b) as to location and size of type of either: (A) A county or a viticultural area, if the brand name bears the name of a geographic area smaller than a state, or (B) A state, county or a viticultural area, if the brand name bears a state name").

58. Revision of American Viticultural Area Regulations, 76 Fed. Reg. 3491 (Jan. 20, 2011) (to be codified at 27 C.F.R. pt. 4, 9, 70).

59. CAL. BUS. & PROF. CODE § 25241 (West 2021).

60. Bronco Wine Co. v. Espinoza, 128 Cal. Rptr. 2d 320, 324 (Cal. Ct. App. 2002); Bronco Wine Co. v. Jolly, 95 P.3d 422, 425 (Cal. 2004).

61. *Espinoza*, 128 Cal. Rptr. 2d at 324; *Jolly*, 95 P.3d at 425.

62. *Jolly*, 95 P.3d at 457. In the case the court held:

NVVA called "AVA dilution."[64] While this is a win for the Napa AVA, the AVA's success was largely due to its lobbying efforts, and its standing as the most established AVA in California's wine country. It has not provided much traction for other AVAs throughout the country. Without specific state legislation, the power and the market potential for grandfathered labeling remains and large distributors have more than enough resources and legal power to defend themselves in each potential challenge. Thus, wine labeling and the grandfather clause remains unresolved federally.

D. Wine Law's Own Antitrust "Protection"

In prior sections, the requirements for facility operation and wine production, taxation, and labeling were reviewed in detail. However, that is only the beginning of the battle to market. This section follows the *properly* produced, labeled, and taxed wine through distribution—the most arduous segment of the lengthy trek to the end consumer.

During Prohibition, the power of vertically and horizontally integrated liquor "trusts" (associated with organized crime) led to the mo-

> Bronco has failed to carry its burden of demonstrating federal preemption of a long-established and legitimate exercise of state police power with respect to the subject regulated by § 25241. As we have seen, there is no express preemption in the present context, and Bronco's assertions of implied preemption are contradicted by the long history we have described of concurrent state and federal regulation of wine labels including, historically, the representations appearing on labels suggesting the place of origin of the grapes used to make wine. Nor has Bronco succeeded in providing any persuasive indication that this long-standing concurrent regulatory scheme no longer is compatible with Congress's overall purposes—which have been to support the states' efforts to protect consumers from misleading labeling, not to permit the type of labeling at issue here. Finally, Bronco has not established that, by purchasing a brand name that had been used prior to 1986, it acquired a federally recognized right or license exempting it from stricter state regulation.

Id.

63. ROBERTSON, *supra* note 4, at 133 (explaining Bronco "had acquired the Napa Ridge brand in January 2000 from Beringer Wine Estates for more than $40 million" and noting that the acquired brand has been in use since the early 1970s).

64. Kiiha, *supra* note 43, at 168–69 (explaining that the use of distinguished regional identifiers by producers who have acquired labels registered before July 7, 1986). Therefore, falling under the grandfather clause can cause consumer confusion. *Id.* Confusion arises because when consumers know that certain wines are not from the regions identified on their labels it can make it more difficult to distinguish those wines that are accurately labeled with regional identifiers. *Id.* This can lead to AVA dilution because the "goods/place association" of many geographic brand names with wine may be more an of association with the wine region indicated by the brand than an association with the producer of the wine brand itself, allowing grandfathered brands to trade on the goodwill of the AVA without complying with its requirements. *Id.*

nopolization of liquor production and distribution.[65] Rather than turning to the Sherman Act for anti-trust protection, Congress (via the FAA Act) and the states (consistent with their usual practice regarding the wine industry) enacted their own laws to protect consumers from price gouging and aggressive sales techniques.[66] The states favored two methods to regulate the distribution of wine within their borders; "open" states requiring licenses, and "control" states establishing state monopolies in either the retail distribution, wholesale distribution, or both.[67] Additionally, the FAA Act and state-enacted "tied-house" and "primary source" limitations as mechanisms for prevented vertical integration.[68]

An "open" state regulates the distribution and retail of alcoholic beverages by requiring licenses for each business vertical, which limits the number, location, and type of license that a given business can hold.[69] To conduct business in an "open" state, in-state premises may need to hold many licenses depending on the division of state license applications and, even then, a license may not be available due to "undue concentration" or other license availability limitations.[70] This created uncertainty and reliance on license-holders of "other" verticals, resulting in additional complexity and upfront costs. The out-of-state producer or distributors must obtain a permit to sell to in-state wholesalers, who may also be subject to state franchise and "primary source" laws, which can effectively lock a producer and a retailer with a specified distributor.[71] Unfortunately, laws that were originally intended to protect wholesalers from the powerful out-of-state producers have led to wholesale tier consolidation and market domination for the massive distributors.[72] For example, in California, the largest producer of domestic wine, there are effectively only two wholesalers.[73]

65. MENDELSON, *supra* note 5, at 11.

66. *Id.*

67. *Id.* at 15, 17.

68. *Id.* at 29, 33.

69. *Id.* at 15–16.

70. *Id.* at 16.

71. *Id.* at 17 (explaining that state franchise laws mandate exclusive distribution agreements and limit the right of the producer to seek more efficient wholesale options and that "primary source" laws require that wine be purchased within the state only from the original producer or his authorized agent, prohibiting purchases from other sources).

72. *A Game Changer for Wine and Spirits Distribution*, *supra* note 13 ("The top 10 wine and spirits distributors account for 75% of the national market. The top two distributors account for $27 billion of the $50 billion spent by consumers on domestic wine.").

73. Andrew Adams, *The Challenge of Distributor Consolidation*, WINES & VINES (Sept. 2017), https://winesvinesanalytics.com/sections/printout_article.cfm?article=feature&

Some "open" states have attempted to strengthen in-state production and distribution one step further by implementing a three-tier scheme where out-of-state producers (tier one) can sell only to wholesalers (tier two), who can only sell to retailers (tier three).[74] In *Swedenburg v. Kelly*, New York's beverage laws were challenged as a violation of the Commerce Clause.[75] The plaintiff wineries argued that in effect they were completely restricted from selling in New York because direct to consumer sales was "their only possible access to the New York market" because their size limited their access to distributors.[76] The Second Circuit determined that the power provided by the plain language of the Twenty-First Amendment was prioritized over the protection of the dormant Commerce Clause.[77] At the same time, in *Heald v. Engler*, the Sixth Circuit concluded the opposite.[78]

The Supreme Court granted certiorari to resolve the circuit split in the consolidated case, *Granholm v. Heald*.[79] Justice Kennedy, writing for the majority, held that the laws in both states were invalid as violations of the Commerce Clause, violations that could not be salvaged under the Twenty-First Amendment.[80] This holding was vehemently dissented by Justice Stevens who found that with regard to the alcohol industry (and no other), the Twenty-First Amendment effectively authorized the states to pass discriminatory laws regarding alcohol.[81] It is important to understand that the decision in *Granholm v. Heald* does not invalidate three-tier distribution schemes, but instead requires that both in-state and out-of-state producers are treated the same—either allowed to ship directly or required to comply with the regulation.[82] States' reaction to *Granhold* was mixed—while New York removed the three-tier requirement, Michigan banned direct shipment

content=189049 [https://perma.cc/VDN4-ECNF]. As of 2017 only Southern Glazer's Wine & Spirits and Young's Market Co. remained in California. *Id.*

74. Tammy E. Linn, *Competing with Antitrust Laws: How New York's Post and Hold Liquor Law Will Lose Against the Sherman Act*, 75 Brook. L. Rev. 983–84 (2010). Specifically, "New York maintains a 'three tier' alcohol distribution system. This means that, with the exception of direct shipping in wine, a manufacturer must sell alcohol to New York wholesalers, who in turn sell to retailers, who then sell to consumers." *Id.*

75. Swedenberg v. Kelly, 358 F.3d 223 (2d Cir. 2004).

76. *Id.* at 229.

77. *Id.* at 239.

78. Heald v. Engler, 342 F.3d 517, 527 (6th Cir. 2003). Judge Daughtry explained that Michigan had not satisfied the strict scrutiny requirement for facial out-of-state discrimination. Therefore, the three-tier system was a violation of the Dormant Commerce Clause. *Id.*

79. Granholm v. Heald, 544 U.S. 460, 471 (2005).

80. *Id.* at 466.

81. *Id.* at 494.

82. *Id.* at 476, 489.

altogether.[83] But, nonetheless, this is a critical decision that limited the power of the states and distributors as a result.

In the "control" (or "monopoly") states, distributers and/or retailers are agents of the state government itself to ensure they achieve their mission to protect and benefit the public. The structure of the government monopolies is varied with some states opting for a control-open hybrid,[84] others limiting state control to either wholesale or retail, and many states distinguishing between the control of on-premise and off-premise sales.[85] Products sold, hours of operation, and pricing[86] are all controlled by the state. Interestingly, control states "impose fixed prices, mandatory price markups, and/or taxes that generally result in higher retail prices than one finds for the same products in the license states."[87]

Washington State's control laws were challenged in the hallmark case *Costco Wholesale Corp. v. Maleng*, where the Ninth Circuit Court of Appeals considered Costco's claim that the mandatory markups of at least ten percent and the disallowance of a central warehousing system imposed by the state was a violation of the Sherman Antitrust Act.[88] Costco argued that the anticompetitive and restrictive laws limited its efficient practices, ultimately causing the same bottle of Washington wine to cost more in its Washington stores than other stores nationally, despite being the company's home state.[89] The Washington Beer and Wine Wholesalers Association asserted that a ruling in Costco's favor would result in less choices for consumers and fewer independent retailers in the market, because large-volume retailers, like Costco, would be able to negotiate for price discounts that would not be available to smaller retailers.[90] The Ninth Circuit, acknowledging that Washington has one of the "moderate" drinking populations, concluded that all but the post-and-hold scheme were direct applications of the Twenty-First Amendment by the state, thus not subject to

83. Shirlene Love, *Napa to New York with the Click of a Mouse: The Dormant Commerce Clause and the Direct Shipment of Wine to Consumers as Discussed in Granholm v. Heald*, 26 J. NAT'L ASS'N ADMIN. L. JUDICIARY 205, 245 (2006).

84. MENDELSON, *supra* note 5, at 17 (defining control-open hybrid "part monopoly, part open" depending often on alcohol content).

85. *Id.* at 18.

86. *Id.* at 19 (explaining in terms of pricing, the control states impose fixed prices, mandatory price markups, and/or taxes that generally result in higher retail prices than one finds for the same products in the license states).

87. *Id.*

88. Costco Wholesale Corp. v. Maleng, 522 F.3d 874 (9th Cir. 2008).

89. *Id.* at 882.

90. ROBERTSON, *supra* note 4, at 125.

Sherman Act pre-emption, and subsequently denied Costco's request for review *en banc*.[91] This win for distributors was short-lived. In 2011, Washington State became the first state in the nation to fully privatize wholesale and retail liquor operations through Initiative 1183.[92] However, since the Supreme Court denied review of *Costco v. Maleng*, the decision remains controlling law.

In addition to the regulations creating requirements for production and distribution, there are key federal and state statutory protections for distributers. There are laws restricting the ability of producers to develop their own retail business (thus bypassing distribution "tied-house" laws) limiting the ability of producers to negotiate and exit distribution contracts (franchise laws, "price posting" statutes, and "primary source" laws).

Under the FAA Act, a supplier is prohibited from inducing a retailer to purchase its products in interstate commerce to the exclusion "in part or in whole" of the products of another supplier.[93] Most states enacted their own "tied-house" law that took a more rigorous approach. For example, in preparation for the Twenty-First Amendment's repeal of Prohibition, California passed the Alcohol Beverage Control Act, within two years of its ratification, including laws to combat the "tied-house evils"[94] of pre-Prohibition.[95] California's "tied-house" laws limit "*any* cross-ownership interest *whatsoever* between a

91. *See Maleng*, 522 F.3d at 901–04 (discussing a "post-and-hold" scheme requires that wholesalers of beer and wine post their prices and adhere to those prices for at least 30 days).

92. Leonard Gilroy, *Washington State Approves Privatization of State Liquor Monopoly; Other States May Follow*, Reason Found. (May 31, 2012), https://reason.org/commentary/washington-liquor-privatization/ [https://perma.cc/3PPQ-FP2R].

93. 27 U.S.C. § 205(b) (2020).

94. Susan Lorde Martin, *Wine Wars – Consumers and Mom-and-Pop Wineries vs. Big Business Wholesalers: A* Citizens United *Example*, 21 Kan. J. L. & Pub. Pol'y 1, 4 (2011) ("The dominance of a few distillers and brewers also led to 'tied-house' arrangements or vertical integration whereby distillers, brewers, and wholesalers would exert control over retail outlets, particularly saloons."). For example, if a saloon keeper agreed to serve only one brewer's beer, the brewer would provide furnishings for the bar, pay for customers' food, and pay licensing fees and bribes. *Id.* Legislators were concerned that tied-house arrangements such as these and increased alcohol consumption because distillers would require retailers to buy certain quotas. In turn, retailers would then encourage customers to drink more. *Id.*; Louis Terminello, *"Tied-House Evil" Laws,* Food Drink Mag. (Apr. 13, 2018), http://www.fooddrink-magazine.com/sections/columns/2389-tied-house-evil-laws [https://perma.cc/6KSA-893M] (defining "tied-house evils" as when "[p]rior to legalization, alcohol distribution and sale was primarily in the hands of the criminal element. These criminals desired to control all aspects of the industry and gain favorable treatment for their brands at the retail level. They employed strong arm tactics against retail vendors, forcing the vendors to be exclusive outlets for their products. What resulted, however, was a landscape of unfair business practices, violence and mayhem.") *Id.*

supplier and a retailer, no matter how small or attenuated, and whether or not it is actual control."[96] The broad language of the "tied-house" laws have been heavily litigated, sometimes resulting in narrowly tailored exceptions.[97] These exceptions, however, are the result of extensive lobbying by big producers, and specifically tailored to their disputes, more often than not.[98] While the exceptions are often challenged by distributors claiming that the exception would weaken the purpose of the tied-house laws (to prevent aggressive marketing by large manufacturers), their ultimate concern is that with each exception protective shield of their statutory monopoly is weakened, thus threatening their market control.[99]

In addition to effectively requiring producers to obtain a distributor to retail their products under "tied-house" laws and three-tier distribution schemes, states have enacted franchise laws and "primary source" laws that go one step further, dictating the contractual exchanges between distributors and wineries (frequently to the detriment of the producer). Originally adopted to prevent the imposition of unfair requirements by large out-of-state producers, franchise laws regulate the business relationship between the producer and distributor, making it difficult, if not impossible for a winery to alter or terminate a distribution contract. While the states' laws vary, many require a showing of "good cause" to terminate, replace, or add a wholesaler, and often even apply retroactively.[100] Furthermore, "good cause" was

95. Colin Nystrom, *Who Stands to Benefit from Chapter 623's Exception to California's Tied-House Laws?*, 51 U. PAC. L. REV. 227, 230–31 (2020).

96. MENDELSON, *supra* note 5, at 51.

97. *See id.* at 69 (explaining that in 2010 a wholesaler was fined $50,000 for inviting retailers to a professional baseball game). Although reasonable entertainment was permissible, wholesalers/suppliers are prohibited from taking retailers to expensive sporting event. *Id.*

98. Nystrom, *supra* note 94, at 237 (explaining that lobbying is another essential aspect of the U.S. duopoly's commitment to maintain their status atop the beer industry). Large manufacturers seek changes in the law that create profitable opportunities, typically by adding exceptions to California's tied-house laws. *Id.* There are numerous exceptions that are directly attributable to Anheuser-Busch. Anheuser-Busch's ability to spend outrageous amounts of money to impact legislation illustrates the unfair playing field within the [beer] industry. *Id.*

99. MENDELSON, *supra* note 5, at 53.

100. ROBERTSON, *supra* note 4, at 59 ("A good example of this was the Illinois Wine and Spirits Industry Fair Dealing Act of 1999 . . . . A number of suppliers, . . . decide[d] to terminate existing distributorships before the law took effect. Their goal was to give themselves a chance to bid out their distribution contracts and to put better pricing and other terms into place before being locked into disadvantageous long-term agreements in Illinois. But the statute went further: it also authorized the Illinois Liquor Control Commission to order suppliers to continue to use the same distributors, on the same terms and at

interpreted more strictly than the common law fair dealing standard (despite the common use of "fair dealing" in their title), often demanding material change to a wholesaler's business or repeated violations to comply.[101] Even if a producer was able to show "good cause," in some states "primary source" laws require a producer to participate in exclusive distribution and "post and hold"[102] its prices, largely closing off a secondary market and depleting any leverage that a producer may have during negotiations.[103] Of note, though franchise and primary source laws often conflict with anti-trust regulations and goals, they are immune from anti-trust challenges under the *Parker* immunity doctrine, like much of state liquor regulation stemming from the Twenty-First Amendment.[104]

II. The Result: The Regulatory Protection Favoring Dominating Distributors Leaves Small-Wineries with Few Options for Survival and Wine Consumers Confused and Unsatisfied

The whole is greater than the sum of its parts. Never is that truer than in wine regulation, and its debilitating effect on small, individually owned wineries. The Twenty-First Amendment's establishment of state power (and its broad interpretation by the courts) is the core of the legal scheme continuously fueling the inherently anticompetitive reality of the industry. State regulations, initially justified as necessary to combat the evils of Prohibition, now use the same rationalizations

the same prices, even if the existing contracts had permitted termination for convenience (without cause).").

101. Martin, *supra* note 93, at 5 ("Michigan law makes it nearly impossible for a winery to fire a wholesaler unless a wholesaler commits fraud, breaches its contract with the winery, or loses its state license.").

102. Linn, *supra* note 73, at 975–76 ("New York's price posting law requires manufacturers and wholesalers to file price schedules that report future prices. The law is also considered a 'post and hold' law, as it requires them to make resale prices public, then hold those prices for a defined period of time, rather than allow prices to fluctuate based on market forces.").

103. MENDELSON, *supra* note 5, at 31–32.

104. *Id.* at 33 (referring to how *Parker v. Brown* protected state franchise laws and pricing schemes from anti-trust attack because they were considered state action for a specific state purpose); *see also* Parker v. Brown, 317 U.S. 341, 350–51 (1943) ("We [the Court] find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.").

almost one-hundred years later to keep them in place, despite their contemporary disconnect. The result is a consolidated corporate-dominated industry, retaining only a glimpse what was once primarily a family owned and operated agricultural business. Consequently, consumers are left longing for the boutique quality wine of the past and often confused by the modern labeling and distribution practices.

Unfortunately, as addressed in Part I, producers assorted attempts to challenge state-derived regulations were effectively combatted or, at the very least, tempered by the almost unlimited power instilled in the states to regulate alcohol.[105] The rare wins have required lobbying by an equally powerful producer,[106] the enactment of new state laws narrowly addressing the challenged issue,[107] or were achieved outside of the judicial system through state legislation.[108] In recent years, the consolidation and lobbying efforts of the few dominating distributors strengthened their statutory position, accelerating the hardship on small wine production.[109] Currently, state alcohol laws—even those with obvious anti-trust implications and direct limitations on and discrimination against interstate commerce—have been interpreted to pre-empt the FAA Act, the Sherman Anti-trust Act, and shockingly, the Constitution's Commerce Clause.[110] The distributors are dug in and prepared for a battle. How can small local wineries challenge federal and global distribution conglomerates without support from federal law? The short answer—they can't.

A. Family Wineries: No Longer Family Owned and Operated

Most winery websites open with a captivating story of their ancestor's perilous travel from Italy (or one of the many European countries known for excellent wine) with everything they owned in their possession, including their knowledge and passion for quality winemaking.[111] Often the heartwarming tales are accompanied by

105. *See supra* Part I.

106. *See* Nystrom, *supra* note 94, at 237.

107. Bronco Wine Co. v. Jolly, 95 P.3d 422, 452 (Cal. 2004) (Because the Napa AVA lobbied for protection under California Law, it should be protected and the FAA Act's grandfather clause, but only because the Napa AVA was able to lobby for protection under California law. In this case, the court was consistent in favoring state law.).

108. *See* Gilroy, *supra* note 91 (explaining that Washington State voters approved Initiative 1183 privatizing Washington's liquor industry after an unfavorable ruling in *Costco Wholesale Co. v. Maleng*).

109. Adams, *supra* note 72.

110. *See supra* Part I.

111. *See Our Legacy*, CHARLES KRUG (2021), https://www.charleskrug.com/legacy [https://perma.cc/L25F-KV2J].

black and white photos of family, aging wine barrels, and scenic views of the original vineyard trellises.[112] Unfortunately, for many wineries, these representations are like an undrinkable vintage—merely a bottled reflection of the past. With each year the number of truly family owned and operated wineries diminishes due to regulation favoring large distributors.[113]

The current regulatory scheme has left small wineries with a few somewhat viable options—(1) stay a small batch, local winery with an on-site tasting room, (2) invest in the land and production infrastructure with the hope that one of the "Big 10"[114] will purchase your label, or (3) join an established AVA that can lobby for state protection.[115] All of these options, while attainable, come with inherent costs and risks.[116] The upfront winery costs are extensive, and the rewards are not immediate and certainly not guaranteed.[117] Opting to stay local (*Option 1*), requires a winery make a local stamp or capture a piece of the tourism to fuel tasting room visitation and club membership, typically resulting in seasonal and inconsistent revenue and an extended

112. *See, e.g.*, *id.*

113. Lisa Mattson, *Infographic: Family Owned Wineries in Sonoma County and Napa Valley (1978–2019)*, JORDAN VINEYARD & WINERY (June 28, 2019), https://blog.jordanwinery.com/family-owned-wineries-infographic/ [https://perma.cc/43AJ-B9JC].

114. *A Game Changer for Wine and Spirits Distribution*, *supra* note 13 (emphasizing that the top 10 wine and spirits distributors account for 75% of the national market).

115. Bronco Wine Co. v. Jolly, 95 P.3d 422 (Cal. 2004).

116. Caroline Goldstein, *How to Start a Winery: 5 Steps to Starting a Wine Business*, NERDWALLET (Oct. 22, 2020), https://www.nerdwallet.com/article/small-business/how-to-start-a-wine-business [https://perma.cc/S7PQ-BS96] (listing the following as expenses to consider within your first two years of starting a wine business alone: "[l]and; [e]quipment, including refrigeration, cellar equipment, winery buildings, trucks, and receiving equipment; [v]ines; [f]ermentation and storage; [c]ooperage; [b]ottling line; [o]ffice; [t]asting room; and other startup costs including payroll for your staff, shipping, marketing, and insurance"). In all, White estimates that a business' first five years require a capital investment of over $1.5 million. *Id.* In some areas, like Northern California, it can be considerably more—vineyards in "Northern California can cost $11,000 to $30,000 per acre, but in the next 30 years, the price tag is predicted to reach $1 million per acre." *Id.*

117. *See* Alexa K. Appalas, *The Life Cycle of a Wine Grape: From Planting to Harvest to Bottle*, WINE COOLER DIRECT (July 6, 2016), https://learn.winecoolerdirect.com/life-cycle-of-a-wine-grape/ [https://perma.cc/RY5C-T258] ("Making wine is a long, slow process. It can take a full three years to get from the initial planting of a brand-new grapevine through the first harvest, and the first vintage might not be bottled for another two years after that."); Aaron Romano, *A Vintage Lost?*, WINE SPECTATOR (Oct. 8, 2020), https://www.winespectator.com/articles/a-vintage-lost-napa-and-sonoma-vintners-say-2020s-fire-and-smoke-has-ruined-much-of-their-harvest [https://perma.cc/ZY4E-9EHR] ("Countless Napa wineries have chosen not to make wine in 2020, but they're not alone. Many suspect that large swaths of Sonoma County grapes may also be damaged by smoke taint.").

breakeven point.[118] For a winery hoping to get acquired (*Option 2*), it is a long and expensive process to earn entry into the highly competitive mergers and acquisitions ("M&A") market where capturing the attention of top distributors is a challenge.[119] Lastly, under the third option (*Option 3*), the dilution of AVAs by grandfathered brands[120] and scarcity of land and high value varietals available,[121] creates a higher entry point into an AVA, requiring a higher up-front investment for land that may not result in the reward (in price) that the buyer expected at the time of purchase.[122] As the law and industry currently stands, traditional wineries are stuck between the proverbial rock, hard place, and, in this case, the additional hurdle of a brick wall. The result is fewer wineries remaining owned by the founding family, selling their beloved winery to another family, a corporation, or having no option but to close.[123]

118. Rob McMillan, State of the Wine Industry Report 2019 (2019), https://www.svb.com/globalassets/library/images/content/trends_and_insights/reports/wine_report/svb-2019-wine-report [https://perma.cc/H6P4-P4U3]>. The report highlights that 61 percent of an average winery's sales comes from a consumer who first walks into the tasting room. *Id.* Of concern, tasting room visits in Napa and Sonoma have trended lower in the past five years and matured owners are unable to grow their active club, reaching a steady state (cancellations equal to conversion-to-club). *Id.*; *See also* Cory Mitchell, *Breakeven Point (BEP)*, Investopedia, https://www.investopedia.com/terms/b/breakevenpoint.asp [https://perma.cc/6YM9-KXYL] ("A company's breakeven is likewise calculated by taking fixed costs and dividing that figure by the gross profit margin percentage . . . . If it generates more sales, the company will have a profit. If it generates fewer sales, there will be a loss." (extending the breakeven point)).

119. McMillan, *supra* note 117, at 11. The report mentions the M&A market will continue at a reduced volume of transactions compared to 2018 and prior. *Id.* There should be more sellers who discovered they have waited just too long to begin the marketing process, and sales prices will fall somewhat from recent prices, if for no other reason than because there are fewer buyers. *Id.*

120. Mendelson, *supra* note 5, at 11.

121. Ashcraft, *supra* note 11.

122. Aris D. Suarez, *Wine Not? Putting a Cork in the Semi-Generic Category of Wine,* 68 DePaul L. Rev. 753, 774 (2019) ("The existence of the semi-generic category exacerbates this damage by allowing use of caveats to excuse wine producers' use of a regional designation to name their wines that come from other regions. One could view the semi-generic category as a sanctioned allowance of dilution, since it allows the use of the name if it clarifies that it comes from a different region, thus contributing to any dilutive harms the wines face.").

123. Mattson, *supra* note 112.

B. Labeling and Distribution Laws: Leaving Consumers Confused and Unsatisfied

Most wine consumers are not trained sommeliers,[124] instead relying on wine labels to guide purchases. Absent of living in the California wine country, for most consumers their first Napa experience is likely either while on vacation or while perusing the "California Wine" section of their local wine shoppe. Thus, most consumers do not have the expertise to differentiate between individual winemakers, except well-known, high-priced bottles (e.g., Screaming Eagle or Silver Oak) or the high-volume, mass-marketed producers (e.g., Robert Mondavi Wines). Left with the task of choosing a moderately priced bottle of wine for that night's dinner, consumers will default their search to "Napa Cab," the recognized varietal from an established AVA—a safe choice. However, they may be surprised when they take the initial sip and taste grape jelly spiked with ethanol instead of the full-bodied, rich red-wine with the dark flavors of cassis and notes of vanilla that they expected.[125] They had not purchased a "Napa Cab," at all, but Charles Shaw's "Two-Buck Chuck."[126] This is an example of the grandfather clause of the FAA Act at work.[127] Thankfully for the Napa AVA, the Supreme Court's decision in *Bronco v. Jolly* confirmed that California's AVA protection pre-empted the grandfather clause.[128] However, other AVAs remain vulnerable, especially emerging small wineries in Washington and Oregon, and so do the consumers.[129]

After having a negative experience purchasing wine at a local shoppe, the consumer decides instead to go straight to the source. The consumer searches out Cliff Lede Vineyards ("Cliff Lede"), a winemaker with several wines recalled fondly from their trip to Napa,

124. Hana-Lee Sedgwick, *What is a Sommelier?,* WINE COUNTRY (Apr. 8, 2018), https://www.winecountry.com/blog/what-is-a-sommelier/ [https://perma.cc/BKA4-2L4L].

125. Jamie Cattanach, *We Asked a Wine Snob to Review All Trader Joe's Two-Buck Chucks,* THE PENNY HOARDER (Apr. 18, 2017), https://www.thepennyhoarder.com/save-money/trader-joes-wine-review/ [https://perma.cc/ZBW4-VGNL] (explaining the expected taste of a Cabernet Sauvignon).

126. *Id.* (comparing a "Two-Buck Chuck" to what a self-proclaimed wine enthusiast believes a Cabernet Sauvignon should taste like and explaining that Charles Shaw wine, also (infamously) known as "Two-Buck Chuck," is certainly a cultural touchstone). Introduced in the early aughts at just $1.99 per bottle, the colloquial moniker isn't quite as accurate today: The wine usually sells for $2.99 to $3.79, depending on the market. *Id.*

127. MENDELSON, *supra* note 5, at 11.

128. ROBERTSON, *supra* note 4, at 133.

129. Peter Mitham, *Small Wineries Underpin Northwest Industry's Growth*, WINE BUS. MONTHLY (Mar. 18, 2019), https://www.winebusiness.com/news/?go=getArticle&dataId=211091 [https://perma.cc/GGU3-H9AJ].

California.[130] Unfortunately, Cliff Lede does not distribute to their local wine shoppe, so direct online shipment is the only option to purchase the quality wine they preferred.[131] The consumer excitedly fills their online cart—two *High Fidelity* Cabs, a variety of Pinot Noirs, and even a splurge bottle of *Poetry*, Cliff Lede's most prestigious estate grown cabernet sauvignon.[132] All set, now just an address and the wine will be on its way—not so fast, Georgia seems to be missing from the "State" dropdown. The consumer calls Cliff Lede and finds to their dismay, that direct shipment is not available to Georgia due to state regulations.[133] Left with no other option, the consumer's only choice is to navigate the shelves of their local wine shoppe, no less confused but undoubtedly more frustrated.

III. Proposal: To Release Wine from Its Regulatory Stronghold: The Pathway to Reestablishing the Open Market and Industry Diversity

Sometimes we need to go backwards before we can move forward. That is the case with the current wine law regulatory scheme. The United States' liquor industry and drinking "evils" of Prohibition are nowhere to be found, yet the courts continue to justify anti-producer regulations based on "high-powered producers" that no longer exist or have already found substantial regulatory loopholes.[134] High-alcohol, low-quality "Jug" wine has been replaced with nuanced, globally

130. Stacy Slinkard, *The 8 Best Napa Wineries for Cabernet Sauvignon*, The Spruce Eats (Sept. 11, 2020), https://www.thespruceeats.com/best-napa-valley-wineries-for-cabernet-sauvignon-4158620 [https://perma.cc/Z9TG-G8H7].

131. *See Shop*, Lede Family Wines, https://www.ledefamilywines.com/Shop [https://perma.cc/4SMB-X7TZ].

132. *See Platinum Wines*, Cliff Lede Vineyards, https://cliffledevineyards.com/platinum-wines [https://perma.cc/XH46-DD4Z]. Poetry is a platinum wine for Cliff Lede that sells for upwards of $300 per bottle. *Id.* It is grown on the flagship estate vineyard in the Stags Leap District and described as "the highest expression of our Stags Leap District estate vineyard and all of its irresistible components are well apportioned and fabulously integrated even at such a young age." *Id.*; *Cliff Lede Vineyards Poetry Cabernet Sauvignon*, Wine Searcher, https://www.wine-searcher.com/find/cliff+lede=poetry+cab+sauv+stags+leap+District+napa+valley+county+north+coast+california+usa/1/usa-ca-y [https://perma.cc/K88G-YA5H] (average price across all vintages listed as $298 per bottle).

133. *Shipping Information*, Lede Family Wines, https://www.ledefamilywines.com/Shipping [https://perma.cc/T6T2-Y6WL] ("By law we can legally ship wine to a limited number of states: AK, AL*, AZ, CA, CO, CT, DC, FL, HI, IA, ID, IL, MA, MD, ME, MI, MN, MO, MT, NC, ND, NE, NH, NJ, NM, NV, NY, OH, OK, OR, PA, SC, SD, TN, TX, VA, VT, WA, WI, WY *must be shipped to an ABC store.").

134. *See supra* Part II.

acclaimed wines meant to be enjoyed slowly and moderately.[135] Wine is now an international business, but it continues to be regulated on a local and state level. In this section, a proposal for unwinding, propelling, and disrupting wine regulation, and the industry hierarchy is presented.

A. State Regulation: The Overgrown Weed of the Wine Industry in Need of Federal "Pruning"

First, the Supreme Court must re-evaluate the Twenty-First Amendment with a modern lens to address the "reverse pre-emption"[136] issue that influenced past decisions to limit the federal checkpoints provided by the Commerce Clause, the Sherman Antitrust Act and the Supreme Court, itself. Despite being framed as a "win" for fair trade activism in the liquor industry, *Granholm v. Heald's* impact falls far below that of a victory, resulting in only minor changes to three-tier laws expressly discriminating against out-of-state wineries without addressing the anti-competitive nature of the three-tier system itself.[137] *But there is hope.* Recently, in *Tennessee Wine and Spirits Retailers v. Thomas*, the Supreme Court found that the two-year durational residency requirement for initial retail liquor store license applicants was unconstitutional as a violation of the Commerce Clause, and that it could not be saved by the Twenty-First Amendment.[138] The importance of this decision is not only in the final holding, but also in the justification for rejection of the Twenty-First Amendment's presumed pre-emption—the law's highly attenuated relationship to public health and safety.[139] The majority explained that the "overly expansive interpretation of section 2 [of the Twenty-First Amendment] . . . can no longer be defended," and its aim was not to "give States a free hand to restrict the importation of alcohol for purely protectionist purposes" but rather the states have the burden to demonstrate that the measures serve a state's legitimate interest based in their police powers.[140]

135. Cathy Huyghe, *The Wine Trend No One's Talkins About (Yet): An Insider's View*, FORBES (Jan. 26, 2016, 7:16 AM), https://www.forbes.com/sites/cathyhuyghe/2016/01/26/the-wine-trend-no-ones-talking-about-yet-an-insiders-view/?sh=241abd412685 [https://perma.cc/4DLV-2GRQ].

136. Anne E. Carlson & Andrew Mayer, *Reverse Preemption,* 40 ECOLOGY L.Q. 583, 583 (2013) (defining reverse preemption as "to veto federal agency decisions that conflict with state policy").

137. *See* Granholm v. Heald, 544 U.S. 460, 493 (2005).

138. Tenn. Wine & Spirits Retailers v. Thomas, 139 S. Ct. 2449, 2476 (2019).

139. *Id.* at 2474.

140. *Id.* at 2469, 2472.

The reinterpretation of the Twenty-First Amendment in *Tennessee v. Thomas* is the first step towards rebalancing the federal and state regulatory power.[141] Optimistically, this decision has opened the door to allow for widespread challenges to state distribution laws. The requirement of state laws to comply with federal constraints mitigates the corruptive markets dominator's lobbying efforts. Thus, states are required to effectuate their policing power in a manner tailored to policy concerns as opposed to distributors employed as their market police in exchange for privileged dealings. Rather than restricting out-of-state wine shipment through an inefficient distribution system, the states can capture additional tax revenue from out-of-state shipments and shift to retail-level regulation to address concerns of moderation and underage access. While distributors may be initially unsettled by the proposed changes, there is an opportunity to pivot their business to partake in the new larger open market. The complacent and mediocre mass-production wineries will not survive in the restored competitive landscape, benefiting the consumer in wine quality, variety, and price and allowing smaller, family-owned wineries to access consumers seeking their product.

B. The Legacy Label: The FAA Act's "Grandfathering" Loophole and the "Diluted" Wine Problem

There are currently two hundred and fifty-one AVAs, with one hundred and forty in California alone.[142] Winemakers have chosen to either modify or petition for an AVA, and both options will require an additional investment of time and money to comply with the AVA requirements and secure a plot in a sought-after location.[143] They do so for the prospect of producing high-quality wine, priced accordingly. Unfortunately, the perceived value of AVA wines is threated by dilution by brands existing prior to 1986, excused from the FAA Act's enhanced AVA production requirements.[144] These grandfathered brand names have been protected long enough. Additionally, with the establishment of new AVAs each year, the possibility of abuse (usually by

141. *See id.*

142. *Established American Viticultural Areas*, Alcohol & Tobacco Tax & Trade Bureau (Aug. 25, 2021), https://www.ttb.gov/wine/established-avas [https://perma.cc/G6RB-LTE4].

143. *Applying to Establish or Modify an AVA*, Alcohol & Tobacco Tax & Trade Bureau (Apr. 15, 2021), https://www.ttb.gov/index.php/wine/applying-to-establish-or-modify-an-ava [https://perma.cc/N7AU-FAQK].

144. Robertson, *supra* note 4, at 133.

market-dominating distributors or "labeling collecting" producers)[145] is a growing, not shrinking, issue. To prevent "AVA dilution" from grandfathered wine labels, the grandfather clause must either be voided from the FAA Act via an amendment or action by the TTB or found pre-empted at the point of AVA establishment (rather than requiring lengthy and expensive lobbying by each AVA to receive state legislative protection). Doing so will allow producers, AVA associations, and legislators to focus on regulatory progress rather than spend unnecessary time correcting the inefficiencies of the past.

C. AVAs: A New Club Where Small Wineries Can Actually Afford the Membership

Why are plots in AVAs so expensive? Yes, the wine is "better," and the names are "well-known," but do those factors justify the almost three-fold premium—or is it something else?[146] Perhaps it is less about the success of the wine and more about the prospect of acquisition. With a shift in consumer demand from mainstream to premium wines, large wine producers are acquiring smaller Napa Valley wineries to diversify their portfolios.[147] But that's not the best scenario for consumers searching for the diversity and quality of wine that emerges through the artistic experimentation of a dedicated producer. The TTB should consider establishing regulations that limit winery consolidation, in addition to the changes proposed above to combat and prevent the current anti-competitive and monopolistic behaviors.[148] Sometimes the risk of a regulation violation is not enough to deter what would otherwise be profitable behaviors, especially when the eco-

145. *The Top Five U.S. Companies*, MEININGER'S WINE BUS. INT'L (Aug. 26, 2013), https://www.wine-business-international.com/wine/power-lists/top-five-us-companies [https://perma.cc/X2L8-ZB5X] (showing constellation brands have more than 100 brands in its portfolio, expanding its repertoire each year.); *See, e.g.*, *Our Portfolio*, E. & J. GALLO WINERY (2021), https://www.gallo.com/portfolio/ [https://perma.cc/8DRK-SQ37]. Gallo is regularly purchasing wine brands and has an extensive wine portfolio. *Id.*

146. Ashcraft, *supra* note 11. Rutherford Vineyard Estate [Napa] valued at $9,025,000; Dry Creek Valley Vineyard Estate Healdsburg [Sonoma] valued at $3,600,000. *Id.*

147. *See, e.g.*, Henry Lutz, *Big Wine Companies Are Snapping Up Napa Valley Producers and Vineyards*, NAPA VALLEY REGISTER (Apr. 4, 2019), https://napavalleyregister.com/news/local/big-wine-companies-are-snapping-up-napa-valley-producers-and-vineyards/article_b48e32e7-f100-5f25-8c07-9427b1cafe43.html [https://perma.cc/PFZ2-KKM2] ("Constellation Brands had purchased Schrader Cellars, a Calistoga producer lauded for multiple 100-point cabernets . . . . In early spring, approximately $180 million changed hands for Stagecoach Vineyard, the largest contiguous vineyard in Napa County, making one of the largest wine companies in the world, E. & J. Gallo Winery, one of the largest owners of vineyard land in the county.").

148. *See supra* Part II.

nomic impact of possible litigation can be prepared and accounted for in their budgets.

Thus, the TTB's new regulations should focus on administrative and economically burdensome requirements for the purchase of a winery in an established AVA, especially if the purchaser already holds several AVA wineries in its portfolio. For instance, if there was an additional tax implication or fee paid to the AVA association upon purchase and in perpetuity, the buyers price point would drop, making an acquisition less favorable than it once was for both the buyer and the seller. Another option is to create benefits, be it tax or favorable access to local consumers, for the family owned and operated wineries to incentivize the emergence and continuance of family-owned wineries within AVA regions. With regards to administrative burden, the TTB could require an arduous level of reporting and recordkeeping when an AVA winery is acquired, justified by the goal of maintaining the quality and price of the products. While this may be an unpopular approach at first, its long-term benefits will be appreciated by small wineries currently in AVAs, emerging winemakers, and wine enthusiasts.

Conclusion

Wine is important socially, agriculturally, and economically in the United States. There has been a wine evolution since Prohibition, but the regulation and underlying policies have remained considerably unchanged. Market domination by powerful distributors and state monopolization have left smaller wineries with but a few risky options for success. The proposed regulation scheme will promote market entry and ensure market diversity and competition by restoring the central federal regulatory framework that provides fundamental antitrust and free trade protections. The outdated policies of post-Prohibition will be left in the past, allowing the states to refocus their policing and revenue raising efforts. Welcome to the next Wine Revolution—*Cheers!*