BREWING TENSION: THE CONSTITUTIONALITY OF INDIANA'S SUNDAY BEER-CARRYOUT LAWS

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INTRODUCTION

In the United States, beer is big business[1] and 2012 was a landmark year.[2] The $99 billion industry was up 1% overall,[3] and many in the industry saw tremendous growth.[4] Indeed, craft brewers[5]—representing 98% of those brewing[6]—grew by an incredible 15% in volume and 17% in retail dollars.[7] What is more, between June 2011 and June 2012, 350 new breweries got in on the craft-brewing boom,[8] bringing the count of operating domestic breweries well over 2000,[9] finally surpassing a 125-year-old national brewery-count record.[10] Even as new breweries are opening at a rate exceeded only by that on the day Prohibition ended,[11] the market still seems tantalizingly untapped; "macrobreweries,"[12] the remaining 2% of domestic brewers,[13] still dominate,[14]

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1. *Beer Sales*, BREWERS ASS'N, http://www.brewersassociation.org/pages/business-tools/craft-brewing-statistics/beer-sales (last visited Feb. 6, 2014). The overall beer industry is estimated at $99 billion. *Id.*

2. *Brewer's Association Reports 2012 Mid-year Growth for U.S. Craft Brewers*, BREWERS ASS'N (Aug. 6, 2012), http://www.brewersassociation.org/pages/media/press-releases/show?title=brewers-association-reports-2012-mid-year-growth-for-u-s-craft-brewers [hereinafter *Mid-year Growth*].

3. *Beer Sales*, *supra* note 1.

4. *Id.*

5. *Id.* Craft brewers are those who produce six million or fewer barrels of beer annually. *Craft Brewer Defined*, BREWERS ASS'N, http://www.brewersassociation.org/pages/business-tools/craft-brewing-statistics/craft-brewer-defined (last visited Feb. 6, 2014). For perspective, a barrel is thirty-one gallons, or 13.78 cases of twenty-four twelve-ounce bottles. *Beer Sales*, *supra* note 1.

6. *Craft Beer Backgrounder*, BREWERS ASS'N, http://www.brewersassociation.org/pages/media/Craft-Beer-Backgrounder (last visited Feb. 6, 2014).

7. *Beer Sales*, *supra* note 1.

8. *Mid-year Growth, supra* note 2.

9. *Id.*

10. *Id.*; *Number of Breweries*, BREWERS ASS'N, http://www.brewersassociation.org/pages/business-tools/craft-brewing-statistics/number-of-breweries (last visited Feb. 6, 2014) (charting 2126 breweries operating in June 2012 in contrast to just eighty-nine breweries in the late 1970s, and, in 2012, overtaking the most-recent high of 2011 breweries in 1887).

11. *Mid-year Growth, supra* note 2.

12. *Craft Brewer Defined*, *supra* note 5. "Macrobrewery" describes breweries that are too large to be considered craft breweries, therefore, based on the definition of craft breweries, this means brewers who produce more than six million barrels of beer annually. *Id.*; *see also* David

controlling as much as 90% of the $99 billion industry.[15]

As consumers become choosier about their beer,[16] new and established craft brewers are eager to make up ground in the market,[17] earning their share of the multibillion-dollar industry.[18] Furthermore, in a struggling economy,[19] the realized and potential success of homegrown craft breweries is at least one encouraging industry for would-be entrepreneurs, job seekers, and state policy analysts alike. Correspondingly, because of recent changes to Indiana law, the state and its brewers are uniquely positioned to gain.[20]

Between 2004 and 2010, Indiana's brewery count doubled from twenty-one to forty-three.[21] During that period of tremendous growth, in-state brewers began

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Sirota, *Can Beer Save America?*, SALON (May 7, 2012, 11:43 AM), http://www.salon.com/2012/05/07/can_beer_save_america (providing a general discussion of brand impressions of the two). The barrel-per-year limit previously was two million, but was increased to six million at the urging of Boston Beer Company, so Samuel Adams beer could retain craft status. *See* Joe Daley, *Sam Adams Beer Pleads to Keep Craft Status*, HUFFINGTON POST (May 25, 2011, 5:45 PM), http://www.huffingtonpost.com/2010/06/14/sam-adams-craft-status-be_n_607395.html.

13. *Craft Beer Backgrounder*, *supra* note 6.

14. *Beer Sales*, *supra* note 1.

15. Authority differs as to just how much market share the biggest breweries control, but in recent years, sources provide a figure roughly between 80% and 90%. *Craft Beer Backgrounder*, *supra* note 6 (noting that the craft breweries represent about 10% of overall beer sales); David Kesmodel, *MillerCoors Grooms No. 2*, WALL ST. J. ONLINE (Sep. 13, 2010), http://online.wsj.com/article/SB10001424052748703597204575483463004764270.html (indicating Anheuser-Busch InBev and Miller Coors Brewing Co. alone control roughly 79% of the market, 49% and 30.39%, respectively).

16. *See, e.g.*, Sirota, *supra* note 12 (discussing the current "battle between the low-price/quantity business model and the higher-price/quality business model" that is "nowhere . . . more clear than in the world of beer").

17. *See* Tom Rutunno, *As Craft Beer Grows, Some Brewers Spread Out, Others Scale Back*, CNBC (Apr. 12, 2012, 1:37 PM), http://www.cnbc.com/id/47030325/As_Craft_Beer_Grows_Some_Brewers_Spread_Out_Others_Scale_Back (noting how craft brewers are rapidly expanding in response to increased sales).

18. *Beer Sales*, *supra* note 1.

19. *The Employment Situation—January 2013*, BUREAU OF LABOR STATS., http://www.bls.gov/news.release/archives/empsit_02012013.htm (last visited Feb. 6, 2014) (reporting a 7.9% nationwide unemployment rate in January 2013); *Regional and State Employment and Unemployment (Monthly) News Release*, BUREAU OF LABOR STATS., http://www.bls.gov/news.release/archives/laus_01182013.htm (last visited Nov. 25, 2012) (showing Indiana with 8.2% unemployment in December 2012).

20. *See infra* Part V.

21. *Brewer's Almanac*, BEER INSTITUTE (Mar. 28, 2013), http://www.beerinstitute.org/assets/uploads/Brewers_Almanac-_20131.xlsx (open the Microsoft Excel document; navigate to the tab called "Brewers by State"). Notably, too, across the nation, more than 1200 breweries were reportedly in planning stages, compared to just 725 in 2011. *Mid-year Growth*, *supra* note 2.

lobbying for advantageous changes to Indiana's laws.[22] Specifically, the brewers sought to revise Indiana's deep-seated Sunday sales restrictions,[23] which continue to form the most-regulated beverage climate in all the United States.[24] Under the Indiana Code as it existed then,[25] consumers could buy beer on Sundays, but only for on-premises consumption[26]—for example, purchasing a beer with dinner. Consumers could not make Sunday beer purchases that would remove the beverage from the premises,[27] commonly referred to as carryout purchases, such as buying beer at a liquor store, drug store, or grocery store.[28]

For in-state brewers, having access to this fastened-up Sunday carryout market was attractive.[29] Rather than seek to open the Sunday carryout market entirely, which would also give liquor stores, drug stores, grocery stores, and other licensed outlets market access, the brewers limited their lobbying efforts.[30] The brewers sought the exclusive ability to sell their own products for carryout

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22. *State of the Six Pack 2011*, HOOSIER BEER GEEK BLOG (Feb. 17, 2011), http://hoosierbeergeek.blogspot.com/2011/02/2011-state-of-six-pack-part-3-agenda.html [hereinafter *Six Pack*] (indicating through brewery-owner quotations that breweries lobbied for this change for many years, through lobbyist Mark Webb); *see also* Rita Kohn, *Sunday Beer Returns*, NUVO, June 10, 2010, http://www.nuvo.net/indianapolis/sunday-beer-returns/Content?oid=1416414#.ULViZ-Oe9qt. (observing that the change reflects "what the Brewers of Indiana Guild ha[d] been wishing for"); *Mad Anthony to Sell Carry Out on Sunday*, WANE.COM (July 2, 2010, 11:46 AM) [hereinafter *Mad Anthony*], http://www.wane.com/dpp/news/mad-anthony-sunday-carry-out-sales (noting through a quotation that brewery owners have worked toward this change for five years).

23. *Mad Anthony*, supra note 22.

24. Laws limiting the Sunday sale of alcohol trace back to as early as 321 A.D. Michael Lee Carmin, Note, *Indiana's Sunday Alcoholic Beverage Sales: Regulation Without Justification*, 55 IND. L.J. 189, 192 (1979). Yet, in the wake of the Twenty-first Amendment and in light of changing social views as to the morality of alcohol consumption, the states have progressively lifted these restrictions. Elizabeth Maker, *Buy Alcohol on Sunday? Connecticut Now Allows It*, N.Y. TIMES, May 20, 2012, at A19, *available at* http://www.nytimes.com/2012/05/21/nyregion/sunday-liquor-sales-end-an-era-in-connecticut.html?_r=0. Indiana currently has more restrictions on Sunday alcohol sales than any other state. *Id.* (noting how prior to the change to Connecticut law, "Connecticut and Indiana had been the only states with such broad [Sunday sales] restrictions," including a broad restriction on carryout alcohol sales).

25. 2010 Ind. Legis. Serv. Pub. L. No. 10-2010 (S.E.A. 75) (West).

26. *Id.*

27. *Id.*

28. *See* Lindy Thackston, *Group Pushes for Relaxing Sunday Alcohol Sales in Indiana*, WTHR, http://www.wthr.com/story/16325524/group-pushes-for-relaxing-sunday-alcohol-sales-ban (last visited Feb. 6, 2014).

29. *Six Pack*, *supra* note 22; *see also* Kohn, *supra* note 22; *Mad Anthony*, *supra* note 22.

30. *Six Pack*, *supra* note 22. This is not to suggest any bad faith on the part of the brewers, indeed, any other position would likely have met opposition from powerful lobbyists on behalf of liquor stores, who regularly vocalize concerns that an open Sunday market would jeopardize their business. *See id.*; Thackston, *supra* note 28.

on Sundays, a privilege wine producers in the state have enjoyed since 1982.[31]

The brewers' lobbying efforts were ultimately successful, spurring a change to Indiana law that went into effect on July 1, 2010.[32] As a result of the change, certain brewers now have the exclusive ability to sell their own beers on Sundays for off-premises consumption.[33] In other words, if consumers want to purchase beer and bring it home on a Sunday, Indiana breweries are their only in-state option.

Since passed, the propriety of this law (hereinafter "Sunday law") has not been challenged.[34] Indeed, although the Sunday law does treat in-state interests differently, in that in-state breweries have access to a market that other in-state outlets do not, such differential treatment of in-state interests would not affront the Constitution.[35] Nevertheless, because of underlying laws structuring access

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31. *See* Christopher Ayers, *Brewpubs, Wineries Change Little to Prepare for Sunday Competition*, IND. PUB. MEDIA (May 21, 2010), http://indianapublicmedia.org/news/brewpubs-wineries-change-prepare-sunday-competition-8379/ (noting the origins of the long-held Sunday carryout privilege for wineries and how, despite breweries entering the Sunday market, wineries do not fear negative business impact).

32. 2010 Ind. Legis. Serv. P.L. 10-2010.

33. *Id*. Brewers do not enjoy the unlimited ability to sell their beer; qualifying brewers may sell no more than 576 ounces to a customer in one transaction and may also only sell beer at an address where (1) they hold a brewer's permit and (2) only if the address is located within the same city boundaries as where the beer was originally brewed. *Id*.

34. Although no one has formally challenged the Sunday law, there is a pendent challenge over other aspects of Indiana's alcohol legislation. *See* Complaint, Indiana Petroleum Marketers & Convenience Store Ass'n et al. v. Huskey et al., No. 1:13-cv-00784 (S.D. Ind. May 14, 2013) (alleging an equal protection violation because Indiana allows the sale of cold alcohol from some in-state outlets but not others). Further, in-state interests have made efforts to gain access to the Sunday carryout market. *See Group Plans Another Push for Sunday Alcohol Sales*, IND. BUS. J., Dec. 14 , 2011, *available at* http://www.ibj.com/group-plans-another-push-for-sunday-alcohol-sales/PARAMS/article/31374. Interestingly, a 2010 effort resulted in a Senate Bill that would have permitted grocery stores and liquor stores to sell beer on Sundays—but only beer made in Indiana. S.B. 106, 2012 Reg. Sess. (Ind. 2012). What is more, a series of Senate Bills have been proposed in 2013 that would make further changes to Indiana's carryout framework and closely related laws, subject to the constitutional limitations described in this Note. S.B. 13, 2013 Reg. Sess. (Ind. 2013) (proposing the creation of a supplemental dealer's permit that would allow specific permit holders to sell carryout alcohol on Sundays); S.B. 100, 2013 Reg. Sess. (Ind. 2013) (allowing the holder of an in-state or out-of-state brewer's permit to sell microbrewery beer for carryout at a farmers' market); S.B. 231, 2013 Reg. Sess. (Ind. 2012) (making an exception to the current laws restricting the sale of cold beer when delivering the beer cold is necessary to meet a brewer's specified storage and sale temperature requirements); H.B. 1293, 2013 Reg. Sess. (Ind. 2013) (creating an artisan distiller's permit for liquor sampling and sales but restricting access to the permit to those who have held a brewery permit, farm winery permit, or distiller's permit for three years prior to application).

35. *See, e.g.*, Ry. Express Agency v. Virginia, 347 U.S. 359, 372 (1954) (holding that an evenhanded tax is constitutionally permissible but not when it discriminates in some way against interstate commerce). The Commerce Clause is concerned with interstate commerce, not intrastate

to Indiana's alcohol market for out-of-state brewers, the Sunday law for brewers and, with it, a similar law for in-state wineries,[36] invites further examination. Could it be that Indiana's flourishing craft-brewing industry is improperly supported, even indirectly subsidized, through unconstitutional legislative measures? This Note explores that very question, arguing that in light of recent Supreme Court jurisprudence and interpretations of the Commerce Clause and Twenty-first Amendment, Indiana's current beer-sales laws improperly advantage in-state brewers while disadvantaging out-of-state brewers. These laws[37] would not likely withstand a constitutional challenge under the current analytical framework.

Part I of this Note introduces the three-tier distribution system, which is the nationally predominant[38] way of structuring alcohol sales into and throughout the state.[39] Part II provides an illuminative history of alcohol-related legislation in the United States, including the emergence of the three-tier distribution system, while focusing on the historic interplay between the Twenty-first Amendment and the Commerce Clause, leading up to a landmark 2005 Supreme Court decision, *Granholm v. Heald*.[40] Part III discusses the *Granholm* decision. Part IV briefly explores the propriety of the three-tier distribution itself, in light of *Granholm*. Part V assesses Indiana's current regulatory framework under *Granholm*, the Supreme Court's last word on the matter. Part VI lays out the Seventh Circuit's post-*Granholm* approach, paying special attention to the recent *Lebamoff*

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commerce. U.S. CONST. art. I, § 8, cl. 3. Differential treatment of in-state interests would implicate the Equal Protection Clause, but an Equal Protection challenge, if brought, would be dispensed with using the lowest standard of review. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 441-42 (1985) (using rational basis review to uphold a law that treated some in-state interests differently but advanced a legitimate state interest, applying the lowest form of review because the law did not divide on the basis of a protected class, such as race or gender).

36. Because of the significant scale of the beer industry—nationally, the beer industry represents more than the wine and liquor industries combined—coupled with intensifying beer-related legislative efforts in Indiana, this Note will focus on Indiana's beer-related laws, as a microcosmic analysis of its beverage policy as a whole. At the time of writing, the reasoning and conclusion this Note draws apply to Indiana's current wine-related carryout laws. A deeper exploration of Indiana's myriad, complicated, and ever-changing alcoholic beverage laws could reveal further battlegrounds for a constitutional challenge. For an overview of the size of the beer industry in relation to liquor and wine, see Emily Bryson York, *Liquor, Wine Continue to Take Share From Beer Sales*, CHI. TRIB. ONLINE (Jan. 31, 2012), http://articles.chicagotribune.com/2012-01-31/business/ct-biz-0131-liquor-export-20120131_1_liquor-sales-alcohol-sales-david-ozgo (indicating beer comprises 49.2% of the $59.24 billion alcohol industry, with liquor accounting for 33.6% and wine accounting for just 17.1%).

37. *Id.*

38. IND. CODE § 7.1-5-10-5 (2012); Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 851 (7th Cir. 2000).

39. *Bridenbaugh*, 227 F.3d at 851.

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

Industries, Inc. v. Huskey[41] decision. Part VII applies the Seventh Circuit's synthesized approach, ultimately concluding that Indiana's current regulatory system would likely be found unconstitutional. Finally, Part VIII proposes changes to Indiana's beverage laws to comport with post-*Granholm* jurisprudence.

I. AN OVERVIEW OF THE THREE-TIER DISTRIBUTION SYSTEM

An examination of Indiana's Sunday laws requires an understanding of the three-tier distribution system, the most common way states structure alcohol sales.[42] States that have adopted the three-tier distribution system use it to regulate alcohol in commerce.[43] "The system typically permits manufacturers (tier one) to sell only to licensed wholesalers (tier two), who in turn can only sell to licensed retailers (tier three)."[44] For clarity, this Note refers to those at tier one as Producers, those at tier two as Distributors, and those at tier three as Retailers.

For states adopting the three-tier distribution system, Producers include both in-state and out-of-state breweries, wineries, and distilleries.[45] At the next tier, Distributors are either state-run operations or state-licensed businesses that buy the alcohol directly from the Producers and sell the alcohol to the in-state Retailers.[46] General consumers may not purchase alcohol from Distributors.[47] Rather, consumers may only purchase alcohol directly from Retailers, which include bars, restaurants, liquor stores, drug stores, grocery stores, and various other licensed businesses.[48] Depending on the scope of a Retailer's license, the Retailer may sell some or all kinds of alcohol to consumers for on-premises consumption (e.g., drinking a beer at dinner or at the bar) or off-premises/carryout consumption (e.g., bringing beer home to consume).[49] Some Retailers are licensed to sell alcohol for both on-premises consumption and off-premises consumption.[50]

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41. Lebamoff Enter., Inc. v. Huskey, 666 F.3d 455 (2012).

42. *Bridenbaugh*, 227 F.3d at 851.

43. *See infra* Part II.

44. Gregory E. Durkin, *What Does* Granholm v. Heald *Mean for the Future of the Twenty-First Amendment, the Three-Tier System, and Efficient Alcohol Distribution?*, 63 WASH & LEE L. REV. 1095, 1097 (2006).

45. *Id.* at 1098.

46. *Id.* at 1097.

47. *Id.*

48. *Id.*

49. *See, e.g.*, IND. CODE §§ 7.1-3-4-6, -9-9, -14-4 (2012) (defining the scope of certain permits for beer, wine, and liquor, allowing on-premises consumption while restricting quantities sold for off-premises consumption).

50. *Compare id.* § 7.1-3-4-6 (allowing permit holders to sell beer for on-premises and off-premises consumption), *with id.* § 7.1-3-5-3 (defining the scope of different beer permit that allows on-premises consumption but expressly notes that the permit holder "may not sell beer by the drink nor for consumption on the licensed premises nor . . . allow it to be consumed on the licensed

Typically, no entity may operate or exist at more than one tier.[51] In other words, a Distributor may not also operate as a consumer-facing Retailer, or, chiefly at issue in this Note, a Producer typically may not also operate as a Distributor and/or a Retailer. Some exceptions, as they inhere in the three-tier distribution system itself, may be permissible, and will be discussed in subsequent Parts of this Note.[52]

II. ALCOHOL AND INTERSTATE COMMERCE: HISTORICAL BACKGROUND ON ALCOHOL SALES IN THE UNITED STATES

Within Article I, Section 8 of the Constitution is the "Commerce Clause," which gives Congress a certain power "[t]o regulate Commerce . . . among the several states" when it so chooses.[53] In addition to the "positive" power the Commerce Clause gives Congress to actively regulate, courts have inferred a "negative" power; that is, where Congress could elect to regulate interstate commerce, the Commerce Clause impliedly limits how states may regulate interstate commerce.[54] Often referred to as the Negative Commerce Clause or, more often, the Dormant Commerce Clause, this inferred mandate "limit[s] the power of the [states] to adopt regulations that discriminate against interstate commerce."[55] The basis of this interpretation is to reflect a central concern of the Framers,[56] which was to "prohibit economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors."[57] As the Supreme Court has stated, "[A]n immediate reason for calling the Constitutional Convention . . . [was] the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic [protectionism] that had plagued relations among the Colonies and later among the States under the Articles of Confederation."[58]

If one considers traditional Commerce Clause jurisprudence in isolation, then alcohol shipped from one state into another state would most certainly be an article of interstate commerce.[59] Thus, Congress could regulate the sale of alcohol and, via the Dormant Commerce Clause, states could not unduly burden

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premises.").

51. *Id.*

52. Granholm v. Heald, 544 U.S. 460, 524 (2005).

53. U.S. CONST. art. I, § 8, cl. 3.

54. West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 192 (1994).

55. *Id. See* City of Phila. v. New Jersey, 437 U.S. 617 (1978); Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

56. Hughes v. Oklahoma, 441 U.S. 322, 335-36 (1979); s*ee also* Thurlow v. Massachusetts, 46 U.S. 504, 563 (1847) ("Let it not be forgotten that the oppressed and degraded condition of commerce was one of the most urgent and pressing reasons which induced the formation of the [C]onstitution.").

57. New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 273-74 (1988).

58. *Hughes*, 441 U.S. at 325.

59. Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 851 (7th Cir. 2000).

interstate commerce through legislation—for example, by imposing additional taxes on out-of-state Producers while using the taxes to subsidize in-state Producers.[60] Nevertheless, when evaluating alcohol-related legislation, the Commerce Clause may not be viewed in isolation. Rather, because of the deeply entrenched "moral nature" of alcohol and its express treatment through the Eighteenth and Twenty-first Amendments, the requisite analysis is not as clear.[61]

A. Pre-Amendment Treatment of Alcohol

"Since the founding of our Republic, power over regulation of liquor has ebbed and flowed between the federal government and the states."[62] As early as 1847, in *The License Cases*,[63] "the Supreme Court recognized broad state authority to regulate alcohol"[64] under the police powers reserved via the Tenth Amendment, "noting that states were free from the implied restrictions of the Commerce Clause."[65] Yet, four decades later in *Leisy v. Hardin*,[66] the Court struck down an Iowa law that permitted the confiscation of alcohol shipped into the state if the alcohol lacked a proper state permit.[67] The court determined that Congress had the power to regulate articles in commerce and, where Congress had not spoken, states could not interfere.[68]

In direct response to *Leisy*, Congress enacted legislation on the matter and passed the Wilson Act,[69] providing that beverages originating from out of state became subject to the laws of the receiving state once they arrived within the receiving state.[70] The passage of the Wilson Act was a success for proponents of the temperance movement, eliminating the prior anomaly that states could ban all in-state production and consumption of alcohol yet remain powerless to control its importation.[71]

The Court found the passage of the Wilson Act to be within Congress's power,[72] yet later determined the Wilson Act did not apply to liquor that was still

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60. *See* West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 192 (1994).

61. *See infra* Parts II.A-VII.

62. Castlewood Int'l Corp. v. Simon, 596 F.2d 638, 641 (5th Cir. 1979).

63. 46 U.S. (5 How.) 504, 579 (1847).

64. Fla. Dep't of Bus. Regulation v. Zachy's Wine & Liquor, Inc., 125 F.3d 1399, 1401 (11th Cir. 1997) (interpreting *The License Cases*, 46 U.S. (5 How.) 504 (1847)).

65. *Id*.

66. 135 U.S. 100 (1890).

67. *Id.* at 119.

68. *Id.* ("The absence of any law of congress on the subject is equivalent to its declaration that commerce in that matter shall be free.").

69. Wilson Act, ch. 728, 26 Stat. 313 (1890) (codified as amended at 27 U.S.C. § 121 (2000)).

70. *Id.*

71. *Id.*

72. *See In re* Rahrer, 140 U.S. 545, 549 (1891).

in transit.[73] Thus, individual states could not prohibit a resident from ordering and receiving alcohol from an out-of-state vendor, so long as it was for personal consumption.[74] Because of the limitation interpreted in the Wilson Act, a state was unable to regulate all the alcohol entering its borders.[75] To eliminate this loophole, Congress passed 1913's Webb-Kenyon Act,[76] which "divest[ed] intoxicating liquors of their interstate character in certain cases"[77] and made all alcohol subject to the receiving state's laws.[78] The Court expressly recognized this function of the Webb-Kenyon Act, finding its purpose "was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor . . . in States contrary to their laws."[79]

Once the Eighteenth Amendment was ratified and took effect in 1920,[80] Prohibition rendered the Wilson Act and Webb-Kenyon Act obsolete until the passage of the Twenty-first Amendment.[81]

B. The Twenty-first Amendment's Passage and Subsequent Analysis of Alcohol in Commerce, Leading Up to 2005's Granholm *Decision*

The Twenty-first Amendment contains two predominant sections.[82] Section 1 expressly overturns the Eighteenth Amendment.[83] Section 2 appears to embrace the concerns embodied in the Wilson Act and Webb-Kenyon Act, providing that "[t]he 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."[84] Indeed, in early post-Prohibition decisions, the Court seemed to reach back to pre-Prohibition jurisprudence and use Section 2 to divest alcohol of its interstate character, upholding discriminatory state laws that would otherwise be struck down under the Commerce Clause.[85] For

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73. Fla. Dep't of Bus. Regulation v. Zachy's Wine & Liquor, Inc., 125 F.3d 1399, 1401 (11th Cir. 1997) (noting Rhodes v. Iowa, 170 U.S. 412 (1898) and Vance v. W.A. Vandercook Co., 170 U.S. 438 (1898)).

74. *Id.*

75. *Id.*

76. Webb-Kenyon Act, ch. 90, 37 Stat. 699 (1913) (codified as amended at 27 U.S.C. § 122 (2006)).

77. *Id.*

78. *Id.*

79. James Clark Distilling Co. v. W. Md. Ry. Co., 242 U.S. 311, 324 (1917).

80. U.S. CONST. amend. XVIII.

81. Tania K. M. Lex, Case Note, *Case Note: Of Wine and War: The Fall of State Twenty-first Amendment Power at the Hands of the Dormant Commerce Clause*—Granholm v. Heald, WM. MITCHELL L. REV. 1145, 1152-53 (2006).

82. U.S. CONST. amend. XXI, §§ 1-2.

83. U.S. CONST. amend. XXI, § 1 ("The eighteenth article of amendment to the Constitution of the United States is hereby repealed.").

84. U.S. CONST. amend. XXI, § 2.

85. *See* Indianapolis Brewing Co. v. Liquor Control Comm'n of State of Mich., 305 U.S. 391,

example, in *Indianapolis Brewing*, the Court upheld a Michigan law that banned the sale of beer manufactured in certain states, finding that "the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause."[86] Similarly, in *Young's Market*, the Court upheld a California statute that imposed a license fee on the importation of beer to California, but not on beer produced in California.[87] The court determined the Twenty-first Amendment carried a "broad command" and noted that a state could permissibly go so far as to "permit the domestic manufacture of beer and exclude all made without the State."[88] In these early decisions, therefore, the Court found that the Twenty-first Amendment excluded alcohol from traditional Commerce Clause principles.

Later, however, in *Bacchus Imports Ltd. v. Dias*,[89] the Court seemed less certain as to the proper interpretation of Section 2.[90] The Court was forthright in its uncertainty, stating, "Despite broad language in some of the opinions of this Court written shortly after ratification of the [Twenty-first] Amendment, more recently we have recognized the obscurity of the legislative history."[91] The Court went on to note that "[n]o clear consensus concerning the meaning of the provision is apparent."[92] The Court further noted inconsistent statements by the Amendment's Senate sponsor, statements that reveal two competing interpretations of Section 2 that persist today.[93]

1. The Broad Interpretation of Section 2.—When Senator Blaine, the Twenty-first Amendment's Senate sponsor, reported his view of Section 2, he remarked that Section 2's purpose was "to restore to the States . . . absolute control in effect over interstate commerce affecting intoxicating liquors."[94] This is the broadest interpretation of Section 2, an interpretation that divests alcohol of its interstate character and would permit alcohol-related state laws that would normally offend the Commerce Clause.[95] Indeed, the Court applied this broad interpretation in deciding *Indianapolis Brewing* and *Young's Market*.[96]

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394 (1939); *see also* State Bd. of Equalization of Cal. v. Young's Mkt. Co., 299 U.S. 59, 62-63 (1936).

86. *Indianapolis Brewing*, 305 U.S. at 394.

87. *Young's Mkt.*, 299 U.S. at 62-63.

88. *Id.*

89. 468 U.S. 263, 275 (1984).

90. *Id*.

91. *Id.* at 274 (citation omitted).

92. *Id.*

93. *Id.* at 274-75; *see also* Granholm v. Heald, 544 U.S. 460 (2005) (noting the historic tension between the interpretations of Section 2 and taking a new approach in reconciliation of the issue).

94. 76 CONG. REC. 4143 (Feb. 15, 1933) (Statement of Sen. John James Blaine).

95. *See e.g.*, *Indianapolis Brewing*, 305 U.S. at 394 ("Since the Twentyfirst [sic] Amendment . . . the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause . . . .")

96. *See supra* Part II.B.

2. The Narrow Interpretation of Section 2.—Yet, Blaine also voiced a narrower view, indicating the Twenty-first Amendment exists only to give states the option, and attendant ability, to remain dry: "So, to assure the so-called dry States against the importation of intoxicating liquor into those States, it is proposed to write permanently into the Constitution a prohibition along that line."[97]

3. The Supreme Court's Evolving Approach to Section 2.—Despite its early jurisprudence,[98] the Court rejected the broadest interpretation in decisions leading up to *Bacchus*[99] and began to adopt[100] what this Note will refer to as the "core concerns test" for evaluating the constitutionality of a state regulation. When using the core concerns test, the Court considers "whether the interests implicated by a state regulation are so closely related to the powers reserved by the Twenty-first Amendment that the regulation may prevail, notwithstanding that its requirements directly conflict with express federal policies."[101] Effectively a "sliding scale" test, the core concerns test marked a departure from the Court's early decisions[102] but offered significantly more protection than the narrowest reading of Section 2, which would merely give states the option to remain dry.[103] The Court justified the new core concerns approach in *Bacchus*, reasoning, "Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution [and] each must be considered in light of the other and in the context of the issues and interests at stake in any concrete case."[104]

Critical to the application of the new test is an understanding of just what constitutes a core concern. The Court noted that "mere economic protectionism"[105] was not one of them but at least the following two concerns were: (1) the promotion of temperance and (2) "combatting the perceived evils of unrestricted traffic in liquor."[106] In *Bacchus*, the Court applied the core concerns test to examine a Hawaii liquor tax imposed on all but certain locally produced alcohol.[107] Because Hawaii could not justify the discriminatory alcohol tax under one of these core concerns, the Court determined the tax was designed "to promote a local industry" and was ultimately unconstitutional.[108]

Even in deciding *Bacchus*, though, the Court seemed reluctant, acknowledging a weakness in its position, but brushing it aside due to the sharp protectionism it read into Hawaii's law, stating, "Doubts about the scope of the

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97. 76 CONG. REC. 4141 (Feb. 15, 1933).
98. *See supra* Part II.B.
99. Bacchus Imports Limited. v. Dias, 468 U.S. 263, 263 (1984).
100. Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 714 (1984).
101. *Id.* at 713-14.
102. *See supra* Part II.B.
103. *See supra* Part II.B.2.
104. Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 331-32 (1964).
105. Bacchus Imports Limited. v. Dias, 468 U.S. 263, 276 (1984).
106. *Id*.
107. *See generally id.*
108. *Id.* at 276.

Amendment's authorization notwithstanding, one thing is certain: The central purpose of [Section 2] was not to empower States to favor local liquor industries by erecting barriers to competition."[109] Three justices dissented, disagreeing with the Court's more middle-of-the-road interpretation of the Twenty-first Amendment, finding the "broad constitutional language" of Section 2 and its historically broad interpretation "confers power upon the States to regulate commerce in intoxicating liquors unconfined by ordinary limitations imposed on state regulation of interstate goods by the Commerce Clause and other constitutional provisions."[110]

C. The Emergence of the Three-tier Distribution System to Address Core Concerns

With this backdrop, it is important to note that when the Twenty-first Amendment was passed, most states[111] began adopting the three-tier distribution system[112] to address the kinds of concerns the Court in *Bacchus* would eventually highlight.[113] First, the system was used as a preventative measure against problematic "tied houses."[114] That is, by separating Producers, Distributors, and Retailers and prohibiting occupancy at more than one tier, states could keep large firms from dominating local markets. One goal of this separation was to prevent product favoritism.[115] More importantly, however, states were concerned that Producers would control establishments, causing widespread intemperance through their sophisticated marketing efforts.[116] Through tiered regulation, states were better able to "prevent organized crime—which had run illegal liquor empires during Prohibition—from dominating the legalized liquor industry."[117] Other advantages of the three-tier distribution system included creating orderly markets and helping states collect tax revenues[118] because all shipments into the

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109. *Id.*

110. *Id.* at 281 (Stevens, J., dissenting).

111. Cal. Beer Wholesalers Ass'n v. Alcoholic Beverage Control Appeals Bd., 96 Cal. Rptr. 297, 300 (Ct. App. 1971).

112. *See supra* Part I.

113. *Bacchus*, 468 U.S. at 276; *see also Cal. Beer Wholesalers*, 96 Cal. Rptr. at 300.

114. Durkin, *supra* note 44, at 1097.

115. Dep't of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd., 123 Cal. Rptr. 2d 278, 282-83 (Ct. App. 2002).

116. *Cal. Beer Wholesalers*, 96 Cal. Rptr. at 300.

117. Duncan Baird Douglass, Note, *Constitutional Crossroads: Reconciling the Twenty-First Amendment and the commerce Clause to Evaluate State Regulation of Interstate Commerce in Alcoholic Beverages* 49 DUKE L.J. 1619, 1621 (2000).

118. Durkin, *supra* note 44 (quoting Justin Lemaire, Note, *Unmixing a Jurisprudential Cocktail: Reconciling the Twenty-First Amendment, the Dormant Commerce Clause, and Federal Appellate Jurisprudence to Judge the Constitutionality of State Laws Restricting Direct Shipment of Alcohol*, 79 NOTRE DAME L. REV. 1613, 1622 (2004)).

state had to be funneled through in-state entities.[119]

III. 2005: A NEW INTERPRETATION OF THE INTERPLAY BETWEEN THE TWENTY-FIRST AMENDMENT AND THE COMMERCE CLAUSE OUTLINED IN *GRANHOLM*

The *Bacchus* decision readied the stage for *Granholm*, where the Court consolidated two cases challenging the constitutionality of direct-wine-shipment laws,[120] giving the Court an opportunity to articulate a more workable Twenty-first Amendment analysis. Michigan's law allowed only in-state producers to ship wine directly to consumers, banning direct-to-consumer shipments from out-of-state producers.[121] New York's law allowed direct shipments of wine produced out of state as long as the out-of-state-producer established a local branch in the state of New York.[122] Both New York and Michigan regulated alcohol sales through a three-tier distribution system.[123]

A. Elevation of the Commerce Clause and a Call for Evenhanded Terms

The Court struck down both laws, finding "the object and design of the Michigan and New York statutes is to grant in-state wineries a competitive advantage over wineries located beyond the States' borders."[124] The Court held that the laws "discriminate against interstate commerce in violation of the Commerce Clause . . . and that the discrimination is neither authorized nor permitted by the Twenty-first Amendment."[125]

In its decision, the Court gave credence to the three-tier distribution system, noting, "States can mandate a three-tier distribution scheme in the exercise of their authority under the Twenty-first Amendment."[126] However, Michigan's and New York's laws troubled the Court because the system was "mandated . . . only for sales from out-of-state wineries," [127] as in-state wineries were capable of obtaining a license for direct-to-consumer sales.[128] The Court ultimately held that "[t]he differential treatment between in-state and out-of-state wineries constitutes explicit discrimination against interstate commerce"[129] and that the "discrimination substantially limits the direct sale of wine to consumers, an otherwise emerging and significant business."[130]

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119. Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 851 (2000).
120. Granholm v. Heald, 544 U.S. 460, 465 (2005).
121. *Id.* at 468.
122. *Id.* at 470.
123. *Id.* at 466.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 467.
128. *Id.*
129. *Id.*
130. *Id.*

In addressing the interaction between the Commerce Clause and the Twenty-first Amendment, the Court found that Section 2 "does not abrogate Congress's Commerce Clause powers with regard to liquor"[131] and that the "state regulation of alcohol is limited by the nondiscrimination principle of the Commerce Clause."[132] This reasoning marked a significant departure from *Bacchus*, where the Court indicated it would uphold otherwise-discriminatory legislation when the state was acting within its core Twenty-first Amendment concerns.[133]

Ultimately, the *Granholm* Court determined, "State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent."[134] The Court found that the Michigan and New York laws involved "straightforward attempts to discriminate in favor of local producers" and such discrimination was "contrary to the Commerce Clause and . . . not saved by the Twenty-first Amendment."[135] The Court further noted that although states may have "broad power" to regulate alcohol under Section 2, the power "does not allow [s]tates to ban, or severely limit, the direct shipment of out-of-state wine while simultaneously authorizing direct shipment by in-state producers."[136] In sum, "[i]f a [s]tate chooses to allow direct shipment of wine, it must do so on evenhanded terms."[137]

B. Examining Discriminatory Laws with the Legitimate Local Purpose Test

After finding the New York and Michigan laws to be discriminatory and not protected by the Twenty-first Amendment, the Court undertook a more traditional Commerce Clause analysis, proceeding to determine whether the laws nevertheless "advance[d] a legitimate local purpose that [could not] be adequately served by a reasonable nondiscriminatory alternative."[138] The Court did not require the local purpose to address a core concern.[139] Here, the states provided two justifications for the laws: preventing minors from accessing alcohol and facilitating tax collection.[140] The Court rejected the minor-access justification, finding minors would be just as likely to purchase wine shipped from out of state as wine shipped from in state, and the state could take less-restrictive steps to minimize the risk to minors.[141] The Court was also not persuaded by any tax-related justification.[142]

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131. *Id.* at 487.
132. *Id.*
133. Bacchus Imports Ltd. v. Dias, 468 U.S. 263, 276 (1984).
134. *Granholm*, 544 U.S. at 463.
135. *Id.* at 489.
136. *Id.* at 493.
137. *Id.*
138. *Id.* at 489 (quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 288 (1988)).
139. *Granholm*, 544 U.S. at 489.
140. *Id.*
141. *Id.* at 490-91.
142. *Id.* at 491.

C. The Granholm *Dissent: Alcohol Is Different*

The four dissenting Justices in *Granholm* determined alcohol was an exception to the Commerce Clause by operation of the Twenty-first Amendment and the Webb-Kenyon Act.[143] The dissenters pointed out that the majority seemingly strayed from *Bacchus*, in that the Court did not apply the core concerns test outlined in *Bacchus* and, instead, seemed to treat alcohol like an ordinary article of commerce.[144]

IV. THE THREE-TIER SYSTEM APPEARS TO BE READ INTO SECTION 2 OF THE TWENTY-FIRST AMENDMENT AND IS NOT IN TENSION WITH *GRANHOLM*'S NONDISCRIMINATION PRINCIPLE

Although the dissenters in *Granholm* chide the majority for seemingly straying from *Bacchus*'s call for evaluating the core concerns of the Twenty-first Amendment against the discriminatory nature of the laws,[145] it seems the majority did implicitly accommodate at least some level of such concerns by endorsing the three-tier distribution system.[146] The majority appears to read Section 2 or, at least the Twenty-first Amendment, as first securing the states' absolute ability to sell or not sell alcohol, giving states the option and ability to remain dry.[147] As the Court put it, "A State which chooses to ban the sale and consumption of alcohol altogether could bar its importation; and, as our history shows, it would have to do so to make its laws effective."[148] Thus, a state could secure temperance, if it so chose, and enact the necessary interstate laws to enforce it. In the very next sentence, after it had just acknowledged a core concern of temperance, the Court endorses the three-tier distribution system,[149] even though there may be some discrimination inherent in the system.[150] The Court notes that "[s]tates may . . . assume direct control of liquor distribution through state-run outlets or funnel sales through the three-tier system."[151] Implicitly, the Court is reading more than just temperance into the Twenty-first Amendment.[152] That is,

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143. *Id.* at 497 (Thomas, J. dissenting).

144. *Id.* at 522-26.

145. *Id.*

146. "The decision to invalidate the instant direct-shipment laws also does not call into question their three-tier systems' constitutionality . . . ." *Id*. at 463 (noting North Dakota v. United States, 495 U.S. 423, 432 (1990)).

147. *Id.* at 488-89.

148. *Id.*

149. *Id.* at 489.

150. For example, an out-of-state Distributor cannot sell to bars or restaurants. This privilege is reserved solely for a Distributor operating on Indiana soil. *See, e.g.*, IND. CODE § 7.1-3-3-4 (West Supp. 2013) (setting forth application requirements for a beer wholesalers permit, which includes stating the local county of the wholesaler's warehouse location).

151. *Granholm*, 544 U.S. at 489.

152. *Id.* at 493.

by supporting the three-tier distribution system,[153] *Granholm* allows a state some ability to address its core concerns without facing Commerce Clause challenges.

Commentators have taken issue with the Court's support of the three-tier distribution system, determining the Court's reasoning stems from the very core concerns cases the Court abrogated when making its decision.[154] Such an argument, however, neglects to consider that the three-tier distribution itself addresses a core concern of the states—part of the compromise wrapped into the ratification of the Twenty-first Amendment and embodied in Section 2.[155] The Court did not endorse the broad reading of Section 2, that the Section entirely excepted alcohol from the Commerce Clause, nor did the Court fully endorse the narrowest reading of Section 2, that the Section existed solely to give the states the option to remain dry, with the attendant power to enforce temperance.[156] Rather, the Court seemed to make a reading somewhere in between, but narrower than the core concerns test in *Bacchus*[157]: that Section 2 embodied more than just temperance, that with the "positive" power to remain dry, the Amendment provides a negative power to permit the sale of alcohol[158]—but without the ills[159] that ran rampant during Prohibition.

Notably, had the states not read more than just temperance into the Amendment, it seems unlikely they would have ratified it nor nearly unanimously adopted an unconstitutional distribution system.[160] By supporting the three-tier distribution system,[161] the Court in *Granholm* impliedly acknowledged that Section 2 provides states with some insulation from the Commerce Clause, including and, arguably, up to any discrimination inherent in the three-tier distribution system.[162] Therefore, contrary to commentary that indicates otherwise,[163] the authority to adopt and use the three-tier distribution system does not derive from common-law interpretations the Court may have abrogated or from *Granholm* itself. Rather, a state's authority to adopt and use the three-tier distribution system stems from the historical context of the Twenty-first Amendment.[164] At any rate, per *Granholm*,[165] Supreme Court jurisprudence indicates that a three-tier distribution system, when applied evenhandedly, is not

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153. *Id.* at 488-89.

154. Amy Murphy, Note, *Discarding the North Dakota Dictum: An Argument for Strict Scrutiny of the Three-tier Distribution System*, 110 MICH. L. REV. 819, 823 (2012).

155. *See supra* Parts II.A-B.

156. *Granholm*, 544 U.S. at 488-89.

157. Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 274-76 (1984).

158. *Id.*

159. *See supra* Parts I, II.C.

160. Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 851-52 (2000).

161. *Granholm*, 544 U.S. at 488-89.

162. *Id.*

163. Murphy, *supra* note 154, at 823 n.19.

164. *See supra* Part II.A-C.

165. *Granholm*, 544 U.S. at 488-89.

constitutionally problematic, and post-*Granholm* courts have so held.[166]

In the Second Circuit's *Arnold's Wines, Inc. v. Boyle*,[167] an Indianapolis retailer challenged New York's law that permitted in-state Retailers to sell directly to consumers but did not permit direct-to-consumer sales from out-of-state retailers.[168] The Second Circuit upheld the law and affirmed the district court decision, finding the attack on the law to be an attack on the three-tier distribution system itself[169]—a system the Court endorsed in *Granholm* as an integral part of the states' Section 2 powers.[170] The court found that the law "treat[ed] in-state and out-of-state liquor evenhandedly under the state's three-tier system, and thus compli[ed] with *Granholm*'s nondiscrimination principle."[171] Similarly, in *Anheuser-Busch, Inc. v. Schnorf*, a district court struck down an Illinois law that let in-state Producers obtain a Distributor's license but prohibited out-of-state Producers from obtaining a Distributor's license.[172] The court relied on *Granholm*, finding that the law was discriminatory and "prevent[ed] out-of-state brewers from competing on equal terms with in-state brewers."[173]

V. ASSESSING INDIANA'S LAWS UNDER *GRANHOLM*

Before discussing Seventh Circuit decisions interpreting *Granholm*,[174] it helps to first discuss the reach of *Granholm* and use the Court's newest analysis to assess Indiana's Sunday laws. In deciding *Granholm*, the Court established the nondiscrimination principle for state regulation of alcohol while, at the same time, endorsing the three-tier distribution system.[175] It follows, and *Arnold's Wines* supports,[176] that any discrimination inherent in the three-tier distribution system itself would not offend *Granholm*. Therefore, to stake a challenge to Indiana's Sunday laws, a challenger would have to point to discrimination that originated outside the three-tier distribution framework. As the following argument suggests, Indiana's Sunday laws cannot be insulated by the three-tier distribution system. A challenge could proceed, although the offending discrimination would be of a different character than the discrimination in *Granholm*,[177] and would require a court to adopt a more mature test.[178]

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166. *See* Arnold's Wines, Inc. v. Boyle, 571 F.3d 185, 190-91 (2d Cir. 2009); Anheuser-Busch, Inc. v. Schnorf, 738 F. Supp. 2d 793, 804 (N.D. Ill. 2010).

167. 571 F.3d 185 (2d Cir. 2009).

168. *Id.* at 187.

169. *Id*. at 191-92.

170. *Id.* at 190-91.

171. *Id.* at 191.

172. Anheuser-Busch, Inc. v. Schnorf, 738 F. Supp. 2d 793, 817 (N.D. Ill. 2010).

173. *Id.*

174. *See infra* Part VI.

175. *See supra* Parts III-IV.

176. *Arnold's Wines*, 571 F.3d at 190.

177. *See supra* Part III.

178. For a discussion of a more mature test the Seventh Circuit has alluded to but not yet

As a starting point, it is notable that Indiana's Sunday laws give in-state Producers the ability to sell carryout beer directly to consumers; out-of-state producers cannot sell directly to consumers.[179] A challenger might argue that because out-of-state producers cannot sell directly to Indiana customers without having an in-state presence, just as the wineries in *Granholm* could not ship to New York or Michigan customers without first establishing an in-state presence,[180] Indiana's Sunday laws are in violation of *Granholm*. At first glance, this argument seems to sound in *Granholm* but is nevertheless likely to fall short.

In *Granholm*, the Court struck down a New York law that required an out-of-state winery to establish an in-state presence in order to ship to in-state customers;[181] in-state producers could automatically make direct shipments. Nothing about the three-tier distribution system demanded New York's regulatory framework. In contrast, Indiana's law lets consumers walk into a Producer's storefront, purchase alcohol, and bring it home.[182] Attacking Indiana's laws only on in-state privilege grounds amounts to saying it is discriminatory that an Indiana consumer cannot walk into a Michigan Producer's storefront, purchase alcohol, and bring it home without going to Michigan. Inherent geography would be causing the discrimination, not any uneven regulation. This argument is likely to fall short under *Granholm* for the same reasons the Second Circuit articulated in *Arnold's Wines*, where an out-of-state Retailer unsuccessfully challenged a New York law that allowed only in-state Retailers to sell directly to customers.[183] Indiana's Sunday law operates more like the discriminatory law in *Anheuser-Busch*,[184] giving in-state producers the ability to occupy two tiers as Producer-Retailers whereas out-of-state Producers can only occupy the first tier as Producers.[185] In this way, the law does sound in *Granholm*;[186] as the statute is written, a Michigan Producer cannot sell to Indiana consumers, even after setting up an in-state presence, unless the Producer actually begins brewing in Indiana.[187]

If a court accepts this discriminatory Producer-as-Retailer argument, Indiana would have to point to legitimate interests the state could not advance by any other reasonable alternative.[188] Here, allowing direct-to-consumer sales from in-

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applied, see *infra* Part VI.

179. 2010 Ind. Legis. Serv. P.L. 10-2010.

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

181. *Id.*

182. *See* 2010 Ind. Legis. Serv. P.L. 10-2010.

183. Arnold's Wines, Inc. v. Boyle, 571 F.3d 185, 186-87, 192 (2nd Cir. 2009).

184. Anheuser-Busch, Inc. v. Schnorf, 738 F. Supp. 2d 793, 793 (N.D. Ill. 2010).

185. *Id.*

186. *See generally Granholm*, 544 U.S. at 463.

187. IND. CODE § 7.1-3-2-7 (2013).

188. *Granholm*, 544 U.S. at 463 ("Our determination that the . . . direct shipment laws are not authorized by the Twenty-first Amendment does not end the inquiry. We must still consider whether [the] state regime 'advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.'" New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 278 (1988)).

state Producers but not from out-of-state Producers arguably alleviates the potential for tax evasion and could help prevent minors from accessing alcohol. Yet, these justifications did not persuade the Court in *Granholm*, partially due to meager evidence.[189] The Court also noted that the state could achieve those and other rationales through less-restrictive steps or "through the alternative of an evenhanded licensing requirement."[190]

Turning to Indiana's Sunday laws, Indiana could, for example, easily require out-of-state brewers to obtain a permit before allowing direct-to-consumer sales. As the law stands, these sales can only occur "at any address for which the brewer holds a brewer's permit . . . if the address is located within the same city boundaries in which the beer was manufactured."[191] Out-of-state craft brewers are already able to obtain the same permit as in-state brewers to receive other advantages[192] under the statute, yet they're restricted from Sunday sales by virtue of being an out-of-state brewer. Even if this discrimination inheres in the three-tier distribution system and is therefore distinguishable from the discrimination in *Granholm*,[193] allowing the out-of-state brewery to establish an in-state storefront and sell its beer would make the law more evenhanded. At any rate, the potential success of such an argument need not be fully considered, as Indiana's Sunday laws contain a deeper flaw.

Indiana's beverage regulation goes beyond any facially discriminatory but three-tier insulated effect, a regulatory framework the *Granholm* Court would protect.[194] Not only can in-state Producers sell carryout alcohol directly to consumers, they can do so seven days a week.[195] At the same time, Indiana prohibits carryout alcohol sales from all other Retailers.[196] Although bars and restaurants may serve alcohol for Sunday consumption[197]—therefore, some out-of-state alcohol reaches the market—in-state Producers enjoy exclusive access to the Sunday carryout market.[198] Thus, 100% of carryout beverages legally sold in Indiana on Sundays are from Indiana's own Producers.[199]

Indiana's Sunday laws thus differ from the facially discriminatory laws the Court analyzed in *Granholm*.[200] Rather, Indiana's laws create a discriminatory

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189. *Granholm*, 544 U.S. at 463.

190. *Id.*

191. IND. CODE § 7.1-3-2-7 (2013).

192. *See id.* The ability to bypass the three-tier distribution system and self-distribute under certain conditions is a key opportunity and, by the way the statute is written, available to in-state and out-of-state breweries alike. *Id.*

193. *Granholm*, 544 U.S. at 463.

194. *Id.* at 488-89.

195. IND. CODE § 7.1-3-2-7 (2013) ("The holder of a brewer's permit . . . may . . . [s]ell the brewery's beer as authorized by this section for carryout on Sunday . . . .").

196. *See* Maker, *supra* note 24.

197. IND. CODE § 7.1-5-10-1 (2013).

198. *Id.* § 7.1-3-2-7.

199. *Id*.

200. *See supra* Part III.

effect, warranting analysis beyond what the Court has articulated. Importantly, the discriminatory operation of Indiana's Sunday laws does not inhere in the three-tier distribution system. Indeed, Indiana created an exception to the three-tier distribution system for in-state Producers;[201] this exception may be permissible via *Granholm* and *Arnold's Wines*, as mere discrimination inherent in the three-tier distribution system.[202] Yet, under a disparate-impact analysis, any constitutional objection would not be to discrimination that solely arises from that exception. Rather, the challenge would be to discrimination arising from how the exception operates in conjunction with other Indiana laws. By preventing Indiana consumers from purchasing out-of-state alcohol for carryout on Sundays, the state directs consumers to its in-state Producers, which puts out-of-state interests on unequal footing. The law arguably acts as a subsidy, supporting the in-state industry and fostering its tremendous growth. Indeed, because Producers enjoy a competition-free day-of carryout sales on the weekend,[203] when the vast majority of consumers are not working and are more free to enter the market, in-state Producers can pad their bottom lines, enabling them to grow more quickly, ramp up production, and begin distributing into other states.[204]

Ultimately, in assessing the constitutionality of Indiana's Sunday laws, the real question the court must address is how to evaluate laws that are not discriminatory on their face yet nevertheless effectuate discriminatory impact. Although the Supreme Court has not spoken on how such an analysis would proceed, the Seventh Circuit revealed an approach it might expect the Supreme Court to take.[205] The Seventh Circuit's referenced approach brings the core concerns back into the analysis,[206] but would not ultimately save Indiana's Sunday laws.[207]

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201. IND. CODE § 7.1-3-2-7 (2013).

202. *See supra* Part IV.

203. *Id.*

204. *See, e.g.*, Win Bassett, *Flat 12 Bierwerks Expands Distribution to Nashville, Tennessee*, ALL ABOUT BEER MAG. (Jan. 15, 2013), http://allaboutbeer.com/daily-pint/whats-brewing/2013/01/flat12-bierwerks-expands-distribution-to-nashville-tennessee/ (reporting how a small Indianapolis-based brewery recently expanded distribution to Tennessee); *see also* Press Release, BEERPULSE.COM (Jan. 29, 2014), http://beerpulse.com/2014/01/flat-12-bierwerks-expanding-distribution-to-kentucky-launching-louisville-with-river-city-2316/ (announcing how, just one year after expansion into Nashville, Tennessee, the same Indianapolis-based brewery has plans to expand into Kentucky).

205. Lebamoff Enter., Inc. v. Huskey, 666 F.3d 455, 460-61 (7th Cir. 2012). *See infra* Part V.A.

206. *Lebamoff*, 666 F.3d at 460-61.

207. *See infra* Part VII.

VI. THE SEVENTH CIRCUIT'S POST-*GRANHOLM* APPROACH AND POSSIBLE DISPARATE-IMPACT ANALYSIS

Because a challenge to Indiana's Sunday laws is subject to Seventh Circuit jurisprudence, a review of the court's post-*Granholm* reasoning is important. So far, the Seventh Circuit has followed *Granholm*'s evenhanded mandate in assessing laws that implicate the Twenty-first Amendment and the Commerce Clause.[208] Further, the court has not expressly resurrected the core concerns test, though it has alluded to it.[209]

A. The Seventh Circuit's First Word on Disparate Impact in Baude v. Heath

In its 2008 decision *Baude v. Heath*,[210] the court assessed the constitutionality of a law allowing direct shipments from in-state and out-of-state wineries to occur only after a face-to-face meeting where the winery verified the purchaser's age.[211] The Seventh Circuit acknowledged that it would apply one of two levels of review to challenged laws.[212] The first level analyzes whether the law discriminates explicitly, in which case it would be "almost always invalid under the Supreme Court's commerce jurisprudence."[213] In *Baude*, because the law applied to every winery no matter the location,[214] the court did not deem the law facially discriminatory and proceeded to its alternative level of analysis: disparate impact.[215] The challengers contended that the evenhanded law nevertheless imposed a burden on interstate commerce, in that it would be more difficult for Indiana residents to achieve the face-to-face verification for wineries on the West Coast, for example, than wineries throughout the state.[216]

In cases of disparate impact, the Seventh Circuit noted that it would apply the Supreme Court's test outlined in *Pike*,[217] often referred to as the *Pike* test.[218] *Pike* provides that "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is

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208. *Lebamoff,* 666 F.3d at 460-61

209. *Id. See infra* Part V.A.

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

211. *Id.* at 611. It should be noted here that the court did strike down one challenged law that needlessly burdened interstate commerce. *Id*. The law effectively banned anyone with a "wholesaler's license" from shipping to a wholesaler in Indiana. *Id.* Because other states permit wineries to ship directly to retailers, many out-of-state wineries are prevented from participating in Indiana's market. *Id*. at 612. Indiana did not defend the law. *Id*.

212. *Id.* at 611.

213. *Id.*

214. *Id.* at 612.

215. *Id.*

216. *Id.*

217. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

218. *Baude*, 538 F.3d at 611.

clearly excessive in relation to the putative local benefits."[219] The Seventh Circuit noted that if a law is facially discriminatory, the burden of production and persuasion rest on the state but where it is not facially discriminatory, "whoever wants to upset the laws bears these burdens."[220] The Seventh Circuit ultimately found that there was not enough evidence to decide the law had anything more than a negligible impact on interstate commerce.[221]

B. Building on Baude*: Core Concerns and Disparate Impact*

The Seventh Circuit extended its analysis in *Baude* more recently in *Lebamoff Enterprises, Inc. v. Huskey*,[222] where the court considered an Indiana law involving wine deliveries.[223] The law permitted motor carriers (such as UPS) to deliver wine to customers, as long as the wine originated from a Producer that had verified the customer's age in a face-to-face meeting.[224] In-state wineries and out-of-state wineries alike could ship wine through common carriers so long as the face-to-face provision had been met.[225] In contrast, Retailers could not deliver wine through a common carrier.[226] Rather, Retailers had to employ their own drivers, who were trained in Indiana's alcohol laws and ID verification.[227]

The Seventh Circuit noted that this law did "not discriminate expressly against out-of-state producers. Both local and out-of-state wineries c[ould] deliver to consumers, and by motor carriers if they want, provided the consumer's age ha[d] been verified at the winery in person."[228] The court acknowledged that the Supreme Court had not yet outlined a perfect standard for such disparate impact alcohol-related cases.[229] The court noted, "One might as an original matter suppose the [Twenty-first] Amendment insulated merely incidental effects on interstate commerce in alcoholic beverages from constitutional challenges based on the commerce clause."[230] But, the court cautioned, "we needn't get ahead of the Supreme Court in the matter."[231] The Seventh Circuit then proceeded to find the effects on interstate commerce to be so limited that the plaintiff would lose even if the Twenty-first Amendment were inapplicable.[232] The court pointed to an out-of-jurisdiction case striking down a similar law, but

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219. *Pike*, 397 U.S. at 142.
220. *Baude*, 538 F.3d at 613.
221. *Id.* at 615.
222. Lebamoff Enter., Inc. v. Huskey, 666 F.3d 455 (7th Cir. 2012).
223. *Id.* at 457.
224. *Id.* at 458.
225. *Id.* at 460.
226. *Id.* at 458-59.
227. *Id.*
228. *Id.* at 460.
229. *Id.* at 461.
230. *Id.*
231. *Id.*
232. *Id.*

where there was a greater showing of an effect on interstate commerce.[233] Ultimately, the Seventh Circuit never applied the disparate-impact approach it speculated to use.[234]

The concurrence departed from the majority's reasoning, and reached back to the core concerns test, determining that the Twenty-first Amendment "should foreclose those balancing tests when the state is exercising its core Twenty-first Amendment power to regulate the transportation . . . of alcoholic beverages for consumption in the state."[235] The concurrence reasoned that the control of direct deliveries fell into core Twenty-first Amendment power and the "law should be upheld even if, as [the Justice] believe[d], its actual benefits are minimal and its burdens on federal interests are significant."[236] The concurrence would ultimately find the Twenty-first Amendment, not minimal impact, saved the law.[237]

VII. APPLYING SEVENTH CIRCUIT JURISPRUDENCE TO ASSESS INDIANA'S LAWS

The Seventh Circuit's speculation and division about how to approach disparate-impact cases[238] is notable. If a court were to find it permissible to give in-state Producers certain privileges not afforded to out-of-state Producers—reasoning that any discrimination either inheres in the three-tier distribution system or nevertheless advances an interest, such as temperance, that cannot otherwise be accommodated[239]—then the court would still have to address the in-state privilege in conjunction with Indiana's ban on Sunday carryout sales from all other outlets.[240] Accordingly, assuming in-state Producer-to-consumer carryout alcohol is a permitted exception from the three-tier distribution system, then arguably Indiana's Sunday carryout ban is evenhanded. That is, all alcohol subject to the three-tier distribution system (not the in-state Producer-to-consumer carryout alcohol), would be treated the same, in that no Retailers could sell it.[241] Nevertheless, this "evenhanded" Sunday ban would still have a disparate impact on out-of-state interests because in-state Producers would be making sales on days when out-of-state Producers would have no way to reach Indiana's potential carryout consumers.[242]

The Seventh Circuit would need to build on *Baude* and *Lebamoff*, and generate its full disparate-impact analysis. As *Baude* and *Lebamoff*

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233. *Id.* at 461, 462 (citing Cherry Hill Vineyards, LLC v. Lilly, 553 F.3d 423 (6th Cir. 2008)).

234. *Id.* at 462.

235. *Id*. (Hamilton, J., concurring) (expressing concern that such balancing tests would "tend to erode states' powers protected by the Twenty-first Amendment").

236. *Id.*

237. *Id*. at 472.

238. *See supra* Part VI.

239. *See supra* Part V.

240. IND. CODE § 7.1-3-2-7 (2013).

241. *Id.*

242. *See supra* Part V.

demonstrate,[243] such analysis would generally begin with *Pike*[244]: "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[245] The *Lebamoff* majority seems to suggest, however, that legislation involving Twenty-first Amendment core concerns would act as a "thumb on the scale" in favor of upholding the law.[246] The court could, as the concurrence most likely would, insulate the law because it would serve to promote temperance, a Twenty-first Amendment concern, by making alcohol available through fewer Retailers.[247] Yet, such a narrow view would not take into account the hollowness of such a purported justification. To be sure, when Indiana had prohibited Sunday carryout sales altogether, it was advancing its temperance interests.[248] Yet, why, if Indiana's ultimate goal was to promote temperance, would the state change a seventy-year-old law, tailoring an exception in favor of local Producers, at precisely the same time when in-state craft-brewery business was booming?[249]

VIII. PROPOSALS: RECTIFYING INDIANA'S BEVERAGE LAWS TO COMPORT WITH POST-*GRANHOLM* JURISPRUDENCE

Returning to *Granholm*, the Supreme Court's last word on the tension between the Twenty-first Amendment and the Commerce Clause,[250] it seems that Indiana could achieve any purported or legitimately desired purpose, quite easily, through a "reasonable nondiscriminatory alternative."[251] That is, to avoid affronting the Constitution and achieve objectives it reserved via the Twenty-first Amendment, Indiana could simply eliminate its advantageous, even if constitutionally justified, Sunday exception for Producers by simply prohibiting all Sunday carryout sales, as it had before. Of course, such a reversion would likely upset the in-state Producers that rely on the additional income as well as consumers who have grown accustomed to additional day of sales.[252] For

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243. *Id.*

244. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

245. *Id.*

246. Lebamoff Enter., Inc. v. Huskey, 666 F.3d 455, 460-61 (7th Cir. 2012).

247. An argument about preventing minor access, if raised, would not be strong, as carryout sales occur through Indiana's various Retailers every other day of the week.

248. *See* Editorial, *Hot-Button Issues: Chorus of Booze*, INDIANAPOLIS MONTHLY (Jan. 30, 2014), http://www.indianapolismonthly.com/features/2014/1/30/hot-button-issues-chorus-of-booze/print (quoting Retailer lobbyist Patrick Tamm who contends that Sunday sales advocates "try to erode public policy, with zero regard for temperance or selling alcohol responsibly . . . [t]hey want to make selling [alcohol] as easy as selling peanut butter").

249. *See supra* INTRODUCTION.

250. *See supra* Part IV.

251. Granholm v. Heald, 544 U.S. 460, 489 (2005).

252. *See* Hayleigh Colombo, *Sunday Alcohol Sales a Low-Foam Issue for Craft Brewers*, J.

example, on 2013's Super Bowl Sunday alone, one Indianapolis brewery sold 1200 gallons of carryout beer, through 600 container fills, over the course of just five hours.[253] That equals around four gallons a minute. The brewery manager referred to the sales leap as "mindblowing," noting that the brewery's Sunday sales numbers continue to increase year after year.[254] Apart from providing a big day of business for in-state Producers, the Super Bowl Sunday boom demonstrates one seemingly much-appreciated benefit for consumers:[255] the ability to make same-day purchases for Sunday gatherings, eliminating the need to plan ahead or spend money in a bordering state.

Rather than eliminate the popular day of sales, Indiana could open its Sunday carryout market, giving in-state Producers and out-of-state Producers equal access to potential consumers. Although in-state brewers would face additional competition with an open-Sunday market,[256] they do not oppose the idea. According to Lee Smith, Executive Director and spokesperson of the Brewers of Indiana Guild trade association,[257] the brewers are "interested in promoting our breweries and what is good for our breweries," but, she continues, the brewers "are not taking a stance on the issue of broad-based Sunday alcohol sales."[258] Indeed, according to one brewer, in-state breweries as a whole have "absolutely done better with carryout sales" due to the change in legislation, but isolation from competition was not the intent in seeking Sunday carryout privileges.[259] When asked about the impact an open Sunday might have on business, one brewer noted, "For the business, I like us having the ability and them not, but personally I really don't see it as a big deal . . . I'm not worried about our sales decreasing."[260]

Without opposition from in-state Producers,[261] however, and what appears like broad consumer support,[262] year after year, legislative proposals to open Indiana's Sunday market have not advanced past the Senate and House

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& COURIER ONLINE (Feb. 6, 2013), http://www.jconline.com/article/20130205/NEWS02/302050039/Indiana-General-Assembly (noting the tremendous customer turnout and attendant sales that occurred at Indiana craft breweries on 2013's Super Bowl Sunday).

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *About the Guild*, BREWERS OF INDIANA GUILD, http://www.brewersofindianaguild.com/ (last visited Feb. 6, 2014).

258. Columbo, *supra* note 245.

259. *Id.*; *see also* Douglas Reiser, *Shoot an Email, Save Thousands: The Best Advice I Can Give You About Your Trademark Issue*, BREWERY LAW BLOG (Feb. 13, 2013), http://brewerylaw.com/2013/02/shoot-an-email-save-thousands-the-best-advice-i-can-give-you-about-your-trademark-issue/ (noting the collegiality among brewers and how "the brewery community is a tight one, even though it continues to grow every day").

260. Columbo, *supra* note 245.

261. *Id.*

262. *See id.*

Committees on Public Policy.[263] The opposition to Indiana's discriminatory legal framework comes, perhaps unexpectedly, from in-state, locally owned Retailers—most notably, liquor store owners—who fear they will be forced out of business by big-box competitors.[264] The lobbying group's concerns, however, might deal less with being open seven days a week and, instead, likely reflect broader concerns about advantages they could lose if Indiana makes sweeping changes to its beverage laws.[265] For example, Indiana's other yet-undisturbed beverage laws provide that liquor stores may sell cold beer whereas grocery stores may not.[266] If the legislature began making deeper changes to Indiana's laws, it might eliminate this competitive advantage. According to one lobbyist, "Sunday sales would be a big blow, and it would lead eventually to the cold beer issue being successful. In this state, cold beer has been one of the things that has [sic] kept the package store industry alive."[267]

Despite the writing liquor store lobbyists may see on the wall, Indiana legislators should take steps to cure the discriminatory effect of its current beverage laws so Indiana does not find itself defending a constitutional challenge. Indeed, the liquor stores' concerns may be mere speculation, and the Public Policy Committees in the House and the Senate ought to let an open-Sunday bill survive initial consideration. This would give more legislators the chance to assess the bill's effects, hear the evidence, voice their opinions, and determine what is best for Indiana. After all, those supporting open-Sunday bills already note that other states that have lifted similar Sunday restrictions have actually seen more package stores open.[268] Supporters further note, "[T]he laws allowing Sunday sales and [unrestricted] cold beer sales have 'overwhelming consumer support,'"[269] which, if true, would seem to align the interests of Indiana legislators, Indiana residents, and, most notably, the United States Constitution.

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263. *See, e.g.*, Chris Sikich, *Sunday Liquor Sales Bill Will Die in Indiana House Committee*, INDIANAPOLIS STAR, Feb. 13, 2013, http://www.indystar.com/article/20130213/NEWS05/130213012/Sunday-liquor-sales-bill-will-die-Indiana-House-committee. Notably, the appointment of a new chairman of the House Public Policy Committee might mean better reception for legislative efforts to reform Indiana's approach to Sunday alcohol sales. *Backers See Better Chance for Sunday Alcohol Sales*, CHI. SUN-TIMES POST-TRIB., Dec. 3, 2014, http://posttrib.suntimes.com/news/24148717-418/backers-see-better-chance-for-sunday-alcohol-sales.html

264. Sikich, supra note 263 ("John Livengood, president of the Indiana Association of Beverage Retailers, countered that [non-passage of the open Sunday bill] is good news for consumers . . . point[ing] to a study that package liquor stores would close if sales were expanded.")

265. Francesca Jarosz, *Sunday Alcohol Sales Backers Make Final Push*, IND. BUS. J., Apr. 18, 2011, http://www.ibj.com/article/print?articleId=26615.

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

CONCLUSION

Over the last decade, the craft brewing industry has seen expansive growth[270]—and Indiana has enjoyed its share.[271] The nation has finally surpassed a pre-Prohibition record of operating domestic breweries and an astounding number of new breweries continue to open each year.[272] During the same time as sweeping industry growth, the Supreme Court has again shifted its historically in-flux approach to alcohol-related regulation.[273]

At one time, alcohol was viewed as fully excepted from the Commerce Clause.[274] Later, discriminatory state beverage laws were upheld if they advanced a state's core Twenty-first Amendment concerns, as indicated in *Bacchus*.[275] In 2005, the Supreme Court changed course.[276] In *Granholm*, the Court protected a state's ability to sell or not sell alcohol, while limiting its ability to enact discriminatory regulation.[277] *Granholm*'s interpretation of the Twenty-first Amendment's interaction with the Commerce Clause gives states the ability to sell alcohol through an evenhanded three-tier distribution system, which addresses Twenty-first Amendment concerns, despite any discrimination that inheres in the system.[278]

In the wake of *Granholm*, the Seventh Circuit has applied *Granholm*'s nondiscrimination principle in its *Baude* and *Lebamoff* decisions, but has noted the lack of a fully articulated analytical approach for laws that are not facially discriminatory yet have a discriminatory effect.[279] In *Lebamoff*, the Seventh Circuit alluded to a potential approach, which would resurrect *Bacchus*'s core concerns test and insulate laws with mere discriminatory impact so long as the state was acting, in some way, within its core Twenty-first Amendment concerns.[280]

Indiana currently gives in-state Producers the ability to sell carryout beverages directly to consumers, a privilege not extended to out-of-state Producers.[281] Further, Indiana gives in-state Producers this ability on Sundays, a day when all other Retailers are prohibited from carryout business.[282] Thus, out-of-state Producers have no access to Sunday's carryout market, giving in-state Producers an advantage and putting out-of-state competitors on unequal

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270. *See supra* INTRODUCTION, notes 1-21 and accompanying text.
271. *See supra* note 21 and accompanying text.
272. *See supra* note 10 and accompanying text.
273. *See supra* Parts II.A-IV.
274. *See supra* Part II.A-B.
275. *See supra* Parts II.A.3-IV.
276. Granholm v. Heald, 544 U.S. 460 (2005). *See supra* Part IV.
277. *Granholm*, 544 U.S. at 488-89.
278. *Id.*
279. *See supra* Part VI.
280. *Id.*
281. IND. CODE § 7.1-3-2-7 (2013).
282. *Id.*

footing.[283] Indeed, Indiana's current regulatory framework best accommodates the loudest voices, giving in-state Producers an advantage while ensuring that locally owned Retailers can stay closed on Sundays without losing business to big-box Retailers already open around the clock.[284] Ultimately, should an out-of-state Producer challenge Indiana's current beverage laws, it would likely succeed under the current analytical framework.

For these reasons, the state legislature would be well served to revisit its beverage regulations, before a challenge in front of the judiciary forces its hands. Many Indiana residents have long called for a less-restrictive Sunday market, which would bring Indiana into step with the forty-nine other states.[285] Further, each year already brings proposed legislation that would cure any contra-constitutional defect.[286] All in all, to comply with articulated and speculated binding precedent in the Supreme Court's *Granholm* and the Seventh Circuit's *Baude* and *Lebamoff* decisions,[287] Indiana can and should choose from two readily available options: simply open its Sunday market or close its Sunday market, much as the state may like to do both.

283. *See supra* Part V.

284. *See supra* Parts V, VII, VIII.

285. *See supra* note 24 and accompanying text.

286. *See supra* Part VIII.

287. *See supra* Parts IV-VII.