

# UNCORKED

Wine and The Law - Abridged

*(A Story of Persia, Politics, Phylloxera, Puritans, and Progress)*



By

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## Chapter I Where Did Wine Come From (And How Can I Get More)?

The origins of wine are less than clear, but according to some experts, there are grape vines that are over sixty million years old. According to one source, an ancient Persian fable credits a lady of the court with the discovery of wine. This Princess, having lost the favor of the King, attempted to poison herself by eating some table grapes that had “spoiled in a jar.” She became intoxicated and giddy, and fell asleep. When she awoke, she found that the stresses that had made her life intolerable had dispersed. Returning to the source of her distress, her subsequent conduct changed so remarkably that she regained the King’s favor. He shared his daughter’s discovery with his court and decreed they increase their production of “spoiled grapes.” See Professional Friends of Wine, <http://www.winepros.org/wine101/history.htm>. The same author indicates that grape cultivation and wine drinking had started by about 4,000 B.C. and possibly as early as 6,000 B.C. The world’s oldest intact bottle of wine was found inside of a Roman stone sarcophagus and dates from approximately 325 A.D. and was found in 1987. About two-thirds of the contents are a thick, hazy mixture. This is probably olive oil, which the Romans commonly used to float atop the wine to prevent it from oxidizing. Cork closures, although known to exist at the time, were quite uncommon. Id.

Some of our older words and phrases come from old customs involving wine. The word “honeymoon” allegedly comes from Babylon. A prospective bride’s family would offer as part of a dowery one month’s supply of mead (honey wine). In Babylon, months were measured by the lunar cycle, so the time following the marriage became known as the “honey moon” for the lunar cycle wherein the husband apparently consumed a great deal of the mead in question.

Wine has been regulated for an astonishing amount of time. Kosher wine laws are the oldest wine making laws in the world. Although certain other countries, such as Spain and Portugal, may disagree about which has the oldest Appellation control laws in the world, Jewish religious laws regulated every aspect of Kosher winemaking centuries before. See Abarbanel Wine Co., Kosher Wine, <http://www.kosher-wine.com/history.shtml>. Kosher laws were designed to protect the religious purity and cleanliness of the winemaking process. Id. No animal products could be allowed to taint the wine and physical cleanliness had to be maintained at all times. Id. Under Jewish law, to retain its Kosherness once the wine is opened and poured by a non-Jew, the wine must be chemically different from non-Kosher wines in every respect. Id. Under modern laws, this requires the wine to be heat pasteurized. Id.

In Egypt, vineyards existed for the use of Egypt's rulers and nobles as far back as perhaps the pre-dynastic and early dynastic periods, 3,200 B.C. and before. See Tour Egypt, <http://www.touregypt.net/magazine> "Food of the Gods, Part I" by Michael Poe. Some researchers believe that ancient Egypt had the equivalent of the French Appellation Contorollée laws. Id. The Egyptians had a royal sealer of wine who oversaw labeling laws. Wine labels in ancient Egypt would tell you the name of the estate, the location, the type of wine, the date of vintage, the vintners name, and assessment of quality. Id. In Tutankhamon's tomb, 36 wine jars were found and each had the date, place, and vintage of the wine. The Egyptians believed that if a winemaker was famous for producing fine wines and moved away, a wine buyer could continue buying fine wine because of his recollection of the name of the winemaker. Id. The winemakers of Egypt, like the winemakers of today, would often blend other wines with the wine, and made both dry and sweet wines. Id. Winemakers in Egypt, however, in addition to grapes, used dates,

pomegranates, and other fruits to make wine.

## Chapter II Wine and Culture

One significant difference between French culture and American culture is that, for a period of time in the Nineteenth Century, the French drew a clear distinction between *alcohol*, which in French referred only to beverages made by distillation, versus *L'Alcool*, which referred to the chemical substances that all fermented and distilled beverages contained, including wine. Tyler Colman, Wine Politics: How Governments, Environmentalists, Mobsters, and Critics Influence the Wines We Drink, 9, University of California Press (2008). Thus, there became a division between alcohol, which was considered to be bad and the cause of delinquency, and wine drinkers, who were praised as a model of moderation. Even into the early Twentieth Century, doctors administered wine to patients to fight alcoholism. Id. at 10.

Contrary to what some believe, wine did not become a drink of the French upper working class until the second half of the nineteenth century, as a result of national railroad networks. See id. at 9. Wine has clear links to Christianity, particularly Catholicism. In Genesis, Noah plants vines after the flood. In The New Testament, Christ's first miracle is to turn water into wine at the marriage in Cana. During the middle ages, Benedictine monks in the Loire, Burgundy, and Champagne regions maintained some of the finest vineyards in Europe.

## Chapter III Wine Comes to the Americas

Wine has a long history in the Americas. In 1525, Hernando Cortez, as Governor of Mexico, ordered the planting of certain grapes in what became California. See Professional Friends of Wine, <http://www.winepros.org/wine101/history.htm>. Ironically, the grapes were such

a success that the King of Spain forbade new plantings because he was concerned the colony would become self-sufficient in wine. This stayed in effect, apparently, for over 150 years. Id. James I, the English King at the time of the settlement of Jamestown, also loved wine. See Professional Friends of Wine, <http://www.winepros.org/wine101/history.htm>. There were high expectations for wine making in the early colonies, but the native vines did not make particularly good grapes, and the European vines did not take well to the climate of the northeastern colonies due to a bug called phylloxera. Id. In 1769, a Franciscan missionary planted the first California winery. See Professional Friends of Wine, <http://www.winepros.org/wine101/history.htm> California's first documented imported European wine vines were planted in Los Angeles in 1833. Id.

It is important to remember that the United States was founded by Protestants who didn't incorporate wine into their religious services, but wine was not completely unknown. Wine Politics at 23. While serving as an ambassador to France, Thomas Jefferson toured the wine regions of France, and brought back several cases of French wine. Id. He also attempted to start his own vineyard in Monticello, which was unsuccessful. Id. His administration, however, granted land in Indiana for what became the first successful commercial wine operation in the country. See id. Jefferson, like the French, believed that wine was a cure for addiction to whiskey and other illnesses. Some of the American pundits at the time also believed that wine was the solution to the negative effects of "grog and spirits" See id. at 24.

#### Chapter IV The Law Meets The Vin

In the mid to late Nineteenth Century, the California wine industry grew, but due to an

outbreak of phylloxera attacking the European grape vines, there was a shortage of wine. During the shortage, both producers and merchants engaged in corner cutting and fraud. Wine Politics at 27. Some wine merchants would sell American wines as French wine, and sell hard cider as white wine. Id. In 1887, the California legislature passed a state law declaring that wine must be made from grape juice, without added sugar. Id. In California, because of the long, hot summers, there was no need to add sugar as they did in the east. Id. A national proposal to have a “no sugar” rule across the entire nation failed. Id. At the same time that California was attempting to address some issues about the quality of wine, the quality of California wine increased substantially. In the 1880s and 1890s, Napa Valley wines collected prizes at several international exhibitions. Id.

A few decades later, France ran into a perfect storm, which would have made California a world player in wine, but for subsequent events. In 1875, the European wine industry was almost decimated by an epidemic of phylloxera, ironically caused by the Americans. Id. at 14. Apparently, in 1863, a wine shop owner living in France planted some roots that he had received from a friend in New York. Id. at 15. This led to an epidemic of phylloxera. Id. American vines had long developed resistance to this bug, but the European vines had never encountered such a pest. See id. at 14 fn. 30. The lack of export controls likely caused this epidemic, and unfortunately, laws adopted by the French contributed to the problem. For several decades, the French were trying to find solutions to their problem, but in 1878, even though the French winemakers were beginning to think that the best approach was to graft French vines onto American grapevines, a law made it illegal to import foreign plants, roots, and leaves out of the fear of making the outbreak worse. Id. at 15, 16. Approximately a decade later, French vines

were grafted onto American rootstock, which largely solved the problem of phylloxera. From the time of the phylloxera crisis to its resolution, wine production in France decreased 72%. *Id.* at 16.

After the French winemaking industry recovered, producers were faced with problems of overproduction and also fraudulent use of place names, which were very important to the value of wine, according to the French culture of *terroir*. *Id.* at 17. As a result, a series of laws were passed in the late twenties and thirties which established new labeling requirements, and additional local *syndicat* producers imposed a series of rules on themselves to protect the names of particular regions and to increase quality. *Id.* at 19, 20. French wine laws were all about quality, but this was not so in the United States.

Back on the Atlantic, around the time that the California market was gearing up, so was the temperance movement. The temperance movement had its roots in Europe, but had a strong presence in the Americas in the middle of the Nineteenth Century. Due to the increase in saloons, the amount of drinking in the United States had increased dramatically. The first prohibition law, which forbid the sale of any alcohol on Sunday, went on the books in Indiana in 1816. See Professional Friends of Wine, <http://www.winepros.org/wine101/history.htm>. Outright prohibition laws were in effect before 1850. In 1843, Portland, Maine was the first city to vote itself dry. Wine Politics at 29. Several other towns followed suit. The Civil War, ironically, had helped alcohol producers because it imposed a licensing fee on liquor retailers and taxed the production of beer, wine, and spirits. *Id.* at 29, 30. The idea of amending the Constitution to achieve national prohibition was first considered in 1876, but failed. *Id.* at 30. In 1880, Kansas became the very first entirely dry state, followed by Iowa, Georgia, Oklahoma,

Mississippi, North Carolina, Tennessee, West Virginia, and Virginia. See Professional Friends of Wine, <http://www.winepros.org/wine101/history.htm>. Ironically, those states apparently allowed winemakers to continue selling outside the states, but few wineries could survive by simply selling wine out of state. Id. The dries went so far as to have any mention of wine expunged from school and college textbooks, and even tried to prove that praises for wine in the bible were actually referring to unfermented grape juice. Id. Thirty-three states had gone dry at the outbreak of World War I. Wine Politics at 30. According to one source, prior to prohibition, the annual per capita consumption of alcohol was 9.8 liters, or 2.6 gallons, an astounding amount, in part, because, after the Civil War, there were approximately 100,000 saloons in the country, or about 1 for every 400 men, women, and children in 1870. MSN Encarta Encyclopedia, [http://encarta.msn.com/encyclopedia\\_761564677/Prohibition.html](http://encarta.msn.com/encyclopedia_761564677/Prohibition.html). Even though there was a strong movement in the United States in the early 1900s for some version of prohibition, and even the late Nineteenth Century, we were not alone. In Europe, the British Prime Minister suggested during World War I, “we are fighting Germany, Austria, and drink and, as far as I can see, the greatest of these three deadly foes is drink.” Id.

## Chapter V Prohibition Arrives (And There Goes the Neighborhood!)

In 1917, both the House and the Senate passed a prohibition amendment. Wine Politics at 30. It took less than three years for the states to adopt the 18<sup>th</sup> Amendment, which began prohibition. To enforce the amendment, the federal government passed the Volstead Act. Id. at 31. The Act permitted the manufacturing of non-intoxicating cider and fruit juice for home consumption, and had three loopholes that allowed wine production to continue in a very limited

fashion: (1) wines were allowed to be produced for sacramental use in churches; (2) wine was allowed for medicinal purposes; and (3) wine was allowed for home production. Id. According to the Volstead Act, each household was permitted to produce up to 200 gallons of non-intoxicating fruit juice for consumption by members of a family over eighteen. Id. A curious effect of this home production loophole was the number of wineries in California fell from 1,000 to about 150, but acres that were actually in grape production doubled between 1919 and 1927 as grapes were transported across the country for home vendors. Id. Unfortunately, the grapes being planted were great for transportation by rail, but not for making wine. Carol Robertson, The Little Red Book of Wine Law: A Case of Legal Issues, 26, American Bar Association, (2009). Prohibition never had a huge amount of government resources to support its broad prohibition. Wine Politics at 31. At the beginning of national prohibition in 1919, there were only 1,512 officers to enforce the laws across the entire country, and the number never exceeded 3,000 during all of prohibition. Id. at 32. Enforcement officers focused on the flagrant violators, and the run of the mill winemaker didn't run into a great amount of problems. Id.

As one author noted, a few vineyards survived selling grapes for juice or the newly popular "flavorings" often sold in casks suitable for fermentation. Grapes were shipped around the country fresh, as well as in dehydrated bricks, labeled with a stern warning, **"Do NOT add this to five gallons of warm water, and do NOT add ten pounds of sugar, and yeast, or it will become wine, which would be ILLEGAL."** Jennifer Rosen, Cork Jester, The Color Purple, <http://www.corkjester.com/archive/TheColorPurple.html> (2006-06-28). Traveling for weeks in unrefrigerated boxcars meant that many grapes were wine by the time they arrived. Id.

Prohibition ended in 1934. Prohibition may not have solved all the world's problems, but

it did substantially decrease the annual per capita consumption of alcohol to 3.7 liters, compared to 9.8 liters prior to prohibition. The 21<sup>st</sup> Amendment, however, which repealed prohibition, gave a very important tool to the states. The text of the 21<sup>st</sup> Amendment is fairly short. Section 1 provides: “The eighteenth article of amendment to the Constitution of the United States is hereby repealed.” Section 2 provides, “The transportation or importation into any State, Territory, or possession of the United States for delivery or use thereof of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.” As Laurence Tribe pointed out, “there are two ways, and only two ways, in which an ordinary private citizen.... can violate the United States Constitution. One is to enslave someone, a suitably hellish act. The other is to bring a bottle of beer, wine, or bourbon into a State in violation of its beverage control laws - an act that might have been thought juvenile, and perhaps even lawless, but unconstitutional?” Laurence H. Tribe, How to Violate the Constitution Without Really Trying: Lessons from the Repeal of Prohibition to the Balanced Budget Amendment, 12 Cont. Comm. 217, 219 (1995).

In its first case to interpret the 21<sup>st</sup> Amendment, State Board of Equalization v. Young’s Market Co., 299 U.S. 59 (1936), the Supreme Court gave broad deference to the states’ ability to regulate alcohol. The plaintiffs in the case were corporations who imported beer from Missouri or Wisconsin. California passed a law which required the corporation to apply for an importer’s license and to take several other steps, including paying a licensing fee. The plaintiffs alleged that requiring such a licensing fee violated the Commerce Clause by discriminating against the wholesaler of imported beers. The Court noted that, prior to the 21<sup>st</sup> Amendment, it would have been unconstitutional to impose any fee for that privilege. The imposition would have been void, not because it resulted in discrimination, but because the fee would be a direct burden on

interstate commerce, and the Commerce Clause confers the right to import merchandise free to any state, except as Congress may otherwise provide. Id. at 63. The plaintiffs suggested that a state could prohibit the importation of intoxicating liquors, provided it prohibits the manufacture and sale within its borders of the same, but if it permits such manufacture and sale, it must let imported liquors compete with the domestic liquors on equal terms. The Court concluded by saying that, “to say that would involve not a construction of the amendment, but a rewriting of it.” Id. The Court also addressed challenges under the Equal Protection Clause, and summarily rejected these, noting, “a classification recognized by the 21<sup>st</sup> Amendment cannot be deemed forbidden by the 14<sup>th</sup>.” Id. at 64.

Although the Court spoke in very broad strokes in the Young’s Market case, the Court, several decades later, would be finding itself backpedaling from such a broad view. In Craig v. Boren, 429 U.S. 190 (1976), the Court confronted an Oklahoma statute, which prohibited the sale of non-intoxicating, 3.2% beer to males under the age of 21, but allowed females over 18 to purchase it. The plaintiff alleged that this was a violation of the equal protection provisions of the 14<sup>th</sup> Amendment. Although the State relied upon a broad interpretation of the 21<sup>st</sup> Amendment, the Supreme Court noted only two cases where constitutional challenges had been successful, one being the Young’s Market case, and attempted to limit the holdings of those cases by stating that the arguments in both cases centered upon importation of intoxicants, a regulatory area where the State’s authority under the 21<sup>st</sup> Amendment is transparently clear, and touched upon purely economic matters that traditionally merit only the mildest review under the 14<sup>th</sup> Amendment. Craig, 429 U.S. at 207.

Chapter VI  
The States Take Up The Temperance Gauntlet  
(With a Little Help From the Distributors)

The repeal of prohibition led the states to develop a patchwork of different regulations for producers and consumers to navigate. Oklahoma did not repeal its prohibition until 1959. Wine Politics at 34. Mississippi stayed dry until 1966. Id. Additionally, 17 states chose to end free market capitalism by establishing monopoly liquor stores with limited selection. See Professional Friends of Wine, <http://www.winepros.org/wine101/history.htm>.

Prohibition changed not only the amount of wine and other spirits consumed, it also changed the type. One of the unintended consequences of prohibition was that the American palate changed. Before 1920, table wines were 3 out of every 4 gallons shipped, but after prohibition, fortified wines, i.e. wines to which sugar had been added, were 3 out of every 4 gallons. It wasn't until 1968 that table wines finally overtook fortified wines. Id. Today, more than 85% of the volume of wine in America is drunk by less than 8% of the total population. Id.

Post-prohibition, even the French were forced to make adjustments about how they addressed wine. In 1990, Claude Évin, was elected to the French National Assembly and passed a law that severely restricted not only direct advertisements for tobacco and alcohol, but also indirect advertisements, such as product placement. Wine Politics at 56. More and more in France, wine was placed together with other types of alcohol, much to the chagrin of wine supporters. Id. at 56, 57. From 1960 to 2004, the average French wine consumption per capita has gone from an astounding 100 liters in 1960 to 54.77 liters in 2004, an almost 50% reduction. Id. at 60.

The California winery industry began a rebirth in the '60s. Robert Mondavi opened his

winery in Napa Valley in 1966. Id. at 70. This led to the now famous Paris Wine Tasting of 1976 (or the Judgment of Paris), where California wines and French wines were tasted side-by-side and a California Chardonnay, Chateau Montelena, and California Cabernet Sauvignon, Stag's Leap, had taken the top spots. Id. at 72. In fact, 6 out of the eleven top wines in the tasting were American. Id.

The next legal battle in California was over establishing American Viticultural Areas, or AVAs, similar to what the French had developed. Id. at 75. The California wine industry wanted to protect itself from fraudulent wines, and to protect the quality of their wines. Under current AVA rules, an American wine label should provide the following information:

(1) The Vintage. To qualify as a vintage wine, 95% of the wine has to come from the harvest of a vintage year, unless it is from a non-specified growing area.

(2) Name and Variety. It must contain the name and the variety, and at least 75% of the wine must come from that grape variety.

(3) American Viticultural Area. If it is from a particular American viticultural area, such as Carneros in Napa Valley, 85% of the grapes used must be from that AVA. If the label indicates it is from a single vineyard, 95% of the grapes must be from the vineyard, in addition to other requirements. Id. at 77.

Not all of the state and local laws made sense, however. In a 2003 article for the San Francisco Chronicle, "Silly Wine Laws Are All Around Us", author Carol Emert noted that she was at a Napa Valley winery and asked for a coffee, but was told that she couldn't purchase coffee based upon a Napa ordinance which bars wineries from holding food service permits, but that if she bought a magazine, the person would give her a "free" coffee. If you go to the V.

Sattui Winery in Napa County (which I've had the pleasure of doing), you can sit down and have a very nice picnic lunch with some very nice wine which is sold only in California. You cannot do that anywhere else in Napa County, however, because the Napa ordinance only allows wineries that were selling food in 1987 to continue in perpetuity, which is why V. Sattui has a luncheon business and no one else does or can, and why Domaine Chandon has a restaurant and no one else does or can. In wine shops in California, free tastes are not allowed. Retailers can pour tastes, but no freebies.

In New York and Kentucky, wine cannot be purchased in a grocery store, although the grocery store, at least in Kentucky, can have a separate small winery shop side-by-side with the grocery store. In 1998, New York Times reporter, Frank Prial, noted that, in Utah, it is forbidden to provide the wine list without permission. Frank J. Prial, "Strange But True Tales from the Annals of Drinking Laws" New York Times, March 11, 1998. Other states prohibit giving away a corkscrew, or offering a free lunch in a bar. He also described a Colorado law that required wine to be sold in containers no smaller than 24 ounces and spirits in containers no smaller than a fifth of a gallon, which meant that splits of Champagne and half bottles of wine were illegal. In Kentucky, apparently, it is illegal to take alcoholic beverages into a dry county, but okay to take them out so long as they are in containers no smaller than 3 gallons. Whether all of these laws are still in existence is unknown, but the author did report that the Chicago law which bans serving champagne to a dog had been repealed.

## Chapter VII What's In A Name?

There have been several interesting chapters in wine history about the importance of

name. In January of 2009, Carol Robertson came out with a book, The Little Red Book of Wine Law: A Case of Legal Issues. It is a fairly entertaining read, which discusses twelve chapters of wine legal history. The layout is specifically designed to mimic a case of wine.

In one of the chapters entitled “Blood is Not Thicker Than Wine: The Gallo Family Feud” she described the struggle between three of the brothers associated with the Gallo name. Carol Robertson, The Little Red Book of Wine Law: A Case of Legal Issues, Ch. 6, American Bar Association, (2009). Two of the brothers, the famous Ernest and Julio of Ernest and Julio Gallo Winery sued their younger brother, Joseph, for trademark infringement because he was using the name Gallo on cheeses. Id. at 68. The tale itself has all the elements of a good soap opera, but the succinct version is that Ernest and Julio were actively working on the wine business while their brother, Joseph, began a successful cattle and farming operation. Id. at 70, 71. In the early 1980s, Joseph decided to enter into the cheese business, and began selling cheese under the name Joseph Gallo. Id. Ernest and Julio had previously licensed the name Gallo to a third party to see meat products, one of which included a cheese and salami combination pack. Id. The brothers sent a letter to Joseph asking him to cease and desist using the name Gallo, or enter into a licensing agreement for use of the name. Id. at 71, 72. The younger brother was furious that his brothers were trying to prevent him from using his own name. Id. at 70-72.

The court ultimately held that Joseph Gallo could not use his own name as a trademark for retail sales of cheese. Id. at 72. The court held that the Gallo name had become synonymous with wine and that wine and cheese are complimentary products. Id. at 75. The court also observed that when Joseph first entered the cheese business, his brothers warned him that they did not want him to use the Gallo name on the products that he sold at retail. Id. The court

allowed Joseph to use the name Gallo Cattle Company, and Joseph Gallo farms are trade names, and he was also allowed to use Joseph Gallo on wholesale packaging. Id. at 75, 76. Carol Robertson notes that, by all accounts, Joseph never spoke to his brothers again, and all three died without any public repair of the rift in the family.

Several years ago, wine fans learned about “Two Buck Chuck,” the affectionate term given to the “Charles Shaw” wine label from California. “Two Buck Chuck,” or Charles Shaw was owned by the Bronco Wine Company in California, one of the largest producers of wine in the United States. Id. at 130. Bronco was able to sell wines substantially cheaper than other California wineries because a large portion of the grapes were grown in California’s Central Valley, where the grapes are less expensive than Napa Valley grapes. Id. In addition to Charles Shaw, Bronco also owned several other wine labels, including wineries such as Napa Ridge, Napa Creek Winery, and Rutherford Vineyards. Other wineries in the Napa Valley proper were upset that wineries were using the name “Napa” even though the grapes were not produced in Napa County. Id. at 131. In response to those challenges, the California legislature enacted a law that prohibits the use of the name of a recognized viticultural region within Napa County, unless a large percentage of the grapes used for the production of wine sold under that brand came from that area. Id. Interestingly, Bronco has acquired these three brand names, Napa Ridge, Napa Creek, and Rutherford Vineyards, from wineries which were located in Napa County and where the grapes for the wineries were grown. Id. at 132.

Bronco sued, alleging that the state statute was preempted by federal labeling requirements, and asserted a variety of constitutional claims. Id. at 133. The California courts held that the use of the term “Napa” in labels on wines made from grapes not grown in Napa

County was not a violation of Bronco's First Amendment rights. Id. at 134. The court found that a wine consumer not familiar with the California geography could conclude that the wine was actually made in Napa County, even though the bottle specifically referenced the fact that the grapes were grown in a locale known as "Lodi." Id. at 135. As a result, consumers could be confused about the true nature of the grapes. The court found it very interesting that Bronco had spent \$40,000,000.00 to acquire one of the winery brands, but did not acquire the vineyards or the winery, which were located in Napa County. Id. at 136. Bronco attempted to take its argument to the U.S. Supreme Court, and on two separate occasions, the Supreme Court denied review. Id. at 137. Ultimately, Bronco agreed to drop the word "Napa" and to add "Lodi" to its wine labels made from grapes outside the Napa Valley, and agreed to change the name "Napa Ridge" to "Harlow Ridge." Bronco ultimately decided to use Napa grapes in their Rutherford Vineyards and Napa Creek wines. Id. at 137. In the last few decades, California winemakers have been much more protective of their geographical agricultural areas, but European winemakers have always been protective of the wine's terroir. In one of the chapters on wine law, Carol Robertson notes the conflict between European Union ("E.U.") rules and United States rules about how wines can be labeled and sold. Id. at 147, "What's Bud Got to Do With It? - Appellations and Trademarks in a Global Economy."

Chablis is not a generic white wine for most Europeans; it is a region of France where a particular type of dry white wine is made. Likewise, Burgundy is a region of France where a large portion of Pinot Noir is raised. France also has the specific regions of Bordeaux and Champagne. Under French law, sparkling wine must be made in the Champagne region to be called Champagne. In the 1970s, California winemakers began to use labeling names which

suggested what type of European wine the American wine was similar to, such as a California Burgundy, or a California Chablis. Id. at 148. Over time, the terms Chablis became to generically represent a light dry or semi-dry white wine. Id. at 149. The European Union initially took the position that terms such as “California Champagne” were deceptive to consumers and undermined the image of wines produced in the E.U. Id. at 151. As a result, the United States filed a complaint with the World Trade Organization (“W.T.O.”), which ultimately held that parties could establish trademarks that were also geographic place names, finding against European Union members seeking to restrict the sale of beverages within their territory of products that carried the place name of a geographic area. Id. at 151, 152. Ultimately, the W.T.O. found that the E.U.’s regulations could only protect geographic names as registered in their original language, but not to translations, unless these had also been specifically registered. As a result, California sparkling wines could be referred to as Champagne and California wines which were comparable to French Burgundy could be called Burgundy.

In another dispute, the governments of Italy and France agreed to require that wines called Tokay d’Alsace (France) and Tocai Friulano (Italy) had to be renamed because the Hungarian government claimed that these names were too similar to the famous Hungarian sweet wine, Tokaji Aszu. Id. at 158, 159. The interesting thing about the dispute was that the wines themselves were very different. Id. at 159. The French and Italian wines were dry white wines. Id. Specifically, the Italian wine was so named because it came from the Tocai grape. Id. By contrast, the Hungarian Tokaji is a very well known sweet wine made from other grape varieties. The Italians had difficulty believing that they could not use the name of the grape actually used in the production of the wine in difference to a Hungarian wine made from an entirely different type

of grape. Id. The author notes that it was somewhat ironic that, at the same time the United States was challenging the European Union's attempts to limit geographic indicators, the Bronco Wine case, a state challenge to geographic place limitations, was going on. Id. at 160.

Chapter VIII  
Temperance Gets a New Partner  
(But Not a Life Partner - That Would Complicate Things Dramatically)

After prohibition, states set up different tiers of distribution. A few states allowed a two-tier system, wherein a winery can sell directly to a retailer, but a large number of other states have a three-tier distribution system, which separates the business of alcohol production, distribution, and final sale. In Wine Politics, the author states that, according to one consulting firm, the wine industry has the most expensive distribution system of consumer goods, with twice the margins of food distribution. Wine Politics at 89. In the 1990s, distributors sought to reinforce their bargaining power by pushing state legislatures to classify out of state shipments of wine as a felony. Wine Politics at 96. One of the distributors apparently learned about a California wine retailer trying to ship directly to Florida consumers, and questioned, "is there any way to stop this?" Id. Some time later (and after \$60,000.00 of contributions to local legislators) the legislature had put a felony law on the books and the possibility of the revocation of a federal winery license. Id. In some states, a wine distributor is granted exclusive licenses. Id. at 98. In the state of Georgia, when a winery selects a distributor, the winery cannot terminate the relationship, regardless of the performance of the distributor. Id. at 98.

In the '90s, two other significant things happened which affected the wine delivery system. Id. at 67. In December of 1995, a fourteen year-old boy in Kentucky called a store in Los Angeles and ordered some Budweiser, Kendall Jackson Chardonnay, and Jack Daniels to be

shipped to his house. Id. The clerk on the other line processed the order without even asking the age of the person placing it. Id. When the boy opened the shipment in Kentucky, he was surrounded by journalists and camera crews that his father had called in to document the ease of the crime. Wine Politics Chapter 4: Baptists and Bootleggers at 67. Within a year, shipping alcohol of any kind to Kentucky was classified as a felony, and 6 other states followed suit. Id. at 67.

In 1999, the head of the Napa Valley Vintners Association proposed using the Internet to boost direct sales, but he proposed a system of checking the buyer's driver's license. Wine Politics Chapter 4: Baptists and Bootleggers at 98. He did not propose doorstep delivery to residences because, in his words, "the last thing I want is a \$1,200.00 case of wine sitting on someone's doorstep in Florida in 90 degree heat." Wine Politics Chapter 4: Baptists and Bootleggers at 98, fn 67. (Testimony by Tom Shelton on the House Subcommittee on Livestock and Horticulture of the status and prospects of American wine production 106 Cong. 1<sup>st</sup> Session 1999). This conflict between interstate commerce and state's rights, based upon the 21<sup>st</sup> Amendment, set up an interesting coalition of interests between free trade advocates and wine lovers on one side, and wine distributors and states on the other side. The free trader groups brought in Kenneth Starr. Id. at 99. The distributors retained Robert Bork. Id. Seven economists also weighed in on the side of the free traders. Id. In 2005, the Supreme Court ruled for the wineries and the consumers, and against distributors, in a 5-4 decision entitled Granholm v. Heald, 544 U.S. 460 (2005).

## Chapter IX Granholm and Its Progeny<sup>1</sup>

In Granholm v. Heald, 544 U.S. 460 (2005), the U.S. Supreme Court noted that Michigan and New York allowed in-state wineries to obtain a license for direct sales to consumers, but out of state wineries could not, subject to some exceptions. Id. at 469-470. The New York statute was a little bit different because it allowed an out of state winery to ship directly to the New York consumers, only if it becomes a licensed New York winery, which requires the establishment of a branch, factory, office or store within the State of New York. Id. The Sixth Circuit had rejected the Michigan statute as being unconstitutional and rejected the argument that the 21<sup>st</sup> Amendment immunizes all state liquor laws from the confines of the Commerce Clause. Id. at 471-472. In the New York case, the Second Circuit upheld the New York shipment statute, as it was in the nature of the powers granted to the states by the 21<sup>st</sup> Amendment. Id. The Court noted that, from 1994 until 1999, consumer spending on direct wine shipments doubled (reaching \$500 million per year) but, at the same time, the number of license wholesalers dropped from 1,600 to 600, which meant that many small wineries did not produce enough wine or have sufficient consumer demand to make it commercially feasible for wholesalers to carry their products. Id. at 467.

The Supreme Court initially noted the clear discriminatory nature of the Michigan statute, which would allow in-state wineries to ship directly to consumers, but have an outright ban on out-of-state wineries doing the same. Id. at 473-474. The Court had no difficulty finding that

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<sup>1</sup> Special thanks to Professor J. Alexander Tanford from IU Bloomington for giving me his insights about the current status of various wine shipment laws

New York's requirement of a physical presence in New York also amounted to unfair discrimination against interstate commerce. Id. As a result, the Court held that both state statutes discriminated against interstate commerce. Id.

The Court then addressed the 21<sup>st</sup> Amendment issues. The Court initially delved into the history leading up to the 21<sup>st</sup> Amendment, and specifically, prior Supreme Court cases that prevented the states from discriminating against imported alcohol outright and also facially neutral statutes that place an impermissible burden on interstate commerce. Id. at 476-477. See Rhodes v. Iowa, 170 U.S. 412 (1898). The Supreme Court referred to a series of statutes wherein the Court had rejected federal attempts to regulate alcohol in a discriminatory fashion. Granholm, 544 U.S. at 478-480. The Court suggested that the language of the 21<sup>st</sup> Amendment closely followed two prior federal acts, The Webb-Kenyon and Wilson Acts, which the Court believed expressed the framers' clear intention of constitutionalizing the Commerce Clause framework established under those statutes. Id. at 480-481. The Court stated that, **"The aim of the Twenty-first Amendment was to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use. The Amendment did not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods, a privilege they had not enjoyed any other time."** Id. at 484-485.

Having found discrimination and a violation of the Commerce Clause, the states sought to justify their limitations on two grounds. A statute which violates interstate commerce could still be saved if the state established a legitimate local purpose that cannot be adequately served by reasonable, nondiscriminatory alternatives. Id. at 489. The states suggested that the ban

would keep alcohol out of the hands of minors, and facilitate tax collection. The Supreme Court rejected the first contention by relying upon an FTC report that found that 26 states, which allowed direct shipments, reported no particular problems with minors' increased access to wine. The Court stated that minors are less likely to order wine, as opposed to other beverages, and that there are easier ways for a minor to obtain such alcohol, rather than direct shipment. Id. at 490. The Court stated that minors typically want "instant gratification" and it would be difficult to see why minors would wait around for the wine to arrive after they order it over the Internet. But, even if those things were true, minors could just as easily, and perhaps easier, order directly from in-state wineries. Addressing the tax collection justification, the Court found that, if licensing and self-reporting provide adequate safe guards for wine distributors through a three-tier system, there is no reason to believe they will not suffice for direct shipments. Id. at 491. The Court had no issues with requiring a permit as a condition of direct shipments. Overall, the Court found the states had not satisfied their burden to show that the discrimination was demonstrably justified. Id. at 492.

After the Supreme Court decision in Granholm v. Heald, one would have thought that the issue of wine shipments had been resolved for the short term, but that was not meant to be. In Cherry Hill Vineyard, LLC v. Baldacci, 505 F.3d 28 (1<sup>st</sup> Cir. 2007), the First Circuit Court of Appeals addressed an issue not resolved in Granholm. In Baldacci, the Court analyzed a Maine statute which allowed certain farm wineries to sell wine directly to consumers provided, however: (a) the transactions take place on the winery's premises, or at one of up to two offsite locations established by the winery; and (b) sales made by farm wineries directly to consumers must be face-to-face. Neither in-state nor out-of-state wineries could ship wine directly to a

consumer. An additional provision of the statutory scheme prohibited a Maine resident from bringing more than 4 quarts of wine (typically 5 bottles) into the state. The plaintiffs, including an Oregon winery and a Maine resident challenged the statute as having the effect of discriminating against interstate commerce in violation of the Dormant Commerce Clause. Maine defended the face-to-face transactional requirement and the related restriction on direct shipment as necessary to prevent underage drinking. The District Court found in favor of the State of Maine, and the parties appealed to the First Circuit.

On appeal, the Court noted that the plaintiffs did not suggest that the Maine statutory scheme was discriminatory, either on its face or in purpose, but challenged the Maine statute based upon the discriminatory effect of the statute, i.e. that the statutory scheme had the practical effect of benefitting Maine wineries at the expense of their out-of-state competitors. The First Circuit held that the plaintiffs had not satisfied their initial burden of showing that the Maine statutory scheme was discriminatory in effect and, in the absence of such a finding, the Court had to defer to the State Legislature. The Court distinguished the Granholm case, noting that both the Michigan and New York schemes did discriminate in ways that had long been understood to be unconstitutional. The Court relied upon a variety of district court opinions which upheld the requirement that direct wine sales be made face-to-face. The First Circuit recognized that the Supreme Court had not directly spoken to the question of what showing is required to prove discriminatory effect where, as in the Maine statute, a statute was evenhanded on its face and had a valid purpose. The Court also found that the plaintiffs had failed to submit probative evidence of an adverse impact. The Court suggested that no evidence that any wines at all are purchased by consumers directly from Maine wineries, or that the Maine law, in fact, acts to protect Maine

vineyards. The Court rejected the plaintiffs' argument that the FTC report, which the U.S. Supreme Court relied upon in Granholm, established that a ban on direct shipping raises the cost of out-of-state wineries so that they cannot compete in the local markets. Plaintiffs responded that they only had to show a de minimis standard of proof because the Dormant Commerce Clause contains no de minimis exception. The Court distinguished this argument, suggesting that the de minimis standard only applies to cases involving facially discriminatory laws. The United States District Court for the District of Arizona, in Black Star Farms, LLC v. Oliver, 544 F.Supp.2d 913 (D. Ariz. 2008), in an opinion handed down in February of 2008, reached a similar conclusion in the face of a challenge to Arizona's direct shipment laws.

These prior cases set the background for the Seventh Circuit's decision in Baude v. Heath, 538 F.3d 608 (7<sup>th</sup> Cir. 2008). In Baude, the plaintiffs challenged the Indiana statutes which allowed direct shipment only if: (a) there was one face-to-face meeting at which the buyer's age and other particulars was verified; and (b) the vintner was not allowed to sell to retailers in any state as its own wholesaler. Id. at 611. The District Court enjoined enforcement of these two provisions because they had a disparate impact on out-of-state sellers. 2007 U.S. District Lexis 6444 (S.D. Ind. August 29, 2007). The Court held that the wholesale clause was a needless and disproportionate burden on interstate commerce because it prevents direct shipment of almost all out-of-state wine, while allowing all wineries in Indiana to sell direct. 538 F.3d at 611-612. This was because, in California, Oregon, and Washington, the wineries in those states may lawfully sell to retailers, which meant that Indiana classified them as wholesalers, and wholesalers cannot ship wine to customers in Indiana. Id. at 612. The Court held that the statute was neutral in terms, but in effect, it forbids interstate shipments direct to Indiana's consumers,

while allowing intrastate shipments. Id. The Court, however, reversed the District Court on the face-to-face clause. Id. at 615.

The plaintiffs argued that the face-to-face meeting clause was much more expensive the farther away the winery was, and that local benefits are negligible because people under 21 are bound to find some way to get a hold of wine. Id. at 613. In addressing the face-to-face provision, the Court suggested that, when challenging a law that treats in-state and out-of-state entities identically, the burden of proof is on the plaintiffs. Id. The plaintiffs complained that the effect of the face-to-face clause was substantial if an Indiana resident had to go to California for a face-to-face meeting before he could legally receive wine. Id. The plaintiffs argued that there are other ways to verify a person's age when the wine is delivered through the mail. Id. at 614.

Unfortunately, for the plaintiffs in Baude, the U.S. Supreme Court decided the case of Rowe v. New Hampshire Motor Transp. Ass'n, 128 S.Ct. 989 (2008) around the time the case was argued in front of the U.S. Supreme Court. In Rowe, Maine had adopted a law which required shippers to verify the age of a buyer to assure that they were of legal age to receive tobacco. This ran afoul of a provision of the Federal Aviation Administration Authorization Act of 1994, which forbid the states from enacting or enforcing laws related to a price, route, or service of any motor carrier. 49 U.S.C. § 14501(c)(1). The U.S. Supreme Court ultimately held that the statute was preempted by federal law. The Seventh Circuit stated that the state cannot require interstate carriers to verify the recipient's age.<sup>2</sup> Baude, 538 F.3d at 613. The Seventh Circuit ultimately concluded that, even though the marginal cost and marginal benefit of the face-

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<sup>2</sup>In Rowe, the dispute was between a federal statute and state law. In Baude, the real issue should have been whether an age verification statute would be valid in light of a constitutional provision allowing the states to regulate the sale of alcohol.

to-face system may be modest, that this was insufficient to declare a law unconstitutional. Id. at 615. The Court suggested that the effect of the law was merely to shift sales from smaller wineries in all states to larger wineries that could contract with a wholesaler. Id. The Court concluded by saying that “Favoritism for larger wineries over small wineries does not pose a constitutional problem, and the fact that all Indiana wineries are small does more to show that the law’s disparate impact cuts against in-state product than to show that Indiana has fenced out wine from other jurisdictions.” Id. The Court, therefore, reversed the District Court as it relates to the face-to-face clause. The Baude decision was rendered on August 7, 2008. Professor Tanford was involved in the original Granholm case and also the Baude case. While the Baude case was pending, however, the Sixth Circuit was considering Kentucky’s direct shipment laws and reached a very different conclusion.

In Cherry Hill Vineyards, LLC v. Lilly, No. 122408 Fed.6, 07-5128 (6<sup>th</sup> Cir. 12/24/08), the Sixth Circuit addressed Kentucky’s direct shipment law. Originally, Huber Winery, which is based in Southern Indiana, filed the case, and Cherry Hill Vineyards was later added as a party plaintiff. Huber Winery was later dismissed by a stipulation. Id. at 3. The Sixth Circuit case has some interesting beginnings. The plaintiffs filed the suit the same day that Granholm was decided. Id. In response to Granholm, the Kentucky Legislature revised its statutes. Id. The Plaintiffs then amended their complaint to assert constitutional challenges to the new statutes, as well. The Kentucky statute allowed a winery to ship its wine to a Kentucky consumer if: (1) the wine is purchased by the customer in person at a small farm winery; (2) the wine is shipped by a licensed common carrier; and (3) the amount of wine shipped is limited to two cases per

customer per visit.<sup>3</sup> Id. at 5. The District Court upheld certain provisions of the revised statutes, but declared the in person purchase requirement unconstitutional because it discriminated, in practical effect, against the out-of-state small farm wineries, and because it had not been shown to advance legitimate local purposes that could not be adequately served by reasonable, nondiscriminatory alternatives.

In Lilly, just as in Baude, the plaintiffs conceded that the statutes were not facially discriminatory, but argued discrimination based upon practical effect. Id. at 11. In a very different analysis from the Seventh Circuit, the Sixth Circuit recognized that the plaintiffs had to show “both how local economic actors are favored by the legislation, and how out-of-state actors are burdened by the legislation.” Id. Unlike the Indiana case, the plaintiffs presented proof to the Court that, if they distribute their wine through a wholesaler, they pay up to 50% of their profits to the wholesaler, which can represent a profit differential of \$10.00 to \$15.00 per bottle of wine. Id. at 12. They also presented evidence that consumers would buy wines directly from out-of-state wineries but for the in-person requirement. The plaintiffs also referenced the exact same report from the FTC which the plaintiffs in Baude did. Based upon this evidence, the Court concluded that “Kentucky’s in-person requirement makes it economically and logistically infeasible for most consumers to purchase wine from out-of-state small farm wineries.” Id. The Court then reached the conclusion that the challenged statutes discriminate against interstate commerce in practical effect. Id. Having reached that conclusion, the Court put the burden on the state to establish whether the statute advances a legitimate local purpose that cannot be

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<sup>3</sup>Note that this is different from the Indiana statute, because the Indiana statute required only one face-to-face meeting, but the Kentucky statute required every purchase to be a face-to-face, but the shipment could occur later.

adequately served by reasonable, nondiscriminatory means. Id.

In an interesting turn of events, after the District Court had granted the Summary Judgment, the State of Kentucky decided not to appeal the decision, but the wine wholesalers who had intervened earlier timely filed a Notice of Appeal. The wholesalers, therefore, were making all the arguments about the value of the wholesaler system. The two arguments raised in Granholm were raised against, namely, concerns about minors purchasing wine over the Internet and taxes. Id. at 14. The Court found that age verification upon delivery of wine was a reasonable, nondiscriminatory means to address the proper State interest. Id. Curiously, the U.S. Supreme Court's decision in Rowe, which the Seventh Circuit relied upon, was not considered at all by the Sixth Circuit. The Court quickly resolved the tax argument by noting that states can adequately collect tax revenue through permit requirements as a condition of direct shipment, relying upon self-reporting and utilizing federal remedies. Id. at 15.

A recent conversation with Professor Tanford revealed that it is likely that a Petition for Writ of Certiorari may be filed due to the conflicting opinions from the First Circuit, the Sixth Circuit, and the Seventh Circuit. At oral argument, Tanford stated that Judge Richard A. Posner suggested that the plaintiffs had to show evidence of both benefit to in-state wineries and harm to outside wineries. Professor Tanford argued that their burden was to show one or the other, based upon prior U.S. Supreme Court precedent, but Judge Posner was not convinced. Professor Tanford also believed that the Seventh Circuit was mistaken in its finding that discriminatory effects can be *de minimis*.

## Chapter X Closing Thoughts

Although the constitutional analysis comes across as somewhat dry, it is somewhat interesting how, in Europe, historically, the concerns that are brought about wine legislation are generally concerns about quality and avoiding fraud, while, in the United States, the concern has been more about protecting the economics of the wholesaler-distributor relationship, and also more conservative values about wine consumption in general.

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