



# RETAILER LITIGATION: THEORY, PRACTICE & UPDATE

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# TOPICS FOR TODAY

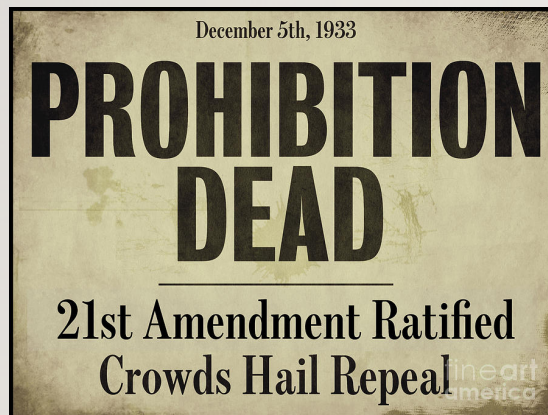
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- Legal Overview and Civil Procedure Primer
- 21<sup>st</sup> Amendment vs. the Commerce Clause
- Granholm
- Early Retailer Cases
- Recent Retailer Cases
- Implications of Winning (or Losing) a SCOTUS Case
- Questions

# 21<sup>ST</sup> AMENDMENT REPEAL OF PROHIBITION

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**Section 2.** *The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.*



Section 2 = States Rights

This delegation of power to the states is the genesis of the current, dual (federal and state) regulatory framework.

# THE COMMERCE CLAUSE

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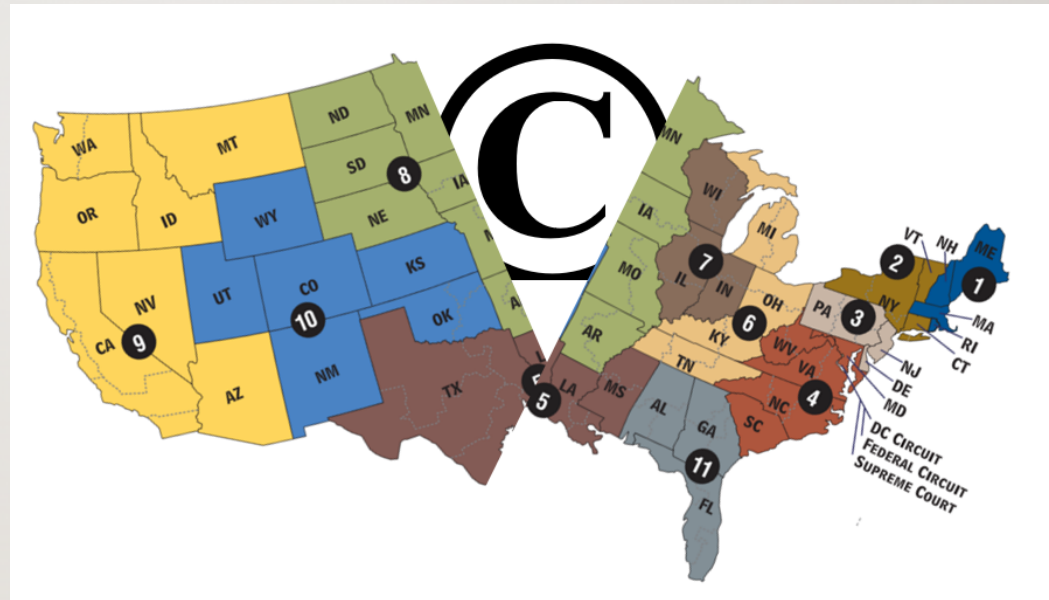
- Commerce Clause:
  - US Constitution - Article I, Section 8, Clause 3: “[Congress shall have Power] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes”
- Dormant Commerce Clause:
  - Legal doctrine courts have inferred from the Commerce Clause
  - If a statute passed by Congress is silent on a point of interstate or international commerce, states can pass legislation as long as the state law does not discriminate or inappropriately burden interstate commerce



# GETTING A CASE TO SCOTUS

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Circuit split occurs when two or more different circuit courts of appeals provide conflicting rulings on the same legal issue



A cinematic still from the movie Rocky, showing Rocky Balboa (Sylvester Stallone) and Apollo Creed (Carl Weathers) in a boxing ring. Rocky is on the right, wearing red boxing gloves and a red and white striped trunks, looking towards Apollo. Apollo is on the left, wearing red boxing gloves and black trunks with "CREED" written on the waistband, looking back at Rocky. The background is a dark blue sky with bright, out-of-focus stadium lights.

**21<sup>ST</sup> AMENDMENT**

**COMMERCE CLAUSE**

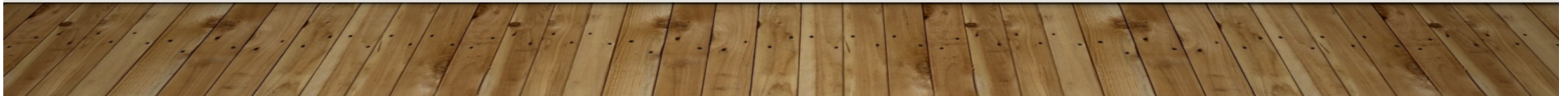
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**21<sup>ST</sup> AMENDMENT V.  
COMMERCE CLAUSE**

# JURISDICTIONAL LIMITS OF STATE LAWS

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- The 21<sup>st</sup> Amendment does not negate the Commerce Clause
- 21<sup>st</sup> Amendment does not give states the power to regulate entities and activities that take place outside of their borders
- String of lawsuits beginning in the 1960s led to *Granholm*, as well as the current climate regarding retailer shipping





# COMMERCE CLAUSE CASES

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## JURISDICTION

- Hostetter v. Idlewild Bon Voyage Liquor Corp. (1964): NYSLA couldn't collect sales tax in duty free zones.
- Healy v. Beer Institute (1989): "Price affirmation" statutes in CT that fixed beer prices by measuring them against the lowest prices in surrounding states were prohibited by the Commerce Clause because it affected pricing in the other states.

## DISCRIMINATION

- Bacchus Imports v. Dias (1984): Hawaii tax that protected in-state products violated the commerce clause.





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GRANHOLM  
VICTORY FOR WINERIES

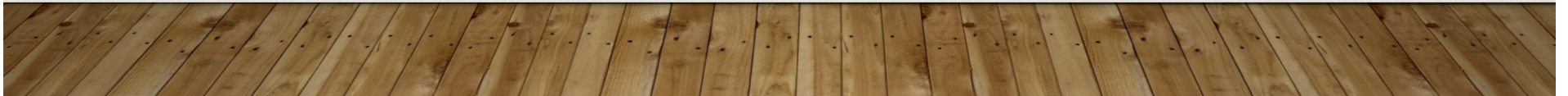
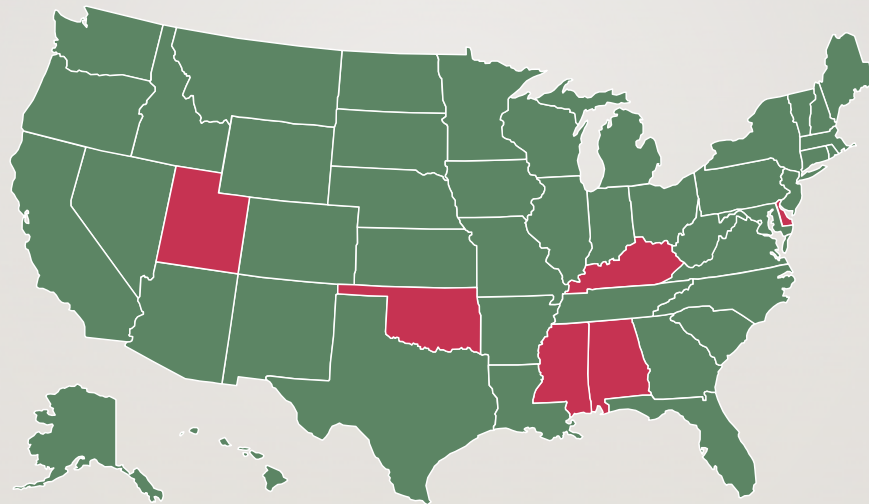
## GRANHOLM V. HEALD (2005)

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- US Supreme Court decision: NY and MI's laws restricting out of state wineries from being able to ship to consumers in NY and MI were unconstitutional because they violated the dormant Commerce Clause
- Dictum controversy: The Court stated that it had previously recognized that the three-tier system itself is "unquestionably legitimate."

## **POST GRANHOLM, MOST STATES ALLOW OUT-OF-STATE SHIPMENTS FROM WINERIES**

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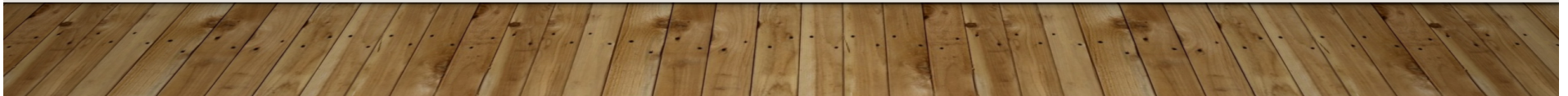
RETAIL CASES, ROUND 1



# NOTHING GAINED

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- **Michigan - Siesta Village v. Granholm (2008)**
  - Retailers win the case, Michigan changes its law
- **Texas - Siesta Village v. Perry (2008)**
  - Maybe too much equality isn't such a good thing, out of state retailers have to comply with same requirements as Texas retailers
- **New York - Arnolds Wine v. Boyle (2009)**
  - Clear loss for retailers, court didn't apply Granholm.





## RETAIL CASES, ROUND 2

## MISSOURI

### **SARASOTA WINE MARKET V. GREITANS (2017)**

- Facts: MO law provides for MO Retailers to sell/deliver to MO residents but OOS Retailers cannot because must be MO citizen to get permit
- Arguments:
  - Law violates **Commerce Clause** and *Granholm*
  - Law violates the **Privileges & Immunities Clause**

## **MICHIGAN**

### **LEBAMOFF ENTERPRISES V. SNYDER (2017)**

- Facts: MI passed bill in 2017 allowing MI Retailers to sell/deliver to MI residents but prohibiting OOS Retailers from doing same.
- Arguments:
  - Law violates **Commerce Clause** and *Granholm*
  - Law violates the **Privileges & Immunities Clause**



## ILLINOIS

### **LEBAMOFF ENTERPRISES V. RAUNER (2017)**

- Facts: IL law allows IL Retailers to sell/deliver to IL residents but prohibits OOS Retailers from doing same.
- Arguments:
  - Law violates **Commerce Clause** and **Granholm**
  - Law violates the **Privileges & Immunities Clause**
- Hearing TODAY (2/16/18) to appeal dismissal

## **MISSISSIPPI**

### **HOOD ET AL V. WINE EXPRESS, CALIFORNIA WINE CLUB, GOLD MEDAL WINE CLUB, AND BOTTLE DEALS (2017)**

- Mississippi state court
- Facts: MS law does not permit OOS Retailers to sell/deliver to MS residents. MS Attorney General brought this action against four OOS Retailers for various counts including selling/delivering alcohol to MS residents; selling/delivering alcohol to minors; and selling/delivering alcohol to dry areas.
- Damages requested include: Disgorgement of \$ received from sales; Attorneys' fees; punitive damages

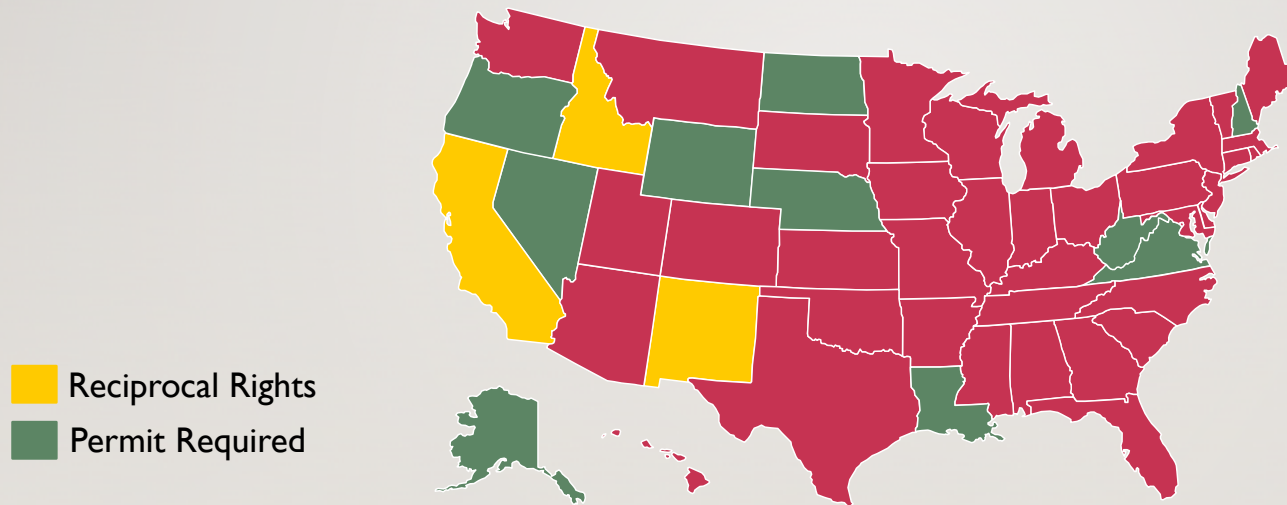


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WIN OR LOSE @SCOTUS,  
WHAT HAPPENS NEXT?

## WHAT WOULD THE MAP LOOK LIKE? CURRENT RETAIL DTC LANDSCAPE

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# WINNING

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- State repeals law (levels down)
- State repeals law and enacts a new one that provides for Retail DTC permit (levels up)
  - State sales and excise taxes, permit fee, regular reporting of shipments
  - Probably not going to go back to reciprocity
- All types of alcohol?

# LOSING

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- State could rescind existing Retail DTC law
- Re-focus strategy to personal importation?

# QUESTIONS?

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