

CASE NOTE

The Commerce Clause Still Delivers Wine to Consumers: The Role of *Costco v. Hoen* in the Battle Between States, Retailers, and Consumers Over the Shipment of Alcoholic Beverages

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On April 21, 2006, the wine industry won a battle in the continuing war over the sale and shipment of alcohol. When the district court decided that Washington state's liquor distribution system was discriminatory and violated federal anti-competition laws, plaintiff Costco gained a small step in easing the flow of alcohol across and within the United States. The issue of wine distribution has been heavily litigated over the past decade, with over 30 lawsuits filed in states across the nation.¹ The arguments advanced by wine lovers and retailers have been met with some success. Where 26 states allowed direct shipment prior to 2005, currently 34 do so.² The ultimate goal of all this litigation is to be able to live in any state, but be able to legally receive wine shipped from any other state. For California, the ability to ship wine to residents of any state is widely regarded in the industry as a growth opportunity,³ since the wine industry claims a \$51.8 billion dollar chunk of the California economy.⁴ Moreover, California is the mainstay of the wine industry, producing 92% of the nation's total wine production.⁵

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1. Howard G Goldberg, *US Direct Wine Sales in Legal Turmoil*, *Decanter*, February 8, 2007. available at <http://www.decanter.com/news/109112.html>.

2. *Id.*

3. Press Release, The Wine Institute, U.S. Wine, Grapes and grape Products Contribute \$162 Billion to Economy (January 17, 2007) (on file at www.wineinstitute.org).

4. Press Release, California Association of Winegrape Growers, California Wine Has a \$51.8 Billion Economic Impact on California's Economy and \$103 Billion On the U.S. Economy (December 7, 2006) (on file at www.cawg.org).

5. www.familywinemakers.org, last updated February 6, 2006.

Because of the economic and cultural ramifications of increased accessibility of wine, the decision of *Costco v. Hoen* (2006) U.S. Dist. LEXIS 27141 involves crucial novel points of law that may serve to advance the interests of oenophiles throughout the United States. Although most of the litigation concerning the shipment and sale of wine has been initiated by consumers or wineries, this is the first time a large retailer has challenged the way states choose to regulate the shipment and sale of alcohol. And, as the largest retailer of wine in the United States,⁶ Costco has a large stake in the benefits of changes to states' control over the production, sale, and importation of wine and liquor. What makes *Costco* unique is that the focus was not simply on direct shipments to consumers, which was the subject of the landmark 2005 Supreme Court case, *Granholm v. Heald*.⁷ Instead, Costco challenges the Washington state stronghold on regulating every aspect of distribution in the state, including pricing, volume sales, and quantity shipments. *Costco* holds that the Washington system discriminates between retailers, decreases competition, and fails to meet the goals of temperance, orderly market conditions, and raising revenue: all goals the state claims are protected by the Twenty-First Amendment.⁸ Because of this decision, states' may now be prevented from using the Twenty-First Amendment as a shield for unlimited control over the distribution of liquor, and the industry may soon be free of the last vestiges of Prohibition.

Historical Development

The history of alcohol sales, importation, and consumption in the United States belies an ambivalent attitude on the part of the United States with respect to alcohol. Beginning in the nineteenth century, the states were able to completely prohibit the production and consumption of alcohol as they deemed appropriate.⁹ However, *Scott v. Donald*,¹⁰ invalidated state regulations that attempted to regulate imports.¹¹ So, while a state could control alcohol within its territory, it could do little to prevent its citizens from procuring alcoholic beverages from other states.

A second principle was also in effect, the so-called original package doctrine. States could not pass, nor enforce, facially neutral laws that placed burdens on interstate commerce, and in *Leisy v. Hardin*,¹² the Supreme Court construed the Commerce Clause to prevent states from regulating

6. Duff, Mike. *Wine Business is Big Business in U.S.* DSN Retailing Today, December 18, 2005

7. *Granholm v. Heald* (2005) 544 U.S. 460.

8. *Costco v. Hoen* (2006) U.S. Dist. LEXIS 21747, at 3.

9. See *Mugler v. Kansas* (1887) 123 U.S. 623

10. *Scott v. Donald* (1897) 165 U.S. 58

11. See also *Walling v. Michigan* (1886) 116 U.S. 446; *Tiernan v. Rinker* (1880) 102 U.S. 123

12. *Leisy v. Hardin* (1890) 135 U.S. 100

out-of-state liquor until its sale in the original packaging.¹³ In fact, the Supreme Court even struck down state statutes requiring a permit to import alcohol into a state.¹⁴ Thus, the Constitution effectively favored out-of-state sellers.”¹⁵

The states were in a bind. They could theoretically regulate alcohol, but in reality they could not, since alcohol was easy to obtain from other states. In an effort to relieve this condition, Congress passed the Wilson Act in 1890.

The purpose of the Wilson Act¹⁶ was to nullify the restrictions on states with regard to regulating imported alcohol. The Wilson Act, however, did not address whether states could regulate direct shipments to consumers.¹⁷ To close that loophole, Congress in 1913 passed the Webb-Kenyon Act,¹⁸ allowing states to regulate the sale of alcohol to “any person. . . to be received, possessed, sold, or in any manner used.”¹⁹ The combination of these two statutes allowed states to regulate alcohol produced in the state as well as any originating outside the state.

The constitutionality of the Webb-Kenyon Act was not yet assured. In 1898, the Supreme Court twice rejected the contention that the Wilson Act authorized states to stop direct shipments to consumers for personal use.²⁰ This was based on the reasoning that such laws were discriminatory and the consumer had a right to receive alcoholic beverages; something the states could not abrogate.²¹ The Court implied any law allowing states to regulate alcohol direct shipments for personal use would be an unconstitutional delegation of Congress’ Commerce Clause powers.²² But in 1917, a divided court explicitly upheld the Webb-Kenyon Act, holding the Act “extend(ed) that which was done by the Wilson Act.”²³ Meaning, now the states were able to do in practice what they could previously do only in theory.

In 1919, Prohibition began, with the adoption of the Eighteenth Amendment.²⁴ Since all alcohol was illegal to possess, the tension between the States concerning regulation of alcohol was moot. This lasted until 1933, when Prohibition was repealed by the adoption of the Twenty-First Amendment.²⁵ Section one of the Twenty-First Amendment²⁶ simply

13. *Vance v. W. A. Vandercook Co.* (1898) 170 U.S. 438

14. *Bowman v. Chicago & Northwestern R. Co.* (1888) 125 U.S. 465

15. *Bridenbaugh v. Freeman-Wilson* (2000) 227 F.3d 848, 852

16. 27 U.S.C. §121

17. 27 U.S.C. §121

18. 27 USCS §122

19. 27 USCS §122

20. *Vance v. W.A. Vandercook Co.* (1898) 170 U.S. 438; *Rhodes v. Iowa* (1898) 170 U.S. 412

21. *Vance v. W.A. Vandercook Co.* (1898) 170 U.S. 438

22. See *Granholm v. Heald* (2005) 544 U.S. 460

23. *Clark Distilling Co. v. Western Maryland R. Co.* (1917) 242 U.S. 311; see also *McCormick & Co. v. Brown* (1932) 286 U.S. 131, 140-141

24. UCSC Const. Amend. 18

25. USCS Const. Amend. 21

served to repeal the Eighteenth Amendment.²⁷ Section two of the Amendment codified into the constitution the pre-Prohibition statutory law. In pertinent part, Section two provides:

The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.²⁸

While ending prohibition, the Twenty-First Amendment also codified what have come to be known as “core concerns” of first Prohibition and later the temperance movement. These concerns are the list of reasons a state may use to legitimize regulation of alcohol. They include promoting temperance,²⁹ ensuring orderly market conditions,³⁰ raising revenue,³¹ and the protection of minors.³² Any inquiry into the legitimate power of a state to make regulations concerning alcohol necessitates the question of “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 federal policies.”³³ Essentially, a state can use the core concerns of the Twenty-First Amendment as a shield to ward off challenges to their regulation of alcohol.

The Commerce Clause and the Twenty-First Amendment

The Commerce Clause of the Constitution provides that Congress “shall have the Power. . . to regulate Commerce. . . among the several States.”³⁴ If Congress makes a law with regard to an issue, the states are precluded from passing a contradictory law. Along with this express authority, there is an implied dormant aspect that limits the power of the states to burden interstate commerce.³⁵ The dormant Commerce Clause is essentially a default rule for interpreting Congressional silence concerning matters related to interstate commerce.³⁶ The courts read Congressional inaction as prohibition to a state restricting trade among the several states. Simply put, a state cannot shield in-state businesses from out-of-state competition.’’³⁷

26. USCS Const. Amend. 21

27. UCSC Const. Amend. 18

28. USCS Const. Amend. 21 §2

29. *Bacchus Imports, Ltd. v. Dias* (1984) 468 U.S. 263

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

31. *North Dakota v. United States* (1990) 495 U.S. 423, 432

32. *Granholt v. Heald* (2005) 544 U.S. 460, 490; *Huber v. Wilcher* (2006) U.S. Dist. LEXIS 60237; see also *Costco v. Hoen* (2006) U.S. Dist LEXIS 27141

33. *Bacchus Imports Ltd. v. Dias* (1984) 468 U.S. 263 at 275-76 (quoting *Capital Cities Cable, Inc. v. Crisp* (1984) 467 U.S. 691)

34. U.S. Constitution. art. I, sec. 8, cl. 3

35. *Dennis v. Higgins* (1991) 498 U.S. 439, 447

36. *L.A.M. Recovery, Inc. v. Dept. of Consumer Affairs* (2005) 377 F.Supp.2d 429

37. *Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd.* (2006) 462 F.3d 249, quoting *Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd.* (2002) 298 F.3d 201, 210

The Supreme Court has designed a two-prong analytic framework for determining the constitutionality of a state regulation. First, the court determines whether the state regulation violates the Commerce Clause in the absence of the Twenty-first Amendment.³⁸ If the court concludes that it does, it will then determine whether a core concern of the Twenty-first Amendment is implicated by the regulation. When such a concern is implicated, the Amendment shields the challenged law so long as the state demonstrates that it genuinely needs the law to effectuate its proffered core concern.³⁹

However, a law cannot be motivated by “mere economic protectionism.”⁴⁰ If the statute discriminates against interstate commerce, it will be subject to strict scrutiny. Under this level of review, almost every state economic protectionism law is held invalid.⁴¹ And, the party who challenges the state regulation must convince the court of the correct level of scrutiny to apply.⁴²

In 1984, the Supreme Court first determined, in *Bacchus Imports v. Dias*, that Hawaii’s law exempting okolehao⁴³ and pineapple wine from the mandatory 20% excise tax at the wholesale level was facially discriminatory and had both the purpose and effect of discriminating in favor of in-state products.⁴⁴ The Court then rejected Hawaii’s proffered affirmative defense that the Twenty-first Amendment saved the Commerce Clause violation.⁴⁵

Based on *Bacchus*,⁴⁶ the Seventh Circuit Court of Appeals upheld Indiana’s code sections that made direct shipments to Indiana residents unlawful.⁴⁷ The Court looked not at the “core concerns” arguments presented by the State in advancing their Twenty-first Amendment defense, but instead examined the text of §2 of the Twenty-First Amendment in order to arrive at the conclusion that there was no discriminatory purpose or effect by Indiana requiring “every drop of liquor pass through its three-tiered system and be subjected to taxation.”⁴⁸ Since the purpose of the statute was to ensure the state collects taxes on all liquor sold in the state, the Court rea-

38. *Beskind v. Easley* (2003) 325 F.3d 506

39. *Bainbridge v. Turner* (2002) 311 F.3d 1104

40. *See, id.*

41. *Cherry Hill Vineyards, LLC v. Baldacci* (2006) U.S. Dist. LEXIS 51657, 20-1, citing *Alliance of Auto Mfrs. v. Gwadosky* (2005) 430 F.3d 30, 35

42. *Id.*

43. An 80 proof Hawaiian liquor made from a mash of the ti plant. *The New Food Lover’s Companion*, 2nd Edition (1995) by Sharon Tyler Herbst.

44. *Bacchus Imports Ltd. v. Dias* (1984) 468 U.S. 263 at 273

45. *Bacchus Imports Ltd. v. Dias* (1984) 468 U.S. 263 at 274

46. *Granholt v. Heald* (2005) 544 U.S. 460

47. *Bridenbaugh v. Freeman-Wilson* (2000) 227 F.3d 848

48. *Id.*

soned it fell squarely within the aims of §2 of the Twenty-first Amendment.⁴⁹

The Indiana system is not unique. The three-tiered system is used by virtually every state in the union.⁵⁰ The general framework is that any alcohol sold in the state must pass through each level; producer to wholesaler, wholesaler to retailer, and finally retailer to consumer. The purpose of enforcing such a regime goes back to the Twenty-first Amendment, and the “core concerns” promoted by the text and intent of §2.⁵¹ Generally, the courts have upheld the three-tiered system as a legitimate framework for distribution of alcohol.⁵² Where states get into constitutional trouble is in the area of exceptions to this system. If their statutory scheme allows for any group to bypass the three tiers of the supply chain, this will often lead to a violation of the Dormant Commerce Clause.

The State of the Law Leading up to *Costco*

The current state of the legal climate leading up to *Costco*⁵³ is one of turbulence, to say the least. To date, there are at least fourteen states that have issued recent decisions on liquor distribution systems.

In 2003, plaintiffs successfully challenged portions of the Texas code that allowed direct shipment by in-state wineries but forced out-of-state wineries to utilize the three-tiered system.⁵⁴ Although previous decisions had upheld the constitutionality of the system,⁵⁵ the Court performed “constitutional surgery” in enjoining the enforcement of the challenged provisions. This decision limited the court’s role in shaping the issue by stating that the proper way to deal with unconstitutional code provisions is to strike only the portions necessary to make them pass constitutional muster.⁵⁶ The court made clear its unwillingness to step into the shoes of the legislature in making policy decisions. Instead, the limited role of the court is to determine the constitutional scope of state laws and strike any provision that violates the permissible scope of a state’s power to regulate alcohol within its borders.⁵⁷

The major predecessor to *Costco* is *Granholm v. Heald*.⁵⁸ In 2005, the Supreme Court finally ruled on the issue addressed by many lower courts; whether states can maintain different rules for in-state and out-of-state sell-

49. USCS Const. Amend. 21 §2

50. *Bridenbaugh v. Freeman-Wilson* (2000) 227 F.3d 848

51. *Granholm v. Heald* (2005) 544 U.S. 460, 484

52. *Granholm v. Heald* (2000) 544 U.S. 460, 489; citing *North Dakota v. United States* (1986) 495 U.S. 432

53. *Costco v. Hoen* (2006) U.S. Dist LEXIS 27141

54. *Dickerson v. Bailey* (2003) 336 F.3d 388

55. See *S.A. Discount Liquor, Inc. v. Texas Alcohol Beverage Comm’n* (1983) 709 F.2d 291

56. *Dickerson v. Bailey* (2003) 336 F.3d 388, 409

57. *Dickerson v. Bailey* (2003) 336 F.3d 388,409

58. *Granholm v. Heald* (2005) 544 U.S. 460

ers of wine. Deciding two consolidated cases from New York and Michigan, the court ruled 5-4 that it is unconstitutional to allow in-state wineries more latitude in selling directly to consumers than out-of-state wineries. Proponents of direct shipping lauded the decision, but the excitement dimmed as the legislature acted to further restrict direct shipping, rather than allow out-of-state wineries direct access to its residents.

While *Costco* was working its way toward trial in late 2005, Pennsylvania similarly addressed the issue of wine shipping laws.⁵⁹ There, all parties agreed that the current Pennsylvania statutory scheme⁶⁰ discriminated against out-of-state wineries. However, while declaring the challenged provisions unconstitutional, the court deferred to the legislature to resolve the constitutional dilemma.⁶¹ The court is powerless to impose regulations uniformly. Instead, they must wait for the legislature to take remedial action to either remove unconstitutional portions of their beverage control laws, or loosen the restrictions against out-of-state suppliers. This is key because, despite the clamor to litigate the issue, a legal victory is only the first step in effecting change. To complete the process, lobbying is necessary to advance the interests of producers and consumers in each state.

Framework and Analysis of *Costco v. Hoen*⁶²

*Costco v. Hoen*⁶³ is the next step in the continuing litigation over states' ability to regulate liquor within and across their borders.

Costco advanced some unique and new arguments that make this case worthy of analysis. Costco challenged various Washington state laws and regulations regarding the sale and distribution of beer and wine, and in particular those policies that tend to increase the average cost of beer and wine to retailers. The defendants here were members of the Washington State Liquor Control Board and the Washington Beer and Wine Wholesalers Association (who were later joined). The primary issue at trial was whether the challenged restraints could be upheld as a valid exercise of state power under the Twenty-First Amendment to the United States Constitution, despite their anti-competitive nature. Also at issue was whether the restraints challenged by Costco violate the Sherman Act of 1890, and therefore are in conflict with federal antitrust law.

Costco challenged particular policies of Washington state in regulating the sale and distribution of wine and beer. In particular, nine policies were challenged by Costco:⁶⁴

59. *Cutner v. Newman* (2005) 398 F.Supp.2d 389

60. Pa. Stat. Ann. tit. 47, §§4-404, 4-488, 40491, 5-505.2, and 40 Pa. Code §§9.143. 11.111

61. *Cutner v. Newman* (2005) 398 F.Supp.2d 389, 391

62. *Costco v. Hoen* (2006) U.S. Dist. LEXIS 27141

63. *Costco v. Hoen* (2006) U.S. Dist. LEXIS 27141

64. *Costco v. Hoen* (2006) U.S. Dist. LEXIS 27141 at 6-8

Posting requirement: prices must be publicly posted with the Liquor Control Board.⁶⁵

Holding requirement: those posted prices must be held for a full calendar month.⁶⁶

Uniform pricing agreement: Distributors are required to sell to all retailers at the posted price.⁶⁷

Ban on credit sales: Distributors are prohibited from selling to retailers on credit.⁶⁸

Ban on volume discounts: Distributors may not give volume discounts to retailers.⁶⁹

Delivered pricing requirement: The same delivered price must apply to all retailers, regardless of whether the retailer pays the freight, consolidates shipments, or picks up the shipment themselves.⁷⁰

Central warehousing ban: Retailers are prohibited from storing or taking delivery at a central warehouse.⁷¹ This also extends to prohibiting a retailer from operating any warehouse that includes wine.⁷² Warehouses are also limited in their output of wine.⁷³

Minimum markup requirements: At every tier, products must be marked up 10%.⁷⁴

Ban on retailer-to-retailer sales: This is strictly prohibited.⁷⁵

While the last restraint, the ban on retailer-to-retailer sales, was considered a unilateral restraint and therefore not preempted by the Sherman Act, the other eight factors framed the factual basis for the Costco Court's decision.⁷⁶

The Sherman Act is federal legislation that reflects a strong federal policy in favor of competition.⁷⁷ The Act is not a constitutional provision, but the *Costco* court references *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*⁷⁸ when it states "Congress exercised all the power it possessed under the Commerce Clause when it approved the Sherman Act."⁷⁹

65. RCW 66.28.180(2)-(3); WAC 314-20-100(2) & (5); WAC 314-24-190(2) & (5)

66. WAC 314-20-100(2) & (5); WAC 314-24-190(2) 7 (5)

67. RCW 66.28.170; RCW 66.28.180(2) & (3); WAC 314-12-140; WAC 314-20-100 (2), (4) & (5); WAC 314-24-190(2), (4) & (5)

68. WAC 314-13-015; RCW 66.28.010; WAC 314-20-090; WAC 314-12-140 (3)

69. RCW 66.28.180(2)(d) & (3)(b); RCW 66.28.170; WAC 314-12-140(3)

70. RCW 66.28.180(2)(h)(ii)

71. RCW 66.28.180(2)(h)(ii)

72. RCW 66.24.185(4)

73. WAC 314-24-220(5)

74. RCW 66.28.010(2); RCW 66.28.180(2)(d) & (3)(b)

75. RCW 66.28.070; WAC 314-13-010

76. *Costco v. Hoen* (2006) U.S. Dist. LEXIS 27141 at 8

77. The Sherman Antitrust Act was the first federal government action to limit monopolies, and is the oldest of all antitrust laws.

78. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum* (1980) 445 U.S. 97

79. *Costco v. Hoen* (2006) U.S. Dist. LEXIS 27141

Because of this, courts must acknowledge the importance of the Act's pro-competition policy.⁸⁰

The test the court uses comes from the Fourth Circuit holding in *TFWS, Inc. v. Schaefer*.⁸¹ First, the court should look to the expressed state interest and how closely tied that interest is to Twenty-First Amendment interests. Second, the court should decide whether, and to what extent, the regulatory scheme serves its stated purpose. Essentially, the court determines if the scheme is effective. Third, the court must balance the state's interest that is actually furthered against the federal interest in promoting competition under the Sherman Act.⁸²

In *Costco*, the state liquor control board and the wholesalers association argued some of the core concerns of the Twenty-First Amendment are advanced by the challenged regulations: 1) promoting temperance; 2) ensuring orderly market conditions; and 3) raising revenue.⁸³ Each of those proffered concerns were dismissed in turn by the Court.

Temperance

Although the state legislature did not cite temperance as a purpose underlying the regulations in question, defendants maintain that temperance is a key concern furthered by the regulations by increasing the average price of beer and wine in the state of Washington.⁸⁴ However, the court pointed out that the regulations do not have the effect of elevating prices for retailers across the state, but instead, there is an uneven price differential among retailers. Large retailers are paying elevated prices, while small retailers pay less than they would absent the regulations.⁸⁵ Following that argument to its logical conclusion, the reality is that this policy would actually increase consumption of alcohol by making it less expensive for consumers to obtain alcoholic beverages at the most convenient places.⁸⁶

Further, the court was not persuaded that these types of policies generally have the effect of promoting temperance. There is little to no empirical evidence that the systems utilized by states to control liquor actually have the effect of decreasing alcohol consumption.⁸⁷ In fact, Nebraska supports the opposite contention. When Nebraska eliminated certain policies, including price posting for wine and spirits and a ban on quantity discounts, consumption in Nebraska actually decreased.⁸⁸

80. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum* (1980) 445 U.S. 97

81. *TFWS, Inc. v. Schaefer* (2001) 242 F.3d 198

82. *Id*

83. *Costco v. Hoen* (2006) U.S. Dist. LEXIS 27141 at 6

84. *Costco v. Hoen* (2006) U.S. Dist. LEXIS 27141 at 12

85. *Costco v. Hoen* (2006) U.S. Dist. LEXIS 27141 at 14

86. *Costco v. Hoen* (2006) U.S. Dist. LEXIS 27141 at 14

87. *Costco v. Hoen* (2006) U.S. Dist. LEXIS 27141 at 14

88. *Costco v. Hoen* (2006) U.S. Dist. LEXIS 27141 at 15-18

Finally, the court argued that even if temperance were promoted by raising average beer and wine prices, that interest does not outweigh the federal interest in promoting competition under the Sherman Act, especially since there are other means to achieving that goal that do not violate the policy of the Sherman Act.⁸⁹

Orderly Market Conditions

The second interest claimed by the liquor control board and the wholesalers association was that the Washington legislature has expressed its intent to foster the orderly and responsible distribution of alcohol.⁹⁰ The court acknowledged that no one is quite sure what is meant by “orderly market conditions”,⁹¹ and found that defendants did not provide a clear or consistent definition of that phrase.⁹² While defendants urged price uniformity, stability, and relatively wide availability should be the guideline,⁹³ the court was not persuaded by this argument. The three-tiered system does not require minimum mark-ups, posting and holding of prices, and delivered prices.⁹⁴ Further, order is not furthered by these requirements.⁹⁵ There was no evidence that there would be periods of scarcity or market ‘gluts’ if the three-tiered system was stripped of the above challenged provisions. There is also no evidence that small retailers would be priced out of the market if even pricing requirements were stricken from the system.⁹⁶

Finally, the court held that, even granting defendants a limited amount of effectiveness in promoting orderly market conditions by requiring uniform pricing to retailers, the federal interest in promoting competition still outweighs the state’s interest here, especially since that interest in protecting small retailers remains unsubstantiated.⁹⁷

Raising Revenue

Additionally, the Court was not persuaded that the challenged restraints, individually or as a whole, advance the state’s interest in raising revenue. The state has alternative means of raising and collecting taxes on liquor that do not run afoul of The Sherman Act.⁹⁸

Ultimately, the holding of *Costco* is that Washington is prevented from exerting control over liquor distribution when it is tantamount to a monopoly. By advancing this pro-competition stance, the court tipped the scales in

89. *Costco v. Hoen* (2006) U.S. Dist. LEXIS 27141 at 19

90. RCW 66.28.180(1)

91. *Bainbridge v. Turner* (2002) 311 F.3d 1104

92. *Costco v. Hoen* (2006) U.S. Dist. LEXIS 27141 at 19-20

93. *Costco v. Hoen* (2006) U.S. Dist. LEXIS 27141 citing Dkt No. 147 at 6

94. *Costco v. Hoen* (2006) U.S. Dist. LEXIS 27141 at 20-21

95. *Costco v. Hoen* (2006) U.S. Dist. LEXIS 27141 at 23

96. *Costco v. Hoen* (2006) U.S. Dist. LEXIS 27141 at 23.

97. See *324 Liquor Corp. v. Duffy* (1987) 479 U.S. 335, 350.

98. *Costco v. Hoen* (2006) U.S. Dist. LEXIS 27141 at 25.

favor of competition and made a sharp turn away from the Prohibition viewpoint of complete state control.

Future Implications

For each of the Twenty-First Amendment concerns advanced by the Liquor Control Board, the *Costco* court found that the provisions did not meet the Schaefer test on one or more levels. However, the true outcome of *Costco* remains uncertain. In September, 2006, the court extended the stay in the case until the next session of the Washington state legislature was completed.⁹⁹ The purpose is to give the legislature a chance to respond to the court's ruling.

Assuming the present state of the case remains in effect, *Costco* brings three possible changes to light. First, it's unlikely states will be able to justify discriminating against out-of-state wineries. Second, it's unlikely states will be able to shield themselves from antitrust scrutiny by using the protection of the Twenty-First Amendment. Finally, the days of state statutes continuing to require distributors to maintain a physical place of business within the state may soon be at an end.¹⁰⁰

But the real issue to note is that, while a flood of litigation may continue in the near future, it may not accomplish what retailers and consumers really want: free distribution of wine. Even if certain portions of state statutes are found unconstitutional, the courts are powerless to do anything beyond striking those provisions.¹⁰¹ Instead, it is the job of the legislature to pass or modify laws, and the courts will not usurp the power of the legislature.¹⁰²

Moreover, it is unclear how the legislatures will respond to this new precedent. After *Costco*, the pressure on states to revise discriminatory statutes is enormous, as the *Granholtm* precedent has spurred litigation in almost every state. But, it's entirely possible the response from the legislatures will not be what retailers and consumers hope. In the summer of 2005, Louisiana passed legislation taking away the rights of in-state wineries to self-distribute.¹⁰³ Instead of gaining the right to have out-of-state wineries ship directly to consumers or even retailers, it's entirely possible restrictions on alcohol shipment and sales will simply be tightened even more. If that happens, the efforts of wineries, retailers, and consumers will have yielded a more fair and evenhanded approach to interstate alcohol distribution, but the elusive goal of having any chosen wine shipped to any state in the union will have yet to materialize.

99. *Costco v. Hoen* (2006) U.S. Dist. LEXIS 65774.

100. Houchins, R. Corbin. *What the Direct Shipment Ruling Means for Retailers* (2005) www.winebusiness.com copyright 1997-2007.

101. *Cutner v. Newman* (2005) 398 F.Supp.2d 389.

102. *Id.*

103. Mattingly, Jenny. *Breaking Down the Costco Case* www.wineamerica.org, January 2006