

Forbes

Like Other Goods, Wine Should Move Freely In Interstate Commerce -- But It Doesn't

George Leef

November 7, 2017

Let's say that you like wine and sometimes like to shop for it online because you can't find a particular one you enjoy in your area. You find that a shop in another state has the wine you want, and place an order for a case or two.

Unfortunately, you may run into a problem. Unless you live in one of the 14 states that allow direct out-of-state shipments, you won't be able to make the purchase. The rest of the states forbid such shipments as a political favor to a potent special interest group – wine and liquor wholesalers. They want to restrict competition that cuts into their business and they're happy to use their considerable clout with state legislators to protect their profits.

As usual when interest groups team up with politicians, consumers bear the cost.

In his October 23 *New York Times* column, Eric Asimov wrote, “For consumers who live in states stocked with fine-wine retailers, like New York, the restrictions are an inconvenience. For consumers in states with few retail options, they are disastrous. It's hard enough outside major metropolitan areas to find wines from small producers. The crackdown makes it that much harder.”

When I saw Asimov's column, I was puzzled. Hadn't the Supreme Court settled this issue years ago in favor of commercial freedom? I thought so, but it turns out that it hadn't.

In 2005, the Supreme Court heard two cases involving state restrictions against the shipment of wine, consolidated under the name *Granholm v. Heald*.

The cases challenged laws in New York and Michigan that allowed wineries located within the state to sell directly to consumers, but prohibited out-of-state wineries from doing so. In a 5-4 decision with a most unusual split of justices, the majority ruled that such laws violated the Constitution's Commerce Clause, which doesn't permit states to enact laws that discriminate against goods or services from other states.

Justice Kennedy wrote the majority opinion, declaring that laws such as those of Michigan and New York “deprive citizens of their right to have access to the markets of other States on equal terms.” Joining in his opinion were Justices Scalia, Souter, Ginsburg, and Breyer. Kennedy also

dismissed the arguments that these laws were needed to combat underage drinking, pointing out that there were better means available for states to do that than by interfering with interstate commerce.

Justices Stevens, O'Connor, Thomas and Chief Justice Rehnquist dissented on the grounds that the 21st Amendment—the amendment that repealed national prohibition—gave the states the power to regulate alcoholic beverages as they saw fit and thus the laws under attack were legitimate.

In my view, Kennedy had much the better of that argument, replying that the purposes of the 21st Amendment were not advanced by laws that favored in-state wineries, but they did run afoul of the Constitution's opposition to state laws that restrict the flow of interstate commerce.

Unfortunately, *Granholm* didn't settle the issue.

In 2010, the Fifth Circuit severely limited the scope of *Granholm* by holding that it only applied to wineries and not to retailers such as the plaintiff in *Wine Country Gift Baskets v. Steen*. In [this post](#), Cato Institute legal scholar Ilya Shapiro called that decision “indefensible” and contrary to Supreme Court precedent. More distressingly, the Supreme Court decided not to hear an appeal in *Wine Country*.

Shapiro writes, “*Granholm* explicitly said that states ‘may not enact laws that burden out-of-state producers *or shippers* simply to give a competitive advantage to in-state businesses.’ It is dismaying that the Supreme Court didn't care about the Fifth Circuit's neglect of this language.”

Their victory in *Wine Country* emboldened the anti-competitive forces to push for maximum enforcement of the state laws against direct sales. That's why Mr. Asimov and many other Americans find that they can no longer order out-of-state wines.

The Supreme Court had this right back in 2005, but instead of holding firm against state protectionism, it meekly retreated.

Congress ought to step in. One of its enumerated powers is to “regulate commerce among the states.” That power has been grossly misread and abused, giving Congress authority to intervene in virtually every aspect of business. The appalling 1942 decision in *Wickard v. Filburn*, where the Court approved of a law that dictated to farmers how much grain they could grow and consume on their own property, was justified as a regulation of interstate commerce. But here we have a pure example of the kind of state favoritism to local interests that the drafters of the Constitution wanted to stop.

People who want more information on the fight for unrestricted interstate wine commerce should consult [Free the Grapes](#).