Pressing Washington's Wine Industry into the Twenty-First Century: Rethinking What It Means to Be a Winery

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PRESSING WASHINGTON’S WINE INDUSTRY INTO THE TWENTY-FIRST CENTURY: RETHINKING WHAT IT MEANS TO BE A WINERY

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Abstract: Washington’s wine industry is growing, and the ways in which Washington winemakers craft and sell their product are changing. Traditional “brick and mortar” wineries coexist with so-called “virtual wineries,” which typically purchase grapes from growers and contract with other wineries or custom crush facilities to access winemaking equipment. The virtual winery is an incubator model and contributes to the rich diversity of Washington’s wine industry. Washington’s current winery licensing statute, RCW 66.24.170, does not clearly apply to virtual wineries because it links the concept of a winery with a particular physical location and fails to delineate exactly what types of winemaking activities licensees must engage in. This statutory ambiguity causes confusion for winemakers and regulators. House Bill 1641, introduced in January 2011, seeks to remedy the confusion by dividing the current winery licensing statute into two classes: one for traditional wineries, and one for virtual wineries. The latter would be licensed not as producers of wine but as retailers. While well-intentioned, House Bill 1641 could negatively impact Washington’s wine industry by limiting virtual wineries’ access to consumers via interstate direct shipment. Unlike licensed wine producers, wine retailers presently lack Commerce Clause protection from state laws discriminating against direct shipment of out-of-state wine. Thus, this Comment argues that Washington should follow the example of Oregon and enact legislation amending RCW 66.24.170 to clearly license virtual wineries as producers.

INTRODUCTION

Like fights about most regulation, those about wine rules are about economic interests. And, as in fights about most product regulation, the overlooked constituencies are consumers and mom-and-pop businesses.1

Washington is home to a robust and growing wine industry. In 2010, Washington grape growers produced 160,000 tons of more than thirty wine grape varietals, a record high.2 These 160,000 tons of grapes yielded approximately twelve million cases of wine.3 According to the

3. Id.
Washington Wine Commission, the total statewide economic impact of Washington’s wine industry is $3 billion. The Washington wine industry has undoubtedly come a long way since its humble origins at Fort Vancouver in 1825. The coming of age of Washington’s wine industry manifests itself not only in sheer numbers but also in the changing ways that Washington winemakers craft, market, and deliver their product to consumers.

Many people may associate winemaking with a villa or château set against a hillside lined with row upon row of lush vines, a barn or cellar housing stacked barrels of aging wine, and an on-site tasting room. While this traditional “estate” or “brick and mortar” model still exists in Washington today, it is not the only model. Of the total 120,000 tons of Washington grapes crushed in 2006, only 35,275 were estate grown—the rest were either purchased or custom crushed. These figures indicate that not all Washington winemakers grow and crush the grapes they produce. Rather, some winemakers purchase grapes from growers and crush them at their own facility. So-called “virtual wineries” purchase grapes and arrange to have them crushed at someone else’s facility. The latter production model has gained recent popularity among Washington’s smaller, start-up wine operations.

The rapid growth in the American wine industry over the past four decades has sparked increased competition, prompting wineries to develop new methods of reaching and retaining consumers. According to the Federal Trade Commission (FTC), American wine consumers increasingly desire “individualistic, hand-crafted wines.” The FTC

4. Id.
6. U.S. DEP’T AGRIC., NAT’L AGRIC. STATISTICS SERVS., PRELIMINARY WASHINGTON WINERY REPORT 2006, 4 (2007) (hereinafter USDA). At the time of this writing, the 2006 statistics are the most recent compilation available.
7. See id.
11. See USDA, supra note 6, at 2 (“With the wine industry growing at a fast pace, competition has increased, forcing wineries to offer unique products and find niche markets.”).
links this shift in consumer preferences with the emergence of more and more small wineries. However, small, start-up wineries face greater difficulty finding distributors than do their established, large-scale counterparts. As a result, many small wineries rely in part on direct-to-consumer sales, including through internet-based wine clubs and other forms of e-commerce. In 2006, Washington wineries sold 42,000 cases of wine direct to consumers online. Though direct-to-consumer sales represent a small percentage of total wine sales in Washington, these sales are often a small winery’s “cash cow.”

Despite the growing diversity of wine production and sales methods, Washington still only offers one domestic winery license. Section 66.04.010(46) of the Revised Code of Washington (RCW) currently defines a domestic winery as “a place where wines are manufactured or produced within the state of Washington.” However, no statute defines “manufactured” or “produced.” This vague definition links the concept of a winery to a particular physical location, which Washington’s virtual wineries lack. It also results in confusion for winemakers and liquor board enforcement officials as to which winemaking activities licensees must conduct on their licensed premises.

House Bill 1641, introduced in the January 2011 state legislative session, seeks to remedy points of confusion in Washington’s winery licensing regime by splitting the current domestic winery license into “Class A” and “Class B” categories. The Class A license would
correspond to the traditional production model, while the Class B license
would correspond to non-traditional wine production models associated
with virtual wineries.25 Though House Bill 1641 may appear at first
blush a clear solution to a simple problem of statutory ambiguity, in
application it could prove problematic by removing virtual winemakers
from the legal realm of wine production altogether, licensing them
instead as wine retailers.26

If enacted in either its original or substitute forms,27 House Bill 1641
could place Washington’s small wineries, particularly its virtual
wineries, at a competitive disadvantage both within and outside
Washington. On the state level, many already operating wineries would
be required to either switch to the new license28 and lose certain rights
and privileges they presently enjoy, or spend more money to produce
enough wine by fermentation to qualify for the new Class A license.29
On the national level, virtual and other alternative wineries licensed as
retailers rather than producers would be vulnerable to protectionist state
laws regarding direct-to-consumer shipping.30 While the U.S. Supreme
Court case of Granholm v. Heald31 extended Commerce Clause
protection to wine producers,32 the federal circuit courts have thus far
deprecated to extend this protection to wine retailers and wholesalers.33
The U.S. Supreme Court recently denied certiorari on the issue, leaving

25. Id. Essentially, the Class A license would correspond to traditional wineries because it allows
for production of wine by fermentation on the licensed winemaking premises. This would not be a
feasible option for virtual wineries because they do not own winemaking premises to license.
26. Id.
27. While in committee, two substitute versions of House Bill 1641 were introduced. See infra
Parts III.A, B.
28. STATE GOV’T & TRIBAL AFFAIRS COMM., H.B. 1641 BILL ANALYSIS, INDIVIDUAL STATE
AGENCY FISCAL NOTE, 62nd Leg., Reg. Sess., at 2 (Wash. 2011) (estimating that 30 percent of
existing wineries would have to switch to the new license).
(all requiring holders of class A licenses to produce a set quantity of wine by fermentation).
30. See, e.g., Siesta Vill. Mkt. LLC v. Steen, 595 F.3d 249 (5th Cir. 2010), abrogated by Wine
Country Gift Baskets.com v. Steen, 612 F.3d 809 (5th Cir. 2010); Wine Country Gift Baskets.com
v. Steen, 612 F.3d 809 (5th Cir. 2010), cert. denied, ___ U.S. ___, 131 S. Ct. 1602 (2011) (upholding
Texas law that prohibited out-of-state retailers from shipping wine directly to consumers but
allowing in-state retailers to do so); Lebamoff Enters., Inc. v. Snow, 757 F. Supp. 2d 811 (S.D. Ind.
2010) (upholding Indiana law prohibiting out-of-state wine dealers from using common carriers for
consumer deliveries; in-state wine dealers were allowed to use common carriers).
32. Id. at 493.
33. See, e.g., Siesta Vill. Mkt., 595 F.3d at 261; Wine Country Gift Baskets, 612 F.3d at 821;
Brooks v. Vassar, 462 F.3d 341, 352 (4th Cir. 2006).
the circuit court decisions undisturbed.\textsuperscript{34} Thus, if passed, House Bill 1641 could place Washington’s virtual wineries in economic and competitive jeopardy and might even hamper the growth and diversification of Washington’s wine industry as a whole.

California and Oregon provide virtual winery licensing models that Washington might follow. Under the California model, virtual wineries are licensed separately from traditional wineries as retailer-wholesalers.\textsuperscript{35} California’s approach gives virtual wineries limited access to consumers, relative to their traditional counterparts.\textsuperscript{36} Under the Oregon model, by contrast, virtual and traditional wineries are able to hold the same license.\textsuperscript{37} This model maximizes virtual wineries’ ability to ship directly to consumers in other states.\textsuperscript{38}

This Comment argues that the Washington Legislature should amend current RCW 66.24.170 based on Oregon’s winery licensing scheme, designating virtual wineries as “wineries” rather than retailer-wholesalers. Part I describes the current wine production industry in Washington. Part II discusses federal and Washington winery licensing laws and their various points of confusion. Part III examines Washington’s House Bill 1641 as a proposed solution. Part IV describes the connection between state winery licensing laws and the federal protectionism jurisprudence. Part V evaluates California and Oregon winery licensing laws as alternatives to Washington’s House Bill 1641. Finally, Part VI argues that Oregon’s law is the optimal model because it provides regulatory clarity and maximizes virtual wineries’ access to consumers.

I. WASHINGTON IS HOME TO A ROBUST AND GROWING WINE INDUSTRY COMPRISING BOTH TRADITIONAL AND VIRTUAL WINERIES

As the second-largest producer of wine in the nation after California, Washington boasts an economically significant and increasingly prestigious wine industry.\textsuperscript{39} Formerly regarded as a “cottage industry,” Washington wine now has an estimated economic impact of $3 billion

\begin{footnotesize}
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\item[35.] \textit{See infra} Part V.A.
\item[36.] \textit{See infra} Part V.A.
\item[37.] \textit{See infra} Part V.B.
\item[38.] \textit{See infra} Part V.B.
\item[39.] WASH. WINE COMM’N, \textit{supra} note 2; \textit{see also} Gordon, \textit{supra} note 10, at 1.
\end{itemize}
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statewide and $4.7 billion nationwide. Over the past four decades the industry has expanded and diversified at a rapid pace, growing from fewer than twenty wineries in the late 1970s to 762 licensed domestic wineries today. The industry also continues to gain in reputation, with Washington wines increasingly ranked among the finest in the world.

Washington’s wine industry comprises both traditional and non-traditional business models. The traditional business model, commonly referred to as a “bricks-and-mortar” winery, is one option available to aspiring vintners. Traditional vintners typically own and operate a complete, one-shop winery, including a vineyard and winemaking facility. Some purchase land and develop a brand-new winery, while others opt to acquire or lease an existing winery instead. Industry experts generally agree that the traditional business model requires significant start-up capital.

While the traditional model continues to exist in Washington, the industry has evolved over the years to encompass non-traditional business models as well. Only about thirty percent of Washington wine

40. WASH. WINE COMM’N, supra note 2; see also Gordon, supra note 10, at 1 (Washington’s wine industry “had been viewed as a ‘cottage’ industry by the other elite growing areas around the world,” but is now “being viewed as a major player and even a threat to market share”).
44. RICHARD MENDELSON, WINE IN AMERICA: LAW AND POLICY 149 (2011).
45. See id. at 149–50.
46. See id. at 150–56.
47. See id. at 161; THE BUSINESS OF WINE: AN ENCYCLOPEDIA, supra note 8, at 265 (“grand” brick-and-mortar wineries are “inevitably” built “with a fortune raised in some other field of endeavor, such as banking or technology”).
grapes crushed in 2010 were estate-grown;\(^{49}\) the remainder consisted of grapes either purchased from or crushed for another winery.\(^{50}\) Purchasing grapes and contracting with crushing facilities in order to make wine are hallmark practices of the non-traditional, or virtual, wine business model.\(^{51}\)

In general terms, a virtual winery can be defined as a wine brand without its own physical winery.\(^{52}\) A typical virtual winery purchases grapes from a grower and then contracts with a traditional winery or special custom crush facility\(^{53}\) to access crushing and bottling equipment or services.\(^{54}\) Virtual wineries generally produce at least one commercially distributed brand, have their own management and winemaker, and control all of the winemaking decisions.\(^{55}\)

The control that virtual winemakers exercise over the wine crafting process distinguishes them from négociants, another non-traditional player in the wine business.\(^{56}\) As opposed to virtual winemakers, négociants generally do not participate in any phase of wine crafting; rather, they purchase bulk finished wine to bottle and sell under their own brand name.\(^{57}\) Accordingly, some virtual wineries prefer to be called “micro-vintners” or “micro-wineries” in order to distance themselves from négociants, who exercise little to no control over winemaking.\(^{58}\)

One significant reason why winemakers entering the industry choose

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50. *GRAPE RELEASE*, supra note 43.

51. See *THE BUSINESS OF WINE: AN ENCYCLOPEDIA*, supra note 8, at 253.

52. See id. at 253; see also Fisher, supra note 43.


54. See *THE BUSINESS OF WINE: AN ENCYCLOPEDIA*, supra note 8, at 265.

55. See id.; see also Fisher, supra note 43; Mary-Colleen Tinney, *Number of U.S. Wineries Tops 6,000*, WINE BUS. MONTHLY (Feb. 15, 2008), http://www.winebusiness.com/wbm/?go=getArticle&dataId=54414.

56. See *THE BUSINESS OF WINE: AN ENCYCLOPEDIA*, supra note 8, at 253 (Négociants are “opportunistic buyers and have no control over their raw material.”).

57. MENDELSON, supra note 44, at 164–65.

58. See *THE BUSINESS OF WINE: AN ENCYCLOPEDIA*, supra note 8, at 265.
the virtual winery business model over the traditional model is reduced capital requirements. Virtual wineries are often (but not always) small boutique operations run by winemakers “scrambling to make ends meet.” Avoiding the cost of building, acquiring, or maintaining a physical winery thus permits virtual winemakers to enter the industry at a relatively low cost, crafting quality wines that can then be marketed and sold through e-commerce and direct shipment.

As of 2007, Wine Business Monthly reported that forty virtual wineries existed in Washington. However, this figure is dated and may not be exact; industry experts remark that virtual wineries are difficult to track, partly because they are not subject to the same federal permitting and reporting requirements as traditional wineries, and partly because they frequently transition to a traditional model once they have grown enough to afford the investment. Overall, however, the number of virtual wineries tends to increase with the number of traditional wineries.

II. ALL WASHINGTON WINERIES ARE SUBJECT TO FEDERAL AND STATE LICENSING LAWS

Whether virtual or traditional, all Washington wineries must comply with applicable federal and state regulations. The federal agency responsible for regulating the wine industry is the Alcohol and Tobacco Tax and Trade Bureau (TTB). The equivalent state agency is the Washington State Liquor Control Board (WSLCB). Unlike the WSLCB, the TTB offers permits corresponding to various models of

59. See id. at 253.
61. See THE BUSINESS OF WINE: AN ENCYCLOPEDIA, supra note 8, at 253.
62. See Tinney, supra note 55. It should be noted that the author did not disclose the criteria used in classifying wineries as “virtual” or “bonded.”
63. See id.; see also THE BUSINESS OF WINE: AN ENCYCLOPEDIA, supra note 8, at 253 (Reported numbers of virtual wineries “fluctuate as players enter and exit the market.”).
64. See THE BUSINESS OF WINE: AN ENCYCLOPEDIA, supra note 8, at 253.
65. MENDELSON, supra note 44, at 149.
67. WASH. REV. CODE §§ 66.08.012, .030 (2010); About Us, WASH. STATE LIQUOR CONTROL Bd., http://www.liq.wa.gov/about/main (last visited Nov. 11, 2011) (The WSLCB was formed in 1933 under the Steel Act to “regulate the importation, manufacture, distribution, and sale of alcohol”).
wine production.68

A. The TTB Offers Several Permit Options for Participating in the Wine Industry

The TTB is charged with regulating the production and sale of alcohol under the Internal Revenue Code,69 the Webb-Kenyon Act,70 the Federal Alcohol Administration Act,71 and the Alcoholic Beverage Labeling Act.72 The TTB’s stated mission is to “collect[] Federal excise taxes on alcohol, tobacco, firearms, and ammunition” and to “assur[e] compliance with Federal tobacco permitting and alcohol permitting, labeling, and marketing requirements to protect consumers.”73

To this end, TTB regulations require anyone seeking to produce, blend, rectify, warehouse, or bottle wine in the United States for commercial purposes to first obtain a basic permit.74 In order to qualify for a basic permit, applicants must simply be “likely to commence operations as a distiller, warehouseman and bottler, rectifier, wine producer, wine blender, importer, or wholesaler.”75 Before commencing such operations, applicants must file a bond with the Secretary of the Treasury in an amount “necessary to protect the revenue” in the event that the licensee fails to pay his or her taxes.76

The TTB basic permit is available to both traditional and non-traditional wineries.77 Variations on the basic permit include: bonded wineries, bonded wine cellars, alternating proprietorships, and wholesalers.78 Bonded winery and bonded wine cellar permits generally

68. See infra Part II.A.
71. Id. §§ 201–08, 211.
72. Id. §§ 213–19(a).
74. 27 C.F.R. § 1.21 (2012). However, adult persons who wish to produce wine solely for personal use need not apply for a TTB permit. Id. § 24.75(a). TTB regulations allow any adult to produce up to one hundred gallons of wine per year for individual consumption, or up to two hundred gallons per year for consumption by two or more adults within the same household. Id. § 24.75(b).
75. Id. § 1.24. Applicants must also not have been convicted of any felony under federal or state law in the past five years, or any federal misdemeanor relating to alcohol in the past three years. The proposed activity must not be in violation of state law. Id.
77. See infra Part II.A.1.
78. See infra Parts II.A.1, 2.
correspond to traditional wineries, whereas alternating proprietorship and wholesaler permits correspond to virtual and other non-traditional wineries.79

1. The TTB Offers Permits for Bonded Wineries and Bonded Wine Cellars

Persons seeking to produce or blend untaxpaid wine80 must apply for a basic permit.81 Holders of basic permits may be designated as bonded wineries if they engage in “production operations,” “production of wine,” or “production processes involving the use of wine” on the permitted premises.82 Otherwise, they are designated as bonded wine cellars.83 However, the precise distinction between a bonded winery and a bonded wine cellar is unclear because neither the federal alcohol statutes nor TTB regulations define production operations, production of wine, or production processes involving the use of wine.

For its regulatory purposes, the Internal Revenue Code defines “own production” with respect to wine in a bonded wine cellar as wine “produced by fermentation in the same bonded wine cellar.”84 By contrast, TTB regulations pertaining to wine labeling define the term “produced” as indicating that one of three activities occurred at the address listed on a wine label: (1) fermentation of at least seventy-five percent of the labeled wine, (2) fortification or amelioration of the labeled wine, or (3) a process to make the labeled wine sparkling.85 Similarly, TTB regulations pertaining to tax credits available to small wineries define “production” as including not only fermentation but also amelioration, wine spirits addition, sweetening, and formula processing.86 As a result of these contrasting definitions of wine production, some members of Washington’s wine industry disagree over what exactly is required to qualify as a bonded winery under the federal permitting scheme.87

79. See infra Parts II.A.1, 2.
80. As opposed to “taxpaid wine,” which is wine “on which the tax imposed by law has been determined.” 27 C.F.R. § 24.10 (2012).
83. See supra note 82.
85. 27 C.F.R. § 4.35 (2012).
86. Id. § 24.278.
87. Compare Hearing on H.B. 1641, supra note 48 (statement of Jean Leonard that federal law requires bonded wineries to produce wine by fermentation on the permitted premises), and GRAPE
2. The TTB Also Offers Permits for Alternating Proprietorships and Custom Crushing

Holders of TTB basic permits to blend and/or produce wine also have the option of operating as alternating proprietors. Alternating proprietors are individual winemakers who own independent space within a single host winery. 88 Like a sole proprietor of a bonded wine cellar or bonded winery, each alternating proprietor is required to obtain a basic permit and file a bond with the Secretary of the Treasury. 89 Each alternating proprietor is responsible for keeping his or her own records for tax reporting purposes. 90 In essence, alternating proprietors are wineries within a winery. Each alternating proprietor has designated space within the host winery, and the alternating proprietor(s) and host winery share use of the various winemaking equipment. 91

In addition to allowing for the non-traditional production of wine through an alternating proprietorship, the TTB also offers a custom crush permit in the form of a federal wholesaler’s basic permit. 92 This permit allows holders to purchase wine at wholesale and resell it, either directly to consumers or through a distributor. 93 According to the TTB, the custom crush permit is designed for companies that own grapes or other winemaking materials and wish to have them made into wine by a host traditional winery or custom crush facility. 94

As discussed above, custom crushing (buying grapes and hiring the services of a crushing and/or bottling facility) is a signature practice of virtual wineries. 95 In a typical custom crush arrangement, the host traditional winery or custom crush facility holds a TTB bonded winery basic permit whereas the custom crush client (e.g., the virtual winemaker) holds a custom crush basic permit allowing for wholesale of

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88. MENDELSOHN, supra note 44, at 165 (“The alternating proprietorship model is conceptually similar to a residential condominium development consisting of commonly owned areas for the enjoyment of all condominium owners as well as separate, independently owned living spaces.”).
90. Id.
91. See MENDELSOHN, supra note 44, at 165.
92. 27 C.F.R. § 1.22 (2012).
93. Id.
95. See THE BUSINESS OF WINE: AN ENCYCLOPEDIA, supra note 8, at 253–54.
the finished wine under the client’s brand name. While the average consumer may be unable to differentiate custom crushed wine from traditionally produced wine, one way to identify a custom-crushed wine is by its label—the TTB will not permit custom crush clients to use the term “winery” as part of their brand name. Accordingly, custom crush clients may describe themselves as a “cellar” instead of a “winery.”

B. The WSLCB Currently Offers a Single Domestic Winery License

The WSLCB, created in 1933 by the Steele Act, is charged with regulating the “importation, manufacture, distribution, and sale of alcohol.” The WSLCB issues liquor licenses, including the domestic winery license under section 66.24.170 of the RCW, and is responsible for regulating the alcoholic beverages industry. The WSLCB’s mission is to “[c]ontribute to the safety and financial stability of our communities by ensuring the responsible sale, and preventing the misuse of, alcohol and tobacco.”

Unlike the TTB, which offers numerous permit options for entering the wine industry, the WSLCB offers only one domestic winery license. Currently, a domestic winery license costs $100 if the winery produces less than 250,000 liters per year, and $400 if the winery produces more than 250,000 liters per year. As described by the WSLCB, the domestic winery license under RCW section 66.24.170 allows for the “manufacture [of] wine in Washington State from grapes or other agricultural products.” Holders of a domestic winery license are also permitted to act as distributor and retailer of wine “of their own

96. See MENDELSON, supra note 44, at 161–62 (“In the custom crush model . . . the host winery will adopt the client’s trade name by adding it to the host winery’s federal basic permit.”); ALCOHOL & TOBACCO TAX & TRADE BUREAU, supra note 94; 27 C.F.R. § 4.35 (2012).
97. See 27 C.F.R. §§ 4.33, .35; MENDELSON, supra note 44, at 162.
98. MENDELSON, supra note 44, at 162.
99. WASH. STATE LIQUOR CONTROL BD., supra note 67.
100. Id.; see also WASH. REV. CODE § 66.08.030 (2010) (listing each of the Board’s regulatory powers).
101. WASH. STATE LIQUOR CONTROL BD., supra note 67.
105. Id.
production.”106 Finally, licensed domestic wineries are permitted to operate two tasting rooms separate from their production or manufacturing sites at no additional charge.107

Section 66.04.010(16) of the RCW defines a “domestic winery” as “a place where wines are manufactured or produced within the state of Washington.”108 Yet section 66.24.170(2) states only that the domestic winery license “allows for the manufacture of wine in Washington.”109 Significantly, no provision of Title 66 of the RCW defines “produced,” “production,” or “manufactured” for purposes of winemaking or obtaining a domestic winery license.110 Section 66.04.010(27) does define “manufacturer” as “a person engaged in the preparation of liquor for sale, in any form whatsoever,”111 yet the statute contains no definition of preparation.112

In response to confusion regarding the exact definition of a winery in Washington, WSLCB deputy director Rick Garza recently stated that in order to hold a domestic winery license a company must either “crush, age, bottle, or blend wine at its facility.”113 Thus, in Garza’s opinion wineries with a single barrel of aging wine on the licensed premises are “not meeting the requirements of what an in-state winery needs to do to [maintain] that license.”114

According to Jean Leonard, director of the Washington Wine Institute, the requirements for holding a domestic winery license are far from clear—in reality, wineries “don’t know” and law enforcement officials “are confused” about how licensing rules apply to virtual wineries, which creates a risk of “uneven enforcement.”115 Furthermore, according to Leonard, Washington wineries that do not actually produce wine by fermentation on the licensed premises run afoul of the requirements of a federal basic bonded winery permit.116

106. WASH. REV. CODE § 66.24.170(3).
107. Id. § 66.24.170(4); see also WASH. STATE LIQUOR CONTROL BD., supra note 104, at 2.
109. Id. § 66.24.170(2).
110. See id. § 66.04.010(1)–(49).
111. See id. § 66.04.010(27) (emphasis added).
112. See id.
114. Id.
115. Mitham, supra note 22.
In light of this statutory ambiguity and resulting confusion, the WSLCB enlisted the aid of the Washington Wine Institute in crafting legislation that would both clarify Washington domestic winery license requirements and bring all Washington wineries into compliance with federal law.117

III.  HOUSE BILL 1641 PROPOSES TO AMEND WASHINGTON’S WINERY LICENSING LAWS TO LICENSE VIRTUAL WINERIES AS RETAILER-WHOLESALERS

Following discussions between the WSLCB and wine industry stakeholders, Representatives Samuel Hunt, David Taylor, and Eric Pettigrew introduced House Bill 1641 in the January 2011 legislative session. House Bill 1641 seeks to amend various provisions of RCW Title 66 pertaining to the domestic winery license.118

First, the bill would amend RCW sections 66.04.010(16) and (27) to define a “domestic winery” as “a premises licensed under RCW 66.24.170” and a “manufacturer” as “a person engaged in the production or other preparation of liquor.”119 Second, the bill would add a new section to RCW 66.04.010 defining “production” with respect to wine as “the creation of wine by fermentation in or on the premises licensed under RCW 66.04.010.”120 House Bill 1641 would thus clearly associate wine production with fermentation as opposed to other winemaking processes like crushing and blending.

In addition to its proposed definitional changes, House Bill 1641 seeks to divide the current domestic winery license into Class A and Class B categories.121 Crucially, the Class A license would allow for production, not manufacture, of wine.122 Because House Bill 1641 defines wine production as fermentation, all Class A licensees by definition would be required to produce wine on their premises by fermentation.123 In addition, there would be a 200-gallon per year minimum production requirement, and wine purchased from another Class A winery could not count toward this total.124 Class A licensees

117. Id.
119. Id. § 1.
120. Id.
121. Id. § 2.
122. Id. § 2(2).
123. Id.
124. Id.
would be allowed to use common carriers to deliver up to one hundred cases of wine per month directly to licensed Washington retailers. They would also be able to sell their wine directly to consumers at qualifying farmers’ markets. The Class A license would be unavailable to virtual wineries because they lack physical premises to manufacture wine in or on. It would also be unavailable to wineries that principally blend wine rather than produce it by fermentation.

Unlike the Class A license, the Class B license would not allow for production of wine. Rather, it would allow for the purchase and resale of wine produced from grapes or other agricultural products by Class A licensees or by approved out-of-state producers. While Class B licensees would be able to sell wine produced for or purchased by them at retail, they would not be permitted to use common carriers for deliveries or to sell their wine at farmers’ markets. Should House Bill 1641 pass, a significant percentage of current wineries (estimated at thirty percent or more) would be required to transfer to the Class B license.

House Bill 1641 was assigned to the State Government & Tribal Affairs Committee on January 27, 2011. On five occasions the bill was reintroduced and retained in its present status. A public hearing was held on January 25, 2012, in which wine industry stakeholders made statements both for and against the bill. As of this writing, House Bill 1641 remains in committee.

125. Id.
126. Id. § 4(1).
127. See THE BUSINESS OF WINE: AN ENCYCLOPEDIA, supra note 8, at 253 ("[A] virtual winery is a brand without a winery.").
128. See H.B. 1641, § 2(2). This is because House Bill 1641 requires wineries to produce an average of 200 gallons of wine per year by fermentation, and wine purchased from another Class A winery could not count toward this total. Id.
129. Id. § 2(3)(a)(ii).
130. Id. § 2(3).
131. See id. §§ 2(3), 4(1).
132. STATE GOV’T & TRIBAL AFFAIRS COMM., supra note 28.
133. Id.
134. Id.
135. Id.
136. See id.
A. Original House Bill 1641 Prompted Opposition from Family Wineries of Washington State

In its original form, House Bill 1641 prompted considerable opposition from Family Wineries of Washington State (FWWS), an industry advocacy organization concerned with clarifying and protecting the rights of Washington’s small wineries. Among FWWS’s chief objections to House Bill 1641 are its provisions creating two classes of wineries, setting a minimum annual output requirement, and defining wine production to necessarily include fermentation.

According to FWWS, there is no basis in federal law for these new provisions, despite proponents’ stated goal of bringing Washington wineries into compliance with such law. Overall, FWWS fears that House Bill 1641 would result in harm to Washington’s “tiny artisan wineries” by forcing them to either spend more money in order to produce enough wine by fermentation to qualify for a Class A license, or switch to the Class B license and find themselves at a competitive disadvantage as “second class wineries.”

While FWWS does not object to creating a new license recognizing the rights of “non-manufacturing wholesalers” (i.e., virtual wineries), it does oppose the imposition of fermentation requirements on small wineries that “choose to manufacture wine by blending or other methods allowed by federal law.” To this end, FWWS suggests removing all instances of the words “produced” and “production” in House Bill 1641 pertaining to the Class A license and replacing them with “manufactured” or “manufacture.” Because the term manufacture is broader than production—it encompasses methods of winemaking other than fermentation—FWWS’s proposed changes would expand the definition of a Class A winery to allow wineries that make wine by


138. See FWWS OPPOSES, supra note 137.


140. See id. FWWS points out that Class B licensees would not have the right to ship via common carriers, would not be allowed to operate off-premises tasting rooms, or sell wine at farmers’ markets. Id.

141. Id.

142. Id.
blending rather than fermentation to qualify for the Class A license.143

B. Representative Hunt’s Proposed Substitute House Bill 1641
Retains Key Features of Original House Bill 1641 and Has
Prompted Similar Opposition from FWWS

While House Bill 1641 was in committee, Representative Samuel
Hunt proposed Substitute House Bill 1641.144 Hunt’s substitute bill
retains many of the original bill’s key features.145 It requires a 200-
gallon annual production minimum, though compliance would be
calculated on the basis of a three-year average as opposed to a single
year’s output.146 Hunt’s substitute bill also retains the original bill’s
definition of production as fermentation of wine “in or on” the licensed
premises.147

However, Hunt’s substitute bill differs from the original version of
House Bill 1641 in its approach to the new winemaking license
category.148 Whereas the original bill would divide the current domestic
winery license into two sub-categories,149 Hunt’s substitute bill would
retain the current single domestic winery license and create a new,
entirely separate license for “nonproducing wine sellers.”150 Holders of
the “nonproducer” license would be required to qualify as manufacturers
of wine under section 66.04.010(27) of the RCW.151

Like the proposed Class B winery license, the proposed nonproducer
license would allow for the purchase of wine for resale, but not for the
production of wine.152 Also like the proposed Class B winery license,
holders of the proposed nonproducer license would not be permitted to
use common carriers for deliveries or to sell wine at farmers’ markets.153
Unlike original House Bill 1641, Hunt’s proposed substitute bill identifies specific activities, in addition to resale, that would be permitted under the nonproducer license. These include blending or bottling wine purchased in bulk, serving samples of wine at the licensed premises, and donating wine to nonprofit organizations.\textsuperscript{154} The substitute bill also specifies that the nonproducer license could be converted to a domestic winery license upon a finding by the WSLCB that “the licensee is capable of satisfying all of the requirements necessary for the issuance of such domestic winery license.”\textsuperscript{155}

FWWS voiced opposition to Hunt’s proposed Substitute House Bill 1641 on the same grounds that it objected to the original bill.\textsuperscript{156} Specifically, FWWS opposes Substitute House Bill 1641’s minimum annual production requirement and definition of wine production as fermentation only.\textsuperscript{157} FWWS believes that these two provisions combined will force many small wineries that create wine by blending rather than by fermentation (i.e., by manufacturing not production) to switch to the nonproducers license, which will not carry the same privileges as the domestic winery license.\textsuperscript{158} For instance, wineries licensed as nonproducers would lose their ability to ferment, to sell wine at farmers’ markets, and to use common carriers for deliveries.\textsuperscript{159}

C. Representative Condotta’s Proposed Substitute House Bill 1641 Addresses FWWS’s Primary Concerns but Would Still License Virtual Wineries as Retailers

In response to Representative Hunt’s substitute bill, Representative Cary Condotta presented his own Substitute House Bill 1641.\textsuperscript{160} Unlike the first two versions of House Bill 1641, Condotta’s substitute bill would address FWWS’s primary concerns.\textsuperscript{161} Essentially, Condotta’s substitute bill would preserve the current domestic winery license by eliminating the new definition of “production,” using the term “manufacture” in place of “produce” in sections pertaining to the domestic winery license, and abolishing the minimum annual output output

\textsuperscript{154.} Id.
\textsuperscript{155.} Id. § 5(4).
\textsuperscript{156.} See Letter from Bd., Family Wineries of Wash. State, \textit{supra} note 139.
\textsuperscript{157.} See id.
\textsuperscript{158.} Id.
\textsuperscript{159.} Id.
\textsuperscript{161.} \textit{See id.; see also} Letter from Bd., Family Wineries of Wash. State, \textit{supra} note 139.
requirement for domestic wineries. Thus, under Condotta’s bill, domestic wineries would not be required to produce any quantity of wine by fermentation and would continue to be able to manufacture wine by methods like blending. By striking the new definition of “production” and removing all instances of the term in provisions relating to the domestic winery license, Condotta’s bill clarifies that winery licensees may produce by fermentation or by other methods included within the broader term of “manufacture” and rejects House Bill 1641’s emphasis on production by fermentation as a hard-and-fast requirement of winery licensees.

Condotta’s substitute bill mirrors Hunt’s by creating a new license category separate from the domestic winery license, as opposed to a sub-category of the domestic winery license as in the original version. However, Condotta’s bill would rename the nonproducer license a négociant license. As discussed previously, a négociant generally purchases finished wine in bulk for resale under the négociant’s brand name. Unlike virtual winemakers, négociants typically do not control the winemaking process.

Holders of Condotta’s négociant license would be permitted to engage in the same activities as holders of Hunt’s proposed nonproducer license, namely to purchase wine for resale, serve samples at the licensed premises, and donate wine to non-profit organizations. However, Condotta’s négociant license differs from the original bill’s Class B license and Hunt’s nonproducer license in that holders would not be barred from producing wine.

IV. STATE WINERY LICENSING DECISIONS DIRECTLY IMPACT WINERIES’ ACCESS TO CONSUMERS VIA INTERSTATE DIRECT SHIPPING

The impact of state winery licensing laws extends beyond local policy

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163. See id.
164. Id. at 3–4.
165. Id.
166. THE BUSINESS OF WINE: AN ENCYCLOPEDIA, supra note 8, at 253 (“Négociants . . . are opportunistic buyers and have no control over their raw material.”); MENDELSON, supra note 44, at 164–65.
167. THE BUSINESS OF WINE: AN ENCYCLOPEDIA, supra note 8, at 253.
169. Id. at § 3–4. Condotta’s Substitute House Bill 1641 retains the original bill’s definition of “production” as “fermentation.” H. 62-334 § 2.
into the realm of interstate commerce. This is because many states allow operations licensed as wineries to ship wine directly to in-state consumers but prohibit operations licensed as wholesalers or retailers from doing so. This distinction in treatment of wineries versus wine retailers or wholesalers for purposes of interstate direct shipping has thus far survived constitutional challenge in federal courts.

A. Wineries Licensed as Producers Enjoy Commerce Clause Protection Under Granholm v. Heald

In Granholm v. Heald, a group of small wineries and wine consumers challenged New York and Michigan laws permitting in-state wineries to ship wine directly to consumers but prohibiting out-of-state wineries from doing the same. Under the challenged Michigan laws, both in-state and out-of-state producers of alcoholic beverages were permitted to distribute only through licensed in-state wholesalers, part of Michigan’s three-tier system. An exception to this requirement allowed in-state wineries to apply for a winemaker license that permitted “direct shipment to in-state consumers.” Out-of-state wineries, by contrast, could only sell wine to in-state wholesalers. The challenged New York laws similarly exempted in-state wineries from New York’s

170. See MENDELSON, supra note 44, at 163 n.58.
171. Id. (citing TEX. ALCO. BEV. CODE ANN. §§ 54.01, .03 (West 2010) as an example) (requiring holders of out-of-state winery direct shipment permits to hold state and federal licenses allowing for “winery” operation).
175. See 544 U.S. at 465–66.
176. Id. at 469 (citing MICH. COMP. LAWS ANN. §§ 436.1109(1), .1305, .1403, .1607(1) (West 2000); MICH. ADMIN. CODE r. 436.1705 (1990), 436.1719 (2000)). A three-tier system generally involves “separate and distinct manufacturers, wholesalers, and retailers, with alcoholic beverages passing from one level to the next and ultimately to the consumer.” MENDELSON, supra note 44, at 29.
177. Granholm, 544 U.S. at 469 (citing MICH. COMP. LAWS ANN. § 436.1113(9) (West 2001), § 436.1537(2)–(3) (West Supp. 2004); MICH. ADMIN. CODE r. 436.1011(7)(b) (2003)).
178. Id. (citing MICH. COMP. LAWS ANN. § 436.1109(9) (West 2001), § 436.1525(1)(e) (West Supp. 2004); MICH. ADMIN. CODE r. 436.1719(5) (2000)).
three-tier system, allowing them to make direct sales to consumers rather than to licensed wholesalers.\(^{179}\) Out-of-state wineries were only permitted to ship directly to New York consumers if they established a physical presence in New York.\(^{180}\)

The three-tier system of alcohol distribution discussed in \textit{Granholm} is designed to ease state regulation of liquor sales and to protect state tax revenues.\(^{181}\) The three tiers generally correspond to manufacturers, wholesalers, and retailers.\(^{182}\) In states utilizing the three-tier system, all alcoholic beverages must pass through all three tiers before ultimately reaching the consumer.\(^{183}\) However, like Michigan and New York, some states made exceptions to the three-tier system requirements for in-state wineries (e.g., allowing them to sell wine directly to retailers) while subjecting out-of-state wineries to the burdensome three-tier process.\(^{184}\) \textit{Granholm} addressed the constitutionality of this disparate treatment. The Court held that the challenged New York and Michigan laws impermissibly discriminated against “interstate commerce in violation of the Commerce Clause.”\(^{185}\)

The Court reasoned that while the Twenty-First Amendment grants states the power to regulate liquor, it does not allow them to “ban, or severely limit, the direct shipment of out-of-state wine while simultaneously authorizing direct shipment by in-state producers.”\(^{186}\) Rather, the Court held, “if a State chooses to allow direct shipment of wine, it must do so on even-handed terms.”\(^{187}\)

Michigan and New York argued that “any decision invalidating their direct-shipment laws would call into question the constitutionality of the three-tier system.”\(^{188}\)

In response to the states’ argument, the Court reasoned that although it had previously endorsed the three-tier system as an “unquestionably legitimate” exercise of states’ Twenty-First Amendment powers, the

\(^{179}\) Id. at 470 (citing N.Y. ALCO. BEV. CONT. LAW § 76-a(3) (McKinney 2005)).

\(^{180}\) Id. (citing N.Y. ALCO. BEV. CONT. LAW § 3(37) (McKinney 2005)).

\(^{181}\) See \textit{RICHARD MENDELSON, FROM DEMON TO DARLING: A LEGAL HISTORY OF WINE IN AMERICA} 117 (2009) (“These requirements are designed to ensure market accountability and payment of taxes, minimize diversion, and insulate the in-state retailer from the out-of-state producer.”).

\(^{182}\) See id. at 116.

\(^{183}\) Id.

\(^{184}\) Id.

\(^{185}\) \textit{Granholm}, 544 U.S. at 466.

\(^{186}\) Id. at 493.

\(^{187}\) Id.

\(^{188}\) Id. at 488.
Amendment does not protect state policies that treat liquor produced in-state differently from liquor produced out-of-state through exceptions to the three-tier system rules. Thus, if Michigan and New York wished to allow their in-state wineries to bypass the three-tier system and sell directly to consumers, they would have to extend that privilege to out-of-state wineries as well.

In the years following Granholm, many states accordingly took an “all or nothing” approach—either allowing direct shipment of wine from both in-state and out-of-state wineries, or prohibiting direct shipment altogether. Currently, twelve states prohibit direct shipment entirely while the rest permit direct shipment generally or with certain restrictions (e.g., a reciprocity requirement between the sending and receiving state).

B. The Circuit Courts Have Refused to Extend Granholm to Licensed Wine Retailers and Wholesalers

After Granholm, wine retailers mounted Commerce Clause challenges to state laws impeding interstate direct sales and shipment of wine. In Brooks v. Vassar, decided one year after Granholm, Virginia wine consumers and out-of-state wine retailers challenged provisions of Virginia’s Alcoholic Beverage Control Act, which limited the amount of alcohol consumers could carry into the state for personal use. The plaintiff wine consumers and retailers argued that the Act’s “Personal Import Exception” violated the Commerce Clause by discriminating against out-of-state wine retailers in favor of in-state retailers. Specifically, the plaintiffs argued that the Personal Import Exception discriminated against interstate commerce because it limited the amount of wine Virginia consumers could import from out-of-state wine retailers while permitting unlimited purchases of wine from

189. Id. at 489 (citing North Dakota v. United States, 495 U.S. 432, 432 (1990)).
190. Id.
193. MENDELSON, supra note 181, at 116.
194. 462 F.3d 341 (4th Cir. 2006).
196. Brooks, 462 F.3d at 349. The provisions challenged generally provided for a “Personal Import Exception” to the rule that all alcohol imported into the state pass through the three-tier system. Id. at 346.
197. Id. at 344–45.
Virginia retailers.  

The Fourth Circuit reasoned that the plaintiffs’ comparison of out-of-state versus in-state retailers’ ability to sell wine to consumers in Virginia amounted to a challenge of “the three-tier system itself,” which allows states to control alcohol sales within their borders, and which the Supreme Court upheld as “unquestionably legitimate” in Granholm.  

Like many states, Virginia had amended its alcohol laws after Granholm to limit direct sales of wine to in-state licensed retailers only. According to the Brooks court’s reasoning, because all wine (both domestic and out-of-state) had to pass through Virginia’s three-tier system (except for limited amounts brought in under the Personal Import Exception), the State had abided by Granholm’s requirement of regulating in-state and out-of-state wine even-handedly. Thus, the court upheld Virginia’s Personal Import Exception as a valid exercise of the State’s Twenty-First Amendment power.

In Siesta Village Market LLC v. Steen and Wine Country Gift Baskets.com v. Steen, both decided in 2010, the Fifth Circuit similarly declined to extend the holding in Granholm to wine retailers. In both cases, out-of-state wine retailers challenged various provisions of the Texas Alcoholic Beverage Code as unconstitutional under the Commerce Clause on the ground that they only permitted retailers with a physical presence in the state to ship wine directly to consumers.

The court in Wine Country Gift Baskets reasoned that because Granholm only “prohibited discrimination against out-of-state products

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198. Id. at 350.

199. Id. at 352 (reasoning that “an argument that compares the status of an in-state retailer with an out-of-state retailer—or that compares the status of any other in-state entity under the three-tier system with its out-of-state counterpart—is nothing different than an argument challenging the three-tier system itself”).

200. Id. at 350.

201. See id. at 352 (noting that the plaintiffs’ argument was foreclosed by the Twenty-First Amendment because “[a]s the ABC Act now stands, all out-of-state suppliers of wine are required by Virginia to sell in Virginia through the three-tier system . . . the Personal Import Exception does not favor in-state wineries”) (emphasis in original).

202. Id. at 355.

203. 595 F.3d 249 (5th Cir. 2010), abrogated by Wine Country Gift Baskets.com v. Steen, 612 F.3d 809 (5th Cir. 2010).

204. 612 F.3d 809 (5th Cir. 2010), cert. denied, ___ U.S. ___, 131 S. Ct. 1602 (2011).

205. See generally Siesta Vill. Mkt., 595 F.3d 249; Wine Country Gift Baskets, 612 F.3d 809.

206. The challenged provisions were TEX. ALCO. BEV. CODE §§ 6.01, 11.01, 22.01, 22.03, 24.01, 24.03, 37.01, 37.03, 41.01, 43.04, 54.12, 107.05(a), 107.07(a), (f) (2007). Siesta Vill. Mkt., 595 F.3d at 261; Wine Country Gift Baskets, 612 F.3d at 821.

or producers,"208 Texas had not violated Granholm’s holding by allowing in-state retailers to make deliveries but prohibiting out-of-state retailers from doing the same.209 Moreover, the courts concluded, because out-of-state retailers are “not similarly situated” to Texas retailers, they “cannot make a logical argument of discrimination.”210 Specifically, as opposed to wine producers, wholesalers and retailers may legitimately be required under state law to maintain an in-state presence.211 Thus, the court concluded that “because of Granholm and its approval of three-tier systems . . . Texas may authorize its in-state, permit-holding retailers to make sales and may prohibit out-of-state retailers from doing the same.”212

The holdings in the wine retailer cases demonstrate that courts distinguish between winery-to-consumer transactions and retailer-to-consumer transactions for Commerce Clause purposes because they view the latter as a normal part of state three-tiered distribution systems.213 This is significant because the Supreme Court in Granholm endorsed three-tiered distribution systems as “unquestionably legitimate.”214 Finally, in March 2011, the Supreme Court denied certiorari on Wine Country Gift Baskets, leaving the Fifth Circuit’s decisions undisturbed.215 Given these developments in federal case law, wineries licensed as retailers or wholesalers are more vulnerable to protectionist wine sales and shipping laws than those licensed as producers.216 Virtual wineries, in particular, face reduced access to out-of-state consumers via e-commerce.

V. OREGON AND CALIFORNIA PROVIDE ALTERNATIVE LICENSING MODELS FOR VIRTUAL WINERIES

Both Oregon and California offer licensing options for virtual wineries. While California licenses virtual wineries separately from traditional wineries, Oregon accords the same license to both types of

208. Wine Country Gift Baskets, 612 F.3d at 820 (emphasis added).
209. Id.
210. Id.
211. Id.
212. Id. at 819.
213. MENDELSON, supra note 181, at 185–86.
214. Granholm v. Heald, 544 U.S. 460, 466 (2005); see also MENDELSON, supra note 181, at 185–86.
216. See MENDELSON, supra note 44, at 163.
wineries. The winery licensing laws of Oregon and California provide alternative models to those schemes currently proposed in the various versions of HB 1641.

A. California Licenses Virtual Wineries Separately as Retailer-Wholesalers

California is the nation’s number one wine producing state. Like Washington, California is home to both traditional and virtual wineries. As of February 2012, virtual wineries accounted for roughly twenty-three percent of California’s total wineries.

California’s Constitution and the Alcoholic Beverage Control Act (ABC Act) vest the Department of Alcoholic Beverage Control (ABC) with authority to license winery operations. Under the ABC Act, traditional wineries must apply for a Type 02 winegrower’s license. The Type 02 winegrower’s license allows holders to manufacture or produce wine. It also allows holders to conduct tastings on the licensed premises, sell wine to any licensed wine seller, sell wine to consumers for on- or off-premises consumption, and sell wine for exportation. In order to qualify for a Type 02 winegrower’s license, applicants must own “facilities and equipment for the conversion of fruit into wine.” Applicants must also hold a federal basic bonded winery permit “to produce and blend wine.”

In addition to the Type 02 winegrower’s license, the ABC also offers a Type 22 wine blender’s license. This license is intended for persons who hold federal basic bonded wine cellar permits but lack facilities or equipment for the conversion of fruit into wine and do not engage in the

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217. See infra Parts V.A, B.
220. Id.
221. CAL. CONST. art. XX, § 22; CAL BUS. & PROF. CODE § 23300 (West 2009).
222. CAL. BUS. & PROF. CODE § 23356 (West 2009).
223. Id. California’s ABC Act does not define “produce” or “manufacture” for purposes of qualifying for a Type 02 winegrower’s license. Id. §§ 23000–47.
224. Id. §§ 23356.1, 23356, 23358.
225. Id. § 23013.
226. Id. § 23770.
227. Id. § 23013.5.
production of wine.\textsuperscript{228} Licensed wine blenders have the same privileges as licensed winegrowers, except that wine blenders may not crush and ferment fruit to produce wine; hold a duplicate license as a winegrower; buy, sell, receive, or deliver wine from persons other than authorized licensees; or sell and deliver wine to consumers for off-premises consumption.\textsuperscript{229}

Finally, California virtual wineries that custom crush at a host winery may apply for a combination Type 17 beer and wine wholesaler’s license and a Type 20 off-sale beer and wine license (known as a 17/20 license). The Type 17 license does not allow for production of wine, but allows for the sale of wine to other licensees for resale.\textsuperscript{230} It also allows for bottling, labeling, and exportation of wine.\textsuperscript{231} The Type 20 license authorizes the sale of wine to consumers for off-premises consumption.\textsuperscript{232} Holders of the 17/20-combination license are not allowed to conduct wine tastings, and have limited access to consumers in other states compared to licensed winegrowers.\textsuperscript{233}

The ABC recently created a new license option—the Type 85 license—for virtual wineries that wish to sell wine exclusively via the internet.\textsuperscript{234} Before the creation of this Type 85 license, persons desiring to sell wine directly to consumers over the internet were required to hold the Type 17/20 combination license.\textsuperscript{235} The Type 85 license simply allows for the sale of wine via the internet without also requiring a Type 17 wholesaler’s license.\textsuperscript{236} However, it is important to note that holders of the Type 85 license are limited to internet sales only.\textsuperscript{237} They are prohibited from maintaining premises open to the public and from conducting tastings.\textsuperscript{238}

In sum, California licenses its virtual wineries separately from its traditional wineries.\textsuperscript{239} This bifurcated licensing regime affords virtual

\textsuperscript{228. Id.}
\textsuperscript{229. Id. § 23356.5.}
\textsuperscript{230. Id. § 23027.}
\textsuperscript{231. Id. §§ 23378–79.}
\textsuperscript{232. Id. §§ 23393–94.7.}
\textsuperscript{233. Id. § 23356.1; see also MENDELSON, supra note 44, at 163.}
\textsuperscript{234. CAL. ALCOHOLIC BEVERAGE CONTROL, INDUSTRY ADVISORY: LIMITED OFF-SALE WINE LICENSE (Dec. 22, 2011) (on file with Washington Law Review); CAL. BUS. & PROF. CODE § 23393.5.}
\textsuperscript{235. CAL. ALCOHOLIC BEVERAGE CONTROL, supra note 234.}
\textsuperscript{236. Id.}
\textsuperscript{237. Id.}
\textsuperscript{238. Id.}
\textsuperscript{239. See supra notes 221–38 and accompanying text.}
wineries limited access to consumers relative to traditional wineries, both in terms of sales methods and ability to conduct tastings. Unlike California, Washington currently offers only one type of winery license. Both Hunt’s and Condotta’s substitute versions of House Bill 1641 would amend Washington’s winery licensing regime to resemble California’s by creating separate license categories for virtual and traditional wineries.

B. Oregon Offers the Same License to Both Traditional Wineries and Virtual Wineries

Until recently, Oregon’s domestic winery statute provided that “in order to hold a winery license the licensee shall principally produce wine or cider in this state.” In June 2011, the Oregon State Legislature passed a law initiated by the Oregon Winegrower’s Association (OWA) amending the statutory requirements for winery licensees. Under Oregon’s new winery statute, licensees must either: (a) possess a valid producer and blender basic permit from the TTB at a bonded premises within Oregon; or (b) possess a valid wine blender or wine wholesaler basic permit from the TTB, and have a written contract with a winery licensed under (a) that authorizes the winery to produce a brand of wine that is under the licensee’s control. The new law defines “control” as either owning the brand under which the wine is labeled, or performing, or having the legal right to perform, the acts of an owner of a trademark, license, or similar agreement.

According to Farshad Allahdadi, Director of License Services at the Oregon Liquor Control Commission (OLCC), a primary objective of the winery legislation was to clarify the privileges and obligations of Oregon winery licensees, particularly the type of federal licenses they were

241. See supra Parts III B, C.
242. OR. REV. STAT. ANN. § 471.223(3) (West 2003).
244. See 2011 Or. Laws 1 (though passed in June 2011, the amendments to ORS § 471.223 do not become operative until Jan. 1, 2014).
245. Id. at § 3(a), (b).
246. Id. at § 1.
required to hold. The OLCC had previously proposed a bill that would have created a separate license for Oregon virtual wineries. However, Allahdadi testified that the OLCC felt confident that its objectives could be accomplished with just one license type, and that the legislation “successfully balanc[ed] the interests of the wine industry and the regulatory needs of the state.”

According to Dan Jarman, a lobbyist for the OWA, another primary objective of the winery legislation was to delineate the regulatory privileges and obligations of Oregon’s different winery operations without putting virtual wineries at a competitive disadvantage for purposes of interstate direct shipping. Jarman testified that the OWA wanted to make virtual winemaking a subcategory of the current winery license as opposed to creating a new custom crush license because some states do not recognize custom crush licenses and only allow licensed wineries to ship wine directly to residents. Jarman also noted that virtual winemaking was a significant business in Oregon, with approximately 100 virtual wineries out of approximately 500 licensed wineries. According to Jarman, the new winery licensing law would facilitate aspiring winemakers’ entry into the industry by allowing them to ship directly to more consumers.

Similar objectives and concerns underlie the debates surrounding Washington’s House Bill 1641. As in Oregon, the emergence of new wine business models in Washington (such as custom crushing) necessitates revision and clarification of the former winery statute aimed at traditional wine production. And as in Oregon, industry stakeholders are concerned about the impact that new winery legislation

248. Id. See also H.B. 2150, 76th Leg., Reg. Sess. (Or. 2011).
249. Oregon Hearing, supra note 247.
251. Id.
252. Id.
253. Id.
254. See supra notes 113–17, 138–40 and accompanying text.
255. Hearing on H.B. 1641, supra note 48 (statements of Jean Leonard and Rick Garza); cf. Theresa Van Winkle, Staff Measure Summary, H.B. 76-2633, (Or. 2011) (H. Comm. on Bus. & Labor) (both linking the emergence of new wine business models with a need to clarify the rights and obligations of winery licensees).
may have on their competitiveness both in and out of state. In Oregon, state regulators and wine industry groups compromised to create a revised winery statute that both clarifies the types of activities required of winery licensees and encompasses traditional and non-traditional methods of wine production under the same license.

VI. WASHINGTON SHOULD ADOPT OREGON’S WINERY LICENSING MODEL BECAUSE IT PROVIDES REGULATORY CLARITY AND MAXIMIZES VIRTUAL WINERIES’ ACCESS TO CONSUMERS

The Washington Legislature should amend RCW 66.24.170 to clearly encompass virtual wineries. To this end, the Legislature should replace HB 1641 with a bill adding a provision to the current statute that would allow custom crush clients (i.e., virtual wineries) to qualify for a domestic winery license. Specifically, Washington lawmakers should adopt the language in Oregon’s newly revised winery statute in a new subsection to current RCW 66.22.170, stating that “in order to qualify for a domestic winery license under this section, an applicant must either (a) possess at a bonded premises within Washington a valid blender and producer permit from the TTB, or (b) possess a valid wine blender or valid wine wholesaler basic permit from the TTB and have a written contract with a winery licensed under paragraph (a) that authorizes the winery to produce for the licensee a brand of wine that is under the licensee’s control.”

Oregon’s winery licensing scheme is an appropriate model for Washington because it meets the regulatory objectives of clarity and consistency without compromising the interests of any of the diverse components of Washington’s wine industry. First, adopting Oregon’s approach to winery licensing would satisfy the Washington Wine Institute and WSLCB’s objectives of promoting regulatory clarity and bringing all Washington wineries into compliance with federal law. Oregon’s revised winery statute makes clear the types of federal licenses applicants must hold in order to qualify for a domestic winery license. Second, it also promotes transparency by acknowledging the reality that many wineries contract out production operations without prohibiting

256. See, e.g., FWWS OPPOSES, supra note 137.
258. Id.
such wineries from obtaining domestic winery status. Moreover, because it encompasses holders of federal producer’s, blender’s, and wholesaler’s basic permits, Oregon’s winery statute does not provide any incentive for Washington winemakers to apply for a federal permit whose requirements they will be unable to meet, in order to qualify for a domestic winery license at home.

Oregon’s approach to winery licensing also satisfies concerns voiced by FWWS on behalf of Washington’s small artisanal wineries that principally manufacture wine by blending rather than by fermentation. Whereas original House Bill 1641 and Rep. Hunt’s substitute version would demote wine blenders that do not produce a yearly average of 200 gallons of wine by fermentation from their current status as domestic wineries to either Class B or non-producing wineries, Oregon’s approach would allow wine blenders to retain their current status. The Oregon approach simply requires that licensees who only hold a federal basic permit to blend (not produce) maintain valid contracts with their sources of bulk wine and exercise control over the wine brands they market and sell—both of which are common business practices. Additionally, adopting Oregon’s approach would allow small, artisanal wineries to make appropriate business choices in a given year without risk of violating the terms of their domestic winery license. For example, if the owner of a small winery that both blends and produces wine by fermentation decides that a given year’s crop of grapes is not worth making into wine, he or she could opt to only blend bulk wine that year, without fear of penalty.

Beyond satisfying the concerns of regulators and small, artisanal wineries, adopting Oregon’s model would benefit Washington’s virtual wineries more than any of the three versions of House Bill 1641. All three versions of House Bill 1641 would license virtual wineries separately from domestic wineries. Such a licensing scheme poses

261. Id.
262. See FWWS OPPOSES, supra note 137.
264. See 2011 Or. Laws 1 2011. This is because the Oregon model allows wine blenders to qualify for a domestic winery license, and does not require domestic winery licensees to produce any specific amount of wine per year by fermentation. Id.
265. See MENDELSON, supra note 44, at 163.
266. 2011 Or. Laws 1 2011. This is because the Oregon model does not specify a minimum quantity of wine that licensees must produce by fermentation per year. Id.
267. Hearing on H.B. 1641, supra note 48 (statements of Mike Sheridan and John Bell).
problems for virtual wineries by jeopardizing their access to out-of-state consumers via direct shipment. Oregon legislators recognized that virtual wineries are a vital component of the state wine industry, and that virtual wineries rely heavily on access to consumers via internet sales. Thus, for both regulators and industry members, the most desirable winery licensing regime was one that met the regulatory objectives of clarity and transparency while simultaneously maximizing virtual wineries’ access to consumers.

Adopting Oregon’s approach to winery licensing would benefit the Washington wine industry generally, as well as wine consumers nationwide. As in Oregon, virtual wineries play an important role in Washington’s wine industry by providing an “incubator” model for small start-up operations that may one day grow into traditional wineries. Given recent developments in Commerce Clause and Twenty-First Amendment jurisprudence, licensing virtual wineries as retailers or wholesalers (as opposed to domestic wineries) could stunt their growth by limiting their access to consumers via direct shipping. Many small wineries rely heavily on e-commerce and other forms of direct-to-consumer shipping because they are unable to find and retain a distributor. Likewise, many out-of-state wine consumers rely on e-commerce and direct-to-consumer shipping to experience new Washington wines from small wineries that cannot be found on retail shelves. Adopting Oregon’s winery licensing model would provide a fertile ground for Washington’s “incubator” wineries and benefit wine consumers by maximizing virtual wineries’ ability to engage in direct shipment.

Finally, Washington’s virtual wineries deserve more than a retailer’s license. While specific practices may vary, virtual winemakers generally exercise sufficient control over wine crafting and branding to merit a winery license and its attendant privileges and protections. In the

270. See id.
271. See id.; see also id. (testimony of Farshad Allahdadi).
272. See Hearing on H.B. 1641, supra note 48 (testimony of Mike Sheridan).
273. See MENDELSOHN, supra note 44, at 163; see also supra Parts V.A, B.
274. FED. TRADE COMM’N, supra note 12, at 6; Cutler, supra note 15.
275. FED. TRADE COMM’N, supra note 12, at 6.
276. See THE BUSINESS OF WINE: AN ENCYCLOPEDIA, supra note 8, at 253 (“[M]ost industry members would agree that a virtual winery . . . has its own management and winemaker . . . and controls all of the winemaking decisions.”); Franson, supra note 53.
context of custom-crush arrangements, virtual wineries may supply their own expert winemaker who makes all the decisions regarding blending, crushing, filtration, barreling, and aging.277 The owner of the custom-crush facility, on the other hand, simply provides “a service,” and does not “take responsibility for the winemaking.”278 Given these circumstances, the Washington legislature should amend state licensing provisions to encourage start-up wineries by leveling the regulatory playing field. Virtual winemakers merit a domestic winery license and its attendant privileges as much as the custom crush facilities that supply them with facilities and equipment.

CONCLUSION

For both economic and regulatory reasons, it is time to bring Washington’s winery licensing regime into the twenty-first century. This can be accomplished by amending the domestic winery license provided for under RCW 66.24.170 to include the diverse methods of wine production in operation on the ground: traditional production, blending, and virtual winemaking through custom crush arrangements. Adopting Oregon’s winery licensing model would allow persons engaging in all of the production models to qualify for a domestic winery license. It would also provide the necessary regulatory clarity and transparency to ensure that all winemakers are in compliance with both state and federal law. Moreover, adopting the Oregon model as opposed to the California model would maximize virtual wineries’ access to consumers by licensing them as wineries, not retailers or wholesalers.

The Washington Legislature should provide virtual wineries legal recognition and protection so that Washington’s wine industry may continue to grow and diversify, and so that Washington’s tiny start-up wineries may answer the call of wine lovers nationwide for “individualistic, handcrafted wines.”279

277. Franson, supra note 53.

278. Id.

279. FED. TRADE COMM’N, supra note 12, at 6.