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**THE SUPREME COURT, WINE  
AND ACCOUNT WAGERING**

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# **THE SUPREME COURT, WINE AND ACCOUNT WAGERING**

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## The Supreme Court, Wine and Account Wagering

The United States' Supreme Court decision in Granholm v. Heald, ()2005 U.S. LEXIS 4174 decided on May 16, 2005 might prove a significant decision not merely to wine makers but to account wagering firms and their customers. The decision holds that a State may not block direct sales from out-of-State wineries while it allows direct sales from wineries inside its own State. If this holds true for wineries, then why shouldn't it hold true for account wagering firms? For example, New York's law (Section 1012 of the Racing Law) allows only its own OTB's and tracks to offer phone accounts. Why shouldn't New Yorkers be allowed to wager with out-of-State account wagering providers? How can New York legally block out-of-state account wagering firms (Think TVG, Youbet, Brisnet, etc.) from doing business with New York consumers?

The short answer is that New York can't. Nor can New Jersey whose account wagering law states that "no entity, other than the account wagering licensee, shall accept an account wager from a person within this State." (N.J. Stat. § 5:5-142 (2005)). Granholm reinforces the position that account wagering laws that, on their face, discriminate against out-of-State account wagering firms are invalid.

In Granholm, the Supreme Court by a 5-4 vote found the limitations on direct sales by out-of-State wineries into the states of Michigan and New York were violations of the dormant Commerce Clause of the United States Constitution. The dormant Commerce Clause requires that States "not enact laws that burden out-of-state producers or shippers simply to give a competitive advantage to in-state businesses." (Granholm Slip Opinion at p. 21) Such laws according to the Supreme Court face "a virtually per se rule of invalidity." Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978). (Granholm at p. 27.)

In fact, the States did not even attempt to justify the notion that the limits on direct winery sales were acceptable under the dormant Commerce Clause. Instead, the States argued that the dormant Commerce Clause was inapplicable because of the 21<sup>st</sup> Amendment to the Constitution ( The 21<sup>st</sup> Amendment repealed the prohibition on liquor that had been enacted by the 18<sup>th</sup> Amendment.) and federal legislation which authorized States to regulate the importation of liquor into their jurisdictions. The States argued that these federal enactments displaced the dormant Commerce Clause. Justice Kennedy in his majority decision found that the 21<sup>st</sup> Amendment did not displace the dormant Commerce Clause on liquor regulation issues, and therefore, the Michigan and New York laws violated the dormant Commerce Clause.

Nor did the four dissenters even argue that the New York and Michigan laws were acceptable under the dormant Commerce Clause. The dissents by Justice Stevens and Justice Thomas simply found that the dormant Commerce Clause did not apply in liquor cases. Justice Stevens in his dissenting opinion clearly agreed with the notion that the Michigan and New York laws if applied to any commodity other than liquor, would be unconstitutional. He wrote, “The New York and Michigan laws challenged in these cases would be patently invalid under well settled dormant Commerce Clause principles if they regulated sales of an ordinary article of commerce rather than wine.” (Granholm at p. 58)

So where would that leave direct sales to bettors by out-of-state account wagering providers? States have established a regulatory system which is similar to the set up in Granholm. A consumer can do business directly with in-state account wagering providers but cannot do business at all with out-of-State account wagering providers. If anything the account wagering system is even more discriminatory than the unconstitutional winery laws. An out-of-State winery could eventually sell its products in New York or Michigan if it was able to interest a wholesaler in distributing its products to retailers . In New York, an out-of-State winery would have been allowed to make direct sales if it established a branch factory or office in New York. The out-of-State account wagering firms, however, are totally banned from doing business in New York or New Jersey. There is no enactment in any way comparable to the 21<sup>st</sup> Amendment which might justify this type of facial discrimination. Under the Granholm decision, State laws that authorize in-State account wagering operations but ban out-of-State account wagering operations should be viewed as per se violations of the dormant Commerce Clause. There is simply nothing that would justify these discriminatory enactments.