GRANHOLM V. HEALD: WINE IN, WIT OUT[1]

NOAH J. STANZIONE*

Upon the repeal of Prohibition, states that chose to permit alcohol on a regulated basis began to run sales through what is now termed the "three-tier" system.[2] To illustrate, imagine, for example, that you are a wine producer. You obtain a basic permit from the Alcohol and Tobacco Tax and Trade Bureau and then sell to a licensed wholesaler, who pays applicable excise taxes and passes the wine on to a retailer, who collects sales tax from the consumer.[3] The three-tier system was created in order to reduce crime and corruption,[4] to enable states to efficiently collect taxes on liquor, and to promote temperance by keeping prices artificially inflated.[5] For a while, everything worked fine. But, in recent decades the wine industry has fundamentally changed.

Grape production in the United States tripled from 1985 to 2000 and domestic wine is now a forty-five billion dollar industry.[6] Family farm wineries increasingly account for a prime share of the market.[7] Some estimate that there are now 3000 family-owned wineries, more than double as many as there were thirty years ago, and they exist in every state.[8] At the same time, the number of wholesalers has appreciably declined, from several thousand in the nineteen fifties to merely a few hundred today.[9] This has made it difficult for many small wineries to find distributors willing to carry their product.[10] Even if a small winery could find willing distributors, the wholesalers' and retailers' exorbitant markups would force the boutique vintner into financial ruin; thus, for the wine connoisseur, there is a less diverse market with higher prices.[11]

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* J.D., Notre Dame Law School; B.A., The Johns Hopkins University. This paper was originally prepared for A.J. Bellia's federalism seminar at the University of Notre Dame Law School. The Author thanks Mr. Bellia for his endless fount of perspicacious comments.

1. THOMAS BECON, THE CATECHISM OF THOMAS BECON 375 (Rev. John Ayre ed., Cambridge Univ. Press 1844) ("[W]hen the wine is in, the wit is out.").

2. Lynnore Seaton, Comment, *Pennsylvania Is Still in America, Right? An Examination of Pennsylvania's Direct Shipment Laws (The Economics of Bad State Policy)*, 17 TEMP. POL. & CIV. RTS. L. REV. 675, 689 (2008).

3. *Id.*

4. *See, e.g.*, Brief for Petitioner Mich. Beer & Wine Wholesalers Ass'n at 8, Granholm v. Heald, 544 U.S. 460 (2005) (No. 03-1120) [hereinafter Mich. Wholesalers Brief] (describing the dangers of "tied-house" arrangements).

5. Seaton, *supra* note 2, at 689. *See also* North Dakota v. United States, 495 U.S. 423, 432 (1990).

6. Brief for Respondents Eleanor Heald et al. at 1, Granholm v. Heald, 544 U.S. 460 (2005) (Nos. 03-1116 and 03-1120) [hereinafter Heald Brief].

7. *See id.* at 2.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 5. *See also* Shri M. Abhyankar, Note, *Dude, Where's My Wine? The Potential Effect of* Granholm v. Heald *on Georgia Direct Wine Shipment Regulations*, 23 GA. ST. U. L. REV. 631, 636–37 (2007).

Additionally, fewer than seventeen percent of U.S. wineries are carried by distributors in every state.[12] Meanwhile, the ten largest wholesalers maintain control over fifty-eight percent of the national market.[13] The only real hope for small wineries is for states to allow them to ship directly to consumers, bypassing the normal "three tiers."

In the years leading up to the Supreme Court's decision in *Granholm v. Heald*,[14] the states treated direct shipment differently. Some states allowed direct shipment on equal terms, in-state and out.[15] Some banned the practice entirely.[16] Some allowed direct shipment from out-of-state on reciprocal terms.[17] Some required sales to take place in person at wineries.[18] Responding to this maze of disparate regulations, as well as state concerns with underage access and tax evasion, the national Conference of State Legislatures drafted a Model Direct Shipping Bill in 1997,[19] which, among other provisions, required wineries to agree to submit to each participating state's jurisdiction, to remit taxes, and to clearly label each package with "CONTAINS ALCOHOL: SIGNATURE OF PERSON AGE 21 OR OLDER REQUIRED FOR DELIVERY."[20] Several states with discriminatory direct-ship regimes signed on, including Virginia, North Carolina, and South Carolina.[21]

In addition to the model legislation, states' concerns over direct shipment were potentially allayed by tools of federal enforcement. These included a federally required "basic permit,"[22] which may be revoked if the laws of any state are violated,[23] and federal authorization for state attorneys general to bring out-of-state wineries to federal court to enforce compliance with state law.[24]

Nevertheless, not every state pursued the Model Act suggestions. The two cases consolidated as *Granholm* arose from the discriminatory practices of Michigan and New York. Michigan, according to opposition, allowed in-state wineries to sell at retail without going through a wholesaler and to ship directly

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12. Seaton, *supra* note 2, at 691.

13. *Id.* at 692.

14. 544 U.S. 460 (2005).

15. Heald Brief, *supra* note 6, at 2-3.

16. *See id.*

17. *Id.* at 3.

18. *Id.*

19. *Model Direct Shipping Bill* (1997), *available at* http://www.freethegrapes.org/?q=content/model (last visited Sept. 3, 2010).

20. *Id.*

21. Heald Brief, *supra* note 6, at 3. As argued by the Healds, following the Model Direct Shipment Bill actually furthers state monitoring of underage drinking more effectively than a total ban by keeping wine shipments in the open and subject to state regulation. *Id.* at 40 n.16.

22. 27 U.S.C. § 203 (2001).

23. 27 U.S.C. § 204(e) (2001).

24. 27 U.S.C. § 122a(b) (2001).

to consumers,[25] while it prevented out-of-state wineries from selling at retail or from obtaining any license to ship directly to Michigan consumers.[26] While Michigan argued that it allowed out-of-state wineries with a "substantial in-state physical presence" to direct-ship, the Healds countered that these wineries would actually have to "plant[] grapes in Michigan" to comply.[27] The Healds, who were married wine critics, were joined by a number of connoisseurs.[28]

The state of Michigan defended its behavior on brief by noting, "Michigan has chosen to except in-State wineries from some aspects of the three-tier system because regulatory control over these in-State manufacturers is practical for purposes of collecting taxes and because the State can assess meaningful sanctions for violations of State law."[29] Michigan, however, did not wish to grant the same privileges to out-of-state wineries because it felt duty-bound to "protect its citizens by preventing the sale of alcohol to minors while promoting responsible drinking and to ensure the collection of taxes."[30] The state was also concerned that, by opening its direct-shipment market to out-of-staters, it might not be able to assert jurisdiction in the event of an illegal or improper sale.[31]

As for the case arising in New York, the nation's second-largest wine market,[32] "two proprietors of out-of-state wineries and three New York State residents who consume wine"[33] objected to the state's requirements that "all alcoholic beverages imported into the State pass through the hands of a licensed entity" and that "all licensed wineries have an in-state presence."[34] New York argued on brief that these provisions of its licensing system are "essential to the States' ability to supervise the manufacture, distribution, and sale of alcoholic beverages and to enforce its regulations governing these activities,"[35] and "to promot[e] temperance . . . and to collect[] applicable taxes."[36] New York vigorously argued that it could not effectively promote these goals under the less-discriminatory alternatives proposed by opposition, finding those alternatives "impractical."[37] The state's opponents countered

25. Heald Brief, *supra* note 6, at 5.

26. *Id.* at 4.

27. *Compare* Mich. Wholesalers Brief, *supra* note 4, at 3, 13, 35 *with* Heald Brief, *supra* note 6, at 4 n.3.

28. *Id.* at 6.

29. Brief for Petitioner at 7, Granholm v. Heald, 544 U.S. 460 (2005) (No. 03-1116) [hereinafter Granholm Brief].

30. *Id.* at 33.

31. *See id.* at 33 n.24 (citing cases where personal jurisdiction over an online seller of liquor was found lacking).

32. Brief for Petitioner at 2 n.3, Granholm v. Heald, 544 U.S. 460 (2005) (No. 03-1274) [hereinafter Swedenburg Brief].

33. Brief for Respondents at 8, Granholm v. Heald, 544 U.S. 460 (2005) (No. 03-1274) [hereinafter N.Y. Brief].

34. *Id.* at 5.

35. *Id.* at 3.

36. *Id.* at 11.

37. *Id.* at 33–34, 42. *See also id.* at 34 n.9 (arguing that the Twenty-first Amendment Enforcement Act, 27 U.S.C. § 122a (2001), does not remedy the state's problems).

that New York's regulations for out-of-state wineries were so prohibitive that "no winery has ever qualified."[38] Meanwhile, "[m]ost of the approximately 190 New York wineries, all but one of which are small, rely heavily on direct shipping" for their business.[39] Additionally, with purple passages about "the vanishing of the family farm from American life" and "[t]he tradition of the yeoman farmer, true to the soil[,] . . . kept alive . . . by stalwart family farmers like [petitioners]," the Swedenburg brief made the case for an open market, bolstered by the Commerce Clause's protections, to support these farmers and protect high-end consumer choice.[40]

On the other side, the Michigan Beer and Wine Wholesalers Association railed that the case was "not about 'fine and rare wines.'"[41] They continued, arguing that "[i]f plaintiffs have a constitutional right to import 'fine and rare wines,' there is no obvious reason why they should not have a right to import cheap wines, or any other beverage that competes with local wineries for their beverage-alcohol dollars."[42]

Those favoring direct shipping dismissed the alarmist claims about underage access and consumption. Not only, they asserted, is the wine market generally unattractive to underage drinkers (who would prefer beer, which is cheaper, or hard liquor, which is more potent), but, according to one author, "few underage individuals have the financial resources, patience, or desire to purchase wine over the Internet."[43] For underage drinkers, who often want instant gratification, a more certain route to getting alcohol is buying it with a fake I.D. at the local liquor store, finding a willing older sibling or whoever to buy it for them, or employing the old trick of trying to confuse the store clerk by burying the request for booze in the middle of an order of small, legal items.[44]

And therein lies the fundamental conflict. Those opposing the discriminatory regimes cited desires for "free trade and consumer access" while those supporting them instead spun out concerns of "safety and social desirability."[45] As one wholesaler noted, "[t]he world sees the Internet as their

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38. Swedenburg Brief, *supra* note 32, at 5. But, "even if an out-of-state winery managed to open a New York winery in order to avail itself of direct shipping opportunities, it still would be foreclosed from the easiest direct sales and shipping options, which are available only to wines made from New York grapes." *Id.* at 26 (emphasis omitted).

39. *Id.* at 4.

40. *Id.* at 10-11.

41. Mich. Wholesalers Brief, *supra* note 4, at 3.

42. *Id. See also* N.Y. Brief, *supra* note 33, at 32 n.8 (arguing that an adverse ruling "would extend to other alcoholic beverages often consumed by minors").

43. Seaton, *supra* note 2, at 694-95. *See also* Heald Brief, *supra* note 6, at 37–38.

44. *See, e.g.*, AMERICAN GRAFFITI (Universal Pictures 1973) ("Let me have a Three Musketeers, and a ball point pen, and one of those combs there, a pint of Old Harper, a couple of flash light batteries and some beef jerky.").

45. Eric Asimov, *More on the Befuddlement of Liquor Laws*, N.Y. TIMES DINER'S JOURNAL (Jan. 31, 2008, 3:26 PM), http://thepour.blogs.nytimes.com/2008/01/31/more-on-the-befuddlement-of-liquor-laws/.

friend, they don't see the danger in it. I guarantee you, if I gave my daughter a gift card or a credit card tomorrow she could order a bottle of vodka on the Internet and get it three days later."[46] Rather than the typical liberal-conservative split on the Bench, this case would pit two brands of conservatives against each other: free-marketers and social conservatives. This odd balance in the court was apparent as attorneys viewed Justice Scalia as the proverbial swing vote[47] on these issues.

I. HISTORICAL BACKGROUND

The question in *Granholm v. Heald* was whether discriminatory direct-shipment practices, such as in New York and Michigan, impermissibly violated the dormant Commerce Clause.[48] The weight of the circuits suggested they did.[49] The brief for the Healds acknowledged that Section 2 of the Twenty-first Amendment granted the states "greater authority over liquor than they do over, say, milk."[50] In fact, the states could regulate liquor "even to the point of prohibition."[51] But, the wine enthusiasts argued, the states cannot regulate in a discriminatory manner, even in light of state concerns for collecting taxes and preventing underage access, for there are perfectly reasonable non-discriminatory tools at the states' disposal.[52] As Justice Stevens observed at oral argument, in the end, "[t]he question . . . really is whether the plain language of the Twenty-First Amendment allows . . . protectionism."[53] This question required the court to consider a wealth of precedent and Congressional action.

A. The Wilson and Webb-Kenyon Acts

Regulation of alcohol was initially a state matter. In the so-called License Cases, the Supreme Court unanimously rejected the argument that state power over liquor is circumscribed by the dormant Commerce Clause.[54] Although the Court in that era even recognized a state's power to ban liquor entirely,[55] the Court eventually cut back against the power granted in the License Cases.

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46. *Id.*

47. *See* Tony Mauro, *Courtside: Grapes of Wrath: Lawyers Locked in Fee Fight*, LEGAL TIMES (Apr. 10, 2006), http://www.law.com/jsp/dc/PubArticleDC.jsp?id=1144154027036&hub=TopStories.

48. 544 U.S. 460, 471 (2005).

49. *See* Heald Brief, *supra* note 6, at 8–9 (collecting citations from the Fourth, Fifth, Seventh, and Eleventh Circuits, as well as the Second and Sixth Circuit cases appealed in *Granholm*, all finding that the Twenty-first Amendment is not immune from dormant Commerce Clause concerns).

50. *Id.* at 9.

51. *Id.* at 10.

52. *Id.*

53. Transcript of Oral Argument at 58, Granholm v. Heald, 544 U.S. 460 (2005) (Nos. 03-1116, 03-1120, 03-1274) 2004 WL 2937830 [hereinafter Oral Argument].

54. *See generally* Thurlow v. Massachusetts, 46 U.S. 504 (1847) (The License Cases).

55. Mugler v. Kansas, 123 U.S. 623, 661-63 (1887).

Supreme Court decisions such as *Bowman v. Chicago & Northwestern Railway Co.*—which struck down a state law requiring a permit to import liquor[56]—and *Leisy v. Hardin*—which held that liquor in its "original package[]" remained an article of interstate commerce[57]—prompted Congress in 1890 to pass the Wilson Act, so as to allow states greater powers to control alcohol. The *Leisy* Court invited as much when it noted that "in the absence of congressional permission . . . the state had no power . . . ."[58]

The Wilson Act provided:

> [a]ll . . . intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, *to the same extent and in the same manner* as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.[59]

This addressed the "original package" loophole created by *Leisy*, and the Court's verdict soon after holding the Wilson Act constitutional[60] was also beneficial. But, because the state regulations only attached after delivery (leaving *Bowman* in force), the alcohol industry took to direct shipping to circumvent regulation.[61] States countered that the Wilson Act divested imported alcohol of its interstate character, thus granting them the power to prohibit importation. In *Rhodes v. Iowa*,[62] the Supreme Court rejected this interpretation, finding it inconsistent with the Wilson Act's purpose.[63]

In 1913, Congress passed the Webb-Kenyon Act, "An Act Divesting intoxicating liquors of their interstate character in certain cases."[64] Webb-Kenyon extended Wilson in that states could now regulate the in-state sale of liquor. The act read in pertinent part:

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56. 125 U.S. 465, 500 (1888). The Court distinguished the License Cases, for at issue there was the state's power to require a license to sell already-imported liquor. In *Bowman*, however, the issue was the state's power to require a license merely to import. *Id.*

57. 135 U.S. 100, 124-25 (1890). At issue in *Leisy* was Iowa's response to *Bowman*, where the state banned the sale of *all* liquor, in-state or imported. *Id.*

58. *Id.* at 124.

59. Wilson Act, ch. 728, 26 Stat. 313 (1890) (codified at 27 U.S.C. § 121 (2009)) (emphasis added).

60. *In re* Rahrer, 140 U.S. 545, 564 (1891).

61. *See, e.g.*, Ivy Brooke Erin Grey, Comment, *Good Spirits or Sour Grapes?: Reaching a Tax Compromise for Direct-to-Consumer Wine Sellers Under* Quill*, The 21st Amendment, and the Dormant Commerce Clause in Light of* Granholm v. Heald, 8 HOUS. BUS. & TAX L.J. 142, 153-55 (2008).

62. 170 U.S. 412 (1898).

63. *Id.* at 419–26.

64. Webb-Kenyon Act, ch. 90, 37 Stat. 699 (1913) (codified at 27 U.S.C. § 122 (2009)).

> [t]he shipment or transportation, *in any manner or by any means whatsoever*, of any . . . intoxicating liquor of any kind, from one State . . . into any other State . . . which said . . . intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State . . . is . . . prohibited.[65]

Notably, the Webb-Kenyon Act did not contain Wilson's language, "to the same extent and in the same manner."[66] In fact, it instead read, "in any manner or by any means whatsoever."[67] Nevertheless, Congress did not repeal the Wilson Act.[68]

In *Clark Distilling Co. v. Western Maryland Railway Co.*,[69] the Supreme Court held that Congress could prohibit all shipment of alcohol, and that such power includes the lesser power to allow individual states to prohibit alcohol if they so choose.[70] This brought direct shipment under state control.[71] In the same opinion, the Supreme Court read Webb-Kenyon "simply to extend that which was done by the Wilson Act, that is to say, its purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in States contrary to their laws," thereby "afford[ing] a means by subterfuge and indirection to set such laws at naught."[72]

B. The Twenty-First Amendment

The crux of the modern dispute stems from the uncompromising language of Section 2 of the Twenty-first Amendment which reads in full:

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65. *Id.* (emphasis added).

66. *Compare id. with* 27 U.S.C. § 121 (2001).

67. 27 U.S.C. § 122 (2001). *Cf.* Granholm v. Heald, 544 U.S. 460, 501 (2005) (Thomas, J., dissenting) ("Even if [the Wilson Act's language] does not authorize States to discriminate against out-of-state liquor products, the Webb-Kenyon Act has no comparable language addressing discrimination. The contrast is telling. It shows that the Webb-Kenyon Act encompasses laws that discriminate against both out-of-state wholesalers and out-of-state manufacturers.") (internal citation omitted); *see also* Mich. Wholesalers Brief, *supra* note 4, at 24 (noting that earlier drafts of Webb-Kenyon included nondiscriminatory language, which was subsequently eliminated).

68. Seaton, *supra* note 2, at 682. *But cf.* N.Y. Brief, *supra* note 33, at 18 n.5 (arguing that the "antidiscrimination" provision of Wilson, rather than being intended to limit the states' power over out-of-state commerce, was meant to broaden that power. States were concerned about the ease with which out-of-state vendors could elude state regulation.).

69. 242 U.S. 311 (1917).

70. *Id.* at 331-32.

71. *Id.*

72. *Id.* at 324.

> 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.[73]

The early understanding of Section 2 was that it gave the states plenary power to regulate alcohol as they saw fit, unencumbered by dormant Commerce Clause concerns since the language of Section 2 did not contain the phrase "to the same extent and in the same manner," although it was obviously influenced by Wilson and Webb-Kenyon and arguably meant to restore to the states the same power they had before Prohibition.[74] In the 1936 Supreme Court case of *Young's Market*, Justice Brandeis wrote clearly regarding Section 2:

> The words used are apt to confer upon the State the power to forbid all importations which do not comply with the conditions which it prescribes. The plaintiffs ask us to limit this broad command. They request us to construe the Amendment as saying, in effect: The State may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale, it must let imported liquors compete with the domestic on equal terms. To say that, would involve not a construction of the Amendment, but a rewriting of it.[75]

The legislative history behind the Twenty-first Amendment's passage seems to confirm the *Young's Market* view, although when "the statute's language is plain, the 'sole function of the courts' . . . 'is to enforce it according to its terms.'"[76] In the postmortem of Prohibition, Congress felt that one of the major failures of Prohibition was the lack of control the states had in enacting their own regulations as they saw fit. As Senator Wagner argued, "[t]he real cause of the failure of the [E]ighteenth [A]mendment was that it attempted to impose a single standard of conduct upon all the people of the United States without regard to local sentiment and local habits."[77]

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73. U.S. CONST. amend. XXI, § 2.

74. This is what the *Granholm* majority held; the states' power to regulate alcohol would be the same as prior to Prohibition. Granholm v. Heald, 544 U.S. 460, 484 (2005). If this is the issue, then it becomes even more critical to determine whether Webb-Kenyon incorporated Wilson's antidiscrimination provision or not. *See* Grey, *supra* note 61, at 152. Since Congress re-enacted Webb-Kenyon in 1935, it seems clear that Congress did not intend the Twenty-first Amendment to overrule it. Rather, Congress wanted to affirm the broad power conferred by the Act and articulated in *Clark Distilling*. *See* Mich. Wholesalers Brief, *supra* note 4, at 16–17, 16 n.1; N.Y. Brief, *supra* note 33, at 15 n.4.

75. State Bd. of Equalization of Cal. v. Young's Mkt. Co., 299 U.S. 59, 62 (1936).

76. Hartford Underwriters Ins. Co. v. Union Planters Bank, 530 U.S. 1, 6 (2000) (citing United States v. Ron Pair Enter., Inc., 489 U.S. 235, 241 (1989)), *quoted in* Mich. Wholesalers Brief, *supra* note 4, at 15.

77. 76 CONG. REC. 4146 (statement of Sen. Robert F. Wagner), *quoted in* Granholm Brief, *supra* note 29, at 19.

Granholm argued on brief that Congress, in enacting Section 2, was concerned not only with the ability of the states to regulate or ban alcohol, but also with their loss of tax revenue from "outlaw liquor."[78] Therefore, Section 2 was meant, in Senator Blaine's words, "to restore to the States by constitutional amendment absolute control in effect over interstate commerce affecting intoxicating liquors which enter the confines of the States."[79]

A broad reading of Section 2 may be further justified because of the ultimate failure of a proposed Section 3, which would have granted Congress concurrent power to regulate alcohol for on-site consumption. Section 3 failed, as Justice Black, who participated in the passage of the amendment in the Senate,[80] noted, because of "the fear, often voiced during the Senate debate, that any grant of power to the Federal Government, even a seemingly narrow one, could be used to whittle away the exclusive control over liquor traffic given the States by Section 2."[81]

The most minimalist reading of Section 2, as argued by Rotter and Stambaugh (perhaps more in a devil's advocate role than anything), is that all it does is ensure a state's jurisdiction over those who would import liquor into a state against its laws.[82] It is notable that in a pre-*International Shoe* world, such a jurisdictional grant would hardly be taken for granted.[83]

But even Rotter and Stambaugh concede that this may be too narrow a reading, given the words Congress chose: "The Amendment *prohibits* transportation and importation in violation of state law, as opposed to merely *allowing* states to prohibit transportation and importation as they see fit. Therefore . . . the Amendment is on its face self-enforcing . . . ."[84]

At the other end of the scale is the "maximalist" view, supported by Senator Blaine's statement that the amendment would restore "absolute control" to the states.[85] The reasoning for the maximalist position, as laid out by Rotter and Stambaugh, is beautiful in its simplicity:

> (1) The Amendment does not say "in violation of the laws thereof, so long as those laws do not violate the Dormant Commerce Clause," (2) the Amendment post-dates the Commerce Clause, (3) the Commerce Clause rules were well

78. Granholm Brief, *supra* note 29, at 19–20.

79. 76 CONG. REC. 4143 (statement of Sen. John J. Blaine, the Senate sponsor), *quoted in* Granholm Brief, *supra* note 29, at 19–20.

80. *See* Granholm v. Heald, 544 U.S. 460, 495 n.2 (Stevens, J., dissenting).

81. Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 337 (1964) (Black, J., dissenting) (footnote omitted), *quoted in* Granholm Brief, *supra* note 29, at 20-21 n.21; *see also* Mich. Wholesalers Brief, *supra* note 4, at 21–22; N.Y. Brief, *supra* note 33, at 21–22.

82. Jonathan M. Rotter & Joshua S. Stambaugh, *What's Left of the Twenty-First Amendment?*, 6 CARDOZO PUB. L. POL'Y & ETHICS J. 601, 606 (2008).

83. *Id.* (referencing Int'l Shoe v. Washington, 326 U.S. 310 (1945)).

84. *Id.* at 607.

85. *Id.* at 609. But compare another quotation of Blaine, which seems to give weight to the minimalist view: "[s]o to assure the so-called dry States against the importation of intoxicating liquor into those States, it is proposed to write permanently into the Constitution a prohibition along that line." *Id.*

> established by the time of the Amendment, and (4) Congress exempted intoxicating liquors from the Dormant Commerce Clause prior to Prohibition.[86]

However, as Ethan Davis suggests, "[i]f the framers had intended to gut such a longstanding fixture of the constitutional landscape [as the dormant Commerce Clause], surely they would have said so explicitly."[87]

In addition to *Young's Market*,[88] other early Supreme Court decisions interpreting the Twenty-first Amendment—like *Ziffrin, Inc. v. Reeves*,[89] which declared the Twenty-first "unfettered by the Commerce Clause,"[90] *Indianapolis Brewing Co. v. Liquor Control Commission*,[91] *Finch & Co. v. McKittrick*,[92] and *Mahoney v. Joseph Triner Corp.*,[93] which even rejected an equal protection challenge to state liquor regulation[94]—gave broad reading to the states' power under Section 2. However, in more recent times, the Supreme Court has given more weight to Commerce Clause concerns, perhaps improperly.

C. Modern Interpretations

In 1964's *Hostetter v. Idlewild Bon Voyage Liquor Corp.*,[95] a liquor company that sold alcohol to imminently departing international airline passengers sought an injunction against the New York State Liquor Authority, which was interfering with its sales.[96] The liquor company transferred its products directly to the airline, and therefore the customers did not receive their alcohol until they were in the foreign country.[97] All liquor sales were cleared with the Bureau of Customs.[98] Thus, while the Court acknowledged that "[b]oth the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution" and "[l]ike other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case,"[99] the Court did not have occasion to reject the *Young's Market* doctrine, and any such rejection would have been inappropriate given the facts of the case. The Court's acknowledgement that the Twenty-first

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86. *Id.* at 609.

87. Ethan Davis, Comment, *Uncorking a Seventy-Four-Year-Old Bottle: A Toast to the Free Flow of Liquor Across State Borders*, 117 YALE L.J. POCKET PART 133 (2007), *available at* http://yalelawjournal.org/the-yale-law-journal-pocket-part/constitutional-law.

88. State Bd. of Equalization of Cal. v. Young's Mkt. Co., 299 U.S. 59 (1936).

89. 308 U.S. 132 (1939).

90. *Id.* at 138.

91. 305 U.S. 391, 394 (1939).

92. 305 U.S. 395, 398 (1939).

93. 304 U.S. 401 (1938).

94. *Id.* at 404.

95. 377 U.S. 324 (1964).

96. *Id.* at 325-27.

97. *Id.* at 325.

98. *Id.*

99. *Id.* at 332.

Amendment did not "repeal"[100] the Commerce Clause hardly serves as a repudiation of the strong theory of Section 2 either. In fact, the Court—even as it ruled against New York—continued to uphold its ruling that "a State is totally unconfined by traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption *within its borders*"—even calling this view of the Amendment's scope "unquestioned."[101] The Court reasoned, critically, that New York was attempting to regulate outside not only state, but also *national*, borders.[102]

Far more problematic for state exercise of Twenty-first Amendment power is *Bacchus Imports, Ltd. v. Dias.*[103] In *Bacchus*, Hawaii liquor wholesalers brought suit to challenge the state's liquor tax, which imposed a 20% excise on all liquor at wholesale except for certain locally produced beverages (pineapple wine and okolehao).[104] While the Supreme Court of Hawaii rejected the wholesalers' Commerce Clause claim, reasoning that the tax could not discriminate since it was on wholesalers in Hawaii and would be largely borne by Hawaii consumers,[105] the United States Supreme Court reversed, charging that the tax "violates a central tenet of the Commerce Clause [and] is not supported by any clear concern of the Twenty-first Amendment."[106] The Court hinted that it was headed for trouble when, a page earlier in the opinion, it reiterated *Hostetter*'s "same Constitution" sense of balance as well as the mode of analysis set forth in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*[107] for the Twenty-first Amendment: a "'pragmatic effort to harmonize state and federal powers.'"[108] As the Court explained:

> The question in this case is thus whether the principles underlying the Twenty-first Amendment are sufficiently implicated by the exemption for okolehao and pineapple wine to outweigh the Commerce Clause principles that would otherwise be offended. Or as we recently asked in a slightly different way, "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 express federal policies."[109]

Those Court-watchers who hoped that *Bacchus* would remain a mere oddity, would be limited to its facts, would not signal the disembowelment of an

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100. *Id.* at 331-32.

101. *Hostetter*, 377 U.S. at 330 (1964) (emphasis added).

102. *Id.* at 333-34.

103. 468 U.S. 263 (1984).

104. *Id.* at 265.

105. *In re* Bacchus Imports, Ltd., 656 P.2d 724, 734-35 (Haw. 1982).

106. *Bacchus*, 468 U.S. at 276.

107. *Id.* at 274-75. *See* Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 109 (1980).

108. *Bacchus*, 468 U.S. at 275 (quoting *Midcal Aluminum*, 445 U.S. at 109).

109. *Id.* at 275–76 (quoting Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 714 (1984)).

amendment, would be sorely disappointed with *Brown-Forman Distillers Corp. v. N.Y. State Liquor Authority*[110] and *Healy v. Beer Institute.*[111]

Brown-Forman Distillers offered its wholesalers "promotional allowances," cash payments credited against amounts due.[112] The New York State Liquor Authority concluded that these allowances effectively slid around a provision of the New York liquor code requiring producers, in setting prices for New York wholesalers, to affirm that lower prices would not be charged in other states in the same month.[113] On review in the Supreme Court, New York's affirmation law was struck down as improperly burdening interstate commerce on its face.[114] In response to the state's argument that the liquor law was permissible under its Section 2 powers, the Court replied, "[t]he Commerce Clause operates with full force whenever one state attempts to regulate the transportation and sale of alcoholic beverages destined for distribution and consumption in . . . another State."[115]

Similarly in *Healy*, a case concerning Connecticut's attempts to require brewers and importers to affirm that their posted prices in Connecticut were no higher than prices in three adjoining states, the Supreme Court finished the deal it had begun in *Hostetter* and *Bacchus* by affirming *Brown-Forman* and giving the Twenty-first Amendment a perfunctory treatment (and that is being nice).[116] In *Healy*, the Court acknowledged that its prior understanding of Section 2 power—that "the Twenty-first Amendment gives States wide latitude in the field of liquor regulation; although such state regulation might violate the Commerce Clause in some *extreme instances*"—was no longer good law.[117]

The Granholm brief countered this unfavorable jurisprudential trend by respectfully arguing that the "transform[ative]" *Bacchus* was "wrongly decided:"[118]

> It is inconsistent with the text, history, and purposes of the 21st Amendment and fails to give the Amendment its full meaning. In any event, *Bacchus* is not controlling here because of substantial differences from the present case. Unlike the tax scheme at issue in *Bacchus*, the import restrictions in the present case fall squarely within the "transportation or importation" text of the 21st Amendment.

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110. 476 U.S. 573 (1986).

111. 491 U.S. 324 (1989).

112. *Brown-Forman Distillers Corp.*, 476 U.S. at 576.

113. *Id.* at 577-78.

114. *Id.* at 585.

115. *Id.*

116. *Beer Inst.*, 491 U.S. at 342-43.

117. *Id.* (emphasis added) (citing Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 42–43 (1966)).

118. Granholm Brief, *supra* note 29, at 27-28.

> Unlike Hawaii's taxation scheme, Michigan's regulatory scheme has ample regulatory purpose and is not "mere economic protectionism."[119]

But the wineries argued that the states' discriminatory practices flew in the face of one of the Constitution's most basic values. In Justice Jackson's majestic lyric,

> [o]ur system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by customs[,] duties[,] or regulations exclude them.[120]

As the Healds argued in their brief, the dormant Commerce Clause is so entrenched in our history that there is no longer any real movement against the doctrine's existence.[121] Even Justice Thomas, who so railed against the Court's dormant Commerce Clause jurisprudence in *Camps Newfound/Owatonna, Inc. v. Town of Harrison*,[122] once wrote for a unanimous court against state discrimination upon interstate commerce.[123] As a result, the wine enthusiasts argued that the mantra of nondiscrimination "applies with force" to sale of liquor.[124]

In a way, the Healds put forth a huge *reductio ad absurdum*, arguing that Section 2 of the Twenty-first Amendment simply cannot overtake the Commerce Clause because other Court decisions have clearly held that the Twenty-first is trumped[125] by freedom of speech in the First Amendment,[126]

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119. *Id.* at 28–29.

120. H.P. Hood & Sons, Inc. v. Du Mond, 336 U.S. 525, 539 (1949).

121. Heald Brief, *supra* note 6, at 12.

122. 520 U.S. 564, 609–20 (1997) (Thomas, J., dissenting). Thomas opined:

> [O]ur negative Commerce Clause jurisprudence, developed primarily to invalidate discriminatory state taxation of interstate commerce, was already both overbroad and unnecessary. It was overbroad because, unmoored from any constitutional text, it brought within the supervisory authority of the federal courts state action far afield from the discriminatory taxes it was primarily designed to check. It was unnecessary because the Constitution would seem to provide an *express* check on the States' power to levy certain discriminatory taxes on the commerce of other States . . . . The negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application.

Id. at 610.

123. Associated Indus. of Mo. v. Lohman, 511 U.S. 641, 643, 646 (1994), *cited in* Heald Brief, *supra* note 6, at 12.

124. Heald Brief, *supra* note 6, at 15. Thomas opined in *Camps Newfound*, "[i]n one fashion or another, every Member of the current Court and a goodly number of our predecessors have at least recognized [the problems caused by our dormant Commerce Clause doctrine], if not been troubled by them." *Camps Newfound/Owatonna, Inc.*, 520 U.S. at 610-11 (Thomas, J., dissenting) (citations omitted).

125. *See* Heald Brief, *supra* note 6, at 18–20.

126. *See, e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 516 (1996).

the Equal Protection Clause, [127] the Due Process Clause,[128] the Import-Export Clause,[129] the Establishment Clause,[130] or the Supremacy Clause.[131] But the Commerce Clause—especially in its "negative" implication[132]—is different, and, even while affirming another provision of the Constitution unaffected by the Twenty-first Amendment seven years after *Healy*, the Court still quoted *Ziffrin*'s language that, in the regulation of alcohol, the states are "largely 'unfettered by the Commerce Clause.'"[133]

II. ORAL ARGUMENT

A. Bolick

At oral argument, Clint Bolick, for the Swedenburgs, began by asserting that "[f]or 124 years . . . one principle has remained virtually constant, that states may regulate alcohol by one set of rules, not by two."[134] Immediately challenged by Justice Kennedy over whether he would strike down the whole three-tier system under this principle, Bolick suggested that the rationale for such an argument was the same, although "[t]he state may have a different set of defenses that it [did not] have here."[135]

When asked why Webb-Kenyon, and later Section 2 of the Twenty-first Amendment did not adopt the Wilson Act's clause "to the same extent and in the same manner," Bolick argued that "it was so obvious that the state could not, prior to prohibition, discriminate."[136] Thus, such an inclusion would be "redundant."[137] Bolick argued that the reasoning of *Scott v. Donald*[138] is authoritative on the issue, and that *Scott* "appl[ied] both the Commerce Clause and the Wilson Act to forbid discrimination."[139] Bolick noted that "there is

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127. *See, e.g.*, Craig v. Boren, 429 U.S. 190, 209 (1976).

128. *See, e.g.*, Wisconsin v. Constantineau, 400 U.S. 433, 436 (1971).

129. *See, e.g.*, Dep't of Revenue v. James B. Beam Distilling Co., 377 U.S. 341, 346 (1964).

130. *See, e.g.*, Larkin v. Grendel's Den, Inc., 459 U.S. 116, 122 n.5 (1982).

131. *See, e.g.*, Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 112–14 (1980).

132. Granholm v. Heald, 544 U.S. 460, 526 (2005) (Thomas, J., dissenting) ("Cases involving the relation between the Twenty-first Amendment and Congress' affirmative Commerce Clause power are irrelevant to whether the Twenty-first Amendment protects state power against the negative implications of the Commerce Clause.").

133. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 514–15 (1996) (quoting Ziffrin, Inc., v. Reeves, 308 U.S. 132, 138 (1939)).

134. Oral Argument, *supra* note 53, at 1-2.

135. *Id.* at 2-3.

136. *Id.* at 4-5.

137. *Id.* at 5.

138. 165 U.S. 58 (1897).

139. Oral Argument, *supra* note 53, at 6.

nothing in the legislative history to indicate that Congress intended to overturn that decision."[140]

When asked by Kennedy whether out-of-state wineries can, consistent with Supreme Court precedent, specifically *Quill Corp. v. North Dakota*,[141] be required to remit taxes, Bolick responded that "[i]t is consistent with *Quill*. . . . The way [states] do it is by requiring a permit in order to ship wine into the state. That takes care of a number of problems, including all sorts of accountability concerns that the state may raise."[142]

Bolick argued that the states' concerns about not being able to monitor out-of-state wineries were inappropriate: "The states already rely on the Federal Government and the other states to police the wineries."[143] In response to the states' concern that any alcohol, especially products more attractive to an underage market, might be affected by the ruling, Bolick responded, "[s]o long as states do not discriminate, in terms of direct shipping with regard to other alcohol—and they don't; there's a flat prohibition across the United States, in terms of beer and other types of spirits—we will not be here."[144]

B. Sullivan

Kathleen Sullivan presented next for the Healds and urged Justice Kennedy that "[n]othing in today's case . . . require[d him] to take on the three-tier system," but Kennedy responded that he was concerned because "the *rationale* [was] sweeping."[145] Sullivan admitted to Justice Ginsburg that New York and Michigan, if they lost, may very well choose to level down.[146] In that case, "out-of-state wineries wouldn't be any better off, but they'd have nothing to complain about."[147] Even reciprocity arrangements, mused Sullivan, may be unconstitutional if the Court were to prohibit the type of discrimination alleged by the respondents.[148]

When questioned about how to deal with the sweeping interpretation of Justice Brandeis in *Young's Market*, Sullivan argued that "the *Young's Market* statements about discrimination have been superseded,"[149] and they were never correct to begin with: "Wilson forbade discrimination. Webb-Kenyon didn't authorize it."[150]

Justice Souter identified a difference from *Bacchus* in that there was never a serious claim about "a need for differential treatment for purposes of

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140. *Id.*

141. 504 U.S. 298, 313 (1992) (requiring a nexus between a business and a state in order for the state to subject the business to taxation).

142. Oral Argument, *supra* note 53, at 7-8.

143. *Id.* at 9.

144. *Id.* at 10.

145. *Id.* at 11 (emphasis added).

146. *Id.* at 12-13.

147. *Id.* at 12.

148. Oral Argument, *supra* note 53, at 23-24.

149. *Id.* at 18.

150. *Id.* at 17.

enforcement" and asked Sullivan to identify what standard the court should use to judge that argument.[151] Sullivan responded that the court must use "strict scrutiny . . . [b]ecause it's facial discrimination."[152]

To counter the states' arguments about lost revenue, Sullivan argued that states can "require an out-of-state winery to get a permit. [T]hat's . . . one thing that's still left of Brandeis."[153] Sullivan indicated that the wineries wanted to pay taxes and sign up for permits but Kennedy perceptively cut her off: "Well, they do today, I'm sure, but . . . ."[154]

Sullivan suggested that the Internet can actually help states police out-of-state wineries by having wineries keep their books on a secure website accessible by the states.[155] But Justice Souter's earlier comment in response to the difficulty of states being able to audit out-of-state wineries would apply here too: "Maybe we're getting ripped off."[156]

C. Casey

Thomas Casey, Solicitor General of Michigan, took up the cause for his state. Immediately challenged on *Bacchus* and its language that, according to Justice Kennedy, effectively "restored the anti-discrimination component of the Commerce Clause to liquor control,"[157] Casey replied:

> MR. CASEY: [Y]ou have to understand that language in light of the actual context. There, the state did not even assert a Twenty-First Amendment defense.
>
> JUSTICE KENNEDY: Well, then you have to understand *Young* in the light of its context, where there was no discrimination—
>
> MR. CASEY: There was discrimination in *Young*, Your Honor, and I'd like to get to that. But to focus on *Bacchus* for a moment, the state never asserted the Twenty-First Amendment . . . .[158]

Casey argued that, in the present case, the states had legitimate countervailing interests—something never argued in *Bacchus*. Because the district court decided the question was one of law, the factual record (which Casey claimed would have supported his state's regime) was never fully

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151. *Id.* at 18-19.
152. *Id.* at 19.
153. *Id.* at 20.
154. Oral Argument, *supra* note 53, at 20-21.
155. *Id.* at 21-22.
156. *Id.* at 21.
157. *Id.* at 27.
158. *Id.* at 27-28 (emphasis added).

developed.[159] The lack of evidence did not win Casey any friends on the Bench as Justices Souter, O'Connor, Kennedy, and Scalia did not take lightly to the circumstances.[160] At one point, Justice Scalia interrupted, "[s]ee, I don't . . . understand. Didn't you have an opportunity to develop the record? . . . You had your chance to show it."[161]

D. Halligan

Caitlin Halligan, Solicitor General of New York, argued last. When Halligan defended New York's actions as "advanc[ing] the concerns of the Twenty-First Amendment"[162] while attempting to answer a question posed by Kennedy, an increasingly agitated Scalia cut off both her and his judicial colleague, "No, no, don't . . . put in the qualifications."[163] To make matters worse, Halligan got herself into trouble when she invoked legislative history in response to Scalia, a strict non-believer in the concept and the crucial swing vote in the case:

> MS. HALLIGAN: The legislative history makes clear that the Twenty-First Amendment was intended to eliminate the impediments posed by the dormant Commerce Clause and authorize states to regulate it.
>
> JUSTICE SCALIA: But you—you want us to read it by its terms. It doesn't say anything about the dormant Commerce Clause. If we read it absolutely the way one of your arguments wants us to do, surely it excludes Congress.
>
> MS. HALLIGAN: By terms of our—
>
> JUSTICE SCALIA: So you don't want us to read it absolutely.[164]

Because the Twenty-First Amendment does not explicitly mention the dormant Commerce Clause, Scalia refused to consider that the amendment may allow states to regulate even to the point of interfering with the clause. While Ms. Halligan argued, Scalia came to dismiss her states-have-the-constitutional-power, no-questions-asked rule, even though the legislative history is *hardly* ambiguous. For Scalia, the argument was "whether there is good reason here or not."[165] At least, though, Scalia seemed to reject Sullivan's invitation to strict scrutiny, perhaps leaning more toward a *Pike v. Bruce Church*[166] standard.

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159. *Id.* at 31-32.
160. Oral Argument, *supra* note 53, at 32-36.
161. *Id.* at 34.
162. *Id.* at 40.
163. *Id.* at 40-41.
164. *Id.* at 42-43.
165. *Id.* at 44.
166. 397 U.S. 137, 142 (1970) ("[W]here the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in

Along with Justice Scalia, Justices Breyer and Souter ganged up on Halligan. As she replied that it was difficult to answer whether Congress could pass a law forbidding a state from engaging in local protectionism, Breyer stopped her and agreed, but stated that the Court still "need[ed] an answer to it."[167] Soon after, Souter criticized Halligan—as Casey had previously been criticized—for insufficient evidence of the state's active policing of wineries. Souter proclaimed, "Well, isn't that the end of the issue, then? I mean, it is your burden, isn't it?"[168]

Finally, when Halligan admitted that New York's policy couldn't prevent out-of-state wineries from shipping to underage drinkers or evading New York's excise tax "a hundred percent," Justice Scalia replied that "[i]t can't prevent it at all."[169] It was over.

III. THE DECISION

A. The Majority

Given the way oral argument went, the Court's eventual decision could hardly have been a great shock; it would be a 5-4 decision.[170] With Scalia, poised to be the swing vote, being wholly unconvinced by the states' reading of their constitutional powers, both direct-shipment laws had to fall.[171] With the closeness of the case, Kennedy, the moderate always on the fence, would be given the task of crafting the opinion of the Court.[172] Given his historical distrust of the dormant Commerce Clause, Thomas would be the natural choice to author the dissent.[173]

How would Kennedy characterize the viewpoints of Michigan and New York? "[T]o allow in-state wineries to sell wine directly to consumers in that State but to prohibit out-of-state wineries from doing so, *or, at the least, to make direct sales impractical from an economic standpoint*."[174] I emphasize Kennedy's equivocation here because, while Michigan, New York, and similar states have fixed their laws post-*Granholm*, some states have fixed them in such a way as to make direct sales impractical for out-of-state wineries, only they have done so a bit more subversively.

The laws in both states, wrote Kennedy, violated the Commerce Clause; "the discrimination is neither authorized nor permitted by the Twenty-first

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relation to the putative local benefits." (quoting Huron Cement Co. v. Detroit, 362 U.S. 440, 443 (1960))).

167. Oral Argument, *supra* note 53, at 41.

168. *Id.* at 45.

169. *Id.* at 48-49.

170. Granholm v. Heald, 544 U.S. 460, 497 (2005).

171. *Id.* at 489.

172. *Id.* at 465.

173. *Id.* at 497.

174. *Id.* at 466 (emphasis added).

Amendment."[175] The rule prohibiting state discrimination against interstate commerce "reflect[s] a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization."[176] The rule holds "in all but the narrowest circumstances."[177]

Characterizing the various states' disparate policies on direct shipment as an "ongoing, low-level trade war,"[178] it took Kennedy until the twelfth page of his opinion to even consider the states' Section 2 argument.[179] He argued that, before the Eighteenth Amendment had come into being, the Court's alcohol jurisprudence advanced two principles: one, that "the Commerce Clause prevented States from discriminating against imported liquor,"[180] and two, that "the Commerce Clause prevented States from passing facially neutral laws that placed an impermissible burden on interstate commerce."[181]

Because of *Leisy*, which left "out-of-state liquor . . . immune from any state regulation as long as it remained in its original package,"[182] Congress passed the Wilson Act. The Wilson Act, "[b]y its own terms . . . did not allow States to discriminate against out-of-state liquor," but it let states regulate it on the same terms as domestic liquor.[183] Further Court holdings made clear that the Wilson Act did not allow states to prohibit direct shipment of liquor "for personal use."[184] Congress, in turn, responded by passing the Webb-Kenyon Act, which was upheld by the Court against a constitutional challenge in *James Clark Distilling Co. v. Western Maryland Railway Co.*[185]

Kennedy opined that Michigan and New York wanted the Court to rule Webb-Kenyon as having eliminated Wilson's anti-discrimination provision, but that would be inconsistent with Webb-Kenyon's text and with the Court's previous pronouncement on that text.[186] Webb-Kenyon's text did not eliminate Wilson's anti-discrimination provision because "it expresses no clear congressional intent to depart from the principle,"[187] and it "did not purport to repeal the Wilson Act."[188]

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175. *Id.*

176. *Granholm*, 544 U.S. at 472 (quoting Hughes v. Oklahoma, 441 U.S. 322, 325–26 (1979)). *See also* Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 430 (1982) (asserting same).

177. *Granholm*, 544 U.S. at 472.

178. *Id.* at 473.

179. *Id.* at 476. Kennedy's opinion starts on page 465.

180. *Id.* at 476.

181. *Id.* at 477.

182. *Id.* at 478 (citing Leisy v. Hardin, 135 U.S. 100, 103 (1890)).

183. *Granholm*, 544 U.S. at 478. *See also* Wilson Act, ch. 728, 26 Stat. 313 (1890) (codified at 27 U.S.C. § 121 (2009)).

184. *Granholm*, 544 U.S. at 479–80 (referencing Vance v. W.A. Vandercook Co., 170 U.S. 438 (1898) and Rhodes v. Iowa, 170 U.S. 412 (1898)).

185. 242 U.S. 311 (1917). *See Granholm*, 544 U.S. at 481.

186. *Granholm*, 544 U.S. at 482.

187. *Id.*

188. *Id.* at 483.

Why the change in language, from the "same extent and in the same manner" to "in any manner or by any means whatsoever," does not indicate "clear congressional intent," I do not understand. I am similarly baffled by why Webb-Kenyon would need to repeal the entire Wilson Act in order to eliminate this one limitation on the states' power. Kennedy subsequently noted that the Twenty-first Amendment simply restored to the states the power they enjoyed under Wilson and Webb-Kenyon,[189] and, with his limited reading of Webb-Kenyon, the states lose the case. Thus, Kennedy disregarded *Young's Market* and that lineage of case law as not adequately considering the history of the amendment,[190] despite being considerably more contemporary with it, and thus in a more natural position to do so.

Furthermore, with a snarkiness more characteristic of Scalia, Kennedy remarked that "[r]ecognizing that *Bacchus* is fatal to their position, the States suggest it should be overruled or limited to its facts. As the foregoing analysis makes clear, we decline their invitation."[191] Finally, Kennedy rejected the states' two aims of keeping alcohol from minors and facilitating tax collection as not "advanc[ing] a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."[192]

B. The Dissents

"Because [he] would follow *Young's Market* and the language of both the statute [i.e., Webb-Kenyon] that Congress enacted and the Amendment that the Nation ratified, rather than the Court's questionable reading of history and the 'negative implications' of the Commerce Clause," Justice Thomas, of course, respectfully dissents.[193]

Justice Thomas took issue with the Court's reading of Webb-Kenyon as incorporating an anti-discrimination provision:

> The Act does not condition a State's ability to regulate the receipt, possession, and use of liquor free from negative Commerce Clause immunity on the character of the state law. It does not mention "discrimination," much less discrimination against out-of-state liquor products. Instead, it prohibits the interstate shipment of liquor into a State "in violation of any law of such State." "[A]ny law of such State" means any law, including a "discriminatory" one.[194]

Justice Thomas criticized the Court for misreading *Clark Distilling* for the conclusion that "the Webb-Kenyon Act did not authorize States to

189. *Id.* at 484.

190. *Id.* at 485.

191. *Id.* at 488.

192. *Granholm*, 544 U.S. at 489-91 (quoting New Energy Co. of Ind. v. Limbach, 486 U.S. 269, 278 (1988)).

193. *Id.* at 497 (Thomas, J., dissenting).

194. *Id.* at 500 (alteration in original) (citation omitted).

discriminate."[195] *Clark Distilling*, Justice Thomas contended, "held that the Webb-Kenyon Act authorized a nondiscriminatory state law, and so had no direct occasion to pass on whether the Act also authorized discriminatory laws."[196] While the majority read *Clark Distilling*'s remark that Webb-Kenyon "extend[ed] that which was done by the Wilson Act" as preserving Wilson's nondiscrimination clause, the language of the acts—as well as the language of the *Clark* Court—gives no such indication.[197] Justice Thomas also provided a more thorough legislative history of the Webb-Kenyon Act in its various attempted forms to dispute the majority's notion that Webb-Kenyon was only intended to overrule *Rhodes* and *Vance* while leaving *Scott* and its nondiscrimination principle intact.[198]

Similar to the majority opinion, Justices Thomas's dissent spends little time analyzing the language of the Twenty-first Amendment, noting that Section 2 of the Amendment tracks the language of Webb-Kenyon. Justice Thomas further argued that the Twenty-first's simpler, clearer language makes the states' power obvious:

> To remove any doubt regarding its broad scope, the Amendment simplified the language of the Webb-Kenyon Act and made clear that States could regulate importation destined for in-state delivery free of negative Commerce Clause restraints. Though the Twenty-first Amendment mirrors the basic terminology of the Webb-Kenyon Act, its language is broader, authorizing States to regulate all "transportation or importation" that runs afoul of state law. The broader language even more naturally encompasses discriminatory state laws.[199]

In reply to the majority's fortification of *Bacchus*, Thomas suggested that Michigan and New York's laws are reconcilable with *Bacchus* because—unlike Hawaii's protectionist tax—the importation of liquor in violation of the laws of a state gets at the amendment's "central purpose" and "clear concern[s]."[200] Nevertheless, *Bacchus* was a "grave departure" that should be overruled.[201]

Stevens wrote a separate dissent to briefly reflect that, while "[t]oday many Americans . . . regard alcohol as an ordinary article of commerce . . . . [t]hat was definitely not the view of the generations that made policy in 1919 . . . or in 1933."[202] Also, "the fact that the Twenty-first Amendment was the only Amendment in our history to have been ratified by the people in state conventions, rather than by state legislatures, provides further reason to give its terms their ordinary meaning."[203]

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195. *Id.* at 501 (Thomas, J., dissenting).
196. *Id.* (citation omitted).
197. *Id.* at 502 (quoting Clark Distilling Co. v. W. Md. Ry. Co., 242 U.S. 311, 324 (1917)).
198. *Granholm*, 544 U.S. at 505–09.
199. *Id.* at 514.
200. *Id.* at 522-23 (quoting Bacchus Imports, Ltd. v. Dias, 468 U.S. 263, 276 (1984)).
201. *Id.* at 524 (2005).
202. *Id.* at 494.
203. *Id.* at 497.

IV. THE AFTERMATH

The unqualified ebullience[204] with which enophiles met the high Court's decision was perhaps premature, and not simply because the attorneys for the case embarrassed themselves by getting into a *Froschmäusekrieg* over their fees.[205]

For one, *Granholm*'s limited ruling continues to confuse. In some states the fight is now over whether direct shipments by *retailers* to consumers must be treated in an evenhanded manner in-state and out. Courts in New York[206] and Texas[207] have reached opposite conclusions.[208] A similar dispute is coming to the fore over winery self-distribution to retailers, a situation not at issue in *Granholm* but over which many states have practiced discrimination.[209]

Additionally, states have, in typical court-rebuffed fashion, done what they can to protect their interests another way—though not as drastically as some had warned.[210] While most of the states affected by *Granholm* have indeed "leveled up" rather than "down" (i.e., they have opened direct shipment to out-of-staters rather than closing the vehicle to all), the panoply of state regulations has nevertheless imposed a sizable burden on wineries attempting to infiltrate all states.[211] Some states now restrict direct shipping to "small" wineries, a category that likely has a sneaky protectionist purpose but is not facially discriminatory, or at least makes such discrimination harder to prove.[212] Some states prohibit out-of-state direct shipment from wineries that have a "relationship" with an in-state distributor, while others require on-site purchase.[213]

Some states impose such low monthly limits or such high reporting requirements that it simply is not worth the bother, especially for the smallest wineries whose exclusion from the three-tier system was the driving force

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204. *See, e.g.*, Davis, *supra* note 87.

205. *See* Mauro, *supra* note 47.

206. *See* Arnold's Wines, Inc. v. Boyle, 515 F. Supp. 2d 401, 411 (S.D.N.Y. 2007).

207. *See* Siesta Village Mkt. v. Perry, 530 F. Supp. 2d 848, 874 (N.D. Tex. 2008), *vacated*, Wine Country Gift Baskets.com v. Steen, 612 F.3d 809 (5th Cir. 2010).

208. Asimov, *supra* note 45. *See also* Maureen K. Ohlhausen & Gregory P. Luib, *Moving Sideways: Post-*Granholm *Developments in Wine Direct Shipping and Their Implications for Competition*, 75 ANTITRUST L.J. 505, 520–23 (2008). *See generally* Andre Nance, Note, *Don't Put a Cork in* Granholm v. Heald*: New York's Ban on Interstate Direct Shipments of Wine is Unconstitutional*, 16 J.L. & POL'Y 925 (2008).

209. *See* Ohlhausen & Luib, *supra* note 208, at 506, 512, 518–20.

210. *See generally id.* at 512-23. Miguel Estrada, for example, who represented the New York wholesalers and retailers, predicted that most states would level down. Grey, *supra* note 61, at 185.

211. For a full list, *see* Wine Institute, Who Ships Where Table: State-by-State Statutes Carrier Status (July 1, 2010), http://www.wineinstitute.org/files/shipping_statutes.pdf.

212. *See* Jason Haas, *The Downside of* Granholm v. Heald, WINES & VINES, Oct. 2008, at 82.

213. *Id. See generally* Ohlhausen & Luib, *supra* note 208, at 512–23.

behind the *Granholm* suits in the first place.[214] The volume quotas in states like Massachusetts and Indiana are especially harsh on wineries, as they define limits in terms of the amount of wine ordered by a consumer *in toto*—not from each particular winery.[215] Another bit of trickery by the states is allowing their citizens to order otherwise unavailable wine from out-of-state wineries, yet requiring shipment to pass through an in-state retailer who can charge a handling fee.[216] In light of all of these compliance oppressions, some wineries have simply limited their market to the now-dwindling number of reciprocal states.[217] Meanwhile, compliance firms are appearing all over the legal landscape to advise those wineries who are still up for the challenge.[218]

Before *Granholm* was handed down, twenty-six states allowed some sort of direct-shipping; half of these had reciprocal policies.[219] Now, there are ten more.[220] All thirty-six of those markets are theoretically open nationwide, so to the extent that each wine is unique and consumers value variety[221] (wine is like ice cream—nobody doesn't like it; it's just a matter of which flavors you prefer), there is a definite good to the Court's ruling. But, because of the myriad of state regulations, the market is not nearly that free.

A large part of the compliance challenge is that Kennedy, in response to the states' arguments about lost revenue, allowed states to collect taxes from out-of-state wine sales. But for the Twenty-first Amendment, such a policy would be quite heterodox. One author has even suggested that *Granholm* should be read to eliminate *all* Commerce Clause exceptions granted in the Twenty-first Amendment.[222]

In an article in the *Houston Business & Tax Law Journal*, Ivy Grey argued that while states can, under *Quill*, tax out-of-state wineries if the wineries have physical presence in state, they cannot force those wineries to have an in-state physical presence, and may not have jurisdiction over them if they do not.[223] Because Grey views the dormant Commerce Clause as fully applying to the Twenty-first Amendment, she argues that online purchases of wine cannot be taxed under the Internet Tax Freedom Act.[224] Grey further argues that Justice

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214. Haas, *supra* note 212, at 82.

215. Ohlhausen & Luib, *supra* note 208, at 515.

216. *Id.* at 518.

217. *See* Haas, *supra* note 212, at 82; Ohlhausen & Luib, *supra* note 208, at 516–17.

218. Tim Patterson, *Curing Compliance Headaches*, WINES & VINES, Sept. 2008, at 32. *See also* Rotter & Stambaugh, *supra* note 82, at 644–45 (lamenting the "unwieldy array of hoops" wineries must jump through).

219. Granholm v. Heald, 544 U.S. 460, 467 (2005).

220. Haas, *supra* note 212, at 82. *See also* Wine Institute, Direct Shipment Laws by State for Wineries (July 10, 2010) http://www.wineinstitute.org/files/direct_shipping_laws_map.pdf.

221. *See* Ohlhausen & Luib, *supra* note 208, at 538.

222. *See* Grey, *supra* note 61, at 144.

223. *Id.* at 157.

224. *Id.* at 177 ("ITFA is likely to be extended further or to become permanent. If this is accurate, and unless Congress or the Supreme Court carves out an exemption, then states cannot condition direct shipment upon payment of taxes so long as the field has been pre-empted, making those taxes illegal.").

Kennedy's proposal that states could require a permit as a condition of direct shipping "would be submitting out-of-state companies to taxation without a jurisdictional nexus," thus being unconstitutional.[225] However, if further jurisprudence chips away at the Twenty-first Amendment to the point where Grey is correct and states cannot compel out-of-state wineries to remit taxes, we may see states indeed take the plunge and level all the way down.[226]

The on-site purchase requirement several states have imposed, that consumers must place an order to be shipped while physically at the winery, has already been successfully challenged in Indiana and Kentucky. Kentucky argued that the policy was not protectionist for a few reasons. The court found the burden on interstate commerce to be impermissibly high: first, as wineries located in Kentucky's seven bordering states were closer for a number of Kentuckians than some in-state wineries; second, because "wine is a unique product," and a consumer might not be satisfied simply by the closest winery; and third, because ninety-nine percent of the nation's wine production is located outside this area.[227] Even though on-site purchase requirements might advance the state's interest in curtailing underage purchases and even though, for many wine lovers, visiting a winery is something of a holy experience,[228] the protectionist drive behind the regulation is fairly easy to spot. Meanwhile, the personal importation restrictions a number of states have concurrently enacted are still untested for constitutionality.[229]

States allowing direct shipment from only small wineries have had better success resisting court challenges, as these states have been able to make the argument that this policy is aimed at helping those wineries most hurt by the three-tier system.[230] However, the future is uncertain, as deeper digging will likely reveal protectionism. Each state's production limit for wineries is probably at a level which barely protects in-state wineries and nothing greater.[231]

Nevertheless, even if wine enthusiasts' initial celebrations were overly sanguine, the post-*Granholm* world is still, overall, better for free trade and

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225. *Id.* at 181.

226. *See id.* at 170–71.

227. Ohlhausen & Luib, *supra* note 208, at 529–30 (citing Cherry Hill Vineyards v. Hudgins, 488 F. Supp. 2d 601, 616-17 (W.D. Ky. 2006)).

228. *See* Cherry Hill Vineyard v. Baldacci, 505 F.3d 28, 37 (1st Cir. 2007) ("[Imbibers everywhere] view trips to a winery as a distinct experience incommensurate with—and, therefore, unlikely to be replaced by—a trip to either a mailbox or a retail liquor store."). At least, visiting a winery *once* can be awe-inspiring; if enophiles find a family-farm-made wine they like, it seems silly to make them repeatedly trek cross-country to resupply.

229. Rotter & Stambaugh, *supra* note 82, at 636.

230. *See* Ohlhausen & Luib, *supra* note 208, at 533.

231. *See generally id.* at 533-38. States setting the limit at 250,000 gallons might have a more compelling case in court, as this is a neutral level established in the U.S. Tax Code. *See* Meredith B. Morgan, Comment, *Arkansas's Response to* Granholm v. Heald*: The Small Farm Winery Law Provides an Appropriate Remedy for Commerce Clause Violations*, 61 ARK. L. REV. 487, 504–05 (2009).

consumer choice, and for the wine industry at large.[232] The number of states allowing some form of interstate direct shipment has risen, and many states once reciprocal are now nominally wide-open.[233] Even with the recession, which has somewhat slowed growth rates, wine club memberships are up, and direct-to-consumer sales are growing.[234]

Additionally, as one study has shown, the threat to wholesalers of increased direct shipment has brought down prices in brick-and-mortar stores. By increasing competition, consumers not only had more choice—even if this choice were not as wide as it might have been had there been no barriers—but also could purchase their products cheaper, whether on-line or off.[235] Yet, at least in this limited experiment, the cost of wine on- and off-line, with controls accounted for, did not converge nearly as much with more expensive varieties.[236] Further, the study's authors surmised that for these finer wines there may be legitimate competitive advantages to brick-and-mortar retailers, such as better ratings guides, tasting, immediate availability, and "other services customers value."[237]

As the free-marketers repeatedly argued in *Granholm*, there are non-discriminatory means available to states to restrict underage access from direct shipment, such as mandating clearly labeled packages and requiring I.D. and signature upon delivery.[238] Additionally, wineries are allegedly unlikely to allow their products to simply be left on a doorstep and not signed for, given the expensiveness of their wines and their perishability.[239] Yet, as one pair of authors asserts, "[s]trident assertions about underage drinking to the contrary, we know of no controlled analysis that examines whether direct wine shipment has any effect on the level of alcohol-related externalities."[240]

So, did the Court in *Granholm* make the "right" call? Given the way oral argument unfolded—especially the poor showings by Michigan and New York that their regulatory regimes were the least discriminatory means to achieve their goals—the ruling of the Court by Justice Anthony Kennedy had something of the inevitable to it. True enough, the states' alleged interests in

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232. In the words of the Federal Trade Commission, "state bans on interstate direct shipping represent the single-largest regulatory barrier to expanded online wine sales." FED. TRADE COMM'N, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE 3, 14 (2003), *available at* http://www.ftc.gov/os/2003/07/winereport2.pdf.

233. Haas, *supra* note 212, at 82.

234. Eleanor & Ray Heald, Granholm v. Heald *3 Years Later*, APPELLATIONAMERICA.COM (May 29, 2008), http://wine.appellationamerica.com/wine-review/577/dtc-Anniversary3.html.

235. Jerry Ellig & Alan E. Wiseman, *The Economics of Direct Wine Shipping*, 3 J.L. ECON. & POL'Y 255, 265-66 (2006).

236. *Id.* at 267.

237. *Id.* at 267-68. The authors also consider that price convergence for these fine wines may simply take longer, or that Virginia, where the study was performed, may have some regulatory barrier that still protects physical storefronts. *Id.*

238. *Id.* at 272 (citing NAT'L RESEARCH COUNCIL INST. OF MED., REDUCING UNDERAGE DRINKING: A COLLECTIVE RESPONSIBILITY 174–75 (Richard J. Bonnie & Mary Ellen O'Connell eds., 2004)).

239. Grey, *supra* note 61, at 172.

240. Ellig & Wiseman, *supra* note 235, at 272 (footnote omitted).

their regulations were directed toward the "core" Twenty-first Amendment purposes—promoting temperance, ensuring orderly market conditions, and raising revenue[241]—and perhaps should have been given more deference.

As a policy matter, I am more on the side of the small wineries and their customers than on the side of the states.[242] But what makes for good policy does not necessarily make for proper judicial intervention, especially if the Court must misapply the Constitution in the process. As Justice Stewart famously concluded in dissent in *Griswold*:

> At the oral argument in this case we were told that the Connecticut law does not "conform to current community standards." But it is not the function of this Court to decide cases on the basis of community standards. We are here to decide cases "agreeably to the Constitution and laws of the United States." It is the essence of judicial duty to subordinate our own personal views, our own ideas of what legislation is wise and what is not. If, as I should surely hope, the law before us does not reflect the standards of the people of Connecticut, the people of Connecticut can freely exercise their true Ninth and Tenth Amendment rights to persuade their elected representatives to repeal it. That is the constitutional way to take this law off the books.[243]

I am willing to concede that, prudentially speaking, the states may have a fuller legitimacy in regulating alcohol given the especially public nature of its effect than in other social ills that are more personal in their destruction.[244] The paramount question, though, is whether discrimination of the sort at issue in *Granholm* was constitutionally permitted.

What does Section 2 of the Twenty-first Amendment grant? Scalia's textualism, which made an appearance in the *Granholm* oral argument, is too limited. Arguably, there are exogenous aids to statutory interpretation that may not aid at all, that are at best irrelevant but more often misleading. "Text before tosh," renowned exegete David Daube was fond of saying.[245] And yet there are certain interpretive aids that are absolutely necessary to correct understanding, the failure of which to consider is irresponsible. Especially for a composite text, understanding the process of the compositors is essential. Given the obvious dependence of Section 2 on the Webb-Kenyon Act, a

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

242. As a policy matter, I even think that we should lower the drinking age to eighteen, as such a modification would promote increased respect for the law among our young people, and steal from college drinking the rebel appeal. When you can do it anyway, there's no reason to do it to such blistering excess. *See*, Radley Balko, *Back to 18?*, REASON (Apr. 12, 2007), http://www.reason.com/archives/2007/04/12/back-to-18.

243. Griswold v. Connecticut, 381 U.S. 479, 530–31 (1965) (Stewart, J., dissenting).

244. *See* Noah J. Stanzione, Cigarettes and Whiskey and Wild, Wild Women: A Regulatory Review (April 25, 2009) (unpublished manuscript) (on file with author) (excoriating state measures to ostracize smokers as fascist).

245. *See* CALUM M. CARMICHAEL, IDEAS AND THE MAN: REMEMBERING DAVID DAUBE 114 (2004).

consideration of that Act's meaning is a *sine qua non* to understanding the constitutional text.

Laurence Tribe has suggested that the Twenty-first Amendment—like the Eleventh—contains a howler, evidence of poor drafting.[246] If he is right, then we can place only very limited stock in the precise words of the amendment; we must go beyond its text to postulate not what it says but what it "means" (a murkier enterprise). This, to me, is dangerous territory. First, I am unconvinced that either of the amendments he points to "missed [their] mark[s]."[247] Why *Hans v. Louisiana*[248] must be taken as a correction of the Eleventh Amendment's "miss" rather than an activist expansion to "limit federal jurisdiction over suits against a State by the State's *own* citizens,"[249] I do not know. At the same time, I fail to understand why the Twenty-first Amendment's blanket "prohibition" of importing liquor in violation of a state's law is, in Tribe's words, not only a "miss" but also a "doozy."[250] To the extent that the language may "fail[] to specify that the States are authorized . . . to do anything at all," it is perhaps unforgivably deficient.[251] But I find nothing peculiar in the result that,

> there are two ways, and two ways only, in which an ordinary private citizen, acting under her own steam and under color of no law, can violate the United States Constitution. One is to enslave somebody, a suitably hellish act. The other is to bring a bottle of beer, wine, or bourbon into a State in violation of its beverage control laws—an act that might have been thought juvenile, and perhaps even lawless, but *unconstitutional?*[252]

To suggest that such an array of constitutional force against a person is a mistake is to underestimate the moral suasion of the temperance movement.[253] Justice Jackson would observe that in 1933:

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246. Laurence H. Tribe, *How to Violate the Constitution Without Really Trying: Lessons from the Repeal of Prohibition to the Balanced Budget Amendment*, 12 CONST. COMMENT. 217, 219, n.12 (1995).

247. *Id.* at 219.

248. 134 U.S. 1 (1890).

249. Tribe, *supra* note 246, at 219 n.12.

250. *Id.* at 219.

251. *Id.*

252. *Id.* at 220.

253. *See* Rotter & Stambaugh, *supra* note 82, at 602.

> [A]n understanding of the way the law has developed is impossible without remembering the tremendous social turmoil surrounding the prohibition movement, which was second only to that associated with the abolitionist movement—turmoil which gave rise to the only two Constitutional Amendments outlawing a commercial practice. While there can be no comparison between the consumption of alcohol and the monstrous evil of slavery, a majority of the population did believe alcohol to be a moral evil, and it was this vehemence that led the early post-prohibition Court to read the Twenty-first Amendment to allow almost any restriction a state put on alcohol, discriminatory or not.

Id. Cf. CHAMP CLARK, 2 MY QUARTER CENTURY OF AMERICAN POLITICS 223 (Harper & Brothers 1920) ("Good American citizens probably differ more widely concerning the

> The people of the United States knew that liquor is a lawlessness unto itself. They determined that it should be governed by a specific and particular constitutional provision. They did not leave it to the courts to devise special distortions of the general rules as to interstate commerce to curb liquor's "tendency to get out of legal bounds."[254]

Had I been around in 1933, I would have argued to the people of the United States that they were wrong. They had been wrong in 1919, and they were wrong again. Chesterton said it best: "The dipsomaniac and the abstainer are not only both mistaken, but they both make the same mistake. They both regard wine as a drug and not as a drink."[255] But that is not the point; the people of the United States spoke, and with such resounding force as to overwhelm the structural barriers placed in our Constitution in order to prevent its change by a fickle desire.

The strange breadth of the Twenty-first Amendment may give weight to the argument that we should not use the Constitution to enshrine social policy preferences of whatever stripe. But the fact remains that the Twenty-first Amendment is part of our Constitution. Some may argue that, besides alcohol, there are other social ills suitably pernicious that the states should have plenary power over them. While I do not know that the authors would go so far, a quartet of lawyers recently wrote with concern over whether state discrimination in pari-mutuel account wagering could raise constitutionality concerns in light of the *Granholm* ruling.[256] After all, if states cannot discriminate in their regulation of liquor, which may be constitutionally granted, what hope is there for states to discriminate in regulating other areas of commerce where they have a special moral or health-related interest?[257]

Yet other dilemmas arise. What if, as I have hinted already, the amendment is outdated? If we, by and large, view alcohol today as one more typical item of commerce, should we be locked in by the démodé language of the Constitution? What if, on the other hand, we think alcohol is a special item of commerce, over which the state should be able to exert more control, but that it is not uniquely so? Should the Court give back to the states their plenary power over alcohol and also give them that same power over other perceived ills to our moral fabric and public safety: gambling, fireworks, cigarettes,

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righteousness of prohibition than they do upon any other question ever brought before them. Even slavery did not engender more heat.").

254. Duckworth v. Arkansas, 314 U.S. 390, 398–99 (1941) (Jackson, J., concurring).

255. G.K. CHESTERTON, GEORGE BERNARD SHAW 45 (Bodley Head 1948) (1909).

256. Linda J. Shorey et al., *Do State Bans on Internet Gambling Violate the Dormant Commerce Clause?*, 10 GAMING L. REV. 240, 245-46 (2006).

257. *See* Ohlhausen & Luib, *supra* note 208, at 544–46 (pondering how *Granholm* could affect state regulation of online contact lens sales, now set up to benefit in-state ophthalmology and optometry offices).

MySpace?[258] As one student Comment recently lamented, "today, in a time when you can buy just about anything on the Internet—bomb materials, automobiles, prescription medications, pornography, etc.—you still can not [sic] buy a bottle of wine and have it shipped to your house if you live in [a] . . . state[] that ha[s] enacted direct shipment bans."[259]

None of these arguments matter. The Constitution says what it says, and no more. To tap the wisdom of another *Griswold* dissenter,

> I realize that many good and able men have eloquently spoken and written, sometimes in rhapsodical strains, about the duty of this Court to keep the Constitution in tune with the times. The idea is that the Constitution must be changed from time to time and that this Court is charged with a duty to make those changes. For myself, I must with all deference reject that philosophy. The Constitution makers knew the need for change and provided for it. Amendments suggested by the people's elected representatives can be submitted to the people or their selected agents for ratification. That method of change was good for our Fathers, and being somewhat old-fashioned I must add it is good enough for me.[260]

If the times change and the Court changes the Constitution with them, it is veering ever farther from the text, and even from the meaning, if there is such a thing discoverable to us. If our Constitution lives at all, its life should be in constantly reapplying the precise words therein to the problem before the Court. Instead, what we often see is a Constitution alive but gasping for breath, turning blue in the face as one Platonic Guardian after another imposes a new doctrine onto the text.[261] In the end, the accretion of doctrines is no more scientific than if the Justices donned Carnac's turban and held up the Constitution to their foreheads, similarly hermetically sealed in an envelope. To invoke *Griswold* once again, Douglas was far more revelatory than I am sure he meant to be when he identified the "right to privacy" as

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258. Consider the Lori Drew case. Ms. Drew used a fraudulent MySpace account to drive her neighbor's thirteen-year-old daughter to suicide. An argument could—indeed has been, though ought not—be made for the government to get involved here and conjure up some new legislation. For details of the incident, see *Mom Indicted in Deadly MySpace Hoax*, (May 15, 2008), http://www.cnn.com/2008/CRIME/05/15/internet.suicide/index.html. Ms. Drew's conviction was recently overturned. *See* UNITED PRESS INT'L, *Judge Acquits Mother in Cyberbully Case*, (Aug. 31, 2009), http://www.upi.com/Top_News/2009/08/31/Judge-acquits-mother-in-cyberbully-case/UPI-54501251733776/.

259. Seaton, *supra* note 2, at 676 (footnote omitted).

260. Griswold v. Connecticut, 381 U.S. 479, 522 (1965) (Black, J., dissenting).

261. *Cf.* Scott v. Sandford, 60 U.S. 393, 621 (1857) (Curtis, J., dissenting).

> [W]hen a strict interpretation of the Constitution, according to the fixed rules which govern the interpretation of laws, is abandoned, and the theoretical opinions of individuals are allowed to control its meaning, we have no longer a Constitution; we are under the government of individual men, who for the time being have power to declare what the Constitution is, according to their own views of what it ought to mean.

Id.

"formed by emanations,"[262] as if these fictive rights were the result of the Constitution's radioactive (moral?) decay.

Crafting and ratifying an amendment is a suitably weighty endeavor that we must not assume the words used were slung around like spaghetti upon a wall, haphazardly chosen.[263] If Section 2 grants the states plenary power, then—wise or not—it is theirs to use and abuse. Any other approach, even a well-meaning compromise,[264] is too slippery a slope.

But this brings us to another dilemma. If the Court has misread, or rewritten, the Constitution for so long, what should the good Justice do? Because of the Supreme Court's far-reaching net, any error can prove monstrous. Mistaken history has given us some of our most heinous rulings.[265] I, for one, feel that in the end, stability is a virtue too, and the aggressive rollback of the conservative counter-revolution, even if it restores the Founders' text, is disserving. The better way, it seems to me, is more the incremental, Harlan-esque approach: do as little damage to the status quo as possible, even if we must sacrifice correctness and relegate it merely to the ivory towers of academia.

But, then again, the Twenty-first Amendment is something of a special circumstance. Because the palimpsest of judicial overwrites here is relatively thin, and the Twenty-first Amendment is relatively clean of interpolation, the Court could have taken a stronger stance in its restoration. Congress itself did not bother to enact implementing legislation for the Twenty-first Amendment until 2002.[266]

The history behind that implementing act, the Twenty-first Amendment Enforcement Act, ensuring federal jurisdiction for a state to reach traffickers of alcohol beyond the state's own enforcement power, is revealing.[267] The Act came about as the result of Senate Committee hearings, which in turn had been spurred by Utah's anxieties over minors receiving alcohol through online

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262. *Griswold*, 381 U.S. at 484. Jerzy Kosinski suggested that the right was formed by two "literary ghosts"—from James' *Reverberator* and Cooper's *Home as Found*—sending messages to Warren and Brandeis, ersatz Gabriels for modern times. JERZY KOSINSKI, THE HERMIT OF 69TH STREET: THE WORKING PAPERS OF NORBERT KOSKY 24–25 n.24 (Zebra Books 1991) (1988).

263. *See* Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253–54 (1992) ("We have stated time and again that courts must presume that a legislature says . . . what it means and means . . . what it says.").

264. *See, e.g.*, Davis, *supra* note 87 (arguing that a state, under the Twenty-first Amendment, "may require that all liquor *purchased* within its borders pass through the three-tier system, but it may not mandate that all liquor *consumed* within its borders pass through the three-tier system.").

265. *See, e.g.*, ALAN WATSON, JOSEPH STORY AND THE COMITY OF ERRORS: A CASE STUDY IN CONFLICT OF LAWS ix (Univ. of Ga. Press 1992) (showing how Joseph Story's faulty history led to the *Dred Scott* case); JOSEPH W. DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY 13-15 (2006) (showing how Cyril Means' faulty history led to *Roe*).

266. Rotter & Stambaugh, *supra* note 82, at 605.

267. 27 U.S.C. § 122(a) (2006).

direct shipment.[268] Even though Utah law enforcement testified that they believed only ten percent of underage access to alcohol was through this route—and even though the judicial decision calling Utah's jurisdiction in such a case into question had been reversed by the time the hearings were through[269]—Congress still acted on Utah's urging for federal assistance.[270]

Even if some states knew direct shipment to be a route less taken by underage kids in search of alcohol, maybe they still had a public goal at heart in enacting their schemes: mollifying the masses with unenforceable legislation as *panem et circenses*. And even if protectionism was a reason[271] (legislatures rarely have but one reason for acting) behind states' discriminatory direct-shipment regimes, at least it helped some wineries (those in-state). Sure, the post-*Granholm* world is somewhat better for connoisseurs and small wineries, but the fact that states have turned the screw even as they purportedly level up only goes to show that, like any other rational actors, states may not always get what they want, but they'll get what they need.[272] In that sense, the *Granholm* compromise—preserving the three-tier system (even calling it "unquestionably legitimate"[273]) and making wineries submit to state tax while continuing to act legislatively and messing around with the Constitution in the meantime—was something of a waste. For what Kennedy has done to the Twenty-first Amendment has, to steal from Brandeis' language, "involve[d] not a construction of the Amendment, but a rewriting of it."[274] Most discomfiting of all is not that Michigan and New York's direct shipment policies were

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268. Rotter & Stambaugh, *supra* note 82, at 605.

269. *Id.*

270. *Id.* The probable source for this statistic, as argued in the Heald Brief, is Linda A. Fletcher et al., *Alcohol Home Delivery Services: A Source of Alcohol for Underage Drinkers*, 61 J. STUD. ON ALCOHOL 81, 82 (2000), which actually asserts a far weaker proposition—that 10% of minors have received deliveries of alcohol from *local retail stores*. S*ee* Heald Brief, *supra* note 6, at 38.

271. Protectionism almost certainly was a factor. As Professor Eule notes, a little poking around reveals an intent to burden interstate commerce in cases as diverse as *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662, 670-71 (1981); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 470-72 (1981); and *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 529-30 (1959). *See* Eule, *supra* note 176, at 464–68.

Some have argued that the Twenty-first Amendment itself was motivated chiefly by the increasing need amidst the Depression for tax revenue from the sale of alcohol. *See* Seaton, *supra* note 2, at 684 (quoting Donald J. Boudreaux & A.C. Pritchard, *The Price of Prohibition*, 36 ARIZ. L. REV. 1, 5 (1994) ("General sentiment favoring a change in the law, even when combined with widespread disregard of the law, seldom spurs politicians into action.")). The prospect of increased revenue, according to the Swedenburg Brief, is what best explains Governor Pataki's change of heart on direct shipment. Swedenburg Brief, *supra* note 32, at 44 n.31. *See also* Abhyankar, *supra* note 11, at 637 ("While it may seem that states support direct wine shipment prohibition to protect their local markets, it is apparent that states are more concerned with protecting their wholesalers and retailers."); Rotter & Stambaugh, *supra* note 82, at 645–46 (noting how well distributors and wholesalers contribute to political campaigns).

272. *See* THE ROLLING STONES, *You Can't Always Get What You Want*, on LET IT BLEED (Decca Records/ABKCO 1969).

273. Granholm v. Heald, 544 U.S. 460, 489 (2005) (quoting North Dakota v. United States, 495 U.S. 423, 432 (1990)).

274. State Bd. of Equalization of Cal. v. Young's Mkt. Co., 299 U.S. 59, 62 (1936).

struck down—so-called "economic Balkanization" has been distasteful to our nation since the Founding—but that the Kennedy majority seemed to even abandon the gesture of special deference to states over alcohol announced in *North Dakota*; the *Granholm* Court barely bothered to ask if Michigan and New York had in mind "core" Twenty-first Amendment concerns.[275]

There is often something troubling when the Court strikes down legislation, for it goes against the nature of a democratic republic for seven men (five justices, an attorney, and an aggrieved party—though, too often it seems, the party himself has no complaint and is merely swept up by a crusading counselor) to balk the will of the people. It is perhaps more troubling when the Court strikes down state legislation, for the state is badgered enough and weak to defend itself against national encroachment. It is thus, in some sense, encouraging when the Court can strike a balance, as it seems to have done here. But it still went too far.

In the greatest hits of the Court's worst compromises, *Granholm* is not that big of a deal. It is a garden-variety fence-sitting and a sidestep in the federalism moment; it is nowhere near the revolting chamberlainism of a *Planned Parenthood v. Casey*,[276] and it is not abusive to state interests in the same way as "Senator" Brennan's[277] *Felder v. Casey*.[278] But, in questioning what were, at worst, moderately offensive state policies and in continuing to rewrite the Constitution, Kennedy and his peers kept us from our greatest blessing as Americans, and our greatest damnation: "get[ting] the government [we] deserve."[279]

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275. *See* Rotter & Stambaugh, *supra* note 82, at 613.

276. 505 U.S. 833 (1992). My criticism of the opinion—at least as far as this article is concerned—is primarily for its mushy, solipsistic definition of rights and its contempt for (and game of hide-the-ball with) "the people." Despite its entertainment value, I hesitate to endorse Lazarus' account, as his reliability has come into serious question. *Compare* EDWARD LAZARUS, CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT 459–86 (1998) *with* Alex Kozinski, *Conduct Unbecoming*, 108 YALE L.J. 835, 852–54 (1999) (reviewing LAZARUS, *supra* and discussing known inaccuracies in Lazarus' account of *Casey*, arguing that such errors detract from Lazarus' substantive message).

277. The disparaging epithet is, so far as I know, my own, but inspired by the accusations in Lino A. Graglia, *The Legacy of Justice Brennan: Constitutionalization of the Left-Liberal Political Agenda*, 77 WASH. U. L.Q. 183, 186-88 (1999), and justified by Brennan's own unapologetic defense of his power in William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 494-95 (1977).

278. 487 U.S. 131, 138-53 (1988). I concede that the state (at least in oral argument) did not make the best showing for its notice-of-claim rights. But in this context, my criticism of the opinion is more due to the disdain with which Brennan treats the sovereign's legitimacy, driving, in a sense, a stake through Hart's heart. *See generally* Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954) (explaining the superstructure of federal law and institutions and the interplay that coexists with state systems).

279. De Tocqueville (attributed). *See also* Eule, *supra* note 176, at 442–43 (explaining, in the context of dormant Commerce Clause jurisprudence why "failure to defer to the legislative process" is a bad idea).