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# Of Wine and War: The Fall of State Twenty-first Amendment Power at the Hands of the Dormant Commerce Clause—*Granholm v. Heald*

Tania K. M. Lex

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**CASE NOTE: OF WINE AND WAR: THE FALL OF STATE  
TWENTY-FIRST AMENDMENT POWER AT THE HANDS  
OF THE DORMANT COMMERCE CLAUSE—  
*GRANHOLM V. HEALD***

Tania K. M. Lex<sup>†</sup>

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## I. INTRODUCTION

We are unquestionably a liquor-loving society. Alcohol is a part of daily life for many Americans; for some it is a refreshing beverage, for others a social enabler, and for still others a potent drug and perhaps a dangerous addiction. Alcohol has been and continues to be a powerful force, spurring protests and debates and giving rise to activist groups throughout history and in modern society. Alcohol occupies a unique position in history as the only substance to inspire not one, but two constitutional amendments.<sup>1</sup>

Alcohol, whether good or evil, has incited a war that has been ongoing since the nation's beginning. Its numerous battles have been at times more than figurative, resulting in violence and lost or destroyed lives. Other battles have been fought in loftier settings. The case of *Granholm v. Heald*<sup>2</sup> represents a turning point in the nearly two-century-old battle fought between the courts and the legislature over the extent of state power to control the importation and distribution of liquor within the states' borders.<sup>3</sup> For nearly 200 years, Congress has fought to give states complete control over liquor regulation only to have their efforts frustrated by the Supreme Court at every turn.<sup>4</sup> For a number of years following the Twenty-first Amendment's ratification it appeared that states had at

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1. See U.S. CONST. amend. XVIII (prohibiting the manufacture, sale, or transportation of alcoholic beverages); U.S. CONST. amend. XXI (repealing U.S. CONST. amend. XVIII). Demonstrating the uniqueness of these amendments is the fact that there are only two ways an ordinary citizen can violate the Constitution. Gordon Eng, *Old Whine in a New Battle: Pragmatic Approaches to Balancing the Twenty-First Amendment, the Dormant Commerce Clause, and the Direct Shipping of Wine*, 30 *FORDHAM URB. L.J.* 1849, 1849 (2003). One way is by enslaving someone and the other is by "bring[ing] a bottle of wine into a state in violation of its alcoholic beverage control laws." *Id.*

2. 125 S. Ct. 1885 (2005).

3. See *infra* Part II. See generally *Granholm*, 125 S. Ct. at 1898-1905 (outlining the history of the struggle for control over liquor regulation).

4. See generally *Granholm*, 125 S. Ct. at 1898-1905.

last won the war, with the Supreme Court seeming to cede control. In recent years, however, the Court has gradually been reclaiming the power it had abdicated. The *Granholm* decision represents the Court's furthest reach into states' Twenty-first Amendment power since the Amendment's ratification.

The popularly termed "wine wars"<sup>5</sup> are the newest outgrowth of this power struggle,<sup>6</sup> stemming from the complaints of wineries and oenophiles<sup>7</sup> that state laws which ban direct wine shipments from out-of-state wineries to in-state consumers are unconstitutionally discriminatory.<sup>8</sup> The Supreme Court addressed this issue in *Granholm*, ruling that states may not discriminate against out-of-state wineries by allowing in-state wineries to ship their products directly to customers, while requiring out-of-state

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5. Lisa Lucas, *A New Approach to the Wine Wars: Reconciling the Twenty-First Amendment with the Commerce Clause*, 52 UCLA L. REV. 899, 902 (2005).

6. The wine wars have been brought on by developments in e-commerce as well as changes in the wine industry. See Jason E. Prince, Note, *New Wine in Old Wineskins: Analyzing State Direct-shipment Laws in the Context of Federalism, the Dormant Commerce Clause, and the Twenty-First Amendment*, 79 NOTRE DAME L. REV. 1563, 1591-92 (2004); see also Eng, *supra* note 1, at 1880 (explaining the factors giving rise to the wine wars, such as the development of e-commerce, changes in the structure of the wholesale liquor industry, and the rise in number and quality of wineries).

7. Merriam-Webster defines oenophile as "a lover or connoisseur of wine." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 806 (10th ed. 1993). Not only are we a liquor-loving society, but more than ever we are a wine-loving society. The grape crop in the United States has more than tripled in the past fifteen years, with wine grapes composing two-thirds of that total. American Wine Society, Wine and Grape Education, [http://www.americanwinesociety.org/web/wine\\_facts\\_figures.htm](http://www.americanwinesociety.org/web/wine_facts_figures.htm) (last visited Feb. 15, 2006). Wine consumption has been steadily growing since the early 1990s, climbing from 176 million cases of wine consumed in 1996 to an unprecedented 232 million cases in 2003. *Id.* The number of small wineries producing less than 5000 cases of wine per year is growing rapidly, currently standing at over 4000. Michael Barbaro, *Small Wineries May Benefit*, WASH. POST, May 17, 2005, at A06, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/05/16/AR2005051601523.html>. However, the number of distributors has decreased and small wineries have difficulty finding a distributor that is not too expensive and willing to deal with small companies. *Id.* For this reason, direct shipment to consumers is an essential part of business for many small wineries.

8. Lucas, *supra* note 5, at 899. Direct shipment laws currently take many forms. Prince, *supra* note 6, at 1592. Some states ban direct shipments of wine altogether and even make direct shipment in violation of the laws a felony. *Id.* Other states place various types of restrictions on direct shipments. *Id.* Some "reciprocity" states allow direct shipments only from states that also allow direct shipments. *Id.* For details on each state's current direct shipment laws, see WineAmerica, Shipping Law, <http://www.wineamerica.org/shipment/law.htm> (last visited Feb. 15, 2006).

wineries to utilize commercial distributors.<sup>9</sup>

This Case Note begins by summarizing the history of the Commerce Clause, the Twenty-first Amendment, and the legal battle over the balance between the two provisions.<sup>10</sup> It then briefly outlines the facts, reasoning, and holding in the two appellate court decisions consolidated by the Supreme Court<sup>11</sup> and explains the majority and dissenting viewpoints in *Granholm*.<sup>12</sup> Next it argues that the reasoning employed by the majority defies existing law and leads to results most likely never intended by those who ratified the Twenty-first Amendment.<sup>13</sup> Nevertheless, the result the majority imposed may be appropriate for modern society. This Case Note concludes by proposing an alternate line of analysis that must be undertaken before straying from well-established precedent.<sup>14</sup>

## II. HISTORY

### A. *The Commerce Clause*

The Commerce Clause of the Constitution vests in Congress the power “[t]o regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes.”<sup>15</sup> The importance of the Commerce Clause is demonstrated by the fact that the problem of regulating commerce was one of the main reasons for the meeting of the Constitutional Convention.<sup>16</sup> The framers thought that regulation of commerce by the federal government was necessary to stem competition between states and to discourage the “economic Balkanization that had plagued relations among the Colonies and later among the States under the Articles of Confederation.”<sup>17</sup>

The Commerce Clause acts not only as a grant of power over interstate commerce to Congress, but also as a limitation on state power.<sup>18</sup> The “dormant” Commerce Clause, as this principle is

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9. *Granholm*, 125 S. Ct. at 1907.

10. *See infra* Part II.

11. *See infra* Part III.

12. *See infra* Part IV.

13. *See infra* Part V.

14. *See infra* Part VI.

15. U.S. CONST. art. I, § 8, cl. 3.

16. *Granholm v. Heald*, 125 S. Ct. 1885, 1895 (2005).

17. *Id.* (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979)).

18. 15A AM. JUR. 2D *Commerce* § 1 (2005).

termed, is not explicitly stated in the Constitution.<sup>19</sup> Rather, it is generally considered to be the logical inverse of the plenary grant of commerce power to Congress.<sup>20</sup> The dormant Commerce Clause prohibits states from making laws “designed to benefit in-state economic interests by burdening out-of-state competitors.”<sup>21</sup> It was this principle that the Supreme Court used to defeat early attempts by states to impose local prohibition, and it is this principle that the Court returned to in *Granholm* to defeat state liquor laws once again.<sup>22</sup>

### B. *Pre-Prohibition Liquor Regulation*

Prompted by the temperance movement, state attempts to impose local prohibition began years before federal Prohibition.<sup>23</sup> The Supreme Court established early on that a state may regulate the manufacture and sale of liquor within its borders as an exercise of its police power.<sup>24</sup> The Court, however, was less solicitous of laws that prevented liquor manufactured outside a state’s borders from entering the state.<sup>25</sup> Relying on the dormant Commerce Clause, the Court struck down attempts to prohibit the importation of alcohol<sup>26</sup> and held that liquor produced out-of-state could be imported and sold in its original package free from the effects of state law.<sup>27</sup> After these decisions, states that wanted to be “dry” were

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19. Prince, *supra* note 6, at 1568.

20. *Id.* at 1568-69.

21. 15A AM. JUR. 2D *Commerce* § 1 (2005).

22. *See infra* Part IV.

23. *Granholm v. Heald*, 125 S. Ct. 1885, 1897-98 (2005). The temperance movement’s first victory came in 1851 in Maine, with a law that authorized stiff penalties for selling liquor. JAMES WEST DAVIDSON ET AL., *NATION OF NATIONS: A NARRATIVE HISTORY OF THE AMERICAN REPUBLIC* 408 (3d ed. 1998). Subsequently, other states enacted such laws, but most were either struck down by courts or repealed. *Id.* For a complete account of American intemperance, the efforts of the temperance movement, and the Prohibition era, see THOMAS R. PEGRAM, *BATTLING DEMON RUM: THE STRUGGLE FOR A DRY AMERICA 1800-1933* (1998).

24. *See Mugler v. Kansas*, 123 U.S. 623, 675 (1887) (holding that a law forbidding private citizens from manufacturing or selling liquor is a valid exercise of the State’s police power and does not infringe the constitutional rights of the citizen).

25. Prince, *supra* note 6, at 1574.

26. *See Bowman v. Chi. & Nw. Ry. Co.*, 125 U.S. 465, 493 (1888) (striking down an Iowa law that prohibited transportation of alcoholic beverages into the state as a violation of the Commerce Clause).

27. *See Leisy v. Hardin*, 135 U.S. 100, 124-25 (1890) (holding that police power attached only after the foreign goods became “mingled in the common mass of property within the state”). The Court held that the State had no power to

free to ban liquor—but only liquor that was produced within their own borders.<sup>28</sup>

Recognizing that these decisions rendered states' prohibition efforts virtually meaningless, Congress responded in 1890 by passing the Wilson Act,<sup>29</sup> which gave states the authority to regulate out-of-state liquor “to the same extent and in the same manner” as in-state liquor.<sup>30</sup> The Wilson Act overruled the “original package doctrine” as applied to alcoholic beverages and prevented out-of-state liquor from being sold in its original package in violation of state law.<sup>31</sup>

This Act was meant to remedy the effects of the dormant Commerce Clause on state regulation of alcohol and to enable states to exclude out-of-state liquor.<sup>32</sup> However, the Supreme Court construed the Wilson Act in a way that stripped it of virtually any power that Congress intended it to have.<sup>33</sup> In *Scott v. Donald*,<sup>34</sup> the Court struck down a South Carolina statute that provided for a state monopoly on liquor importation and sale and prohibited in-state consumers from ordering out-of-state liquor for their personal use.<sup>35</sup> The Court stated that the Wilson Act was not meant “to

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regulate alcohol so long as it remained in its original package. *Id.*

28. See Prince, *supra* note 6, at 1574 (“[E]nterprising individuals could circumvent their state’s temperance laws by importing alcohol and then reselling it to in-state consumers—they merely needed to refrain from removing the liquor’s out-of-state packaging.”).

29. Wilson Act, ch. 728, 26 Stat. 313 (1890) (codified as amended at 27 U.S.C. § 121 (2000)).

30. The Act provides:

All fermented, distilled, or other 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.

27 U.S.C. § 121.

31. Prince, *supra* note 6, at 1574-75. The Supreme Court upheld the Wilson Act’s constitutionality, recognizing that Congress may “provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character.” *Id.* at 1575 (quoting *In re Raheer*, 140 U.S. 545, 562 (1891)).

32. *Id.* at 1574-75.

33. See *id.* at 1575.

34. 165 U.S. 58 (1897).

35. *Id.* at 92-93.

confer upon any state the power to discriminate injuriously against the products of other states in articles whose manufacture and use are not forbidden, and which are therefore the subjects of legitimate commerce.”<sup>36</sup> In *Vance v. W.A. Vandercook Co.*<sup>37</sup> and *Rhodes v. Iowa*,<sup>38</sup> the Court expanded *Scott*, upholding the constitutional right of consumers under the Commerce Clause to import liquor for their own use, regardless of state law, without violating the Wilson Act.<sup>39</sup> While citizens of dry states could no longer circumvent liquor laws by selling imported liquor in its original package, dry states were still unable to remain truly dry, because citizens were free to import liquor for their own personal use.<sup>40</sup>

The Supreme Court’s construction of the Wilson Act prompted Congress to react quickly to close the “direct-shipment loophole.”<sup>41</sup> Congress enacted the Webb-Kenyon Act<sup>42</sup> in 1913 to remedy the situation.<sup>43</sup> This Act prohibited “shipment or transportation” of any “intoxicating liquor” into any state or territory in violation of its laws.<sup>44</sup> The Supreme Court upheld the

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36. *Id.* at 100.

37. 170 U.S. 438 (1898).

38. 170 U.S. 412 (1898).

39. *Rhodes* narrowed the scope of the Wilson Act by holding that the words “upon arrival” in the Act meant that state liquor law applied to alcoholic beverages only once they reached their in-state destination. *Id.* at 421. States could only regulate liquor once it had been delivered to the consumer. *Granholt v. Heald*, 125 S. Ct. 1885, 1915-16 (2005) (Thomas, J., dissenting). *Vance* relied on the holding in *Scott*, affirming the right of the citizen to import liquor for his own use free of “onerous and burdensome” regulations that “so hamper and restrict the exercise of the right as to materially interfere with or in effect, prevent its enjoyment.” *Vance*, 170 U.S. at 453.

40. *Prince*, *supra* note 6, at 1575.

41. *Id.*

42. Webb-Kenyon Act, ch. 90, 37 Stat. 699 (1913) (codified as amended at 27 U.S.C. § 122 (2000)).

43. *Prince*, *supra* note 6, at 1575.

44. 27 U.S.C. § 122. This Act provides in full:

The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign county into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original



constitutionality of the Webb-Kenyon Act in *James Clark Distilling Co. v. Western Maryland Railway Co.*,<sup>45</sup> holding that it was “enacted 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.”<sup>46</sup> This Act functioned to divest alcohol of its character as an article of commerce in cases where it was imported into a state in violation of that state’s laws; consequently, a ban on direct shipments was no longer a violation of the Commerce Clause.<sup>47</sup> The Court did not get a chance to further construe this Act, since the Eighteenth Amendment was ratified two years later and produced a temporary cease-fire in the battle over liquor regulation.

### C. Prohibition

In January of 1920, the Eighteenth Amendment<sup>48</sup> ushered in the “noble” but miserably failed “experiment” known as Prohibition.<sup>49</sup> This Amendment prohibited nationwide the “manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes,”<sup>50</sup> and gave Congress and the states concurrent power to enforce its provisions.<sup>51</sup> The consequences of the Amendment were plentiful, but unfortunately those consequences

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package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited.

*Id.*

45. 242 U.S. 311 (1917).

46. *Id.* at 324.

47. Prince, *supra* note 6, at 1575-76.

48. U.S. CONST. amend. XVIII, § 1.

49. See Marc Aaron Melzer, Comment, *A Vintage Conflict Uncorked: The 21st Amendment, the Commerce Clause, and the Fully-Ripened Fight over Interstate Wine and Liquor Sales*, 7 U. PA. J. CONST. L. 279, 279 n.1 (2004) (noting that the term “the noble experiment” was coined by President Herbert Hoover to describe Prohibition). The Eighteenth Amendment “appears to be the legal and political odd-man-out.” *Id.* at 282. The previous seventeen amendments deal with governmental structure and issues of fundamental rights. *Id.* The Eighteenth Amendment is the first time the process of amending the Constitution has been used “to address matters as mundane as the manufacturing and sale of a single class of products.” *Id.*

50. U.S. CONST. amend. XVIII, § 1.

51. *Id.* § 2.

did not include the teetotalism the reformers desired.<sup>52</sup> The “flaws of this ‘one-size-fits-all alcohol regulatory regime,’”<sup>53</sup> even led President Harding to admit that the “noble experiment” had turned into a “nationwide scandal.”<sup>54</sup> The failure of the federal government to effectively administer Prohibition “hastened the Eighteenth Amendment’s demise” and led to insistence on state control upon repeal.<sup>55</sup>

*D. The Twenty-First Amendment and the Early Cases*

The Twenty-first Amendment was ratified in 1933, repealing Prohibition in Section 1<sup>56</sup> and prohibiting the “transportation or importation” of liquor into a state in violation of its laws, in Section 2.<sup>57</sup> The plain language of this Amendment seems to vest complete control over liquor importation in the states—unrestricted by the dormant Commerce Clause—and in fact, the early cases interpreting the Amendment so held.<sup>58</sup> A line of cases beginning with *State Board of Equalization of California v. Young’s Market Co.*<sup>59</sup> interpreted the reach of the Twenty-first Amendment as permitting states to impose discriminatory regulations on liquor imports.<sup>60</sup> In *Young’s Market*, the Court upheld a \$500 importation fee that the State imposed on beer, stating that prior to the Twenty-first Amendment, this provision would have been an unconstitutional burden on interstate commerce.<sup>61</sup> The *Young’s Market* Court

52. DAVIDSON ET AL., *supra* note 23, at 856; Prince, *supra* note 6, at 1576. Consequences of the Eighteenth Amendment did include underfunded and understaffed enforcement; illegal undercover taverns (speakeasies)—which, unlike pre-Prohibition saloons, welcomed women; rurally-distilled moonshine which was commonly of low quality and often caused death or blindness; a reversal of the trend toward beer and wine in favor of hard liquor; and a proliferation of gangster bootlegging, government corruption, and violence. DAVIDSON ET AL., *supra* note 23, at 856; Prince, *supra* note 6, at 1576.

53. Prince, *supra* note 6, at 1576 (quoting Matthew J. Patterson, Note, *A Brewing Debate: Alcohol Direct Shipment Laws and the Twenty-First Amendment*, 2002 U. ILL. L. REV. 761, 769 (2002)).

54. *Id.* at 1576 (quoting LAURENCE F. SCHMECKEBIER, *THE BUREAU OF PROHIBITION* 46 (1929)).

55. *Id.* at 1576-77.

56. U.S. CONST. amend. XXI, § 1.

57. *Id.* § 2. “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.” *Id.*

58. Prince, *supra* note 6, at 1582-83.

59. 299 U.S. 59 (1936).

60. See Prince, *supra* note 6, at 1582.

61. 299 U.S. at 62. Although this provision was discriminatory, in that it

explained that “[t]he words used [in the Amendment] are apt to confer upon the state the power to forbid all importations which do not comply with the conditions which it prescribes.”<sup>62</sup> The Court reasoned that the Twenty-first Amendment would certainly allow a state to maintain a monopoly over liquor and forbid importation altogether.<sup>63</sup> If this is so, then the greater power to forbid importation must surely encompass the lesser power to place restrictions on imports.<sup>64</sup>

Several other cases soon followed, challenging restrictions on liquor importation, and the Court continued to uphold the laws under the Twenty-first Amendment. In *Indianapolis Brewing Co. v. Liquor Control Commission*,<sup>65</sup> the Court upheld a discriminatory statute, stating that “whatever its character, the law is valid” since “the right of a state [under the Twenty-first Amendment] to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause.”<sup>66</sup> The Court continued with this line of reasoning for a number of years.<sup>67</sup> It was not until 1964 that the Court began to limit the states’ Twenty-first Amendment power and impose dormant Commerce Clause restrictions on liquor regulation once again.

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placed a higher burden on out-of-state sellers of beer than in-state sellers, the Court explained that even if the State had charged in-state sellers an equal fee to transport beer, the statute still would have violated the Commerce Clause before the Twenty-first Amendment, because it placed a direct burden on interstate commerce. *Id.* The Commerce Clause “confers the right to import merchandise free into any state, except as Congress may otherwise provide,” but the Twenty-first Amendment “abrogated the right to import free, so far as concerns intoxicating liquors.” *Id.*

62. *Id.*

63. *Id.* at 63.

64. *Id.*; see also *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138 (1939).

65. 305 U.S. 391 (1939).

66. *Id.* at 394.

67. See, e.g., *Ziffrin*, 308 U.S. at 137-38 (“Prior to the Wilson and Webb-Kenyon Acts, and the Twenty-first Amendment, the powers of the States over intoxicants . . . were limited by the Commerce Clause . . . . The Twenty-first Amendment sanctions the right of a state to legislate concerning intoxicating liquors brought from without, unfettered by the Commerce Clause.”); *Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395, 398 (1939) (Since the Twenty-first Amendment, “the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause”); *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401, 403 (1938) (“[U]nder the [Twenty-first] [A]mendment, discrimination against imported liquor is permissible although it is not an incident of the reasonable regulation of the liquor traffic . . .”).

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*E. Narrowing Twenty-First Amendment Power*

The Supreme Court first indicated that there may be limits to the states' Twenty-first Amendment power in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*<sup>68</sup> The Court stated that “[t]o draw a conclusion from [prior cases] that the Twenty-first Amendment has somehow operated to ‘repeal’ the Commerce Clause wherever regulation of intoxicating liquors is concerned would . . . be an absurd oversimplification.”<sup>69</sup> *Hostetter* concerned a law attempting to exercise control over liquor being sold for delivery and use in foreign countries.<sup>70</sup> The Court held that since the state’s regulation was not aimed at liquor intended for delivery or use within the state, the statute was an impermissible intrusion into Congress’s exclusive jurisdiction over the regulation of interstate commerce.<sup>71</sup>

The ruling in *Hostetter* did not disturb the reasoning established in the *Young’s Market* line of cases. However, in 1984 the Supreme Court departed from its well-established precedent when it seized upon the idea that the Twenty-first Amendment had not repealed the Commerce Clause.<sup>72</sup> In *Bacchus Imports, Ltd. v. Dias*,<sup>73</sup> the Court struck down a Hawaii tax exemption for certain types of locally produced native liquors.<sup>74</sup> The Court held that the

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68. 377 U.S. 324 (1964).

69. *Id.* at 331-32. The Court stated that the Twenty-first Amendment and the Commerce Clause are both parts of the same Constitution and must be considered in light of one another. *Id.* at 332.

70. *Id.* at 333.

71. *Id.* at 333-34.

72. Prince, *supra* note 6, at 1587.

73. 468 U.S. 263 (1984). In Roman mythology, Bacchus (equated with the Greek god Dionysus) was the god of the vine and the inventor of wine and the art of tending grapes. J.M. Hunt, Greek Mythology: The Lessor Gods, [http://www.desy.de/gna/interpedia/greek\\_myth/lessorgod.html#Dionysus](http://www.desy.de/gna/interpedia/greek_myth/lessorgod.html#Dionysus) (last visited Feb. 15, 2006). “[Bacchus] has a dual nature. On the one hand bringing joy and divine ecstasy. On the other, brutal, unthinking rage. Thus, reflecting both sides of wines [sic] nature.” *Id.* The son of Zeus and Semele, [Bacchus] was the only god with a mortal parent, and one of the few able to bring the dead from the underworld. *Id.* [Bacchus] is associated with wanton behavior, and his festivals (the Bacchanalia, celebrated March 16th and 17th) got so out of hand that they were banned by the Roman Senate. Micha F. Lindemans, *Bacchus*, ENCYCLOPEDIA MYTHICA: ROMAN MYTHOLOGY, <http://www.pantheon.org/areas/mythology/europe/roman/articles.html> (follow “Bacchus” hyperlink) (last visited Feb. 15, 2006). How fitting that a case named after the god of wine should be the one to hold that wine should flow more freely!

74. *Bacchus*, 468 U.S. at 265. In order to encourage the development of the Hawaiian liquor industry, the State enacted a law exempting okolehao (brandy made from the root of the native ti plant) and pineapple wine from the Hawaiian

exemption was a clear violation of the Commerce Clause, “because it had both the purpose and effect of discriminating in favor of local products.”<sup>75</sup> The Court held that the statute was an invalid exercise of Twenty-first Amendment power and disposed of the *Young’s Market* precedent stating that “the Amendment did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause.”<sup>76</sup> The Court then applied a balancing test, stating that a discriminatory statute would be constitutional only if the “principles underlying the Twenty-first Amendment are sufficiently implicated by [the statute] . . . to outweigh the Commerce Clause principles that would otherwise be offended.”<sup>77</sup>

#### F. *Beyond Bacchus*

The confusion generated by *Bacchus’s* balancing test is evident in the lower court cases decided since the *Bacchus* decision. The direct shipment question in *Granholm* was previously addressed by six circuit courts, all of which came to widely varying conclusions. Four courts have followed the reasoning in *Bacchus* by applying variations of its balancing test and ultimately striking down discriminatory statutes.<sup>78</sup> Two courts have fallen back on the liberal

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liquor tax. *Id.*

75. *Id.* at 273. In making this determination, the Court relied on a “cardinal rule of Commerce Clause jurisprudence” that a State may not enact a tax which discriminates against out-of-state products and provides an advantage to in-state products. *Id.* at 268.

76. *Id.* at 275.

77. *Id.* Since the statute was enacted as “mere economic protectionism” and was not intended to “combat the perceived evils of an unrestricted traffic in liquor . . . promote temperance or . . . carry out any other purpose of the Twenty-first Amendment,” it was unconstitutional. *Id.* at 276. The “central purpose of the [Twenty-first Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition.” *Id.*

78. See *Heald v. Engler*, 342 F.3d 517, 520 (6th Cir. 2003) (“[W]e conclude that the regulations in question are discriminatory in their application to out-of-state wineries, in violation of the dormant Commerce Clause, and cannot be justified as advancing the traditional ‘core concerns’ of the Twenty-first Amendment.”), *aff’d sub nom.* *Granholm v. Heald*, 125 S. Ct. 1885 (2005); *Dickerson v. Bailey*, 336 F.3d 388, 407 (5th Cir. 2003) (“Texas may not use the Twenty-first Amendment as a veil to hide from constitutional scrutiny its parochial economic discrimination against out-of-state wineries.”); *Beskind v. Easley*, 325 F.3d 506, 517 (4th Cir. 2003) (“North Carolina’s regulatory preference of in-state wine manufacturers discriminates against out-of-state wine manufacturers and sellers, in violation of the dormant Commerce Clause, and . . . the preference is ‘not supported by any clear concern of the Twenty-first Amendment.’” (quoting

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interpretation of the Twenty-first Amendment originally espoused by the Supreme Court, upholding discriminatory direct-shipment statutes as a valid exercise of the State's plenary power to regulate liquor importation.<sup>79</sup> The two cases consolidated by the Supreme Court in *Granholtm* clearly illustrate this split in reasoning.

### III. FACTS OF THE *GRANHOLM* CASE

#### A. *The Three-Tier System and the Challenged Statutes*

As did most states in the years following Prohibition, Michigan and New York used their Twenty-first Amendment power to establish a three-tier system of alcohol regulation.<sup>80</sup> Under this system, liquor manufacturers, whether located in or out of state, must sell their products to in-state wholesalers; wholesalers may sell only to in-state retailers; and retailers may then sell to consumers.<sup>81</sup> As a general rule, this system applies to all liquor sold within a state, although some states allow certain exceptions, usually for producers of wine.<sup>82</sup>

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*Bacchus*, 468 U.S. at 276)); *Bainbridge v. Turner*, 311 F.3d 1104, 1115 (11th Cir. 2002) ("Before the State can successfully raise the Twenty-first Amendment as a shield, it must show that its statutory scheme is necessary to effectuate the proffered core concern [of the Amendment] in a way that justifies treating out-of-state firms differently from in-state firms . . .").

79. See *Swedenburg v. Kelly*, 358 F.3d 223, 227 (2d Cir. 2004), *rev'd sub nom. Granholtm v. Heald*, 125 S. Ct. 1885 (2005); *Bridenbaugh v. Freeman-Wilson*, 227 F.3d 848, 853 (7th Cir. 2000) ("No longer may the dormant commerce clause be read to protect interstate shipments of liquor from regulation.").

80. *Swedenburg*, 358 F.3d at 228; *Engler*, 342 F.3d at 520; *Prince*, *supra* note 6, at 1591.

81. *Granholtm*, 125 S. Ct. at 1893; *Swedenburg*, 358 F.3d at 228; *Engler*, 342 F.3d at 520; *Prince*, *supra* note 6, at 1591. States that adopted this system justified it on the grounds that it "ensures the orderly collection of taxes, prevents the vertical and horizontal integration of the state alcohol market, and helps fulfill temperance goals." *Prince*, *supra* note 6, at 1591.

82. Motivation for discriminatory protection of wine is stronger than for other alcoholic beverages because of "[t]he existence in many states of significant wine production destined primarily for local consumption" and the tendency of wine producers to purchase their materials locally. Note, *Economic Localism in State Alcoholic Beverage Laws—Experience Under the Twenty-First Amendment*, 72 HARV. L. REV. 1145, 1153 (1959). A major motivation for laws giving advantages to in-state wine producers is the desire to protect and encourage local agriculture. *Id.* Consequently, these laws give advantages where the "ultimate benefits" are likely to accrue to local growers. *Id.* "It is notable that most statutes extend preferential treatment only to wines produced from agricultural products grown in the state." *Id.*

In Michigan, a license is available for in-state wineries allowing them to ship directly to consumers, bypassing two tiers of the three-tier system.<sup>83</sup> This privilege is not available to out-of-state wineries, which may ship into the state, but are required to ship to a Michigan wholesaler.<sup>84</sup> The plaintiffs in *Heald v. Engler*<sup>85</sup> claimed that this discriminatory law violated the dormant Commerce Clause by giving in-state wineries a competitive advantage over out-of-state wineries.<sup>86</sup>

Similarly, in New York, *licensed* wineries may bypass the three-tier system and ship wine directly to consumers.<sup>87</sup> In theory, this privilege is fully available to out-of-state wineries.<sup>88</sup> All that is required to become a licensed New York winery is the establishment and maintenance of a physical presence in New York.<sup>89</sup> Out-of-state wineries may ship to New York customers as long as they open a branch in New York.<sup>90</sup> However, the plaintiffs in *Swedenburg v. Kelly*<sup>91</sup> contended that this law was also unconstitutionally discriminatory, thereby disadvantaging out-of-state wineries by effectively prohibiting direct shipment of wine.<sup>92</sup>

#### B. *Heald v. Engler: The Balancing Approach*

The Sixth Circuit applied the test as set forth in *Bacchus* and held that the Michigan law was unconstitutional and could not be characterized as a proper exercise of Twenty-first Amendment power.<sup>93</sup> The court stated that the law's "discriminatory character

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83. *Engler*, 342 F.3d at 520-21.

84. *Id.*

85. 342 F.3d 517 (6th Cir. 2003).

86. *Id.* at 521. The plaintiffs claimed that in-state wineries could bypass wholesalers and retailers and avoid their attendant mark-ups, making in-state wines cheaper for consumers in some cases, and allowing the in-state wineries to realize a greater profit. *Id.*

87. *Swedenburg v. Kelly*, 358 F.3d 223, 229 (2d Cir. 2004), *rev'd sub nom. Granholm v. Heald*, 125 S. Ct. 1885 (2005).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* The *Granholm* Court described the presence requirement as cost-prohibitive, evidenced by the fact that "not a single out-of-state winery has availed itself of New York's direct-shipping privilege." *Granholm*, 125 S. Ct. at 1897. "For most wineries, the expense of establishing a bricks-and-mortar distribution operation in 1 State, let alone all 50, is prohibitive." *Id.*

93. *Heald v. Engler*, 342 F.3d 517, 524-26 (6th Cir. 2003), *aff'd sub nom. Granholm v. Heald*, 125 S. Ct. 1885 (2005).

eliminates the immunity afforded by the Twenty-first Amendment.”<sup>94</sup> The district court had upheld the statute, relying on the Supreme Court’s opinions in the *Young’s Market* line of cases, but the Sixth Circuit held that this reliance was misplaced since the *Hostetter* and *Bacchus* decisions had signaled a shift in the Supreme Court’s reasoning.<sup>95</sup> The court of appeals held that the correct approach was “to apply the traditional dormant Commerce Clause analysis and, if the provisions are unconstitutional under the Commerce Clause, to determine whether the state has shown that it has no reasonable nondiscriminatory means of advancing the ‘core concerns’ of the Twenty-first Amendment.”<sup>96</sup>

Applying this test to the Michigan direct-shipment law, the court noted that discriminatory statutes “are ‘virtually *per se*’ invalid”<sup>97</sup> under the Commerce Clause unless they serve “‘a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.’”<sup>98</sup> The court found that the Michigan statute was clearly facially discriminatory.<sup>99</sup> It then addressed whether “the regulatory scheme [was] nevertheless constitutional because it ‘fall[s] within the core of the State’s power under the Twenty-first Amendment,’ having been enacted ‘in the interest of promoting temperance, ensuring orderly market conditions, and raising revenue.’”<sup>100</sup> The court held that it was not.<sup>101</sup> According to the court, the Michigan Legislature’s stated goals of ensuring tax collection and keeping alcohol out of the hands of minors were not enough to pass the “strict scrutiny” that the court imposes on statutes that discriminate against interstate

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94. *Id.* at 524 (quoting *Healy v. Beer Inst.*, 491 U.S. 324, 344 (1989) (Scalia, J., concurring)).

95. *Id.* at 523-24.

96. *Id.* at 524.

97. *Id.* (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)).

98. *Id.* at 525 (quoting *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988)).

99. *Id.* The discriminatory effect is demonstrated by the fact that Michigan wineries have greater access to consumers who desire direct shipment and are able to realize a greater profit by bypassing the three-tier system. *Id.* In contrast, out-of-state wineries are harmed economically by their inability to bypass the system and may not be able to gain access to the Michigan market at all. *Id.*

100. *Id.* at 525-26 (quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1990)). The *North Dakota* Court proposed these three factors—promoting temperance, ensuring orderly market conditions, and raising revenue—as the “core concerns” underlying the Twenty-first Amendment. *Id.* at 523-24.

101. *Id.* at 526.



commerce.<sup>102</sup>

C. *Swedenburg v. Kelly: The Unconditional Grant Approach*

The Second Circuit in *Swedenburg* reached the opposite result. The court held that the balancing approach utilized by the *Engler* court and other courts was “flawed because it has the effect of unnecessarily limiting the authority delegated to the states through the clear and unambiguous language of section 2.”<sup>103</sup> While the Sixth Circuit interpreted *Hostetter* as mandating a balancing test between the Commerce Clause and the Twenty-first Amendment, the *Swedenburg* court read the *Hostetter* decision as proposing a different test.<sup>104</sup> According to the Second Circuit, a court should consider “the scope of the Twenty-first Amendment’s grant of authority to the states to determine whether the challenged statute is within the ambit of that authority, such that it is exempted from the effect of the dormant Commerce Clause.”<sup>105</sup>

The Second Circuit interpreted the recent Supreme Court cases not as placing limits on the states’ Twenty-first Amendment power, but as upholding limits already there.<sup>106</sup> Rather than subordinating the Twenty-first Amendment to the Commerce Clause when there is a conflict, the court recognized that “under section 2, a state may regulate the importation of alcohol for distribution and use within its borders, but may not intrude upon federal authority to regulate beyond the state’s borders or to preserve fundamental rights.”<sup>107</sup> The court characterized the opinions seeming to limit Twenty-first Amendment power as simply recognizing that the Commerce Clause still applies to liquor outside of the powers granted to the states.<sup>108</sup> The court upheld

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102. *Id.* at 527.

103. *Swedenburg v. Kelly*, 358 F.3d 223, 231 (2d Cir. 2004), *rev’d sub nom. Granholm v. Heald*, 125 S. Ct. 1885 (2005).

104. *Id.*

105. *Id.*; see Patterson, *supra* note 53, at 780 (“The sole ‘question is whether the provision in this case is an exercise of a power expressly conferred upon the States by the Constitution.’” (quoting *Liquor Corp. v. Duffy*, 479 U.S. 335, 359-60 (1987) (O’Connor, J., dissenting))).

106. See *Swedenburg*, 358 F.3d at 233.

107. *Id.*

108. *Id.* at 236; see also Patterson, *supra* note 53, at 774 (“[P]roponents of the unconditional grant theory have never argued that the Twenty-first Amendment operates to completely divest Congress of the power to regulate alcohol. Rather, they have argued that the Twenty-first Amendment operates to repeal the Commerce Clause as it pertains to state laws regulating the importation and

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New York's direct shipment law as being within the scope of authority granted to the states by the Twenty-first Amendment.<sup>109</sup>

#### IV. THE SUPREME COURT'S ANALYSIS AND HOLDING

##### A. *The Majority—Finally Finding a Balance?*

The Supreme Court in *Granholm* sided with the Sixth Circuit, maintaining its *Bacchus* stance that a balancing approach is required for statutes that discriminate against out-of-state liquor in violation of the Commerce Clause.<sup>110</sup> The Court laid out the facts of the cases and commented on the obviously discriminatory character of both the Michigan and New York laws.<sup>111</sup> It then explained that the States' position, that their statutes are valid under the Twenty-first Amendment despite their discriminatory effect, was "inconsistent with our precedents and with the Twenty-first Amendment's history."<sup>112</sup> The Court held that the Twenty-first Amendment "does not allow states to regulate the direct shipment of wine on terms that discriminate in favor of in-state producers."<sup>113</sup>

The Supreme Court based its holding primarily on its (1) interpretation of the Wilson and Webb-Kenyon Acts and those Acts' effect on the *Scott* decision, (2) treatment of the *Young's Market* line of cases, and (3) interpretation and application of the *Bacchus* decision.

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distribution of alcohol.").

109. *Swedenburg*, 358 F.3d at 239. Interestingly, although the *Swedenburg* court's holding does not seem to require this finding, after stating that the statute was "within the ambit" of Twenty-first Amendment power, the court went on to explain that the statute allows access to the New York market for both in-state and out-of-state wine "in a non-discriminatory manner, while targeting valid state interests in controlling the importation and transportation of alcohol." *Id.* Although "core concerns" do not enter into the court's calculation, this reference could be taken as implying either that the court was somewhat unsure of its analysis of the statute or that it would have reached an identical holding had it applied a *Bacchus* balancing test.

110. *See Granholm v. Heald*, 125 S. Ct. 1885, 1897 (2005).

111. *Id.* at 1893-97. The Michigan law was discriminatory because out-of-state wineries were banned completely from shipping to in-state consumers. *Id.* at 1896. Forcing these wineries to utilize the three-tier system increased costs and for some small wineries it had the effect of barring them from the Michigan market if they were unable to secure a wholesaler to carry their product. *Id.* The New York system accomplished indirectly what the Michigan system accomplished directly. *Id.*; *see supra* note 92.

112. *Granholm*, 125 S. Ct. at 1897.

113. *Id.*

1. *The Wilson and Webb-Kenyon Acts and the Scott Case*

The majority interpreted the Wilson Act as prohibiting discrimination “[b]y its own terms,” since the Act allows states to regulate imported liquor only “to the same extent and in the same manner” as liquor produced in the state.<sup>114</sup> The majority explained that *Scott* confirms this understanding of the Act.<sup>115</sup> *Scott* involved a challenge to a liquor regulation system that required all liquor sales to be “channeled through the state liquor commissioner.”<sup>116</sup> This statute was discriminatory because it required the Commissioner to purchase in-state alcohol whenever it was as cheap as out-of-state alcohol, and it limited the state’s markup on locally produced wine while imposing no such limit on imported wine.<sup>117</sup> The *Scott* Court held that the statute was unconstitutional since “the Wilson Act was ‘not intended to confer upon any State the power to discriminate injuriously against the products of other States in articles whose manufacture and use are not forbidden, and which are therefore the subjects of legitimate commerce.’”<sup>118</sup>

According to the majority, *Vance* and *Rhodes* clarified that states could not prohibit direct shipments to consumers under the Wilson Act.<sup>119</sup> The *Vance* Court “characterized *Scott* as embodying two distinct holdings: first, the South Carolina dispensary law ‘amount[ed] to an unjust discrimination against liquors, the products of other States’”; and second, banning direct shipments to consumers was an unconstitutional violation of the Commerce Clause.<sup>120</sup> The *Granholm* majority concluded that the second holding was implicit in *Scott*, but *Vance* and *Rhodes* later clarified and expanded it.<sup>121</sup>

The Webb-Kenyon Act was enacted thereafter simply to respond to the gap that the Wilson Act left open requiring states to allow direct shipments of alcohol to consumers.<sup>122</sup> The majority rejected the plaintiffs’ claim that the Webb-Kenyon Act “removed

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114. *Id.* at 1899 (quoting 27 U.S.C. § 121 (2000)).

115. *See id.*

116. *Id.*

117. *Id.*

118. *Id.* (quoting *Scott v. Donald*, 165 U.S. 58, 100 (1897)).

119. *Id.*

120. *Id.* at 1899-1900 (quoting *Vance v. W.A. Vandercook Co.*, 170 U.S. 438, 422 (1898)).

121. *Id.* at 1900.

122. *Id.*

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any barrier to discriminatory state liquor regulations,”<sup>123</sup> stating that the Court in *Clark Distilling* construed the Webb-Kenyon Act as enacted “‘simply to extend that which was done by the Wilson Act.’”<sup>124</sup> Since the Wilson Act did not allow discriminatory liquor regulation, neither did the Webb-Kenyon Act.<sup>125</sup>

The Court also rejected the idea that the plain language of the Webb-Kenyon Act allows discriminatory legislation, citing *McCormick & Co. v. Brown*<sup>126</sup> to support the conclusion that the Webb-Kenyon Act, although forbidding shipment or transportation in violation of any state law, applies only to “valid” state laws, meaning laws that do not violate the dormant Commerce Clause.<sup>127</sup> The Court held that the Webb-Kenyon Act did not displace *Scott’s* holding that states must regulate in-state and out-of-state liquor on equal terms.<sup>128</sup>

## 2. What Happened to Young’s Market?

The majority also rejected the plaintiffs’ contention that the Twenty-first Amendment provides states with the authority to enact discriminatory statutes.<sup>129</sup> The majority explained that the history of the Amendment “provides strong support for the view that [Section] 2 restored to the states the powers they had under the Wilson and Webb-Kenyon Acts,” since the wording of the

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123. *Id.* at 1901.

124. *Id.* (quoting *Clark Distilling Co. v. W. Md. Ry. Co.*, 242 U.S. 311, 324 (1917)).

125. *Id.*

126. 286 U.S. 131 (1932).

127. *Granholtm*, 125 S. Ct. at 1901 (quoting *McCormick & Co.*, 286 U.S. at 141). The Court notes that the Webb-Kenyon Act evinced “no clear congressional intent to depart from the principle, unexceptional at the time the Act was passed and still applicable today . . . that discrimination against out-of-state goods is disfavored.” *Id.* (citing *Hillside Dairy, Inc. v. Lyons*, 539 U.S. 59, 66 (2003); *W. & S. Life Ins. Co. v. State Bd. of Equalization of Cal.*, 451 U.S. 648, 652-53 (1981)).

128. *Id.* at 1902.

[T]he intent of . . . the Webb-Kenyon Act . . . was to take from intoxicating liquor the protection of the interstate commerce laws in so far as necessary to deny them an advantage over the intoxicating liquors produced in the state into which they were brought, yet, [the Act does not] show an intent or purpose to so abdicate control over interstate commerce as to permit discrimination against the intoxicating liquor brought into one state from another.

*Id.* (quoting *Pac. Fruit & Produce Co. v. Martin*, 16 F. Supp. 34, 39-40 (W.D. Wash. 1936)).

129. *Id.*

Amendment closely tracks that of the Acts.<sup>130</sup> The Court stated:

The aim of the Twenty-first Amendment was to allow States to maintain an effective and uniform system for controlling liquor by regulating its transportation, importation, and use. The Amendment did not give States the authority to pass nonuniform laws in order to discriminate against out-of-state goods, a privilege they had not enjoyed at any earlier time.<sup>131</sup>

The Court gave short shrift to *Young's Market* and its progeny, holding that these cases did not take account of and were inconsistent with the history the Court had set forth.<sup>132</sup> The Court rejected the reasoning in *Young's Market* outright in favor of "more recent cases . . . [which] confirm that the Twenty-first Amendment does not supersede other provisions of the Constitution and, in particular, does not displace the rule that States may not give a discriminatory preference to their own producers."<sup>133</sup>

### 3. *The Bacchus Balancing Act*

The majority also declined to acquiesce to the plaintiffs' suggestion that *Bacchus* should be overruled or distinguished, stating that *Bacchus* "forecloses any contention that [Section] 2 of the Twenty-first Amendment immunizes discriminatory direct-shipment laws from Commerce Clause scrutiny."<sup>134</sup>

After determining that the statutes were clearly discriminatory<sup>135</sup> and that this discrimination was not authorized by the Twenty-first Amendment,<sup>136</sup> the Court turned to the question whether either states' statute "advance[d] a legitimate local purpose that [could not] be adequately served by reasonable nondiscriminatory alternatives."<sup>137</sup> The Court decisively rejected

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130. *Id.*

131. *Id.*

132. *Id.* at 1902-03.

133. *Id.* at 1903.

134. *Id.* at 1904. The Court suggested that *Bacchus* was not anomalous in its recognition that the Twenty-first Amendment does not allow States to enact discriminatory regulations. *Id.* The Court noted that *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986) and *Healy v. Beer Institute*, 491 U.S. 324 (1989) would also be invalidated if *Bacchus* were overruled since they also invalidated state liquor regulations under the Commerce Clause. *Id.*

135. *Id.* at 1896-97.

136. *Id.* at 1897.

137. *Id.* at 1905 (quoting *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988)).

the two justifications advanced by the States attempting to show that they could not adequately police out-of-state direct shipments.<sup>138</sup>

The States first advanced the justification that allowing direct-shipments of wine from out of-state diminished their ability to prevent underage drinking.<sup>139</sup> The Court found that the States' evidence to support this justification was less than convincing.<sup>140</sup> It stated that minors are less likely to consume wine than other types of liquor, and in any case, are just as likely to order wine from in-state producers as from out-of-state producers.<sup>141</sup> The Court found that other non-discriminatory means were available to address this problem if indeed it really was a problem.<sup>142</sup> The Court also summarily dismissed the States' second concern—the facilitation of tax collection—as “insufficient.”<sup>143</sup> The Court held that while the States' concern about tax revenue was not “wholly illusory,” the States could accomplish these objectives through non-discriminatory means.<sup>144</sup> Since the States had not offered any “concrete record evidence” to show that “nondiscriminatory alternatives [would] prove unworkable,” the Court held the states' direct-shipment laws to be an unconstitutional violation of the Commerce Clause.<sup>145</sup>

### B. Justice Thomas's Dissent

Justice Thomas in his dissent took issue with each of the points addressed by the majority. He poignantly stated:

A century ago, this Court repeatedly invalidated, as inconsistent with the negative Commerce Clause, state

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138. *Id.* at 1905-07. In doing so, the Court relied heavily on a report from the Federal Trade Commission, which compiled detailed data on the wine industry and barriers to direct shipment. *Id.* at 1905; see FED. TRADE COMM'N, POSSIBLE ANTICOMPETITIVE BARRIERS TO E-COMMERCE: WINE (2003), available at <http://www.ftc.gov/os/2003/07/winereport2.pdf>.

139. *Granholtm*, 125 S. Ct. at 1905.

140. *Id.*

141. *Id.* at 1905-06; see FED. TRADE COMM'N, *supra* note 138, at 4 (noting that states that permit direct shipment of out-of-state wines report few problems with sales to minors and have found other effective ways to address this concern).

142. *Granholtm*, 125 S. Ct. at 1906.

143. *Id.*

144. *Id.*; see FED. TRADE COMM'N, *supra* note 138, at 4 (noting that states which allow direct shipment have reported few problems with tax collection when they require permits for wineries who wish to ship to in-state customers).

145. *Granholtm*, 125 S. Ct. at 1907.

liquor legislation that prevented out-of-state businesses from shipping liquor directly to a State's residents. The Webb-Kenyon Act and the Twenty-first Amendment cut off this intrusive review, as their text and history make clear and as this Court's early cases on the Twenty-first Amendment recognized. The Court today seizes back this power, based primarily on a historical argument that this Court decisively rejected long ago in [*Young's Market*].<sup>146</sup>

1. *The Wilson and Webb-Kenyon Acts and the Scott Case*

The dissenting opinion, written by Justice Thomas, characterized the Court's holding as "[s]traying from the Webb-Kenyon Act's text,"<sup>147</sup> in that the holding required the Court to interpret the Webb-Kenyon Act as overruling only *Vance* and *Rhodes* and leaving *Scott* intact.<sup>148</sup> According to Justice Thomas, "[h]istory reveals that the Webb-Kenyon Act overturned not only *Vance* and *Rhodes*, but also *Scott* and therefore its 'nondiscrimination' principle."<sup>149</sup> His dissent noted that when Congress promulgated the Wilson Act in an effort to allow states to regulate liquor imports, "[r]ather than holding that the Wilson Act meant what it said, three decisions of this Court construed the Act to be a virtual

146. *Id.* at 1909-10 (Thomas, J., dissenting). Justice Stevens, Justice O'Connor, and Chief Justice Rhenquist also joined in this dissent. *Id.* at 1909.

147. *Id.* at 1913. Justice Thomas gave much attention in his dissent to the plain meaning of the Webb-Kenyon Act. *Id.* at 1910-13. He posited that the Act "immunizes from negative Commerce Clause review the state liquor laws that the Court holds are unconstitutional." *Id.* at 1910. According to Justice Thomas, the Act's prohibition of liquor importation into a state in violation of "[a]ny law of such State" means any law, including a "discriminatory" one." *Id.* at 1911 (emphasis added). He disputed the Court's characterization of the holding in *Clark Distilling*, stating that even though that case upheld the Webb-Kenyon Act in the context of a non-discriminatory law, the Court's characterization of the Act in that case applies equally to a discriminatory law. *Id.* at 1912. *Clark Distilling* "construed the Webb-Kenyon Act to 'extend that which was done by the Wilson Act' in that 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.'" *Id.* (quoting *Clark Distilling Co. v. W. Md. Ry. Co.*, 242 U.S. 311, 324 (2005)). Justice Thomas emphasized that the majority's interpretation of this passage as referring only to nondiscriminatory laws was misguided. *Id.* He believed that this passage also applied to the non-discrimination principle of the Commerce Clause since this "principle flows from the 'immunity characteristic of interstate commerce,' no less than any other negative Commerce Clause doctrine." *Id.*

148. *Id.* at 1913.

149. *Id.*

nullity.”<sup>150</sup>

Justice Thomas interpreted *Scott* differently than the majority. He explained that the plaintiff was a resident of South Carolina who had tried to directly import liquor for his own use, rather than purchasing it through the State Commissioner as the monopoly system required.<sup>151</sup> When the State seized this liquor before he received it, he sued for damages and an injunction allowing him to import liquor directly for his own use.<sup>152</sup> Justice Thomas explained that the majority misread *Scott* when it stated that the main holding was that statutes that discriminate against out-of-state liquor are unconstitutional.<sup>153</sup> According to Thomas, *Scott* actually held “that the state monopoly system unconstitutionally discriminated against Donald by allowing him to purchase liquor from in-state stores, but not directly from out-of-state interests.”<sup>154</sup> Thus, the direct shipment question was not only implicit in *Scott*, it was “squarely at issue.”<sup>155</sup>

According to Justice Thomas, the *Scott* Court struck down South Carolina’s monopoly system not based on discriminatory provisions within the statute, but based on its belief that “a ban on direct importation *was* ‘discrimination’ under the negative Commerce Clause.”<sup>156</sup> This was the only basis on which the Court could have upheld the plaintiff’s award of damages for “interference with his ability to import goods directly from outside the State.”<sup>157</sup> The *Scott* Court reserved the issue of whether a state monopoly system that allowed direct importation was constitutional.<sup>158</sup> Later, *Vance* upheld South Carolina’s new monopoly system that allowed direct shipments, because it had “preserved the constitutional right established in *Scott* and *Rhodes* to send and receive direct shipments of liquor free of state interference.”<sup>159</sup>

When Congress enacted the Webb-Kenyon Act shortly

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150. *Id.*

151. *Id.* at 1914.

152. *Id.*

153. *Id.* at 1918.

154. *Id.*

155. *Id.*

156. *Id.* (emphasis added). Justice Thomas noted that Justice Shiras, who authored the *Scott* opinion, believed that all state monopoly systems were unconstitutionally discriminatory. *Id.*

157. *Id.*

158. *Id.* at 1914.

159. *Id.* at 1917.



thereafter, in response to the treatment these cases gave to the Wilson Act, it overruled all three cases, not just *Vance* and *Rhodes*.<sup>160</sup> Because the direct shipment ban was at the heart of the *Scott* case and the essence of its holding was that a ban on direct shipment was unconstitutional discrimination, the Webb-Kenyon Act also overruled *Scott* by closing the direct shipment loophole and removing the protections of the Commerce Clause from liquor imports.<sup>161</sup> Therefore, the Webb-Kenyon Act, Justice Thomas remarked, “authorizes the discriminatory state laws before the Court today.”<sup>162</sup>

## 2. *Young’s Market Should Be Upheld*

Justice Thomas explained that his reading of the Webb-Kenyon Act is dispositive of the case, but even under the Twenty-first Amendment and subsequent case law, the Michigan and New York statutes should be upheld.<sup>163</sup> He noted that the Twenty-first Amendment tracks the language of the Webb-Kenyon Act, but is broader in that it encompasses all transportation and importation of products destined for in-state use that violates the laws of that state.<sup>164</sup> According to Justice Thomas, this language “even more naturally encompasses discriminatory state laws.”<sup>165</sup>

Thomas’s dissent defended the Court’s post-Twenty-first Amendment holdings in *Young’s Market* and its progeny, stating that these cases held explicitly that discriminatory laws were constitutional under the Twenty-first Amendment.<sup>166</sup> Rather than failing to consider the history of the Twenty-first Amendment, as the majority proposed, the Court in *Young’s Market* decisively rejected “virtually the same historical argument the Court today accepts”<sup>167</sup> in favor of a holding based on the plain language of the Twenty-first Amendment, reasoning that “the text of our Constitution is the best guide to its meaning.”<sup>168</sup> Justice Thomas would have upheld *Young’s Market*. He argued that the majority gave too little weight to the opinions and practices contemporary to

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160. *Id.* at 1919.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 1920.

167. *Id.*

168. *Id.*

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the Amendment.<sup>169</sup>

### 3. *Bacchus Should Be Abandoned*

Justice Thomas did not believe that *Bacchus* demanded the conclusion that the majority reached, but he would have resolved any conflict in favor of the Court's earlier Twenty-first Amendment cases.<sup>170</sup> He stated that even under *Bacchus*, the New York and Michigan statutes were constitutional.<sup>171</sup>

In *Bacchus*, the Court struck down a Hawaii tax exemption because it was "mere economic protectionism," and the State did not justify it under any core concern of the Twenty-first Amendment.<sup>172</sup> In contrast, Justice Thomas concluded that the statutes of Michigan and New York were constitutional because they advanced the core concern of allowing states to regulate direct shipment of liquor, which was an issue of concern to the drafters of the Amendment, as evidenced by the Webb-Kenyon Act's haste to close the direct-shipment loophole.<sup>173</sup> Even if one concedes that the Twenty-first Amendment does not authorize merely protectionist liquor legislation, the laws at issue in *Granholtm* did not fall under that category.<sup>174</sup> The states' requirements, that out-of-state liquor pass through an in-state wholesaler and retailer, serve valid regulatory interests since their "presence ensures accountability."<sup>175</sup> The laws simply allow in-state wineries to "act as their own wholesalers and retailers in limited circumstances."<sup>176</sup>

The dissent stated that "*Bacchus* should be overruled, not fortified with a textually and historically unjustified 'nondiscrimination against products' test."<sup>177</sup> Although the Twenty-first Amendment did not "repeal" the Commerce Clause as it relates to liquor, "that does not justify *Bacchus*' narrowing of the Twenty-first Amendment to its 'core concerns.'"<sup>178</sup>

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169. *Id.* at 1921.

170. *Id.* at 1924.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 1924-25.

175. *Id.* at 1925 (quoting *Swedenburg v. Kelly*, 358 F.3d 223, 237 (2d Cir. 2004), *rev'd sub nom.* *Granholtm v. Heald*, 125 S. Ct. 1885 (2005)).

176. *Id.*

177. *Id.*

178. *Id.*

C. *Justice Stevens's Dissent*

Justice Stevens's dissent had a different focus. He argued that the Court should give deference to the judges who authored the *Young's Market* line of opinions, which broadly interpreted the States' power under the Twenty-first Amendment, since they "lived through the debates that led to the ratification of [the Eighteenth and Twenty-first Amendments]." <sup>179</sup> He stated that at the time the Amendment was ratified, the idea that

discriminatory state laws violated the unwritten prohibition against balkanizing the American economy—while persuasive in contemporary times when alcohol is viewed as an ordinary article of commerce—would have seemed strange indeed to the millions of Americans who condemned the use of the "demon rum" in the 1920's and 1930's. Indeed, they expressly authorized the "balkanization" that today's decision condemns. <sup>180</sup>

While many Americans today view alcohol as "an ordinary article of commerce," this was not the dominant view in the times that produced Prohibition and its subsequent repeal in favor of state control. <sup>181</sup> According to Justice Stevens's "understanding (and recollection) of the historical context" of the Twenty-first Amendment, it should be "broadly and colloquially interpreted" as the people who ratified it intended. <sup>182</sup>

## V. ANALYSIS

In 2004, one ambitious "wine guru" predicted the "total collapse" of the three-tier system within ten years. <sup>183</sup> After *Granholm*, this prophesy is even more likely to come to pass. While arguable, the Court's interpretation of the precedents on which its decision rests is not altogether unreasonable; the major flaw in the Court's reasoning is that it completely failed to consider the impact

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179. *Id.* at 1908 (Stevens, J., dissenting).

180. *Id.* at 1909.

181. *Id.* at 1908.

182. *Id.* at 1909 (quoting *Carter v. Virginia*, 321 U.S. 131, 141 (1944)). Justice John Paul Stevens was born on April 20, 1920, and he grew up during the era of Prohibition and its repeal. Jerry Goldman, *Oyez: U.S. Supreme Court Multimedia*, [http://www.oyez.org/oyez/resource/legal\\_entity/101/](http://www.oyez.org/oyez/resource/legal_entity/101/) (last visited Feb. 15, 2006).

183. Melzer, *supra* note 49, at 299 (quoting Robert M. Parker Jr., *Parker Predicts the Future*, FOOD & WINE, Oct. 2004, at 120, available at <http://www.foodandwine.com/articles/parker-predicts-the-future>).

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of its decision on state liquor laws that have been in place since the mid-1930s.

A. *Implications of the Non-Discrimination Principle*

The Court held categorically that state laws discriminating against out-of-state liquor are invalid.<sup>184</sup> The three-tier system in use in most states, which according to the majority is “unquestionably legitimate,”<sup>185</sup> requires most liquor to pass through in-state wholesalers and retailers. This means that out-of-state retailers and wholesalers are unable to ship liquor to consumers in another state. The majority mentioned that the three-tier system is valid under the Twenty-first Amendment; however, these laws clearly discriminate against out-of-state interests.<sup>186</sup> The inconsistency in the Court’s position, as Justice Thomas pointed out, is that while striking down laws that discriminate against out-of-state manufacturers, the Court seemed to approve of laws that discriminate against wholesalers and retailers.<sup>187</sup> Justice Thomas commented that the distinction between discrimination that the Court held unconstitutional and that which it held to be valid is “difficult to understand.”<sup>188</sup> The reason the Court’s position is difficult to understand is that it does not make sense.

The *Granholtm* plaintiffs asserted that a decision invalidating laws that ban direct-shipments of out-of-state wine based on their discriminatory character would “call into question the constitutionality of the three-tier system.”<sup>189</sup> In response, the Court simply stated that “[t]his does not follow from our holding.”<sup>190</sup> The Court noted that the “Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution

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184. *Granholtm*, 125 S. Ct. at 1905 (“State policies are protected under the Twenty-first Amendment when they treat liquor produced out of state the same as its domestic equivalent. The instant cases, in contrast, involve straightforward attempts to discriminate in favor of local producers. The discrimination is contrary to the Commerce Clause and is not saved by the Twenty-first Amendment.”).

185. *Id.* at 1905 (quoting *North Dakota v. United States*, 495 U.S. 423, 432 (1990)).

186. *Id.* at 1922 (Thomas, J., dissenting).

187. *Id.* at 1911.

188. *Id.* at 1923.

189. *Id.* at 1904-05 (majority opinion).

190. *Id.* at 1905.

system.”<sup>191</sup> The Court failed to consider the fact that *any* restriction on liquor imports that is not accompanied by a complete in-state ban on liquor sales is inherently discriminatory. In the same breath, the Court both affirmed the nearly unlimited power of the states under the Twenty-first Amendment and fashioned a weapon by which it may gradually take that power away if it so chooses.<sup>192</sup>

### B. *Implications of the Commerce Clause Test*

Of course, one may argue that the three-tier system is safe under the second prong of the Commerce Clause balancing test—that it “advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives.”<sup>193</sup> From the text of the opinion, it seems unlikely that any discriminatory liquor import law would be upheld under this second prong.<sup>194</sup> The Court gave no indication as to what types of justifications would meet the test. One may begin with the *Bacchus* “core concerns,” but as Justice Thomas noted, although the Court placed much weight on *Bacchus*, it “[did] not even mention, let alone apply, the ‘core concerns’ test that *Bacchus* established. The Court instead *sub silentio* cast aside that test, employing otherwise-applicable negative Commerce Clause scrutiny.”<sup>195</sup> In addition, the Court dismissed two justifications of Michigan and New York for the direct shipment laws that fall under two of the core concerns previously proposed.<sup>196</sup>

The two main justifications that the States advanced for the direct-shipment statutes were “keeping alcohol out of the hands of minors and facilitating tax collection.”<sup>197</sup> These two justifications fall neatly under the categories of “promoting temperance”<sup>198</sup> and

191. *Id.* (quoting *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980)).

192. *Id.* at 1907.

193. *Id.* at 1905 (quoting *New Energy Co. v. Limbach*, 486 U.S. 269, 278 (1988)).

194. *See id.* at 1907.

195. *Id.* at 1925 (Thomas, J., dissenting).

196. *Bacchus* asserted promotion of temperance as one of the possible purposes of the Twenty-first Amendment and alluded to, but did not specifically delineate others. *Bacchus Imps., Ltd. v. Dias*, 468 U.S. 263, 276 (1984). *North Dakota* expanded on *Bacchus* by identifying some of the Amendment’s core concerns as “promoting temperance, ensuring orderly market conditions, and raising revenue.” *North Dakota v. United States*, 495 U.S. 423, 432 (1990).

197. *Granholm*, 125 S. Ct. at 1905.

198. *North Dakota*, 495 U.S. at 432.

“raising revenue.”<sup>199</sup> Nevertheless, the Court made short work of them, stating that although these were valid goals, the States must still accomplish them in a non-discriminatory manner.<sup>200</sup>

States may defend their three-tier system under any one of the proposed core concerns. However, *Granholm* has now shown that, where discriminatory laws are at issue, two of these core concerns are, at best, difficult to establish. One scholar noted that “the three-tier system played a valuable role in the decades immediately following the repeal of Prohibition.”<sup>201</sup> Its aims were “to collect taxes, to reduce the hold organized crime had gained on the liquor trade during Prohibition, and to prevent sales of alcohol to minors.”<sup>202</sup> However, “[a]lthough the system was—and in many respects still is—effective, it has not evolved and kept pace with the expansion of the market. Consumer choice has, in fact, been drastically limited.”<sup>203</sup> Some have even called it “an absurdly inefficient system that costs the consumer big bucks.”<sup>204</sup>

Organized crime is no longer a major problem in the liquor industry, and the Court has already indicated that states have non-discriminatory ways to collect taxes and keep alcohol from minors. Given the Court’s focus on the free movement of goods in interstate commerce,<sup>205</sup> it would not be surprising if the Court strikes down the three-tier system at some point in the coming years either because it no longer serves a valid purpose under the Twenty-first Amendment or because its purposes can be adequately served by non-discriminatory means.

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199. *Id.*

200. *Granholm*, 125 S. Ct. at 1906.

201. Lucas, *supra* note 5, at 906.

202. *Id.* at 906-07.

203. *Id.* at 907.

204. Parker, *supra* note 183, at 120. Parker noted that this “narrowly restricted approach . . . is coming to a dramatic end—hastened in part by the comparative ease of ordering wine over the Internet.” *Id.*

205. Justice Thomas states in his dissent:

The Court’s focus on [the effects of the states’ direct shipment laws on the wine industry] suggests that it believes that its decision serves this Nation well. I am sure that the judges who repeatedly invalidated state liquor legislation, even in the face of clear congressional direction to the contrary, thought the same. The Twenty-first Amendment and the Webb-Kenyon Act took those policy choices away from judges and returned them to the States. Whatever the wisdom of that choice, the Court does this Nation no service by ignoring the textual commands of the Constitution and Acts of Congress.

*Granholm*, 125 S. Ct. at 1927 (citation omitted).

### C. *Taking a Step Backwards*

So the question remains, what power has the Court left to the states under the Twenty-first Amendment, if courts are likely to hold all discriminatory laws unconstitutional? The Court's decision seems to require the view, espoused by some scholars, that the Twenty-first Amendment protects only states that wish to be "dry."<sup>206</sup> However, this view is neither supported by case law nor by the practice of the states at the time Prohibition was repealed.

#### 1. *Post-Prohibition Liquor Laws*

The widespread and largely unquestioned practice of the states following the Twenty-first Amendment's ratification was to enact liquor regulations, which were often discriminatory.<sup>207</sup> According to Justice Thomas, this "confirm[s] that the [Twenty-first] Amendment freed the States from negative Commerce Clause restraints on discriminatory regulation."<sup>208</sup> He commented that this

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206. The view that the power of the Twenty-first Amendment was intended only to protect "dry" states from having to allow direct shipments into the states is put forth by several scholars. Melzer described the two prominent views as the "federalist" and "absolutist" views. Melzer, *supra* note 49, at 285. The federalist view is that "section two merely protected dry states: that is, states that allowed the importation, manufacture, or sale of intoxicating liquor gained no new powers vis-à-vis the federal government under the amendment." *Id.* at 286. The absolutist view proposed that "the section gave states plenary power to regulate the evils associated with intoxicating beverages." *Id.* Agarwal and Zywicki also posit that the Twenty-first Amendment "enabled dry States to remain dry if they so chose, but it did not empower wet states to engage in economic warfare against the products of other wet States." Asheesh Agarwal & Todd Zywicki, *The Original Meaning of the 21st Amendment*, 8 GREEN BAG 2d 137, 138 (2005).

207. *Granholm*, 125 S. Ct. at 1921 (Thomas, J., dissenting). After the repeal of Prohibition, "[s]tates that made liquor legal imposed either state monopoly systems, or licensing schemes strictly circumscribing the ability of private interests to sell and distribute liquor within state borders." *Id.* All of these laws were in some way discriminatory. *Id.* For example, twenty-one states subjected out-of-state alcohol producers to two layers of licensing fees by requiring them to purchase a license to sell their products within the state. *Id.* at 1922. Thirteen states charged in-state wine manufacturers lower licensing fees. *Id.* One state exempted in-state wine producers from licensing entirely. *Id.* Eight states taxed out-of-state liquor at a higher rate than in-state liquor. *Id.* Twenty-nine states "exempted exports from excise taxes that were applicable to imports." *Id.* Ten states required a special license for "solicitors of out-of-state liquor products." *Id.* Ten states charged increased licensing fees to wholesalers that sold imported liquor. *Id.* Some states had "antiretaliation statutes limiting or banning imports from other States that themselves discriminated against out-of-state liquor." *Id.*

208. *Id.* at 1921.

practice reflects a “lay consensus”<sup>209</sup> that discriminatory legislation is “within the ambit of the Twenty-first Amendment.”<sup>210</sup> Rather than credit this “lay consensus,” the majority relied on “scattered academic and judicial commentary arguing that the Twenty-first Amendment did not permit States to enact discriminatory liquor legislation.”<sup>211</sup> Justice Thomas considered “the uniform practice of the States whose people ratified the Twenty-first Amendment” to be a more reliable gauge of its meaning than the “confused mishmash of elite opinion” that drove the Court’s analysis.<sup>212</sup>

## 2. Case Law Interpreting the Twenty-First Amendment

Certainly, the failure of the Court to take into account the prolific nature of discriminatory legislation, as a guide to the intention of those who ratified the Twenty-first Amendment, is troubling. Even more troubling is the Court’s treatment of the precedent it used to justify its holding. The Court not only ignored and misapplied controlling precedent, but it also resurrected long-dead precedent to make the law fit its desired result.

One of the most troubling aspects of the majority’s decision is its treatment of *Young’s Market*. Without expressly overruling *Young’s Market* and its progeny, the Court rendered the decisions wholly invalid. The Court did not even stop to consider what reasoning might have prompted an entire line of cases to hold—without one dissenting voice—that the Twenty-first Amendment immunized state laws regulating liquor imports completely from dormant Commerce Clause review.<sup>213</sup> In *Granholm*, the Court adopted an interpretation of the Amendment that the *Young’s Market* Court expressly rejected.<sup>214</sup> The *Young’s Market* Court stated:

[The plaintiffs] request us to construe the amendment as saying, in effect: The state may prohibit the importation of

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209. *Id.* at 1923.

210. *Id.* at 1922.

211. *Id.* at 1923; *see id.* at 1903 (majority opinion) (citing case law and scholarly works supporting the idea that the Twenty-first Amendment does not authorize discriminatory liquor legislation).

212. *Id.* at 1923 (Thomas, J., dissenting). Justice Stevens also weighed in on this point stating that “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.” *Id.* at 1909 (Stevens, J., dissenting).

213. *See supra* Part II.D.

214. *See State Bd. of Equalization v. Young’s Market Co.*, 299 U.S. 59, 62 (1936).



intoxicating liquors provided it prohibits the manufacture and sale within its borders [sic]; 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.<sup>215</sup>

The Court's justification for its dismissive treatment of these cases is that it failed to consider the history underlying the Twenty-first Amendment in reaching its conclusions.<sup>216</sup> As Justice Thomas pointed out, the *Young's Market* Court was presented with an argument that the history of the Twenty-first Amendment evidenced an intent to omit discriminatory liquor legislation from its scope and rejected it outright in favor of an interpretation based on the plain language of the Amendment.<sup>217</sup> Considering the long and tortured history of the Twenty-first Amendment, the *Granholtm* Court should have deferred to the interpretations of the Justices who had firsthand knowledge of the events.<sup>218</sup>

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215. *Id.*

216. *Granholtm*, 125 S. Ct. at 1903.

217. *Id.* at 1920 (Thomas, J., dissenting); see *Young's Market*, 299 U.S. at 63-64.

218. See *Granholtm*, 125 S. Ct. at 1908 (Stevens, J., dissenting). After the Supreme Court in *Bacchus* commented on the "obscurity of the legislative history" of the Twenty-first Amendment, declaring that "[n]o clear consensus concerning the meaning of the provision is apparent," *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 274 (1984), the Court grounded its *Granholtm* decision in the history and purpose of the Twenty-first Amendment. See *Granholtm*, 125 S. Ct. at 1902.

The *Bacchus* Court noted that Senator Blaine, the Senate sponsor for the Twenty-first Amendment, "appears to have espoused varying interpretations" of the Amendment. 468 U.S. at 274. Senator Blaine's comments during the ratification debates for the Twenty-first Amendment, though inconclusive, are a main point of contention in the debate over the Amendment's language. Suggesting a narrow interpretation of the Amendment are the Senator's words that the purpose of the Amendment was "to assure the so-called dry States against the importation of intoxicating liquor into those States." Aaron Nielson, *No More 'Cherry-Picking': The Real History of the 21st Amendment's § 2*, 28 HARV. J.L. & PUB. POL'Y 281, 287 (2004). However, Senator Blaine also made other remarks indicating that he considered the purpose of the Amendment to be broader. *Id.* He stated that the purpose of the Amendment was "to restore to the States by constitutional amendment absolute control in effect over interstate commerce affecting intoxicating liquors." *Id.* Those who advocate a narrow interpretation of the Amendment suggest that the Senator was simply being careless in his word choice. *Id.* However, the two statements are not contradictory. Therefore, there is no reason to think that the Senator intended the Twenty-first Amendment to be limited to one purpose or the other. The broad interpretation of the Amendment would encompass both statements. Lucas credits the "rush to ratify" the Amendment and the "lack of attention paid to the details and to the potential consequences" of the Amendment as key factors leading to the confusion about

The Court grounded its decision largely in *Bacchus*, which on its face appears to lend support to the Court's position.<sup>219</sup> The Court in that case held that liquor regulations are valid if "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."<sup>220</sup> But assuming that *Bacchus* reached the right decision,<sup>221</sup> it does not require the result that the *Granolm* Court reached.<sup>222</sup> The State in *Bacchus* admitted that its purpose in enacting the tax exemption was to encourage local industry.<sup>223</sup> The *Bacchus* Court's holding was based on the fact that the admitted purpose of the statute in the case was for "economic protectionism."<sup>224</sup> Even under a broad reading of the Twenty-first Amendment, it is reasonable to assume that state laws that serve no legitimate purpose in combating "the perceived evils of an unrestricted traffic in liquor"<sup>225</sup> might be invalid.<sup>226</sup> However, this is not the case in *Granolm*. Michigan and New York justified

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the meaning of the Amendment. *Lucas*, *supra* note 5, at 919.

219. See *Bacchus*, 468 U.S. at 276 ("The central purpose of the [Twenty-first Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition.")

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

221. This presumption is questionable. The *Bacchus* Court largely based its decision on *Hostetter*, stating that this case was evidence that the Twenty-first Amendment "did not entirely remove state regulation of alcoholic beverages from the ambit of the Commerce Clause." *Id.* at 275. While it is true that *Hostetter* recognized a limitation on Commerce Clause power, another case decided prior to *Bacchus* makes clear that *Hostetter's* holding did not limit states' Twenty-first Amendment power as much as *Bacchus* assumes. In *North Dakota*, the Court states that "[i]n [*Hostetter*], we concluded that the State has no authority to regulate in an area or over a transaction that fell outside of its jurisdiction." *North Dakota v. United States*, 495 U.S. 423, 431 (1990).

222. See *Granolm*, 125 S. Ct. at 1924 (Thomas, J., dissenting) (stating that the Michigan and New York laws are constitutional even under *Bacchus*).

223. *Bacchus*, 468 U.S. at 271.

224. *Id.* at 276. The Court held that "State laws that constitute mere economic protectionism are . . . not entitled to the same deference as laws enacted to combat the perceived evils of an unrestricted traffic in liquor." *Id.* The Court explained that "[h]ere, the State does not seek to justify its tax on the ground that it was designed to promote temperance or to carry out any other purpose of the Twenty-first Amendment, but instead acknowledges that the purpose was 'to promote a local industry.'" *Id.*

225. *Id.*

226. See *Granolm*, 125 S. Ct. at 1925 (Thomas, J., dissenting) ("[T]here is little evidence that purely protectionist tax exemptions like those at issue in *Bacchus* were of any concern to the framers of the [Twenty-first Amendment].").

their laws not as mere economic protectionism, but as means to promote the goals of the Twenty-first Amendment.<sup>227</sup> In this case, the Court should have deferred to the judgment of the legislatures in determining the best way for the states to accomplish these goals.<sup>228</sup>

### 3. Back to Scott

Regardless of the majority's interpretation of *Young's Market* and *Bacchus*, its action in skipping over seventy years of valid precedent and reaching back into ancient history to resurrect a case that has long been superseded by acts of Congress, a constitutional Amendment, and later case law, was completely unwarranted.

The majority conceded that its decision in *Granholm* takes the state of the law back to where it was at the time of the Wilson and Webb-Kenyon Acts.<sup>229</sup> In fact, the decision takes the state of the law farther back than that—all the way back to *Scott*. Assuming for the sake of argument that the Court does not disturb the three-tier system, the *Granholm* decision still does not remedy the discrimination problem. The majority ruled simply that states may not treat in-state and out-of-state liquors differently without requiring states to remedy their discriminatory laws in any particular way. Thus, states that currently ban or restrict direct shipments from out-of-state have two options. They may either allow all wineries, whether in or out-of-state, to ship directly to consumers, or they may ban direct shipments entirely.

Assuming states decide to allow all direct imports of wine, there is no problem with discrimination against out-of-state wineries. However, if a state decides to ban direct shipments altogether, the discrimination problem will not be solved. Those small out-of-state wineries that rely on direct shipments and are unable to secure in-state distributors to carry their products will still be foreclosed from the state's market. This outright ban on direct

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227. See *id.* at 1924 (noting that allowing regulation of direct-shipments of liquor was a clear concern of the Twenty-first Amendment).

228. See Prince, *supra* note 6, at 1610 (“If direct-shipment laws have outlived their usefulness, each state can certainly amend its own laws to accommodate this cultural transformation.”).

229. See *Granholm*, 125 S. Ct. at 1902 (majority opinion) (stating that there is “strong support for the view that § 2 restored to the States the powers they had under the Wilson and Webb-Kenyon Acts”).

shipment creates as much of a burden on interstate commerce as a ban on only out-of-state direct shipments. Consumers are still not able to easily import the products of their choice. This is the exact situation that *Scott*, *Vance*, and *Rhodes* held unconstitutional.<sup>230</sup>

The only remedy for this problem, apart from abolishing the three-tier system and most other state liquor laws, is to allow all direct shipments of wine, and by extension, all direct shipments of any type of liquor. This is the same state of affairs that the Court imposed on the states in *Scott*, *Vance*, and *Rhodes* prior to the Twenty-first Amendment. States were allowed to maintain whatever sort of liquor distribution system they wanted so long as they allowed direct shipment of out-of-state liquor to in-state consumers nearly free of any restrictions.<sup>231</sup> This was also the state of affairs that the Twenty-first Amendment attempted to abolish in 1933. Although it does not concede as much, the Court in *Granholm* has given itself the tools to take away nearly every shred of Twenty-first Amendment power the states have enjoyed. It seems the result of *Granholm* is that states now have two choices: remain completely dry or be subjected to the unrestricted flow of out-of-state liquor.

## VI. CONCLUSION

And so, the battle rages on. The wine wars are destined to continue as the states attempt to discern the extent to which the *Granholm* decision has disarmed them. The Court's decision has created more questions than answers. It is particularly unclear just how much authority the states have after *Granholm* to regulate liquor imports. Where *Young's Market* had previously provided a conclusive answer to this question, *Granholm* has undone all of that and provided an avenue by which nearly every regulation on liquor importation currently in place may fall victim to the whim of the Court.

The *Granholm* decision may have reached the correct result for today's society. However, if that is the case, the Court should have employed a different line of analysis in reaching this result. It was the nature of liquor and society's attitude towards it that led to Prohibition and the Twenty-first Amendment in the first place.<sup>232</sup>

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230. See *supra* Part II.B.

231. See *Granholm*, 125 S. Ct. at 1919 (Thomas, J., dissenting) (explaining that the state monopoly system was invalid under *Scott* unless it allowed consumers to purchase out-of-state liquor on the same terms as in-state liquor).

232. "The people of the United States knew that liquor is a lawlessness unto

Likewise, it should be an analysis of the nature of liquor and society's current attitude towards it that determines whether that law should be undone.

The original reason for affording states broad power to regulate alcohol, even in violation of Commerce Clause principles, is that alcohol is fundamentally different from other articles of commerce. Perhaps this is no longer the case in a nation of fifty "wet" states and an age of e-commerce, but we should not be so quick to strike down seventy years of alcohol regulation without first considering whether it has achieved and is achieving its intended purpose.<sup>233</sup>

The law of *Scott* changed in response to dissatisfaction with the results it produced. The Court, in its *Granholm* decision, takes the nation back to the *Scott* liquor regulation era, and it does so without considering the potential consequences. While the law is susceptible to change, the Court should not do so without a full analysis of the changes in society that require a departure from precedent. Wine may get better with time, but failed constitutional doctrines do not.

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itself . . . 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.'" Prince, *supra* note 6, at 1585 (quoting *Duckworth v. Arkansas*, 314 U.S. 390, 398-99 (1941) (Jackson, J., concurring)). "It was their unsatisfactory experience with that method that resulted in giving liquor an exclusive place in constitutional law as a commodity whose transportation is governed by a special constitutional provision." *Id.*

233. Patterson notes that the focus of the courts in recent evaluations of the constitutionality of state liquor laws has been on the intentions of the legislatures in passing the laws. Patterson, *supra* note 53, at 782. He states that this focus has the result of "striking down laws that promote temperance on the grounds that they were not motivated by concern for temperance." *Id.* Patterson states:

The lack of a national market in alcohol, however, is not an accidental effect of an erroneous Supreme Court decision, and certainly does not contradict longstanding Commerce Clause jurisprudence. Rather, an implicit intention behind the passage of Section 2 of the Twenty-first Amendment was to ensure against the creation of a national market for alcohol. Simply put, a national market for alcohol is incompatible with the notion that some states may completely ban alcohol, and nearly everyone involved in the debate over the Twenty-first Amendment agrees that a state has the authority to completely ban alcohol within its jurisdiction.

*Id.* at 788. Patterson proposes that a better course of action would be to abandon the focus on the purpose of state alcohol regulations and return to a *Young's Market* analysis under which state liquor laws are exempt from dormant Commerce Clause scrutiny "if they pertain to the importation and distribution of alcohol within state territories." *Id.* at 784.