THE CAMEL'S NOSE UNDER THE TENT: NEXT STEPS FOR STATE-BASED ALCOHOL POLICY AFTER *TENNESSEE WINE AND SPIRITS*[1]

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I. INTRODUCTION . . . 1
II. ADOPTION OF THE TWENTY-FIRST AMENDMENT . . . 3
A. *The Context within which the States Agreed to Ratify the Amendment* . . . 3
III. INITIAL INTERPRETATIONS OF THE TWENTY-FIRST AMENDMENT . . . 5
A. *State-Based Alcohol Policies Unfettered by the Commerce Clause* . . . 5
B. *State-Based Alcohol Policies Limited by Other Constitutional Provisions* . . . 8
IV. THE DORMANT COMMERCE CLAUSE . . . 10
A. *Tax Exemption for Locally Produced Liquor in* Bacchus . . . 13
B. *Out-of-State Manufacturers in* Granholm . . . 15
C. *Out-of-State Residents in* Tennessee Wine . . . 16
V. NEXT STEPS FOR STATE-BASED REGULATION OF ALCOHOLIC BEVERAGES . . . 17
A. *Foreseeable Challenges to State-Based Alcohol Policies after* Tennessee Wine . . . 17
B. *Recommendations for State Policymakers and the Alcoholic Beverage Industry* . . . 22
VI. CONCLUSION . . . 23

I. INTRODUCTION

Following the repeal of nationwide Prohibition with the ratification of the Twenty-first Amendment on December 5, 1933, states enacted broad controls on the manufacturing, distribution, and sale of alcoholic beverages.[2] These state-based alcohol policies were adopted pursuant to § 2 of the Twenty-first Amendment, which provides that "[t]he 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."[3]

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[1] Transcript of Oral Argument at 49-50, Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449 (2019) (No. 18-96) [hereinafter "*Tenn. Wine* Oral Argument"].

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[2] Clark Byse, *Alcoholic Beverage Control Before Repeal*, 7 L. & CONTEMP. PROBS. 544, 544-569 (1940) (discussing lessons learned from the history of liquor control before Prohibition).

[3] U.S. CONST. amend. XXI, § 2 (emphasis added).

Initially, courts construed this provision broadly to confer upon states the authority to exercise "large discretion" in protecting their citizens against the evil incident to intoxicants.[4] States could prohibit any importation of alcoholic beverages which did not comply with conditions prescribed by the states "unfettered by the Commerce Clause."[5]

But state-based alcohol policies must now overcome two additional considerations. First, the U.S. Supreme Court has recognized that § 2 of the Twenty-first Amendment does not supersede all previously adopted positive constitutional provisions.[6] Second, particular attention must now also be given to the negative, or dormant, Commerce Clause. In fact, a trilogy of recent dormant Commerce Clause cases have called into question the states' longstanding prerogative to regulate the importation of intoxicating liquors for delivery or use within their borders. The first was *Bacchus Imports, Ltd. v. Dias*, in which the Court held that Hawaii's liquor-tax exemption for certain locally-produced alcoholic beverages violated the Commerce Clause.[7] The second was *Granholm v. Heald*, which struck down wine-importation laws in Michigan and New York, finding that they discriminated against interstate commerce in violation of the Commerce Clause, and that such discrimination was neither authorized nor permitted by the Twenty-first Amendment.[8] The third was *Tennessee Wine & Spirits Retailers Association v. Thomas*, which held that Tennessee's two-year durational residency requirement for retail liquor store license applicants violated the Commerce Clause because it discriminated against nonresidents and was not justified as a public health or safety measure.[9]

Part II of this paper considers the history of state-based regulation of alcoholic beverages within the context of the states' agreement to ratify the Twenty-first Amendment. It also provides a brief

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[4] Ziffrin, Inc. v. Reeves, 308 U.S. 132 (1939) (emphasis added).
[5] *Id.*
[6] Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2455 (2019).
[7] Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984).
[8] Granholm v. Heald, 544 U.S. 460, 466 (2005).
[9] *Tenn. Wine*, 139 S. Ct. at 2455.

overview of the states' regulation of alcoholic beverages immediately after the Amendment's adoption. Finally, it considers the impact of other constitutional provisions. Part III discusses the Court's initial interpretations of the Twenty-first Amendment. Part IV looks at the Court's dormant Commerce Clause doctrine as it has been applied to state-based alcohol policies adopted pursuant to § 2. It analyzes *Bacchus* (liquor taxes), *Granholm* (imported wine), and *Tennessee Wine* (durational-residency requirements). Part V considers *Tennessee Wine*'s impact on next steps for state-based regulation of alcoholic beverages. In particular, this part will consider the decision's impact on other states' durational-residency requirements, direct-to-consumer shipping, and whether a national market for alcoholic beverages is inevitable. This section will also provide recommendations for state legislators, regulators, and the alcoholic beverage industry itself in the wake of the *Tennessee Wine* decision.

II. ADOPTION OF THE TWENTY-FIRST AMENDMENT

A. *The Context within which the States Agreed to Ratify the Amendment*

To understand the next steps for state-based alcohol policies, one must first consider the context within which the states agreed to ratify the Twenty-first Amendment. Only with the aid of a proper long-range historical perspective can we appreciate the importance of § 2 of the Twenty-first Amendment.[10]

After fourteen years of national Prohibition, it was clear to a majority to Americans that the nation's noble experiment failed.[11] It had resulted in a disregard for the law that was exploited by bootleggers, racketeers, and corrupt public officials.[12] In fact, by 1932, the Eighteenth Amendment, which was put into force for enforcement purposes through the Volstead Act[13], resulted in more than 70,000 arrests annually by the federal Bureau of Prohibition.[14] Consequently, enforcement of the Act

[10] Oral arguments in *Tennessee Wine* were held on Jan. 16, 2019 – exactly 100 years after the Eighteenth Amendment was ratified on Jan. 16, 1919.
[11] Raymond B. Fosdick & Albert L. Scott, TOWARD LIQUOR CONTROL xiii (Center for Alcohol Policy 2011) (1933).
[12] *Id.* at 9.
[13] National Prohibition Act, 41 Stat. 305 (voided by Twenty-first Amendment on December 5, 1933).
[14] Carroll H. Wooddy, THE GROWTH OF THE FEDERAL GOVERNMENT, 1915-1932 102 (McGraw-Hill Book Co., 1934).

had contributed substantially to the growth of the federal government from 1915-32.[15] So, by 1933, there was a clear consensus that this nationwide disregard of the law was an "intolerable situation" that must end.[16]

It was this atmosphere of nationwide disregard of the law that led even ardent teetotalers like John D. Rockefeller, Jr., to abandon the nation's attempt at Prohibition.[17] In its stead, they sought to promote temperance though state-based regulation of alcohol.[18] National Prohibition had failed in large part because it established a single nationwide alcohol policy that was left to local police officers and local courts to enforce.[19] The mistake was to regard the entire country as a single community receptive to a uniform policy of liquor control.[20] In ratifying the Eighteenth Amendment, the country forgot that it was not a single society with uniform ideas and customs.[21] Thus, it was a mistake to adopt this nationwide policy in lieu of state-based policy choices that represented the interests of local communities.[22] Instead, a system of state-based regulation protected by the terms of the Twenty-first Amendment was adopted to replace nationwide Prohibition.[23]

Finally, one must also appreciate the challenges posed *before* national Prohibition, to understand why states developed the regulatory systems they did after the Twenty-first Amendment was adopted.[24] It is within the framework of an apprehension of the harms caused by excessive alcohol consumption before national Prohibition that led perspicacious policy makers to discern the need for a well-regulated

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[15] *Id.* at 104.
[16] Fosdick & Scott, *supra* note 6, at xiii.
[17] *Id.*
[18] *See generally*, Fosdick & Scott, *supra* note 6.
[19] Fosdick & Scott, *supra* note 6, at 7.
[20] *Id.* at 6.
[21] *Id.*
[22] NATIONAL BEER WHOLESALERS ASSOCIATION, https://www.alcohollawreview.com/guest-column-100-years-after-the-failure-of-prohibition-the-supreme-court-has-opportunity-to-prevent-another-federalization-of-alcohol-policy/.
[23] George A. Shipman, *State Administrative Machinery for Liquor Control*, 7 L. & CONTEMP. PROBS. 600, 601-602 (1940).
[24] *See generally*, Fosdick & Scott, *supra* note 6.

system of manufacturing, distributing, and retailing alcoholic beverages.[25] It is universally agreed that immoderate use of alcoholic beverages results in harmful consequences to individuals and communities.[26] Saloons, some of which were tied directly to manufacturers, presented a particular problem in the period leading up to national Prohibition.[27]

So, as national Prohibition was set to end with the adoption of the Twenty-first Amendment, states were faced with the question of how to regulate alcoholic beverages.[28] They adopted new systems, which ranged from continued prohibition, state monopoly, and state licensing of private businesses.[29] And alcoholic beverages have been a highly-regulated commodity since. In fact, in most states, licensing agencies have their own law enforcement divisions to carry out enforcement of alcohol laws and regulations.[30]

This long-range historical view of alcohol in America – before, during, and after national Prohibition – provides the perspective necessary to understand what was at stake for policy makers with the end of Prohibition, and what concerns still remain important today.[31]

III. Initial Interpretations of the Twenty-First Amendment

A. *State-Based Alcohol Policies Unfettered by the Commerce Clause*

We must also consider how courts initially understood § 2 of the Twenty-first Amendment in order to consider carefully the next steps for state-based alcohol policies after *Tennessee Wine*. In the

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[25] *Id.*
[26] Ernst Freund, The Police Power: Public Policy and Constitutional Rights, 192 (Central Typesetting Co., 1904); Shipman, *supra* note 31, at 600 (noting that "[i]n a legal sense Repeal meant the abandonment of rigid national control and a return to state regulation protected by the terms of the Twenty-first Amendment, which was reminiscent of the provisions of the Webb-Kenyon Act of 1913.").
[27] *Id.* at 193. ("[T]here are few sources of crime and misery to society equal to the dram-shop, where intoxicating liquors, in small quantities, to be drunk at the time, are sold indiscriminately to all parties applying.")
[28] *See generally*, Fosdick & Scott, *supra* note 6.
[29] Byse, *supra*, note 3, at 544.
[30] U.S. Dep't of Transp., Nat'l Highway Traffic Safety Admin., The Role of Alcohol Beverage Control Agencies in the Enforcement and Adjudication of Alcohol Laws (2005), https://nllea.org/documents/RoleofABCsNHTSA.pdf
[31] Because space does not permit a comprehensive assessment of all of the problems posed by excessive alcohol consumption before Prohibition, I commend the following to interested readers: Fosdick & Scott, *supra* note 6; Byse, *supra* note 3.

years immediately after the adoption of the Twenty-first Amendment, courts recognized that § 2 restored to the states the powers they previously had under the Wilson and Webb-Kenyon Acts.[32] The provision gave states virtually complete control over whether to allow the importation of alcoholic beverages and, if so, how to structure their state-based liquor distribution systems.[33] After Prohibition's repeal, primary responsibility for regulation of alcoholic beverages returned to the states.[34] In fact, states regulated alcoholic beverages "unfettered by the Commerce Clause."[35]

Three years after national Prohibition ended, the Court held in *State Bd. of Equalization v. Young's Mkt. Co.* that California could charge a beer importer's license fee, even though "[p]rior to the Twenty-first Amendment it would obviously have been unconstitutional to have imposed any fee for that privilege."[36] Two years later, in *Mahoney v. Joseph Triner Corp.*, the Court upheld a Minnesota statute against a Commerce Clause challenge even though it clearly discriminated in favor of liquor processed within Minnesota.[37] The Court held that such discrimination was permissible because the language of the Twenty-first Amendment conferred upon the state the power to forbid importations that did not comply with the conditions set by the state.[38]

The next year, in *Ziffrin, Inc. v. Reeves*, the Court said that § 2 sanctioned a state's right to legislate concerning alcoholic beverages brought from without, "unfettered by the Commerce Clause."[39] The Court said in *Ziffrin* that because Kentucky had the absolute power to prohibit the manufacture, sale, transportation, or possession of alcoholic beverages, it also had the ability to permit those things

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[32] Granholm v. Heald, 544 U.S. 460, 484 (2005).
[33] Cal. Retail Liquor Dealers Ass'n. v. Midcal Aluminium, Inc., 445 U.S. 97, 110 (1980).
[34] Michael D. Madigan, *Control versus Competition: The Courts' Enigmatic Journey in the Obscure Borderland Between the Twenty-First Amendment and Commerce Clause*, 44:5 Mitchell Hamline L. Rev. 3; *Granholm*, 544 U.S. at 484.
[35] Ziffrin, Inc. v. Reeves, 308 U.S. 132, 132 (1939).
[36] State Bd. of Equalization v. Young's Mkt. Co., 299 U.S. 59, 62 (1936).
[37] Mahoney v. Joseph Triner Corp., 304 U.S. 401 (1938).
[38] *Id.* at 403 ("The 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 [the State] prescribes.")
[39] *Ziffrin*, 308 U.S. at 132.

only under definitely prescribed conditions.[40] The Court said that a state could exercise "large discretion" in protecting her people against the evil incident to intoxicants.[41]

That same year, the Court also upheld two state laws that prohibited the importation of liquor from states that discriminated against domestic liquor.[42] In *Indianapolis Brewing Co. v. Liquor Control Comm'n*, the Court noted that § 2 permitted states to "discriminat[e] between domestic and imported intoxicating liquors."[43] And in *Joseph S. Finch & Co. v. McKittrick*, it noted that after the Twenty-first Amendment was adopted, "the right of a State to prohibit or regulate the importation of intoxicating liquor [was] not limited by the commerce clause."[44] But in the same year, the Court also held that Congress still had authority to control the importation of alcoholic beverages into the United States.[45] In *William Jameson & Co. v. Morgenthau*, the Court considered whether to enjoin the Secretary of the Treasury and other officials from enforcing the Federal Alcohol Administration Act.[46] The Court held that there was no substance in the contention that the Twenty-first Amendment provided the states with complete and exclusive control over commerce in intoxicating liquors, unlimited by the Commerce Clause.[47] Of course, the critical difference in these three cases is that *Jameson & Co.* involved Congress's power under the positive Commerce Clause, while *Indianapolis Brewing* and *Finch & Co.* were dormant Commerce Clause challenges.

Five years later, in *Carter v. Virginia*, the Court confirmed again that because states derived their power to regulate liquor from § 2 of the Twenty-first Amendment, the Commerce Clause did not come

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[40] *Id.*
[41] *Id.*
[42] *See* Indianapolis Brewing Co. v. Liquor Control Comm'n, 305 U.S. 391, 394 (1939); Joseph S. Finch & Co. v. McKittrick, 305 U.S. 395, 398 (1939).
[43] *Indianapolis Brewing*, 305 U.S. at 394.
[44] *Finch & Co.*, 305 U.S. at 398.
[45] *Id.*
[46] William Jameson & Co. v. Morgenthau, 307 U.S. 171, 172-73 (1939).
[47] *Id.*

into play.[48] In *Carter*, the Court held that the Commerce Clause was not invaded by a Virginia law that required regulatory licenses for through shipments of liquor.[49] The range of local control over alcoholic beverages was extended by the Twenty-first Amendment beyond the normal limits of the Commerce Clause.[50]

Finally, in *United States v. Frankfort Distilleries, Inc.*, the Court noted that even though the Twenty-first Amendment did not give states plenary and exclusive power to regulate an interstate liquor business *outside their boundaries*, it nonetheless bestowed upon them "broad regulatory power over the liquor traffic *within their territories*."[51]

Hence, the Court made clear in the years after the Twenty-first Amendment was adopted that a state was "totally unconfined by traditional Commerce Clause limitations" when it restricted the importation of intoxicants destined for use, distribution, or consumption within its borders.[52] States' ability to control the importation of alcoholic beverages was an essential component to their regulatory systems, which were insulated from the dormant Commerce Clause by the Twenty-first Amendment.[53]

B. *State-Based Alcohol Policies Limited by Other Constitutional Provisions*

Even though the early cases gave states broad authority[54] to regulate alcoholic beverages, the Court has since limited that authority when it involves other constitutional provisions, including the Import-Export Clause, the Due Process Clause, the Equal Protection Clause, the Free Speech Clause, and the Establishment Clause.[55] For example, in *Department of Revenue* v. *James B. Beam Distilling*

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[48] *Id*. at 471 (Frankfurter, J., concurring).
[49] Carter v. Virginia, 321 U.S. 131, 132 (1944) ("In the absence of federal legislation, it was permissible for the commonwealth to require regulatory licenses for through shipments of liquor in order to guard against violations of its own laws.")
[50] *Id*. at 470 (Frankfurter, J., concurring).
[51] United States v. Frankfort Distilleries, Inc., 324 U.S. 293, 299 (1945).
[52] Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 330 (1964).
[53] Madigan, *supra* note 23, at 15.
[54] Ziffrin, Inc. v. Reeves, 308 U.S. 132, 132 (1939); *also, see generally*, Madigan, *supra* note 23, at 14-16.
[55] Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2455 (2019).

Co., the Court held that a Kentucky tax on whisky imported from abroad was prohibited by the Import-Export Clause.[56] Noting that § 2 did not save the Kentucky tax law, the court concluded the Commonwealth lacked the power to tax imports from abroad.[57]

In *Wisconsin* v. *Constantineau,* the Court considered whether a state statute allowing certain officials to forbid – summarily – the sale or gift of liquor to someone who "by excessive drinking" engaged in certain activities violated the Due Process Clause.[58] In *Wisconsin*, a city police chief acting pursuant to the statute, caused notices to be posted in all retail liquor outlets in the city forbidding the sale or gift of liquor to a particular city resident for one year – without notice or a hearing.[59] The Court said that such action violated the Due Process Clause because the individual involved was not given notice and an opportunity to be heard on the matter before the notices were posted.[60]

Then in *Craig v. Boren*, the Court examined whether an Oklahoma law that prohibited the sale of beer to males under 21 years old and females under 18 years old violated the Equal Protection Clause of the Fourteenth Amendment. [61] The Court held that it did because it constituted invidious discrimination and a denial of equal protection of the laws to males who were 18 to 20 years old.[62]

In *44 Liquormart, Inc.* v. *Rhode Island*, the Court considered whether two Rhode Island laws that regulated price advertising violated the First Amendment's Free Speech Clause.[63] Applying a

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[56] Dep't of Revenue v. James B. Beam Distilling Co., 377 U.S. 341, 342 (1964); Ky. Rev. Stat. § 243.680 (providing that "[n]o person shall ship or transport or cause to be shipped or transported into the state any distilled spirits from points without the state without first obtaining a permit from the department and paying a tax of ten cents on each proof gallon contained in the shipment.")
[57] *Id.* at 346 ("We have no doubt that under the Twenty-first Amendment Kentucky could not only regulate, but could completely prohibit the importation of some intoxicants, or of all intoxicants, destined for distribution, use, or consumption within its borders. There can surely be no doubt, either, of Kentucky's plenary power to regulate and control, by taxation or otherwise, the distribution, use, or consumption of intoxicants within her territory after they have been imported. All we decide today is that, because of the explicit and precise words of the Export-Import Clause of the Constitution, Kentucky may not lay this impost on these imports from abroad.").
[58] Wis. Stat. § 176.26 (1967); Wisconsin v. Constantineau, 400 U.S. 433, 435 (1971).
[59] *Constantineau*, 400 U.S. at 435.
[60] *Id*. at 436.
[61] Craig v. Boren, 429 U.S. 190, 210 (1976).
[62] *Id.*
[63] 44 Liquormart, Inc. v. Rhode Island, 517 U. S. 484 (1996).

heightened-scrutiny analysis, the Court found that the laws prohibiting advertisements about retail prices of alcoholic beverages violated the Free Speech Clause.[64]

Finally, in *Larkin v. Grendel's Den, Inc.*, the Court examined whether a Massachusetts law that effectively gave churches and schools the power to veto an application for a proposed alcoholic beverage permit within 500 feet of the church or school violated the First Amendment's Establishment Clause.[65] The Court said it did because it was an impermissible delegation of governmental power to a religious group.[66]

IV. THE DORMANT COMMERCE CLAUSE

The durational-residency requirements at issue in *Tennessee Wine*, however, involved the dormant Commerce Clause, rather than one of these express constitutional provisions. And because a durational-residency requirement would appear to discriminate on its face against out-of-state persons – a central concern in dormant Commerce Clause analysis – it runs straight into § 2, which expressly gives states the ability to regulate alcoholic beverages.[67] The Commerce Clause provides that "[t]he Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[68] Even though the provision is nothing more than a positive grant of power to Congress, the Court has long held that it also prohibits state laws that unduly restrict interstate commerce.[69] "This 'negative' aspect of the Commerce Clause" prevents the states from enacting protectionist legislation – preserving a national market for goods and services.[70] But when it comes to

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[64] *Id.*
[65] Larkin v. Grendel's Den, Inc., 459 U. S. 116, 103 (1982).
[66] *Id.*
[67] Braden H. Boucek, *That's Why I Hang My Hat in Tennessee: Alcohol and the Commerce Clause*, CATO Supreme Court Review, 130 (2019).
[68] U.S. CONST. art. I, § 8, cl. 3.
[69] *See, e.g.,* Philadelphia v. New Jersey, 437 U. S. 617, 623-624 (1978); Cooley v. Board of Wardens of Port of Philadelphia ex rel. Soc. for Relief of Distressed Pilots, 53 U.S. 299 (1852); Willson v. Black Bird Creek Marsh Co., 27 U.S. 245 (1829).
[70] New Energy Co. of Ind. v. Limbach, 486 U. S. 269, 273 (1988).

liquor, the analysis is distinctive from normal dormant Commerce Clause jurisprudence.[71] Because the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution, they must be considered in light of one another.[72] Interestingly, though, the Twenty-first Amendment, which appears in the Constitution, is pitted against by the dormant Commerce Clause, which does not.[73] While the text of §2 straightforwardly sanctions state-based control over imports of alcoholic beverages, the proposition of dormant Commerce Clause jurisprudence is a mere inference that the grant of power to Congress in Art. I § 8 cl. 3 impliedly limits state power over the same subject.[74] Accordingly, courts must decide how the combination of express grant and implied withdrawal of state power applies to state-based alcohol policies.[75] And until the Court's *Bacchus*, *Granholm*, and *Tennessee Wine* rulings, the inquiry was a simple one: if the state policy was adopted pursuant to §2's express grant of power to states to regulate alcoholic beverages within their borders, the Commerce Clause was of no consequence.[76]

The dormant Commerce Clause was first expounded in 1824, in *Gibbons v. Ogden*, a case in which the Court adopted an expansive view of the scope of congressional authority under the Commerce Clause.[77] But from 1887 to 1937, the Court withdrew its support for a board view of the Commerce Clause power and, as a result, invalidated a number of federal laws as exceeding the scope of Congress's Commerce Clause authority.[78] Then from 1937 until 1995, not one federal law was invalidated as exceeding Congress's authority to regulate commerce among the several states.[79] Aside from two cases,

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[71] Wal-Mart Stores, Inc. v. Tex. Alcoholic Bev. Comm'n, 945 F.3d 206 (5th Cir. 2019).
[72] Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 331-33 (1964); *Wal-Mart*, 945 F.3d 206.
[73] Bridenbaugh v. Freeman-Wilson, 227 F.3d 848, 849 (7th Cir. 2000).
[74] *Bridenbaugh*, 227 F.3d at 849.
[75] *Id.*
[76] Ziffrin, Inc. v. Reeves, 308 U.S. 132, 132 (1939).
[77] 22 U.S. (9 Wheat.) 1 (1824); *see, generally*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 247-278 (4th ed. 2011).
[78] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 252 (4th ed. 2011).
[79] *Id.*

the Court has consistently maintained this expansive view of congressional authority since.[80] But, remember, the positive Commerce Clause was not at issue in *Bacchus*, *Granholm*, or *Tennessee Wine*.[81] Instead, those cases involved challenges to state-based alcohol policies under the dormant Commerce Clause's nondiscrimination principle.[82] Because the dormant Commerce Clause is inferred from the existence of the positive Commerce Clause and not itself written into the text of the Constitution, the dormant Commerce Clause cases are fundamentally different from cases with a positive textual provision.[83]

As a threshold matter, it's important to remember that the Court has held that the Twenty-first Amendment gives states virtually complete control over whether to allow importation of liquor and, if so, how to structure their distribution system.[84] For many years, the Commerce Clause inquiry was a simple one: if the state policy was adopted pursuant to §2's express grant of power to states to regulate alcoholic beverages within their borders, the commerce clause was of little or no consequence.[85] State alcohol policies still had to comply with other express constitutional provisions, including the Free Speech Clause, the Establishment Clause, the Equal Protection Clause, the Due Process Clause, and the Import-Export Clause.[86] But it wasn't until the trio of cases concerning a tax exemption for locally-produced liquor, different treatment of in-state and out-of-state wine, and a two-year residency requirement to obtain a liquor-store permit, that the dormant Commerce Clause was erected as a barrier to otherwise permissible state-based alcohol regulations. [87]

[80] U.S. v. Lopez, 514 U.S. 549 (1995); U.S. v. Morrison, 529 U.S. 598 (2000).
[81] *See, e.g.,* Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2449 (2019); Granholm v. Heald, 544 U.S. 460, 466 (2005); Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984).
[82] *Id.*
[83] *Cf.* 44 Liquormart, Inc. v. Rhode Island, 517 U. S. 484 (1996) (applying the Free Exercise Clause of the First Amendment); Craig v. Boren, 429 U.S. 190, 210 (1976) (applying the Equal Protection Clause of the Fourteenth Amendment).
[84] California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980).
[85] Ziffrin, Inc. v. Reeves, 308 U.S. 132, 132 (1939).
[86] *Tenn. Wine*, 139 S. Ct. at 2455.
[87] *Tenn. Wine*, 139 S. Ct. at 2449; Granholm v. Heald, 544 U.S. 460, 466 (2005); Bacchus Imports, Ltd. v. Dias, 468 U.S. 263 (1984).

Over a period of 35 years, *Bacchus*, *Granholm*, and *Tennessee Wine* brought some state-based alcohol regulations into the fold of the the Court's dormant Commerce Clause doctrine, which had previously dealt with things like meat, oysters, shrimp, cantaloupes, and timber.[88]

A. *Tax Exemption for Locally Produced Liquor in* Bacchus

In the first case, *Bacchus Imports, Ltd. v. Dias*, the Court considered whether Hawaii's liquor-tax exemption for certain locally-produced alcoholic beverages violated the Commerce Clause.[89] In *Bacchus*, liquor wholesalers brought an action seeking to recover liquor taxes paid under protest.[90] At the time, Hawaii imposed a 20 percent excise tax on liquor, but exempted certain locally-produced alcoholic beverages from the tax.[91] The Court held that Hawaii's exemption for locally-made liquor violated the Commerce Clause because it had both the purpose and effect of discriminating in favor of local products.[92] Until then, alcohol had been treated differently than other commodities. But the principle of nondiscrimination that guided the Court's decisions on products like meat, oysters, shrimp, cantaloupes, and timber now affected a product so unique that two constitutional amendments were adopted specifically to determine whether it should exist at all. Nonetheless, the Court held that the tax was not saved by the Twenty-first Amendment because it was not designed to promote temperance or to carry out any other purpose of the Twenty-first Amendment.[93] Thus, *Bacchus* established that § 2 of the Twenty-first Amendment did not entirely remove state-based alcohol policies from the ambit of the Commerce Clause.[94]

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[88] Minnesota v. Barber, 136 U.S. 313, (1890) (involving inspections of imported meat); Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928) (involving shrimp exports); Johnson v. Haydel, 278 U.S. 16 (1928) (involving oyster exports); Toomer v. Witsell, 334 U.S. 385 (1948) (also involving shrimp exports); Pike v. Bruce Church, Inc., 397 U.S. 137 (involving cantaloupe exports); South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82 (1984) (involving timber exports).
[89] *Bacchus*, 468 U.S. at 263.
[90] *Id.*
[91] *Id*. at 266.
[92] *Id*. at 270-274.
[93] *Id.* at 276.
[94] *Id*. at 275.

Shortly after *Bacchus*, the Court also invalidated two state laws requiring alcohol wholesalers to affirm prices charged to in-state wholesalers.[95] In *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, the Court held that a state law controlling liquor prices in New York[96] had the effect of regulating out-of-state transactions in violation of the Commerce Clause.[97] The Court further said that the pricing law was not a valid exercise of New York's authority under the Twenty-first Amendment.[98] Therefore, to the extent that New York's price statute had the effect of regulating out-of-state liquor prices, it ran afoul of the Commerce Clause, even given states' authority under the Twenty-first Amendment.[99]

Three years later, the Court reiterated its holdings in *Bacchus* and *Brown-Forman*. In *Healy v. Beer Institute*, the Court found that a Connecticut pricing law also had an impermissible extraterritorial effect.[100] Out-of-state shippers had to confirm that their prices for products sold to in-state wholesalers were no higher than those charged in the bordering states of Massachusetts, New York, and Rhode Island.[101] But the Court has retreated from the broad articulation of the extraterritoriality principal since *Healy*.[102] In 2003, the Court limited the extraterritoriality principle when it rejected the idea that a state's prescription-drug subsidy system attempted to fix prices outside the state.[103] In fact, one legal scholar has said that "the extraterritoriality principle looks to be quite moribund."[104]

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[95] Healy v. Beer Inst., Inc., 491 U.S. 324 (1989) (striking down Connecticut price affirmation statute for beer); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573 (1986) (striking down New York price affirmation statute for liquor).
[96] N.Y. Alco. Bev. Cont. Law § 101-b(3)(d) required any distiller or agent who filed a schedule of prices to affirm that "the bottle and case price of liquor to wholesalers set forth in such schedule is no higher than the lowest price at which such item of liquor will be sold by such [distiller] to any wholesaler anywhere in any other state of the United States or in the District of Columbia, or to any state (or state agency) which owns and operates retail liquor stores" during the same month covered by the schedule.
[97] Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573 (1986).
[98] *Id.*
[99] *Id.* at 585.
[100] *Healy*, 491 U.S. at 324.
[101] *Id.* at 326.
[102] Brannon P. Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 La. L.Rev. 981 (2013).
[103] Pharm. Research & Mfrs. of Am. v. Walsh, 538 U.S. 644 (2003).
[104] Denning, *supra* note 99, at 979.

Nonetheless, state alcohol laws that discriminate in favor of local products, have an extraterritorial effect on alcohol sold in other states, or seek to provide economic protection to in-state businesses against their out-of-state competitors likely violate the dormant Commerce Clause.[105]

B. *Out-of-State Manufacturers in* Granholm

In the second case, *Granholm v. Heald*, the Court considered whether a regulatory scheme that allows in-state wineries to ship alcohol directly to consumers while also restricting the ability of out-of-state wineries to do the same violated the dormant Commerce Clause in light of § 2 of the Twenty-first Amendment.[106] Under Michigan law, in-state wineries could ship directly to in-state consumers after obtaining a license, but all out-of-state wine had to pass through an in-state wholesaler and in-state retailer before reaching a consumer.[107] The New York law was similar, but also required out-of-state wineries to set up an in-state distribution system, including a branch office and warehouse, if they wanted to become a licensee and avail themselves of the privilege of direct shipment in New York.[108]

The Court held that both laws violated the dormant Commerce Clause because they mandated different treatment of in-state and out-of-state economic interests.[109] But because alcoholic beverages are different from oysters or cantaloupes, the Court then looked to whether § 2 would nonetheless still allow the states to regulate direct shipment of wine on terms that were different for in-state and out-of-state vintners.[110] Finding that it would not, the Court said that § 2 did not authorize states to enact nonuniform policies that discriminated against out-of-state goods.[111] In doing so, the Court recognized that it was discounting the cases decided soon after the Twenty-first Amendment's ratification.[112]

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[105] James Alexander Tanford, *E-Commerce in Wine*, 3 J.L. ECON. & POL'Y 275, 299-300 (2007).
[106] Granholm v. Heald, 544 U.S. 460, 471 (2005).
[107] *Id.* at 469.
[108] *Id*. at 470.
[109] *Id.* at 526.
[110] *Id*. at 484.
[111] *Id.* at 489.
[112] *Id.*

Finally, the Court considered whether the state's regulatory systems nonetheless "advance[d] a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."[113] Dismissing the states' concerns – which included the ability of minors to access alcohol, tax evasion, orderly market conditions, protecting public health and safety, and ensuring regulatory accountability – the Court said states could alleviate these concerns through evenhanded licensing.[114]

Even though states have broad power to regulate alcoholic beverages pursuant to § 2 of the Twenty-first Amendment, the Court held that such power did not permit them "to ban, or severely limit, the direct shipment of out-of-state wine while simultaneously authorizing direct shipment by in-state producers."[115] Because the states could not demonstrate the need to treat in-state and out-of-state wine producers differently, the Court held that the Michigan and New York laws violated the dormant Commerce Clause.[116]

C. *Out-of-State Residents in* Tennessee Wine

In the third case, *Tennessee Wine & Spirits Retailers Association v. Thomas*, the Court considered whether Tennessee's two-year durational residency requirement for retail liquor store license applicants violated the dormant Commerce Clause.[117] Because the predominant effect of the durational-residency requirement was to protect in-state interests from out-of-state competition, the Court held that it violated the dormant Commerce Clause and was not saved by the Twenty-first Amendment.[118] Even though states have regulatory authority they would not otherwise have as a result of the Twenty-first Amendment, mere speculation or unsupported assertions are insufficient to sustain a law that would otherwise violate the Commerce Clause.[119] "Where the predominant effect of a law is protectionism, not

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[113] *Id*. (citing *Limbach*, 486 U.S. at 278).
[114] *Id.* at 493 ("If a State chooses to allow direct shipment of wine, it must do so on evenhanded terms.").
[115] *Id.*
[116] *Id.*
[117] Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2449 (2019).
[118] *Id.* at 2476.
[119] *Id.* at 2474.

the protection of public health or safety," the Court said it was not shielded by § 2.[120] Although the Court recognized that § 2 "was adopted to give each State the authority to address alcohol-related public health and safety issues in accordance with the preferences of its citizens, [the Court asked] whether the challenged requirement [could] be justified as a public health or safety measure or on some other legitimate nonprotectionist ground."[121] Going forward, then, the need to justify certain state-based alcohol policies as public health or safety measures, or on some other legitimate nonprotectionist ground, will be key for policymakers.

V. Next Steps for State-Based Regulation of Alcoholic Beverages

What, then, are the next steps policymakers should consider for state-based regulation of alcoholic beverages? This section of the essay will address three areas that already have, or may yet become, the subject of post-*Tennessee Wine* challenges to state alcohol policies. It will conclude by recommending ways policymakers can mitigate the chances of successful challenges to their state-based alcohol policies.

A. Foreseeable Challenges to State-Based Alcohol Policies after Tennessee Wine

Tennessee Wine could have a significant impact on how states regulate alcoholic beverages. There are three immediately foreseeable challenges facing state-based alcohol policies in the wake of *Tennessee Wine*: residency requirements, direct-to-consumer shipping, and establishment of a *de facto* national market for alcoholic beverages.

Residency requirements are the most obvious question facing state regulators in light of the holding in *Tennessee Wine*. About a dozen states have similar durational-residency requirements for retail liquor

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[120] *Id.*
[121] *Id.*

licenses.[122] At one extreme, South Carolina's is a mere 30 days; while, at the other extreme, Indiana and Oklahoma have five-year residency requirements.[123] That puts Indiana and Oklahoma beyond Tennessee's two-year durational-residency requirement that the Court said violated the dormant Commerce Clause.[124]

At least one state attorney general has already issued an opinion that his state's residency requirements are unenforceable in light of *Tennessee Wine*. On Dec. 31, 2019, Oklahoma Attorney General Mike Hunter said that his office believed that the U.S. Supreme Court would likely hold the residency requirements for obtaining a Retail Spirits License or a Wine and Spirits Wholesaler's License set forth in OKLA. CONST. art. 28A, § 4(A), (B) and in 37A O.S.Supp.2019, § 2-146 to be in violation of the dormant Commerce Clause.[125] It was, therefore, his opinion that they were unenforceable.[126]

What remains to be seen is if other states – and the courts – will limit the scope of the impact of *Tennessee Wine* in either of two ways: (1) to *durational*-residency requirements, leaving mere in-state presence laws in place, and (2) to the retail tier of the three-tier systems states employ. Logically, laws requiring someone to be merely present (or a current resident) without any period of past durational-residency need not be affected by *Tennessee Wine* because anyone can move to any state at any time.

Oklahoma's attorney general says the reasoning behind *Tennessee Wine* logically applies to both retailers and wholesalers.[127] But can regulators make a coherent case that wholesalers must be residents for some period of time before applying for a wholesaler's permit? Wholesalers are a critical piece of the three-tier system that make for an orderly system of regulation. Whereas manufacturers are

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[122] Nick Sibilla, *Supreme Court Strikes Down Tennessee Liquor License That "Blantantly Favors" In-State Businesses*, FORBES (June 27, 2019), https://www.forbes.com/sites/nicksibilla/2019/06/27/supreme-court-strikes-down-tennessee-liquor-license-that-blatantly-favors-in-state-businesses/#16f47cae506a.
[123] *Id.*
[124] *Tenn. Wine*, 139 S. Ct. at 2449.
[125] Okla. Att'y Gen. No. 2019-13 (Dec. 31, 2019).
[126] *Id.* at 7.
[127] Okla. Att'y Gen. No. 2019-13 (Dec. 31, 2019) at 7.

worldwide and retailers are so large in number, the wholesalers, on the other hand, are few in number and physically located in state. They are amiable to inspections by regulators, particularly as it relates to tax assessments on inventory, determining if products are being fairly distributed to retailers, and serving as a point at which dangerous products can be easily recalled. In the alternative, even if durational-residency requirements are per se violations of the dormant Commerce Clause, what about mere in-state presence? Requiring retailers and wholesalers to have an in-state presence promotes health and public safety. For example, regulators may physically enter and inspect their premises to determine compliance with health and safety regulations. Accordingly, it is likely that federal courts will have to resolve a number of challenges to durational-residency requirements in the next few years.

The second foreseeable challenge facing state-based alcohol policies in the wake of *Tennessee Wine* concerns direct-to-consumer shipping. While some wine enthusiasts might see an opening to challenge state prohibitions on direct-to-consumer shipping after *Tennessee Wine*, such prohibitions serve several legitimate public health and safety interests. On the same day the Court announced its decision in *Tennessee Wine*, *Wine Spectator* magazine said the Court's "interpretation open[ed] the door for future challenges to discriminatory state alcohol laws, notably pertaining to retailer direct shipping."[128]

Admittedly, state alcohol policies that treat in-state and out-of-state interests differently must now be demonstrably concerned with matters of public health and safety or other legitimate state interests after *Tennessee Wine*.[129] But that burden can be met. There are many legitimate health and

[128] Emma Balter, *U.S. Supreme Court Strikes Down Tennessee Residency Law; Opens Door for National Wine Retailer Shipping Challenges*, WINE SPECTATOR (June 26, 2019), https://www.winespectator.com/articles/supreme-court-strikes-down-tennessee-residency-law.

[129] *Tenn. Wine*, 139 S. Ct. at 2449.

safety concerns – in fact, at one point in our nation's history, these resulted in national Prohibition – related to alcoholic beverages.[130]

Provided that the state statute at issue complies with *Granholm*, it's hard to see how *Tennessee Wine* alters the analysis for direct-to-consumer shipping. In fact, there are clear public health and safety concerns when it comes to access to alcoholic beverages, most notably as it relates to access by minors and those who are already intoxicated.

But states that desire to prevent access by minors and those who are already intoxicated will need to gather additional evidence, including how a mere signature on delivery solves the problem.[131] Admittedly, it is hard to demonstrate the existence of a problem that one does not have the resources to investigate fully. But, it may be worthwhile, considering how closely-divided the *Granholm* court was on the issue.[132]

In-person age verification, where a trained clerk can assess the physical characteristics of a customer with those listed on the identification provided, not to mention the opportunity to ask the customer in-person questions that may reveal deception, is far superior to any online process. And a delivery driver, for whom speed of delivery is paramount, lacks the experience that someone who deals primary in alcoholic beverage sales has – not to mention the mandatory training in recognizing false IDs that licensed clerks get in many states.[133]

The same is true of intoxication. Delivery drivers would have to be trained in how to recognize signs of intoxication to avoid giving someone who is already intoxicated more alcoholic beverages. And

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[130] Elyse Grossman, *Public Health, State Alcohol Pricing Policies, and the Dismantling of the 21st Amendment: A Legal Analysis*, 15 MICH. ST. U. J. MED. & L. 177 (2011).
[131] Granholm v. Heald, 544 U.S. 460, 490 (2005) ("The States provide little evidence that the purchase of wine over the Internet by minors is a problem."); *Tenn. Wine*, 139 S. Ct. at 2474 ("The record is devoid of any "concrete evidence" showing that the 2-year residency requirement actually promotes public health or safety; nor is there evidence that nondiscriminatory alternatives would be insufficient to further those interests.")
[132] *Id.*
[133] *See, e.g.*, Ind. Code §§ 7.1-3-18-9 (requiring permits for employees), 7.1-3-1.5-13 (requiring training); Tenn. Code Ann. §57-3-221 (requiring permits and training for managers of liquor stores).

from an enforcement perspective, states would be nearly powerless to investigate violations of their laws prohibiting the sale or furnishing of alcoholic beverages to minors or intoxicated persons.[134] While state liquor enforcement agents can investigate for sales to minors or intoxicated persons at licensed retail establishments, direct shipping of alcoholic beverages turns everyone's front porch into somewhere a minor or intoxicated person may be provided with an alcoholic beverage in violation of state statutes. The limitlessness of such a scenario severely curtails a state's ability to pursue its legitimate public health and safety concerns. So, while there may be some lawsuits seeking to enjoin states from enforcing their direct-to-consumer shipping prohibitions, they are likely to be unaffected by *Tennessee Wine*.

The third issue concerns whether the nondiscrimination principals expounded in *Tennessee Wine* will lead inevitably to a national market for alcoholic beverages. Related to the direct-to-consumer issue above is the question of whether a state can require that a retailer be an in-state resident before shipping alcohol to its residents.[135] If courts apply the non-discrimination principles of *Tennessee Wine* broadly to state-based alcohol policies (including the regulation of both the wholesale and retail tiers), we may be forced toward the emergence of a single national alcohol beverage market.[136]

Justice Neil Gorsuch raised concerns about a national market for alcoholic beverages during oral arguments when he asked respondents' attorney Carter G. Phillips what lawsuits would follow in the wake of *Tennessee Wine* if the Court struck down Tennessee's durational-residency requirement.[137] He suggested that lawsuits challenging the "requirement of physical presence in state" or the three-tier system itself may be forthcoming.[138] And, he wondered aloud, whether the next business model would

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[134] *See, e.g.,* N.Y. Alco. Bev. Cont. Law § 65 (minors); Mass. Ann. Laws ch. 138, § 69 (intoxicated persons).

[135] Emma Balter, *Will the Supreme Court's* Tennessee Wine *Decision Dramatically Change the U.S. Wine Market,* WINE SPECTATOR (July 12, 2019), *https*://www.winespectator.com/articles/will-the-supreme-court-wine-decision-reshape-the-u-s-wine-market.

[136] Marc Sorini, *Son of Granholm Inches Closer*, ALCOHOL LAW ADVISOR, (July 2, 2018), https://www.alcohollawadvisor.com/2018/07/son-of-granholm-inches-closer/.

[137] *Tenn. Wine* Oral Argument, *supra* note 1.

[138] *Id.* ("I would think that the next case would be – much as we've reexamined Quill, for example, and the requirement of physical presence in state, that the next lawsuit would be that, yes, this three-tier system is, in fact, discriminatory by

be the "Amazon of liquor."[139] After reminding the Court that his clients were only challenging Tennessee's durational-residency requirement, Mr. Phillips provided one option for states to undertake after *Tennessee Wine*: demonstrate why they can't regulate effectively without a particular requirement.[140] Of course, that discounts the role of state legislatures in our dual-sovereign form of government – particularly when the federal Constitution expressly confers authority on states to regulate in a certain area (§ 2 of the Twenty-first Amendment).[141] Nonetheless, policymakers should be concerned that *Tennessee Wine* brings us closer to *New Energy Co. of Ind. v. Limbach*, which supports the idea of using the "negative" aspect of the Commerce Clause to prevent states from enacting protectionist legislation, thereby preserving a national market for goods and services.[142]

B. Recommendations for State Policymakers and the Alcoholic Beverage Industry

At the outset, state legislators, regulations, and the alcoholic beverage industry itself must recognize the challenge facing them. They must enact alcohol policies that can withstand the post-*Tennessee Wine* dormant Commerce Clause analysis by basing them on concerns for public health or safety or on some other legitimate nonprotectionist ground. Regulators must also be ready to provide reasoned answers when their alcohol policies are tested in the courts.[143] Promoting public health and safety by encouraging temperance, preventing underage access, ensuring orderly market conditions, and raising revenue are just a few of the many valid reasons to regulate alcoholic beverages more closely than oysters or cantaloupes. And states still have other justifications for their alcohol policies that can be defended as necessary to promote public health and safety or another legitimate state interest – including

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requiring some sort of physical presence in state. And under the dormant Commerce Clause jurisprudence, you have a point.")

[139] *Id.* at 50.

[140] *Id.* at 57 ("at that point, presumably, the state will say: This is why we can't regulate effectively. This is why we won't have the orderly market. This is why we need this restriction.")

[141] *See also*, 27 U.S.C.A. § 122 (West), known as the Webb-Kenyon Act of 1913, which prohibits the shipment or transportation of alcohol into any state in violation of its laws.

[142] *Limbach*, 486 U. S. at 273.

[143] *Wal-Mart*, 945 F.3d 206.

preserving the three-tier system and requirement of physical in-state presence.[144] In fact, *Granholm* confirmed that the three-tier system itself was "unquestionably legitimate."[145] It's also worth remembering that the new requirement that a state alcohol regulation promote public health and safety or another legitimate state interest only applies to those that would otherwise violate the dormant Commerce Clause.

In their post-*Tennessee Wine* evaluations, courts will want concrete evidence that the regulation actually promotes public health or safety, or evidence that "nondiscriminatory alternatives would be insufficient to further those interests."[146] Mere speculation or unsupported assertions will not be enough to shield a regulation that would otherwise violate the Commerce Clause.[147] Because there are so many legitimate public health and safety reasons that a uniquely dangerous product like alcohol should be tightly regulated – not to mention other legitimate nonprotectionist grounds – states can meet this burden.

VI. Conclusion

While the issue presented in *Tennessee Wine* – whether durational-residency requirements violated the dormant Commerce Clause – may have been narrow, the rationale undergirding its holding is sweeping. And the next steps for legislators, regulators, and the alcoholic beverage industry itself are critical to preserving an affective system of state-based alcohol regulation. Legislators and policy makers must reconsider their approach to certain alcohol laws and administrative rules to withstand dormant Commerce Clause challenges. Of central importance now is whether a statute or administrative

[144] *Id*. at 2474 ("Recognizing that § 2 was adopted to give each State the authority to address alcohol-related public health and safety issues in accordance with the preferences of its citizens, we ask whether the challenged requirement can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground. Section 2 gives the States regulatory authority that they would not otherwise enjoy[.]").
[145] Granholm v. Heald, 544 U.S. 460, 489 (2005) (citing North Dakota v. United States, 495 U.S. 423, 432 (1990)).
[146] *Id.*
[147] Tenn. Wine & Spirits Retailers Ass'n v. Thomas, 139 S. Ct. 2449, 2474 (2019)

rule "can be justified as a public health or safety measure or on some other legitimate nonprotectionist ground."[148]

In fact, Justice Gorsuch recognized the threat to other state-based alcohol policies at oral argument when he asked what may prove to be a prescient question: "Why isn't this just the camel's nose under the tent?"[149] And, as the story goes, once the camel's nose is in the tent, isn't the rest likely to follow?[150] Each new exception, in turn, chips away at the vitality of the rule set forth in the text of § 2 of the Twenty-first Amendment. While the wisest course of action would have been to resist the beginnings of the invasion in the first place, state-based alcohol policies may not inevitably end in disaster if policymakers ensure their regulations can be sustained on any of the grounds available to them after *Bacchus*, *Granholm*, and *Tennessee Wine*.[151] States should make a habit of explaining why a particular regulation is adopted. Establishing a record of how an alcohol law will promote public health and safety, or carry out another legitimate state interest, may also limit unnecessary litigation.

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[148] *Id.*
[149] *Tenn. Wine* Oral Argument, *supra* note 1 at 49-50 (asking respondents' attorney Carter G. Phillips whether the next lawsuit would be that the three-tier system is, in fact, discriminatory by requiring some sort of physical presence in state).
[150] Horace Scudder, *The Arab and His Camel* (1882), https://www.gutenberg.org/files/45384/45384-h/45384-h.htm#link2H_4_0032 (last visited Jan. 11, 2020); *see, also*, Steadfast Ins. Co. v. Greenwich Ins. Co., 385 Wis. 2d 213, 242 (2019) (Bradley, J., concurring in part, dissenting in part).
[151] Perhaps Justice Gorsuch's question would have been better suited for *Granholm*, or even *Bacchus*, which paved the way for *Tennessee Wine*. It seems as though the camel stuck his nose into the tent in *Bacchus*, then his head in *Granholm*, and now in *Tennessee Wine*, the camel has started to set foot into the tent. Before we realize it, the camel will have entirely invaded our tent, leaving no room for us.