

Residency Requirements, the Commerce Clause, and the “Predominant Effects Test”: A Brief Analysis of *Tennessee Wine and Spirits Retailers Association v. Thomas*

Introduction:

In September of 2018, in what many viewed as a re-visitation of *Granholm v. Heald*,¹ the Supreme Court of the United States somewhat surprisingly granted a writ of certiorari to *Tennessee Wine & Spirits Retailers Association v. Byrd*.² Due to a change in Executive Director at the Tennessee Alcoholic Beverage Commission (which was a respondent in the proceedings,) the case was subsequently referred to as *Tennessee Wine & Spirit Retailers Association v. Blair*, and then finally as *Tennessee Wine & Spirits Retailers Association v. Thomas*.³ Like its purported predecessor *Granholm v. Heald*, *Tennessee Wine v. Thomas* has been hailed as something of a “historic decision,” at least by parties most affected by the ruling.⁴ At the very least, both cases demonstrate a consistent effort by the Supreme Court to rectify what it deemed an “overly expansive interpretation,” of the Twenty-First Amendment that appears to have “[taken] hold for a time in the immediate aftermath of its adoption.”⁵

The proximal dispute of *Tennessee Wine & Spirits Retailers Association v. Thomas* centered around the constitutionality of a Tennessee statute stipulating a durational residency requirement for owners of brick-and-mortar retail liquor stores.⁶ However, the broader issue that appears to have caught the attention of the Supreme Court is the interplay between Section 2 of the Twenty-first Amendment (which “returned to the states broad power to regulate alcoholic beverages within their respective borders,”)⁷ and the dormant Commerce Clause doctrine derived from Article 1, Section 8, Clause 3 of the Constitution (which, by granting Congress the authority to regulate commerce amongst the states ostensibly prohibits a state from passing legislation that excessively burdens interstate commerce).⁸ More plainly, the ruling explores the

question of whether “a state [may] discriminate against out-of-state entities while pursuing their 21st amendment police powers over alcohol sales and distribution?”⁹

Following oral arguments presented in January of 2019, the Supreme Court (with Justice Alito writing for a 7-2 majority,) affirmed on June 26th of the same year that Tennessee’s durational residency requirements were indeed unconstitutional.¹⁰ Furthermore, the court “explicitly held that the non-discrimination and anti-protectionist principles laid out in the 2005 *Granholm v Heald* decision...also applied to retailers.”¹¹ As such, while the case itself dealt with a fairly discrete set of Tennessee residency requirements for retail liquor sales, the ruling may eventually spell the end of residency requirements at every level of the Three-Tier regulatory system. Furthermore, while the decision in *Tennessee Wine v. Thomas* may not directly address every conceivable conflict between state alcohol regulation and the dormant Commerce Clause, it does provide a “framework for reconciling [the two],”¹² using a test of “predominant effects.”¹³ Ultimately, this “predominant effects test” may serve as the beachhead for litigation against other state specific alcohol regulation scrutinized in light of the dormant Commerce Clause doctrine.

Case History

With the passage of the Twenty-first Amendment which repealed federal prohibition, states were encouraged to bring the liquor trade within their borders “under complete supervision and control,”¹⁴ by either implementing new, or reinstating old, laws and regulations that best suited their constituent populations.¹⁵ Tennessee, among other states, implemented a regulatory framework known as the “Three-Tier System,” a reference to the legislatively enforced distinction made between Producers, Distributors, and Retailers of alcoholic beverages.¹⁶ As a component of this Three-Tier System, Tennessee established a series of durational residency requirements for retailers wishing to operate brick-and-mortar liquor stores within the state, with

the earliest such regulation appearing in 1939.¹⁷ The Tennessee law stipulates that an individual wishing to operate a retail liquor store in the state must obtain a license from the Tennessee Alcoholic Beverage Commission (TABC). However, in order to qualify for the license, an individual must have, “been a bona fide resident of [Tennessee] during the two-year period immediately preceding the date upon which application is made to the commission.”¹⁸ In addition to this two year residency requirement for an initial license, individuals wishing to renew their license at the end of the one year licensure period must have continuously resided in the state for ten years.¹⁹ These residency provisions also applied to corporate applicants, requiring that every officer, director, and shareholder of a corporation meet the same two and ten year residency stipulations.²⁰

Despite these stringent residency requirements remaining on Tennessee’s books, the state had stopped enforcing the regulations prior to the circumstances that gave rise to the case.²¹ The Attorney General of Tennessee had issued two opinions regarding the residency requirements, one in 2012 and one in 2014, both of which concluded that the laws were unconstitutional because they functioned as, “trade restraints and barriers that impermissibly discriminate against interstate commerce.”²² In light of these recommendations, the state opted for a policy of nonenforcement rather than risk litigation. In 2016, aware of the state’s hiatus in enforcing the residency requirements, two new entities submitted retail liquor license applications to the TABC: 1) Tennessee Fine Wines and Spirits, LLC, and 2) Affluere Investments, Inc., an incorporated entity owned by a husband and wife named Doug and Mary Ketchum.²³

As with prior applicants, the TABC staff recommended that licenses be issued to both entities, entirely ignoring the residency requirement.²⁴ Prior to the licenses being granted, however, the Tennessee Wine and Spirits Retailers Association (a trade group representing

roughly 500 independent liquor store owners across Tennessee,) threatened legal action against the TABC if the licenses were issued.²⁵ After deferring action for several months, the director of the TABC requested a declaratory judgement from a state court to settle whether the residency requirement was in fact constitutional.²⁶ Shortly thereafter, the Retailers Association removed the case to the United States District Court for the Middle District of Tennessee, where the court concluded that the residency requirements were unconstitutional. In its judgement, the District Court relied on a reading of *Granholm v. Heald* that expanded the original ruling beyond the producer tier to include the retailer and wholesaler tiers of the Three-Tier System.²⁷ Following the District Court ruling, the State declined to appeal, and the TABC proceeded to grant both of the retail licenses.²⁸

Unsatisfied with the District Court's reading of *Granholm v. Heald*, "the Association appealed to the Sixth Circuit, and the State largely ceded defense of the durational residency requirements to the Association."²⁹ Ultimately, the Sixth Circuit affirmed the District Court's decision, but did note that the Supreme Court ruling in *Granholm* had "created some uncertainty," amongst both regulators and the judiciary.³⁰ The uncertainty referenced by the Sixth Circuit presumably alluded to a "Circuit Split," that had developed in the wake of *Granholm v. Heald*; wherein two federal appellate courts had struck down state residency requirements citing the dormant commerce clause, while three other appellate courts had upheld the state laws citing the states' "inherent police powers, bolstered by the Twenty-first Amendment."³¹ The rulings of the lower courts highlighted confusion in two key areas not explicitly resolved in *Granholm*: 1) "Does scrutiny under the dormant Commerce Clause apply only when an alcoholic-beverages law regulates producers or products?"³² and 2) "Does the Twenty-first Amendment automatically immunize a state law regarding retailers and wholesalers

of alcoholic beverages?”³³ Perhaps acknowledging that these two points were not clear enough in their original *Granholm* ruling,³⁴ the Supreme Court granted the petition for certiorari submitted by the Tennessee Wine & Spirits Retailers Association by agreeing to hear the case during the 2019 term. By the time *Tennessee Wine v. Byrd* was reviewed by the Supreme Court, the state of Tennessee had entirely ceded defense of the residency statute to the Retailers Association, and declined to file a merits brief or participate in oral arguments before the court.³⁵

Supreme Court Ruling

The Supreme Court’s analysis of *Tennessee Wine v. Byrd* largely focused on the two-year residency requirement, as the Retailers Association had generally acceded to the Sixth Circuit’s view that the ten-year proviso was, “the epitome of arbitrariness.”³⁶ While the Supreme Court acknowledged that the two-year requirement was less extreme than its ten-year counterpart, the majority maintained that the two-year stipulation, “also violates the Commerce Clause and is not shielded by §2 of the Twenty-first Amendment.”³⁷ The reasoning provided by the court was that,

Section 2...gives each State leeway in choosing the alcohol-related public health and safety measures that its citizens find desirable. But §2 is not a license to impose all manner of protectionist restrictions on commerce in alcoholic beverages. Because Tennessee’s 2-year residency requirement for retail license applicants blatantly favors the State’s residents and has little relationship to public health and safety, it is unconstitutional.³⁸

While acknowledging “that the text of Section 2...confers [broad] authority on the states to regulate liquor differently than other products,”³⁹ the court maintained that “Section 2 has to

be viewed as one part of a unified constitutional scheme.”⁴⁰ Essentially, the court suggested that although Section 2 of the Twenty-first Amendment grants substantial regulatory authority to the states, that regulatory authority was expected to function within the framework provided by other “irreconcilable provisions of the original Constitution,” including the “Bill of Rights, the Fourteenth Amendment, and every other constitutional provision predating ratification of the Twenty-first Amendment.”⁴¹ In addition to these explicit constitutional provisions, the court also maintained that the “negative” or “dormant” aspect of the Commerce Clause has “its own force,” and should be viewed as an equally important pillar of the constitutional framework.⁴² Accordingly, the court argued that Section 2 of the Twenty-first Amendment was primarily “meant to ‘constitutionaliz[e]’ the basic understanding of the extent of the State’s power to regulate alcohol that prevailed before Prohibition,” and certainly did “not permit the States to impose protectionist measures clothed as police-power regulations.”⁴³

In light of this interpretation of the inherent tension which exists between Section 2 and the dormant Commerce Clause doctrine, the Court then addressed how conflicts between the two should be approached. The Court argued that any state law that discriminates against “out-of-state goods or nonresident economic actors...can be sustained only on a showing that it is narrowly tailored to ‘advanc[e] a legitimate local purpose.’”⁴⁴ Employing language from an 1887 Supreme Court ruling in *Mugler v. Kansas*, the Court further articulated that,

‘mere pretences’ [cannot] sustain a law regulating alcohol; rather, if ‘a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution.’⁴⁵

Placing the burden of proof on the State to demonstrate a questionable law's benefit to public health or safety, the Court maintained that "'mere speculation' or 'unsupported assertions' are insufficient to sustain a law that would otherwise violate the Commerce Clause."⁴⁶ "Where the predominant effect of a law is protectionism, not the protection of public health or safety," the court concluded, "it is not shielded by §2."⁴⁷ Lastly, making explicit what previous courts had found only implied in *Granholm v. Heald*, the Supreme Court held that this "predominant effects test," applied equally to each level of the Three-tier system.⁴⁸

Implications of Ruling for Future Regulation and Litigation

In many ways, attempting to predict the long-term ramifications of any Supreme Court ruling is something of a fool's errand.⁴⁹ The language of the rulings are often intentionally narrow, and, as seen with the divergent readings of the *Granholm v. Heald* decision, subject to competing judicial interpretation.⁵⁰ Additionally, because of the difficulty in determining the applicability of rulings, cases involving alcohol can be doubly, or perhaps, triply problematic, due to the unique Three-tiered regulatory system. Further complicating the matter, the High Court's own understanding of the implications of constitutional provisions (such as the Twenty-first Amendment and the Commerce Clause,) often undergo significant change over time, as was noted by the Sixth Circuit,⁵¹ Justice Gorsuch,⁵² and Justice Alito,⁵³ in dealing with this case. Consequently, applying the ruling of *Tennessee Wine v. Thomas* to other existing statutes is more art than science, as it requires both anticipation of the judicial climate beyond the present, as well as a willingness to not apply the ruling beyond its immediately applicable bounds. While it is certainly tempting to prognosticate impending and sweeping changes in the regulatory landscape, "it is unclear to what extent *Tennessee Retailers* will spur states to act on their own to revise [potentially] discriminatory aspects of [their] regulatory scheme."⁵⁴ The reality is that changes in

alcohol regulation will likely come gradually, as states reevaluate their statutes in light of the ruling, and weigh the risks of leaving possibly discriminatory regulations on the books pending litigation. As such, the following discussion of the implications of *Tennessee Wine v. Thomas* is best understood as one author's attempt to *generally* articulate potential ramifications of the ruling, rather than as an effort to make concrete predictions.

If there is one clear implication for future alcohol regulation from *Tennessee Wine v. Thomas*, it is that “*Tennessee Wine* will [certainly not] be the last case in which states are challenged over their liquor licensing laws.”⁵⁵ Indeed, “the most direct outcome of [*Tennessee Wine v. Thomas*] will likely be a considerable amount of litigation.”⁵⁶ These statements highlight the reality that the days of the Twenty-first Amendment serving as an impervious bulwark against constitutional challenges to state alcohol statutes appear to be a thing of the past. While *Tennessee Wine v. Thomas* maintained that “States ‘remain free to pursue’ their legitimate interests in...the alcohol trade,”⁵⁷ the ruling opens to judicial scrutiny nearly every state specific feature of the Three-tier system, short of the system itself. In the words of Justice Alito:

Although Granholm spoke approvingly of [the] basic [three-tier] model, it did not suggest that §2 sanctions every discriminatory feature that a State may incorporate into its three-tiered scheme. At issue in the present case is not the basic three-tiered model of separating producers, wholesalers, and retailers, but the durational-residency requirement that Tennessee has chosen to impose on new applicants for liquor store licenses. Such a requirement is not an essential feature of a three-tiered scheme. Many such schemes do not impose durational-residency requirements—or indeed any residency requirements—on individual or corporate liquor store owners...each variation must be judged based on its own features.⁵⁸

By separating state specific “features,” and “variations,” of the Three-tier system from the system itself, the Court creates ground for challengers to litigate against state alcohol regulations without challenging the legitimacy of the Three-tier structure. Consequently, if “through competent pleadings,”⁵⁹ a challenger could demonstrate that a state law draws a distinction between in-state and out-of-state economic interests or products, the burden of proof will fall entirely upon the State to justify the statute as an “essential feature of [its] three-tiered scheme.”⁶⁰ After the State has presented, “concrete evidence to justify the law’s discriminatory effect,”⁶¹ a court would then measure the statute against the three tenets of Justice Alito’s “Predominant Effects Test.”⁶² The test is derived from the logic used by the court to measure whether the “predominant effect” of the Tennessee residency statute was “protectionism [or] the protection of health and safety.”⁶³ The three tenets of the test can be summed as follows:

1. Does the law “serve a bona fide public health and safety purpose or ‘some other legitimate nonprotectionist ground?’”⁶⁴
2. Does the law “function as an ‘essential element’ of the state’s means to achieving its legitimate end purpose?”⁶⁵
3. Is the law “necessary because nondiscriminatory alternatives would be insufficient to further those legitimate purposes?”⁶⁶

If a statute fails on any of these three measures, the statute would be deemed unconstitutional, and is not saved by an appeal to Section 2 of the Twenty-first Amendment.

While the intent of this “predominant effects test” is certainly cogent, Justice Gorsuch’s critique of the “delphic” nature of its application is perhaps warranted:

For its part, the Court assures us that it will still allow each State “leeway to enact the measures that its citizens believe are appropriate” to address public health and safety. Yet the Court then proceeds to turn around and dismantle the longstanding judgment of the citizens of Tennessee on just these questions, dismissing them as “protectionist measures with no demonstrable connection” to public health and safety. And it promises it will not sustain any state law whose protectionist “effect[s] . . . predomina[te].” What are lower courts supposed to make of this? How much public health and safety benefit must there be to overcome this Court’s worries about protectionism “predominat[ing]”? Does reducing competition in the liquor market, raising prices, and thus reducing demand still count as a public health benefit, as many States have long supposed? And if residency requirements are problematic, what about simple physical presence laws? After all, can’t States “thoroughly investigate applicants” for liquor licenses without requiring them to have a brick-and-mortar store in the State? The Court offers lower courts no more guidance than to proclaim delphically that “each variation must be judged based on its own features.”⁶⁷

Until a substantial corpus of case law develops demonstrating what level of evidence the courts require to prove the viability of a discriminatory statute, legislators are left at something of an impasse. Even in the case of *Tennessee Wine and Spirits Retailers Association v. Thomas*, we are left to wonder whether the court would have ruled differently if Tennessee had competently defended the connection of the residency law to public health and safety:

The provision at issue here expressly discriminates against nonresidents and has at best a highly attenuated relationship to public health or safety. During the

course of this litigation, the Association relied almost entirely on the argument that Tennessee's residency requirements are simply "not subject to Commerce Clause challenge," and the State itself mounted no independent defense. As a result, 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.⁶⁸

While it is unclear what amount of evidence may have redeemed the Tennessee law in the eyes of the court, it is clear from this ruling that durational residency requirements at the retail level of alcohol have been deemed unconstitutional for the foreseeable future. Consequently, the durational statutes in roughly twenty-one other states are likely to soon suffer the same fate as the Tennessee law.⁶⁹ While the correlation is less clear, the ruling also probably spells the end of nondurational residency requirements and may have similar implications for physical presence laws.⁷⁰

When attempting to apply *Tennessee Wine v. Thomas* past these relatively modest applications, the metaphorical water becomes far less clear. Many have speculated that the ruling could eventually be applied in a similar fashion to regulations in the wholesale tier of the Three-tiered system.⁷¹ It is also possible that the ruling could be used to challenge laws in control states that grant the state wholesale and retail monopolies. Almost certainly, individuals and institutions interested in liberalizing alcohol regulation will utilize this new-found ambiguity to challenge a variety of related or unrelated statutes, including laws that are, "facially neutral but potentially discriminatory in effect."⁷²

Conclusion

In an amicus brief filed in support of the Tennessee Wine and Spirits Retailers Association, Illinois (speaking on behalf of thirty-four other States and the District of Columbia,) asserted that, “*it is vital* to the Amici States to have the *authority* to regulate the manufacture, distribution, and sale of alcohol within their borders, and the *discretion* to adapt their regulatory regimes to their particular needs.”⁷³ In many ways, this plea for the court to acknowledge the importance of State sovereignty in its ruling is a call from a bygone age. With the rise of e-commerce and globalization, the modern individual may find it difficult to understand that the post-Prohibition inefficiencies of the State run alcohol market were at one time “accepted, and even desired following the repeal of Prohibition, as a way of reinforcing temperance objectives.”⁷⁴ However, “today, the post-Prohibition inefficiencies are [often] at odds with a national marketplace supported by a globalized economy,”⁷⁵ and thus fail the modern litmus test for validity. The ruling in *Tennessee Wine v. Thomas* (taken in conjunction with *Granholm*,) appears to be a concerted effort by the court to “legitimize a national marketplace for alcohol[ic] beverages.”⁷⁶ By utilizing an explicit comparison between the three-tiered system of Tennessee and the systems of other states to declare Tennessee’s residency requirements “not an essential feature of the three-tiered scheme,”⁷⁷ the Court intimates a desire for a more federally uniform standard of alcohol regulation, and certainly exhibits the “intellectual passion...for symmetry,”⁷⁸ they are accused of by Justice Gorsuch in his dissent.

But what will be the unforeseen results that arise from this new wave of federal input on alcohol regulation? If Prohibition teaches us nothing else, it at least teaches that the federalizing of laws that appear to be effective for certain regions of the country are not without unanticipated difficulties.⁷⁹ Perhaps the loosening of state control over alcohol may make collection of state

taxes on interstate sales more difficult;⁸⁰ Perhaps it leads to a dramatic increase in public and private spending on monitoring regulations designed to replace residency requirements;⁸¹ Additionally, these sorts of rulings have the potential to squeeze small economic players in the alcohol market, as unrestricted alcohol sales across state lines could potentially lead to, “coastal retail/wholesaler power consolidation.”⁸² Whatever the ultimate outcomes, we have certainly not heard the last word from the Supreme Court on the Twenty-first Amendment.

¹ “The latest installment of the debate between state alcohol regulation and interstate alcohol commerce involves what industry observers are calling *Granholm II* – the U.S. Supreme Court’s decision in *Tennessee Wine & Spirits Retailers Association v. Thomas*. This case required the Court to interpret and construe its original holding in *Granholm* relative to Tennessee’s durational residency requirements licensure.” Richard M. Blau, “The Supreme Court Speaks: *Tennessee Wine & Spirits Retailers Assn. v. Thomas*,” Pg. 4, <http://www.gray-robinson.com/docs/tennessee-wine-and-spirits.pdf>.

² “Despite the expectations of many who deemed the Tennessee case a poor choice for revisiting *Granholm* due to the unique set of circumstances, the U.S. Supreme Court granted certiorari review through a one sentence order issued on September 27, 2018.” Blau, “The Supreme Court Speaks,” Pg. 6.

³ National Association of Wine Retailers, “Tennessee Wine v. Thomas,” 6, <https://nawr.org/tennessee-v-thomas/>.

⁴ Liza Zimmerman, “Wine Wholesalers React To The Court’s Support of Retailers,” *Forbes*, (June, 2019), <https://www.forbes.com/sites/lizazimmerman/2019/06/30/wine-wholesalers-react-to-the-courts-support-of-retailers/#515c553538e3>. See Also: Thomas Pellechia, “The Future of Wine Retailer Interstate Shipping Hinges on One Word,” *Forbes*, (July, 2019), <https://www.forbes.com/sites/thomaspellechia/2019/07/01/the-future-of-wine-retailer-interstate-shipping-hinges-on-one-word/#4ce8afa11831>.

⁵ Alito, J., Opinion of the Court, *Tennessee Wine & Spirits Retailers Association v. Thomas*, 588 U.S., No. 18-96, (U.S. June 26, 2019), pg. 29, https://www.supremecourt.gov/opinions/18pdf/18-96_5i36.pdf.

⁶ Nicholas Bellos, “Supreme Court Examines Liquor Retail Regulations,” *The Regulatory Review*, (June, 2019), <https://www.theregreview.org/2019/06/05/bellos-supreme-court-liquor-retail-regulations/>.

⁷ Blau, “The Supreme Court Speaks,” 8.

⁸ Martin H. Redish & Shane V. Nugent, “The Dormant Commerce Clause and the Constitutional Balance of Federalism,” *Duke Law Journal*, 1987:4 (1987), 569-617.

⁹ National Association of Wine Retailers, “Tennessee Wine v. Thomas.”

¹⁰ Alito, J., Opinion of the Court, 588 U.S., No. 18-96, (U.S. June 26, 2019), pg. 4.

¹¹ National Association of Wine Retailers, “Tennessee Wine v. Thomas.”

¹² Michael Bindas, “Courthouse Steps Decision Teleforum: Tennessee Wine and Spirits Retailers Association v. Thomas,” *The Federalist Society*, (June 28, 2019), <https://fedsoc.org/events/courthouse-steps-decision-teleforum-tennessee-wine-and-spirits-retailers-association-v-thomas>.

¹³ Alito, J., Opinion of the Court, 588 U.S., No. 18-96, (U.S. June 26, 2019), pg. 33.

¹⁴ Herman W. Ronnenberg, “The American Brewing Industry since 1920,” in Wilson, R.G. and T.R. Gourvish, eds., *The Dynamics of the International Brewing Industry Since 1800*, (New York: Routledge, 1998), 193-212.

¹⁵ Paul J. Gruenewald, “Regulating Availability: How Access to Alcohol Affects Drinking and Problems in Youth and Adults,” *Alcohol Research & Health*, 34:2, (2011), 249-250; See also: Ian Tyrell, “The US prohibition experiment: myths, history and implications,” *Addiction*, 92:11 (1997), 1405-1409.

¹⁶ Pamela S. Erickson, “Safe and Sound: How the three-tier system of U.S. alcohol regulations helps ensure safe products and protects against revenue loss,” *National Alcohol Beverage Control Association*, https://www.nabca.org/sites/default/files/assets/publications/research_studies/SafeandSound.pdf. See Also: “The Three Tier System: A Modern View,” *National Alcohol Beverage Control Association*, https://www.nabca.org/sites/default/files/assets/files/ThreeTierSystem_Mar2015.pdf; Elias, Roni, “Three Cheers for Three Tiers: Why the Three-Tier System Maintains Its Legal Validity and Social Benefits After Granholm,” *Center for Alcohol Policy*, <https://www.centerforalcoholpolicy.org/wp-content/uploads/2016/02/Roni-Elias-Essay.pdf>.

¹⁷ Gorsuch, J., Dissenting, *Tennessee Wine & Spirits Retailers Association v. Thomas*, 588 U.S., No. 18-96, (U.S. June 26, 2019), https://www.supremecourt.gov/opinions/18pdf/18-96_5i36.pdf.

¹⁸ Tennessee Code § 57-3-204(b)(2)(A).

¹⁹ Tennessee Code § 57-3-201—219.

²⁰ *Ibid.*

²¹ Alito, J., Opinion of the Court, 588 U.S., No. 18-96, (U.S. June 26, 2019), pg. 4.

²² Robert E. Cooper, “Tennessee Residency Requirements for Alcoholic Beverages Wholesalers and Retailers,” State of Tennessee Office of the Attorney General, Op. No. 12-59, (June 6, 2012), <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/ops/2012/op12-059.pdf>. See Also: Robert E. Cooper, “Constitutionality of 2014 Residency Requirement for Retailer’s Liquor License,” State of Tennessee Office of the Attorney General, Op. No. 14-83, (September 12th, 2014), <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/ops/2014/op14-083.pdf>.

²³ Institute for Justice, “Tennessee Wine and Spirits Retailers Association v. Thomas,” <https://ij.org/case/tennessee-wine-and-spirits-retailers-association-v-thomas/>.

²⁴ Alito, J., Opinion of the Court, 588 U.S., No. 18-96, (U.S. June 26, 2019), pg. 4.

²⁵ Mark Walsh, “Liquor store war: Should a giant wine and spirits retailer be subject to state residency requirements,” *ABA Journal*, (January, 2019), http://www.abajournal.com/magazine/article/liquor_retailer_state_residency_requirement.

²⁶ Alito, J., Opinion of the Court, 588 U.S., No. 18-96, (U.S. June 26, 2019), pg. 4.

²⁷ “Granholm reaffirmed the Commerce Clause limits state alcohol regulations—to a greater extent when the regulations deal with the producer tier and to a lesser extent when they deal with the retailer or wholesaler tier. This Court agrees with the Fifth Circuit that ‘state regulations of the retailer and wholesaler tiers are not immune from Commerce Clause scrutiny just because they do not discriminate against out-of-state liquor.’” *Byrd v. Tennessee Wine and Spirits Retailers Association*, United States District Court for the Middle District of Tennessee Nashville Division, Case No. 3:16-cv-02738, pg. 11, https://www.govinfo.gov/content/pkg/USCOURTS-tnmd-3_16-cv-02738/pdf/USCOURTS-tnmd-3_16-cv-02738-2.pdf.

²⁸ Bindas, “Courthouse Steps Decision, Teleforum”.

²⁹ *Ibid.*

³⁰ United States Court of Appeals for the Sixth Circuit, *Byrd v. Tennessee Wine and Spirits Retailers Association*, No. 17-5552, (February 21, 2018), pg. 8, <https://www.opn.ca6.uscourts.gov/opinions.pdf/18a0035p-06.pdf>.

³¹ Blau, “The Supreme Court Speaks,” 6.

³² *Ibid.*

³³ *Ibid.*

³⁴ “We granted certiorari...in light of the disagreement among the Courts of Appeals about how to reconcile our modern Twenty-first Amendment and dormant Commerce Clause precedents.” Alito, J., Opinion of the Court, 588 U.S., No. 18-96, (U.S. June 26, 2019), pg. 6.

³⁵ Bindas, “Courthouse Steps Decision, Teleforum”.

³⁶ Sixth Circuit, No. 17-5552, pg. 33. See also Alito, J., Opinion of the Court, 588 U.S., No. 18-96, (U.S. June 26, 2019), pg. 2.

³⁷ Alito, J., Opinion of the Court, 588 U.S., No. 18-96, (U.S. June 26, 2019), pg. 2.

³⁸ *Ibid.*

³⁹ Bindas, “Courthouse Steps Decision, Teleforum”.

⁴⁰ Alito, J., Opinion of the Court, 588 U.S., No. 18-96, (U.S. June 26, 2019), pg. 12.

⁴¹ Ibid, pg. 11.

⁴² Ibid, pg. 7.

⁴³ Ibid, pg. 21.

⁴⁴ Ibid, pg. 10.

⁴⁵ Ibid, pg. 14.

⁴⁶ Ibid, pg. 33.

⁴⁷ Ibid.

⁴⁸ Ibid, pg. 27.

⁴⁹ Michael Stokes Paulsen, "Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis," *North Carolina Law Review*, 86:5, (2008), 1165-1212; See also: Charles J. Cooper, "Stare Decisis: Precedent and Principle in Constitutional Adjudication," *Cornell Law Review*, 73:2, (1988), 401-410.

⁵⁰ Blau, "The Supreme Court Speaks," 6.

⁵¹ "Initially, the Supreme Court afforded the states nearly limitless power to regulate alcohol under the [Twenty-first Amendment]...However, 'as early as the 1960s, the Supreme Court signaled a break with this line of reasoning.'" Sixth Circuit, No. 17-5552, pg. 5.

⁵² "The truth is, things have begun to shift only in very recent years. Bending to the same impulses that moved it at the beginning of the 20th century, this Court has lately begun flexing its dormant Commerce Clause muscles once more to strike down state laws even in core areas of state authority under §2." Gorsuch, J., Dissenting, 588 U.S., No. 18-96, Pg. 11.

⁵³ Alito, J., Opinion of the Court, 588 U.S., No. 18-96, pg. 29.

⁵⁴ Strike & Techel, "The Supreme Court Rules in Tennessee Retailers: What Does It Really Mean?" (July, 2019), <http://www.alcohol.law/digest>.

⁵⁵ Alan B. Morrison, "Tennessee Wine & Spirits Retailers Ass'n v. Thomas: Local Protectionism Loses Out," *The George Washington Law Review*, (July, 2019), <https://www.gwlr.org/tennessee-wine-spirits-retailers-assn-v-thomas-local-protectionism-loses-out/>.

⁵⁶ Strike & Techel, "The Supreme Court Rules in Tennessee Retailers: What Does It Really Mean?" (July, 2019), <http://www.alcohol.law/digest>.

⁵⁷ Alito, J., Opinion of the Court, 588 U.S., No. 18-96, Pg. 28.

⁵⁸ Ibid. Pg. 27-28.

⁵⁹ Blau, "The Supreme Court Speaks," 2.

⁶⁰ Alito, J., Opinion of the Court, 588 U.S., No. 18-96, Pg. 28.

⁶¹ Blau, "The Supreme Court Speaks," 2.

⁶² Bindas, "Courthouse Steps Decision, Teleforum".

⁶³ Alito, J., Opinion of the Court, 588 U.S., No. 18-96, Pg. 33.

⁶⁴ Blau, "The Supreme Court Speaks," 2. See also: Alito, J., Opinion of the Court, 588 U.S., No. 18-96, Pg.

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⁶⁵ Ibid. See also: Alito, J., Opinion of the Court, 588 U.S., No. 18-96, Pg. 28.

⁶⁶ Ibid.. See also: Alito, J., Opinion of the Court, 588 U.S., No. 18-96, Pg. 33.

⁶⁷ Gorsuch, J., Dissenting, 588 U.S., No. 18-96, Pg. 14.

⁶⁸ Alito, J., Opinion of the Court, 588 U.S., No. 18-96, Pg. 33.

⁶⁹ Lisa Soronen, "Are Durational-residency Requirements for Alcohol Retailers Constitutional?" *The Council for State Governments*, (October, 2018), <https://knowledgecenter.csg.org/kc/content/are-durational-residency-requirements-alcohol-retailers-constitutional>. See Also: Bindas, "Courthouse Steps Decision, Teleforum".

⁷⁰ Bindas, "Courthouse Steps Decision, Teleforum".

⁷¹ Blau, "The Supreme Court Speaks," 14.

⁷² "Litigation could focus on laws that authorize only in-state retailers to deliver or ship to consumers, or it could target laws such as physical presence requirements, tied-house exceptions that allow only in-state producers to operate retail locations, laws that require retailers to purchase from in-state sources, laws that authorize only in-state suppliers to self-distribute products to retailers, at-rest laws, or franchise law exemptions

that apply only to in-state suppliers. The recent ruling in Tennessee Retailers may also inspire further litigation and move the needle in the related area of alcohol laws that are facially neutral but potentially discriminatory in effect. For example, states such as New Jersey or Ohio with laws that have special privileges for certain “small” producers, where the definition of “small” may be designed to encompass most or all in-state producers while excluding many out-of-state producers.” Strike & Techel, “The Supreme Court Rules.”

⁷³ Emphasis added. David L. Franklin, et al., *Amici Curiae In Support of Petitioner in Tennessee Wine and Spirits Retailers Association v. Blair*, No. 18-96, pg. 1, https://www.supremecourt.gov/DocketPDF/18/18-96/72811/20181120153341467_Tennessee%20Wine%20and%20Spirits%20v.%20Blair%20IL%20Multistate%20Amicus%20FINAL.pdf.

⁷⁴ Blau, “The Supreme Court Speaks,” 3.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Alito, J., Opinion of the Court, 588 U.S., No. 18-96, Pg. 28.

⁷⁸ Gorsuch, J., Dissenting, 588 U.S., No. 18-96, Pg. 14.

⁷⁹ “In December 1917, Congress submitted to the states the Eighteenth Amendment...By that time most of the states had been dry for years.” Norman H. Clark, “Prohibition and Temperance,” in *Reader’s Companion to American History*, Ed. Eric Foner and John A. Garraty, (Boston; Houghton Mifflin, 1991), 873.

⁸⁰ Zimmerman, Liza B., “Wine Wholesalers React.”

⁸¹ Ibid.

⁸² Thomas, Pellechia “Wine Retailers Cross Fingers Over Soon-To-Come Supreme Court Ruling,” *Forbes*, (June, 2019), <https://www.forbes.com/sites/thomaspellechia/2019/06/12/wine-retailers-cross-fingers-over-soon-to-come-supreme-court-ruling/#3495e74f7673>