DISTILLING PURPOSE: REVISIONIST HISTORY AND THE SUPREME COURT'S SHIFTING INTERPRETATION OF THE TWENTY-FIRST AMENDMENT

Patrick J. Glen

ABSTRACT

History, context, and precedent establish the purpose of the Twenty-First Amendment: to enact a rule of constitutional authority permitting State regulation of alcohol unfettered by the dormant Commerce Clause. This purpose, consistently recognized and applied for fifty years following the Amendment's ratification, has been abrogated by the contemporary Supreme Court, which has instead reinjected the Commerce-Clause limitations the Amendment was meant to nullify back into the analysis of state law. So long as the Supreme Court hews to this erroneous path, it will be impossible for the Twenty-First Amendment to fulfill its true purpose.

INTRODUCTION

The purpose of the Twenty-First Amendment, repealing Prohibition and restoring to the States the primary role in alcohol regulation, was not to enact any particular social or economic policy. Rather, the purpose behind the Amendment was to implement a substantive rule of constitutional authority that the Supreme Court had, in the years leading up to Prohibition, denied to the States. The Twenty-First Amendment sought to negate the dormant Commerce Clause rationales that had consistently been invoked by the Supreme Court to overturn state laws in the late Nineteenth and early Twentieth centuries. Under that Amendment, *any* "transportation or importation into any State . . . for delivery or use therein . . . in violation of the laws thereof," was prohibited.[1] The Amendment's language contained no limitation on this broad grant of authority, such as a requirement that imported alcohol be treated on an identical footing as domestically produced alcohol.

In the wake of the Twenty-First Amendment's ratification, the Supreme Court recognized this purpose, upholding discriminatory state alcohol regulations against Commerce Clause and Equal Protection challenges. It held that course for the better part of half a century before slowly

reinjecting the dormant Commerce Clause limitations that the Amendment had sought to eradicate, premising this shift on a revisionist view of history that is unsupported by a close examination of relevant statutes and judicial decisions. Now, just as in the days before Prohibition, States are limited by the negative implications of the Commerce Clause and barred from any discrimination between the domestic alcohol industry and its regulation, and the regulation of interstate commerce in alcohol.

In light of this renewal of rejected principles, the Twenty-First Amendment cannot meet the purposes for which it was proposed and ratified. The strictures imposed by the Supreme Court have removed broad swathes of regulation from the competence of state governments, while mandating a strict principle of nondiscrimination on any provision the States may enact. Whether this jurisprudential turn embodies a wiser economic or social policy is irrelevant; at bottom, the Supreme Court has functionally negated the Twenty-First Amendment by reconceiving the purposes behind that Amendment and adopting a jurisprudence specifically adapted to those invented purposes.

Part I of this article traces the Supreme Court's approach to state alcohol regulation from the mid-1800s through its interactions with Congressional attempts to provide the States with more significant authority over alcohol issues. This brief history establishes the Congressional policy that would finally be embodied in the Twenty-First Amendment: only by eliminating dormant Commerce Clause issues could true authority be exercised by the States. Part II turns to the Twenty-First Amendment itself, reviewing available evidence of Congressional intent, state regulation in the years immediately following ratification, and the Supreme Court's early precedent on the scope of authority provided to the States. These sources all support construing the Amendment's policy as abrogating dormant Commerce Clause limitations insofar as interstate

commerce in alcohol was concerned. Finally, Part III marks the shift in the Supreme Court's jurisprudence, moving from its 1984 decision in *Bacchus Imports* through its most recent cases. These decisions are a radical departure from the rule the Court had applied between the Twenty-First Amendment's ratification and the mid-1980s, and cannot be squared with the policy considerations animating the Amendment.

I. THE LEGAL PATH TO PROHIBITION

The Supreme Court initially contemplated a significant role for the States in the regulation of the importation and sale of intoxicating liquors within the receiving State. As Chief Justice Taney wrote in 1847, where "Congress has made no regulation on the subject, the traffic in the article may be lawfully regulated by the State as soon as it is landed in its territory, and a tax imposed upon it, or license required, or sale altogether prohibited, according to the policy which the State may suppose to be its interest or duty to pursue."[2] The Supreme Court's opinion was premised on a specific construal of the Commerce Clause; though that provision provides authority for Congress to act, should it chose to do so, where it has not, the States were given leeway to regulate.

That conception of limited concurrent authority between the States and the Federal government lasted until 1888, when the Supreme Court reversed this interpretation of the Commerce Clause. An Iowa law forbade the importation of alcohol into the state except upon strict conditions, including proof that the ultimate consignee was permitted to sell the liquor in the county of receipt.[3] The Supreme Court held that this law transgressed Congress's own authority under the Commerce Clause, despite there being no relevant federal law related to interstate commerce in alcohol. To do so, it reversed the presumption it had established in *Thurlow*. As

Chief Justice Field noted in concurrence, the appropriate implication from congressional silence should be that "[t]he absence of any law of congress on the subject is equivalent to its declaration that commerce in that matter shall be free. Thus the absence of regulations as to interstate commerce with reference to any particular subject is taken as a declaration that the importation of that article into the states shall be unrestricted."[4] The effect of *Bowman* was that state laws could only operate on imported alcohol once importation was complete.[5]

Two years later the Supreme Court extended *Bowman*, while also opining that Congress could provide greater authority to the States to regulate interstate commerce. Another Iowa state law limited who could sell, under what conditions, and for what purposes, certain intoxicating liquors within the state.[6] The Supreme Court held that the right to import alcohol recognized in *Bowman* carried with it an implied right to sell that alcohol, at least so long as it remained in its original packaging.[7] Until the imported article was out of its original packaging, "the state had no power to interfere . . . in prohibition of importation and sale by the foreign or non-resident importer."[8] Nonetheless, the Court did opine at numerous points in its decision that Congress *could* grant authority over certain aspects of interstate commerce to the States.[9]

Congress took the Court's hint and eventually passed the Wilson Act. In its initial form, that Act provided that "no state shall be held to be limited or restrained in its power to prohibit, regulate, control, or tax the sale, keeping for sale, or the transportation as an article of commerce or otherwise, to be delivered within its own limits, of any [alcohol] by reason of the fact that the same [has] been imported into such State from beyond its limits[.]"[10] Some congressmen were concerned, however, that the proposed language permitted favoritism of domestic alcohol and discrimination against imported alcohol and "foreign" producers.[11] Thus, various amendments were proposed to make nondiscrimination against imports an integral part of the new Act.

Accordingly, the final version of the Wilson Act *did* contain an explicit nondiscrimination principle: "All fermented, distilled, or other intoxicating liquors or liquids, transported into any State or Territory . . . shall upon arrival in such State or Territory, be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, *to the same extent and to the same manner* as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."

The nondiscrimination language of the Act was quickly seized upon by the Supreme Court to effectively negate the grant of authority Congress had intended. In *Scott v. Donald*, for instance, the Court held that South Carolina could not create a liquor monopoly and thereby prohibit the direct sale and shipment of alcohol to its citizens.[12] On the Supreme Court's reasoning, such a system amounted to discrimination, given the limitations under which the State monopoly would itself select, import, and sell non-domestic alcohol. Thus, given the discriminatory effect, the Wilson Act could not save the State's law from constitutional infirmity: that Act "was not intended to confer upon any state the power to discriminate injuriously against the products of other states in articles whose manufacture and use are not forbidden, and which are, therefore, the subjects of legitimate commerce."[13] Justice Brown dissented from this holding. In his view, the Wilson Act withdrew alcohol "from the operation of the commerce clause of the constitution, and [permitted traffic in alcohol] to be regulated in such manner as the several states, in the exercise of their police powers, shall deem best for the general interests of the public."[14] Under Justice Brown's reasoning, once alcohol was imported into a state, the state's laws were paramount and controlled resolution of any question concerning lawfulness of sale or importation immune from dormant Commerce Clause considerations.[15]

The holding of *Scott* thus safeguarded an individual constitutional right to import alcohol. In a later case, the Court also clarified that the States could not condition this individual right of importation on health and safety measures related to the imported alcohol, *e.g.*, a state-mandated purity test.[16] In a different case, the Supreme Court also concluded that state laws could not be applied to imported liquor prior to delivery to the ultimate consignee, meaning states could not interdict alcohol shipments *even if* those shipments were in violation of state law.[17]

The Wilson Act had sought to provide a rule of characterization to supersede the Supreme Court's treatment of state alcohol regulation: imported alcohol should be treated the same as domestic alcohol upon arrival in the state, and not be exempt from state regulation simply on account of its imported character. Yet the Supreme Court had used the nondiscrimination language to different ends, neutering state laws and barring States from conditioning the import of alcohol on specific rules or regulations, or even from prohibiting import altogether, whether or not the use of alcohol was legal under state law. Congress was not pleased with these jurisprudential developments and sought to act almost immediately after the Court's decision in *Scott*. It was not until 1913, however, that a new law would be enacted to address the problem.

The Webb-Kenyon Act sought to take a stronger stand in favor of State authority. Section 1 of the initial draft provided that "the shipment or transportation in any manner or by any means whatsoever of any [alcohol between the states], which said [alcohol] is intended by any person interested therein, directly or indirectly, or in any manner connected with the transition, to be received, possessed, or kept, or in any manner used, either in the original package or otherwise, in violation of any law of such [state], is hereby prohibited."[18] This language was broad and moved beyond that of the Wilson Act, creating a prohibition premised entirely on state law and effectively removing alcohol as an item of interstate commerce. Yet the initial draft *also* included a Section

2, which restated the Wilson Act's nondiscrimination principle once imported alcohol arrived within a state's borders.[19] The tension in this draft was noted by one of its sponsors, Senator Kenyon, who noted that "[t]he first section takes certain liquor out of commerce, and the second section seems to recognize it as being in. There is some incongruity in this."[20] Senator Borah, too, thought that "[t]he prohibition which has been made in the [first section] is, in a sense, abrogated in the second, and liquor is recognized as an article of commerce."[21]

The "incongruity" was resolved *not* by moderating the language of the first section, *i.e.*, the prohibition, but by eliminating the nondiscrimination principle of the second section. The enacted language provided that "[t]he shipment or transportation, in any manner or by any means whatsoever, of [alcohol, between the states, where] intended by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such [state], is hereby prohibited."[22] The history of the Webb-Kenyon Act is thus the converse of the Wilson Act. The latter act initially had broad language condoning discrimination, but was revised to include a nondiscrimination principle, while the former initially had a nondiscrimination principle that was ultimately deleted in favor of an extraordinarily broad prohibition on importation and sale of alcohol, where such importation or sale was barred by state law.

This history – the explicit rejection of a nondiscrimination principle that had governed application of the Wilson Act – supports the conception of the Webb-Kenyon Act as entirely removing alcohol from the realm of interstate commerce, at least when its importation into a state was in violation of the laws thereof. Contemporary consideration of the Act also supports this characterization. Attorney General Wickersham believed that the broad language of the Act and the absence of any nondiscrimination principle led to constitutional infirmity: the constitutionality

of the Act "can only be conceded if it be held that Congress can abrogate entirely its power over interstate commerce in an article which it does not itself declare to be 'an outlaw of commerce,' but which it leaves to the varying legislation of the respective States to more or less endow with qualities of outlawry."[23] President Taft, whose veto of the bill would be overridden by Congress, also opined that the effect of the new law would be "to permit the States to exercise their old authority, before they became States, *to interfere with commerce between them and their neighbors*."[24]

The Supreme Court clearly saw this purpose, as well, and, although case law under the Webb-Kenyon Act was limited, the Court applied the Act's broad language even in cases of discrimination or unequal treatment as between imported and domestic alcohol. In *Adams Express Company*, for instance, the Court noted that the Webb-Kenyon Act was an "extension" of the Wilson Act which allowed state laws to operate on interstate commerce in alcohol in "certain cases."[25] Those "certain cases" were when an interested person "intends that [the shipment] be possessed, sold, or used in violation of any law of the state wherein they are received. Thus far and no farther has Congress seen fit to extend the prohibitions of the act in relation to interstate shipments."[26] This early decision appropriately cabined Webb-Kenyon's applicability; interstate commerce in alcohol should be free, *but for* shipments made into a state in violation of any law of the receiving state. In *Adams Express*, the Court ultimately found Webb-Kenyon inapposite, as Kentucky law did *not* prohibit the use for which the subject liquor had been imported.[27]

This understanding was affirmed and extended in *James Clark Distilling Company*. West Virginia state law prohibited shipments of liquor, even for personal use, except under strict conditions and regulations.[28] The Court rejected the argument that, because personal use of

alcohol was not prohibited under West Virginia law, the State could not constitutionally limit its importation. Even in such circumstances, the Court held, the Webb-Kenyon Act was applicable:

> Its purpose was to prevent the immunity characteristic of interstate commerce from being used to permit the receipt of liquor through such commerce in states contrary to their laws, and thus in effect afford a means by subterfuge and indirection to set such laws at naught. In this light it is clear that the Webb-Kenyon Act, if effect is to be given to its text, but operated so as to cause the prohibitions of the West Virginia law against shipment, receipt, and possession to be applicable and controlling irrespective of whether the state law did or did not prohibit the individual use of liquor.[29]

The relevant legal question was whether importation complied with the strict conditions and regulations established by the state, not whether its ultimate use was sanctioned. Framed in that fashion, the Court had no problem rejecting the argument of the distiller. Because interstate commerce in alcohol had, when undertaken for prohibited purposes under state law, "been in express terms divested by the Webb-Kenyon Act of their interstate commerce character, it follows that . . . there is no possible reason for holding that to enforce the prohibitions of the state law would conflict with the commerce clause of the Constitution."[30] Having recognized this effect, the Court also cautioned that the potential disruption to interstate commerce was not of more general concern. Alcohol was deemed *sui generis* as an item of interstate commerce, and that the Court upheld the Webb-Kenyon Act and its specific rationale in these narrow circumstances was not indicative of how it would treat other items of commerce or apply the dormant Commerce Clause to other classes of commerce.[31]

The larger questions of the constitutionality and scope of Webb-Kenyon were settled by *James Clark Distilling*, with subsequent decisions dealing with case-specific applications of its holding. The Court upheld a North Carolina law requiring railroad companies to keep detailed records of shipments of alcohol within the state and to keep those records available for public review.[32] In light of the Webb-Kenyon Act, the Court held that this was constitutionally

permissible, while also observing that, since the state could have permissibly barred all importation of alcohol, it was entitled to permit such importation only upon certain specific conditions. According to the Court, "the greater power [of an outright prohibition on imports] includes the less [*i.e.*, restrictions on importation]."[33] Similarly, the Court upheld a railroad company's refusal to transfer a shipment of alcohol for delivery into Washington state, where that shipment did not comport with the strict requirements of Washington state law:

> This statement of the applicable law shows that the purpose of the legislation was to make the transportation of intoxicating liquors in the state of Washington as difficult, conspicuous and expensive as possible. Only an individual could qualify to ship or receive it and it was intended that it should move only in a single package of strictly limited quantity, with a permit attached, showing its origin, destination and the name of the shipper who must also be the ultimate consignee. A carrier could lawfully receive it for transportation only when the required permit was attached and it was made its legal duty to deface and cancel such permit before delivery so that it could not again be used.[34]

Finally, in *McCormick & Co., Inc.*, the Court upheld West Virginia's requirement that importers obtain licenses to sell alcohol within the state, even when personal use was allowed and thus importation was not for an impermissible purpose.[35] As the Court observed, "[i]f the provisions of the state law . . . which expressly require state permits for sale by wholesale dealers of the products in question, are valid, it necessarily follows that sales by appellants of these products without such permits would be in violation of the state law within the meaning of the Webb-Kenyon Act."[36]

II. THE 21ST AMENDMENT, INITIAL STATE REGULATORY MEASURES, AND THE SUPREME COURT'S BROAD INTERPRETATION OF PURPOSE

For the over fourteen years of the Prohibition era, state authority over alcohol regulation was a far less compelling issue. With the movement towards repeal, however, debate on the issue was reinvigorated in Congress. Subpart A addresses the drafting history and debate surrounding the Twenty-First Amendment, which establishes the broad purpose of returning alcohol policy to

the States, free of dormant Commerce Clause concerns. Subpart B supports this argument with reference to post-ratification developments in the States and the Supreme Court. The States took the Amendment's cue and enacted a wide variety of regulations, many of which were blatantly discriminatory, while the Supreme Court sanctioned these laws, holding that the plain language of the Amendment abrogated dormant Commerce Clause limitations on state authority.

A. Drafting and Debate on the Twenty-First Amendment

The question of the scope of the Twenty-First Amendment swung between two positions during drafting and debate. On one hand, there was a faction that sought only to safeguard the right of dry States to bar importation of alcohol, but otherwise believed that interstate commerce in alcohol should be free, *i.e.*, if a State was wet, commerce in alcohol could not be restricted. This position was embodied in an initial Senate resolution on the issue, which provided that the Commerce Clause "shall not be construed to confer upon the Congress the power to authorize the transportation or importation into any state . . . for use therein of [alcohol] if the laws in force therein prohibit such transportation or importation."[37] This proposal, made in December 1932, had a short lifespan, as the Amendment in its ultimate form was proposed by the Senate Judiciary Committee in January 1933.[38] That latter proposal, as ratified, provided that "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors in violation of the laws thereof, is hereby prohibited."[39]

Debate on the Judiciary Committee's proposal focused on the grant of plenary authority to the States to regulate alcohol. Rejecting a proposal to permit concurrent federal authority over the issue, Senator Wagner argued "let the people of each State deal with that subject, and they will do it more effectively and more successfully than the Federal government has done[.]"[40] Although referring to the concurrent-authority question, the Senator's commentary contemplates diverse

regulation by the States on all questions surrounding importation, transportation, sale, and use. Senator Blaine, speaking for the Judiciary Committee that had advanced the final language, was more explicit, submitting that "[t]he purpose of section 2 is to restore to the States by constitutional amendment absolute control in effect *over interstate commerce* affecting intoxicating liquors which enter the confines of the States[.]"[41] The ability to safeguard state and local regulation over alcohol unfettered by the dormant Commerce Clause rationale employed by the Supreme Court in Wilson Act cases was also noted by Senator Borah. The Senator remarked that "if we are to have what we are now promised, local self government, States rights, the right of the people of the respective States to adopt and enjoy their own policies, we must have some other method, some other provision of the Constitution, than those which existed prior to the adoption of the Eighteenth Amendment."[42]

Recognizing this clear intent, proponents of the original December version of the Amendment, limited to interstate commerce affecting dry States, pushed back. Senator Glass proposed that the negation of dormant Commerce Clause principles should be limited to protecting dry States by advancing an amendment to the Judiciary Committee's version, which barred importation and transportation into States *only* where "the manufacture, sale, and transportation of [alcohol] are prohibited by law[.]"[43] The specific rationale for this amendment was, according to Senator Glass, to "[meet] the objection that are we undertaking to interfere with interstate commerce as between States which authorize the manufacture, transportation, and sale of liquors[.]"[44] The import of the Judiciary Committee's version was thus well understood by both supporters and detractors. And, importantly, Senator Glass's amendment ultimately failed.

There is no commentary that establishes a contrary purpose. Although several Senators noted that the Amendment would "*assist* the States that want to be dry to remain dry,"[45] the

Amendment *did* do that; it just had a broader effect. In other words, observations that the Amendment accomplished one aim fail to establish that the drafters did not have additional aims they sought to accomplish. Moreover, the defeat of language that would have limited the scope of the Amendment to this single aim – including the initially proposed version in December 1932 and Senator Glass's 1933 amendment – undercuts any contention that the final version should be interpreted in such a cramped fashion. So, too, reliance on statements that the Amendment simply restated the principles undergirding the Webb-Kenyon Act is fraught with interpretive difficulty.[46] The better interpretation of the Webb-Kenyon Act, as well as the Supreme Court decisions applying that statute, is that it negated dormant Commerce Clause concerns over all state regulation of alcohol, whether or not that regulation was discriminatory and regardless of whether the consumption or sale of alcohol was lawful within the State. Noting that the Amendment restated this law thus tends to support the expansive view of authority under the Twenty-First Amendment.

B. State Regulation and the Supreme Court's Negation of Dormant Commerce Clause Principles in 21st Amendment Cases

The expansive understanding of the Twenty-First Amendment is further supported by State legislative action following ratification of the Amendment. In the wake of repeal, the States enacted numerous alcohol regulations that had the practical effect of discriminating against out-of-state economic interests. For instance, many States enacted licensing regimes that required not only residency for the applicant, but imposed durational requirements on that residency.[47] These requirements applied not only to individuals, but also to the components of corporate and business entities seeking to enter the State's alcohol market.[48] Other States imposed health and safety requirements on imported alcohol that were not applied to domestically produced alcohol, such as purity tests or registration with federal authorities.[49] Discrimination was more overt in regimes that contained reciprocity provisions, permitting imports only when the producer seeking to import

alcohol *to* "State A" resided in a state that permitted imports of alcohol *from* "State A"; otherwise, such imports would be barred.[50] States also enacted discriminatory taxing regimes, charging higher rates on imported alcohol than on domestic products, or exempting *exported* liquor from state excise taxes.[51] In all, 41 of the then-48 States had state regulations of alcohol that were facially discriminatory or had that practical effect, with many of these laws dating to the Webb-Kenyon era, and all maintained following ratification of the Twenty-First Amendment.[52] In other words, the Webb-Kenyon understanding advanced in this essay was shared by the States prior to the Twenty-First Amendment, and that Amendment's "constitutionalization" of the prior Act was similarly understood to permit laws that fell disproportionately on out-of-state alcohol interests.

From the very first cases dealing with state regulation under the Twenty-First Amendment, the Supreme Court was aggressive in its construal of the Amendment's effect on dormant Commerce Clause principles. In *Young's Market*, the Court was confronted with a California law that required a license fee to import beer, and then separate licenses to sell to wholesalers after importation had been completed.[53] This licensing scheme, it was argued, impermissibly discriminated against interstate commerce.[54] Justice Brandeis rejected this contention. Prior to the Twenty-First Amendment, "the exaction of a fee for the privilege of importation would not . . . have been permissible *even if* the state had exacted an equal fee for the privilege of transporting domestic beer from its place of manufacture to the wholesaler's place of business."[55] But the text of the new Amendment upset that rationale: "The words [of the Twenty-First Amendment] are apt to confer upon the state the power to forbid all importations which do not comply with the conditions which it prescribes."[56] The plaintiffs argued the Court should "construe the amendment as saying, in effect: The state may prohibit the importation of intoxicating liquors provided it prohibits the manufacture and sale within its borders; but if it permits such manufacture and sale,

it must let imported liquors compete with the domestic on equal terms"[57] Justice Brandies rejected this interpretive invitation, observing that it "would involve not a construction of the amendment, but a rewriting of it."[58] And, importantly, the Court did *not* limit it construal of authority under the Amendment to traditional police-power concerns. Under the Amendment, the Court believed that a State could "establish a monopoly of the manufacture and sale of beer, and either prohibit all competing importations, or discourage importation by laying a heavy import, or channelize desired importations by confining them to a single consignee."[59] As with its decision in *Seaboard*, *supra*, the Court viewed this greater power to include the lesser of permissibly exacting licensing fees, even when those fees discriminated against imports.

Other laws addressed by the Court were more overtly discriminatory. Following ratification of the Twenty-First Amendment, Minnesota enacted a law barring the import of certain "brands of intoxicating liquors containing more than 25 per cent of alcohol by volume . . . unless such brand or brands shall be duly registered in the patent office of the United States."[60] The manufacturer won an injunction against this law in the lower court, but the Supreme Court reversed. Despite "clear[]" discrimination against out-of-state alcohol as compared to domestic alcohol, the Court held that such discrimination was "permissible although it is not an incident of reasonable regulation of the liquor traffic."[61] The Twenty-First Amendment, by its text, effectively sanctioned classifications based on where alcohol is produced, and laws that are then premised on such classifications are not constitutionally problematic.[62]

Michigan barred importation of beer from any state whose laws discriminated against the importation of Michigan beer, *i.e.*, importation was permitted only from states that granted reciprocity of importation.[63] A brewing company in Indiana, a state that did not permit importation of Michigan beer, was thus barred from importing beer to Michigan, and brought an action to

enjoin Michigan's law.[64] The Supreme Court began by entirely discounting the motivation of the state law – whether it was retaliatory or protectionist was irrelevant to the analysis under the constitution. "[*W*]*hatever* its character, the law is valid. Since the Twenty-First Amendment . . . the right of a state to prohibit or regulate the importation of intoxicating liquor *is not limited* by the commerce clause[.]"[65] Nor was such discrimination between imported and domestic alcohol violative of equal protection principles, since the text of the Twenty-First Amendment itself established those classes and permitted disparate treatment.[66]

III. FROM *BACCHUS IMPORTS* TO *TENNESSEE WINE*: NEW PURPOSES AND GREATER RESTRICTIONS ON STATE REGULATION

By the end of the 1930s, Supreme Court precedent on the scope of the Twenty-First was clear. That provision "sanctions the right of a state to legislate concerning intoxicating liquors brought from without, *unfettered by the Commerce Clause*."[67] In the fifty years following the ratification of the Twenty-First Amendment, the Supreme Court hewed to this interpretation. The Court did find that state regulation of alcohol was not "unfettered" by *other* constitutional provisions, including the various protections in the First Amendment,[68] the Due Process Clause,[69] and certain applications of the Equal Protection Clause.[70] The Court also concluded that states were not free from Commerce Clause limitations when attempting to apply their state laws to shipments simply passing through the state, *i.e.*, not destined for use within the state,[71] or shipments to lands within the state that were outside the jurisdiction of the state, *i.e.*, national parks or federal military bases.[72] Yet despite these ancillary developments on the scope of the provision, the Court continued to apply its fundamental interpretation of the Twenty-First Amendment as "free[ing] the State of 'traditional Commerce Clause limitations when it restricts the importation of intoxicants destined for use, distribution, or consumption within its borders.'"[73]

The Court nodded to this understanding of the Amendment as late as June 18, 1984, where it observed that "[t]his Court's decisions . . . have confirmed that the Amendment primarily created an exception to the normal operation of the Commerce Clause," allowing the States to "impose burdens . . . that, absent the Amendment, would clearly be invalid under the Commerce Clause."[74] Just eleven days later, however, the Supreme Court would effectively abrogate fifty years of precedent in five paragraphs of inapposite legal analysis.

Hawaii imposed a tax on all liquor, but, for differing periods of time, provided an exemption from the tax for certain domestically produced liquors, including okolehao and fruit wine.[75] Wholesalers brought suit seeking refund of the tax, arguing that it was unconstitutional under the Commerce Clause.[76] A five Justice majority agreed. The Court began by noting that the legislative intent behind the tax exemptions was to promote local liquor producers, and that the effect of the exemptions was to favor domestic industry at the expense of the products of other States.[77] The exemptions thus "violated the Commerce Clause."[78]

This violation was not "saved" by the Twenty-First Amendment. Despite the clear import of the Court's earlier jurisprudence, the *Bacchus* majority elided these decisions with an observation that the history behind the Amendment was "obscure," and failed to point in a specific direction concerning the scope of state authority.[79] It thus invented a standard to judge state regulation going forward, opining that the relevant question is "whether the principles underlying the Twenty-first Amendment are sufficiently implicated by the" state regulation "to outweigh the Commerce Clause principles that would otherwise be offended."[80] The Court did not provide any clear statement regarding what the principles underlying the Amendment were, noting doubts about the scope of Section Two's authorization.[81] But it did conclude that economic protectionism was *not* among those principles, and that the federal government maintained a strong interest in

"preventing economic balkanization."[82] Accordingly, "because the tax violates a central tenet of the Commerce Clause but is not supported by any clear concern of the Twenty-first Amendment," it was unconstitutional.[83]

Justice Stevens dissented, joined by Justices Rehnquist and O'Connor. For the dissent, the clear text of the Amendment "authorize[d]" the Hawaii provision, buttressed by the Court's own precedent consistently – over the course of fifty years – holding that state regulation of alcohol was "unconfined by ordinary limitations imposed . . . by the Commerce Clause[.]"[84] Noting the majority's key move, its reliance on the "obscurity" of purpose behind the Amendment, the dissent found the rationale wanting. The Supreme Court had already, in *Young's Market*, noted that the history of the provision was irrelevant given its clear language, making its "obscurity" an insufficient basis for the majority's "novel approach to the Twenty-first Amendment."[85] Moreover, even focusing on purposes missed the point, as the question under the Amendment was one of authorization: is the state "provision . . . an exercise of a power expressly conferred upon the States by the Constitution."[86] For the dissent, the answer was "plainly" yes.[87]

Whatever one may think of the *policy* embodied by the decision in *Bacchus*, *i.e.*, that State regulation of alcohol must comport with some amorphous conception of principles emanating from the Twenty-First Amendment in order to avoid dormant Commerce Clause issues, it is inconsistent with the text of the Amendment and fifty years of Supreme Court precedent. Most troubling, the majority made no effort whatsoever to justify its decision. As Justice Stevens noted in dissent, the Court had squarely addressed the scope of the Amendment in tens of cases over the years, always holding, even in the face of unquestionably discriminatory state regulation, that the dormant Commerce Clause was *not* a limit on state authority under the Twenty-First Amendment. And ultimately these decisions had been grounded in the broad text of the Amendment itself, language

that the majority failed to consider. Finally, Justice Stevens' point regarding the fundamental question is sounder than the majority's construction of its own fundamental question. The Twenty-First Amendment did not seek to establish particular policy goals, be it temperance, a free and fair market place, or some other vague health and public safety rationale, making the majority's reliance on an analysis that would seek consonance of purpose between the state regulation at issue and the Amendment an impossible task. Rather, the Amendment sought to grant States authority previously denied them to fully regulate the importation and sale of alcohol within their borders, without being confined by the dormant Commerce Clause principles that had plagued earlier Congressional attempts to return alcohol policy to the States. Justice Stevens' fundamental question is directly related to this purpose and asks simply whether the state has exercised an authority granted to it by the Constitution. If the state law relates to the importation, transportation, or sale of alcohol within the state, the answer is easy: the state had authority to enact the law, and the dormant Commerce Clause is irrelevant to assessing the law's constitutionality.

Considering the paucity of reasoning and its narrow focus on an explicitly protectionist state regulation, *Bacchus* did not definitively settle the Court's shift away from its original understanding of the Twenty-First Amendment. Following *Bacchus*, States still maintained discriminatory regulatory regimes, including prohibitions or onerous conditions on the direct shipment of alcohol from out-of-state wineries to citizens within the regulating state. In *Granholm v. Heald*, the Supreme Court considered the permissibility of such prohibitions and limitations in consolidated cases arising out of Michigan and New York.[88] Both States, including at least 24 others, prohibited or limited the direct shipment of wine to consumers within the state from out of state wineries, while at least 13 other States had reciprocity rules, allowing direct shipment only when the wine was produced in a state that allowed direct shipment of wine produced in the

receiving state.[89] As with *Bacchus*, the Court began with the Commerce Clause, holding that the direct-shipping laws of both Michigan and New York discriminated against interstate commerce and were thus presumptively invalid.[90]

The Court then proceeded to reject the States' reliance on the Twenty-First Amendment, deeming their arguments "inconsistent with [the Court's] precedents and with the Twenty-First Amendment's history."[91] The Court first turned to the Webb-Kenyon Act, narrowly construing both its language and the Supreme Court's decisions interpreting that Act. The Court reasoned that Webb-Kenyon was simply meant to address the so-called direct-order loophole that had arisen under the Wilson Act, and only intended to extend to States the power "to forbid shipments of alcohol to consumers for personal use," while also mandating that "States treated in-state and out-of-state liquor on the same terms."[92] This result also followed from the statute's language, according to the Court, as the Act expressed "no clear congressional intent to depart from the principle . . . that discrimination against out-of-state goods is disfavored."[93] Jumping to the Twenty-First Amendment, the Court made the uncontroversial observation that the text of the Amendment tracked the language of Webb-Kenyon, and thus that the former Act was relevant to the interpretation of the latter Amendment. Given the Court's gloss on its precedent under the Wilson and Webb-Kenyon Acts, it concluded that the Amendment likewise was not meant to permit discriminatory state laws, since, in its view, no prior law had done so, either.[94]

This history is incorrect on all counts. The Court's decisions under the Wilson Act did not carve out a personal right to receive liquor shipped from out of state, but rather held that States could not discriminate against that alcohol by applying different legal provisions to imports than it did to domestically produced alcohol.[95] It was, at least according to the decisions of the Court at that time, a faithful application of the nondiscrimination principle contained in the Wilson Act

itself. It was these holdings that Congress sought to address in proposing and ultimately adopting the Webb-Kenyon Act, and the history of that Act on the principle of nondiscrimination is especially illuminating. The draft of that Act, as noted previously, contained a nondiscrimination clause almost identical to that in the Wilson Act. But such a principle clashed with the fundamental purpose of the proposal, which was to entirely remove alcohol as an item of interstate commerce. Accordingly, that section was dropped from the final version of the Act, leaving only the broad prohibition of importation and sale when in violation of state law. The whole history of the Webb-Kenyon Act expresses the "clear congressional intent" that the Court somehow found lacking.

The majority's treatment of past precedent was similarly cursory and largely missed the point. It recognized the broad view taken by *Young's Market*, for instance, but minimized the import of its holding by quoting a passage where the Court noted that "the case [did] not present a question of discrimination prohibited by the commerce clause."[96] Fuller context is important; *Younger's Market* did not present a case of "discrimination *prohibited* by the commerce clause," because the Twenty First Amendment *permitted* the discrimination at issue. That is clear from the paragraph that precedes the Court's quote, where Justice Brandeis noted that the state's licensing fee would have been impermissible *but for* the Twenty-First Amendment. It is not that there was no discrimination in *Younger's Market*, but that the Supreme Court found such discrimination permissible under the Twenty-First Amendment. The *Granholm* majority also failed to review other decisions of the Court that were even more relevant. For instance, shortly after *Younger's Market* was decided, the Supreme Court upheld laws barring imports from specific states that did not provide for reciprocity of importation, as well as regulatory regimes that placed conditions on imported alcohol that were not applicable to domestically produced alcohol.[97] The Michigan and

New York provisions were in relevant part indistinguishable from these prior laws that had been upheld as within the States' authority under the Twenty-First Amendment.

The *Granholm* majority ultimately turned to contemporary precedent, but that was, if anything, a thinner reed than its erroneous historical analysis. For instance, that the Twenty-First Amendment does not override other explicit provisions of the constitution says nothing about whether it was meant to trump the *negative* implications of the Commerce Clause.[98] Moreover, the argument that the Twenty-First Amendment did not abrogate congressional authority under the Commerce Clause is a strawman; nobody argues that it did, and the fact that Congress *could* utilize this authority again says nothing about whether the Amendment is unfettered by the *dormant* Commerce Clause. The Court was finally left with only *Bacchus* as support, but the holding of that case, as already argued here, is simply *ipse dixit*, as unsupported as any of the additional rationales the *Granholm* majority attempted to muster on behalf of its own novel interpretation of the Twenty-First Amendment.

The decision in *Granholm* was close, 5-4, with Chief Justice Rehnquist and Justices Stevens, O'Connor, and Thomas dissenting. But with the death of the Chief Justice and the subsequent retirements of Justices Stevens and O'Connor, it has proven the high-water mark in the defense of the Court's traditional Twenty-First Amendment jurisprudence. In *Tennessee Wine and Spirits Retailers Association*, decided fourteen years later, Justice Thomas maintained his dissenting position but could only marshal the support of Justice Gorsuch.[99] At issue in *Tennessee Wine* were durational residence requirements, as well as compositional and residential requirements for corporate bodies, seeking licenses to operate liquor stores in the state.[100] These licensing requirements discriminated against both new residents and out-of-state corporations, and the Court thus held that they violated the Commerce Clause.[101] Proceeding to the argument under

the Twenty-First Amendment, the Court relied on the reasoning of *Granholm* and the weight of other post-*Bacchus* decisions, while ultimately assessing whether the regulatory regime was protectionist or served some legitimate purpose to which the State's police powers attached.[102] On this latter point, the Court concluded that protectionism was the main aim of Tennessee's durational requirements, and that they were otherwise ill-suited to protect any public health or safety concern.[103]

Tennessee Wine is notable not only for the majority's revisionist history – the same errors in construing the Supreme Court's Wilson Act precedent, the scope and purpose of the Webb-Kenyon Act, and the Court's jurisprudence under the latter provision were similarly present in *Granholm* – but also for its remarkably dismissive attitude towards the contemporaneous practice of the states and courts at the time of the Twenty-First Amendment's ratification. Although the majority recognized the expansive and consistently discriminatory nature of State regulation in the early years of the Webb-Kenyon Act and Twenty-First Amendment, it ignored these point on the shaky ground that this contemporaneous practice was not consistent with the Court's *own* later drift away from its initial interpretation of the Amendment.[104] That same dismissive approach is present in the majority's treatment of the judicial decisions upholding these state regulations, which are questioned solely on account of the Court's evolving interpretation, not as a matter of first principles.[105] Yet as Justice Steven's wrote in dissent in *Granholm*, "[t]he views of the judges who lived through the debates that led to the ratification of [the Twenty-First Amendment] are entitled to special deference," as are the social context and policy choices made in light of that context by the legislature and civic society.[106] Those views and decisions point firmly away from the Court's modern conception of the Twenty-First Amendment's purpose. The Supreme Court justices who were immersed in the debates surrounding successive congressional attempts to return

alcohol policy to the States rendered knowledgably decisions establishing the plenary authority in the States to implement whatever policies the States deemed most appropriate. And, even if the contemporary interpretation could be deemed "sound economic policy," it cannot be deemed "consistent with the policy choices made by those who amended our Constitution in 1919 and 1933."[107] Those policy choices reflected only an intent to return full control of alcohol regulation to the States, not to limit that authority for fear of some form of economic balkanization.[108]

CONCLUSION

The question of whether the Twenty-First Amendment has achieved its purpose must, unfortunately, prompt the full range of dreaded professorial responses – "It depends," certainly, and "yes and no," among them. It depends, first and foremost, on one's conception of purpose. Was the Twenty-First Amendment meant only to safeguard the inviolability of dry States while otherwise applying the nondiscrimination principles of the dormant Commerce Clause to their fullest extent against wet States? Or was the purpose to remove alcohol entirely from the realm of interstate commerce and allow states a free hand, unfettered from Commerce Clause principles, in their regulation of alcohol? Of course, resolution of this threshold question simply leads to a similarly fraught second question, as to whether the purpose has been fulfilled. Considering the shift in the Supreme Court's precedent, it could be said that the Amendment initially failed in achieving its purpose by a too-robust interpretation of its aims by the Supreme Court (if one believes that the Amendment's aims were modest), or that it operated perfectly by allowing the States carte blanche in their regulation of alcohol (on the assumption that the Amendment was, indeed, meant to eradicate Commerce Clause concerns). And, if moving to the present day, reverse those responses – some will view the Amendment a failure, given the more restrictionist

interpretation prevailing since *Bacchus*, while others will view *Bacchus* as a tardy course correction that will allow the Amendment to achieve its aims in the years ahead.

This essay's view is fundamentally defeatist on the relevant question. The history of the Twenty-First Amendment is characterized by a consistent striving on the part of Congress to return full sovereignty over alcohol regulation to the States. It tried, and failed to do so, with the Wilson Act, but rectified its mistake in the form of the Webb-Kenyon Act decades later. It was this expansive conception of State authority over the issue that was later enshrined in the Constitution and given its full breadth by a Supreme Court well aware of the import of the Amendment's language and the full-throated debates surrounding its ratification. And it was this conception that prevailed for over half a century before the Supreme Court, on the barest of pretexts, resurrected the various dormant Commerce Clause rationales that had been rejected by successive generations of congressmen and jurists alike. Did the Amendment succeed? Yes, and spectacularly so, right up to its moment of interment.

Even after *Bacchus* things may have gone differently. Justice Thomas needed only one more vote in *Granholm* to reinvigorate the purpose of the Twenty-First Amendment. But with the passing of that generation most connected to the Amendment's debate, adoption, and ratification, chances remain slim that the Supreme Court will again reverse course and embrace its earlier interpretation of State authority. The fate of the Twenty-First Amendment, at least as regards State authority, will unfortunately be of a kind with its forebear, the Wilson Act – an enactment made with good intentions and clear purpose doomed by a Supreme Court that, by bald fiat, chose to embrace a neutering construction untethered to text, history, or precedent.

---

[1] U.S. Const. Amend. XXI, § 2.
[2] Thurlow v. Commonwealth of Mass., 46 U.S. 504, 586 (1847).
[3] *See* Bowman v. Chicago & N.W. Ry. Co., 125 U.S. 465, 474-76 (1888).
[4] *Id.* at 508 (Field, C.J., concurring).

[5] *Ibid.* ("It is only after the importation is completed, and the property imported has mingled with and become a part of the general property of the state, that its regulations can act upon it, except so far as may be necessary to insure safety in the disposition of the import until thus mingled.").
[6] *See* Leisy v. Hardin, 135 U.S. 100, 124 (1890).
[7] *Ibid.*
[8] *Id.* at 124-25.
[9] *Id.* at 108 ("a subject-matter which has been confided exclusively to congress by the constitution is not within the jurisdiction of the police power of the state, *unless placed there by congressional action*") (emphasis added); *id.* at 109 ("interstate commerce . . . must be governed by a uniform system, so long as congress does not pass any law to regulate it, *or allowing the states so to do*") (emphasis added); *see id.* at 124-25 (noting limitations on state authority "in the absence of congressional permission" to act).
[10] 21 Cong. Rec. 534.
[11] *See*, *e.g.*, 21 Cong. Rec. 5090 (language "may be invoked by the Legislature of a State . . . for the purpose of protecting the industries, the distillers, of their own State, the brewers of their own State, the wine-makers of their own State, against those of others . . .").
[12] 165 U.S. 58, 91-93, 99-100 (1897).
[13] *Id.* at 100; *ibid.* ("[T]he state cannot, under the congressional legislation referred to [the Wilson Act], establish a system which, in effect, discriminates between interstate and domestic commerce in commodities to make and use which are admitted to be lawful.").
[14] *Id.* at 102-03 (Brown, J., dissenting).
[15] *Ibid.* (liquors "shall be subject, upon their arrival within the state, to the operation of all its laws enacted in the exercise of its police powers.").
[16] *See* Vance v. W.A. Vandercook Co., 170 U.S. 438 (1898).
[17] *See* Rhodes v. Iowa, 170 U.S. 412 (1898).
[18] 49 Cong. Rec. 2687.
[19] *See ibid.*
[20] 49 Cong. Rec. 830.
[21] 49 Cong. Rec. 702.
[22] 27 U.S.C. § 122.
[23] 49 Cong. Rec. 4296.
[24] 49 Cong. Rec. 4292 (emphasis added).
[25] Adams Express Co. v. Kentucky, 238 U.S. 190, 198-99 (1915).
[26] *Id.* at 199.
[27] *See id.* at 193-94, 200-02.
[28] James Clark Distilling Co. v. Western Maryland R. Co., 242 U.S. 311, 318-320 & n.1 (1915).
[29] *Id.* at 324.
[30] *Id.* at 325.
[31] *See id.* at 332.
[32] Seaboard Air Line Ry. v. North Carolina, 245 U.S. 298, 299-301 (1917).
[33] *Id.* at 304.
[34] Rainier Brewing Co. v. Great Norther Pacific S.S. Co., 259 U.S. 150, 154 (1922).
[35] McCormick & Co., Inc., et al. v. Brown, 286 U.S. 131, 133-38, 143 (1932).
[36] *Id.* at 143.
[37] 76 Cong. Rec. 65.
[38] *See* 76 Cong. Rec. 1621.
[39] U.S. Const. Amend. XXI, § 2.
[40] 76 Cong. Rec. 4146.
[41] 76 Cong. Rec. 4143.
[42] 76 Cong. Rec. 4172.
[43] 76 Cong. Rec. 4211.
[44] 76 Cong. Rec. 4219.
[45] *See*, *e.g.*, 76 Cong. Rec. 4168.
[46] *See*, *e.g.*, 76 Cong. Rec. 4228 (the Amendment is a "restatement of the Webb-Kenyon law").
[47] *See* Brief for Petitioner, *Tennessee Wine & Spirits Retailers Association v. Thomas*, No. 18-96 (S. Ct.), at 33-34.
[48] *See id.* at 34-35.
[49] *See* Mahoney v. Joseph Triner Corp., 304 U.S. 401 (1938).

[50] *See* Indianapolis Brewing Co., Inc. v. Liquor Control Commission of State of Michigan, et al., 305 U.S. 391 (1939); Joseph S. Finch & Co. v. McKittrick, 305 U.S. 395 (1939).
[51] *See* Granholm v. Heald, 544 U.S. 521, 519 (2005) (Thomas, J., dissenting).
[52] *See id.* at 519-20.
[53] State Board of Equalization of California, et al. v. Young's Market Co., et al., 299 U.S. 59, 60 (1936).
[54] *Id.* at 60-61.
[55] *Id.* at 62 (emphasis added).
[56] *Ibid.*
[57] *Ibid.*
[58] *Ibid.*
[59] *Id.* at 63.
[60] *Joseph Triner Corp.*, 304 U.S. at 402.
[61] *Id.* at 403.
[62] *Id.* at 404.
[63] *Indianapolis Brewing Co., Inc.*, 305 U.S. at 392-93.
[64] *Id.* at 393.
[65] *Id*. at 394 (emphasis added); *accord McKittrick*, 305 U.S. 395 (upholding a Missouri statutory scheme similarly barring importation of alcohol from states that place limitations on the import of alcoholic products manufacture in Missouri).
[66] *Ibid.*
[67] Ziffrin, Inc. v. Reeves, 308 U.S. 132, 138 (1939).
[68] *See*, *e.g.*, 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) (freedom of speech).
[69] *See*, *e.g.*, Wisconsin v. Constantineau, 400 U.S. 433 (1971) (deprivation of due process to bar sale of alcohol to certain individuals absent provision for notice or a hearing on the issue).
[70] *See*, *e.g.*, Craig v. Boren, 429 U.S. 190 (1976) (equal protection claim of gender discrimination concerning different ages at which males and females were lawfully permitted to drink certain types of alcohol).
[71] *See*, *e.g.*, United States v. Frankfort Distilleries, 324 U.S. 293 (1945).
[72] *See*, *e.g.*, United States v. State Tax Comm. of Miss., 421 U.S. 599 (1975); Johnson v. Yellow Cab Transit Co., 321 U.S. 383 (1943); Collins v. Yosemite Park & Curry Co., 304 U.S. 518 (1938).
[73] *State Tax Commission of Miss*., 412 U.S. at 375 (quoting Hostetter v. Idelewild Bon Voyage Liquor Corp., 377 U.S. 324, 330 (1964)); *accord* Joseph E. Seagram & Sons, Inc. v. Hostetter, 384 U.S. 35, 42 (1966).
[74] Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 713 (1984).
[75] Bacchus Imports, Ltd., et al. v. Dias, 468 U.S. 263, 265 (1984).
[76] *Id.* at 266-67.
[77] *See id.* at 270-73.
[78] *Id.* at 273.
[79] *Id.* at 274 ("Despite broad language in some of the opinions of this Court written shortly after ratification of the Amendment, more recently we have recognized the obscurity of the legislative history of § 2.").
[80] *Id.* at 275.
[81] *Id.* at 276.
[82] *Ibid.*
[83] *Ibid.*
[84] *Bacchus*, 468 U.S. at 281-82 (Stevens, J., dissenting).
[85] *Id.* at 286-87.
[86] *Id.* at 287.
[87] *Ibid.*
[88] 544 U.S. 466 (2005).
[89] *See id.* at 467-68.
[90] *See generally id.* at 472-76.
[91] *Id.* at 476.
[92] *Id.*at 481-82.
[93] *Id.* at 482.
[94] *Id.* at 484-85.
[95] *See*, *e.g.*, *Scott*, 165 U.S. at 100 (the Wilson Act "was not intended to confer upon any state the power to discriminate injuriously against the products of other states in articles whose manufacture and use are not forbidden, and which are, therefore, the subjects of legitimate commerce.").

[96] *Id.* at 485 (quoting *Younger's Market*, 299 U.S. at 62).
[97] *See supra* footnotes 49 & 50.
[98] *See Granholm*, 544 U.S. at 486-87 (citing, *inter alia*, *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996)).
[99] 139 S. Ct. 2449 (2019).
[100] *Id.*at 2457-58.
[101] *See generally id.* at 2461-62.
[102] *See id.* at 2474-76.
[103] *Ibid.*
[104] *Tennessee Wine*, 139 S. Ct. at 2472-73.
[105] *Id.* at 2468-69.
[106] *Granholm*, 544 U.S. at 494-97 (Stevens, J., dissenting).
[107] *Id.* at 496.
[108] *Ibid.*